

When Objecting Once Is Not Enough: Recognizing a Continuing Duty as the Charges and Verdict Form Evolve

January 03, 2017



On November 21, 2016, the First Circuit offered practitioners yet another reminder that, as the charges and verdict form evolve through colloquies with the trial judge, there is a continuing obligation to object; the timing of objections to jury instructions and verdict form can sometimes take on more importance than the fact of an objection at the start. See *In re Nexium (Esomeprazole) Antitrust Litigation*, 842 F.3d 34, 59 (1st Cir. 2016).

In this pharmaceutical-settlement antitrust action, objections were made to versions of the jury instructions and verdict form at a conference with the trial court before the jury was charged. But when the trial judge made some modifications before finally instructing the jury, the plaintiffs did not make the specific objections they raised on appeal in a post-charge sidebar, despite the trial judge's earlier warning that the parties had to raise their objections at the end of the charge to preserve them for appeal.

Preservation Issues:

- *In the context of evolving charges, “[i]f a party fails to preserve its objections to jury instructions after the jury is charged, those objections are forfeited on appeal and reviewed only for plain error.”*
- *“[W]ith respect to special verdicts, ‘the law is perfectly clear that parties waive any claim of internal inconsistency by failing to object after the verdict is read and before the jury is discharged.’”*

Tips: When charges are modified by the trial court after initial objections are made, new objections must be lodged to the actual charges read to the jury. Even after Rule 51 was amended in 2003 to ease the burden in preserving objections to charges after the trial court makes a definitive ruling on instructions on the record, “[n]othing in the amended rule suggests that a party may preserve a claim of error by objecting to a tentative instruction at the precharge conference, but then failing to object after the instruction is modified to accommodate the initial objection.” *Booker v. Mass. Dep’t of Pub. Health*, 612 F.3d 34, 42 (1st Cir. 2010).

Likewise, objections to internal inconsistencies in the actual verdict should be made before the jury is discharged. The First Circuit noted that “[t]his has been an ‘iron-clad rule’ in our circuit.”

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