

Taming Plaintiffs' Thriving 'Reptile' Tactics: How To Start

By **Scott Seaman and Diane Webster** (July 26, 2022, 6:30 PM EDT)

It is easy to see how plaintiffs attorneys' reptile tactics — which attempts to target the "reptile portion" of jurors' brains by appealing to primal emotions rather than logic — can undermine the U.S. civil justice system and produces unjust results and nuclear verdicts.

Fortunately, plaintiffs counsel are not the only participants in the trial process. Defense counsel have a role to play in identifying reptile tactics and in challenging it at every stage of the proceedings from pleadings and motions to dismiss or strike, to the discovery they propound and their objections to plaintiffs discovery, to witness selection and preparation for deposition and trial, to developing their theories of the case, to motions in limine, to jury instructions, to trial tactics and strategy, to how they conduct voir dire, opening statements, witness questioning, objections to evidence and argument, and closing arguments.

Judges also have a role to play in the pretrial rulings they make and at trial by assuring the fairness of the proceedings and by rendering correct evidentiary rulings. Courts should treat reptile tactics in a cold-blooded manner and prevent them from interfering with fair and orderly trial proceedings.

In a **previous article**, we explored what reptile theory is, why jurors are susceptible to the reptile's bite and how reptile tactics thrive in an environment supercharged with social inflation. We now focus on the approach and steps insurers, corporate policyholders and their counsel may take to defeat reptile tactics in these dangerous times of social inflation coupled with price level inflation.

We begin by explaining how price level inflation is likely to fuel additional social inflation.

Social Inflation and Reptile Tactics' Increased Danger

All other things being equal, price level inflation automatically increases social inflation by increasing the costs of defending cases, increasing settlement values and producing higher jury verdicts. As Julian James of Somp International recently pointed out:

Looking at the economy, we're entering a period of high inflation and if we think about what that means, it means the cost of claims is going to increase, it means the cost of rebuilding basic things is



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going to increase, and it means that companies themselves are going to have to weather the impact of those inflationary demands. [1]

James also referenced the impact high inflation will have on insurers themselves in terms of their own solvency requirements in times of high inflation.[2]

Supply chain constraints have produced shortages of lumber and other building materials, driving up the costs of property repairs. Shortages of microchips also increase costs to build and repair property and other goods that incorporate chips.

The medical consumer price index has outpaced the overall consumer price index and liability insurance losses are influenced by medical costs for injured plaintiffs. Although recent advances in medical treatments for trauma victims — such as skin grafts for burn victims, robotic exoskeletons and advanced prosthetics — have extended longevity and improved patients' quality of life, they have also been known to increase the cost of care.

Shortages of numerous items, including baby formula and food items, have been widely reported and put upward pressure on prices.

There likely is a synergistic effect between many of the factors driving social inflation and price level inflation. For example, an inflationary environment will likely increase nuclear verdicts and create expectations on the part of jurors of large and continuing price increases, which likely will be factored into their awards.

Media reports of multimillion- and multibillion-dollar verdicts have desensitized jurors and, to some extent, have normalized large awards. Similarly, media reports of large price increases likely will result in even larger verdicts to account for jurors' inflationary expectations.

Many economists subscribe to John Maynard Keynes' theory that some wages and prices are sticky downward, meaning that prices increase quickly when demand is increasing but decrease slowly, when demand is decreasing.

It is not unreasonable to believe that jury verdicts will rise quickly to keep up with and even outpace inflation and remain sticky downward. A surge in defense costs, settlement values and jury verdicts may result from the double barrel of price inflation and social inflation.

Capturing the Reptile and Defeating Reptile Tactics

Reptile theory, in its early years, provided plaintiffs counsel with the advantage of surprise. Defendants were caught off guard and sometimes even unaware of its use at first. Once defendants caught on to the use of reptile theory, there was still a delay in effectively responding to the reptile.

The defense bar appears to have now caught up and has become more adept at countering reptile theory. Remarkably, many judges were unaware that reptile tactics were being unleashed in their courtrooms for a long time and some judges still may not be fully cognizant of reptile theory. Accordingly, exposure of the reptile and educating courts about the impropriety of reptile tactics remain important functions of defense counsel.

There is no one-size-fits-all solution, but there are many things defendants can do to contain and even

slaughter the reptile. Defendants must identify and be prepared to address the reptile at each pretrial and trial phase, employ the traditional tools available to defendants in civil litigation, and adapt their strategies and apply these tools to succeed in a land swarming with reptiles.

Here are some overarching themes and strategies that defendants may deploy, as appropriate, in a particular case.

Promptly spot a case that is susceptible to the reptile's bite.

Prompt case evaluation and early identification of cases with high nuclear verdict potential are even more critical activities in the land of the reptile.

Early settlements of such cases on terms acceptable to defendants and their insurers, where achievable, often provide the most cost-effective resolution, even though the wisdom of such settlements may not be fully appreciated because the verdict alternative will never be known and because the parties move on to other cases and claims. Strive to put a dollar value on a case or claim early and revisit it as the matter evolves.

Keep the reptile out of the courtroom.

The best way to defeat the reptile is not to allow it in to the courtroom. Motions to dismiss, motions to strike, motions in limine, objections to discovery, and motions for protective order provide vehicles to limit the scope of discovery and evidence to the particular issues and incidents at issue in the case, and foreclose or limit discovery on extraneous issues.

Excluding evidence will limit the space in which the reptile may slither. To the extent a court nonetheless allows this type of evidence, a defendant can decide what affirmative or rebuttal evidence it wishes to adduce to counter the reptile evidence.

It is worth elaborating on the importance of filing motions in limine and zealously pursuing to exclude improper arguments, evidence, and anticipated misconduct by plaintiff's counsel in advance of trial. Motions in limine have the advantage of educating the judge and making arguments outside the presence of the jurors. Obtaining rulings will also assist defendants in preparing for trial and marshalling evidence to counter the reptile to the extent it is allowed to enter the courtroom.

Delayed or deferred rulings usually are friends of the reptile because they open the door for plaintiffs to adduce evidence recognizing it may be more difficult for defendants to make a full argument and less likely a court may give full consideration to such arguments during the heat of trial with a jury empaneled.

Reptiles are not concerned with limiting instructions as they know such instructions are not a panacea for venom already injected in the minds of jurors. Also, courts and defendants may be more hesitant to interpose objections or interrupt arguments at trial before the jury.

Additionally, avoiding in limine rulings increases the chances a plaintiff will be able to prevail on an appeal of a verdict that is the product of reptile tactics based upon a defendant's failure to properly preserve an issue for appeal, notions of broad latitude at trial, and application of the harmless error doctrine.

Defendants have been able to prevail in excluding the reptile or substantial reptile evidence or questioning in many cases.[3] An example of such a motion in limine is a motion to bar mischaracterization of the standard of care, which is what the reptile attempts to do.

Some lost motions may be attributable to failing to detail to the court what reptile theory is or precisely explain what evidence or types of evidence should be excluded and why their admission would be improper. Generally, the more specific and detailed the motion, the more likely it is to be successful.

Put the reptile to work for the defense.

Defendants can activate jurors' reptile brains in favor of the defense. Fear and survival instincts — particularly those of so-called defense jurors — can be triggered in ways favorable to the defense. For example, fears associated with lawsuits and large awards such as undermining the quality and availability of health care may be deployed in a medical malpractice action.

In other cases, pointing out the harms of large awards on the economy, in terms of costing people jobs, increasing prices and suppressing the introduction and development of products and services may be a beneficial approach.

Demonstrating the defendant's conduct promotes societal interests, whether safety or otherwise, puts the reptile to work for the defense. Point out the societal problems that would be created by the conduct or rules advocated by plaintiffs, so they are allowed to resonate with jurors. Make sure you get the defendant's theory and message out early and often.

Expose the so-called paper reptile.

Demonstrate throughout the trial that the plaintiff's reliance upon general notions of safety is nothing more than an attempt to deceive jurors and obfuscate the plaintiff's failure of proofs and lack of evidence necessary to prove essential elements of the claim, such as failure to establish the standard of care, lack of evidence of any breach of the standard, lack of causation and lack of damages.

Jurors will not appreciate being manipulated by plaintiffs and, as a result, the reptile may bite plaintiff.

Help jurors see through the reptile's camouflage.

Show jurors that abstract safety rules and notions of corporate responsibility are inadequate substitutes for the required proofs. Emphasize appropriate details of a case as well as the evidence. Hammer home the deception in the plaintiff's approach of generalizations and oversimplification. Continually bring the focus of witnesses and jurors back to the defendant, the plaintiff, the issues in the case, and the proofs and lack of proofs in the case.

Appeal to jurors to repel the reptile and free the defendant hostage.

In the event that the court allows the plaintiff's improper use of the reptile, then attempt, wherever possible, to have jurors place themselves in the shoes of the defendant.

Put jurors in the position of being attacked by the reptile and needing to survive its vicious attack. Show that rules of evidence, the burden of proof, meeting the burden of proof and proving elements of claims are important requirements to prevent jurors and others from being bitten or killed by the reptile.

Engender reptile emotions related to being falsely accused, wrongfully hauled into court, being subject to unfair or improper scrutiny, and being judged based upon generalizations or conduct of others. Distinguish between accusations and evidence, puffery and proof, and place the jurors in the position of challenging and evaluating evidence.

Let jurors know where the reptile is hiding.

Place safety rules in the appropriate context. Demonstrate that safety rules are not absolute and show why other considerations should influence actions. Show that any alleged violation was inadvertent, rare, minor or reasonable, or did not actually cause any harm. Show why the generic safety rule that plaintiffs advocate itself presents dangers.

If the court improperly allows the plaintiff to argue the role of jurors in keeping society safe, be prepared to explain to jurors what their proper role is, the importance of jurors being objective triers of fact based upon the specific evidence in the case before them, and the harm to society that would emerge from jurors stepping outside their appropriate role.

Remind jurors the defendant is human, compassionate and like them.

It is important to humanize the company and its witnesses throughout the trial. Demonstrate the humanity of the defendant. Where appropriate, put the jurors in position to understand the attributes of the individuals and to view the actions and statements from the perspective of the individuals taking or making them. The more jurors relate to the defendant, the less susceptible jurors will be to reptile theory.

Turn the table over on the reptile.

Where general safety rules or information on violations is admitted, counter with evidence of the defendant's systemwide safety processes, safety policies and training regimen.

Use handbooks, guidelines, signs, posters, memoranda and other evidence demonstrating the defendant's positive actions and their concern and focus on safety. Point out the company's hiring and retention of experienced, qualified people.

Contrast the defendant to the reptile and present the defendant in a positive light.

Project a tone of compassion and concern for safety. Speak about care demonstrated by individuals within the company. Emphasize the corporate responsibility and good corporate citizenship of the company. This should be reflected in the tone, words and approach of the counsel and witnesses throughout the proceedings.

Provide training to witnesses in proper handling of the reptile.

Educate witnesses on reptile theory and prepare them to respond to reptile questions at deposition and trial.

Prepare for reptile question topics such as: safety should always be a top priority; companies should not put profits over people; products should be safe for all consumers; businesses should not make or sell a

product that could hurt people; cost should not be a factor when it comes to safety; policies and procedures are needed to ensure people do not get injured; a company should warn of any dangers with their products; and documentation must be thorough to ensure safety policies are followed.

Educating witnesses on properly addressing hypothetical questions is important. Preparing witnesses to address the reptile will prevent the type of evidence the defendant seeks to exclude from existing in the first place. Remember to prepare the witnesses on wording and tone as well as content of responses and the importance of proper demeanor.

Attack the reptile.

A defendant waiting for the reptile to attack first is at greater risk of being eaten than one that is proactive in identifying the reptile, exposing the beast to the judge and jury, limiting or eliminating the reptile's movement through objections, filing motions in limine and employing other trial tools, and affirmatively adducing evidence and argument supportive of the defendant's theory. Simply stated, attack the reptile before it attacks you.

Offer up other prey.

A defendant does not necessarily have to outrun the reptile, instead it may often avoid the reptile's bite simply by outrunning other potential prey. Do not let reptile tactics prevent you from focusing on the contributory negligence or comparative fault of the plaintiff or other defendants and empty chairs.

Don't confuse the reptile with Puff the Magic Dragon.

Defendants should not be intimidated by reptile tactics or chase the reptile through the underbrush of the jargon associated with reptile tactics. Reptile theory seeks to frolic in the courtroom, not in a land called Honah Lee.

To defeat it, defendants must recognize reptile theory for what it is — an attempt by plaintiffs counsel to circumvent traditional rules of evidence and adduce evidence and arguments traditionally barred. Exposing the reptile for what it is will prevent the jurors from being transformed from triers of fact into Little Jackie Paper.

A snake may shed its skin, but it's still a snake.

Plaintiffs use the reptile theory in an attempt to circumvent traditional rules of evidence and adduce evidence and arguments traditionally barred. Use of traditional weapons and arguments can go a long way in defeating the reptile.

Remember the importance of proper jury instructions and spending time during closing argument reviewing key jury instructions with the jurors and explaining in detail how the instructions apply to the evidence.

Reptiles abhor rules of evidence.

Once again, the reptile was created in large part in an attempt to evade and avoid long-standing rules of evidence. Relevance is the enemy of the reptile. Further, Federal Rule of Evidence 403 and state equivalents can be effective reptile slayers. Reptile theory presents all the countervailing considerations

warranting exclusion of even relevant evidence under Rule 403.

The reptile's DNA is riddled with engendering unfair prejudice, confusing the issues, misleading the jury, interposing undue delay and wasting time. Reptile theory also runs counter to the prohibition of Federal Rule of Evidence 404 of admitting evidence of any other crimes, wrongs, or acts to prove a defendant's character or to show that, on a particular occasion, the defendant acted in accordance with the character.

Keep in mind that Rule 103(d) admonishes that, to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Jump on improper reptile arguments and remember the golden rule applies to reptiles.

Reptile theory is based, in large part, upon asking the jurors to consider their interests in safety, the interests of society in safety, and to be the conscience of society. As such, reptile theory violates the almost universal prohibition against asking jurors to place themselves in the shoes of another person and/or encouraging jurors to decide the case on the basis of their personal interests or bias.[4]

Start attacking the reptile during voir dire.

Depending upon the jurisdiction and judge, defense counsel may begin the process of exposing and destroying the reptile and conditioning the jurors during voir dire. Voir dire should at least provide an opportunity to identify potential jurors that are reptile-friendly and to exercise peremptory strikes and challenges for cause accordingly.

Questioning can include the traditional line of inquiry about whether or not jurors can agree to leave their personal views and experiences aside and instead follow the evidence as presented in the courtroom and the law as the trial judge will instruct them in reaching a decision. Their promises to follow the law at the beginning can be revisited in closing along with showing that there is no place for the reptile in their decision making.

Challenge the reptile on damages.

In a world of nuclear verdicts, defendants can ill afford to ignore damages. Deemphasizing damages out of concern that it will make jurors more likely to find liability can be a risky strategy. Defendants must be aggressive in conducting discovery on damages and in challenging plaintiffs' damage proofs. Mock trials and juror research should be directed at damages as well as liability and defenses.

Plaintiffs have been inclined to set a higher damage anchors recently, even at the risk of seeming to be unreasonable, based upon studies showing that jury awards are increased by higher damages requests and decreased by lower damages requests. In many cases, defendants may be well-served by setting out their lower damage anchors earlier and more often at trial. Defendants should remember to present fact witnesses and experts to address damages issues.

Do not forget the impact of the COVID-19 pandemic on jurors.

In selecting jurors and in trying cases, defendants must keep in mind the potential impact of the pandemic and related shutdowns on jurors who may have experienced physical, psychological or emotional injuries themselves, suffered loss from the deaths of friends or family, and had their lives

altered in a variety of ways. These events could make some jurors plaintiff oriented and particularly susceptible to reptile tactics.

Think proactively about the reptile.

Companies should be thinking about the reptile outside the courtroom in connection with their business, loss control, safety and documentation practices. Such awareness may result in a reduction of the type of internal company correspondence and practices that plaintiffs will find useful in deploying reptile tactics.

Even counsel retained to defend a company in a particular case, may have an important role to play as a counselor or advisor. Long-term, the absence of documentation that feeds the reptile and proper training of appropriate personnel about reptile tactics may result in the extinction of the reptile in the litigation setting.

Seek legislative relief from the reptile.

Just as insurers, corporate defendants and their advocates have sought tort or legislative reform to limit other aspects of social inflation, they should not hesitate to seek legislative reform directly aimed at limiting reptile tactics.

For example, Texas enacted legislation effective Sept. 1, 2021, to curb reptile theory and other abuses in commercial vehicle cases.[5] Among other things, on motion by defendant courts are required to bifurcate trial such that liability for the accident and the amount of compensatory damages are determined in the first phase.

A jury must find a truck driver liable before the jury can consider vicarious liability against a motor carrier and exemplary damages in the second phase. The legislation limits admissibility of evidence of a defendant's failure to comply with a regulation or standard in Phase 1 of a bifurcated action and contains other provisions.

Conclusion

Through prompt identification of the reptile theory, proper preparation, cogent trial and pretrial strategy, and proper use of the traditional tools available to defendants and their counsel, the reptile can be captured and rendered the way of the dinosaur.

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[1] Sompo Intl's James: Aggregation of systemic risks and inflation present ongoing challenges for industry, *The Insurer* (June 7, 2022), available at <https://www.theinsurer.com/tv/sompo-intls-james->

aggregation-of-systemic-risks-and-inflation-present-ongo-ing-challenges-for-industry-
/23193.article?utm_source=slipcase&utm_medium=affiliate&utm_campaign=slipcase.

[2] *Id.*

[3] See, e.g., *Estate of Richard McNamara v. Navar*, No. 2:19-cv-109, 2020 U.S. Dist. LEXIS 70813, at *1–2, *5 (N.D. Ind. Apr. 22, 2020) (granting protective order prohibiting reptilian questions about existence and purpose of alleged safety rules during the company witness deposition).

[4] See generally 33 Federal Procedure, L. Ed. §77:268 (2019); see also L.S. Tellier, Annotation, Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position, 70 A.L.R.2d 935 §§3[a] & 3[b] (1960 & Supp. 2019).

[5] Texas Civil Practice and Remedies Code §§ 72.051-72.052.