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Strategy #1 for Dealing With 'Outsized' Damages Awards: Focus Courts on the Experts

By Ross Todd
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In yesterday's column, Wilmer's **Bill Lee** and trial consultant **Jamie Laird** identified what they see as the problem: There's been a marked increase in the number of $10 million-plus damages awards against corporate defendants in the wake of the pandemic. There's also been a spike in the total value of those awards—verdicts which many have dubbed "nuclear" but that Lee and Laird call "outsized."

Regardless of what they're called, what should lawyers do to address them?

Lee and Laird have laid out three overlapping strategies. Today we'll focus on the first: Encouraging courts to be more consistent in how they approach *Daubert* challenges to damages demands that are disconnected from the facts in dispute. Given that this suggestion focuses on the law, Lee took the lead in explaining the approach to me, as he did in the initial presentation he and Laird gave to an audience at the American College of Trial Lawyers.

"There are very few advantages of age, but one is you have some experience," Lee said. "I have the age and the corollary experience."

That was Lee's way of putting me into something of a virtual time machine. He urged me to contemplate life as a litigator pre-1993, before the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals* and set out the standard for expert testimony in federal courts.

Courtesy photo

William Lee, of Wilmer Cutler Pickering Hale and Dorr.

"If you go back before 1993 when *Daubert* was decided, there were very few time-limited trials. Trials went on for weeks and months—even before juries," Lee said. Testing the validity of an expert's opinion and their methodology could go on for days in those pre-*Daubert* times, Lee said. But through *Daubert*, the Supreme Court suggested there was a different way to address those questions, with the court acting as the gatekeeper before the jury was ever impaneled.

"Fast forward after *Daubert* was decided in 1993 to today or to 2020, -21, -22: Trials are now time-limited, very severely time-limited. You often have a five or six-day trial where in a patent case you're asked to address teaching the technology, the issue of infringement, the issue of validity and complicated damages models," Lee said. "You're supposed to open and close and do all that in a matter of six trial days."

The problem, according to Lee, is that *Daubert* has been applied in a variety of cases, including the sorts of patent cases he often handles, on an "inconsistent" basis. He came armed with a couple of examples, the first focusing on how courts have dealt with regression analysis, a statistical technique attempting to determine the relationship between variables.

In the first of Lee's examples, *ATA Airlines Inc. v. Federal Express Corp.*, ATA sued FedEx for breach of contract. The plaintiff's expert used a regression analysis to attempt to prove lost profits. ATA's regression analysis, however, concluded that costs fall as revenues rise, despite the fact that all the real-world data showed that ATA's costs and revenues either rose or fell together. "No mechanism for such a reversal is suggested, and revenues and costs had never moved in opposite directions during the preceding decade in which ATA had actually been operating," wrote then-Seventh Circuit Judge Richard Posner, finding a lack of proof for the underlying expert damages opinion. The ruling tossed the expert testimony, the prior damages award, and the case altogether.

Said Lee: "Whether you agree with [the judge's] ultimate conclusion, the manner in which he looked at the regression, the detailed level at which he looked at the regression, and the fact he focused on whether it led to logical or illogical conclusions is exactly what you want to have someone do before this is all thrown before the jury."

But courts have gone the opposite way on similar questions concerning regression analyses. Lee pointed to *Kleen Products LLC v. International Paper*, where Kleen brought a price-fixing class action seeking $3.9 billion from containerboard makers. There Kleen's expert used a regression analysis to calculate the price increase attributable to the alleged price-fixing and the regression concluded that as costs go up, price comes down. Although Senior U.S. District Judge Harry Leinenweber in Chicago found that negative correlation between price and costs "suspect" and "counterintuitive," he ultimately allowed the expert and his opinion to remain in the case. The judge found the defendants were free to impeach the expert with their arguments on cross-examination at trial.

To this, Lee said the "truth of the matter" is that you can deal with anything on cross-examination. That was especially the case in the pre-*Daubert* era. "That's probably what occurred in these three-month, four-month trials. There were extended cross-examinations on many of these issues," Lee said. But Lee says now lawyers shouldn't have to wait until cross to address irrelevant or unsubstantiated damages theories. "The idea of *Daubert* is that opinions that are not valid or validated should never get to the jury because it's confusing for them. It allows evidence, which is ultimately not material, to come into the record. And it requires the jurors to make decisions on very complicated issues before they even know whether the evidence has a proper predicate."

Lee said that there also have been similar divisions in how courts have addressed experts' use of conjoint analysis, a statistical use of survey data to try to find a value for different components or features of products. Here he pointed first to the Volkswagen "Clean Diesel" multidistrict litigation, where the plaintiff's expert used a conjoint survey to try to determine the

premium VW customers paid for cars the company said had low emissions. Senior U.S. District Judge Charles Breyer in San Francisco, however, found that the survey ignored the "supply" side of the supply/demand curve and assumed that VW would produce the same number of cars regardless of the price it could charge. The judge excluded the expert concluding that "presuming that defendants would have sold the same number of cars, at the exact price that consumers would have been willing to pay, is not a way to reliably incorporate supply-side considerations."

The flip side? In a class action lawsuit claiming Champion Petfoods USA Inc. deceptively marketed its dog food, the plaintiffs' expert used a conjoint survey to try to determine the price consumers would pay without that marketing. That survey assumed production would be the same regardless of any change in price. U.S. District Judge Lawrence Kahn in Albany, New York last year allowed the expert's conjoint analysis to stay in the case. "This methodological decision goes to the weight given to the evidence and not its admissibility," Kahn wrote.

Lee said that one of the things he thinks lawyers can do to push for more consistent application of *Daubert* is to remind the courts of the reasoning behind the original Supreme Court decision. "Remind courts that it's not just another motion in limine," Lee said. "It's something that really is critical, particularly in the context of the timed trials that we have today."

Lee also said it's also critical to start educating the court about damages models and their potential flaws early in a case, well before the expert reports roll in and the *Daubert* motions are filed. "Use the opportunities you have to address the court …. the disputes that inevitably arise during discovery, to start to identify the reason these are important and how they're going to affect the *Daubert* analysis."

Lee also suggests asking for full-on *Daubert* hearings with live testimony. He said it's important to remind the court that what's being requested is in line with the changes in Rule 702 of the Federal Rules of Evidence set to go into effect in December. The amendments make explicit that the party putting forward an expert bears the burden of showing by a preponderance of evidence that the expert's opinion is based on reliable principles and methods and that it applies to the facts of the case.

"Most of the time a *Daubert* hearing is like a motion hearing," Lee said. "You very infrequently see an opinion that says 'The plaintiff's expert says A [and] defense expert says B. I find that the opinion is reliable because …" Lee said that sort of opinion is what the rule changes set to go into effect contemplate. He said he thinks if *Daubert* is applied as the Supreme Court contemplated it back in 1993, damages opinions that get before jurors will be "more precise, more supportable, and actually, I think, lower at the end of the day."

"We should be asking ourselves the questions: 'Has the methodology been validated? Has it been peer-reviewed? Has it been published? Has it been tested? What are the standards by which to control and evaluate the application of the methodology? Has it been widely accepted outside the context of litigation in the scientific community?'" Lee said. "When *Daubert* is enforced on a disciplined basis, it can be an effective safeguard against unvalidated opinions. It also means that what gets before the jury is validated and has the blessing of the trial judge and goes to the narrow issues that should be decided."