

# Settlement by jury

## Attorneys use jury polling to facilitate settlement agreement, save parties time and money

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### Verdicts & Settlements Plus

Juries may not just be for verdicts anymore.

In a unique case out of the U.S. District Court for the Eastern District of Michigan, a jury-polling system was used to settle a complicated breach of contract dispute.

After nearly two months in front of a jury, Chicago attorney Ross B. Bricker, who represents defendant SPX Corporation and who was the mastermind behind the plan, found himself faced with a "one-of-a-kind moment."

Having presented only an opening statement and having cross-examined merely three of the plaintiff's witnesses, Bricker came up with a way to settle the case to save all parties the time, effort, and expense of a lengthy trial, while still respecting the efforts of "jurors who had invested a lot in the process."

Instead of settling the case between only the parties, Bricker negotiated with the plaintiff's attorneys to design a settlement structure that called on each juror to cast a vote in favor of the plaintiff, defendant, or neither party.

Southfield attorney Rodger D. Young, attorney for plaintiff company VSI, was open to the system from the beginning, and believed this to be "an excellent example of lawyers' creativity actually adding some momentum to settlement discussions."

Bloomfield Hills attorney Dennis M. Haffey, who represents certain shareholders of the plaintiff company, agreed, adding that this case illustrates the importance of remaining "open-minded and flexible in resolving very complex disputes where there are multiple and conflicting constituencies."

As for Bricker, though his client had to directly pay a settlement of \$20 million to the plaintiff, he is pleased with the outcome.

"What happened here was the best kind of example" of innovative lawyering because "everyone involved decided that we needed to find a way to fairly and creatively resolve this dispute, and not continue the stress it was putting on all the parties involved," he noted.

A Verdicts & Settlements Report of the case, *VSI Holdings v. SPX Corporation*, can be found on page 5 of this issue, and on our website, [www.milawyersweekly.com](http://www.milawyersweekly.com).

### The trial

In 2001, defendant SPX Corporation, a Fortune 500 company, agreed to acquire plaintiff VSI, a marketing services company headquartered in Bloomfield Hills whose principle business was designing and implementing marketing services to automobile manufacturers.

The defendant proceeded with integration activities, but soon backed out of the deal, alleging material adverse effects of the pending merger.

Claiming damages for breach of contract in excess of \$100 million, the plaintiff and its shareholders sued, arguing no material adverse effects existed and that the defendant had not acted properly in calling off the merger.

Pending litigation, the plaintiff filed for bankruptcy and closed its doors.

The case went trial and a jury was selected on April 11, 2006.

By early June, however, Bricker had come up with a novel solution to avoid the expenses of continuing the trial.

### **The settlement structure**

"It was pretty clear to us that we would be continuing this case for several more months before we got to a jury verdict," Bricker said, noting that "the complexity of the issues and the vigorousness of the advocacy" would have likely led to an appeal "that would cause this case to get tried all over again."

Keeping that in mind, Bricker realized settling the case would be the best alternative for both plaintiffs and defendant. However, all parties were reluctant to mediate the case, given that a mediated outcome offered no "finality," he said.

Because the jury had heard some of the plaintiffs' evidence, Bricker came up with the idea to use the jurors as "substitute" mediators or arbiters, whereby the jurors would cast votes for the parties whom each juror favored.

After several rounds of negotiation, both plaintiffs' and defense counsel came up with a simple, five-word question to present to the jury — "Which party do you favor?"

Each vote was assigned a point amount, and the number of points for either party corresponded to a dollar amount. A vote for plaintiffs was worth two points; a vote for defendant was worth zero points; and an undecided vote was worth one point. Once the points were tallied, they would translate into a figure set out in the settlement structure, which had a range of zero dollars to \$25 million, depending on the number of points garnered in favor of plaintiffs.

This system was proposed first to U.S. District Court Judge Denise Page Hood, who had, like both plaintiff's and defense counsel, never heard of such a system.

When asked by the judge on what authority this idea rested, Bricker said he replied, "None, your honor. But they're going to write law review articles about us."

Despite the lack of case or statutory law, Hood allowed the settlement structure to proceed because all parties agreed to the jury polling.

According to Young, everyone involved "took the position that, if everybody agrees to it, we ought to be able to do it."

Initially, he recalled, Hood said the jury "was very surprised that they were being asked to decide, rather quickly, which party they favored even though they had heard only one party's case" and that "they were [being] asked to individually make that decision, instead of deliberating together."

However, after the question was posed to the jury, the jurors cast five votes in favor of the plaintiff and zero in favor of defendant, with four jurors undecided, which translated to a \$20 million settlement for the plaintiff.

Additionally, \$3 million was released from a bankruptcy reserve fund that was being held by creditors for the defendant's \$10 million counterclaim against plaintiffs.

## The agreement

For the defense, settling the case in this way could be viewed as a huge risk.

According to Bricker, the jury "hadn't heard any of our case" when he proposed this idea. "They heard our opening statement, but we had not put on a witness."

However, "our strategy during the case was to put a lot of evidence in during cross-examination. So while we had not yet put on a witness, we had put in substantial parts of our major themes," he pointed out.

This left him confident the votes returned by the jurors would not lead to a "horrid" outcome for his client.

Further, Bricker was sure any settled outcome would be favorable to litigating the dispute for an extended period of time.

"Litigation is oftentimes a wasteful and inefficient way to solve problems and to resolve disputes," he observed, adding he and his co-counsel knew they could be facing "years and years of additional litigation and the cost attendant to that litigation."

Because of this possibility, he believed both parties would be amenable to resolving the dispute.

His hunch was confirmed by Young who also echoed the concern that the trial "would likely have gone well into late September 2006."

Further, the Southfield attorney agreed to this arrangement because persuading a jury is "essentially [his] business." Therefore, he found the idea to be a "live by the sword, die by the sword" opportunity.

Elaborating on that thought, Haffey explained he "felt [the plaintiffs' arguments and presentation] were persuasive and convincing," which made him "willing to test the strength of those convictions by having the jury have a voice in the outcome of the settlement."

As for whether this system could be used by attorneys in other cases, Haffey, Young and Bricker aren't sure.

"This structure was somewhat of a perfect storm in our particular case," Haffey explained, "but it may not precisely work anywhere else."

Still, both Haffey and Young agreed this case should encourage lawyers to remain "creative and flexible in [all] circumstances."

Bricker noted, too, "this system was tailored to this case at that point in time."

But, the "genuine lesson" to draw from this case is "attorneys should always be thinking of ways to end lawsuits. They should always be thinking about what is the fair and inventive way to get to a conclusion, because that is a lawyer's professional obligation and in the best interest of clients."

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