



**2020 CLM Workers' Compensation, Retail, Restaurant & Hospitality Conference  
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**High Exposure: Questionable Liability — Managing Litigation from a Hospitality Standpoint**

I. Initial Intake

**Understanding how to properly identify these types of claims**

One of the most difficult types of claims to identify early on are those claims with high exposure and questionable liability. We often see these types of claims when death or a traumatic brain injury is involved. The initial response is to check the policy limits and possibly pay. However, if you properly evaluate the claim, and liability is highly questionable (i.e. claimant was drunk, high on drugs or was the main contributing factor to the loss, liability becomes questionable) then the true value of the claim should be evaluated.

Most large hospitality entities have detailed claims handling guidelines such as detailed checklist and escalation procedures. However, as times change and the economy evolves, we are seeing more and more smaller startups who don't have detailed claims handling policies and procedures. Unfortunately, these companies often times end up over paying on claims. Further, just because a company has detailed policies for handling claims, that doesn't necessarily mean the claims will be processed appropriately and efficiently.

In order to identify these claims when they come in, you have to be able to quickly process the claim and have checklist that will assist in routing the claims to the proper claims handler. We have found that having a detailed check list for identifying liability and damages and then an escalation procedure to work best. For instance, when one of these claims comes in, the front line adjuster has to be taught and able to turn the claim around to a supervisor quickly.

Traditionally, claims such as these can be easily mislabeled for a quick settlement that is extremely higher than the actual value of the claim. Due to the unfavorable case law in most states dealing with bad faith, most companies will tend to overpay to avoid possible issues. THIS IS NOT a bad faith presentation but we would be doing a misfortune to not mention it. Florida for example has some of the most plaintiff friendly bad faith laws in the country. In **Florida**, the insurer has an affirmative duty to initiate settlement negotiations and cannot wait for a policy limits demand. Once **liability is clear**, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations, and bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. However, In **California**, an insurer cannot be held liable for the bad faith

failure to settle a claim absent either a demand within policy limits or some "other manifestation the injured party is interested in settlement." *Reid v. Mercury Insurance Co.* (Cal. 2013) 220 Cal.App.4th 262 (a mere request for information regarding the amount of policy limits was held to not be sufficient an indication of a party's interest in settlement). This is why having the ability to process these claims and quickly identify the liability picture is huge.

## II. Investigation

### **Documenting the loss**

When these types of claims, high exposure and questionable liability have been identified during initial intake and proper escalation procedures have been used and the claim routed to the handling adjuster, the real work begins. These types of claims require detailed documentation. We typically start off by documenting these claims with an incident report. In Florida, incident reports are protected under the work product privilege. Florida Rules of Civil Procedure 1.280; See *Neighborhood Health P'Ship, Inc. v. Merkle*, 8 So. 3d 1180 (Fla. 4th DCA 2009). We typically argue that the Plaintiff reported an event in one of Defendant's hotels as described in the Complaint which based on Defendant's knowledge and experience would foreseeably and in all probability be made the basis of a claim in the future.

We also recommend taking as many photographs as possible of the area and the surrounding area as quickly as possible even if the photographs don't show anything. Sometimes, the absence of dangerous items or things can help tremendously. Just as an incident report, photographs can also be clothed with the work process privilege and we argue that Defendant took a photograph(s) where the probability of litigation was substantial and imminent. *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373 (Fla. 4th DCA 2004). And the photograph(s) was taken in furtherance thereof as a direct consequence of the Plaintiff's described event. See *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1298 (Fla. 3d DCA 1985); *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444, 446-47 (Fla. 3d DCA 2006). In accordance with Florida Rule of Civil Procedure 1.280(b)5.

Written statements are also extremely important. As we all know, memories fade with time and employees move on. Having these statements will assist should the matter ever proceed to trial.

### **Hiring Independent Adjuster**

Many times, these claims require a claims handler to go to the property or site quickly to properly document the claim i.e. take measurements, interview witnesses, take additional photographs and begin gathering records. These individuals can be crucial to properly documenting everything and allowing for an independent review of all of the facts of the case.

### **Hiring Outside Counsel**

In addition to independent adjusters, many clients retain outside defense counsel during this process. We have found that involving defense counsel early saves money, resources and time. Having counsel provide legal opinion on liability and damage assessments is crucial.

Oftentimes, we have found that outside counsel is able to speak more freely with the possible employee witnesses with everyone understanding that the conversation is protected under attorney client privilege.

### **Retention of experts**

In high exposure claims, it is never too early to get crucial liability experts involved in the investigation. For instant, in cases of burns dealing with water, knowing the temperature of the water is crucial to the evaluation of liability in the case. In cases involving issues with the walking surface, knowing to coefficient of the surface or if the surface is up to speed can greatly help with determining the liability picture.

#### III. Claim Evaluation

### **Roundtable the claim within the organization**

Many large clients either self insured or carrier have stated implementing the ability roundtable these types of claims. Using this method provides for the ability for numerous points of view and opinions. This allows for a more logical approach in coming up with the actual liability picture. Further, if you have retained outside defense counsel early, the committee will have the ability to question counsel from numerous different angles. Active participation is a must in these types of meetings.

### **Discussing claim with personnel at the loss location**

One area of the investigation that can't be forgotten is the ability of the claims handler to speak with the boots on the ground at the location. Speaking to the employees, managers and witnesses can often times help understand the claim and obtain information that may have been left out of the witness statements. Another key here is the ability to judge how the employee or witness may present to a jury.

#### IV. Litigation

### **Outside Counsel**

Advising outside counsel of your expectations during litigation for these claims with high exposure but limited liability will save headaches and possible issues in the future. Many of these claims can be geared toward dispositive motions early on. Ensuring that outside counsel understands what is expected of them will allow for more efficient handling of the claim. For example, due to issues with liability, some of the damages related items maybe held off from accomplishing until the liability issues have been fully flushed out through written discovery and depositions.

### **Retention of Testifying Experts**

Retention of experts for the use of trial can greatly assist the evaluation of these types of cases. Florida has been a state that has gone back and forth on expert standards for many years. Finally, in 2019, Florida adopted *Daubert* (again). *In re Amendments to the Florida Evidence Code*, No. SC19-107, May 23, 2019, "[t]he Court, according to its exclusive rulemaking

authority pursuant to article V, section 2(a), of the Florida Constitution, adopts chapter 2013-107, sections 1 and 2, Law of Florida (*Daubert* amendments), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the *Frye* standard for admitting certain expert testimony with the *Daubert* standard, the standard for expert testimony found in Federal Rule of Evidence 702." "Effective immediately, upon release of this opinion we adopt the amendments to section 90.702 as procedural rules of evidence and adopt the amendment to section 90.704 to the extent it is procedural." Having the ability to rely on solid liability experts will greatly assist in ensuring these claims are efficiently handled.

V. Resolution

**Requesting early demand**

Enough can't be said about engaging Plaintiff's counsel early and often in these types of cases. If you see the issues with liability, many times so do the Plaintiff's attorneys. Having an early demand will assist in getting the other sides liability picture and how they also view the damages.

After gathering the necessary items for defending the liability in the case, consideration should be given for an early mediation. Many times, we have been successful in mediating and resolving these types of claims without the need for conducting discovery on the economic side of the case.