Relieve Heartache and Uncertainty

Drafting Verdict Forms to Avoid Duplicative Damages

By Chad Clamage

By avoiding the two most common structural problems with jury verdict forms and by tailoring a verdict form to the claims and evidence at trial, attorneys can reduce the possibility of duplicative damages.

As a case barrels toward a jury trial, the last thing on most attorneys' minds is the structure of the verdict form. This lack of attention, however, can lead to disaster. Case after case shows that incorrectly framed verdict forms invite juries to award duplicative damages, exposing the defendants to potentially millions of dollars of unnecessary damages. Worse, by the time that defense attorneys realize that a jury may have awarded duplicative damages, it could be too late to fix the problem. Courts are loath to overturn jury verdicts, especially when the verdict is flawed because of a form that the attorneys helped draft.

The threat of duplicative damages must be eliminated before a jury retires. Thankfully, attorneys can minimize this threat by giving careful thought to the structure of the verdict form.

The Problem of Duplicative Damages

The basic principle of compensatory damages is that a plaintiff should be "made whole for his injuries, not enriched." *Medina v. District of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011). In other words, a plaintiff should recover only once for each compensable harm. This means that a plaintiff who is entitled to recover his or her medical expenses should be awarded those expenses only once. A business that is seeking its lost profits should be awarded those profits only once. A person who suffered compensable emotional distress should be paid for that distress, but only once. Thus, for purposes of computing compensatory damages, it is often (though not always) irrelevant which defendant is found liable or which cause of action succeeds. What matters are the factual *injuries* that a plaintiff has suffered, which are different from the plaintiff's legal theories of relief.

The threat of duplicative damages arises when a plaintiff asserts multiple causes of action, sues multiple defendants, or does both, which is typical. In those cases, a jury may award a plaintiff full compensation for each cause of action or an award against each defendant. If those awards are added together, a plaintiff could receive a windfall judgment that is multiple times the damages caused by his or her injuries.

More often than not, as mentioned, the underlying culprit behind duplicative damages is the jury verdict form. Specifically, there is significant risk of duplicative damages whenever a verdict form asks a jury to assign damages by cause of action or by defendant.

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Problem #1: Asking a Jury to Award Damages by Cause of Action

A verdict form generally should not require a jury to award damages based on cause of action. The case of *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85 (1st Cir. 2006), illustrates the problem. There, a former police officer sued a municipality, alleging that she had been sexually harassed on her job and unlawfully fired for complaining about the harassment. The plaintiff asserted claims under Title VII, Law 17 (Puerto Rico's analog of Title VII), and §1983. The jury awarded her $250,000 on her Title VII claim, $250,000 on her Law 17 claim, and $125,000 on her §1983 claim. The district court doubled the Law 17 verdict under Law 17's doubling provisions, added the remaining figures together, and entered an $875,000 judgment against the municipality.

The problem with the verdict, the municipality realized after trial, was that the three awards may have been duplicative. The municipality argued on appeal that the plaintiff was "awarded damages for the same basic harms—sexual harassment and eventual termination—multiple times, under different legal theories." *Id.* at 102. The First Circuit did not resolve that argument, however. The court stated that "in this circuit, the primary mechanisms to avoid impermissible duplicate awards for damages are the jury instructions and the structure of the verdict form." *Id.* The First Circuit held that the municipality had "given away" its duplicative damages argument by not objecting at trial, and on that basis, the First Circuit affirmed the district court's judgment. *Id.*

Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991), provides another example of the problem. The plaintiffs there had alleged that the county took part in a cover-up that resulted in the plaintiffs' unlawful arrests, prosecutions, and convictions. The jury found the county liable and awarded each plaintiff $75,000 on a §1983 claim and $75,000 on a state law claim for malicious prosecution. The district court added the figures and awarded each plaintiff $150,000. On appeal, the county argued that each plaintiff had received duplicative damages, but the county did not persuade the Second Circuit. The Second Circuit found it "possible that the jury committed the error of duplicating damages" but "equally conceivable" that the jury found that each plaintiff suffered $150,000 in damages and divided damages among the two causes of action. *Id.* at 154. The Second Circuit noted that the county had failed to object at trial and did not "establish" duplicative damages "with any degree of certainty" on appeal. *Id.*

These results are not surprising. When a jury awards damages by cause of action, it is difficult to tell what the jury was thinking: It might have calculated total damages correctly and then spread out the damages among the claims. But it is also possible—and perhaps in most cases likely—that the jury awarded the same damages more than once.

Given the inherent ambiguity in all jury verdicts that award damages by cause of action, reviewing courts often shy away from deciding whether a jury improperly awarded duplicative damages. After all, they cannot see into the minds of the jurors and typically will have no basis to determine whether the damages were duplicative or appropriately divided among counts. Appellate courts are thus quick to affirm a judgment based on waiver when a defendant did not object at trial to the verdict form. Appellate courts also frequently note, when applicable, that a trial court instructed a jury not to award duplicative damages. When a trial court has given such an instruction, an appellate court may "presume" that the jury followed the instruction, even though it is impossible to tell whether the presumption is accurate. *Havoco of Am., Ltd. v. Sumitomo Corp. of Am.*, 971 F.2d 1332, 1346 (7th Cir. 1992).

A duplicative damages argument is not necessarily lost when a case reaches an appeal. Appellate courts have overturned duplicative damages awards and ordered new trials on damages when the verdicts were incomprehensible. But rather than ask an appellate court to correct a verdict that might contain duplicative damages, it is better to structure a verdict form correctly in the first place.

Problem #2: Asking a Jury to Award Damages by Defendant

A similar problem occurs when a verdict form asks a jury to award damages by defendant. The Seventh Circuit case of *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2010), demonstrates this flaw. There, the plaintiff's son died from meningitis while in jail. The mother sued the county, the sheriff, and several correctional employees, alleging that each violated her son's constitutional rights. On the plaintiff's §1983 claim, the jury awarded the plaintiff $3 million against the county, $1 million against the sheriff, and $150,000 against the individual defendants. The district court added the figures together and then remitted the $4.15 million verdict to a $4 million judgment on that claim.

The threat of duplicative damages arises when a plaintiff asserts multiple causes of action, sues multiple defendants, or does both, which is typical.

The county argued on appeal that the jury had awarded duplicative damages. The Seventh Circuit panel acknowledged that "it is unclear from the face of the verdict form whether the jury meant to allocate duplicate awards for the same injury, or whether it merely calculated total damages and then allocated the amounts separately based on what it perceived to be each party's relative fault." *Id.* at 311. The panel "assume[d] the latter" because the district court had instructed the jury not to award duplicative damages. *Id.*

The appeal presented a further complication. The panel also ruled that there was insufficient evidence to hold the sheriff liable. But rather than reduce the judgment by the $1 million that the jury assigned to the sheriff, the panel held that the remaining parties were all liable for the $4 million judgment. The panel explained that the defendants faced joint and several liability for the death of the plaintiff's son and that "cumulating the damage awards—which the district court ended up effectively

doing—would be more consistent with the presumption" that the jury followed the district court's instruction not to award duplicative damages. *Id.* at 312. The panel observed that "[m]ost of the issues surrounding the damages award in this case could have been avoided with a better verdict form." *Id.* The ruling prompted strong disagreement from Judge Sykes, who dissented from the Seventh Circuit's denial of rehearing en banc on the ground that the verdict form was so "badly botched" that the case merited the full court's review. *Id.* at 314.

Attorneys can minimize the threat of duplicative damages by structuring a verdict form correctly.

Appellate courts have reached divergent results when faced with similar problems. In *ClearOne Communications, Inc. v. Biamp Systems*, 653 F.3d 1163 (10th Cir. 2011), for example, the jury awarded the plaintiff $956,000 in lost profits against one defendant and $956,000 in lost profits against the second defendant. The district court added those figures together, reasoning that the jury had calculated lost profits at $1,912,000 and then divided the award among the defendants. On appeal, the Tenth Circuit ruled that the verdict was "ambiguous as to whether the jury intended to award a total of $1,912,000 in lost profits and allocated that amount between [the defendants], or whether the jury intended to award $956,000 in lost profits and found that [the defendants] were both liable for that amount." *Id.* at 1180. The Tenth Circuit then reversed, holding that the district court should have selected the smaller award to avoid the possibility of unlawful additur.

As these cases show, appellate courts candidly struggle to make sense of verdict forms that ask a jury to award damages by defendant. Similar to verdicts that award damages by claim, verdicts that award damages by defendant are inherently ambiguous: it is impossible to tell whether a jury awarded duplicative damages in error or instead correctly calculated damages and then apportioned those damages among the defendants. This uncertainty will pervade most appeals involving jury verdicts that award damages by defendant, confirming once more the need to get the verdict form right before a case is submitted to the jury.

The Solution

Attorneys can minimize the threat of duplicative damages by structuring a verdict form correctly. Before I suggest a few potential solutions to this problem, it is important to note that the law on verdict forms varies by jurisdiction. The Sixth Circuit, for example, has faulted a verdict form for "*not* allow[ing] the jury to award specific damage amounts for each claim." *Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559, 567 (6th Cir. 2001) (emphasis added). The Sixth Circuit's conclusion seems at odds with the practice in other circuits, and probably encourages double recovery for the reasons discussed above, but it nonetheless is the law in the Sixth Circuit. Thus, before following the advice in this section, attorneys should take care to understand the law in the jurisdiction in which their trial will be held.

That said, generally speaking, the verdict form should be in two parts. The first part asks the jury to decide all questions of liability; the second part addresses damages.

In a simple case in which a plaintiff suffered a single, indivisible injury and the defendants face joint and several liability, the verdict form should ask the jury to calculate the *total* amount of damages caused by the liable defendants. There generally is no need for further breakdown, and the jury certainly should not be asked to assign damages to each defendant. Once a jury calculates total damages, "[d]amages in this amount can then be awarded, jointly and severally, against each defendant found liable." *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 248 (2d Cir. 1985).

The same is true when a plaintiff attempts to hold one defendant vicariously liable for the actions of another—for example, under the doctrine of *respondeat superior*. In such a case, there is no need for a jury to assign compensatory damages to each defendant. The jury simply should determine which defendants are liable and calculate the total amount of damages. The court can then fashion the judgment based on the jury's findings.

Cases, of course, can become more complicated. For example, some states have abolished joint and several liability. New Jersey's statutory law provides a good illustration of how to avoid duplicative damages when defendants face the prospect of several liability. The relevant statute requires a jury to determine the "amount of damages which would be recoverable" by a plaintiff "regardless of any consideration of negligence or fault," meaning "the full value of the injured party's damages." N.J. Stat. Ann. §2A:15-5.2.a(1). The jury must then assign a percentage of fault to each liable party—and to the plaintiff, whose comparative fault may reduce his or her recovery—and those percentages must add up to 100 percent. The judge then must "mold the judgment" based on the jury's "findings of fact" and the state's rules for several liability. *Id.* §2A:15-5.2.d. This is a sensible approach to dealing with several liability. By calculating total liability without regard to the number of parties, fault, or cause of action, a jury is more likely to calculate compensatory damages correctly, and without duplication. Under this approach, the record is cleaner, the jury's findings are more understandable, and the threat of duplicative damages is reduced.

As I noted above, sometimes the cause of action *does* matter. For example, some claims allow a plaintiff to elect between different forms of recovery. In *Iowa Pacific Holdings, LLC v. National Railroad Passenger Corp.*, 853 F. Supp. 2d 1094 (D. Colo. 2012), for example, the district court ruled that a plaintiff asserting a breach of contract claim could decide to recover either expectation (or bargain-of-the-benefit) damages or reliance (or out-of-pocket) damages. Because these awards are calculated differently, the judge asked the jury to calculate *both* expectation damages *and* reliance damages. The judge then allowed the plaintiff to choose to recover either expectation damages or reliance damages, but not both. The court's approach was sound. It allowed the jury to perform the necessary fact

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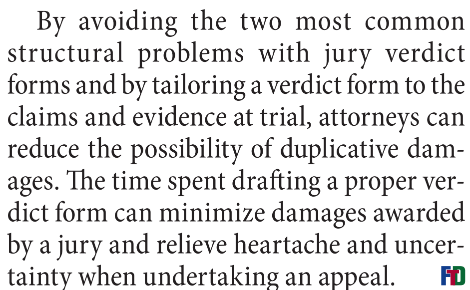
finding. At the same time, the court controlled the legal issue of election of remedies while ensuring that the plaintiff would not receive duplicative damages.

In other cases, the plaintiffs' causes of action may affect recoverable damages. For example, some causes of action allow a plaintiff to recover out-of-pocket damages but not noneconomic damages, while other causes of action allow a plaintiff to recover both out-of-pocket and noneconomic damages. In these instances, a verdict form could ask a jury to calculate damages based on *non-overlapping* categories of *injuries* to a plaintiff—again, different from legal claims. For example, a verdict form could ask a jury to calculate a plaintiff's total economic injuries (*e.g.*, medical expenses or lost profits) and calculate the plaintiff's total noneconomic injuries (*e.g.*, emotional distress or loss of enjoyment of life) on separate lines. Based on the jury's answers in the liability section of the verdict form, the judge can then determine the amount of the judgment, including whether each category of injury should be part of the judgment.

Cases will present additional factual and legal nuances. It is therefore important that each trial team have an attorney devoted to thinking about avoiding duplicative damages, in addition to other legal questions. Especially in high-stakes cases when millions or even billions of dollars are at issue, an appellate attorney can be an invaluable asset to a trial team. An attorney who throughout trial is focused on legal issues and appeal can help avoid error at trial and help preserve a defendant's objections to errors that occur, allowing the defendant to steer clear of waiver on appeal. An appellate attorney can also help frame a case for a potential appeal, increasing a defendant's chances of ultimate success.



By avoiding the two most common structural problems with jury verdict forms and by tailoring a verdict form to the claims and evidence at trial, attorneys can reduce the possibility of duplicative damages. The time spent drafting a proper verdict form can minimize damages awarded by a jury and relieve heartache and uncertainty when undertaking an appeal. FTD