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Federal Civil Procedure-Federal Rule 16-Definition of Issues by the Pre-Trial Judge

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FEDERAL CIVIL PROCEDURE—FEDERAL RULE 16—DEFINITION OF ISSUES BY THE PRE-TRIAL JUDGE—Plaintiff instituted a civil antitrust suit against defendant in 1956. After numerous pre-trial conferences, the parties reached agreement as to the definition of only some of the issues.[1] On other issues, however, the parties tendered different versions and were unable to reach an agreement. In a progress memorandum, the court issued a pre-trial order adopting defendant's version of the issues and rejecting the version proposed by plaintiff. The court reasoned that, under Federal Rule 16,[2] it has the authority to adopt the formulation of issues proposed by one of the parties even though the other party is not in complete agreement with that formulation. *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y. 1962).[3]

1 The process of issue definition in the principal case involved two separate ideas. On the one hand, the judge eliminated factual issues about which there was no actual controversy between the parties. An example of this was the treatment of plaintiff's Issue No. 2(e), which raised the issue of ownership of radio stations by some of the defendants. Principal case at 15. The judge eliminated this subsection on the ground that it was not a "real issue," because ownership was not disputed by the defendants. On the other hand, there were certain matters which both parties agreed were in controversy, but they were unable to agree on a specific statement of the points of controversy. For example, the judge eliminated plaintiff's Issue No. 2(l), because it raised the issue of ownership of stock which had been previously included in more general terms in Issue No. 2(c), to which both parties had agreed and which was thus accepted as the proper statement of the issue. Principal case at 16.

2 FED. R. CIV. P. 16: "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) The simplification of the issues . . . . The court shall make an order . . . which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

3 See Note, 72 YALE L.J. 383 (1962).

One of the principal functions of Federal Rule 16 is to encourage the parties to formulate the issues for trial, so the court may then enter an order stating the issues.[4] Formulation of issues, which most authorities in the field of federal civil procedure regard as essential in a protracted case,[5] serves two major purposes at the pre-trial level. First, it furnishes the pre-trial judge with a basis for limiting the parties' discovery. Under Federal Rule 26(b) the parties may examine any material, not privileged, which is relevant to the "subject matter in the pending action."[6] Although some courts have held that the test is one of relevancy to the "subject matter" of the suit,[7] others have indicated that the issues presented by the pleadings alone determine the permissible bounds of discovery.[8] Consequently, issue definition may be an important step in establishing criteria for determining the relevancy of a particular inquiry.[9] This is especially true in protracted litigation such as the "big" antitrust case.[10] Secondly, the pre-trial formulation of issues aids the parties in preparing for trial. By having the issues precisely defined, the parties can more easily determine the evidence and arguments that must be presented, and can avoid preparation on spurious issues.[11] Moreover, the time required for the actual trial may be shortened considerably by the deletion of extraneous matter, with a resulting reduction in expense for both parties. In addition, the trial court will obviously benefit from pre-trial issue formulation—for example, by the reduction of the burden of determining the relevancy, and thus admissibility, of evidence. In spite of these benefits, there is some cause for the parties' reluctance to have the issues clearly stated. This is particularly true of the plaintiff, who usually prefers to have unlimited discovery, hoping to discover unexpected material if unrestricted in the scope of his investigations.[12] Furthermore, by harassing the defendant with requests for discovery, the plaintiff may enhance his position in settlement negotiations, even though his case is actually weak.[13]

It is apparent that a solution to the problem raised in the principal case—judicial definition of the issues when the parties refuse to do so of

4 Owen v. Schwartz, 177 F.2d 641 (D.C. Cir. 1949).

5 *E.g.*, Judicial Conference Study Group on Procedure in Protracted Litigation, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); Judicial Conference of the United States, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1951).

6 FED. R. CIV. P. 26(b). The court may enforce this rule under its power pursuant to FED. R. CIV. P. 30(b) & (d) to enter an order limiting the scope of examination.

7 Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50 (S.D.N.Y. 1951); Heiner v. North Am. Coal Corp., 3 F.R.D. 63 (W.D. Pa. 1942).

8 *E.g.*, Prosperity Co. v. St. Joe Machs., Inc., 2 F.R.D. 299 (W.D. Mich. 1942).

9 Judicial Conference of the United States, *supra* note 5, at 67-68.

10 Judicial Conference Study Group on Procedure in Protracted Litigation, *supra* note 5, at 386.

11 See Holcomb v. Aetna Life Ins. Co., 255 F.2d 577 (10th Cir. 1958).

12 Judicial Conference Study Group on Procedure in Protracted Litigation, *supra* note 5, at 388.

13 4 MOORE, FEDERAL PRACTICE ¶ 26.02[3], at 1037 (2d ed. 1948).

their own accord—must be found. It has been suggested in this context that the judge should take the initiative[14] and actually be a participant in the process of clarifying and limiting the issues.[15] At the same time, it seems to be assumed that the final order stating the issues will be a result of agreement between the parties. Existing authority is unclear as to exactly how much power the judge has to force a pre-trial definition of issues when the parties cannot agree. Professor Moore states that a court should not impose its own view of the issues upon the parties;[16] however, only one case can be cited to support this proposition, and that only indirectly.[17] There was, however, some indication prior to the principal case that courts were tending to assume a larger role in the definition of issues.[18] Illustrative of this trend is *Package Mach. Co. v. Hayssen Mfg. Co.*,[19] in which the court granted defendant's motion to dismiss when plaintiff failed to comply with a pre-trial order to particularize the issues. This was not a defining of issues by the court, but rather a means of forcing the parties to define the issues themselves under Federal Rule 41(b).[20] Although this case did not involve the operation of Rule 16, it exemplifies the general philosophy that a judge does have the power to participate actively in the formulation of issues. The first and only decision, prior to the principal case, in which the court actually entered a pre-trial order defining the issues without complete agreement of the parties,[21] was *Brinn v. Bull Insular Lines, Inc.*[22] The judge had entered a pre-trial order defining the issues which stated that the definition had been obtained by agreement of the parties. Subsequently, the defendant moved to amend the pre-trial order to include the issue of contributory negligence, claiming that he had not intended to admit liability as stated therein.[23] The amendment was denied on the ground that there was no evidence to support the issue, and the court decided instead to delete the phrase "by agreement" from the original order. This seems to indicate that the court felt that it had the power to define the issues absent complete agreement of the parties.

It would appear that the concept of judicial participation in issue formulation espoused by *Brinn* and the principal case is well-suited to achiev-

14 Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937).

15 Judicial Conference Study Group on Procedure in Protracted Litigation, *supra* note 5, at 388.

16 3 MOORE, *op. cit. supra* note 13, ¶16.11, at 1116.

17 Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961).

18 See Bromley, *Judicial Control of Anti-Trust Cases*, 23 F.R.D. 417 (1959).

19 164 F. Supp. 904 (E.D. Wis. 1958), *aff'd*, 266 F.2d 56 (7th Cir. 1959).

20 FED. R. CIV. P. 41(b), which gives the judge the power to dismiss the complaint for plaintiff's failure to comply with any orders of the court.

21 *But see* Note, 72 YALE L.J. 383, 385 (1962), which expresses the opinion that *Brinn* is considerably weakened as precedent for the proposition that a judge may define the issues without complete agreement of the parties, because the parties had reached apparent agreement prior to the issuance of the pre-trial order.

22 28 F.R.D. 578 (E.D. Pa. 1961).

23 The pre-trial order stated that the parties had agreed on the existence of liability and only a question of remedy remained.

ing the purposes of Rule 16. The desirability of these purposes seems to lead to the conclusion that *unilateral* formulation of the issues by the judge might be proper in cases where the parties fail to agree. The opinion in the principal case suggested that the pre-trial judge has the power to do so, although it was unnecessary in this instance.[24] One of the prime reasons for not allowing such a broad power is the lack of restrictions to prevent an arbitrary formulation. Rule 16 contains no express limitations on the judge's power in drawing up the pre-trial order. Thus, restrictions must be self-imposed by the judiciary. In the principal case, for example, the court limited itself to adopting defendant's version of the issues because it found the parties in substantial agreement and sought to build upon that accord.[25] A second reason for not allowing such an unfettered power is that there will ordinarily be no review of such an order available before a decision on the merits, because a pre-trial order is generally not regarded as a final judgment,[26] and review, with the exception of an interlocutory appeal, is limited to final judgments.[27] Subsequent to the issuance of the pre-trial order, the plaintiff in the principal case petitioned for a writ of mandamus to compel the judge to add plaintiff's version of the issues to the order.[28] In a short opinion the court of appeals stated that formal assent of the parties was not necessary for the definition of issues if the judge found that they were in basic agreement, thus indicating that the appellate court approves of the reasoning in the principal case. The court then denied the writ on the basis of a federal policy against interlocutory appeals at the pre-trial stage. Because the parties are usually denied appeal until the final judgment, they run the risk of having the court of appeals find the lower court's formulation of the issues erroneous. Therefore, a long and expensive trial may go for naught, and the parties may face the delay and expense of a new trial on only slightly different issues. A new trial also means an additional burden on the federal district courts—swelling their already crowded dockets.

The aforementioned problems demonstrate the need for some safeguards if there is to be a practicable means by which the judge can break a deadlock in the definition of issues. One such safeguard inherent in the system is the general high quality of the federal bench. This is one of the best possible guarantees against judicial arbitrariness in the definition of issues. Although even a qualified jurist may err, Rule 16 allows him to modify the pre-trial order during the trial if it appears that there will be "manifest injustice" if it is not changed.[29] Perhaps this will be sufficient to prevent any miscarriage of justice. It would probably be better, how-

24 Principal case at 8.
25 *Ibid.*
26 3 MOORE, *op. cit. supra* note 13, ¶ 16.21, at 1132.
27 Interlocutory Appeals Act, 72 Stat. 1770 (1958), 28 U.S.C. § 1292 (1958); See 3 MOORE, *op. cit. supra* note 13, ¶ 16.21, at 1132.
28 Life Music, Inc. v. Edelstein, 309 F.2d 242 (2d Cir. 1962).
29 FED. R. CIV. P. 16.

ever, to revamp Rule 16 to include express limitations on this new-found power, rather than to rely solely on the high quality of the bench to prevent its misuse. One such limitation might involve restricting the judge to accepting the formulation of one or the other of the parties, as was done in the principal case. It is possible that this solution would cause additional problems if the parties were far from agreement and each position had some merit. A variation of the limitation suggested might provide a more appropriate solution. Rather than requiring the judge to accept one of the formulations in toto, he might be permitted to select the portions of each which he considers as correctly defining the issues and combine them in his pre-trial order. Such a limitation should not unduly hinder the court, and at the same time would be more compatible with an adversary system than unilateral formulation of the issues by the judge.

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