CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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Personalizing the Insurance Carrier in Bad Faith Litigation … Putting a Face on the Company and Avoiding Being Branded as the Uncaring Corporate Monster

I. Overview of Problems and Issues

Adverse Rulings Against "Big, Bad Insurance Carriers"

According to a recent litigation profile using *Westlaw©* statistical data, Plaintiffs are "winning" approximately 58% of the lawsuits in Bad Faith litigation. Texas, California, South Florida, Oregon, and Louisiana all had an "average award" of monetary damages ranging from $1 million to $6.2 million from 2010-2015.

Awards by Party

	2010	2011	2012	2013	2014	2015	Total Number of Cases	Percentage Of Total
Plaintiff Verdicts *	0	0	30	75	54	6	165	57.89
Defense Verdicts **	0	0	15	54	27	5	101	35.44

Adverse Rulings During Litigation: Setting the Stage for the Adverse Verdict

Why all of the bad faith verdicts, you ask? Particularly in Bad Faith Litigation, Plaintiffs' attorneys are perfecting the art of the "reptile" strategy. (*See* David Ball & Donald Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Balloon Press, 2009). Ball and Keenan boast that their strategy has resulted in over $5 billion in settlements and damages awards since 2009.

In a nutshell, the "reptile" strategy is a round-about way to violate the "Golden Rule" and put the jurors in the shoes of the Plaintiff despite the adamant denial from Ball and Keenan. The strategy starts at the inception of the case (i.e. discovery phase) and uses concepts like *codes*, *harms and losses* and *safety rules* to control the outcome of the trial. The theory basically instills a "fear" and "danger" in the jurors' minds that if they do not render a verdict in favor of the Plaintiff then they are doing a disservice to the community and needlessly endangering the public as a whole.

Executed properly, the "reptile" strategy is a set up to tear the carrier/defendant down when it matters the most … in front of the jury! The ultimate goal is simple: convince a jury that awarding a verdict above and beyond the actual damages is the *safest* decision for the greater good of the community.

The "reptile" strategy is premised on three simple concepts:

1) Establish in the jurors' minds that there is a danger to the community caused directly by the Defendant;

2) Empower the juror to improve the safety of the community by rendering a verdict that will eliminate or reduce the dangerous situation or conduct created by the Defendant and;

3) Frame the case/facts against the Defendant in such a way that it appears that the Defendant made a conscious decision to violate a safety rule specifically put in place to protect the community and that the Defendant is unwilling to accept responsibility for dangerous situation that they have caused or created.

Horror Stories

We use the *Mosely v. Lloyd case* as a prime example of the "reptile" strategy executed with precision and also to show a classic bad faith "set up" by Plaintiff's counsel. Often times, the underlying facts in the tort/negligence case itself lay the groundwork for future extra-contractual and bad faith claims.

In *Mosely*, a Broward County, Florida jury rendered one of the worst automobile negligence verdicts nationally in 2014. Lloyd, a 67 year old, convicted felony spending three-decades in prison for breaking and entering, attempted robbery possession of heroin and murder, struck an 11 year-old child while riding his scooter intermittently in the street and sidewalk. Witnesses reported that Lloyd was also hard of hearing, only able to read lips, thus could not hear the passengers' warnings that there was a child in the road upon impact. The defense presented evidence at trial that, prior to accident, the child had special needs (i.e. ADD, on medication, student in a special education program, issues with defiance and rule following) which contributed to the accident and was not properly supervised by his legal guardian.

Witnesses stated that Lloyd did not slow down or do any evasive action to prevent the accident which threw the child 100 feet upon impact. The defense denied this allegation and fought liability through an accident reconstructionist. The impact of the crash ruptured the child's aorta, which caused the blood supply to his brain to be cut off resulting in permanent, traumatic brain injury. The child was hospitalized for approximately two months. Additionally, the child's kidneys suffered severe and permanent damage with the child requiring constant monitoring with a myriad of other disabilities and medical challenges. The child cannot eat, speak, walk or take care of himself for the rest of his life. While the jury did find the child 70% comparatively at fault, the verdict, after the comparative fault reduction, was still $22.7 million. The verdict is on appeal before the 4th District Court of Appeal.

The insurance carrier was subsequently sued for bad faith shortly thereafter asserting 1) failure to "pay for damages for bodily injury for which an insured person becomes legally responsible because of an accident" [policy language]; 2) the insured's "coverage included liability insurance, and an unlimited defense of Mr. Lloyd, which defense obligation was breached by carrier"; 3) the $10,000 policy limits were demanded and no timely response or a financial affidavit of the insured were provided; 4) the carrier breached its duty to advise the insured of any steps that might be taken to avoid an excessive judgment; 5) failure to perform its contractual duties; 6) allegations of a "false affidavit" by a Claims Manager; 7) the carrier knew or should have known that based upon the facts of the accident, there would be a verdict in favor of the Plaintiff and the damages exceeded the policy limits; 8) carrier failed to properly evaluate and investigate the claim; 9) breached its obligations and acted in bad faith for failing to proactively settle the case and; 10) No *Cunningham* settlement was offered or agreed upon by the carrier. The bad faith claim has been abated pending the appeal.

Lessons learned:

1) Know your jurisdiction. Broward County, Florida is notorious for excruciatingly high verdicts and criminal justice court and/or State Attorney's Office that has a reputation for showing no mercy. The jurors are cut from the same cloth. When evaluating the case, jurisdictional consideration, like Broward, should be considered and weighed heavily in whether to try or settle a matter.

2) Look at the case through the jurors eyes. Here, you have a) a convicted felon; b) a child c) a driver with less driving experience than the average person his age due to his incarceration; d) he has a disability which impaired his ability to avoid the accident and; e) as a result, catastrophic and permanent injuries were sustained to a child at play. Fact patterns like this are breeding grounds for *reptilian* trial maneuvers.

3) Do not victimize the "victim" in high stakes cases. It appears from the evidence presented, that the defense asserted allegations of negligent supervision upon the child's guardian that has taken care of him since he was five years old. Further, the defense presented evidence that Mosely was diagnosed with Attention Deficit Disorder (ADD), in a special education program, was not properly taking his medication, defiant and basically a wayward child. When the child is wheeled into the courtroom, all will be forgotten. One must tread very lightly as to not come across as criticizing or blaming this child or his family … if not, you are playing right into the Plaintiffs' hand.

4) Mock try unique issues (i.e. children with special needs, failure of a child to take medications, wayward child and/or school records, allegations of guardian negligence, convicted felon as insured, insured with disability, etc.) to gauge whether to present these issues to the jury. It can be expensive to mock try cases but in high stakes cases, it's worth it!

II. How We Got Here

Image of Insurance Company

Every Defendant should be afforded the right to due process under the law and not arbitrarily punished for *reptilian* strategies implemented by the Plaintiffs' Bar. There is well-established case law prevents using punitive damage awards for the purposes of punishing a Defendant for the harms of others. (*See Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)). Despite the law being on our side, this will not necessarily prevent a jury of our peers from falling victim to savvy Plaintiffs' attorneys that incite sympathy, a false sense of danger and fear with a healthy dose of righteous indignation upon the panel.

Image is everything, right? In order to debunk the "reptile" strategy, we need to be prepared to annihilate the theory through proper witness preparation, priming the jurors in voir dire, creating a likeable, "we care" corporate image in opening statement, putting the right face to the company with respect to the corporate representative and carefully selecting the appropriate counsel to fit the facts of the case. When contemplating the corporate representative at trial, a V.P. may sound impressive but could reinforce the corporate structure. Consider instead the agent who issued the policy. If local jurors in the community return a multi-million dollar bad faith verdict, let them read it before the neighbor they see at church or synagogue, the grocery store or the soccer field.

If Plaintiffs are selling danger, fear and a false sense of insecurity … then the corporation must promote and exude safety, confidence, reliability, honesty and security in the products and services they are providing and/or selling to the public. Bottom line: Let's tell the story of *our* company, *our* commitment to excellence and the community … our mission statement.

Are We Our Worst Enemies?

Insurers are the largest single advertisers behind beer on American sports programming. $5 billion dollars is spent annually on insurance advertising and is growing exponentially. With some insurance companies spending over a billion dollars a year on advertising, a couple of million dollars for a verdict seems like a drop in the bucket, right? (Not right, when profit margins for the industry can be razor thin especially when there is a natural disaster!) At least that's what Plaintiff's counsel will be telling the jury during the punitive damage phase. A drop in the bucket!

When it comes to advertising, the ads and the way the products and/or services are marketed, often give the impression that every claim is covered and paid instantly. Commercials imply their company's policy provides more coverage while other carriers offer inferior service. Clever, catchy marketing slogans and commercials do not necessarily lead comfortable situations in the courtroom. Marketing strategies providing "guarantees" (that are successful with increasing market shares for a company) do not always fair as well in the eyes of the jurors. We are all too often hit with the classic Plaintiff's rant i.e. the insured held up their end of the guarantee/bargain by paying their premiums, and perhaps for several years, so why shouldn't

they be entitled to damages … regardless of the policy language or coverage. Be it a commercial or a courtroom, over promising and under delivering can be catastrophic.

Here are some things to think about in terms of advertising and corporate image. First, what are "we" as carriers disseminating to the public to improve our image and dispelled the *reptilian* theory? While apps that can be downloaded in seconds to process claims more efficiently and cost effectively … are we losing the customer contact and relationship building component that we will need our customers to fall back and rely on as prospective jurors? Second, while some insurance commercials and/or mascots are funny and memorable, does this type of propaganda promote the image, sense of security, curry favor with the community and provide the tools to have a juror fight for the insurance company in deliberations? Without focusing on community image, it may be too late once the panel is sworn in.

III. The Team It Takes to Correct the Problem

We are in a time where speed replaces quality and accuracy. Most companies are understaffed in an effort to increase profits forcing the handling of more claims than personnel can manage properly. Technology allows us to conduct business remotely through service or call centers and even off-shore claims processing. While these create a better bottom line, they remove the insurer from being a part of the local community creating a real and emotional distance between the company and the community. We need to change the perspective from a "business model" to a "service model" letting the consumer *believe* that they are more than a policy number.

When round tabling ideas with your team, do not be afraid of your loss ratio. Does your company pay more in claims than received premiums? This may be on a national, state level or local basis. Educate your counsel, claims professionals and jurors regarding the number of claims handled and indemnity dollars paid. This demonstrates the insurance carrier is in the business of paying claims, not litigating claims. Such testimony is especially powerful following a major catastrophic storm or loss where the company acted as "first responders" and exhibited prompt and efficient claims handling.

If a claim is denied, do not apologize for the denial. Explain why it is harder and more costly to deny coverage than issue payment. Prepare an exhibit listing all the individuals involved in the investigation, adjustment and coverage decision. Rather than allow the plaintiff attorney to portray it as a random decision, list each person involved, their role, and years of experience. Generally a collective of several hundred years of insurance experience goes into each claim coverage decision.

Like most things in life, leading by example is key in spearheading issues in order to ensure the best possible outcome. Senior management's awareness of all the pitfalls of the claim at the inception is paramount to properly evaluating and handling the claim. This will allow for early detection of issues, team roundtable and brainstorming opportunities, potential early settlement and/or strategic, solution-based approaches to claims file handling and well-thought out litigation strategies, if necessary. Through open lines of communication, claims management can look at new ways to *humanize* the company, allow for training opportunities for growth and development within the organization and hand-pick the appropriate in-house

counsel or panel counsel best suited for the case to further the company's goals and expectations.

IV. New and Innovative Ways and Methods to Personalize Insurance Companies

1) Use positive, community service based advertisement campaigns to bring awareness to the public of the "good deeds" the industry is engaged in and promoting on a regular basis.

2) Effectively use the company's mission statement as a "theme" from the inception of the claim/litigation.

3) Carefully and thoughtfully choose the "face" of the company – be it the attorneys hired to represent the company or the corporate representative that promotes and endorses the company's mission statement.

4) Humanize the company … companies are not just claims processing centers. Companies are made up of people, families, colleagues and friends and community involvement.