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It's Not About the Money – Or Is It? Creative Settlement Solutions

I. Special challenges for religious and non-profit organizations

Due to their unique nature, religious and non-profit organizations face a much wider variety of potential claims than most other types of insureds. This is compounded by how jurors and the general public view these organizations. Religious and non-profit organizations are held to a higher standard, due in part to the special relationships they have with the people they serve. A business's stated purpose is to earn a profit, and that will be a factor in many decisions they make. In contrast, the stated purpose of religious and non-profit groups is to help people. When that does not happen, difficult claims ensue.

Most claims against religious and non-profit groups have emotional layers which must be addressed, whether your exit strategy is settlement or trial. Even a seemingly small claim can be an emotional minefield for the unwary claims professional. Emotions must be defused before a mediation can succeed.

The familiarity which often exists between plaintiffs and these groups does not exist in most other claims. Most auto accidents are between complete strangers whose paths may never cross again. A product liability defendant likely was previously unaware of the person now suing them. In contrast, many times the people bringing claims against organizations are either members or people who have had some level of involvement in the organization. Sometimes the relationship can and should be salvaged. Other times a clean break is necessary.

These claims are more difficult to evaluate for reserving and settlement. A common auto accident is usually straightforward to evaluate. But what if the defendants are a church and their employee driving their vehicle? Does that drive the value of what is seemingly a routine bodily injury claim either up or down?

Consider this fact pattern – a “red light – green light” accident with moderate injuries. Both drivers profess to have had the green light. Now add another layer to it – the accident occurred on a Sunday, not long after Church let out, and both drivers are members of the same Church and were trying to beat traffic to get to the same popular brunch spot. Now let's complicate it further – the defendant is a popular lay leader of the Church. The plaintiff is upset, not just because of the accident, but because every Sunday the defendant is up on the pulpit and she sees him as a self-righteous hypocrite. This happened on a claim one of us handled and it caused a serious rift in the Church, even though the

Church itself was not directly involved. These issues had to be worked through at mediation before the merits of the claim could even begin to be discussed.

Betrayal is one common emotion for a plaintiff making a claim against a religious or non-profit group. They are not suing a faceless defendant. They are not suing someone whom they will never see again. They are suing **their** church, **their** school, **their** nursing home, or **their** organization. They are suing a defendant whose help they expected, and they feel they did not receive it.

Sometimes emotions run so high they overshadow an objective assessment of liability damages. Consider a religious burial society who buried spouses side by side, but put the wife in the husband's plot and vice versa. The solution seems simple enough – apologize and fix the headstone. The spouses were buried side by side as they wished, so what's the problem and what are the damages?

At trial, how will a jury perceive and react to a defendant who is a religious or non-profit organization? The answer of course is, "it depends." A jury might be more sympathetic to a non-profit than a Fortune 500 company. Then again, a jury might be more outraged by the behavior of a non-profit's employees if they think the group and their employees failed to help a vulnerable person. Trials are inherently risky to begin with, but this volatility adds to the level of risk.

One of the thorniest challenges presented on these claims is the contrast between a legal duty to pay a claim versus a moral duty to pay. These can be very different perspectives and very difficult to reconcile. A legal duty is looked at objectively and emotion is rarely part of the analysis, and rightfully so. A moral duty has nothing to do with the law or the language of an insurance policy, and instead flows from a group's key values and beliefs. Consider a scenario where a plaintiff suffers a catastrophic injury but there is likely no tort liability. The business decision is easy – either do not pay the claim or offer a negligible amount. When the insured is a religious or non-profit group, whether or not to pay a claim may be viewed from a very different prism. This is further complicated when many organizations obtain insurance through agents and brokers with whom they have strong relationships.

A common thread in claims against religious and non-profit groups is the segment of the population they are supposed to help is vulnerable on some level. Consider:

- Children
- Elderly
- Disabled
- Disadvantaged
- Distraught

The common thread is these are all vulnerable segments who put their trust in an organization whose purpose is to help them. When the opposite result occurs, that is where challenges arise.

Pre-existing relationships between plaintiff and defendant are complicated. In addition to real or perceived harm, a driving force for the claim might be hurt feelings. A plaintiff may have been pushed to pursue their claim by what they perceive as an insensitive response. A claim may also be prompted by behavior which is more offensive than it was harmful.

Abuse and molestation have victims of all ages. Children are always the first group who come to mind for these types of claims, but they are not the only ones impacted by these types of claims. The elderly

and disabled can also be victims of abuse due to difficulties they may have reporting what they experienced. This can occur in houses of worship, schools, and care facilities. The common thread is they are harmed in environments where they and their family expected to be protected. The elderly are the most common victims of financial exploitation, again because of the trust they have in place.

Allegations of organizational misconduct and mismanagement bring their own set of challenges. Differences of opinion on how an organization should be led, and whether fiduciary duties were breached give rise to polarizing claims. Whether there was wrongdoing or harm is not always clear, and personality clashes are often the driving force. Resolution is complicated because the dispute cannot usually be resolved by a monetary payment. Usually the parties are at odds over whether changes can or will be made to an organization's leadership or fundamental decision-making processes and procedures.

Communicating with the insured also presents unique challenges. If the insured is an individual, that is course whom you communicate with. If the insured is a business, there is usually someone specifically identified in the chain of command to serve as your liaison. With religious and non-profit groups, the lines of demarcation are not always as clear. Sometimes your point person will be a CEO or COO type, other times it could be a religious leader, and other times it could be a Board representative. There are times when an organization's leadership is not unified and multiple people need to be plugged into the communication chain. The problem this poses in return is it is difficult then reaching consensus when decisions need to be made. For defense counsel, an added issue is who is your "go to" person when it comes to answering discovery?

People typically join an organization's Board because they are passionate about the organization and its objectives. This passion is valuable and constructive in many instances, but in others it can cloud that member's judgment, as well as that of others on the Board. This lack of objectivity can create unrealistic views regarding existing practices the organization has in place. Many times a claim should prompt an organization to revisit and rethink their risk management practices, but emotions may keep this from occurring.

II. Settlement challenges

A sincere and timely apology can be very effective in resolving a claim. An insincere or untimely response will inflame existing tensions. Unfortunately sometimes by the time an insurer and defense counsel becomes involved, things have already been said or done which make an effective apology difficult.

Understanding what is most important to a plaintiff is one of the keys to a settlement. Money is part of most settlements, but it is not always the sole motivator. Sometimes non-monetary issues are a driving factor. Understanding this makes you a more effective negotiator. A restaurant once unknowingly served contaminated meat one night and was faced with a flurry of food poisoning claims, thankfully none were too serious. Most of the customers' claims settled quickly. One customer was particularly upset and reluctant to settle. She had not finished her steak and took the rest home to her dog, and he became sick. The claims rep was savvy and figured out quickly the customer was more upset about her dog than about her own illness. She ordered the biggest dog bone she could find, had it gift-wrapped,

and delivered that same day to the claimant. The claim settled the next morning, on very favorable terms.

Loss of trust is a sentiment plaintiffs often express during claims against religious and non-profit organizations. People may go through life expecting not to trust used car salesmen and thus react very differently if lied to in a car sale, compared to if they feel they were betrayed by their own Church or organization. Churches and organizations are seen as safe places, but when they can no longer be counted on as being safe, resolving your claim is much more difficult.

Only dollars and cents can resolve a routine auto accident claim. When you are working on behalf of a religious or non-profit organization, you may have more tools in your toolbox when it comes to settlement. Conversely, that may also impact what the plaintiffs want. Plaintiffs who have a relationship with an organization may want changes made as part of any settlement. These may include changes in leadership, governance and operations, or in policies and procedures. Whether or not these requests can or should be implemented will always depend upon your claim's particular circumstances. Even these types of changes are not implemented, at least listening to the requests can be a key part of any settlement.

Since these types of claims are inherently emotional, you may well encounter an angry plaintiff who is more interested in punishing the organization than in being compensated. They do not care that publicity from their claim or a high verdict will harm the organization. They might even plead their lawsuit in such a way that there may not be coverage for their claims, as they are more interested in hurting the organization than in receiving money from an insurer. There may not be a more challenging plaintiff to deal with. One way to reason with them is to draw a distinction between the people within the organization with whom they are angry, and the organization itself.

The relationship between a plaintiff and an organization does not always have to be a challenge to a settlement. Sometimes it can help promote a settlement. Consider a claim where both sides hope that after the settlement concludes that their relationship continues. Maybe this means involving the claimant in a discussion about changes to policies and procedures. Maybe this means some sort of recognition of the claimant and their family – an award, a section of a building, etc. These are non-monetary items, but if used properly, can heal some wounds and preserve a relationship.

Sometimes damages are not always clear or easy to calculate or quantify. Consider the fact pattern mentioned earlier with a mix-up by a burial society. Will money make a difference to a family that is more indignant than harmed?

Especially when religious organizations are involved, there may be alternatives to conventional ADR options. Many faiths have clergy or lay leaders with training in mediation and dispute resolution. Parties may feel more comfortable participating in faith-based ADR, especially when they see the facilitator as a person who shares their faith, as opposed to an attorney or retired judge.

Earlier we discussed the challenges when an organization feels there is a moral duty to pay a claim. Sometimes the opposite scenario presents itself, and the organization feels so strongly about their position that they cannot agree to any settlement, and insist upon complete vindication. Perhaps this is based on moral grounds, and perhaps this is based upon the need to protect their reputation.

A “one size fits all” approach is never a good idea for handling claims. This is particularly so for claims involving religious and non-profit organizations. If you do not appreciate the unique issues and challenges presented, it will keep you from doing the best job possible for your insured and your company.