IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

John Lucas, VC of Insurance for the IADC Product Liability Committee, Whitney Frazier Watt, Chair of the IADC Product Liability Committee, and Adam Bobkin, recently nominated for IADC membership, had the opportunity to discuss nuclear verdicts. This month's newsletter captures that conversation and provides insight into techniques to challenge plaintiff attorneys' inflated calculations to reduce the probability of a nuclear verdict.

Defusing Nuclear Verdicts Prior to Trial

ABOUT THE AUTHORS

John Lucas is with Sompo International and is Vice President, Head of Continuous Quality Assurance-North America Claims. John has over 27 years of claim handling and claim management experience and has been with Sompo international for 12 years. He has managed primary and excess casualty claims teams and recently began a new role, leading the claims quality assurance team. He closely follows the trends of social inflation and nuclear verdicts and collaborates frequently on these topics in various roles which he holds with DRI, CLM, and IADC. He can be reached at jlucas@sompo-intl.com.

Whitney Frazier Watt is a Member at Stites & Harbison PLLC in Louisville, Kentucky. She specializes in defending complex product liability lawsuits and managing mass tort litigation. Whitney's practice also includes cases involving toxic torts, transportation, contract issues, coverage disputes, and tortious interference. She is currently serving as Chair of the IADC Product Liability Committee. She can be reached at wwatt@stites.com.

Adam J. Bobkin practices primarily in MAURO | LILLING |NAPARTY LLP's Damages Mitigation and Litigation Strategy practice groups. As a team leader in the Damages Mitigation practice, Adam manages a caseload of high exposure cases venued around the country offering his expertise in the body of developing law concerning collateral sources and the best methods for attacking life care plans in personal injury and medical malpractice actions. Adam is often involved in matters with limited liability defenses and significant future medical damages claims. Adam can be reached at abobkin@mlnappeals.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Whitney: **We have all heard about how nuclear verdicts (over $10,000,000) are becoming increasingly common – and that thermonuclear verdicts (over $100,000,000) are on the rise. John, how are these verdicts disrupting the insurance world**?

John[1]: *As a casualty claim manager, I have watched the reptile theory develop. The first time that I spoke on the topic, I was nearly laughed out of the room. Before long, insurance professionals – even outside of claims – began asking about social inflation. All of this has evolved to a state where nuclear verdicts are quite commonplace. After twenty-eight years working in the insurance industry, I could easily ask whether the industry can sustain the impact of nuclear verdicts, but a better question is whether or not our economy can sustain the impact. Sometimes, you have to go back to the basics. When I trained as a claims adjuster, the instructor said, "Insurance is designed to make people whole, no more, no less." As jury verdicts are announced and publicized in the tens of millions, or hundreds of millions, or in some cases, over a billion dollars, I often wonder how we got here, to a place where in some cases, there are no economic theories or logical mathematic equations to connect jury awards to reality. Similarly, I often wonder what we, as an industry, can do about it. Then I met Adam Bobkin, an appellate attorney at Mauro, Liling, Naparty, LLP, and learned of the important and creative work that he and his firm do to try to mitigate nuclear verdicts.*

Whitney: **Adam, I have read a lot about settlement considerations, potential legislative remedies, and anchoring to limit nuclear verdicts. I am curious, though, what you are doing to try to lessen the risk for your clients.**

Adam**:** I would say that the first line of defense in combatting these verdicts is to develop each case as if it were going to be tried. Every aspect of discovery must be explored, every deposition taken, every motion made, and every expert witness retained – including damages experts. Too often I hear that there is little value in deposing an expert because his opinions are well known, or that a motion is unlikely to succeed and therefore not worth the time or expense. In my experience, however, we can never know which of the various available leverage points will tip the scales in our favor, or when. The defense should approach each step in the process with optimism and the belief that we can win.

The next step in the process is to rethink our approach and evolve. For far too long, the defense bar has been utilizing the same strategies while the plaintiffs' bar is constantly developing new ones. We have found success in defending damages claims by unpacking plaintiffs' life care plans to

[1] The views and opinions expressed in this article are solely those of John Lucas; shall not be construed as legal advice; and do not reflect any corporate position, opinion, endorsement, or view of Sompo International or any of its member companies.

expose inconsistencies and collateral sources baked into them, demonstrating the fallacy of the traditional present value calculation performed by economists, and presenting new approaches to reasonable value that challenge the collateral source rule. Gone should be days of simply making need and frequency challenges to life care plans on cross-examination. A more comprehensive approach is a must.

Life care planners rely on pricing resources that are used by insurance companies and contain insurance data. They also regularly include case managers in their life care plans without addressing the reality that a core function of a case manager is to identify collateral sources to help their patient cover costs. All of this must be unpacked for the jury.

When it comes to economists, the reality that their opinions make assumptions about how litigation proceeds will be invested, even though they have no background or training in investments, is often overlooked. Working with an investment professional to compute present value leads to a more realistic figure that takes advantage of higher returns in a statistically safer group of investments that leads to lower present values.

Finally, we all know that healthcare goods and services do not cost what providers charge for them. Yet many believe the collateral source rule precludes talking about anything less than the inflated billed amounts. That might be true for what I like to call a "direct attack" on the collateral source rule. Relying on the actual bills or explanation of benefits for a plaintiff is a "direct" collateral source attack. That is allowed in certain jurisdictions, but in many it is not. Reframing the discussion to talk about the market value of these goods and services goes around the collateral source rule and has been accepted in several jurisdictions where a direct attack is not. Specialized experts in healthcare pricing, as opposed to "billing experts," are a necessary component for this argument.

With these types of opinions in hand, the defense can then seize on the recently strengthened rules relating to the admissibility of expert witness opinions to challenge plaintiffs' experts and create legal issues plaintiffs' counsel are not used to seeing. This adds new leverage for the defense. That leverage may come from a trial judge granting a motion to limit or preclude plaintiff's experts or as appellate leverage if the case must be tried. An appeal should never be the goal, but the threat of one needs to be real to the plaintiff for maximum leverage to be obtained.

***Whitney*: What types of Rule 702 challenges or other motions *in limine*, specifically, have been helping your firm combat nuclear verdicts?**

***Adam*:** Several, Whitney, but not every case will benefit from every available strategy. Most cases benefit from an attack on the plaintiff life care planner's foundation for his opinion. The International Association of Rehabilitation Professionals, which is one of the primary groups dedicated to the life care planning profession, has made clear in its publications that there are no statistical

studies regarding the efficacy of life care plans or a generally accepted methodology for determining prices for the items contained in life care plans. This is where having a healthcare economist on the defense side to contrast with the life care planner on the plaintiff's side is key.

When it comes to present value, precluding reliance on net-negative discount rates, which have the effect of *inflating* to present value, instead of *reducing* to present value, is important to recognize and preclude as improper.

When a plaintiff suffers a catastrophic injury but continues to claim a full life expectancy based solely upon a treating physician's anecdotal experience treating a handful of patients, a motion to preclude that life expectancy opinion is very impactful. Life expectancy is a defined science based upon statistics that cannot be replicated reliably using the individual experiences of one physician with a handful of patients. A larger sample size is required. When faced with this type of life expectancy opinion, the recently strengthened rules relating to the admissibility of expert witness opinions can help to eliminate decades of expensive future medical care.

Other motions specific to each case are also valuable to consider. For example, if family members testify that they will care for the plaintiff at home and on their own, plaintiff's life care planner should not be allowed to offer an opinion about costly home or facility care. Likewise, if a plaintiff does not intend to pursue certain treatments or use specialized prosthetics or wheelchairs, those items also should be precluded. And, if the plaintiff does not live within the jurisdiction, or possibly even outside of the country, costs should be based upon the local market in which care is reasonably likely to be purchased, not where the case is venued. Finally, if nationalized healthcare exists in the plaintiff's home country, a motion to preclude the life care plan for lack of foundation can be particularly powerful leverage.

***Whitney*: John, from the carrier side, what do you think about these strategies?**

John: *As with any other complex issue, where there are many variables involved, a simple solution is often elusive or altogether impossible. In those situations, a rational approach is to seek incremental solutions. I have read many articles and attended dozens of webinars related to combating nuclear verdicts. The focus is typically on humanizing the corporate defendant, anchoring, and hiring a defense life care planner or economist to offer a counter value to the plaintiff's. While these are all worth discussion and important components of any present day trial defense strategy, when I began learning about the strategies which Adam is employing, my thought was, now we have something that may help to level the playing field. As we observe more and more plaintiff attorneys retaining vocational rehabilitation experts, life care planners, and economists on less serious injuries, we have also observed exponentially increased settlement demands and large dollar awards asked of the jury during closing. What seems to enable or justify these large demands and*

jury asks is the oftentimes highly inflated damages models, supported by experts or "experts". In some cases, the latter is true, purported experts using highly speculative models to generate future medical care cost estimates and non-credible future wage loss claims. Take for example a claim in which a closed head injury is alleged, with minimal treatment or completely non-invasive treatment. We would tend to call that a concussion claim. Add to that, subjective complaints, the retention of a life care planner and an expert report proposing a $3,000,000 life care plan, a $1,500,000 future loss of earnings claim, as well as general damages (pain and suffering) and it is easy for plaintiff to justify a $6,000,000 settlement demand. The strategies being built around the restatement of Federal Rule 702 are critical in that they work toward disqualifying experts who use nothing more than common thinking in some instances to justify a highly inflated damages model. Referring back to the hypothetical claim above, what is the true settlement value without a $3,000,000 life care plan? What is the settlement value without a $1,500,000 future loss of earnings claim? It's worth what a closed head injury is worth, it is worth the pain and suffering associated with that injury if the defendant is legally liable for that injury. If the inflated damages are based on non-scientific conjecture by a paid expert, and nothing more, and that claimant is compensated for the injury that the defendant caused, what occurred? The claimant was made whole, nothing more, nothing less. Working step by step, within the rules, to seek fairness for both sides of the v. is the path to a level playing field.

***Whitney*: Defendants definitely have some work to do to level the playing field. What should lawyers and their clients understand about the value of filing motions that might not win – or bringing in another law firm on a significant matter – to try to combat a nuclear verdict?**

***Adam*:** Adding specialty counsel to address damages has several advantages. First, it allows defense counsel to focus on the liability defense and witness preparation in the weeks before and during trial when motion practice can be particularly time consuming. Second, on a significant case, having additional points of view is extremely advantageous. Specialty counsel on damages can help frame arguments to anchor not only economic damages, but also non-economic damages. That makes it easier for defense counsel to prepare their case for trial and for the defense to maintain the position that we are ready to try the case if it cannot be resolved. Being prepared gives us the fortitude to maintain our view of case value in the days before trial, which anchors cases away from nuclear outcomes.

When it comes to motions, what better time to give new thought to motion practice than the new environment we find ourselves in where courts are supposed to think about expert witness admissibility with renewed vigor. Pending motions have long been a tool for the defense to gain leverage and to show plaintiffs that they are serious about their value of the case. Working with specialty counsel to identify legal issues not typically

raised forces plaintiff's counsel to face new risks and reevaluate their settlement position as the start of trial approaches.

John: *Commentators on nuclear verdicts nearly always begin with the fact that the plaintiffs' bar is more organized and is steps ahead of the defense side. Years ago, they began sharing ideas and strategies such as reptile tactics designed to anger juries and encourage them to punish corporate defendants. In order to reset the market toward fair compensation as to case values and jury awards, the defense community must do something different. Adam and his firm offer something different, something additional to add to defense strategies with the goal of reducing, possibly even eliminating what in some cases amounts to highly exaggerated damages models which drive outsized verdicts. This supports a move back to basics, simply to a level playing field, where when the defendant is legally liable, the claimant is made whole, nothing more, nothing less.*

Whitney**: As social inflation continues to rise, defense counsel must work hard to find ways to combat plaintiff attorneys' increasingly aggressive tactics. I am grateful to the IADC for helping to facilitate these discussions – and appreciate both of you sharing your experiences in this article.**

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