

# Jury Trials for Franchisors: “... a delusion, a mockery and a snare”!<sup>1</sup>

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Contemporary critics assail the civil jury as “biased, sympathy-prone” and “hostile to corporate defendants.”<sup>2</sup> Many businesspeople (and their lawyers) believe, sometimes from painful personal experience, that whatever the facts and the law, juries reflexively favor the “little guy” and enjoy redistributing the wealth of corporate defendants. Media accounts of big verdicts, from the McDonald’s coffee case to the staggering punitive damage awards against tobacco companies, reinforce the common perception “of Modern American culture as pro-plaintiff,”<sup>3</sup> especially when the plaintiff is an individual at odds with a large business.



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If the reality matches that perception, franchisors should be especially concerned. Some might question this assertion, since franchisees and franchisors alike are businesspeople,<sup>4</sup> and every franchising lawsuit is by definition a business dispute.<sup>5</sup> Often, however, franchise litigation does not feel that way. Every lawsuit has its own emotional architecture, and frequently the design of a franchise case is similar to that of an employment, consumer, or personal injury action, with a sympathetic hometown victim alleging misconduct by a faraway corporate cutthroat.

But are jurors actually hostile to business, or is this a self-serving myth perpetuated by “special interests” as an excuse to limit causes of action and remedies and thereby safeguard the predations of Corporate America? Perhaps not surprisingly, the available evidence—actual verdicts, mock jury results, polling data—is sometimes sufficiently equivocal to validate both sides of the argument. Based upon that evidence, however, three conclusions relevant to franchise litigation are difficult to escape:

- (1) Juries regard the profit motive, and its effect on human behavior, with suspicion.
- (2) Juries hold corporations to higher standards than they apply to individual litigants.
- (3) Plaintiffs win a strikingly high percentage of jury

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verdicts in business cases, including disputes between franchisees and franchisors.

### Academic Research and Survey Data

Over the last decade, many legal theorists and social scientists have sharply challenged the conventional wisdom that jurors are biased against business. According to these scholars, “many claims about juries are based on anecdotes that are unrepresentative or fabricated or on studies that are so badly flawed that they lack scientific validity.”<sup>6</sup> As Ostrom, Rottman, and Goerdts wrote in a path-breaking study of state court jury verdicts:

Improving the civil justice system requires thoughtful, objective analysis based on sound empirical data. The lack of systematic, cumulative data in this area makes it possible for far-reaching policy proposals to be advanced on the basis of tendentious anecdotes and numbers. A bias in which solutions to perceived problems are developed by reference to unusual and atypical cases goes unchallenged.<sup>7</sup>

The consensus among these academic empiricists appears to be that “[r]eflecting the citizenry from which they are drawn, civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation.”<sup>8</sup> In this view, “conservative ideological beliefs against getting something for nothing are still embedded in American culture.”<sup>9</sup>

Even these writers concede, however, that actual jurors and the population at large expect far more from corporations than they do from individuals, and it is hard to imagine that this mindset does not drive the outcome of many cases. Valerie Hans, for example, while arguing that “the simplistic illusion of the anti-business jury fails to accord with a much more complex reality,”<sup>10</sup> describes a reality that no sensible corporate defendant could find appealing:

Quite independent of whether jurors like or dislike business, they may hold distinct expectations of a commercial business enterprise that they do not have for individuals or other types of groups. . . .

In the same way that people would expect more of the boss and the doctor, citizens may expect more of corporations. In making decisions about the culpability of an organization, people may respond to structural differences between individuals and corporations. The typical corporation is organized in a rational structure and contains a number of individuals with specialized skills. Because of these characteristics, groups such as corporations may be assumed to possess greater rationality and more ability to anticipate the consequences of their actions than individuals. . . .

A corporation’s potential reach and impact, its collective expertise or its profit making nature could all influence expectations which in turn affect judgments in the courtroom. I want to underscore the

point that these hypothesized greater expectations are theoretically distinct from pro-business or anti-business attitudes. Even if individuals have high confidence in business and believe business is a worthwhile endeavor, they might still feel that the singular role of the business enterprise requires it to follow special rules and standards of behavior that do not apply to individuals.<sup>11</sup>

The reported juror response to the standard instruction concerning treatment of corporate parties supports Ms. Hans's thesis. Every trial lawyer representing a corporation before a jury routinely requests and receives a charge to the effect that the corporation is a "person" in the eyes of the law, with the same legal rights, and entitled to the same treatment from the jury, as an individual litigant. This seems to strike many jurors as meaningless boilerplate. According to one study, notwithstanding the typical instruction, approximately 42 percent of jurors said that higher standards of conduct should apply to corporations. In surveys of the general population that figure rose to 64 percent.<sup>12</sup>

Another scholar, Robert MacCoun, postulates that "jurors will hold corporations to the same standard but think that corporations are more likely to fall short—to cut corners in the interest of profits. Alternatively, it may simply be easier for jurors to sanction an impersonal aggregate entity than a flesh-and-blood (or in the mock context, pen-and-pencil) person."<sup>13</sup> Once again, either theoretical formulation is cold comfort to corporate litigants and their counsel.

The results of the 2000 Juror Outlook Survey by DecisionQuest and the *National Law Journal*, a national poll with 1,000 respondents, likewise suggest that corporations have good reason to worry about juries.<sup>14</sup> Most striking, a landslide of those questioned (75.6 percent) agreed "strongly or somewhat" that "executives of big companies often try to cover up the harm they do." Also notable, more than a quarter of the respondents (27 percent) acknowledged that they could not be impartial if a case included a corporate executive as a party.<sup>15</sup> (To state the obvious, it is doubtful that the typical juror's capacity for impartiality would increase if the party were instead the executive's corporate employer.) In the 1999 survey, the question was whether respondents could be "fair," and only 8 percent replied that they could not be fair toward a corporate executive party. When the word changed from "fair" to "impartial" in 2000, the number of people acknowledging their incapacity shot up for every category (e.g., African-American from 4 percent to 24 percent; tobacco company from 15 percent to 34 percent; doctor from 5 percent to 24 percent). DecisionQuest changed the question because it concluded that people's desire to view themselves as fair had skewed the answers in the 1999 survey. DecisionQuest's 2000 report "hypothesize[s] that many jurors believe that by

not being impartial to certain litigants they are still being fair." In other words, a substantial portion of the American public apparently believes that particular categories of litigants, including corporate executives, have earned biased treatment, regardless of the specific facts of a given case.

Several other findings also indicate that a jury trial may not be the optimum forum for corporate parties, including franchisors, at least when their adversary is an individual. For example, in many disputes with franchisees, franchisors rely on a strict reading of the contract and various legal defenses. The jury learns the applicable law, including the legal significance of contract terms, from the judge's instructions. However, consistent with the other study discussed above, 45 percent of the survey respondents "agreed that in reaching a verdict, jurors should disregard a judge's instructions if they believe justice will be served by doing so."<sup>16</sup>

A substantial majority of respondents (62 percent) believes that "huge jury awards grab headlines when announced, but most get thrown out or reduced on appeal." That misguided assumption would certainly encourage actual juries to view damage verdicts as largely symbolic—in

effect, sending messages with Monopoly money—with the actual, real world impact determined later by judges.<sup>17</sup>

Finally, 30 percent of the respondents to the 2000 DecisionQuest survey agreed that "in order for a jury to send an effective message to a big corporation, it needs to award damages in the billions of

dollars." Since the question did not define "big," it is hard to assess the implications of this statistic, but when the American public has been hearing every day about instant dot com millionaires and the extraordinary compensation of actors and athletes, not to mention making *Who Wants to Be A Millionaire* one of the country's most popular television shows, there is little reason to expect juries to be conservative in their damage awards. Of course, if the economy goes into prolonged recession, juror generosity may ebb.

One cautionary note about all these statistics: although the dispute resolution alternatives to jurors have not been polled, they may well share many of the same views. Many trial judges, especially state court judges popularly elected in campaigns funded by lawyer contributions, may be as skeptical about corporate behavior as jurors are, and "neutral" arbitrator pools often include many plaintiffs' lawyers. Thus, neither bench trials nor arbitrations are predictably free of the issues that concern corporations and their lawyers about jury trials.

### **The Anecdotal Voice of Experience**

I have tried enough jury cases to have some definite opinions of my own about the civil jury. Empiricists would dismiss these impressions as "anecdotal," and they surely are, but

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courtroom experience has taught me a few simple lessons that any franchisor facing a jury trial in a dispute with a franchisee would do well to consider:

- Individuals identify with other individuals, not with corporations or their owners, officers, and employees.
- Most Americans are drawn to (because they see themselves as) the struggling underdog in any dispute with an adversary perceived as rich and powerful.
- In an increasingly complex world, people feel that they have dwindling influence over their own lives and resent the control exerted by distant, impersonal, usually corporate forces (e.g., their employers, the utilities and other companies whose bills they must pay every month, and the corporate interests perceived as unfairly influencing the behavior of elected officials).
- Jurors experience what might be called a *Queen for a Day*<sup>18</sup> phenomenon: for once in their lives, they get to exercise tremendous power, virtually unchecked. As one commentator has observed in discussing the theoretically “lawless” act of jury nullification:

But if nullification is so awful, why is it that the whole system is set up in such a way that a jury that wanted to nullify can do so very easily? In fact, what is impossible is detecting or controlling nullification. This is a system where the jury leaves the courtroom and discusses the case in total isolation and secrecy. The verdicts are brief and gnomic, and the jury is never asked to give reasons for what it does or to explain itself in any way. In short, although juries are not supposed to be “lawless” and not supposed to toss a coin or decide cases on the basis of prejudice or sympathy, there is absolutely nothing to prevent the jury from doing any or all of these things.<sup>19</sup>

- The jury’s deliberations are primarily a visceral, not an intellectual, exercise. For many citizens, it is probably emotionally rewarding to compensate an allegedly injured person, whether a discharged employee, a personal injury victim, or a supposedly beleaguered franchisee, and not especially gratifying to conclude that a substantial business enterprise did nothing wrong.

Nevertheless, corporations can still win lawsuits against apparently sympathetic individual adversaries. All franchisors and their counsel must understand, however, that the specific facts and the applicable law are only two pieces of the puzzle in any jury trial. This is especially so of in-house counsel, who are often principal architects of litigation strategy but may be corporate lawyers without any real appreciation of just how unpredictable—and dangerous—courtrooms can be.

In our next issue, I will share some striking facts about the incidence and outcomes of jury verdicts in franchise cases, and discuss the pervasive effect that the possibility of jury trials has had on the franchise relationship.

## Endnotes

1. “Trial by jury, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare.” Lord Denman Thomas, *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 393 (Justin Kaplon ed., 16th ed. 1992).

2. Neil Vidmar, *The Performance of the Civil Jury: An Empirical*

*Perspective*, 40 ARIZ. L. REV. 849 (1998). That does not exhaust the bill of particulars, which also includes “incompetent, capricious, unreliable . . . confused . . . excessively generous in awarding compensatory damages, and out of control when awarding punitive damages.” *Id.*

3. *Id.* at 870. Conservative politicians decrying the influence of the organized plaintiffs’ bar obviously contribute to this view as well.

4. See GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FEDERAL TRADE COMMISSION, ENFORCEMENT OF THE FRANCHISE RULE 42 (July 31, 2001); Edward W. Dunham, *Flattery Will Get You Nowhere*, 20 FRANCHISE L.J. 103 (Winter 2001).

5. Many courts have recognized that fact. See, e.g., *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *Doctor’s Assocs., Inc. v. Jabush*, 89 F.3d 109 (2d Cir. 1996); *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273 (7th Cir. 1992). Mr. Dunham represented the franchisors in *Engen* and *Jabush*.

6. Vidmar, *supra* note 2, at 850.

7. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 234 (1996).

8. Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DE PAUL L. REV. 327, 327–28 (1998).

9. Vidmar, *supra* note 2, at 870.

10. Hans, *supra* note 8, at 327–28.

11. *Id.* at 335.

12. Vidmar, *supra* note 2, at 870–71.

13. Robert MacCoun, *Inside the Black Box, What Empirical Research Tells Us About Decision Making by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 164 (Robert E. Litan ed., 1993).

14. This was the third annual DecisionQuest/*National Law Journal* survey. According to DecisionQuest’s report, the sample was 1,000 completed interviews of male and female adults (in approximately equal number), with the subjects identified by “a random digit dialing probability sample of all telephone households in the continental United States.” The data were “weighted to be representative of the population. Of the sample, 54.3 percent have been called for jury duty; of those, 39.2 percent have served on a jury.”

15. Even various types of corporations with awful public images, HMOs, gun manufacturers, asbestos manufacturers, and tobacco companies, did not fare much worse than the corporate executive, with a range of 31 percent to 34 percent of respondents saying that they could not be impartial to such entities.

16. If almost half the respondents were willing to endorse this behavior, one wonders whether an even higher percentage of jurors actually do this in practice. If so, it is probably a safe bet that a large corporate entity is rarely the beneficiary of the jury’s impulse to take the law into its own hands.

17. Many clients and some lawyers may believe that appellate courts frequently overturn jury verdicts. Reliable jury verdict reversal rates are not readily available, especially for state courts. However, the overall (i.e., including all appealed verdicts and judicial decisions) federal court reversal rate is actually quite low. For the twelve months ending September 30, 2000, the U. S. Circuit Courts reversed in only 9.5 percent of the appeals that terminated on the merits during the period. In the category “other private civil” appeals, which would cover franchise litigation and most other business disputes, the percent reversed was still only 11.8 percent, with the individual circuits ranging from the Seventh Circuit (16.1 percent) and the D.C. Circuit (15.3 percent) to the Second Circuit (3.4 percent). *Judicial Business of the United States Courts*, 2000 ANN. REP. OF THE DIRECTOR, Table B-5, available at <http://www.uscourts.gov/judbus2000/appendices/b05sep00.pdf>.

18. A game show televised during the 1950s.

19. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DE PAUL L. REV. 201, 209 (1998).