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PERSPECTIVE

Unraveling the Gordian Knot of damages

By Greg Derin

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In the Fourth Century B.C.E., Alexander the Great arrived in Phrygia and encountered a challenge. An oracle had proclaimed that any man who could unravel the intricate knot created by Gordius, the farmer turned king, was destined to become ruler of all of Asia. The Gordian Knot secured an ox cart, and many had tried and failed to loosen its bond.

Alexander tried unsuccessfully to untie the knot. Reasoning that bold action was required, legend has it that Alexander either severed the knot with a single blow of his sword or removed the lynchpin by which it was secured, allowing him to untie its strands. He thus succeeded by re-writing the rules with a fresh approach to an ancient problem. Before his early death, Alexander went on to conquer large portions of Asia.

Millennia later, we continue to recite this legend when reflecting on intractable problems. Winston Churchill famously said "[h]owever beautiful the strategy, you should occasionally look at the results." Had Alexander continued to examine the Gordian Knot from different perspectives but failed to focus on his goal and act, he would not have arrived at a solution that led to his desired outcome.

I spend countless hours assisting parties in mediation as they seek resolution to their conflicts. Given the nature of commercial and intellectual property matters, whether litigated or pre-litigated, most participants with whom I work deliver voluminous briefs and analyses. Briefs often attach pending motions for summary judgment with responses, declarations, and exhibits, along with argument and analysis focused on rights-based solutions and determinations. The opening caucuses frequently begin with the suggestion that I just go tell the other side that they are going to "lose," and a struggle to explore the interests, goals, and motivations of the players.

A fascinating aspect of all such disputes is the Gordian Knot with which the participants are confronted. All these cases involve the familiar dichotomy between liability and damages. Too often, the focus of participants before mediation has been almost exclusively on liability. There is some logic to this from a litigation perspective. Motions to dismiss, demurrers, SLAPP motions, motions for summary judgment, or summary adjudication are almost always centered on liability, standing, or other predicate issues. Unless and until a case crosses the threshold, damages will not be assessed by a trier of fact. Thus, while a plaintiff's counsel may have done a preliminary assessment of the "value" of a case, and the defense will have evaluated the "risk," less attention to the details of damages will have governed discovery and motion practice.

The same is not true in mediation. Whether or not a matter has

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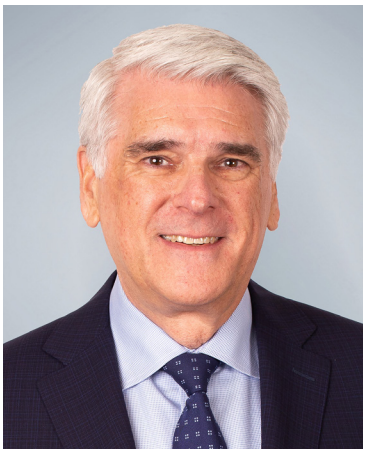

yet survived a dispositive motion, once the participants are attempting to resolve the controversy at mediation, both liability and damages are vibrant subjects of conversation. Engaging in a decision tree or cost-benefit analysis and helping participants assess their alternatives to a negotiated agreement will always require attention to the strengths and weaknesses of liability issues. However, no objective determination regarding liability is ever achieved at mediation. It does not matter if one works with a retired jurist or experienced litigator as a mediator; the best that one can obtain is a realistic assessment of the strengths and weaknesses of the merits. This is useful information, and after decades litigating complex cases and decades mediating cases, I know that parties and counsel appreciate impartial input.

Often overlooked before the mediation is the power or risk associated with the damage analysis. It is here that the Gordian Knot is most often untangled. The best cases can unravel when confronted with the expense of winning a Pyrrhic victory – that is winning, but at a devastating cost which is tantamount to defeat. I have seen many copyright cases, for example, in which the rights holder and counsel are so determined to protect the subject intellectual property, they fail to realize that the plaintiff's actual damages are insignificant, and the recoverable statutory damages are either non-existent (due to a failure timely to register the copyright) or dwarfed by the costs of the federal court litigation where potentially recoverable attorneys' fees are not guaranteed to make plaintiff whole.

In business litigation, plaintiffs and counsel often place much confidence in what may strike an impartial, experienced eye as either speculative damages predicated on the opinion of experts whose testimony may prove inadmissible, or exposure to the defense that multiple sources might exist for the loss, without the ability to prove the nature and source of damages sufficient to meet plaintiff's burden. Without an early analysis of damages, or an early mediation undertaken before the plaintiff has incurred unrecoupable "sunk costs," settlement becomes precarious. In such cases, plaintiffs face the Las Vegas challenge – how much more do they wager in the hopes of recovering their losses?

Astrophysicist Neil deGrasse Tyson has written: "Any time scientists disagree, it's because we have insufficient data. Then we can agree on what kind of data to get; we get the data; and data solves the problem. Either I'm right, or you're right, or we're both wrong. And we move on." While there can be, and are, major disputes concerning damages, the discussions and bargaining can be much more "data" driven and less subjective. Problems are generally more manifest, even if tied to whether recovery is legally cognizable.

What would Alexander do? He would look at the Knot from all directions. Perhaps he would find a bold solution to unravel the problem, perhaps he would re-write the rules. But he would not have taken the ox cart on his journey, studied it endlessly, fought battles hoping to realize a solution, and eventually made up his mind.

The Knot needs untying. For maximum efficiency, it needs to be untied early. Surely, there are facts that require discovery relevant to liability and/or damages. But leaving damages until late in the process risks finding oneself with a Pyrrhic victory, with one's forces destroyed and lacking satisfaction. Early fact-finding, early mediation, and objective assessment are keys to bold action and living to fight another day.