



2020 CLM Workers' Compensation, Retail Restaurant & Hospitality Conference  
May 20-21, 2020  
Chicago, IL

## **Start from the End-Managing High Exposure Litigation with Questionable Liability**

### **I. Anticipating Litigation – Beginning with the End in Mind**

From the moment a loss is reported, claims professionals and insurance attorneys must think ahead and then work backwards. What will this claim look like to a jury, and what do I need to do now to ensure the highest probability of defending the claim? This panel will explain how to think through those questions.

Emergencies in the Retail, Restaurant, and Hospitality industries are often catastrophic. Policies and procedures must be followed to manage the crisis. Early and careful management of personnel, communications, and documentation is essential to safeguard the defense. Once a claim is formally made, cases with high damages but questionable liability become frustrating for insurers because defense costs soar while carriers believe they may ultimately not be responsible to pay anything. This panel will discuss best practices for managing high exposure cases with questionable liability and will highlight the good and bad of recent cases. The panel will teach claim professionals what to look for, who to hire, how to evaluate the claim, what to ask attorneys, and what attorneys should be reporting to build the best defense.

#### **A. A Claims' Representative's Guide to the Necessary Actions following a Notice of Loss**

##### **i. Claims Escalation Protocols and Post-Emergency Procedures**

Any store, hotel, or restaurant should have emergency procedures that are taught and trained to their staff. The staff should be taught and trained to differentiate between different levels of incidents, often by designation into a particular table or matrix. We have provided each of you with a sample emergency response plan and emergency escalation plan. In the event of an emergency, such as death(s), catastrophic injuries, substantial property damage, or highly public incident, staff must follow the procedures in place to protect other guests, end the crisis, and begin planning for a claim. Failure to follow these procedures may jeopardize the eventual defense of the claim/lawsuit.

Often, the emergency response protocols will include discussion with a public relations firm. In circumstances involving emergencies, news outlets may be reporting on the incident. Anticipating the response to the public immediately after the incident is critical to set the tone

for the public's perception of the incident. This task can be handled internally, but is often referred to an outside vendor that specializes in crisis management. Some insurance policies, including the Beasley Policy *include* coverages for crisis management, including PR response, so be sure to double check the policy and internal procedures for assigning a PR manager.

**ii. Assignment to Counsel**

In catastrophic cases, pre-claim assignment of counsel is highly recommended. Counsel should guide the efforts to preserve evidence. Counsel and the adjuster should quickly familiarize themselves with brand, local, and management policies and procedures to ensure all relevant documentation is preserved. This generally requires that counsel issue a preservation letter to the insured, as well as to any individual or entity that may have information or documentation regarding the claim.

**iii. Preservation of Evidence**

Most jurisdictions require that any information or documentation that may be relevant to the claim must be preserved. If the incident is catastrophic, most courts presume that a claim will be forthcoming. Therefore, it is important to ensure that information and documentation is preserved immediately, especially given some challenges specific to the retail, restaurant, and hospitality industries.

Counsel and/or the claims adjuster should consider a prompt visit to the site to ensure that all policies and procedures are being met regarding evidence retention. Often, each store, hotel, or restaurant will have a manual or handbook for handling the situation. These protocols should also be reviewed to ensure they are followed, in addition to any brand or management company standards.

Counsel should direct the local employees or responsible person to conduct necessary interviews with staff, guests, or others involved in the matter. Statements should be recorded, if possible, to later be transcribed. The earliest recollection of the incident is generally the most accurate.

One of the predominant challenges in preserving information is managing transient staff. While policies and procedures are often in place, staff tend to be transient between stores, hotels, and restaurants and may not be intimately familiar with the protocols and procedures. Additionally, preservation letters are legal documents that may not be fully understandable to a typical hourly manager at a particular location. Therefore, reliance on a preservation letter is generally not advisable.

Counsel should direct the retention of all relevant information and documentation, ideally at the physical location. This retention also includes electronically stored information. Most electronically stored information has a relatively short window where information is overwritten. For example, surveillance footage, key cards, door entries, etc. are automatically overwritten. Ensure that such information is not lost by stopping all automatic overwrite procedures and by preserving the information on separate devices.

Here is a real-world example of the challenges of retaining documentation immediately after a catastrophic incident – the Hu case. In the Hu case, an adult guest who was a poor swimmer drowned in the pool unaccompanied, although other individuals were in the pool. The incident was deemed an emergency and was escalated to the highest priority. Counsel was assigned within days of the incident. A PR firm was assigned as news outlets had reported the drowning.

In the Hu case, staff was instructed to interview all employees that had involvement or knowledge of the incident. The employee wrote notes of the conversations, but did not record them. Also, not every employee with knowledge was interviewed immediately. Upon the happening of the incident, staff was instructed to allow police to handle the scene. Employees did not identify the guests within the pool area at the time of the drowning. Police also failed to identify everyone, but rather only took statements from those who offered to have information. Additionally, many of the guests had left the hotel within one day of the incident.

Counsel was hired and most, but not all, of the guests were identified within 3 days of the incident. Staff received a preservation letter and counsel visited the site to conduct an investigation. A substantial amount of documentation was retained, including ESI. A staff member was tasked with preserving surveillance footage. The staff member retained only footage showing the drowning victim (which did not include the pool area), but did not retain all surveillance footage. Despite clear instructions, staff did not follow the instructions nor did they stop overwriting procedures. Relevant footage of the victim was retained, and further footage from body cameras by police was obtained. However, despite best efforts, some surveillance footage was not retained.

The staff employee tasked to be in charge of the investigation left employment within 60 days of the incident, and pre-claim and pre-litigation. Additionally, the management company of the hotel changed 90 days after the incident. While most information and documentation had been retained or was ultimately recovered, and the minor issues were not damning to the defense, acquiring the information and documentation was time consuming and costly. These slight issues highlight the importance of having a well-constructed emergency response plan with escalation procedures, and getting counsel involved immediately to direct the investigation. Had counsel not been retained until the lawsuit came in 10 months later, surely much of the information and documentation regarding the claim would have been lost.

## **II. The Claim**

### **A. Early Case Assessment**

#### **i. Coverage**

Upon receipt of a claim or demand, the first step is to ensure the incident is covered. In the hotel, retail, and restaurant businesses, many claims arise out of intentional acts or acts of god, and coverage may be limited or not apply. Additionally, many claims arise out of incidents that involve multiple companies. Careful early consideration should be given to what companies may bear responsibility or liability. This includes review of the contracts, agreements, and other relationships that may have an impact on the matter. As part of the coverage review, other

policies should be identified that may share in the risk or potentially assume the defense and/or eventual indemnity for the claim. These other parties and their respective policies should be evaluated immediately upon the receipt of the claim.

**ii. Working the case backwards**

Assuming coverage is clear, counsel and the claims adjuster should carefully consider now what this case will look like to a jury although that may be several years ago. Attorneys tend to focus too much on what legal arguments can be won, while carriers tend to focus too much on how much is this defense going to cost. As part of counsel's early reporting and budgeting, we recommend identifying all of the defenses and probabilities for success, but at the same time highlighting what facts will remain regardless of legal victories.

In the Hu case, while we prevailed on 17 motions in limine and 3 motions for partial summary judgment, the case was still one involving the death of a wife and young mother. Early consideration must be given to the costs associated with winning the legal battles but understanding what will remain even if those are won. (think also of many recent talcum power and/or Johnson and Johnson cases, as well as the MGM Grande shooting matter in Las Vegas – even winning the legal arguments does not preclude a sympathetic and/or millennial jury).

**iii. Evaluations of the claimants**

As part of the early case analysis, the claimants should be evaluated. This includes a background search, an ISO claims search, and possible monitoring. Claims can often be minimized or eliminated if the claimant is revealed to have a criminal background, is a serial litigant, or does not show the alleged injuries through surveillance. Often, surveillance is delayed until later in the litigation, but consideration should often be given to early monitoring.

Additionally, early in the evaluation, consideration must be given for the venue. In Arizona, Maricopa County is a conservative jurisdiction, whereas Pima County is liberal. Pima County is also much more diverse and younger, representing a much higher millennial demographic. In evaluating a claim from the outset, it is impossible to fairly evaluate the claim, the damages, or the potential settlement or reserve amounts without knowing the trends in the jurisdiction.

**iv. Understanding damages and setting reserves**

As part of preliminarily evaluating the claim, consideration should be given not only to the facts of the case, but to how they will be presented. For years, we have heard about the "Reptile" theory, in which a claimant pressures the jury to feel angry at the defendant to invoke a sense that the jury has to protect the general public from the defendant. Such fear of public safety generally results in much higher verdicts than the standard "pain and suffering" concepts of years past.

Typically, most attorneys and carriers will also delay jury research specific to the case until all of the facts and evidence has been determined. This requires large budgets and years of

litigation to get to the point where the damages of the case are understood. More and more carriers are opting for early jury evaluations through questionnaires, surveys, and small panels. These are not mock trials (because again the evidence is not fully developed), but enough information generally exists early in the case to explain the matter to another person. At that point, it may be valuable to hire a jury consultant to preliminarily give an opinion or perhaps conduct research as to what the claim may result in damages should it proceed to a trial.

Claims reserves are challenging because no one wants to ask for too much in authority, but it is often worse to try to get more money later. In evaluating the damages under the criteria detailed above, we recommend being realistic and not overly aggressive with the reserves. Hopefully, while understanding the claimants, the venue, the damages, and how the claim will be presented, this will yield a realistic result. Counsel should be careful to report realistic claim valuations as well.

### **III. The Lawsuit**

#### **A. A Claims' Representative's Guide to Managing High Exposure Litigation with Questionable Liability**

##### **i. Budgeting and Reporting**

Counsel is tasked with the critical responsibility of reporting on the case. We often want to advocate for our positions, even to our clients. Instead of pounding our chests as to why we are right, we believe the best approach is to be reasonable. If the damages are owed, we owe the carrier the obligation of telling them that.

Reporting should include all statements, depositions, important documents, identities of crucial players, and how such impact the case both in terms of liability and damages. In addition to reporting on those items addressed in Section II, counsel should also report on the nature and characteristics of the particular judge. Many judges are inclined to resolve cases through dispositive practice, while others almost always find issues of fact for the jury. This is an important consideration in creating claims reserves and evaluating the strength of the legal defenses.

Additionally, counsel should report on the history, successes, failures, and personality of the attorney representing the claimants. In the Hu matter, we had a Plaintiffs' attorney who was angry and disabled from an injury at a pool. There was no reason or cordiality that could be had with this case involving an apparent personal vendetta with a drowning. Knowing that there would be no concessions, no agreements, and a complete scorched earth approach to discovery, allows counsel to create a better understanding of the anticipated costs in defending the claim, which clearly impacts the settlement value.

All attorneys report on the legal defenses and the strengths thereof. However, rarely does an attorney report on that even if they prevail on the legal defenses, the facts are still negative. Claims representatives must be careful to see the facts as the Plaintiffs' attorney will present them – even if all legal arguments are won. As in the Hu case, even after winning

essentially ever legal argument available (which we had to fight because there was no working amicably with opposing counsel), it is still a sad factual situation where a millennial jury or one made up of mothers could go rogue.

As indicated earlier, adjusters and counsel should consider jury research, questionnaires, and surveys early to give the best information regarding potential damages. If a preliminary jury evaluation has not yet been done, the best practice is to hire a consultant at least at the outset of litigation once mandatory disclosures (which are fairly broad in most States) are served. This again provides the clearest picture to understanding the potential damage and potential settlement value.

Another critical aspect of early and ongoing reporting is expert witnesses. Counsel should be afforded significant time and investment to determine what expert categories are needed, and whom to hire. Experts often make or break the case. The importance of expert witness testimony, appearance, and their anticipated rates cannot be overstated. A carrier cannot get a full picture of the case and adequately evaluate damages and potential settlement value without understanding the strength of the experts and their anticipated costs. This generally requires that counsel receive a budget from the experts and manage such costs as well.

Additionally, in the theme of working a case backwards, counsel must highlight the litigation steps that will prepare the case for the best defenses. Discovery just to learn is not litigation. Good litigation is steering the case to a desired legal result. Thus, all recommendations for depositions, travel, experts, etc. should be geared toward motion practice and minimizing the potential damages.

Counsel should also ensure that reporting is done frequently. While most carriers have guidelines that require reports only every 90 days, a lot can happen in 90 days. We recommend that for high damage cases, separate guidelines or instructions be in place that counsel is to report on any major development, including any fact or document that may impact the liability or damages in the case. While this cannot occur for every case, high damage cases should have their own set of guidelines or at least preferences by the adjuster.

## **ii. Knowing When to Settle**

Hopefully, by the time this conversation arises, the adjuster and counsel will have vetted the opposing attorney, the claimants, the venue, the defenses, the experts, the costs of defense, the judge, the presentation methods, etc. Consideration must also be given to how this settlement will impact future claims. In many large-scale damage cases there are numerous claimants. It is imperative to consider how the settlement with the particular claimant will impact other claimants or other future cases.

The answer to the question of when to settle is, of course, an impossible to give. We find that happiness is at the intersection of expectation and reality. If you have done a thorough job of managing the claim by following all of the tasks outlined in this course, knowing when to settle should be easier. If there are questions about the venue, the jury, the judge, the experts, etc. you will not have appropriate reserves set and it will be near impossible to feel comfortable

recommending a settlement amount that is higher and actually in line with an amount that will actually resolve the case. If you have thought ahead and worked backwards, settlement is much more realistic. Of course, you cannot control the other side. In our case of Hu, no anticipation or reasonable efforts on our part to properly value the case would affect and overly zealous and aggressive Plaintiffs' lawyer. That said, knowing all the strengths and weaknesses of the case can and should allow enough leverage to make opposing counsel uncomfortable enough to come to the table. And, settlements occur when all parties are unhappy.

**iii. Did you look ahead and work backwards?**

Whether you try the case to a jury or settle, you will have managed the litigation best if you followed these best practices by planning for the end in mind and working backwards.