CARLTON FIELDS

Resolving the Judicial Manager/Judicial Judge Debate: So What Would Help?

October 01, 2014

Part 4 of a 4-part series

- Make meaningful the provisions for summary judgment and motions to dismiss for failure to state a claim. The federal courts have moved in that direction with plausibility requirements for pleadings, and their reversion to much more practical summary judgment standards than exist in certain state courts. The federal courts were 20 years ahead in jumping to the notice pleading/discovery doctrine, and are ahead in backing away from it. Other state courts have moved further in the direction of permitting summary judgment unless there are genuine or plausible disputes of fact.
- *Require* **or encourage** partial summary judgments where they can be set up, even if the whole case is not appropriate for summary ruling. Every ruling on a matter of law will have substantial effects on the cost and the likelihood that the parties will resolve the dispute.
- Mediate early and often. Consider an acceptable mediated result to be a joint motion for partial summary judgment or some other means to obtain a ruling on one or more legal issues. Or a settlement on one or more legal issues - damages limited to $X in exchange for concession on element A, or in consideration of limits on discovery.
- Mini trials to settle an element that can be tried with little discovery. Particularly when the issue is to be decided by the judge, in many cases there will be facts that can be tried in a day rather than a month, and if it whittles down the issues, it will be of benefit.
- Provide interim appellate review if certified by the trial court or stipulated by the parties that questions of law are likely determinative or will facilitate resolution.

- Eliminate most sanctions.
    - They do not do much good. They increase the cost of litigation unnecessarily (the motions, not the sanctions). They create their own jurisprudence and collateral trials. Unless they progress the case towards a merits decision, they just add another ring to the circus, another distraction.

- Go to trial without discovery. Bankruptcy lawyers do it all the time. As an aside, it is pretty relaxing and fun. Although you have to ask questions to which you don't know the answer, when the question backfires, it is not your fault.

- Private judge? Mock trial? Useful for different reasons. It should at least test the assumptions the parties are making about the odds of proving the elements of their claims or defenses. But not near the same as rulings on the merits issues. A private judge who will make decisions and a right to appellate review would be very good.

- Agreement to limit discovery?

Are these realistic? Some are, some not. Without the knowing approval of a savvy client, the failure to take reasonable discovery is likely to be seen as malpractice on the part of the lawyer. Some suggestions require both parties to be as interested in saving money and reaching conclusion, or lawyers less interested in winning than in resolution, or the side with the weaker case but stronger resources to give up the expense of litigation as a bargaining chip. But when the federal practice on summary judgment changed to put at least some burden on the opponent to identify contrary evidence, the contrast with Florida's continued insistence that the movant prove there was no possibility of a fact issue became significant. And partial summary judgments would be a useful tool, available under the language of the rules but ignored in practice, that should produce effects well beyond the immediate ruling. More and more, business clients present Outside Counsel Guidelines instructing them that the Client wants limited discovery – just the plaintiff and eye witnesses, for example - without prior approval of inside counsel, indicating a realization that perfect discovery is too costly to be the assumed best way to proceed.[1] As should be obvious, I don't know that there is an "answer." I don't want to fall into some Nirvana fallacy – where I am arguing against a good idea on the basis it does not solve all the problems (seat belts don't prevent all injuries so I don't wear them). An ideal that the judges should do their jobs of judging, that the lawyers do their jobs of managing cases (without unreasonable delay) and that human nature should be changed so that combatants do not bite or butt or gouge or use the turnbuckle, even without a referee. But evolving and reforming too far from the basics runs the risk of backing into a system that would be laughable if proposed as a whole from the beginning: *"This system we have of settling disputes by 20 minutes in the ring beating each other with sticks could stand improvement." "Why don't we hire a bunch of judges to make each party tell the other everything he doesn't want to tell over a 2 or 3 year period, hire somebody to write it all down, then go over the important stuff before another bunch of judges over a month long trial and hire other people to argue to the judges who should win?" "What! Are you crazy? I guess the stick court is not such a bad system after*

all." **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)*

---

[1] Of course, the guidelines most of the time will disavow any intention of interfering with the lawyer's exercise of independent judgment, a high- and reasonable-sounding provision allowing the client to still blame the lawyer if the guideline restrictions cripple the handling of the case.

Authored By

Peter J. Winders