Tips for Avoiding Forfeiture *of* Sufficiency *of the* Evidence Arguments under Rule 50

Preserving Insufficiency

By Joshua Yount [*]

This past fall, in *Maher v. City of Chicago,* 547 F.3d 817, 824 (7th Cir. 2008), the Seventh Circuit ruled that a challenge to a jury verdict was "doom[ed]" because the appealing plaintiff did not file a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. Filing the required Rule 50 motions, the *Maher* court explained, is necessary to preserve the right to challenge the sufficiency of the evidence supporting a verdict. *Maher* is a good and timely reminder that Rule 50 lays a number of forfeiture traps that can easily snare lawyers who do not pay careful attention to Rule 50's preservation requirements.

In relevant part, Rule 50 provides:

> **(a) Judgment as a Matter of Law.**
>
> (1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment—or if the motion addresses a jury issue not

Continued on page 21

[*] *Mr. Yount is a Partner at Mayer Brown LLP and an Associate Editor of the Circuit Rider. He clerked for Circuit Judge Ann Williams and served as a Staff Attorney for the Seventh Circuit. He gratefully acknowledges the assistance of Mayer Brown summer associate Ian Block in researching this article.*

Preserving Insufficiency

Continued from page 20

> decided by a verdict, no later than 10 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;
>
> (2) order a new trial; or
>
> (3) direct the entry of judgment as a matter of law.

The raise-or-waive nature of Rule 50 motions may not be obvious from Rule 50's text. The relevant language is permissive rather than mandatory, providing that a litigant "may" make Rule 50 motions. And Rule 50 certainly makes no mention of appeal rights. Still, the Seventh Circuit and other courts have long recognized that a litigant can forfeit arguments on appeal by failing, in one way or another, to properly raise its arguments in Rule 50 motions. Six such forfeiture traps deserve mention.

1. You Must Raise All Challenges Related To The Sufficiency Of The Evidence.

By its terms, Rule 50 offers litigants a way to challenge, at and after trial, whether there is "a legally sufficient evidentiary basis" to find for the opposing party on an issue. Fed. R. Civ. P. 50(a)(1). Accordingly, the Seventh Circuit (like all courts) has ruled that it will not consider an argument related to the sufficiency of the evidence supporting a trial verdict unless that argument was properly raised before the district court under Rule 50. *E.g., Maher,* 547 F.3d at 824. Importantly, the Seventh Circuit has invoked that preservation requirement against not just simple sufficiency-of-the-evidence challenges, but also other claims of error that turn on alleged evidentiary shortcomings. For instance, the Seventh Circuit refused to review a plaintiff's argument that the evidence did not warrant a jury instruction on an affirmative defense, despite an objection to the instruction under Rule 51, because the plaintiff did not make a Rule 50 motion on the issue. *Savino v. C.P. Hall Co.,* 199 F.3d 925, 931 (7th Cir. 1999). The *Savino* court reasoned that "[i]f a party could avoid the necessity of a Rule 50 motion simply by attacking the judge's decision to give certain jury instructions, the clarity achieved by the Rule 50 process would be compromised and little would be left of the general rule." *Id.*

At the same time, no Rule 50 motion is needed to preserve a pure legal issue that was otherwise properly raised in the district court. Thus a summary judgment motion can preserve an argument that collateral estoppel, the First Amendment, or plain contract language bars a claim as a matter of law. *Houskins v. Sheahan,* 549 F.3d 480, 488-89 (7th Cir. 2008) (First Amendment); *Chemetall GMBH v. ZR Energy, Inc.,* 320 F.3d 714, 718-20 (7th Cir. 2003) (contract); *Rekhi v. Wildwood Indus., Inc.,* 61 F.3d 1313, 1318 (7th Cir. 1995) (collateral estoppel). And a contemporaneous trial objection can preserve a claim that the district court wrongly admitted expert evidence. *Fuesting v. Zimmer, Inc.,* 448 F.3d 936, 940-41 (7th Cir. 2006). The *Fuesting* case well illustrates the sometimes fine line between sufficiency issues and pure legal issues for forfeiture purposes. In that case, the Seventh Circuit held that the appealing defendant's failure to file a required Rule 50 motion did not block the court from reviewing the admissibility of objected-to expert evidence, but that the defendant could obtain only a new trial, not judgment in its favor, because any right to such a judgment depended on the sufficiency of the properly admitted evidence, which the court could not review absent the required Rule 50 motions. *Id.* at 938-42.

As *Fuesting* and *Savino* demonstrate, it is not always simple to predict whether the Seventh Circuit will think an argument relates to the sufficiency of the evidence or otherwise had to be raised in Rule 50 motions. *See also Allahar v. Zahora,* 59 F.3d 693, 695-96 (7th Cir. 1995) (failure to raise res judicata in Rule 50 motion forfeited defense, even though it was raised in summary judgment motion). The best practice, therefore, is to raise in your Rule 50 motions all of the factual and legal arguments you might offer on appeal.

Continued on page 22

Preserving Insufficiency

Continued from page 21

2. You Must Make A Rule 50(b) Post-trial Motion.

For over 60 years it has been settled that an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand" based on the insufficiency of the evidence, unless the party challenging the judgment made a Rule 50(b) post-trial motion. *Cone v. W. Va. Pulp & Paper Co.,* 330 U.S. 212, 218 (1947). And just three years ago, the Supreme Court reaffirmed that rule, stressing the vital importance of making a Rule 50(b) motion to preserve any sufficiency argument for appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 400-04 (2006). In the Supreme Court's view, a Rule 50(b) motion "is necessary because 'determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Id.* at 401 (quoting *Cone*, 330 U.S. at 216).

Thus, under *Cone* and *Unitherm*, a litigant that does not file a Rule 50(b) motion forfeits its right to argue that an adverse verdict must be reversed because the evidence is insufficient to support the verdict. The Seventh Circuit vigilantly enforces such forfeitures. *Maher,* 547 F.3d at 824; *Pearson v. Welborn,* 471 F.3d 732, 738-39 (7th Cir. 2006); *Fuesting,* 448 F.3d at 938-39. Even if the appealing party made a Rule 50(a) pre-verdict motion or otherwise raised the issue in the district court, the Seventh Circuit simply will not review a sufficiency of the evidence challenge absent a Rule 50(b) motion. *Pearson,* 471 F.3d at 738-39; *Fuesting,* 448 F.3d at 938-39. It is imperative, therefore, that you make a Rule 50(b) motion if you hope to appeal an adverse verdict on grounds related to the sufficiency of the evidence.

3. You Must Make A Rule 50(a) Trial Motion.

A Rule 50(a) trial motion is also necessary to preserve any sufficiency of the evidence arguments. The need for a Rule 50(a) motion follows directly from the need for a Rule 50(b) motion. By the terms of Rule 50(b), a post-trial motion for judgment as a matter of law is merely a renewal of the Rule 50(a) trial motion. Fed. R. Civ. P. 50(b) ("the movant may file a renewed motion for judgment as a matter of law"). Consequently, no Rule 50(b) motion, and therefore no appeal on sufficiency grounds, is possible without a Rule 50(a) motion. *McCarty v. Pheasant Run, Inc.,* 826 F.2d 1554, 1555 (7th Cir. 1987). Plus, as the advisory committee notes to Rule 50 explain, a Rule 50(a) motion usefully "informs the opposing party of the challenge to the sufficiency of the evidence," "affords a clear opportunity to provide additional evidence," and "alerts the court to the opportunity to simplify the trial by resolving some [or all] issues." Fed. R. Civ. P. 50, adv. comm. notes, 2006 Amend.; *see also McCarty*, 826 F.2d at 1556.

For these reasons, the Seventh Circuit has been firm in holding that "[a] failure to file a prejudgment motion under Rule 50(a) prevents [the] court from reviewing the sufficiency of a jury verdict." *Maher,* 547 F.3d at 824; *see also Van Bumble v. Wal-Mart Stores, Inc.,* 407 F.3d 823, 827 (7th Cir. 2005); *Savino,* 199 F.3d at 931. And the court has enforced such Rule 50(a) forfeitures even when the appealing party filed a Rule 50(b) motion. *Moore ex rel. Estate of Grady v. Tuleja,* 546 F.3d 423, 427 n.3 (7th Cir. 2008); *E.E.O.C. v. AIC Sec. Investigations, Ltd.,* 55 F.3d 1276, 1286-87 (7th Cir. 1995). You therefore must be sure to make a Rule 50(a) motion to preserve any sufficiency-of-the-evidence arguments.

4. You Must State The Grounds For Rule 50 Motions With Specificity.

Asserting in Rule 50 motions only a general insufficiency of the evidence will not ordinarily preserve insufficiency claims for appeal. A litigant must instead identify the legal and factual grounds for its Rule 50 motions. Rule 50 is clear on this point: "The motion *must specify* the judgment sought and *the law and facts that entitle the movant to the judgment.*" Fed. R. Civ. P. 50(a)(2) (emphasis added). Otherwise, the motion will not serve Rule 50's purpose of putting the district court and the opposing party on notice of potential evidentiary shortcomings. Thus courts have found forfeiture when an appealing party's Rule 50 motion failed to sufficiently specify an argument raised on appeal. *E.g., Junker v. Eddings,* 396 F.3d 1359, 1362-64 (Fed. Cir. 2005); *Holmes v. United States,* 85 F.3d 956, 962-63 (2d Cir. 1996).

Still, the Seventh Circuit takes a liberal approach to Rule 50's specificity requirement. On at least two occasions, the court has excused a failure to specify Rule 50 arguments where the grounds for the Rule 50 motion were apparent to the judge and the parties from previous efforts to assert the arguments. *Laborers' Pension Fund v. A&C Envtl., Inc.,* 301 F.3d 768, 777-78 (7th Cir. 2002); *Urso v. United States,* 72 F.3d 59, 61 (7th Cir. 1995). The best practice, however, remains a detailed and specific recitation of the legal and factual grounds for a Rule 50 motion. Likewise, although oral Rule 50 motions are allowed, filing a written motion is the most prudent course, if only so that arguments are not garbled or forgotten in the heat of trial.

Continued on page 23

Preserving Insufficiency

Continued from page 22

5. You Must Raise *Each* Sufficiency Argument In A Rule 50(a) Motion *And* A Rule 50(b) Motion.

Consistent with the need to raise Rule 50 arguments with specificity *and* make Rule 50(a) and Rule 50(b) motions, preserving any particular Rule 50 argument for appeal requires raising the argument in *both* a Rule 50(a) motion and a Rule 50(b) motion. A litigant that fails to make an argument in a Rule 50(a) motion deprives the district court and the opposing party of the chance to act on evidentiary deficiencies, defeating the purpose of Rule 50(a) even if the argument appears in a Rule 50(b) motion. Fed. R. Civ. P. 50, adv. comm. notes, 2006 Amend. Likewise, a litigant that makes an argument in a Rule 50(a) motion but fails to renew the argument in a Rule 50(b) motion prevents the district court from offering its vital first-hand assessment of the sufficiency of the evidence (particularly when the district court follows the preferred practice of granting judgment as a matter of law only after a verdict). *Unitherm,* 546 U.S. at 400-06.

The Seventh Circuit accordingly deems any argument not made in a Rule 50(a) motion *and* a Rule 50(b) motion to be forfeited. *Zelinski v. Columbia 300, Inc.,* 335 F.3d 633, 638 (7th Cir. 2003); *McCarty,* 826 F.2d at 1555-56. The *McCarty* case is illustrative. In that case, the plaintiff made a Rule 50(a) motion on her own contributory negligence, but not on the defendant's negligence. 826 F.2d at 1555. As a result, even though she made a *Rule 50(b)* motion on that issue and the *defendant* had made a Rule 50(a) motion on the issue, the Seventh Circuit held that she forfeited any claim that the evidence was insufficient to find the defendant not negligent. *Id.* at 1556. Under *McCarty* and like decisions, you therefore must raise each of your sufficiency-of-the-evidence arguments in both a Rule 50(a) motion and a Rule 50(b) motion.

6. You Must File Rule 50 Motions In A Timely Fashion.

Technically speaking, a Rule 50(a) motion for judgment as a matter of law can be made "at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2). But a district court may not grant judgment as a matter of law until the non-moving party "has been fully heard on an issue." Fed. R. Civ. P. 50(a)(1). Plus, until your opponent presents its case, it will be difficult to state completely and specifically the reasons the jury would not have a "legally sufficient evidentiary basis" to find for your opponent. *Id.* In most cases, therefore, the best practice is to wait until your opponent rests on its case-in-chief to make a Rule 50(a) motion. It also may be wise to make another Rule 50(a) motion at the close of all evidence to give the judge one more chance to consider your sufficiency arguments and to ensure that you have offered all of the sufficiency arguments you want to preserve. Before a 2006 amendment to Rule 50, litigants had an obligation to make such close-of-evidence motions, leading to quite a bit of litigation over when a failure to do so resulted in forfeiture. *E.g., Prod. Specialties Group, Inc. v. Minsor Sys., Inc.,* 513 F.3d 695, 699 (7th Cir. 2008); *Laborers' Pension Fund,* 301 F.3d at 775-78; *Downes v. Volkswagen of Am., Inc.,* 41 F.3d 1132, 1139-40 (7th Cir. 1994). Now, a close-of-evidence Rule 50(a) motion is merely recommended, not required. Fed. R. Civ. P. 50, adv. comm. notes, 2006 Amend.

A litigant has 10 days after the entry of judgment (or the discharge of a jury that returned no verdict or an incomplete one) to renew its motion for judgment as a matter of law under Rule 50(b). Fed. R. Civ. P. 50(b). The allotted 10-day period cannot be extended. Fed. R. Civ. P. 6(b)(2); *Hulson v. Atchison, Topeka & Santa Fe Ry. Co.,* 289 F.2d 726, 729-31 (7th Cir. 1961). And an untimely motion results in forfeiture. *Mickey v. Tremco Mfg. Co.,* 226 F.2d 956, 957 (7th Cir. 1955). Counsel thus must act promptly after trial to preserve sufficiency-of-the-evidence arguments under Rule 50(b). (Note, however, that a proposed amendment to Rule 50(b) slated to take effect in December 2009 would extend the period for filing a Rule 50(b) motion from 10 days to 28 days.)

* * *

Lawyers rightly focus their efforts at trial on winning the case before the jury. Taking the necessary steps to preserve appellate arguments under Rule 50 understandably takes a back seat, especially when making Rule 50 motions threatens to disrupt your trial presentation or annoy the trial judge. Nonetheless, as the cases discussed above demonstrate, missteps under Rule 50 can doom an otherwise winnable appeal. It makes sense, therefore, to consider detailed, specific, and timely Rule 50 motions a standard part of your trial and post-trial routine. At the very least, doing so should save you from ever having to explain to the Seventh Circuit—and your client—why you did not properly move for judgment as a matter of law on an issue that entitled you to judgment.