Plaintiffs' attorneys try to squeeze every last drop of "Damages" juice at trial…

Fighting the Squeeze

By J. Thaddeus Eckenrode and Dwight A. Vermette

Attempting to maximize economic damages at every turn is simply another "work-around" that plaintiffs' attorneys use to make litigating cases subject to caps more financially attractive to pursue.

Several years ago, as one plaintiff's attorney was wrapping up his evidence in a medical malpractice case against us, we were surprised that he did not attempt to offer into evidence the medical bills relevant to the treatment that the plaintiff had received. Those expenses, which were unquestionably legitimate and caused by the medical condition that our client allegedly failed to diagnose, totaled about $50,000. After the trial concluded, we asked the attorney why he had not submitted those expenses, and he simply stated that he felt that his case was all about the noneconomic losses suffered by his client, meaning the impact of losing his sight on his hobbies, lifestyle, and ability to enjoy life, among other things. In essence, he expected those types of damages would have a worth of over $1 million, and he didn't want to "diminish" the value of his case with the medical bills. How times have changed.

Caps Increase Plaintiffs' Attorneys' Interest in Economic Damages

Although most plaintiffs' attorneys routinely seek both economic and noneconomic damages during medical malpractice trials, in the seven or eight years since the trial described above, we've seen more and more plaintiffs' attorneys go to unusual lengths to bolster and prove high medical expenses and other "out-of-pocket" damages, working feverishly to squeeze every drop of compensable "economic" losses that they can from juries. We attribute this change in our area to our state's (Missouri) enactment in 2005 of a "hard" cap of $350,000 on "noneconomic" damages—a limit that applies in each malpractice case to a collective group of plaintiffs if a case involves more than one, no matter how many defendants there are, how serious the injury or loss suffered, nor how egregious the care or negligence, if an injury or loss doesn't otherwise support a punitive damages award. Mo. Rev. Stat. §538.210. Due to "tort reform" efforts around the country, more than half of the states currently have a cap on at least "noneconomic" damages in medical negligence cases. Compiling an accurate list of those states remains a somewhat temporary achievement, how-

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ever, in that the list is in flux constantly as individual states face ongoing challenges to their caps on constitutional grounds, and state legislatures revisit these issues to overhaul the laws on their own or because of court rulings that have whittled down the caps that legislators initially enacted. Quite frankly, the status of a state's individual cap or lack of one may change with each election and the new faces elected or appointed to any of its three branches of government. [Note: Since the original draft of this article was prepared, the Missouri Supreme Court declared its state's noneconomic cap referenced above to be unconstitutional in *Watts v. Lester E. Cox Medical Centers, et al.*, on July 31, 2012, effectively ending six years of certainty about noneconomic case value.]

What caps offer defendants, of course, is significant protection against runaway verdicts. But they also encourage plaintiffs' attorneys to go to seemingly extraordinary lengths to bolster the damages claims that they *can* make to maximize potential verdicts that may favor their clients. Similar to most states that enacted caps, our state saw a noticeable decrease in the number of medical malpractice lawsuits filed in the years after enactment of the new cap as plaintiffs' attorneys across the state claimed that taking on a case with a possible maximum value of $350,000 was generally not worth the effort, given that it often cost more than $100,000 just to bring a malpractice case to a trial. Those who have chosen to take on cases of any sort, however, have also started looking for every nickel that they could identify as an "economic" loss for which they could seek recovery unimpeded by the cap, pursuing past medical expenses, past wage loss, future diminution of earning capacity, and future medical expenses, among other things. From those basic categories, plaintiffs' attorneys, using liberal economic experts and creative "life-care planners," have created classifications and subsets of economic damages so exhaustive and broad that even the plaintiffs themselves seem astounded during trials to learn how much they've apparently lost.

As young lawyers years ago we constantly heard the general mantra that suggested that the value of a personal injury case was "three times the specials," with "specials," of course, meaning special damages or incurred economic losses of any kind, such as medical expenses, property replacement cost, lost wages, future lost wages, and expenses. In fact, Internet postings by plaintiffs' attorneys seem to indicate that this old rule of thumb still holds as a starting point for case value discussions. If you simply "Google" the phrase "three times the specials," you will see this yourself. On the one hand, this suggests why in the trial described at the beginning of this article the plaintiff's attorney thought that introducing evidence of only $50,000 in medical expenses might "diminish" his plaintiff's case's value in the eyes of the jury. On the other hand, someone can quickly see that, if faced with a maximum noneconomic judgment of $250,000 to $500,000, depending on the applicable state "cap," a plaintiff's attorney will want to introduce as much evidence of "economic" damages as possible. One reason is to convince a jury to award as much in noneconomic or general damages as possible, assuming that the jury also has heard of the "three times the specials" concept, to perhaps obtain a verdict large enough to warrant revisiting the issue of that state's cap on an appeal. More likely, however, an attorney simply wishes to enhance a capped general damages award with as many otherwise provable economic losses as possible because states commonly do not cap economic damages. Notably some states with caps apply them to the total damages awarded and do not differentiate between economic and noneconomic losses. *See* Ind. Code Ann. §34-18-14-3 (currently limiting total damages to $1.25 million); Va. Code Ann. §8.01-35 (increasing the previous total limits of $2 million to $2.05 million on July 1, 2012).

"Billed Versus Paid" Medical Expenses

One growing economic damages battleground relates to the amount of medical expenses billed versus those actually paid. As any trial practitioner knows, a health-care provider often sends a bill to a patient that is often astronomically higher than the amount that provider was actually paid by a health insurer. Hospital bills, for example, are routinely "adjusted" significantly, sometimes as much as 75–80 percent because a hospital has contracted with various health insurers and, of course, Medicare, to honor contractual rates. That means that although a plaintiff may have a *bill* from a hospital for $250,000, the plaintiff's health insurer may have only paid the hospital $50,000 for the care rendered, plus a nominal out-of-pocket deductible amount that the plaintiff paid. Defense attorneys have argued consistently for years that allowing a plaintiff to seek the full amount of such a bill as part of his or her "loss" in this scenario results in a huge windfall to the plaintiff. The counterargument made by plaintiffs' attorneys is that allowing evidence of the amount that an insurer paid violates the "collateral source" rule.

For obvious reasons, plaintiffs' attorneys have fought vigorously to keep the amount "billed" as the measure of damages because, depending on the extent of the medical care rendered, those figures can potentially make a difference of hundreds of thousands of dollars in a judgment. For cases involving a noneconomic damages cap, this is important since medical bills often will make up the largest component of the limitless economic damages. Currently, the approach taken by differing jurisdictions on "billed versus paid" medical expenses appears, as with caps, to vary greatly from state to state and remains in evolution. Some states continue to bar all evidence of the portion of a bill paid by an insurer or of any "adjustment" and allow only evidence of the amount billed. *Brannon v. Shelter Mutual Insurance Co.*, 520 So. 2d 984 (La. App. 3rd Cir. 1987). Some states limit the evidence to only the portion of the medical expenses that were actually paid or remain owed to a health-care provider. *Mills v. Fletcher*, 229 S.W.2d 765 (Tex. App. 2007) (also holding that the portion of a bill that was "adjusted" did not constitute expenses "incurred" by the plaintiff). However, with most state legislatures and many courts now acknowledging the inherent injustice of allowing a plaintiff to seek an award of damages for expenses that he or she has never truly incurred, the hybrid solution of allowing a jury to decide the "reasonable value" of medical services has evolved: a court may admit both the amount billed and the amount paid into evidence, and the jurors hear the evidence of both figures, and potentially other evi-

dence of reasonableness, and they award whatever they think fair. *See*, *e.g.*, *Deck v. Teasley*, 322 S.W.3d 356 (Mo. banc 2010). However, these diverse "reasonable value" methodologies, which require varying degrees of proof before a court will authorize submitting them to a jury, depending on your jurisdiction, have undergone ongoing attack as well. The most recent judicial ruling on the "billed versus paid" issue that we uncovered as of this writing came from Colorado this past April. That state's supreme court, in several rulings in different cases, specifically prohibited a defendant from introducing evidence of the amounts *paid* by an insurer for medical services, rationalizing that the collateral source rule forbade it. However, the court's rulings continue to allow a defendant to introduce other evidence of the "reasonable value" of medical services. *Sunahara v. State Farm Mutual Automobile Ins. Co.*, 2012 WL 1492843 (Colo. 2012); *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 WL 1492845 (Colo. 2012); *Smith v. Jeppsen*, 2012 WL 1493568 (Colo. 2012). This means that in Colorado and other states that follow similar rulings although a court will not admit the amount that a health-care provider was actually *paid* into evidence, a defense attorney can, in theory, still try to establish that the "reasonable value" of medical services is less than the amount of the bill for the services. However, if a defense attorney cannot show how much a health-care provider actually accepted as payment, can he or she make a plausible argument that the amount billed should not be the measure of damages? How much success will he or she have trying to cross-examine a plaintiff's treating physicians on the "value" of their services? And how many physicians will answer cross-examination questions in ways that seem to discount the value of the professional care that they provide? Does evidence that a health-care provider accepts less than the billed amount, or allows an "adjustment," even without referencing the actual amount in question, constitute a violation of a state's collateral source rule? Ultimately, will a jury become distracted, if not simply feel dumbfounded or offended if a defense attorney attempts to contest an issue that may appear completely collateral (excuse the pun)—how much the jury should award for medical damages—when the jurors have the actual *bill* right in front of them?

Thoroughly deposing the plaintiff's supervisor may reveal that the plaintiff's belief that he or she would have received some of these additional benefits is only wishful thinking and without basis in fact.

In this situation you should still strongly oppose any attempt to limit past medical expense evidence to the "billed" amount, plan to offer contradictory evidence of value and have it ready, and make a strong record for an appeal because courts' positions on this issue tend to change frequently. But for now this is a battle that defense attorneys frequently lose when plaintiffs' attorneys fight to squeeze every dollar of damages from juries.

Lost Wages

Similar to medical expenses, damages for lost wages are generally easy to calculate since the amount that an injured plaintiff would have made at a job that he or she had at the time of some alleged negligence usually involves reviewing routine documentation such as personnel file materials, wage records, attendance reports, and W-2s. Once again, however, plaintiffs' attorneys try to bolster these figures with additional calculations for valuating vacation and sick leave also allegedly lost, fringe benefits not received, promotional opportunities unreached, and raises and bonuses not earned since an injury. You have a strategic opportunity if you challenge these loss areas. You probably can't diminish the evidence of wages that a plaintiff would have received between the date of an injury and a trial, assuming that the plaintiff's employer testifies that it would probably have continued to employ the plaintiff if he or she hadn't become injured. If, however, you can adduce some evidence demonstrating uncertainty about the likelihood of promotions, raises, or bonuses, then a jury might not only award a few dollars less in damages, but a jury might view a plaintiff as overreaching, and if the jury begins to question a plaintiff's honesty in general, perhaps that will help undermine his or her credibility to help you on other case issues. If a plaintiff has testified in a deposition or responded to interrogatories by suggesting that his or her past wage loss constitutes more than just "salary," thoroughly deposing the plaintiff's supervisor may reveal that the plaintiff's belief that he or she would have received some of these additional benefits is only wishful thinking and without basis in fact.

Future Damages

While the types of "past" economic damages mentioned earlier certainly are ripe for inflation beyond true loss, you have to accept that a plaintiff theoretically would have at least some documentation to support those damages—wage records or a medical bill, for instance. However, the plaintiff's bar seems to have adopted the concept of "creative" future damages, which it has found increasingly useful. We put "diminution of earnings capacity" and "life-care plans" in this damages category. Each may represent admittedly, *potentially* a legitimate loss. At their very core, however, they often use assumptions and unknown variables as their purported foundation rather than substantial supporting evidence, and a defense challenge should use these assumptions and unknown variables as a challenge starting point.

Future Wage Loss (Diminution of Earning Capacity)

When an injured plaintiff loses time from work, as noted above, that usually is provable and easily calculable. However, when that same plaintiff claims that for the next 30 years he or she will be unable to make the same wage, or worse yet, argues that he or she planned to move on, through education or other opportunities, to become a successful "fill in the vocational blank" with a lifetime of even higher wages and

benefits, you should undertake a vigorous but professional attack on those dreams. First, you should question the likelihood that a plaintiff would have kept his or her current job, or would have become eligible for the promotions and raises that he or she claims would have come his or her way. Thoroughly examining a plaintiff's personnel file for *every* job that he or she has had may highlight information that bears on the plaintiff's ability to keep, if not grow in, his or her current position and place of employment. You must evaluate the actual future viability of a plaintiff's employer. Will that company still exist in five years in the current economic climate? Will that company still have same number of jobs available? What has been the history of both that employer and that industry? While deposing a plaintiff's supervisor on past wage loss is important, as noted above, examining individuals higher in the management chain will explore how many employees with job evaluations and experience comparable to the plaintiff actually move up the ladder, how many promotional opportunities actually may exist, the likelihood of this plaintiff working his or her way up the ranks, and both the company's and this employee's ultimate longevity.

Needless to say, if a plaintiff claims that he or she someday planned to move to greener pastures in some other business, industry, or professional field, that claim only magnifies the guesswork inherent in his or her claim and presents an opportunity to demonstrate that the plaintiff attempted to dupe the jury. You must strongly challenge the verifiability of this claim that the plaintiff intended to pursue these plans. You can't simply rely on a jury to agree with your argument that a plaintiff can't prove that he or she had lofty but thwarted dreams because without contradictory evidence, or at least showing that the plaintiff didn't actually pursue these goals, the jury may very well give him or her the benefit of the doubt. Many injured plaintiffs will claim that they planned to obtain new degrees or training that would have allowed them greater opportunities. You must explore this fully in depositions, examining what steps, if any, the plaintiff actually has taken to that point, what currently has prevented the plaintiff from pursuing those "plans," how long it would take to carry them out and the investment necessary to succeed, and the opportunities available to someone in that industry.

Finally, depending on the exact nature of a plaintiff's injury, is it reasonable to believe that this plaintiff is completely unemployable? Although a plaintiff's attorney will argue that it is demeaning for a professional person to take a job as a department store cashier, if a plaintiff can hold a job of any type, you should explore the options in an attempt to mitigate the otherwise huge claimed future earnings loss. One useful publication is the *Dictionary of Occupational Titles with O*NET Definitions* (6th Edition), which comprehensively lists literally every vocation, trade, job, or profession in existence and helps demonstrate how little an allegedly unemployable plaintiff truly has done to investigate his or her actual options.

To illustrate loss, plaintiffs' attorneys usually will call an economic expert to project not only the simple loss of wages for the next 30 years of unemployment, but all of the other less obvious losses as well. These include projections of the income that a plaintiff would have made in the alleged field of new opportunities that the plaintiff planned to pursue. While George H. W. Bush may have coined the term "voodoo economics," plaintiff economic experts clearly put that concept into play. Using various tables on the growth of wages and benefits, studies on the educational and location variables about job availability, and "data" on the likelihood of advancement and professional growth, these economists will come up with figures that far exceed those calculated by simply multiplying a plaintiff's last salary times the 30 years he or she supposedly won't work. However, these same economists are actually quite adept at honestly admitting that *they* are not predicting actual loss but simply projecting or estimating potential numbers that will come to pass only *if* various assumptions hold true. For instance, to arrive at these numbers the economist probably assumed one or more of the following: a plaintiff's employer would stay in business, the plaintiff would succeed sufficiently in his or her current position to qualify for certain promotions, those promotional positions actually would become available, he or she would take a job in his or her claimed new field, inflation would stay at X percent, or wages would grow at Y percent. Although an economist will quickly acknowledge that he or she personally cannot make those predictions, you must go through all the assumptions that he or she has made and get him or her to concede that each one may not actually occur, and that if they do not, it will negatively impact his or her projections or even make them inaccurate. The more times that an economist admits that something is an "assumption," and something that might not ever occur, the closer the house of cards may come to at least partial collapse. Likewise, when addressing future damages during a closing argument, you should focus on the many "assumptions" that purportedly supported a plaintiff's claim, equating assumptions with wishful thinking.

Other "Economic" Loss (Value of Services Provided)

Another way that plaintiff's attorneys increasingly use "economic" expert testimony is to assign a value to the services provided by an injured plaintiff to his or her family. Nobody who has ever been a stay-at-home parent or taken care of the general needs of a household would ever suggest that those services don't have value. In light of the limitations placed on noneconomic damages by caps, however, plaintiffs' attorneys are more likely than ever to ask their economic expert to assign a *monetary* value to these services so that they can submit them as part of the consortium of a plaintiff's economic loss and avoid losing the amount to a damages cap. Economic experts have used various studies or economic literature to support these projections, including *The Dollar Value of a Day*, by Expectancy Data: Economic Demographers. Since you must be cautious about attacking these alleged loss components for fear of alienating a jury that *will* agree that they have some value, you must make a strategic decision about whether or not it is better to allow the jury to consider these figures as evidence and simply concede that the defense doesn't quarrel with them, demonstrating that you won't fight about every little penny. On the other hand, if you feel that an opponent has presented a damages claim through these figures, you must resist. You should try

challenging the underlying foundation of the economist's projections by raising the issue of alternative literature to plant the seed with the jury that not all experts agree with the figures used by the plaintiff's economist. Likewise, you can also suggest that someone's contribution to household needs slowly diminishes over time with the departure of children from the nest and the tendency of older people to move into smaller housing requiring less effort to maintain, for example.

Attacking a life-care plan must be done with caution because questioning can become a dual-edged sword.

Future Medical Expense (Life-Care Plan)

Perhaps no elements of economic damages that courts routinely admit into evidence are as rank with speculation and conjecture as the projections made by "life-care" planners, usually nurses with a "certificate." Often with little more documentation than a plaintiff's medical records and liberally interpreting some physician's note about the plaintiff's prognosis and treatment plan, this "expert" will make artistic use of spreadsheets and tables to itemize the surgical needs, physician and psychiatric visits, medical supplies, medications, home improvements, ambulation and movement modalities, special diets, and more that the plaintiff will need and project costs for these items on a per annum or lifetime basis. Likewise, in an attempt to appear reasonable, a life-care planning expert frequently will claim to have researched both the cheapest and most expensive options available for each item, assigning a "low" cost projection and a "high" cost projection for future care needs. Needless to say, plaintiffs' attorneys are thrilled to have a jury even "split the difference" in these future care-need ranges, which generally mean a significant seven to eight figure verdict. However, even the "low" end figures ultimately amount to millions of dollars over the assumed life expectancy of a plaintiff, which is what makes it worth your while to take painstaking care to try to demonstrate a life-care plan's inaccuracy and lack of true merit.

Most plaintiffs' attorneys prove "life expectancy" by simply reading the U.S. Bureau of Labor life tables to a jury, which can seem unimpeachable. However, a 50-year-old man with congestive heart failure, a 30-year smoking history, COPD, hypertension, and diabetes does *not* have the same life expectancy as the "average" male on these life tables. When the difference is significant, and the extended life expectancy will lead to substantial multiplication of the future damages that a plaintiff claims, it may be worthwhile for you to call an actual expert witness on life expectancy to explain to a jury in simple terms why, due to a plaintiff's multiple preexisting or other health conditions, the life tables don't really apply to this plaintiff.

In general, we are not advocates of endorsing and offering expert testimony at trial from either a defense economist or defense life care planner, except in those cases where the defense almost concedes that a plaintiff's verdict is likely, and the main goal is to limit a runaway damage verdict. Otherwise, the simple act of calling an economist or a life-care planner for your side *may* convey exactly that message to the jury: we cannot defend our client so we just want to try to reduce damages. We recognize that this is a strategic decision that you must wrestle with on a case-by-case basis.

On the other hand, we do recommend that a defense team at least retain a "consulting" economist and life-care planner to assist in evaluating a plaintiff's expert's projections in these areas when your jurisdiction's procedural rules protect you and your client so that your opponent cannot discover a consulting expert's identity. Regarding a life-care plan, a good consulting defense expert can assist in formulating your cross-examination of a plaintiff's expert during a trial, to help you avoid stepping in any traps regarding certain plan items and to help you attack those items on the plaintiff life-care plan that are a complete stretch.

Life-care planners seem to fall into one of two categories: those whose plans limit the total number of actual items that they list and focus instead on "big ticket" items, and those who itemize future needs down to the number of sanitary wipes that a plaintiff will use per year. The typical items listed in either type of life-care plan include

- Office visits with various physicians
- Surgical and hospital care
- Specialized transportation (vans, wheelchair lifts, hand operative devices)
- Home modifications
- Adjustable bed
- Wheelchairs, crutches, walkers, canes
- Medications
- Lifts for shower, bath, bed, stairs
- Attendant care by RNs, LPNs or aides.
- Therapy (OT, PT, RT)

Besides these obvious care needs that you can expect to see itemized, the "other" group of life-care planners seem to believe that they can convey a sense of thoroughness by articulating items down to the minutia. We recently received a life-care plan that included hundreds of future care need items, including

- Replacement cane tips
- Electrode patches for a TENS unit
- Ergonomic long-handled sponge
- Long-handled shoehorn
- Number of jars of Vaseline needed annually
- Adaptive jar/bottle opener
- Sanitary wipes
- Washable bed pads
- Exercise equipment
- Gym membership
- Stationary bike

Although these items at least make some medical sense, that same life-care plan went on to list various items that, in theory, have nothing to do with the medical needs of that plaintiff.

- Automobile oil changes
- CD player
- Audio books (two per month)
- Hair dryer stand
- Lightweight folding chair
- Automobile tire rotation
- Cell phone charger
- Wheelchair tote bag
- Walker pouch
- Elevated garden cart
- Snow removal
- Lawn maintenance
- Replacement tennis balls for walker

In reviewing all of these items, you can't

help but think that someone has attempted to "pad" the damages. Tennis balls… really? Needless to say, we could argue that whether or not this plaintiff was injured, the plaintiff's vehicle would still need oil changes and tire rotations; the plaintiff would still need a cell phone charger; the plaintiff probably already has a CD player; a hair dryer stand is unnecessary; a stationary bike, gym membership, and weight set are redundant; and a gardening cart is a luxury that isn't a mandatory care item. And, are audio books a "need"? The response from this life-care planner to our feigned shock at this lengthy list of items, however, and the one that you can expect to hear from every plaintiff's life-care planner, is that a life-care planner's job is to try to consider all of the day-to-day items that a plaintiff *might* need, to anticipate all of the things that a plaintiff simply can no longer do him- or herself, things that the plaintiff desperately wishes that he or she could do, and to consider how to allow the plaintiff to live as normally but as safely as possible, anticipating all potential scenarios of concern.

Although it is frequently a stretch, jurors do seem to accept the notion that certain things that an injured plaintiff can no longer do for him- or herself, even if he or she rarely did them before, have some value. Ultimately, when faced with a seemingly absurd projection—maybe 32 weeks of snow removal in a climate that sees an average of three snowstorms per year—carefully questioning a life-care planner on the actual research that he or she did to reach that projection is important. Although, as do the economic experts, life-care planners will ultimately make a statement such as, "if the jury doesn't agree with these projections then I presume they will award less," it is important to respond by politely pointing out that "*you* listed 32 weeks of snow removal, when you know this area averages only three snowstorms a year." The idea is to show a jury that a plaintiff's attorney has tried to inflate the damages. You might just plant the seed of doubt in the jurors' minds about the credibility of the rest of a life-care plan.

The big ticket items in a life-care plan, as noted above, often include home "modifications," special automobiles or vans, large assistive devices such as hospital beds or electric wheelchairs, and nursing or nurse-aid home care. You must evaluate each of these items carefully, the extent to which far cheaper alternatives are available, including state services, if *that* inquiry does not violate your state's collateral source rule, and the true need for each. For example, some life-care plans will list 24-hour-per-day nursing or attendant care, which seems extremely excessive when a plaintiff may sleep up to 8 hours of that time. A life-care planner generally will explain that away by noting that a plaintiff "might" have difficulties at night and need help that wouldn't be available without attendant care. Needless to say, a plaintiff with family members at home should not need round-the-clock professional care when family members are home to address those potential middle of the night hypothetical problems as long as those members aren't elderly, frail, and unable to take on some care duties for some legitimate reason.

When challenging a plaintiff's life-care plan, instead of asking the life-care planner to explain why the plaintiff needs a particular item, it is sometimes better to question the plaintiff's own treating physicians about whether certain items are truly necessary to a plaintiff's care. Getting a plaintiff's own doctor or doctors in effect to question the legitimacy of items in a life-care plan may be more persuasive to a jury and lead jurors to question the overall merit of the balance of the projections. However, although a treating physician may be willing to state that a plaintiff doesn't truly "need" some things," he or she ultimately will agree when questioned by a plaintiff's attorney that he or she would never refuse the injured plaintiff any of these listed items to create a safe and beneficial environment.

Attacking a life-care plan must be done with caution because questioning can become a dual-edged sword. On the one hand, a jury may find tennis balls and a CD player unnecessary, which may lead jurors to develop skepticism about the balance of a plan. Depending on your venue and jury pool, jurors may appreciate or even be entertained by your methodical evaluation of items from the sublime to the ridiculous. However, some jurors may find a detailed line-by-line attack on a life-care plan tedious, and ultimately, a plaintiff's attorney likely will argue that if nit-picking over small dollar items is all that the defense attorney can do, that nit-picking must inherently establish that the large dollar items are legitimate, and they probably account for over 90 percent of the total life-care plan value. The counterargument, of course, is that if trials are truly about "compensation," then as much as all of the listed items may improve a plaintiff's life, just as they would improve the life of *anyone* who has these things, only those items that meet a true "need" can qualify as compensatory. This is especially helpful if a plaintiff's attorney has used that word, "compensation," in his or her opening statement to explain why the plaintiff has sued the defendant.

Since a life-care plan likely will account for the largest portion of the economic damages that a plaintiff will have the ability to list, it is critical to pick apart its legitimacy, accuracy, and honesty. However, no matter how you approach it, in trying to illustrate that a life-care planner has inflated a life-care plan, even if you can justifiably do it because it includes inappropriate items, you must still approach a cross-examination of the life-care planner carefully so that you do not fall into the trap of appearing uncaring about an injured plaintiff's true needs.

Conclusion

Even though you already face enough challenges on the issues of liability and causation in medical negligence cases, you may still need to focus on the various ways that a plaintiff's attorney has attempted to milk every bit of "pure dollar" damages from a jury, which will only increase those other challenges. Caps on damages do prevent runaway verdicts, but through constitutional attacks, legislative lobbying, and political public relations campaigns, the plaintiffs' bar continues to chip away at damages reforms. Attempting to maximize economic damages at every turn is simply another "work-around" that plaintiffs' attorneys use to try to make litigating cases subject to caps more financially attractive to pursue. All trial practitioners know that attacking a plaintiff's evidence without alienating a jury is important in the trial dance. Despite an inherent desire to scream "poppycock!" at each creative new element of economic damages presented to a jury, you must keep your ultimate strategy and goals in mind. FD