Waived your right to trial by jury in federal court? Relief is likely available under Rule 39(b).

John Collier
Balch & Bingham LLP

***John Collier** is an associate at Balch & Bingham LLP in Birmingham, AL. John works on a variety of civil litigation matters for institutional, private, and agency clients. He assists clients during all phases of litigation in both state and federal courts.*

Steven Corhern
Balch & Bingham LLP

***Steven Corhern** is a partner at Balch & Bingham LLP in Birmingham, AL and his practice focuses on toxic torts, e-discovery, and insurance coverage both in Alabama and nationally. He is currently an adjunct e-discovery professor at the Cumberland School of Law. Before joining Balch, Steven clerked for the Honorable Emmett R. Cox on the Eleventh Circuit.*

Under Federal Rule of Civil Procedure 38, parties waive their right to a trial by jury if no demand is made within 14 days of the last allowed pleading. Is such a waiver final? Often, it is not. This article discusses when a waiver occurs and how a party can request a jury trial out-of-time.

First Question: Have you waived your right to trial by jury?

The Constitution and the Federal Rule of Civil Procedure express a strong preference for trial by jury. The Seventh Amendment provides for the preservation of the right to a jury trial in all suits at common law wherein the value in controversy exceeds twenty dollars. And Federal Rule of Civil Procedure 38 provides "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate" and that, unless otherwise specified, a jury demand "is considered to have demanded a jury trial on all the issues so triable."[1]

When evaluating whether you need to request relief under Rule 39(b), you should first ask whether you have even waived your right to trial by jury? If only a Complaint and Answer were filed and no demand was made within 14 days of the last pleading, then the answer is yes.

But what if a demand was made and a party later asserts a counterclaim, cross-claim, or third-party claim? The answer should turn on whether the "new" claim includes issues covered by the original jury demand.

To illustrate, a party's complaint demands a jury trial on a breach of contract claim. The defendant counterclaims but neither the Counterclaim nor the Answer thereto includes a jury demand. Does the original demand apply to the counterclaims? The compulsory or permissive nature of the counterclaim should decide the issue. For compulsory counterclaims, the original jury demand should apply.[2] For permissive counterclaims, on the other hand, the demand should not apply and the parties will have waived their right to a jury trial on those counterclaims.

Second Question: What is your Circuit's approach to Rule 39(b)?

Assuming a waiver has occurred, Rule 39(b) allows courts to permit an out-of-time jury demand. The Rule provides:

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> Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

As a general rule, district courts have broad discretion to decide Rule 39(b) motions. The federal circuit courts take one of three approaches to relief under Rule 39(b). First, some circuits only allow under Rule 39(b) relief upon a showing of good cause. These circuits include the Second Circuit, Third Circuit, Seventh Circuit, and Ninth Circuit. On the other end of the spectrum, some circuits favor granting Rule 39(b) relief unless there is a good reason not to do so. The Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits follow this approach. The First and Fourth Circuits have adopted a more neutral approach. They give district courts essentially unfettered discretion to either grant or deny Rule 39(b) motions.

CIRCUIT	APPROACH
First Circuit	District courts have nearly unbridled discretion to either grant or deny Rule 39(b) motions.
Second Circuit	District courts will not grant Rule 39(b) motions for mere inadvertence.
Third Circuit	District courts will not grant Rule 39(b) motions for mere inadvertence.
Fourth Circuit	District courts have nearly unbridled discretion to grant or deny Rule 39(b) relief.
Fifth Circuit	District courts should grant Rule 39(b) motions absent strong and compelling reasons to the contrary.
Sixth Circuit	District courts should grant Rule 39(b) motions absent strong and compelling reasons to the contrary.
Seventh Circuit	District courts will grant Rule 39(b) motions only upon a showing of good cause.
Eighth Circuit	District courts ought to liberally grant Rule 39(b) motions for jury trials as long as it does not prejudice the opposing party.
Ninth Circuit	District courts will not grant 39(b) motions when the only justification for the untimely demand is oversight or inadvertence.

Tenth Circuit	District courts should grant Rule 39(b) motions absent strong and compelling reasons to the contrary.
Eleventh Circuit	District courts should grant Rule 39(b) motions absent strong and compelling reasons to the contrary.

As the above chart shows, the burden for obtaining relief under Rule 39(b) varies by circuit. In some, the party requesting relief has the burden to show good cause and in others, relief should be granted absent a compelling reason. A note to Supreme Court litigators, this circuit split looks ripe for resolution.

In requesting Rule 39(b) relief, you should emphasize your circuit's standard, especially if you are in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.

Third Question: What factors will the Court balance in deciding Rule 39(b) relief?

Courts will apply a balancing test in resolving a request for Rule 39(b) relief. While these tests are similar, the specific articulation of the factors vary. Accordingly, it is important to identify the specific factors used in your circuit.

To illustrate, the Eleventh Circuit uses the five-factor test set forth in *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983). According to the *Parrott* test, courts should consider: "(1) whether the case involves issues which are best tried to a jury; (2) whether granting the motion would disrupt the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial."[3] The Tenth Circuit applies similar factors.[4]

The Second Circuit, however, focuses on "excusable neglect" and considers four factors: "(1) prejudice to the other party, (2) the reason for the delay, (3) the duration of the delay, and (4) whether the movant acted in good faith."[5] The Fourth Circuit also applies a four-factor balancing test: "(1) whether the issues are more appropriate for determination by a jury or a judge (i.e., factual versus legal, legal versus equitable, simple versus complex); (2) any prejudice that granting a jury trial would cause the opposing party; (3) the timing of the motion (early or late in the proceedings); and (4) any effect a jury trial would have on the court's docket and the orderly administration of justice."[6]

Regardless of the test used, courts will pay special attention to the reason the party requesting Rule 39(b) relief was late and any prejudice to any non-requesting parties.

Accordingly, lawyers should take care to explain carefully and completely the reason for the delay and proactively dispel any appearance of gamesmanship or bad faith.

Conclusion

Waiver of the right to trial by jury under Rule 38 is seldom final. If ever confronted with this situation, ask yourself the following three questions and then prepare and file a Motion for Relief under Rule 39(b) (or a Motion for Clarification of the scope of the original jury demand) as soon as possible.

1. Have I waived my right to a jury trial?
2. What is my circuit's approach to Rule 39(b) relief?
3. What factors will the Court balance?

Endnotes

1 *See* Fed. R. Civ. P. 38(a) & (c).

2 *See Coach Servs., Inc. v. 777 Lucky Accessories, Inc.*, No. 09-61590-CIV-MORENO, 2010 WL 2427432, at *1 (S.D. Fla. June 16, 2010); *Bentler v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 959 F.2d 138, 141 (9th Cir. 1992); *Newport Yacht Club v. City of Bellevue*, No. C09-0589-MJP, 2012 WL 254013, at *3 (W.D. Wash. Jan. 27, 2012); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994); *Transocean Air Lines v. Pan Am. World Airways, Inc.*, 36 F.R.D. 43, 45 (S.D.N.Y. 1964).

3 *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983).

4 *See McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp.*, 2008 WL 4936311, *3 (N.D. Okla. 2008).

5 *See Amerisource Corp. v. RX USA Intern., Inc.*, 2008 WL 2783355, *1 (E.D. N.Y. 2008).

6 *See Lawrence v. Con-Way Freight, Inc.*, No. 2:12-CV-2392, 2012 WL 5330984, at *2 (S.D.W. Va. Oct. 29, 2012).