



# The pincer move

*With more than one defendant at trial, the enemy of your enemy might be your friend*



Cooper

BY MILES B. COOPER

My partner and I were sitting in the hotel the night before trial. Across from us sat the defense lawyers for the forklift manufacturer and the company's general counsel. Our client's injuries stemmed from an incident where an Albertsons employee, operating the manufacturer's forklift, struck our client. The employee and Albertsons said brake failure. The manufacturer said operator error. Because of Albertsons' allegations, we sued the manufacturer in order to avoid an empty chair argument.

It was bad enough that the forklift had a local, whip-smart products defense lawyer. When it became clear the case would be tried, they added a second, a *pro hac vice* lawyer whose bread and butter was traveling around the country defending this manufacturer against products liability claims. To say the forklift team was a tad more sophisticated than our Albertsons opponents at defeating liability *and* damage claims was an understatement.

**An opening**

We had come to a grudging understanding that our case against the manufacturer was not great. But the manufacturer knew we stood a better chance of tagging the manufacturer than the Albertsons team did with Albertsons' cross-complaint. We also knew the manufacturer's lawyers had the capacity to slice away at our damages in a way the Albertsons team could not. The last three weeks we had danced around the issue, neither side being able to put their finger precisely on how we might be able to ally ourselves.

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## The enemy of my enemy is my friend

Until finally it clicked. Clicked in a way so obvious that we wondered why we did not figure it out before. In part, the issue was that the solution required trust – a rare and delicate commodity in today's practice. But there it was – a classic pincer move. For those whose military history is rusty, the pincer involves sending troops around both sides of an enemy, encircling them. A variant, the buffalo horns formation, was developed and employed to devastating effect by Shaka Zulu, the 18th century Zulu leader. The descriptive name provides a good visual – the horns portions of the formation come up and around the enemy's sides, forcing a multi-front battle, encirclement and the inability to retreat.

We realized we had the ability and common interests to place Albertsons in a pincer with us on one side and the manufacturer on the other.

"We'll dismiss our case against you. We'll present a case at trial where we state that we proceeded to trial against the entity who we feel is responsible – Albertsons – and who is trying to avoid responsibility by claiming a defect in the forklift. In exchange, you'll tell the jury that our client suffered a horrible and gruesome injury and that he is entitled to every penny he is asking for. We think if we do this, you will not get hit with any percentage fault. But if you do, you agree to pay that percentage."

The forklift defense team and its general counsel huddled for a few minutes. They came back.

"Done." A handshake sealed the deal.

## On the record

The next day, before the jury panel was called up, we informed the court that we were dismissing the case against the manufacturer. You could see the surprise in the eyes of Albertsons lawyers. They were not sure where this was headed. But they could tell it was not good.

## Credibility in front of the jury

A plaintiff and a plaintiff's lawyer stand before a jury at the beginning of trial with a credibility deficit. Jurors come in with the McDonald's case in their conscious, the recent and well-done *Hot Coffee* documentary notwithstanding. The panel arrives, tilted ever so slightly (or perhaps even more), with a belief that the injured person is there for jackpot justice. And that the plaintiff's lawyer knows how to work the system to make it happen. If you're very good, you don't oversell yourself and you keep your word with the jury, you'll overcome this by the end of trial.

But when a defense lawyer says, in opening statement, that your client's case is worth every penny you are asking for, it provides instant credibility. Which is exactly what happened in our case.

## Winning

The jury came back in an hour and a half. When you're asking for mid-seven figures with an eight-page verdict form, a quick return causes a bit of stress. We sat on pins and needles as the clerk read the verdict. For our plaintiff, every penny we asked for. For the manufacturer, zero liability. We spoke to the jurors after. The fact that we did not hold the manufacturer responsible and the fact that the manufacturer said our client was entitled to



every penny guided the jury to their quick decisions favoring both of us.

### **Application**

Creative approaches to resolution can have dramatic effects on your client's recovery. In any case with more than one defendant, consider whether there might

be an opening that could be mutually beneficial. And remember that the enemy of your enemy might be your friend.

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*trial matters. He has served as lead counsel, co-counsel, second seat and schlepper over his career. He is a member of the American Board of Trial Advocates. Cooper's focus beyond litigation includes trial presentation technology. When not working on injury or death cases, he volunteers with the Volunteer Legal Services' pro bono programs.*