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## **How to Survive Litigating a Construction Claim in a Judicial Hell Hole**

### **I. Introduction**

Often cases are filed in judicial "hell holes" or areas in which juries disproportionately grant higher than normal verdicts. In such jurisdictions, plaintiffs' counsel employ tactics like the Reptile Theory to exploit a juror's pre-existing bias in favor of plaintiffs in order to obtain higher verdicts. This presentation sets forth strategies in recognizing potential "hell hole" jurisdictions, identifying a high-risk case, avoiding selection of high damages jurors, and presenting a case to avoid high damages.

### **II. Identifying a Judicial Hell Hole**

A judicial hell hole is a jurisdiction in which juries disproportionately grant higher than normal verdicts in cases. In hell hole jurisdictions, juries often award larger verdicts in cases involving companies. For example, a juror after the trial of an auto part manufacturer related, "None of us are stupid here, we all know companies do cost analysis every day to determine the value of the dollar versus human life...it's not new."

Cases filed in a judicial hell hole may require additional strategic decisions in a high-risk case. For instance, to avoid jurors like the above quoted juror, you may opt for a bench trial as opposed to a jury trial. A trial by a jury of peers may not be as beneficial as a bench trial in jurisdictions in which jurors tend to espouse beliefs that companies should pay more for potential wrongs.

Another strategic decision in a case filed in a judicial hell hole is whether to remove the case to federal court or to litigate the case in state court. Federal and state courts have different jury pool sizes and may result in a different composition of the panel. Federal court generally has larger jury pool sizes as it is by districts which may include more than one county; whereas, state courts generally pull from only one county. Depending on the case and location in which the case is initially filed, removing a matter from state to federal court may prove beneficial in obtaining a more diverse panel.

There are several judicial hell holes to be aware of in the U.S. California is the number one judicial hell hole for the years of 2014 to 2015. Other hell holes include (in order from worst jurisdiction to best) West Virginia; Madison County, Illinois; New York City and Albany, New York; Baltimore, Maryland; Philadelphia, Pennsylvania; and South Florida.

## **A. Contributing Factors to a High Verdict Case**

Several factors contribute to high verdict cases. One is poor pre-trial preparation which may make an already high-risk case, even riskier. Poor trial preparation will lead to a lack of strategic decisions in handling the case which may prove costly in the long run. Other factors that may drive verdicts higher are working with the wrong team, litigating the case in a bad jurisdiction, and impaneling the wrong jurors.

Plaintiff's counsel employs several strategies to coax these predisposed jurors into awarding high verdicts. The first is using a theme throughout the case of "David v. Goliath." Plaintiff's counsel will use a narrative of his client as the underdog taking on a large corporation in order to inflame a jurors' emotions. The theory of playing on a juror's emotions in obtaining a higher verdict stems from a book written by David Ball and Don Keenan, "Reptile in the Mist and Beyond." The book calls this strategy the Reptile Theory in that the strategy is intended to awaken a juror's inner reptile to become angry and want to punish companies.

In addition to using the Reptile Theory, Plaintiffs have procedural and substantive advantages already in their favor. Plaintiff gets both the first and the last word in the case and are able to use the timing to frame the case for the jury.

Jury panels are also largely plaintiff leaning. Some jurors already have preconceived biases towards the defense that Plaintiff's counsel exploit. For instance, in a case against a pool manufacturer, a juror stated, "It wasn't negligence it was just a freak accident that happened. It would be nice to bankrupt the company." Another juror in a case against a chemical plant remarked, "I agree with everything he said except the amount. I awarded them \$50 million. It has to be a large enough amount that they are not going to shrug it off. Something that makes them realize they cannot play this game – let's just wait it out and wait until the lawsuit comes." Coupled with the Reptile Theory and procedural advantages, Plaintiffs' counsel is able to play upon a juror's emotions to illicit a higher verdict.

## **B. Markers of a High-Risk Case**

When a case is filed in a judicial hell hole, it is important to identify if the case is a high-risk case with the potential to obtain a larger verdict. Cases involving catastrophic injury or death are often indicators of a high-risk case. These cases include injuries of quadriplegia, burns, and amputation. The more catastrophic or gruesome the injury, the more likely the case is susceptible to a high verdict.

Another marker of a high-risk matter is if the case involves a pattern of company misconduct. Jurors may be more willing to grant higher verdicts in these cases as a pattern of misconduct will be more likely to inflame their anger towards a company. Additionally, cases involving professional liability for well-paid lawyers. These cases include professional liability actions against lawyers and individuals working for Wall street, banks, or in real estate. Jurors are more likely to grant higher verdicts against the "top 1%" of individuals.

Lastly, cases with sympathetic or "perfect" plaintiffs may be an indication that the case is susceptible to receiving a high verdict award. These plaintiffs include babies and children, individuals who had no fault in the incident, and the elderly. Jurors are more likely to sympathize with these plaintiffs and award higher verdicts based purely on emotion.

### **III. Elements of a Successful Defense**

In cases filed in a judicial hell hole, there are several strategies to mitigate the risk of obtaining a high verdict as well as to counter Plaintiff's Reptile Theory. Strategies include selecting a jury so as to avoid individuals likely to vote against the defense, effective opening statements and cross examination at trial, and humanizing the company.

#### **A. Jury Selection**

Jury selection or better yet, de-selection, is essential to limiting risk in a potentially high verdict case. Voir dire allows for an attorney to identify and weed out jurors with attitudes and experiences most dangerous to a case. De-selection of jurors is best viewed on two continuums with a juror's sentiment against your client and a juror's potential for leadership. A juror who may have more of a sentiment against your client but little to no potential for leadership should be evaluated in comparison to a juror who may have a little less sentiment against your client but more potential for leadership. Individuals with potential for leadership have the ability to sway other jurors even if the others initially have less harmful views.

There are several predictors which can help an attorney during voir dire to evaluate if a juror is a high damages juror. Factors include exhibiting emotional decision making, personally identifying with plaintiff, having an external locus of control, maintaining an anti-corporate sentiment and harboring certain attitudes towards civil lawsuits.

The following are potential questions aimed to elicit a juror's predilection to become a high damages juror.

1. Do your friends and family describe you as an unusually sympathetic person?
2. When making a decision, do you think most about the practical consequences of your decision or what is morally right and wrong?
3. I always speak up when I see injustice. Agree/Disagree/Strongly Agree
4. Have you or anyone close to you ever had to care for anyone who was seriously ill or disabled?
5. Have you, a family member, or someone close ever had a loved one become injured or die as a result of the wrongdoing or negligence of another party?

6. In general, making sure an injured party gets compensated is more important than figuring out who is at fault. Agree/Disagree

7. If a company is responsible for an accident in which people are injured or killed, no amount of money is too high to compensate the victims' families for their losses.

8. Have any of your family members had a serious, negative experience with a corporation?

9. I do not trust big business. Strongly Agree/Agree Somewhat/Disagree

10. Most companies put profit above public health. Strongly Agree/Agree Somewhat/Disagree

11. Most companies put profit above public health. Strongly Agree/Agree Somewhat/Disagree

12. To what extent do you believe that corporations conspire to hide important health and safety information from the public. I am positive they conspire/ I suspect they conspire/ I am doubtful they conspire/ I do not believe they conspire

## **B. Effective Trial Advocacy**

In addition to carefully selecting jurors, another strategy for mitigating risk in a judicial hell hole is to have effective trial advocacy, focusing primarily on the opening statement and the cross-examination of witnesses.

The opening statement in a trial frames how a potential juror will view the case throughout the trial. Provide a clear roadmap for jurors of what evidence and issues you will present in the trial. Personalize the client to minimize potential of jurors' anti-corporate sentiment. In creating your opening statement, prepare for the likelihood that a defense witness will be called as a hostile witness in plaintiff's case-in-chief. An effective opening statement captures a juror's attention and limits the risk of that juror becoming a high damages juror when hearing plaintiff's case-in-chief.

Cross-examination of witnesses during trial is another beneficial trial strategy to limit risk in a judicial hell hole. Cross-examination allows the defense to use plaintiff's witnesses to make the defense's case. During cross-examination, be sure to make every point clear, simple and powerful. Generally, jurors decide cases based on concessions obtained during cross-examination. Remind jurors of cross concessions obtained during trial by making them the foundation for closing argument in the case.

Another trial strategy to employ in a judicial hell hole is to humanize the company. In your opening statement, tell a story about your company and the people who make up the company. Evaluate the right corporate representative to appear in court on behalf of the company. When you speak of the company, use specific examples rather platitudes. Do not set the bar too high for jurors' expectations of the company's conduct. Describe the company as a solid company rather than a perfect company. All of these strategies will help to avoid anti-corporate sentiment in jurors.

### **C. Defending Punitive Damages**

There are several strategies to use in reducing potential exposure while defending punitive damages claims. Use the burden of proof to your advantage by explaining to the jury which party has the burden and what that burden means in the case. Educate jurors about the purpose of punitive damages and focus jurors on the impact of the compensatory award as a message to the defense. Jurors often believe that they are "watch dogs" of corporate conduct and providing an anchor for punitive damages will limit the anti-corporate sentiment.

### **IV. Conclusion**

Cases in judicial hell holes require careful strategies to counter plaintiff's tactics like Reptile Theory and jurors' potential predisposition against companies. Pre-trial tools like removing a case to federal court and trial tools like jury selection and cross-examination are helpful in avoiding high damages in a judicial hell hole.