

## **Discovery tiers — Definition of “damages” for designation of a discovery tier.**

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**Question:** What damages are considered in arriving at the damage amount for purposes of the tier level? For example, what if a party pleads \$40,000.00 in compensatory damages and then for such punitive damages as are reasonable? Assuming a tier 1 case, would the jury be limited to awarding \$10,000.00 in punitive damages? Do prejudgment interest and attorney's fees count toward the damage amount?

**Answer:** "For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings." URCP 26(c)(4). "A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3)." URCP 8(a).

Parties should anticipate the value of any punitive damage claim and plead in to the appropriate tier. This is important because "a pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15." URCP 8(a).

To determine the appropriate tier, a party should include in the damage calculation all amounts sought as damages by all parties. Depending on the nature of the claim, prejudgment interest and attorney's fees may constitute damages.

**Question:** Is the tier designation of a case based on damages claimed by the plaintiff only, or based on the damages claimed by all parties in all claims for relief?

**Answer:** "For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings." URCP 26(c)(4).

**Question:** If a plaintiff specifies Tier 1 or Tier 2 in the complaint, and a subsequent pleading (such as a counterclaim) elevates the case to a higher standard discovery tier pursuant to Rules 26(c)(3)-(4), does the plaintiff then automatically have the right to seek higher damages at trial commensurate with the higher tier?

**Answer:** No. The rule does not automatically give the plaintiff that right. Although Rule 26(c)(3)-(4) is clear that additional standard discovery will be available in the case due to the higher tier triggered by the later pleading, Rule 8(a) nevertheless states that "a pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15." Although the parties will conduct standard discovery commensurate with a higher tier, Rule 8(a) nevertheless continues to limit the plaintiff's damages if the face of the complaint still specifies the lower tier. The best practice for a plaintiff in this circumstance is to amend the complaint pursuant to Rule 15 to identify the higher tier and claim the right to recover damages commensurate with that tier.

Otherwise, the plaintiff may face the unfortunate circumstance of conducting more extensive and costly discovery in keeping with the higher tier but still being limited to the lower-tier damages prayed for in the complaint. This option is of course limited to cases in which the plaintiff has a basis under Rule 11 to seek damages consistent with the higher tier. This would be the case, for example, if the plaintiff initially chose to forego the right to seek higher damages in order to enjoy the benefits of speedier and less costly discovery that accompany the lower tiers.