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Narrative

Mediating to Avoid the Nuclear Verdict

Nuclear verdicts – disproportionately large multi-million dollar jury awards – are a growing concern given their increasing frequency. One of the most effective tools for avoiding this type of outcome is mediation. In this panel discussion, we will address strategies for successfully mediating claims that have the potential to go nuclear, addressing considerations in preparation, presentation, and negotiation, as well as how mediation may fit within a larger claims-handling strategy.

I. Definition and Causes of Nuclear Verdicts

"Nuclear" verdicts are excessively large multi-million dollar jury awards – often defined as exceeding $10M. It is an award that is grossly disproportionate to plaintiff's economic damages. While there have always been "runaway" juries and outlier cases, the frequency of such results is increasing.

While there can be many causes, nuclear verdicts are more frequent due to a shift in plaintiff's strategy and increased publicizing of horrific accidents with large verdicts. For years, the general public has been bombarded by plaintiff's counsel and their advertising, which presents corporate America and its insurers as "horrible evil-doers." These lawyers simultaneously promise huge verdicts. Often plaintiff's counsel will try to enrage the jury with the horrific circumstances leading to the claim, the defendant's actions, and the defendant's attitude following the incident. Plaintiff's counsel tend to encourage the jury to place themselves in plaintiff's position, to consider excessive damages amounts as normal, and to "punish" the defendant.

Excessive verdicts are also the results of little guidance in awarding punitive damages and the lack of capped damages in many states. Only about half the states have some form of cap on punitive damages awards, and at present, only eleven states cap non-economic damages.

As the causes of nuclear verdicts become better understood, claims professionals and attorneys have a greater opportunity to identify these claims and implement an effective strategy to position these claims for a reasonable resolution.

II. Mediation Strategies to Avoid Nuclear Verdicts

One important tool for avoiding this type of extreme outcome is mediation. When the proper strategy is implemented, it can be an effective tool in reaching a reasonable end result to avoid a worse result at trial.

The panel will discuss various considerations and approaches to preparing for and negotiating at mediation for these types of claims.

A. Identify the potential for a nuclear verdict early

Effective mediation requires preparation, and employing a strategy to combat a potential nuclear verdict requires identification of potential runaway cases early in the process. Once potentially problematic claims are identified, formulating a strategy early and actively managing a claim can be critical in achieving a successful outcome.

Claims with nuclear potential can in part be identified by the severity of the injuries, inflammatory evidence in the circumstances of the accident, and sympathetic plaintiffs.

Other key considerations include the particular jurisdiction and judge involved, which can have a significant effect on what evidence may be allowed to be presented to the jury, the leeway plaintiff's counsel may be given in making arguments to the jury, and whether the members of the jury may be more susceptible to pressure to award high damages.

B. Know the players involved and choose a mediator accordingly

Settlement negotiations happen through people, and the personalities, experience, and skill of the lawyers involved have a significant effect on the outcome. Understanding how opposing counsel will approach the mediation process will help frame the negotiation strategy and guide the selection of a mediator who can effectively communicate and help move the parties closer to compromise.

This can be of particular importance in evaluating which plaintiff's attorneys can make credible threats to bring a case to trial, how much bluster is built into demands, whether statutory offers can be an effective leverage point, and what stage of the case is likely to be the point where the plaintiff's attorney becomes willing to seriously entertain settlement negotiation.

Local defense counsel with experience with the plaintiff's counsel, the assigned judge, and/or the mediator can be an invaluable resource in determining strategies for framing the approach to mediation. It is important to select a mediator that both you and opposing counsel respect and trust.

C. Timing of mediation

Another important consideration is what stage of the litigation process to seek mediation.

In some matters, early settlement negotiations may be advisable. Where liability is clear and damages have the potential to be significant, moving the case to address settlement early in the process acknowledges the plaintiff's loss and focuses the discussion on a reasonable settlement.

In other matters, where initial posturing from plaintiff's counsel is unreasonable or there are material legal or factual disputes to be resolved to reduce uncertainty in the risk or valuation of the claim, it may make sense to wait to initiate mediation until the case has been developed further in litigation.

D. Presentations at mediation

The trend in many states is to avoid making any presentation at mediation or having any direct contact between the parties. This may or may not be advisable in the context of a potential nuclear claim, which could involve horrific injuries and losses and/or inflammatory evidence.

On the one hand, confrontation between the parties may exacerbate tension and further inflame the plaintiff.

On the other hand, mediation may be the only pre-trial opportunity to communicate directly to the plaintiff without interference by the plaintiff's attorney, as well as one of the few opportunities to listen directly to the plaintiff (whether through verbal or non-verbal communication) and learn what is motivating the plaintiff. The parties should try to have one-on-one discussions, even if a presentation is not desired.

If a presentation is desired, careful attention should be paid to the details to avoid inflaming the opposing party. The party should approach the mediator ahead of time and make its desire for presentations known and how such should be staged. It is critical for the defense to see the plaintiff and let him or her be heard. The value of opening statements should not be underestimated in a nuclear verdict case.

1. Preparation

Working up the claim through investigation and discovery to have a thorough understanding of the liability and damages arguments will greatly assist in deciding the focus of the mediation presentation.

Conduct an objective case assessment to determine potential liability. Determine what factors contributed to the accident. Identifying potential vulnerabilities early on and realistic damage projections will assist in obtaining a favorable and reasonable resolution.

With potential nuclear claims, additional focus group testing or mock jury presentations can assist in identifying evidence and arguments that a jury could sympathize with, as well as evidence and arguments that are likely to anger the jurors.

All of this information can be put to use in framing the presentation to the plaintiff.

2. Set the right tone

Presentations for potential nuclear claims in particular require careful consideration of the tone of arguments used in advancing defense positions to the plaintiff. As these claims typically involve significant injuries and inflammatory evidence, if the presentation is taken the wrong way there is a risk that it could exacerbate feelings of anger and make the claim more difficult to settle.

3. Use of technology

Depending on the type of case, technology can be effectively utilized to enhance mediation presentations to present a more compelling message.

The presentation can include video deposition excerpts, which would allow the plaintiff (who may not have attended the depositions or be familiar with the witnesses) the chance to hear and see testimony directly.

A consultant or expert can also assist in digital accident recreations, computer or physical models, and demonstrations to provide visual or physical support to the verbal arguments.

E. Monetary negotiation strategy

Potential nuclear claims have traits that may make them more sensitive than average to settlement negotiation strategies.

Starting with an unreasonably low offer could be viewed as an insulting attempt to "low-ball" the plaintiff, and could be used by the plaintiff's attorney to stir up anger at the defendant.

Accurate and informative defense counsel valuations and jury verdict research can play an important role in evaluating the level to start settlement negotiations.

F. Creative non-monetary solutions

For some claims, money may not be the only way to motivate a plaintiff. Creative negotiation may find ways to provide a plaintiff with non-monetary value that could be a difference-maker in getting the case settled.

This could include an apology or other acknowledgment of wrongdoing from the defendant, or a specific agreement to repair or replace property significant to Plaintiff that was damaged or lost in the accident.

III. The Larger Strategy: Initial Claim Investigation and Mediation

Of course, settling a claim at mediation is not always possible. However, the potential for mediation can be an effective part of a larger strategy for avoiding nuclear verdicts.

The panel will address how pre-mediation actions can affect the potential for success in obtaining a mediated resolution and how even an unsuccessful mediation can set the stage for future settlement discussions and eventual resolution.

A. Loss mitigation and documentation

Assisting an insured in implementing loss mitigation strategies can help to reduce the prevalence of claims in the first instance. The insured may also institute policies to proactively document incidents that may turn into claims, through devices such as security cameras, dash cams, etc.

Where such evidence exists, it can be important to take early action when a claim is reported to ensure the evidence is preserved. The potential for spoliation arguments or adverse inferences can compound the risk of nuclear verdicts.

Later in the litigation, accident documentation can provide very effective support at mediation, as well as at trial.

B. Pre-suit handling

Identifying potential nuclear claims before suit is filed can present additional opportunities to address potential settlement. Taking a proactive approach to investigating and evaluating the claim can pay dividends.

Special care that the insured and insurer collect and preserve evidence is essential. Spoliation (i.e., negligent or intentional destruction of evidence) will garner jury sympathy and increase the likelihood of punishing the defendant with an extremely high verdict.

In some cases, pre-suit mediation or other settlement negotiations could be considered where there is a possibility of reasonable compromise.

C. Post-mediation strategies

Even if a matter does not fully settle at mediation (or at least at the first mediation), the discussions can provide valuable insight into how the plaintiff views the claim, what themes and evidence the plaintiff will emphasize, and whether there are outstanding legal or factual disputes that could be narrowed through motion practice.