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New Rule 50 May End Directed Verdicts for Plaintiffs

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NEW RULE 50 MAY END DIRECTED VERDICTS FOR PLAINTIFFS

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Plaintiff's counsel: We move for a directed verdict as to liability, Your Honor. The jury may then determine damages. Our evidence was direct, uncontradicted, and unbiased. Defendant's only evidence to support its affirmative defense of release was excluded as hearsay.

Defense counsel: We object under amended Rule 50(a)(1) of the Federal Rules of Civil Procedure which states:

(1) There are no more directed verdicts; instead we have judgments as a matter of law.

(2) Such judgments can be obtained only against claims, not for claims and not against defenses.

(3) There is no provision allowing such judgments as to only part of a claim.

The Judge: You can't be serious! Everything plaintiff has requested is clearly authorized by existing law.

Defense counsel: Prior law, Your Honor, not existing law. Please read carefully the text of Rule 50(a)(1), as amended.

Defense counsel may indeed have a serious argument, because plaintiffs' right to seek a directed verdict in federal courts may have been eliminated under the December 1, 1991 revision of Rule 50(a)(1) of the Federal Rules of Civil Procedure.[1] Many states patterning their rules of civil procedure after the federal model may adopt this revision, creating similar problems in state court systems.

Under prior law, although the jury normally could decide the case for either side, a verdict could be directed for one side if it was clear under applicable law and the evidence presented that reasonable people

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1. FED. R. CIV. P. 50(a)(1), as amended, provides:

If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

could only decide the case for that side.[2] Directed verdicts are much more likely to be sought by and granted to defendants, but they are also available to plaintiffs.[3] The revision of Rule 50 was intended merely to change the name "directed verdict" to "judgment as a matter of law."[4]

The revised wording, however, appears to permit only defendants, and not plaintiffs[5] to invoke the rule. The revision refers to "judgment . . . against [a] party on any *claim* . . . that cannot under the controlling law be *maintained*," but it makes no reference to a *defense* that cannot be maintained, or to a claim that cannot be *defeated*.[6] The Committee Notes suggest that the omission was inadvertent, stating that the proposal "effects no change in the existing standard," and that a "judgment as a matter of law" may be entered "as soon as it is apparent that *either* party is unable to carry a burden of proof that is essential to that party's case."[7] Thus, while the Committee Notes indicate that the Committee intended to continue existing law, allowing either side to seek a directed verdict (or "judgment as a matter of law"), the language adopted appears to allow only defendants to obtain such verdicts or judgments. In addition, the revision makes no provision for partial directed verdicts as to fewer than all the elements of a claim (or defense).[8]

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2. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2524-29 (1971 & Supp. 1992).

3. *See* Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966) (summary judgment for intervening claimant; summary judgment is decided under essentially the same standards as directed verdicts or judgments as a matter of law, *id.* at 407). *See also* Edson R. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198, 203-09 (1913); *see infra* note 8.

4. *Compare* the old FED. R. CIV. P. 50 *with* the revised rule. The advisory committee noted that the terminology of "direction of verdict" was both misleading and "freighted with anachronisms." *See Proposed Amendments to the Fed. R. Civ. P.*, 134 F.R.D. 579, 684 (1991); FED. R. CIV. P. 50, advisory committee's notes to 1991 amendment.

5. "Plaintiff" and "defendant" are used here to refer respectively to the party asserting the claim and the party defending a claim. A defendant may well be a claiming party on a counterclaim, cross-claim, or third party claim.

6. FED. R. CIV. P. 50(a) (emphasis added). *See supra* note 1. Fed. R. Civ. P. 52(c), added when Rule 50 was revised, has language very similar to that in Rule 50(a)(1), except that where Rule 50(a)(1) uses the word "maintained," Rule 52(c) uses the words "*maintained or defeated*." FED. R. CIV. P. 52(c) (emphasis added). The language in Rule 52(c) is an improvement to the language in Rule 50(a)(1) because it permits plaintiffs, as well as defendants, to obtain such rulings. However, Rule 52(c) still does not deal with determinations of issues or elements of claims or defenses, leaving other matters pertaining to the claim or defense to be resolved later.

7. 134 F.R.D. at 685 (emphasis added). The Committee Notes refer to "the second sentence of paragraph (a)(1)," *id.*, but that paragraph has only one sentence.

8. Because a summary judgment under Fed. R. Civ. P. 56 is regarded merely as a prediction of what would happen on a directed verdict motion were the case to go to trial, *see, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the proposed rule outlawing plaintiffs' directed verdict motions might also prevent plaintiffs from seeking summary judgment.

The problem appears to be that the drafters focused on the most common type of directed verdict, where the claimant loses because claimant's proof is inadequate. Directed verdicts have also been possible, however, when the claimant's evidence is overwhelming, and in the analogous situations when the evidence on a defense is either inadequate or overwhelming. Although the rule deals adequately with the overwhelming defense, the drafters appear to have overlooked the other, less common, directed verdict situations.

These problems could be solved in one of two ways:

(1) Revise Rule 50(a)(1) to incorporate by reference prior directed verdict practice: "Judgments as a matter of law may be ordered in the circumstances in which verdicts have been directed in courts of the United States," much as is done in Rule 59, dealing with new trials.[9]

(2) Revise Rule 50(a)(1) to more accurately describe prior directed verdict practice:

> If during a trial by jury a party has been fully heard with respect to an issue *pertaining to a claim or defense* and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court, *on motion, may determine that issue. Any remaining material issues will be submitted to the jury. The court may enter judgment as a matter of law allowing or dismissing any claim as to which no material issues remain. "Claim" includes claim, counterclaim, cross-claim, and third party claim.*[10]

Other solutions may also be possible. Unless some solution is adopted, the revision, while purporting to change only terminology, may result in a dramatic change in existing federal court directed verdict practice.

I do not wish to overstate the problem. Perhaps the revised language will not create any difficulties. Courts may not read the language literally; rather, courts may follow the Committee Notes. On the other hand, some courts might adhere to the rule's words,[11] or some litigants might hope that the court would do so, forcing the court and the opposing litigants to address the issue.[12] This drafting error presents yet an-

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9. FED. R. CIV. P. 59(a)(1) provides in pertinent part: "A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ."

10. Proposed addtions to Rule 50(a)(1) are noted in italics; deletions are not indicated.

11. Justice Scalia has cautioned against excessive reliance on legislative history (such as the Committee Notes?) rather than the text of the statute (the Rule?). *See* United States v. R.L.C., 112 S. Ct. 1329, 1339 (1992) (Scalia, J., concurring) (stating, in the context of a criminal statute, "no matter how 'authoritative' the [legislative] history may be . . . one can never be sure that the legislators who voted for the text of the bill were aware of it," *id.* at 1340).

12. Those primarily responsible for drafting the rule agree that the language of the rule may

other opportunity to increase litigation costs and delays. Certainly, a state revising its equivalent of Rule 50 could easily avoid any problems by more careful drafting. The recent federal version should be amended when the federal rules are revised.

Should the judge's next statement in the colloquy that began this essay be,

> "All right, let's have briefs and arguments on this issue,"

or should it be,

> "Very interesting, defense counsel, but a subsequent amendment has eliminated that ambiguity. Please address the merits of plaintiff's counsel's motion."?

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present problems, although they do not believe that the risk is great. "I believe it unlikely that a court would construe Rule 56 [sic] as you fear, but I agree with you that the drafting could be improved." Letter from Judge Robert E. Keeton, Chair of the Committee on Rules of Practice and Procedure, Judicial Conference of the United States to Michael J. Waggoner, Associate Professor of Law at University of Colorado Law School (Nov. 15, 1991) (on file with author).

"It is . . . perhaps imaginable that a federal judge would be misled as you suggest and make a plaintiff go to a jury . . . even though that plaintiff is entitled to judgment as a matter of law. . . . [T]he rule would be clearer if the words 'or defense' were added." Letter from Professor Paul D. Carrington, Reporter for the Advisory Committee on the Civil Rules, Judicial Conference of the United States to Michael J. Waggoner, Associate Professor of Law at University of Colorado Law School (Nov. 14, 1991) (on file with author).

Even if a judge correctly resolves the matter, ruling that the plaintiff may obtain a judgment as a matter of law, resources of the parties and the judicial system are wasted in having to consider the issue.