MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 22, 2004
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Cullen Battle, Janet H. Smith, Terrie T. McIntosh, Leslie W. Slaugh, Virginia S. Smith, R. Scott Waterfall, James T. Blanch, Lance Long, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Francis J. Carney, Paula Carr, David W. Scofield, Thomas R. Karrenberg, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy

GUESTS: Matty Branch
Jim Olson
Gary Thorup
Keith Teel
Cap Ferry
Nancy Sechrest

I. APPROVAL OF MINUTES AND PRELIMINARY MATTERS.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the July 28, 2004 meeting were reviewed, and Leslie W. Slaugh moved that they be approved as submitted. The Motion was seconded by James T. Blanch, and approved unanimously.

Mr. Wikstrom reported that he met with the Supreme Court in August of 2004 to submit the proposed amended rules as approved by the Committee. He stated that the Court has approved all submitted amendments as proposed, with the exception of the proposed amendments to Rule 63.

II. CAP ON SUPERSEDEAS BONDS.

Mr. Wikstrom introduced Keith Teel, an attorney with the law firm of Covington & Burling. Mr. Teel, who works out of his firm's Washington, D.C., office, introduced himself as having been involved in virtually all appeal bond changes in recent years. Mr. Teel provided a history of his involvement in the supersedeas bond issue on behalf of his clients, major tobacco companies, including that the initial impetus for change in supersedeas bond rules came from

tobacco companies involved in product liability litigation. The first such changes were adopted in Florida in response to a product liability lawsuit where the defendant tobacco company had reason to believe that significant punitive damages might be imposed. Florida's rules at that time required a supersedeas bond of 125% of the amount of verdict, with no latitude for trial or appellate courts to decrease the amount. At the conclusion of the one-year trial, the jury awarded $145 billion in damages, which meant that the supersedeas bond would have been set at $181 billion. Mr. Teel stated that there was no way for even a major tobacco company to post that bond amount, so that the only way an appeal could have been taken would have been for the company to file for bankruptcy. However, the company did not want to file for bankruptcy for numerous reasons, including that a bankruptcy filing would disrupt the settlement that tobacco companies had entered into with certain states. Since the defendant in the Florida lawsuit had foreseen the possibility of a huge verdict, prior to the end of trial the defendant was able to approach the Florida legislature with its concerns. The result was that by the time of the verdict, the legislature had already amended its supersedeas bond requirements to limit the amount of bond to a $100 million maximum for punitive damages. This change allowed the defendant to post bond and pursue an appeal without first having to file for bankruptcy. On intermediate appeal the court reversed the judgment and decertified the class. The case is now on appeal to the Florida Supreme Court.

Mr. Teel commented that even though tobacco companies are not popular, they provide employment for thousands of employees and a bankruptcy filing would have impacted those jobs. He observed that legislators and courts are beginning to recognize that supersedeas bond rules initially did not arise in the extreme situations that now exist in litigation, *e.g*, class actions, large punitive damages verdicts. He commented that courts also appear to recognize that defendants are entitled to their day in court, and that it is contrary to that right if a defendant is forced to file for bankruptcy before it can pursue an appeal.

Mr. Teel stated that since the Florida rule changes, thirty-one states have addressed the supersedeas bond issue, and the result is a hodge-podge of changes. However, all changes have the following in common:

(1) All thirty-one states have adopted some hard cap with most of them similar to Florida's cap, *i.e.*, a cap on bond for punitive damages, although some states have imposed a broader cap .

(2) All thirty-one states have included a provision that if there is evidence that a defendant is dissipating assets, the court can impose a bond of up to the full amount of judgment.

Mr. Slaugh asked why this Committee should provide a set rule when only 1% of cases might fall into a situation such as that described. He also pointed out that Utah's Rule 62 presently gives judges discretion as to bond amount, and since an expedited motion to an appellate court on bond amount is allowed, a rule change would appear to presuppose that a judge's decision on bond will be wrong. In response, Mr. Teel stated that some of the thirty-one states that have changed their bond requirements also had an expedited appeal process to an appellate court, but defendants were still required to post bond before they could appeal the amount of bond. He pointed out that an additional problem is that judges are often reluctant to

exercise the discretion they have regarding bond amount.

A Committee member asked whether changes to supersedeas bond requirements should be by rule or by legislation. Mr. Teel stated that three states changed supersedeas bond requirements by rule, and the remaining twenty-eight states made changes through legislation. He commented that in some states it is clear that appeal bonds are creatures of statute, that in some states it is clear that they are creatures of rules, and that in some states they can be changed by legislation or by rule. The question of why this issue is before this Committee was again discussed in light of the fact that the legislature already has acted.

Mr. Slaugh commented that the purpose of any change should be to appropriately protect everyone involved. Mr. Teel admitted that the rule changes that he has proposed likely would not protect small companies. A discussion ensued concerning changes to the bond rule and small versus large companies. Mr. Slaugh then expressed concern that changing the rule would not protect plaintiffs. Mr. Teel responded that in virtually no state has the plaintiffs' bar come forward to complain about proposed changes. In fact, the Missouri plaintiffs' bar supported the changes because they felt that they would rather have good judgments against solvent companies.

Mr. Wikstrom asked whether the settlement with the states could be viewed as an executory contract that could be re-affirmed in a bankruptcy proceeding. Mr. Teel stated that in the Florida lawsuit, bond companies assessed the situation and could not reach agreement on that question. It was also asked whether the issue might be resolved by allowing a faster bond appeal process after giving judges discretion. Mr. Teel commented that in Florida there was concern that there would be an immediate execution during any bond appeal and that the company's working capital would be taken. In this context, Committee members commented that in Utah it is possible to execute on the judgment immediately after final judgment, and that a motion to appeal the bond amount is on a separate track from the actual appeal.

Mr. Teel was asked whether he believes there should be two rules, one for large companies and one for small companies. He stated that he has dealt only with large companies, and what they are interested in is certainty even if they do not like the dollar amount. He also commented that courts will always require a bond amounting to the entire judgment if the overriding principle is, as stated in present Rule 62, that the overriding interest is that of the plaintiff.

Committee members then discussed the issue of dissipation of funds if a lower bond is allowed. They also discussed whether to require a supersedeas bond for punitive damages, whether to limit the bond amount for compensatory damages, and whether a bond should be required in class actions.

After discussion, the consensus was that: (1) there presumptively should be no bond requirement for punitive damages, (2) there presumptively should NOT be a bond limit for compensatory damages, and (3) the presumptive bond limit for compensatory damages in class action lawsuits should be $25 million. Tim Shea will work on drafting a proposed amendment to Rule 62, with input from other members.

III. RULE 7: MOTION TO RECONSIDER.

Cullen Battle led a discussion of whether to adopt a proposed rule that he has drafted which would specifically provide for motions to reconsider in trial courts. He stated that he is in favor of such a rule because motions seeking reconsideration are already being filed in trial courts even though they may not be captioned as such. At the present time the non-movant must respond to these motions no matter how frivolous they are, whereas the proposed rule provides that the non-movant need not respond to a motion to reconsider unless the court so orders.

Committee members discussed general issues involving motions that are already being filed which in reality are motions to reconsider even if they are not captioned as such. A comment was made that whenever there is a rotation of judges in civil cases, the first thing new judges receive are motions to reconsider rulings made by the previous judge. Lance Long commented that he agrees that there is merit to a rule that would specifically recognize a motion to reconsider, and would specify that a response is not required except by court order.

After discussion, the members' consensus was that the proposed rule has merit. Mr. Battle agreed to work on revising the proposed rule in accord with members' comments.

IV. RULE 9: NAMING PERSONS FOR ALLOCATION OF FAULT.

Mr. Shea stated that legislation has been drafted for the 2005 General Session that would amend the Liability Reform Act, and the Supreme Court has asked the Committee to look at the issue. The amendment would: (1) provide for a 90-day time period to add defendants to a lawsuit for purposes of allocation of fault, (2) require the party requesting the addition of additional parties to provide specific information about the additional parties, and (3) allow the court to deny a request to add parties simply because it was not timely filed.

Mr. Slaugh commented that the proponent of the legislation, John Valentine, is not suggesting that the Committee do anything regarding the proposed legislation, and that he submitted it to the Committee first only to see whether the Committee would like to comment on it. Mr. Slaugh suggested that the Committee do nothing. Mr. Shea disagreed, commenting that he believes the changes that are proposed amount to a pleading rule, and that as such it is more appropriately placed in the rules than in legislation.

The Committee discussed the proposed legislative amendment, including allocation of fault and statutes of limitation, and how to establish procedures for pleading allocation of fault. Due to lack of time, it was agreed that this matter would be discussed again in a later meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, October 27, 2004, at the Administrative Office of the Courts.

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