Lawyers, Food, and Money

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The first food litigation claims were filed a decade ago against McDonald’s for obesity-related health problems. *Pelman v. McDonald’s Corp.*, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003). As public-interest lawyer Joe Banzhaf said at the time, these personal injury claims were an “opening gun” meant “to make fast food companies bear … some of the responsibility for the huge cost of the epidemic of obesity” in America. See J. Banzhaf, Who Should Pay for Obesity, *S.F. Daily J.* (Feb. 4, 2002). The number of potential claimants is staggering, given the dramatic increase in obesity rates in the U.S. over the past two decades. According to government statistics, more than one-third of adults in the U.S. (35.7%) and approximately 17% (or 12.5 million) of children aged 2-19 years are obese. Centers for Disease Control & Prevention, Overweight and Obesity: Data and Statistics (Apr. 27, 2012). It has proved difficult for a variety of reasons, however, for plaintiffs to get food-related personal injury actions off the ground, not least of which is factual causation — the need “to isolate the particular effect of McDonald’s foods on their obesity and other injuries,” as opposed to other causal factors. See *Pelman*, supra, at *11

**CONSUMER-FRAUD CLASS ACTION ‘FOOD FIGHTS’**

More recently, a number of lawyers who made hundreds of millions of dollars after winning a record settlement from cigarette makers in the late 1990s have taken notice and aim at major food makers. See S. Strom, Lawyers from Suits Against Big Tobacco Target Food Makers, *N.Y. Times* (Aug. 18, 2012). Having themselves once been stuck between a rock and a hard place in cases like *Pelman*, these history-making veterans of tobacco litigation are taking a different tack by filing consumer class actions against food companies for mislabeling based on the use of unhealthy ingredients, such as sugar, high-fructose corn syrup, and trans or saturated fats. Food products marketed with health-benefit claims (e.g., “heart-healthy,” “cholesterol-reducing,” etc.) are also being targeted. For the most
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part, these cases are being run under plaintiff-friendly unfair and deceptive trade practice statutes now common in many states, particularly California and New Jersey. See, e.g., Kane v. Chobani, No. 5:2012cv02425 (N.D. Cal. May 14, 2012).

Without evidence of the serious harms that propelled personal injury litigation against tobacco companies, the claimants in these consumer-fraud class actions are seeking damages for economic loss based on future health risks and the theory that they would not have purchased the products had they known the truth about their ingredients. Citing a yogurt maker's use of "evaporated cane juice" as an example, one of the lawyers who fought tobacco cases for years said: "Food companies will argue that these are harmless crimes — the tobacco companies said the same thing. But to diabetics and some other people, sugar is just as deadly a poison." Id.

Even before the recent involvement of the lawyers who took on the tobacco industry, parallels between food litigation and tobacco litigation were being drawn or dispelled. Only time will tell whether the comparison is apt or not, but tobacco litigation had similarly modest beginnings in the 1950s, with the first wave of cases majoring on theories of warranty and deceit. See, e.g., Green v. The American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) (affirming defense verdict).

The Tobacco Parallel: Apples and Oranges?

Without doubt, the legal landscape for food companies is different. For starters, in response to the first obesity-related lawsuits, a number of states passed legislation — so-called "cheeseburger bills" — designed to limit or immunize the food industry from liability for damages arising from the health consequences of long-term consumption of food and non-alcoholic beverages, including obesity. Things have a way of changing, however. The tobacco industry once also enjoyed fairly broad liability protection as part of tort reform measures in a number of states, but that cover was quickly swept away as a function of both politics and dramatic change in public opinion about smoking and tobacco companies in the 1990s.

Another factor likely to continue limiting personal injury claims against food companies is the combination of the Class Action Fairness Act and the Iqbal-Twombly effect, referring to the adoption of heightened pleading standards in federal courts for civil actions, including traditional class-action lawsuits. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (requiring that civil complaints in antitrust cases be demonstrably "plausible"); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (expanding Twombly to all federal civil complaints). Food cases also lack a signature, high-value, stand-alone harm equivalent to, say, lung cancer — although the availability of trebled damages and attorneys fees on certain statutory theories of liability on a class-action basis raises the possibility of sizable damages. Tobacco litigation is further distinguished by the manner in which plaintiffs succeeded in using evidence of addiction and second-hand smoke to overcome the strong American ethic of "individual responsibility." This evidentiary combination eventually enabled tobacco claimants to sidestep the traditional libertarian defense of smoking as "personal choice" by reframing debate about the health risks of tobacco use as "a systemic problem" rather than a personal lifestyle issue: "a risk that individuals do not assume fully voluntarily, a risk arising from the environment itself and threatening to
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everyone” as well as “a risk knowingly created by others.” R. Lawrence, Framing Obesity: The Evolution of News Discourse on a Public Health Issue, The Joan Shorenstein Center on the Press, Politics and Public Policy Working Paper Series, at 59 (Harvard University 2004); see also id. at 62 (“The environmental frame puts individual choice in a larger context of environmental influences and policy choices.”).

The Trojan Horse

For now, these differences in the legal landscape — especially the legislative protections against personal injury suits — are likely to keep food litigation limited to claims for consumer fraud, false labeling, and deceptive or unfair trade practices: that a product is mislabeled, or not “natural” or “healthy,” because it contains processed ingredients, added sugars, fats, synthetic or artificial chemicals, or genetically modified organisms. See, e.g., The Chicago Faucet Shoppe, Inc. v. Nestlé Waters of N. Am., Inc., No. 1:2012cv08119 (N.D. Ill. Oct. 10, 2012) (putative class action alleging that Nestlé falsely marketed its Ice Mountain water as spring-sourced); Rojas v. Gen. Mills, Inc., No. 4:12cv05099 (N.D. Cal. Oct. 1, 2012) (putative class action comparing shoppers not wishing to consume genetically modified organisms with people who follow restricted diets for “religious,” “moral,” and “personal” reasons, as well as those who “physically cannot eat certain foods” due to allergies); Zeisel v. Diamond Foods, Inc., No. C10-01192 JSW (N.D. Cal. Oct. 16, 2012) (order approving settlement of class action claims that Diamond’s shelled walnut products bearing certain labels were misleading because the product “did not provide the health benefits that were claimed on the package labels”); but see Sugarwara v. PepsiCo, Inc., 2009 U.S. Dist. LEXIS 43127 (E.D. Cal. May 21, 2009) (order dismissing deceptive trade practice claims on ground that “a reasonable consumer would not be deceived into believing that [“Cap’n Crunch’s Crunchberries”] contained a fruit that does not exist”).

Public health advocates, however, warn that “[a] number of threats lie in the food industry’s future” with the potential to turn public opinion against it, including heightened health consciousness among the population at large, an increased focus on health-benefit claims in advertising, rising rates of heart disease, obesity, Type 2 diabetes and other health problems, and escalating healthcare costs generally. K. Brownell and K. Warner, The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?, 87 Milbank Quarterly 259 (2009), at 286, citing D. Vogel, Fluctuating Fortunes: The Political Power of Business in America (NY: Basic Books 1989). And they suggest that a turn could “occur more rapidly with food because of the cynicism bred by tobacco and a general anti-industry outlook inspired by players such as Enron, Tyco, WorldCom, and sub-prime lenders.” Id.

Food Addiction

With past as prologue, litigation is likely to lead “shifting opinion” about food, “with addiction potentially a looming target.” Id. at 286. Indeed, the scientific and public health community is already making claims that food can be as addictive as drugs (or even more so). See, e.g., M. Szalavitz, Can Food Really Be Addictive? Yes, Says National Drug Expert, TIME (Apr. 5, 2012) (quoting Dr. Nora Volkow, the Director of the National Institute on Drug Abuse); Food and Addiction: A Comprehensive Handbook (K. Brownell and M. Gold eds., Oxford Univ. Press 2012); N. Volkow and R. Wise, How Can Drug Addiction Help Us Understand Obesity, 8 Nature Neuroscience 555 (May 2005). Scientific evidence like this has the power to shift both public opinion and the policy-making environment about the health risks of the modern food environment, enabling plaintiffs to reframe the litigation dynamic to their advantage. R. Lawrence, supra, at 59.

Plaintiffs in tobacco litigation did the same thing, marshaling evidence of addiction to argue that the modern cigarette was a highly engineered product cynically designed to deliver addictive levels of nicotine to keep people smoking cigarettes despite the health risks involved. In food litigation, the theme will be that defendants engineered their products “to deliver as much sugar and fat as cheaply as possible.” In sum, the language of addiction — foods that “hijack” the brain — has the potential to influence food litigation in a similar, paradigm-shifting way.

Escalating Healthcare Costs As A Second Litigation Front

Another threat to food makers, and those up and down the supply chain, could be coordinated efforts by state attorneys general and government generally to use the court system to recover diet-related healthcare costs associated with the treatment of heart disease, diabetes, and obesity. These which might be likened to the “secondhand smoke” of food litigation, which helped to change the course of tobacco litigation. Tobacco companies faced a similar situation in the 1990s, and the opening of this second litigation front — together with the cost of its historic, multi-hundred-billion-dollar settlement in 1998 — fundamentally transformed both public opinion about tobacco as well as the industry’s liability exposure. The other threat to food companies is if the discovery phase of the consumer-fraud class actions they now face leads to the disclosure of negative company documents that fuel more litigation and larger verdicts. Here again, only time will tell.

Whither Personal Responsibility?

The twin concepts of personal responsibility and common sense can still serve as a bulwark for defendants in food litigation, but they are increasingly under siege in America in what amounts to a wider cultural framing contest over who should...
Advocacy groups, and policy-makers bear the costs of diet-related and other health risks in society at large. As with tobacco litigation, plaintiffs, advocacy groups, and policy-makers can be expected to use a variety of fronts and strategies to reframe and shift “the debate on nutrition and physical activity away from a primary focus on personal responsibility and individual choice to one that examines corporate and government practices and the role of environment in shaping eating and activity behaviors.” R. Lawrence, supra, at 62. Whether food litigation actually ends up resembling aspects of tobacco litigation will turn in large measure upon how this dynamic plays out.

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“You want me to say it was a hard decision … ” You are not breathing. Finally, the judge explains the polling process to Juror No. 4, and the clerk reads the question again. “Juror Number Four,” the clerk says, “Is that your verdict? “Yes,” answers Juror No. 4. The judge accepts the verdict and discharges the jury.

The plaintiffs immediately move for a mistrial on the grounds that the verdict was not unanimous. The judge invites the parties to provide simultaneous written submissions in seven days. In the course of briefing, the plaintiffs produce an “affidavit” from Juror No. 4. (It is actually a transcription of an alleged conversation between opposing counsel and this juror.) In the affidavit, Juror No. 4 states that he did not agree with the verdict and that he felt pressure from the judge in open court. Among other revelations, he also states that he was pressured by the other jurors to conform his verdict to theirs, and that the other jurors disregarded the court’s instructions during their deliberation.

The above scenario is based on a true story: In Connecticut, the trial court subsequently denied the plaintiff’s motion for a new trial, and the Connecticut Supreme Court ultimately affirmed both that decision and the jury’s verdict in the defendant’s favor. See Hurley v. Heart Physicians, P.C., 3 A.D.3d 892 (Conn. 2010).

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The purpose of this article is to help the practitioner preserve his or her favorable trial verdict against allegations of juror impropriety. To that end, Part One herein identifies some of the most common juror-related pitfalls, and provides strategies for countering the allegations and tactics that could give rise to a new trial.

Jury Polls, Post-Trial Interviews and Juror Affidavits

Jury Polls and Juror Confusion

Whether a civil litigant has an unfettered right to poll the jury is an unsettled question. For example, the Supreme Court has stated:

That, generally, the right to poll a jury exists may be conceded. … It is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict.


Some lower courts have construed Humphries “as an indication that the Supreme Court does not consider the right constitutionally protected.” Audette v. Isaksen Fishing Corp., 789 F.2d 956, 959 (1st Cir. 1986). Still others have questioned, but not decided, “whether a party may demand a poll of the jury in a civil action as a matter of right or whether that decision is commendable to the discretion of the district court upon motion by counsel.” Kazan v. Wolinski, 721 F.2d 911, 916 n. 5 (3d Cir. 1983).

Notably, while the Federal Rules of Criminal Procedure codify the right to a jury poll in criminal cases, see Fed. R. Crim. Proc. 31(d), the Federal Rules of Civil Procedure do not contain a similar provision.

As reflected by the above cases, the rules concerning jury polls vary from jurisdiction to jurisdiction. Unless yours has a specific rule to the contrary, you should assume that a request for a jury poll is, if not a right, at least within the trial court’s discretion. Accordingly, there is little to be gained by objecting to a request to poll the jury. If your adversary declines to request a poll, however, he or she cannot raise that issue on appeal. See, e.g., Audette, 789 F.2d at 959. Similarly, a party waives his right to object to the polling procedure employed by the court unless he asserts that objection before the jury is discharged. See, e.g., Rivera v. Conway, 350 F. Supp. 2d 536, 547 (S.D.N.Y. 2004).

Apparent Discrepancies

A larger concern arises when there is an apparent discrepancy between the individual verdicts stated during polling and the unanimous verdict announced by the foreperson. As an initial matter, it is critical to determine the nature of the discrepancy. Is the juror merely confused about the polling process? Or has your unanimous verdict suddenly vanished? Given the choice between the two, you would much prefer to resolve the confusion (and retain the verdict in your client’s favor).

As noted above, the juror in the Hurley case ultimately affirmed the verdict in favor of the defendant. Thus, the plaintiff argued on appeal, once the trial court appropriately dispelled the juror’s confusion about the polling process, it properly accepted the juror’s final answer — that “yes,” the verdict was his — and accepted the unanimous verdict.

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bear the costs of diet-related and other health risks in society at large. As with tobacco litigation, plaintiffs, advocacy groups, and policy-makers can be expected to use a variety of fronts and strategies to reframe and shift “the debate on nutrition and physical activity away from a primary focus on personal responsibility and individual choice to one that examines corporate and government practices and the role of environment in shaping eating and activity behaviors.” R. Lawrence, supra, at 62. Whether food litigation actually ends up resembling aspects of tobacco litigation will turn in large measure upon how this dynamic plays out.
verdict. The plaintiffs, in contrast, argued that the verdict was not unanimous; as they saw it, the trial court coerced the dissenting juror into accepting a verdict that was not his own. Accordingly, the characterization of the trial court's conduct during polling became one of the critical questions on appeal.

Connecticut, where Hurley was venued, has had cases on both ends of the spectrum. In Tough v. Ives, 162 Conn. 274, 277-78 (1972), a juror exhibited confusion about the polling process by stating that her verdict was for the plaintiff, contrary to the defense verdict that had been presented to the court by the jury as a whole. After an explanation by the court, the juror indicated she had initially found for the plaintiff, but had subsequently cast her final vote for the defendant. Id. The Connecticut Supreme Court found that the juror exhibited confusion about the polling process by stating that her verdict was for the plaintiff, contrary to the defense verdict that had been presented to the court by the jury as a whole. After an explanation by the court, the juror indicated she had initially found for the plaintiff, but had subsequently cast her final vote for the defendant. Id. The Connecticut Supreme Court found that the juror's statement was sufficient to establish her assent to the verdict. With respect to the judge's conduct, the court explained

[n]eutral inquiry by the trial judge as to the meaning of a juror's response is not erroneous. Only when such inquiry is coercive or seeks explanations, motives or information in the jury room should it be found objectionable. The action by the trial court here at issue is wholly different. In the case at bar, there was no argument, by either court or counsel, with the juror. Nor did the court require an explanation from the juror as to whether she changed her mind or the reasons therefor. The questions asked sought only to elucidate the meaning of her statement; there was no further inquiry. When the juror stated that her verdict was for defendant, there was no reason to send the jury back for further deliberation, and the court was not in error accepting the verdict.

Id. at 280.

In support of their argument, the plaintiffs relied primarily on State v. Bell, 13 Conn. App. 420 (1988).

In that case, “the polled juror, after initially expressing doubt by her inability to state a verdict to the robbery count, was led by repeated pollings by the clerk at the court's insistence to five progressive responses culminating in a verdict of guilty to the charge.” Id. at 430-31. After carefully examining the nature of the exchange between the trial court and the juror, the appellate court determined that “such conductment of the juror's verdict deprived the defendant of his right to a unanimous verdict. This polling process was improper.” Id.

In affirming the verdict in favor of the defendant in Hurley, the Connecticut Supreme Court rejected both plaintiffs' characterization of the trial court's conduct and her reliance on State v. Bell:

The exchange in Bell is distinguishable from the brief and neutral inquiry undertaken by the trial court in the present case. Whereas the juror's response in Bell ... indicated that she had not decided whether the defendant was guilty of the polled charge, [the juror in question]'s first statement ... demonstrated that he was confused with the polling process. The trial court was not presented with any indication that [the juror] had not decided the issue of the defendant's liability. To the contrary, [the juror] repeatedly demonstrated confusion with the polling process, both before and after his remark ...”

Hurley v. Heart Physicians, P.C., 298 Conn. 371, 399 (2010). Accordingly, the court held that “plaintiffs' claims as to 'undue influence from the court' and 'intense pressure and embarrassment' are wholly unsupported by the record.” Id.

Addressing juror confusion is largely in the hands of the judge (and therefore out of your control). It is, therefore, imperative to listen to the judge's conversation with the juror as objectively as possible. If the judge is being measured and neutral, stay quiet. If you sense that the judge may be crossing the line — from a neutral inquiry to potentially coercive prompting — you should consider whether and how to intervene in order to diffuse the tension. Although immediate confirmation of the verdict is preferable, you would certainly prefer additional deliberation to an additional trial.

If in fact a confused or indecisive juror is destroying your unanimous verdict, the judge has two choices: She can either request further deliberation or else declare an immediate mistrial. Needless to say, you should strenuously argue that the jury should be instructed to continue deliberations. See, e.g., Lee v. Hershberger, No. RDB-09-2203, 2011 WL 6258466, *8-9 (D. Md. Dec. 13, 2011) (no error in court ordering further deliberation after juror indicated during polling that she did not agree with verdict; not coercive for judge to inform jurors verdict had to be unanimous or else hopelessly deadlocked).

Post-Trial Interviews with Jurors

Most trial lawyers, the authors included, like to speak to jurors after a case is over. Jurors can be a valuable resource for learning about which witnesses were most credible or whether the use of trial technology was effective. Although some courts recognize that it is a “laudable and most desirable endeavor” for an attorney to seek to improve his or her trial skills, Sixberry v. Buster, 88 F.R.D. 561, (E.D. Pa. 1980), there remains a general hostility to post-trial contact between lawyers and jurors. See, e.g., id. (“We cannot and will not go against the strong and well established policy of the Federal courts ... which frown on post-trial inquiries to jurors in a case such as this.”)

Unfortunately, post-trial contact with jurors does not always serve the laudatory educational purposes described above. In fact, some lawyers contact jurors for the express purpose of discovering information that could be used to impeach an unfavorable verdict. If you encounter such an adversary, the starting point is the permissibility of post-trial contact with jurors, which varies from jurisdiction to jurisdiction.
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Under Tennessee law, for example, some manner of post-trial contact is viewed as a protected right. See State v. Gaddis, E2011-00003-CCA-R3CD, 2012 WL 2370636 (Tenn. Crim. App. June 25, 2012) (“Although local court rules may place some reasonable minor restrictions on the time, place, and manner of this communication, they may not place any additional restrictions on an attorney’s right to informally interview jurors that work to contravene the attorney’s right as established in Supreme Court Rule 8.”) The Model Rules of Professional Conduct take a similarly permissive approach:

A lawyer shall not:
(c) communicate with a juror or prospective juror after discharge of the jury if:
(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment

ABA Mod. Rules. Prof. Cond. 3.5.

Most jurisdictions, however, are more restrictive when it comes to post-trial contact. The Second Circuit Court of Appeals, for example, prohibits post-trial contact with jurors without first providing notice to the court and opposing counsel. See U.S. v. Schwarz, 283 F.3d 76, 98 (2nd Cir. 2002). As the Second Circuit explained in an earlier case, such a rule is necessary because “a serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts.” U.S. v. Moten, 582 F.2d 654, 665 (2nd Cir. 1978). Information obtained in violation of these rules is properly excluded. See U.S. v. Sattar, 395 F. Supp. 2d 66, 76-77 (S.D.N.Y. 2005) (citing Tanner v. U.S., 483 U.S. 107, 126 (1987)).

Florida places even more restrictions on post-trial contact with jurors. Such contact is presumptively prohibited, except:
A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion shall be served within 10 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion shall state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

Thus, in Florida, a juror interview will only be allowed upon the presentation of “sworn factual allegations that, if true, would require a trial court to order a new trial.” State Farm Mut. Auto. Ins. Co. v. Lawrence, 65 So. 3d 52, 56 (2d. Fla. Dist. Ct. App. 2011) (holding that the trial court abused its discretion by denying motion for post-trial interviews with three jurors where there was reasonable grounds to believe jurors concealed information during voir dire).

In other states, the law on this issue is un- or under-developed. In Connecticut for example, “there is no statute or practice book rule precluding an attorney from contacting jurors when a trial is over. Indeed, there is no statute or rule even requiring counsel to seek court permission before engaging in such contacts.” Struski v. Big Y Foods, Inc., CV 9701371085, 2000 WL 1429478, *3 (Conn. Super. Ct. Sept. 11, 2000). The court in Struski, however, recognized the potential abuse associated with post-trial contact:

Giving disgruntled, losing litigants and their attorneys unfettered access to jurors certainly raises significant concerns. Consequently, while the court authorized the defendant to interview jurors, it instructed counsel to conduct the interviews “based on” specific pretrial language and questions provided in an appendix to the decision. Id. at *5-6.

It is imperative for the practitioner to be fully conversant in the particular rules of his or her jurisdiction. If your adversary’s post-trial contact with jurors violates those rules, that may provide a basis for excluding the evidence developed through such contact. If the rules of a particular jurisdiction are not clear or are otherwise ambiguous, it may be helpful to raise this issue with the court and request guidance. If nothing else, you may be able to prompt the court to limit post-trial contact or otherwise impose conditions that will minimize the potential for your adversary to create a verdict-impeaching issue.

Juror Testimony and Affidavits

Juror testimony — often in the form of an affidavit obtained in a post-trial interview — provides another way for disappointed litigants to attack the validity of a jury’s verdict. Fortunately, most, if not all, jurisdictions have rules that significantly restrict the admissibility of juror testimony. In the federal courts, Federal Rule of Evidence 606(b)(1) precludes consideration of a juror’s affidavit or testimony concerning “any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processing concerning the verdict on indictment.” Under the Federal Rules, a juror would be permitted to testify, however, about certain areas related to actual juror misconduct, including whether “(A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear

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on any juror; or (C) a mistake was made in entering the verdict on the verdict form.” Fed. R. Evid. 606(b) (2). Whether by statute, court law or common law, most states have adopted some form of these rules. See, e.g., Tenn. R. Evid. 606(b) (similar to Fed. R. Evid. 606 with slight differences in the language).

Although the federal rule — and its state corollaries — are seemingly straightforward, they are nevertheless subject to attempted abuse. To circumvent the prohibitions of such rules, your adversary may attempt to mischaracterize the purpose for which the affidavit is submitted. For example, in *Baugh v. Cuprum S.A. De C.V.*, No. 08 C 4204 (RRP), 2012 WL 1032614, *5-6* (N.D. Ill. Mar. 27, 2012), the plaintiff argued that the trial court erred by allowing a ladder to be taken into the jury room during the deliberations. In support of his motion for a new trial, the plaintiff submitted an “affidavit” from one of the jurors; although the trial court had instructed the jurors that they were not to attempt to reconstruct the accident, the affidavit stated that five of the jurors had in fact climbed the exemplar ladder. *Id.* at *5.*

Pointing to the prohibitions of Rule 606(b), the defendant argued that the court could not consider the information contained in the juror’s affidavit because it related to the jury’s deliberations. The plaintiff argued that the information contained in the affidavit was within the exception that allows jury testimony on the issue of whether extraneous prejudicial information was improperly brought to the jury’s attention. *Id.* The trial court rejected the plaintiff’s argument:

There has never been any suggestion that the jurors considered any “extraneous information.” Plaintiff’s counsel well knew that the jurors wanted access to the exemplar ladder that had stood in the courtroom during portions of the trial. In any event, even if the court were to consider evidence of the juror’s activities … nothing about those activities suggests that a new trial is warranted. *Id.* at *6.* In the best-case scenario, the court will decline to consider an improper jury affidavit. Depending on the rules in your jurisdiction, this outcome can be effectuated by a motion to strike. See, e.g., *Hitachi Medical Systems America, Inc. v. Branch*, No. 5:09 CV 01575 (BYP), 2012 WL 3853004, *1-2* (N.D. Oh. Sept. 5, 2012). In *Hitachi*, the plaintiff supported its motion for a new trial with an affidavit from one of the jurors. The defendants moved to strike that affidavit. Hitachi attempted to avoid Rule 606(b) “by arguing that its motion for a new trial ‘is not dependent upon the juror letter … for support.” *Id.* at *2.* Although Hitachi also described its evidence as merely “anecdotal,” the court was not convinced:

Assuming, arguendo, that the court disregarded Hitachi’s “anecdotal evidence,” Hitachi’s remaining argument … still probes into the juror’s mental processes, which Rule 606(b) expressly prohibits. Simply seeking to inquire as to the reasons for the verdict is not a proper subject of inquiry. *Id.* The court granted defendants’ motion to strike the affidavit for the same reasons. *Id.*

There was a similar situation in the *Hurley* case. In support of their motion for a new trial, the plaintiffs submitted an “affidavit” from the juror who had exhibited confusion during the jury poll. (We use quotation marks because the “affidavit” was actually a typed version of plaintiff’s counsel’s hand-writen transcription of the juror’s verbal responses to questions posed during an in-person interview.) Some questions were leading: “Did you feel undue pressure or influence to return a verdict by a certain time or within a certain time after the jury deliberations began? For example, did you feel undue pressure or influence to return a verdict before the close of the trial day on Friday, Jan. 18, 2008?” Others were overly broad and under-defined: “Was the verdict determined in any improper manner?”

In response to one of the questions, the juror stated that he had felt pressured by the judge in open court. The majority of the juror’s responses, however, contained information about the jury’s internal deliberation. For example, the juror stated that the jury as a whole had hardly discussed the evidence and were dismissive when he raised questions. Based primarily on the juror’s affidavit, the plaintiffs asserted they were entitled to a new trial both because: 1) the verdict was not unanimous; and 2) there was juror misconduct.

In its reply papers, the defendant argued the juror’s affidavit was inadmissible on its face. Under Connecticut law, “[u]pon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined.” Conn. Practice Book § 16-34. In addition to other issues, this rule has been construed to prohibit any evidence or testimony “that one or more jurors misunderstood the judge’s instructions; or were influenced by an illegal paper or by an improper remark of a fellow juror; or asserted because of weariness or illness or importunities … or had been influenced by inadmissible evidence … or had by any other motive or belief been led to their decisions.” *Aillon v. State*, 168 Conn. 541, 550 n. 3 (1975). The assertions of the juror in question, the defendant argued, were entirely within the conduct prohibited by the rule and the relevant caselaw.

The court agreed and denied the plaintiffs’ motion for mistrial. See *Hurley v. Heart Physicians, P.C.*, No. X08CV000177475S, 2008 WL 4307573 (Conn. Super. Ct. Aug. 25, 2008). The court held that “[a]lthough evidence of coercion by the court, the claim of misconduct is based entirely on verbal and written statements made by [the

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HIGHLY RECKLESS CONDUCT AS AN AFFIRMATIVE DEFENSE


The *Reott* case involved a manufacturing defect in the locking strap of a tree stand used for hunting. Mr. Reott owned two identical tree stands manufactured and/or sold by the defendants, both with locking straps designed to secure the stand to the tree. Evidence at trial demonstrated that the locking strap for the first tree stand was both glued and stitched together, while the locking strap on the second stand was only glued. Mr. Reott used the first tree stand numerous times without incident. However, when he installed the second tree stand using what was described as a “self-taught maneuver” to set the stand securely and take any slack out of the locking strap, the strap that had no stitching broke, and Mr. Reott fell to the ground, sustaining significant injury.

Mr. Reott sued the defendants under Section 402A of the Restatement (Second) of Torts alleging strict liability for manufacturing defect. The defendants answered the Complaint, raising product misuse as an affirmative defense, and averring assumption of the risk and superseding or intervening cause in their answers. Although two of the defendants alleged in their answer that plaintiff’s conduct was highly reckless, none specifically pleaded highly reckless conduct as an affirmative defense. At trial, the judge entered a directed verdict against the defendants that the tree-stand locking strap was defective, but denied a motion for directed verdict regarding causation. The defendants presented evidence at trial that the plaintiff’s self-taught maneuver to set the stand constituted highly reckless conduct that defeated causation. The jury found in favor of the defendants; however, the Pennsylvania Superior Court reversed, on the grounds that highly reckless conduct is an affirmative defense. The opinion also noted that placing the burden on the defendant in such cases to prove that the plaintiff knew or should have known of the high degree of risk associated with his actions. The majority opinion also noted that placing the burden of proof on the defendant to demonstrate that highly reckless conduct was the sole or intervening cause of plaintiff’s injury, “prevent[s] the impermissible blending of negligence and strict liability concepts” whenever highly reckless conduct is raised as a defense. *Reott* at p. 23.

The *Reott* opinion provides defendant-manufacturers with a crucial pleading guideline in manufacturing defect cases: Defendants in 402A actions in Pennsylvania will not be permitted to raise highly reckless conduct to disprove causation without first raising the affirmative defense that highly reckless conduct was the sole or superseding cause of injury. Defendants in pending product liability actions should consider revisiting their pleadings to ascertain whether amended pleadings should be filed promptly to include the affirmative defense of highly reckless conduct.

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Practice Tip

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juror] to plaintiff’s counsel outside of the courtroom after the jury had been dismissed ... Except for his reference to the individual polling in the courtroom, everything else [the juror] relates occurred in the jury room during deliberations.” *Id.* at *5. Consequently, the court held that all of the allegations concerning jury misconduct were within Practice Book 16-34, Connecticut’s exclusionary rule. *Id.* at *6. (It is debatable whether the affidavit could have been properly received if its subject were limited to the juror’s subjective impression that he had felt pressured by the court during the jury poll.) On appeal, the plaintiffs did not challenge the trial court’s exclusion of the juror’s “affidavit,” and therefore the Connecticut Supreme Court did not consider those statements in its opinion affirming the complete defense verdict. See *Hurley v. Heart Physicians, P.C.*, 298 Conn. 371, 392 n. 16 (2010).

The conclusion of this article will address some of the problems caused by jurors’ use of technology and social media and offers some helpful tips for avoiding the most prevalent forms of juror misconduct.

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