



Suggested amendment to FRCP 48

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I suggest that FRCP 48 be amended so that in diversity cases the number of jurors and the percentage that must vote in favor of a decision matches state law.

The reason I think this is justified is that the number one reason diversity cases are removed to Federal Court in Utah is that in Federal Court a jury must be unanimous while in State Court the jury must have (75% in favor of the verdict. This has created a perception amongst the defense bar that verdicts are harder to get in Federal Court than in State Court. Those that see a hung jury as equivalent to a no-cause remove their cases to Federal Court. It is widely believed that unanimous verdicts also result in smaller damage awards. The reason for this is that any single holdout gets veto power in Federal Court whereas in States that require less than a unanimous verdict, any holdout on damages must convince others that he or she is right. If the holdout fails to convince others, the holdout has no power to prevent the verdict.

The amendment I suggest is as follows:

48(b) VERDICT.

48(b)(1) In cases in which jurisdiction is based solely upon diversity of citizenship and unless the parties stipulate otherwise, the verdict shall be determined by the number of jurors that would have been required under the State law where the case would have been tried absent diversity jurisdiction;

48(b)(2) In all other cases, unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.


This existing rule is unfair and is not justified.

Let me give an example. Imagine a case where both litigants are from the State of Utah and the case does not involve any federal question. That case will be tried in State court and a party must receive 6 votes out of 8 jurors to receive a verdict. In the exact same case, in which diversity jurisdiction exists, the case would be tried to a 12 person jury and any verdict must be unanimous. This makes it much more difficult for both the defense and for the plaintiff to get a verdict. The other thing is that it makes compromise verdicts much more likely. If one juror holds out on liability, that juror may be successful in getting other jurors to compromise on damages to win the holdout's vote on liability. It also makes it more likely that a biased or unreasonable juror can influence a verdict, even though that juror is not able to convince any other jurors to follow the holdout.

The result is that the odds of winning the case and the amount of damages awarded are significantly different in diversity cases compared to non-diversity cases. That is not fair and is not consistent with the reason Federal Courts grant diversity jurisdiction in the first place, ie. creating a fair and level playing field for out of State defendants. The existing rule actually gives out of State defendants an advantage over in State defendants, at least in those States that don't require a unanimous verdict.

Put another way, the purpose of diversity jurisdiction is to take away the home field advantage for out of State defendants. Under diversity jurisdiction, the issue is tried under State law. The idea is to create a level playing field and get the same result as if no diversity existed. The result of Rule 48 is to change the game significantly. In practice, in Utah at least, it is the defense who almost always pushes for Federal jurisdiction through removal. They do this for the sole reason that they believe the Federal Rules are more favorable to the defendant than State rules. Specifically, Rule 48 favors the defense because it requires a unanimous verdict. This results in more hung juries and in smaller damage awards. I believe this is true. Thus, the effect of diversity jurisdiction is to change the playing field in favor of the defendant.

This is not right. To fix it, Rule 48 should be amended.

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