Damages

A View From the Defense Perspective

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There is an adage that the difference between a successful plaintiffs' attorney and a successful defense attorney is that the successful plaintiffs' attorney handles cases that cannot be lost while the successful defense attorney is retained on cases that cannot be won. This means "winning" from the defense perspective may be about controlling, not completely preventing, the damages to be paid by a client. This can be a difficult task in this age of volatile, unpredictable jury awards and changing venues. For example, in 2012, a Decatur County, Georgia jury awarded a $150 million dollar verdict to the parents of a four-year-old child who died tragically in an automobile fire after the automobile gas tank was punctured in an accident. In 2013, a Cobb County, Georgia jury awarded a $35 million dollar verdict against an amusement park to a man who was assaulted by several persons, some of whom may have been employed at the amusement park, off the premises of the amusement park.

While these verdicts remain outliers rather than the norm, they are the kinds of events that grab the attention of defendants, insurers, and litigators everywhere and highlight the importance of vigorously litigating damages. While there is no "silver bullet" for defeating or defending against damages claims, there are some strategies that effective defense attorneys utilize to minimize the chance of their clients being subjected to such an outlier verdict. This article will discuss some of the processes used by and concerns of the defense side on damages, and how plaintiffs' attorneys can assist opposing counsel in a way that helps achieve just and fair results for all parties.

For any attorney, the end goal is simple—satisfy the client. Most clients, whether plaintiff or defendant, are most likely to be happy with a result if it is among a range of previously explained potentially likely outcomes, rather than coming as a surprise to the client. If the client is satisfied, the attorney performed the assignment efficiently, professionally, and fairly. Client satisfaction is, of course, in the eye of the beholder, and the size of the damage award, if any, is a major influence on client expectation.

On the defense side, the attorney-client relationship typically begins with the client seeking advice concerning a pre-suit demand letter or a complaint. After checking conflicts, the defense attorney will evaluate the plaintiff's allegations and have preliminary discussions with the client. Typically, defense lawyers will formally report to the client within the first three months on an initial assessment. That initial report most often includes at least a preliminary analysis and recommendation regarding potential settlement and verdict ranges. Insurers and self-insured clients use these initial assessments and reports to set reserves—the amount of money they project as necessary to resolve the claim. The defense attorney's initial reporting generally includes the litigation's projected costs as well as an assessment of: the plaintiff's allegations, the supporting facts, the initial defense investigation findings, the defendant, the plaintiff, the venue, the judge, the plaintiffs' attorney, the defendant's liability, the alleged damages, and potential defenses. Damages are usually the most significant component of an insurer's reserves and should be a point of focus for any defense attorney.

Defendants and insurers often weigh the defense attorney's damages analysis against the projected costs of litigation to make strategic decisions. All defendants value an element of cost control and predictability, though the specific value placed on such concerns will vary from one client to the next. Thus, a defense attorney must set cost expectations and ultimately meet or exceed them. Defense attorneys, like plaintiffs' attorneys, work hard to provide the client with informed and reasonable expectations. But to do so, defense attorneys must rely in part on plaintiffs' attorneys to disclose key facts and legal implications at the right time and in the appropriate manner. When plaintiffs' attorneys attempt to inflate the value of a claim, fail to promptly divulge support for the plaintiff's valuation, or prevent initial discovery in a case from moving forward at a reasonable pace, defendants become rightfully frustrated, and lawsuits can quickly devolve into standoffs with unpredictable costs and frustrated clients on both sides.

Litigation is naturally adversarial, but cases are more likely to be resolved with content plaintiffs and defendants when everything is on the table from the outset. It takes time to develop all of the case facts, but even so, a plaintiffs' attorney should not bring immature, under-developed claims. Filing suit before a diligent investigation can result in claims that lack a good faith basis for prosecution and at the very least will make it difficult if not impossible for the defense attorney to accurately set reasonable expectations for the client.

When the defense feels that it is blind-sided by new information after setting the defendant's expectations, especially relating to damages, this permeates the litigation and fosters a zero-sum game environment. That environment tends to prevent client satisfaction on both sides. Full and prompt initial disclosure, whether formal or informal, of important information and documents facilitates dispute resolution and prevents the parties from reaching an impasse. It also promotes the plaintiffs' attorney's reputation within the defense bar, providing credibility for current and future claims. Make no mistake, a plaintiffs' attorney's reputation is worth its weight in gold in dealing with defense counsel and their clients. Likewise, a

good defense attorney recognizes the importance of promptly responding with a forthright disclosure of the defenses.

Even where settlement ultimately may be appropriate, a defense attorney must aggressively defend the case from the first moment of representation. A defense attorney will investigate and attack any weaknesses in the plaintiff's case with damages being a key target. The defense lawyer will place the plaintiff's alleged special and punitive damages under a microscope. Special damages have been inflated in recent years due in part to increasing costs of healthcare and the increasing prevalence of legal and medical funding companies. Defense attorneys understand this, but the pace of special-damages inflation creates an element of healthy skepticism, which plaintiffs' attorneys should recognize and work to refute where possible. Punitive damages claims will also receive thorough scrutiny, given the size of verdicts that can result from such allegations.

Assuming a case cannot be resolved in the early stages, it can be expected that a defense attorney will explore all of the plaintiff's alleged damages in written discovery, fact witness depositions, and expert witness depositions. The defense will focus on gathering all the facts because it wants to be able to tell a story to a jury, which allows the jury to take an analytical approach to deciding the case. Storytelling is persuasive, and a story enabling a jury's analytical approach disinclines the jury to rely too heavily on an emotional response that might lead to a significant verdict against the defendant. As a part of this discovery effort, the defense attorney must inquire about all components of the plaintiff's alleged damages, including sensitive emotional components of the plaintiff's allegations, such as personal pain and suffering. This aspect of the defense is not undertaken to antagonize the plaintiff; it is necessary to prepare an adequate defense.

If appropriate, the defense lawyer will move for partial or complete relief from the plaintiff's claims. Defense motions for summary judgment may relate to damages. For example, a provision in a contract may control or limit damages to less than those claimed by the plaintiff, or a key fact in discovery may otherwise open the door to an argument for limiting or precluding damages. A defense lawyer must pursue these means as a part of professional client advocacy.

If the case makes it to trial, defense attorneys tend to view *voir dire* as one of the most important phases of the trial. Jury consultants advise defense lawyers that the primary goal in *voir dire* should be to identify and strike potential jurors who are pre-disposed toward high verdicts and those that have an anti-corporate bias, as opposed to trying to condition the panel that the defense's position is correct. The defense should inform the panel of the type of damages sought and ask the panel if there is any reason that they believe that they could not be fair to the defendant. Defense attorneys will want to avoid monopolizing the conversation and focus instead on asking probative questions and then listening and looking for the panel's responses. They will often use questionnaires to this end. Usually, the defense's early strikes become obvious, with the later strikes being more difficult to assess. In short, a defense attorney will want to gather information from the panel, and then rely on intuition and experience to strike a favorable jury.

Seasoned defense attorneys will not employ "scorched earth" tactics at trial because they know that persuasion is more powerful than blunt force, and they will work to limit the issues to be considered and decided by the jury. Smart defense attorneys have already admitted liability by the time of trial in cases of clear or very likely liability. Similarly, where there is a sympathetic plaintiff with significant or catastrophic injuries, the defense will directly confront these issues to build credibility through empathy and forthrightness. Where the defendant is a corporation, defense lawyers will work to humanize them, reminding jurors that all corporations are made up of people. Where there are culpable co-defendants or non-parties, the defense lawyer will establish which defendant or non-party is to blame while distancing their own client from that entity, and acknowledging the plaintiff's genuine injuries.

When liability is not contested, the defense lawyer may choose to suggest a sum of damages that would be fair and reasonable, reminding the jury that compensating the plaintiff does not require punishing the defendant. If a plaintiff introduces an exact amount of proposed damages in the closing argument, commonly called an "anchor," and the defendant's liability remains in dispute, the defense may respond with a counter figure or "counter-anchor." The defense's decision to provide a proposed amount of damages, in a contested-liability case or otherwise, is a strategic one often based on the perceived strength of liability defenses and the reasonableness of the plaintiff's proposed damages. If the plaintiff's purported damages are unreasonable or if significant causation issues exist, a defense lawyer will not shy away from saying so, using clear examples, including the value of the dollar to emphasize the plaintiff's unreasonableness.

In sum, no defense attorney wants to be on the receiving end of a landmark jury verdict, and any good defense attorney will always work to preserve the best interests of the defendant with an eye toward avoiding surprises. While it may not get either party's name in the paper, cooperation from opposing counsel facilitates amicable resolutions and joint client satisfaction. ●

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