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CLM Presentation Overview

Competing Factors in Claims Analysis and Damages Valuation

Introduction

Assessing a claim involves determining the likelihood that a jury will find your covered entity liable as well as determining potential monetary exposure. However, damages are driven by many different factors including liability arguments, calculation of economic losses, and projection of non-economic claims. Plaintiff's attorneys, defense counsel, claims handlers, and jurors all have a different starting point when assessing damages. This session will discuss how potential damages are assessed by different parties, how future damages are computed, how jurors make decisions on damages, and how claims handlers and defense attorneys can work together to more accurately assess case values.

Despite the importance of damage awards, juries are often at sea about the amounts that should be awarded, with widely differing awards for cases that seem comparable. In Pennsylvania, New York, New Jersey, and Connecticut, attorneys are not permitted to include an actual damage amount in any pleadings, nor are they permitted to ask a jury to contemplate a specific amount. However, some jurisdictions, such as Delaware, permit such tactics. Juries in those jurisdictions can consider requested amounts.

No matter the jurisdiction, however, the party seeking damages has the burden of proving those damages. Although the law does not command mathematical precision from evidence in finding damages, enough facts must be introduced so that the court can arrive at an intelligent estimate without conjecture. Where the amount of damage can be fairly estimated from the evidence, recovery will be sustained even though such amount cannot be determined with entire accuracy. It is only required that the proof afford a reasonable basis from which the fact finder can calculate the plaintiff's loss. *Delahanty v. First Pennsylvania Bank*, N.A., 318 Pa. Super. 90, 464 A.2d 1243 (1983).

Damages in General

Generally, there are three types of damages that may be recoverable in a lawsuit: compensatory, general, and punitive.

1. Compensatory Damages

Compensatory damages are generally the most identifiable and concrete type of damages. These include amounts for lost income, property damages, and medical care resulting from the Defendant's misconduct. An attorney, through documents obtained during litigation, is usually able to seek a definitive amount of compensatory damages based on the injuries to a Plaintiff's person and property. These types of damages are designed to put the injured party in the same position as the party was in before the harm occurred. These are usually the most simple and uncontested form of damages as they are typically tied to a quantifiable amount. Because the information related to compensatory damages is usually readily attainable, the plaintiff must prove these expenses with near absolute certainty.

2. General Damages

General damages are sought in conjunction with compensatory damages. However, these damages are typically less specific and less tangible than compensatory damages. Examples of general damages include pain and suffering, mental anguish, and loss of consortium. General damages can also include future losses due to loss of earning capacity or future medical care. Factors to consider when evaluating the potential value of general damages in a case include a Plaintiff's age, occupation, income, and the severity and permanency of the injuries. Generally, for a jury to consider these types of costs, the amounts cannot be speculative and must be supported by other evidence such as past costs or expert testimony.

In Pennsylvania, it is well settled that "[a]n item of damage claimed by a plaintiff can properly be submitted to the jury only where the burden of establishing damages by proper testimony has been met." *Cohen v. Albert Einstein Medical Center*, 405 Pa. Super. 392, 410 (Pa. Super. Ct. 1991). In the context of a claim for future medical expenses, the movant must prove, by expert testimony, not only that future medical expenses will be incurred, but also the reasonable estimated cost of such services. *Id*. Because the estimated cost of future medical expenses is not within the juror's general knowledge, the requirement of such testimony eliminates the prospect that the jury's award will be speculative. *Id*.

In general, any future costs must be reasonably estimated and presented to the jury. In *Mendralla v. Weaver Corp.*, the Pennsylvania Superior Court held that the jury should not have been permitted to award damages for the plaintiff's future medical expenses because there was no testimony as to the estimated or actual cost of these anticipated medical services. *Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. Ct. 1997).[1]

Similarly, a plaintiff in Connecticut may receive a damages award for future medical expenses. In *Marchetti v. Ramirez*, the Supreme Court of Connecticut determined that a jury's determination of future medical expenses must be based upon an estimate of reasonable probabilities, not possibilities. *Marchetti v. Ramirez*, 688 A.2d 1325 (Conn. 1997). The Court also stated that because future medical expenses do not require the same degree of certainty as past medical expenses, it is not speculation or conjecture to calculate future medical expenses based upon history of medical expenses that accrue up until trial. *Id*. Further, testimony by a medical expert that plaintiff *might* need future treatment, coupled with a

[1] New Jersey follows this rule. In *Hardy v. Sparta Township High School*, the Court declined to award future medical expenses because there was no "competent evidence of anticipated future medical expenses." *Hardy v. Sparta Tp. High School*, 2015 WL 10853708, at *6 (N.J. Super. Ct. App. Div. 2015).

plaintiff's assertion that he or she is still experiencing pain, is insufficient to permit a jury to award future medical expenses. *Id*.[2]

3. Punitive Damages

Punitive damages are meant to punish a Defendant for particularly egregious conduct. They are the most difficult damages to obtain as the burden the Plaintiff must meet to receive punitive damages is very high. Each state handles punitive damages differently; some states even cap the amount of punitive damages which can be awarded. If successfully obtained, punitive damages often exceed the amount of compensatory or general damages awarded. However, large punitive awards are frequently appealed by the Defendant resulting in a reduction of the punitive damages by the higher appellate court.

In Pennsylvania, punitive damages do not need to bear a reasonable relationship to compensatory damages. In *Kirkbride v. Lisbon Contractors, Inc.*, the Pennsylvania Supreme Court held that if no cause of action exists, then no independent action exists for a claim of punitive damages because punitive damages are only an element of damages. *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97 (Pa. 1989). Further, the Court held that punitive damages do not have to bear a reasonable relationship to compensatory damages awarded in each case. *Id*. However, the Court did place a discretionary limit on the amount of punitive damages that may be awarded. The Court held that if punitive damages become so disproportionate when compared to the act, nature, and extent of harm and wealth of the defendant that it shocks the Court's sense of justice, then the Court has discretion to remit damages to a more reasonable amount. *Id*. at 104.

New York handles punitive damages slightly differently. New York courts evaluate the reasonableness of punitive damages as they relate to the injury. The New York Supreme Court stated in *Guariglia v. Price Chopper Operating Co. Inc*. that in evaluating the reasonableness of a punitive damages award, the Court must consider: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Guariglia v. Price Chopper Operating Co. Inc.*, 830 N.Y.S.2d 871 (N.Y. App. Div. 2007). The Court noted that the purpose of awarding punitive damages goes beyond simply punishing the perpetrator for the morally culpable act committed, holding that punitive damages may be awarded when a defendant is grossly negligent, wanton, or reckless, but they also serve to deter repetition or such acts. *Id*.

Similarly, New Jersey Courts tend to consider all relevant factors and circumstances in the award of punitive damages. In *Herman v. Sunshine Chemical Specialties, Inc.*, the Supreme Court of New Jersey stated that consideration of all relevant circumstances, including the nature of the defendant's misconduct and harm to the plaintiff, is essential in determining the appropriate amount of punitive damages. *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329 (N.J. 1993). The Court also held that in addition to bearing a reasonable relationship to an actual injury, the amount of punitive damages should account for the plaintiff's litigation expenses, the punishment the defendant may incur from other sources, the defendant's financial condition, and the effect of its condition on judgment for the plaintiff.

[2] New York courts refuse to award future medical expenses when they are entirely speculative. *See Mohamed v. New York City Transit Authority*, 915 N.Y.S.2d 599 (N.Y. App. Div. 2011) (holding that a jury's award for future medical expenses was clearly speculative and not supported by evidence when an expert testified that the plaintiff would "likely" need medical treatment in an amount much lower than the amount awarded by the jury).

Id. The Court stated further the defendant's wealth is always a factor to consider when awarding punitive damages because the defendant must be punished but not devastated. *Id*. The Court also stated that punitive damages may be subject to appellate review for reasonableness.

Connecticut places a limit on the amount of punitive damages that a plaintiff may recover. In *Berry v. Loiseau*, the Connecticut Supreme Court held that an award of punitive damages may not exceed the plaintiff's expenses of litigation, less his taxable costs. *Berry v. Loiseau*, 223 Conn. 786, (Conn. 1992). The Court held that litigation expenses for purposes of punitive damages may include not only reasonable attorney's fees, but also any other nontaxable disbursements reasonably necessary to bringing an action. Id. Further, the Court determined that Courts should consider any evidence that the plaintiff submits regarding nontaxable costs incurred in bringing an action. *Id*.

Calculating Future Damages

Future damages may be awarded when there exists a reasonable apprehension of a loss or injury in the future due to a negligent or intentionally wrongful act or omissions by a defendant. When such a reasonable apprehension exists, there is a satisfactory basis for future damages. In the personal injury context, some damages are easier to calculate than others. For example, if you are injured while driving a car, most of the damages you will seek are compensatory in nature, that is, the damages will serve to cover costs incurred from the injuries suffered. These damages are easy to measure as they will relate directly to the costs for medical treatment and vehicle repair. However, calculating future damages often involves more complicated algorithms that can be utilized, often through an expert witness.

Forensic economics is the application of standard methods of economic analysis, finance, and accounting in order to estimate damages in litigation. The most important function of the economist is to assist the trier-of-fact in the task of deciding on a damages amount, should they find liability. An important distinction is that this is "forensic economics" versus "academic economics" or "corporate finance." This distinction is important because forensic economics is really economics according to the rules of law, whereas academic economics is more the study of theory and corporate finance is more attuned to financial decision-making for a business entity. In forensic economics, any time theory and law are in conflict in an economic analysis, law must prevail.

How Different Reduction to Present Value Methodologies Consideration of Taxes, and the Low Interest Rate Environment Can Impact the Calculation of Future Damages

There are drastic differences in value from jurisdiction to jurisdiction. There are many reasons for these differences. This presentation will focus on one area in particular – the different results produced by the different methods used to quantify future damages. In order to elucidate these differences, I will apply these methods to a hypothetical stream of damages:

What is the **Present Value** of $100,000 a year for 30 years?

The seminal case establishing a defendant's right to have future damages discounted to present value and instructs concerning the determination of an appropriate discount rate is the US Supreme Court

decision in *Chesapeake & O. Ry. Co. v. Kelly, 241 U.S. 485* (1916). The high court, in holding that future damages should be reduced to present value, also held that the interest rate that should be used to discount future damages is the rate available in "**the best and safest investments**, **and those which require the least care ….".**

Most economists have interpreted this instruction to mean that they should use the rate available in US Treasury bonds as the discount rate. Application of the methodology enunciated in *Chesapeake* results in a PV of $1,960,000 assuming a 3% 30-year treasury bond rate. If the rate is 2% the present value increases to $2,240,000. If a 5% rate prevails the present value drops to $1,537,000.

The methodology prescribed in *Chesapeake* reigned supreme for 60 plus years. Today it is virtually defunct, although a methodological facsimile is being applied to Medicare Set-Aside computations. The missing *ingredient* in both methods (*Chesapeake* and MSA) is the consideration of *inflation*.

During the 1970s and early 1980s this country experienced rampant inflation in some years reaching double digits. Economists responded with new methods seeking to incorporate consideration of inflation into the present value formula. In 1983 (67 years after *Chesapeake*) the Supreme Court rendered its decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983). *Pfeifer* represents the single most scholarly legal analysis of future damage "reduction to present value" issues. The US Supreme Court embarked on an exhaustive analysis that included cases from across our nation, scholarly works, and methods employed in other countries in its quest to review various methodologies that had evolved in an attempt to factor inflation into the "reduction to present value" formula. *Pfeifer* has been called a Rosetta Stone and has over 3000 citations shown in Westlaw.

The *Pfeifer* Court examined the various method that had cropped up and the underlying theories which can be viewed as essentially two or three methodologies;

- Method 1. This method uses historical documented CPI inflation rates for the various elements of future damages to *project future values* for those elements of future damages. Then each future value stream is discounted to present value using **current** rates of return available in safe secure investments. The Pfeifer Court frowned upon use of this method noting that "specific forecasts of future price inflation remain too unreliable to be useful …." and further opining that "the average accident trial should not be converted into a graduate seminar on economic forecasting". However, the court did not rule out the possible use of this methodology.

- Method 2 - This method rejects method 1) because it relies on "proving" future inflation rates which is too speculative. This theory holds that there is a *relationship* between interest rates and inflation – and this "real interest rate" (or net difference between inflation and interest rates) can be used as the discount rate. Hence the nomenclature "net-discount method" or "real-interest rate" method. The *Pfeifer* court stated …." we do not believe a trial court adopting such an approach …… should be reversed if it adopts a rate between one and three percent and explains its choice".

- Method 3 - Straight wash or total offset method. This is really a "net-discount rate" method with the "net" being zero. It does **not allow** for evidence of inflation to be introduced into evidence in the form of **future value numbers**. With respect to this methodology the *Pfeifer* court stated; "Although such an approach has the virtue of simplicity and may even be economically precise,

we cannot at this time agree with the Court of Appeals for the Third Circuit that its use is mandatory in the federal courts.

The frowned upon method is the one most widely used by economists. According to a study reported in the Journal of Forensic Economics (JFE) almost 66% of economists use Method 1; with 31% using (Method 2 or 3). a net discount rate (on average about 1%) and 20% used a rate of 0% *or less*.

Calculations and Effect of Low Interest Rates

Method 3 - The present value of $100,000 for 30 years using is $3,000,000. This calculation is not affected by current rates (interest or inflation). It produces a constant present value. It also obliterates any distinction between immediate and deferred damages.

Method 2 - The present value of $100,000 a year for 30 years using a net-discount rate of 1% is $2,581,000.; using a net-discount rate of 2% is $2,224,000.; using a net-discount rate of 3% is $1,960,000. The current low interest rate environment has caused many economists to lower their net rate.

Method 1 – assuming a 4% growth rate and a 3% discount rate the present value is $3,479,000. Assuming a 2% discount rate the present value is $4,056,800. This method (measuring current interest rates against historical inflation rates) is producing a **negative discount rate**.

There is another methodology that we must consider. The *Pfeifer* Court noted "The award could in theory take the form of periodic payments …." and shortly thereafter numerous states enacted Tort-reform statutes, many of which included periodic payment of future damages statutes? While many of the statutes are simply discretionary post-verdict mechanisms that allow a court (with or without urging from one or both parties) to structure awards for future damages, some of the statutes were clearly intended to supplant the existing common law treatment of future damages. The virtually identical New York sister statutes of CPLR Article 50A (applying to medical malpractice cases and enacted in 1985) and CPLR Article 50B (applying to all other personal injury cases and property damage and enacted in 1986) were clearly intended to act as a new method for adjudicating future damages. From a defense vantage point, these statutes worked beautifully. The jury would itemize damages on a flat projection basis (e.g. $100,000 a year for 30 years equals $3 million over 30 years). The statutes contained a 4% built in additur to compensate for inflation. Verdicts would be reduced to present value and then (almost always) reduced further by the cost of the annuities required to fund the periodic payment judgment. Since bond rates were in excess of 8% and annuity rates in excess of 9% - future damages were being effectively reduced by a net-discount rate of 4% to 5%. Our hypothetical stream of damages might have had a present value of $1,537,000. "back in the day" with a cost under $1.4 million. With respect to certain elements of damages, the defendant might also realize a further discount related to rated age price adjustments (impaired life expectancy cases).

Unfortunately, these statutes were misinterpreted. Failing to recognize that the 4% additur was intended to be compensation for inflation, the courts allowed evidence of inflation to be presented to the jury. This issue (in one form or another) reached the NY Court of Appeals on four separate occasions; *Rohring v. City of Niagara Falls,* 84 N.Y.2d 60 [Ct of App - 1994]; *Schultz v Harrison Radiator Div. General Motors Corp.,* 90 N.Y.2d 311 [Ct of App - 1997]; *Bryant v N.Y. City Health & Hosp. Corp.* (93 N.Y.2d 592 [1999] *Desiderio v Ochs_(100 N.Y.2d 159, Court of Appeals 4/8/2003).* One only need read the *Desiderio* decision to get the full history of statutory misinterpretation. As Justice Read aptly states in her concurring

(but really dissenting) opinion that "*Schultz,* read in conjunction with *Bryant,* created a **double counting for inflation** in the annuity not called for by the structured judgment statutes' language. This double-counting is fundamentally at odds with the statutory purpose and predictably produces **absurd results** in cases (such as this one) where substantial non-earnings or earnings losses are payable by an annuity over many years or decades".

Within months of the *Desiderio* decision, the NY Legislature acted to repeal CPLR Article 50A and enacted a new 50A statute. The most notable difference is that the "double counting of inflation problem" is eliminated. The new Article 50A falls with the Method 1 category except that the jury should not be presented with future value projections. The Legislature never bothered to amend 50B and the double counting problem persists for non-medical malpractice cases.

Comparative Analysis – Pennsylvania, New Jersey and New York

Pennsylvania is a Method 3 state for *non-medical malpractice* cases (*see Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 21 A.L.R.4th 1 (1980)). Productivity can be added (not inflation) and only for wages, not future medical expenses? $100,000 a year for 30 years equals $3 million for future medical expenses. $100,000 a year for 30 years with a 2% productivity factor equals $4,056,000 for lost earnings. **Subtraction of taxes** is not allowed [*Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co.*, 410 Pa. 530, 190 A.2d 293 (1963) and *Gradel v. Inouye*, 491 Pa. 534, 421 A.2d 674 (1980)]. You cannot use the cost of an annuity as a measure of present value.

For Medical Malpractice cases PA 509(b) of the M-Care statute was enacted in 2002. That statute appears to supplant *Bolubasz* and require that future damages be reduced to present value with consideration of inflation. Future medical expenses are to be periodically paid. I am not aware of cases interpreting this statute.

New Jersey is a Method 2 state. New Jersey does not allow future value numbers projected using inflation rates to be presented to a jury. In fact, NJ does not allow an economist to present aggregate numbers to the jury. The plaintiff's experts may, however, "provide the jury with their analyses of trends of future wage increases and discount interest rates generally," and the jurors can "use those trends and rates in arriving at their own independent single-figure appraisal of plaintiff's pecuniary loss. *Green v. General Motors Corporation* 709 A.2d 205; *Tenore v. Nu Car Carriers, Inc.,* 67 *N.J.* 466, 341 *A.*2d 613 (1975),

NJ subscribes to a net-discount methodology and in fact has rejected the total offset method as not reflecting reality. We can argue for a net-discount rate of more than 2% since NJ will allow an economist or other expert to apply a "prudent investor" standard. As this court noted in *Friedman v. C & S Car Serv.,* 211 *N.J.Super.* 657, 670-73, 512 *A.*2d 560 (App.Div.1986), *rev'd,* 108 *N.J.* 72, 527 *A.*2d 871 (1987), **the total offset method does not reflect reality**. Lost earnings awards should be discounted on an **after-tax basis** *Caldwell v. Haynes,* 136 *N.J.* 422, 436-40, 643 *A.*2d 564 (1994); *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976)

Cost of annuity may be admissible: The Supreme Court in *Pellicer v. St. Barbabas Hospital* 974 A.2d 1070 (2009) criticized the lower court for various ruling including "the limits imposed on defendants, but not plaintiffs, *relating to their use of experts and proofs, in particular, the court's exclusion of proffered expert evidence about the* ***cost of an annuity that would fully fund the life care plan*****;** …."

Using a net-discount rate of 2%, the present value of $100,000 a year for 30 years for lost earnings is $2,240,000. Subtracting 25% for tax yields $1,680,000. For a future medical expense claim, using a net-discount rate of 1% produces a present value of $2,580,000.

New York: Articles 50A and 50B were intended to be a Method 2 (net-discount rate) approach wherein the 4% built in additur for inflation would be offset by the current market rate available. With the US Treasury Bond 30-year bond rate at 2%, the effect would be a negative discount rate of 2% and a present value of $4,000,000. With double counting of inflation (assuming a $5,600,000 verdict based on a 4% inflation factor) the present value would be **$7,310,578**.

Taxes are **not** to be considered on non-medical malpractice cases; *Johnson v. Manhattan & Bronx Surface Transit Operating Authority*, 71 N.Y.2d 198, 524 N.Y.S.2d 415, 519 N.E.2d 326 (1988); *Lanzano v. City of New York*, 71 N.Y.2d 208, 524 N.Y.S.2d 420, 519 N.E.2d 331 (1988).

The new (replacement) Article 50A enacted in 2003 and can be categorized as a Method 1 approach. The jury is presented with evidence of inflation but **should not** be presented with a *future value number*. Instead the jury is asked to make its future damages awards in annual amounts with a growth factor and a period (and a start date). This approach can produce a negative discount rate for certain items. The present value today **$3,223,000**. If this is a lost earnings claim, taxes are subtracted pursuant to CPLR 4546. A 25% subtraction for taxes would further reduce the award to $2,417,000. Subtraction of taxes does not impact the discount rate since the discount rate is determined in accordance with statutory instructions in the new 50A.

The Good, the Bad & the Ugly: How Jurors Translate Views on Liability into Damages

As jury consultants, one of the most commonly asked questions we get is "How do jurors make decisions on damages in civil matters?" Having watched mock juror groups deliberate on hundreds of cases, there is a pattern or loose structure to jurors' decisions on damages. While this article is based on personal observations, there is also support in the literature for much of these conclusions. See for example, Reyna, V. F., Hans, V. P., Corbin, J.C., Yeh, R., Lin, K., & Royer, C. (2015). The gist of juries: Testing a model of damage award decision making. *Psychology, Public Policy, and Law,* 21, 280-294 and Hans, V.P., Helms, R. K., Reyna, V. F., (2018) From Meaning to Money: Translating Injury into Dollars, *Law and Human Behavior,* Vol. 42, No. 2, 95-109.

As many in the litigation world already know, jurors' decisions on damages are tied directly to their views on liability. This means jurors need to first decide who should win the case. Once a juror has decided who should win, they then categorize the conduct of the various parties as bad, somewhat bad or not that bad. Finally, they translate their decision on liability and the categorization of the conduct into monetary awards.

Conduct that is bad obviously translates into high jury awards, conduct somewhat bad translates into medium size awards and conduct that is not that bad translates into low dollar awards. Each juror's view on what constitutes a high, medium or low dollar award varies by the individual. What a million dollars means to one juror may mean something completely different to another juror. The frame of reference for how much to award is often set by their views on liability. If they view the plaintiff as deserving of money, they most likely will start by deciding whether the amount of money the plaintiff is asking for coincides with their decision regarding whether the plaintiff deserves a lot of money, some money or not that much money. Because the plaintiff gets to go first, they have the benefit of setting the

first reference point. If, however, the jurors view the plaintiff as being less deserving, they may look for other numbers to use as their starting point. This is where low dollar anchors may be effectively utilized for defendants to change the starting point for damage assessment. Briefly, low dollar anchors are monetary values which have some connection to the case that can be used to provide the jurors with an alternate starting point from which to value the case. The cost of current medical care is one of the most common low dollar defense anchors used in this context.

It should be noted that, although it has been laid out as a somewhat stepwise approach, jurors' decisions do not necessarily proceed in a straight-line fashion and the assessment on liability goes on simultaneously with the assessment of the egregiousness of the conduct. This includes evaluating and categorizing the conduct not only of the defendants, but also that of the plaintiffs as well as potentially any third parties or witnesses that may be involved. Furthermore, individual decisions regarding damages changes when faced with group dynamics.

For now, the process jurors use to determine damages can be summarized as 1) Decide who should win the case; 2) Evaluate the conduct of the parties involved; and 3) Translate the conduct into high, medium or low dollar awards. This is the basis for a more complex discussion on how these steps interact with one another, how they may change in a group dynamic situation and how jurors' preconceived biases affect their overall perception of the case.

Conclusion

Calculating damages can often be a complicated process, especially when future damages must be part of the calculation. Interest rates and the current labor market could potentially have a big impact on the damages calculation for an employee who was forced to miss work to heal from an injury. Generally, a plaintiff seeking a specific amount in damages must prove those damages by using documents such as tax returns and payroll documents. Claims professionals and defense attorneys may attempt to counter a plaintiff's damages amount by offering a low anchor amount to drive the damages award down. However, claims professionals and defense attorneys must always assess whether in each situation the counter may be an admission or concession of liability.