The Precipice Episode 5

[00:00:00] Thank you for listening to this PLUS Podcast, the Precipice. Before we get started, we would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

With the housekeeping announcements out of the way, I'm pleased to turn it over to our host, Peter Biging.

Peter Biging:

Thanks, Tyla. Hello again everyone, and welcome to the Precipice, the podcast devoted to identifying and discussing what's coming next in management and professional liability. In prior episodes, we've taken looks at where things appear to be heading with respect to lawyers, professional liability and cyber risks.

In coming episodes, we're going to look at some risks presented to insurance agents and brokers, accountants and financial services professionals. Today I wanna spend some time discussing the question of whether and if so, to what extent the threat of nuclear verdicts presents a concern in the area of management and professional liability.

I've got an impressive group of guests to talk about this with, and I'm anxious to really dig in on the issues, including a frank and honest conversation about what we as a professional liability defense industry are getting right, what we're getting wrong, and what we can perhaps do better moving forward.

Okay. So to set the table for our discussion, before I introduce my guests, I wanna offer a 30,000 foot view of the issue. If you take a look at some of the data surrounding the Nuclear Verdicts phenomenon, you can see that according to a report issued by Marathon Strategies titled Corporate Verdicts Go Thermonuclear 2024 Edition, the so-called nuclear verdicts characterized as jury verdicts in excess of $10 million were so numerous in 2023 that they led to awards totally more than $14.5 billion that year. Yes, that's billion with a B.

Verdicts referred to as thermonuclear, i.e. verdicts in excess of a hundred million dollars, were issued on 27 separate occasions. According to ALFA International, the average verdict in the National Law Journal's Top 100

Verdicts, more than tripled from 64 million to 214 million during the period 2015 to 2019. In 2023, the median nuclear verdict was $24 million. During a 10 year study period utilized by the US Chamber of Commerce Institute for Legal Reform, analyzing 1,376 nuclear verdicts, between 2010 and 2019, the median nuclear verdict increased 27.5%.

Looking at this data, the question that immediately came to mind for me was, "is this a management and professional liability problem now? If not, is it going to be? And to the extent it is or can reasonably be forecast to become a management professional liability problem, what are we gonna do about it?"

"And in which areas of management and professional liability can we expect it to manifest itself to the extent it is or will be a problem? What is feeding the concerns are insurers of management and professional liability risks themselves feeding into the problem, or at least pursuing operational processes and strategies that are not fully addressing the threat?"

"And if they are, what could or arguably should be done to better address this issue? To the extent a claim has been identified as presenting a potential nuclear verdict risk as it comes in the door, what defense tactics and strategies should be considered?"

In today's podcast, we're going to try to tackle all of these questions and see if we can in the process identify some real world practical answers.

I'd like to introduce my guests on today's episode and get our conversation going. Ari Magedoff is a Senior Vice President, Financial Lines Claims for Westfield Specialty Insurance. With over 20 years of experience, Ari's areas of focus include middle market and large account exposures for D&O, E&O, fiduciary, fidelity, EPL, and transactional liability.

Prior to joining Westfield, Ari was the Head of Management Liability Claims at Access Insurance. Ari, welcome to the Precipice.

Ari Magedoff: Thank you, Peter. [00:05:00]

Peter Biging: Eric Marler is the Head of Claims for Counterpart Inc. He has more than 20 years of experience as well involving directors and officers, liability, employment practices, liability, fiduciary liability, fidelity and crime and rancid cyber liability, and school and educators legal liability.

Eric began his career in private practice representing carriers involving complex coverage matters before transitioning in-house. Prior to joining Counterpart, Eric held leadership roles at two Fortune 500 insurers. Welcome Eric.

Eric Marler: Thanks, Peter. Great to be here.

Peter Biging: Alright, and last but not least, Chris Vlasich is the Senior Vice President of Claims for North America at Trisura Group, where he oversees claims operations across both the US and Canadian markets with wait for it, over two [00:06:00] decades of experience.

As an insurance industry executive and attorney, Chris has led complex claims teams and driven strategic initiatives and financial lines, cyber and liability. A frequent speaker at industry conferences, Chris is recognized for his expertise in emerging risk trends, litigation strategy, and claim innovation.

Welcome Chris.

Christopher Vlasich: Thanks Peter.

Peter Biging: Alright, with introduction to having been made, let's dive in, shall we? Ari? Could you talk a little bit about some of the general categories of what people studying nuclear verdicts see as the typical drivers of these verdicts?

Ari Magedoff: Yeah. It's a great place to start, Peter. So, I think it kind of sets the tone for the entire discussion.

Like what are driving these issues and what should we be looking at? So, I think there are several, and putting aside jurisdiction, because we always know that jurisdiction can be a driver, but what are the other things that we should be looking at beyond, say, the judicial hell [00:07:00] holes that get listed from year to year?

And one of the areas that I think is incredibly important is the rise in non-economic damages, such as emotional distress and punitive damages. You know, how are they impacting? We also got to look at anchoring with jurors and reptile tactics, which, it's another issue as well. And then one of, I think probably the two largest, and maybe in the more important ones that we're looking at now today and that we need to address is really social inflation and third party litigation funding.

But I think all those are kind of the central drivers that we should be thinking about as we dive into nuclear verdicts.

Peter Biging: Let me get Chris in this discussion. Chris, can you, can I ask you to drill a little deeper into what folks mean by the phrase reptile tactics?

Christopher Vlasich: Yeah. So, I think the plaintiff's firms have been pretty clever about this.

Essentially taking what used to be a GL concept, right? And using reptile tactics, how [00:08:00] are we going to save the community from this dangerous defendant? One way you can do that is through this very large verdict that you're going to sign against them that is not necessarily specifically related to the facts of the case, right?

And so, when we think about how is that going to be applied in the professional liability and management liability area. Now frequently when we're looking at cases that have the potential for a nuclear verdict, what you're going to see is plaintiff counsel not really necessarily hammering in on the facts of that specific case so much, but talking about sort of larger concepts, danger to sort of a group, right?

And one example I like to use is in the accounting space. One area that we frequently see in these large APL cases or potentially large APL verdicts are an accounting firm that was asked to do an audit, right? And they're generally not given the time, money, resources to completely audit the entire company, right?

And so there are times where maybe they don't catch something. So that [00:09:00] deposition is not necessarily just about, so the facts of that case, they're not going to be bringing up obviously, the limited resources. They're going to start talking about these larger concepts of where there are people who were at risk, and in the GL concept, that's a dangerous risk in the financial alliance and management liability space, that's an economic risk, right?

So, they start turning it on its head, talking about these generalized standards as opposed to the specific facts of that case. And we've seen plaintiffs getting more and more sophisticated borrowing that GL concept and applying it to the financial lives cases.

Peter Biging: Now, it's interesting you talk about like safety is the concept that they apply in general liability and product liability cases.

And I know that in the professional lines, and we'll talk a little bit more about this later, but I've had a couple of experiences, you know, for example in representing an investment advisor. And a client was scammed out of her life savings over a million dollars. [00:10:00] And there was a focus on safety, you know?

What are you doing to protect the people who are investing the money under your oversight from these types of things. And, you know, had an insurance agent and broker and I had a case again, where there was a demolition done and there was enormous exposure that was presented when a demolition went wrong and it collapsed onto an adjoining building while people were there and there were just, insane exposure limits.

And I know the case settled in a confidential settlement, but it was over a couple hundred million dollars and the insured had a million dollars in coverage for the demolition. And the question again, is what are you doing as the insurance broker to protect the safety of your customers from these potentially massive risks?

So, I do personally see the reptile tactics being applied in the management professional liability space. [00:11:00] And I want to talk about that some more further, but let me try and cover some of the other issues that Ari discussed as some of the major drivers. And he mentioned, I think as his first topic was the rise in like non-economic damages.

Eric, where do you see that coming up into play? You know, what is the risk there? And where do you see that coming into play in management professional liability?

Eric Marler: Yeah, I think there's a couple things to think about there, Peter, right? I mean first we tend to see it mainly in the employment litigation space.

This is particularly true where you have really, you know, allegations of very egregious conduct. Things like sexual harassment or hostile work environment, things of those natures basically, like Chris alluded to earlier, right? Anything that is going to inflame a jury's passions, that's a very common tactic.

And then secondarily and sort of [00:12:00] almost as a tag along with that, right? I mean, we've seen some activity in the public company space, but I think there's private company exposure here too, of when you get a large settlement or a large verdict in an employment case, for example, then you have to worry

about the potential ramifications of that by shareholders against the company for essentially failure to prevent that initial circumstance.

I know you and I have talked about this in the past. We saw something like this in the Steve Wynn case, right? Where you had allegations of sexual harassment against Mr. Wynn, and then that in turn led to a shareholder class action for essentially, you know, the board being alleged to have been asleep at the switch while all of that happened.

Peter Biging: Yeah, Ari, just as an aside, you and I, I think had talked about some cases involving those during, during the height of Me Too, right? Some of those cases becoming D&O exposure. And I think that ties right into what Eric was talking about.

Ari Magedoff: Yeah. And I think you [00:13:00] and I, several years back now, you know, dealt with the Me Too situation that was happening across corporate America.

Very hot topic and a real issue that the industries had had to deal with and address. And it was troubling for many boards because there was significant exposure coming from behavior of top level officials and executives at many companies. And it was pretty much when they wrote those policies, when you look at it from an insurance perspective kind of an unforeseeable kind of exposure that kind of erupted out of several cases.

And like Eric brought up when you saw it with other large companies, I think Fox and a few others. And it, it kind of shows you [00:14:00] how hot button issues, and we didn't list that really as a driver. And that can maybe fall into social inflation a little bit. But how, just an issue that is kind of the issue du jour of the day, that is a safely impactful, the corporations, how that can kind of drive larger exposures, especially when it's in the kind of everyday discussions and news feeds and of everyone, especially on social media and all that.

So, all these different things that can kind of be impactful. And then also an issue that it's very emotional and important to not only those who are impacted, but those who are monitoring it or even facing it in other areas, or know someone who's faced it. Like there are all these different drivers that can come in and really kind of push up these kind of big hot button issues, and Me Too was one of those.

And while a very difficult time, you know, for many people who suffered [00:15:00] through that as victims of this behavior, it also increased massive

exposures for the companies that had employees who, or executives that were behaving badly. It was very troubling.

Peter Biging: Yeah. And emotional distress aspect of it, you know, is the, there's no necessarily set number, right? And, you know what--how do you, that's one of the concerns, right? Is that you can pick a number and you can just pick a number out of the sky because it's a, it's not a set number that you can just necessarily do a mathematical calculation for.

And I know, for example, the one I talked, the case I talked about where the woman was deprived of her, lost her life savings, she was somewhat complicit in it, right? Because it was a social engineering scam. And can you imagine the emotional toll it took, not just to lose your life savings, but to be having given it away, manipulated what that does to you.

And that was a big concern. I think it was a little over a million dollars, [00:16:00] in losses. But there was a threat of like $10 million in emotional distress that we were dealing with. And that was really the big driver of that case. Chris, let me turn it to anchoring. Can you talk a little bit about what's meant by the concept and why this is such a concern in a driver?

Christopher Vlasich: Yeah, and Peter, it's important to remember that each state has their own rules. And from the carrier side, that's one of the first things we talk about. You know, when this case is going to trial, how much leeway is plaintiff going to have in that sort of poisoning the, well early on, especially during voir dire, you know, asking the, you know, the questions we all know, you know? Would you feel comfortable offering or awarding, you know, fill in the blank number?

And that can be a difficult concept on the defense side because obviously we want that number to be zero, right? So not only will plaintiff counsel try to get those numbers out there early and often, if at all possible, potentially then through their witnesses during the trial, and then also during [00:17:00] closing, they may ask for a specific number.

Frequently that is a number far larger than even they believe is reasonable in the case, hoping that the jury will take that number and run with it. The challenge that we've had on the defense side is for years the thought process was, look, we think it should be a defense verdict offer zero.

And the jury is going back with a number that they've heard from plaintiff counsel that might be in the tens, hundreds of millions of dollars, sometimes

even higher. And on the other hand, a number from us saying zero, don't give them anything. And what we have found is a couple things. One is, by offering a number from the defense, so doing the proactive counter anchoring by saying, instead of offering 75 million, we think five is appropriate. And here's why. We are getting as many, if not more defense verdicts because you are buying credibility with the jury. But also, we're not finding that, or we are finding that the jurors are more likely to give a lower number.

And the reason is, and I've [00:18:00] seen this in mock juries before, when you only give or when they only hear that one number, I've actually seen juries say we heard 75 million from plaintiff. How high should we go? Not realizing that in fact it should be between that zero and 75. But starting that and going higher.

And I saw mock jury a couple years ago where, you know, plaintiff counsel went with 1.5. We said it should be a defense verdict. At one point they got up to six, right? So, they were four times what plaintiff counsel was even asking for. And so this concept of anchoring, I think for the past few years, I think our industry has said, you know, we're just going to shy away from it and attack it where we can.

And again, depending on the state you're in, how much you can actually attack that, you know, getting the judge to help you out. But I think the reality is, and the question that I asked before all of our pretrials, or during our pretrials is, you know, what is our counter anchor number? How are we going to counter anchor?

How are we going to get that number out there? Because we know plaintiff is going to do that, right? Burying our head in the sand [00:19:00] isn't going to do us any good. So this concept is, it is powerful for the plaintiff's side, but it is powerful for our side to build credibility with the jury. And if you give them a number that makes sense in a number that they understand, they are actually even more likely to give you that zero, than by not offering a number at all.

Peter Biging: Now, it's interesting you talk to jury consultants and some of the research that they've done. Jurors understand that they're being manipulated and it doesn't matter. There are statistics and some of the studies have developed that most jurors are aware that plaintiff lawyers inflate their demands, expecting jurors to compromise at a number closer to the middle when the in defense introduces a lower number.

So if you're not introducing a lower number, like you said, like counter anchoring, you're doing yourself a disservice. Despite being aware of this tactic.

Again, the statistics show, the polling shows that jurors don't appear to [00:20:00] resent it. It's an expectation. It's not something that they get uncomfortable with or are upset about.

Christopher Vlasich: Well, Peter, it's also just, just worth noting while we're going through these, that I think the one scenario where that, where maybe it doesn't work quite as well is when they, when the plaintiff counsel gets the jury angry. And that's sort of a lot of what Ari was talking about earlier, and we're talking about sort of the reptile tactics and with the non-economic damages, when they are successful in getting the jury angry, sometimes those, those concepts go out the window and they go, how high can we go against this party?

And we've seen some of those verdicts that went to the billions of dollars the past few years. That's not compensatory, right? I mean, that is them sending a message and that is them saying, we were really unhappy with what we saw. And there's, you know, there's times I suspect where the four of us, when we saw it, we go, yeah, I can understand why the jury was upset with this party.

And so I think it is worth keeping in mind what we're talking about, other concepts here of trying to nullify [00:21:00] the potential for nuclear verdicts that, you know, there's a part for us to play in that as well, on who we're putting up during the trial, how we're presenting the case, and how we're talking to the jury.

Peter Biging: I totally agree. With regard to social inflation, Ari, you touched upon that earlier. Can you talk a little bit about why this is such a big part of the nuclear verdict phenomenon?

Ari Magedoff: Yeah. So, thinking about social inflation and what views are coming into, what's happening in the world around you, right?

Like, what's, is there stuff in the news that's impacting how, let's say jurors are, are making determinations? Is there a hot issue in that region or in that jurisdiction that should be taken into account? And also, who's on the other side, right? Peter and Chris and Eric, we've talked about this one in the past, but you know, I have the example [00:22:00] of where you have a convent that went, that had money stolen from it.

It was done through a really, a social engineering claim where they were hacked by instructions for a significant investment. $5 million was made and it was directed to a bad actor. I mean, definitely you can blame the folks at the

convent. You know, they're the ones who sent out an email with the wrong instructions, right?

And maybe they should have checked it. And there may be some validity to that. But when you get in front of a jury, you know, here you have a large bank, large asset manager and then a convent with people who in the community who are looked at mostly by everyone as being like stalwarts in terms of being, [00:23:00] you know, really like investing in the community, giving back to the community, right?

They're very sympathetic as a plaintiff and how, if you're the insurance company or defense counsel representing that investment bank or that that asset manager, how do you defend against that? Like, and when a jury sees that they're going to inflate that number because, gee, these are people who spend their entire life giving to the community and they've had something stolen from them.

And geez, how hard could they have worked just to get that $5 million? Now, let's not put aside that this group, this convent group had probably a hundred million dollars invested. They were hardly poor. And, and they were rather sophisticated investors. But juries aren't going to see that. They're going to inflate that number to say, look, here you are big bad bank, big bad asset manager making millions of dollars, [00:24:00] very sympathetic convent.

And how, how do you deal with that? And I think when you look at social inflation overall it's just sometimes people want to feel that they have to give something back even more to pay for emotional trauma or what they view as emotional trauma. And, and that's a difficult issue. And in management liability, I think it's even more troubling because they don't always look at the person on the other end as being a person.

It's a corporation and I think a lot of people think corporations can pay and should pay, whether it's their insurance paying or it digs into the corporation itself in, into their bottom line. But I think it makes it even that much more difficult for juries and, those who are making determinations in terms of what should be awarded in these situations that much more difficult.[00:25:00]

Peter Biging: Can you talk about social inflation? I always like to bring up, because I'm a New Yorker and I'm a New York Mets fan, and we had our big signing of Juan Soto for I think $755,765 million, $765 million contract, three quarters of a billion dollars to play, pay a guy to play baseball. And people, I think, hear these kind of numbers, and that's just one aspect of life, right?

And you know, there's a bridge that gets damaged and they have to spend a billion or 2 billion to fix it. Or you hear these kind of numbers and I wonder if people get kind of desensitized to the numbers. And then if you're looking to, um, make a point, either a punitive point, like you and Chris mentioned Ari or if you're just looking to provide recompense for severe and debilitating emotional distress [00:26:00] where do you go?

And I think that it gets easier to get to crazy numbers if in the context in which we're in now, which makes things just, I think that much more difficult.

Christopher Vlasich: Um, yeah, but I'll say this, Peter, you're talking about Juan Soto. We're not even like Shohei Ohtani numbers. He's passed it, but he is earning it, you know, with like, what was his last game?

Uh, three homers and like pen strikeouts in the same game. And how do you put value on that?

Peter Biging: That, that was good stuff.

Christopher Vlasich: I'm a Dodgers fan, so I had to poke at your Juan Soto comment.

Eric Marler: Peter, I'm just going to say too, from the other side of those numbers, right? I mean, if you're of a certain age, you remember the McDonald's coffee lawsuit, right?

Where the woman spilled the hot coffee on herself, and that was sort of, at the time treated as like an extreme example of runaway litigation, right? Do you remember what the McDonald's verdict actually was?

Peter Biging: I don't, but I do agree with you. I'm interested to hear what you have to say, but I do agree with you. At the time we [00:27:00] thought it was insane. We thought the number was crazy.

Christopher Vlasich: Yeah. $2.8 million, which is like a rounding error today, right? Like that's how far we've come in, you know, whatever that was 30 years ago, 25, 30 years ago now it, it's insane. That was deemed at the time to be just this wild verdict, right?

And that had no basis in facts and oh my God, how could anybody ever give somebody that much money for that kind of injury? That's like, that's garden variety in today's environment, unfortunately.

Ari Magedoff: And I think, I think norms change, right? Like, and that's, and I think that's a great example, Eric, is that, you know, what was crazy?

What was that? How many years ago was that, 15, 20 years ago that McDonald's verdict? I don't remember it. It was a while ago. But I mean, so many things today that were like shocking, you know, 10, 15, 20 years ago or even 30 years ago are just okay today, [00:28:00] right? Whether it's on social media, whatever. I think people have kind of come accustomed to things, but also have inflated the valuation of things, right?

And what would that McDonald's verdict be today? Yeah, I mean, 30, 40 million, you know?

Eric Marler: It was 30 years ago, by the way. It was 1994. I googled it while we're talking here.

Ari Magedoff: That makes me feel old.

Peter Biging: Alright. So, somebody earlier mentioned, I think, one of the things again that Ari talked about is one of the drivers, the general drivers was litigation funding. Eric, since I had you weigh in on social inflation, could you talk a little bit about litigation funding and how that plays into driving nuclear verdicts?

Eric Marler: Yeah, just a real quick primer, right? For anybody listening that maybe doesn't know what third party litigation funding is, this is, there are funding companies out there, venture capital and similar outfits that essentially finance plaintiff's legal costs in [00:29:00] exchange for a share of the recovery from the case.

We find on the defense side, what this does is essentially commoditizes litigation and really works where instead of having an opponent that's acting like sort of a rational economic actor on the other side and considering reasonable settlement offers, you have people that expect a certain rate of return.

Nothing wrong with capitalism, certainly. But this is, the valuations that are getting put on some of these cases are making it very difficult to achieve anything approaching a realistic settlement. I mean, we're talking people that want 60, 70, 80, 100 percent returns on their money basically.

So you know what this does essentially, right? It removes the financial risk from the plaintiff themselves. This, you know, in turn drives prolonged discovery,

expert discovery, makes settlement negotiations more difficult, and just generally pushes for more aggressive litigation tactics to perceive this sort of, or, excuse me, to [00:30:00] punish this sort of perceived corporate wrongdoing.

The tricky part or the tough part is, and there's plenty of people and plenty that has been written about this, right, is plaintiffs are not always obligated to discuss, or disclose the presence of these third party litigation funding arrangements, right? This essentially keeps jurors in the dark about who the real party and interest is.

And it, you know, it sort of enables this reptile, these reptile tactics that we were speaking about earlier. It is just in our view and in our perspective it's another factor out there that's just leading to some of these outsized case valuations and outsized awards.

Peter Biging: We're going to talk about this a little bit further in our conversation, but as you and I have talked about in the past, the litigation funders, this is a business proposition, right? So, they are investigating the claim at the outset. So, they're identifying the potential [00:31:00] upside, they're investigating who the witnesses are, what the potential damages are, what experts will be needed, and they come into this case with a full steam behind them.

You know, they've got themselves moving already well in advance of the litigation and that also drives things as well, I think. But, and I agree with you. I think that one of the concerns too is right, they've got so much that they've invested in this it's harder to maybe have a conversation that we might have called a rational conversation about the value of the case because you're dealing with somebody who is already invested a lot of time and money and done some research into it and has already fixed their opinions on what they need to get back to make this successful financially.

Eric Marler: Yeah. And I know we're scheduled later to talk about some of the technological aspects of this, right? But the reality is these guys are using, you know, in most cases [00:32:00] fairly complex algorithms, right? They are reviewing these cases at the outset much earlier than the defense side is, and they're basically placing really sophisticated bets on the cases they think that they're more likely to win.

The other thing is because they do have so much money, they're not afraid to lose, right? I mean, that is a, that's a realistic, or something we just need to be

realistic about, which is they don't behave like your single plaintiffs, like your, you know, your individual plaintiffs necessarily would.

It's closer to if anybody's ever, you know, defended a governmental investigation or something that's been prosecuted by the federal government where resources are not necessarily an issue there, it's more about proving a point. There's a lot of that that goes on here too. Sorry Chris. I didn't mean to cut you off there.

Christopher Vlasich: No, I just wanted to add one thing. So remember, Ari was talking about changing norms. I think it's important to remember the changing norms in the third party led funding is when it initially popped up, what they were saying is, we're just adding some money to the [00:33:00] pool here, maybe helping out a plaintiff for a law firm, but we're not actually calling the shots, right?

That was their position. You have actually seen in some cases, because the lit funder and the plaintiff couldn't agree on whether to accept a settlement. The lit funder is now the named plaintiff in some of these cases and has literally taken over the handling of it, right? So, you know, for years we heard, oh, you know, the lit funder, of course, they're, they wouldn't be calling the shots.

That'd be ridiculous. Well, now they're being blatant about it. And in a pretty high profile federal case last year uh, one of the major funders is literally now the plaintiff in your case.

Peter Biging: I wanted to follow up on a point that Eric made, I think Nate Silver, the guy, the 538 guy who does a lot of polling and stuff, and I think and he wrote a book that I haven't read, but I heard him talk on a podcast about it.

I think he mentioned like the river, which is this concept of like most of us in terms of assessing risk. We look at overall risks, pluses and minus in [00:34:00] the much broader context. And we thus would normally aim for a landing spot that's much closer to avoiding risk of getting nothing. And I think as you were pointing out Eric, that these litigation funders are more like into arbitrage.

It's more like, look, if I take a hundred cases and I average a million dollars a case and I get a hundred million dollars. If I take a hundred cases and I just push them to the max and I get defense verdicts in like 65 of them or 80 of them, but I hit big in 20 of them, I'm not getting a hundred million dollars, I'm getting a billion or more.

And I think that they're looking at it from that perspective and that I think, again contributes to the complexities of trying to resolve these cases. Alright. So, we talked a little bit [00:35:00] about the drivers of this general overall. I've asked, I'm going to ask this question, but I think we've answered it to a certain extent.

Are nuclear verdicts a real concern from your perspectives in the area of management professional liability? And I think Ari, you mentioned it earlier, and I guess both in D&O and in financial services professionals, is it a risk that you see, or a growing threat of a concern for financial services and professionals in D&O?

Ari Magedoff: I really think it matters on really the different products and insureds that you're dealing with. I think that there's always a risk in like the asset manager space of getting roiled in some type of like promissory note scheme or Ponzi scheme where someone puts, or a group of people, put their life savings into an investment and it turns out to have been fraudulent.

And either the [00:36:00] insurer is part of that scheme or really failed to supervise its team to prevent it from happening. And, you know, those are very sympathetic plaintiffs to get in front of a jury, right? So, you always have that risk there. You also have that risk in the ICPL sphere, Insurance Company Professional Liability, you know, for bad faith when you have insurance carriers that at times may just get something wrong, right?

And hasn't either been properly staffed, or done something incorrect in its claim handling, and let something go to a rather large verdict and in a difficult jurisdiction when they could have settled it maybe within limits.

You always have that exposure from an ICPL standpoint, which is, you know, a risk that's spread over many carriers, but it's still something that the financial [00:37:00] line space you have to deal with as a carrier. I think in the management liability space, it's a little different. You know, you always have large exposures to securities class actions, but they settle, right?

It's very rare for you to see a securities litigation go to trial to get in front of a jury, they resolve. So, while they spit out huge numbers, now, especially with the market doing as well as it is, you're seeing damages in the billions more common. You know, 20 years ago you didn't see that at all.

But they're still in, settlements at times may be higher than they have been in the past. You're not seeing that translate into nuclear verdicts in the management liability space because the industry as a whole resolves those before they get to

that point, which I think is great in terms of preventing that type of [00:38:00] exposure.

But, I'm sure they will. There will be a day when someone takes the securities litigation to trial, and we'll see what happens. But, I don't know if anyone even wants to kind of test those waters and face the verdict that could come out of that type of case.

Peter Biging: So Chris, what about like lawyers and accountants?

I think you mentioned that earlier.

Christopher Vlasich: Yeah. You know, I'd be hard pressed to find any of the major E&O categories that doesn't have that potential for it. And as you start to dig in, you can sort of see it's kind of obvious once you start playing around with sort of scenarios, right?

Like on the design professional side of things, you know, think about that, like the condo collapse in Miami a few years ago, you know, lawyers and accountants especially, you know? When I think about lawyers and accountants, I think about the great recession from 2008-2009. What happened was, after, you know, a couple years, the only people left who were potentially involved in some of these, [00:39:00] situations, let's say, were the lawyers and the accountants that had deep pockets left.

And you were doing, you know, paying round the clock, you know, reinstatements sort of double limits on some of these firms, you know, insurance agents and brokers. I mean, Peter, you gave an example at the outset, right, you know, of where you could potentially have this explosive verdict. And then you have the MedMal space, which I think really was probably one of the first places where we saw larger verdicts in the financial lines.

And then, so, you know, Ari was talking about, so the public D&O, you know, I think about in the private D&O space where you essentially have like your private D&O policies kind of have like this quasi D&O coverage, some E&O coverage, and then EPL coverage. Well, you could see it in all three areas. And I think it's important for listeners who might be a little skeptical of saying, well, it's probably not going to hit this area where I practice law.

Plaintiff counsel gets paid to find ways to put pressure on in new and ever expanding ways for from the third party lit funding [00:40:00] perspective. Also, just from their own bottom line. And if they can try to, you know, ratchet

up the non-economic pressure, you know, we talked about punitives here and a lot of times we don't get too worried about that because it's not covered, right?

And so, from the carrier perspective, what do we care? Well, sometimes the jurors will take what really functionally is a punitive damages type assessment and just apply it to compensatory because they don't even know any better, right? I mean, they're just sort of throwing these numbers out there. And so I think we, you know, and I don't think the four of us are doing that, but anybody sort of listening to this saying, well the financial line space that I practice in, we're immune from nuclear verdicts. I would be very careful coming to that conclusion.

Peter Biging: So, I think you really covered a lot of the grounds, and I do think I agree with you wholeheartedly, Chris, that this is a broad based, real concern and it, I think it's a concern that's only going to grow. So that being said, we've talked about some of [00:41:00] the general drivers of management, professional liability nuclear verdict risk or nuclear verdict risk generally.

Are there behavioral and operational drivers in the way we as a defense industry deal with claims from the very outset of the case and then through all the way through trial that you also think contribute to this? And I, Eric, let me see, ask you to see if you can start the conversation there.

Eric Marler: I think there's a number of different areas, right? I think you could, you could probably categorize the first as just, you know, sort of the front loading of cases. This is an increasingly common tactic among the plaintiff's bar – you'll get these massive demand packets, right on day one, right? Along with of course, the policy limit demand to come along with it. This is an area where I [00:42:00] think plaintiffs have successfully adapted to and are more effectively leveraging AI than the defense bar is quite honestly. I mean, you can't tell me that some of these single plaintiff or I'm sorry, single lawyer or three lawyer offices, right, really have the amount of resources to throw at this, right?

The only answer in my mind is they have to be doing it through technology, you know? They're using it to summarize medical records, draft discovery demands, draft their pleadings and their answers, right? And, and not necessarily, this isn't intended to be sort of a sidebar into the use of AI in the legal profession, certainly.

But they are using it in new and creative ways every day, right, that are allowing them to do, essentially to do more with less. So, I think that's a big factor here. Obviously there, you know, we've talked about the sort of the reptile tactics and

this extends [00:43:00] not just in the courtroom in my mind, but to sort of the media battle as well.

Plaintiff's attorneys have long been very effective at advertising their wins. How many billboards have you seen, right, or how many television ads have you seen? We don't do the same thing on the defense bar, right? I mean, yeah, we publicize some big wins from time to time, but there's just different hurdles and just a different mentality I would say about that.

Plaintiff's attorneys, again, are not shy about sort of using technology and media to their advantage. And then the last thing I guess I would touch on, right, we've already kind of talked about some of the lit funding stuff and I alluded to sort of the policy limits demands earlier, but they've always been very good.

This is nothing new, right? They've always been very good about forum shopping, and sort of steering their cases into the most plaintiff friendly jurisdictions. There's a reason you see a lot of cases filed, you know, downstate Illinois, [00:44:00] LA County, these places, right, that perpetually appear on the list of judicial hell holes again they're just behaving intelligently, right?

And they're filing their cases in the places that are most advantageous to them.

Peter Biging: Are there things that operationally, the insurance defendants industry is doing that may be unwittingly feeding into the nuclear verdict problem that we're encountering?

Eric Marler: I think there are, you know. I think there's at the moment, right, in the insurance industry, there's resources are stretched thin and they're always stretched thin, right?

I mean, you have caseloads going up on adjusters. They're being asked to do more, in part because you know, the plaintiffs are getting more aggressive and creating more work for them. So, it gets tough to, as a claims manager or a claims professional, to proactively manage your cases when it seems like probably most of [00:45:00] what you're doing your day spending your day on, or a large part of what you're spending your day on, is just simply putting out that day's fires.

So, I think plaintiffs again, right, they're very good at leveraging you know, the rules as it were, right, in litigation to insist upon responses in certain times. And not just responses for simple questions, but for very complex questions. So, I think that's definitely an area that they exploit.

I think they also, like I said earlier, right, they're ahead of us when it comes to sort of the technology game. CELA, for listeners that may not know the California Employment Lawyers Association, essentially the California Employment Plaintiff's Bar, as of three years ago was putting out a CLE training on how to effectively use AI in your legal practice.

I can guarantee you there were no similar defense bars doing the same thing three years ago. This is a topic that is just now being talked about extensively in the insurance industry and among the defense bar. So again, being early adopters [00:46:00] gives them a strategic advantage. And they're, you know, to their credit, right, they're using it effectively at this point.

Christopher Vlasich: Eric, can I just add one thing on, on the AI front and so this is going to be real interesting how the industry does this. My concern is what we do is we take a normal pending as one 50, let's say, and then we give that AI capability or increase the AI capability to the adjusters. And now we go, congrats now here's 300 is your new pending target, right? So, all this technology that we get, instead of giving the adjusters a chance to be great at what they do, we're just going to give them a chance to then do double the work so that that's going to have to be a real fight from the claim side, pushing back, saying, hold up. We need this technology with a reasonable pending just to counteract plaintiffs. And, fingers crossed, but I think the four of us that we had to vote, which way is it probably going to trend? I think we'd probably end up voting in the same way.

Peter Biging: So, when we were talking about this earlier on, [00:47:00] I got some bullet points about some of the comments.

One is unsustainable caseloads undermining strategic claims handling. Another is chronic underinvestment in claims talent and training. Another is reactive claims culture driven by cost control as opposed to risk control. Still another is information silos between underwriting claims and counsel, and yet another is limited use of data and analytics to predict verdict risk at the outset.

Can I ask you guys to talk about some of those as issues of concern for the insurance defense community and, you know, why are they a problem and what can we perhaps do to, to address these problems?

Ari Magedoff: Peter, I just, uh, wanted, you know, to jump in and, you know, a question that I get from a lot of our defense counsel, it's like, well, what can we be doing differently?[00:48:00]

And you brought up some issues that, you know, you see in the industry, it's not at every carrier. Some carriers worse than others, some much better. Some are using analytics rate, some aren't. But one of the things that you, and you especially see it in the ICPL space, when you kind of look back at claim handling that has gone awry, right?

And well, what happened, you see a lot of times where you have defense counsel who's like, I flagged this, I think it could settle within, you know, the $10 million policy limit and we have a demand for nine, but no one's responding to me, right? And they're kind of continuing to defend the case and moving forward.

And I think one of the things that defense counsel can do to kind of help stem some of this is when you're not hearing from someone at a carrier, you're not being responded to kind of stop for a second, say, why? What's going on? Has a claim handler changed? Do I have a [00:49:00] relationship with the manager of that department that I should reach out to?

I have a relationship with the chief claim officer to reach out to them and kind of flag it. There's just too many times where just kind of let things go by and say, okay, fine. You know what? They're just not being, they're busy. I'll get back to them. I'll just continue to defend the case when sometimes there needs to be some saber rattling among the defense counsel that says, I need your attention here.

This is, this may not go well for you if we keep moving forward as we are. I see an opportunity where we can settle it within limits, and I'm imploring you to do that or face a potential significant consequence in maybe a difficult jurisdiction or before a difficult jury. Kind of continuing along the way to see opportunities to resolve.

You always hear from people, claims don't get better [00:50:00] over time. You know, they're not a fine wine. And if you have opportunities to resolve them earlier, the better. And as defense counsel, you should be looking for opportunities for early settlement from the outset, right? That it should be what are the off ramps when we can either leverage certain issues to drive a settlement or see an opportunity to save on defense cost, to drive a settlement.

And you know, that's one of the reasons why carriers, we build panels, right? To build relationships with folks, so they know how we work and how we function. And also know that that's not the only matter you're going to have with us.

That's not where you have to bill, bill, bill, you know? We settled this one early on.

We can have another matter later. And yes, there are some matters we can't force a plaintiff to settle, but we can sure fight hard to drive, try to resolve something within limits. And we really need defense counsel's help to kind of do [00:51:00] that risk analysis and it for them. I know it's difficult because you have your client who's the insured who you're defending, but you also have this relationship with the carrier to try to help us in terms of helping manage that risk and driving a resolution for everyone.

And I think that we could prevent a lot of particular verdicts by just having better communication among defense counsel and the carriers.

Peter Biging: What about identify cases early on? Chris, we've talked about this a lot. You know, a lot of times, you and I talk all the time about the fact that my philosophy is that the trial starts at the first deposition.

And if you've blown that first deposition, I think you mentioned that as well. Like, you know, with the safety and types of things you can have lost the case and lost it big in that first deposition. How do we go about doing a better job of, as an industry, and I [00:52:00] guess I put it more on the insurance defense side in identifying the cases that present a nuclear verdict risk or present a higher potential for that.

And maybe siloing them, or at least, or structuring them so that the defense is geared towards the major battles ahead and are real and you're really investing in them the way the plaintiff's bars already invested in the case before it's even been filed as a complaint.

Christopher Vlasich: Yeah. So, let's talk about that.

So, as you were sort of listing out some of the concepts so that reactive claims culture driven by cost control, not risk control. Most of our litigation guidelines and internal claim mailing guidelines, a lot of that is based on sort of your average case, right? You know, I want, one or two attorneys on this file, maybe a [00:53:00] partner, maybe an associate, you know, don't spend any money on experts until you get to a certain point, et cetera, et cetera.

We could sort of delineate all the ways that probably we need to be updating those litigation guidelines to reflect sort of the current litigation environment, especially in light of nuclear verdicts. So I think there's blame to be shared on

both sides. The time where I get a little frustrated is if I hear, you know, two or three years into the case, oh yeah, I wish I could have done, fill in the blank, right?

I wish I had two partners that could have put on this so we could, you know, attack on two fronts, right? Because, you know, plaintiff's been working up this case for the two years before they filed it, so we need, you know, to hit the ground running. I wish I had gotten this expert on board to help, know this issue a little bit better before they deposed this key witness and now it's too late.

And so, along the lines of what Ari was saying is, you know, sometimes we might get a letter and we're not responding to it. It's probably not that we, you know, we're not thinking about it. [00:54:00] Somebody may have read it so quickly, they didn't even recognize what was going on. You know, I've had situations where I've had, you know, in a 10 or 15 page sort of pretrial report or sort of a status report on it, embedded in one paragraph is, you guys probably didn't do anything wrong, but you're the only deep pockets.

You're going to have to pay tens of millions of dollars. Put that in the front, like, you know, bold letters, hey, there's a problem here. Same thing on these cases as they come in and we assign it out to defense counsel to say, hey, we really need to do the work on the front end, and here's why your guidelines only allow for such and such.

Here's why you need, we need to expand it. For this case, this is a problem. And getting into, you know, sort of trial starts when that first witness is deposed. I keep seeing more and more situations where as we get to a month or two before trial, defense counsel is saying, this is going to be a really hard case to try because of how discovery went.

And as you dig into that, sometimes you are finding, well, it kind of went poorly because we didn't spend, you know, the two or three days necessary to get [00:55:00] a certain key witness or multiple key witnesses on board. And, I think sometimes we forget how hard that is if you don't live in the litigation environment, right?

If you're not an attorney or work at a carrier, it is really tough to be cross examined by a good plaintiff counsel. And if we're not, if I am not authorizing Peter, you know, enough funds to actually prep for that, essentially what we're doing is we're just buying a situation where, when it comes around towards trial, we just have to pay whatever those limits are, right?

And so when we're talking about cost control versus risk control, there are definitely times where carriers need to be a little bit more cognizant of, we may need to spend, you know, an extra, 100, 200 grand whatever in defense costs in order to help save that money on the backend. And I think we need defense counsel to help us get to that point by, really by raising this early, being loud about it and explaining why they need to spend that extra time and money early on in the case.

Peter Biging: Let me just jump in real quick, and then [00:56:00] I want to hear from you. I also want to hear from Eric on this. I talked to carriers. When I, when the claim comes in, I tell them, if you're new to dealing with me. I may be more costly at the outset in terms of the amount of time and effort I put into investigating the case and preparing the initial case analysis because I want you to know as early as possible what the problem areas may be in terms of facts, in terms of documents, in terms of witnesses and where we're going to need to invest the dollars.

And I'm also a big proponent, like you were mentioning, Chris, of identifying experts early. I say the witness has always got to tell the truth, but it would be nice if the witness tells the truth in a way that aligns with the expert's anticipated opinion going forward so that everything's lined up and you don't know that if you grab the expert at the very, very end of the process and have to, have to shoehorn them in to whatever has [00:57:00] already been baked in terms of testimony.

Ari, I wanted to hear your comments and also Eric, I wanted to ask you, I think, I know we've talked in the past about some of the things you do and your company does to try to use data and analytics to identify potential nuclear verdict cases right when they first come in. So you kind of have a sense before you've even gotten the assessment from counsel that this might be a case that I need to direct towards a particular type of firm and a firm that I feel if we need to take it all the way to trial, I can trust them.

Ari Magedoff: So, yes I'll jump in real quick and pass the mic to Eric. Yeah, the point that I want to make, and I've made this in the past, is that we, as carriers need to treat our defense counsel, like business partners, right? That they're [00:58:00] are an important part of how we do business for both us in helping mitigate and manage risk and also to kind of properly defend our insureds.

And I think there are too many--things have gotten the way in recent time that has kind of made that relationship almost adversarial, right? With software that is reviewing invoices, teams of people that are not the claim handlers, they're

reviewing invoices and making deductions. And I think it's making our defense counsel that we work with our business partners, finding it harder to do their job, harder to communicate with us.

Are they going to pay for that? Are they not? Is the system maybe broken and needs to be addressed? Because I think for me, and, you know, my own personal view is that I want my claims team reviewing your invoices. I want them to know, hey, what you're working on that helps them think about, gee if you're spending a lot of [00:59:00] time on this issue, what's going on there?

Are we not talking about it a lot? Should we be talking about more? Is it important issue? And also, they know what they've asked you to work on. Whereas some team member who's part of a billing review team who's never once interacted with people like yourself, Peter, in making judgements on your bills without the input of a claim handler, it is not helpful.

Right? So, I think we need to work as an industry in repairing the relationships with our defense counsel. And I think that's going to drive better results. You're going to have better communication, and you're going to have less of these situations where these nuclear verdicts come down because. We're going to be working better together.

You're going to feel that your work product is being properly compensated and that you feel more whole and that the relationship's going to be better and we're going to see better results on our side of the fence.

Eric Marler: Yeah, I think that's well said [01:00:00] Ari. And Peter, we talked a little bit earlier right, about the dearth of insurance talent and specifically, right, about some of the challenges that come as the industry as a whole gets a little bit older and we start to see people retire and there's a little bit of attrition there, and we're not sure if we have the necessary talent in pipe to backfill for those roles.

I think the same thing is very true in the legal services space, right? I've heard from a number of my business partners that, you know, they're having trouble attracting and retaining talent, particularly in competitive environments like California, New York, Florida, places like that, right? Where there's more jobs than there are lawyers, frankly.

You also have to account for the fact that, you know, some defense attorneys choose to jump ship and go to the other side, right? We see cases every day

involving employment attorneys, plaintiffs represented by folks that used to be with large, well-known national law firms doing the defense work.

So that's a [01:01:00] challenge implicit here as well. But to your question about sort of what we're doing in terms of data and analytics, our core philosophy is that effective claims management is just one series of decisions being made, one after the next, after the next. And at the very earliest stages, you know, from an intake perspective that looks like which member of my team do I want to handle this case?

So, we're scraping data, we're trying to understand what a case looks like as soon as it walks in the door so that we can give it sort of the attention it deserves. That may mean it needs to go to a senior team member.

It may need, you know, it may mean it needs to go to a junior team member. And then we're trying to equip those folks with the information they need to best steer that case to resolution while minimizing the potential for these nuclear verdicts. So that's, you know, what do I want to do about coverage?

What do I want to do about defense counsel? What do I want do about reserves? What do I want to do about motion strategy or settlement strategy? Trying to equip folks. And [01:02:00] again, right, customizing the experience to their level of experience within the industry, just to give them additional information so that they can make those key critical decisions with the benefit of the most information possible.

A lot of times that does look like numbers, but sometimes it takes a more narrative form too, right? We try to do certain overlays, like, how does this particular defense attorney stack up against this particular plaintiff's attorney with this particular judge? And what, if any, track record is there?

And, you know, what is that, what is that combination of factors going to look like for us?

Peter Biging: So, we've been talking for over an hour now, and I feel like to some extent we've just scratched the surface. But I think that that's a really good place to end the conversation. I want to thank you all again for the time and attention you put on this.

I think that this was a pretty darn frank and open and direct conversation, and I [01:03:00] think that this is the kind of stuff that we need to engage in moving forward as a defense industry. From my perspective I will say that I have rarely

if ever encountered pushback when I explain in an intelligent form the risks and the threats and the concerns, and then I say, hey, I need to lock this person in a room with me for three days and to, and prepare them.

I don't get, no, you can't do it. If I say I really need to try and retain an expert early, and here's why, I'm typically provided that authority. And so, and that goes on with mock juries and jury science. So I think it's also it's incumbent upon the defense lawyers side of things as partners [01:04:00] with the carriers to do their job as well in dealing with this risk.

And if we're not doing our job, if we're for the first time saying, Chris, you know, just before trial, this is going to be a hard case to try. That's really not doing you any good. And we're feeding into the problem. So, thank you again for this conversation. It was really terrific. And I'm sure that this conversation will help drive further consideration of the issues and move the ball forward towards making some of the necessary adjustments that this nuclear verdicts issue is something that's dressed in a meaningful way. Alright, so thank you again. Until the next time, this is Peter Biging taking you to the Precipice.

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