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REMITTITUR PRACTICE IN THE FEDERAL COURTS

INTRODUCTION

Remittitur¹ is the procedure by which a trial judge gives a plaintiff who has received an excessively favorable jury verdict the option of accepting a specified reduction in the jury verdict or submitting to a new trial.² Since its approval by a federal court in 1822,³ remittitur has been accepted and employed by the courts of the United States.⁴ Despite this century and a half of use, the procedures and standards utilized by the federal courts have been, and still are, far from uniform.⁵ Doubts are still expressed about the constitutionality⁶ and efficacy⁷ of remittitur.

1. Technically, the remittitur is "[a]n entry on the record by which the plaintiff declares that he remits a part of the damages which have been awarded him." BLACK'S LAW DICTIONARY 1458 (4th ed. 1951). However, the term is commonly used to refer to the entire procedure.

2. See 6A J. MOORE, FEDERAL PRACTICE ¶ 59.05[3] (2d ed. 1974); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815 (1973); Busch, *Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEFENSE L.J. 521 (1963); Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942); James, *Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 DUQUESNE L. REV. 143 (1963); Comment, *Additur and Remittitur in Federal and State Courts: An Anomaly?*, 3 CUMBER.-SAM. L. REV. 150 (1972); Note, *Constitutional Law—Right to Jury Trial—Judicial Use of Additurs in Correcting Insufficient Damage Verdicts*, 21 VA. L. REV. 666 (1935); Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934).

Additur procedure allows the losing party a choice between supplementing an inadequate jury verdict or submitting to a new trial. See 6A J. MOORE, *supra* ¶ 59.05[4]; James, *supra* at 153; Carlin, *supra* at 1, 24. This procedure has been held to be an unconstitutional re-examination of the jury verdict. *Dimick v. Scheidt*, 293 U.S. 474 (1935). See note 16 and accompanying text *infra*, text accompanying notes 18-20 *infra*, and note 21 *infra*.

Since *Dimick*, additur has generally not been allowed in federal courts, see, e.g., *Miller v. Tennessee Gas Transmission Co.*, 220 F.2d 434 (5th Cir. 1955); *Mutual Benefit Health & Accident Ass'n v. Thomas*, 123 F.2d 353 (8th Cir. 1941), although there is authority for the proposition that when the right to a civil jury trial is not derived from the seventh amendment, *Dimick* is inapplicable. *United States v. Kennesaw Mountain Battlefield Ass'n*, 99 F.2d 830 (5th Cir. 1938), *cert. denied*, 306 U.S. 646 (1939). The states are not bound by the seventh amendment guarantee, *Olesen v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957); *Iacaponi v. New Amsterdam Cas. Co.*, 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 355 U.S. 896 (1968), and the courts of several states regularly employ additur. See, e.g., *Fisch v. Manger*, 24 N.J. 66, 130 A.2d 815 (1957); *Lea v. American Nat. Bank of Pryor Creek*, 199 Okla. 360, 186 P.2d 321 (1947). Cf. *Cox v. Charles Wright Academy, Inc.*, 422 P.2d 515 (Wash. 1967). Other states refuse to allow additur. See, e.g., *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 391 P.2d 692 (1964); *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952).

3. *Blunt v. Little*, 3 F. Cas. 760 (No. 1578) (C.C.A. Mass. 1822). See notes 12-16 and accompanying text *infra*.

4. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160 (1966), *reh. denied*, 389 U.S. 889 (1966); *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975); *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974); *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), *cert. denied*, 388 U.S. 858 (1949); *Bristol Gas & Electric Co. v. Boy*, 261 F. 297 (6th Cir. 1919). See also *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 66 (1966).

5. See notes 21-90 and accompanying text *infra*.

6. See, e.g., *Dimick v. Scheidt*, 293 U.S. 474 (1935); *Bonura v. Sea Land Service, Inc.*, 512 F.2d 671, 672-73 (5th Cir. 1975) (Goldberg, J., dissenting); Carlin, *supra* note 2.

7. See Carlin, *supra* note 2, at 1, 13. See also 6A J. MOORE, *supra* note 2, ¶ 59.05[3], n. 42i.

The first section⁸ of this Note examines and evaluates the mechanics of remittitur procedure in the federal courts.⁹ The second section¹⁰ focuses on the major unresolved issue of remittitur procedure: whether a plaintiff who elects to remit is entitled to appellate review of the remittitur order. The final section¹¹ of the Note evaluate remitting-plaintiff appeal procedures and suggest some ways in which federal remittitur procedure might be made more efficient and more responsive to policy objectives.

I. REMITTITUR PRACTICE IN THE FEDERAL COURTS

A. History

The origins of remittitur practice in the federal courts can be traced to Justice Story's 1822 circuit court decision in *Blunt v. Little*.¹² The plaintiff received a jury verdict of \$2,000 in an action for malicious prosecution, and the defendant moved for a new trial on the ground that the verdict was excessive. After citing two cases in support of the proposition that a new trial could be granted on the ground of excessive damages,¹³ Justice Story noted:

[I]f it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.¹⁴

Without further citation or authoritative support, he continued:

I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. . . . [T]he cause should be submitted to another jury, *unless the plaintiff is willing to remit \$500 of the damages*.¹⁵

8. See notes 12-90 and accompanying text *infra*.

9. Although consideration of state court practices will be necessitated by the fact that some federal courts have felt constrained to adopt these procedures, see notes 62-67 and 125-34 and accompanying text *infra*, this Note will be limited to an evaluation of federal court remittitur practice. Inclusion of extensive discussion of state court procedures would confuse and complicate the issues, since these practices vary widely. See Busch, *supra* note 2. See also Carlin, *supra* note 2; Hullverson, *Remittitur and Other Things*, 28 J. Mo. B. 81 (Feb. 1972); Comment, *Additur and Remittitur in Federal and State Courts: An Anomaly?*, *supra* note 2.

Another reason for focusing exclusively on the federal courts is the significance of the remittitur device in that forum. Of the 103,530 civil cases commenced in the federal district courts in 1974, 24,231, or 23.4%, were suits for personal injury or property damage. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 389 (1974). If tried to a jury, each would present a potential excessive verdict case. Contract actions, real property actions, and actions under statutes can also result in excessive jury verdicts. A recent review of 1974 closed-case docket sheets for the district courts of the Second Circuit revealed that almost 50% of all suits involving money claims were admiralty cases, many of which were potential candidates for remittitur.

10. See notes 91-152 and accompanying text *infra*.

11. See notes 153-63 and accompanying text *infra*.

12. 3 F. Cas. 760 (No. 1578) (C.C.A. Mass. 1822).

13. *Id.* at 761.

14. *Id.* at 761-62.

15. *Id.* at 762 (emphasis added).

Justice Story's simple statement, unsupported by authoritative precedent in either American or English law,¹⁶ has served as the cornerstone for federal court remittitur. The paucity of precedent went seemingly unnoticed as the Supreme Court in early decisions consistently upheld the remittitur procedure.¹⁷ The procedure became so well-established that when its constitutional validity was seriously considered in *Dimick v. Scheidt*,¹⁸ a case in which additur,¹⁹ the defendant's counterpart to remittitur, was held unconstitutional, the Court noted:

[I]t . . . may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. . . . [W]e may assume that . . . the doctrine would not be reconsidered or disturbed at this late date.²⁰

The Supreme Court has apparently never again directly considered the constitutional issue, and from the language in *Dimick* it is fair to infer that no reconsideration is likely.

B. Procedure

The seemingly simple idea of remittitur becomes discouragingly complex when it is put into action. This section sets forth the "how" of federal remittitur in all its complexity and measures each element of the procedure against five standards: (1) fairness to the plaintiff; (2) fairness to the defendant; (3) judicial economy; (4) the constitutional preference for jury trials;²¹ and (5) non-constitutionally mandated public policy favoring trial by jury.

16. Although a few early English courts used a remittitur-type procedure in some strictly limited situations, see discussion of early English practices in *Dimick v. Scheidt*, 293 U.S. 474, 477-80 (1935); Carlin, *supra* note 2, at 3-4, the device as practiced in the United States federal courts was not approved in England until 1884, *Belt v. Lawes*, 12 Q.B.D. 356, sixty-two years after *Blunt*. Comment, *Statutory Authorization of Additur and Remittitur*, 43 Miss. L.J. 107, 107-08 n.7 (1972). The English approval of remittitur was later repudiated in *Watt v. Watt*, [1905] A.C. 115. See discussion of *Watt v. Watt* and *Belt v. Lawes* in *Dimick v. Scheidt*, 293 U.S. at 480-81.

17. *Northern Pac. R.R. v. Herbert*, 116 U.S. 642 (1886); *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Kenyon v. Gilmer*, 131 U.S. 22 (1889); *Clark v. Sidway*, 142 U.S. 682 (1892); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Hansen v. Boyd*, 161 U.S. 397 (1896); *Woodworth v. Chesbrough*, 244 U.S. 79 (1917).

18. 293 U.S. 474 (1935). See notes 2 and 16 and accompanying text *supra* and note 21 *infra*.

19. See note 2 *supra*.

20. 293 U.S. at 484-85.

21. Although the Supreme Court is unlikely to reconsider the question of whether remittitur is constitutional, see notes 16-20 and accompanying text *supra*, the issue is by no means dead. The Court in *Dimick* distinguished remittitur from additur by arguing that [w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence.

293 U.S. at 486.

This rationale has been attacked in Carlin, *supra* note 2, at 17-18, on the ground that in a remittitur case the verdict after remittitur is not an amount found by the jury any more than an increased verdict in an additur case would be.

Because of such continuing doubts and the shaky precedents on which remittitur stands,

1. *Procedural Steps to a Remittitur.* The trial court remittitur device is employed only in cases tried to a jury. It usually arises when a losing defendant moves for a new trial on the ground that the damages awarded by the jury are excessive,²² or for a new trial and in the alternative for a remittitur.²³ If the trial judge finds the verdict proper, he denies the motions and enters the jury verdict as a final judgment.²⁴ If the judge deems the award to be excessive, he can grant a new trial "conditioned upon the refusal of the plaintiff"²⁵ to remit a portion of the jury verdict,²⁶ or grant a partial²⁷ or complete new trial.²⁸

a. *Excessive Verdict or Not?* The initial determination that the trial judge must make is whether the jury verdict is proper or whether it should be set aside as excessive.²⁹ This is a matter within the discretion of the trial

Professor Moore, among others, has urged restraint in tampering with jury verdicts. 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 48-50. Thus, the Court's approval of remittitur in *Dimick* does not imply permission for unlimited innovation, and the seventh amendment right of trial by jury, U.S. CONST. amend. VII, must be considered in analyzing remittitur practice.

22. See, e.g., *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Arkansas Valley Land and Cattle Company v. Mann*, 130 U.S. 69 (1889); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966), *reh. denied*, 389 U.S. 889 (1965).

In some cases, the plaintiff may be the moving party if the defendant has prevailed on a cross- or counter-claim. See, e.g., *Chickasha Cotton Oil Co. v. Chapman*, 4 F.2d 319 (5th Cir.), *cert. denied*, 268 U.S. 700 (1925).

23. See, e.g., *Pellegrin v. Ray McDermott & Co.*, 504 F.2d 884 (5th Cir. 1974); *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967).

There are other ways of initiating a remittitur order as well. In one case, *Woodworth v. Chesbrough*, 244 U.S. 79 (1917), it was the plaintiff who moved to be allowed to remit a portion of his jury award in order to preserve his judgment when it became clear that the trial judge would have granted a new trial because of the size of the verdict.

The trial judge also has the implicit power to order remittitur. The judge may grant a new trial on his own initiative if the order is made within ten days of entry of judgment. FED. R. CIV. P. 59(d). The power to order that the plaintiff elect either remittitur or a new trial without motions from either party is thus implicit, as long as the trial judge complies with the ten day limit.

Once the remittitur order is entered, subsequent procedure in no way depends on whether the defendant, the plaintiff, or the trial judge initially requested the remittitur. In most cases, however, a court-initiated remittitur will be improper. There will usually be a strong possibility that the judge has not correctly assessed the situation since even the defendant is willing to accept the jury's verdict. Furthermore, unless defendant's counsel is incompetent, the judge's action would undermine the adversary system by giving aid to one party and, in effect, pointing out a way in which he can "do better."

24. See, e.g., *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968); *Morvant v. Lumbermans Mut. Cas. Co.*, 429 F.2d 495 (5th Cir. 1970); *Brents v. Freeman's Oil Field Serv., Inc.*, 448 F.2d 601 (5th Cir. 1971); *Tucker v. Bethlehem Steel Corp.*, 445 F.2d 390 (5th Cir. 1971); *Brown v. Richard H. Wacholz, Inc.*, 467 F.2d 18 (10th Cir. 1972); *Pellegrin v. Ray McDermott & Co.*, 504 F.2d 884 (5th Cir. 1974).

25. W. PROSSER & J. WADE, *CASES AND MATERIALS ON TORTS* 1068 (5th ed. 1971).

26. See, e.g., *Bonn v. Puerto Rico International Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975); *Reinersten v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975); *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975); *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974).

27. See, e.g., *Wagner v. Burlington Indus., Inc.*, 423 F.2d 1319 (6th Cir. 1970), See 6A J. MOORE, *supra* note 2, ¶ 59.05[3]. Cf. *Great Coastal Express, Inc. v. Teamsters Union*, 511 F.2d 839 (4th Cir. 1975); *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Young v. International Paper Co.*, 322 F.2d 820 (4th Cir. 1963).

28. See, e.g., *Dillard Dep't Stores, Inc. v. Fidelity Union Life Ins. Co.*, 508 F.2d 331 (5th Cir. 1975). See 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 54. Cf. *Massey v. Gulf Oil Corp.*, 508 F.2d 92 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3202 (1975); *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972); *Cosentino v. Royal Netherlands S.S. Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968).

29. Interference with jury verdicts in which the allegedly excessive damages are for pain

judge,³⁰ subject, however, to the varying standards which have been established by the appellate courts. Some circuits permit the trial judge to set aside the jury verdict only if he believes that it is not supported by substantial evidence.³¹ In other circuits the trial judge is not at liberty to tamper with the verdict unless it is "grossly excessive"³² or "shocks the conscience" of the court.³³

Of these differing standards, the most desirable from a constitutional standpoint would be the "grossly excessive" or "shocks the conscience" tests, since they permit the least "re-examination" by the judge of the jury verdict. Non-constitutional public policy favoring trial by jury would also favor this limited role for the judge. When fewer new trials are granted judicial economy is served as well. On the other hand, the "grossly excessive" or "shocks the conscience" standards may be unfair to defendants; utilization of these tests maximizes the defendant's chances of having to pay a verdict that is admittedly excessive.

Once the trial judge has determined the appropriate test for excessiveness, he applies it to the case at hand. If he finds the jury verdict to be within the limits of propriety as established by the standard,³⁴ he denies the defendant's motions and renders final judgment in the amount of the verdict.³⁵ Since a final judgment has been entered, the defendant at that time can appeal the denial of his new trial motion.³⁶ If the defendant had originally moved for a new trial and in the alternative for a remittitur and the trial judge has denied both motions, the defendant can seek review of both denials.³⁷

In theory, the standard of review is very strict. It is usually said that a

and suffering or some other injury that involves intangibles has been criticized as outside the scope of the trial court's expertise. Busch, *supra* note 2, at 536-38.

30. 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 52.

31. See, e.g., *Shipe v. Leavesley Industries, Inc.*, 55 F.R.D. 190 (E.D. Tenn. 1971); *Knight v. Nurseryman Supply, Inc.*, 248 F. Supp. 925 (E.D. Tenn. 1965); *Werthan Bag Corp. v. Agnew*, 202 F.2d 119 (6th Cir. 1953).

In one early case the court required that the jury verdict be the product of passion or prejudice before it could be set aside as excessive. Professor Moore has condemned both this and the "substantial evidence" standard as being "too narrow." 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 53 nn.19-20.

32. See, e.g., *Cole v. Chicago, St. P., M. & O. Ry.*, 59 F. Supp. 443 (D. Minn. 1945).

33. See, e.g., *Brents v. Freeman's Oil Field Service, Inc.*, 448 F.2d 601 (5th Cir. 1971); *Tucker v. Bethlehem Steel Corp.*, 445 F.2d 390 (5th Cir. 1971); *Collum v. Butler*, 288 F. Supp. 918 (N.D. Ill. 1968), *aff'd*, 421 F.2d 1257 (7th Cir. 1970); *Huddleston v. Crain Bros., Inc.*, 183 F. Supp. 874 (W.D. Pa. 1960).

34. Regardless of the standard used by the court, a judge should not tamper with a jury award for pain and suffering or other intangibles unless he finds the verdict highly excessive. Judges commonly reduce these verdicts between 15 and 25% by remittitur, Busch, *supra* note 2, at 537, but this is clearly improper. Where fine lines cannot be justified they should not be drawn. It is in cases involving intangibles that the jury serves its most important function. See note 29 *supra*.

35. See, e.g., cases cited in note 24 *supra*.

36. See, e.g., cases cited in note 24 *supra*. The plaintiff might cross-appeal if he thinks the damages assessed by the jury inadequate.

37. See, e.g., *Bonn v. Puerto Rico International Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975); *Pellegrin v. Ray McDermott & Co.*, 504 F.2d 884 (5th Cir. 1974); *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967).

court of appeals will not reverse the district court on the denial of a new trial or remittitur motion unless a "clear abuse of discretion" on the part of the district court is found.³⁸ However, one commentator has noted that while the appellate courts verbally adhere to this principle, trial court findings of non-excessiveness are rejected "pretty routinely."³⁹ Such a course of action can only be explained in terms of the courts' perception of fairness to the defendant. Yet, in terms of the other considerations pertinent to remittitur, the standard of review should be strict—both in enunciation and application. With only a written record of the trial before him, the appellate judge is not well-qualified to review jury verdicts for excessiveness.⁴⁰ Also, a less strict standard of review would inevitably result in more new trials, thus undermining the goal of judicial economy.

b. *Remittitur or New Trial?* If the trial judge concludes that the jury verdict is excessive, he has three options open to him: he may enter an unconditional order for a total new trial, enter an unconditional order for a partial new trial confined to the issue of damages, or order that the defendant is entitled to a new trial only if the plaintiff refuses to remit.

In deciding among these three options, the trial judge must first consider whether the excessiveness of the verdict was the result of "passion or prejudice" on the part of the jury.⁴¹ Most circuits require that a full new

38. See, e.g., *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968); *Neese v. Southern Ry.*, 350 U.S. 77 (1955); *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972); *Brents v. Freeman's Oil Field Service, Inc.*, 448 F.2d 601 (5th Cir. 1971); *Morvant v. Lumbermans Mut. Cas. Co.*, 429 F.2d 495 (5th Cir. 1970); *Brown v. Louisiana & Ark. Ry.*, 429 F.2d 1265 (5th Cir. 1970); *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967); *Delta Engineering Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (5th Cir. 1964).

In a recent opinion, *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969), Judge Skelly Wright cogently enunciated the reasons for such stringent standards for reviewability.

Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.

Id. at 148 (footnotes omitted). In cases where the trial court "refuses to disturb" the jury verdict on a new trial motion, Judge Wright went on to note that

the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial.

Id.

The Fifth Circuit has recently adopted the reviewability standards formulated in *Taylor Terminal*. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1045 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (1972). See note 123 and accompanying text *infra*. The less stringent rule formulated by Judge Wright for cases where the judge grants a new trial for excessive verdict is discussed in note 55 *infra*.

39. *Busch*, *supra* note 2, at 530.

40. See note 38 *supra*.

41. Although passion and prejudice can never be proved beyond doubt, its influence can be inferred with a high degree of certainty from the circumstances of some excessive verdict cases. For example, in *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975), the plaintiff's closing statement to the jury, which included references to the decedent's children weeping at graveside, was held to have evoked "passion or prejudice" on the part of the jury. In *Brabham v. Mississippi*, 96 F.2d 210 (5th Cir.), *reh. denied*, 97 F.2d 251 (5th

trial be ordered whenever the trial judge discerns such jury bias.⁴² The Fifth Circuit, however, evidently feels that it is appropriate for the trial judge to "cure" the defective verdict with remittitur if the "passion or prejudice" affected only the amount of the verdict and not the assessment of liability as well.⁴³ Although the caseload of the courts could be reduced by allowing trial courts to use remittitur as a "cure" for some verdicts tainted by passion or prejudice, this advantage is far outweighed by other considerations. It is almost impossible for a trial judge to determine that the jury bias which infected the assessment of damages played no part in the jury's finding on the issue of liability. There is always a danger that a jury which was unable to deal with the issue of damages in an unbiased manner was equally unable to deliberate dispassionately on the question of liability.

Even after the trial judge has determined that a verdict attacked as excessive is not the result of jury passion or prejudice, remittitur is not necessarily indicated. Where the damages that should properly have been awarded are ascertainable with a high degree of certainty,⁴⁴ or the defect in the verdict can be traced to a specific error in the course of the trial or a specific misconception on the part of the jury and the effect of that error or misconception is readily calculable,⁴⁵ the trial judge should ordinarily give

Cir.), *cert. denied*, 305 U.S. 636 (1938), a \$10,000 verdict awarded to a boy beaten by a deputy sheriff was found to be the product of "passion or prejudice." The court held "that excessiveness which results from passion and prejudice, however natural the resentment which arouses it, may not be cured." *Id.* at 214.

Sometimes the argument is made that "passion or prejudice" can be inferred from the very enormity of the verdict. *See, e.g.*, *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966), *reh. denied*, 389 U.S. 889 (1966). This "bootstrapping" argument may take two different forms, both of which are usually rejected by the courts. The first is that the size of the remittitur requested indicated that the trial judge believed that the jury was biased. *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. at 75. The second is that the conclusion of the trial judge that the "amount of the verdict [was] . . . more than the law would permit" was tantamount to a finding of "passion or prejudice." *Curtis Publishing Co. v. Butts*, 351 F.2d at 718.

"Bootstrapping" arguments should not, however, be rejected out of hand. A valid inference of "passion or prejudice" can be drawn from the fact that the jury awarded excessive damages. Perhaps the inference would not be strong in most cases, but neither should it be blindly ignored.

42. *See, e.g.*, *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520 (1931); *Brabham v. Mississippi*, 96 F.2d 210 (5th Cir.), *reh denied*, 97 F.2d 251 (5th Cir.), *cert. denied*, 305 U.S. 636 (1938). *See also* 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 59.

43. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975).

44. Such a situation might arise, for example, if the jury were charged with determining whether certain elements of the plaintiff's claimed damages were recoverable and then with calculating the amount of the award on the basis of those findings. If the jury found that all elements were recoverable but awarded an amount 50% greater than the sum of those elements, remittitur would be completely appropriate. A new trial would be wasteful and unnecessary. *See A. W. SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 142 (1922). *See also* notes 56 and 79 and accompanying text *infra*.

45. *See, e.g.*, *Hansen v. Boyd*, 161 U.S. 397 (1896). Under a mistake of law, the trial judge incorrectly instructed the jury that if it found certain facts it would mean that the defendant had ratified the purchase of a shipment of wheat and should be chargeable with the loss the plaintiff suffered on that transaction. The jury found those facts and included the amount of the loss in its verdict for the plaintiff. The Supreme Court held that the verdict could be properly cured by remittitur since the amount of the item was readily calculable.

the plaintiff the option to remit. The expense and delay of a new trial can be avoided, interference with the jury function is minimal, and the end-product is a verdict identical to that which would have been reached in a completely proper trial. When the issue of damages is not so clear-cut, or the excessiveness cannot be traced to a particular error of the judge or jury, the trial judge is faced with a more difficult decision.

Common contexts in which this problem arises are personal injury suits where the judge deems the award for pain and suffering or other intangible or incalculable loss to be clearly excessive,⁴⁶ defamation⁴⁷ and malicious prosecution⁴⁸ cases where the assessment of damages for "injured reputation" or "hurt feelings" are considered extreme, and cases in which punitive damages are assessed in an amount considered excessive as a matter of law.⁴⁹ Sometimes a new trial will be the only appropriate procedure.

If the trial judge does conclude that a new trial is necessary, he must then decide whether to grant it on some⁵⁰ or all⁵¹ of the issues. This decision turns on whether he deems the issue of liability adequately and properly resolved by the first trial. If so, a partial rather than a total new trial can be granted, limited to the question of appropriate damages.⁵²

A new trial order is not ordinarily appealable until the new trial is had.⁵³ Only after final judgment is entered in the second trial can the

46. See, e.g., *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975); *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972).

47. See, e.g., *Lewis v. Wilson*, 151 U.S. 551 (1894); *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966), *reh. denied*, 389 U.S. 889 (1966); *Dorin v. Equitable Life Assurance Soc'y of United States*, 382 F.2d 73 (7th Cir. 1967).

It is interesting to note that while these verdicts were reduced by remittiturs in amounts varying from 1/3 to 1/10 of the original verdicts, none was deemed to be the product of "passion or prejudice." See note 41 *supra*.

48. See, e.g., *Rothschild v. Drake Hotel, Inc.*, 397 F.2d 419 (7th Cir. 1968); *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973).

49. See, e.g., *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966), *reh. denied*, 389 U.S. 889 (1966); *Dorin v. Equitable Life Assurance Soc'y of United States*, 382 F.2d 73 (7th Cir. 1967); *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975).

50. See note 27 and accompanying text *supra*.

51. See note 28 and accompanying text *supra*.

52. See note 27 and accompanying text *supra*. Of course, if the defendant's liability is stipulated or the result of a strict liability statute, a new trial would necessarily deal only with damages.

53. See, e.g., *Dillard Dep't Stores, Inc. v. Fidelity Union Life Ins. Co.*, 508 F.2d 331 (5th Cir. 1975); *Peterman v. Chicago, R.I. & Pac. R.R.*, 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974); *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973); *Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967); *Patterson v. Moore*, 254 F.2d 853 (3d Cir. 1958).

If, however, the issue on appeal is the jurisdiction of the trial court to grant the new trial at all, it has been held that an immediate appeal will lie. *Stradley v. Cortez*, 518 F.2d 488 (3d Cir. 1975) (new trial order entered four years after trial and challenged as beyond jurisdiction would be treated as final for purposes of appeal); *Chicago & N.W. Ry. v. Britten*, 301 F.2d 400 (8th Cir. 1962) (new trial order made months after the entry of judgment and on the

plaintiff appeal the new trial order.⁵⁴ The standard of review applied by the appellate court to a new trial order is usually "clear abuse of discretion" as in the review of the denial of a new trial motion.⁵⁵

c. *How Much Should be Remitted?* If the trial judge decides both that the jury verdict is excessive and that remittitur rather than an unconditional new trial is appropriate, he must then determine the proper amount to be remitted by the plaintiff. In some cases this sum is easily determined,⁵⁶ but in many others the judge must select a proper verdict without clear guidance. There are no standard awards for items such as pain and suffering or damage to reputation,⁵⁷ and in determining the amount to be remitted, the trial judge must adhere to the vague standards required by the court of appeals for his circuit.

The various circuits agree that some sort of "reasonable jury" standard should be applied in evaluating the amount to be remitted,⁵⁸ but the practices are still not uniform. Most courts have articulated no definite standards but "seem to fix the amount of the residue . . . at a figure that the court believes a proper functioning jury should have found."⁵⁹ The Fifth Circuit and some other courts have adopted a "maximum recovery" rule, requiring that the amount remitted only reduce the jury verdict to the maximum amount a reasonable jury could have found in the case.⁶⁰ The theory behind this practice is that a jury which gave a large award did so with the intention of giving the plaintiff the maximum recovery the law

judge's own initiative was appealable); *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962) (new trial order appealable since trial judge gave a conditional remittitur or new trial more than ten days after entry of judgment and on his own initiative).

54. See 6A J. MOORE, *supra* note 2, ¶ 59.05[3]. If a partial new trial was granted, the defendant may be the party taking the appeal.

55. See note 38 and accompanying text *supra*. It has been suggested that an appellate court should feel somewhat freer to reverse a grant of a new trial than a denial of a new trial motion. When the judge and jury agree—and the new trial motion is denied—the verdict is entitled to great weight. A grant of a new trial means that the judge and jury disagreed, and the appellate court has good cause to inquire more deeply into the matter. *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

56. See note 44 and accompanying text *supra*. See also *Hansen v. Boyd*, 161 U.S. 397 (1896). Professor Scott, among others, has suggested that where the amount of the excess is definite and easily calculable, the plaintiff should be compelled to remit. A. W. SCOTT, *supra* note 44, at 142; see also 35 HARV. L. REV. 616 (1921). Such mandatory remittitur has never been permitted, see note 79 and accompanying text *infra*, and the plaintiff may refuse to remit with or without reason. The anomaly created by this is obvious. Even in the situation where remittitur would be most useful and the result of a new trial would be completely predictable, judicial economy is still in the hands of a potentially whimsical plaintiff.

57. See notes 46-48 and accompanying text *supra*.

58. See, e.g., *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

59. 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 58. See, e.g., *Lanfronconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967); *Meehan v. Central R.R. of N.J.*, 181 F. Supp. 594 (S.D.N.Y. 1960); *Raske v. Raske*, 92 F. Supp. 348 (D. Minn. 1950); *Grobengieser v. Clearfield Cheese Co.*, 94 F. Supp. 402 (W.D. Pa. 1950).

60. See, e.g., *Jenkins v. Aquatic Contractors & Engineers*, 446 F.2d 520 (5th Cir. 1971); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970); *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (1972); *Schottka v. American Export Isbrandtsen Lines, Inc.*, 311 F. Supp. 77 (S.D.N.Y. 1969).

would allow. Thus, to effectuate their intent, the verdict is reduced only to the point where it is not excessive.⁶¹

The federal courts in two states look to state practice to determine the size of remittiturs. In 1940 a federal district court in Wisconsin embraced that state's unique "minimum recovery" rule⁶² under which a plaintiff retained only that portion of his award below the minimum amount that a reasonable jury would award.⁶³ The United States District Court for the Eastern District of Tennessee has repeatedly looked for guidance to Tennessee state court remittitur cases, both on the question of whether a given verdict is excessive and on the question of how much of a verdict should be remitted by a plaintiff.⁶⁴ Presumably, both these courts felt compelled to apply state remittitur standards under the *Erie* doctrine.⁶⁵ Commentators, such as Professors Wright and Miller, have criticized such an application of *Erie*, arguing that

[t]he incidents of jury trials are for federal courts to decide for themselves, guided by the Seventh Amendment, and are not a matter on which state law should be given any effect.⁶⁶

61. 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 56-58. The Fifth Circuit has declined to employ the maximum recovery standard in calculating remittiturs from punitive damage awards. *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966), *reh. denied*, 389 U.S. 889 (1966). In *Gilbert*, the court noted that punitive damages "are not administrable in the same fashion" as compensatory damages, and that any limitation on such damages is not a question of fact in which the jury's determination should be given great deference, but a question of law. 514 F.2d at 1280-81.

62. *Meissner v. Papas*, 35 F. Supp. 676 (E.D. Wis. 1940), *aff'd*, 124 F.2d 720 (7th Cir. 1941). Professor Moore notes that the Wisconsin procedure was "apparently based on the theory that as the defendant has no option but to accept the remitted verdict the utmost consideration should be given to him. . . ." 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 55. This argument would have been more tenable if the defendant had also been precluded from appeal. This was not the case, however. The defendant could still get his new trial if the appellate court found that the remittitur order was an abuse of discretion. *See* notes 83-84 and accompanying text *infra*.

63. The actual Wisconsin procedure was somewhat more complicated than the text indicates. When the trial judge determined that a jury award was not appropriate he announced both the maximum and minimum amounts that he thought a reasonable jury could have found. The defendant was then given 20 days to agree to pay the higher amount. If he did not so agree, the plaintiff was given 10 days to accept the lower figure. If the plaintiff refused to remit, a new trial was ordered. M. ROSENBERG, J. WEINSTEIN & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE* 854 n.3 (2d ed. 1970). Apparently, defendants never exercised their options to pay the larger amounts, and the "minimum recovery" standard became an accurate description of the procedure; the plaintiff had to choose between the minimum amount and a new trial.

64. *Shipe v. Leavesley Industries, Inc.*, 55 F.R.D. 190 (E.D. Tenn. 1971); *Pruett v. Everett Lowrance, Inc.*, 314 F. Supp. 282 (E.D. Tenn. 1970); *Knight v. Nurseryman Supply, Inc.*, 248 F. Supp. 925 (E.D. Tenn. 1965).

65. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The Wisconsin federal court did not explain its adherence to the "minimum recovery" standard. Wisconsin eventually abandoned the standard in *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960), and there have been no subsequent federal court cases raising the issue.

The Tennessee federal court explicitly held that *Erie* required use of state remittitur practice in a diversity case controlled by state law. *Knight v. Nurseryman Supply, Inc.*, 248 F. Supp. 925, 928 (E.D. Tenn. 1965). In the *Shipe* case, however, the court appeared to back away from this position. *Shipe v. Leavesley Industries, Inc.*, 55 F.R.D. 190, 194 (E.D. Tenn. 1971).

66. C. WRIGHT & A. MILLER, *supra* note 2, § 2802, at 31.

Despite the persuasiveness of this argument, the *Erie* question in federal court remittitur practice has not been definitively resolved. Most federal courts do not indicate whether or not they are following state remittitur practice, and no circuit court has squarely addressed the issue of whether remittitur is substantive or procedural for *Erie* purposes. Of the circuits, only the Fifth has promulgated its own remittitur rule.⁶⁷

If and when the other circuits choose to follow the Fifth Circuit's lead, there are convincing arguments for the adoption of a maximum recovery standard. If the theory that the jury intended to give the plaintiff the largest recovery the law would allow is correct, then this standard represents the least impingement on the province of the jury. Some have even argued that this is the only standard that "has any reasonable claim of being consistent with the Seventh Amendment."⁶⁸ The maximum recovery rule would also be the most effective in reducing caseloads. The plaintiff is the party who decides whether or not a new trial will be had. If he knows that he is being given the maximum amount that this court believes a reasonable jury would award, he will realize that it is unlikely that on a new trial he will achieve a verdict as high or higher than the post-remittitur verdict suggested by the court.

The maximum recovery standard is, however, the most inequitable in terms of fairness to the defendant. The defendant can quite properly complain that

[he] has never had his damages assessed by a proper jury. Very likely such a jury might bring in a verdict for much less than the largest amount which can reasonably be justified.⁶⁹

The defendant will feel that he is being penalized for the improper functioning of the first jury. If given the opportunity, the defendant will press for the minimum recovery rule, arguing that but for the procedure of remittitur he would be entitled to a new trial. On balance, Professor Moore finds the average amount standard—which is, in effect, a compromise between the demands of plaintiff and defendant—the most desirable method for determining remittitur.⁷⁰ However, Moore does not consider the constitutional or public policy arguments in reaching his decision, factors which weigh heavily in favor of the maximum recovery standard.⁷¹

67. See note 60 and accompanying text *supra*.

68. C. WRIGHT & A. MILLER, *supra* note 2, § 2815, at 104-05.

69. Note, *Constitutional Law—Right to Jury Trial—Judicial Use of Additurs in Correcting Insufficient Damage Verdicts*, 21 VA. L. REV. 666, 672 (1935).

70. [It] gives the defendant the benefit of the full supervisory power of the trial court, and yet the plaintiff still has his option to refuse to remit. And it moderately serves the function of remittitur aimed at avoiding the judicial waste of a new trial, for the plaintiff still has a strong incentive to remit.

6A J. MOORE, *supra* note 2, ¶ 59.05[3], at 58.

71. Even if the maximum recovery rule—the standard which provides for the least drastic re-examination of the jury verdict—is employed, there is still the danger of an unconstitutional

2. *Appellate Remittitur*. A defendant who feels wronged by a federal trial court's handling of an excessive verdict case may appeal from the court's denial of a motion for a new trial⁷² or a motion for remittitur,⁷³ or from the court's determination of the amount to be remitted.⁷⁴ An appellate court which finds merit in the defendant's objections can not only remand the case to the district court;⁷⁵ the appellate court can itself enter a remittitur order.⁷⁶

The practice of appellate remittitur is open to criticism⁷⁷ on three grounds: (1) a court of appeals, having only a cold record before it, is poorly equipped to determine whether—and the extent to which—the jury erred; (2) appellate remittitur gives the defendant another “shot” at the plaintiff thereby reducing the chances of settlement and adding to court congestion;⁷⁸ and (3) appellate remittitur involves a more remote re-examination of the jury verdict than trial court remittitur and thus comes closer to infringing the guarantee of the seventh amendment. Although the second objection is not of major significance, the first and third objections seem

interference with the seventh amendment guarantee; the trial judge may merely substitute his assessment of a proper award under the standard rather than determine what a reasonable jury would have awarded. Since there can never be a guarantee that the amount fixed by the trial judge is even near what a properly functioning jury would have awarded, Carlin, *supra* note 2, at 15, it follows that all remittiturs necessarily involve some substitution of the court's judgment for that of the jury. The trial court should strive to minimize this interference.

The method used to determine the remittitur in some personal injury cases is illogical, although probably not dangerous. In a few districts, contributory negligence is not a complete bar to relief; the verdict is merely reduced in proportion to the degree that the plaintiff was found to be negligent. For example, in *Delta Engineering Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (5th Cir. 1964), *cert. denied*, 377 U.S. 905 (1964), the plaintiff received a jury verdict of \$108,800 for injuries sustained when a barge (!) fell on his head. The verdict was then reduced to \$98,200 because the jury had found Scott 10% negligent and thereafter an order was entered granting a new trial unless the plaintiff remitted \$23,200. This procedure seems clearly improper. If the trial judge believed the jury assessment of damages incorrect, how could he accept their evaluation of contributory negligence without question? A judge who tampers with the jury verdict should at least consider each element which affects the amount of the final award.

It also seems unreasonable to reduce the jury verdict by a small amount for contributory negligence and then reduce that award on the ground that it was excessive. The contributory negligence subtraction becomes meaningless if it precedes remittitur. In fact, it is clearly improper for the reductions to be made in this order. If the plaintiff was 10% negligent, he should be deprived of 10% of the remittitur-reduced award, not 10% of his “grossly excessive” jury verdict. Otherwise, the trial judge is really substituting his own award, since he is necessarily deciding what he thinks this plaintiff should receive from this trial, and not what a reasonable jury would have assessed.

72. This challenge can occur in two situations: the new trial motion is denied because the court finds the jury verdict proper, *see, e.g.*, cases cited in note 24 *supra*, or the new trial motion is denied because the court has ordered a remittitur and the plaintiff has agreed to remit. *See, e.g.*, *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974); *Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966).

73. *See* note 37 *supra*.

74. *See, e.g.*, *Bonn v. Puerto Rico International Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975); *Movable Offshore Co. v. Ousley*, 346 F.2d 870 (5th Cir. 1965). *See also* cases cited in notes 104-05 *infra*.

75. *See, e.g.*, *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967); *Brabham v. Mississippi*, 96 F.2d 210 (5th Cir.), *reh. denied*, 97 F.2d 251 (5th Cir.), *cert. denied*, 305 U.S. 636 (1938).

76. *See, e.g.*, *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Texas Co. v. Christian*, 177 F.2d 759 (5th Cir. 1949).

77. *Busch, supra* note 2, at 550; *Hullverson, supra* note 9. *Contra*, *Comment, Appellate Remittitur*, 33 Mo. L. Rev. 637, 644 (1968).

78. *Hullverson, supra* note 9, at 98.

irrefutable. A jury verdict becomes a tenuous thing when cloistered appellate judges feel free to tamper with it.

C. After the Remittitur Decision

Once the trial judge decides that a verdict is excessive and that it can be cured by a remittitur in a certain amount, he informs the plaintiff that unless the plaintiff agrees to remit the excess, a new trial will be granted.⁷⁹ The plaintiff can then choose to remit, in which case final judgment is entered in the reduced amount,⁸⁰ or he can refuse to accept a lesser verdict,⁸¹ and a new trial order is automatically entered.⁸²

Both the plaintiff's and the defendant's right to appeal hinge on the plaintiff's decision at this point. If the plaintiff agrees to remit, and a final judgment is entered on the reduced verdict, the defendant has the right to appeal.⁸³ The plaintiff who chooses to remit, however, has traditionally been precluded from appeal on the theory that, by choice, he has acquiesced in the final judgment on remittitur.⁸⁴

79. See, e.g., cases cited in note 26 *supra*. Some courts have ordered plaintiffs to remit without allowing them the option of a new trial, but this practice has always been held impermissible. *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2d Cir. 1975); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974); *Stewart v. Atlantic Pipe Line Co.*, 470 F.2d 738 (5th Cir.), *reh. denied*, 474 F.2d 695 (5th Cir. 1972), *mod.*, 479 F.2d 311 (5th Cir. 1973).

The defendant is never consulted about the remittitur; if the plaintiff agrees to remit, the defendant's new trial motion is automatically denied. See 6A J. MOORE, *supra* note 2, ¶ 59.05[3] n.2, and cases cited in notes 104, 105, and 125 *infra*. The defendant can contest the remittitur order only on appeal from the final judgment which is entered. See, e.g., cases cited in notes 104, 105, and 125 *infra*.

Because the defendant is given no opportunity to voice his objections, there has been a continuing debate over whether remittitur is unfair to defendants. The Supreme Court in *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69, 74 (1889), held that the defendant, having benefited from the plaintiff's decision to remit, had no cause to complain of a remittitur order. Professor Scott agrees: "The defendant should not be allowed to object, for he is not compelled to pay more than the jury might properly award. . . ." A. W. SCOTT, *supra* note 44, at 122.

Professor Carlin sees the defendant's position in a different light:

After the defendant has made his motion for a new trial, he becomes a helpless bystander. . . . [I]t would seem to be something a little short of justice and consistency to tell the defendant that he is entitled to a new trial because the jury has not treated him fairly, and then to tell him that he must forego the privilege because the court and the plaintiff have agreed upon a scheme for disposing of the case without the aid of a jury.

Carlin, *supra* note 2, at 12, 20. Carlin's argument, however, overlooks the fact that the defendant is entitled to appeal the remittitur order. There is, nevertheless, a grain of truth in the argument; it is doubtful that a defendant's objections to a remittitur order can be fully appreciated by an appellate tribunal having no "feel" for the case. The obvious remedy would be a requirement that both parties agree to a remittitur before the reduced verdict is entered as a final judgment. As Professor Carlin notes, "If both parties agree, of course, propriety of the remittitur cannot be questioned." Carlin, *supra* note 2, at 37. While such a requirement of bilateral agreement might be fairer to defendants, it would also increase the courts' caseload since fewer remittiturs—and more new trials—would inevitably result.

80. See, e.g., cases cited in notes 104, 105, and 125 *infra*.

81. See, e.g., *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975); *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972); *Cosentino v. Royal Netherlands S.S. Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968).

82. See, e.g., cases cited in note 81 *supra*.

83. See, e.g., *Neese v. Southern Ry.*, 350 U.S. 77 (1955). The defendant can also appeal on any other appropriate grounds.

84. See notes 91-103 and 151-52 and accompanying text *infra*.

Under the prevailing view, if the plaintiff refuses to remit and a new trial order is entered, he can take no appeal until a final judgment has been entered following the second trial.⁸⁵ (The defendant, of course, cannot appeal from the *granting* of his motion.) Once the final judgment has been entered, however, the plaintiff can, on appeal, challenge the remittitur order that followed the first trial as an abuse of the trial judge's discretion.⁸⁶

The appellate courts, however, seem quite hostile to plaintiffs who refuse to remit. A court will hold that a remittitur from, for example, \$50,000 to \$30,000 was not an abuse of discretion since a reasonable jury might find that amount. In the next breath the appellate court will decide that it was not an abuse of discretion for the judge at the second trial to affirm a verdict of \$5,000 and deny plaintiff's motion for a new trial.⁸⁷

This attitude on the part of the courts of appeals actually makes remittitur unfair to plaintiffs. From the plaintiff's perspective, remittitur may be a coercive device, especially when only a small amount is to be remitted.⁸⁸ The plaintiff would like to keep his entire verdict, but the risk and expense of a new trial are too high. Even if the remittitur is for a

One early Fifth Circuit case, *Chickasha Cotton Oil Co. v. Chapman*, 4 F.2d 319 (5th Cir.), *cert. denied*, 268 U.S. 700 (1925), shows how far the courts have gone with the consent argument and how unfairly litigants have been treated. The defendants had prevailed on a counterclaim, remitted the entire amount on the court's order, and tried to appeal. The court held that

[t]he writ of error of the defendants must be dismissed, for the reason that by entering the remittitur *without protest* and in compliance with the suggestion of the lower court, rather than have the motion of plaintiff for new trial allowed, they thereby acquiesced in that ruling and precluded themselves from seeking a review at the hands of this court. . . . The *voluntary* entering of the remittitur was in effect an *admission* that nothing was due on the cross-action

Id. at 321 (emphasis added). The court's argument clearly strains credulity. The defendant neither "volunteered" nor "admitted" anything. He remitted in order to avoid a new trial in which he might have been adjudged liable; not because he agreed with the amount to be remitted. The court, in effect, gave defendant a choice between the "devil" and the "deep blue sea" and then termed the choice voluntary.

85. *See, e.g.*, cases cited in note 81 *supra*.

86. *Taylor v. Washington Terminal Co.*, 404 F.2d 145, 147 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). *See, e.g.*, cases cited in note 81 *supra*. It has been suggested that in this appeal, as in that of all new trial orders, the reviewability standard should not be as strict as that for review of the denial of a new trial. The theory is that in ordering a remittitur the judge is, in effect, disagreeing with the jury verdict. This remittitur order therefore deserves less deference than the order denying a new trial, since the denial of a new trial is evidence of judge and jury agreement. *Taylor v. Washington Terminal Co.*, *supra*. This less restrictive standard of review has been applied by the Fifth Circuit when reviewing protested, consented-to remittiturs. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1045-46 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972).

87. *See, e.g.*, *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975) (reduction from \$75,000 to \$45,000 no abuse, \$16,000 at second trial affirmed); *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) (reduction from \$85,000 to \$35,000 no abuse, \$19,000 at second trial affirmed); *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972) (reduction from \$15,000 to \$5,000 no abuse, 0 at second trial affirmed); *Cosentino v. Royal Netherlands S.S. Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968) (reduction from \$25,000 to \$12,000 no abuse, \$1,800 at second trial affirmed).

88. If a small remittitur is requested, the plaintiff will be afraid to risk his verdict, yet it is questionable whether such fine lines can be validly drawn. *See* notes 46-48 and accompanying text *supra*.

substantial amount, the plaintiff may reluctantly decide to remit rather than take the chance of losing some or all of the remainder in the second trial.⁸⁹

After the plaintiff has "elected" to remit, his verdict is still not safe: if the defendant decides to prosecute an appeal, the appellate court might grant the second trial that the plaintiff sought to avoid or might even reduce the verdict more by requiring another remittitur. In the appellate court there is no way that the plaintiff can better his position if his consent to the remittitur order precludes an appeal. Some circuits have recently begun to appreciate that this may be unfair to remitting plaintiffs and have allowed them to reserve their right to appeal by filing remittiturs "under protest."⁹⁰

II. REMITTITUR UNDER PROTEST

A. *The Supreme Court Decisions*

The belief that a remitting plaintiff should not be permitted to appeal the propriety of the remittitur order is apparently based on four early Supreme Court decisions, none of which, on analysis, proves very compelling.

The first case was *Kennon v. Gilmer*.⁹¹ *Kennon* contains a statement to the effect that an appeal by plaintiff would not lie from a "voluntary" remittitur,⁹² but the statement is clearly dictum; the lower court had reduced the jury verdict without giving the plaintiff the option of a new trial.⁹³ *Lewis v. Wilson*,⁹⁴ the next of these cases to be decided, involved procedural complexities not likely to be encountered today⁹⁵ and the case should be accorded very little precedential weight.⁹⁶

89. See note 87 *supra*.

90. See notes 104-40 and accompanying text *infra*. Cf. notes 141-50 and accompanying text *infra*. A plaintiff can also appeal a judgment entered on a remitted amount when the trial court orders the remittitur unconditionally. See, e.g., *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2d Cir. 1975); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974); *Stewart v. Atlantic Pipe Line Co.*, 470 F.2d 738 (5th Cir.), *reh. denied*, 474 F.2d 695 (5th Cir. 1972), *mod.*, 479 F.2d 311 (5th Cir. 1973).

91. 131 U.S. 22 (1889).

92. "[I]f the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error. . . ." 131 U.S. at 30.

93. The Court ruled that the reduction of the jury verdict without the plaintiff's consent was improper and that the plaintiff could appeal in this situation. *Id.* at 30. This rule has been followed consistently by the federal courts. See note 79 *supra*.

94. 151 U.S. 551 (1894).

95. The plaintiff remitted and signed an acknowledgment of satisfaction, but tried to prosecute this appeal more than two years later. *Id.* at 554. The defendant had no warning that the plaintiff might seek to have the judgment reviewed and would have been put in the unfortunate position of having to reassemble his case if the appeal had been permitted. This would have been especially inequitable to the defendant who had expressly waived his own right to appeal and was entitled to repose.

96. The remittitur-new trial order in *Lewis* was made at a time when the trial judge would have had no power to grant a new trial. Thus, if the plaintiff had not agreed to remit, it would have been beyond the trial judge's jurisdiction to enter the new trial order. The Supreme Court, however, did not permit the plaintiff to appeal. It is doubtful that a plaintiff would today be foreclosed from appeal by a consent which the trial judge no longer had jurisdiction to request. This would be analogous to a direct appeal from a new trial order when the trial judge had no jurisdiction to order the new trial. See note 53 *supra*.

A more apposite discussion by the Court occurred in *Koenigsberger v. Richmond Silver Mining Co.*⁹⁷ and *Woodworth v. Chesbrough*,⁹⁸ but these too involved procedures that differed in important respects from modern remittitur practice.⁹⁹ In both, the Court's dismissal of the plaintiff's appeal was premised on the notion that the plaintiff had freely elected to accept the certain amount of the reduced award rather than submit to the uncertainties of a new trial.¹⁰⁰ He was said to have "waived all right to object to the order of the Court, . . . the benefit of which he had availed himself."¹⁰¹

A careful analysis of the plaintiff's position in the context of modern federal court procedure, however, does not necessarily lead to the conclusion that the remitting plaintiff reaps such great benefits. By consent to a remittitur, the plaintiff cannot "freeze" his verdict at the reduced amount. He can lose part or all of it on the defendant's appeal and can even be subjected to the uncertainties of a new trial if the appellate court reverses the trial court on the denial of defendant's new trial motion. The advantage that the plaintiff obtains from a remittitur is no more than the *probable* avoidance of the expense and delay of a new trial. Since the appealing plaintiff could lose as well as gain in the appellate court, he is not realistically in the posture that the Supreme Court opinions seem to suggest: "having his cake" in the reduced verdict and "eating it too" on appeal.¹⁰²

97. 158 U.S. 41 (1895).

98. 244 U.S. 79 (1917).

99. Both *Woodworth* and *Koenigsberger* were appellate remittitur cases, and in each the Supreme Court stressed the fact that the plaintiff obtained an "affirmance" of the reduced judgment after he remitted. Apparently, the "affirmance" was no more than an act of the judge who had ordered the remittitur reiterating the fact that the portion of the jury award that remained after remittitur was an appropriate verdict in this case. This may be significant in *Koenigsberger* since the plaintiff actively sought the affirmance and did not in any way put the defendant on notice that he intended to file a writ of error. The plaintiff in *Woodworth*, however, specifically stated in the remittitur he filed that it was "intended to be without prejudice to the plaintiff in any cross proceeding hereafter prosecuted by him." 244 U.S. at 80-81, quoting the plaintiff's remittitur order.

In *Woodworth*, unlike most other remittitur cases, it was the *plaintiff* that sought permission to remit when it became clear that without a remittitur the trial court would grant a new trial on the ground of excessiveness. When a plaintiff tries to repudiate such a remittitur on appeal, it might be argued that his position is more inconsistent than that of a plaintiff who complies with a remittitur order made by the court and later seeks redress in the appellate courts. However, in both cases the judge sets the amount of the remittitur, both plaintiffs feel the same pressures to remit, and both are motivated by the desire to avoid a new trial.

100. 244 U.S. at 82, 158 U.S. at 52. This reasoning has been echoed in at least one modern decision. *Movable Offshore Co. v. Ousley*, 346 F.2d 870, 875 (5th Cir. 1965).

101. 158 U.S. at 52.

102. In *Woodworth* the plaintiff attempted to preserve a right to appeal by stating in his filed remittitur that it was

for the sole purpose of obtaining the entry of a final judgment herein, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to the plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States. . . .

244 U.S. at 80-81. Thereafter, the defendant filed a writ of error, and the plaintiff, a cross-writ.

The Supreme Court disposed of the cross-writ in short order. It noted *Woodworth* is in the somewhat anomalous position of having secured a judgment against *Chesbrough* and yet seeking to retract the condition upon which it was obtained. This he cannot do.

Id. at 82. The Court seems to be saying that since this position would be "anomalous," the

The Supreme Court cases, in sum, offer little guidance. None of the cases is directly on point, and the two cases that come closest to dealing with the issue are grounded in highly questionable logic. To the extent that the lower federal courts adhere faithfully to these supposed precedents, they do themselves and plaintiffs an injustice.¹⁰³

B. *The Fifth Circuit*

The Fifth Circuit is the only circuit to abandon totally the traditional rule that barred appeals by remitting plaintiffs. By now, it is well-settled Fifth Circuit practice that a remitting plaintiff can challenge the propriety of the court's remittitur order by appeal¹⁰⁴ or cross-appeal.¹⁰⁵ No differentiation is made between appeals taken from remittitur orders entered on the trial judge's own initiative and those entered in response to the defendant's new trial or remittitur motions.¹⁰⁶

A Fifth Circuit plaintiff who wishes to appeal can do so only after he has actually remitted.¹⁰⁷ One plaintiff who attempted to "short-cut" the

plaintiff cannot appeal. However, what *Woodworth* did was not "anomalous" at all. The remittitur he filed said, in effect, "I will remit as long as I can cross-appeal if the defendant appeals." When the defendant appealed it was entirely consistent for *Woodworth* to attempt a cross-appeal. Perhaps the Supreme Court was trying to say, "We will not permit conditional remittiturs. Either you remit or you do not." However, if that was its position, the more appropriate disposition of this case would have been to remand so that the plaintiff could elect either to file a remittitur without conditional language or to submit to a new trial. Instead, the Supreme Court ignored the language in the remittitur filed by *Woodworth* and denied the appeal, apparently holding that the filing of a remittitur is effective acceptance of the finding that the reduced verdict is the proper one.

103. Some decisions denying the right of remitting plaintiffs to appeal rely heavily on these Supreme Court cases. *See, e.g., S. Birch & Sons v. Martin*, 244 F.2d 556 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957); *Movable Offshore Co. v. Ousley*, 346 F.2d 870 (5th Cir. 1965). The Fifth Circuit allows appeals by remitting plaintiffs, *see* notes 104-24 and accompanying text *infra*, and has been criticized for its treatment of the Supreme Court cases: "[While *Kennon* and *Lewis*] may be distinguishable on their facts. . . . [i]t is not clear from the Fifth Circuit's discussion how it distinguishes [*Woodworth* and *Koenigsberger*]." *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531, 534 n.2 (2d Cir. 1975). While it is true that some of the Fifth Circuit cases do not even bother to discuss these Supreme Court decisions, *see, e.g., Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972); *Delta Engineering Co. v. Scott*, 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (5th Cir.), *cert. denied*, 377 U.S. 905 (1964), in *United States v. 1160.96 Acres of Land, Holmes County, Mississippi*, 432 F.2d 910, 911-12 (5th Cir. 1970), the court did deal with *Woodworth*. The court does not clearly state that *Woodworth* is inapplicable to modern remittitur cases, but it analyzes the reasoning of the case in such a way that this inference can clearly be drawn. *Id.* at 912.

104. *See, e.g., Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975); *United States v. 1160.96 Acres of Land, Holmes County, Mississippi*, 432 F.2d 910 (5th Cir. 1970); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972); *Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966).

105. *See, e.g., Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974), *reh. and reh. en banc denied*, 512 F.2d 671 (5th Cir. 1975); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973).

106. *Compare Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966), with *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972).

107. *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973).

procedure by appealing the conditional new trial-remittitur order was not permitted to do so.¹⁰⁸

In order to preserve his right to appeal, the plaintiff *must* accept the remittitur conditionally or "under protest."¹⁰⁹ The plaintiff can accomplish this by including a "protest" statement in his remittitur consent form, indicating that he objects to the action of the trial court in making the remittitur order, that his sole purpose in agreeing to the remittitur is to prevent a new trial, and that he does not intend such consent to preclude an appeal.¹¹⁰ If the plaintiff desires a more limited right of appeal, his statement might be to the effect that he agrees to remit, but if the defendant appeals, the plaintiff will cross appeal.¹¹¹ Filing "under protest" serves the important function of putting the defendant on notice that the plaintiff may prosecute an appeal.¹¹²

One aspect of the Fifth Circuit practice which is not entirely clear is whether the plaintiff must refuse to collect the fruits of the diminished verdict in order to preserve his right to appeal.¹¹³ In *Delta Engineering Corp. v. Scott*,¹¹⁴ the court assumed

108. *Id.* Judicial economy was the primary reason enunciated by the *Wiggs* court for requiring the remittitur before the plaintiff could gain access to the appellate court.

By this procedure, the determination of the appeals court would be final. If the remittitur was in order, the plaintiff has agreed to it, the judgment would be final, and no new trial would be required. If the trial court erred in ordering the remittitur, the appellate court could set aside the judgment and order that a judgment be entered on the jury verdict.

Id. at 1283. See also *Dillard Dep't Stores, Inc. v. Fidelity Union Life Ins. Co.*, 508 F.2d 331 (5th Cir. 1975), in which both parties, apparently encouraged by Fifth Circuit remittitur innovations, unsuccessfully tried to appeal from a new trial order.

109. *Minerals & Chemicals Philipp Corp. v. Milwhite*, 414 F.2d 428 (5th Cir. 1969); *Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966). See also *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *United States v. 1160.96 Acres of Land, Holmes County, Mississippi*, 432 F.2d 910 (5th Cir. 1970); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *mod.*, 456 F.2d 180 (5th Cir. 1972); *Delta Engineering Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (1964), *cert. denied*, 377 U.S. 905 (1964).

110. See, e.g., *Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966). Cf. *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973), *discussed* at note 146 *infra*.

111. See, e.g., *Simmons v. King*, 478 F.2d 857, 859 (5th Cir. 1973).

112. See note 95 *supra*. If the defendant knows that the plaintiff might appeal he will not be in the position of having to reassemble a case in which he thought that the litigation had concluded. Filing "under protest" also eliminates the argument that the plaintiff, by remitting, admitted that the trial court's assessment of damages was proper. See note 84 *supra*.

113. Ordinarily a losing defendant will get a stay of execution of the lower court judgment until the appeal proceedings are over. FED. R. CIV. P. 62(d). If the defendant posts a supersedeas bond with the court, he is entitled to a stay of a money judgment as a matter of right. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 385 U.S. 931 (1966). The question of collection of reduced verdicts by a plaintiff prior to appeal comes up only where the defendant did not seek a stay of execution pending appeal. In some cases this may occur because of negligence or lack of concern on the part of a defendant who intends to prosecute an appeal. At other times, however, the defendant may not plan to appeal the remittitur-reduced verdict. The plaintiff might then obtain the fruits of that verdict and subsequently appeal, assuming that he had preserved such right by "protest." Usually, it would seem that a defendant who has been put on notice of a potential appeal by the plaintiff's protested remittitur will himself appeal and obtain the bond.

114. 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (5th Cir.), *cert. denied*, 377 U.S. 905 (1964).

without deciding, that until such time as a plaintiff has actually obtained the fruits of a judgment . . . , he is free to challenge the legal correctness of the Court-enforced remittitur.¹¹⁵

In *Steinberg v. Indemnity Insurance Company of North America*¹¹⁶ the court noted, in an apparent afterthought to its holding that the plaintiff was entitled to an appeal, "[m]oreover, plaintiff has not collected the judgment as reduced."¹¹⁷ The only other remittitur case in which the Fifth Circuit has expressly dealt with this issue was an eminent domain action¹¹⁸ in which the plaintiffs had received the remittitur-reduced amount. The court, in deeming this collection not equivalent to a waiver of right of appeal, stressed the fact that it would be inconsistent with the fifth amendment to deprive the plaintiffs of both the use of their land and the use of their money while the appeal proceedings dragged on.¹¹⁹ Since a similar argument could be made in other remittitur cases on grounds of simple fairness and since the statements in *Steinberg* and *Delta Engineering* were not binding, it is likely that refusal to accept the fruits of the reduced judgment will not be held to be a necessary condition for plaintiff-appeals in the future.¹²⁰

In *Delta Engineering Corp. v. Scott*,¹²¹ the Fifth Circuit noted that if a plaintiff is allowed to challenge a remittitur order by appeal,

the burden is a heavy one and the scope of appellate review correspondingly narrow. . . . A clear abuse of . . . discretion or some extraordinary legal situation must be demonstrated to obtain relief from such action.¹²²

Subsequently the court has established that such abuse will be found only if the jury verdict was within the maximum reasonable range possible¹²³ and that, on appeal, it will be presumed that the amount of the remittitur required by the trial judge is the proper amount to reduce the award to this maximum reasonable verdict unless the plaintiff "can point to credible

115. *Id.* at 15.

116. 364 F.2d 266 (5th Cir. 1966).

117. *Id.* at 268.

118. *United States v. 1160.96 Acres of Land, Holmes County, Mississippi*, 432 F.2d 910 (5th Cir. 1970).

119. *Id.* at 912-13.

120. This seems especially probable since the only purpose of the rule appears to be to keep the defendant from being misled into thinking that the plaintiff was satisfied with the reduced verdict. This notice function, however, is already better served by the filing "under protest" requirement, since "protest" informs the defendant that the plaintiff is definitely dissatisfied and probably intends to appeal.

121. 322 F.2d 11 (5th Cir. 1963), *reh. denied*, 325 F.2d 432 (5th Cir.), *cert. denied*, 377 U.S. 905 (1964).

122. *Id.* at 15-16.

123. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970), *cert. denied*, 407 U.S. 921, *reh. denied*, 409 U.S. 899, *mod.*, 456 F.2d 180 (5th Cir. 1972). This standard is like that adopted in some courts for the review of an order granting a new trial—less strict than that applied when judge and jury both agree on the award. See note 55 *supra*.

evidence which would support a greater recovery."¹²⁴ Thus, although the Fifth Circuit plaintiff is entitled to appeal if he remits "under protest," a reversal of the trial judge's action is not easily obtained.

C. The Sixth Circuit

The Sixth Circuit has permitted a remitting plaintiff to appeal in a diversity case, but it looked to state statutory law for the authority to do so.¹²⁵ In *Mooney v. Henderson Portion Pack Co.*,¹²⁶ the court held that the *Erie* doctrine¹²⁷ made a Tennessee statute,¹²⁸ which provided for such appeals, applicable in the federal courts sitting in Tennessee.¹²⁹ Although the Seventh Circuit has declined to follow similar state statutes,¹³⁰ noting that *Mooney* was decided before the *Erie* doctrine was more clearly explicated in *Hanna v. Plumer*,¹³¹ subsequent cases indicate that *Hanna* will not cause the Sixth Circuit to modify its position.¹³² Apparently, no cases have come to the Sixth Circuit on appeal from the district courts in Kentucky, Michigan, or Ohio,¹³³ and it is unclear whether the circuit will follow state law on remitting plaintiff appeals in non-Tennessee cases.¹³⁴

124. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974), *reh. and reh. en banc denied*, 512 F.2d 671 (5th Cir. 1975). Judge Goldberg in his dissent to the denial of plaintiff's petition for rehearing *en banc*, criticized this standard as putting the burden on the plaintiff to prove that he deserved more rather than on the trial judge to justify the remittitur.

125. *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973); *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964). See also *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974).

126. 334 F.2d 7 (6th Cir. 1964).

127. See notes 63-66 and accompanying text *supra*.

128. TENN. CODE ANN. § 27-118 (1955).

129. In *Bristol Gas & Electric Co. v. Boy*, 261 F. 297 (6th Cir. 1919), the plaintiff remitted "under protest" and attempted to prosecute a cross-appeal, but the court refused to review the trial judge's grant of remittitur "in the absence of a statute providing therefor." *Id.* at 302. Tennessee state statutory law permitted this procedure, but the court held that the statute was not within the federal Conformity Act and could not be applied by a federal court. *Id.* Interestingly, however, the court *did* discuss the merits of the appeal, noting that since the trial court "was well within the limits of a proper discretion, the result would be the same, whether the cross-writ [was] dismissed, or the action complained of affirmed." *Id.* at 302-03.

It is obvious that this court would have liked to follow Tennessee state practice and permit such appeals. With the decision in *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964), its wish became a reality.

130. *Dorin v. Equitable Life Assurance Soc'y of the United States*, 382 F.2d 73 (7th Cir. 1967).

131. 380 U.S. 460 (1965).

132. *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974); *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973). However, the *Erie* question and the state statute were not discussed in either of these diversity cases which came up on appeal from the district courts sitting in Tennessee. The court in *Manning* permitted the appeal on the strength of *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964), while the *Burnett* court entertained the plaintiff's cross-appeal without comment.

133. It has been noted that only six states expressly allow remitting plaintiffs an appeal: Nebraska, New York, Tennessee, and Texas provide for such appeals by statute, while New Jersey and Wisconsin offer this opportunity by judicial action. Note, *Civil Procedure—Remittitur—Remitting Parties' Right to Cross-Appeal*, 49 N.C. L. REV. 141, 141-42 (1970). This is not entirely correct, as an Illinois statute provides that at an appeal by the defendant the remitting plaintiff can assert the correctness of the original jury verdict. ILL. STAT. ANN., ch. 110, § 68.1(7) (1968). This writer was unable to locate any Michigan, Ohio, or Kentucky statute to that effect.

134. The practice of following state law has been severely criticized on the ground that it is solely for the federal courts to decide, within constitutional limits, which appeals it will

The present practice in Tennessee Sixth Circuit cases as derived from the state statute requires that the plaintiff remit "under protest."¹³⁵ He may register this objection to the trial judge's remittitur order orally as well as in writing,¹³⁶ and it appears that he is not required to refuse to collect his reduced judgment in order to preserve his right to appeal.¹³⁷ The trial court remittitur order is subject to review only for abuse of discretion,¹³⁸ and the standard for finding abuse is not as strict as in review of orders denying new trial motions.¹³⁹ As in the Fifth Circuit, no distinction is made between an appeal of a new trial-remittitur order made in response to a motion by the defendant and an appeal of such order entered on the trial judge's own initiative.¹⁴⁰

D. The Other Circuits

Although no other circuit has given its unqualified approval to appeals by remitting plaintiffs, some appear to be straying from the time-honored doctrine that consent, actual or implied, precludes appeal. In a recent decision, *Bonn v. Puerto Rico International Airlines, Inc.*,¹⁴¹ the First

allow and which it will not. C. WRIGHT & A. MILLER, *supra* note 2, § 2802. See notes 63-66 and accompanying text *supra*.

135. *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974); *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973); *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964).

136. In *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964), the plaintiff "announced in open Court that he was accepting the remittitur . . . under protest, and would pray an appeal . . . from the action of the Court in remitting . . . damages awarded by the jury." *Id.* at 8, quoting the order of the district court. The subsequent appeal was permitted.

137. The plaintiff in *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964), had collected his reduced judgment.

138. *Manning v. Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973).

139. *Id.* This is the same standard as that adopted by the Fifth Circuit. See note 123 and accompanying text *supra*.

140. Compare *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973) (remittitur order entered on the trial court's own initiative), with *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964) (remittitur order entered in response to defendant's new trial motion).

One recent Sixth Circuit case, *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974) has created a bizarre and unfortunate twist on the remittitur "under protest" procedure. The trial court ordered remittiturs without giving the plaintiffs the option of submitting to a new trial. *Id.* at 727. Such actions have always been held improper. See note 79 *supra*. These remittiturs were filed "under protest" and appeals were taken all around. On the plaintiffs' cross-appeal, over which the court of appeals assumed jurisdiction, it was held that the remittitur was proper. *Id.* Only then did the court of appeals remand to the district court so that the plaintiffs could be afforded the opportunity of accepting the remittitur or submitting to the new trial. *Id.* at 728.

This is indeed a very curious practice. If the plaintiffs were not given a chance to choose initially, why did they have to remit "under protest"? See note 79 and accompanying text *supra*. Even if that was the proper way to get the issue into the court of appeals, that tribunal should never have ruled on the merits of the remittitur order before the plaintiffs had made their election between remittitur and the new trial. On remand the plaintiffs were in the unique position of knowing how their appeal would turn out before they had to make their choice. In effect, they lost their appeal, but still could have their new trial. This situation is not only clearly bizarre, but is also patently unfair to the defendant.

141. 518 F.2d 89 (1st Cir. 1975). The plaintiffs, administratrix and three children of parents who died in a plane crash, were awarded a total recovery of \$1,385,605 (!) by the jury—\$1,045,000 for their pain, suffering and mental anguish, \$304,605 for economic loss, and \$36,000 for the decedents' conscious pain and suffering. The defendants' motions for new trials or remittiturs were denied except for a \$26,000 remittitur of the award for decedents' pain and suffering! The defendants appealed the other awards as excessive and the plaintiffs appealed the remittitur to which they had consented.

Circuit assumed that "an appeal lies from a consented-to remittitur,"¹⁴² but found it unnecessary to entertain the plaintiffs' appeal since "the district court did not abuse its discretion in ordering a remittitur . . ."¹⁴³ There was no indication in the opinion that the plaintiffs had accepted the remittitur "under protest" or had in any other manner noted that their assent was conditionally given. A single case, however, can hardly be considered conclusive evidence that "protest" will not be required if and when the First Circuit squarely faces the remitting-plaintiff appeal issue.¹⁴⁴

The Third Circuit has also allowed some innovation. A plaintiff attempted to preserve his right to appeal on a consented-to remittitur in *Thomas v. E.J. Korvette, Inc.*¹⁴⁵ The district court permitted the plaintiff to file his remittitur "under protest" but noted that the question of whether the plaintiff could "challenge the propriety of the remittitur, [was] . . . for the appellate tribunal to decide."¹⁴⁶ On appeal the plaintiff's cross-appeal was mentioned but not discussed, since the court of appeals reversed and remanded the case for a new trial on all issues.¹⁴⁷ The appellate court did not, however, reject the contention that an appeal would lie.

The Second Circuit has never expressly permitted appeals from consented-to remittiturs, but its attitude on the subject has been quite equivocal.¹⁴⁸ The court, in *Reinertsen v. George W. Rogers Construction Corp.*,¹⁴⁹ recently reviewed some of the modern remitting-plaintiff appeal procedures but declined to reach a decision until it was faced "squarely" with the issue.¹⁵⁰

142. *Id.* at 94.

143. *Id.* The court of appeals noted that "there was no direct evidence as to decedents' conscious pain and suffering and . . . any suffering that might have occurred could not have lasted more than seconds anyway." *Id.*

144. A problem of notice to defendants might arise if no "protest" is required. A defendant should be entitled to some measure of reliance on a plaintiff's acceptance of a remittitur order. See note 120 and accompanying text *supra*.

145. 329 F. Supp. 1163 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973).

146. *Id.* at 1171. The plaintiff had sought an amendment to his remittitur containing the following language:

[T]he plaintiff's filing of the remittitur shall not be construed to mean that the plaintiff agrees with the court's judgment, and should the defendant thereafter file a notice of appeal, the plaintiff shall have ten (10) days thereafter in which to file a cross-appeal, said cross-appeal preserving to the plaintiff his right to challenge the court's discretion in ordering the remittitur.

Id. at 1170, *quoting* the requested amendment. He had to settle, however, for merely filing "under protest."

147. 476 F.2d 471 (3d Cir. 1973).

148. In *Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941), the court noted that "[t]he action of the trial court in requiring" the plaintiff to elect a new trial or remittitur "if ever reviewable in a federal appellate court, can only be reviewed when there has been a plain abuse of discretion." *Id.* at 223 (emphasis added). On finding no clear abuse of discretion, the court dismissed plaintiff's appeal. *Id.* A few years later, however, in *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949), the court dismissed a plaintiff's appeal from an unprotested, consented-to remittitur in short order. The most recent decision discussing this issue, *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975), indicates that the court may be shifting from the *Mattox* position. See notes 149-50 and accompanying text *infra*.

149. 519 F.2d 531 (2d Cir. 1975).

150. The trial court had ordered a remittitur, but the plaintiff refused to remit and at the

So far as can be determined, no other circuit has ever allowed an appeal by a remitting plaintiff.¹⁵¹ In at least one circuit, the Seventh, remitting plaintiffs have tried to prosecute appeals,¹⁵² but the court has refused to budge. It remains to be seen whether other circuits, if similarly pressed, will prove equally resolute defenders of tradition.

III. EVALUATION OF REMITTITUR UNDER PROTEST

The traditional rules of remittitur procedure effectively coerce plaintiffs into accepting smaller verdicts than the ones to which they believe themselves entitled.¹⁵³ Remittitur under protest is an effective antidote to this coercion. A plaintiff who is permitted an appeal from a consented-to remittitur will not feel obliged to opt for a new trial in order to obtain his "day in court"; on appeal he can rebut the trial judge's findings of excessiveness. The coercive effect of remittitur is reduced: in appealing, the plaintiff risks only the part of his jury verdict in excess of the remittitur-reduced award. Ideally, the workload of the courts is also reduced if plaintiff appeals are allowed, since plaintiffs will opt for new trials less frequently.

Allowing appeals by remitting plaintiffs does not, however, solve all

same time, by a writ of mandamus, tried to waive his right to a new trial and to have the reduced verdict entered as a final judgment from which he could appeal. *Id.* at 533. This was denied, and the ensuing new trial resulted in a much smaller verdict. After that final judgment was entered, the plaintiff appealed claiming *inter alia* that it was error to deny him the right to remit under protest. The court of appeals refused to decide whether remitting-plaintiff appeals would thereafter be permitted in the Second Circuit, noting that here the plaintiff had not tried to remit and then appeal but had instead "sought the issuance of mandamus, a remedy granted by this court only under exceptional circumstances." *Id.* at 536.

151. See, e.g., *S. Birch & Sons v. Martin*, 244 F.2d 556 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957), *relying on* *Lewis v. Wilson*, 151 U.S. 551 (1894). *Lewis*, however, can hardly be considered applicable to a case such as *S. Birch & Sons* in which there was no defendant waiver of right to appeal, no signed acknowledgment of satisfaction, no lengthy delay before attempting the cross-appeal, and no jurisdictional issue. See notes 95-96 and accompanying text *supra*.

152. *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970); *Rothschild v. Drake Hotel, Inc.*, 397 F.2d 419 (7th Cir. 1968); *Dorin v. Equitable Life Assurance Soc'y of the United States*, 382 F.2d 73 (7th Cir. 1967); *Casko v. Elgin, J. & E. Ry.*, 361 F.2d 748 (7th Cir. 1966).

No remitting-plaintiff appeals cases have arisen in the Seventh Circuit for over five years; perhaps the plaintiffs have finally given up.

In one of these cases, plaintiffs attempted to appeal from voluntary, consented-to remittitur. *Casko v. Elgin, J. & E. Ry.*, 361 F.2d 748 (7th Cir. 1966). The court dismissed plaintiff's appeal as improper, citing *Movible Offshore Co. v. Ousley*, 346 F.2d 870 (5th Cir. 1965), a case which the Fifth Circuit later read as holding that a plaintiff appeal would not lie from an *unprotested*, consented-to remittitur. *Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

In two other cases, the remittiturs were filed "under protest." *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970); *Rothschild v. Drake Hotel, Inc.*, 397 F.2d 419 (7th Cir. 1968). In *Rothschild* the court did touch on the merits of the appeal, finding the remittitur order not an abuse of discretion, 397 F.2d at 426, but in *Collum* the court was again steadfast in its adherence to the "no appeal" rule.

Another plaintiff based his cross-appeal on an Illinois statute. *Dorin v. Equitable Life Assurance Soc'y of the United States*, 382 F.2d 73 (7th Cir. 1967). The statute gives the remitting plaintiff access to the appellate courts if and only if the defendant had already appealed. ILL. STAT. ANN., ch. 110, § 68.1(7) (1968). The Seventh Circuit, however, refused to adopt the state rule. 382 F.2d at 79. See note 130 and accompanying text *supra*.

153. See notes 85-90 and accompanying text *supra*.

the problems of traditional remittitur practice—the constitutional and public policy issues are not resolved, and the question of standards to be applied by the trial or appellate courts is not resolved. In some respects the new appeal procedures are not unequivocally helpful and in others they may even create new problems.

Defendants, for example, have valid objections to appeals by plaintiffs. The defendant is told that he can have a new trial if the plaintiff does not remit. The defendant may not agree that the amount of the proposed remittitur is adequate to cure the defective verdict; yet the plaintiff has the privilege of cutting off the defendant's new trial by remitting. Although he must forfeit part of his verdict, the plaintiff still comes out as the winner. The only corresponding privilege the defendant has under traditional practice is the right to prosecute an appeal while the plaintiff is barred. This advantage disappears if the plaintiff is also allowed to appeal. In fact, the scale is tipped heavily in favor of the plaintiff since he has nothing to lose by taking an appeal and everything to gain: if the plaintiff wins on his appeal, his jury verdict will be reinstated; if he loses, he is still permitted to keep the reduced verdict. Even if the defendant prevails on his own appeal the worst possible result for the plaintiff would be a new trial, a possibility which does not turn on whether the plaintiff is part of the appeals process or not. Favoring the plaintiff in this way may be defended on the ground that the court is stepping outside its province to tamper with the jury verdict in the first place and should therefore make amends for such interference.

Additional unfairness to the defendant, however, will occur if the plaintiff is allowed to appeal without filing "under protest," since the defendant will have no notice of the plaintiff's intentions.¹⁵⁴ Some sort of conditional language should be required in order to avoid this danger.¹⁵⁵

The impact of a plaintiff appeal procedure on the workloads of the courts is far from clear. Professor Moore has suggested that plaintiff appeals are basically a waste of time.¹⁵⁶ He noted that when the court of appeals rules that the remittitur order is incorrect, the case is reversed and remanded to the district court for a ruling on the defendant's new trial motion uncluttered by the remittitur question. But the trial judge has already decided that the verdict is excessive and now has been told that the ordered remittitur is improper. There is only one reasonable ruling that the trial court can make at this point—order a new trial—thereby putting the

154. See notes 95 and 112 and accompanying text *supra*.

155. If remittitur under protest became a common practice in all remittitur cases, defendant notification might not be necessary. The defendant would assume, as he now does after an ordinary final judgment is entered, that the plaintiff will appeal.

156. 6A J. MOORE, *supra* note 2, ¶ 59.05[3], at n.42i.

sadder but wiser plaintiff in the same position he would have occupied if he had refused to remit initially. Professor Moore concludes:

It appears, then, that in a jurisdiction in which the standard for a new trial on the ground of excessive verdict is broader than the ground for remittitur, the right to appeal is chimerical unless the court of appeals will rule upon the propriety of the grant of a new trial or decrease the remittitur amount.¹⁵⁷

With all deference to Professor Moore, it is not entirely true that all plaintiff appeals waste time. It is possible that on remand the trial court will order a smaller remittitur or will reinstate the jury verdict. The appellate court may also resolve the issue by reviewing the original verdict, as Professor Moore suggests. In other cases the court of appeals will hold that the remittitur was not an abuse of discretion. Then the plaintiff will necessarily relent without putting his entire verdict on the line and without having to go through the expense and delay of a new trial. In these situations the plaintiff would not find himself in the anomalous position of having prosecuted an appeal to achieve a result more easily obtained by merely refusing to remit.

Even if a remitting plaintiff appeal procedure is not in itself a waste of time, it is highly debatable whether the practice actually reduces the judicial workload or merely shifts the burden from the district courts to the courts of appeals.¹⁵⁸ Arguably, appellate court caseload will increase dramatically. A plaintiff usually does not opt for a new trial unless very dissatisfied, since new trials are expensive and time consuming. Appeals are less costly, and, as noted above, a plaintiff has nothing to lose by appealing, so it seems that such appeals will be taken almost as a matter of course. On the other hand, it is strongly argued that frivolous appeals will not be taken for at least two reasons:¹⁵⁹ (1) the standard of review of the propriety of a remittitur order is abuse of discretion; and (2) appeals are not free. Consideration should also be given to the fact that the busiest circuit in the United States, the Fifth, uses the new procedure,¹⁶⁰ and must therefore believe it to be economical. Finally, it is noteworthy that under traditional remittitur practice, the plaintiff can always appeal the new trial-remittitur order if he first submits to a second trial, and at that point he

157. *Id.*

158. See *Reinertsen v. George W. Rogers Construction Co.*, 519 F.2d 531, 536 (2d Cir. 1975) (discussion of contentions of plaintiff and defendant on this issue).

159. *Id.* at 535 (discussion of plaintiff's contention on this issue).

160. In *Reinertsen*, *id.* at 535-36, Judge Feinberg suggested that statistical studies could answer some of these judicial economy questions. If the percentage of Fifth Circuit remitting plaintiffs who appeal could be compared with the percentage of plaintiffs in "no appeal" jurisdictions who opt for new trials, the relative efficiencies could be evaluated. Unfortunately, the Fifth Circuit maintains no such statistics.

has no more to lose than the remitting plaintiff who directly appeals a remittitur entered "under protest."

CONCLUSION

While the remitting plaintiff appeal procedures employed by the various circuits do solve some of the problems of traditional remittitur practice, there is definitely room for improvement in some areas. As noted above, some variations in appeals practices are especially unfair to the defendant. This problem could be easily solved if all courts which permit plaintiff appeals from consented-to remittiturs adopt certain uniform rules: the remittitur must be filed "under protest" in order to preserve a right of appeal, and in the trial court the plaintiff must be afforded the election of remittitur or new trial. It will also be fairer to the defendant if the plaintiff is not permitted to accept the fruits of the reduced judgment if he intends to prosecute an appeal.

Some of the inherent defects of the traditional "no appeal" rule and of present innovative practices could be cured by an intermediate position on consenting plaintiff appeals—that such appeals should be entertained *only if* the defendant has already appealed in the cause of action. It has been noted that allowing the plaintiff to appeal unconditionally "provides no incentive to achieve finality at trial because the plaintiff's right to appeal is completely independent of the defendant's action following judgment in the lower court."¹⁶¹ On the other hand, permitting only plaintiff cross-appeals but no unilateral plaintiff appeals would encourage the defendant to make a considered appraisal of the merits of his appeal prior to seeking review. The defendant would tend to think twice before prosecuting an appeal which automatically opens the door to the higher court for the plaintiff.¹⁶² The plaintiff would not be able to use remittitur merely to get to the appellate court, since he would not know if the defendant himself would appeal and thereby pave the way for the plaintiff's appeal. Therefore, if the remittitur were totally unacceptable, the plaintiff would opt for the new trial rather than risk preclusion from any further proceedings. The defendant would have the opportunity to end the litigation if the plaintiff agreed to remit. In fact, this would function much like asking the defendant for *his* consent to the remittitur,¹⁶³ certainly a fairer result. The defendant would not be tempted to prosecute frivolous appeals in the hope that the court might reduce the verdict a little more, nor could he proceed one-sidedly on appeal. Either the appellate tribunal would hear both sides of the story or neither.

161. Note, *Civil Procedure—Remittitur—Remitting Parties' Right to Cross-Appeal*, *supra* note 133, at 145.

162. *Id.*

163. *See* note 79 *supra*.

Under this procedure a few more new trials would be elected by plaintiffs than would be chosen if a full, free plaintiff-appeals device were adopted. However, many appeals will be avoided, and this saving should more than compensate for the possibility of more new trials.

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