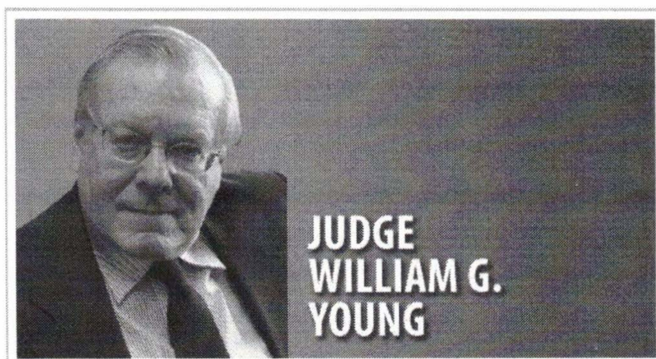
Defendant gets new trial after judge refuses to poll jury

By Pat Murphy June 10, 2022



A two-week civil trial in U.S. District Court in Boston appears to be all for naught after the presiding judge refused a request to poll the jury following a unanimous verdict finding the defendant liable for securities fraud.

Judge William G. Young denied defendant Henry B. Sargent's request to poll the jury after the foreperson announced the verdict in *Securities and Exchange Commission v. Sargent* on April 4.

The jury found the Connecticut attorney committed securities fraud in connection with a scheme to disguise stock sales by corporate affiliates. The SEC claimed that Sargent reaped approximately $900,000 in proceeds from the ploy.

Federal Rule of Civil Procedure 48(c) provides that after "a verdict is returned but before the jury is discharged, the court must on a party's request … poll the jurors individually." The rule had been added in 2009 to mirror a similar requirement under the criminal rules.

According to court records, two days after the verdict in *Sargent*, defense counsel moved for a new trial, alleging Young's refusal to poll the jury constituted per se reversible error.

At an April 21 hearing on the motion, Young confessed that he had made a mistake. Young said he "simply did not know the rule," and that since Rule 48(c)'s adoption, he had never been asked

to poll a jury in a civil case.

Given the circumstances, Young partially recused himself and Judge Richard G. Stearns was assigned to decide the defendant's new trial motion. In a June 2 decision, Stearns ruled that Young's refusal to poll the jury constituted reversible error.

Stearns had been placed in the unenviable position of having to decide an open question in the 1st Circuit: As is the case under the criminal rule, does the refusal of a party's request to poll the jury in a civil case require automatic reversal?

The 1st U.S. Circuit Court of Appeals dodged the question in a 2014 case, *Ira Green, Inc. v. Military Sales & Service Co.* In *Ira Green*, the panel cited with approval the 7th Circuit's holding in a 2013 case, *Verser v. Barfield*, that a judge's denial of a litigant's timely request to poll a jury in a civil trial constituted per se reversible error.

However, the court in *Ira Green* ultimately determined that it didn't have to decide the question because the complaining party had waived its objection to the judge's refusal to poll the jury in that case.

But Stearns viewed *Ira Green* as sending a strong signal as to how the circuit would decide the issue.

"It is difficult to read the *Ira Green* panel's positive treatment of *Verser* (albeit dicta) as suggesting anything but a blaze marker pointing to the First Circuit's predilection, particularly now, that after the 2009 adoption of Rule 48(c), 'there is little reason to distinguish between the two contexts,'" Stearns wrote.

But Stearns hedged his bets.

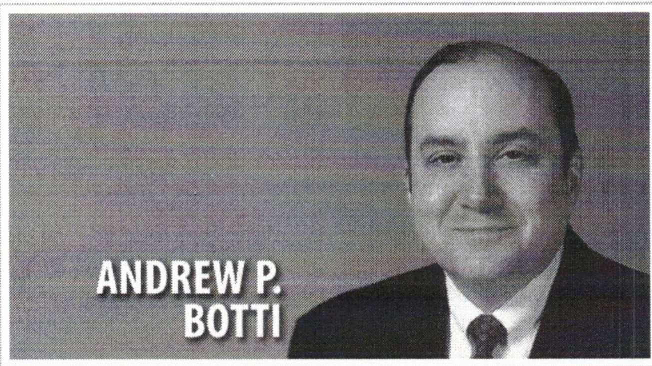
While granting the defense motion for a new trial in *Sargent*, Stearns further allowed the SEC to file an interlocutory appeal to the 1st Circuit for the court, in its discretion, to resolve a "controlling question of law as to which there is substantial ground for difference of opinion."

Sargent's attorney, Peter R. Ginsberg of Moskowitz & Book in New York City, declined to comment on Stearns' decision.

Through a spokesperson, the SEC likewise declined to comment.

Business litigator Andrew P. Botti, who has tried a case before Young, calls the polling requirement in the federal civil rules "absurd."

"I've had juries out for two weeks," Botti says. "After they spent all that time [deliberating], what is the point of polling them?"

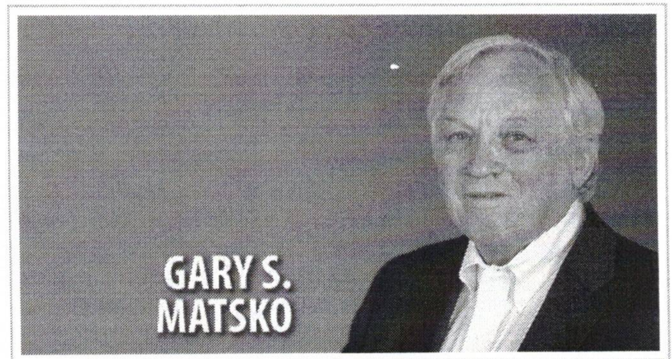


Botti views polling requests in civil cases as a "last ditch" effort by the losing party to get a new trial.

"It's a way to retry the case if you're not happy with the verdict," says Botti, of APB Law in Andover. "It's a waste of judicial and other resources."

Botti says he would only request to have a jury polled if there was some clear indication that the jurors were not in agreement when the verdict was read.

"I've had a court officer come down and tell me [jurors] were fighting in making their decision, but that's not unusual," Botti says.

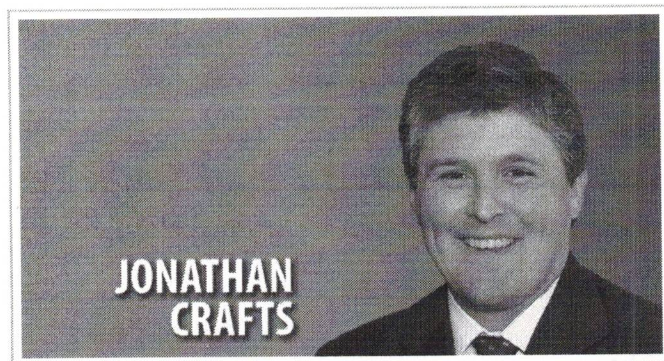


Gary S. Matsko represents parties in matters before the SEC as part of his commercial litigation practice at Davis Malm in Boston.

Matsko sees Stearns as choosing a "middle path" in his ruling.

"He granted a new trial, but he's also urging an interlocutory appeal, which says to me he's not entirely certain he got it right," Matsko says.

While understanding the concerns of juror intimidation on the criminal side, Matsko finds a per se reversal rule in civil cases to be "a little harsh."



"This is the sort of thing that can be left to the discretion of the court as to whether or not the decision not to poll resulted in a severe enough prejudice to warrant a new trial," Matsko says. "It's a tremendous expense to go through a new trial. I wouldn't be surprised to see the 1st Circuit take that into consideration."

Wellesley attorney Jonathan Crafts says he agrees with the "conservative" approach taken by Stearns.

"It does appear that the 1st Circuit was leaning in that direction," says Crafts, a commercial litigator and white-collar criminal defense attorney at Fields & Dennis. "But in the interest of judicial economy, he's allowing it to go to the 1st Circuit. That's the correct approach here." **MLW**