

Challenging the Remittitur Order (Donovan v. Penn Shipping Co.)

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FEDERAL JURISDICTION AND PRACTICE

CHALLENGING THE REMITTITUR ORDER

Donovan v. Penn Shipping Co.

Upon determining that an exorbitant jury verdict has been awarded, a trial court judge may grant the plaintiff an election to either voluntarily remit a stated portion of his award or submit to a new jury trial for a redetermination of damages.¹ Pursuant to the traditional rule, a claimant who consents to an order of remittitur following a jury trial waives his right to appellate review of the reduced judgment,² whereas a plaintiff who opts to submit to a new trial cannot challenge the propriety of the remittitur until a final judgment has been entered in the subsequent trial.³ Recently, this longstanding procedural maxim has become the subject of substantial criticism based on both constitutional and equitable considerations.⁴ Against this backdrop, the Second Circuit, in *Donovan v.*

¹ The remittitur device apparently originated in Justice Story's circuit court decision in *Blunt v. Little*, 3 F. Cas. 760 (No. 1578) (C.C. Mass. 1822), and soon became well established in the federal courts. See, e.g., *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970). Such a procedural tool, it is argued, promotes both finality and efficiency in the judicial process. *Evans v. Calmar S.S. Co.*, 534 F.2d 519, 522 (2d Cir. 1976). This practice, nevertheless, has been severely questioned on constitutional grounds as infringing upon the province of the jury in violation of the seventh amendment. See, e.g., *Busch, Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEF. L.J. 521 (1963) (remittitur should only be used in those cases where the jury has returned a verdict which is flagrantly extravagant); *Carlin, Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942) (remittitur practice is inconsistent with one's right to have questions of fact resolved by a jury); *James, Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 DUQ. L. REV. 143 (1963) (remittitur will probably not be overturned despite its questionable constitutional basis); *Comment, Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934). See generally 6A MOORE'S FEDERAL PRACTICE ¶ 59.05[3] (2d ed. 1974); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815 (1973). Despite this concern, and notwithstanding the noticeable lack of precedent for Justice Story's cornerstone decision, the Supreme Court has impliedly approved use of this discretionary procedural device. See, e.g., *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466-67 (1968); *Dimick v. Schiedt*, 293 U.S. 474, 484-87 (1935); *Union Pac. R.R. v. Hadley*, 246 U.S. 330, 334 (1918); *Hansen v. Boyd*, 161 U.S. 397, 411-12 (1896).

² See generally 6A MOORE'S FEDERAL PRACTICE ¶ 59.05[3] (2d ed. 1974); *Comment, Waiver of Right to Appeal*, 39 NEB. L. REV. 739 (1960).

³ See, e.g., *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969). For a discussion of the final judgment rule, see notes 31 & 49 *infra*.

⁴ The traditional reviewability rule has been questioned in several recent cases, see notes 29-38 and accompanying text *infra*, and law review commentary. E.g. *Note, Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976) [hereinafter cited as *Columbia*].

Penn Shipping Co.,⁵ had its first direct opportunity to assess the continued validity of this rather narrow but significant principle of adjective law. Reaffirming the conventional view, a divided panel⁶ held that a litigant who voluntarily accedes to a remittitur "with or without qualifications" is "bound by his acceptance" and may not subsequently challenge the propriety of the reduced verdict.⁷

In 1970, Francis Donovan suffered serious physical injuries while employed by the Penn Shipping Co. Subsequently, he instituted a Jones Act⁸ suit against his employer in the Southern District of New York.⁹ As compensation for his losses, a jury awarded Donovan \$90,000 in damages. In response to the defendant's motion to set aside the verdict as excessive, then District Judge Gurfein found the award to be unreasonable and ordered a new trial unless plaintiff agreed to remit \$25,000.¹⁰ After a one-year delay, the plaintiff, attempting to preserve a right to appeal without having to first submit to a new trial, consented to the remittitur "under protest without prejudice to his right to appeal therefrom."¹¹ Shortly thereafter, Donovan sought review of the judgment entered upon the reduced verdict. The Second Circuit, however, refused to entertain the appeal.¹²

In support of its decision disallowing appeal from an order of remittitur accepted "under protest," the *Donovan* majority stressed two factors.¹³ First, the court emphasized that judicial economy

Note]; Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150 (1975) [hereinafter cited as Duke Note]; Comment, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases*, 43 U. CHI. L. REV. 376 (1976) [hereinafter cited as Chicago Comment].

⁵ 536 F.2d 536 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3347 (U.S. Nov. 1, 1976) (No. 76-613).

⁶ The majority consisted of Judges Lumbard and Hays. Judge Feinberg authored a dissenting opinion.

⁷ 536 F.2d at 538.

⁸ 46 U.S.C. § 688 (1970) provides that any seaman injured "in the course of his employment" has the right to maintain a suit for damages in federal court and guarantees the right of trial by jury in such action.

⁹ *Donovan v. Penn Shipping Co.*, No. 70-3572 (S.D.N.Y. Aug. 6, 1974).

¹⁰ *Id.*, slip op. at 7-8. Judge Gurfein was sitting as a district judge prior to his elevation to the court of appeals.

¹¹ No. 70-3572 (S.D.N.Y. Aug. 6, 1975) (judgment) (emphasis added). The judgment was entered by Judge Werker who was assigned to the case after Judge Gurfein was appointed to the Second Circuit. 536 F.2d at 537 n.1.

¹² 536 F.2d at 538.

¹³ While emphasizing only two aspects of the remittitur controversy, the majority indicated that the Second Circuit had previously considered the problem in detail. *Id.* at 537, *citing* *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531 (2d Cir. 1975), and *Evans v. Calmar S.S. Co.*, 534 F.2d 519 (2d Cir. 1976). Careful analysis of these opinions, however,

indicates that although the *Reinertsen* and *Evans* panels identified the various facets of the remittitur problem, they did not reconcile these considerations. In *Reinertsen*, the plaintiff, an employee injured in an on-the-job accident, received a \$75,000 jury verdict in his favor. The trial judge, however, ordered a new trial unless Reinertsen agreed to remit \$30,000 of his recovery. Refusing to consent to the reduction of his award, the plaintiff opted to submit to a new trial, only to receive a much larger abatement at the hands of a second jury. Upon hearing Reinertsen's appeal, the Second Circuit refused to either set aside the latter damage award as inadequate or reverse the original remittitur. The court also rejected the plaintiff's contention that since he had not had an opportunity to immediately appeal the remittitur, he should now be allowed to accept it in lieu of the second verdict. The court noted that rather than immediately *appealing* the trial judge's remittitur order, the plaintiff sought a writ of mandamus instructing the district court to "enter the . . . [reduced] award in such form that . . . [he could] appeal from such judgment." 519 F.2d at 533. His petition was denied because mandamus is "granted . . . only under exceptional circumstances," *id.* at 536, and the second trial resulted. Thus, since the plaintiff did not appeal from the order, resolution of the reviewability issue was not necessary for a disposition of the case at bar. Nevertheless, the court took the opportunity to analyze both sides of the appealability question, examining earlier pertinent Second Circuit decisions and discussing the practice of the other circuits. *See id.* at 534-35. Writing for a unanimous panel, Judge Feinberg noted that various policy considerations required further investigation before a conclusive determination of the problem could be made. Consequently, the court decided to postpone resolution of the issue until such time as it "squarely" presented itself before the court. *See id.* at 536. In the aftermath of *Reinertsen*, notwithstanding the court's unequivocal statements in its decision, many commentators believed that the Second Circuit was about to depart from the conventional rule. *See Columbia Note, supra* note 4, at 320 n.148; 44 *FORDHAM L. REV.* 845, 850 (1976).

Shortly thereafter, in *Evans*, the Second Circuit was presented with another opportunity to discuss remittitur practice. In that case, the plaintiff had initially received a \$60,000 jury verdict in compensation for personal injuries sustained while employed by the Calmar Steamship Co. Upon the defendant's motion, however, the trial judge found the award to be excessive and ordered a new trial unless Evans consented to remit \$20,000. The plaintiff elected to submit to a new trial. While the second trial was in progress, the claimant belatedly opted to agree to the proposed remittitur. When the defendant agreed, the recently empanelled jury was dismissed and the new trial judge executed an order extending the time for Evans' acceptance of the remittitur to that day. The order, it should be noted, stated that it was without prejudice to claimant's right to appeal following the entry of a final judgment. Subsequently, Evans sought review of the \$40,000 judgment. *See* 534 F.2d at 519-22. The Second Circuit, however, disposed of Evans' appeal as follows:

We hold that by agreeing to accept the remittitur after a jury had been empanelled at the second trial, such action was the equivalent to a settlement of the action and having settled the action there was nothing from which to appeal. . . . Once the plaintiff has elected to go the route of a second trial he must see it through to judgment if he has any desire to complain of what was done either as a result of the first trial, or as a result of the second trial.

Id. at 522. Therefore, as in *Reinertsen*, the court was confronted with a controversy which did not turn upon resolution of the appealability question. Unlike the *Reinertsen* panel, however, the *Evans* court suggested that, when faced with the controversial issue in the future, it would adhere to the deep-rooted traditional rule. *See id.* In authoring the *Evans* opinion, Judge Lumbard expressed the judiciary's view that any alteration in conventional procedure would significantly increase the workload of the appellate courts. *See id.* He contended that the remittitur order often "provides the means" for bringing litigation to an end in that by acceptance of the reduced verdict and payment of the judgment, the expense and inconvenience of a second trial are avoided. *Id.* Should the plaintiff's position be accepted, the court maintained, every plaintiff would be assured of his minimum verdict and would have no reason not to pursue an appeal of the remittitur "under protest." *See id.* Concluding that judicial inefficiency and not economy would be the result, Judge Lumbard expressed

would be best promoted by continuation of the bar against direct appeals¹⁴ from orders of remittitur.¹⁵ If the rule were otherwise, the majority posited, "[t]he proliferation of appeals would be the inevitable consequence," for plaintiffs would freely accept remittiturs "under protest" and then immediately appeal to have their original verdicts reinstated.¹⁶ Second, the court noted that a defendant might be prejudiced by allowing a claimant to bypass a second trial and obtain prompt review of the remittitur.¹⁷ The majority opined that if the first jury's determination of damages is unreasonable, the defendant should not be denied the right to have the issue considered by a second jury.¹⁸ Thus, fearing that a departure from established practice would both prejudice the defendant's right to a jury trial and increase the administrative burdens of an already overcrowded court system, the majority characterized "orders of remitti-

disapproval of direct review of remittitur orders, regardless of whether they were accepted "under protest." See *id.* at 522-23.

" Pursuant to the prevailing practice, a plaintiff faced with a remittitur order normally has but two alternatives. He may refuse to consent to the reduction, in which case a new trial must be held, see, e.g., *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972), or he may choose to accept the reduced verdict and thus hopefully freeze his recovery at the reduced amount, see, e.g., *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665 (5th Cir. 1974). By taking this latter course of action, the claimant is held to have acquiesced in the judgment and waived his right to challenge it on appeal. See generally 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815, at 105-06 (1973). Where the defendant seeks appellate review of the reduced judgment, however, a new avenue for the plaintiff may be opened, viz., the cross-appeal. The Second Circuit has rendered apparently conflicting decisions in this area. Compare *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), cert. denied, 338 U.S. 858 (1949) (denying cross-appeal of remittitur by plaintiff), with *Burris v. American Chiclé Co.*, 120 F.2d 218 (2d Cir. 1941) (indicating that cross-appeal is available). If the *Mattox* case is still viable, a plaintiff in the Second Circuit cannot challenge the propriety of a judge's reduction of a jury award, even by means of a cross-appeal. The distinction between direct appeals and cross-appeals is quite important, for a better argument can be made for allowing a cross-appeal by a remitting plaintiff than a direct appeal since in the former situation the entire dispute will nevertheless be brought before an appellate court by the dissatisfied defendant. Thus, disallowing cross-appeals by remitting plaintiffs certainly does not encourage judicial economy. On the contrary, efficient judicial administration may best be achieved by permitting such appeals, since a defendant may reconsider further challenging an already reduced trial court judgment if he knows that by doing so he will thereby open the door for an appeal by the plaintiff. See generally 49 N.C.L. Rev. 141 (1970).

¹⁴ 536 F.2d at 537. Earlier, in *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531 (2d Cir. 1975), the Second Circuit considered the effect that adoption of the "under protest" rule would have upon judicial economy. As an aid to its determination, the court indicated its desire for the implementation of a statistical study of the district courts to analyze the remittitur problem. *Id.* at 536. While apparently no such study has been made, the *Donovan* court nevertheless reached the conclusion that the "under protest" rule would foster judicial inefficiency. 536 F.2d at 537.

¹⁵ 536 F.2d at 537.

¹⁷ *Id.* at 538.

¹⁸ *Id.*

tur as interlocutory and therefore unappealable," regardless of any qualifications which a plaintiff might attach to his acceptance of such an order.¹⁹

In a lengthy dissenting opinion, Judge Feinberg maintained that the court should allow an appeal by a claimant who relinquishes "his right to a new trial and accepts a remittitur 'under protest.'"²⁰ Declaring that the rights of the parties should take precedence over the desire to foster judicial efficiency, Judge Feinberg emphasized the hardship that the traditional rule works on the plaintiff.²¹ Since the only manner in which a claimant may challenge a trial judge's order of remittitur is by initially "undergoing the risk, delay and expense of a second trial," the dissent maintained that a party confronted with such an order lacks a meaningful opportunity to protest the trial judge's exercise of discretion.²² Believing that a plaintiff's "right to the jury verdict" may not be cast aside so readily, Judge Feinberg questioned the constitutionality of the present practice.²³

After an examination of the plaintiff's plight, Judge Feinberg turned to a consideration of the effect which remittitur has upon the defendant. He noted that a defendant can promptly seek review of a trial judge's refusal to order a new trial or a remittitur.²⁴ Moreover, a defendant may also appeal from the inadequacy of a remittitur that has actually been accepted; thus, a claimant may be forced to face the protracted litigation which he had hoped to avoid by remitting.²⁵ Judge Feinberg concluded that the present remittitur proce-

¹⁹ *Id.* at 537. The majority declared that the plaintiff, having agreed to the reduction, was "bound by his decision just as if he had reached a settlement with his adversary." *Id.* at 536. If a plaintiff seriously objects to the trial judge's diminution of the award, the majority continued, he should refuse to accept the reduction and proceed to a second trial. *Id.*

²⁰ *Id.* at 541 (Feinberg, J., dissenting).

²¹ Judge Feinberg observed:

[The plaintiff] is offered a reduced verdict right away. Should he refuse, in order to regain the full amount of the verdict he must first undergo the delay and trouble of a second trial, perhaps obtain a lower verdict, and then try to persuade an appellate court that the trial judge erred in reducing the first verdict.

Id. at 539 (footnote omitted).

²² *Id.* at 538-39. The dissent suggested that even if a claimant who had refused to accede to a remittitur were to be awarded a higher verdict by the second jury, the trial judge probably would set it aside again. *Id.* at 539 n.4.

²³ *Id.* at 539. See notes 44-47 and accompanying text *infra*.

²⁴ 536 F.2d at 540-41 (Feinberg, J., dissenting). This aspect of remittitur procedure has been utilized frequently by defendants. See, e.g., *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961); *Ballard v. Forbes*, 208 F.2d 883 (1st Cir. 1954); *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952), cert. denied, 345 U.S. 997 (1953); *Sebring Trucking Co. v. White*, 187 F.2d 486 (6th Cir. 1951) (per curiam); *Boyle v. Bond*, 187 F.2d 362 (D.C. Cir. 1951).

²⁵ 536 F.2d at 541 (Feinberg, J., dissenting). It should be noted that there are many cases

ture already favors the defendant, and thus adoption of the "under protest" rule would merely reduce this imbalance.²⁶ Hence, refusing to give much weight to the majority's predictions of an increased appellate workload, cognizant of the coercive effect which the established rule tends to have upon a plaintiff, and sensitive to possible seventh amendment ramifications, Judge Feinberg advocated permitting a plaintiff to challenge remittitur orders accepted "under protest."²⁷

The Second Circuit, in *Donovan*, chose to maintain traditional remittitur procedure notwithstanding the recent criticism which that approach has engendered.²⁸ This criticism, however, has caused other courts to reevaluate the traditional rule.²⁹ Indeed, the Fifth Circuit has completely abandoned this aspect of conventional remittitur practice and now permits a plaintiff to obtain direct appellate review of remittitur orders accepted "under protest."³⁰ In departing from traditional procedure, it was necessary for that court to skirt the imposing barrier to appeal posed by the final judgment rule.³¹ The Fifth Circuit surmounted this obstacle by maintaining

illustrating this facet of traditional remittitur practice. For example, in *Smith v. Welch*, 189 F.2d 832 (10th Cir. 1951), the trial court ordered a \$10,000 remittitur to which the plaintiff agreed. Thereafter, the defendant sought appellate review of the reduced judgment which had been entered in the claimant's favor. The Tenth Circuit, however, held that the \$25,000 recovery awarded to the plaintiff, following the reduction of a \$35,000 jury verdict, was not excessive. *Id.* at 838.

²⁶ 536 F.2d at 541 (Feinberg, J., dissenting), citing Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 526 (1969).

²⁷ 536 F.2d at 541 (Feinberg, J., dissenting).

²⁸ See generally Columbia Note, *supra* note 4; Duke Note, *supra* note 4; Chicago Comment, *supra* note 4. Interestingly, in the latter article, the author distinguishes between cases in which damages can be clearly measured and cases in which no such recovery standards exist, such as personal injury actions. Emphasizing the distinction between matters of law and matters of fact, the author asserts that there is no constitutional barrier to either remittitur or direct remittitur review in those cases where there exist liquidated damages which may be accurately determined by the court as a matter of law. In the other class of cases, however, the author maintains that remittitur itself is an unconstitutional mechanism and that appellate review would merely compound the unfairness "without remedying trial court invasions of the jury's function." Chicago Comment, *supra* note 4, at 397. It would seem preferable, however, that so long as remittitur is used in both situations, a claimant should be able to obtain immediate review in all cases.

²⁹ See notes 30-38 and accompanying text *infra*.

³⁰ See, e.g., *Gilbert v. St. Louis-San Fran. R.R.*, 514 F.2d 1277 (5th Cir. 1975); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921, *modified on other grounds*, 456 F.2d 180 (5th Cir. 1972).

³¹ The final judgment rule, codified at 28 U.S.C. § 1291 (1970), provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." Although causing litigation over the meaning of a "final" decree, the rule does eliminate the problems created by piecemeal adjudication of judicial controversies.

that direct appeal from an order of remittitur does not offend the federal policy against piecemeal review.³² Irrespective of the decision reached by an appellate tribunal, the court maintained, no subsequent trial is needed to conclude the litigation.³³ More specifically, the court reasoned that if the plaintiff succeeds on appeal, the original verdict will be reinstated, whereas should the defendant prevail, judgment will be entered upon the properly reduced verdict.³⁴ The only limitation imposed on this procedure by the Fifth Circuit is that a claimant must unequivocally accept the remittitur "under protest."³⁵ The First³⁶ and Sixth³⁷ Circuits, while not abandoning the

See generally Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557 (1932); Note, *The Finality and Appealability of Interlocutory Orders — A Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037, 1039-40 (1973).

³² See, e.g., *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973).

³³ *Id.* at 1283.

³⁴ *Id.* It should be noted that the *Wiggs* court neglected to consider two other possibilities: The appellate court might (1) alter the amount of the remittitur, or (2) order a new trial. These dispositions are quite uncommon, however, as evidenced by the noticeable lack of illustrative case law.

³⁵ See, e.g., *id.* at 1282; *Minerals & Chems. Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969); *Steinberg v. Indemnity Ins. Co. of N.A.*, 364 F.2d 266 (5th Cir. 1966). Use of the "under protest" language avoids unfairness by providing the defendant with notice of the conditional nature of the plaintiff's acceptance. Although the Fifth Circuit requires that the remitting plaintiff accept "under protest," it is not settled whether he must also refrain from collecting his reduced judgment to preserve the right to challenge the remittitur immediately. Compare *United States v. 1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970), with *Steinberg v. Indemnity Ins. Co. of N.A.*, 364 F.2d 266 (5th Cir. 1966), and *Delta Eng'r Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

³⁶ In *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975) (per curiam), the plaintiff consented, apparently without qualification, to the trial judge's order of remittitur. Upon review, the First Circuit assumed that an appeal would lie from an accepted remittitur. Finding no abuse of discretion on the part of the lower court, however, the appellate court declared that plaintiff's cross-appeal was meritless. *Id.* at 94. Hence, it appears as though the First Circuit will permit a remitting claimant to challenge an order of remittitur, at least by means of a cross-appeal. It remains to be seen, however, whether the First Circuit will extend this holding to direct appeals and require all future remitting litigants to clearly indicate the conditional nature of their consent.

³⁷ In *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964) (per curiam), the Sixth Circuit concluded that a Tennessee statute, TENN. CODE ANN. § 27-118 (1955), allowing a direct appeal from an accepted order of remittitur was applicable to federal courts sitting in that state. Based upon the rationale expressed in *Mooney*, the Sixth Circuit has continued to allow remitting plaintiffs to prosecute appeals in diversity actions where state statutory law permits. See, e.g., *Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974) (per curiam); *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973).

Recently, the Sixth Circuit's procedure of applying state law to determine the availability of an immediate appeal from an order of remittitur has been severely questioned. Contending that the Sixth Circuit's practice represents a misapplication of the rule enunciated in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), commentators have generally agreed that the issue of reviewability of remittiturs accepted "under protest" is one which the federal courts should resolve without recourse to state law. See, e.g., 11 C. WRIGHT & A. MILLER,

traditional rule completely, have also chosen to diverge from conventional practice. It appears, however, that the remaining federal forums have elected to adhere to traditional procedure.³⁸

Although the *Donovan* court's conservative ruling might appear consistent with most precedent, including a few early Supreme Court decisions,³⁹ it is submitted that the Fifth Circuit's approach

FEDERAL PRACTICE AND PROCEDURE § 2802 (1973); Duke Note, *supra* note 4, at 1151-55.

In *Dorin v. Equitable Life Assurance Soc'y of the United States*, 382 F.2d 73 (7th Cir. 1967), the Seventh Circuit was also highly critical of the Sixth Circuit's practice. Emphasizing the policy considerations behind *Erie*, *viz.*, equitable administration of law and the discouragement of forum shopping, and the Supreme Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), wherein the supremacy of federal procedural rules in the federal courts was reaffirmed, the *Dorin* court refused to allow a claimant to take advantage of a pertinent Illinois statute, ILL. ANN. STAT. ch. 110A, § 366(b)(2)(ii) (Smith-Hurd 1976), which allows remitting litigants to prosecute cross-appeals. 382 F.2d at 78-79.

Indeed, in light of the *Hanna* decision, the Sixth Circuit's analysis in *Mooney* appears suspect, for the federal courts should be able to determine the scope of their appellate review independent of state law. Although the application of state procedure might have been acceptable under the "outcome-determinative" test established by *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), whereby state law controlled matters which affected the ultimate outcome of litigation, it is certainly questionable in the aftermath of *Hanna*. It is submitted that given the parameters set by *Erie* and *Hanna*, the application of federal procedural rules for the appealability of remittitur would seem to be proper.

³⁸ See, e.g., *S. Birch & Sons v. Martin*, 244 F.2d 556 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957), wherein the Ninth Circuit agreed that a claimant who had consented to a remittitur was precluded from questioning the validity of the reduction on appeal. The plaintiff, however, apparently attached no qualifications to his acquiescence in the reduced judgment.

Similarly, the Seventh Circuit has rigidly followed conventional practice. See *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). It is interesting to note that in *Collum*, the Seventh Circuit considered and rejected the Fifth Circuit's approach to remittitur review. 421 F.2d at 1259.

It is uncertain, however, whether the Third Circuit still adheres to traditional practice. See *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1171 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973), wherein the plaintiff was allowed to consent to a remittitur "without prejudice to the exercise of what ever right of appeal" he might have. In reversing the district court decision, both parties having appealed, the Third Circuit made no mention of this procedural innovation. Thus, *Thomas* is not clear authority for permitting appellate review of judgments entered pursuant to orders of remittitur, since substantive considerations precluded the circuit court from deliberating on the remittitur issue.

³⁹ See *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Lewis v. Wilson*, 151 U.S. 551 (1894); *Kennon v. Gilmer*, 131 U.S. 22 (1889). Numerous lower federal court decisions upholding the validity of traditional remittitur procedure have relied heavily upon these Supreme Court rulings. See, e.g., *S. Birch & Sons v. Martin*, 244 F.2d 556 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957). See generally 6A MOORE'S FEDERAL PRACTICE ¶ 59.05[3], at 59-63 (2d ed. 1974).

It is submitted, however, that these Supreme Court cases are distinguishable from *Donovan* and therefore should not be controlling. In *Kennon*, it was held that an intermediate appellate court may not enter an absolute judgment for a lesser award than that determined by the jury and thus deprive the plaintiff of an election to either remit or face a new trial. In

is preferable. By stressing only the issues of judicial economy and fairness to defending litigants, the *Donovan* majority appears to have engaged in a rather superficial analysis of the remittitur controversy. While the Second Circuit's reluctance to adopt a rule which might hinder the efficiency of the appellate system is justified, it is suggested that adoption of the Fifth Circuit's "under protest" rule would not produce the detrimental effects which the *Donovan* court envisioned. In view of the rather stringent standard

discussing its ruling, the Supreme Court stated in dicta that an appeal would not lie from a remittitur for which consent had been obtained. 131 U.S. at 30. Clearly, this case does not establish any binding principles applicable to the *Donovan* controversy. Similarly, *Lewis* should not be considered as authoritative precedent for the Second Circuit's holding in *Donovan*, for it involved an attempted appeal by a plaintiff who had actually remitted and signed an acknowledgment of satisfaction two years earlier. *Koenigsberger* is distinguishable in that the remitting claimant attached no conditions or qualifications to his acceptance of the reduced award. *Woodworth*, however, appears to be more analogous to *Donovan*. There, the plaintiff filed a remittitur "intended to be without prejudice . . . in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States . . ." 244 U.S. at 80-81. In narrowly qualifying his consent to the remittitur order, however, *Woodworth* reserved only the right to seek review if the defendant appealed the remittitur order. *Id.* Furthermore, the plaintiff, having suggested the remittitur device to the court on his own motion earlier in the litigation, was apparently quite willing to accept a reduced verdict. *Id.* at 80. Based upon these factors, the *Woodworth* decision should not control a modern court's resolution of the appealability issue. Even if the above arguments are discounted and it is assumed that these four Supreme Court decisions are compelling precedents for *Donovan*, it is submitted that modern judges should thoughtfully reflect upon the wisdom of Justice Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), quoted in *Donovan v. Penn Shipping Co.*, 536 F.2d 536, 540 n.7 (2d Cir. 1976) (Feinberg, J., dissenting).

The Fifth Circuit has been the only federal court to discard established procedural mechanics completely and adopt an "under protest" rule. Interestingly, in adopting this new rule, the Fifth Circuit gave little credence to these old Supreme Court precedents. See, e.g., *United States v. 1160.96 Acres of Land*, 432 F.2d 910, 911-12 (5th Cir. 1970), wherein the court simply assumed that these dated cases were no longer controlling. Moreover, the *Woodworth* case was not even cited in two cornerstone Fifth Circuit decisions. See *Steinberg v. Indemnity Ins. Co. of N.A.*, 364 F.2d 266 (5th Cir. 1966); *Delta Eng'r Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), cert. denied, 377 U.S. 905 (1964). The Second Circuit, in reaffirming the traditional rule, does not appear to have relied on the early cases. In light of this lack of analysis by both circuits, the precedential value of these decisions appears to be suspect. The force of these Supreme Court rulings is further weakened by the Court's decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935). The *Dimick* Court held that additur, the procedure by which a losing defendant is permitted to supplement an inadequate verdict rather than submit to a new trial, is unconstitutional. *Id.* at 477-78. See generally Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition that Damages be Increased*, 3 CAL. W.L. REV. 1 (1967); Note, *Additur: Application and Constitutionality*, 12 HASTINGS L.J. 212 (1960). In the course of its discussion, the Court also evinced some displeasure with the concept of remittitur. 293 U.S. at 482-85. Since *Dimick* is a more recent decision than the old remittitur review cases, it is possible that the Court will take a more restrictive approach towards remittitur in the future.

for appellate review of remittiturs,⁴⁰ it is likely that appeals would be commenced only in situations where the trial judge has clearly abused his discretion. Indeed, the *Donovan* court's predictions of greatly burdened courts of appeals are completely speculative.⁴¹ In the absence of conclusive data, the majority's rejection of a procedure practiced with apparent efficiency in the busiest of the eleven circuits seems premature. Even if the majority's apprehension of an increased appellate caseload is well founded, it should be noted that the "under protest" rule would decrease the burden on the trial courts by eliminating unnecessary second trials.⁴² Consequently, it is suggested that the Second Circuit give adequate consideration to all aspects of remittitur practice, rather than simply adhering to tradition based upon an inadequate examination of the ramifications of direct remittitur appeal.

Forced to choose between accepting a reduced verdict and experiencing the expense and delay of a second trial, the claimant confronted with a remittitur order in the Second Circuit is faced with a truly difficult choice. Many plaintiffs, financially unable to retain counsel or simply unwilling to risk their initial recoveries, are compelled to agree to the reduced award proposed by the trial judge.⁴³ In contradistinction, the "under protest" rule practiced in the Fifth Circuit and advocated by Judge Feinberg substantially mitigates the coercive effects of conventional practice. By allowing the aggrieved plaintiff to accept the remittitur and then challenge the reduction through an immediate appeal, this rule saves him time, money, and considerable anxiety.

It is suggested, moreover, that the "under protest" rule, in affording the plaintiff the right to obtain immediate review of a trial

⁴⁰ See *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 669-70 (5th Cir. 1974), wherein it was clearly asserted that a lower court would be reversed only if the complaining party could establish an abuse of discretion by the trial judge. It is also submitted that the expense involved in prosecuting an appeal will deter most litigants from capriciously challenging accepted orders of remittitur.

⁴¹ As Judge Feinberg maintained in *Donovan*, there is a noticeable lack of substantive data in the area of remittiturs. Hence, judges and commentators can only speculate about the effect the "under protest" rule may have upon judicial economy. 536 F.2d at 541 (Feinberg, J., dissenting). See generally Columbia Note, *supra* note 4, at 322-24; Duke Note, *supra* note 4, at 1161-62; 44 *FORDHAM L. REV.* 845, 850-51 (1976).

⁴² See generally Duke Note, *supra* note 4, at 1161-62.

⁴³ The coercive nature of this conventional procedure is particularly apparent in cases where a fairly small remittitur is suggested. See, e.g., *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949), where a \$5,000 reduction was requested. In such instances, the claimant may very well be unwilling to risk his award. See Columbia Note, *supra* note 4, at 312 n.88. See also Duke Note, *supra* note 4, at 1150.

judge's discretionary reduction of a jury verdict, more fully implements the seventh amendment's mandate that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."⁴⁴ Although impliedly approved by the judiciary on various occasions, traditional remittitur practice rests upon a dubious constitutional foundation,⁴⁵ especially when viewed in light of the Supreme Court's warning that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."⁴⁶ The argument that remittitur may result in an improper limitation on the right to trial by jury is weakened when the "under protest" rule is utilized. It would seem that the time-saving aspect of this rule, *viz.*, the abrogation of the requirement that a plaintiff submit to a second trial before he may obtain judicial review of an order of remittitur, mitigates the impact of any possible constitutional infirmity. A claimant having the ability to accept a reduced verdict "under protest" can bypass the vicious cycle of consecutive new trials which could conceivably be ordered should subsequent juries likewise award a recovery deemed exorbitant by the court.⁴⁷ Thus, by allowing the claimant to avoid the expense, delay, and inconvenience of continued litigation, the "under protest" rule not only ameliorates the coercive effects of traditional practice but also brings remittitur practice more in line with the dictates of the Constitution.

Arguably, a procedure which permits direct appeal of an order of remittitur may be violative of the final judgment rule.⁴⁸ While it appears that the language of that rule, strictly construed, prohibits the plaintiff from appealing a remittitur until final judgment has

⁴⁴ U.S. CONST. amend. VII.

⁴⁵ See note 1 *supra*.

⁴⁶ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (citation omitted).

⁴⁷ This argument has been succinctly enunciated by at least one commentator:

So long as there is no limit to the number of retrials that may be ordered, it would seem that a plaintiff never has a real choice in a remittitur situation. Sooner or later, even the most determined plaintiff will have to get off the retrial treadmill, and the only way to do so is to consent to a remittitur or to its non-judicial equivalent, a settlement. In this sense, all remittiturs involve a forced instead of a free choice; indeed, the whole rationale behind the remittitur procedure is to pressure the plaintiff into taking less than that which a jury has awarded him.

Chicago Comment, *supra* note 4, at 380. As accurately noted by the Chicago commentator, should subsequent juries return excessive verdicts on retrial, the judge could continue to set them aside. See *id.* As a practical matter, however, a judge will rarely order more than one retrial, since it is extremely difficult to justify setting aside a verdict as exorbitant when two juries have found it to be reasonable.

⁴⁸ See note 31 *supra*. For a discussion of the Fifth Circuit's approach to the final judgment rule, see text accompanying notes 32-35 *supra*; note 49 *infra*.

been entered at the conclusion of the second trial, the "under protest" procedure is actually consonant with the basic policy underlying this federal legislation.⁴⁹ Indeed, it is submitted that allowing immediate appeals from interlocutory orders of remittitur would foster finality, efficiency, and economy in the judicial process by preventing subsequent litigation at the trial level.

When one analyzes the proposed "under protest" rule in light of all of its projected ramifications, the conclusion can be drawn

⁴⁹ The primary purpose behind the final judgment rule is to prevent piecemeal litigation of controversies and thereby eliminate unnecessary delay. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949); *Peterson v. Brotherhood of Locomotive Firemen & Enginemen*, 268 F.2d 567, 569 (7th Cir. 1959). Clearly, when a claimant opts to submit to another trial rather than remit, judicial efficiency and finality are thwarted. Moreover, following the second trial, subsequent appeals may be taken by both parties to the litigation. These contingencies, it is submitted, are avoided by the "under protest" rule. In contending that finality is indeed promoted by the new rule, the Fifth Circuit has declared:

[I]f the plaintiff accepts the remittitur under protest, the final judgment entered thereon would be appealable, and the order requiring remittitur could be reviewed in that appeal. 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. Again, no new trial would be necessary to conclude the litigation.

Wiggs v. Courshon, 485 F.2d 1281, 1283 (5th Cir. 1973) (citation omitted). For a mild criticism of the reasoning expressed in *Wiggs*, see note 34 *supra*.

Recognizing the hardship that can result from strict application of the final judgment rule, Congress has created a limited number of exceptions to the finality requirement. For example, 28 U.S.C. § 1292(a)(1) (1970) sanctions review of interlocutory orders granting or denying injunctive relief. Similarly, pursuant to 28 U.S.C. § 1292(b) (1970), if "a district judge, in making in a civil action an order not otherwise appealable . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," he may certify the issue to permit an interlocutory appeal which the court of appeals has discretionary power to hear. There are also a small number of judicially created exceptions to the final judgment rule. See, e.g., *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (review of order allowed where that order is necessary for continuation of the litigation); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (review of collateral orders permitted where irreparable harm will result if the appeal is denied); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) (appeal lies from interlocutory order directing the transfer of physical property); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (appeal sanctioned where the district court order would otherwise terminate the litigation). In engrafting these judicial exceptions, the major inquiry has involved a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974), quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Measured against this standard, it is suggested that the "under protest" rule could conceivably constitute a new judicial exception to the finality rule, since allowing immediate appeals from orders of remittitur would promote justice without fostering delay or inefficiency.

that such a procedural mechanism will best serve the interests of justice. By providing aggrieved claimants with a realistic opportunity to challenge a trial court judge's discretionary use of the remittitur device, it is submitted that the rights of litigants will be better balanced⁵⁰ and federal practice brought further within the guidelines of the seventh amendment.⁵¹ Hopefully, when again faced with an opportunity to rule on the appealability of judgments entered pursuant to remittitur orders, the Second Circuit will reconsider and perhaps reverse the *Donovan* decision.⁵²

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Editor's Note. As *The Second Circuit Note* goes to print, the Supreme Court has granted certiorari and summarily affirmed *Donovan*. 45 U.S.L.W. 3565 (U.S. Feb. 22, 1977) (per curiam). Although the Court rejected the "under protest" rule, it failed to explore the many ramifications of traditional practice. Had oral arguments been permitted, perhaps the Court would have recognized the coercive nature of conventional procedure and reassessed the precedential value of the dated decisions upon which it exclusively relied.

⁵⁰ In fact, the "under protest" rule merely gives the plaintiff the same right and ability to appeal that the defendant has always enjoyed. See notes 24-26 and accompanying text *supra*.

⁵¹ Permitting the plaintiff to seek direct review of a remittitur, thereby depriving his adversary of a second jury trial, is a concern which has been emphatically voiced by many defendants. See, e.g., Brief for Appellee at 5, *Evans v. Calmar S.S. Co.*, 534 F.2d 519 (2d Cir. 1976). Should the plaintiff be successful on his appeal, it is argued, the excessive jury verdict will be reinstated; however, even if the plaintiff loses on appeal, he will be guaranteed the reduced verdict. *Id.* at 522. See generally *Columbia Note, supra* note 4, at 322. Judge Feinberg, however, addressing this issue in his dissent in *Donovan*, pointed out that if the remitting claimant loses on appeal, the already reduced recovery is theoretically a justifiable one. 536 F.2d at 540 (Feinberg, J., dissenting). In addition, it is submitted that should the appellate court find the trial judge to have abused his discretion in ordering the remittitur, reinstatement of the original verdict does not prejudice the defendant.

⁵² It is interesting to note that several states have adopted liberal approaches to appeals from remittiturs. See *Mulkerin v. Somerset Tire Serv., Inc.*, 110 N.J. Super. 173, 264 A.2d 748 (App. Div. 1970) (review of remittitur order permitted on cross-appeal); *Plesko v. City of Milwaukee*, 19 Wis. 2d 210, 120 N.W.2d 130 (1963) (cross-appeal allowed); ILL. ANN. STAT. ch. 110A, § 366(b)(2)(ii) (*Smith-Hurd* 1976) (direct appeals permitted); NEB. REV. STAT. § 25-1929 (1943) (cross-appeals allowed); N.Y. CIV. PRAC. LAW § 5501(a)(5) (*McKinney* 1963) (cross-appeals allowed); TENN. CODE ANN. § 27-118 (1955) (acceptance "under protest" and direct appeals sanctioned); TEX. R. CIV. P. 328 (cross-appeals permitted). See generally 49 N.C.L. REV. 141 (1970).