

## ARTICLES

### What Do You Do with an Inconsistent Jury Verdict?

By Sanket J. Bulsara, Chris Casamassima, and Laura Schwalbe – December 1, 2014

The announcement of a jury verdict is the culmination of months—or more often, years—of hard work. In almost any case, and particularly in cases with complex issues, claims, or multiple parties, there is the potential that the jury may give an inconsistent verdict. Indeed, a basic search for cases involving “inconsistent jury verdict” in Westlaw or LexisNexis results in hundreds of reported federal cases raising the issue. But what to do with a verdict that you cannot reconcile? You may think you should leave the matter for the court and make an oral or written motion for a new trial. After all, as soon as the verdict is announced, within minutes the jury is discharged, and the posttrial phase begins.

But if you wait until the jury is on its way home, you may have waited too long and waived your right to challenge the verdict. In most jurisdictions, and with most jury verdicts, you have to object to the inconsistent verdict; and in some jurisdictions, you waive your challenge unless in addition to objecting, you explicitly ask the court to resubmit the case to the jury to resolve the inconsistency.

This article provides some tips to make sure you are not caught flat-footed when the jury returns with an inconsistent verdict.

#### What Kind of Verdict?

How to deal with an inconsistent verdict depends, initially, on the type of verdict the jury has rendered.

In the civil context, there are three kinds of jury verdicts: (1) the general verdict, (2) the general verdict with answers to written questions, and (3) the special verdict.

The general verdict is a straightforward finding by the jury either for the defendant or plaintiff, accompanied by a damages award, if appropriate. Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2501 (3d ed.). A general verdict “asks the jury to indicate for each Count whether it ruled for plaintiff or against plaintiff, with respect to each defendant. The word ‘Damages’ then appears . . . with blanks for the jury to complete with amounts for compensatory damages and punitive damages.” *Turyna v. Martam Const. Co.*, 83 F.3d 178, 179–80 (7th Cir. 1996).

Rule 49 of the Federal Rules of Civil Procedure outlines two other forms of a civil verdict. The first, embodied in Rule 49(b), is a variation on the general verdict (a “General Verdict with

Answers to Written Questions”) and asks the jury to answer “one or more issues of fact,” in addition to providing a general verdict. The second, embodied in Rule 49(a), is the special verdict, which simply asks the jury to answer specific questions. Ostensibly, “special verdicts compel the jury to focus exclusively on its fact-finding role, and empower the judge to play a more prominent role by applying the law to the jury’s findings of facts.” *Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991). That being said, courts—and litigators—often confuse Rule 49(a) special verdicts with Rule 49(b) general verdicts that also contain answers to interrogatories. *Id.*

### **Inconsistency with General Verdict**

Inconsistency can arise in a case where the jury is asked to provide a general verdict. This is in part due to the fact that a jury is often asked to provide multiple general verdicts for a single case—by, for example, distinguishing liability between multiple defendants, awarding damages in addition to a liability finding, or providing verdicts for distinct causes of action. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003) (“In addition to the ultimate legal conclusion in a case, a jury may make legal conclusions as to subsidiary issues, such as affirmative defenses, or the amount of damages owed, which are neither findings of fact nor quite ‘verdicts.’ Such answers are similar in kind to general verdicts. . . .”); *Cash v. Cnty. of Erie*, 654 F.3d 324, 343 (2d Cir. 2011) (“Although defendants characterize the jury’s responses on the verdict form as ‘special verdicts,’ and the form is labeled ‘Special Verdict Form,’ the questions on the form, viewed in light of jury instructions that specifically identified certain questions as pertaining to the § 1983 claim and others as pertaining to the negligence claim, is reasonably construed to solicit a general verdict with interrogatories on each of Cash’s two theories of liability.”).

A general verdict can be inconsistent in a number of ways: “[T]he jury might return a general verdict that, under the facts of the case, implies a lack of evidence underlying another general verdict.” *Zhang*, 339 F.3d at 1032; *see also Turyna*, 83 F.3d at 181 (ordering new trial where jury found for defendant for claims alleging retaliation under Federal Labor Standards Act, but awarded plaintiff punitive damages for prohibited retaliation).

Alternatively, “the jury might return two general verdicts that, under any facts, seem to be legally irreconcilable.” *Zhang*, 339 F.3d at 1032; *see, e.g., Int’l Longshoremen’s & Warehousemen’s Union (CIO) v. Hawaiian Pineapple Co.*, 226 F.2d 875, 881 (9th Cir. 1955) (noting inconsistency between general verdict holding defendant unions liable while imposing no liability on individuals who acted on behalf of unions).

What are the options when faced with a seemingly inconsistent general verdict? One option is to object and move immediately for the inconsistent verdicts to be resubmitted to the jury to be reconciled. The other is to allow the jury to be dismissed and ask the court to order a new trial on the basis of the inconsistency, usually through a posttrial motion.

The first option is the wiser course for a number of reasons. First, in many federal jurisdictions, failing to object to an inconsistent jury verdict (and moving simultaneously for the case to be

resubmitted to jury) results in a waiver of the ability to challenge the verdict. *See, e.g., Kosmyinka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006); *Pearson v. Welborn*, 471 F.3d 732, 739 (7th Cir. 2006) (“[I]t does not appear from the record that Kwasniewski made a contemporaneous objection to the alleged inconsistency of the verdict at the time it was rendered. In many circuits, such a failure amounts to waiver of the argument.”). Thus, even if there was an actual inconsistency in the jury verdict—and one that would otherwise justify a new trial—a party that waits until posttrial briefing to raise the issue risks waiver.

Second, even if a party does not waive the objection, there are advantages to having the jury, and not the court, resolve the discrepancy. If the verdict is colorably inconsistent, then a court can easily send the case back to the jury. *Scott-Harris v. City of Fall River*, 134 F.3d 427, 435 (1st Cir. 1997) (“When a verdict appears to be internally inconsistent, the safest course . . . is to defer its acceptance, consult with counsel, give the jury supplemental instructions, and recommit the matter for further consideration.”), *rev’d sub nom. on other grounds, Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Waiting to challenge the verdict until after the jury is dismissed eliminates the Court’s ability to do so, and the verdict is given a presumption of correctness that is difficult to overcome. *See, e.g., Julien J. Studley, Inc. v. Gulf Oil Corp.*, 407 F.2d 521, 527 (2d Cir. 1969) (“The record may reveal a plausible, or even highly probable, ground for reasoning that the jury’s findings on specific issues leave no logical basis for the general verdict. Even so, if it is discoverable that the jury ‘might’ nevertheless have found consistent grounds for its ultimate decision—if the findings, therefore, are not necessarily in conflict the general verdict must be sustained.”).

If you are going to object and ask the case be resubmitted to the jury, the time to do so is limited. Despite the lengthy build-up to trial, the amount of time after a verdict is announced and the jury is dismissed can be very brief. However, what may seem like a perfunctory comment (e.g., “Anything else for the jury?”) should not be treated as a passing formality. It is the court’s invitation for counsel to raise the issue of an inconsistent verdict while the jury is still present.

### **Inconsistency with Rule 49 Verdicts**

Unlike general verdicts, both special verdicts and general verdicts with interrogatories are addressed in the Federal Rules of Civil Procedure.

Rule 49(b) outlines how a court should handle special interrogatory responses that are inconsistent with the general verdict. A court may (1) order entry of judgment according to the responses, notwithstanding the general verdict; (2) direct the jury to further consider its responses to special interrogatories and verdict; or (3) order a new trial. The rule further provides that when special interrogatory responses are inconsistent with each other and also inconsistent with the general verdict, the court must either direct the jury to reconsider the special interrogatory responses and general verdict or order a new trial.

Although Rule 49(a), which covers special verdicts, does not contain an explicit discussion of how to handle inconsistent verdicts, most, but not all, courts have found the trial court has the

same options as with a Rule 49(b) verdict. *See, e.g., Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1990); *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 444 (1st Cir. 1989); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 72 (8th Cir. 1989); *but see McCollum v. Stahl*, 579 F.2d 869, 871 (4th Cir. 1978) (finding that an inconsistency could not be resubmitted to the jury under Rule 49(a) because the rule contained no such provision).

Rule 49(b) provides that the trial court may not enter judgment in a case where the answer to the special interrogatories are “inconsistent with each other and one or more is inconsistent with the general verdict.” Because Rule 49(b) appears to prohibit the district court judge from accepting an inconsistent verdict, several courts have found that a party cannot waive its objection to such a verdict and may challenge the alleged inconsistency for the first time in posttrial motions. *See, e.g., Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 634 (2d Cir. 1986) (“The terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made.”).

Despite this leeway, not raising an objection to a special verdict or general verdict with interrogatories, runs serious risks. At a minimum, you have to be certain that your verdict is not a general verdict—where waiver would likely apply—and is, in fact, a verdict governed by Rule 49. The fact that your verdict form says “Special Verdict” form is not dispositive. Reviewing courts will look at the nature of the decisions reached by the jury, not the labels applied to them. The safest course is to bring the inconsistency to the court’s attention and then make an objection.

### **Bottom Line**

Keep in mind the potential for inconsistencies while drafting and finalizing verdict forms and jury instructions. While it may be tempting to draft a very detailed verdict form covering every element of every claim, complicated verdict forms can confuse the jury and increase the possibility of an internal inconsistency. Once the verdict form and jury instructions are finalized with the court, look for ways in which a verdict could come back inconsistent, and plan out ahead of time what your reaction will be.

Ultimately, no matter how carefully jury instructions and verdict forms are drafted, juries can reach inconsistent verdicts. Trial attorneys should anticipate possible inconsistencies, research the applicable standard, and be prepared to interpose timely objections. And last, if you are unsure, ask for a moment to consider the verdict before telling the judge that you have no further business for the jury. At that point, you may lose your chance to challenge any inconsistency.

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