Effective Strategies and Trend-Spotting in Patent Damages

Karen Boyd, Turner Boyd LLP
James Pampinella, Navigant Consulting, Inc.
Isaac Peterson, Netflix, Inc.

15th Annual
Advanced Patent Law Institute
December 11, 2014
Insert Weather Joke Here
Main Topics

- Damages fact development
- Expert depositions
- Challenging experts
Timing Matters

• Focus on money early
• Think about settlement structure and precedent
• Bifurcation
• Reverse bifurcation
Damages fact development—interplay with liability development
(with apologies to the Bard)

To depose or not to depose? That is the question.
(and with further apologies)

To *Daubert* challenge or cross-examine?
A yearly study of trends and outcomes – 2013 PwC Study
Grant, Partial Grant, and Denial

- Lowest: 29%
- Highest: 59%
- Excluded
- Partially excluded
- Included

46% = 14-year average of exclusions, in whole or in part

2013 successful challenges 41%

No decision made
Success rate of *Daubert* challenges to financial expert witnesses, by Circuit

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Success Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>11th</td>
<td>59%</td>
</tr>
<tr>
<td>10th</td>
<td>56%</td>
</tr>
<tr>
<td>2nd</td>
<td>51%</td>
</tr>
<tr>
<td>7th</td>
<td>49%</td>
</tr>
<tr>
<td>9th</td>
<td>49%</td>
</tr>
<tr>
<td>4th</td>
<td>47%</td>
</tr>
<tr>
<td>6th</td>
<td>43%</td>
</tr>
<tr>
<td>5th</td>
<td>43%</td>
</tr>
<tr>
<td>8th</td>
<td>36%</td>
</tr>
<tr>
<td>1st</td>
<td>41%</td>
</tr>
<tr>
<td>3rd</td>
<td>32%</td>
</tr>
</tbody>
</table>

Legend:
- Excluded in whole or in part
- Included or No Decision Made
Which side wins?

14-year Average:
Defendant = 31%
Plaintiff = 69%
Success rate of *Daubert* challenges to financial expert witnesses, by case type

- **Fraud**: 52% (89/95)
- **Intellectual property**: 51% (101/106)
- **Bankruptcy**: 49% (29/28)
- **Discrimination**: 47% (47/41)
- **Product Liability**: 46% (37/31)
- **Securities Litigation**: 46% (33/28)
- **Personal Injury**: 44% (33/26)
- **Other case types**: 44% (176/139)
- **Breach of contract/Fiduciary duty**: 43% (241/184)
- **Antitrust**: 36% (71/40)

*Legend:*
- Red: Excluded in whole or in part
- Beige: Included or No Decision Made
[Trial] is nasty, brutish and short.
What’s Enough for a New Trial?

- Failure to apportion/change in the law
- Unexplained overlap with contract damages or failure to justify damages of 6x defendant’s profits
- Where the judge can divine what the jury did and concludes it wasn’t supported by law
What’s Enough for Remittitur?

• Royalty base 2.5 times what experts for both parties testified

• Judge just thought it was too high, given apportionment-like evidence
And What’s Enough for JMOL?

• Apparently, next to nothing.
Should you get a mulligan on damages?