A Closer Look at Post-Verdict Bargaining

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I. Introduction

In the past year, the newspapers have been often reported information about the Texaco v. Pennzoil Case. This large-scale drama of two commercial giants engaged in post-verdict bargaining is intriguing to lawyers who understand the process, and probably a source of confusion or dismay to the lay public who do not understand the negotiations. The Texaco case seems to dramatize a process which is usually an epistomologically submerged area of the law.

Yet, how well do lawyers understand the process of post-verdict bargaining? Law reviews have all but ignored the topic. Even the commercial "how-to-do-it" publications for lawyers seldom discuss the subject. When information is available, it is often cursory and anecdotal. Thus, lawyers are captive of their own limited experience. Because this is a low-profile area, attornies cannot learn from each other's experience. They often make their best guess as to what is approriate and learn only from costly mistakes. In this respect, it can be said that many lawyers operate in naive and costly ignorance.

Post-verdict bargaining is a crucial stage often overlooked in the litigation process. After the verdict, a plaintiff may appear to have "won" if the jury awards a sizeable verdict. For the small percentage of cases that get this far, it would appear that these plaintiffs finally received compensation for their troubles. However, this could be considered just the start of an entirely "new ball game," post-verdict bargaining.

The informal rules of this game are not set in stone.

After the verdict, there are a number of procedural motions a dissatisfied party can make to alter the eventual judgment. These include motions for remittitur, additur, new trial and judgment notwithstanding the verdict. The threat of appeal is also present. At this point increased negotiation takes place "in the shadows of the pending motions." The judge may give some signal which way the motion might go and then the parties arrive at a deal. Despite the importance of this subject there is a paucity of research outlining the process.

Last autumn, I decided to learn more about this area of litigation. I interviewed nine attornies, gathering their ideas about how the process worked. This paper outlines a method to more concretely identify and research my hypotheses regarding post-verdict bargaining (hereafter p-vb). First I will review the results of my preliminary interviews. Then, I will discuss the origninal questionaire. Next, lawyer's responces to the pre-test will be discussed. Then modifications will be suggested to improve the questionaire. Finally, survey implementation will be analyzed.

II. Preliminary Interviews

Fortunately, an extremely insightful way to learn how P-VB takes place is to consult the lawyers currently engaged in that stage of the litigation process. This provides a perspective into the terminology and assumptions that lawyers use. Thus, I attempted to to learn about the process from an insider's view, digesting the participants own words and gathering their

perceptions of this bargaining scenario.

1. Towards Defining "P-VB"

Unfortunately, the term "post-verdict bargaining" is lexically ambiguous. That is, lawyers themselves give the term different meanings. Two lawyers may have different responses to questions about P-VB, not because of a difference in perspective, but because of their different definitions.

To clarify the term, P-VB can be defined as negotiations subsequent to a stated verdict and lasting until a settlement arrangement. Generally, bargaining occurs between opposing attornies and the terms discussed remain subject to the approval of their clients. P-VB can be sub-classified into two main groups. "Nuisance bargaining" occurs when a winning side discounts a verdict so that the loser will not run up the costs of litigation. In contrast, "real issue" bargaining involves more complex negotiations involving a question of error at trial, related to either liability or damages.

a) Nuisance Bargaining

Nuisance bargaining seems to be the most common form of post-verdict negotiation. In this process, the stakes are relatively small. Further, the verdict is typically defensible, but to follow through would require further legal expense. This was explained by most lawyers in the preliminary interviews. Eight out of nine lawyers reported that nuisance bargaining occurred in 90-100% of their cases. In one attorney's view, this

occurs "... particularly when you're defending an insurance company and you win and the other side does not have enough money to pay your costs anyway." In this example, the further legal expense would outweigh results achieved by defending the verdict.

Nuisance bargaining is common when a verdict exceeds the financial resources of the defendant. Thus solvency is a determining factor, although not a procedural one. In some cases, insurance companies can be held in excess of their policy limits under the bad faith law. This too will promote bargaining, if the insurance carrier feels there is a risk of being held liable for that amount beyond the policy limits. Here, insurance companies may be willing to pay increased amounts while the plaintiff may be willing to accept less realizing that it will be difficult to collect from a defendant. Further, to collect from the insurance company would require proving bad faith, which carries a high burden of proof.

b) Real Issue Bargaining

Real issue bargaining has distinct qualities from its counterpart, nuisance bargaining. With real issue bargaining, the verdict is less defensable. It is characterized by a strong argument for appeal. Within Real Issue Bargaining, issues of law are more commonly disputed than issues of fact. Further, negotiation focuses on damages with less emphasis on the cost or interest.

Based on the initial interviews, it appears that real issue bargaining occurs less often than nuisance bargaining. With the

new 12% interest rule, if the verdict is easily defensable, there is no negotiation. Thus, there may be an inverse correlation between the defensability of a verdict and the willingness of the parties to negotiate. A consensus of those interviewed said real issue bargaining occurred in less than 20% of the cases which went to verdict. Indeed, for an appeal to be successful, it would have to show that not only was the jury wrong, but also the trial court judge (who turned down post-verdict motions), since there are presumptions that the trial court is correct. One attorney asserted that "... an appeal begins with two strikes against (it)." If the problem is liability and not damages, then there is probably some evidentury issue that is debatable. If there is an evidentury issue debatable, an appeal would become more attractive.

Common situations in which this type of bargaining might occur involve a problematic verdict. Those interviewed agreed that real issue bargaining is more likely to occur in cases with money damages than in cases with an extraordinary writ. Lawyers seemed to indicate that it is easier to bargain about money than argue about injunctions. In short, real issue bargaining is more characteristic of debatable verdicts whereas nuisance bargaining is more characteristic of cases involving no real appealable issues.

2. Effect of Animosity

In some cases, there can be animosity between opposing clients. Whether animosity influences bargaining is debated

however. During the initial interviews, the lawyers agreed it is important to encourage a client to take a reasonable posture relative to the opposing client. In fact, lawyers prided themselves in having client control, defined as the ability to persuade clients to accept the lawyer's vantage. Perhaps lawyers consider themselves as masters in the art of persuasion. It is often assumed that if a lawyer has won a verdict, the client would be easily persuaded to accept that lawyer's recommendation. Insurance companies, for example, are almost always willing to wave costs at the request of their winning attornies. Yet, some other clients are more resistive.

Two attornies felt that bargaining occurs less often when opposing clients are bitter. They felt that in these cases, bargaining before the trial would be difficult and it would continue to be difficult even after the trial. This may occur in employment situations or defamation cases, where it is a matter of principal, not money. Yet, in other contexts, the effect of animosity may be negligible.

Interestingly, lawyers regarded animosity between attornies as much less influencial. Without exception, the attornies stated that the clients' needs surpassed the attornies' emotions. Therefore, the only animosity that seems to have a significant effect on P-VB is animosity between clients.

3. Client Participation

Client participation is the extent to which clients are

involved in decisions during P-VB. In some instances, an educated or sophisticated client may insist on participation. In other instances, a client may simply accept a lawyer's decision tacitly. Typically, however, lawyers may make the decision and persuade the clients to accept them. If an attorney has won the verdict, and thinks the verdict is defensible, the next step is discussing P-VB with the client. One attorney said "The client is usually disturbed by the fact that you don't get a check after the verdict is read... you try to advise them that the case could still be appealed." By talking to the client, a lawyer has become aware of the client's needs and desires. It is important to inform the client that, for example, 90% of the verdict can be obtained within a month if the client wants it. One attorney summarized the consensus well by stating "If the client says 'Yes I want that instead of going through the risk of having it set aside,' then you decide what your bargaining position is going to be..." Yet, it is also important to inform the client that cases are rarely overturned on post-verdict motions. Most of the time on appeal, the winning side will win again. Still, clients are reluctant to accept less than 100% of what they have "won." Clients feel they have fought long and hard, and they are not eager to surrender the position they feel has been fairly and dearly bought. Lawyers should remember to explain their reason for engaging in a compromise when the verdict is in their favor. Therefore, explaining to the clients possible options is a crucial component of P-VB.

One trial lawyer differentiated client participation in nuisance bargaining from participation in real issue bargaining.

Regarding nuisance bargaining, he said, "If the bargaining is over costs, I'm more easily swayed to the client's view." Yet, regarding real issue bargaining, he said, "If I have a verdict and I am concerned that there's something from the trial to appeal, I instruct my clients what they should do with regards to cost." He added that clients usually listen and accept his advice in real issue bargaining. He tries to persuade winning plaintiffs to forgo non-compensatory damages to secure a large verdict.

In summary, lawyers usually inform clients about P-VB. Furhter, lawyers appear to make decisions and persuade the clients to accept them rather than following guidance from the client. This is particularly true with real issue bargaining as compared to nuisance bargaining.

4. Interest Rates

The statutory interest rate on a verdict has greatly affected bargaining. Winning plaintiffs are now less willing to deal since they are receiving a high rate of return on their asset; the verdict. Rates have risen from 6% originally, to 12% now. On the other hand, defendants, who previously dragged their feet to pay a verdict or to ask for some sort of deal, are now quick to do so.

5. Procedural Issues

Cases are usually settled by bargaining after a post-verdict motion has been made, but before the judge rules on the

motion, according to most of those interviewed. Non-legal factors like "gaming," prior negotiation and client participation effect the bargaining process. Yet, what exactly are these procedural issues that induce bargaining?

Surprisingly, no two attornies agreed exactly on what procedural issue was used most frequently. On the extremes, one said the new trial motion was used, to the exclusion of remittitur, while another said the remittitur was used to the exclusion of the new trial motion. Other attornies fell in between, favoring one side or the other. A final lawyer estimated they occurred in similar ratios. These extremes in view, though surprising, may be attributable to differences in experience in this area.

In divorce cases, there were three possible alternative motions in a post-verdict situation. None of these motions are used frequently. In the Wisconsin statutes, Section 767.32 dealing with the revision of judgment is used to change custody and the support of children. The relief from judgment provision, Section 806.07, which includes fraud and mistake, is rarely used. Also rarely used is a motion for reconsideration found in Section 805.17 (3). We can speculate that this provision is rarely used because so few attornies are aware of its existence. In sum, post-verdict bargaining was rare in divorce cases. Thus, there is little agreement over which procedural issues are more likely to prompt negotiation. Lawyers may be unsure which motions are most effective and particularly in divorce they may be reluctant to use any.

6. Creativity in Post-Verdict Bargaining

Creativity in bargaining here is defined as the substitution of a cash verdict for a non-monetary remedy. When asked about "the potential for creativity in post-verdict bargaining," the group felt that this would not occur often. Although it would not be inconceivable that a plaintiff may wish to convert a cash award into a non-cash award, this is usually done at the pre-trial stage. In P-VB, it has all been reduced to dollars. Further, in product liability cases, defendants are usually solvent and the award has already been reduced to cash terms. Thus, the many difficulties found at other points in the negotiation process are absent after the verdict. Creativity is "... just not done."

7. A Common Offer

A "common offer" occurred in nuisance bargaining situations. Here, the winner often might offer to take the verdict but wave costs, if the defendant agrees to wave rights to appeal. Defendants almost always look for this kind of break. However, with respect to real issue bargaining, none of the lawyers described a "standard" or "common" offer. Here they unanimously preferred to talk instead on a "case-by-case basis."

There are economic influences for verdicts less than about $ 100,000. One attorney claims that if the defense won a verdict, the defendant was entitled to receive costs, the verdict was defensible and if damages alleged at trial were about equal to or less than the $ 100,000, then there will be no bargaining after

the trial. With a verdict of less than $ 100,000., costs become a significant part of the judgment. Conversely, with extremely large verdicts, costs, as a percentage of the total amount, become less significant. When costs are a low percentage of the total award, the waving of costs functions as an insurance policy to make sure a verdict stands. Thus, there emmerges an analogy. A low dollar value verdict is similar to a decision by the Court of Appeals. It is not cost effective to appeal a low dollar amount when alleged damages are not over $ 100,000. In similar fashion, only 10-15% of Court of Appeals decisions are taken up by the Supreme Court. Thus, in these small damages claims, a low verdict rules out bargaining, in the same manner a proclamation from the Appellate Courts might foreclose on future bargaining in a larger case.

8. Judge Participation

Lawyers do not feel judges do or should participate in the process of post-verdict bargaining. However, judges do engage in pre-trial conferences to promote settlement. In these conferences, litigants get an idea of the judge's valuation of a case. This will effect post-verdict bargaining. None of the attornies felt that it was fair for a judge to become involved at this stage of the process. Further, if a judge did become involved, lawyers would become irritated. Yet, judges often know a lawyer's view after having heard bargaining in the pre-trial conference, and this in turn can be used against a plaintiff's attorney if a remittitur question arises later.

9. Whose advantage?

All the attornies agree that the winner in the verdict has a distinct advantage when asked "Who has the upper hand in post-verdict bargaining?" The main reasons given were that the standards of review are difficult to overcome and that the interest rules which take affect after a verdict favor the jury verdict winner. After all, most verdicts are upheld. Thus, the winner is likely to win again. Further, there is a psychological uplift after winning at trial. This too affects negotiation.

It seems that the second most powerful position after a verdict is to be a losing insurance company. Insurance companies have greater bargaining power than other participants because, after losing a case, they have the capacity to pay in full immediately or to drag out the process, one attorney noted. In contrast a losing plaintiff has "the least leverage." Thus a hierarchy can be established: 1) Winning plaintiff's have the best advantage. 2) Losing insurance companies have the second best advantage. 3) Losing plaintiffs have the least advantage.

10. How Settlements are Achieved

After the verdict, there seems to be more emphasis on efficiency than on positioning. A plaintiffs' firm reported that it sends a letter to a defendant immediately after a verdict, stating the amount of the verdict, the costs, and an offer of settlement. This occurs whether the plaintiff wins or loses. Yet, this process is not as easy as it may seem. If an attorney wins a verdict, it is difficult for a plaintiff attorney to write