1 RIGHT TO A JURY TRIAL: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The right to a jury trial does not exist in all civil actions. The purpose of this note is to assist trial courts in determining whether a civil litigant has a constitutional right to a jury trial. The note examines common law and statutory claims. Article I, Section 5 of the Wisconsin Constitution governs a civil litigant's right to a jury trial in a Wisconsin court.

That constitutional section states: "the right of trial by jury shall remain inviolate and shall extend to all cases at law." This provision guarantees the right to a civil jury trial as the right existed at the time our state's constitution was adopted in 1848.

RIGHT TO A JURY TRIAL IN EQUITABLE ACTIONS

The right to a trial by jury does not exist in equitable actions. In an equitable action, all the issues, whether legal or equitable, are triable by the court.[1] The merger of law and equity has not abolished the difference between legal and equitable remedies. In an equitable action a litigant has never been held entitled to a jury trial as a matter of right.[2]

The trial court in an action in equity may submit questions of fact to an advisory jury. The trial court is required to find facts necessary for a party to have judgment and is free to disregard the jury's findings. Failure of a trial court to make its own findings is prejudicial error.[3]

The issues triable by the court in an equitable action include counterclaims or other legal responses submitted by the defendant.[4] However, the waiver of jury does not apply to a compulsory legal counterclaim asserted by defendant in an equitable suit.[5] A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject of the action and it is lost if not asserted.

CLASSIFYING CASES AS LEGAL OR EQUITABLE

Classification of cases as legal or equitable is based on two types of criteria. The first criteria is whether the relief is coercive in nature. Examples of coercive remedies include injunction, attachment, receivership, and other remedies which can be both provisional or permanent. These types of remedies are equitable remedies. Equitable remedies of this type

include a coercive in personam order directing the defendant to act in a certain way and are enforceable by contempt. Dobbs Law of Remedies (2nd edition) §1.4, p. 16.

The second criteria for equitable classification is historical. Under this approach, "a claim could be deemed equitable if the plaintiff sought to enforce a right that was originally created in equity courts, or a right that was traditionally decided according to equitable principles." Dobbs Law of Remedies (2nd edition) §2.6(3) p. 155. Examples of historical equity actions are the law of mortgages, trusts, divorces, fiduciary, and confidential relationships. Other examples are claims for rescission and restitution.[6]

Modern legal pleadings can assert multiple claims which include both legal and equitable claims. The trial court can analyze and manage these claims in the following suggested ways:

1. **Clean up or incidental authority**: A plaintiff who joins both legal or equitable claims or a defendant who files a legal claim in an equity suit waives a right to a jury trial. Under clean up or incidental authority, the trial court determines both the legal and equitable issues. A party who voluntarily submits a claim in equity takes an equity trial even as to legal claims. This approach is efficient as it avoids a multiplicity of suits. Dobbs Law of Remedies (2nd edition) §2.6(4) pp. 169-170.

2. **Primary focus of case**: In this approach, a court examines whether the gist or primary point of the case is equitable. If so, then the whole case including the legal issue is tried to the court. Dobbs, supra, at page 169.

3. **Severance of legal and equitable claims**: The trial court can sever the claims and try them separately. If the court tries the equity claim first, the equity decision will create issue preclusion on any facts the legal and equitable claims have in common. In cases where equitable relief depends on whether a legal right was first established, the cases can be severed and the legal claim can be tried to a jury. Alternatively, the claims can be tried together and the jury's verdict can be accepted as binding on both the legal and equitable issues. Dobbs, supra, at page 170.

STATUTORY CLAIMS

Claims created by statute require an analysis of the constitutional right to a jury trial. If the legislature includes a provision for trial by jury in the statute, litigants are entitled to a jury trial for any claim at law.[7] If the statute is silent with regard to the right to jury trial, no

jury trial is required unless the right is preserved by Article I, section 5 of the Wisconsin Constitution.[8]

In Village Food & Liquor v. H&S Petroleum, Inc., 254 Wis.2d 478, 484, 647 N.W.2d 177 (2002), the Wisconsin Supreme Court stated:

> …consistent with our prior case law, we conclude that a party has a constitutional right to have a statutory claim tried to a jury when:
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> (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and
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> (2) the action was regarded at law in 1848.

The application of part (1) of the test to particular causes of an action has lacked a unanimous consensus.[9]

In Village Food, supra, the supreme court concluded that the plaintiff was entitled to a jury trial for alleged violation of the minimum mark up statute. The majority determined that the mark up laws were "of the same nature" as the common law crimes of forestalling the market, regrating, and engrossing found in Blackstone's Commentaries on the Law of England. The majority rejected a rigid test of requiring statutory causes of action to codify common law causes of action in a form substantially similar. Instead, the majority opted for a broader test requiring that the modern statutory claim be analogous to a common law claim or essentially a counterpart to a known common law claim.

In State v. Schweda, 303 Wis.2d 353, 736 N.W.2d 49 (2007), the supreme court refused to grant a jury trial in a case involving alleged violations of waste disposal regulations. The defendants premised their right to a jury trial on analogous common law nuisance claims. The court concluded that the analogy between nuisance law and modern environmental regulatory law was not precise enough to establish that part (1) of the Village Food test had been met.

In Harvot v. Solo Cup, 320 Wis.2d 1, 768 N.W.2d 176 (2009), a majority of the supreme court refused to permit a jury trial in an action under the Family Medical Leave Act. The statute again was silent on the jury trial issue. The majority opinion concluded that the Family Medical Leave Act was not a counterpart to a cause of action existing in 1848 because there was no common purpose with any common law cause of action. No common law claim existed in 1848 designed to protect employees while on leave to care for their medical needs or those of their families.

In State of Wisconsin v. Abbott Laboratories, 341 Wis.2d 510, 816 N.W.2d 145 (2012), the State sued various pharmaceutical companies alleging violations of the Deceptive Trade Practices Act (DTPA) and the Medicaid fraud statute. The supreme court affirmed the right to a jury trial under both statutes. Applying the Village Food test, the court's decision concluded that the DTPA claims were an essential counterpart to the common law claim of "cheating." The claim shared a similar purpose of combatting deceptive commercial conduct. As to the Medicaid fraud claim, the court concluded that that statute counterpart was the common law claim of fraud. The similar purpose was to protect the integrity of business relationships and market transactions.

Determining whether the first part of the Village Food & Liquor test has been met for a jury trial on a statutory claim is difficult. The committee believes the following five criteria should be considered to determine if the first part of the test has been met:

- Does the statute codify common law causes of action in a form substantially similar to causes of action that existed in 1848? If so, the first test is met.

- Is the modern day statutory claim sufficiently analogous to a known common law claim? Considerations here include whether the statutory claim is: of the same nature as the common law claim, similar to the common law claim, or essentially a counterpart to a known common law claim.

- The purpose of the statute should be examined. If the purpose of the statute does not share a purpose with an 1848 common law action, then the first test is not met.

- The court should examine the analogy to the common law claim. The analogy must be precise and cannot be vague, general or amorphous.

- Statutes which deal with prohibited deception or fraud are likely to be sufficiently analogous to common law fraud to meet the first test. The purpose of protecting the market place from business misconduct is a common denominator.

The second part of the Village Food & Liquor test is whether the claim was regarded at law in 1848. Equitable claims do not meet the test. The discussion in "**CLASSIFYING CASES AS LEGAL OR EQUITABLE**" section of this Law Note on determining whether a claim is legal or equitable should be consulted for help in resolving this issue.

NOTES:

1. In Neff v. Barber, 165 Wis. 503, 162 N.W. 667 (1917), a derivative claim was brought by a stockholder and creditor of a company alleging conspiracy and mismanagement. The case was tried to the court who found no conspiracy and no mismanagement. On appeal, the plaintiff claimed the issue of conspiracy was a legal issue entitling him to a jury trial as a matter of right. The supreme court disagreed stating:

> He admits that the action was one in equity, but claims, nevertheless, the absolute right to a jury trial of the issue of law presented by the charge of conspiracy. That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. Harrigan v. Gilchrist, 121 Wis. 127, 281, 282, 99 N.W. 909. In an action in equity all the issues, whether legal or equitable, are triable by the court. In its discretion an advisory verdict upon any or all of the issues may be taken, but neither party is entitled thereto as a matter of right, much less to a verdict having the force of one in an action at law. (emphasis supplied)

2. In Spensley Feeds v. Livingston Feed & Lumber, Inc., 128 Wis.2d 279, 381 N.W.2d 601 (1985), the trial court tried an action to a jury involving the applicability of the statute of frauds to a land transaction. Because this was an equitable action, the court of appeals found error and reversed stating:

> Although the distinctions between actions at law and suits in equity have long been abolished, the differences between legal and equitable remedies continue. Miller v. Joannes, 262 Wis. 425, 428, 55 N.W.2d 375, 376 (1952). The right to trial by jury under Wis. Const. art. 1, sec 5, does not extend to "equity cases, in which the party has never been held entitled to a jury trial as a matter of right." Stilwell v. Kellogg, 14 Wis. 499[461], 503 [464] (1861).
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> In all equitable actions, the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence. Stahl v. Gotzenberger, 45 Wis. 121, 123 (1878), quoted with approval in Dombrowski v. Tomasino, 27 Wis.2d 378, 385, 134 N.W.2d 420, 424 (1965). The trial court made no findings or conclusion regarding any of the equitable exceptions in sec. 706.04(1)-(3), Stats.
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> The trial court in an action in equity may, of course, on the motion of a party or its own motion, submit questions of fact to an advisory jury. Jolin v. Oster, 55 Wis.2d 199, 205, 198 N.W.2d 639, 642 (1972); sec. 805.02(1), Stats.
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> Nothing in the record indicates that the trial court considered the verdict as advisory. Nor did the verdict determine which, if any, of the equitable exceptions in sec. 706.04, Stats., is applicable. For those reasons, the error was prejudicial.

3. Spensley Feeds v. Livingston Feed and Lumber, Inc., Ibid.

4. Mortgage Associates v. Monona Shores, 47 Wis.2d 171, 176-177, 177 N.W.2d 340 (1969); Zabel v. Zabel, 210 Wis.2d 336, 344-345, 565 N.W.2d 240 (1997).

5. Green Spring Farms v. Spring Green Farms, 172 Wis.2d 28, 492 N.W.2d 392 (Ct. App. 1992).

6. Dobbs Law of Remedies (2nd edition) Vol 1, §2.6 (3) pp. 162-163. Zabel v. Zabel, 210 Wis.2d 336, 345, 565 N.W.2d 240 (1997); Zastrow v. Journal Communications, Inc. 291 Wis.2d 426, 442, 718

N.W.2d 51 (2006).

7. Bekkedal v. City of Viroqua, 183 Wis.2d 176, 192, 197 N.W. 707 (1924); Stillwell v. Kellogg, 14 Wis. 499 (1861); Harvot v. Solo Cup, 320 Wis.2d 1, 20, 768 N.W.2d 176 (2009); Village Food & Liquor, supra, page 486.

8. Harvot, supra, page 20.

9. State v. Schweda, 303 Wis.2d 353, 363, 736 N.W.2d 49 (2007).