Is What You See What You Get?:

Perspectives on Post-Verdict Bargaining

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I. Introduction

Law, in its ideal, vindicates rights. It compensates victims, punishes evil and rewards good. It is the champion of the afflicted. Yet it does not surprise us that the system has its critics. Indeed Critical Legal Studies often report that the "Law in Action" fails to live up to its ideals.

The Law of Contracts is a useful example to demonstrate this inherent dichotomy in our legal norms. On the hand, every first year Law student knows that the Law tries to place victims "where they would have been, had there been no breach of contract." This, of course, is the familiar "expectation interest." Yet for reasons best known only to lawyers, the system fails to deliver. In a contracts scenario, victims may have to settle for a "reliance" or "restitutionary" recovery. They may suffer financially, emotionally or physically while trying to obtain "their rights." They may decide the costs outweigh the benefits and simply decide to avoid the whole mess of litigation.

One common solution is to "cut a deal" with an opponent. This settlement process often requires victims to give up some of their rights (for example, to a cash award) in order to lower other costs which include lawyer's fees, time, energy, frustration, anxiety, possible embarassment and numerous other factors. Normally, this agreement can be made before a courtroom confrontation. Indeed, where an outcome is more certain, a

settlement is more likely. (Comments made during an oral presentation by George Priest entitled, "Settlement Success and Failure: A General Theory," given at the "Frontiers of Research on Civil Litigation" Conference, co-sponsored by the Disputes Processing Research Program, University of Wisconsin, and the Institute of Civil Liability, Yale Law School, on September 20, 1985 at the University of Wisconsin at Madison) Thus, "bargaining in the shadow of the law" strongly influences settlements. Most literature on bargaining discusses this stage of "the game." Procedural problems of discovery (FRCP rule 26), motions for declaratory relief (FRCP rule 57) and preliminary injunctions (FRCP rules 64 and 65), and motions to strike (FRCP rules 12 and 15), dismiss (FRCP rule 12 (b)(6)), direct a verdict (FRCP rule 50 (a)), and dismiss involuntarily (FRCP rule 41) all affect the bargaining position both before trial and during the trial until the verdict.

Yet there is another crucial moment often overlooked when bargaining can take place--after the verdict. At this point 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 did receive compensation for their troubles. Yet in other ways, this could be considered just the start of an entirely new "game," the game of post-verdict bargaining.

The informal rules of this game are not set in stone. We get a notion that 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. Just exactly how this process works is the subject of this study.

It would be difficult to invent a "cookbook" or devise a "roadmap" thoroughly detailing this process. Yet some parameters can be established. One major influence on the bargaining that takes place "in the shadows" is the object that creates those shadows--in this case, the rules of civil procedure. Thus the first section will summarize the procedural options available after a verdict has been reached. Next, I will explore and attempt to bring together literature involving post-verdict negotiation. Then I will discuss differing perspectives of members of the Bar on the mechanics of this abstract process in action. Finally, I will demonstrate the application of the mechanics, using empirical examples from situations in Wisconsin.

II. Procedral Rules affecting Negotiation

A quick review of post-verdict options among procedural rules will aid the discussion of settlement "in the shadows." Generally, motions made at this point are referred to as "jury control devices" because they have the potential of overturning a jury's findings. Thus, a party may "see" its award, but it remains uncertain whether the party can "get it." Since the alternative of bargaining is a complement to adjudication--not a

substitute--bargaining will be influenced by the procedural process. (Comments made during an oral presentation by Herbert Kritzer entitled "Lawyers as Negotiators" given at the "Frontiers of Research on Civil Litigation" Conference, op. cit.)

There are several motions often made at this point in the judication process. "Remittitur" and "additur," devices to lower or raise an award, are often made in conjunction with a "motion for new trial." Similarly, a "judgment non obstante veredicto" (JNOV or judgment notwithstanding the verdict), a device to overturn a jury outcome, is also often employed with the new trial motion. To simplify discussion, these two major sets of motions can be analysed separately.

a. The use of additur and remittitur.

After a verdict a dissatisfied party can make a motion for a new trial under rule 50 (a) and (b) of the FRCP. A defendant may do this when it is perceived that "excessive damages" have been awarded. If the defendants's motion is denied, the judge would then give judgment to the plaintiff, leaving appeal as the only means to overturn the trial court result. However a judge may "conditionally grant" a new trial. If the plaintiff then accepts the remittitur, there is no new trial and the judgment is entered as ammended by the judge. If the plaintiff rejects the offer, the judge will grant the defendant's new trial motion. Thus a judge will use this procedure within discretion when there is no question that some liability exists, but an error lead to an inflation of liability.

Additur is quite similar to remittitur. It begins with

the plaintiff's motion for a new trial. If a judge denies the motion, the plaintiff's recourse is appeal. A judge may conditionally grant the new trial motion if a verdict failed to find sufficient liability. Like remittitur, additur allows the judge to adjust the award. If the defendant accepts the increase, judgment is entered. If the defendant rejects the offer, the entire process returns for a new trial.

One important distinction between additur and remittitur is their acceptance by various jurisdictions. The federal rules allow for remittitur under the theory that an error produced the outcome, but that the question of liability is certain. Yet the federal rules do not accept additur. The rationale is that juries must have considered a larger award but decided against it. Only a few state jurisdictions reject the federal position, arguing that if a jury can err on the upward side, it can just as easily err on the downward side of a verdict.

Appellate review of a trial court's granting of a new trial motion seldom occurs. In the federal system, there must be a final judgment before there can be an appeal. Thus, any review would come to the appellate court after the second trial. Further, because there was a second trial, often any error in the first will become "harmless error." Usually the granting of a new trial motion will lead to settlement.

b. Judgment non obstante veredicto.

Another jury control device available to a dissatisfied party is a judgment non obstante veredicto. Procedurally, to use a JNOV, the defendant must have previously made a motion for a

directed verdict under FRCP rule 50(a). Theoretically, a JNOV is a reserved judgment on the directed verdict motion. In practice, JNOV motions are customarily made along with motions for new trial. To understand the process, it is best to separate the procedure following the denial of a JNOV from the granting of a JNOV.

If a court denies the JNOV motion one of two things could occur. The court may still grant the new trial motion. At this point the process would revert back to stage one of the process. On the other hand, if the judge denies the new trial motion, the verdict is entered, leaving appeal as the only recourse. On appeal, if the trial court decision is affirmed, action is concluded. Yet if the appellate procedure discovers errors, the JNOV may be entered, or the case might be set for retrial.

If the JNOV motion is initially granted by the trial court, several things could happen. The aggrieved party may try to appeal the JNOV and any other errors. On appeal, if the judgment is affirmed, the JNOV is entered as a final judgment. On the other hand, if appellate judges reverse the trial court, one of two things will happen. If a new trial motion was made and granted at the trial court, the case will be sent back down. However, if a motion for new trial was denied, or if no motion for new trial was made, the appellate court will reinstate the jury verdict.

All these post-verdict motions provide the framework for negotiation. Using the terminology of Mnookin and Kornhauser ("Bargaining in the Shadow of the Law:The Case of Divorce"

Supplemental Material for Civil Procedure, fall 1984, UW, p. 169-216) the Law creates endowments of advantage or disadvantage in the bargaining process. In other words, the Law directly influences private settlements, given that an unreasonable party can be ignored at this point, leaving the decision to the court.(Kritzer, op. cit.) In fact, it may be better said that there are two shadows: the judge and the dollar.(Kritzer, ibid.) Thus, it is appropriate to turn now to discussions of the Law's influence on negotiations after the verdict.

III. Prior Research on Post-Verdict Bargaining

There is very little written specifically on this particular theme. Indeed when the research librarian of a Law School in a smaller town in Wisconsin found out I was searching for information on "bargaining after the verdict," I was politely told that my study was "impossible...(because) bargaining is suppose to avoid a court case..." Yet, there is a wealth of articles in books, magazines and journals which do provide general guidelines for settling and which sometimes mention a potential for negotiation following a verdict. This available information is quite relevant and does increase our understanding of the strategies in settlement.

Generally, the quicker the settlement, the better off the plaintiff will be. (David M. Trubek, "The Costs of Ordinary Litigation," Supplemental Material for Civil Procedure, UW, p. 1-57, fall 1984). Thus, the plaintiff's attorney will try to speed up the process while a defense lawyer will try to delay and put off settlement. In this light, the procedural options available

will influence bargaining after the verdict.

At this point, it is important to ask ourselves what are the benefits of settlement. On this there are various perspectives. They can be summarized by looking to the works of Armstrong (Walter P. Armstrong, Jr., "How and When to Settle," Ark. L. Rev. 19:20 Spring 1985) David F. Pike (Retrials: A bad Case of Deja Vu; Pandora's Box Awaits Both Sides, but defense often gets a break" National Law Journal, August 3, 1981) and Tom H. Davis ("Settlement Negotiations: Strategies and Tactics," 19 Trial 82-85, July 1983).

Armstrong lists a number of reasons for settlement. First he notes the "decreased costs of litigation." (Armstrong, p.24) Eventhough a client may have to accept a lower award, cash flow problems, medical expenses and other needs may require a quick settlement. Second, earlier settlement avoids intangible costs such as the tension of delay or fear of testifying. Third is the danger of a mistrial. Fourth, creative payment schedules may actually allow an increased verdict if a plaintiff is willing to arrange for installments over a considerable period of time. Fifth, creativity may allow substitution of remedies allowing the plaintiff to "...get everything he wants without taking away from the defendant anything that hurts him too much." (Armstrong, p. 25). Finally, Armstrong notes that settlement in fraud cases will be rare since payment could be interpreted as an admission of guilt. (Armstrong, p.25)

Pike discusses lawyers attitudes towards retrial. Quoting Windle Turley, Pike claims that neither judges nor lawyers ever

like to retry cases. Yet Pike also notes that "...defense generally learns more from the first trial than (plaintiffs) do." Thus, "...the advantage generally swings to the defense..." This lends support to Trubek's hypothesis that a longer case helps the defense. In this respect, we can see the plaintiff's incentive to settle before more procedural advancement, especially if there is a real threat of a new trial or appellate review.

Davis gives advice in a "how to" fashion concerning settlement. He states that after the verdict is in fact a good time to settle. Yet he warns against automatically discounting an award. Borrowing from Herman (Phillip J. Herman, Better Settlements through Leverage, Rochester, N.Y.: Aqueduct Books, Lawyer's Cooperative Publ. Co. (1965)), Davis asserts:

> Once the insurance company has forced you to go to trial and you have taken the gamble and won, it is no time to settle. The appeal is going to cost the defense far more than it will cost you (the plaintiff), and the new 9 percent interest on judgments should help in this respect. (p.84, Davis)

Davis states another important consideration when settling: the effect on future cases. If an attorney discounts a verdict unnecessarily, in future cases, opponents will expect a similar discount at the start of negotiations. After all, that attorney had the certainty of a verdict and still discounted. The net effect thus, in theory, is that the settlement value of all other cases by that attorney are discounted by a percentage at least equal to that given in the prior case. As years pass, the loss will add up quickly.

Having examined Armstrong's, Pike's, and Davis' motivations for settlement, we have some insight into how authors

have described the thought processes. Yet how do the participants themselves feel about bargaining specifically after a verdict? To find out I have analyzed comments among lawyers familiar with the process.

IV. Lawyers' Perspectives

An extremely insightful way to learn exactly how bargaining takes place after a jury verdict is to consult the "masters of the fund of information," here the lawyers engaged in that stage of the litigation process. In this way, we can get inside the meanings and beliefs of lawyers. Thus, I have attempted to capture a certain manner of behavior from an inside view using the participants own words, by conducting a series of interviews asking lawyers for their perceptions of this bargaining scenario. First I will look at the reactions of the plaintiff's bar on an issue. Then I will compare their view with the view of the defense bar, before moving on to the next question.

The perspectives in this section were gathered during interviews with Madison area attornies familiar with this stage of the litigation process. James R. Janson of Habush, Habush and Davis was interviewed first, in the offices of the firm, on Monday, November 11, 1985. James A. Olson of Lawton and Cates was interviewed next by telephone on Thursday, November 14, and finally William L. McCusker of McCusker and Robertson was interviewed in his office on Tuesday, November 19. Mr. Janson, Mr. Olson and Mr. McCusker are all plaintiff's attornies.

Defense attornies were also asked for their comments. Alan

R. Kortzinsky, a specialist in divorce from Stolper, Koritzinsky, Brewster and Neider was interviewed by telephone on Tuesday November 19. Micheal Riley, a long time defense lawyer for insurance companies, now recently turned plaintiff lawyer of Lee, Johnson, Kilkelly and Nichol was questioned by phone on Thursday, November 21. On Friday, November 22, I interviewed Claude Covelli and Ken McCormick, both of Boardman, Suhr, Curry and Field, at their office. Finally, on Saturday November 23, I spoke with Brad Armstrong at the offices of Brynelson, Herrick, Bucaida, Dorschel and Armstrong.

a. Frequence of Post-Verdict Bargaining

The first and probably most important question was "How often does post-verdict bargaining occur in your practice?" Answers to this question help determine the importance of even studying the matter. Interestingly, opinion was divided. Mr. Janson and Mr. Olson both stated that it comes up "...in almost every case (that arrives at this point in the litigation process)." Mr. Olson said "I'm not sure I ever had a case in which there wasn't something afterwards--some post-verdict bargaining." Similarly, Mr. Armstrong stated that there was discussion of costs and interest in 95% of all cases. Yet Mr. McCusker affirmed that in his practice, the matter rarely came up.

If the plaintiff wins, Mr. McCusker said, the defendant will usually "pay up." If the verdict is solid, "...there is no deal." Because of the 12% interest rule from the verdict, there

is further incentive to pay off as quickly as possible. In fact, he stated that "...there's really not that much to talk about." In a similar vain, Mr. Covelli stated that "A lot of (verdicts) are paid."

Mr. Koritzinsky stated that in divorce, there is no post-verdict bargaining as we normally think of it because all divorce cases go before a judge. In generaly, he said, there is no bargaining after the verdict.

Mr. Riley stated that bargaining over costs comes up frequently. "This is almost time honored... It happens constantly," he said. He added that, "This is something that most people in most cases will agree to... 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." He then speculated that "On the plaintiff's side, if this happens, and the costs are substantial, the plaintiff may be less willing to wave costs." Mr. Covelli seemed also to support this vantage.

Other than the issues of cost or extremely large verdicts, bargaining is something that is rarely done at this point, according to Mr. Riley. His "formula" for determining whether post-verdict bargaining will take place is, if there is a strong legal argument on appeal, bargaining is more likely. Thus, Mr. Riley seems to follow Mr. McCusker's view. "If you have a straight factual case that is a case of who ran the red light and the jury chooses to believe one side, that's the kind of case that is not going to get overturned on appeal." Thus, no bargaining will take place. Conversely, in questions of law, both sides, winner and loser, realize a case may be overturned on