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## **Has the Price of Poker Gone Up – Alarming Trends in Dispute Resolution**

### **I. A View of How We USED to Evaluate Claims**

Whether you are a claim professional, claims management, in-house attorney, outside counsel, or even a plaintiffs' attorney, the closer you can come to evaluating your claim, the better off it is for all parties involved. Therefore, we have all strived to correctly evaluate our claims no matter what jurisdiction you are in so that every party can determine if the subject case is one to settle or bring to trial.

Throughout the years, these evaluations have come in many forms, but there were always a few that you could rely on, especially in a “soft tissue case”. For example, depending on how conservative or liberal the jurisdiction, you may be able to average out a cost of each month's worth of treatment and then multiply by the amount of months the plaintiff had treated and voila, you could have a general idea of the case evaluation. Others may choose to add up the medical special damages and multiply by three if the jurisdiction was moderate. Others may use “Quantum Evaluation” books such as “Eason's Louisiana Quantum Book” in Louisiana that is broken down by not only injury, but jurisdiction as well.

However, these age-old ways of determining what your case was worth are eroding at an alarming rate. Why, you ask. That is what we will discuss in this Roundtable.

### **II. Has the Price of Poker Gone Up?**

Is the price of poker going up in the claims world, it sure seems that way? What is causing this trend?

#### **a. Lawyer Advertising**

It seems to be a few things but some would say it started around 1977 due to the case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, the United States Supreme Court

decided that the traditional ban on lawyer advertising was unconstitutional holding among other things that:

“(c) Advertising legal services is not inherently misleading. Only routine services lend themselves to advertising, and, for such services, fixed rates can be meaningfully established, as the Arizona State Bar's own Legal Services Program demonstrates. Although a client may not know the detail involved in a given task, he can identify the service at the level of generality to which advertising lends itself. Though advertising does not provide a complete foundation on which to select an attorney, it would be peculiar to deny the consumer at least some of the relevant information needed for an informed decision on the ground that the information was not complete.” Pp. [433 U. S. 372-375](#).

However, the 42 years since has seen the advertising plaintiff's bar continually move the “bar” so that they not only advertise for clients, but also use the advertising as a means to somewhat subliminally also inform the public of “what a case is worth”. Moreover, due to the expansion of the internet and social media, billboards and commercials are not the only way to “get the word out”.

How do they do that? Take the case of the New Orleans law firm of Ed Womac, who vows to “Put the WOMAC on ‘Em!” (you can't make this up). Ed's on-line ads make sure to not only promote his “successes”, but also let you know the injuries and money paid for each:

The screenshot shows the website for Ed Womac Law Firm. The navigation bar includes links for HOME, ABOUT US, PERSONAL INJURY, OUR SUCCESS RECORD, PERSONAL INJURY FAQ, LOCATIONS, CASE EVALUATION, and BLOG, along with social media icons for Facebook, Google+, LinkedIn, and Twitter. The main header features the firm's name, 'WOMAC LAW FIRM New Orleans Personal Injury Attorneys', a circular logo with the text 'PUT THE WOMAC ON 'EM!', the phone number '504.475.2240', and the slogan 'We Don't Get Paid Unless You Do!'. The 'OUR RECORD OF SUCCESS' section contains text about the firm's history and two case examples with settlement amounts: \$3,000,000.00 for a head-on collision and \$2,700,000.00 for a bus accident. A 'CONTACT US TODAY' form is located on the right, with fields for NAME, EMAIL, and PHONE, a checkbox for 'Are you a new client?', a 'TELL US ABOUT YOUR CASE' text area, and a 'SEND MY INFORMATION' button. Below the form are links for 'OUR SUCCESS RECORD' and 'TESTIMONIALS'.

Why is that a bad thing, because it IS influencing not only potential or actual plaintiffs, but POTENTIAL JURORS. Yes, jurors. Mediators and Judges alike are now discussing the alarming trend that jurors listen to these ads and believe that if the person on TV or on the internet got that amount, someone who is REALLY injured should deserve more.

#### **b. Life Care Plans Traumatic Brain Injuries (TBI)**

Another alarming trend that appears to be causing the price of poker to rise in the evaluation of claims is the overuse of Life Care Plans. There was a time when a forensic economist and a Life Care Planner was reserved for the really serious cases. For example, cases where the plaintiff's injuries left he or she a quadriplegic needing around the clock care for the rest of his or her life.

These days, Life Care Plans can pop up on the smallest of personal injury cases, not surprisingly, they almost always pop up in TBI cases. It goes without saying that TBI cases are the subject of entire seminars if not entire conferences, so we will discuss them just as they pertain to Life Care Plans and vice versa.

#### **c. Liberal Judges**

Yet another reason for the rising price of poker are judges who seem to become more and more liberal. Could it be due to the election of judges and the fact that the plaintiffs' bar "support" their campaign.

Damon M. Cann in his article "Justice for Sale? Campaign Contributions and Judicial Decisionmaking" *State Politics & Policy Quarterly* Vol. 7, No. 3 (Fall, 2007), pp. 281-297, sure thinks so as he reviewed 2003 cases decided by the Supreme Court of Georgia and averred that campaign contributions correlated with judge's decisions.

Accordingly, in the 20 states where judges are elected at the district court level, and the 8, such as Louisiana and Tennessee, where judges are elected to all levels of courts (i.e. appellate and supreme courts as well) are those not making significant contributions not anteing in? Moreover, does election allow for a level of protection for the judges. Are they not worried of being "overruled" by the appellate courts as they do not believe the electorate knows and/or cares?

#### **d. Millennial Jurors**

In their paper, "6 Things You Need To Know About Millennial Jurors" in Law360 of December 11, 2017, Lee Hollis and Zachary Martin concluded that:

“ . . . millennials can be hampered by their lack of attention span, expectations of instant gratification, lack of respect for expertise, and, in some types of trials, their lack of experience in a corporate or business culture.”

Can't wait to get them on your jury, right???

#### **e. Fraud**

Another issue that drives the price of poker are fraud claims and the brazen nature of the alleged fraud. For example, there is currently an ongoing investigation into a ring of fraud in the New Orleans area that involved not only runners and plaintiffs, but also lawyers. In sum, the plaintiffs would either hit or make believe they sideswiped 18 Wheelers and then chase down the 18-Wheeler and state that it was a hit and run.

These cases are not only raising insurance rates, they are making cases impossible to settle!

### **III. Remedies to Bring the Numbers Back Down**

#### **a. Try More Cases**

Nothing slows down a trend of the rising value of cases like a few losses for the plaintiff's attorneys and/or the attorneys knowing that you are going to make them work for their fee. Cases are expensive. Those life care experts, TBI experts, economists, doctors, etc. cost a whole lot of money. Try a few cases to defense verdict and attitudes will change.

For example, in his article, “*Study Finds Settling Is Better Than Going to Trial*” in the NY Times on August 7, 2008, Jonathan D. Glater wrote:

“Note to victims of accidents, medical malpractice, broken contracts and the like: When you sue, make a deal.

That is the clear lesson of a soon-to-be-released study of civil lawsuits that has found that most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken that offer.

“The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more,” said Randall L. Kiser, a co-author of the study and principal analyst at DecisionSet, a consulting firm that advises clients on litigation decisions.

Defendants made the wrong decision by proceeding to trial far less often, in 24 percent of cases, according to the study; plaintiffs were wrong in 61 percent of cases.

In just 15 percent of cases, both sides were right to go to trial — meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered.”

Accordingly, maybe there needs to be a new mindset of trying more cases, especially if the ante and price of poker make it so that a case can't be settled.

### **b. Settle Early**

Unfortunately, unlike wine, it is a rare occasion when a defense case gets better with time. Therefore, if there is a chance to try to settle early, give it your best shot.

### **c. Investigate Fraud**

It certainly isn't a new concept, but the more investigation in potential fraud cases the better. Moreover, the internet is sometimes a wonderful thing and definitely when it comes to investigations of backgrounds and social media.

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