CARLTON FIELDS

Resolving the Judicial Manager/Judicial Judge Debate: The Effect of Early Issue Resolution

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Part 2 of a 4-part series

First, let me disavow any intention tell you about "the good old days." I fully agree with the definition of nostalgia as, "the art of forgetting the parts that sucked."[1] But here is a scenario from the demurrer days before the appellate courts, buying in to the notice/discovery doctrine, broke the trial judges from the tendency to actually make decisions:[2] **COMPLAINT** (alleging a cause of action that has 3 elements) alleges facts that clearly will satisfy elements 1 and 2, and facts that provide a basis for an argument that element 3 is excused or that the cause of action should be extended to include those facts as a substitute. $1 million in damages. **DEMURRER** or motion to dismiss for failure to state a cause of action because Element 3 is missing. Note at this point, the defendant is faced with a legal theory that is novel, but may cost him a lot of money if the theory is accepted. Plaintiff knows his case is novel and risky. Each lawyer so advises his client. Defendant is confident in his position on the law on Element 3, and he also doubts whether plaintiff can prove what he alleges as a substitute for element 3. Defendant assesses his chances of winning at 90%. Plaintiff is willing to spend a certain amount on prosecuting his novel theory because, in part, the potential damages are large, and assesses his chances at 30%. Settlement at this stage is unlikely. **HEARING and RULING on motion. Alternative A:** Judge rules for plaintiff – the facts alleged, if proved, are the equivalent of element 3. The dynamic has changed dramatically. Before the ruling, Defendant assessed the case at 10%, or $100k, with a $100k cost to try, the same cost as plaintiff. Prior to the ruling, defendant sees the case as plaintiff basically bluffing, worth only a nuisance value to avoid the defense cost. For defendant, a $50k settlement would be better than winning at trial – same result at half the cost. But after the ruling, the assessment must be different. There is a chance on appeal, but that is costly, and with a trial court's reasoned opinion and support from other states, defendant must change the odds of a plaintiff win to 30 to 40%. Plaintiff likewise has changed his assessment,

and while he knows the appellate courts can reverse, he has a lot more leverage in the settlement arena. On the other hand, he will have to actually SPEND the money to try the case. It is still an uphill proposition, but he increases his assessment to 40%. Defendant at 40% now plus the more than $100k to try and appeal is in the same ballpark, and both may have additional motivations to avoid the precedent and publicity of a trial. The stage is set for meaningful settlement negotiations. The progress results from a ruling on the law, not from judicial management. **HEARING and RULING on motion. Alternative B:** Judge grants the motion but with leave to amend, telling the parties that unless Plaintiff can plead and prove certain additional things, he will rule on summary judgment or directed verdict. From a progress of the case standpoint, and from the standpoint of enabling settlement, this is almost as good as granting or denying the motion. The case turns on specific proof, and settlement of the case depends on the assessment of the ability to prove those specific facts. Issues are narrowed almost as much as a ruling, and the progress of the case toward settlement or merits is given a sizeable boost. **HEARING and RULING on motion. Alternative C:** Judge rules for defendant. Again, the dynamic has changed. Although plaintiff has lost, he has an immediate right to appeal without spending the $100k to try the case. The appeal is de novo so the assessments may not have changed much but they are certain to have changed. Plaintiff may want to accept a nuisance settlement rather than gamble further. Defendant may want to avoid an appellate decision, or he may want an appellate decision. The case is more likely to settle, but as important, it is closer to resolution because there will be a decision substantially affecting the merits by the appellate court, without the expense of getting ready for trial. **HEARING and RULING on motion. Alternative D**: Judge rules for nobody – denied without prejudice to raise again after discovery or on directed verdict. This is of NO help to the parties. The parties are doomed to spend the $100k each to get ready to try the case. They are stuck in the same evaluations of the case they had initially. The stronger party is enabled and tempted to increase the cost of discovery. The court can manage the case by ruling on discovery motions and stuff, but so what? The process has become the product – a well-managed case – when the goal should be to decide merits issues. The well-managed case becomes an initiation the parties must suffer to get the system to pay attention to their problem. This simple, one-issue example illustrates, I hope, that the decision that advances the case on the merits also is the one that will make settlement more likely, or at least enable the lawyers to do their jobs assessing the case with better information, and enable them better to educate the clients on the changed picture. In the case of the earlier scenarios with 4 disputable issues, the same effect should obtain. Each time an issue of law (or fact for that matter) is eliminated (or changed to an appellate issue) by a ruling on the merits as to that issue, the odds change and the settlement metrics change, making settlement more likely. An emphasis by the courts on deciding legal issues early will have the added benefit, if settlement does not result, of making it more likely to produce an appellate opinion guiding the parties and establishing precedent that will help lawyers advise their clients regarding future disputes, a benefit that becomes more important as new laws and new remedies proliferate. In contrast, postponement of decisions on the legal issues controlling the merits prolongs the process, postpones the time when the lawyers can contribute most to useful settlement analysis and increases expense both with the make-work of complying with rules of

management and procedure and the postponement of the essential functions of both judge and lawyer to decide legal issues affecting the merits and to analyze the value and exposure of the case, respectively. Please do not misunderstand. "Settlement" should not be and end in itself for a dispute resolution system, and certainly should not be the business of the court. Although there really should be no change to the maxim that settlements should be encouraged, and it is all well and good that 90% of cases settle, and that "policy encourages settlement," when the court sees its job to make cases settle, the process is easily perverted. Settlement is quite likely to happen if the court does its job of making decisions. Once a decision is made on enough issues affecting the merits, the parties, with the help of their lawyers who are also officers of the court, and who are in the best positions to analyze their client's interests, will settle those cases that should be settled. And for the court, either myopic because of management distractions or concern with reversal stats or otherwise, to hold the terrifying expense of lengthy discovery as a club to encourage settlement is perverse, right up there with the bullying prosecutor who knows he cannot convict but who can bankrupt a party by involving him in a months-long trial, and the mediator who boosts his "success rate" by ganging up with the stronger party against the weaker. Those abuses do not make things better. Neither does a system that places such a premium on fact development over legal issues that the price of admission to the system is overwhelming to most. **Read the full series, *Resolving the Judicial Manager/Judicial Judge Debate*:**

- Axioms and Elements of a Settlement (Part 1)
- The Effect of Early Issue Resolution (Part 2)
- Theories and Fads of Civil Procedure (Part 3)
- What Would Help? (Part 4)

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[1] I will admit one bias – that everybody ought to be able to do something inherently useful. Think of the member of the Donner party who had to admit that his skill set was "e-discovery specialist."
[2] Judge John R. Brown of the 5th Circuit Court of Appeals, used to write an opinion once every year or two that included a statement to the effect that the court had heard 100 appeals from orders granting motions to dismiss for failure to state a claim, of which 80 were from Florida and of which only 2 were affirmed. The cases were listed in a footnote. See Barber v. Motor Vessel 'Blue Cat', 5 Cir., 1967, 372 F.2d 626; Cook & Nichol, Inc. v. Plimsoll Club, 5 Cir., 1971, 451 F.2d 505.

Authored By

Peter J. Winders