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IN THIS ISSUE

Trial counsel frequently think of 'winning' as meaning only winning on liability. But winning on damages issues can be even more important, depending on the case. This article highlights important issues for 'winning' on damages, both before and at trial.

Defending Against Economic Damages Claims

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice.

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Whether defending a case involving a catastrophic personal injury, a significant property loss or some other type of commercial loss, defense counsel actually get "two bites at the apple" to register a win. While it is best to win on liability, a win by having no or minimal damages awarded can be almost as satisfying to a client. For that reason it is important for trial counsel to take the preparation and trial strategy for defending damages as seriously as the liability phase of the case.

Economic damages are an important element of personal injury cases as well as property damage and commercial cases. Plaintiffs will present economic damages in catastrophic personal injury cases for past and future medical expenses, life care plans and lost earning capacity. Property damage claims may include repair or replacement costs, business interruption and lost revenue or profits. Other commercial cases may involve damages consisting of contractual damages, cover, lost revenue and profits.

Usually in cases involving potentially significant damages, plaintiff's counsel will hire one or more economic experts to establish the magnitude of the plaintiff's damages. Typically there will be an economist, accountant or other financial expert to provide the economic calculations and other experts to provide the factual predicate for the economist's calculations.

In a personal injury case, for example, in addition to an economist, the plaintiff's attorney may use a medical expert to offer evidence on future anticipated medical expenses and disability, a life care planner to provide evidence on future living needs and expenses, and a vocational expert to provide evidence on the plaintiff's future job prospects and lost earnings. In a case involving a destroyed factory, in addition to the economist, plaintiff's counsel might retain a real estate or construction expert for the diminished value of the property or repair costs, an expert on the value of destroyed or damaged equipment and personal property, and perhaps an industry expert to testify concerning business losses that are unique to the plaintiff's industry and business.

Just as defense counsel prepares the liability side of a case through discovery, it is equally important to conduct damages discovery to obtain factual information on damages issues and discovery of plaintiff's damages experts. But before conducting damages discovery it's extremely important to study the applicable law on damages in the case jurisdiction to understand fully what damages are and are not recoverable in that case, what evidence the plaintiff must present to prove its damages claims and what defenses may exist. Even if defense counsel generally is familiar with the law, there may be subtleties in the law related to particular damages claims that have been overlooked and that can be exploited in defending the case. A thorough understanding of the applicable law on damages will provide a "road map" that will help defense counsel explore the plaintiff's damages claims during the discovery process. It can be used both to evaluate potential gaps in the plaintiff's damages evidence, as well as to extract admissions that might help establish defenses to some of the damages claims being presented.

For significant damages cases, it is also prudent for defense counsel first to retain

his/her own damages experts as consultants before conducting discovery on the plaintiff's damage claims. Defense damages experts can assist counsel in understanding the damages issues, in framing the discovery requests to obtain the right type of factual information needed to evaluate the damages claims, and help counsel with questioning the plaintiff's damages experts during their depositions so that counsel extracts information useful in attacking the plaintiff's experts' opinions. This helps to avoid missing important information that might impair the defense expert's ability to challenge the theories of the plaintiff's experts.

When taking depositions of plaintiff's damages experts, defense counsel needs to make a tactical decision on how to approach the interrogation of the experts. It is always important to learn the experts' opinions and the detailed bases for those opinions. It is usually also helpful to inquire as to the expert's background, education, work and other experience, testifying experience, the work done in the case to enable the expert to form his/her opinions, etc. In some cases, such as for developing settlement leverage, defense counsel also may want to challenge the experts and explore deficiencies in their opinions or the work they performed to arrive at their opinions. The potential problem with that approach is that it illustrates, for plaintiff's counsel and his/her experts, the weaknesses in the experts' opinions. This gives them an opportunity to do additional work to correct the deficiencies before the trial if the case does not resolve.

When preparing for trial, defense counsel must decide whether to present his/her own affirmative damages evidence, or just attack the opinions and credibility of plaintiffs' experts, leaving it to the judge or jury to discount those opinions and reduce or eliminate damages entirely in any award made to the plaintiff. The benefit of presenting an affirmative damages claim is that it gives defense counsel an opportunity to control the damages equation by providing an alternative damages model to be considered. The downside, of course, is that it sets a floor for a damages award, making it more likely that the judge or jury will award no less than that amount, if damages are awarded. Simply attacking the plaintiff's damages evidence leaves the judge or jury with considerably more room to find damages in a wider range.

Regardless of the approach being taken, defense counsel needs to understand the important factual and economic principles that relate to the damage claims being advanced by the plaintiffs and the underlying assumptions being made in the plaintiff's damage model. For example, in a personal injury case, a plaintiff's economist will often offer the opinion that but for the plaintiff's injury, the plaintiff would have continued working continuously until a particular age and would have continued to receive pay increases at a particular rate based on historic data. But we know that in today's disruptive economy, such assumptions probably are antiquated and invalid. Being able to point to factual information that is inconsistent with those assumptions will undermine the plaintiff's expert's credibility and cause the judge or jury to doubt those opinions.

One dubious assumption in the above example is that a plaintiff would continue working continuously until a particular age. At any given time, there will be a certain

percentage chance that a plaintiff will be capable of working (not sick, injured or deceased), that the plaintiff will choose to work (not voluntarily drop out of the job market for various reasons) and that the plaintiff will have a job (not be laid off, fired, employer became bankrupt or shut down the business, job made redundant by changing technology). Many plaintiffs' economists assume a 100% probability for each of those assumptions during the entire period that the plaintiff would supposedly be working. Such an assumption is not correct and jurors will know that from their own experience.

Another dubious assumption is that the plaintiff would continue to receive pay increases at past historic rates. Revolutionary changes in the economy at macro and micro levels now are unmistakable to almost anyone that reads a newspaper or watches the news on television or online. Defense counsel usually can point to multiple examples of changes affecting the economy and the industry where the plaintiff works, that could significantly undermine the expert's assumption about continuous pay increases at historic rates. For example, global trade may have a profound impact on competitiveness, job creation and job losses, inflation and other factors that affect wage increases. Political decisions such as trade protectionism also could lead to drastic market shifts and price changes in particular industries that may affect wages across many sectors. Changes in technology can be a significant game changer. New technologies could result in reduced demand for certain types of jobs creating an oversupply that reduces wages in particular industries. Think about autonomous trucks, buses and cars eliminating driver jobs. Also, new foreign competitors could reduce prices in particular industries, leading to reduced wages in other countries.

Obviously these types of factors also could be extremely important when challenging business interruption or lost profit claims. Also, with respect to specific industry trends, there is a wealth of detailed data and information available for many different industries. Business and financial data regularly is compiled and analyzed for investors and financial services companies that finance different industries around the world. Investors and companies that finance businesses want to have as much knowledge as possible as part of their due diligence process before investing or financing particular companies. They purchase and analyze this data to assist in making decisions concerning where to put their money.

Governments also have agencies that obtain, compile and publish very detailed information pertaining to different industries as part of their governmental functions. Utilizing this type of detailed information, defense experts can find very current and competent data and statistics to analyze what is occurring in the economy generally and in particular industries. Often that information will demonstrate that many of the plaintiff's experts' underlying assumptions are flawed.

Close attention also must be given to the specific data being supplied by plaintiff's damages foundation experts. Frequently these types of experts present a "one-size-fits-all" opinion. They take opinion reports from prior litigation matters and repurpose them for new cases, often without looking closely at differences and thoroughly updating their opinions accordingly. For

example, in a personal injury case, you might have a life care planner including costs for items that the plaintiff does not need and will not use. There may be costs that are based on average costs in a particular location that are not valid because the plaintiff lives in another location where the costs are very different.

The same could be true in a property damage case where construction costs to rebuild a destroyed structure are significantly less than the overall average costs that are being used by the plaintiff's expert. Perhaps a defense expert knows of a source of replacement equipment, unknown to the plaintiff's expert, which replacement equipment is significantly less expensive than the amounts the plaintiff has used in its damage model. The bottom line is that the details matter and defense counsel often can find many obvious factual mistakes when looking at the details. These obvious mistakes can later be exploited at trial to undermine the plaintiff's experts' credibility.

Also consider the methodologies used by the plaintiff's experts in reaching their damages opinions. Were they competent methodologies that would pass Daubert or Frye standards? Even if the methodologies are competent, are there other deficiencies or reasons why they should not be deemed credible or acceptable in a particular case? Sometimes damages experts will use a methodology that, although competent, is not permitted under the applicable law of the subject jurisdiction. For example, an expert may include an amount for certain consequential damages resulting from a breach of contract when such damages are not recoverable under applicable contract law.

At trial, if defense counsel does decide to present his/her own affirmative damages model, it is very helpful to include charts, graphs and other demonstrative visual aids when presenting the damages model. Economic principles can be fairly dry and difficult for many people to understand. Utilizing an expert who is a good "teacher" and who makes good use of visual aids can significantly enhance the presentation and help the jurors and judge to better grasp the concepts and understand why the defense expert's opinions are more credible than the plaintiff's expert's opinions.

When cross-examining the plaintiff's experts, it is beneficial to use exhibits and other visual aids to help educate the judge and jury and reinforce their understanding of defense attacks on the plaintiff's experts' opinions. If a plaintiff's expert used the wrong number, misquoted deposition testimony, admitted that a methodology used is not widely recognized in the industry, etc. and defense counsel has an exhibit that reflects this, counsel should use it. The error that defense counsel reveals will have greater impact in the jurors' minds if they see the error visually depicted in some way as well as hearing about it.

Also, in cross-examination, it is usually beneficial to confront plaintiffs' experts with mistakes or errors in their opinions that are very clear, that can be demonstrated with exhibits or deposition testimony, and that will be easily understood by the judge and jury. Even if the errors in and of themselves are not crucial to the overall opinions, just putting the expert on the defensive and being able to demonstrate clearly that the plaintiff's

experts have been sloppy and made multiple errors, will help to undermine their credibility and result in the jurors questioning their opinions generally.

Additionally, when conducting cross examination, an important challenge for defense counsel is to not get bogged down in esoteric debates with plaintiff's experts over subtle mistakes that are not likely to be understood by the judge or jury. Even if it is something important, if it is so obtuse a point that the jurors do not understand it, then making the point probably is not a victory. Moreover, jurors are likely to just get bored and "zone out" while defense counsel is tilting with the plaintiff's expert over some incomprehensible issue. And counsel may end up losing their attention for the remainder of counsel's cross examination. If they are important points, defense counsel can consider saving them for his/her own expert witness to explain the errors of the plaintiff's expert and why that information is important. If the point needs to be made for the record, and defense counsel does not have a testifying expert to make the point, then it is best to try to make the point quickly with the plaintiffs' expert and get out without boring the jurors.

In conclusion, defense counsel has a great opportunity to lose the battle but still win the war if the plaintiff loses on damages. Counsel should approach the defense of the damages claims with the same dedication and attention that is given to the liability claims so that the "second bite" is not squandered.

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