



2018 Annual Conference

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Putting the Client First: Increasing Awareness of Litigation Impacts for Insureds

I. Impacts of a “Check the box” Mentality

Adopting a “check the box” mentality when it comes to processing a claim or handling a litigated file can have adverse effects and unintended consequences. When the claims handler does not take time to understand the insured’s business, the “check the box” mentality can lead to an adversarial relationship with the insured because the insured feels left out of the loop. Most companies invest heavily in their reputation or brand and the lack of understanding of the insured’s business that comes with a “check the box” approach can result in decisions being made that harm the insured’s reputation or brand. Additionally, a “check the box” approach can result in an inadequate investigation where critical facts or evidence (bad or good) goes uncovered and/or unpreserved.

The adjuster needs to be willing to listen and the insured’s job is to educate with respect to its operations. The insured wants to help the adjuster understand what the insured’s brand is about. If the adjuster does not understand these issues at the outset of the claim, then problems in the adjusting process tend to increase once defense counsel gets involved.

It is critical to start the relationship between client and claims handler as soon as possible. An overview of the client’s culture and philosophy can help key the adjuster’s active listening skills upon investigation of a new claim. Having historic knowledge as well as specific claim insight will assist the adjuster in making sound claims decisions before and after legal representation. Beyond the initial investigation, if a claim does become litigated, engagement between the client, claims handler, and defense counsel are critical to a positive outcome.

SI (special instructions) can only go so far when ensuring your adjusting team understands the insureds philosophy on claim handling. They need to know how you view your insurance program. Do you use your insurance program to resolve sensitive issues or is it

truly an “insurance program” only subject to determinations of liabilities. Insureds with high retentions or self-insured program will often have greater flexibility within their own layer.

Invite the adjusters into your business. Let them shadow operations so they understand the daily tasks and operations that occur. Conduct claim reviews at operational sites in lieu of corporate offices. Understanding the work performed and under what circumstances can be crucial in successful outcomes for all parties. We invited our adjusters to hotels so they could see operations from a up close perspective allowing them both front and back of house exposure. The insights gained helped align our goals and improved overall program results.

In addition, flip it, and invite the client into the adjuster’s offices. Let the client in on how and where you do what you do. That too will advance the partnership and improved results. Even if the results are not monetary, a positive partnership creates trust between the parties and when things get tough can reduce the stress, tension and time involved in tough decision making.

II. E-Discovery

The adjuster is often the first person that can educate the insured about E-Discovery and the importance of electronic evidence preservation. A failure to properly preserve electronic evidence can have serious negative impacts on a case, so it is crucial that the insured understand from the very beginning that it has electronic evidence preservation obligations. Because E-discovery can be very expensive and time consuming, starting the educational process with the insured at the outset of the claim can help the insured reduce the potential operational impacts of E-Discovery.

This is another important touch point between the client and the adjuster. The adjuster needs to have a grasp of the knowledge level and sophistication of each of their clients to ensure they are providing the right information at the right time. A client based out of state with minimal jurisdictional knowledge may require more in depth discussion on jurisdictional laws and requirements with respect to preservation of records (and potentially equipment).

The TPA may be the first point of contact with respect to notices of representation and any preservation of evidence notices. It is critical that the adjuster relays that information to the insured so they can issue their own internal litigation holds.

III. Depositions

The decision process regarding who should be deposed and what testimony is expected to be obtained should not take place in a vacuum. The insured should be included in that process for multiple reasons.

In addition to the free exchange of information to ensure the client is up to date and aware of the current exposure, these discussions are an opportunity for the client to share other insight they may have from their location contacts or other internal events.

It is preferable from the insureds point of view to know the good the bad and the ugly prior to litigation as part of the initial investigation by the TPA and or Insurer. In some cases, that means the adjuster makes a call to discuss the incident with the insured rather than take formal statements – we always need to be mindful that the TPA's file is subject to discovery. Don't ask that formal question unless you are fairly confident on what you expect to learn.

Deposition scheduling needs to be coordinated with the client. In addition, the client is generally an advocate for any employee who is to be deposed. The legal team needs to consult with the client to understand background of the employee and any specific issues for which the client may be aware. In a particular case, the legal team was advised by plaintiff counsel of the need to take a particular employee's deposition. The employee was an hourly housekeeper who had entered a guest room which was crucial to the plaintiff's case. Legal arranged to do the depo at client's location but did not discuss with HR. HR had knowledge of background on this employee that suggested that the employee would not do well in a stressful situation (such as a depo) and would likely suffer an anxiety attack. Not only did the employee have an anxiety attack, the employee began spinning tales about what had occurred and became a completely unreliable witness which resulted in a very unnecessary and large settlement.

Had the legal team kept in mind the entirety of the client's business, HR could have been proactive advising of techniques used to guide the employee in prior stressful situations and talking with the employee prior to deposition.

Adequate prep time needs to be considered when deposing employees who may have reason to be concerned about their personal well-being and status.

IV. Settlements

The impact of settlements on claims is larger than the specific financial impact of that claim. Settlements have the potential to show good faith and positive culture, but could also foster false claims for those seeking a settlement. It is critically important for the adjuster and client to be discussing specific settlements to ensure there are not greater ramifications not immediately apparent.

There may be issues that are important to the client. Being in the hospitality industry, bed bugs are an issue that we are sensitive to. Sometimes is it a matter of educating the adjuster if they are not familiar with your industry as bed bugs are not a matter of hygiene for the industry – it is a matter of the guest who brought them into your hotel. They don't cause disease (i.e. medical treatment is not often applicable) but the guest understandably is concerned and we want those issues to be addressed. However, that doesn't necessarily

mean that you get to redecorate their entire house – critical is setting expectations early. What did the investigation determine – were they present and if not, does the insured want to hold firm on that denial. Again have you discussed those issues and then followed up with counsel to ensure they understand as well?

We don't view our retention layer as a means of guest satisfaction – that is a different set of funds however, not everyone looks at insurance the same way which is what needs to be conveyed both to the adjuster and defense counsel.

From a guaranteed workers' compensation perspective, although the insurer may have the right to settle a claim without the consent of the client, failure to communicate accurate information regarding settlement can jeopardize the client's business. In a real case, an adjuster made a decision to settle a claim without notification to the client. At a prior claim review, the client had been told the value of the claim was \$2,500 and had no problem with that nuisance value settlement. However, 2 months after the claim review, the adjuster assignment had changed and the new adjuster increased the value of the claim settlement to \$20,000 and proceeded to settle. The employee receiving the settlement made the information known to coworkers and the client received an additional 16 claims within 2 months of the first settlement.

If the client had been made aware in advance of the increased settlement they would have been able to be proactive with employees and manage response to the information. Instead, the 16 additional claims resulted in 12 of 16 employees being placed off duty and significantly burdened the client's business with additional costs associated with temporary help, guest satisfaction scores lowered not to mention the additional costs to their workers' compensation program.