



Arkansas Association of Defense Counsel

June 19, 2017

Court Case Reveals Misconceptions about Damages Expert's Role

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An economic damages expert's role in establishing causation is not always clear and may vary by jurisdiction and depending on the facts of each case. Damages experts should be aware of the risks of strictly assuming causation with no further consideration of the existence of a causal link to their damages analysis. However, damages experts can also assume too much responsibility for establishing causation, as illustrated in a recent federal court case in Utah. In *Rowe v. DPI Specialty Foods*¹, the proper role of the damages expert was at issue in a Daubert challenge in which the court found that the defendants' rebuttal expert failed to stay within his area of expertise.

Case Background

The plaintiff was a former employee at Premier Sales Solutions ("Premier"), a food broker for retailers and distributors. The defendants were DPI Specialty Foods ("DPI"), Premier's former client, and one of its employees. The plaintiff alleged that the defendants made defamatory statements about him to his employer, resulting in his termination. The plaintiff sued the defendants for defamation and tortious interference with economic relations.

The Experts

The plaintiff offered a damages expert ("Expert P") to provide an opinion on the economic damages for lost earnings and benefits; loss of reputation; loss of economic relations; emotional distress, pain, and suffering; and value of reparative work. Expert P stated that his report was based on an assumption of liability, and that no work was done or will be done to determine liability.

The defendants' highly credentialed and experienced expert ("Expert D") criticized Expert P's report because he did not consider certain factors that Expert D believed to be relevant, arguing that Expert P's assumptions about the case were either incomplete or incorrect. Expert D then broadened his critique by describing in his report how he believes a proper economic damages analysis should be conducted. Expert D asserted that the "expert has a duty to understand and prove that a causal link exists between the incident and each of the damages elements," and that "an expert is specifically precluded from relying upon an assumption that economic causation exists."

The Court's Conclusion

In its decision, the court stated that it was "troubled" by Expert D's assumptions about his role in the courtroom. The court noted that a substantial portion of Expert D's report contained his evaluation and critique of deposition testimony of experts on non-economic matters and concluded that he was not qualified to evaluate and opine on the conclusions of the other experts.

The following commentary from the court's decision provides insight into its reasoning:

An expert witness has no duty to prove causal links between incident and damages. An expert opines on facts which the expert assumes will be proven, and an expert can explain the bases for an opinion. But an expert is not to opine on the weight of the facts or take a principal role in sifting, weighing, and reciting them for the jury... His cited references correctly state that experts must understand and carefully examine causation, but they do not state that experts have any role in proving and then concluding issues of causation as he suggests... Contrary to [Expert D]'s erroneous statement that experts are precluded from relying on assumptions of causation, it is necessarily the role of a damages expert to offer an opinion based only

on assumptions because only the jury has the opportunity to conclude the factual issues in the case. Until a jury has found facts to resolve the factual issues presented to them, an expert has nothing other than assumptions on which economic analysis may be based.

The court ultimately concluded that a limited portion of Expert D's testimony was "potentially proper", but that most of his testimony would not be helpful to the jury. The court precluded Expert D from offering any testimony, and the Plaintiff prevailed at trial.

Take-aways

Rowe v. DPI is noteworthy in a couple of respects. First, it demonstrates that even a seasoned damages expert can stumble on the issue of causation. The defendants' expert is the president of a reputable forensic accounting firm, holds numerous credentials, has previously testified in over 100 cases, but still was excluded from testifying at trial due to the court's determination that he had misunderstood his responsibilities.

Second, the case is different from most others involving damages causation issues. There are numerous examples of courts allowing testimony in which the damages expert did not address causation, and instead relied on other testimony to establish the causal link, on one hand, and cases in which experts were excluded for failing to sufficiently demonstrate causation, on the other hand. *Rowe v. DPI* is a unique example of a court excluding an expert because he had an overly broad understanding of his role with respect to causation. As such, it is a significant addition to the body of court decisions available to assist attorneys and experts as they carefully consider the expert's proper role in light of the facts of each case.

¹*Thomas Rowe v. DPI Specialty Foods, Inc., Jami Floyd* (2015 U.S. Dist. LEXIS 110605 (Aug. 19, 2015))

The AADC thanks Clay Glasgow of JPMS Cox, PLLC for writing this article.

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