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## THIRD CIRCUIT HOLDS THAT ARGUMENTS INCORPORATED BY REFERENCE TO LOWER COURT BRIEFS ARE WAIVED

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Last week the Third Circuit Court of Appeals reiterated its disapproval of cursory arguments made in a footnote<sup>1</sup> while joining other Circuits that have held that making arguments solely by reference to trial court briefs is insufficient to preserve issues for appeal.

In this recent case,<sup>2</sup> the appellant raised and fully briefed a number of issues, but for one, a timeliness argument, it simply asked in a footnote that the Third Circuit consider the appellant's prior briefing on the issue in the trial court. The district court did not address the matter but the appellant argued that it was ripe for the Third Circuit's consideration because it was subject to *de novo* review. After remarking that the footnote was "not even phrased as an argument," the Third Circuit deemed the issue waived. As it explained, "To permit parties to present arguments in that fashion would effectively nullify the page or word limits imposed by the appellate and local rules."

Notably, amendments to the Federal Rules of Appellate Procedure reducing the word limits for appellate briefs are set to take effect on December 1, 2016. Attorneys hoping to skirt the new word limits by incorporating arguments made in the trial court will be out of luck, now that the Third Circuit has, not surprisingly, expressly disapproved of this tactic. ♦

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<sup>1</sup> See, e.g., *United States v. Centeno*, 793 F.3d 378, 388 n.9 (3d Cir. 2015) (holding that issues that were not "squarely argued" and were merely "raised in passing (such as, in a footnote)" were waived) (internal citations omitted).

<sup>2</sup> *Papp v. Fore-Kast Sales Co.*, No. 15-2851 (3d Cir. Nov. 22, 2016).