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Narrative

***TRIAL PREPARATION STARTS WHEN YOU LEARN OF AN ACCIDENT: PUTTING YOUR COMPANY AND EMPLOYEES IN THE MOST FAVORABLE LIGHT FROM INCEPTION THROUGH DEPOSITIONS***

As plaintiffs' attorneys try more and more to make claims and lawsuits about defendant companies and their employees, they endeavor to make them less and less about any particular accident or actual damages sustained by plaintiffs. Accordingly, claims professionals, risk managers and lawyers need to focus early -- often before litigation is brought -- on handling evidence, discovery tools and deposition preparation.

Recent multimillion dollar jury verdicts against companies reveal a growing national trend and are a reminder that companies and their insurers must begin preparing to mount a defense in court immediately after an accident. Waiting months or years to prepare a defense, or mistakenly not taking an accident seriously at its outset, is a key factor leading to runaway, or so-called "nuclear" verdicts. The key to a solid defense is early strategy and preparation.

The escalation of jury verdict numbers sometimes seems counter-intuitive because industries have become more focused than ever on safety, so one would expect that verdicts would be lowered accordingly. In fact, industries such as trucking and essential retail are receiving almost universally positive publicity. Yet, despite those trends, in our new reality, mock jurors and members of the public are still expressing distrust when confronted with sets of facts presented in lawsuits against corporations.

Juries are also becoming accustomed to exponentially large verdicts. Once an object of ridicule, now when plaintiff's attorneys ask for millions of dollars in their closing arguments, it does not shock jurors' consciences like it might have only a few years ago. Further, as the economy on Main Street America has been shaken by the pandemic and economic downturns, communities have become more concerned with struggling to get by every day. Consequently, the difference between $350,000 and $3.5 million does not mean as much neither one of those numbers are familiar to the typical juror, who is becoming desensitized to these large numbers.

Verdicts are also increasing because plaintiff's attorneys have learned to try cases not only against companies, but also against corporations and indeed entire industries. Plaintiff's attorneys are basing cases on what has come to be known as The Reptile Theory; appealing to jurors' primitive emotions and fears. Instead of focusing on the case and the injuries, they make the case about a "big bad company" that puts profits above safety. Lawyers search for safety

violations, which almost never have anything to do with the case at hand. The intent is to inflame the passions of the jury with feelings about companies and general safety issues; anything other than the actual facts of the case, which are often not that strong. Nationally, plaintiff's attorneys are looking for any safety violation they can to find that would be admissible in court. Then they try to pin the violation on the company, even if it was not the cause of accident. "Let's find something they did wrong that is admissible and let's play off the public fear of these products, trucks, construction sites, etc."

This "new normal" in litigation requires companies and insurance carriers to make some changes. First, they must change the way they triage incidents. When a seemingly minor accident and/or an accident with a strong liability defense occurs, companies often sort that claim into their low exposure, or "not likely to proceed to litigation" claims. Now, they need to look for signs that something about the big picture may indicate that litigation is more likely to ensue.

Given today's litigious environment, how is a company, or their insurance company to do this? First, the company should take steps to reduce their exposure before an accident happens by setting clear guidelines and then training their employees in how to follow them. However, they should make sure these guidelines can realistically be followed. Companies should not put unrealistic expectations in writing because if an employee fails to comply, the plaintiff's attorney will emphasize that the employee - and by extension, the company - didn't follow its own rules.

Second, if an accident does occur, the company and the insurer must get ahead of the case as quickly as possible. Risk managers should have a policy and a protocol in place regarding whom the employee should contact. Employees who are off site, such as drivers, should carry a list of accident rules and contacts with them.

In accidents that could lead to a lawsuit, companies should get an attorney on the scene as quickly as possible. In the event of a police investigation, the attorney should be on the scene, if at all possible, while the police officers were still investigating. Retaining counsel does not have to be expensive and will usually lead to a more secure investigation for the business as it waits to see if an accident becomes a lawsuit. An attorney can wrap up an investigation, create attorney client privilege relative to documents and statements and make sure that if, or when litigation ensues, I's are dotted and T's are crossed. There are many items that can be taken care of early and in a cost-effective way, but cannot be recreated years later when a lawsuit is brought on the eve of a Statute of Limitations running.

Third, when a case does proceed to litigation, defending it as if it is going to trial will cause an eventual, potential trial to have a much higher probability of ending successfully for the company. While everyone understands that the vast majority of cases will never go to trial, this early thorough strategy and preparation will demonstrate to plaintiff's counsel that the company is willing to try the case, which can lead to much more favorable settlements.

Specifically, companies should be ready to start defending the case during the discovery and deposition process. Risk managers, claims professionals and attorneys need to work together to select the appropriate witness for a deposition. It is very important that companies consider who is knowledgeable, while not being so high up the corporate ladder as to give

extensive corporate information, or so relatively low to cause the valid request for additional witnesses.

Likewise, companies should take careful notice of any communications they receive from plaintiff's attorneys, paying particular attention to pre-litigation letters instructing them to preserve pieces of evidence. In years past, there would be a limited and manageable list of items and documents to preserve. Now, risk managers often receive lists that continue for a few pages from plaintiff's attorneys who are simply hoping that some items were not preserved and they can later raise a spoliation issue, or perhaps a regulation was not followed, even if the incident had absolutely nothing to do with that particular regulation. Careful review of these letters can also reveal the plaintiff's strategy.

Armed with knowledge, companies, insurers and attorneys can prepare their defense. Companies do not need to preserve all evidence; just that which is required by law. Witnesses can be prepared for deposition responses, so they don't get trapped in a situation where they paint the company as unsafe. Meanwhile, defense attorneys can prepare motions to keep inflammatory evidence out of the trial so it does not prejudice a jury.

Defense attorneys are also responding to multi-page requests with requests of their own, because plaintiffs and their vehicle (if one was involved) often possess more evidence than ever before. Passenger cars have electronic data, i.e., braking and airbag data that could shine a light on the facts of an accident. Of course, plaintiff's social media and cell phone history and records could provide a plethora of information relative to liability and damages, as can witness media posts. Carriers need to be very proactive with investigation, and defense attorneys need to be extremely proactive when it comes to requesting preservation and discovery.

Deposition witnesses need to be prepared differently than they were in the past. Not that long ago, witnesses would have been told only to answer the questions asked and in particular, to either say yes or no to "yes or no questions." Now, they need to be instructed to listen to the question and to sometimes answer that a particular response or action "often depends on the circumstances."

Plaintiffs' attorneys are successfully implementing The Reptile Theory and other tactics and techniques to divert jurors' analysis from the specifics of cases at hand. Like any trial strategy, however, there are ways to defuse the intended results of the strategy plaintiffs' attorneys seek to employ. It is imperative from the outset of any case that seems like it may proceed to litigation and possibly trial that the defense proactively attack trial strategy, so that a jury can decide the specific issues at hand rather than simplistic rules and broader societal questions plaintiffs' attorneys seek to exploit.