



Securities Class Action Trials After the Financial Crisis

Presented by Mark S. Arisohn & James P. Bennett

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Program Overview

- Introduction
 - Moderator
 - Michael W. Stocker, Esq. (Labaton Sucharow LLP)
- Presentation
 - Mark S. Arisohn, Esq. (Labaton Sucharow LLP)
 - James P. Bennett, Esq. (Morrison & Foerster LLP)
- Question and Answer

Jury Competence: Why Try a Complex Case Before a Jury?

- **Plaintiff Perspective**
 - Jury of your peers is the cornerstone of our justice system – but peers of whom?
 - Don't want to leave your fate in the hands of one person
 - Practically, need all parties to agree to waive the right to a jury and often parties will not agree
 - Jury will identify with a victimized investor
 - Plaintiffs may be able to take advantage of bias created by news regarding white collar crime
 - e.g. Enron, WorldCom

Jury Competence: Why Try a Complex Case Before a Jury?

- **Defense Perspective**

- Under what circumstances [if any] should defendants consider waiving right to trial by jury?
- Practically, how often do plaintiffs waive the right?
- Are there some complex cases that, from a defense perspective, are better tried before a jury?
- Jury is more likely to be receptive to a compelling story
- Try to get as many jurors as possible
- It is difficult to get a unanimous verdict from a jury
- There are more opportunities for judicial error which can lead to motions, bad verdicts, and possible reversal on appeal
- Inconsistent verdicts
- Complex verdict forms

Jury Selection in Complex Cases

- Practicality of jury selection: In federal courts limited voir dire/limited challenges
- Do jurors who are able to serve for the extended periods necessary in a complex case differ from jurors available for shorter-term trials?
 - Plaintiffs prefer jurors who are less likely to relate to “corporate” and highly compensated executive defendants
 - Defendants prefer jurors who are highly educated and have some exposure to investments and/or business

Jury Selection in Complex Cases

- What challenges do longer trials present?
 - Limits the pool of available jurors
 - Risk of alienating jurors by forcing them into serving in a long trial
 - Presents issues in keeping the jurors engaged and interested in the case
- Special considerations for voir dire in a complex securities fraud class action case
 - Use of juror questionnaires
 - Submission of potential voir dire questions to the judge

Jury Selection in a Complex Case

- Use of Jury Consultants
 - Is it worth the expense?
 - Mock trials
 - Through focus groups and observing deliberations you can learn how a jury may react to certain theories or themes of your case
 - Forces attorneys to think through issues and put together a presentation
 - However, may not get an accurate picture because the presentations to the mock jury are often one sided
 - Assistance in creating of questions for voir dire or questionnaire
 - Presence at voir dire and assistance in actually picking the jury and exercising challenges
 - Time away from trial preparation

Jury Instructions

- One of the most difficult challenges in presenting complex cases to juries
 - Cases involve complex legal issues that need to be clearly and succinctly explained to the jury
 - It is very difficult to reach a neutral and concise explanation of the legal issues in the form of a jury instruction
 - There is often long argument between the parties over the jury instructions because this is the only explanation of the law that will be provided to the jury
- Special considerations for jury instructions
- Verdict Form
 - “This is really terrible. I mean, if Congress doesn't want us to have securities fraud class actions they should just get rid of them.”
 - “So now I'm going to try to go over the Verdict Form with you. Now, I think someone told you in closings that the Verdict Form is 50 pages long. This is not usual. We have not devised this to torture you. This is the result of the statute that governs the case requires that specific findings be made. We tried to make it as short and as self explanatory as possible. This is the best we could do.”

Challenges in Presenting a Legally and Factually Complex Case to a Jury

- Key Role of Opening Statement
 - Explain the key points of the case in a simple way but still impart the foundation needed to understand the evidence that is going to be presented
 - Plaintiff Perspective
 - Explain the background of the company and its business in terms jury can understand
 - Explain broadly the concept of securities laws and a company's obligation to investors (i.e. SEC filings, disclosure obligations)
 - Explain the basis for their claims and stress the theory of their case
 - Summarize the evidence that will be presented (e.g. internal emails) and highlight key documents
 - Explain that plaintiffs must rely on the testimony of current and former executives

Challenges in Presenting a Legally and Factually Complex Case to a Jury

- Key Role of Opening Statement
 - Defense Perspective
 - Present the ‘key facts’ on which the defense turns
 - Orient the jury to key different story lines with use of timelines and other graphics
 - Educate the jury on critical industry, accounting or other ‘technical issues’

Challenges in Presenting a Legally and Factually Complex Case to a Jury

- Presentation of Evidence
 - Effective Use of Graphics and Trial Technology
 - Playing videotaped depositions, either as testimony or to impeach a live witness
 - Especially effective for plaintiffs who do not control any witnesses and must obtain all testimony from hostile witnesses identified with the defendants
 - Presentation of electronic versions of exhibits that can be enlarged, highlighted and underlined
 - Use of graphics and demonstratives

Issues Relating to Trials With Multiple Defendants

- Corporation and Individual Defendants
 - Should they be represented by the same or different counsel?
 - Identifying 'legal' and other conflicts
 - Is separate representation really separate or is it entirely coordinated?
 - How does separate or joint representation affect plaintiffs' case?
 - How can plaintiffs break through the barrier?

Issues Relating to Trials With Multiple Defendants

- Underwriters and Auditors
 - How does the presence of these defendants affect representation and the coordination of a case?
 - Are plaintiffs at a disadvantage if there is coordination between defendants?
 - May undermine the credibility of the defense
 - Benefits from having a consistent story

Use of Experts In a Jury Trial

- The Paradox
 - “We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people ... and then we ask lay judges and jurors to judge their testimony” – *Prof. Samuel Gross, Esq.*
- What is the danger of presenting expert testimony to jurors?
 - May risk confusing a jury; Must explain the complex testimony in a way that a lay juror can understand
- How do you help a jury assess the weight to be assigned to expert testimony?
 - Collateral Damage
 - New Federal Rule