

Don't Leave it to the Appellate Court to "Make the Best of a Bad Thing": The Seventh Circuit is the Latest to Require a Contemporaneous Objection to an Inconsistent Verdict Before the Jury Disbands

September 22, 2020

On September 2, 2020, the Seventh Circuit Court of Appeals issued its decision in *Continental Vineyard, LLC v. Vinifera Wine Co., LLC*, and adopted a new contemporaneous objection rule for the circuit in doing so. In this case, the Seventh Circuit addressed a lawsuit between two wine enterprises. The plaintiff proceeded to a jury trial on four causes of action: (1) breach of fiduciary duty for failing to act in good faith; (2) breach of fiduciary duty of loyalty for self-dealing; (3) unfair competition; and (4) unjust enrichment. The jury found liability against the defendants on the unfair competition cause of action but awarded no damages. It found for the defendants on the other three causes of action. The plaintiff did not object to the general verdict as being inconsistent before the jury was discharged. Weeks later, however, the plaintiff filed a Rule 59 new trial motion and made that contention. The district court denied the motion for new trial. It ruled that the plaintiff waived its objection that the verdict was inconsistent because it did not object to the jury instructions pursuant to Rule 51. An appeal ensued. The primary issue on appeal was the purportedly inconsistent verdict. Faced with something of a messy situation, the panel observed, "[a]s for the verdicts, we are left to make the best of a bad thing. They are hard to reconcile at first glance, but neither party made any objection until several weeks after the jury was disbanded." The panel understood that, after the jury was discharged and "[w]ithout such a contemporaneous objection, the court was left on its own." The panel recognized that the Second, Ninth, and Tenth Circuits require parties to raise an argument

as to an inconsistent verdict before the jury is discharged. Otherwise, the issue usually is deemed to be waived. Finding those decisions to be persuasive and guided by Rule 49, the panel adopted a contemporaneous objection rule as the law of the Seventh Circuit in relation to inconsistent verdict arguments on general verdicts:

We find the reasoning of our sister circuits to be sound, and thus now adopt the position that a party wishing to challenge a jury's general verdict on the ground of inconsistent verdicts must normally make a contemporaneous objection before the jury disbands. Without such an objection, the court's option to fix the problem by resubmission to the jury as contemplated by Rule 49(b)(3)(B), vanishes. Indeed, this is implicit in Rule 49(b), which strikes us as a better match for guidance in this situation than Rule 51.

Continental Vineyard, LLC v. Vinifera Wine Co., LLC, --- F.3d ---- (7th Cir. Sept. 2, 2020)

Tips:

- The return and reading of a verdict in a jury trial can be a stressful moment for attorneys and parties alike. Nevertheless, it is critical to take the time to examine the verdict for inconsistencies before agreeing to the discharge of the jury. Many jurisdictions have adopted a contemporaneous objection rule for inconsistent verdicts and, even in those jurisdictions that have not, silence in the face of an inconsistent verdict may create practical hurdles to later challenges.
- This contemporaneous objection rule is not limited to federal practice under Rules 49 and 51. Some state courts have adopted a similar requirement. *See, e.g., Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 644 (Fla. 2015) ("Each of Florida's five district courts of appeal has long recognized the general rule that a party *must* object to an inconsistent jury verdict before the jury is discharged.")
- Be careful what you ask for. A timely inconsistent verdict objection will often lead to the verdict being sent back to the jury to consider again. Query whether the risk of the result getting worse may outweigh preserving the objection.

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