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Summary Jury Trial - A Caution

Avern Cohn

Professor Woodley has done an excellent job in describing the origins of the summary jury trial, its benefits and drawbacks, its place in the spectrum of alternative dispute resolution procedures available to federal district judges and ways by which impediments to its use can be eliminated. However, she does not explain why a district judge should be "explicitly authoriz[ed] . . . to conduct summary jury trials and to mandate participation in them," nor does she justify the effort needed to obtain congressional elimination of the impediments in relationship to the benefits to be obtained.

My experience with summary jury trials as a settlement device, as well as a poll of my colleagues in the Eastern District of Michigan, suggests the drawbacks of summary jury trials outweigh the benefits. Additionally, a decision regarding the worth of summary jury trial as a dispute resolution mechanism, particularly over the objections of a party, should be suspended until the Rand Corporation's Institute for Civil Justice reports to Congress on its evaluation of Civil Justice Reform Act initiatives with regard to alternate dispute resolution procedures in federal district courts.

During my sixteen years as a federal district judge, I twice persuaded parties in personal injury actions to participate in a summary jury trial as a settlement device. The first case involved a railroad worker who was trapped between the rails in a freight yard while a long freight train passed over him. There was no real dispute that the worker was traumatized by the event and that his work life ended as a consequence of the accident. The parties faithfully participated in a four hour summary trial to a jury of six persons, who were not told that the trial was not real. There was no testimony during the summary jury trial, only a reading of stipulated facts, opening and final arguments and jury instructions. The jury rendered a substantial verdict for the worker. In a discussion with the jury after the trial, the jurors suggested that they stumbled on reducing damages to present value.

After the summary jury trial, the case did not settle. At trial, the railroad's lawyer spent a good deal of time arguing reduction of damages to present value. The trial verdict was substantially the same as the summary jury trial verdict. The only difference in the verdicts was that the trial verdict was the same as the summary verdict reduced to present value. It appears that the summary jury trial educated the defendant on how to try its case.

The second summary jury trial I oversaw involved a nine-year-old boy who was severely burned when his younger sister threw a lighted match at him while

1. The author is a United States District Judge for the Eastern District of Michigan.
3. Id. at 219 (emphasis added). FED. R. CIV. P. 16(c)(9) authorizes a district court to "take appropriate action" with regard to assisting settlement. The Notes of Advisory Committee on Rules concerning the 1993 Amendment to the Rule state that the Rule contemplates the use of summary jury trials, but avoids answering the question of "the extent [to which] a court would be authorized to require such proceedings."
he was wearing a gasoline-soaked shirt. Minutes before the incident, the boy brought home an open filled gasoline can that he purchased at the defendant’s gasoline station. At the final pretrial conference, I inquired about settlement and was told by defendant’s counsel that he was working through a risk management firm and was having difficulty talking directly to his client. I suggested that the parties use a summary jury trial coupled with an order that a defendant’s representative, with authority, be present. The parties agreed to this procedure.

The summary jury trial, in this second case, lasted for a morning and part of an afternoon. The jury deliberated through to the early afternoon of the second day and returned a substantial verdict for the plaintiff. During debriefing, a juror told me that her decision was one of the most difficult of her life and that she had spent a sleepless night worrying about it. I did not have the heart to tell her that she was not involved in a real trial, but was part of a settlement effort. After considerable effort was expended in getting the corporate defendant to talk to its lawyers, this case was settled before trial.

These two experiences tell me that:

- Summary jury trials should be a voluntary effort and not ordered over the objections of a party. While I have an obligation to assist parties’ efforts at settlement, facilitating settlement is not a primary function of any judge.
- Jurors are misled as to their roles in summary jury trials. If judges tell jurors what they are involved in is not a real trial, even though it is a real dispute, their verdict will not offer the insight the parties seek. If judges do not tell them, jurors leave the courthouse with the mistaken belief they have resolved a dispute.

The experiences of my colleagues in the Eastern District of Michigan suggest that summary jury trials are not regularly used and are likely a passing fancy. Only three of my twenty colleagues have experience with summary jury trials. Their comments accompanying my poll suggest the device has limited utility:

- Summary jury trials are an excellent settlement tool provided they are used in the right case.
- I think "summary jury trials are the greatest ([I] hope passing)" charade one could witness - it will surely do its part to demean the constitutional right to a meaningful jury trial.
- Summary jury trials have been used almost exclusively in civil rights cases. It appears to be a useful cathartic experience for the litigants and has more often than not assisted ultimate settlement.
No one has yet acted on Chief Judge Richard Posner’s 1986 recommendation for a scientific study of summary jury trial case results compared to adjudication.\textsuperscript{4} Judge Posner’s observation of a decade ago remains true today:

The imbalance seems to me unfortunate. Beginning with the promulgation of the Federal Rules of Civil Procedure in 1938 and accelerating with the caseload explosion that began around 1960, the federal courts have been an arena of massive experimentation in judicial administration. The milestones include liberalized class actions, one-way attorney’s fee shifting, expansive pretrial discovery, managerial judging, the six-person jury, limited publication of appellate opinions, greater use of judicial adjuncts, and now "alternative dispute resolution," illustrated by the summary jury trial and court-annexed arbitration. Very few of these experiments have been conceived or evaluated in a scientific spirit and this may help explain why the federal courts remain in a state of crisis. Maybe a dose of social science is the thing, or one of the things, that the system needs.\textsuperscript{5}

The Judge’s Deskbook On Court Alternate Dispute Resolution published by the Center for Public Resources/CPR Legal Program notes that the summary jury trial is a demanding process generally reserved for cases involving substantial court and litigant resources.\textsuperscript{6} These cases, as we know, are few and far between. The Judge’s Deskbook suggests that some of the factors to be used in selecting such cases are:

- Trial-ready cases headed for a jury trial of over five days.
- Cases where the parties . . . disagree substantially over how a jury will view [the case].
- Cases where one or more of the parties . . . have an unrealistic view of the merits.
- Cases where strong emotions are a principal obstacle to settlement and the opportunity to have a "day in court" may be beneficial.\textsuperscript{7}

\textsuperscript{5} Id. at 393.
\textsuperscript{6} Elizabeth Plapinger et al., Judge’s Deskbook on Court ADR, Center for Public Resources, reprinted in 12 ALTERNATIVES TO HIGH COST LITIGATION 9, 13 (1994).
\textsuperscript{7} Id. at 14.
The summary jury trial is, of course, only one of a variety of alternate dispute resolution procedures. Before we give federal trial judges authority to impose the procedure on parties without consent, we first ought to decide whether alternate dispute resolution devices—whatever the form—should be mandatory. The American Judicature Society suggests we have yet to answer four relevant questions in this regard:

- Is it ever appropriate for courts to compel parties to participate in pretrial non-binding dispute resolution, given that requiring parties to pass through multiple procedures on the way to trial may diminish some parties’ ability to sustain their litigation through trial?
- Are some ADR procedures inappropriate for certain types of cases?
- Are clearer standards needed to guide courts in the use of mandatory and voluntary programs?
- Is it appropriate to expect parties to bear the costs of ADR neutrals?  

My comments are not meant to diminish Professor Woodley’s efforts. Coming from the Northern District of Ohio, her enthusiasm for the summary jury trial is to be expected. I have concerns about the effort it will take to get legislative approval and whether it is really worth the trouble considering the limited utility and the perhaps passing vogue of the procedure. Assuming that the effort is worthwhile, the fact that a judge or magistrate judge may order a summary jury trial upon the judge’s determination that a summary jury trial would be appropriate, even in the absence of the agreement of all the parties is problematic. This is really more authority than I can handle and likely so for most of my colleagues on the federal bench. Federal judges simply ought not have the authority to dictate how parties are to go about trying or settling their cases.