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Investigating Catastrophic Product Failures: Learn from Others' Mistakes

I. Time is of the Essence

Hours have passed since the accident occurred. Law enforcement is involved. Evidence has been retained as part of the investigation by various interested parties and your employees have been interviewed repeatedly by investigators and reporters. Is it possible to un-ring a bell? The key to protecting your client and insured from multi-million dollar verdicts in catastrophic product failures often depends on the program in place before the accident even occurs.

II. Wisdom Comes from Failure

Experience, when it comes to investigating product failures is invaluable. One must be prepared to take the steps and incur the costs necessary to protect your client's position from the moment you are notified of the claim. Having an Emergency Response Team, whether it be engineers, fire investigators, accident reconstruction experts or any other specialist available immediately could make the difference between a successful defense and massive exposure. It is crucial to know how to maneuver among the investigating agencies, law enforcement departments or government entities involved and creating a retention agreement allowing preservation without spoiling relevant evidence.

Your strategy should include a communications strategy between counsel, retained experts and your client to protect your investigation from privilege waiver attacks and to draw from various pools of ideas as to how to best protect your client's interests. Theories of cause should be developed and agreed upon early in the process to focus the investigation. This will allow the experts to focus their investigation on the immediate possible causes and help develop a plan for long-term retention of the product (or parts of it) for future testing to avoid long-term financial consequences for your client.

Coordination and communication with law enforcement and investigating officers is crucial in the early stages of your investigation. A determination as to control and storage of any retained evidence should be considered whenever possible, especially after the part or parts are released by any government agency.

III. Objective Documentation and Historical Document Retention

Often, evidence that is indirectly involved to a failure is often overlooked at the initial stages of a catastrophic loss. All investigations should include, to the extent time allows, an interview of any client representative with information as to the activity undertaken at the time of the loss. Logbooks, electronically monitored data, notes, photographs or other information should be sought out. It is not uncommon for evidence to disappear because it was not requested until several months or years later when formal discovery was undertaken. This initial search should not be limited to evidence under your client's control. Social media search companies give us access to videos posted to various social media sites and provide valuable eyewitness contact information. Security cameras, cell phone camera and Go-Pros have become prevalent in today's society but storage of video images of an accident may not be saved for any significant period of time. Location and retention of this information must be done quickly to save any chance of certain evidence that may absolve your client of any liability.

Perception often controls case outcomes. Jurors develop perceptions of the parties and their practices and often pigeonhole their findings to fit these perceptions. Evidence gathering in early stages should be geared towards cultivating a positive perception. Insure that all maintenance documents are retained and explained. Identify the employees with the most direct knowledge related to the product and discuss the case with him/her immediately. What are his/her thoughts on why the product failed? Have they seen it before? Have they been concerned something like this would happen? Determining other's knowledge and informal opinions well before they provide damaging testimony should be considered ultimately important.

Never take for granted that a witness will be available to you four years down the road. The nature of the case may require sworn statements be provided taking care, if possible, to preserve admissible factual testimony at a later date. These statements can also be used to refresh stale recollection and counter what can only be described as "witness regret". It is not uncommon for a witness to change his/her mind years after an event by claiming they do not remember anything because it occurred a long time ago. Sworn statements help deter a witness' change of heart.

IV. Picking the Right Expert

The selection of an appropriate expert may be the most important step in securing the appropriate evidence. The best protocol is one that has the expert selected and vetted before any catastrophic failure. There are several considerations to focus on when picking an expert. Work backwards. Will the expert serve as an effective and credible witness for your client? Focusing on credentials can often lead to witnesses with the ability to draft reports including their opinions but who lack the ability to convince jurors that his/her causation opinions are credible. Experts should always be asked for references from other industry professionals that have worked with the expert in similar cases. Background should be provided on whether the expert has been allowed to testify in various jurisdictions and whether *Daubert* challenges have been overcome. At this stage, retaining a "jack of all trades" because of locale or familiarity is a dangerous proposition.

The process of expert selection often loses steam and direction after retention and production of the file. Often, industry members do not provide a progression schedule which outlines the expert's

responsibilities. This lack of direction often leads to a scattered response from the expert which is usually more costly than if the professionals develop a focused plan from start to finish. This plan invites communication and an understanding of budgeting requirements and expectations. Most importantly, it helps avoid the problem of investing deeply in an expert only to learn, after designation deadlines, that the client is, for lack of a better term, stuck with the expert through trial. Be prepared to admit mistakes in selection at an early stage. An expert should never be relied upon if, at an early stage, you realize the expert is not everything he/she claims to be.

An expert should be required to give initial formative opinions as early as possible. The expert should be asked to develop working theories on failures. Industry-wide, what are the known possible causes? Can any of them be eliminated at this time? Your working plan should include developing physical evidence to eliminate as many as soon as possible. This allows everyone involved to understand the likelihood of the failure being caused by a common occurrence versus a near-mathematical impossibility.

Guidance should be sought on written discovery requests, cross-examination of opposing experts and provision of literature that assist in the defense of the case. In other words, in massive catastrophic failures, the expert should be more involved in the development of your theory and the request for evidence to support the same. Importantly, the expert's theory should be tested by counsel before the expert is designated. There should be a complete understanding as to the strengths and weakness of the designation so an educated group decision can be made before the expert's opinion is memorialized. It is crucial that any expert's theory be supported, to the extent possible, by objective evidence. Relying on an expert's subjective beliefs opens the door for extensive pre-trial motions followed by vigorous cross-examination.

In certain cases, experts may fit different molds. Be creative. In trucking related cases, Carrier Enforcement Officers are extensively trained in the Federal Motor Carrier Safety Act and may be allowed to render opinions between violations and causation. Many times, they have more hours inspecting tractor-trailer units than some engineers. Mechanics serve as other valid experts in certain cases. Jurors tend to appreciate local experts who have traditional, hands-on experience in certain situations.

V. Putting It All Together

Prior preparation prevents poor performance is an old adage that applies to investigating catastrophic product failure. Having a plan in place before the inevitable occurs may be the most significant step to protecting your client. Retaining wisdom with expertise in these investigations may lead to expense, but it may save you significantly more. Retain professionals that have a clear history of ability. Once retained, develop a clear plan moving forward to develop a theory and what evidence will be necessary to prove or disprove the same. Most importantly, be prepared to handle the flood of information and decisions that must be made in a short period of time once you are put on notice of a catastrophic loss. Develop a plan and hire the right people to execute it to the best of their abilities.