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ABRACADABRA: THE MAGIC IN SPECIAL VERDICTS

Hon. Brian M. Hoffstadt

For decades now, courts have repeatedly proclaimed that asking a civil jury specific questions as part of its verdict was a "risky" and "pitfall"-filled endeavor. (*Jarman v. HCR ManorCare, Inc.* (2017) 9 Cal.App.5th 807, 828-829; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855 (*Falls*).) That is largely because general verdicts are "safer": Courts are required to "impl[y] findings on all issues" necessary to uphold a jury's general verdict (*Falls*, at p. 854), but are *prohibited* from doing so for a jury's special findings (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*D.R. Horton*).) What is more, the price for a defective special finding is typically the re-trial of the entire case (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 124 (*Trejo*); see Code Civ. Proc., § 657, subd. (6)), and there are few things worse than having to re-live the same experience again and again.

So, other than in the sole situation where a special finding is expressly required by statute—namely, to separate "punitive" from "compensatory damages" (Code Civ. Proc., § 625)—the use of such findings is optional. (*Eng v. Brown* (2018) 21 Cal. App.5th 675, 705.)

So why would any sane litigant chance it?

The answer is simple: Asking the jury specific questions—whether it be through a special verdict form or through special interrogatories in conjunction with a general verdict—can work magic.

If you're a plaintiff, why settle for a mundane verdict of actual damages when, by asking the jury the right specific questions, you can double, triple, or potentially even decuple those damages? And if you're a defendant, why be stuck paying the full amount of aggregate damages when, by asking the jury the right specific questions, you can potentially cap or offset certain components of that damages award?

From a plaintiff's perspective, a general verdict for fraud may not by itself be enough to support an award of double damages for misrepresentations that induce someone to "change from one place to another" to accept new employment. (Lab. Code, §§ 970, 972.) Likewise, a general verdict may not by itself be enough to support the award of treble damages and attorneys' fees for receipt of "property that has been stolen or that has been obtained in any manner constituting theft" under California Penal Code section 496. (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 128.) So a plaintiff seeking this kind of recovery must ask the jury to specially find its statutorily defined predicate. (Indeed, this is why a special finding is statutorily required for punitive damages.) And in those rare cases where a plaintiff bringing legal and equitable claims tries the legal claims first, the more specific the jury's findings on the legal claims, the more effectively those findings will bind the trial court in making its findings on overlapping equitable claims. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158-159.)

From a defendant's perspective, special interrogatories are all but necessary to cap, limit or offset certain types of damages. California law caps non-economic damages awards in malpractice cases against health care providers at $250,000 (Civ. Code, § 3333.2), and permits "provider[s] of health care services" to make periodic payments for "future damages" awards equaling or exceeding $50,000 (Code Civ. Proc., § 667.7). However, these caps are enforceable only if the damage award is segregated by type, and the only way to do that is with special interrogatories. (See *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 771; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346.) California law also makes liability for non-economic damages among concurrent tortfeasors several, not joint. (Civ. Code, § 1431.2.) However, this limit is enforceable only if the jury imposes a specific amount of non-economic damages against each defendant, and the only way to do that is with special interrogatories that segregate damages by defendant. (*Soto v. BorgWarner Morse TEC, Inc.* (2015) 239 Cal.App.4th 165, 205-206; cf. *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1398.) California law empowers defendants to offset economic damages by a prior worker's compensation lien and by the amount recovered against other defendants in a prior good faith settlement. (*Demkowski v. Lee* (1991) 233 Cal. App.3d 1251, 1259-1264; *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1841.) As noted above, however, such an offset is enforceable only if damages are segregated by type, which, also as noted above, requires a special interrogatory.

But just like casting a spell or brewing a magic potion, the magic of special findings works only if the sorcerer gets the spell just right. When eye of newt is required, frog's breath simply won't do. And woe to the apprentice who trips up the spoken incantation; Professor Dumbledore recognized that "[*w*]*ords* . . . are our most inexhaustible source of magic," and his wisdom applies with even greater force when working *legal* magic. (Harry Potter and the Deathly Hallows-Part 2 (Warner Bros. Pictures 2011), emphasis added.)

Whether a party has wielded the magic of special findings correctly depends largely on the rules governing when those findings will be upheld. Those rules, in turn, depend on the *type* of special finding at issue.

The first type of special finding is a special interrogatory, which is made by a jury along with a general verdict. By and large, special interrogatories are only problematic when they are inconsistent with one another or with the accompanying general verdict. Courts have developed specific rules for how to resolve inconsistencies. When two special interrogatories conflict with each other, the court will give effect to whichever interrogatory answer is more consistent with the general verdict. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541 (*Hasson*). When a special interrogatory "is inconsistent" with the general verdict, the court will give effect to the interrogatory over the general verdict (Code Civ. Proc., § 625), with one major caveat: If the inconsistency between the two is so fundamental that there is "no possibility of reconciling the general and special verdict under any possible application of the evidence and instructions," the court must vacate the general verdict and set the case for a new trial. (*D.R. Horton, supra, 126 Cal.App.4th at p. 679; Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 302 (*Mendoza*)*; Hasson*, at p. 540.)

The second type of special finding is the bona fide special verdict.

To be valid at all, a special verdict form itself must require the jury to find all necessary "conclusions of fact" or "ultimate facts" underlying a claim, such that "nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960 (*Myers Building*).) A special verdict form must not ask the jury to find *evidence or legal conclusions,* and must not set forth the "legal effect" of the conclusions of fact it requires the jury to find. (*Myers Building,* at p. 959; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 854 [legal conclusions generally inappropriate].) And the form must require findings on "every controverted issue." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285,

internal quotation marks omitted; *Trejo, supra,* 13 Cal.App.5th at pp. 136-137.) A special verdict that does not resolve all controverted issues is a "puzzle with pieces missing" and will be disregarded. (*Falls, supra,* 194 Cal.App.3d at p. 855.) Further, a trial court will not generally give any effect to a jury's findings on an incomplete special verdict form. (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 103-104; *Tierney v. Javaid* (2018) 24 Cal. App.5th 99, 112. The sole exception is if the partial findings are sufficient to "eliminate[]" a basis for liability. (E.g., *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1478-1479.)

Even if it calls for a jury to make all necessary findings, a special verdict will be ineffective if there is any inconsistency "between or among [the jury's] answers." (*D.R. Horton*, *supra,* 126 Cal.App.4th at p. 682.) If the inconsistent answers cannot be reconciled and render the jury's findings "'hopelessly ambiguous,'" the special verdict cannot stand because a court is not permitted to choose which of the contradictory answers to credit. (*Fuller v. Department* (2019) 38 Cal.App.5th 1034, 1038 (*Fuller*); *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 358-359 (*Singh*); *D.R. Horton,* at p. 682; *Trejo, supra,* 13 Cal.App.5th at p. 124.) Applying these standards, courts have invalidated special verdicts in which the jury (1) has assigned different monetary values to the same parcel of property when awarding different types of damages (*D.R. Horton,* at p. 683); (2) has found a defendant liable for negligence but not for strict liability when both claims are based on a single possible defect (*Trejo*, at pp. 127-128; *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 721; cf. *Fuller,* at p. 1040); (3) has found a defendant inconsistently liable and not liable for promissory estoppel, misrepresentations, false promises, intentional misrepresentation and concealment when all claims are based on the same underlying misrepresentation (*Singh,* at pp. 359-360); (4) has found a defendant, in a non-insurance context, not liable for breach of contract but liable for breach of the implied covenant of good faith and fair dealing (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344); or (5) has assigned different values to the same object for breach of contract and common count claims (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1093-1094 (*Zagami*).

So what tips should be scribbled in the margins of the spell book for how to properly use the magic of special findings?

Tip No. 1: Ask yourself, "Do I really *need* special findings?" Sometimes, they are required or, as a practical matter, necessary. But when they are not, the risks may outweigh the benefits.

Tip No. 2: If you elect to use a special verdict form, be sure to make sure the form includes *every* element of the claim. And if the form employs a decision-tree model, make sure the instructions about which question to answer next are all correct. Special verdict forms typically go through a lot of negotiation, so you must re-check them after every revision to ensure they work properly. Start with the CACI verdict form if one exists, but carefully examine whether and how it needs to be tailored to your case. And remember that special verdicts, for the reasons explained above, are not for the neophyte. There is a reason the Ministry of Magic didn't allow new Hogwarts students to disapparate.

Tip No. 3: Avoid special interrogatories and special verdict questions that use "and/or" because their inherent ambiguity increases the likelihood of inconsistency (it may be impossible to know whether the jury found both items or just one of them). (See *Myers Buildings*, *supra*, 13 Cal.App.4th at p. 961.)

Tip No. 4: Run through the possible permutations of answers the jury might give on the special verdict form to flush out (and remove) any possible inconsistencies.

Tip No. 5: Be vigilant for inconsistencies and ambiguities while the jury is still empaneled. Objections matter. If a party perceives that a verdict is "potentially ambiguous or inconsistent," the party should ask the court to obtain clarification from the jury before the jury is discharged; the court is duty-bound to seek such clarification. (*Zagami*, *supra*, 160 Cal. App.4th at pp. 1091-1092; Code Civ. Proc., § 619; *Mendoza, supra,* 81 Cal.App.4th at p. 303; *Singh*, *supra*, 186 Cal.App.4th at pp. 357-358.) But if the party fails to seek clarification at that time, the trial court in post-trial motions and the appellate court will do what they can to "'interpret the verdict from its

language considered in connection with the pleadings, evidence and instructions"' and will only invalidate the verdict if it is '"hopelessly ambiguous."' (*Zagami,* at p. 1092; *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 456-457.) What is more, if the party's failure to ask for clarification appears to have been tactical, the courts may deem the issue waived and let the resulting inconsistent verdict stand. (E.g., *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 529-530; *Woodcock,* at p. 456, fn. 2.)

Tip No. 6: And while the jury is still empaneled, ask that the court poll the jury. You should always do this anyway, but polling is particularly important to ensure that each finding has the necessary votes (and, if you're the losing party, in hopes of learning that a key finding has only the minimal 9-3 vote).

As this complex body of law indicates, making special findings work takes more than being able to utter some magic word like "Abracadabra." It requires parties to "invest the time and attention necessary to ensure" that they are done right; otherwise, they can and do backfire. (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 796.)

And, as Jafar and Voldemort will tell you, there's nothing worse than magic that goes awry.

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