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Resolving Inconsistencies in Federal Special Verdicts

RESOLVING INCONSISTENCIES IN FEDERAL SPECIAL VERDICTS

INTRODUCTION

Juries are normally requested to return a general verdict[1]—a finding for or against the plaintiff that does not state the grounds for the jury's decision.[2] General verdicts have been described as being "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."[3] One way to draw back the veil of secrecy, thereby revealing the jury's conclusion on each issue in a case, is through the use of special verdicts. A special verdict is composed of responses by the jury to a series of questions submitted by the court.[4] The questions should cover all the material issues in a case.[5] Rule 49(a) of the Federal Rules of Civil Procedure (Federal Rules)[6] governs the use of special verdicts in

1. *See* Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Boyce v. Pi Kappa Alpha Holding Corp., 476 F.2d 447, 453-54 (5th Cir. 1973) (Brown, C.J., concurring); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2501, at 484 (1971).

2. *See* Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30 (1962); Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644 (11th Cir. 1984); Jones v. Miles, 656 F.2d 103, 106 & n.3 (5th Cir. 1981); Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 662 (1st Cir. 1981); Morrissey v. National Maritime Union of Am., 544 F.2d 19, 27 (2d Cir. 1976); Barzelis v. Kulikowski, 418 F.2d 869, 870 (9th Cir. 1969); Albergo v. Reading Co., 372 F.2d 83, 85-86 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967).

3. Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 258 (1920); *see* Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780, 790 n.11 (D.C. Cir. 1982); Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 60 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

4. *See* Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985); Bates v. Jean, 745 F.2d 1146, 1149 (7th Cir. 1984); Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 572 (3d Cir. 1983); Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); McCollum v. Stahl, 579 F.2d 869, 870-71 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979); SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 988, 1021-27 (D. Conn. 1978), *aff'd and remanded*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

A special verdict consists of the group of responses from the jury. Each answer in itself is not a special verdict. The jury returns a single special verdict, not special verdicts. *See Quaker City*, 747 F.2d at 1453.

5. *See* Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 643 (11th Cir. 1984); Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1005 (6th Cir. 1983); Martinez v. Union Pac. R.R., 714 F.2d 1028, 1032 (10th Cir. 1983); Simien v. S.S. Kresge Co., 566 F.2d 551, 555 (5th Cir. 1978); National Bank of Commerce v. Royal Exch. Assurance of Am., Inc., 455 F.2d 892, 898 (6th Cir. 1972); 9 C. Wright & A. Miller, *supra* note 1, § 2506, at 499.

6. Fed. R. Civ. P. 49(a) states:

> Special Verdicts.
> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it

federal courts.[7] District court judges have broad discretion over whether the special verdict procedure should be used[8] and what form the questions and accompanying instructions should take.[9]

Special verdicts have many advantages over general verdicts. Special verdicts reduce jury confusion in factually and legally complex cases by identifying and organizing the issues in the case[10] and by simplifying the

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deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

7. Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 723 (Fed. Cir. 1984); Johnson v. Richardson, 701 F.2d 753, 758 (8th Cir. 1983); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Smith v. Danyo, 585 F.2d 83, 87-88 (3d Cir. 1978); Sadowski v. Bombardier, Ltd., 539 F.2d 615, 622 (7th Cir. 1976); Gonzales v. Missouri Pac. R.R., 511 F.2d 629, 632 (5th Cir. 1975).

8. Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 643 (11th Cir. 1984); Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515 (Fed. Cir.), *cert. denied*, 105 S. Ct. 220 (1984); Kazan v. Wolinski, 721 F.2d 911, 915 (3d Cir. 1983); Martinez v. Union Pac. R.R., 714 F.2d 1028, 1032 (10th Cir. 1983); Garwood v. International Paper Co., 666 F.2d 217, 222 (5th Cir. 1982); Hammerquist v. Clarke's Sheet Metal, Inc., 658 F.2d 1319, 1322-23 (9th Cir. 1981), *modified on other grounds sub nom.* Sarkisian v. Winn-Proof Corp., 688 F.2d 647 (9th Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983); Estate of Spinosa v. International Harvester Co., 621 F.2d 1154, 1162 (1st Cir. 1980); Davis v. Oberholtzer, 588 F.2d 243, 246 (8th Cir. 1978); Sadowski v. Bombardier, Ltd., 539 F.2d 615, 622 (7th Cir. 1976); Turchin v. D/A A/S Den Norske Afr., 509 F.2d 101, 104 (2d Cir. 1974); National Bank of Commerce v. Royal Exch. Assurance of Am., Inc., 455 F.2d 892, 898 (6th Cir. 1972).

9. Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549, 1560 (11th Cir. 1984); Solis v. Rio Grande City Indep. School, 734 F.2d 243, 248 (5th Cir. 1984); Cann v. Ford Motor Co., 658 F.2d 54, 58 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Davis v. Oberholtzer, 588 F.2d 243, 246 (8th Cir. 1978); Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1060 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976); Perzinski v. Chevron Chem. Co., 503 F.2d 654, 660 (7th Cir. 1974); National Bank of Commerce v. Royal Exch. Assurance of Am., Inc., 455 F.2d 892, 898 (6th Cir. 1972); R.H. Baker & Co. v. Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir. 1964); Thorp v. American Aviation & Gen. Ins. Co., 212 F.2d 821, 830 (3d Cir. 1954).

10. For example, in SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978), *aff'd and remanded*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982), two photocopier manufacturers were involved in an antitrust suit concerning patent violations. *See id.* at 985-87. Evidence was presented for 215 days, summations consumed almost five days, the jury deliberated for 38 days, and the trial transcript totaled 46,082 pages. *Id.* at 986. The jury's verdict consisted of responses to 54 questions that outlined the issues in the case. *Id.* at 986, 1021-27. The trial judge stated that "the sheer volume and complexity of the evidence necessitated focusing the jury's attention on specific issues to be sure that orderly decision-making occurred." *Id.* at 988. For other comments on the utility of special verdicts in complex cases, see Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644 (11th Cir. 1984); Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Cote v. Estate of Butler, 518 F.2d 157, 160 (2d Cir. 1975); Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 345 (1968); McCormick,

instructions given to the jury.[11] Judicial economy also favors special verdicts over general verdicts. If error affects a general verdict, the entire verdict collapses and all the issues in the case must be relitigated.[12] If a special verdict is used, however, error may only affect a few of the jury's findings, thus limiting a second trial to the issues covered by the tainted findings.[13] In some instances, because a special verdict reveals the grounds for the jury's decision, a second trial can be avoided altogether.[14]

Jury Verdicts Upon Special Questions in Civil Cases, 2 F.R.D. 176, 181 (1943); *cf.* Lubasch, *Jurors Back Sharon on 2d Key Point in Libel Trial*, N.Y. Times, Jan. 19, 1985, at A1, col. 4 (commenting that Judge Sofaer decided to use a special verdict rather than a general verdict because it was the most orderly procedure for the complex case).

11. *See* Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 724 (Fed. Cir. 1984); Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); 2 J. Moore, A. Vestal & P. Kurland, Moore's Manual—Federal Practice and Procedure § 22.08[1], at 22-78 to -79 (1982); Brown, *supra* note 10, at 345-46. For an example of the clarity that special verdicts bring to a case, see the comparison between a typical special verdict form and a typical general verdict form in McCormick, *supra* note 10, at 178-79.

12. *See* Jones v. Miles, 656 F.2d 103, 108 (5th Cir. 1981); Mueller v. Hubbard Milling Co., 573 F.2d 1029, 1038-39 (8th Cir. 1978), *cert. denied*, 439 U.S. 865 (1978); 5A J. Moore, Moore's Federal Practice ¶ 49.02 (2d ed. 1984); Sunderland, *supra* note 3, at 259; *see also* Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1546 (Fed. Cir. 1983) (The "naked general verdict . . . involves a presumption that the jury found the facts and reached the legal conclusions undergirding its verdict. [This] practice [leaves] a wide area of uncertainty on review [and] appellate judges have expressed grave concern over use of the general verdict in civil cases.").

13. *See* Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 & n.6 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Pritchard v. Liggett & Myers Tobacco Co., 370 F.2d 95, 95-96 (3d Cir. 1966) (per curiam), *cert. denied*, 386 U.S. 1009 (1967); Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 93 & n.31 (5th Cir. 1966); Hennigan v. Atlantic Ref. Co., 282 F. Supp. 667, 672 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); Brown, *supra* note 10, at 348. The inefficiency that can result when special verdicts are not used is apparent in Jones v. Miles, 656 F.2d 103 (5th Cir. 1981). In that case the defendants were charged with securities laws offenses and common law fraud. *Id.* at 107. The court of appeals remanded the case for a retrial because the district court had failed to instruct the jury on the defense of waiver of fraud. *See id.* at 107-08. If a special verdict had been used instead of a general verdict, the retrial could have been limited to the waiver of fraud issue. The court of appeals stated: "Had special verdicts been submitted to the jury, this error could have been localized thereby permitting the valid portions of the original verdict to be salvaged." *Id.* at 108.

14. For example, in Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635 (11th Cir. 1984), the case went to the jury on the theories of negligence, gross negligence, and fraud in the inducement of the contract. *Id.* at 644. The jury was given a special verdict form that requested a specific finding on each theory of recovery. *Id.* The court of appeals determined that the fraud theory was not a valid basis for recovery and should not have been submitted to the jury. *See id.* at 645. If a general verdict had been used, the court of appeals would not have been able to determine if the verdict for the plaintiff had been predicated on the valid theories of recovery rather than the invalid theory. *See id.* Because a special verdict was used, the court of appeals had proof that the jury had found for the plaintiff on a valid theory of recovery, thus obviating the need for a retrial. *See id.*; *see also* Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 693-94 (5th Cir. 1975) (noting that district court's failure to utilize special verdict necessitated retrial of all issues), *cert. denied*, 424 U.S. 943 (1976). For other cases in which courts have commented

Special verdicts also increase confidence in the fairness and effectiveness of the jury system by giving litigants and the public a better understanding of how the jury analyzed the case.[15]

One problem with special verdicts is that the jury may return inconsistent responses. In a Fifth Circuit decision,[16] for example, the jury found in response to one question that the plaintiff's decedent was contributorily negligent,[17] but when asked in another question to state what percent of the total negligence was attributable to him, the jury answered zero percent.[18] These responses are obviously inconsistent. The Supreme Court has held that if, under any view of the case, the inconsistent findings can be reconciled, they must be resolved under that view, and judgment entered on the special verdict.[19] If the findings are irreconcilable, no judgment may be entered.[20] The purpose of this Note is to suggest procedures that federal courts should follow when faced with irreconcilable responses in special verdicts.

Part I of this Note discusses whether district courts should be permitted to resubmit inconsistent findings to the jury for clarification. Part II is concerned with how and when objections to inconsistencies must be made in order to preserve the issue for appellate review. This Note concludes that resubmitting inconsistencies to the jury and requiring litigants to object to inconsistencies before the jury has been discharged further the Federal Rules' goals of speed, economy and fairness.

I. RESUBMITTING INCONSISTENT FINDINGS

Whether a district court is permitted to resubmit inconsistent responses to the jury can have a substantial effect on the outcome of the

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on the ability of special verdicts to prevent retrials, see Cappellini v. McCabe Powers Body Co., 713 F.2d 1, 8 (2d Cir. 1983); Superturf, Inc. v. Monsanto, 660 F.2d 1275, 1283-84 & n.14 (8th Cir. 1981); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

15. *See* Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 65 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948); Sunderland, *supra* note 3, at 259; *see also* Petes v. Hayes, 664 F.2d 523, 526 (5th Cir. 1981) ("[W]e specifically approve of the district court's use of special interrogatories, which avoid the 'inscrutable mystery of a general verdict [and] impenetrable uncertainty . . . .' ") (quoting Tugwell v. A.F. Klaveness & Co., 320 F.2d 866, 868 n.2 (5th Cir. 1963), *cert. denied*, 376 U.S. 951 (1964)).

16. Morrison v. Frito-Lay, Inc., 546 F.2d 154 (5th Cir. 1977).

17. *Id.* at 158-59.

18. *Id.* at 159.

19. *See* Gallick v. Baltimore & O.R.R., 372 U.S. 108, 119 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 364 (1962). Lower federal courts have followed the Supreme Court's position. *See* Goeken v. Kay, 751 F.2d 469, 475 (1st Cir. 1985); Smith v. Shell Oil Co., 746 F.2d 1087, 1092 (5th Cir. 1984); Andrasko v. Chamberlain Mfg. Corp., 608 F.2d 944, 947 (3d Cir. 1979); Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975).

20. Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Andrasko v. Chamberlain Mfg. Co., 608 F.2d 944, 947 (3d Cir. 1979); Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975); Royal Netherlands S.S. Co. v. Strachan Shipping Co., 362 F.2d 691, 694 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004 (1967).

case. An example of this effect is *McCollum v. Stahl*,[21] a civil rights action in which the plaintiff contended that he had been wrongfully discharged from his job as a deputy sheriff.[22] The case was submitted to the jury under Rule 49(a).[23] The special verdict concluded that the defendant had not acted wrongfully, but that the plaintiff had been discharged in a malicious fashion and should receive $15,000 in punitive damages.[24] Faced with these inconsistent responses, the district court resubmitted the responses to the jury for clarification.[25] The jury then changed its responses, finding that the defendant had acted wrongfully, and awarding $3750 in compensatory damages and $3750 in punitive damages.[26] On appeal, the Fourth Circuit held as a matter of law that the responses should not have been resubmitted.[27] The court reversed the verdict against the defendant, relying on the jury's original finding that the defendant had not acted wrongfully.[28]

A. *Textual Analysis*

The Fourth Circuit in *McCollum* argued that inconsistent special verdicts cannot be resubmitted to the jury because of the structure of Rule 49(a).[29] Because Rule 49(a) does not contain any provision allowing for resubmission, the court of appeals concluded that the proper inference is that resubmission is impermissible.[30] The court of appeals arrived at this result[31] by comparing Rule 49(a) with Rule 49(b).[32] Rule 49(b), which

21. 579 F.2d 869 (4th Cir. 1978) (cited as controlling on the issue of resubmission of inconsistent special verdicts in 1 J. Moore, Moore's Federal Practice Rules Pamphlet R 49, at 472 (1985)), *cert. denied*, 440 U.S. 912 (1979).

22. *See id.* at 869-70.

23. *Id.* at 871.

24. *Id.* at 870.

25. *Id.*

26. *Id.* at 871.

27. *See id.*

28. *See id.* at 871, 873.

29. *See id.* at 871; Fed. R. Civ. P. 49(a).

30. *McCollum*, 579 F.2d at 871.

31. One reason the Fourth Circuit should not be followed on this point is because its determination was based on dicta in a Fifth Circuit decision, Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973), which has been disregarded by subsequent Fifth Circuit decisions. In *Griffin*, the court suggested in a footnote that because Rule 49(a) does not have a specific provision allowing for resubmission, the presumption should be that resubmission is impermissible. *Id.* at 917 n.6. Although the Fifth Circuit expressed concern about resubmission in Perricone v. Kansas City S. Ry., 704 F.2d 1376, 1378 (5th Cir. 1983), in the other decisions in which the issue has arisen, resubmission has been approved, *see* Alverez v. J. Ray McDermott & Co., 674 F.2d 1037, 1040-41 (5th Cir. 1982); Mercer v. Long Mfg. N.C., Inc., 671 F.2d 946, 947 (5th Cir. 1982); Guidry v. Kem Mfg. Co., 604 F.2d 320, 321 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Fugitt v. Jones, 549 F.2d 1001, 1005 (5th Cir. 1977); *cf.* Morrison v. Frito-Lay, Inc., 546 F.2d 154, 161 (5th Cir. 1977) (submitting supplemental questions to the jury is an acceptable way to resolve an inconsistency).

32. Fed. R. Civ. P. 49(b) states:

> General Verdict Accompanied by Answer to Interrogatories.
> The court may submit to the jury, together with appropriate forms for a general

covers the use of general verdicts with interrogatories, contains provisions that allow inconsistent responses to be resubmitted to the jury.[33] The *McCollum* court appears to have assumed that when a provision is included in one part of a statute or rule but not another, the provision does not apply where it was omitted.[34] But it has been consistently held that this assumption should not be applied rigidly, and not when inconsistent with congressional intent or the statute's or rule's purpose.[35] Application of this assumption in an interpretation of Rule 49(a) is inconsistent with the well-established policy that the Federal Rules are to be construed liberally in order to effectuate the ends of justice and efficiency.[36]

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verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

33. *See id.*

34. The maxim "expressio unius est exclusio alterius" is defined as "[a] maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." Black's Law Dictionary 521 (5th ed. 1979). Courts have often applied this rule in construing related statutes. *See* Russello v. United States, 104 S. Ct. 296, 300 (1983); Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197-98 (6th Cir. 1983); Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1251 (3d Cir. 1980); League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979); J. Ray McDermott & Co. v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

35. *See* Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980); United States Dep't of Justice v. Federal Labor Relations Auth., 727 F.2d 481, 491 (5th Cir. 1984); National Ass'n of Metal Finishers v. EPA, 719 F.2d 624, 648 n.33 (3d Cir. 1983), *rev'd on other grounds sub nom.* Chemical Mfrs. Ass'n v. National Resources Defense Council, Inc., 105 S. Ct. 1102 (1985); Illinois Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 675-76 (D.C. Cir. 1973), *cert. denied*, 415 U.S 951 (1974); Hill v. Whitlock Oil Servs., Inc., 450 F.2d 170, 173 (10th Cir. 1971); FTC v. Standard Motor Prods., Inc., 371 F.2d 613, 617-18 (2d Cir. 1967); Massachusetts Trustees of E. Gas & Fuel Assocs. v. United States, 312 F.2d 214, 220 (1st Cir. 1963), *aff'd*, 377 U.S. 235 (1964).

36. *See* Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964); Hickman v. Taylor, 329 U.S. 495, 507 (1947); Trevino v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983); Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1305 & n.22 (9th Cir.), *cert. denied*, 104 S. Ct. 279 *and* 104 S. Ct. 280 (1983); United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1386 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); Staren v. American Nat'l Bank & Trust Co., 529 F.2d 1257, 1263 (7th Cir. 1976); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275, 278 (3d Cir. 1962), *overruled in part on other grounds*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972).

The provisions in Rule 49(b) covering resubmission can be implied into 49(a) because the two rules cover the same subject[37] and have consistent purposes.[38] Both Rule 49(a) and Rule 49(b) cover the use of specific questions as means of obtaining a verdict.[39] Both the questions submitted under Rule 49(a) and those submitted under Rule 49(b), called "interrogatories,"[40] are designed to elicit the jury's findings on the specific issues in the case.[41]

The difference between the two rules is that under Rule 49(b) the jury returns a general verdict in addition to the responses to specific interrogatories.[42] Also, the questions submitted under Rule 49(a) form the basis of the court's judgment,[43] while the interrogatories submitted under Rule 49(b) are used mainly to test the validity of the general verdict.[44] But Rule 49(a) questions and Rule 49(b) interrogatories do not always have a

37. *See* 2A N. Singer, Sutherland Statutory Construction § 51.02, at 453 (C. Sands rev. 4th ed. 1984) (provisions in one statute "which are omitted in another on the same subject will be applied [where omitted] when the purposes of the two [statutes] are consistent"); *see, e.g.*, Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (provisions of Bankruptcy Act applied to Consumer Credit Protection Act); Northcross v. Board of Ed., 412 U.S. 427, 427-28 (1973) (common, general purpose of providing relief from racial discrimination sufficent to read provisions of Civil Rights Act of 1964 into Emergency School Aid Act); United States v. Stauffer Chem. Co., 684 F.2d 1174, 1187 (6th Cir. 1982) (when "a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the expression of legislative intent is clear"), *aff'd*, 104 S. Ct. 575 (1984); United States v. California Portland Cement Co., 413 F.2d 161, 166 (9th Cir. 1969) (subsections of Internal Revenue Code should be construed consistently); General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 775 (5th Cir. 1968) (Georgia Motor Vehicle Certificate of Title Act and Uniform Commercial Code adopted at same session of the legislature and relating in part to same subject construed together); Hallenbeck v. Penn Mut. Life Ins. Co., 323 F.2d 566, 571-72 (4th Cir. 1963) (Chapters XI and XIII of Bankruptcy Act should be given similar and harmonious treatment); Kleinfelter v. United States, 318 F.2d 929, 931-32 (Ct. Cl. 1963) (Retirement Act and Veterans Preference Act should be construed together).

The case for a consistent reading of two statutes is stronger when the statutes were enacted by the same body at the same time, as were Rules 49(a) and 49(b). *See* Erlenbaugh v. United States, 409 U.S. 239, 244 (1972); United States v. Stewart, 311 U.S. 60, 64 (1940); General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 775 (5th Cir. 1968); 2A N. Singer, *supra*, § 51.03, at 467-69.

38. *See* 2A N. Singer, *supra* note 37, § 51.02, at 453; *see, e.g.*, Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979); Northcross v. Board of Ed., 412 U.S. 427, 428 (1973) (per curiam); United States v. Stauffer Chem. Co., 684 F.2d 1174, 1186-87 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984); *In re* Robison, 665 F.2d 166, 171 (7th Cir. 1981) (per curiam); Iron Workers Local No. 272 v. Bowden, 624 F.2d 1255, 1265 (5th Cir. 1980).

39. *See* Fed. R. Civ. P. 49(a), 49(b).

40. *See* Fed. R. Civ. P. 49(b).

41. *See, e.g.*, Merchant v. Rukle, 740 F.2d 86, 89 n.2 (1st Cir. 1984); McGill, Inc. v. John Zink Co., 736 F.2d 666, 671, 676 (Fed. Cir.), *cert. denied*, 105 S. Ct. 514 (1984); Stoddard v. School Dist. No. 1, 590 F.2d 829, 831-32 (10th Cir. 1979); Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 715 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975). See *supra* notes 20, 25 and accompanying text.

42. *See* Fed. R. Civ. P. 49(b).

43. See *supra* notes 4, 5 and accompanying text.

44. *See, e.g.*, Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983); Petes v. Hayes, 664 F.2d 523, 525 (5th Cir. 1981); Brown v. Tennessee Gas Pipeline Co.,

different function. Rule 49(b) interrogatories, like Rule 49(a) questions, may form the basis for judgment. Under Rule 49(b), if the general verdict and the responses to the interrogatories conflict, judgment may not be entered on the general verdict, but may be entered on the responses to the interrogatories.[45]

Despite the fact that the Rule 49(b) interrogatories usually serve a different function than Rule 49(a) questions, the overall purposes of the two rules are the same. Practice under both sections of Rule 49[46] is designed to guide the jury, increase the reliability of its verdict, and facilitate the judicial role following a jury trial.[47] Because the rules possess these common purposes, and address the same subjects, the provisions in Rule 49(b) allowing for resubmission can be applied to special verdicts rendered under Rule 49(a).[48]

Rule 49(a) must be interpreted not only in light of analogous provisions, but also in light of the goals of the Federal Rules.[49] Rule 1 of the Federal Rules states that every rule "shall be construed to secure the just, speedy, and inexpensive determination of every action."[50] Resubmission of irreconcilable inconsistencies is swifter and more economical than the alternative: a new trial on the conflicting findings.[51] A rule that

623 F.2d 450, 455 (6th Cir. 1980); Dual Mfg. & Eng'g, Inc. v. Burris Indus., Inc., 619 F.2d 660, 667 (7th Cir.) (en banc), *cert. denied*, 449 U.S. 870 (1980).

45. *See* Fed. R. Civ. P. 49(b); *see, e.g.*, Stoddard v. School Dist. No. 1, 590 F.2d 829, 834 (10th Cir. 1979); Blackwell v. Cities Serv. Oil Co., 532 F.2d 1006, 1008 (5th Cir. 1976) (per curiam); Turner v. Global Seas, Inc., 505 F.2d 751, 757 (6th Cir. 1974); Elston v. Morgan, 440 F.2d 47, 49 (7th Cir. 1971); Giblin v. Beeler, 396 F.2d 584, 588 (10th Cir. 1968).

46. The advantage Rule 49(a) offers over Rule 49(b) is that it is less prone to conflict. Although Rule 49(a) verdicts can have conflicts among the findings, Rule 49(b) verdicts add the general verdict as an additional source of conflict, which makes the Rule 49(b) procedure less reliable than the Rule 49(a) procedure. *See* Industries, Investments & Agencies Ltd. v. Panelfab Int'l Corp., 529 F.2d 1203, 1207 & n.4 (5th Cir. 1976); Wolfe v. Virusky, 470 F.2d 831, 837 (5th Cir. 1972) (Brown, C.J., concurring); Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 93 n.31 (5th Cir. 1966); Brown, *supra* note 10, at 339-40.

47. *See* Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1517 (Fed. Cir.), *cert. denied*, 105 S. Ct. 220 (1984); American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1361 (Fed. Cir.), *cert. denied*, 105 S. Ct. 95 (1984); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

48. See *supra* notes 37, 38 and accompanying text.

49. *See* Foman v. Davis, 371 U.S. 178, 182 (1962); Hensley v. Chesapeake & O. Ry., 651 F.2d 226, 228 (4th Cir. 1981) (quoting Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275, 278 (3d Cir. 1962), *overruled in part on other grounds*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972)); Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795, 798 (3d Cir. 1967); Markham v. Holt, 369 F.2d 940, 942 (5th Cir. 1966), *aff'd*, 409 F.2d 542 (5th Cir. 1969); Rands v. United States, 367 F.2d 186, 189 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 121 (1967); Fed. R. Civ. P. 1.

50. Fed. R. Civ. P. 1.

51. *See* Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 575-76 (3d Cir. 1983); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 n.5 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1284

allows for resubmission is also more just than one that does not. If resubmission is not available, the court is faced with the prospect of a new trial on the conflicting responses.[52] To avoid this time-consuming and costly alternative, judges may decide to resolve inconsistencies themselves, even though the responses may be essentially irreconcilable.[53] When a party has not waived the right to a jury trial, the resolution of the factual issues of the case should remain in the hands of the jury.[54] Allowance for resubmission will help ensure that it is the jury that resolves the factual issues in the case.[55] Furthermore, the retrials that could result if resubmission were disallowed could dissuade federal judges from using special verdicts at all. Numerous judges and commentators have extolled the virtues of special verdicts.[56] Construing Rule 49(a) to permit resubmission would

n.14 (8th Cir. 1981); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Guidry v. Kem Mfg. Co., 598 F.2d 402, 407 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

52. See *supra* note 20 and accompanying text.

53. One example of how judges sometimes strain too far in an effort to reconcile inconsistencies can be seen in Alverez v. J. Ray McDermott & Co., 674 F.2d 1037 (5th Cir. 1982). In this case a seaman brought a negligence action against his employer. *Id.* at 1038-39. The special verdict the jury returned stated that the plaintiff was not a proximate cause of the accident, but that he was 90% contributorily negligent. *Id.* at 1039. The jury also found that the employer was negligent but that its ship was seaworthy. *Id.* Because the responses had not been resubmitted, to avoid a retrial the court of appeals had to strain to resolve these essentially irreconcilable inconsistencies. *See id.* at 1041-44. A rule disallowing resubmission would increase the likelihood that when confronted with inconsistencies judges will supplant the jury by resolving the factual conflicts in the case. For cases in which district court judges were reversed after resolving inconsistent responses, see Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 743 F.2d 133, 145-46 (3d Cir.), *cert. denied*, 105 S. Ct. 564 (1984); Guidry v. Kem Mfg. Co., 598 F.2d 402, 406-07 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Fugitt v. Jones, 549 F.2d 1001, 1005 (5th Cir. 1977).

54. *See In re* Randall, 712 F.2d 1275, 1277 (8th Cir. 1983); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Guidry v. Kem Mfg. Co., 598 F.2d 402, 407 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); *In re* Zweibon, 565 F.2d 742, 746 (D.C. Cir. 1977) (per curiam), *rev'd in part on other grounds sub nom.* Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1980); Lee Pharmaceuticals v. Mishler, 526 F.2d 1115, 1117 (2d Cir. 1975); Local 783, Allied Indus. Workers of Am. v. General Elec. Co., 471 F.2d 751, 755 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973); Pacific Queen Fisheries v. Symes, 307 F.2d 700, 718-19 (9th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

55. *See* Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 575-76 (3d Cir. 1983); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 & n.5 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Fugitt v. Jones, 549 F.2d 1001, 1005 (5th Cir. 1977).

56. *See, e.g.*, Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644 (11th Cir. 1984) ("wonder to behold"); Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 724 (Fed. Cir. 1984) ("particularly useful tool"); Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1517 (Fed. Cir.) (special verdict procedure "strongly recommended as an appropriate means of guiding a jury, increasing the reliability of its verdict, and facilitating the judical role following a jury trial"), *cert. denied*, 105 S. Ct. 220 (1984); Baumstimler v. Rankin, 677 F.2d 1061, 1071 (5th Cir. 1982) (special verdicts especially useful in patent cases); Dual Mfg. & Eng'g, Inc. v. Burris Indus., Inc., 619 F.2d 660, 667 (7th Cir.) (en banc) (special verdicts useful in resolving "specific contested issues"), *cert. denied*, 449 U.S. 870 (1980); Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979) ("splendid device"), *cert. denied*, 445 U.S. 929 (1980); Cote v. Estate of Butler, 518 F.2d

promote the use of this precise and economical procedure.[57]

B. *The Threat of Coercion*

The Fourth Circuit in *McCollum v. Stahl*[58] determined that the "inescapable implication" the jury derived from resubmission of the verdict was that the finding on liability should be changed to match the finding on damages.[59] The court of appeals stated that resubmission was "tantamount, in its effect, to a direction to the jury to find liability in order to warrant the award of damages."[60]

What appeared to have been a coercive procedure to the court, however, may not have been coercive in fact. The trial court, during resubmission, gave no instruction that suggested how the jury should resolve the conflict.[61] Despite the court of appeals' belief that resubmission constituted a direction that the jury change the finding on liability to match the damages award, it may be equally likely that resubmission signified to the jurors that the trial judge wanted them to reduce the damages award to zero to match their finding on liability.[62] The jury appears to have

157, 160 (2d Cir. 1975) ("prudent expedient for simplifying the issues and for preventing confusion"); Brown, *supra* note 10, at 338 ("remarkably effective in fact-resolution"); McCormick, *supra* note 10, at 181 ("valuable resource").

57. Aside from the Fourth Circuit, and the Fifth Circuit's qualified disapproval of resubmission in *Perricone*, all other circuits that have considered the issue have determined that resubmission is a permissible way to resolve inconsistencies. *See* Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985); Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 575-76 (3d Cir. 1983); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); Bell v. Mickelsen, 710 F.2d 611, 616 (10th Cir. 1983); Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981); Epstein v. Dennison Mfg. Co., 314 F. Supp. 116, 124 (S.D.N.Y. 1969).

58. 579 F.2d 869 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979). For the specific facts of this case see *supra* notes 21-28 and accompanying text.

59. *Id.* at 871.

60. *Id.*

61. The court of appeals nowhere suggests that the judge gave the jury additional instructions during resubmission. The court of appeals stated that there was an implication arising from the act of resubmission. At no point did the court of appeals state or suggest that any coercive statements were made by the trial judge. *See id.* at 870-71.

62. Resubmission of inconsistent special verdicts does not involve the kind of coercion present when a verdict is resubmitted with an "Allen" charge, also known as a "dynamite" charge. 1 E. Devitt & C. Blackmar, Federal Jury Practice & Instruction § 5.22, at 163 (3d ed. 1977). An Allen instruction is given to break a deadlocked jury. *See* Allen v. United States, 164 U.S. 492, 501-02 (1896); 2 C. Wright, Federal Practice and Procedure: Criminal 2d § 502, at 834-35 (2d ed. 1982). These instructions can be inherently coercive, because they are designed to induce jurors holding a minority view to compromise their positions. *See* 2 C. Wright, *supra*, at 836-37.

This inherent coercion is not present when a special verdict is resubmitted. The conflict in a special verdict is between the findings, not the jurors. No Allen instruction need be given when a special verdict is resubmitted. The special verdicts can be resubmitted in a neutral fashion. By identifying the inconsistencies, see *infra* note 74, and stating the legal effect of different possible resolutions, see *infra* note 75, judges can provide a jury the information it needs to resolve a conflict, thus making any type of coercive Allen charge unnecessary.

remained more independent after resubmission than the court of appeals realized. Although the jurors resolved the inconsistencies in the plaintiff's favor, they also aided the defendant somewhat by reducing the overall damages award from $15,000 to $7500.[63] Without a supplemental instruction pointing the jury toward one specific resolution,[64] it is hard to see how the jury could infer that the trial judge wanted a particular result.

This concern over misleading implications arising from resubmission was also raised in *Perricone v. Kansas City Southern Railway Co.*[65] Although the Fifth Circuit did not go so far as to hold resubmission impermissible as a matter of law, it did state that normally the jury should not be allowed to reconsider its responses.[66] The court was concerned that the trial judge may have somehow intimated to the jury how it should resolve the ambiguity in the special verdict.[67] This intimation was not a result of the trial judge's instruction to the jury, which the court of appeals readily admitted had "nothing coercive or suggestive in its content. It was phrased in a neutral manner and accurately expressed the law."[68] The court of appeals was, however, concerned that the judge's demeanor and gestures may have influenced the jury:[69] "[A judge] can communicate his attitude in a thousand ways from a cocked eyebrow to a sideways glance."[70] This problem, of course, can occur at any point in a trial, not only on the resubmission of special verdicts.[71] The Fifth Circuit itself stated that the only true protection against such behavior is the good faith and integrity of our federal judges.[72] We rely on this good faith and integrity throughout a trial; there is no reason to stop relying on it when a faulty verdict must be resubmitted.

A proper instruction to the jury when a special verdict is resubmitted[73]

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63. *See id.* at 871.

64. As long as an objection is made to the instruction at trial, litigants are protected by appellate review from any patent manipulation of the jury. *See* Fed. R. Civ. P. 51; *see also* Robison v. Lescrenier, 721 F.2d 1101, 1112 (7th Cir. 1983) (right to raise objection on appeal to instruction given at trial lost only if no objection was made at trial); DeHues v. Western Elec. Co., 710 F.2d 1344, 1346 (8th Cir. 1983) (same); Barnett v. Housing Auth. of Atlanta, 707 F.2d 1571, 1580 (11th Cir. 1983) (same); Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85, 94 (3d Cir. 1976) (same) ; Clark Advertising Agency, Inc. v. Tice, 490 F.2d 834, 836 (5th Cir. 1974) (same).

65. 704 F.2d 1376 (5th Cir. 1983).

66. *See id.* at 1379.

67. *See id.* at 1378.

68. *Id.*

69. *See id.*

70. *Id.*

71. *See* Crandell v. United States, 703 F.2d 74, 74-78 (4th Cir. 1983); Bentley v. Stromberg-Carlson Corp., 638 F.2d 9, 10-11 (2d Cir. 1981); Maheu v. Hughes Tool Co., 569 F.2d 459, 471-72 (9th Cir. 1977); United States v. Pfizer Inc., 560 F.2d 319, 322-23 (8th Cir. 1977); Greener v. Green, 460 F.2d 1279, 1280-81 (3d Cir. 1972).

72. *Perricone*, 704 F.2d at 1378-79.

73. Rather than resubmitting the conflicting findings, inconsistencies can be resolved by submitting to the jury a supplemental interrogatory that covers only the conflict. This method of resolving inconsistencies was approved by the Fifth Circuit in Morrison v.

should state why an inconsistency has resulted.[74] To aid the jury in resolving the conflict, the instruction should also explain the legal effects of possible resolutions.[75]

II. OBJECTING TO INCONSISTENCIES IN SPECIAL VERDICTS

The courts of appeals are in conflict over whether the failure to object to inconsistencies at trial causes a waiver of the right to raise the objection on appeal.[76] Those courts that decline to apply a waiver rule do so because of the absence of a provision in Rule 49(a) requiring that objections to inconsistencies be made at trial.[77] Other courts favor application

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Frito-Lay, Inc., 546 F.2d 154, 161 (5th Cir. 1977). *See* Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 575 (3d Cir. 1983); Aquachem Co. v. Olin Corp., 699 F.2d 516, 521 n.3 (11th Cir. 1983); United States v. 0.78 Acres of Land, More or Less, 81 F.R.D. 618, 621-22 (E.D. Pa.), *aff'd mem.*, 609 F.2d 504 (3d Cir.), *aff'd mem. sub nom. In re* Moyer Packing Co., 609 F.2d 502 (3d Cir. 1979); *cf.* Croce v. Kurnit, 737 F.2d 229, 234 (2d Cir. 1984) (when issue was originally omitted from special verdict questions "matter of whether to submit a postverdict interrogatory was wholly within the discretion of the trial judge").

74. In the cases in which resubmission has been allowed, the courts did not discuss whether the trial judge should point out the inconsistencies to the jury. In Texas, where special verdicts are commonly used, trial judges are required to identify the conflicting findings for the jury. *See* Pon Lip Chew v. Gilliland, 398 S.W.2d 98, 101 (Tex. 1965); A.B.C. Stores, Inc. v. Taylor, 136 Tex. 89, 91, 148 S.W.2d 392, 393 (1941) (per curiam); Harris County v. Patrick, 636 S.W.2d 211, 213 (Tex. Ct. App. 1982); British Overseas Airways Corp. v. Tours and Travel of Houston, Inc., 568 S.W.2d 888, 893 (Tex. Civ. App. 1978); Garcia v. Sky Climber, Inc., 470 S.W.2d 261, 265 (Tex. Civ. App. 1971); McCarty v. Morrison, 461 S.W.2d 180, 181 (Tex. Civ. App. 1970), *rev'd on other grounds*, 468 S.W.2d 350 (Tex. 1971); Tex. R. Civ. P. 295. The Texas rule on this point should be applied by the federal courts. Having the trial judge identify the inconsistencies for the jury will bring about the most expeditious resolution and will ensure that the jury understands that resubmission is taking place because there is a definite inconsistency, not because the judge is dissatisfied with whom the verdict favors.

75. Most judges and commentators now agree that it is an acceptable practice to inform the jury of the legal consequences of its responses. *See* Vinieris v. Byzantine Maritime Corp., 731 F.2d 1061, 1065 (2d Cir. 1984) (first decision to hold that failure to inform the jury of the legal consequences of its responses may be reversible error); Perricone v. Kansas City S. Ry., 704 F.2d 1376, 1378 (5th Cir. 1983) (proper to tell the jury the legal effects of its responses); Lowery v. Clouse, 348 F.2d 252, 259-61 (8th Cir. 1965) (same); Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975) ("jury is not to be set loose in a maze of factual questions, to be answered without intelligent awareness of the consequences"); Truitt v. Travelers Ins. Co., 175 F. Supp. 67, 73 (S.D. Tex. 1959) (court instructed jury how questions should be answered in order to reach the legal effect the jury desired), *aff'd*, 280 F.2d 784, 790 (5th Cir. 1960); 9 C. Wright & A. Miller, *supra* note 1, § 2509, at 513 (preferable rule is to allow jury to know legal effects of its answers); Brown, *supra* note 10, at 341 (jury is aware of legal effects of its answers); Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 204-06 (1966) (arguing against following Texas and Wisconsin systems of blindfolding the jury as to the effects of its answers). *But see* Gullet v. St. Paul Fire and Marine Ins. Co., 446 F.2d 1100, 1105 (7th Cir. 1971) (comments on the legal effects of answers to special verdict questions are improper); Krolikowski v. Allstate Ins. Co., 283 F.2d 889, 891-92 (7th Cir. 1960) (same); Thedorf v. Lipsey, 237 F.2d 190, 193-94 (7th Cir. 1956) (same).

76. Bates v. Jean, 745 F.2d 1146, 1150 (7th Cir. 1984).

77. *See id.*; Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133, 144-45 (3d Cir.), *cert. denied*, 105 S. Ct. 564 (1984); Alverez v. J. Ray McDermott & Co., 674

of a waiver rule to promote efficiency and to deter litigants from using inconsistencies as a means of obtaining a second opportunity at a favorable judgment.[78]

Although Rule 49(a) is silent on when objections must be made,[79] Rule 51 is not: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."[80] On its face, application of Rule 51 to inconsistent responses in special verdicts seems inappropriate because the Rule is concerned with objections that must be made *before* the jury retires to deliberate; it does not explictly address objections that must be made after the jury has returned its verdict. Nevertheless, the intent of Rule 51 should govern Rule 49(a) inconsistencies.[81] The Tenth Circuit, holding that Rule 51 should be applied to Rule 49(a), stated: " 'The purpose of Rule 51 is to prevent a litigant from taking advantage of an error which could be rectified by the court if called to its attention by timely and specific objection.' "[82] If brought to the court's attention at trial, incon-

F.2d 1037, 1040 (5th Cir. 1982); Mercer v. Long Mfg. N.C., Inc., 671 F.2d 946, 947 (5th Cir. 1982); Fugitt v. Jones, 549 F.2d 1001, 1004-05 (5th Cir. 1977); Griffin v. Matherne, 471 F.2d 911, 917-18 (5th Cir. 1973); Stephenson v. College Misericordia, 376 F. Supp. 1324, 1326-27 (M.D. Pa. 1974).

78. *See, e.g.*, Burgess v. Premier Corp., 727 F.2d 826, 837 (9th Cir. 1984); Bell v. Mickelsen, 710 F.2d 611, 616 (10th Cir. 1983); Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981); Wagner v. International Harvester Co., 611 F.2d 224, 229 n.6 (8th Cir. 1979); Seven Provinces Ins. Co. v. Commerce & Indus. Ins. Co., 65 F.R.D. 674, 690 (W.D. Mo. 1975); *cf.* Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 534-35 (5th Cir. 1974) (failure to move at trial that inconsistent findings rendered under Rule 49(b) be resubmitted to jury results in a waiver of right to object on appeal); Barnes v. Brown, 430 F.2d 578, 580 (7th Cir. 1970) (same); Kirkendoll v. Neustrom, 379 F.2d 694, 698-99 (10th Cir. 1967) (same).

79. *See* Fed. R. Civ. P. 49(a).

80. Fed. R. Civ. P. 51.

81. Many courts have applied the provisions of Rule 51 to Rule 49(a) in other contexts not involving the resubmission of inconsistencies. *See* Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) (Rule 51 applied to Rule 49(a) on whether counsel must be informed that special verdict questions are to be submitted); Cann v. Ford Motor Co., 658 F.2d 54, 58 (2d Cir. 1981) (Rule 51 applied to Rule 49(a) on whether counsel is entitled to object to form of questions out of hearing of jury), *cert. denied*, 456 U.S. 960 (1982); Smith v. Danyo, 585 F.2d 83, 88 (3d Cir. 1978) (Rule 51 applied to Rule 49(a) on whether counsel must be shown exact text of special verdict questions prior to submission to the jury); Clegg v. Hardware Mut. Casualty Co., 264 F.2d 152, 156-57 (5th Cir. 1959) (Rule 51 applied to Rule 49(a) on whether court must notify counsel that special verdicts are to be used); *In re* Air Crash Disaster at Mannheim, Ger., 586 F. Supp. 711, 723-24 (E.D. Pa. 1984) (Rule 51 applied to Rule 49(a) on whether counsel must be shown exact text of special questions prior to submission to the jury); Kushner v. Hendon Constr., Inc., 81 F.R.D. 93, 97-98 (M.D. Pa.) (same), *aff'd mem.*, 609 F.2d 502 (3d Cir.), *aff'd mem. sub nom.* Hendon Constr. Inc. v. Naholnik, 609 F.2d 501 (3d Cir. 1979). Applying the overall intent of Rule 51 to Rule 49(a) on the issue of resubmission would promote economy and fairness.

82. Bell v. Mickelsen, 710 F.2d 611, 616 (10th Cir. 1983) (quoting Corriz v. Naranjo, 667 F.2d 892, 896 (10th Cir. 1981), *cert. dismissed per stipulation*, 458 U.S. 1123 (1982)); *see* Taylor v. Denver & Rio Grande W.R.R., 438 F.2d 351, 353 (10th Cir. 1971); Smith v. Welch, 189 F.2d 832, 836 (10th Cir. 1951).

sistencies can be resolved by resubmission to the jury.[83]

If not required to object to inconsistencies at trial, litigants may be able to obtain a second chance for a favorable verdict and judgment. A litigant aware of an inconsistency could allow the district court to render a judgment, and then object to the inconsistencies on appeal if that judgment was adverse, thus securing a second chance for a favorable verdict and judgment.[84] The application of a waiver rule would prevent litigants from engaging in this kind of gamesmanship.[85]

By requiring litigants to bring all inconsistencies to the court's attention before judgment has been rendered and the jury has been discharged, the court can resolve conflicts by resubmitting them to the jury. This procedure is swifter and more economical than allowing inconsistencies to be raised after the jury has been discharged and then permitting a new trial on the conflicting responses.[86]

III. LOCATING THE INCONSISTENCIES

Requiring that objections to inconsistencies be made before the jury is discharged may be unfair if counsel is not allowed sufficient time to detect inconsistencies. Many special verdicts are composed of twenty or

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83. For a discussion of resubmission, see Pt. I.

84. *See* Skillin v. Kimball, 643 F.2d 19, 20 (1st Cir. 1981) ("To allow a new trial after the objecting party failed to seek a proper remedy at the only possible time would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures . . . by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.").

85. Allowing such tactics to take place would violate the Federal Rules' goals of reducing surprise and deception. *See* Foman v. Davis, 371 U.S. 178, 181-82 (1962) (Federal Rules reject notion that litigation is a game of skill); Conley v. Gibson, 355 U.S. 41, 48 (1957) (same); Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1186 n.3 (7th Cir. 1973) (same); Central Distribs., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5th Cir. 1968) (Federal Rules adopted to end "sporting theory of justice"), *rev'd in part on other grounds*, 428 F.2d 369 (5th Cir. 1970); Travelers Indem. Co. v. United States, 382 F.2d 103, 105-06 (10th Cir. 1967) (Federal Rules reject notion that litigation is game of skill); Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961) (purpose of Federal Rules is to take "sporting element out of litigation"); Meadow Gold Prods. Co. v. Wright, 278 F.2d 867, 869 (D.C. Cir. 1960) (Federal Rules adopted "to get away from legal sparring and fencing, and from surprise moves of litigants"); FRA S.p.A. v. Surg-O-Flex of Am., Inc., 415 F. Supp. 421, 424 (S.D.N.Y. 1976) (Federal Rules not designed "to outfit a party with tactical armaments for delay and harassment of his adversary"); Mahler v. Drake, 43 F.R.D. 1, 3 (D.S.C. 1967) ("old concept of litigation as a battle of wits is to be eliminated"); Vopelak v. Williams, 42 F.R.D. 387, 389 (N.D. Ohio 1967) (Federal Rules "not designed for playing games").

86. *See* Stanton v. Astra Pharmaceutical Prods., Inc., 718 F.2d 553, 575-76 (3d Cir. 1983) ("terribly inefficient not to obtain clarification from a still-empaneled jury of the meaning of its answers"); Burger King Corp. v. Mason, 710 F.2d 1480, 1489 n.5 (11th Cir. 1983) (resolving inconsistencies at trial conserves "valuable judicial resources"), *cert. denied*, 104 S. Ct. 1599 (1984); Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981) (only efficient time for inconsistencies to be cured is before jury is discharged); Fugitt v. Jones, 549 F.2d 1001, 1005 (5th Cir. 1977) (inconsistencies can be resolved "with relative ease" if objection is made while the jury is at hand).

more questions,[87] so inconsistencies may not be apparent at first glance.[88] One way the court can aid in the swift detection of inconsistencies is to allow counsel to examine the special questions and accompanying instructions for potential inconsistencies.[89] If counsel is familiar with the special questions and instructions, inconsistencies are more likely to be detected quickly and precisely once the special verdict has been returned from the jury.

The courts of appeals are split regarding what prior notice should be given to counsel about the content of special questions and their accompanying instructions. Three circuits have held that it is within the district court's discretion whether counsel may see the special questions and instructions before they are sent to the jury.[90] These courts have reached this result by applying the generally accepted interpretation of Rule 51's notice requirement.[91] Although Rule 51 provides that the court must in-

87. *See, e.g.*, Gallick v. Baltimore & O.R.R., 372 U.S. 108, 110-11 (1963) (negligence action; 22 questions); Smith v. Danyo, 585 F.2d 83, 88 (3d Cir. 1978) (medical malpractice action; 49 questions); Fox v. Kane-Miller Corp., 542 F.2d 915, 916 (4th Cir. 1976) (securities fraud action; 52 questions); Griffin v. Matherne, 471 F.2d 911, 913-14 (5th Cir. 1973) (negligence action; 28 questions); SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 988, 1021-27 (D. Conn. 1978) (patent/antitrust action; 54 questions), *aff'd and remanded*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); Envirex, Inc. v. Ecological Recovery Assocs., Inc., 454 F. Supp. 1329, 1339, 1341-47 (M.D. Pa. 1978) (breach of contract action; 51 questions), *aff'd mem.*, 601 F.2d 574 (3d Cir. 1979).

88. Even if a special verdict contains only a few questions, inconsistencies still may take time to identify. For example, in Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir.), *cert. denied*, 105 S. Ct. 564 (1984), the special verdict consisted of only three questions. *See id.* at 144 & n.3. The case involved a complex area of the Pennsylvania common law of civil conspiracy. *See id.* at 145. Although there were only three questions, the court of appeals required two pages to explain why an inconsistency had occurred. *See id.* at 145-46. The court found that one of the questions was "woefully ambiguous" and that "the jury instructions treated this very complex subject in legal terms somewhat lacking in perspicuity." *Id.* at 146. Even if a special verdict contains only a few questions, it may still take time to locate an inconsistency if the questions were poorly drafted or involve a complex area of the law.

89. See *infra* note 101.

90. *See* Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) (trial judge need only give counsel "substance" of special verdict questions, not exact text of special questions); Cramer v. Hoffman, 390 F.2d 19, 23 (2d Cir. 1968) (court has discretion whether to show special verdict questions to counsel); Clegg v. Hardware Mut. Casualty Co., 264 F.2d 152, 157-58 (5th Cir. 1959) (court is not compelled to show special verdict questions to counsel prior to summation); *see also* Cutlass Prods., Inc. v. Bregman, 682 F.2d 323, 330 (2d Cir. 1982) (court has discretion whether to show special verdict questions to counsel prior to submission, but abuse of discretion may be found if counsel was not shown questions in complex cases).

91. *See* Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) (permitting trial judge not to show special verdict questions and instructions to counsel is in accord with "generally accepted interpretation of Rule 51 that in the federal courts counsel have no right to be apprised of the exact language of any instruction"); Cramer v. Hoffman, 390 F.2d 19, 23 (2d Cir. 1968) (denying plaintiff's claim that Rule 51 requires that counsel be supplied with the special verdict questions prior to summation); Clegg v. Hardware Mut. Casualty Co., 264 F.2d 152, 157-58 (5th Cir. 1959) (Rule 51 requires that counsel be told special verdict questions will be submitted, but does not require that counsel be shown those questions).

form counsel how it has acted on proposed charges submitted by counsel,[92] many federal courts have held that this provision places no obligation on the judge to disclose to counsel the exact language of the actual instructions.[93]

The better view is that adopted by the Third Circuit, which has held that district courts must disclose the exact form of the special questions and instructions before submission to the jury.[94] This gives counsel an excellent opportunity to prepare for inconsistencies. In addition, counsel may be able to make suggestions on the wording and organization of the questions, thus possibly preventing inconsistencies from occurring at all.[95]

Moreover, counsel should be allowed to see the special questions and instructions before they go to the jury because of the Rule 49(a) provision concerning omissions.[96] No objection to an omitted issue is allowed if counsel did not move to have that issue submitted to the jury before the jury was given the special verdict form.[97] It would be unfair to deem that the right to have an issue submitted to the jury has been waived if counsel never had the chance to examine the verdict form to determine if all

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92. Fed. R. Civ. P. 51 states in part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

93. *See* Dunn v. St. Louis-S.F. Ry., 370 F.2d 681, 683 (10th Cir. 1966); Garland v. Material Serv. Corp., 291 F.2d 861, 862-63 (7th Cir. 1961); Puggioni v. Luckenbach S.S. Co., 286 F.2d 340, 344 (2d Cir. 1961); Downie v. Powers, 193 F.2d 760, 767 (10th Cir. 1951); Dallas Ry. & Terminal Co. v. Sullivan, 108 F.2d 581, 583 (5th Cir. 1940); Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381, 1388 (E.D. Pa. 1969), *aff'd*, 436 F.2d 416 (3d Cir. 1970); *cf.* Martin v. United States, 404 F.2d 640, 643 (10th Cir. 1968) (under Federal Rules of Criminal Procedure, as under the Federal Rules of Civil Procedure, trial judge need not show jury instructions to counsel).

94. *See* Smith v. Danyo, 585 F.2d 83, 88 (3d Cir. 1978); *see also In re* Air Crash Disaster at Mannheim, Ger., 586 F. Supp. 711, 723-24 (E.D. Pa. 1984) (following rule of *Smith v. Danyo*); Kushner v. Hendon Constr., Inc., 81 F.R.D. 93, 98 (M.D. Pa.) (same), *aff'd mem.*, 609 F.2d 502 (3d Cir.), *aff'd mem. sub nom.* Hendon Constr. Inc. v. Naholnik, 609 F.2d 501 (3d Cir. 1979).

95. *See* Smith v. Danyo, 585 F.2d 83, 88 (3d Cir. 1978) ("[G]iving counsel an opportunity to comment upon the proposed interrogatories is an obvious safeguard against inadvertent confusion or error in their preparation. . . . Indeed, the time so spent might often improve the interrogatories and thus result in a more orderly, and shorter, jury deliberation."); *see also* Bell v. Mickelsen, 710 F.2d 611, 616 (10th Cir. 1983) (court attempted to avoid vagueness in special verdict questions by reviewing questions with counsel prior to submission); Guidry v. Kem Mfg. Co., 598 F.2d 402, 407 (5th Cir. 1979) (inconsistencies might have been avoided if counsel had assisted court in framing the special questions).

96. *See* Fed. R. Civ. P. 49(a).

97. Goeken v. Kay, 751 F.2d 469, 472 (1st Cir. 1985); Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985); Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1337 (10th Cir. 1984); Bell v. City of Milwaukee, 746 F.2d 1205, 1254 n.62 (7th Cir. 1984); Fed. R. Civ. P. 49(a).

the issues were covered adequately.[98]

If the jury is discharged hastily, however, inconsistencies may remain undiscovered even if counsel have diligently studied[99] the special questions and instructions before and after submission to the jury.[100] If time is not allowed for a careful examination of the special verdict after it has been returned by the jury, a waiver rule may be prejudicial to litigants.[101] To avoid such a result, the court should hold the jury for a reasonable time proportionate to the length or complexity of the special verdict so that counsel can examine the verdict carefully.

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98. *See* Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1336-37 (10th Cir. 1984) (court held that appellant had waived right to a jury trial on specific issue, but noted that appellant had been given chance to examine verdict form before its submission to jury); Smith v. Danyo, 585 F.2d 83, 88 (3d Cir. 1978) (if counsel is not shown interrogatories before submission, "counsel will have been deprived of the opportunity to request instructions on . . . significant issues"); Cote v. Estate of Butler, 518 F.2d 157, 160 (2d Cir. 1975) (noting that counsel had been given opportunity to examine special verdict questions); *In re* Air Crash Disaster at Mannheim, Ger., 586 F. Supp. 711, 723-24 (M.D. Pa. 1984) (counsel is deprived of chance to ensure that all issues are submitted unless shown special questions prior to submission).

99. Of course, allowing counsel to see the special verdict questions and instructions before they are submitted to the jury is only effective in preventing inconsistencies if counsel is diligent in examining the material both before and after submission. This point was stressed by the Eleventh Circuit: "A very cursory reading of the verdict form would have uncovered the inadequacies of the verdict. Had the attorneys examined the verdict with the same degree of vigor with which they pursued their cause at the trial . . . , valuable judicial resources could have been conserved." Burger King Corp. v. Mason, 710 F.2d 1480, 1489 n.5 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

100. If the special verdict is long, it is very possible that the jury will be dismissed before counsel have been able to discover inconsistencies. See *supra* note 87 and accompanying text.

101. Many courts, in determining whether application of a waiver rule would be prejudicial when inconsistencies have resulted under Rules 49(a) and 49(b), have considered whether counsel was given sufficient time to examine the verdict and whether the trial judge asked counsel if they were satisfied with the verdict before dismissing the jury. *See* Perricone v. Kansas City S. Ry., 704 F.2d 1376, 1379 (5th Cir. 1983) ("we will not listen to counsel complain about the [special verdict] . . . when he then uttered not a peep—even though the judge specifically invited any objection"); Wagner v. International Harvester Co., 611 F.2d 224, 229 n.6 (8th Cir. 1979) (appellant "expressly declined to have the jury resume its deliberations in an effort to resolve any inconsistency in the verdict answers at issue here"); Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 535 (5th Cir. 1974) ("trial judge was careful to solicit objections from both counsel after the verdict was rendered"); Tennessee Consol. Coal Co. v. United Mine Workers of Am., 416 F.2d 1192, 1200 (6th Cir. 1969) (trial judge asked counsel if they had any objections to make before dismissal of jury), *cert. denied*, 397 U.S. 964 (1970); Cundiff v. Washburn, 393 F.2d 505, 506 (7th Cir. 1968) (trial judge asked if counsel wanted inconsistencies resubmitted to jury); Kirkendoll v. Neustrom, 379 F.2d 694, 699 (10th Cir. 1967) ("court asked if there was any reason why the jury should not be discharged"); Employers Casualty Co. v. Dupaquier, 338 F.2d 336, 337 (5th Cir. 1964) ("inconsistencies as existed between answer to special interrogatory and jury's general verdict were apparent in ample time for defendant to have moved for resubmission to jury"). These two factors—sufficient time for review and notice of impending dismissal of the jury—should be considered before a court of appeals determines that a waiver rule should be applied in an individual case.

CONCLUSION

Special verdicts aid the jury in understanding cases with numerous and complex legal and factual issues. In all types of cases, special verdicts often prevent or limit retrials. To further the use of special verdicts in federal courts, uniform approaches should be followed in resolving inconsistencies among the findings.

The most efficient way to resolve inconsistencies is by resubmitting them to the jury because that procedure eliminates the need for a costly and time-consuming retrial. Resubmitting inconsistencies also ensures that the jury, not the judge, resolves all the issues that were submitted to the jury. To assist counsel in locating inconsistencies, the trial judge should allow counsel to see the special questions and instructions before they are submitted to the jury. After the special verdict has been returned from the jury, the trial judge should hold the jury long enough for counsel to make a careful examination of the special verdict. To prevent gamesmanship and to achieve the Federal Rules' goals of economy and efficiency, litigants should be required to object to inconsistencies before the jury is discharged. If followed, these procedures will minimize the problems caused by inconsistencies and therefore maximize the use of special verdicts in the federal courts.

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