EAGLE™
INTERNATIONAL ASSOCIATES

Presents

THE MADNESS CONTINUES
And Other Growing Litigation Concerns

March 22, 2023

The Notary Hotel
Philadelphia, Pennsylvania

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

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PROGRAM

11:30 am **Registration (Light Lunch)**

12:30 pm **Welcoming Remarks**
Alison M. Crane, Esq., Bledsoe Diestel Treppa & Crane LLP, Eagle Chair

Program Introduction
Gerald J. Valentini, Esq., Deasey Mahoney & Valentini, Ltd., Program Chair

12:40 pm **The Rising Threat of Nuclear Verdicts – How Do Juries Get There?**

Moderators:
Yelena Graves, Esq., Strongin Rothman & Abrams
Daniel J. Ripper, Esq., Luther-Anderson PLLP

Panelists:
Hon. Daniel J. Anders, Supervising Judge, Civil Trial Division, Court of Common Pleas, Philadelphia Co., PA
Jane North, Esq., Chief Claims Counsel, Philadelphia Insurance Company
Ross Suter, Esq., Senior Vice President of Litigation Solutions and Associate General Counsel, Magna Legal Services

1:40 pm **Litigation Funding – Are We Allowed to Know About That?**

Moderators:
Paul M. Finamore, Esq., Pessin Katz Law, P.A.
B. Lyle Robinson, Esq., Taylor Wellons Politz Duhe

Panelists:
Maxwell H. Brusky, Director, Claims Management, Bulkmatic LLC
Steven Velardi, J.D., Assistant Vice President, Claims Manager, WR Berkley
Jennifer Wojciechowski, Vice President Operations, Alliant Insurance Services – CAU Underwriters of America, Inc.

2:40 pm **BREAK**

3:00 pm **The Plaintiff's Perspective on Litigating in a Post-Covid World**

Moderators:
David V. Hayes, Esq., Bendin Sumrall & Ladner, LLC
Kambon R. Williams, Esq., Pessin Katz Law, P.A.

Panelists:
Larry Bendesky, Esq., Saltz Mongeluzzi & Bendesky
Lee Gutschenritter, Esq., Finch McCranie, LLP

4:00 pm **What You Need to Know About Reptile Theory and How It May Impact Your Cases**

Moderators:
Leanna B. Ruotanen, Esq., Deasey Mahoney & Valentini, Ltd.
Debra S. Stafford, Esq., Hudgins Law Firm

Panelists:
Billy Smith, Executive Vice President, Claims and Risk Management, NBIS
Ross Suter, Esq., Senior Vice President of Litigation Solutions and Associate General Counsel, Magna Legal Services

5:00pm **Closing Remarks**

Cocktail Reception

6:00 pm **Dinner**

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And Other Growing Litigation Concerns

PRESENTERS

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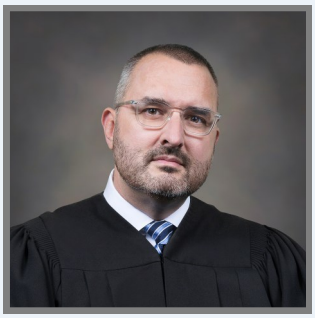

Daniel J. Anders has served as a Judge on the Court of Common Pleas of Philadelphia since 2007. He was nominated by Governor Edward Rendell and unanimously confirmed by the Pennsylvania State Senate in 2007. On November 3, 2009, Judge Anders was elected to a full ten-year term. On November 5, 2019, Judge Anders was retained for a second ten-year term.

Judge Anders currently serves as the Supervising Judge of the Civil Division where he leads 30 trial judges who are assigned to the Civil Division. He previously served as a Judicial Team Leader for the 2019 Major Jury Program, where he was responsible for the case management and disposition of nearly 8000 major jury cases from initiation of the civil action all the way through trial and post-trial motions. Judge Anders previously served in the Criminal Division, where he conducted hundreds of jury and bench trials on major felony cases including attempted murder and rape cases. He started his judicial service in the Family Court Division, where he heard cases involving thousands of at-risk children who were abused or neglected.

Judge Anders has extensive criminal and civil trial experience including presiding over 150 jury trials to verdict. He has successfully conducted hundreds of settlement conferences that resulted in an amicable resolution of the parties' claims. More recently, Judge Anders has obtained substantial case management through his service as a judicial team leader for the major jury program and also court administrative experience as the Supervising Judge of the Civil Division. As Supervising Judge, he is responsible for the following programs: Major jury; Mass Torts; Arbitration Center; Arbitration Appeal; Motions Court (statutory appeals and injunctions); Mortgage Foreclosure; Discovery Court; and the Dispute Resolution Center.

Prior to his judicial service, Judge Anders practiced at Pepper Hamilton LLP (now Troutman Pepper), where he represented clients in business-to-business litigation to help resolve disputes in a fair and equitable manner. As an attorney, his outstanding legal and community work won him high praise from his peers in the legal and business communities, including being named as a "Lawyer on the Fast Track" by the Philadelphia Legal Intelligencer and one of the Philadelphia Business Journal's "Forty Under 40."

Judge Anders graduated cum laude from the University of Pittsburgh's law school and served as an editor of the school's Law Review. He received his undergraduate degree in political science from Lehigh University. . He is the first openly LGBTQ person nominated by a Governor and confirmed by the State Senate as a judge in Pennsylvania, and the first openly gay man to run for public office in the City of Philadelphia.

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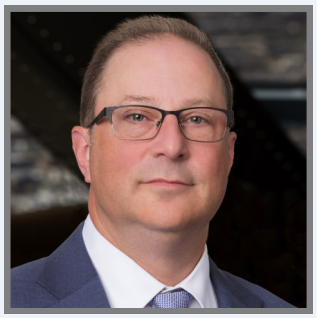

Larry Bendesky is the Managing Shareholder of Saltz Mongeluzzi & Bendesky. He has handled more than 200 catastrophic injury and accident cases resulting in verdicts or settlements that have exceeded $1 million, and numerous cases over $10 million, including a $101 million settlement for the collapse of the Tropicana Hotel's parking garage in Atlantic City. The Tropicana case was the largest settlement of a construction case in U.S. history.

Larry's cases have focused primarily on construction accidents and product liability claims, but his experience spans a wide range of incidents, including building collapses, elevator and escalator failures, industrial equipment design defects, power tool defects, roadway design cases, motor vehicle accidents, and consumer product defects. Catastrophic accident cases are complicated, involve tens of thousands of documents, and dozens of fact and expert witnesses. Over his 30-year legal career, Larry has brought his relentless, detail-oriented approach to his cases and has made a significant difference in the lives of thousands of clients.

He has been named a Pennsylvania Superlawyer every year it has been awarded and has been named a Top 100 Philadelphia and Pennsylvania Superlawyer for the past 5 consecutive years. He has been listed among the Best Lawyers in America each of the past 10 years. Larry has lectured more than 100 times, teaching other lawyers about cross-examination, evidence, depositions, construction law and product liability. After graduating as an outstanding lawyer in his Masters in Trial Advocacy (LL.M.) class, Larry has become an Adjunct Professor in the LL.M. Program, and has been the Director of its Experts and Depositions Program.

Larry has always been drawn to the struggle individuals face when they do battle with big companies and their large law firms. Larry not only fights for his injured clients, but also feels an obligation to help those who cannot afford a lawyer for their legal problems, as he is active on the Board of Directors of Philadelphia Community Legal Services and Philadelphia Legal Assistance.

Larry's leadership is not limited to SMB and legal aid. He served as President of the Philadelphia Trial Lawyers' Association from 2017-2018, and has been on its Board of Governors since 2008. He is also on the Board of Governors of the state trial lawyers' association, PAJ, and is on the Board of Directors of the national trial lawyers' association, AAJ, as Pennsylvania's Delegate. He is on the Board of Directors of the Committee of 70 and was the President of the Temple American Inn of Court, a group of prominent lawyers and judges. Larry served at the request of the Pennsylvania Supreme Court as a member of its Appellate Rules Committee from 2008 – 2014. Larry has also been a leader in his community, serving as a coach, Commissioner and President of Lower Merion Little League.

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Maxwell (Max) Brusky is currently Director, Claims Management for Bulkmatic, LLC, the largest dedicated dry bulk goods carrier in the U.S. Based in Griffith, IN, Bulkmatic, LLC operates in 20 states from the upper Midwest to eastern Pennsylvania and New Jersey and south to Texas, Alabama, Georgia, the Carolinas, and Florida. In this role, Max is responsible for managing the variety of claims exposures to company and the implementation of its insurance and risk management programs.

Prior to joining Bulkmatic, Max was an Assistant Branch Manager of Gallagher Bassett Specialty's Transportation Practice Major Case Unit, since its establishment in 2020. Prior to joining GB, he was the Director, Claims Management for Hub Group and Hub Group Trucking for nearly 5 years. Prior to that, Max operated a solo litigation practice specializing in defense, subrogation, and coverage for nearly 8 years, and was an associate with 2 Chicago defense firms, and began his legal career with the Chicago Transit Authority. Originally from Racine, Wisconsin, he is a 1995 graduate of the University of Wisconsin-Madison, and a 2000 J.D. graduate from the DePaul University College of Law.

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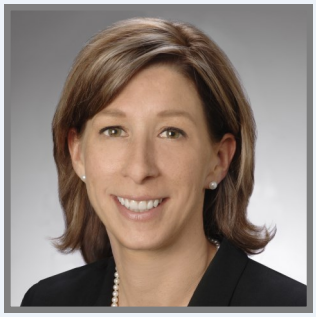

Alison M. Crane is a partner with Bledsoe, Diestel, Treppa & Crane, LLP in San Francisco, California. Her practice focuses on complex personal injury, wrongful death and business litigation, including products liability, industrial and construction accidents, unfair competition, and employment litigation. Alison graduated from Villanova University in 1995 and received her J.D. from Boston University School of Law in 1998. She is a member of the Judicial Nominations Evaluation Commission for the State Bar of California and serves as Chair of the Queen's Bench Mentorship Committee. She is also active in the American Inns of Court which promotes legal excellence, civility, professionalism, and ethics and the Association of Defense Counsel for Northern California and Nevada. Alison is the current Chair of Eagle International Associates.

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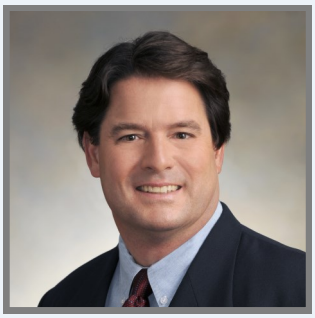

Paul M. Finamore is a member of the Maryland firm, Pessin Katz Law, P.A. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30 years. His experience includes litigation of general and professional liability matters, including first and third party claims, as well as employment law.

Mr. Finamore has been recognized in Best Lawyers in America in the areas of Insurance Law as well as in Litigation – Insurance. He has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has also been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is also a member of the Federation of Defense and Corporate Counsel.

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Yelena Graves is a partner at Strongin Rothman and Abrams. She represents large and small clients ranging from local entrepreneurs to global manufacturers and service providers. She brings a growing wealth of experience to her litigation, arbitration and transactional practice, in which she focuses on avoiding legal risks in advance, where possible, and achieving the best possible outcomes when claims and disputes do arise. Yelena especially enjoys helping clients in preventing costly disputes through careful contract negotiation and drafting. When disputes arise, she helps resolve them through negotiation, mediation, arbitration or litigation. In doing so, she strives to partner with clients in exploring new ways of achieving the most efficient and cost-effective results, whether by leveraging technology or simply understanding client objectives. Her practice includes product liability, general liability and business matters as well as appellate advocacy.

Yelena grew up and received her undergraduate education in Ukraine. Soon after immigrating to the U.S., she obtained her law degree from Touro Law Center, where she focused her studies on international commercial law and dispute resolution. After graduation, she worked as a visiting scholar at the United Nations Commission on International Trade Law ("UNCITRAL"). She now brings her multicultural perspective and knowledge of international commercial law and dispute resolution to her work with U.S.-based and international clients.

Yelena is a member of the American Bar Association, Section of International Law (International Arbitration Committee, International Litigation Committee, Russia/Eurasia Committee, International Secured Transactions & Insolvency Committee) and Business Law Section.

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Lee Gutschenritter is a trial lawyer dedicated to the representation of individuals who have suffered serious injuries and death due to the negligence of others. Lee has recovered millions of dollars on behalf of his clients; in the past four years alone, he has recovered in excess of $32 million in verdicts and settlements. Every year since 2016, Lee has been selected as an Atlanta Magazine Super Lawyers' "Rising Star," an award reserved for the top 2.5% of attorneys in Georgia. He has also been named in America's Top 100 Personal Injury Attorneys®. Lee was recently featured on the front page of the Daily Report after obtaining a $6 million jury verdict in a wrongful death lawsuit.

Lee primarily handles cases in the areas of medical malpractice, tractor-trailer accidents, premises liability, and wrongful death cases. He has represented clients in cases throughout Georgia and has successfully litigated over one hundred cases in both state and federal courts. Lee limits his practice to handling a small number of cases at a time. This approach allows him to develop meaningful relationships with his clients and to invest substantial time and resources into every one of his cases.

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David V. Hayes is a partner at Bendin, Sumrall & Ladner, LLC, in Atlanta. David represents and advises insurers, medical professionals, product manufacturers, businesses and governmental entities in state and federal courts across the Southeast. David is licensed to practice law in Alabama and Georgia. David's practice is widespread from premises liability to products liability to professional liability. He received his undergraduate degree from Samford University, in Birmingham, Alabama, and graduated from the Cumberland School of Law at Samford University.

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Jane North is the Chief Claims Counsel for Philadelphia Insurance Company. She previously served as the company's Senior Vice President- Claims from 2014-2022. Jane is responsible for managing all litigated claims nationwide as well as assisting the Chief Claims Officer in all aspects of supervising a claims team of over 400 individuals. Jane maintains the Company's panel of outside counsel and manages the Company's legal spend. She also provides advice and guidance to the other departments within the Company. Prior to joining Philadelphia Insurance Company, Jane was a trial attorney with the law firm of Deasey, Mahoney, Valentini and North in Philadelphia for nearly 25 years. She became the first female equity partner of her former law firm of which she was a name partner and served as its managing partner for several years. Jane graduated from King's College magna cum laude with dual degrees in Theology and Political Science and the Villanova University School of Law. She currently is a Board Member of the Villanova Law Women's Network and is on the Advisory Board for Cityteam Chester. She is also very active in several non-profits which serve neuro-diverse individuals and those with developmental disabilities.

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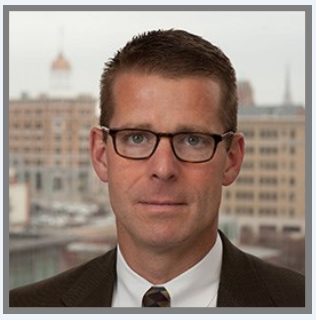

Daniel J. Ripper is a partner in the law firm of Luther-Anderson, PLLP in Chattanooga, Tennessee and has been in practice since 1992. He is licensed in all state and federal courts in both Tennessee and Georgia, as well as the Sixth and Eleventh Circuit Courts of Appeal and the United States Supreme Court. Dan received his BA from the University of Notre Dame in 1989 and his JD from the University of Tennessee in 1992. Since that time, he has represented corporations and other businesses as well as individuals in a variety of civil and criminal cases. His practice primarily focuses on the defense of insureds in auto, product and legal malpractice matters along with the frequently associated coverage disputes. He also represents professionals before licensing and disciplinary boards and individuals in significant criminal matters. He has extensive trial experience, both jury and non-jury. He is a member of the Tennessee Bar Association, the Georgia State Bar and the American Bar Association.

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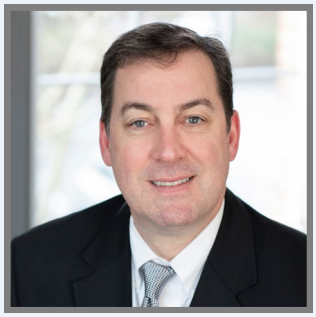

Lyle Robinson is a partner with Taylor Wellons Politz Duhe in Madison, Mississippi. He received a Bachelor of Business Administration in Risk Management and Insurance from the University of Georgia in 1992. He received his Juris Doctor magna cum laude from Mississippi College School of Law in 2000. While in law school, he served as the Managing Editor of the Law Review. In addition, Lyle received AmJur Awards in Insurance Law and Secured Transactions, and was awarded an academic scholarship. He is an experienced litigator who specializes in matters that involve complex commercial and tort litigation, insurance coverage disputes, bad faith claims and products liability. Lyle is admitted to practice in all state and federal courts in the state of Mississippi, as well as the United States Courts of Appeals for the Fifth and Eleventh Circuits.

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Leanna Ruotanen is a partner with Deasey, Mahoney & Valentini in Philadelphia. She currently defends clients in a broad range of general liability claims including premises liability, products liability, professional liability and construction defects. However, she specializes in the defense of catastrophic construction accidents involving cranes, power cranes and other aerial lift devices. In 2018, she received a certification as a mobile crane operator from the Crane Institute of America which allows her to provide an invaluable level of understanding and nuance in the defense of these cases.

In addition to her litigation practice, Leanna regularly serves as an arbitrator with the Philadelphia Court of Common Pleas Compulsory Arbitration Program adjudicating myriad civil disputes. She advises clients on a variety of issues and regularly lectures to clients of the firm in various practice areas.

Prior to working in insurance defense, Leanna worked as an Associate attorney with Andrew, Merritt, Reilly & Smith, LLP, a metro Atlanta firm, and served as counsel for the County Administrator for Gwinnett County, representing more than 200 estates and conservatorships. She guided clients through all aspects of the administration process and litigated on behalf of individuals and estates on a range of probate related claims from breach of fiduciary duty to undue influence.

Leanna graduated cum laude from the University of Georgia with a dual Bachelor of Arts in International Affairs and Political Science. Thereafter, she attended Georgia State College of Law where she worked as a student attorney and a graduate assistant in the Phillip C. Cook Low-Income Taxpayer Clinic. During her tenure, she settled over $200,000.00 in individual tax debt for low-income candidates and received the Senator Paul D. Coverdell Award for outstanding service.

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Billy Smith brings an impressive list of career accomplishments to the NBIS organization. Joining the company as Executive Vice President of NBIS Claims & Risk Management in 2006, Billy has played an important part in developing the company's growing suite of services and products.

In his role as Executive Vice President, Billy manages the relationship NBIS has with a number of industry associations and oversees various sales and marketing, claims, risk management, loss prevention, safety awareness, and accident investigation tasks.

Billy was one of the primary innovators of the NBIS Risk Management Support System (RMSS), and he and his recognized team of experts have helped establish NBIS's reputation as an industry leader.

With nearly three decades of experience in the Crane, Rigging, and Construction sectors, Billy has operated cranes, designed safety programs, and held the esteemed position of Safety and Health Specialist with the Directorate of Construction for the U.S. Department of Labor/OSHA, where he guided and assisted all departments and field offices on crane and construction policies, procedures, and safe working practices.

Billy is a well-known figurehead and thought leader who has been published many times over in magazines such as American Cranes and Transport, International Cranes and Specialized Transport, Crane Works, and Lifting and Transportation. He has also been acknowledged in the book, "Crane and Derricks," and is a widely sought-after public speaker.

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Debra Schneider Stafford is a partner at Hudgins Law Firm, P.C., a litigation, business, and insurance practice in Alexandria, Virginia. Ms. Stafford is licensed in state and federal courts in Virginia and Washington, D.C. She earned her B.A. cum laude in Classics & Political Science from Randolph-Macon College in 1994 and was inducted into Phi Beta Kappa. During college, she studied archaeology and classics in Rome, Italy for four months. Deb earned her J.D. in 1998 from the University of Richmond, where she was also a member, web editor, and note author for the Richmond Public Interest Law Review. During law school, Deb served as a summer law clerk/intern at the U.S. House of Representatives and at the U.S. Department of Justice. After graduation, she became a staff attorney for the prosecutor training affiliate of the National District Attorneys Association. Deb joined Hudgins Law Firm as an associate in 1999 and became a partner in 2006. Over the years, she has successfully represented many businesses, individuals, and insureds. Her current practice focuses on defending professional and general liability matters, and advising individuals and businesses on transactional matters. Deb is a member of CLM and is rated AV-Preeminent by Martindale. She lives in Fairfax County with her two children. Deb volunteers as a leader for her daughter's Girl Scout troop, and as a member of the events committee for her neighborhood which is a unique adaptive reuse of the former D.C. prison site.

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Ross Suter is the Senior Vice President of Litigation Solutions and the Associate General Counsel of Magna Legal Services. Mr. Suter is a resident of the firm's Philadelphia and New York offices. After practicing as a litigator in Philadelphia, Pennsylvania for several years, he turned his attention to litigation consulting services where he has been involved in the development of graphics and trial presentation strategies in hundreds of cases. His work includes partnering with members of the trial team to develop themes and case strategies that persuade juries, judges and arbitration panels.

Mr. Suter has personally tried and consulted on cases in a wide variety of practice areas from intellectual property to commercial litigation to mass tort matters. He has experience working with AMLAW 200 firms, as well as, small litigation and boutique law firms in small exposure to bet the company matters. This experience has provided him with a unique insight into how jurors and judges process information.
He is a frequent lecturer of Continuing Legal Education seminars at law firms, law schools and legal associations on the use of litigation strategy, graphics, and trial presentation solutions to maximize results in adversarial proceedings. Mr. Suter is a frequent contributor of articles involving litigation consulting issues. Further, over the course of the last several years he has developed an expertise in the use of social media and its impact on jury selection and monitoring.

Mr. Suter received his Juris Doctorate from Widener University School of Law, a Master of Science from Villanova University and a Bachelor of Arts from McDaniel College. He is a member of the Pennsylvania and New Jersey State Bars.

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"Jerry" Valentini is a shareholder and board member of Deasey Mahoney & Valentini, LTD, located in Philadelphia, PA. He received his BA from the University of Delaware in 1984, and received his JD in 1987 from Whittier Law School in Los Angeles, CA. Jerry is a current, active member in several defense industry organizations, including the Federation of Defense and Corporate Counsel ("FDCC"), Defense Research Institute ("DRI"), and the Professional Liability Underwriters Society ("PLUS"). Jerry is also a member and past-President of the Philadelphia Association of Defense Counsel.

Jerry has successfully tried and defended clients of the firm in a variety of cases throughout the state and federal courts of Pennsylvania and New Jersey, including professional liability, products liability, premises liability, construction accident cases, construction defect cases, liquor liability ("Dram Shop") cases, and many others. Jerry has also litigated insurance coverage disputes, and frequently advices clients of the firm on matters involving insurance coverage and extra-contractual (i.e., "bad faith") exposure.

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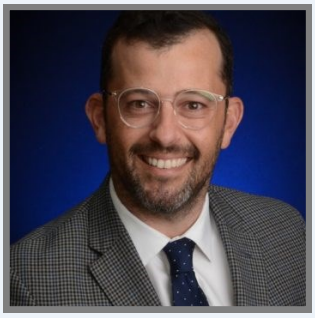

Steven Velardi is the AVP Claims Manager for Berkley LifeSciences and Berkley Technology Underwriters. Steven handles complex products and life sciences claims concerning non-admitted policies while also overseeing all GL, Auto and Property on admitted policies. Steven is licensed to practice law in Connecticut. Prior to joining WR Berkley in 2021, Steven worked at The Hartford, Navigators Insurance, AIG and private practice with a focus on personal injury. He has been involved in all aspects of litigation from trial through appeals and takes pride in creative resolutions.

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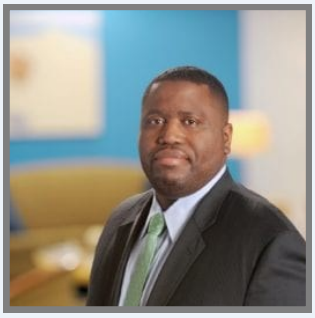

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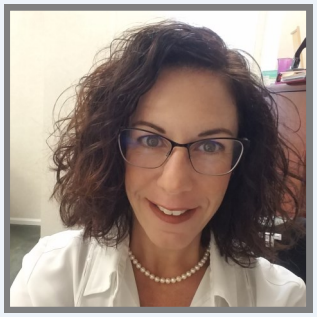

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THE RISING THREAT OF NUCLEAR VERDICTS

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The Rising Threat of Nuclear Verdicts

There has been a substantial rise in nuclear verdicts in the United States in recent years, and if you haven't been paying attention---you should be. The concept of nuclear verdicts has always been present to some degree, but in our current climate –socially, economically and politically—it seems as if the perfect storm has created an increased risk in your case becoming one of the dreaded verdict headlines. Though the issue has been studied by scholars and researched over the years by those like the Institute for Legal Reform,[1] those efforts have done little to quell the overall trend. This paper will discuss the basics of a nuclear verdict, some of the driving factors behind those verdicts, whether we are living in the era of "the new norm", and how defense counsel can fight against those verdicts from discovery forward.

I. What is Considered a "Nuclear Verdict"

It is generally accepted that any verdict in excess of $10,000,000 is considered a "nuclear verdict," but with current economic inflation, social inflation, social justice issues, the "me too" movement, political divides, etc., we are seeing verdicts well in excess of that number. Below are a few examples.

- $102.5 million in California was awarded to two women who successfully sued the Union School District for failing to stop a middle school teacher who sexually exploited them when they were underage.

- $38.8 million verdict in a wrongful death case arising out of a child being killed by a garbage truck.

- $29.5 million verdict in in a Nevada case involving an EMT's negligent treatment in responding to a peanut allergy resulting in brain damage.

- $200 million verdict in Nevada arising out of a coverage claim that Plaintiff was improperly denied health insurance coverage for a specific type of lung cancer treatment and later died.

- $336 million in a Texas case against Fed Ex arising out of allegations of racial discrimination. Of that, $365 million were allocated as punitive damages.

- $177 million verdict in Missouri arising out of sexual assault claims against a security guard hired by a hotel who was found to have sexually assaulted a woman staying at the hotel.

- $56 million after a Minnesota man was burned by hot water while attempting to power wash a floor at work.

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[1] *See* Nuclear Verdicts Trends, Causes and Solutions, U.S. Chamber of Commerce Institute for Legal Reform, September 2022 by Cary Silverman and Christopher Appel, Shook, Hardy & Bacon L.L.P.

- $77 million award for a Georgia man who has suffering a psychotic episode after being discharged from a medical facility and was later struck by vehicles driving on the highway where Plaintiff ended up during his psychotic episode.

The above are only a smattering of cases across the country outlining verdicts well in excess of $10 million in the last five years. As you can appreciate, cases where we are seeing nuclear verdicts can run the gambit of fact patterns and legal claims including the most obvious (wrongful death) to employment cases. While each instance may have fact specific issues like: unlikeable defendant, overly sympathetic plaintiff or surviving family, bad venue, unfavorable pretrial rulings, etc., we cannot ignore that these verdicts arguably well exceed what defense lawyers have traditionally relied upon to evaluate cases. Considering recent reporting, it is imperative that defense lawyers and those in the insurance industry be mindful of the risks associated with high exposure and volatile facts.

II. So, What are the Driving Factors?

We all appreciate that every case is different, each has its own good and bad, but with that, can we appreciate what the driving factors can be behind these nuclear verdicts? It is a complex question that is currently being studied and reviewed not only by the Plaintiff and Defense bar, but also by those deeply affected within the insurance industry. So, what are some of the practical things those in the front lines as claims adjusters and as defense counsel should consider as the driving factors which can lead to a nuclear verdict?

The reptile theory is not new, but it seems as if it has gained more and more traction over recent history, especially post-covid. The reptile theory is a discovery and trial strategy that can be effectively implemented by plaintiff's counsel to relate to the primal, inherent and sometimes subconscious instincts and fears of jurors. They use those inherent humanistic emotions to implore jurors to artfully relate to their own need to protect against harm by awarding significant sums to "compensate" a victim of a wrongful act. It has been hugely successful in the past, and continues to be used successfully today. The pandemic has undoubtedly given more life to the concept where the entire world has spent the previous three years in some element of fear and self-preservation. Knowing, understanding, and defending against reptile theory arguments will be imperative in the diminishment of nuclear verdicts.

Punitive damages have also been a substantial factor in the rise of nuclear verdicts. Assessing and evaluating punitive damages has never been a simple task, however, in the current climate, punitive damages can (and have shown to) take on a life of their own. I doubt that plaintiff's attorneys have become more skilled at arguing for punitive damages, but what is clear from looking at jury verdicts across the country is that with the right facts, jurors have little hesitation to monetarily punish a defendant for its conduct as an attempt to curb future similar behaviors. Humanization of corporate defendants, preparing favorable witnesses, and even in some instances taking responsibility for some, if not all, of the liability can be significant factors in reducing punitive damage awards. A focused consideration should be given on these issues early in discovery in order to establish strong likeability, both to the Court in cases where motion practice is required to bring a punitive claim, and to plaintiff to counteract anticipated arguments and theories counsel may argue.

Venue and judicial appointments continue to be a significant factor in determining value of cases as well as the potential for a nuclear verdict. Defense counsel should be aware of "hellhole" venues and determine if the case warrants removal or seek to change venue. Likewise, consideration should be given to the judicial officer assigned to the case and an evaluation should be completed on that particular jurist's experience with the important issues involved (both in practice prior to becoming a judge and experience since appointment).

III. Are Nuclear Verdicts the "New Norm" or Still Considered Outliers?

How many of us have rhetorically (or actually) said to ourselves and others: *this case ten years ago had a value of $10-15k, why do we now accept that it has a value of $20-30k?* There are some concrete issues that have absolutely changed the value of cases, especially since the global COVID-19 pandemic, including the cost of health care, the overall cost of living, inflation generally and supply chain issues. Those hard numbers will be difficult to defend against, but what are some of the less concrete factors we should be aware of in evaluating cases?

We have all seen the advertisements from plaintiff's lawyers on their websites, social media and TV and radio ads boasting about any nuclear verdict they obtained. I would suggest it has gone farther than that and has bled directly into settlement discussions. How many times have we all heard from a plaintiff's lawyer (or saw on their website)… "well, I had a similar case and I just settled it for $X million." That becomes not only the threshold in their minds, but it becomes their next client's expectation as well. Becoming aggressive—especially in mediations—to determine the differences (factually, legally and impression-wise) in the nuclear case vs. the one you are defending is imperative in tamping down those expectations.

What does that mean for those within the insurance industry? Obviously nuclear verdicts have an impact on insurance pricing for clients, an impact on claim resolution and evaluations and whether the claim should settle pre-suit or move towards litigation. In cases where large damages are a consideration, it is important to get appropriate experts involved early on. Those experts can determine whether a liability and/or damages defense exists, and if so, what things need to be preserved to maintain those defenses and what other avenues/experts, etc. need to be implemented best defend the claim. Likewise, consideration of obtaining counsel to investigate or monitor the claim early on becomes exceedingly important. Hiring defense counsel with expertise in the subject matter of the litigation, experience with Plaintiff's counsel and knowledge of the venue/judge who will hear the case can provide guidance on the liability issues and can properly evaluate the exposure.

IV. So How Do We Fight Nuclear Verdicts?

We all know the saying, "the early bird gets the worm." While it may be cliché to use, it rings true for a reason. Defending against these massive verdicts needs to start in the claims handling process. Identifying those cases with sympathetic claimants, potential for large damages and those cases with potentially unlikeable defendants and/or corporate defendants. If you can identify the possibility of a case that could result in the theories directed towards nuclear potential, it is imperative that the right experts and defense counsel is retained early on in the

process to conduct the site investigation, interviews, data and document collection, etc. so that if the claim does go into litigation, the foundation has been set for a successful defense.

If the claim proceeds to litigation, timely responding to demands and setting expectations becomes critical to a case. Having defense counsel respond not only with a rejection of any demand, if appropriate, but also with a request for additional information along with a possible analysis of the defenses and theory of damages can help in setting expectations—if not for plaintiff's counsel, then for plaintiff. Think of it in a similar way to how a defense counsel would work to set expectations with a jury: should a number be introduced as to how the defense views damages, should evidentiary issues be raised early, issues with the foundation or admissibility of expert opinions can also help set the stage early on.

In those cases where the matter is proceeding towards trial, jury consultants and running mock trials can be critical in evaluating the defenses theories on both liability and damages, but also in evaluating exposure and whether the case should really be tried. Reputable jury consultant companies keep more up to date on all of these issues than your local defense lawyer can and they can become a critical component to avoiding potential nuclear verdicts.

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LITIGATION FUNDING

Are We Allowed to Know About That?

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(AND OTHER GROWING LITIGATION CONCERNS)

Litigation Funding – Are We Allowed to Know About That?

1. Types of Litigation Funding

Third-party litigation funding is an arrangement where an entity that is not a party to the lawsuit agrees to provide funding to a litigant or law firm in exchange for an interest in the potential recovery in a lawsuit. Typically, the funding is for the plaintiff. In some cases, the third-party funds are used for the medical treatment of plaintiffs. The funding is essentially a non-recourse loan to plaintiffs. Although this practice has been accepted around the world for many years, it has become prevalent in the United States in the last decade. There are three basic types of litigation funding in use in the United States.

a. Commercial litigation funding

Commercial litigation funding typically involves corporate plaintiffs and law firms, which use the funding for legal expenses or to supplement their general operating budgets. These types of arrangements usually involve a funder providing users with millions of dollars through single-case or portfolio financing agreements.

b. Consumer funding

Consumer funding is generally used to fund living expenses such as rent and medical bills while a plaintiff's litigation is ongoing. The funding normally is not used to finance the actual litigation itself. The use of litigation funding to pay legal costs may conflict with some states' laws prohibiting such conduct through champerty laws.[1] In most cases, consumer funding involves a single plaintiff in a single action. It is common for a plaintiff to be funded multiple times over the course of a single litigation. The most common types of cases used in litigation funding involve car accidents, slip and fall accidents, and medical malpractice.

The average funding amounts range between $1,000 and $10,000 for consumer litigation funding.[i] Some funders indicate they are willing to fund approximately 7% to 10% of the estimated value of a case.[ii] Funding investors have indicated they take a conservative approach as to the amounts they are willing to fund because clients may be deterred from accepting settlement offers due to the fact they then owe the funder exorbitant amounts. Consumer funders typically, prior to providing funds, evaluate whether the defendant's liability for the plaintiff's injuries has been established and whether the defendant has insurance to cover the plaintiff's injuries.

[1] Champerty laws prohibit agreements in which a person with no interest in a lawsuit finances the lawsuit with a view to sharing in the proceeds.

c. Medical Litigation Funding

Medical litigation funding is used for the medical treatment of a plaintiff. There are two primary types of medical litigation funding. In the first type of this particular funding, the funding entity loans money to a plaintiff for medical treatment. The treating physician (chosen by plaintiff's counsel) bills at a discounted self-pay rate or special litigation rate. The medical provider then sells the patient's account at inflated rates to a medical factoring company for less. However, the medical factoring company files a lien to recover the difference between what it paid and the inflated account total.

In the second type of medical litigation funding, the funder provides loans to medical providers for overhead expenses so the providers can treat patients on a volume basis. Providers, in turn, then work with lawyers who identify and refer patients to them. The providers create inflated medical bills by over-treating the patients and over-billing. Providers receive approximately 50-60% of the total billed charges. Providers then reimburse the litigation funder with a percentage of the surplus.

2. How are third-party litigation funds repaid?

In most cases, third-party litigation funding is non-recourse. That is, the funding entity is not entitled to repayment of the funds unless the plaintiff is successful. Plaintiffs and their attorneys see this contingency as a major benefit of third-party litigation funding. Funds are repaid to the litigation funder directly from the proceeds of settlement or jury awards. Most agreements call for the funder to be repaid first, before any other expenses are paid.

3. Problems associated with third-party litigation funding

a. Expensive

Because litigation funders assume a lot of risks with funding, the funders charge higher interest rates, which can range from 15-18% of the amount funded. There have even been cases reported with litigation funders charging in excess of 18%.[2] Because of these high interest charges, the fees associated with the financing may significantly reduce the amount a plaintiff ultimately recovers.

b. Settlement deterrence

Plaintiffs who have secured litigation funding may not be inclined to accept a fair settlement offer. In addition, plaintiffs may seek additional monetary damages to make up for the amount that has to be repaid to these funders. As such, this can be a significant obstacle to reaching a resolution.

[2] In some states, higher interest rates violate usury laws which are state-specific laws that set limits for interest rates. This must be addressed on a state-by-state basis.

c. Increase in defendant's litigation costs

Plaintiffs' access to litigation funding may encourage the filing of meritless lawsuits. In addition, plaintiffs' use of funding may cause defendants to file additional discovery motions to obtain access to the third-party litigation funding agreement, which could increase costs. Defendants may also face increased expenses and costs because cases may take longer to litigate if plaintiffs are less inclined to settle.

d. Outside control of plaintiff's case

Although most litigation funders take the position that they cannot control the plaintiffs' litigation, in some instances, these funders may provide input to plaintiffs or their counsel. In such a situation, a substantial risk exists that the attorney's professional judgment may be impaired.

4. Disclosure issues/requirements relating to litigation funding

Whether defendants are entitled to the disclosure of third-party litigation funding agreements and related documents is a hot topic throughout the country. Currently, there are no disclosure requirements in federal litigation. Whether defendants are allowed to obtain this information in state court depends on the actual state. In many cases where disclosure of third-party litigation funding agreements is required, the issue involves some type of medical litigation funding. Accordingly, much of the additional discovery related to litigation funding is through third-party subpoenas for documents and depositions of medical professionals.

a. Federal level – no disclosure requirements

There is no nationwide requirement to disclose litigation funding agreements to courts or opposing parties in federal litigation. There have been efforts by those in the industry to implement such a requirement. A proposal has been submitted to the advisory committee on civil rules to consider an amendment to require disclosure of third-party litigation funding agreements in any civil action filed in federal court. In 2019, there was a proposed revision to the Federal Rules of Civil Procedure Rule 26(a)(1)(A) to include a requirement that Initial Disclosures include disclosure of any third-party litigation funding arrangement in civil actions filed in federal court. Thus far, however, the committee has not taken any action in this regard. The committee, though, has stated that it would continue to monitor third-party litigation funding issues.

Federal legislation to require disclosure of third-party litigation funding agreements has been proposed due to concerns that the agreements could create conflicts of interest between plaintiffs and their attorneys and because disclosure could provide additional transparency. Opponents are concerned that defendants want access to third-party litigation funding agreements in order to gain a tactical advantage in courts namely that they would discover how much plaintiffs could spend on litigation.

Although no nationwide disclosure requirement exists at this time, federal courts may still obtain information about third-party litigation funding arrangements. For instance, judges can obtain information about third-party litigation funding when it may be relevant in a particular case. Some federal courts have also developed local rules for taking other steps to require litigants to disclose information regarding their third-party litigation funding arrangements.

In November 2018, the Northern District of California, through a standing order, began requiring parties in any class, collective, or representative actions to disclose to the court the identity of any person or entity funding the prosecution of any claim or counterclaim. U.S. District Court for the Northern District of California, Standing Order for all Judges of the Northern District of California on the Contents of the Joint Case Management System, § 19 (effective Nov. 1, 2018). Additionally, in June 2021, the District of New Jersey adopted a rule requiring litigants to have certain third-party litigation funding arrangements to file a statement that

(1) identifies the funder, including the name, address and, if a legal entity, its place of formation;

(2) states whether the funder's approval is needed for litigation or settlement decisions, and if so, the nature of the terms and conditions of that approval; and

(3) provides a brief description of the nature of the funder's financial interest. Parties may seek additional discovery of the terms of the agreement upon a showing of good cause that the funding entity has authority to make material litigation decisions or settlement decisions.

U.S. District Court for the District of New Jersey, Local Civ. Rule 7.1.1, Disclosure of Third-Party Litigation Funding.

b. <u>State level – State by State</u>

At the state level, at least two states have enacted laws requiring disclosure of third-party litigation funding agreements in civil litigation. In 2018, Wisconsin passed a law requiring a party in a civil action to disclose to the other party any agreement that provides a contingent right to compensation from the proceeds of the action. The statute states:

> Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

Wis. Stat. § 804.01(2).

One year later, in 2019, West Virginia amended a state consumer protection law to include a similar requirement for agreements with litigation funders. Similar to Wisconsin, in West Virginia, disclosure is required unless otherwise stipulated or ordered by the court.

Other states have considered, but not passed, proposed legislation to require disclosure of third-party litigation funding agreements. It is likely that more states will follow the lead of Wisconsin and West Virginia in enacting legislation addressing the disclosure of third-party litigation funding agreements.

c. Bases for allowing disclosure of third party litigation funding agreements

Proponents of the disclosure of third-party litigation funding agreements assert it may assist the trier of fact to determine bias, intent, and motivation of actions and testimony, specifically the testimony of medical professionals. In *Rangel v. Anderson*, 202 F.Supp.3d 1361 (S.D. Ga. 2016), the court addressed a treating physician's financial incentive to testify favorably on behalf of a plaintiff. It found that evidence of payment arrangement between the funder, physician, and plaintiff were admissible as evidence of the reasonableness of plaintiff's medical treatment and the value of the services rendered. *Id.* at 1374.

In *Stephens v. Castano*, 814 S.E.2d 434 (2018), the Georgia Court of Appeals overturned a $700,000 verdict due to the trial court's exclusion of evidence relating to a third-party funding agreement. The *Stephens* Court found that the evidence related to the third-party litigation funding went directly to bias, intent, and motive, as the treating physician's financial interest in the outcome of the case was "highly relevant" to the physician's credibility and potential bias. *Id.* at p. 440.

The logical takeaway from these cases is that the physician and the funding entity are incentivized to perform as many procedures as possible to increase the charges to a plaintiff. Another argument for the disclosure of third-party litigation agreements is that it allows defendants to have an understanding of the motivation behind a plaintiff's position in litigation.[iii] It should be noted, however, that many courts faced with these issues have not required the disclosure of third-party litigation agreements or the documents related thereto.

5. Discovery methods regarding litigation funding

As noted above, disclosure of third-party litigation funding agreements will depend on the state or federal court in which you are operating. Where disclosure is required, a creative approach to discovery is required. The discovery sought will most likely come from third parties through subpoenas. In most cases where disclosure is required and additional discovery is needed, medical litigation funding is at issue.

a. Seek documents from third parties

In medical litigation funding, medical providers may use marketing specialists or liaisons for communications with plaintiff's counsel. These communications may involve the marketing of a physician's services directly to plaintiffs' attorneys. In addition, there are often discrete ways in which medical professionals and attorneys communicate. These communications may take place in forms other than emails and often the communications involve much more than treatment of plaintiff's injuries. Thus, it is important to request much more than a typical subpoena may

request.

For litigation funders, there may be communications between the funders and medical professionals or plaintiffs' attorneys. In addition, some funders have presentations, including video presentations, providing advice and guidance on how to drive up litigations costs and, accordingly, the value of a claim. These materials are marketing materials that should be subject to production by court that require production of litigation funding agreements.

b. <u>No boilerplate third-party subpoena language</u>

Discovery issued to third parties should be formulated to seek specific documents and information from the third parties. You should seek documents and information regarding communications platforms between the funder and medical providers and plaintiffs' attorneys. The requests should include communications between medical providers and staff with plaintiffs' counsel and their staff. They should also include marketing materials. There are no specific requests that should be used but these are a few examples for subpoenas to a third-party litigation funder:

- All communications between your office and the offices of any attorney representing [plaintiff] specifically including:
    - All report to [litigation funding company] regarding the status or progress of [plaintiff's] lawsuit;
    - [Litigation funding company's] complete file on [plaintiff], including any intake sheets or letters or register of phone calls regarding the progress of the lawsuit filed on behalf of [plaintiff].
- All contracts, letters of agreement, agreement, letter of protection, memo of agreement [litigation factoring company] has with any physician or medical facility at which [plaintiff] received medical care after [date] and up to the present.
- All documentation of all policies and procedures regarding the amounts that [litigation funding company] accepts or considers as payment in full for its services.

There are many areas of inquiry for both the litigation funding company and the medical professionals. It is important to thoroughly research the types of communications, the means of communications, and the documents that may be available. Following the production of documents by the litigation funding company and medical providers, the depositions of both should be completed.

c. <u>Motions to compel</u>

You can expect the litigation funding company and the medical providers to object to the production of documents and information. In the event they object to production, it is important to move to compel the production of the materials as soon as possible. Litigation funding

companies and medical professionals may attempt to delay production in hopes that the matter resolves prior to the production.

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[i] United States Government Accountability Office, Report to Congressional Requesters, Third-Party Litigation Financing, Market Characteristics, Data, and Trends, December 2022.

[ii] *Id.*

[iii] Why Third-Party Litigation Funding Should be More Transparent, Michael Menapace. January 30, 2023. Menapace argues that disclosure of third-party litigation agreements is similar to a defendant's disclosure of applicable insurance – it may facilitate resolution.

WE KNOW IT WHEN WE SEE IT

A Discussion on Plaintiff Attorney Tactics

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We Know It When We See It

A Discussion on Plaintiff Attorney Tactics

In recent years, plaintiff's attorneys have adopted new tactics to increase their chances of success in personal injury cases. One tactic that is critical for successful plaintiff's attorneys is Early Case Assessment. One of the most important tactics used by plaintiff's attorneys is early case assessment. This involves evaluating the potential merits of a case as soon as possible after an injury occurs. This allows the attorney to identify any key evidence, gather medical records, and assess the impact of the injury on the victim's life. By conducting an early case assessment, the attorney can make informed decisions about the best course of action, including whether to settle or take the case to trial. As part of early case assessment, plaintiff's attorneys will typically evaluate the potential jurisdictions in which their suit may be filed and any evidence regarding the tendencies of the jury pools operating in those jurisdictions.

If it is the case that the "proper" jurisdiction or venue favors the defendant(s), Plaintiffs' attorneys will typically look to fashion a colorable argument to file or lay venue in a jurisdiction that is friendlier to "victims" or the "little guy". If Plaintiff's attorney cannot commence the suit in the more favorable jurisdiction, they will frequently file, if they can, a motion to transfer or a motion for forum non conveniens upon the argument that there is a more significant relationship between the more favorable jurisdiction and the event in dispute than found in the less favorable jurisdiction and that defendant(s) would suffer no prejudice if there is a transfer. Defendants must pay close attention to not only the substance of plaintiff's claims but also the forum as unnecessarily hostile form can compel defendants to acquiesce to settlements that would otherwise be rejected.

As part of early case assessment, prudent plaintiff attorneys will provide all the information to the defense early in the process. On a practical level, good plaintiff attorneys understand that a defendants file must be complete if an insurance company is going to give enough

authority to settle the case. Showing up at a mediation with new information is often not going to move the needle for the insurance defendant. Smart plaintiff attorneys will share anything that will increase the value of their case as soon as they have it. This include life care plans, economist reports or expert designations.

Additionally, Plaintiff's attorneys are smart when they focus on the story of their case and the human factors involved. These factors include emotional appeal, identifying key fears, building a strong narrative and focusing on safety. Personal injury attorneys can use emotional appeals to increase the settlement value. This can be done by highlighting the human impact of the injury, such as the loss of income, the pain and suffering of the victim, and the impact on the victim's family and community. Ideally, a plaintiff's attorney will be able to get a jury to put themselves in the shoes of the injured party. From a plaintiff's perspective, it's important for the jury to understand the human impact of an injury. Plaintiff's attorneys are now focusing more on the emotional and psychological impact of the injury, in addition to the physical harm. They are presenting evidence of the victim's lost wages, medical expenses, and pain and suffering. By highlighting the human impact, the attorney can help the jury understand the true costs of the injury and the importance of providing compensation to the victim. This is particularly easy to do when a plaintiff is severely and/or obviously injured, if the Plaintiff is a good witness or if the defendant is part of an industry that is looked upon negatively by society at large.

As to key fears, personal injury attorneys must first identify the key fears and concerns that are likely to resonate with the jurors. This could include fear of injury, fear of harm to loved ones, or fear of injustice. Every potential juror will relate to each other in terms of having common fears. This commonality can in turn weaponize a group of jurors to seek to issue a verdict that offers some protection from the subject fear. As to building a strong narrative, personal injury attorneys can use the evidence they gather to build a compelling narrative that tells the story of their clients' injury and its impact on their lives. This can help increase the settlement value by highlighting the human impact of the injury and appealing to the jurors' fears and concerns. Lastly, by focusing on safety, personal injury attorneys can focus on the issue of safety by emphasizing the ways in which their clients were harmed and the steps that

can be taken to prevent similar injuries from happening in the future. This can help create a sense of urgency in the jurors and increase the settlement value.

When it comes to mediation or trial, plaintiff's attorneys are increasingly using technology, visual aids to assist in telling their story and in choosing the right jury. Technology has become an increasingly important tool for plaintiff's attorneys in recent years. Attorneys are using computer-based analysis, virtual reality simulations, and other technological tools to help build their cases. For example, computer-based simulations can help demonstrate how a particular injury occurred and how it impacted the victim's life. Virtual reality simulations can be used to recreate an accident scene and help a jury understand what happened. Personal injury attorneys are also using visual aids, such as diagrams and animations, to help illustrate their clients' injuries and the impact of those injuries on their lives. This can help increase the settlement value by making the jurors feel more connected to the case.

Plaintiff's counsel are also utilizing mock trials to rehearse the trial to ensure that they are able to effectively present their clients' cases and tap into the jurors' fears and concerns. This can help increase the settlement value by making the attorneys' arguments more persuasive and impactful. Mock trials also help plaintiff's counsel in choosing the right jury. Personal injury attorneys can choose a jury that is sympathetic to their clients' claims. This can be done by selecting a jury that is composed of individuals who have had similar experiences, or who are likely to be concerned about the issue in question.

Lastly, Plaintiff attorneys are increasingly using the same experts and establishing strong relationships with these experts. Attorneys are now investing more time and resources in building strong relationships with experts in various fields, such as medicine, engineering, and psychology. By doing so, they can ensure that they have the right experts in place when they need them and that they are familiar with the case and the evidence.

In conclusion, plaintiff's attorneys are using a range of tactics to help increase their chances of success in personal injury cases. By conducting early case assessments, using technology, focusing on the human impact, building strong relationships with experts, and

negotiating strategically, they can help ensure that their clients receive the compensation they deserve for their losses.

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REPTILE THEORY AND STRATEGIES FOR DEFENSE

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Reptile Theory and Strategies for Defense

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The main purpose of the Reptile Theory is to unlock the jury's "reptilian brain," particularly to trigger the primitive part of their mind as opposed to using logic and applying the facts of the case to the law. By encouraging jurors to put themselves in the plaintiff's place, the strategy causes the jurors themselves to feel subjected to or threatened by the same harm that the plaintiffs allege they suffered from the defendants. The Reptile Theory is being used by plaintiff's lawyers as a way to try to get around the Golden Rule, and try to get jurors to put themselves in the plaintiff's place.

The Background of the Reptile Theory

The reptile theory of the brain was introduced through the work of Paul D. MacLean, MD, who was a Yale faculty member starting in the late 1940's and who later worked through NIMH in Maryland. In 1990, he published a culmination of his research and papers over about 50 years in The Triune Brain in Evolution. MacLean's "triune brain," or three in one brain, hypothesis has the following parts:

1. the limbic system where emotions arise;
2. neocortex where intellect develops; and
3. the reptilian complex which is responsible for instinctual behaviors.

The reptile theory was later shaped for use in litigation by David Ball, a North Carolina jury consultant, and Don Keenan, a seasoned lawyer with hundreds of verdicts and settlements under his belt. The two authored a book, Reptile: The 2009 Manual of the Plaintiff's Revolution, to educate lawyers on how to apply the theory at trial. According to their website, www.reptilekeenanball.com, the two claim $6 billion worth of recoveries using this theory during settlements and trials.

The Reptile Theory:

It is an aggressive strategy used by plaintiff lawyers to manipulate jurors by fostering fears that are broader than the case at issue. The theory relies on a juror's desire for self-preservation. Jurors see themselves as guardians of community safety and that by awarding damages they will enhance safety and decrease danger.

While the theory has been disproven by the scientific community, it is effective and speaks to juror motivation. Accordingly, defense counsel needs to respond effectively

to reptilian arguments. Under the Reptile Theory, cases are not won by logic; rather, the focus is on the conduct of the defendant and not on the plaintiff's injuries.

An Overview of How the Reptile Theory Might Look:

Lawyers using the reptile theory will engage jurors by demonstrating how the conduct of the defendant could affect them. Plaintiff's lawyers want the jury to think that if the defendant endangers the community, only a verdict for the plaintiff could protect the community. The formula is a safety rule plus danger invokes a reptile response. Jurors' gut reactions, based on the theory, is that by reducing danger the chance of survival increases.

The reptile theory pushes the argument that safety is paramount, not just for the plaintiff but for the entire community.

A reptile case may use a rule that:

1. Must protect people;
2. Be in clear English;
3. Explicitly state what a person must or must not do;
4. Should be easy to follow;
5. Must be agreed with by defendant;
6. If the defendant does not agree with the safety rule then he or she is perceived as careless.

Strategies for Defending Against the Reptile Theory:

In order to protect the carrier from reptile advocacy, defense counsel needs to understand what it is in order to develop a strategy to combat it during litigation at every stage.

For example, throughout written discovery, plaintiff may issue requests focused on purportedly applicable rules or regulations, to attempt to get defendants to admit that some rule or regulation applies. Use of appropriate objections will be key in written discovery, and it may be possible to seek a protective order where a plaintiff may seek wholly irrelevant information or information entirely disproportionate to the case, whichever the discovery standard may be in the applicable jurisdiction.

During deposition, a defense witness will need to understand that a safety rule is not a standard of care. Further, counsel needs to distinguish between a fact question, hypothetical question, and a safety question. You will also want to make sure your witness knows that acceptable answers to deposition questions might include: "Not in every situation"; "Not always"; "Sometimes this is true, but not all of the time"; and "It can be in in certain situations."

At the end of discovery, a motion in limine can be an effective tool to use to prevent these types of questions from getting before a jury.

Reptile argument may also make its way in to voir dire. For example, in a hypothetical sinkhole case, plaintiff's counsel might ask a juror during voir dire:

- How worried are you about dangers of sinkholes?
- Do you think insurers can put the community in danger, how?
- Have you or your family members experienced any financial effects resulting from your dealings with insurers?

A plaintiff's lawyer would be looking for jurors using words like protect, danger, and risk in their responses. Voir dire will be used by plaintiff's counsel to prime the jury with terminology and to remind them of an unreasonable risk. Reptile-type voir dire will be focused on creating community panic.

When it comes to opening statements, a typical Reptile Theory opening may avoid sympathy and will rather focus on the safety rule. Plaintiff's counsel will use persuasion to emphasize that the violation of a safety rule endangers the community.

Part of the defense response to the Reptile Theory is legal: to convince the court, and ultimately the jury, that plaintiffs' reptilian propositions are contrary to law. For example, the standard of care is usually not defined as the best or most perfect care; rather it is usually defined as reasonable care considering the circumstances.

Defense attorneys should also use their cross-examinations to inject as much scientific and technical information as possible into the jury's minds. While the reptile strategy avoids the specifics of the case, it is all the more reason for defense counsel to utilize the facts to their advantage. For example, a plaintiff expert in a medical malpractice action may only testify to the general standard of care and circularly conclude that the defendant did not meet such a standard. This gives the defense the opportunity to "fill in the blanks" of the plaintiff's broad testimony, by either expanding on the standard of care (and the variety of deviations that may exist in real-world application) or by specifically applying the facts of the case to the defendant's conduct to illustrate that no duty was breached. Overall, the defense should use the reptile strategy to highlight their expert's own base of knowledge on the subject. So, although a plaintiff might invoke the reptilian mind of a jury, a qualified and credible defense expert can trigger the more logical parts of their brain in an effort to even the playing field.

A second possible way to neutralize the "reptile" is for a witness to introduce concepts of comparative fault, third-party actions, or alternative cause. For example, in a consumer products liability case, the plaintiff's actions may be relevant to the safety question. In a medical device or pharmaceutical case, the physician's actions in choosing a particular product for the plaintiff may come in to play. Where appropriate, a defense-side witness should introduce these concepts into their responses. These responses help to shape the defense-side narrative by providing additional information

about possible causes for the injuries the plaintiff experienced and diffusing the plaintiff's singular focus on the defendant.

For example, assume that the plaintiffs utilize the reptile method in questioning the engineer who designed an appliance for consumer in-home use. Consider this possible exchange compared to the one cited above:

> Q: You would agree that the greater the risk of injury, the greater duty an appliance engineer owes to the consumer to provide a safe and effective product?
>
> A: Yes and I would add that both engineers and consumers can play a role in preventing injuries. Engineers have an obligation to use their training and expertise to design safe and effective products, and that is what I/we did here. And, consumers have an obligation to use the product responsibly.
>
> Q: You agree the engineer has the duty to be trained and qualified to design equipment that safeguards the end-users?
>
> A: Yes, of course the qualified engineer must take into account many unknowns when making decisions to minimize risks—there is no way to eliminate all risks, unfortunately, because you just don't know how any one accident is going to happen or how any particular customer is going to use the product.

Defense counsel will need to work with witnesses to make them aware of the Reptile Theory so that fact witnesses and expert witnesses can turn the jury’s focus to the facts and the appropriate legal standard of care.

Conclusion:

When faced with these instinctual arguments, it is important for defendants and counsel first, to identify such arguments, and then to be ready with a strong and well-supported case narrative, showing not only the positive benefits that defendants contribute to society, but presenting a compelling story to show why plaintiff's all-or-nothing approach to safety is not only impossible in the real world, but also goes beyond the requirements of the law.