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Adapting in the Arena:

Strategies for Confronting Jury Trial Twists in A Complex Commercial Dispute

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Introduction

The majority of lawsuits, estimated between 80-92%, settle before reaching the courtroom. There are numerous reasons for this: trials can be prohibitively expensive, incredibly time-consuming, and fraught with unpredictability. But some cases have to be tried. In this article, we delve into the nuanced tactics for preparing for a jury trial in a complex business dispute. We will cover trial preparation and pre-trial strategy, considerations for assembling a diverse jury, the value of including junior lawyers in your trial presentation, the strategic use of anchoring numbers, and techniques for navigating unforeseen twists. Our discussion is grounded in a hypothetical breach of contract and breach of warranty dispute stemming from a nationwide recall of flour.

Background of the case

Wheat Farmers of America ("WFA") is a cooperative of wheat farmers who supply wheat products to food manufacturers around the United States. In early 2021, WFA initiated a nationwide recall of certain lots of flour that it processed and distributed from one of its facilities in Wisconsin because of the potential of salmonella contamination. Some of the recalled flour was incorporated into Hydros brand cookies, a popular snack food distributed and sold by GiantCorp, a multinational snack food company headquartered in Chicago, IL.

GiantCorp purchased recalled flour directly from WFA by submitting purchase orders to WFA that set forth the terms of each sale and included a choice of law provision establishing Illinois law as the governing law (the "GiantCorp Purchase Orders"). GiantCorp separately contracted with TPM Inc. ("TPM"), a third-party manufacturer, to manufacture Hydros brand cookies to GiantCorp specs. When TPM purchased flour from WFA, it submitted its own purchase orders which set forth terms and conditions and included a choice of law provision establishing Wisconsin law as the governing law (the "TPM Purchase Orders"). The TPM Purchase Orders also each contained an integration clause stating that the Purchase Order "shall constitute the entire agreement and understanding of the Parties" and that "neither Buyer nor Seller shall be bound by any oral or written agreements not expressly included in this Purchase Order."

Only a small amount of recalled flour that was sold directly to GiantCorp was used in finished Hydros products, and those products were never distributed and were not incorporated into GiantCorp's recall. The value of the Hydros products manufactured by GiantCorp using recalled flour directly purchased from WFA was only $60,000 and those Hydros cookies were promptly destroyed before ever being distributed.

However, TPM manufactured Hydros cookies using lots of WFA's recalled flour. The Hydros cookies that TPM manufactured with the recalled flour were delivered to GiantCorp and then distributed to retailers. Thus, upon receipt of notice of WFA's recall, GiantCorp initiated a nationwide recall of certain lots of Hydros cookies.

GiantCorp sued WFA in the United States District Court for the Northern District of Illinois for breach of express and implied warranties and demanded $23 million based on the following categories of alleged damages:

- Value of the Recalled Hydros Product Inventory - $10,000,000
- Lost Profits on Sale of Non-Recalled Hydros Products - $5,500,000
- Indemnification for Fines and Fees to Third Parties - $2,700,000
- Expenses Incurred in Recall of Hydros Products - $300,000
- Marketing Expenses to Mitigate Brand Damage - $4,500,000

Major Trial Issues

WFA Disputes That GiantCorp Has Standing to Sue Under the TPM Purchase Orders

WFA argues that GiantCorp lacks standing to sue WFA for alleged damages resulting from breach of warranties express or implied in the TPM Purchase Orders because, under Wisconsin law, GiantCorp is not a party to those contracts and is not a third-party beneficiary. The express terms of the TPM Purchase Orders establish that Wisconsin law governs all enforcement, interpretation, application and disputes arising from the TPM Purchase Orders. And Wisconsin law always requires privity of contract to bring express and implied warranty claims.[i]

WFA also argues that GiantCorp cannot prove that it was a third-party beneficiary to the TPM Purchase Orders. Under Wisconsin law, as the party claiming to be a third-party beneficiary, GiantCorp must show that the TPM Purchase Orders were entered into by WFA and TPM directly and primarily for GiantCorp's benefit.[ii] The TPM Purchase Orders are fully integrated contracts and nowhere state that they were made to directly and primarily benefit GiantCorp. Under Wisconsin law, where a contract is silent on a term, extrinsic evidence cannot be used to establish third-party beneficiary status.[iii] "If a completely integrated agreement is silent as to intention to benefit [a third party], evidence of prior negotiations to show such an intention should not be admitted because it would, in effect, be used to add a term."[iv]

GiantCorp argues that its claims are not based on the TPM Purchase Orders but on its direct relationship and dealings with WFA who allegedly knew that the flour it sold to TPM was intended ultimately for GiantCorp's Hydros cookies. GiantCorp argues that it relied on WFA's warranties in approving WFA as a supplier of flour to TPM and that it directed TPM to purchase flour from WFA.

GiantCorp contends that Illinois law governs its relationship with WFA because the GiantCorp Purchase Orders establish Illinois as the law governing their relationship. Additionally, the relevant contacts favor application of Illinois law because GiantCorp is headquartered in Illinois, some of the GiantCorp personnel involved in the relationship with WFA were in Illinois, and the GiantCorp Purchase Orders were issued out of Illinois. Under Illinois law, privity is not required in breach of warranty actions involving food products.[v] GiantCorp also argues that there is no actual conflict between Wisconsin law and Illinois law because Wisconsin courts have permitted warranty claims by an ultimate purchaser where the facts establish that the ultimate purchaser and the defendant manufacturer formed a separate contract governing the sale of a product through a third party intermediary.[vi] GiantCorp argues that the evidence will show that a separate contract existed between GiantCorp and WFA governing the intermediary sale of flour to TPM.

GiantCorp also contends that parol evidence of its dealings with WFA is admissible to prove that it is a third-party beneficiary notwithstanding the integration clause in the TPM Purchase Orders. Under Wisconsin UCC §2-202, parol evidence is admissible to explain the meaning of even a fully integrated agreement.[vii] GiantCorp intends to introduce evidence of its course of dealings with WFA to prove that WFA and TPM entered the Purchase Orders for the direct and immediate benefit of GiantCorp.

WFA Disputes GiantCorp's Damages

WFA contends that GiantCorp's recall of Hydros cookies was overbroad and included products that GiantCorp knew were not contaminated with the recalled flour. According to WFA's expert forensic accountants, the value of inventory that was actually contaminated by recalled flour is $5 million, not $10 million. WFA also argues that GIantCorp's claim for $5.5 million in lost profits on non-recalled, similarly branded Hydros products is speculative. Moreover, WFA argues that GiantCorp is not entitled to the $4.5 million that GiantCorp spent on marketing purportedly to mitigate brand damage. Thus, WFA contends that if it is liable to GiantCorp, GiantCorp is only entitled to $8 million.

GiantCorp argues that it had to include some lots of non-contaminated Hydros products into its recall because if it included too many product identifiers in its recall notice, it could confuse consumers who might not be able to understand which products were actually contaminated. GiantCorp also argues that it can prove its claim for lost profits and the need for a marketing spend through expert testimony.

Trial Preparation and Pre-Trial Strategy

WFA has valid defenses against liability, but GiantCorp's pleadings and discovery responses convolute the issues enough that there are likely disputed issues of material fact sufficient for GiantCorp to survive dispositive motions and present the issues to a jury. Federal Rule of Civil Procedure Rule 56 allows a party to move for summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought."[viii] However, it can be difficult to obtain summary judgment, particularly on complex issues and convoluted facts. Additionally, a motion for summary judgment can give a plaintiff a roadmap of certain pleading deficiencies that some courts will allow a plaintiff to cure, even after the close of discovery.

WFA makes a strategic decision not to move for summary judgment and instead files a motion in limine arguing that the parol evidence rule bars Giantcorp from offering testimony, evidence, or argument of any agreement between WFA and TPM not expressly stated in the TPM Purchase Orders. WFA argues that such a bar should also prohibit GiantCorp from offering evidence or argument that it had a separate contract governing WFA's sale of flour to TPM. WFA argues that the plain language of the integration clause in the TPM Purchase Orders establishes that it is a fully integrated contract. WFA cites deposition testimony from GiantCorp's designated corporate representative which it contends constitute admissions that GiantCorp sustained no damages from its purchase of flour from WFA directly and that the only products that GiantCorp had to recall were those manufactured by TPM.

The Court construes WFA's motion in limine as nothing short of a motion for summary judgment presented under the banner of a motion in limine. The Court finds that the gravamen of WFA's motion is that GiantCorp does not have viable warranty or third-party beneficiary claims for the flour that WFA sold to TPM based on the evidentiary record and that WFA is seeking a ruling that GiantCorp cannot state claims for express and implied breach of warranty. "A district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules."[ix] The Court concludes that a motion in limine that seeks to bar claims rather than exclude prejudicial evidence is not proper.[x] Accordingly, the Court declines to bar evidence related to GiantCorp's course of dealing with WFA and denies WFA's motion in limine.

The Court declines to determine whether a conflict of law exists between Illinois and Wisconsin substantive law and reserves ruling on the issue until the jury instructions conference at the close of the evidence. This means that the parties will present their case at trial without knowing which law the Court will determine governs the dispute and how the jury will be instructed.

Preparing Your Theme/Story for the Jury

In the realm of commercial jury trials, the complexity of legal and business matters can be daunting for jurors, who are often laypersons with no specialized knowledge in law or business. Amidst the technical jargon, dense documents, and intricate arguments, one critical element stands out as a constant for persuasive advocacy: storytelling. Crafting a compelling narrative and preparing coherent themes are indispensable tools for attorneys aiming to win the hearts and minds of the jury.

At its core, storytelling is a fundamental human activity. People naturally gravitate towards stories because they provide context, evoke emotions, and offer a framework for understanding. In a commercial jury trial, storytelling can humanize a case that might otherwise be perceived as cold and abstract.

To help humanize its case, WFA needs to emphasize that it is a cooperative of wheat farmers, meaning that the farmers that produce its products are each the owners of the cooperative. Additionally, WFA's witnesses all live in and around the Midwest near the farms that produce its products, and they all grew up on wheat farms. In contrast, GiantCorp is a multinational corporation, and its witnesses are located in Chicago, New York City, Mexico City, and London. As such, WFA will make the case about corporate greed and exploit the unreasonable breath of GiantCorp's demand for damages.

GiantCorp will have to combat the perception that it is a faceless corporation. GiantCorp will argue that every action it took put the interest of consumer safety above all. GiantCorp will try to exploit certain facts about WFA's recall investigation and argue that WFA carelessness caused the recall and put consumers at risk and that GiantCorp acted reasonably in responding to WFA's recall.

Picking A Diverse Jury

There are many arguments that support picking a diverse jury, but perhaps the most compelling reason for a litigant is to enhance the quality of deliberations. The case of GiantCorp versus WFA presents complex issues and jury instructions will play a very important role. When jurors with diverse backgrounds and experiences come together, their discussions are often richer and more thorough. Different viewpoints can challenge assumptions, encourage critical thinking, and lead to more comprehensive deliberations. Having a jury that is diverse in thought increases the likelihood that all aspects of a case are examined from multiple angles and that jury deliberations are not dominated by a small body of like-minded jurors who might engage in groupthink for the sake of harmony in the group.

In some jurisdictions, a diverse jury is inevitable. The United States District Court for the Northern District of Illinois is the third largest district court in the U.S. and covers the five largest cities in Illinois: Chicago, Aurora, Rockford, Joliet and Naperville. The racial makeup of Chicago in 2020 was 29.2% Black, 35.9% White, 7% Asian, 0.1 % Native American or Alaska Native, 10.8% from two or more races, and 15.8% from some other race. Additionally, the U.S. District Court for the Northern District of Illinois has revised its jury plan several times in an effort to increase the diversity of the District's jury pools to more accurately reflect the diversity of the District's population.[xi]

Including Junior Lawyers in your Trial Presentation

At some point junior lawyers must have an opportunity to learn and prove themselves in the field. Additionally, including younger lawyers on your trial team introduces generational diversity. The younger generation of lawyers tend to have more diverse backgrounds and ways to connect with jurors. If we have diverse juries, we should have diverse trial teams. Diverse thinking among the trial team will lead to better strategizing and, in turn, result in better outcomes. Additionally, since trial attorneys are trying to tell their client's story, it is important to tell the story in ways that will connect with the audience and be adopted by them.

If you are going to include a diverse lawyer on your team, make them a part of the team. They should not be just for show. The jury needs to see that the lawyer is there because the firm and the client value them as an attorney and not just as a token to win points with a diverse jury. Even if the junior lawyer is not ready to examine significant witnesses or deliver a closing argument, the jury needs to see that the junior lawyer is engaged in trial strategy and plays an active role. Decisions on when and how to include a junior lawyer on a trial presentation can still be deliberate and should be made with consideration for how the junior lawyer will be able to contribute to telling the client's story. When a junior lawyer plays a dominant role on the trial team, or even acts as first-chair, jurors will notice and pay attention.

Use of Anchor Numbers

In commercial jury trials, where actual damages are expected to be calculated from actual data, the concept of anchoring may be different than in injury cases. But the concept behind anchoring is generally the same—anchoring is a form of cognitive bias where individuals rely heavily on the first piece of information they receive (the "anchor"). In WFA's case, where GiantCorp is demanding $25 million and WFA has tried to paint GiantCorp as greedy and opportunistic, WFA has to set an anchor at $8 million, which represents the amount of actual damages that its forensic accountants opined were actually caused by WFA's recall of flour. Of course, the downside of using an anchor is that WFA is also arguing to the jury that it has no liability because GiantCorp is not a third-party beneficiary to the TPM Purchase Orders. It is very difficult to present the $8 million anchor as conditional without unintentionally signaling that the jury should award *at least* $8 million. However, if WFA does not give the anchor, and loses on the liability issue, then it increases the likelihood of a jury awarding GiantCorp the whole $25 million demand. Thus, in these circumstances, anchoring appears to be the right move for WFA.

Strategies for Addressing Twists in a Jury Trial

Jury trials are often unpredictable, and unexpected developments can significantly impact the case's outcome. A party witness gets confused about key facts or loses their cool on the stand, you accidentally open the door to otherwise excluded evidence, your opponent is allowed to ambush you with evidence or witnesses that were not timely or properly disclosed, you need to rehabilitate a witness, but you are uncertain how they will respond to the questions. It is important to prepare to encounter twists and have a strategy to adapt. Here are some strategies for handling unexpected turns during a jury trial:

1. Stay Calm and Composed – Panic or visible frustration can undermine confidence in your case. Staying calm helps maintain credibility, minimize the impact of the issue, and allows for clear, strategic thinking.
2. Anticipate Possible Twists – Trial preparation should include brainstorming potential twists and planning responses in advance. This involves thoroughly understanding the case details, identifying weak points, and preparing counterarguments or evidence that can mitigate potential surprises.
3. Be Willing to Adapt – When an unexpected twist occurs, it is crucial to assess the situation and adapt your strategy. This may involve shifting the focus of your argument, introducing new evidence, or reevaluating witness testimonies to credibly address the new development.
4. Do Not Forget to Object – Objections may not only help prevent trial twists, but are necessary to preserve arguments on appeal. An objection and argument may also provide time to regroup and assess the evidence and disrupt the opposing counsel's momentum or soften the blow. However, stay calm when objecting, and do not show your frustration to the jury.
5. Consider Reframing the Narrative – If a twist threatens to undermine your case, be prepared to reframe the narrative to fit your overall argument. This might involve highlighting different aspects of the evidence or testimony that align with your theory of the case. But be careful not to sway too far or get caught goal shifting. Remember to focus on your strengths, and you may be able to redirect the jury's attention.
6. Embrace the Twist – Often the act of surprise is more dramatic than the evidence justifies. Think of ways to credibly show the jury that your opponent is resorting to cheap stunts, and explain why the surprise does not change the ultimate outcome.
7. Cover it in Your Closing Argument – Closing argument is your opportunity to bring it all home. Summarize the key points, reinforce your narrative and directly address any unexpected developments.

Conclusion

Navigating the complexities of a jury trial in a commercial dispute requires a combination of meticulous preparation, strategic flexibility, and effective storytelling. The hypothetical case of GiantCorp versus Wheat Farmers of America illustrates the multifaceted challenges faced by legal teams in such scenarios. From the importance of selecting a diverse jury to the strategic inclusion of junior lawyers and the nuanced use of anchoring numbers, each element plays a crucial role in shaping the trial's outcome. Furthermore, the ability to adeptly manage unforeseen twists is crucial for maintaining credibility with the jury. By embracing these strategies, attorneys can enhance their advocacy and improve their chances of securing a favorable verdict, despite the inherent unpredictability of jury trials.

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[i] *Estate of Kriefall v. Sizzler USA Franchise, Inc.,* 2011 WI App 101, ¶ 72, *aff'd*, 2012 WI 70, ¶72.
[ii] *Schilling by Foy v. Employers Mut. Cas. Co.,* 212 Wis. 2d 878, 886-87 (Wis. Ct. App. 1997).
[iii] *See* Wis. Stat. § 402.202 ("[T]erms . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.")
[iv] *Emirat AG v. High Point Printing, LLC,* 248 F. Supp. 3d 911, 932 (E.D. Wis. 2017) (quoting *Farnsworth on Contracts* § 10.3 (3d ed. 2004)).
[v] *Blommer Chocolate Co. v Bongards Creameries, Inc.,* 635 F. Supp. 911 (N.D.Ill 1985); *Sharpe v. Danville Coca-Cola Bottling Co.,* 9 Ill. App. 2d 175 (3d Dist. 1956).
[vi] *Paulson v. Olson Implement Co.,* 319 N.W. 2d 855, 857-59 (Wis. 1982).
[vii] *McMahon Food Corp. v. Burger Dairy Co.,* 103 F.3d 1307, 1314 (7th Cir. 1996); *see also Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., Inc.,* 400 F. Supp. 273, 278 n. 2 (E.D. Wis. 1975) (parol evidence rule does not bar evidence of course of dealing to explain an integrated agreement).
[viii] Fed. R. Civ. Proc. 56(a).
[ix] *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 384 (2008).
[x] *See Hill v. City of Chicago,* 2011 WL 3205304, at *4 (N.D. Ill. Apr. 7, 2006) ("motions in limine are designed to narrow evidentiary issues for trial, not resolve factual disputes or weigh evidence"); *Ty Inc. v. Softbelly's Inc.,* 2006 WL 5111124, at *11 (N.D. Ill. Apr. 7, 2006) (denying motion in limine where it "essentially [sought] summary judgment" on a substantive issue, explaining that while the party's argument "may be borne out, it is for the jury to decide whether [the plaintiff] has proven its case"); *Rainey v. Metro. Water Reclamation Dist.,* 2012 WL 2192241, at *1 (N.D. Ill. June 14, 2012) (denying motion in limine and noting "[e]ssentially, in trying to permanently narrow the claims at issue in this case, Defendant seeks partial summary judgment without complying with the local summary judgment rules [as demonstrated by] Defendant's reliance on Plaintiff's discovery responses, which are outside the pleadings."); *Mavrinac v. Emergency Med. Ass'n of Pittzburgh,* 2007 WL 2907007 at * 1 (W.D. Pa. Oct. 2, 2007) ("motions in limine are inappropriate vehicles to seek a final determination with respect to a substantive cause of action and should not be used as a substitute for a motion for summary judgment").
[xi] "Study of the Revised Jury Plan for the U.S. District Court, Northern District of Illinois," Prof. Jeffrey Abramson, Professor of Law and Government, University of Texas School of Law, September 10, 2020, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_press/Study%20of%20the%20Revised%20Jury%20Plan%20(002).pdf