CARLTON FIELDS

Suggesting a Damages Amount to the Jury during Closing Arguments in Cases Involving Intangible or Liquidated Damages

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Welcome back to the special Practice Tips printed on blue pages! After a hiatus of several years, the Trial Techniques Committee of the ABA Tort Trial and Insurance Practice Section (TIPS) is reviving this feature for trial practitioners in this issue of The Brief. The "blue pages" historically have contained valuable insights from a variety of experienced trial lawyers in TIPS, and we hope to revive that tradition here and in the future.

In a recent broad survey conducted by members of TIPS's Trial Techniques Committee, practitioners with significant trial experience were asked to provide their perspectives about real-world issues that trial lawyers frequently face. We received many thoughtful responses that we will share with you in this and upcoming issues of *The Brief*. Each of these articles will highlight some of the most useful responses we received on a particular subject matter. Our goal is to offer all TIPS members an opportunity to learn more about trial practice from the best trial lawyers in the Section. We certainly hope you will find this information interesting and instructive.

Meet the Litigators

We focus in this issue on whether trial attorneys rep-resenting defendants should suggest an amount of damages to the jury during closing arguments in cases involving intangible or unliquidated damages. For insight on this matter, we have consulted Michael Lowe, Stanley Lipshultz, David Littleton, Mark Metzger, and Bob Redemann, all of whom are among the most experienced trial lawyers in their fields. They come from a wide variety of backgrounds, and their disparate experiences provide the basis for their differing analyses.

Lowe is of counsel to Booth, Mitchel and Strange LLP in Los Angeles and focuses his practice on construction industry claims, reinsurance matters, and other forms of commercial litigation. He has tried more than 50 cases to verdict. Lipshultz is a visiting professor at Rutgers School of Law in Newark, New Jersey, and has tried more than 200 cases to verdict. His cases have primarily involved the defense of medical malpractice claims. Littleton is a senior partner at Anderson, Murphy & Hopkins LLP in Little Rock, Arkansas. His practice focuses on professional negligence defense, and he has tried 38 cases to verdict. Metzger is a founding partner at Metzger Rosta LLP, north of Indianapolis, Indiana, where he practices in the areas of insurance defense, litigation, and personal injury. He has tried more than 100 cases to verdict. Finally, Redemann is a trial lawyer with Perrine, Redemann, Berry, Taylor & Sloan PLLC, in Tulsa, Oklahoma, and has experience in products liability, toxic torts, insurance, and employment. He has tried more than 30 cases to verdict.

The Case against a Damages Amount

When trying a case involving intangible or unliquidated damages, deciding whether to suggest a damages amount to the jury in closing argument can be difficult. Even the most experienced attorneys disagree on the wisdom of suggesting a damages amount in this context. The five experts we interviewed highlight the complexity of making this decision and the need to assess various factors before making the final call.

Most of our panel generally advised *against* providing a damages amount in a defense closing argument. The primary concern identified with proposing a number to the jury is that it may be seen as an unstated concession that the lawyer questions the strength of his or her case or, even more troublesome, that the lawyer agrees that the other party is entitled to

damages of at least the amount suggested. Littleton counsels, "I believe it erodes your credibility to say, "`My client is not liable, but if you disagree, it is only x dollars." Similarly, Lipshultz adds, "Making a suggestion as to the amount a jury might render is the same as giving the jury an idea of what to do." In Redemann's view, "I generally do not suggest a number because there are issues of fault, and I want the jury to feel like we have no or little fault. Therefore, it is not appropriate to talk about damages."

Littleton shares a related concern about how and when to suggest a damages number:

> I have not had a case where I felt that it would benefit my presentation to the jury in the sense that "[L]adies and gentlemen, you've heard the evidence over the last few days, and we feel very strongly about liability. However, if you don't agree with us, we believe there should be alternate damages, and here's what they are." Or some variation of that theme. To me, it goes against my nature of starting strong, finishing strong, and hiding stuff in the middle.

The Dangers of Not Providing an Amount

Despite these concerns, trial lawyers should be aware of the potential danger in not providing an alternative damages number to the jury. As Littleton describes, "[T]he very obvious risk is if the jury does find against you, you have put it all out on the table and have given the jury nothing." Redemann experienced this firsthand:

> I had one case a long time ago where the jury awarded every single penny that the plaintiff asked for. .. . We thought we had a pretty strong defense, but obviously we did not, and the jury basically bought everything that the plaintiff's side was arguing. In retrospect, in that case I wish we had argued something a little less than the full damages and given the jury a rationale of how to get there.

To address these and related concerns, other attorneys routinely suggest a damages amount. For example, Metzger explains as follows:

> There would not be a case that I would not suggest a number to the jury. . . Early in my career I had a case where I did not put up a specific number, and the jury came back and said, "Well, why didn't you tell us what you were thinking?" I would never go buy a car if I didn't know what the price was. The jury wants to know your thought process.

Based on this experience, Metzger believes that juries expect to be told what the defense counsel believes the case is worth. Thus, an assessment of an alternate damages amount must begin from the start of the case. "I always think about the number that I am going to put up and how I am going to justify it. My number has to make sense."

Other Reasons for Giving a Number

For attorneys who generally oppose suggesting a damages amount, all concede that exceptions do exist. It is a case-by-case decision, and various considerations play into their analyses. Our trial practitioners highlighted two significant factors.

The first is the strength of the case and how it ultimately plays out before the jury. Lowe takes a broad view of his case and the dynamics of the courtroom during trial in making a decision.

> It depends on how comfortable I feel about the evidence and witnesses presented, how the argument on both sides is being accepted, and the demeanor of the jury in the box.... If the defense is sound and the case is all or nothing, arguing for no recovery at all is certainly in order.

Redemann concurs about the importance of what transpires in the courtroom:

> [I]f it's so clear from the evidence that you are going to be held liable, or if you're going to be held liable and there are multiple parties that might also be at fault, I think in those situations you should consider suggesting some number to the jury. . . . On those occasions where I have given a figure, it was generally based upon an evaluation of the potential exposure with some deduction for how well or poorly the evidence went in.

The second factor is the amount suggested by the plaintiff's counsel in his or her closing argument. Lipshultz advises that he usually does not suggest an amount to the jury "unless the plaintiff's demand is outside the realm of reality." Even in such

circumstances, some attorneys still avoid recommending a damages number. Lowe, for example, believes that "if the plaintiff's number to the jury is outrageous enough, it is much easier to scoff at an outrageous number but leave it to the jury's common sense to consider a reasonable number if they find for the plaintiff."

Responding to the Plaintiff's Damages Request

Although our seasoned trial practitioners did not reach a consensus regarding whether to suggest a damages number, all agreed that the plaintiff's damages request could not be ignored. Lipshultz explains, "We address it because I do not care how good you are as an attorney, you never know what is going to happen. Juries disregard information that lawyers think is extremely important and vice versa." Redemann agrees: "I'm a believer that you lead the horse to the water but you don't tell it how to drink. In those cases where we attack damages, we point out the flaws in the damages case and suggest that maybe this is a little overblown, or not totally related." For Littleton, attacking the plaintiff's damages demand should be thoroughly covered during the cross-examination of the plaintiff's economic expert, and counsel "can harken back to that without actually putting another number in front of the jury." Metzger advises a discussion of damages from the very beginning of trial: "[Y]ou have to talk to the jury in voir dire about the true value of a case, overreaching, and taking personal feelings out of the case.... Then you remind the jurors when you are closing that you discussed these things in voir dire—and hold them to what they agreed to."

Conclusion

As the opinions of these trial lawyers demonstrate, no bright-line rule exists on whether a lawyer should suggest a damages amount to a jury during closing arguments in a case involving intangible or unliquidated damages. Several factors need to be evaluated. The opinions presented in this edition of the "blue pages" Practice Tips are all based on the experience of seasoned trial lawyers who have tried numerous cases to verdict. Each attorney's experience has led him to develop different approaches to this complex and very important issue. We hope that you will benefit from their practical insight into this difficult issue.