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The Rocky Road of Resolving Securities Cases

A REPORT PRODUCED by the Bureau of Justice Statistics in 2007 states that less than 1 percent of federal cases are tried by a jury, and this is particularly true when it comes to cases involving securities. In today's world of high-stakes securities litigation, the potential risk to the defendant is often a damage award that can be in the hundreds of millions or billions of dollars or even time in prison. Few corporate and individual defendants want to leave such a critical decision in the hands of a jury.

An adverse jury verdict—which was later overturned—was the death knell for Arthur Andersen after the Enron collapse, and the first criminal backdating trial recently resulted in a conviction. Most high-stakes securities cases that survive motions are resolved by settlement, mediation, or a plea bargain rather than having defendants risk large jury damage awards that will have a negative impact on stock prices, prevent an auditor from practicing for several years, damage either side's reputation, or worse. In addition, given the cost of litigation, plaintiffs—particularly class actions and their counsel—are uncomfortable about risking a guaranteed recovery often under some type of contingency agreement.

When parties enter into settlement talks or mediation, a series of assumptions are made about how the trier of fact will react to the case. Each party evaluates who the potential jurors could be, how strong the liability case is, how well witnesses will testify, what a damage award could or would have been had the case gone to trial, what the plaintiffs hope to receive, and what the defendants can afford to pay or have covered by their insurance.

When it comes to identifying the hot-button issues in a case, the earlier this is done, the better. According to Scott Schreiber, co-chairman of Arnold & Porter's Securities Enforcement and Litigation Practice Group, "Conducting jury-related research early, even before a complaint is officially filed, but once the issues have been sufficiently identified, can often be very helpful. It's important to find out all you can about a venue before getting too far down the road of litigation so you know what it is you're dealing with."

Doing your homework before attempting to resolve the case is the most effective tool for measuring risk, building effective case themes, and determining favorable settlement positions. Proven research techniques—such as focus groups, mock trials, and surveys—can test how arguments and evidence influence people. The results will augment your experience and intuition, providing both validation and alternative strategies for the rocky road ahead.

Know Your Venue

Jurors' experiences with investments, complex financial transactions, accounting and auditing practices, and even balancing their own checkbooks influence their opinions in securities cases. Jurors who are used to making judgment calls about their own investments and tax returns or who consider themselves to be risk takers are more likely to sympathize with a corporation's executive or auditor who had to make difficult financial decisions and rely on information that others provided. On the other hand, jurors who rely on others to balance their checkbooks or prepare their tax returns, or those who prefer to play it safe, are more likely to have difficulty relating to defendants and their financial decisions.

In a survey conducted by TrialGraphix of more than 4,500 jury-eligible adults, 49 percent reported having no familiarity with the concept of due diligence. Of the respondents surveyed, 89 percent reported having some understanding of what financial statements are; however, it is likely that few respondents are familiar with the complex financial statements and disclosures that public corporations are required to create and file.

Jurors in some parts of the country are more familiar with relevant concepts than jurors in other areas. For example, jurors in Manhattan and the Southern District of New York are more likely to be exposed to complex financial dealings than jurors in the Southern District of Iowa. However, Des Moines is home to several insurance and financial services companies. It would be difficult to gauge how open the residents of the Southern District of Iowa would be to many specific securities themes without further investigation.

If a regulatory agency, such as the Securities and Exchange Commission or the U.S. Department of Justice, is involved in the litigation, counsel should get a sense of what jurors in a specific venue think of those agencies. Authoritarian jurors are more likely to believe that, when an agency files claims or charges, there must be some merit to them. Jurors who are

skeptical of the government and its use of power are more likely to question the government's motives.

A venue analysis telephone survey can assess how prevalent certain attitudes and experiences are within a venue or in multiple venues in comparison to one another. Measuring the prevalence of residents' relevant experiences and attitudes in the venue in which the case will be heard can help counsel determine how favorable a venue is to one side or another. Getting a handle on where your client's starting line is lets you know how much more work you have to do to swing a jury to your side.

Create Your Position, Don't Defend It

Aside from knowing the attitudes and experiences of a venue's residents, it is even more critical to know how potential jurors may evaluate the actual evidence. Someone may have extensive experience with complex financial transactions, but if he or she simply does not believe the auditor who states that the company hid information from that auditor, the juror's experiences won't matter.

Conducting jury research at various stages of the litigation can help answer different questions. Talking to jurors about the case prior to discovery or early in discovery can help the trial team understand what jurors will want to know in order to make a decision. The litigant will be in a better position for deciding about settlement or mediation at the end of discovery if those big questions are uncovered early and good answers are already on the record.

"Early research is critical in determining how to frame your case for the finder of fact and in determining the type of pretrial discovery and experts that are needed," says Schreiber. Knowing what to look for and developing a good story from the start, rather than piecing the facts together afterward in hopes of making a good story, can be extremely valuable later, when counsel is trying to convince the opposing party or a mediator of the strength of each side's case.

It is well documented that jurors rely heavily on the stories they develop during the trial when making their decisions. (For example, *see* N. Pennington and R. Hastie, "The Story Model for Juror Decision Making," *Inside the Juror: The Psychology of Juror Decision Making* (R. Hastie, ed., 1993).) The parties need to develop their own stories based on the evidence, and those stories should contain a few solid themes. Early research is also beneficial in identifying which case themes jurors might generate on their own, and some themes will grow organically out of the evidence. When potential themes are identified early, counsel can determine which ones are best supported by the facts and eliminate themes that are not well supported. The result is a well-developed set of themes that creates a well-rounded story that will be very persuasive to opposing counsel or a mediator in settlement negotiations.

Going into Battle

Determining when to compromise and when to stand firm for your client is critical when entering settlement or mediation talks. Once discovery is closed and the evidence is in, it is time to test how well everything fits together. According to Schreiber, who has used results from jury research in settling cases, "Once discovery is over and you know what the evidence looks like, you need to find out how a jury is likely to react to both sides of the case. It's absolutely necessary to know which arguments will work and won't work with a jury before going into settlement talks or mediation. I've found that doing mini trials and focus groups is very helpful for that."

Research, such as focus groups and trial simulations, usually consist of going to the venue; making case presentations to a group of jury-eligible, venue-matched adults; and observing the mock juries' discussions and/or deliberations. The presentations typically include a summary of the evidence, the main themes of the case, adversarial arguments, important pieces of evidence, and perhaps some short clips from key depositions. Damages are also usually presented and discussed at these sessions, and if jurors aren't asked to generate actual numbers, they are at least asked to evaluate competing theories of damages and perhaps experts' opinions of damages.

These exercises provide an unparalleled opportunity to peek into the black box of a jury's decision-making process and see and hear firsthand what potential jurors think of each side of the case. Jurors at these mock trials are encouraged to pick apart each argument, theme, and piece of evidence, thereby arming counsel with invaluable information that can be used to make sound decisions about settlement or mediation strategy. Information gleamed from these types of jury research can include calculations of risk and expected loss as well as how much to accept or offer, how much can be attributed to the defendant's actions versus those of the plaintiff, or how much an executive unjustly gained.

At the same time, this information will also help to convince a client that settlement, mediation, or plea bargaining is preferable to a trial. "Doing jury research for settlement purposes can also be a necessary reality check—both for counsel and the client," says Schreiber. It is not uncommon for cases that seemed destined for trial to settle shortly after counsel has conducted jury research.

If All Else Fails

If attempts to resolve the case before trial fail, the parties then must prepare for trial, even if the case is likely to settle on the courthouse steps. In the past, jurors have been receptive to a few plaintiff/prosecution and defense themes that should be considered. Examples of plaintiff/prosecution themes that have

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see www.nationalpopularvote.com.

[7]*Leser v. Garnett*, 258 U.S. 130 (1922). For a scholarly review of this subject, *see also* Howard H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. L. REV. 731 (2001).

[8]Letter from President Lincoln to the U.S. Senate and House of Representatives, Feb. 5, 1865, *Abraham Lincoln: Speeches and Writings 1859-1865*, THE LIBRARY OF AMERICA at 671–72 (1989).

[9]Florida's legislature also unsuccessfully attempted to appoint a set of electors in January 1877, after the December 1876 date set by Congress for the meeting of the Electoral College for the disputed election of 1876.

[10]Senate Rep. 1st Sess. 43rd Cong. No. 395 (1874).

[11]*McPherson v. Blacker*, 146 U.S. 1 (1892).

[12]*Bush v. Gore*, 531 U.S. 98 (2000).

[13]In one footnote, Justice Stevens tried to distinguish appointing electors from ratifying constitutional amendments, arguing that appointing electors call upon legislatures "to act in a lawmaking capacity whereas Article V simply calls on the legislative body to make a binary decision." Justice Stevens did not want to overturn *Leser v. Garnet*, but his short argument is neither clear nor persuasive. It is particularly difficult to reconcile his idea of the state legislature's duty with another constitutional duty originally delegated to state legislatures: the selection of senators before passage of the 17th Amendment in 1913 gave that duty to the "people" of the states. For more than a century before 1913, it was widely understood that state legislatures operated in this area under the federal Constitution and not their state constitutions. Even if there were a difference between legislative selection of electors as "lawmaking" and ratification of constitutional amendments as a "binary decision," it is much harder to see such a difference between legislative selection of electors and senators.

[14]*Virginia v. Tennessee*, 148 U.S. 503 (1893).

[15]Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L. J. at 372 (2007).

[16]*See also* Frederick L. Zimmerman and Mitchell Wendell, THE LAW AND USE OF INTERSTATE COMPACTS at 23 (Council of State Governments, 1976). According to the authors, "The real test of the need for Congressional consent is the degree to which an interstate agreement may conflict with federal law or federal interest."

[17]The plan provides that the last date for the plan to be effective in that election year is July 20, but that still might not be enough time for the courts to definitively rule on the plan in time to avoid a rancorous election.

[18]Rick Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, Legal Studies Paper No. 2007-48, HASTINGS CONST. L.Q. (forthcoming 2008).

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been successful in the past include the following:

- The fact that there was a restatement means someone did something wrong.
- The corporate executives did whatever they wanted to line their pockets and protect themselves at the expense of the investors and stockholders.
- Outside independent auditors are far from independent.
- Auditors have full access to the company's documents and employees and therefore either knew or should have known what was going on.

A few defense themes that have been successful include the following:

- Investors have a responsibility to do their own investigations into their investments.
- The plaintiffs are sophisticated investors who knew what they were doing.
- Investments are risks not guarantees.
- The government is desperate to blame somebody, so they're coming after us.
- The company hid information from us too.

Of course, the applicability and strength of these themes depend on the case at hand, and they are not successful in every case. Moreover, themes that are not usually successful could work in a particular case if the facts and witnesses credibly support the idea. If a case looks like it will go to trial, parties must do their own due diligence and thoroughly examine the case to determine which themes and arguments work best with a specific fact pattern and in a specific venue.

In summary, securities cases often involve high stakes and high risk; therefore, such cases rarely go all the way to a trial. More commonly, securities cases are resolved through some type of settlement, mediation, or plea bargaining. Jury research can be a powerful tool in arriving at a successful resolution by identifying potential case themes prior to discovery so that counsel will know what to look for and ask in depositions and document requests. Once a good story is on the record, the story can be tested and tweaked through additional jury research to ensure that the strongest story possible is presented to opposing counsel, prosecutors, or mediators. Keep the destination in mind from the beginning, and the road won't be as bumpy. **TFL**

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