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COMPLEX LITIGATION

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Vigilance Is a Virtue

The importance of disclosing juror misconduct in complex actions

By Mark Salah Morgan and Andrés Acebo

Jurors are not blank slates onto which the evidence is written. Jurors enter the deliberating room with not only their notes and memories of the evidence, but with their own personal beliefs, prejudices and experiences. Attorneys who discover that a juror has concealed personal information during voir dire that is relevant to the case must act promptly to inform the court or otherwise risk waiving the right to a new trial on the basis of juror misconduct.

In the summer of 2012, a jury returned a $1 billion verdict against Samsung Electronics for infringing patents owned by Apple, Inc. Samsung subsequently moved for a new trial proffering an ill-fated contention that the verdict was the product of juror bias. Samsung alleged that the jury foreperson was dishonest during voir dire, because he had failed to disclose his prior litigation with his former employer, Seagate Technology PLC, a company of which Samsung owned a 10 percent stake. In December 2012, the United States District Court for the Northern District of California issued a 20-page opinion denying Samsung's motion for a new trial. *Apple, Inc. v. Samsung Elecs. Co.*, Case No.: 11-CV-01846 (LHK), 2012 U.S. Dist. LEXIS 179533 (D. Cal. Dec. 17, 2012).

The district court recounted its efforts to empanel a fair and impartial jury, and found that the foreperson indeed failed to disclose pertinent facts concerning his lawsuit against Seagate and his subsequent personal bankruptcy filing. Poignantly, the court observed that, at the time of jury empanelling, Samsung's counsel "expressed no concerns about [the foreperson's] past employment at Seagate." Samsung's counsel never sought "to elicit any information about whether that relationship might influence [the foreperson's] view in any way." Critical to the court's ruling was the fact that although Samsung only learned of the Seagate suit from the foreperson's bankruptcy file after the trial concluded, Samsung had knowledge of the bankruptcy, "through its own research," at the time of jury voir dire.

During postverdict interviews, the foreperson revealed that he "expected to be dismissed from the jury because of [his] experience," but was "very grateful to have been part of this case." The juror added "[e]xcept for my family, it was the high spot of my career. You might even say my life." He further revealed that he was particularly pleased to have been selected for the jury "because [he] wanted to be satisfied from [his] own perspective that this trial was fair, and protected copyrights and intellectual property rights, no matter who they belong to." The foreperson also noted that "[t]he jury 'wanted to send a message to the industry at large that patent infringing is not the right thing to do,'" and that the "message [they] sent was not just a slap on the wrist." The court found that despite the foregoing revelations, Samsung waived its claim to a new trial because it "could have discovered [the foreperson's] litigation with Seagate, had [it] acted with reasonable diligence based on the information [it] acquired through voir dire."

The court premised its opinion on the well-settled law that the right to challenge the partiality of a jury verdict based on a juror's alleged misconduct during voir dire may be waived. The United States Supreme Court, in *McDonough Power Equipment v. Greenwood*, held that when

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information is known to a party or their counsel at the time of "voir dire examination," and they fail to interrogate the prospective juror upon receiving an answer deemed to be incorrect, they are later barred from "challenging the composition of the jury." 464 U.S. 548, 551 n.2 (1984) (citing *Johnson v. Hill*, 274 F.2d 110, 115-16 (8th Cir. 1960)).

In 2011, the Supreme Court once again affirmed that constitutional rights could be waived in complex actions. The court observed it had previously recognized "'the value of waiver and forfeitures rules'" in "complex" matters. *Stern v. Marshall*, 131 S.Ct. 2594, 2608 (2011) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487-88, n.6 (2008)). The court added that in complex cases the "consequences of 'a litigant ... "sandbagging" the court — remaining silent about his objection and belatedly raising the error only if the case does not conclude in its favor' ... can be particularly severe." Accordingly, courts have consistently held that where a party or its counsel learns of juror misconduct or bias before verdict, the misconduct may not be raised as a colorable basis for a new trial.

Significantly, as the district court noted in deciding Samsung's motion, actual knowledge of misconduct is not required. *Apple*, 2012 U.S. Dist. LEXIS 179533, at *45. So long as a party is aware of evidence giving rise to the possible need for a new trial, or fails to exercise reasonable diligence in discovering that evidence, any right to challenge the jury's impartiality is deemed waived. To that end, a party may not consciously avoid learning the truth with the hope that the jury verdict will be in his favor. *Johnson*, 274 F.2d at 115-16.

In *Johnson*, a case that the Supreme Court relied on in its *McDonough* opinion, the United States Court of Appeals for the Eighth Circuit explained:

> The right to challenge the panel or to challenge a particular juror may be waived and in fact is waived by failure to seasonably object. It is established that failure to object at the time the jury is empanelled operates as a conclusive waiver if the basis of the objection is known or *might have been known or discovered through the exercise of reasonable diligence*, or if the party is otherwise chargeable with knowledge of the ground of the objection.

274 F.2d at 115-16 (emphasis added) (internal citations omitted).

The court's disposition of Samsung's motion relied heavily on the Eighth Circuit's standard. The district court found that because the record shows that Samsung had the chance to investigate the matter on its own or to pursue further questioning in voir dire, its basis for a new trial was without merit. *Apple*, 2012 U.S. Dist. LEXIS 179533, at *46-49.

Moreover, the district court observed that Samsung could not rely exclusively on the foreperson's postverdict statements as "'[t]he near-universal and firmly established common law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a verdict.'" *Id.* at *57 (quoting *Tanner v. United States*, 483 U.S. 107 (1987)). This longstanding policy has been codified in Federal Rule of Evidence 606(b). Both the common law and evidentiary rule recognize, as the District Court noted, that juries are "expected to bring their own personal experience with them into the courtroom, and may generally rely on their personal knowledge or past experience when hearing the evidence, deliberating, and deciding their verdict so long as they do not have knowledge related to the specific case they are deciding." *Apple*, 2012 U.S. Dist. LEXIS 179533, at *59-60 (citing *Hard v. Burlington N. R.R.*, 812 F.2d 482, 486 (9th Cir. 1987)).

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The slightest oversight or lapse in reviewing a prospective juror's background or an empanelled juror's behavior can later be deemed a waiver of the constitutional right to a fair and impartial jury. Reasonable diligence necessitates prompt action. Suspected wrongdoing or misconduct must be both investigated and presented to the court. Lawyers can neither delay in testing their suspicions nor rely on postverdict statements as grounds to set aside a verdict and begin anew. The trial lawyer must, to every extent possible, think prospectively and act in the present.

Cases like *Apple v. Samsung*, where billions of dollars are at stake, posit that zealous advocacy is inextricably married to heedfulness. In litigation, vigilance is indeed a virtue. ■