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February 25, 2003

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On February 12, 2003, the Section approved the enclosed report entitled Eliminating a Trap for the Unwary: A Proposed Revision of Federal Rule of Civil Procedure 50. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

Gregory K. Arenson

GKA:sm
Enclosure

cc: Cathi A. Hession, Esq., Chair (w/encl.)
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Eliminating a Trap for the Unwary:

A Proposed Revision of Federal Rule of Civil Procedure 50

Introduction

Federal Rule of Civil Procedure 50, now entitled "Judgment as Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings" (hereinafter "Rule 50"), was extensively amended in 1991. The 1991 amendment eliminated the terminology of "directed verdict" and "judgment notwithstanding the verdict (hereinafter "judgment n.o.v.") and substituted the term "judgment as a matter of law" for both. The rule provides that "motions for judgment as a matter of law may be made at any time before submission of the case to the jury." (Fed. R. Civ. P. 50(a)(2)) (hereinafter "Rule 50(a)(2)"). The motion is no longer required to be made when a party has completed its case and formally rested, but may be granted at any time when "a party has been fully heard on an issue." (Fed. R. Civ. P. 50(a)(1)) It is relatively rare that such a motion is granted; the trial court usually either reserves decision or denies such a motion, and leaves the initial determination to the jury. "[A]ppellate courts have often indicated that in general the better and safer practice is for trial courts to wait for a verdict and rule on the sufficiency of the evidence in a post-verdict motion for judgment." Moore's Federal Practice (3d ed.) § 50.02(2) at 50-14. See Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163, 166 n.2 (2d Cir. 1980).

The rule retains the requirement that, in order for a motion for judgment made after the verdict to be considered, there must have been a motion made for judgment "at the close of all the evidence." (See Fed. R. Civ. P. 50(b) (hereinafter "Rule 50(b)") and Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (b)). Thus, even if a party has made a motion for

judgment at the end of the opposing party's case (or when the opposing party has been heard), but fails to renew it at the close of the evidence, such party can not make a motion for judgment after the verdict is rendered. Instead, under the language of Rule 50, that party is limited to a motion for a new trial under Rule 59.

The Advisory Committee stated in 1991 that it is desirable for the motion for judgment to be made before the case is submitted to the jury "so that the responding party may seek to correct any overlooked deficiencies in the proof." Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (a). However, the Advisory Committee did not address why such a motion must again be made at the close of all the evidence, if it has already been made at a time when the responding party has been fully heard.

Numerous commentators have criticized the structure of Rule 50 in this regard as "a trap for the unwary." Paul D. Carrington, The Federal Rule–Making Process, 137 U. Pa. L. Rev. 2067, 2110-2111 (1989). Both New York and California have abolished the rule that a pre-submission motion must have been made as a prerequisite to entering judgment for a party despite a jury verdict in favor of the other party. See N.Y.C.P.L.R. 4404 (McKinney 2003) (permitting a post-verdict motion by a losing party or on the court's own motion without requiring a pre-verdict motion.) and Cal. Civ. Proc. § 629. 7 B.E. Witkin California Procedure (4th ed. 1997) refers to the prior procedure as "a useless and annoying formality." (Section 448). The New York Advisory Committee stated in its 1958 Report:

> The motion at the close of the evidence is a mere formality today which does not give either the court or litigants any fair notice in time to cure defects. It seems only a trap for the unwary or inadvertent which should not be an absolute condition for judgment notwithstanding the verdict.

Advisory Comm. on Practice & Procedure, Second Preliminary Report, N.Y. Leg. Doc. No. 13 at 312 (1958).

Perhaps more significantly, several federal appellate and trial courts have refused to enforce Rule 50 as written in this regard, finding that the procedure has no practical justification. Other courts do enforce the rule as written, creating uncertainty within and among the various circuits as to the state of the law.

The varied and unpredictable approach of the courts to the procedure under Rule 50 creates a problem that should be addressed. At least four significant alternatives present themselves:

(1) Rule 50 should be enforced as written;

(2) Rule 50 should be amended to eliminate the requirement for any pre-verdict motion to be made as a prerequisite to a post-verdict motion for judgment;

(3) Rule 50 should be amended to eliminate the need for making a motion for judgment "at the close of all the evidence" as a prerequisite to making a post-verdict motion, if a motion for judgment in accordance with Rule 50(a) has already been made prior to that time.

(4) The issue should be decided by weighing the prejudice to each side based on the facts of the case.

For the reasons discussed below, the Section concludes that alternative 3 should be adopted.

Discussion

A. Constitutional Background

The procedure under Rule 50 (and its predecessors) has been shaped by Supreme Court decisions interpreting the Seventh Amendment. The Supreme Court in 1913 held that a motion for judgment notwithstanding the verdict could not be granted in federal courts because its grant would have the effect of depriving the victorious party of his right to a jury trial. The Court found no analogue to the motion in the pre-Constitution common law procedure. The Court made specific reference to the clause of the Seventh Amendment that provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States." Slocum v. New York Life Ins. Co., 228 U.S. 364, 376 (1913) (5-4 decision). The Court did hold in that case that the trial court had erroneously denied a directed verdict motion, but held that the appropriate remedy was a new trial.

Twenty-two years later, in Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654 (1935), the Court found a way around Slocum. The Court held that if the district court expressly reserved the point whether a directed verdict should be granted, both it and the appellate court were thereby empowered to enter judgment n.o.v., if they determined that the directed verdict motion should have been granted.

Rule 50(b), as it was promulgated in 1937, eliminated the need for a formal reservation by the district court. The Rule provided that the court was "deemed" to have reserved the determination of legal issues whenever a pre-verdict motion for a directed verdict was not granted. The language has been modified, but the same concept is embodied in the current

version of Rule 50(b). The Supreme Court has upheld post-verdict judgment as a matter of law pursuant to Rule 50 as consistent with the Seventh Amendment. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321 (1967).

The Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (a) makes clear that the Advisory Committee considers the constitutional thinking of Slocum anachronistic:

> [A]ction taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment . . ..

However, the historical development of the Supreme Court cases and Rule 50 does indicate that there may be a constitutional objection to eliminating the requirement that at least one pre-verdict motion for judgment be made. If such a motion has not been made at all, then there would be nothing upon which to base the fiction[1] that decision has been reserved. In light of this, alternative (2) – the procedure adopted in New York and California – cannot easily be adopted in the federal courts. The question remains as to whether there is any justification for requiring renewal of the motion if it has once been made.

[1] There is no question that it is a fiction: "A judge may issue a definitive ruling denying the pre-verdict motion for judgment as a matter of law. . . yet that seemingly definitive ruling is somehow deemed to constitute nothing more than a reservation of decision on the motion." Moore's Federal Practice (3d ed.) ¶ 50.04(2) at 50.21.

B. The Advisory Committee's Rationale for Requiring Pre-Verdict Motions

The Advisory Committee in 1991 addressed the practical justification for requiring a pre-verdict motion in several places. In commenting on subdivision (a), the Advisory Committee Note states:

> Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment.

The Note also refers to the second sentence of Rule 50(a)(2) which requires that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The Note goes on to say that the "revision thus alters the result in cases in which courts have used various techniques to avoid the requirement" that a pre-verdict motion be made as a predicate for a motion notwithstanding the verdict. This provision does require that at least one such pre-verdict motion be made; it does not, however, provide a rationale for the position that the motion, once made, has to be renewed. The Note then quotes from Farley Transp. Co. v. Sante Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986) and Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), both discussed below (see pages 10-11).

A similar comment is made by the 1991 Advisory Committee with respect to Subdivision (b):

> **Subdivision (b).** This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-

> verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d Cir.1989).

Again, this statement does not address the issue of why it should be necessary to renew a motion for judgment at the close of all the evidence.

C. The Conflicting Case Law

Prior to the 1991 amendment, the then Advisory Committee Reporter, Paul Carrington, in an article in the University of Pennsylvania Law Review,[2] commented on the status of the case law under Rule 50:

> The concern with Rule 50 is not that it sends too many or too few cases to a jury, or that too many or too few verdicts are being disregarded at the point of judgment. The concern is rather that Rule 50 and the practice under it are anachronistic, too complex, and a trap for the unwary.
>
> An old rule of questionable value requires a motion for directed verdict under Rule 50(a) as a predicate for a motion for judgment notwithstanding the verdict under Rule 50(b). The rule rests on the fiction that denial of a motion for directed verdict automatically reserves the issue for reconsideration when the post-verdict motion is made. Courts interpreted a 1913 decision to require the fiction, but a 1935 holding substantially undermined the 1913 ruling. Also questionable is the old rule, possibly abiding, that a party waives a motion for directed verdict by presenting evidence.
>
> These otherwise anachronistic rules protected opposing parties from being surprised by a motion for a judgment notwithstanding the verdict based on a legal theory or a factual contention not previously raised or considered.

[2] Paul D. Carrington, The Federal Rulemaking Process, 137 U. Pa. L. Rev. 2067, 2110-2111 (1989).

> Absent these provisions, parties might have been tempted to save an objection to the legal sufficiency of an adversary's case until it was too late to cure the defect by submission of additional evidence on a fact not previously recognized by the adversary as material.
>
> On the other hand, requiring a formal motion for directed verdict has several unfortunate consequences. It is a trap: Failing to make a timely motion that a judge very likely would have denied could force a party to undergo a new trial. The refusal to consider a motion for judgment notwithstanding the verdict on the sole ground that the party did not make a motion for directed verdict is an empty formalism out of keeping with the Rules. Moreover, the requirement forces some parties to make motions contrary to their own tactical interests; in doubtful cases, litigants may prefer sending their cases to the jury in the hope of a favorable factual termination rather than risking a reversal of a directed verdict resulting in yet another trial. A number of courts have used techniques designed to avoid the effect of the requirement and in the process they have created some complex doctrine. (footnote omitted).

Despite Professor Carrington's views, the Advisory Committee maintained the requirement of a pre-verdict motion for making a post-verdict motion.

As Professor Carrington noted, one of the results of literal enforcement of the rule is that noncompliance can mean that a party, which may deserve judgment as a matter of law, is limited to seeking the relief of a new trial. See DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) (defendant moved for directed verdict at end of plaintiff's case, but failed to renew the motion at the close of all the evidence; held, although defendant deserved judgment as matter of law, failure to renew motion in accordance with Rule 50's terms, precluded such relief). This result is intolerable to many courts, and they have devised ways to avoid this result.

As a practical matter, if a party is entitled to judgment as a matter of law, it makes little sense to require another trial to present factual evidence, when the result is foreordained by the resolution of the legal issue.

A note in the Michigan Law Review of March 1993[3] collects numerous cases and compares the approach of the various circuits to the requirements of Rule 50. This survey detailed five or six different rules applied in ten different circuits. No cases were then found in the D.C. Circuit or the Fourth Circuit. As further discussed below, since that time the Fourth Circuit has adopted a lenient approach to Rule 50, but the Seventh Circuit has criticized its previous decisions and adopted a strict approach.

(1) The Third and the Eleventh Circuits have taken a literal, strict approach. Even if a directed verdict motion was made, a post-verdict motion for judgment as a matter of law should not be considered if the motion had not been renewed at the close of all the evidence. See Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9 (3d Cir. 1976); Mark Seitman & Assoc. Inc. v. R.J. Reynolds Tobacco Co., 837 F.2d 1527 (11th Cir. 1988).

(2) Four circuits - the First, Sixth, Eighth and Tenth – have held that the post-verdict motion could be entertained, even if the directed verdict motion had not been renewed, if two conditions were met: (1) the district judge, at the time of hearing the directed verdict motion, had somehow specifically indicated that the failure to renew the motion at the close of the evidence would not result in a waiver; and (2) the evidence put on by the moving party after denial of the

[3] Note, Rollin A. Ransom, Toward A Liberal Application of the "Close of all the Evidence "Requirement of Rule 50(B) of the Federal Rules of Civil Procedure: Embracing Fairness over Formalism, 91 Mich. L. Rev. 1060 (1993).

directed verdict motion was not extensive. Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969); Boynton v. TRW Inc., 858 F.2d 1178, 1186 (6th Cir. 1988); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294 (8th Cir. 1982) (however, the Eighth Circuit has also required that a motion for judgment n.o.v. be renewed, without reference to the Halsell case, in Duckworth v. Ford, 83 F.3d 999, 1001 (8th Cir. 1996); Armstrong v. Fed. Nat'l. Mortgage Ass'n, 796 F.2d 366, 370 (10th Cir. 1986).

(3) The Fifth Circuit also permitted consideration of post-verdict motions where there has been no renewal of the directed verdict motion, but formulated the test somewhat differently: (1) the district judge need only have "reserved" decision on the motion — it was not necessary that the judge give specific assurance to the moving party that its rights were being preserved; and (2) the evidence introduced after reservation of the directed verdict motion may be substantial, so long as it is essentially unrelated to the motion. Miller v. Rowan Cos., 815 F.2d 1021, 1024-25 (5th Cir. 1987). See also Bay Colony, Ltd. v. Trendmaker, Inc., 121 F.3d 998, 1003 (5th Cir. 1997) ("Thus, this Court has not required strict compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirements have been satisfied.").

(3A) The Second Circuit articulated a variant of the Fifth Circuit rule that: (1) required that the trial judge indicate that the movant's rights were preserved; but (2) phrased the test relating to the evidence introduced after the motion as being of such a nature that the opposing party could not "reasonably have thought that the moving party's initial view of the insufficiency of the evidence had been overcome and there was no need to produce anything more in order to avoid the risk of judgment n.o.v." Ebker v. Tan Jay Int'l Ltd. 739 F.2d 812, 824 (2d Cir. 1984). The Second Circuit has also held that it will not enforce the strict provisions of Rule 50, if the

opposing party fails to raise the issue in the district court. See Gibeau v. Nellis, 18 F.3d 107, 109 (2d Cir. 1994).

(4) The Ninth Circuit has held that it was permissible to entertain a post-verdict motion for judgment, just so long as the district court had taken an earlier motion for a directed verdict under advisement, rather then deciding it. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986). In a later case, the Ninth Circuit held that the motion had to be renewed at the close of the evidence, when the district court had denied a prior motion for judgment made after plaintiff's opening statement. Patel v. Penman, 103 F.3d 868 (9th Cir. 1996). The court noted that plaintiff had called six witnesses and defendant one witness, after the motion was made.

(5) Prior to the 1991 amendments, the Seventh Circuit had adopted a rule that depended upon a showing of prejudice by the opposing party. If the movant had made a motion for a directed verdict, and even if the district court had denied it outright, the movant was entitled to renew the motion post-trial if there was no prejudice to the other party. Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986). However, in Downes v. Volkswagen of Am., Inc., 41 F.3d 1132 (7th Cir. 1994), the Seventh Circuit held that since the Advisory Committee had the chance to revise Rule 50 in 1991, but instead had retained the requirement of renewing a pre-verdict motion for judgment, Benson should not be followed. Id. At 1139-40. Other Seventh Circuit decisions have followed Downes. See Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1364 (7th Cir. 1996) (collecting cases).

(6) The Fourth Circuit, which had not taken a position prior to 1991, adopted a lenient approach in Singer v. Dungan, 45 F.3d 823 (4th Cir. 1995). In that case, the court, after quoting

from Moore's Federal Practice (2d ed. 1994)¶ 50.08[4], and noting the decisions of various courts applying a limited approach to Rule 50(a), determined that defendant's motion for judgment should have been granted, despite defendant's failure to renew the motion at the close of the evidence, "because the spirit behind Rule 50 was served" in that case. Id. at 828-829.

One conclusion that can be drawn from this survey is that a large amount of judicial effort has been expended to determine whether the literal requirements of Rule 50(a) should be enforced, and that, as a result, this rule has quite different application in various federal courts throughout the United States.

Conclusion

In 1991, the Advisory Committee articulated a practical justification for the procedure of requiring a motion for judgment to be made before submission to the jury. It found the justification to be "that the responding party may seek to correct any overlooked differences in the proof." The Advisory Committee cited to decisions in the Ninth and Seventh Circuits (Farley Transp. Corp. v. Sante Fe Trail Transp. Co., supra, and Benson v. Allphin, supra) which had articulated these justifications. However, the holdings of these cases were both to excuse the failure to renew, before submission to the jury, a directed verdict motion.

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[4] "[G]uided by the general principle that the Federal Rules are to be liberally construed, some courts have held that a motion for judgment under Rule 50(b) may be granted, despite the movant's failure to renew a previous motion under Rule 50(a) at the close of all the evidence, where the purposes of Rule 50 have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury."

Moore's Federal Practice, ¶ 50.08, at 50-91 (footnote omitted). This statement does not appear in the third edition of Moore's Federal Practice (1997).

The Advisory Committee's rationale does not support a requirement that a directed verdict motion must be renewed at the close of all the evidence, as Rule 50(b) now requires. At most, it supports the position that at some time prior to submission to the jury, a motion for judgment as a matter of law should be made and the basis for the motion clearly articulated. Such motions can be made after the non-moving party has been fully heard on the issue, or after it has rested.

We do not believe that the question of whether the motion should be reserved should be resolved on a case-by-case basis by weighing the comparative prejudice to each party. Nor do we believe that the complicated formulations adopted by some courts on this issue are helpful; indeed they seemed designed to encourage further litigation directed to procedural, not substantive, issues. There should be a clear rule which makes practical sense.

We thus suggest that the first sentence of Rule 50(b) be amended to add the underlined phraseology:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made after the non-moving party has been heard on an issue or rested, or at the close of all the evidence, 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.

We believe that such an amendment satisfies the purpose of Rule 50 – to give notice to the non-moving party of correctable deficiencies in its case – but lessens the potential of the rule to be simply a "trap for the unwary."

February 12, 2003

New York State Bar Association
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