

### Other Significant Evidence Issues (Changed In Limine Rulings During Trial)



**Pretrial evidentiary rulings are provisional and do not bind the trial court, so that a party's "surprise" that a court changed a pretrial evidentiary ruling is not the type of "unfair prejudice" contemplated under the FRE 403 balance of probative value of the evidence against possible unfair prejudice**

*United States v. Benedetti* (1st Cir.)



### The Case

Defendant Benedetti was indicted by a grand jury of being a felon in possession of a firearm in 1999 based on information from a search of the defendant's residence by state police. The defendant fled before federal authorities could arrest him and remained "at large" until he was apprehended in 2003.

During the initial pretrial stage of the criminal case, the trial court initially decided to exclude evidence of the defendant's flight, fearing "the jury might be tempted to convict the appellant simply because he fled." But the trial court confined this "exclusionary ruling to the government's case in chief" and "took pains to remind the parties that the ruling was subject to change and that the matter could be revisited if the evidence at trial unfolded in a manner that altered the variables inherent in the Rule 403 algorithm." [\*\*\*]

During the government's case in chief, two of the police officers who participated in the search of defendant's residence testified how they found the weapon and how long ago the search had occurred. In addition, defense counsel made repeated references to the fact that the events to which they testified had occurred almost five years prior to the time of trial. The defense theory was that the gun found in defendant's possession "did not belong to" the defendant but rather to a friend of the defendant, who was allowing the defendant to live at the residence temporarily. The defendant's friend testified that "by coincidence, he had moved out of the apartment on the very day that the troopers arrived" to search the apartment. [\*\*\*] The jury convicted the defendant.

The circuit approved the trial court's admission of the flight evidence. The circuit rejected the defendant's

contention that the flight evidence was unduly prejudicial. The court noted this contention was "unpersuasive" because the standard was not whether the evidence was prejudicial but whether it was "unfairly prejudicial". This meant that the evidence "has an undue tendency to prompt a decision by the factfinder on an improper basis." [\*\*\* (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997))] In *Benedetti's* case, the evidence of his resistance to the search, statements at the time regarding ownership of the gun, and his "unfulfilled promise of self-surrender formed a sufficient factual predicate for the introduction of the flight evidence. This predicate substantially diminished the possibility that the jury might infer guilt solely on the basis of the appellant's flight." [\*\*\*]

But the defendant also contended that the trial court improperly took an "about-face" on the flight evidence and that the defendant "suffered unfair prejudice when the court, after having granted his pretrial motion *in limine*, 'reversed' that decision in the middle of the defense case." The circuit was unimpressed by this argument and let it "collapse[] of its own weight." [\*\*\*] "It is settled law that *in limine* rulings are provisional," noted the circuit. "Such 'rulings are not binding on the trial judge [who] may always change his mind during the course of a trial.'" [\*\*\* (quoting *Ohler v. United States*, 529 U.S. 753, 758 n. 3 (2000); *Luce v. United States*, 469 U.S. 38, 41 (1984) (noting that *in limine* rulings are always subject to change, especially if the evidence unfolds in an unanticipated manner))] In *Benedetti's* case, "the additional evidence made available to the court gave it a fresh coin of vantage. So viewed, the court's midtrial decision to allow use of the evidence cannot fairly be characterized as an overruling of its original order." [\*\*\*]

The defendant also alleged that the court's admission of the flight evidence during trial although it had ruled it was not to be admitted in an *in limine* ruling "caused unfair surprise and thereby undermined the defense's trial strategy." The circuit described this claim as one that "rings hollow" because the trial court's *in limine* ruling excluded the flight evidence "only from the government's case in chief. The carefully circumscribed nature of the order undercuts any claim of unfair surprise." [\*\*\* (citing *Thudium v. Allied Prods. Corp.*, 36 F.3d 767, 769-70 (8th Cir. 1994))] The circuit noted that "[m]ere surprise is insufficient to ground a Rule 403 challenge." [\*\*\* (citing *O'Rourke v. E. Air Lines, Inc.*, 730 F.2d 842, 855 n. 21 (2d Cir. 1984))] Only if the ruling resulted in an "unfair surprise" would the protections of FRE 403 come into play.



## Commentary

**Comment – FRE 403 And The Remedy For “Surprise”:** FRE 403 does not directly address the issue of surprise. In applying the rule, the general approach has not been exclusion of the evidence, but rather a possible continuance, as suggested by the Advisory Committee Note to the FRE 403 (“While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence.”). For other cases addressing the appropriate remedy for unfair surprise, consult:

❖ *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 573 (5th Cir.) (trial court amended pretrial order on day trial started so that defendant could assert new defense, despite plaintiff's claim of unfair surprise, noting that the trial court offered continuance, but plaintiffs declined; continuance was the more appropriate remedy for unfair surprise than excluding evidence and the trial court's offer of continuance “rectified any error” in altering the pretrial order), *cert. denied*, 513 U.S. 1017 (1994)

❖ *Le Maire v. United States*, 826 F.2d 949, 951-52 (10th Cir. 1987) (plaintiff's surprise at testimony of doctor called by defendant in medical malpractice suit not a ground for exclusion of that testimony, noting that plaintiff failed to ask for a continuance which would have been the proper remedy)

❖ *Conway v Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108, 112 (5th Cir. 1982) (circuit notes the advisory committee note to FRE 403 as authority for use of a continuance, rather than exclusion of evidence, as a more appropriate remedy to a party's claim or unfair surprise at admission of evidence)

**Practice Point – Exclusion Of Evidence:** While FRE 403 is not interpreted to support exclusion of evidence because of surprise, other rules, for example in the Federal Rules of Civil Procedure support exclusion if the action by a party might unfairly surprise the other party. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(B) (when a party refuses to provide discovery pursuant to the court's order, the court may sanction the party by “prohibiting him from introducing designated matters in evidence”)



## Case Reference

**Cross-Reference:** For other evidence issues, *see* FRE 403 (p. 85).

**Citation:** *United States v. Benedetti*, \_\_\_ F.3d \_\_\_ (1st Cir. Dec. 23, 2005) (No. 05-1033) (*Selya*, Stahl, Lipez).

**Type Of Action/Claim Or Charge:** Criminal; 18 U.S.C. § 922(g) (felon in possession of a firearm). 

