DEFENSE WEAPONS IN A NUCLEAR WORLD

Alison H. Sausaman and **Thomas S. Thornton, III** Carr Allison

One of the most salient and intimidating topics plaguing the legal industry is the rise of "nuclear verdicts," especially in personal injury cases. Most commentators attribute this recent increase in disproportionate verdicts to the following factors: plaintiffs' personification of corporate clients as impersonal or inhumane, which is often compounded by strategic use of the reptile theory; exaggerated economic damages, due to letters of protection and third-party litigation funding; staggering and non-sensical non-economic awards; jury selection; general anger or bitterness due to the current economic, political, and cultural climate; and strategic use of law firm advertising as propaganda by normalizing and desensitizing the general public to high verdicts and settlements, while also educating them on the fact that insurance companies are the ones paying for such. While the availability of certain "weapons" in defendants' arsenal depends on the jurisdiction, below are some potential "weapons" to use to defend against nuclear verdicts and "nuclear settlements."

DEFENDANTS' DEPOSITIONS

One of the most important ways to prevent a nuclear verdict is by preventing damaging testimony or "sound bites" from defendants. It is important to invest time and energy preparing not only the corporate representative but also employees, who are equally (or more) vulnerable to reptilian attacks and can be easily cornered with questions about the company's policies, values, or training as it relates to public safety. Savvy plaintiffs' attorneys also elicit detrimental testimony from employees about being understaffed, lack of training, staff turn around, or other shortcomings due to difficulties faced by businesses during COVID (such as, "we were going to clean it up, but we were short-staffed because of COVID and couldn't get to it"). These depositions are crucial to how the defendant will be portrayed at trial and plaintiffs will attempt to have the jury extrapolate based on such.

SPOLIATION OF EVIDENCE, MEDICAL EXAMINATIONS, AND PREVENTING SURPRISE SURGICAL RECOMMENDATIONS

At the outset of cases, defendants should send spoliation letters requesting to be notified if plaintiff intends to undergo surgical intervention and reserving the right to have a medical examination of plaintiff performed prior to such treatment. Similarly, defendants may want to request the following information in their initial interrogatories: whether any physician or medical professional has recommended that plaintiff undergo injections or surgery as a result of complaints or injuries from the subject incident, as well as who made the recommendation, and whether the recommended treatment has been performed (and if not, why). If the plaintiff then proceeds with surgery prior to submitting to the examination, the defendant can, depending on the jurisdiction, move for sanctions for spoliation, arguing that a plaintiff who submits to non-emergency and non-life-threatening surgery prior to a court-ordered physical examination has destroyed or altered critical evidence. Additionally, this tactic also encourages plaintiffs' attorneys to keep defendants apprised of new developments and can help prevent "surprise" surgeries and dramatic, unanticipated increases in case valuations.

Additionally, neuropsychology examinations can be an extremely powerful tool in combatting against the resurgence of baseless traumatic brain injury claims. These examinations typically entail 6-8 hours of invasive, highly personal evaluation, and as a result, merely requesting the plaintiff undergo such an evaluation can sometimes dissuade a plaintiff from pursuing such a claim.

THIRD-PARTY LITIGATION FUNDING

While attempts to introduce federal legislation regarding litigation funding transparency have been unsuccessful to date, courts increasingly allow discovery regarding this information, albeit with great variability as to the permissible scope. Additionally, some federal courts are requiring automatic

disclosure of litigation funding as part of parties' initial disclosure requirements. Defendants should request such information by propounding discovery requests on plaintiffs, sending non-party subpoenas to the funding companies, and requesting depositions of the funding companies. In many states, defendants can search the state UCC website to ascertain whether the plaintiff has taken out a litigation loan, although there is significant variability in what information is available on such sites.

MITIGATION OF DAMAGES

In cases where plaintiffs have private insurance available and decline to use it, thereby amassing grossly exaggerated medical bills by treating under letters of protection, defendants should argue that plaintiffs have failed to mitigate their damages. This should be asserted as an affirmative defense. Defendants should also consider filing motions for summary judgment on this issue, which usually requires the deposition of a billing expert and/or evidence of what the charges would have been if plaintiff had mitigated his damages.

Alternatively, depending on the applicable collateral source rule, defendants can file affirmative motions in limine to admit evidence of plaintiff's failure to mitigate. Some practitioners have successfully argued that the collateral source rule only prevents evidence of payments made for medical care; thus, it is inapplicable because no payments from a collateral source were made and therefore evidence of health insurance coverage is not barred. Defendants should attempt to expose the plaintiff's nefarious intent in failing to submit his bills to his insurer and thereby knowingly failing to mitigate his damages to try to obtain a larger verdict.

DAMAGES AWARDS

Historically, defense practitioners have valued non-economic damages based on the economic damages, often using some type of ratio. At trial, plaintiffs are routinely asking for egregious non-economic damages awards based on a per diem or per hour rate of compensation. Plaintiffs will ask for a small, seemingly unoffensive hourly amount (such as minimum wage) to be attributed to every waking hour of plaintiffs' life for the rest of their life span. This equates to roughly $50,000/year and easily translates into a multi-million-dollar non-economic damages award for younger plaintiffs (especially when coupled with a life care plan predicting a lifetime of pain management), even in cases with minimal treatment and low boardable economics. There is a clear psychological aspect to this strategic "lawyer math," as plaintiffs spoon-feed the numbers to unsuspecting (and often unsophisticated) juries in small palatable amounts that snowball into massive, disproportionate, illogical awards. Plaintiffs justify this by focusing on what was "taken" from the plaintiff as a result of the defendant's negligence and asking for the "fair value" of what plaintiff lost ("he or she will experience some level of pain or discomfort every waking moment for the rest of his or her life"). Thus, it is not about the amount the plaintiff will be given, it is about what was "taken" from the plaintiff, which triggers the reptilian brain and fundamental concepts of fairness.

Defendants must be prepared to combat these tactics at trial in their closing arguments by delicately explaining to the jury what the plaintiff's attorney is trying to accomplish without insulting or angering them. Additionally, defendants must anchor the jury and offer a more palatable alternative to a defense verdict. One such approach is to tell the jury that if they find the defendant at fault, they should award the plaintiff the cost of his initial ER visit, initial imaging, and initial chiropractic treatment or physical therapy. Similarly, an alternative, rational value should be offered for non-economics based on what has been "taken" from plaintiff. In sum, defendants should be prepared to give the jury a proposed number for both economic and non-economic damages and to offer some rationale for how they came up with that number. While this tactic may be seen as decreasing your likelihood of a defense verdict, or even inviting the jury to "split the baby" and award the midpoint of the two options it was presented with, this may be a risk worth taking to mitigate the potential for a nuclear verdict.

JURY SELECTION

Undoubtedly, the jury's perception of the defendant's corporate identity and the identity of the industry in which it operates has a significant impact on a verdict. During voir dire, careful inquiry should be made into the venire's perceptions of the defendant company and its industry. Defendants should also be analyzing whether the COVID pandemic affected potential jurors' perceptions of such.

Defendants should also use voir dire to identify jurors who are disproportionately angry or likely to "lash out." If able, ask questions about the impact of COVID on the venire. For example, asking jurors to address whether they feel they were disproportionately impacted by COVID, or even using a numerical scale to define the level of perceived impact. It is important to delicately identify and isolate jurors who are "mad at the world" by engaging in a dialogue that empowers them to admit that the burden and hardships in their life may preclude them from effectively serving, such that they may be stricken for cause.

Defendants should also file motions in limine to prevent plaintiffs from asking the jury, in voir dire or openings, to commit to a high damages award without being presented with the evidence.

CONCLUSION

As reflected above, the best defensive weapon against a "Nuclear Verdict" is to always approach and prepare a case for trial from the onset through every stage of discovery. Efforts which may be perceived as solely going through the motions to prepare a case for settlement would be like blood in the water for the Plaintiff's Bar based upon the opportunity they may view being presented for a Nuclear Verdict. We must also make a concerted effort to identify early in the discovery process, appreciate and discuss the problems with our cases which may lead to an unexpected high damage award that exceeds any rational analysis or multiplier of damages. As once your case begins to slip down the potential nuclear verdict rabbit hole, it can be difficult to de-escalate the ensuing arms race.

Alison H. Sausaman is a shareholder in Carr Allison's Jacksonville, Florida, office, where she practices in the areas of premises liability, retail and hospitality, transportation, and professional liability. Alison is admitted to practice in the state of Florida and before the United States District Court for the Middle and Northern Districts of Florida.

Thomas S. Thornton, III is a shareholder with Carr Allison and a resident in the firm's Birmingham, Alabama, office where he serves as chair of the firm's Retail and Hospitality Practice Group. He has focused his litigation practice on the defense of personal injury, premises liability, product liability, transportation, retaliatory discharge, general liability, as well as catastrophic workers' compensation matters. Tommy also serves as National CMS Coordination Compliance Counsel for a number of his national business and insurance industry clients ensuring compliance with the Medicare Secondary Payer Act and Section 111 Reporting bringing strategic solutions to the forefront of the claims and litigation industry while increasing compliance and improving claim closure rates.