CENTER FOR JUSTICE & DEMOCRACY
185 WEST BROADWAY
NEW YORK, NY 10013
TEL: 212.431.2882
centerjd@centerjd.org
http://centerjd.org

BACKGROUNDER: HOW CORPORATE GROUPS ARE HUMILIATING THEIR OWN ATTORNEYS

It is hardly news that groups representing large corporations hate it when their high-paid corporate lawyers lose cases. These organizations have typically responded to such losses with attacks on jurors, judges, and/or people who sue them. Coordinated industry messaging has tended to blame everything except the preventable harm caused by their own clients.

Lately, there seems to be a growing drumbeat of corporate reports and articles hyper-focused on plaintiffs' lawyers, with coordinated industry whining about how plaintiffs' lawyers are more effectively representing their clients and outsmarting them in court. By extension, this line of attack only highlights their own ineptitude. It is an odd and embarrassing development.

General Incompetence of Defense Counsel

American Transportation Research Institute (ATRI) represents big trucking companies. In 2020, ATRI released a report publicly announcing to the world that their attorneys are not very good.[1] In a survey of plaintiff and defense counsel described by ATRI, "73.3 percent said that plaintiff attorneys were doing better, 20.0 percent said both, 6.7 percent said neither, with no one saying defense attorneys did better."[2] They characterized competent lawyering by plaintiffs' counsel as follows:

> Plaintiff attorneys maintain strong communication networks, and actively share strategies and insights among their peers. Beyond direct and informal conversations between plaintiff attorneys, the plaintiff bar holds numerous educational conferences where litigation case studies are dissected, and where successful plaintiff attorneys share their tactics and approaches.

On the other hand, truck company lawyers say they do few of these things. They invest too little to win their cases, are too "secretive and competitive in their approaches and strategies — ostensibly a function of using a corporate business-oriented model," and are behind in the use of technology. What's more, they are stuck with clients who keep information from them.

Defense Incompetence in the Courtroom

Organizations like ATRI, the U.S. Chamber of Commerce Institute for Legal Reform, and the American Tort Reform Association have recently attacked large jury verdicts (although some of

these reports seems to cite themselves as evidence of the same "problems").[3] This is something they have done for decades.[4] But unlike past attacks on what they used to call "runaway juries," these new analyses have twisted their jury complaints into attacks on trial lawyers. These groups are essentially saying that their overpaid attorneys are unable to compete with plaintiffs' lawyers in neutral courtrooms. This might seem comical, except for the fact that they have turned their bellyaching into legislative efforts to interfere with the role of plaintiff attorneys before judges and juries.[5]

"Reptile theory." Nearly every corporate jury grievance report these days contains one or more griping paragraphs about something called the "reptile theory," where plaintiff lawyers "redirect the jury to emotional pleas when decisions should be 'based on the factual merits of the case.'"[6]

Whatever effective courtroom approaches plaintiffs' attorneys may be using (and for whatever reason, defense counsel are not), no evidence is ever presented in these reports showing that juries are ruling on "emotion" and not facts. Indeed, actual jury research explicitly contracts any such suggestion.[7] As recently described by one of the nation's preeminent jury researchers, jurors "try hard to base decisions on facts and law, are generally moderate and comparable to judges in their decisions and can handle a good amount of complexity."[8]

At least one of these corporate jury grievance reports recognizes the failings of their own attorneys before juries, saying they are neglecting to "humanize the defense" or make them "seem more human, compassionate or relatable."[9] In other words, the problem is not what plaintiffs are doing — it's what defendants are doing wrong.

Anchoring damages. Insecure corporate lawyers have long tried to control what juries do by limiting relevant information that juries hear. For example, their lobbyists often insist that when a state caps non-economic damages, juries are prevented from knowing about the cap — the condescending assumption being that jurors can't be trusted with such knowledge.[10]

Along these lines, recent corporate jury grievance reports argue that plaintiffs' lawyers should be completely prevented from asking juries to award a specific amount in damages, which they call "anchors."[11] The inference is that jurors are idiots unable to assess damages by listening to evidence from both sides of a case— an entirely unsupported allegation, which is contracted by jury research.[12]

What's more, actual case evidence of "anchoring" presented by these groups consists of a few anecdotal verdicts where a jury awarded what a plaintiff asked for.[13] Of course, this proves nothing. It is certainly as likely that defense counsel presented no credible evidence to the contrary, or at a minimum, were unable to communicate properly with the jury — a problem that some corporate groups have publicly acknowledged.[14]

Fees and Funding of Victim Cases

Attorneys for corporations and trial lawyers for victims are paid in very different ways. Corporate lawyers are paid by the hour, so they are guaranteed a fee no matter what they do (*e.g.*, drag out cases, double or triple bill). On the other hand, plaintiffs' lawyers are paid on contingency (*i.e.*, a percentage of the judgment, typically one-third), which means they must front the costs of litigation themselves. In addition, they take a big risk — if the case is lost, the lawyer is paid nothing. Sometimes, this can amount to thousands or even millions of dollars. There isn't a defense lawyer in the world who would operate with that kind of financial peril over their head.

So while this is clearly an uneven pay structure, for insecure corporate lawyers, it's never been lopsided enough. Half the states in this country have succumbed to corporate pressure and enacted some type of law dealing with contingency fees, most of which limit fees and block victims' ability to hire their own lawyers.[15] Meanwhile, corporate defendants and their insurance companies have no reciprocal limits on what they can pay their own attorneys, who may charge excessively leading to higher insurance and overall system costs.[16]

Yet the corporate bar's lack of confidence continues as they have now set their sights on third-party litigation financing. Third-party financing can offer plaintiffs and/or their lawyers some up-front financial cushion so they can afford to bring particularly expensive cases.[17] This type of funding not only levels the playing field between corporate and victims' lawyers, it offers an added benefit much like the contingency fee system: screening out meritless cases.[18]

The fear-mongering around these kinds of arrangements has heated up in recent years. While the corporate defense bar may think this whiny approach is helping them to expose something nefarious about plaintiffs' lawyers, it's actually revealing their own humiliating failures. Whatever astronomical sums corporations are paying them, they seem hardly worth the money.

Notes

[1] American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf

[2] Ibid.

[3] *See, e.g.,* American Tort Reform Foundation, *Judicial Hellholes 2022/2023* (December 2022), https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf (*see* New York State in particular); U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts; Trends, Causes, and Solutions* (September 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf (written by Cary Silverman and Christopher E. Appel of Shook, Hardy and Bacon, the law firm long associated with the American Tort Reform Association).

[4] *See, e.g.,* James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, "The Self-Fulfilling Prophecy of Social Inflation," *Lexology*, February 5, 2020, https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d

[5] *See, e.g.,* American Legislative Exchange Council, "Anchors Away Act," https://alec.org/model-policy/anchors-away-act/ (viewed December 15, 2022).

[6] American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-

Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf. *See also*, American Tort Reform Foundation, *Judicial Hellholes 2022/2023* (December 2022), https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf (*see* New York State in particular); U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts; Trends, Causes, and Solutions* (September 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf

[7] *See* Richard L. Jolly, Valerie P. Hans and Robert S. Peck. *The Civil Jury: Reviving an American Institution*. U.C. Berkeley School of Law, Civil Justice Research Initiative (September 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf

[8] JD Supra, "The Civil Jury Trial: Treat the Crisis as an Opportunity," September 20, 2021, https://www.jdsupra.com/legalnews/the-civil-jury-trial-treat-the-crisis-9710089/

[9] American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf

[10] For example, in a California case involving severe negligence and harm to a child, a jury awarded $7.1 million in non-economic damages for the child's avoidable life of suffering. By law, the jury was not told of a cap on non-economic damages in the state. The judge was forced to reduce the amount to $250,000. The jurors only found out that their verdict had been reduced by reading about it in the newspaper. The jury foreman expressed his dismay in a letter published in the *San Diego Union Tribune*.

[11] *See, e.g.,* American Legislative Exchange Council, "Anchors Away Act," https://alec.org/model-policy/anchors-away-act/ (viewed December 15, 2022).

[12] *See* Richard L. Jolly, Valerie P. Hans and Robert S. Peck. *The Civil Jury: Reviving an American Institution*. U.C. Berkeley School of Law, Civil Justice Research Initiative (September 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf

[13] Mark A. Behrens, Cary Silverman and Christopher E. Appel, "Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?," 44 *Am. J. Trial Adv.* 321 (2021), https://www.shb.com/-/media/files/professionals/b/behrensmark/ajta-plaintiff-summation-2021.pdf

[14] *See* American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf

[15] *See* Center for Justice & Democracy, "Courthouse Cornerstone: Contingency Fees and Their Importance for Everyday Americans" (January 2013), https://centerjd.org/content/courthouse-cornerstone

[16] Center for Justice & Democracy, "Fact Sheet: To Rein in Costs, Get Insurance Defense Lawyers Under Control!" (July 2021), https://centerjd.org/content/fact-sheet-rein-costs-get-insurance-defense-lawyers-under-control

[17] *See*, *e.g.*, James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, "The Self-Fulfilling Prophecy of Social Inflation," *Lexology*, February 5, 2020, https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d ("[L]itigation financing allows plaintiffs to obtain medical treatment they otherwise would not have or retain experts they otherwise could not afford.")

[18] *See* Ronen Avraham and Anthony Sebok, "An Empirical Investigation of Third Party Consumer Litigant Funding," 104 *Cornell L. Rev.* 1133 (2019), https://scholarship.law.cornell.edu/clr/vol104/iss5/1 ("First, we show that consumer litigating funding is based on underwriting criteria which result in a significant number of applications screened out and rejected.… As a matter of economics it would make sense for a funder to take steps to screen potential lawsuit investments in favor of those they reasonably believe are stronger, both because they profit from screening better. The fact that in order sample set the funder rejected more than half of the cases presented to it is consistent with this prediction.… The tort reform argument has not held up well under serious academic scrutiny.")