

# Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After *Unitherm* and Amended Rule 50

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It is already a monstrous uphill climb to win appellate review of judgments entered on civil jury verdicts in the federal courts. Jury findings of fact have their own strict protection from judicial review, and that deference carries over to the appellate court. On appeal of even mundane jury findings for sufficiency of the evidence, a verdict will not be overturned without a finding that the jury acted *unreasonably*.<sup>1</sup>

The Seventh Amendment demands no less,<sup>2</sup> nor does its current implementation in Rule 50 of the Federal Rules of Civil Procedure (Federal Rules).<sup>3</sup> All factors—constitutional and historical,<sup>4</sup> political and institutional<sup>5</sup>—press for deference to the

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1. See *infra* text accompanying notes 22-23.

2. U.S. Const. amend. VII. “No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

3. FED. R. CIV. P. 50, quoted in pertinent part *infra* at note 81.

4. See, e.g., JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (2006) (tracing the original application of the American constitutional ideal of right to trial by jury); William W. Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950) (arguing that directed verdicts, as used, in more modern courts, are jury decisions in name only and should be discontinued).

5. See, e.g., William Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695 (2001) (reviewing institutional reasons for deference to federal juries and comparing state practice); Debra L. Bassett, “*I Lost at Trial—In the Court of Appeals*”: *The Expanding Power of the Federal Appellate Courts to*

jury in this instance and limit the judicial scrutiny that appellate judges may be tempted to undertake when faced with questionable jury findings. Time and again, the United States Supreme Court has warned appellate courts to make this deference to elemental findings of fact really count.<sup>6</sup> Objections to such a finding, claiming the evidence is insufficient to support the verdict, are typically rejected under a deferential standard of review.<sup>7</sup> But at least the promise of review lives.

The news gets worse for some litigants. The climb becomes as steep and tall as Mount Everest if the complaining party has failed to make the necessary objections at trial. What would be improbable review now becomes impossible or nearly so. In some instances and in some courts, sufficiency review is entirely foreclosed.<sup>8</sup> Even if other situations or courts offer the hope of procedural forgiveness, it often takes the form of a standard of review so strict that it makes the unpreserved objection largely fatal and the verdict virtually

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*Reexamine Facts*, 38 HOUS. L. REV. 1129 (2001) (examining institutional policies favoring deference and urging their strengthening); Martin Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980) (discussing political purposes of appellate review and courts in many systems).

6. *E.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (instructing lower courts to review all the evidence in the record when entertaining a motion for judgment as a matter of law); *Lavender v. Kurn*, 327 U.S. 645, 652 (1946) (ruling that once a jury made a factual inference, "the respondents were not free to relitigate the factual dispute in a reviewing court"). One context in which the Supreme Court traditionally gives less deference to juries is constitutional fact-finding. *E.g.*, *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (Breyer, J., plurality) (urging independent judicial review in appellate courts that are assessing statutory restrictions on campaign contributions); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full."). In such cases, especially under the First Amendment, courts routinely apply independent review to protect the interests at stake. Steven A. Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229 (1996); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001). Constitutional fact review is not considered here, but similar rules requiring preservation of objection should still apply.

7. *See, e.g.*, 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.01-3.03 (3d ed. 1999) [hereinafter FEDERAL STANDARDS OF REVIEW] (explaining the standards that must be used in reviewing jury verdicts in civil cases). *See also infra* notes 22-23 and accompanying text.

8. *See infra* note 69 and accompanying text.

unassailable as a matter of sufficiency review.<sup>9</sup> Some judges will write, in exceptional cases, that they can still review the verdict for *plain error* or a *miscarriage of justice*, but this glimpse of daylight is nearly always stated in dicta—in the course of finding that no such plain error or miscarriage occurred and the verdict must be affirmed, regardless of any procedural generosity offered in that court or situation. At best the litigant might hope for a new trial (granted under a similarly deferential standard),<sup>10</sup> but true sufficiency review is foreclosed, effectively waived, or made so difficult as to be practically unhelpful or illusory.

The news got even darker last year in a Supreme Court case resulting in a total waiver. In its 2006 decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*,<sup>11</sup> the Court refused to offer even a glimmer of hope—any kind of review at all, even just for whether a new trial should be ordered because the evidence weakly supported the result. In that case, the Court categorically stated that “there was no basis for review of respondent’s sufficiency of the evidence challenge in the Court of Appeals.”<sup>12</sup> This conclusion applied to a fairly specific context, one in which the failure of preservation below is so total as to preclude even new trial review because the party has failed to preserve that fallback option too. However, this recurs enough that the opinion should serve as a wake-up call for all lawyers practicing in federal court.

This is one procedural trap in which litigants simply do not want to find themselves—least of all the defendant in *Unitherm*, ConAgra, who had won an appellate reversal of a jury decision in a case where little or no evidence supported the jury finding on an essential element of economic damages. But ConAgra lost the war in the Supreme Court and the unsupported verdict against it reinstated.<sup>13</sup>

The news did, however, get somewhat better for litigants caught in a different but related sort of trap that has existed for years under the Federal Rules. The recent amendment to Rule 50,<sup>14</sup>

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9. See *infra* notes 70-74 and accompanying text.

10. See *infra* notes 75-78 and accompanying text.

11. 126 S. Ct. 980 (2006). The case and its ramifications are discussed in Part IV *infra*.

12. *Unitherm*, 126 S. Ct. at 989.

13. *Id.* at 984-85, 989.

14. As discussed in Part III and quoted in note 81 *infra*.

effective December 1, 2006, solves one relatively common dilemma: some litigants, apparently reasonably represented by otherwise experienced trial lawyers,<sup>15</sup> found themselves failing to properly make an initial and appropriate objection to sufficiency of the evidence (which must then be renewed post-verdict). Essentially, this was a timing failure. The lawyer had asked for the jury review at an earlier time, as the rule requires, but not at precisely the right point of the trial. As amended, Rule 50 makes it easier to preserve the objection in proper sequence and is apparently more forgiving of some procedural lapses that can occur when trying to have the judge throw out an anticipated verdict, or a decided one, sometime during or after the trial. The effect on appeal is to grant more generous review than would typically be allowed, if any, after a procedural lapse resulted in a failure to preserve the sufficiency objection.<sup>16</sup>

The amendment's gift, however, stops abruptly at the situation in *Unitherm*.<sup>17</sup> The *Unitherm* result apparently survives amended Rule 50, even though the rule's new generosity obviously has its origins in the Supreme Court's rule-making function. By allowing new Rule 50 to go into effect unchanged, the Court and Congress failed to remove the avoidable trap that *Unitherm* did not create but has made so deadly.

This article explores various procedural lapses and possible traps at trial that may negatively affect jury review for sufficiency of the evidence, particularly the review normally made on appeal after such procedural problems occurred. The *Unitherm* total-waiver result is one practice (and maybe even malpractice) with a hefty price tag, but one that can be avoided by making proper objections, in wording and timing, below. The amended rule makes it easier to ensure that the timing at trial is adequate to preserve the sufficiency objection, and thereby to continue climbing with the hope of meaningful appellate review of a questionable jury verdict.

Fortunately, the pitfalls can be side-stepped with careful application of Rule 50's mechanism coupled with an adequate new trial objection. These measures avoid the kind of ire that the Court expressed in *Unitherm*, as well as its fatal appellate consequences.

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15. *Cf. Unitherm*, 126 S. Ct. at 989 (Stevens, J., dissenting) ("Murphy's law applies to trial lawyers as well as pilots. Even an expert will occasionally blunder.").

16. *See infra* notes 81-82 and accompanying text.

17. *See infra* notes 104-06 and accompanying text.

Many other apparent lapses may still be fixed or at least improved on appeal, even if the careful appellate lawyer inherits a case where the trial lawyer was not so careful.

#### I. PRESERVING REVIEW OF JURY VERDICTS UNDER TRADITIONAL RULE 50 PRACTICE

Rule 50 sets forth the procedure for making motions in federal court to challenge the sufficiency of the evidence to support a civil jury verdict. Traditionally, the necessary motions were named *directed verdict* (which came before submission of the case to the jury) and *judgment notwithstanding the verdict*, or *judgment n.o.v.* (which came after the verdict).<sup>18</sup> A 1991 amendment to Rule 50 replaced both motions with one procedural device: the *motion for judgment as a matter of law*.<sup>19</sup> Even as re-christened, the rule still required two separate and key times to make the “single” motion: the motion must be brought during trial or before submission under Rule 50(a); and then “renewed” after judgment under Rule 50(b). The renewal purportedly acted on the motion “made at the close of all the evidence,”<sup>20</sup> suggesting that, like former Rule 50 practice under the old labels,<sup>21</sup> the initial motion be made not just during trial but at its precise *close*, for proper preservation of the later “renewed” motion. This is certainly advisable practice today, even if the precise timing of the initial motion is relaxed by the more recent amendment.

Under all versions of the procedure, the district court uses the same standard in ruling on the sufficiency motion (whatever its labeling and regardless of its timing) as the appellate court does in reviewing the judge’s decision on the motion. The standard, of course, is the general *reasonableness* test for sufficiency of the evidence,<sup>22</sup> as discussed in many sources.<sup>23</sup> Rule 50 motions simply

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18. FED. R. CIV. P. 50 (1963).

19. FED. R. CIV. P. 50 (1991).

20. FED. R. CIV. P. 50(a) (1991).

21. See, e.g., 12B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 781 (Supp. 2006) (noting the change in terminology after the rule change in 1991); Steven A. Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 285-86 (2005) (comparing pre-1991 decisions on Rule 50 motions with post-1991 decisions on Rule 50 motions).

22. See, e.g., *Reeves*, 530 U.S. at 150 (giving a general description of the reasonableness test); *Weisgram v. Marley Co.*, 528 U.S. 440, 453-54 (2000)

provide the vehicle to raise a proper and preserved sufficiency challenge. On appeal, the same reasonableness standard of review applies, whether or not the judge granted or denied the motion. All of this “legal” sufficiency of the evidence is distinguished from the discretion courts hold to grant a new trial under Rule 59 if they find that the verdict is against the weight of the evidence.<sup>24</sup> Nevertheless, both challenges are often raised together and ideally should be. (The 1991 amendment further clarified the relationship between Rule 50 and Rule 59. For example, it specified the method to make a conditional new trial motion should the court deny judgment as a matter of law.<sup>25</sup>)

For the sufficiency challenge, problems arose because litigants would make only one such motion, mis-time the requisite initial motion before submission to the jury, or offer different grounds in the second motion than had been stated initially. The traditional rule has been that the trial court will not entertain a sufficiency motion after trial unless an earlier proper one mirroring it was made before submission (including its renewal yet again if it

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(pointing to the old Rule 50 as requiring the reasonableness test); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (“If reasonable minds could differ as to the importance of the evidence, however, a verdict should not be directed.”).

23. *E.g.*, FEDERAL STANDARDS OF REVIEW, *supra* note 7, § 3.02 (discussing the reasonableness test and its application across circuits); Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237 (describing in general terms issues in appellate review of civil verdicts, including splits among various appellate courts on how to apply the reasonableness test); CHARLES A. WRIGHT & MARY KAY KANE, FEDERAL COURTS § 95 (6th ed. 2002) (giving a broad view of attacking verdicts and describing the reasonableness test and its application); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971) (discussing the reasonableness test for juries in the context of directed verdicts). *See also* Steven A. Childress, *Taking Jury Verdicts Seriously*, 54 SMU L. REV. 1739 (2001) (arguing that *Reeves* makes this reasonableness standard apply to the whole record below, not just that supporting the verdict); Steven A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271 (1994) (arguing that this federal standard should apply even in cases based on state law).

24. *Weisgram*, 528 U.S. at 452-53 n.9 (distinguishing sufficiency review at law from trial court discretion to order new trial); FEDERAL STANDARDS OF REVIEW, *supra* note 7, § 5.11 (discussing the same distinction).

25. FED. R. CIV. P. 50 (1991) advisory committee’s note.

was first made at the close of plaintiff's case).<sup>26</sup> The earlier motion was "a prerequisite, virtually jurisdictional."<sup>27</sup> The policies for such a requirement include fair notice to opposing parties, the chance for the court to take curative steps, and the avoidance of constitutional issues.<sup>28</sup> Also, the party's motion must "specify the judgment sought and the law and facts on which the moving party is entitled to the judgment."<sup>29</sup>

Despite this strict rule, over the years many courts in various circuits (not necessarily consistently within the same court) began to stretch the notion of what constitutes a *motion* under Rule 50.<sup>30</sup> In one such case, the Fifth Circuit held that even a defendant who flatly failed to make a motion at the close of all evidence was allowed judgment on appeal because his "actions were a sufficient approximation of a renewed motion for directed verdict to support his later motion" after the verdict.<sup>31</sup> Such leniency seemed especially likely if the failure was one to *renew* at close of evidence an adequately-stated motion made earlier,<sup>32</sup> coupled with an actual motion made after trial.

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26. *Unitherm*, 126 S. Ct. at 985-88 (discussing the preservation rule's history and several early cases enforcing it).

27. *Perricone v. Kansas City S. Ry.*, 704 F.2d 1376, 1380 (5th Cir. 1983).

28. *See, e.g., Serna v. City of San Antonio*, 244 F.3d 479, 482 (5th Cir. 2001) (discussing a previous case in which the appellate court overruled a trial court that had granted a motion for judgment as a matter of law when it was still possible to call back the jury from deliberations and present more evidence); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978) ("[A] party is not permitted to gamble on the verdict and later question the sufficiency of the evidence that led to his defeat."); FED. R. CIV. P. 50 (2006) advisory committee's note (noting that the prior motion rule serves the purpose of alerting the opposing party, gives notice to the court should it have an opportunity to "resolv[e] some issues, or even all issues, without submission to the jury," and is compliant with the Seventh Amendment).

29. FED. R. CIV. P. 50(a). That requirement and language is carried over from the previous version of Rule 50(a).

30. *E.g., Boynton v. TRW, Inc.*, 858 F.2d 1178, 1185-86 (6th Cir. 1988) (en banc) (holding that a "renewed" post-verdict motion for directed verdict can be considered a motion for a judgment n.o.v.); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982) (holding that a motion for directed verdict made even before all evidence had been presented can satisfy the prior motion rule under certain circumstances).

31. *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984).

32. *See, e.g., id.* at 417 (listing cases); *Ebker v. Tan Jay Int'l*, 739 F.2d 812, 823 (2d Cir. 1984) ("In contrast to the lack of clarity in the defendant's post-verdict motion, the omission of a motion for a directed verdict at the close of the

Often the rationale for such definitional clemency was that the opponent and court were on notice of the evidentiary deficit.<sup>33</sup> The Seventh Circuit, for example, indicated that renewing before submission a mid-trial motion is “certainly the better and safer practice,”<sup>34</sup> but that application of Rule 50(b) “in any case ‘should be examined in the light of the accomplishment of (its) particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for truth.’”<sup>35</sup> Such panels pronounced they would not “succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.”<sup>36</sup> The hallmark of this good-enough approach, and the full sufficiency review that followed, was that it enforced the “spirit of the rules”—in many cases over the clear direction of the rules as to how and when to make a jury motion. The Fifth and Seventh Circuits most consistently applied this approach.

By contrast, some courts declined to interpret a request for directed instructions on quasi-sufficiency grounds as sufficient to satisfy Rule 50(b)’s prerequisites,<sup>37</sup> particularly in the Third<sup>38</sup> and

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whole case was no longer curable. Still it does not necessarily follow that it is now incumbent upon us to insist on compliance with the letter of Rule 50(b) when plaintiff’s counsel acquiesced in a departure from it.”)

33. *See, e.g.,* *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983) (listing two of the purposes of Rule 50(b) as alerting the court and the opposing party to “evidentiary insufficiency”); *Jack Cole Co. v. Hudson*, 409 F.2d 188, 191 (5th Cir. 1969) (holding that a request by the defendants in the trial court that the jury be instructed to find for them was “sufficient predicate” under the Rule for their motion for judgment notwithstanding the verdict).

34. *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir. 1981).

35. *Id.* (quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978)).

36. *Quinn v. Sw. Wood Prods.*, 597 F.2d 1018, 1025 (5th Cir. 1979).

37. Even in the Fifth Circuit, occasionally. *See, e.g.,* *Freimanis v. Sea-Land Serv.*, 654 F.2d 1155, 1161 (5th Cir. 1981) (declining to follow the “liberal” interpretation of the Rule and distinguishing itself from *Quinn*).

38. *See, e.g.,* *Mallick v. Int’l Bhd. of Elec. Workers*, 644 F.2d 228, 234 (3d Cir. 1981) (“[A request for a binding jury instruction] will cure a failure to renew a motion for a directed verdict only when the district court explicitly treats and rules on the request as though it were a directed verdict motion and the parties are aware that the court regards it as such.”); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1195 (3d Cir. 1978) (holding to a strict interpretation of Rule 50(b) and stating that a court that did not require objections to sufficiency would violate the Seventh Amendment).

Ninth Circuits.<sup>39</sup> The First Circuit has also held that a failure to renew the motion at the close of all evidence precludes review of an otherwise proper motion after the verdict, curtly stating, “the issue has not been preserved for appeal.”<sup>40</sup> Despite such waiver, courts often did treat the defective sufficiency motion as one for new trial.<sup>41</sup>

Rule 50, after amendment in 1991, continued the requirement of twin motions for sufficiency, before submission and after verdict. Despite stating “[m]otions for judgment as a matter of law may be made at any time before submission of the case to the jury,”<sup>42</sup> the rule still framed the Rule 50(b) motion after verdict as a “renewal” of a previous motion “made at the close of the evidence.”<sup>43</sup>

That language was similar enough to the previous version that courts could continue, if they so chose, a traditionally strict requirement of a motion made right before submission and at the close of all evidence, then renewed after verdict. The Second Circuit so held in 1995.<sup>44</sup> The Ninth Circuit continued to strictly require a motion made at the close of evidence,<sup>45</sup> as did the Eighth Circuit<sup>46</sup>

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39. *See, e.g.*, *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1987) (holding that the defendant’s failure to renew its motion for a directed verdict did not fall into either of the Ninth Circuit’s narrow exceptions to Rule 50(b)’s plain language); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345-47 (9th Cir. 1986) (discussing the court’s strict interpretation of Rule 50(b)).

40. *R & R Assocs. v. Visual Scene, Inc.*, 726 F.2d 36, 38 (1st Cir. 1984).

41. *See, e.g.*, *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1207 (9th Cir. 1979) (“The record discloses that plaintiff never moved for a directed verdict. Therefore, his motion for judgment n.o.v. has no legal effect, and we will treat his motion solely as one made for a new trial.”); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2539, at 362 n.6 (1995) (listing cases).

42. FED. R. CIV. P. 50(a)(2) (1991).

43. FED. R. CIV. P. 50(b) (1991). The requirement of a motion at the close of trial, renewed after verdict, was retained. FED. R. CIV. P. 50 (1991) advisory committee’s note.

44. *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995). *Accord* *United States ex rel. Wallace v. Flintco, Inc.*, 143 F.3d 955, 961 (5th Cir. 1998) (holding that even with a liberal construction of Rule 50(b), a party must move for judgment as a matter of law at the close of evidence to preserve the right to renew such a motion after the verdict).

45. *Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 886-87 (9th Cir. 2002).

46. *Mathieu v. Gopher News Co.*, 273 F.3d 769, 777 (8th Cir. 2001).

and (inconsistently) the District of Columbia Circuit.<sup>47</sup> The Sixth Circuit held in 2005 that the amended rule did not allow for opening the case to further proof after the jury motion had been made, finding waiver.<sup>48</sup>

Going further, the Seventh Circuit—which, like the Fifth Circuit, had traditionally shown leniency in enforcing the Rule 50 requirements—later recognized that the 1991 amendment was meant to change the circuit’s practice of forgiving improper motions, at least those not made at the required *times*.<sup>49</sup> Nonetheless, the court has expressed and applied its traditional leniency to properly-timed motions that may not specify all the grounds sought as long as adequate notice was provided.<sup>50</sup> The court reasoned that although the party did not specify all arguments in a pre-verdict Rule 50(a) motion, the same arguments had been fully presented in other

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47. See *Frederick v. District of Columbia*, 254 F.3d 156, 160-62 (D.C. Cir. 2001) (discussing various approaches across the circuits, including the D.C. Circuit).

48. *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 447-49 & n.14 (6th Cir. 2005) (holding that further evidence, after motion, was neither cumulative nor inconsequential and that 1991 amendment did not change circuit rule that motion be made at the close of evidence, though mere technical deviations may not be fatal). The court found one such lapse to be non-fatal, where the judge had wrongly ordered the movant to raise the issue as he did. *Karam v. Sagemark Consulting, Inc.*, 383 F.3d 421, 426 (6th Cir. 2004). In any event, the result in *A+ Homecare* will not survive Rule 50 as amended in 2006.

49. *Equal Employment Opportunity Comm’n v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1286-87 (7th Cir. 1995) (rejecting cases that allowed something other than a motion for directed verdict at the close of all evidence to preserve the sufficiency objection). See generally *Szmaj v. Am. Tel. & Tel. Co.*, 291 F.3d 955, 957-58 (7th Cir. 2002) (listing post-1991 cases, noting amendment’s effect, and describing the Seventh, Eighth, and maybe the Eleventh Circuits as strictly applying Rule 50, while “[m]ost of the other circuits, even in their post-1991 decisions, have taken a more forgiving view of harmless violations of the renewal requirement”). Specifically, the 1991 rule altered the lenient posture of prior cases, as recognized in *Laborers’ Pension Fund v. A & C Envtl., Inc.*, 301 F.3d 768, 778 (7th Cir. 2002).

50. *A & C Envtl.*, 301 F.3d at 777-78 (holding timely motions for JMOL preserved them for appeal and were consequently to be fully considered on the merits); *Urso v. United States*, 72 F.3d 59, 61 (7th Cir. 1995) (holding that the issue had been “preserved for appeal” and that the “function of Rule 50 ha[d] been served,” since the same arguments were presented at trial).

motions. Thus, adequate notice existed and curative measures were possible.<sup>51</sup>

On the other hand, other courts that relaxed the definition of such a motion, and thereby forgave even some ill-timing of the first step, often found that they could continue their leniency. Indeed, the added language of “at any time” may have supported reviewing the motion as it existed at that time, regardless of whether it was renewed by the “same” motion after judgment. A 1999 Fifth Circuit panel, for example, fully reviewed a motion made at the close of the evidence, even though it was not renewed after the verdict.<sup>52</sup>

The Tenth Circuit, similarly, increasingly described itself as a lenient or flexible court on the waiver issue.<sup>53</sup> It tallied that the vast majority of circuits hold that a failure to *renew* a sufficiency motion after the jury verdict precludes sufficiency review on appeal.<sup>54</sup> But not in the Tenth Circuit, as it reaffirmed in 2004: even the lack of a post-verdict motion was held not to bar appellate review for sufficiency as long as the motion was made prior to jury submission,<sup>55</sup> as was also held in a 1999 case.<sup>56</sup>

Two notable Fifth Circuit cases pushed this generosity to its limits. In 2000, one Fifth Circuit panel refused to find waiver even though no renewal was made at the close of all evidence (since the trial court had permitted further deposition evidence to be read into the record after the Rule 50 motion was made). In *Taylor Publishing Co. v. Jostens Inc.*,<sup>57</sup> the appellate court gave full appellate review to

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51. *A & C Envtl.*, 301 F.3d at 777-78. This was true even though the court recognized that the amended rule cut back on the leniency the court had provided regarding timing. *Id.* at 778.

52. *Gaia Techs. Inc. v. Recycled Prods. Corp.*, 175 F.3d 365, 374-75 (5th Cir. 1999). *Accord* *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 935-36 (D.C. Cir. 1991) (applying liberally the pre-1991 rule using language that would survive that amendment).

53. *See, e.g.*, *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 949-51 (10th Cir. 2004) (“When determining whether a particular issue has been raised in a motion for judgment as a matter of law, the court has liberally construed such motions . . .”).

54. *Id.* at 950 n.1 (listing cases).

55. *Id.* at 950-51 (adding, however, that the only remedy would be a new trial).

56. *Morrison Knudsen Corp. v. Fireman’s Fund Ins. Co.*, 175 F.3d 1221, 1246 & n.34 (10th Cir. 1999) (rejecting the strict Second Circuit precedent in *Varda*). This particular leniency is overturned by *Unitherm*.

57. 216 F.3d 465 (5th Cir. 2000).

the sufficiency issue (reviewing the trial judge's later consideration of post-judgment motion for judgment as a matter of law), despite the technical noncompliance it found with regard to Rule 50(b). Although "[i]t is well-established that to preserve the right to file a Rule 50(b) motion the moving party must first request JML at the close of all evidence," the Fifth Circuit traditionally "'approached this requirement with a liberal spirit.'"<sup>58</sup> The court did not require "'strict compliance,'" instead excusing "'technical noncompliance where the purposes of the requirement have been satisfied.'"<sup>59</sup> At bottom, "[t]he facts here fit within our *de minimis* exception," because "the only evidence presented after [the defendant] made the Rule 50(b) motion was the three pieces of deposition testimony."<sup>60</sup> The judge had reserved ruling on the issue, and all parties were on notice that sufficiency was disputed.<sup>61</sup> Review on appeal would thus follow the normal standards afforded the jury sufficiency issue, not some more limited review for new trial or *plain error*.

In 2001, the Fifth Circuit even found adequate preservation in a motion that was clearly untimely because it was made after the jury began *deliberating*. This fails, of course, to be "before submission" as Rule 50(a)(2), even read broadly, required. Nevertheless, in *Serna v. City of San Antonio*, the panel cited Rule 50's "liberal spirit" and pre-1991 amendment case law in order to allow the court to fully address the defendants' sufficiency objections (and reversed the refusal below to grant judgment as a matter of law).<sup>62</sup> Recognizing that the "timing of the motion . . . was anomalous and inconvenient," the court found that the defendants "did not gamble on the jury's verdict in this case."<sup>63</sup> Thus, the "purposes of the rule" were

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58. *Id.* at 471 (quoting *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 780 (5th Cir. 1999)).

59. *Id.* at 471-72 (quoting *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1244 (5th Cir. 1997)).

60. *Id.* at 472-73. This particular leniency on timing is now mandated by Rule 50 as amended in 2006, discussed in Part III *infra*.

61. *Id.*

62. 244 F.3d 479, 480-82 (5th Cir. 2001). The district court had addressed the merits of the JMOL motion but was found wrong on the merits, this panel reversing on the properly-preserved sufficiency issue. *Id.* at 482. Interestingly, the court suggests that "it would be faced with a very different situation" had the judge just rejected the motion as untimely. *Id.* How or why this would change its rule of adequate preservation is unclear.

63. *Id.* at 482 (following a pre-1991 case which had allowed the motion after charge but before deliberations).

satisfied and the merits were properly before the court on appeal.<sup>64</sup> The *Serna* court did not reconcile many other cases, even those applying the rule leniently, that emphasized that the important fact is whether defendant made his objection before the jury began deliberating,<sup>65</sup> choosing instead to forgive the defendant's lapse.

Moreover, courts in various circuits, including the Fifth Circuit, increasingly found the waiver argument to be waived itself, if the party opposing judgment as a matter of law (the non-movant) did not timely assert below the failure to comply with Rule 50(b).<sup>66</sup> In 2003, the Ninth Circuit expressly joined this "waiver of waiver" position.<sup>67</sup> The Sixth Circuit has further held that the overall question of whether a waiver of sufficiency review occurred is a mixed question of law and fact: fact-findings receive clear error deference, but the reviewing court makes a *de novo* determination of whether they add up to legal waiver in a case.<sup>68</sup>

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64. *Id.* This plaintiff's jury verdict, affirmed by a trial judge, was reversed without any further proceedings to show the missing substance of "adverse employment action" or an opportunity to augment the record, which might have occurred had the sufficiency objection been made as required.

65. *E.g.*, *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465, 471-72 (5th Cir. 2000) (excusing technical noncompliance where the defendant had given the court timely notice that it intended to present a Rule 50 motion); *Villanueva*, 723 F.2d at 417-18 (holding that where the defendant filed his motion before jury deliberation began, the motion was timely filed). Such cases and policies may now constitute a split of authority within the Fifth Circuit itself. Other cases do not apply the rule leniently, *e.g.*, *Adames v. Perez*, 331 F.3d 508, 511 (5th Cir. 2003) (holding that the defendants had waived their sufficiency argument since they did not make the motion after the verdict, meaning the appellate court could only review for plain error), leaving another apparent conflict within the Fifth Circuit if these decisions are not reconciled and some altered in light of the 2006 amendment and *Unitherm*, discussed in Part IV, *infra*.

66. *E.g.*, *Thomas v. Tex. Dept. of Criminal Justice*, 297 F.3d 361, 367 (5th Cir. 2002) (holding motion at the close of evidence did not include attack on emotional damages, but motion after judgment did, and appellee did not argue waiver, thus, usual review standard applied); *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1076 n.3 (10th Cir. 2002) (reviewing fully a sufficiency challenge to punitive damages without considering on appeal the waiver below since the non-movant had failed to argue the inadequacy of the Rule 50(a) motion, and citing cases in the D.C., Second, Third, Fifth, Sixth, Seventh, and Eighth Circuits).

67. *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 838-39 (9th Cir. 2003).

68. *A+ Homecare*, 400 F.3d at 447 (holding that one defendant waived his insufficiency argument); *Karam*, 383 F.3d at 426 (holding no waiver occurred).

The state of the law regarding waiver, or leniency in defining an adequate motion—treating it as if fully preserved and timely—was clearly a mixed bag before 2006, even in those circuits for which a general trend had been spotted or that were openly characterized as either strict or flexible.<sup>69</sup> The need for leniency could readily be avoided through proper framing and timing of two separate motions alleging insufficiency of the evidence (coupled wisely with a conditional request for a new trial). But, failing that, many courts had found a way around a literal reading of a rule that seemed to require that the key preliminary motion be made at the close of all evidence and before jury submission. Others were strict and found waiver, at least of normal sufficiency review.

## II. FAILURE TO PRESERVE: PLAIN ERROR OR MISCARRIAGE OF JUSTICE? OR NO REVIEW?

Whether a court is strict or lenient, at some point it will find that the circumstances constitute a waiver of sufficiency review. The leniency, if any, usually exists in the broader characterization of an adequate and timely sufficiency objection. Yet if that line is breached, these courts, like the ones more readily finding waiver, are faced with an unpreserved motion.

In that event, some courts have found that waiver is complete and that no sufficiency review is allowed.<sup>70</sup> But most courts have

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69. For example, the Tenth Circuit characterized the Fifth Circuit as a strict court despite the lenient precedent discussed above. *Cummings*, 365 F.3d at 950 & n.1.

70. *E.g.*, *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1108 (Fed. Cir. 2003) (holding that the post-verdict motion could not be considered because it included grounds that were not in the pre-trial motion); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (holding that a sufficiency of the evidence argument raised for the first time at the appellate court could not be considered); *United States v. Valdosta-Lowndes County Hosp. Auth.*, 696 F.2d 911, 912-13 (11th Cir. 1983) (noting the appellant's concession that a failure to move for a judgment notwithstanding the verdict prevents a party from requesting an appellate court to enter judgment in its favor); *Cargill, Inc. v. Weston*, 520 F.2d 669, 670-72 (8th Cir. 1975) (holding that the only option the appellate court had was to order a new trial after the trial court entered judgment for the defendant without a motion for judgment notwithstanding the verdict); *Delchamps, Inc. v. Borkin*, 429 F.2d 417, 418 (5th Cir. 1970) (noting that the appellate court could not

found that a modicum of review remains, just not under the usual standard of review for reasonableness. The remaining review in such cases is often stated as *plain error* or, restated, *manifest miscarriage of justice*.<sup>71</sup> This test is framed very deferentially, and certainly more so than the typical reasonableness standard.<sup>72</sup> Even if the evidence would be found insufficient under normal scrutiny (for example, the jury might be found to have acted unreasonably), the verdict should very presumptively be affirmed, at least on sufficiency grounds.

Although this truncated review is meant to be more deferential than even the regular deferential test, on paper it at least allows some review. One 1970 Fifth Circuit case even found plain error and reversed,<sup>73</sup> though such instances are rare.<sup>74</sup> The plain

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consider a sufficiency of the evidence argument when it had not been raised at the trial level).

71. See, e.g., *Mathieu v. Gopher News Co.*, 273 F.3d 769, 778 (8th Cir. 2001) (reviewing the trial court for plain error and finding none); *Frederick*, 254 F.3d at 162 (“[W]e are limited in our review to considering whether the verdict is so unsupported by evidence that allowing it to stand would constitute a manifest miscarriage of justice.”); *Wallace*, 143 F.3d at 963-64 (noting that the appellant’s failure to comply with Rule 50(a) means that the court can only review for plain error); *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988) (exercising a plain error review because of the appellant’s preclusion from challenging the sufficiency of the evidence); *Herrington*, 834 F.2d at 1500 n.11 (“We find no such plain error here.”); *Perricone*, 704 F.2d at 1380 (holding that the appellate court could only order a new trial under plain error review because the defendant had not moved for a judgment notwithstanding the verdict); *Oliveras v. Am. Exp. Isbrandtsen Lines*, 431 F.2d 814, 817 (2d Cir. 1970) (“We are of the opinion that where the undisputed evidence results in a verdict that is totally without legal support justice requires a new trial despite counsel’s failure to move for a directed verdict prior to submission of the case to the jury.”); *Little v. Bankers Life & Cas. Co.*, 426 F.2d 509, 511 (5th Cir. 1970) (“Our consideration is limited to whether plain error has been committed which, if not noticed, would result in a manifest miscarriage of justice.”).

72. See *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001) (following *Benigni* and affirming on review for plain error, terming it “‘extraordinarily deferential review’” (quoting *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996))).

73. *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1038 (5th Cir. 1970).

74. Some of these rare instances include, e.g., *Adames*, 331 F.3d at 511-12, 515 (vacating and remanding for a new trial despite no post-verdict motion for judgment as a matter of law because the plaintiff produced no evidence to support the verdict); *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228, 1232 (5th Cir. 1988)

error or similar standard is nearly always stated, if at all, only in dicta as technically available in that court, but unavailing on the facts at hand. Litigants simply cannot count on it for anything other than, perhaps, a way to show the decision below has holes, and to set up some other reviewable issue on appeal (such as legal error in the instructions, or to encourage a new trial), as it will not be the grounds for overturning the verdict itself and the entering of judgment on appeal in nearly all such cases of sufficiency waiver.

In many such courts, the plain error test is further restated as a test of *no evidence* or *complete absence of evidence*.<sup>75</sup> These courts say that the sufficiency challenge will be denied if any evidence supports the jury's finding. This phrasing, likewise, is at best likely to be a promise in dicta that is not found to grant judgment on the facts before the court.

Even in courts that allow review for plain error or no evidence, many add that the best relief possible can be a new trial.<sup>76</sup> In such cases, the procedural lapse still precludes entry of judgment. But there are some relatively recent instances of courts remanding

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(holding that there was no evidence to support the jury's verdict, reversing the district court's denial of a motion for a new trial, and remanding for a new trial).

75. See, e.g., *Industrias Magromer Cueros y Pieles S.A. v. La. Bayou Furs, Inc.*, 293 F.3d 912 (5th Cir. 2002) (reviewing the trial court's refusal to grant a new trial motion under a "complete absence of evidence" standard (quoting *Sam's Style Shop v. Cosmos Broad. Corp.*, 694 F.2d 998, 1006 (5th Cir. 1982))); *Deere & Co. v. Johnson*, 271 F.3d 613, 623-24 (5th Cir. 2001) ("[O]ur inquiry on appeal is narrow—whether there was any evidence to support the jury verdict."); *Yeti by Molly*, 259 F.3d at 1109 (reviewing the trial court under an exception to the waiver rule that requires an inquiry to see if there were any evidence to support the verdict); *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1006 (5th Cir. 1998) (noting that to review for plain error is to review whether there was any evidence supporting the jury's verdict); *Little*, 426 F.2d at 511 ("We may inquire whether there was ANY evidence supporting . . . the jury's finding . . . but we may not question the sufficiency of whatever evidence we do find.").

76. E.g., *Cummings*, 365 F.3d at 951 ("In this situation, the only remedy available is a new trial."); *Frederick*, 254 F.3d at 160-62 ("It is common ground that under no circumstances may the [appellant] win more than a new trial."); *Morrison Knudsen Corp.*, 175 F.3d at 1246 n.34 (stating that if the defendant failed to renew its motion for judgment as a matter of law after the verdict, the only relief the appellate court can grant is a new trial); *Hinojosa*, 834 F.2d at 1228 (holding that if there was no evidence to support the jury's verdict, "appellate relief is limited to ordering a new trial").

for new trial on the weight of the evidence after a finding of plain error or no evidence.<sup>77</sup>

This procedural substitute is somewhat ironic given that the standard for permitting it—i.e., finding nothing supporting the verdict at all—sounds even stricter than the normal test of *abuse of discretion* used to assess whether a new trial should have been granted on its own.<sup>78</sup> Once a party has shown such a lack of evidence that a new trial should have been granted and the district court abused its discretion in denying a motion for a new trial, there remains little marginal incentive to emphasize a lapsed sufficiency challenge, given that the relief will be limited to the new trial otherwise sought. Indeed, one wonders whether restating the plain error test in terms of *any evidence* is ideal or accurate, if the new trial motion might expect less.<sup>79</sup> To the extent the new trial test can also be restated in terms of a complete lack of evidence, courts that say they allow plain error review for sufficiency might just as well say they have no sufficiency review at all.

This definitional conundrum, though, makes little difference in practice (at least to jury review waivers) if the reality is that even plain error review is an empty promise and a poor appellate hook—and is in some contexts now foreclosed.<sup>80</sup> It is better to find a way that the sufficiency objection was not waived.

### III. THE 2006 AMENDMENT TO RULE 50: REMOVING A TIMING TRAP FOR OBJECTION

In 2006, Rule 50 was fundamentally revised, effective December 1, 2006. The amendment to subsections 50(a) and 50(b) changed the rule, especially in terms of the motion's timing. Most significantly, it eliminated the traditional but often-neglected requirement that such a motion be made at the literal close of all the

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77. *E.g.*, *Adames*, 331 F.3d at 511-12, 515 (holding that there was no evidence to support the jury's verdict and remanding for a new trial).

78. *See* *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 & n.1 (5th Cir. 2004) (reviewing the denial of a motion for a new trial under a standard of abuse of discretion and noting overlap with sufficiency review); FEDERAL STANDARDS OF REVIEW, *supra* note 7, § 5.09 (discussing the abuse of discretion standard for new trials and comparing it to review at law of judgment as a matter of law).

79. FEDERAL STANDARDS OF REVIEW, *supra* note 7, § 5.09.

80. *See infra* Part IV.

evidence. The new text of the affected part of the rule is set out in a footnote below.<sup>81</sup>

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81. The rule now reads, in pertinent part:

**Rule 50. Judgment as a Matter of Law in Jury Trials;  
Alternative Motion for New Trial; Conditional Rulings**

**(a) Judgment as a Matter of Law.**

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) **Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.**

If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

FED. R. CIV. P. 50(a), (b). Subsections (c) and (d) continue as before.

Moreover, the Notes of the Advisory Committee make clear the amendment's purpose to ease the accident-prone timing issue: the new rule is meant to change dramatically these sorts of waivers found in various circuits, making practice consistent and predictable.<sup>82</sup> Of course, "[m]any judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice."<sup>83</sup> Nor is this article. There is no good reason not to make a motion at the close of all evidence, and then renew it in mirror form after judgment.

As a consequence, strict-timing circuits (and panels in many other circuits that had strict applications in the case at hand) will adjust their precedent and allow normal sufficiency review even without a motion properly timed as indicated. Thus, strict-timing precedent from such courts as the Sixth, Seventh, Eighth, Ninth, and

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82. The Advisory Notes say:

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

FED. R. CIV. P. 50 (2006) advisory committee's note.

83. *Id.*

D.C. Circuits<sup>84</sup> are necessarily abrogated by the amended rule. These courts and others need not resort to the empty promise of plain error review and will apply the test of reasonableness to the judgment as it stands after the verdict, regardless of the precise timing of the earlier prerequisite motion for sufficiency—at least if made sometime before submission.<sup>85</sup>

On the other hand, the amended rule does not purport to do away with the requirement that some motion be made before the jury verdict. Nor does it do away with the traditional view that the post-trial motion is a renewal of some earlier motion. The amended rule just eases the timing of the first step.

Finally, the amended rule does not redefine the requirement of adequately stating the grounds for review. Indeed, the Advisory Notes clearly characterize the later motion as “only a renewal” of the former one, and so “it can be granted only on grounds advanced in the preverdict motion.”<sup>86</sup> Prior circuit precedents that found strict waiver where the motion did not specifically state its grounds or where the follow-up motion was not based on the same grounds<sup>87</sup> appear to survive the timing allowances of the amendment. Conversely, courts that did not require much technical precision in matching the grounds between the two motions<sup>88</sup> may find a way to

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84. See *supra* notes 45-49 and accompanying text.

85. Nothing in the new rule or its stated policies supports the result in *Serna*, discussed *supra* notes 62-64 and accompanying text, which found preservation after deliberations had started and with no chance to cure.

86. FED. R. CIV. P. 50 (2006) advisory committee’s note.

87. *E.g.*, *Cummings*, 365 F.3d at 950 (holding that grounds must “‘be stated with sufficient certainty to apprise court and opposing counsel of the movant’s position’” and finding that that standard was not met (quoting *United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1229 (10th Cir. 2000))); *Freund v. Nycomed Amersham*, 347 F.3d 752, 760-62 (9th Cir. 2003) (holding that the district court erred when it heard and granted a post-verdict sufficiency motion on sufficiency of malice even though that issue was not raised in a pre-verdict Rule 50(a) motion); *Duro-Last*, 321 F.3d at 1105-07 (discussing the strict Federal Circuit waiver rule on specificity and finding waiver where pre-verdict motions’ grounds were not the same as those raised post-verdict); *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1245 (11th Cir. 2001) (construing strictly, and finding waiver under the rule that a party cannot assert new grounds in renewed motion). Indeed, this requirement may be reinforced by language in *Unitherm*, as discussed at notes 104-105 *infra* and accompanying text.

88. *E.g.*, *Taylor Publ’g*, 216 F.3d at 473 (holding that although a party cannot assert a ground that was not included in the pre-judgment motion, under Fifth Circuit precedent, as long as “an inquiry [shows that] . . . the evidence and law

continue that liberal spirit. It would nonetheless be an error to treat the new rule as rejecting the strict-application circuits and panels on various other aspects of the rule's prerequisites. Traps remain for the unwary litigator, including the mistake of raising different grounds in the post-trial motion.

If a litigant on appeal finds that it fell into one such trap below (or, more likely, inherits a record on which the procedural lapse has already occurred at trial), the prior case law in various circuits defining adequate preservation remains intact. Nothing in the 2006 rule or its comments suggests a rejection of the leniency and broad definitions those cases traditionally support. Indeed, one can argue from the Advisory Notes and their results that the policies of fair notice to opponent and court are more important than strict labeling or motion-defining. It seems courts that had previously read a sufficiency motion into the tea leaves of vague challenges to jury instructions or weight of the evidence—once everyone knew what the complaint was and had a chance to cure it—will continue to treat the sufficiency objection as properly preserved on appeal.

It may even be true that previous strict circuits will take the opportunity to revisit their waiver rule in light of the policies and flexibility advanced in this amendment and its comments. This is especially so to the extent there exists contrary, flexible rulings in that very court (as is often the case), such that the current decision is really a moment of choice between competing views of the strictures of the rule, in matters of timing and formal labeling.

#### IV. THE UNFORGIVABLE *UNITHERM* DEBACLE: TOTAL FAILURE TO PRESERVE, AND NO NEW TRIAL

One area where courts will no longer have flexibility, and no sprinkling of the “spirit of the rules” will revive a waived sufficiency review, is the unusual situation the Supreme Court faced last year.

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supporting the pre-submission challenge are the same as the evidence and law supporting the post-judgment challenge,” the post-judgment challenge is sufficient); *Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 457 (5th Cir. 2001) (applying liberal spirit of rule to excuse technical noncompliance, since defendant “adequately preserved the issue of fraud damages in its motions for judgment as a matter of law before the case was submitted to the jury” by moving as to all forms of liability, which the court found included damages, so “in this case, a general, all encompassing statement . . . suffice[d]”).

In response, the Court certainly eliminated some of the more noteworthy examples of circuit court generosity.

In *Unitherm*,<sup>89</sup> the Court held that the appellate court is utterly powerless to review the evidence where a complete waiver was found under Rule 50(b). The party had made a proper sufficiency motion under Rule 50(a) at the close of trial, but filed no post-verdict motion renewing it (nor one for a new trial on the weight of the evidence under Rule 59). This lapse was found to foreclose *any* appellate review of the jury's verdict. The Federal Circuit's grant of relief on appeal, based on Tenth Circuit law, was reversed and judgment was entered accordingly.<sup>90</sup> The Tenth Circuit approach of allowing a new trial after a complete failure to renew the motion post-verdict, echoed in cases from other circuits as well,<sup>91</sup> must be recognized as overturned by *Unitherm*.<sup>92</sup>

The Court's reasoning necessarily abrogates even plain error review. The Tenth Circuit precedent using that "out"<sup>93</sup> is rejected by *Unitherm*, which does not merely restrict review of the evidentiary issue, but essentially makes it unreviewable. The dissenting opinion clearly argued for a residual review for plain error,<sup>94</sup> but lost the day. Nor did the majority remand for further inquiry into plain error or manifest injustice. The resulting rule is that some civil jury verdicts with demonstrably zero evidence to support them must nonetheless be affirmed.

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89. 126 S. Ct. at 987.

90. *Id.* at 983-87.

91. *See, e.g., Gaia Techs.*, 175 F.3d at 374-75 (entertaining but ultimately rejecting an argument for a new trial when the defendant relied on a renewed motion for judgment as a matter of law that it had made after the judgment in the initial trial but had neglected to make after judgment in a trial on remand from the Federal Circuit); *Harbor Ins.*, 946 F.2d at 935-36, 938 (remanding for a new trial after finding no evidence to support the jury's verdict despite the defendant's failure to move for a judgment notwithstanding the verdict).

92. *See Unitherm*, 126 S. Ct. at 987 ("[A] party is not entitled to pursue a new trial on appeal unless that party makes an appropriate post-verdict motion in the district court."). The Federal Circuit had relied on *Cummings* in particular, *id.* at 984, but the Court rejected its rule that some review is allowed.

93. *See Cummings*, 365 F.3d at 951 (reviewing for "plain error constituting a miscarriage of justice" where specific grounds of sufficiency motion were not preserved).

94. *Unitherm*, 126 S. Ct. at 989 (Stevens, J., dissenting).

Nor is the substitute relief of new trial allowed, at least when there was also a failure to move for a new trial properly as well.<sup>95</sup> Apparently even the usual judicial authority to order a new trial *sua sponte* does not extend so far, at least to an appellate court faced with two missing motions below.<sup>96</sup>

At least to the extent many of the circuit court cases allowed some form of appellate review after wholesale waiver,<sup>97</sup> they appear to be rejected by *Unitherm*. For example, the Eleventh Circuit in 2006 found a complete waiver where the party had asked for a rule just like that in *Cummings*.<sup>98</sup> But the court held that the Supreme Court has rejected any such mercy. It distinguished a wealth of Eleventh Circuit cases where a new trial was nonetheless ordered because, unlike in the present case and in *Unitherm*, the new trial issue had been preserved.<sup>99</sup> And the First Circuit, faced in *Vazquez-Valentin v. Santiago-Diaz*<sup>100</sup> with no renewal post-trial and no new trial motion, recognized that no sufficiency or related issue would continue to afford the defendants relief in that case.<sup>101</sup>

On the other hand, the Seventh Circuit, while routinely applying the waiver to a defendant in the same position as ConAgra in *Unitherm*,<sup>102</sup> has observed in another recent case that the failure to move for a new trial in *Unitherm* was particularly focused on such a motion based on the *weight of the evidence*. It reaffirmed its rule that a new trial can be ordered even without a properly preserved Rule 59 motion if based on other grounds, such as erroneously

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95. See *id.* at 987-88 & n.5 (majority opinion) (“[R]espondent never sought a new trial before the District Court, and thus forfeited its right to do so on appeal.”).

96. See *id.* at 988 (“[Rule 50(b)] provides that a district court may only order a new trial on the basis of issues raised in a preverdict Rule 50(a) motion when ‘ruling on a renewed motion’ under Rule 50(b).”).

97. See, e.g., notes 34-36, 52-56, and 62-64 *supra* and accompanying text.

98. *HI Ltd. P’ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1301-02 (11th Cir. 2006).

99. *Id.* at 1302.

100. 59 F.3d 144 (1st Cir. 2006).

101. *Id.* at 147 n.1. The court nonetheless addressed other issues which it resurrected because its earlier ruling had focused just on the weight or sufficiency of the evidence, but that ruling had been vacated and remanded by the Supreme Court, 126 S. Ct. 1329 (2006), in light of *Unitherm*.

102. *Pearson v. Welborn*, 471 F.3d 732, 738-39 (7th Cir. 2006) (rejecting one defendant’s appeal for a judgment or a new trial because of non-compliance with Rule 50(b) even though co-defendant had filed a proper post-trial motion).

admitted evidence or trial misconduct.<sup>103</sup> Broad language in *Unitherm* may support extending its absolute waiver decision to many forms of new trial motions. But the Seventh Circuit ruled otherwise and conducted appellate review over, in that case, the erroneous admission of expert evidence.<sup>104</sup>

Combining *Unitherm* with the 2006 amendment also means that the opportunities for plain error or other alternative reviews based on sufficiency or weight of the evidence just became fundamentally rarer. This is because *Unitherm* rejects any such review where there is a similar procedural lapse, while the amendment generously shrinks the universe of situations in which circuit courts had to resort to plain error review or a new trial inquiry. Most situations in which plain error review had been applied, if not constituting the waiver held fatal in *Unitherm*, are timing contexts in which now the review is for the normal sufficiency test. Either the situation is unreviewable or it is reviewed fully, with few spots left for traditional plain error review.

Perhaps the three places that will see the need for occasional resort to plain error review will be: (1) failing to move properly for judgment as a matter of law yet having made a new trial motion, unlike in *Unitherm*; (2) failing even the generous timing allowances of the amended rule, as by making no pre-submission sufficiency motion at all to later “renew”; or (3) failing to properly match the grounds for claiming insufficiency between the two motions made at trial. Even the latter is likely foreclosed by *Unitherm*, at least if it results in no renewed motion on that issue after verdict (as is often the case). The Court states that its precedents “unequivocally establish that the precise subject matter of a party’s Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b).”<sup>105</sup> And it elsewhere reminds the parties in a footnote that the 1991 amendment limits the post-trial motion to grounds advanced in the pre-verdict one.<sup>106</sup>

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103. *Fuesting v. Zimmer*, 448 F.3d 936, 938-42 (7th Cir. 2006) (on rehearing).

104. *Id.* Moreover, the Supreme Court’s reasoning seems to leave intact the trial court’s discretion to grant new trial where appropriate, on all such grounds—only foreclosing appellate review.

105. *Unitherm*, 126 S. Ct. at 987.

106. *Id.* at 984 n.1.

The newly amended rule will still require that some motion be made during trial or at its close, in order to have the sufficiency issue available to be *renewed* in a post-trial motion. And the post-trial motion, as before, will be limited to grounds urged in the prior motion. But the particular timing of having the earlier motion be made right at the close of all evidence, with all its functional dilemmas, will no longer cause waiver. This change will vitiate much of the detail and split authority in previous case law, as well as obviate the most typical applications of a plain error review.

It should also be recognized, nonetheless, that the *Unitherm* holding may not eliminate some of the authority finding that adequate preservation was made under the circumstances (e.g., by a generous reading of what constitutes sufficient pre-verdict and post-verdict motions, or by noting that the trial court's misdirection caused the lapse) and thus finding no waiver at all. This is especially true to the extent some of the leniency was traditionally applied to the precise *timing* of the *pre-verdict* motion (as in the Fifth Circuit's decision in *Taylor Publishing*). That particular brand of flexibility will now be the rule under the 2006 amendment to Rule 50(a).

## V. CONCLUSION

The 2006 amendment to Rule 50 certainly resolves one circuit conflict as to the precise timing necessary to make an adequate motion raising insufficiency. The new rule may generally support a more generous definition, even in previously strict courts, of what constitutes an "adequate motion" under this rule. It certainly lays to rest the concern over renewing the motion at the literal close of the case, for instance when the court reopens the case to allow admission of a little more evidence to cure one aspect of deficient proof. In such an event, it is clear that the moving party need not restate the motion—perhaps made only fifteen minutes before—by claiming that the evidence is insufficient in some specific ways. The party need only make sure to *renew*, by a post-trial motion under Rule 50(b), whatever sufficiency motion was made sometime before (and wisely move for new trial as well).

Nevertheless, it remains inadvisable to test the limits of a court's definitional charity by calling the sufficiency motion, whenever brought, anything other than one for "judgment as a matter

of law under Rule 50.” Other traps remain for the unwary. Although the policies of notice and flexibility in the new rule may support an argument that the rule should be read liberally regarding other forms of putative lapses, the reality is that nothing in the amended rule particularly resolves other sorts of procedural hiccups that litigants have encountered.

Furthermore, even though the lenient amendment makes it harder to “overlook” the prerequisites and timing aspects, the Rule 50 consequences of being on the wrong side of the rule are now fatal. This is because nothing in the amendment purports to reverse the ruling in *Unitherm*. To the extent that case made unreviewable the procedural lapse, at least as a matter of jury sufficiency leading to entry of judgment, the product of these two changes is that the rule appears harder to waive—all while the consequences of waiver are much more final than most previous courts had indicated.

After *Unitherm*, the usual wisdom of raising an adequate, properly named, and specific motion—still twice and at generally required times—has become an adversarial imperative. Courts may move the line over, but once it is crossed, they have no power to provide sufficiency review of even the most questionably supported jury finding.

The year 2006 thus saw a set of revolving trapdoors. Or perhaps more precisely, one oft-encountered trapdoor was virtually eliminated while the remaining ones, including the new holding that a post-verdict renewal categorically must be made, were reinforced. These remaining traps are now even more dangerous.