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Avoiding Double Damages: 3 Practical Tips And A Hail Mary

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Everybody knows that a plaintiff cannot obtain a double recovery for the same injury under multiple legal theories.[1] But, if litigants are not careful, post-trial implementation of the no-double-recovery rule can prove tricky because of the opacity of some verdict forms. Product-liability and personal-injury cases manage to avoid duplicative damages by following a well-trod path, often using pattern jury instructions that instruct the jury how to avoid duplication in those cases.[2] In commercial and intellectual-property cases, however, varied causes of action with dozens of potential measures of damage can make it more challenging to avoid duplicative damages.

Recent Post-Trial Verdict Modifications — Texas Advanced and Dietz


Andrew Meerkins

Just a few weeks ago, in a complex commercial case, the Eastern District of Texas eliminated $30 million in duplicative damages from an $89 million verdict. In Texas Advanced,[3] the parties, who were in the business of making light sensors, explored a potential business relationship by exchanging information pursuant to a confidentiality agreement. Texas Advanced Optoelectronics Solutions, the plaintiff, subsequently accused the defendant, Intersil, of using its confidential information to create a competing digital-sensor product line. Texas Advanced pursued multiple legal theories, including trade-secret misappropriation, breach of contract, tortious interference and patent infringement. The damages sought varied by claim, but included disgorgement of the defendant's profits (breach, trade secret), award of the plaintiff's lost profits (tortious interference) and a royalty award (patent infringement).

Immediately before trial, Intersil proposed jury instructions it asserted would avoid double recovery. Texas Advanced countered that the jury should assess full damages for each claim and the court could later sort out which damages, if any, were duplicative.[4] The court agreed and instructed the jury accordingly.[5] At trial, the jury awarded $58.7 million for trade-secret related damages, $10 million for breach, $18 million for tortious interference and just under $100,000 for patent infringement. Intersil immediately asked the court to eliminate a third of the damages — damages it claimed were duplicative. Texas Advanced conceded that trade-secret and breach damages, which were based on the same disgorgement damage theory, could not be had twice. But the court reduced damages further, finding that the tortious-interference damages also were duplicative, though the smaller patent damages were not. All told, Texas Advanced saw its win slashed by roughly $30 million.

And on June 9, 2016, the U.S. Supreme Court affirmed a decision allowing a trial court to recall a previously dismissed jury in order to correct a problem with the jury verdict. Dietz v. Bouldin,[6] involved a somewhat unusual situation in which the parties had stipulated to liability and a minimum of approximately $10,000 in damages, but the jury was to decide whether more was justified. The jury appeared confused, sending questions about the posture of those damages, and eventually awarding $0. The trial court dismissed the jury, then realized that the verdict was legally impermissible and asked the clerk to track down the jurors. One had briefly left the building but the rest were still in the courthouse. They returned, the court reinstructed them, they deliberated again and ultimately reached a judgment of $15,000. Not surprisingly, the defendant appealed but the Ninth Circuit affirmed. The Supreme Court also affirmed (with Justice Sonya Sotomayor writing for the majority and Justices Anthony Kennedy and Clarence Thomas dissenting), holding that trial courts possess inherent powers to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[7] Stating that "[a]ll judges make mistakes, ([e]ven us)," Justice Sotomayor found that trial judges should have the ability to fix "easily identified and fixable mistakes." The court identified limits to this inherent authority, however, warning that, since jurors are permitted to talk about the case with others and consult external sources after their dismissal, there must be no evidence of external influence or prejudice in the recalled jury.

The Dietz case provides powerful support for the trial court's ability to have the jury "redo" an obviously mistaken verdict that was easy to fix. In Dietz, the verdict was legally impossible, but the court's reasoning logically extends to a situation where the verdict form was ambiguous or unclear about duplicative damages. As discussed below, preverdict measures are recommended, but the Dietz decision provides a post-verdict option, albeit a risky one that places litigants in uncharted waters.

Types of Cases Affected

Though not an exclusive list, the following types of disputes are especially susceptible to a confusing and possibly duplicative damages award:

- Business torts (e.g., trade secret misappropriation, tortious interference) and breach of contract claims. A plaintiff will likely want to raise both, since the business tort typically offers a broader range of damages, including exemplary damages and/or attorney's fees. There can be conflicts among business torts or between business tort and contract claims, and they often arise out of the same fact patterns (e.g., an employee with a confidentiality agreement who steals company IP).

- Statutory claims relating to false or deceptive customer communications (e.g., a case raising State Uniform Deceptive Trade Practices Acts and the Lanham Act)[8] and common law claims relating to similar practices (defamation, misrepresentation, interference with contract or prospective economic advantage). Here again, there can be overlap between damages associated with the statutory claims themselves and/or between statutory and common law claims.

- Claims relating to employment obligations, such as the breach of an employment contract and employment discrimination.

Some damages awarded in these cases will be clearly duplicative. As was the case in Texas Advanced, a plaintiff will be hard pressed to argue for two sets of damages based on the taking of the same information and disgorgement of the same profit. Other cases will be far harder to analyze after trial. For example, suppose joint-venture partner X sues its partner, Y. X claims that Y sold a product in violation of two contractual provisions: by (1) failing to live up to contractually-mandated quality standards; and (2) misusing X's trademark. X asserts both a contract theory and also a trademark-infringement theory. A jury verdict of $100k on the trademark count and $500k on the breach-of-contract count could mean at least two things. It could mean that the jury found that both activities violated the contract, in which case the damages might be duplicative. Or it could mean that the jury found the contract was violated only by the substandard goods, but found a separate and nonduplicative trademark violation. But if the jurors are dismissed in a way that does not provide an option for recalling them, the litigants are left trying to figure out what the jury meant to accomplish.

Trial Tactics — Ask the Jury to Decide or Leave it for the Judge?

The plaintiff in Texas Advanced elected to let the jury award whatever it thought was the full measure of damages, and to have the court untangle the damages later. But there may be substantial risks associated with having a trial court or appellate court decide the jury's intent after the fact. The plaintiff runs the risk that the trial court will interpret a jury verdict in a way that fails to maximize damages or that an appellate court will find the damage award so confusing that it will order a new trial. As dangerous, if not more, a defendant who fails to raise the issue of duplicative damages in advance (probably at the jury-instruction phase) runs the risk that it will have waived its right to protest a duplicative verdict. The question addressed below is whether jury instructions and the verdict form can be structured in a way that minimizes confusion about the jury's intent.

Three Practical Suggestions and One Risky Option

There are at least three practical ways to achieve clarity that should eliminate or reduce the risk of post-trial confusion.

1. Seek Clarity in the Jury Instructions

The jury charge can instruct the jury to assess "full" damages or it can instruct a jury not to award duplicative damages. The plaintiff should consider seeking a jury instruction that instructs the jury not to award duplicative damages. In at least a few cases, a trial court gave that instruction, and the appellate court "presumed" that jury had followed the instruction and not awarded duplicative damages.[9] A defendant should always raise and preserve the issue of duplicative damages — both at the jury-instruction conference and post-trial — or risk waiver on appeal.

2. Separate Liability Findings and Damages Findings

Pattern instruction that address multiple theories do so by identifying claims and associated categories of damages, asking the jury to make a liability finding on the claims and then asking the jury to determine a total dollar amount for each category of damages associated with a claim for which it found liability. In this way, the verdict form permits only one "number" for each category of damages. The pattern instructions are tailored for product-liability and personal-injury claims, and include examples of categories (medical expenses, lost income, emotional distress) that separate more neatly than damage measures such as royalties, plaintiff's lost profits, defendant's unjust enrichment, reputational injury,

cover for breach and other commercial damages. This method will work well for some such cases, but if the verdict form becomes overwhelming, as it often can in complex cases, other alternatives must be considered.

3. A "Maximum" Question

Another option is to ask the jury a "maximum" question. By this we mean that, after assessing liability and damages per cause of action, the jury could be asked "what is the maximum amount to be awarded to the plaintiff under all of the causes of action for which you find liability?" This question has the benefit of simplicity and of accurately assessing jury intent. But a potential major drawback is that it cannot entirely eliminate duplicative-damage questions if one or more liability findings are reversed in post-trial motions or on appeal. If, for example, the jury awards $1 million on each of three claims, and its answer to the "maximum" question is $2 million, reversal of the jury's finding on one claim on appeal could leave open questions. Despite its potential flaws, however, this solution has the value of simplicity and will, in most cases, end the inquiry into duplicative damages.

But what if you didn't see it coming? What if only after having heard the jury's findings do you realize that the verdict form is potentially confusing? If you act fast enough, the Supreme Court might have just handed you a fourth potential option:

4. Seeking to Recall the Jury

If the duplicative damage problem is "easily identified" and "fixable" and if the jury either remains in the courtroom or the courthouse, you may have the right to ask the judge to exercise his or her inherent authority to obtain a nonduplicative verdict pursuant to the Supreme Court's opinion in Dietz. This is no sure thing — the dissenters argue that Dietz leads to more litigation, and you'll be asking a trial judge to potentially deliver just that. But there is a strong counterargument that getting clarity immediately actually leads to judicial efficiency and fewer post-trial motions and appeals, in the right circumstances.

Conclusion

There is no silver bullet to avoiding confusing damages awards and the attendant uncertainty for the parties. The optimal strategy may vary depending on the nuances and particulars of each case. But a major pitfall to avoid is neglecting the issue, especially as trial nears and the pressing tasks pile up. Given the proper amount of forethought, it is possible to design jury instructions and a verdict form that minimizes confusion over damages so that neither party receives an unexpected windfall post-trial. And, although preverdict caution is the best strategy, the U.S. Supreme Court may have provided one additional post-verdict tool in its recent Dietz opinion.

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[1] See, e.g., Aero Products Int'l Inc. v. Intex Rec. Corp., 466 F.3d 1000, 1020 (Fed. Cir. 2006)

[2] See, e.g., Judicial Council of California Civil Jury Instructions (CACI), No. 3934 (2016 edition), (instructing jury how to award different types of damages based on different theories in personal-injury case).

[3] Texas Advanced Optoelectronic Solutions Inc. v. Intersil Corp., 4:08-cv-00451 (E.D. Tex.).

[4] Id. Dkt. 524.

[5] Id. Dkt. 506.

[6] No. 15-458 (June 9, 2016)

[7] Id., p. 4 (citing Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

[8] Most states have a deceptive trade practices act that overlaps substantially with the federal Lanham Act. Both cover trademarks, unfair competition, false advertising, and the like. Compare, e.g., Del. Code tit. 6 §§ 2531 et seq., with 15 U.S.C.§§ 1501 et seq.

[9] See Thomas v. Cook Cnty.Sheriff's Dep't., 604 F.3d 293, 311–12 (7th Cir. 2010); Havaco of Am. Let v. Sumitomo Corp. of Am., 971 F. 2d 1332, 1346 (7th Cir. 1992).