

BRAD: NICELY DONE!

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# Lawyer Can't Appeal To Jury's Regional Bias

Where a Vermont lawyer appealed to a Vermont jury's "regional bias" in arguing against a New Jersey opponent in a diversity case, this was improper and the judgment below must be reversed, says the Second Circuit.

This case opens up a number of possibilities for appealing adverse judgments in cases involving parties from different states. For instance:

- Plaintiff's lawyers sometimes argue that juries should "send a message" to large out-of-state manufacturers or insurance companies. In some cases, the jury is urged to "let those executives in New York know that the people of such-and-such a state won't stand for this kind of conduct," or words to similar effect. Under the reasoning of this new decision, this type of argument could be reversible error.

- On the defense side, lawyers representing businesses that are being sued by out-of-state plaintiffs have been known to subtly suggest to the jury that a plaintiffs' verdict would adversely affect the local economy, or at least local people's jobs. Plaintiffs could seize on any language to this effect and claim that it constitutes improper argument.

The key in such a case is to be sure to get a "regionalism" objection on the record.

## Ski Condo

The plaintiff in the Second Circuit case was a New Jersey tugboat worker who rented a ski condominium in Vermont along with a group of friends for a vacation. On arriving at the condominium complex, he slipped and fell on a patch of ice, and brought a suit against the condominium association and the management company.

Here's the critical language in the defense lawyers's summation:

"There's no question there's a legitimate injury here....But isn't what they're really asking is...if they can come up here from New Jersey to Vermont to enjoy what we experience every year,

for those of us who are here originally for most of our lives, for most of us who come here for our own reasons, for the rest of the time that we're here, and without a care in the world for their own safety when they encounter what we, ourselves, do not take for granted, and they can injure themselves, and they can sit back and say, 'Well, yes. I'm on long-term disability, and I sit around and I watch golf on TV, but I'd like you to retire me. Retire me now.'"

The lawyer also asked the jury, "Would we go to New Jersey and walk on a tugboat without looking where we were going?"

The judge overruled a "regionalism" objection from the plaintiff's lawyer, but did caution the jury that arguments and questions from counsel are not evidence. The jury returned a defense verdict.

## Blatant Appeal

Quoting from James Madison and Chief Justice Marshall, the circuit said that one of the original purposes of diversity jurisdiction was "to obviate the fear that state courts would be prejudiced against out-of-state litigants." Therefore, "[t]here is no doubt whatever that appeals to the regional bias of a jury are completely out of place in a federal courtroom."

In this case, "defense counsel made a blatant 'us-against-them' appeal to the jury." Further, "[t]he combination of the overruled objection, the absence of a curative instruction, and the giving of only the standard jury charge regarding arguments of counsel could only have left [the jury] with the impression that they might properly be influenced by

[the improper argument] in rendering their verdict, and thus its prejudicial effect was enhanced."

The court then went on to distinguish this case from earlier ones in which there had been no reversal despite the presence of more elaborate appeals to regional feelings. In this case, the court said, the defendants had presented no

proof, called no witnesses, and made only a brief summation. "In such a context, we think the strong plea to regional bias stood out more starkly in the jurors' minds."

## Object

"The most important lesson of this case is simply getting up and objecting when you hear something like this," says

Bradley D. Myerson, who represented the plaintiff.

"Often it seems like there's a gentlemen's agreement among lawyers that they won't object during closing argument," he adds. "But you shouldn't be afraid to do it. I would have had a much harder time on appeal if I didn't have an objection on the record."

Myerson says that the "most analogous" case to this one — and the one he relied on most heavily in his brief — is *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985). In *Westbrook*, the Fifth Circuit overturned a products liability award on the grounds that the plaintiff's lawyer had used an "us-against-them" argument against an out-of-state manufacturer.

U.S. Court of Appeals, 2nd Circuit. *Pappas v. Middle Earth Condominium Association*, No. 91-7942. May 8, 1992. Lawyers Alert No. 9025923 (16 pages). To order a copy of the opinion, call 800-933-5594.