



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

**Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432**

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

Preventative Strategies – How To Reduce The Exposure To The Insured Or Avoid The Next Claim

I. Implementing safety conscious routines, habits and practices – creating a culture of safety.

A. General inspections

It is important to develop a preventative maintenance and inspection program that is both comprehensive and realistic, therefore easily implemented and followed. If the insured can provide evidence through affidavits or deposition testimony that the area with the alleged dangerous condition was regularly inspected, plaintiffs will be hard pressed to prove liability against the insured. As it will show that due diligence is being performed. One person can be designated to perform routine inspections daily, weekly and monthly of the various areas, to reduce the exposure for the next claim. A safety check list should be developed and maintained to assist with inspections. All inspections must be documented with a paper trail. This holds true for area inspections inside and outside a premise. Equipment inspection should also regularly be done.

Maintenance

Regular maintenance is important but having an insured who is able to testify about routine maintenance will go a long way. It is also important to keep key documents for large maintenance jobs such as new carpet or floors installation, construction modifications or other physical alterations. If you are renting equipment from others in your facility, it's important to have Certificates of Insurance from those vendors in case their property malfunctions and causes injury or damage on your property. A certification of insurance alone is not enough, confirm with the broker you are an additional insured on the policy.

B. Training- it all starts with training. Train the insured to train their employees. Regular meetings to discuss safety issues are an important element of any successful risk management program. Safety meetings re-emphasize your commitment to safety management. Document the safety meetings and training that each employee undergoes. The first thing that will be asked for in most cases by the plaintiff's attorney will be your training manuals. The attorney

will read through the manuals and request production of documentation to substantiate the training requirements. Any lack of documentation in this area will be used against the insured by a good plaintiff's attorney.

Adequate investigations surrounding accidents and injury is an important part of risk management. Employees should be trained in accident investigation techniques. The main goal in accident investigation is to gather information about the cause of the accident; obtain an accurate description of the conditions present at the accident scene; and to obtain enough detail to prevent the story from changing.

C. Have a "Safety Director" that will oversee all things safety at the facility or business.

Duties of the Safety Director:

- Be in charge of training all key safety related positions or oversee the training by others.
- Oversee employee files to be sure the initial training and documentation is properly completed and all employees get the same detailed training set forth in the insured's policies and procedures.
- If claims are brought by guests or employees, they can be the contact with the insurance claims adjusters and defense attorneys and serve as a liaison for documentation and information needed to defend claims.
- The safety director should reach out to each guest or employee injured on your premises and elicit details on the extent of injury (if any) and type of treatment. Many times this follow-up call sends off a good will signal to the injured guest or employee. Extra things like "Get Well cards" and gift cards also go a long way in letting the injured know your insured cares. Such treatment could be just what it takes to prevent the injured party from pursuing a claim.
- The safety director should know when the nature of the injury is so catastrophic to necessitate the initial investigation being performed by legal counsel, to help preserve the nature of the information received as privileged.

II. Documenting the paper trail

Documentation is important before and after an accident. Risk Management guidelines should be developed and maintained by the company. These guidelines should specify job titles, duties and responsibilities for safety, safety rules and regulations and how to handle an accident, if such arises.

A. Gathering the Evidence

The guidelines should include pre-printed forms such as accident reports, safety surveys, witness statements, employee statements, inspection check list and any other forms specific to your company. Logs should be kept with check lists for inspections used daily, weekly and monthly, especially on any property rented to guests of the insured. All contracts, repair records, work orders and invoices must be maintained.

B. The importance of preserving evidence

A claim is made against an insured months or even years after an incident for bodily injury that occurred on the premises. This is frustrating for both the insured and the claims handler who is working on the defense of the matter. It can become even more frustrating and possibly have adverse legal consequences when the insured has unintentionally failed to preserve evidence. The

key issue is going to be whether the insured could have foreseen that the particular piece of evidence was material to a future claim. The failure to preserve evidence can have damaging impact during litigation depending on the particular state that the accident occurs in and what laws apply. In many jurisdictions, if evidence is not preserved, a court will allow a jury to make an adverse inference against the insured. In other words, absence of the evidence will be construed to mean that if the evidence had been available it would have been bad for the insured. The theory being: “why else would someone destroy evidence”? So, what can we do to assist the insured with respect to the issue? In some jurisdictions depending on the nature of the destroyed evidence and the surrounding circumstances, this could result in a defendant’s answer being stricken, i.e. they are prohibited from asserting liability defenses.

Remind the insured of the following: If a person claims injury on the premises due to a defective product e.g. a broken chair or a piece of equipment, do NOT discard the product. Although this can be burdensome to preserve a broken chair or other evidence, it is imperative for the defense that the chair be examined when the claim is made. A good practice would be to store the object and document where it is stored, by whom it was stored and the date and time in which it was stored. Photos of the broken object would also be helpful. Additional preventive measures that would assist in keeping a claimant from arguing spoliation of evidence are to complete an incident report immediately and preserve any video surveillance as well. Again, this may be burdensome especially when the incident appears to be minor, but the lack of evidence down the road can not only make the claim harder to defend, but also be used against the insured. So, the bottom line is to remind the insureds to have a policy and procedure in place to preserve evidence even if the injury or occurrence seems minor at the time.

- C. Waivers and Releases – Written releases and waivers, signed by the patrons, may bar or help to prevent a claim against the insured. In many states, a written release and waiver is a legally binding contract between the insured and its patron. The patron gives up certain rights to sue in exchange for the use of the facility. These types of documents are not valid in every state and the laws for same are very state specific. That being said, the patrons do not necessarily know the law. They may believe that signing the waiver and release is a valid contract and it may prevent them from otherwise pursuing a claim. In those cases involving recreational activities, if properly worded. These can also help support an assumption of risk defense.

III. How to better use video surveillance

A. What can the Video Offer

Surveillance videos do not just capture an accident. There are so many other ways surveillance can be used. If the company has surveillance running continually, it may capture the inspection, the cleaning, the fact that nothing was caused or created by company employees. It can show dozens of other patrons traversed the area of the alleged defect. It can also document rental equipment inspections and preserving of evidence. Companies need to strategically place the video cameras to best capture the most information. They are not only being used inside facilities, but in vehicles, which are very helpful defending car accidents. Having a video showing the color of the light before the accident occurs, assists greatly with a summary judgment motion. Other video can be used in defending claims. If the accident is reported early enough, canvassing the area to find whether other video cameras captured the accident could also be useful. This should be made part of the initial accident investigations as the video will likely be taped over after a short period of time.

A detailed safety director will preserve video clips of all incidents so that they are never lost. Also preserved will be a significant period of time before and after the incident. Although many

times, guests will send up red flags during an investigation of follow-up call that they are thinking of pursuing a claim, this is not always the case. We all know that injured parties have years until the statute of limitations runs on their ability to file suit & preserve the statute and in the case of minors, it can be many more years after that.

B. When to use the video before the claim is made

Sometimes a specific allegation is laid out on the front end by a guest of the insured which can be clearly disproved by showing the video. The guest may have had no idea their incident was recorded and that alone can discourage untruthful allegations by guests or employees from getting into the hands of plaintiff attorneys. It can also be used if a defect is being claimed early on in an investigation, but clear video exists documenting contradictory evidence.

IV. Employment manuals: an ounce of prevention is worth a pound cure

A. Ensure consistent treatment of the employees

Insureds often ask whether it is necessary to provide a manual for the employees. The response is always the same. Sooner or later employees will ask about vacation time, sick time or maternity leave. An employment manual will save you time and money by providing answers to these common questions while insuring consistency in the treatment of each employee.

In employment litigation, hundreds of thousands of dollars are on the line. Incredibly, in many instances, cases hinge on the employer's employment manual. Good manuals can save the day for the employer, while bad manuals pave the way for the plaintiff/employee to obtain a large payday. In most employment matters, the employment manual will be Exhibit 1. The issue is whether it will be the employer or employee's key exhibit to victory. Because the law is constantly evolving, so must your employment manual.

B. The Sexual Harassment Policy and other nondiscriminatory policies

In the sexual harassment context, an employer can be held automatically responsible for the actions of a supervisor sexually harassing a subordinate employee. However, an effective affirmative defense for the employer is that a harassment complaint procedure was in place, the employee had knowledge of the policy, and the employee failed to utilize the complaint procedure.

- Do you have a detailed harassment policy, which satisfies the Supreme Court standards?
- Do your employees know about the policy?
- Do you have signed acknowledgements from employees to prove they have read the policy?
- Do you have documentation that employees undergo periodic re-training on your sexual harassment policy as well as review of other nondiscriminatory policies?