

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**BOOKLAND OF MAINE,** )  
 )  
 **PLAINTIFF** )  
 )  
 **v.** )  
 )  
 **BAKER, NEWMAN & NOYES,** )  
 **LLC,** )  
 )  
 **DEFENDANT** )

**CIVIL No. 01-234-P-H**

**ORDER ON PLAINTIFF’S MOTION FOR RECONSIDERATION,  
DEFENDANT’S MOTION TO REOPEN DISCOVERY AND  
DEFENDANT’S MOTION TO CERTIFY THE DEEPENING INSOLVENCY ISSUE**

All pending motions are **DENIED**.

**I. BOOKLAND’S MOTION FOR RECONSIDERATION**

1. Bookland is correct that the original jury instruction did not require the jury to choose the actual date of the bankruptcy filing as its comparison point in determining the company’s loss of value. See Bookland’s Mot. Recons. at 2 & n.1 (Docket No. 81). The bankruptcy filing date, May 4, 2000, was merely an ending point. See Jury Instrs. at 14 (Docket No. 62).<sup>1</sup>

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<sup>1</sup> The Jury was instructed to calculate economic damages as follows:

You may consider two elements in any economic damage award:

1. Any loss in the value of Bookland as a company up until May 4, 2000 (the date when it first filed for bankruptcy), that you find was caused by Baker, Newman & Noyes’s act or failure to act; and
2. Any legal and/or administrative expenses that

*(continued next page)*

Nevertheless, I used that date in my Order of June 19, 2003, granting Baker, Newman & Noyes's motion for a new trial on damages, because that is the date that Bookland's lawyer chose to use in his closing argument.<sup>2</sup> He showed the jury a total asset value in 1998 of \$10,241,963, without subtracting any liabilities, and then stated:

*And on the date of bankruptcy, which is the measure that the Judge has instructed you about, you only had a company that was worth the \$3,981,000 owed to Fleet. Because you heard that Bookland was liquidated and only Fleet was able to be paid out of the value of the company. And that [damage] figure is \$6,260,963. That is the change in value following the negligence of Baker Newman.*

Trial Tr. (April 4, 2003) at 49-50 (emphasis added). As I stated in my June 19 Order, the jury followed Bookland's lawyer's analysis on how to determine damages precisely, starting with the gross asset value in 1998 and then subtracting an asserted value for the company upon the filing date in 2000.

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Bookland incurred in the Bankruptcy Court proceedings that you find were caused by Baker, Newman & Noyes's act or failure to act.

Loss in value can occur in a reduction of a company's value from a positive value to a lower positive value; from a positive value to a negative value; or from a negative value to a greater negative value. The measure of value is determined by subtracting liabilities from assets.

If you award economic damages to Bookland on more than one Count, they will not be added together. Instead, judgment will be entered against Baker, Newman and Noyes for the single largest award you make.

<sup>2</sup> The last sentence of my Order of June 19, 2003, is to that extent incorrect. The word "difference" in that sentence was a typographical error for the word "decrease," and the sentence should read: "The new trial will be limited to a determination of the decrease in Bookland's value between the time Baker, Newman & Noyes conducted its review of Bookland's fiscal year 1998 financial statements and the date Bookland filed in chapter 11, May 4, 2000." I did not intend in that sentence to imply that May 4, 2000 was the only date for measuring any damages to Bookland, but the jury ultimately must choose one date as of which to measure any decreased value of Bookland.

This analysis was simply wrong.<sup>3</sup> Bookland now says that its “counsel urged the jury in its closing to compare the 1998 asset value with the asset value just prior to the first of the store closings [some months before the bankruptcy], to wit: the \$3,981,000 paid to Fleet prior to and during bankruptcy from sales of stores.” Bookland’s Mot. Recons. at 2 & n.2. Bookland refers to no transcript pages from its closing argument to support this assertion, and the assertion is directly contrary to the language I have quoted.<sup>4</sup>

2. The damage instruction was not just an “approach advocated by the Court and included within the instruction.” Id. at 2. Instead, it was the Court’s instruction as to the *only* method of measuring damages, and was agreed to by the parties at the charge conference. Neither party objected to it when the charge was delivered to the jury (except insofar as Baker Newman & Noyes objected to the deepening insolvency measure of recovery). Indeed, it was apparently the only available method of measuring damages in this trial, since no expert business valuation testimony was presented. Thus, Bookland cannot sustain the verdict by arguing that its lawyer’s different method of damages “generates the same result.” Id. (And in fact, it does not generate the same result for the reasons I set forth in my original Order.)

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<sup>3</sup> Bookland points out that it used the same analysis in its April 2, 2003 brief in support of its proposed jury instructions. See Bookland’s Mot. Recons. at 4 n.5. That does not make the analysis correct, and Bookland still has not come to grips with the fact that the decrease in value is measured by comparing assets minus liabilities at two distinct points in time.

<sup>4</sup> I have reviewed the transcript of Bookland’s closing argument and find this alleged argument nowhere.

3. Bookland offers no support in accounting principles for its proposal that the company's value as of a point in time can be determined by picking numbers from a variety of dates, such as the total loan repayment to Fleet that transpired over a period of time during 1999 and 2000, see id. at 2 n.2; and other liabilities of \$8,533,378 derived from the 1998 financial statements that, according to Bookland, without citation to the record, "were nearly constant" during a period of two years and therefore could be used for the 2000 calculations as well. Id. at 2; see also id. at 4. It is therefore not enough to argue that "the approach shown to the jury was a permissible shorthand method because of the identity of the Fleet debt and year 2000 value." Id. at 3.

4. Bookland erroneously argues that its lawyer's misstatement about the bankruptcy schedules could not have had a prejudicial impact because the jury was not entitled to rely upon their contents. See id. at 6. To the contrary, as admitted evidence, they were available for use by the jury. Bookland alternatively argues that the jury was free to examine the schedules in the jury room and find for itself the lawyer's error. See id. at 6 n.8. We expect a lot of a jury, but that is too much.

5. As I noted in my original Order, Bookland presents a number of possible calculations that could yield jury verdicts somewhere in the general vicinity of the verdict. Unfortunately for Bookland, this is a case where the basis for the jury verdict is precisely ascertainable because the jury did exactly what Bookland's lawyer urged, and it was wrong.

## **II. BAKER NEWMAN & NOYES'S MOTION TO REOPEN DISCOVERY**

This motion is **DENIED**. This case was fully prepared, and proceeded to a full trial on the merits. It is too late for the lawyers to determine, now that they have seen what happened at the first trial, that they would like some more information before they conduct the second (partial) trial on damages.

## **III. BAKER NEWMAN & NOYES'S MOTION TO CERTIFY THE DEEPENING INSOLVENCY ISSUE**

This motion is **DENIED**. I do not believe the issue is ripe for certification to the Maine Law Court until we have a jury verdict on damages that demonstrates that deepening insolvency played a part in the jury's determination.<sup>5</sup> The original verdict did so, but on Baker Newman & Noyes's motion I vacated that original verdict on damages and I have no idea what verdict a new jury will give.

**SO ORDERED.**

**DATED THIS 1ST DAY OF AUGUST, 2003**

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**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**

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<sup>5</sup> Contrary to Baker Newman & Noyes's assertion, I did not originate the deepening insolvency theory of Bookland's damages. Defs.' Mot. Certify at 3 (Docket No. 87). Bookland's lawyer used that term on April 1 at the end of the jury day when I pressed him on Bookland's theory of damages.

U.S. District Court  
District of Maine (Portland)  
Civil Docket For Case #: 01-CV-234

BOOKLAND OF MAINE  
plaintiff

ROBERT J. KEACH, ESQ.  
BERNSTEIN, SHUR, SAWYER &  
NELSON  
P.O. BOX 9729  
PORTLAND, ME 04104-5029  
(207) 774-1200

v.

BAKER NEWMAN & NOYES  
defendant

PETER W. CULLEY, ESQ.  
MARK E. PORADA, ESQ.  
PIERCE, ATWOOD  
ONE MONUMENT SQUARE  
PORTLAND, ME 04101-1110  
(207) 791-1100