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Moving Target- How to Identify and Defend Against New Medical Evidence Strategies by Plaintiff Including the Non-Presentation of Blackboard Damages"

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I. Introduction

This session focuses on the various new strategies being used by plaintiffs around the country in catastrophic injury cases and how the industry can best underwrite, evaluate, and defend those cases. In this era of exploding verdicts, plaintiffs are becoming more and more creative on what damages they put, or in some instances, do not put in front of juries. This session will focus on those various strategies and how defendants and carriers can best respond to those challenges.

In an increasing number of cases, the Plaintiff is electing not to put blackboard damages in front of a jury and is filing pretrial motions to prevent the introduction of this evidence to a jury. Evaluating a case, simply on the injury presents a new and unique evaluation issue for the industry. Other strategies include the use of medical or litigation funding companies by Plaintiffs and the impact on damages, the ever-increasing use of experts and life care plans to show permanency and reptilian tactics that have been on the rise for years. This session will discuss how to best counter these new and emerging strategies.

II. Exploding Verdicts

All across the county, jury verdicts are exploding. Even formerly "conservative" jurisdictions are seeing a rise in verdicts in amounts previously unthinkable. Nearly every CLM conference includes multiple sessions dedicated to dissecting and diagnosing these trends. Part of this trend deals with jurors' distrust: distrust of the judicial system, distrust of the oft-corporate defendant, and even distrust of the plaintiff's counsel. To make up for this "trust gap" juries may be increasing their awards to ensure the plaintiff is "properly" compensated. Part of this trend also deals with the jury's ability to assimilate information. In complex, catastrophic injury cases, the empaneled jury can sit for days, or weeks, listening

to complex, technical information. Their attention wanes and they ultimately want a figure they can easily award at the end of the trial. However, a large part of this trend is the development of new strategies by plaintiffs' counsel to present their cases and, ultimately, the damages sought. Many of these strategies are based upon the Reptile Theory and seek to punish defendants.

Some recent "exploding" verdicts include:

- *Ingraham v. Johnson & Johnson*, $4.69 billion, ovarian cancer talc powder
- *Johnson v. Monsanto*, $289 million, Roundup weedkiller
- *McGinnis v. C.R. Bard, Inc.*, $68 million, pelvic mesh
- *Lenning v. CRST*, $52 million, head-on collision with semi-truck
- *Pierce v. East Texas Medical Center*, $43 million, prolonged medically-induced coma
- *Estate of Dunn v. OM Lodging*, $41 million, hotel stabbing

This session focuses on these exploding verdict, how plaintiffs' counsel are increasing their jury verdicts and settlements through several new and unique strategies, and what carriers and defense counsel can do to combat these new strategies and dangerous results.

III. New Strategies

a. Reptile as the Basis

Much of the new strategy we are seeing is based on, at least in part, some of the underlying teachings of the Reptile Theory. The Reptile seeks an exploding verdict by making the case less about the Plaintiff and more about safety, standards and community. Perhaps what is most dangerous about the Reptile Theory is that is has Plaintiffs thinking creatively and upfront about how each case should be tried. The non-presentation of special damages creates unique issues and certainly stems from the "not about Plaintiff" underpinnings of the Reptile.

IV. Non-Introduction of Medical Bills and Blackboard Damages

a. The Strategy

An emerging trend among the Plaintiff's bar is to refrain from offering medical bills as evidence of damages. In doing so, Plaintiffs will: (1) not introduce testimony regarding medical bills; (2) move to prohibit the introduction of medical bills by an opposing party; and/or (3) proceed solely under a theory of general damages. Plaintiffs are doing this to avoid providing an anchor in the mind of jurors via special damages. Instead, the case is tried on a "what's it worth" strategy when it comes to a significant injury. This theory is gaining steam in states like North Carolina, Illinois, Virginia and Georgia.

b. The Playbook

In only focusing on a theory of general damages, Plaintiff's counsel are operating, in part, under theories espoused via the Reptile Theory. Plaintiff's attorneys have begun avoiding or excluding the introduction of medical bills which such strategy fits in line with the Reptile Theory as it follows the theme of making the trial about the Defendant rather than the Plaintiff. In doing so, this strategy plays on the

jurors sense of responsibility and need to protect the community rather than compensate for direct economic losses.

The focus of Plaintiff's attorneys proceeding under a theory of general damages means that they are not claiming medical, or special, damages. They are also filing pretrial motions to prohibit Defendant from brining in information relating to actual damages. Often times, Plaintiffs will initially include a claim of special damages in their Complaint. However, there is a growing trend to where they will seek to amend their Complaint in order to strike any reference to specific damages or take a voluntary dismissal as to medical bills. Thereafter, Plaintiff's will seek damages and try their case based upon the general harm to Plaintiff without an anchor for a jury to consider.

c. The Dangerous Results

As of May 2019, plaintiffs' attorneys have attributed over $8 billion in verdicts and settlements to the Reptile Theory, which appeals to deep-seated survival instincts. The panel is aware of several cases in which Plaintiff did not put on special damages and where Defendant was prohibited from doing so. While this has been somewhat of a trend with Plaintiffs in smaller cases, the trend is now moving towards catastrophic and large loss cases.

In North Carolina, for example, two multi-million verdicts were rendered in amounts 2-3 times the last offer from Plaintiff counsel and 10-15 times what most carriers would have evaluated the case at in light of the special damages. Defendants in both of these cases were prevented from introducing evidence relating to medical bills and economic loss. One of these matters is pending with the Court of Appeals which may be the first appellate ruling on the topic nationally.

d. Combatting the Strategy

Defendants must first note the strategy and know which firms are likely to implement the strategy on a large loss case. Not putting medicals on in front of a jury creates risk for the Plaintiff. It is likely your innovative and aggressive Plaintiff firms who are going to be willing to try this strategy.

Note in the pleadings whether medical bills, future bills, lost wages and the like are part of the prayer for relief. If they are noticeably absent, that should put you on warning. However, the presence of these allegations does not mean that Plaintiff will not try to implement the strategy down the road via an amendment or simply by trying to exclude those damages by way of pretrial motion.

Defendants should engage in discovery on these issues. Find out the special damages. Try to lock Plaintiff early into stating it is part of their claim. Defendants must file their own pretrial motions to ALLOW the introduction of medical bill and economic damages. Many States have jury instructions that tell the jury they may consider things like "medical bills, lost wages" in determining a jury award. Use this language in your pretrial motion to argue that these damages should be admissible in cases where you deem it best to have special damages entered as an anchor.

V. Litigation and Medical Bill Funding

Plaintiffs' counsel are turning to new avenues and strategies to finance their catastrophic injury suits. The effect of these new strategies is to drive up litigation costs for carriers and potentially increase awards and damages.

a. The Strategy

How medical providers are paid has a major impact on the amount of money the plaintiff will receive which ultimately guides their settlement decision. In many states, due to the collateral source rule and the admissibility of medical bills, the source of medical bill funding will often guide the plaintiff's litigation strategy. In states where there are strong collateral source rules, write-offs, reductions, and/or pre-negotiated rates are not admissible.

The most common sources of medical bill funding are liens, private insurance, and government programs such as Medicaid or Medicare. The new method is Medical Funding Companies (private for-profit businesses serving as litigation funding arms). The method and amount of reimbursement of the medical bills differ substantially from each source. Not only will the amount charged vary from source to source, but also the type of treatment which is available may differ. Plaintiffs' attorneys, medical funding companies, and medical providers are taking advantage of this system and maximizing their respective payouts when they can identify that the medical bills will be paid by a liability insurance carrier.

b. The Playbook

Liens – Medical treatment resulting from personal injury cases often are funded by a lien on the entire claim. Any limitations in regards to type of treatment and the cost of the treatment are controlled by the medical provider itself. For example, a private insurer may limit or even exclude chiropractic treatment, but with the use of a lien the chiropractor can provide services which ultimately have to be paid by the tortfeasor's liability carrier without the limitations of a third party. In fact, some medical providers will opt to treat on a lien even when the patient is insured. A medical provider will file a lien for the full and often inflated amount of medical services provided only to discount the lien upon settlement or verdict. This scenario is further diluted when the relationship between the medical provider and plaintiff's attorney is such that allows for the parties to manipulate and negotiate several unrelated claims together. Furthermore, many medical providers also take note of how much insurance coverage is in place to determine a patient's treatment plan. Seasoned attorneys and established law firms are very effective in directing their clients to medical providers that will maximize their client's payout.

Medical funding companies – A relatively new scenario is developing all over the country. Third-party lending companies known as medical fund companies started "quarterbacking" litigation. Traditionally, medical funding companies directly provide a claimant funding for their medical bills and lost wages. A new practice has emerged where funding companies are advancing money directly to the medical providers to cover the cost of the treatment. In essence, the medical providers have sold off the control to negotiate write-offs or discounts to the funding company. The funding companies have now assumed the risk associated with the claim and seek compensation for assuming the risk. In addition to this scenario, in many states these funding companies are not subject to any usury laws, thus the interest rate charged is not subject to any regulation. Naturally, the addition of a finance company increases the potential settlement value of the inflated medical bills charged by the medical provider, which serves as an extra barrier to settlement.

c. The Dangerous Results

In a Federal Court case filed in the Northern District of Georgia, a party was able to access information held by a popular medical provider which revealed how plaintiffs' attorneys, medical providers, and medical funding companies were working together. It was discovered that the medical provider was bundling multiple claims together for sale to the medical funding company. The claims were being evaluated on the front end, and treatment was largely being determined based on the strength of the legal case and not solely on the patient's need for treatment. A key factor in their evaluation was the amount of coverage that was available. The discovery helped shed some light on how medical bills were grossly inflated, and how the medical bills were not reasonable or necessary.

The dangerous results are with the presence of these inflated special damages. These damages are leading to increasingly high settlements and verdicts around the country.

d. Combatting the Strategy

Identify the source of payment – Typically there is information on the medical bills that identifies the source of payment. Many times the bills are sent directly the attorney which is a strong indicator that the medical provider was referred by the attorney. In many cases, the plaintiff has no idea how much he/she incurred in medical bills. Also, while in many states the collateral source rule bars the introduction of third-party payments into evidence, the information is still discoverable. The use of non-party requests and other discovery tools can be used identify the relationship between the medical provider, attorney, and funding company.

30(b)(6) depositions – An effective tool used in discovery is a deposition of a corporate representative of the medical provider and/or the funding company. The deposition will allow for the inquiry into the relationship between the parties and show that the medical bills are not charged at a reasonable rate.

Medical billing analysis expert – An expert in medical billing will be able to review the medical bills and offer an opinion on the reasonableness of the charges and the necessity of the treatment.

Depending on the state, try to get the medical funding company more involved in the litigation. Can you erode collateral source? Are they an interested party? Use pretrial motions to at least educate the Court on the issues.

VI. Experts and Life Care Plans

Plaintiffs' counsel are increasingly turning to Life Care Plans, especially in catastrophic injury and/or permanent damages cases, in order to help achieve large verdicts. Whenever a plaintiff has sustained an injury that causes them to be unable to work perform the normal activities of daily living, the preparation of a Life Care Plan to determine the financial impact and cost of future care is of critical importance, as the cost of future medical care may be the largest measure of damages the plaintiff can receive. To prepare Life Care Plans, plaintiffs' counsel rely on experts with a range of qualifications, including career nurses, vocational rehabilitation specialists, and rehabilitative medicine doctors. These experts review a plaintiff's medical history, may meet with the plaintiff, and ultimately create a projection of future medical needs, including for items such as complications, treatment requirements, medication, medical devices, home aides, rehabilitation facility residency, and/or assisted living facilities.

a. The Strategy and Playbook

Plaintiffs' counsel rely on Life Care Plans for two reasons: (1) to substantiate damages claimed for pain and suffering and (2) to put future costs of care into an easy-to-understand format for juries, so they can make an appropriate award when rendering their verdict. Therefore, it behooves the plaintiffs' counsel to project out the largest numbers reasonably possible, often including projected costs for unnecessary items. Plaintiffs' counsel may also utilize an economist to factor in long- and short-term rates of interest and medical care increases to the value of the Life Care Plan, thus further increasing the potential damages and award. More and more, plaintiffs' counsel are focusing less attention on existing damages, and rather focusing the jury's attention on a large future medical expenses figure, as presented in the Life Care Plan.

b. Dangerous Results

The increasing prevalence of Life Care Plans and large future medical expenses damages presents can lead to dangerous results for defendants and their carriers. One Life Care Plan provider touts the role its plans had in achieving $166,000,00.00 and $105,000,000.00 verdicts. The danger here is having a seven or eight figured damage number being put in front of a jury.

c. Combatting the Strategy

Given the increasing use of Life Care Plans and their connection to exploding verdicts, defending against this strategy early and effective is of utmost importance. To do so, defense counsel should focus on the substance of the Life Care Plan itself and the individual(s) preparing it, to determine where they can be attacked.

First, ensure the Life Care Plan and the expert opinion presenting it are admissible. In order to pass the reliability prong of the *Daubert* test, the Life Care Plan must be able to be reproduced by other experts. Therefore, the data sources for the present charges and costs must be accounted for and cited. The failure to disclose these sources not only places the reliability of the Life Care Plan at issue, but may present ethical issues under the standards of practice established by the International Academy of Life Care Planners and the International Commission on Health Care Certification.

Second, consider hearsay issues, as many components of the plan will be based upon out-of-court sources used to determine the costs of care, therapy, devices, or other items and offered for the truth of what is being asserted. An evidentiary objection may be proper.

Third, the Life Care Plan may also be subject to attack for its speculative nature. If the preparer is not a physician, it must otherwise be supported by medical testimony from a treating physician, including through affidavit. Where the Life Care Plan is not supported by such testimony, it may be subject to attack and exclusion if beyond the preparer's qualifications.

Finally, depending on the state, the Life Care Plan may also be subject to attack if based on the billed/charged rate of services, rather than the paid rate of services. In these instances, defense counsel should consider filing a motion in limine to bar testimony and evidence of costs based upon the billed/charged amount. Similarly, a Life Care Plan may include the cost of numerous items that are available to the plaintiff for free, and will continue to be available for free.

VII. **How to Properly Evaluate and Adjust**

These new theories create new challenges and opportunities on the carrier and evaluation side. Know your opponents and know the trends from various states as to what will be allowed. Encourage your teams to think outside the box on traditional ways of evaluating these matters.