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Slip & Fall: How to Prevent, Investigate, Defend, and Utilize Experts

This presentation will focus on personal injuries that frequently occur at retail stores, restaurants and hotels, including slip and falls and other related injuries from alleged defective conditions and/or failure to follow proper procedures and protocols. The panelists will discuss the duties and procedures that are often central to the issue of liability in a slip and fall premises liability injury case, as well as how implementation of proper policy and procedure can help prevent the occurrence of a slip & fall incident for a retail store, restaurant or hotel. The selection and vetting of an expert regarding liability issues will be discussed, including experts who can provide opinions concerning human factor analysis and friction coefficient, which can be important in the defense of these lawsuits. Regarding an occasion when an injury does occur, the panel will discuss the preservation of evidence, investigation of the occurrence and legal defenses used in litigation.

I. Prevent

a. Create Good Housekeeping Practices

Maintaining a clean facility is critical in preventing slip and fall accidents. If your housekeeping practices are poor, there is a significantly higher chance that an employee or guest will be injured, which will increase insurance costs and regulatory citations. Proper housekeeping should be part of your company's policy and procedures and should be performed on a daily basis. All employees should know what needs to be done, who is going to do it and when it needs to be performed.

b. Reduce Wet or Slippery Surfaces

Slip and fall accidents most frequently occur on surfaces that employees or guests travel frequently. These types of surfaces include: (1) food preparation areas; (2) sidewalks; (3) parking lots; (4) shower stalls in hotels; (5) floors in general. It is of paramount importance that your company identifies these problem areas both indoors and outdoors. Indoor surfaces can be controlled with anti-skid adhesive tape, moisture-absorbent mats with beveled edges, "Wet Floor" signs and proper area rugs or mats. Outdoor surfaces are more difficult to maintain due to changing weather conditions. These conditions can also affect indoor surfaces as they are tracked in by pedestrians. Outdoor surfaces should be constantly monitored and kept in good repair. If snow and ice are present, proper steps should be taken to remove or treat these elements.

c. Avoid Creating Obstacles in Aisles and Walkways

Slip and falls frequently occur as the result of trips from obstacles, equipment or other clutter in aisles, corridors, entranceways and stairwells. Good housekeeping practices are the most effective method to avoid creating a hazard. This requires the company to have policies and procedures in place to allow for time to clean the area and ensure that the pathway is clear. Periodic inspections should be performed in order to identify potential slip and trip hazards.

d. Create and Maintain Proper Lighting

Insufficient lighting is a common cause for many slip and fall accidents. These types of accidents can be reduced or eliminated with proper illumination in walkways, staircases, ramps, hallways, etc. This also requires that the company have a policy and procedure in place to identify these areas and ensure that fixtures are repaired or replaced.

e. Control Individual Behavior

It is difficult to control individual behavior, but having proper walkways and controlling traffic through your facility can reduce slip and fall accidents. Customers and guests that are in a hurry, typically result in walking too fast or running, which increases the chance of a slip and fall accident.

II. Investigate

a. Accident Reports

The development of a concise accident report may benefit your company in the event of a lawsuit. Often, there is limited time to speak with a guest after an accident. The accident report should be tailored to suit that nature of your business, but should include the guest's basic contact information, a narrative description of the accident, the guest's alleged injuries and witness contact information. For slip and fall accidents, it is also a good idea to note the weather conditions, what type of footwear that guest was wearing and if the guest was carrying anything. The accident report should also report the description of how the accident occurred or what caused the accident from the guest's perspective. .

b. Take Photographs

A photograph of the hazardous condition is very important to fully document the accident. Be sure to take photographs of the hazardous condition and all warning signs present at the time of the accident.

c. Preserve Video Surveillance

In many instances, video surveillance of the accident may be available. After an accident is reported, immediately take steps to preserve not only all available footage of the accident itself, but all other relevant footage. While determining what footage is relevant may be a judgment call, review the footage prior to the accident and save starting at the spill if it can be identified. Preserve all post-accident footage through the guest's exit of the facility. Most video surveillance has a time when the video is no longer saved, so be sure you know how long footage is saved before it is recorded over.

d. Employee Schedule / Guest Receipts

Employee turnover is high in retail, restaurant and hospitality industries; thus, it is important to attach a copy of the employee schedule for the day of the incident to each accident report. It is also important to preserve copies of the guest's receipts to show all food and/or alcohol purchases.

e. Train Employees on Accident Reporting and Investigation

All employees need to be trained in accident response procedures and receive periodic refresher training. Management should be provided with additional training in accident reporting and investigation. Further, accident forms should be prepared and employees should know where they are located and how to properly fill out the accident form in the event a manager is not available.

III. Defend

a. Notify Insurer

When a company is first notified of the claim, the usual first step is to notify your insurer. After the insurer is notified, it will generally undertake an investigation. This can involve site inspections, witness statements, and in some cases immediate retention of experts. Ultimately, the policy holder bears the obligation to tender their claim to their carrier for coverage, but there are other parties that can be subject to liability exposure for failure to do so.

b. Retain Defense Counsel

When a claim goes into suit, a typical CGL carrier's obligation to defend a covered claim begins. In many cases, at the discretion of the carrier, counsel can be retained immediately to maintain privilege of any investigative materials, including expert reports and initial case valuations. In an unendorsed CGL policy that is not subject to a self-insured retention, the choice of counsel remains with the primary carrier. However, in certain cases, the policy will provide for the insured's selection of counsel. Many carriers have staff counsel that they will assign initially to all suits as a matter of practice. If the excess carrier perceives that there will be exposure to its policy, it may choose to retain monitoring counsel, or to associate in its own defense counsel. There are many strategic considerations to make regarding selection of counsel on a catastrophic injury case, particularly early in the life of a claim.

c. Site Inspection / Witness Interviews

When a claim goes into suit and defense counsel is retained, it is the obligation of defense counsel to investigate the incident and the allegation in the lawsuit. For example, when a serious injury results from a slip and fall, defense counsel may retain an engineer or certified safety professional to perform a site inspection and report on such issues as building code violations or failure to institute mandated safety policies or failure of staff to comply with those policies. Further, defense counsel will speak with the Insured to obtain preliminary information about potential defenses and act as a

barrier between Plaintiff's counsel and the Insured. In a slip and fall case, defense counsel may recommend a number of actions be taken, including retention of experts or testing of evidence.

d. Discovery

Defense counsel will propound written discovery upon the other parties and issue subpoenas for medical records, police reports, etc. After defense counsel has obtained all the pertinent materials, defense counsel will take the oral depositions of the parties and witnesses.

IV. Utilize Experts

a. Experts to Address Safety Regarding Policies, Procedures and Compliance

Twenty-five years ago, proving the defense that the retail or hospitality establishment exercised reasonable care was not something that could be done utilizing expert witnesses in regard to safety policies and procedures. That is not the case today. A Certified Safety Professional or similar expert can be called upon to testify about codes, guidelines and recommendations to improve and ensure safety. The expert can educate the jury on the appropriate house keeping procedures, required and recommended methods to reduce development of wet and/or slippery floors and the required type and amount of lighting in a specific area. With the introduction of such expert opinions, the business and their defense counsel are no longer limited to presentation of fact evidence and arguing that the actions of the business and its employees acted reasonably and then hoping that the jury agrees with their interpretation of reasonable care.

b. Experts to Address a Claim of Violation of Building Code Provisions

A slip and fall claim or suit may involve more than rain drops or a slippery substance on the floor of a store or hotel. Many times a claim that the flooring or the structure of a particular area of the establishment where a patron slipped is alleged to violate an applicable Federal state or local building code. There are also occasions when the business can prove that a defect in the flooring material or a construction or architectural defect is at least partly to blame for the accident. Structural and civil engineers can provide opinions regarding allegations and defenses related to these issues. Such an expert can identify the building code provisions that apply to the site of the slip and fall, conduct a site inspection and possibly perform testing which will

determine if the materials and construction of the business complies with those codes. Testing may demonstrate that flooring tile is or is not less slip-resistant than mandated by various code provisions.

c. Early Retention of Experts

It is often true that the first notice that an insurer has of a claim of a slip and fall injury at a store, restaurant or hotel is the service of a suit on the insured. However, when the injury involved is serious, there is usually an opportunity to investigate the accident immediately after the occurrence. A severe injury or death also has the potential of a high dollar value exposure. For these claims, it is advisable to consider involving defense counsel to assist in the investigation of the claim and in the retention of appropriate experts. Obtaining expert opinions with regard to causation can be a critical part of an early resolution of a major injury claim. Even if the opinions of the expert indicate that action or inaction by the restaurant or other establishment was the cause of the accident, a settlement without the need for litigation is usually preferred under such circumstances.

d. Vetting of Experts for Defense of Slip and Fall Claims and Suits

While there are now a number of areas of expertise that can apply in determining causation in a slip and fall claim or suit, it is important to vet potential experts to be certain that they do have the qualifications and background to give their opinions credibility. When selecting an expert, careful review of education, experience, licenses and certifications and prior expert testimony of any potential expert cannot be over emphasized. Selecting an expert who is not only capable of assisting in the investigation of the slip and fall, but who has the resume to get them through a Daubert challenge and ultimately to make a convincing argument to a jury is the goal in vetting expert candidates.