

IN THE MATTER OF:
THE LOEWEN GROUP , INC. and RAYMOND L. LOEWEN

VS.

THE UNITED STATES OF AMERICA

SUPPLEMENTAL STATEMENT
OF JACK F. DUNBAR, ESQ.

I. Preface

I am Jack F. Dunbar, a practicing Mississippi attorney with the law firm of Holcomb Dunbar, P.A. I previously prepared a Statement in connection with this arbitration, which was submitted in support of the United States' Counter-Memorial. A copy of my resume was provided along with that Statement.

The United States has requested that I give further opinions on certain matters of Mississippi law and trial practice that have been raised by the Claimants in the Joint Reply of Claimants The Loewen Group, Inc. and Raymond L. Loewen To The Counter-Memorial Of The United States (hereinafter "Loewen Reply"). In particular, the United States has asked me to address: (1) the propriety of submitting antitrust claims to the jury in the *O'Keefe* litigation, (2) the propriety of the jury instructions given by Judge Graves with regard to "bias, passion and prejudice," and (3) the handling and reformation by Judge Graves of the initial

verdict rendered in that cause.

As before, in preparing my opinions in this matter, I have reviewed relevant portions of the transcripts of the proceedings conducted by Hinds County Circuit Judge Graves in the *O'Keefe v. Loewen Group* litigation, related documents produced during discovery in this arbitration, submissions by the parties to this arbitration and applicable Mississippi law. Likewise, I have relied upon over forty years' experience as a trial attorney in the Mississippi Court system.

II. Antitrust Claims Under Mississippi Law

It is my considered opinion that Judge Graves appropriately submitted a monopolization claim to the *O'Keefe* jury for consideration, and that the *O'Keefe* plaintiffs adduced sufficient evidence at trial to support such a claim. Questions as to whether particular conduct violates the Mississippi antitrust laws are to be considered on a case-by-case basis by the Courts and do not fall into bright line categories. While the *O'Keefe* plaintiffs' "predatory conduct" theory was tied to the particular facts of the case, Judge Graves' submission to the jury of the question of monopolization was not "legally unsupported" as Loewen and its proffered experts contend that it was.

Aside from the existence of claims which arise under federal law for market monopolization, Mississippi law independently provides for certain statutory causes of action against those who engage in an improper restraint of trade. Miss.

Code Ann. § 75-21-1; 75-21-3.

Loewen, in its submissions to the Tribunal in this matter, has apparently taken the position that the only portion of this statutory provision relevant to the *O'Keefe* litigation was its prohibition against "predatory pricing" as contained in one subsection of the statutes, § 75-21-3(e). Loewen Reply, p. 68-72. Yet, this is simply not accurate. Indeed, while "predatory pricing" claims are in fact encompassed by subsection (e) of the statute, the statute prohibits numerous categories of conduct in addition to that one particular theory. The broadest of the statutes' prohibitions are those against efforts to "[r]estrain or attempt to restrain the freedom of trade or production" and to "monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business." Miss. Code Ann. § 75-21-3(a), (b). In the *O'Keefe* litigation, a general monopolization claim wholly separate from a "predatory pricing" theory was in fact submitted to the jury for consideration. (Tr. 5527-5528).

Since the inception of Mississippi's antitrust statutes in 1892, the Courts have struggled with precisely what sort of conduct is prohibited under the general "monopolization" and "restraint of trade" provisions.

When this statute was enacted, it introduced into the law no new definition of what constituted a "restraint of trade" or "a monopoly." It did not attempt to define either. These are questions to be determined in the

light of the facts of each case . . . As to what does or does not constitute a monopoly within the meaning of the statute is not always easy to decide. The courts must be left to determine these questions when they arise.

Cumberland Telephone & Telegraph Co. v. State, 54 So. 670, 675, 100 Miss. 102, (Miss. 1911). Moreover, because trusts and combines “constitute one of the greatest menaces to public welfare known to modern times,” the Mississippi antitrust statutes are to be

liberally construed to the end that trusts and combines may be suppressed, and the benefits arising from competition in the business reserved to the people of [Mississippi]. The benefits which the Legislature sought to secure to the people of this State were those which naturally flow from competition in business.

Yazoo & M.V.R. Co. v. Searles, 37 So. 939, 942-43 (Miss. 1905).

Otherwise, as the Mississippi Supreme Court has acknowledged that the Mississippi antitrust statutes do not blaze new trails with regard to what constitutes a “restraint of trade” or a “monopoly,” the statute has been interpreted to be generally coextensive with Federal law on the subject. See, e.g., Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068, 1070 n. 5 (5th Cir.1984) (treating Mississippi and federal antitrust claims as “analytically identical”); Hardy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co., 848 F.Supp. 1276, 1291 (S.D. Miss. 1994) (“Moreover, where a court finds no federal antitrust violations, allegations of state law antitrust violations may be dismissed as well.”). Indeed, the Mississippi Supreme Court has acknowledged that the Mississippi statutory

provisions were patterned after the Sherman Act and therefore reference to Federal law in interpreting the statutes is appropriate. See, e.g., National Ass'n for Advancement of Colored People v. Claiborne, 393 So. 2d 1290, 1301 (Miss. 1980). In essence, Mississippi statutory law largely provides an additional vehicle for recovery for antitrust violations already prohibited by Federal law.

As such, there was more than sufficient evidence in the *O'Keefe* litigation for Judge Graves to instruct the jury on a "monopolization" claim. Loewen's tortious breaches of contract, committed with the intent to destroy O'Keefe and thereby eliminate him as a competitor, can be viewed as a form of "exclusionary conduct," as antitrust law generally proscribes "exclusionary conduct" without limiting the types of conduct prescribed:

"Exclusionary conduct" is conduct, other than competition on the merits or restraints "reasonably necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.

Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 475 (5th Cir. 2000) (evaluating antitrust claims based upon *four* different types of exclusionary conduct).

Determination of whether conduct is exclusionary depends upon an evaluation of the proffered business justification for the act. Id. (where conduct has no rational purpose except adverse effect upon competitor). The most important element to any monopolization or attempted monopolization claim is whether the defendant

had a specific intent to monopolize. See, e.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993); Great Western Directories, Inc. v. Southwestern Bell Telephone Co., 63 F.3d 1378, 1385 (5th Cir. 1995) (“Intent may be inferred by anti-competitive practices or proven by direct evidence.”).

Faced with the evidence presented to him, Judge Graves was required to make a determination of whether sufficient evidence existed so that a reasonable juror could find that a violation of Miss. Code Ann. § 75-21-3(a) or (b) had occurred. While the *O'Keefe* plaintiffs may have presented a “monopolization” theory which did not fit squarely into a reported decision under the Mississippi antitrust statutes, Judge Graves was bound to liberally construe those statutes and make his best determination of whether to submit those claims to the jury for consideration. In light of the evidence presented before him, it is my opinion that he properly submitted the monopolization claims to the jury in this case.

Another question raised concerning the *O'Keefe* plaintiffs' antitrust claims arising under Mississippi law was that of their standing to assert those claims. Here again, as a general rule, principles of standing can be addressed with reference to Federal antitrust law. See, e.g., National Ass'n for Advancement of Colored People v. Claiborne, 393 So. 2d 1290, 1301 (Miss. 1980). However, with respect to standing issues, it is important to note that the Mississippi antitrust

provisions are not wholly identical to Federal law and in fact permit a much broader class of plaintiffs to bring suit than Federal law does.

§ 75-21-9. Recovery of damages by private persons

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars (\$500.00), by suit in any court of competent jurisdiction. Said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. Such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit.

Miss. Code Ann. § 75-21-9 (emphasis added). Under Federal law, a plaintiff must demonstrate a *direct* injury by virtue of an antitrust violation. See, e.g.,

Associated General Contractors, Inc. v. California State Council of Carpenters,

459 U.S. 519, 538-41, 103 S.Ct. 897, 908-10, 74 L.Ed.2d 723 (1983); Illinois

Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); Walker

v. U-Haul Co. of Mississippi, 747 F.2d 1011, 1014 (5th Cir. 1984). The

Mississippi antitrust statutes plainly provide that a plaintiff may recover even if

his injury is *indirectly* caused by an antitrust violation. Miss. Code Ann. §

75-21-9.

In light of the particular requirements and boundaries of Mississippi antitrust law, it was not error for Judge Graves to submit a “monopolization” claim to the *O’Keeffe* jury. Both the liberal standing requirements and the express

preference for the broad interpretation of claims under the Mississippi statutes permitted the *O'Keefe* plaintiffs to present their claim in this regard to a trier of fact.

III. Judge Graves' Jury Instructions Regarding "Bias, Passion and Prejudice"

If the instructions given, when read as a whole, fairly announce the law of the case and create no injustice, then this Court will not reverse a trial court's decision concerning jury instructions.

Delahoussaye v. Mary Mahoney's, Inc., 2001 WL 171331, *2 (Miss. 2001); see also, Fielder v. Magnolia Beverage Co., 757 So. 2d 925, 929 (Miss.1999); Splain v. Hines, 609 So. 2d 1234, 1239 (Miss.1992). In light of this deferential standard, trial judges are given very broad discretion in the giving of jury instructions.

Included within this discretion is the ability to refuse instructions which are "fairly covered elsewhere in the instructions." Dorrough v. State, 2001 WL 291175, *3 (Miss. App. 2001) (Cohen v. State, 732 So. 2d 867, 872 (Miss.1998)). One of Loewen's contentions in this matter is that the failure of Judge Graves to give a detailed instruction to the jury to specifically give the Loewen Defendants fair and equal treatment - as opposed to a general instruction to the jury to not to be influenced by bias, sympathy or prejudice - was error.

When looking at the propriety of any particular jury instruction in the *O'Keefe* litigation, it is important to understand the context of the jury instructions

in that case. The controlling Mississippi rule requires a party to “select no more than six jury instructions on the substantive law of the case” and present them to the presiding Judge. Uniform Rule of Circuit and County Court Practice 3.07. The rule permits the presiding Judge, for good cause shown, to allow more than six instructions on substantive law. *Id.* Prior to the instruction conference in the *O’Keefe* litigation, Judge Graves noted that “I’ve had people come in and submit as many as 30 or 40 instructions.” (Tr. 5299). Foreseeing a potential problem with handling proposed instructions in the *O’Keefe* litigation, Judge Graves issued the parties a cautionary warning:

[A]s big as this case is, I will not be giving 20 or 30 instructions for each side to the jury in this case, so you’d better consider which ones you really need and which ones you’ve really got to have, how can you tailor the instruction to the case, because I know it’s complex, and I know its been a long trial, but I can’t see anything that would compel me to grant 30 instructions for the plaintiff and 30 for the defendant unless they’re real short instructions, I mean, two, three lines or something like that, but very long, detailed convoluted instructions in large numbers will not be granted.

(Tr. 5299-5300). Immediately following this statement by Judge Graves, the Plaintiff’s proffered twenty-four (24) instructions and the Loewen Defendants proffered no less than *one hundred and sixteen* (116) jury instructions. (Tr. 5300-5303). Faced with one hundred and forty (140) proposed instructions (as well as the Court’s standard instructions), Judge Graves undertook to distill all of these instructions into a digestible form for the jury. After many of the proposed

instructions were withdrawn and Judge Graves addressed the remainder, the instructions given still fill thirty (30) single-spaced pages of the trial transcript. (Tr. 5506-5536). Upon a review of the entirety of the instructions given by Judge Graves, it cannot be said that the instructions as a whole failed to fairly instruct the jury on the applicable law. As such, and for the reasons below, I cannot agree that the giving of the Model Jury Instruction regarding bias, as well as Judge Graves' failure to give Loewen's proffered bias instruction, was error.

The Court's instruction regarding "bias, sympathy and prejudice" tracked the precise language of Mississippi Model Jury Instruction C.05, which is used in virtually every civil jury trial in the State of Mississippi. (Tr. 5508; MJI C.05). The instruction is a correct statement of Mississippi law and Loewen's counsel agreed. When asked if Loewen had any objection to the Court's proposed instruction, Loewen's counsel affirmatively stated, "There's nothing wrong with this one as it's written . . . We would only request an additional one." (Tr. 5390-5391). After being given another opportunity to object to the Court's instruction, Loewen's counsel replied that he still did not object to the Court's instruction. (Tr. 5391).

As Loewen failed to interpose any objection to the Court's proposed instruction, it waived any opportunity to argue on appeal that the submission of that instruction was error, for "[i]f no objection is made to an instruction at trial,

then a party is procedurally barred from review on appeal." See, e.g., Brown v. State, 2001 WL 271767, *3 (Miss.App. 2001); Edwards v. State, 737 So. 2d 275 (¶ 87) (Miss.1999) (citing Jackson v. State, 684 So. 2d 1213, 1226 (Miss.1996)). Rather, Loewen would be relegated to argue that the failure of Judge Graves to give an *additional* instruction - the one proposed by Loewen - was error. The proposed instruction was cumulative because it did in fact cover the same subject matter and instructed the jury not to let bias, sympathy or prejudice play any role in their decision. The question is whether the given instruction "fairly covered" the topic so as to justify Judge Graves' refusal to give an additional instruction. It is my opinion that it did and was certainly a sufficient predicate for Loewen's counsel to utilize in final arguments regarding the jury's obligation to be fair and impartial.

I would note that a good portion of Loewen's proffered instruction was specifically tailored to instruct the jury not to let prejudice *against the Loewen defendants* affect their decision, instead of instructing the jury to not let prejudice against any party affect their decision. Aside from general principles of fairness that would require that the Judge not give jury instructions which highlight one party over another, the evidence presented before Judge Graves necessitated a more balanced instruction. Indeed, throughout the trial, it is more than apparent that the Loewen defendants attempted to generate sympathy for themselves by

painting the *O'Keefe* plaintiffs as economic protectionists who engaged in an anti-foreigner smear campaign.

Additionally, Judge Graves informed the parties early on that he did not wish to highlight for the jury matters which were not properly before their consideration. (Tr. 44-45) (Judge Graves notes that he denied limiting instructions regarding evidence barred by previous *limine* rulings because “to do so would call unnecessary attention to matters which we had already deemed were at least irrelevant to this point.”); see also Wilhite v. State, 2000 WL 823524, *16 (Miss. App. 2000) (noting that on many occasions, counsel does not want a limiting instruction regarding evidence because “all it would do would be to remind the jury of the prior bad acts and serve to highlight the same.”). The more specifically the jury is told to disregard particular evidence or to not consider particular matters, the more likely jurors are to actually entertain the improper considerations. The concept of individuals being unable to suppress ideas presented to them is certainly not new, as aptly illustrated by the venerable Russian idiom to “not think of a white bear.”

For the foregoing reasons, it is my opinion that Judge Graves' decision to give a neutral instruction regarding bias and sympathy in a simplified manner was appropriate and was not error. Judge Graves was faced with distilling the many weeks of trial and evidence into a palatable form for the jury so that they could

understand the governing law. It was necessary for Judge Graves to streamline all of the instructions in order to provide a workable set for the jury's consideration and the instructions ultimately given in this case still cover thirty pages of transcript.

IV. Reformation of the Verdict by Judge Graves

Loewen also contends that Judge Graves should have declared a mistrial upon learning that the O'Keefe jury's initial verdict of \$260 million was intended to encompass an award of \$100 million compensatory damages and \$160 million punitive damages, even though the jury was not instructed with regard to either the consideration or rendition of a punitive award.¹ By reference to the Special Interrogatory answers returned by the jury, it first appeared that the original verdict was in the total sum of \$260 million in compensatory damages and was broken down in the interrogatories by claim. (A650-A658). However, on the morning that the jury returned to consider punitive damages, the jury foreman forwarded a note to Judge Graves informing the Judge that the jury had already awarded punitive damages. (A659). According to the jury foreman's note, the

¹Interestingly, Loewen did not request Mississippi Model Jury Instruction C-21, which would have made clear to the jury that they were not to consider punitive damages at that stage of the litigation. See Mississippi Model Jury Instruction MJI C-21. It is rare that a defendant does not request this instruction when compensatory damage questions are submitted to a jury. Indeed, Judge Graves indicated that had such an instruction been offered by Loewen, it would have been given. (Tr. 5742).

\$260 million was comprised of \$100 million in compensatory damages and \$160 million punitive damages. (A659). Further confusing the situation was that the jurors had “broken down” the total damage award by claim in their initial verdict but had not indicated the breakdown of their impromptu punitive award.

When faced with these problems, Judge Graves did in fact have several options: 1) declare a mistrial; 2) re-instruct the jury and return them to the jury room to render a new verdict; or 3) reform the verdict to reflect the jury’s intent and proceed with the case.

Judge Graves certainly could have granted a new trial if he felt the jury was substantively confused. Clark v. Viniard By and Through Viniard, 548 So. 2d 987, 991 (Miss. 1989) (jury confusion can serve as basis for granting new trial). In practice, however, mistrials are highly disfavored for mere errors in the form of the verdict because no Judge wishes to nullify all of the time, effort and expense involved in litigation from all sides.

The trial court [is] under the duty to see that loss of time and the expense of the trial should not be nullified by the failure of the jury to put their verdict in proper form.

Adams v. Green, 474 So. 2d 577, 580 (Miss. 1985) (quoting Universal C.I.T.

Credit Corp. v. Turner, 56 So. 2d 800, 803 (Miss.1952)). Rendering for naught a lengthy trial such as the *O’Keefe* litigation would be a substantial waste of judicial resources. As such, trial judges are empowered to take other action - besides

declaring a mistrial - when jury verdicts are not in their proper form. The choice of the Judge between declaring a mistrial or pursuing another remedy such as reformation is a matter left within his sound discretion. Gill v. W.C. Fore Trucking, Inc., 511 So. 2d 496, 498 (Miss. 1987).

The Judge's ability to reform a verdict or return the jury for further deliberations finds its basis in statute. See, e.g., Miss. Code Ann. § 11-7-159 ("If the verdict is informal or defective, the court may direct it to be reformed at the bar."); Miss. Code Ann. § 11-7-161 ("If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation.").

The determinative factor in whether a trial judge reforms the verdict at the bar or returns the jury for further deliberations is whether the jury's intent with regard to the issues presented to it is clearly expressed. Where the intent of the jury is not clear, the appropriate course of action is to return the jury to deliberations and require them to put their findings in proper form. See, e.g., Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 151 (Miss. 1998); Sperry-New Holland v. Prestage, 617 So. 2d 248, 263-64 (Miss. 1993); Harrison v. Smith, 379 So. 2d 517, 519 (Miss. 1980). Where, however, the jury has clearly expressed their intent with regard to the issues submitted to them, but has also addressed matters not submitted the jury, the trial judge is entitled to strike the

surplusage in the jury's verdict and reform the verdict to reflect the jury's intent with regard to issues submitted. See, e.g., Powell v. Thigpen, 336 So. 2d 719, 720 (Miss. 1976) (determining that sending jury back for further deliberation was error in light of clear intent to award plaintiff \$5,000.00 from initial verdict; surplusage should have been ignored by trial court); Poynter v. Trotter, 168 So. 2d 635, 250 Miss. 812 (Miss. 1964).

In essence, the jury is returned to deliberation only where their expressed intent with regard to the issues submitted to them is unclear. Where the intent of the jury is clear, the Court is duty-bound to give it effect. See, e.g., Hill v. Columbus Ice Cream & Creamery Co., 93 So. 2d 634, 230 Miss. 634, 635 (Miss. 1957) ("The evidence and all the proceedings in this case may be looked at in order to ascertain the intention of the jury, and, when that is discovered, it is the duty of the court to give it effect."). By reforming the verdict, the trial court essentially voids the initial verdict rendered by the jury and enters judgment to reflect the true intent of the jury. In the *O'Keefe* litigation, Judge Graves voided the Special Interrogatories initially returned by the jury and entered a general verdict of \$100 million on compensatory damages alone. The remainder of the jury's initial verdict was struck as surplusage. The fact that Judge Graves changed the verdict form from that of Special Interrogatories to that of a general verdict is *non appropo*. See Miss. Code. Ann. § 11-7-157 ("No special form of verdict is

required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein").

In the *O'Keefe* litigation, the jury clearly expressed its intent that it had found in favor of the Plaintiffs and considered an appropriate compensatory damage award to be \$100 million. Indeed, there is no question that this was the jury's intent. (A695) (Jury Foreman's Note to Judge Graves); (Tr. 5739-5744) ("I think this note clarifies what the jury's intent was with regard to an award of compensatory damages which they indicate very clearly in this note was 100 million dollars."). In fact, Judge Graves confirmed that this was the jury's intent when he reformed the verdict. (Tr. 5763). As noted above, where the jury's intent is clear - but the verdict itself is improperly rendered - the trial Court has the power to reform the verdict to reflect the jury's intent and eliminate any surplusage. Indeed, Loewen's own expert, former Justice Hawkins, has acknowledged this fact. See, e.g., Singleton v. State, 495 So. 2d 14, 16 (Miss. 1986) (Hawkins, J.) ("Courts do have the power to correct a verdict obviously irregular and to make it conform to a clear and unequivocal jury intent.").

It was undeniable that the jury did answer the questions presented to it - that of liability and compensatory damage. The mere fact that it decided questions not presented to it, namely punitive damages, did not prevent Judge Graves from

reforming the verdict and entering judgment to reflect the jury's clear intent on the issues appropriately submitted to it. In light of the fact that the jury's intent as to compensatory damages was clear, Judge Graves was left with the discretion to either: 1) declare a mistrial; or 2) reform the verdict as he did. As the matter was one within his sound discretion, it is my opinion that he did not commit error in reforming the verdict in this fashion. Rather, the error committed was that of Loewen's counsel in failing to accept the initial jury's verdict when offered by Judge Graves.

III. Conclusion

Upon review of the record in this matter, it is my considered opinion that: 1) Judge Graves properly submitted antitrust "monopolization" claims to the jury; 2) Judge Graves did not commit error in refusing to give Loewen's proffered jury instruction on "bias and prejudice;" and 3) Judge Graves properly handled the reformation of the jury's initial verdict. The blanket statements of Loewen's proffered experts notwithstanding, none of these asserted "errors" would have served as a valid legal basis for the reversal of the jury's verdict in the *O'Keefe* litigation.


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