Fast Track Jury Trials: The Abbreviation of the Traditional Jury Trial

By Matthew J. Story and Brittany F. Boykin

On March 7, 2013, South Carolina Chief Justice Toal issued the Fast Track Jury Trial Administrative Order permitting implementation of the Fast Track Jury Trial statewide.[1] The Administrative Order builds upon and provides a uniform structure to the ad hoc system used in Charleston and surrounding counties for more than 10 years. Fast Track Trial Jury Trials (Fast Tracks) have become a popular method of trying cases in those areas that have experimented with the system. The Charleston County Clerk of Court reports that from 2010 through the end of 2012, approximately 40% of cases tried to verdict were Fast Tracks. Depending on the case, Fast Tracks can provide advantages such as a date-certain trial and reduced out-of-pocket expenses.

History of Fast Track Jury Trials in South Carolina

A Fast Track is an expedited, yet abbreviated, trial tried before an attorney who is paid by the parties to act as a judge with a six-person jury panel. It first appeared in South Carolina approximately 13 years ago. Charleston attorneys Samuel R. Clawson and Karen McCormick participated in the first Fast Track before the Hon. Daniel J. Piper in Charleston. Since then, attorneys in the First and Ninth Circuits have repeatedly engaged in Fast Tracks, which were generally called "Summary Jury Trials." Fast Tracks in South Carolina have binding jury verdicts and are used almost exclusively in personal injury cases.

Benefits of a Fast Track Jury Trial

The Administrative Order establishes the rules and procedures for the Fast Track process. The rules are flexible to allow the parties to present their case in a traditional manner; however, the parties are also permitted to agree to a relaxed application of the evidentiary rules for a more streamlined presentation. Parties who desire to engage in a Fast Track do so by entering into a "Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer."[2] The agreement is irrevocable absent a finding of fraud.

Cases are tried before an attorney who is mutually agreed upon and compensated by the parties. This attorney, known as a Special Hearing Officer, must be a member of the South Carolina Bar and must have completed the trial experience requirements of Rule 403. The costs of the Special Hearing Officer are typically split equally between the parties.

One of the most appealing facets of the Fast Track is that the parties are given a date-certain for trial. Once the parties provide the clerk of court with a filed copy of the consent order, the case is removed from the docket and a mutually convenient trial date is set. Date-certain trials can provide an inherent cost savings by avoiding the need to appear for multiple roster meetings or the need to issue repeated subpoenas to witnesses. Under the Administrative Order, parties are also able to limit their expenses by being excused from mandatory mediation and/or arbitration.

Under the Order, the parties may agree to a high/low agreement, not to be disclosed to the jury. Defendants and their insurance carriers typically insist on a high of policy limits or less as an absolute condition. To a defendant and the defendant's insurer, this is particularly important due to limited or no post-trial recourse to the litigants. On the other side of the equation, a low can often be negotiated to provide a plaintiff with a guaranteed recovery equivalent to the minimum amount a jury might be expected to award or perhaps a first offer. In a case where the defense feels the minimum verdict is close to zero, a low is sometimes offered to help offset the costs associated with the proceeding. Sometimes the low is zero. The undisclosed high/low agreement is often the first issue discussed after the parties broach the possibility of a Fast Track. In cases involving minors or incapacitated persons, the Order requires that a circuit court judge approve the consent order and the high/low agreement just as if approving a minor settlement.

Although the Supreme Court's order makes clear that the parties *may* agree to modify the rules of evidence, the practical experience has shown that relaxing the rules of evidence has been one of the most important cost-saving features of the Fast Track Trial system. If the parties cannot agree to relaxed rules of evidence, it is likely a sign the case is not suited for the Fast

Track Trial system. An agreement to modify the rules of evidence should be written into the stipulations section of the consent order for the Fast Track. The form promulgated by the Supreme Court provides a line for "Other" agreements, and this would be an appropriate place to state the stipulations regarding this point.[3]

When discussing modifications from the rules of evidence, the parties generally agree that reports, records and affidavits may be offered in lieu of live testimony. If depositions have already been taken in a case, excerpts may be submitted or read regardless of the availability of the witness. Doctors' reports, hospital records, x-rays, EMS reports, tax records and lost wage verifications are all commonly submitted as evidence without the necessity of calling a single witness to provide foundation or authentication.

This kind of agreement greatly reduces the cost of the trial to the litigants. In a modest personal injury case, calling doctors live or securing their appearance at trial through video depositions can generate costs that exceed the reasonable value of the case or costs that substantially erode the plaintiff's recovery. In contrast, the cost of obtaining a reasonably detailed medical report is several hundred dollars. The cost of obtaining the doctor's notes is often much less. With an agreement to relax the rules of evidence, these documents can be submitted in a Fast Track Trial without the necessity of calling any witness. By waiving authentication and foundation requirements, defendants also receive the benefits of being able to introduce medical records that may include reports of pre-existing conditions, as well as documents showing other accidents and injuries that may account for the plaintiff's complaints.

The parties should also discuss whether they agree that "ex parte depositions" may be used and to what extent. The term "ex parte depositions" is expressly referenced by the S.C. Supreme Court as something that the parties may agree is admissible in a Fast Track Trial. An ex parte deposition is a term that generally refers to any deposition to which the other side is not invited. It may be a fact witness but is more often a medical witness.

The sooner the parties agree that the case should go before a Fast Track, the greater the cost-savings that can be realized.

Parties should not enter into a Fast Track with the expectation that they will be able to introduce evidence that would most likely be excluded by a circuit court judge. It should be noted that the evidentiary rules that are typically modified are those relating to authentication and format of presentation, not those governing relevance. Subsequent remedial measures, stale convictions and evidence of liability insurance should remain excluded, just as in traditional trials. Hearsay rules typically remain in force and unmodified.

At what point in a lawsuit should the parties and their counsel discuss the option of a Fast Track? The sooner the parties agree that the case should go before a Fast Track, the greater the cost-savings that can be realized. Cases can be identified for Fast Track before suit is filed. Others are agreed to only after the case is on the trial roster.

To consent to a Fast Track both parties generally need to have enough information to evaluate the case. This may require an exchange of basic discovery materials, either formally or through voluntary exchange. In some cases, depositions may have to be taken and subpoenas issued to have the evidence necessary for a Fast Track Trial.

The Administrative Order is silent on whether discovery will still be available after the agreement to have a Fast Track Trial is reached between the parties. In practice, attorneys usually discuss what discovery is left to be completed at the time they enter into Fast Track discussions. This allows the parties to approximate how many weeks or months will be needed before the trial is scheduled and also fosters reasonable expectations as to the time and expense each party's preparation will entail.

The Administrative Order provides that documentary evidence be exchanged at least 30 days before the scheduled trial, unless that time is modified by the order. Upon exchanging proposed documents, the parties then submit to a pre-trial conference with the Special Hearing Officer at least 10 days before the trial to address any objections and exchange a witness list.

Any evidence not produced at the pre-trial conference is excluded unless otherwise agreed to by the parties. There is typically no need to have the pretrial conference in a courtroom as there is usually no record kept of any of the proceedings.

Fast Tracks are only restricted by the agreement of the parties. The Order permits the parties to limit or forfeit post-trial motions, by agreement. However, in the case of inconsistent verdicts the Special Hearing Officer must recharge the jury to return to deliberations to resolve any inconsistencies. The clerk of court does not enter Fast Track judgments except by motion to the circuit court and a showing that the jury's verdict has not been satisfied.

Caveat Emptor: no appeal, post-trial motions may be limited

While Fast Tracks offer many benefits to the parties involved, litigants engaging in a Fast Track forfeit their right of appeal except in instances of fraud. It is quite likely that this exception will be interpreted narrowly as it is with arbitration awards. It will not be

sufficient to prove a jury decided the matter incorrectly. Ultimately, the parties must be willing to accept whatever rulings are made by the Special Hearing Officer. There will be no appeal from a Fast Track even if the Special Hearing Officer reads a jury charge that is incorrect or incomplete. Even manifest errors of law are not appealable. Fast Track Trials are not recorded by an official Judicial Department court reporter, making an appeal even more difficult and unlikely.

The Administrative Order states that the parties *may* agree to waive motions for a directed verdict, motions to set aside the verdict, or motions for additur or remittitur. Even those who have experience in Fast Tracks should be careful to specify their agreement on this issue. Before the Court's Order, most Fast Tracks were tried with the understanding that the presiding attorney lacked the power to set aside the verdict. Under the current Administrative Order, Special Hearing Officers will have the power to hear post-trial motions for additur, remittitur and new trial unless the parties agree otherwise.

Is your case right for a fast track jury trial?

By far, the experience in the First and Ninth Judicial Circuits is that Fast Tracks are well suited for personal injury cases. Although the practice first started with modest sized bodily injury cases, the positive experience of the bar led to larger bodily injury cases being tried via Fast Track. Cases with substantial medical expenses have been tried using Fast Tracks, as well as cases involving substantial issues of liability. There is no reason Fast Tracks must be limited to personal injury cases. At least one insurance coverage case has been tried via a Fast Track Jury Trial. In that case, the only issue was the residence of the plaintiff at the time of the accident. Other types of cases may be suitable for Fast Tracks. The best test is to ask whether the issues in the case are principally factual questions to be determined by a jury.

Questions raised in basic negligence cases, such as liability and damages, are seldom overturned on appeal. Therefore, agreeing to a Fast Track and waiving the right to appeal may be an attractive alternative in these cases. However, cases involving novel issues or a convoluted area of law are probably not suitable for a Fast Track. Care should be exercised where there is a thorny evidentiary question that has a substantial impact on the case. The parties should not agree to a Fast Track unless they are willing to accept the decision of the Special Hearing Officer, with no appeal. Such cases may be more suitable for a traditional jury trial where the parties retain the recourse of an appeal.

Your day in court

The jury is selected after qualification and voir dire by a circuit judge. Most commonly, this is accomplished on Monday at the beginning of a civil term, but there is no reason a jury could not be selected from a criminal term jury panel. Ten jurors are drawn and each side strikes two. The six jurors are then sworn just as in a traditional jury trial. Once the jury is selected, the trial usually begins on another day, providing the litigants the entire day to start and finish the trial.

On the day of trial, the Special Hearing Officer gives a preliminary instruction. In the past, the presiding attorney has simply read an abbreviated preliminary instruction, with an introduction to this effect:

> Ladies and gentlemen of the jury, the parties have agreed to expedite the normal course of this trial. For instance, you may have noticed that there are only 6 of you rather than 12. During the trial, you may notice that the attorneys will present documentary evidence rather than call a live witness. Attorneys may present testimony by depositions or live witnesses. While the parties have agreed to some expedited procedures, this does not lessen the importance of this case, for either the plaintiff or the defendant. You are to give this case the same attention and consideration as you would if the parties had not agreed to this procedure.[4]

Each side gives a brief opening statement. The plaintiff proceeds with his case, followed by the defendant's case. Live witnesses provide direct testimony and are subject to cross-examination. To facilitate an expedited process, the Administrative Order encourages parties not to present more than three live witnesses. As an accommodation, affidavits may be read to the jury and as well as any reply affidavits. Depositions may be read and video depositions played for the jury. Records may also be read and/or introduced into evidence. Each side gives a closing argument. The "Special Hearing Officer" instructs the jury and they are sent to deliberate. Ultimately, the jury renders a binding verdict, subject only to the high/low agreement of the parties.

Conclusion

The Fast Track Jury Trial is yet another option to resolve disputes. It is a proven viable alternative to achieving expedited and cost-efficient results while retaining the integrity implicit in a jury's verdict. ■

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[1] Fast Track Jury Trials Administrative Order, Appellate Case No.: 2013-000389, March 7, 2013

[2] The Administrative Order provides a template for the "Consent Order: Fast Track Jury Trial and Appointment of Special Hearing Officer" at http://www.sccourts.org/forms/dspFormID.cfm?formID=SCCA239

[3] See "Consent Order: Fast Track Jury Trial and Appointment of Special Hearing Officer" Form: http://www.sccourts.org/forms/pdf/SCCA239.pdf

[4] "The Basics of Summary Jury Trials" presentation by Samuel R. Clawson and Matthew J. Story of Clawson and Staubes, LLC ©2008