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Catastrophic Litigation:
Lessons from Defending Headline Cases

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I. What is “Catastrophic Litigation?”

The term “catastrophic litigation” refers to complex claims that arise from a tragic, publicized disaster. Catastrophic litigation is intense, and will unleash a frenzy of accusations and responses, threatening to eclipse your business focus and monopolize your time and legal resources. Catastrophic litigation presents a significant risk of exposure to your company, and could threaten its very survival. While specific catastrophes and litigation that follows will differ in significant ways, they raise compelling issues, and this panel and these materials offer recommendations on best practices and lessons learned that your business can draw on when needed.

II. Introduction

Increasingly in modern times, there is no such a thing as “just an accident” or an “act of God.” When something dramatic happens – when many people are injured and there is extensive damage and publicity – we now assume that high-stakes litigation against somebody will follow. This will happen in most places across the globe, and it does not matter if you may be just a small actor in the tragedy. This will happen even if you believe you have strong defenses to both liability and causation. Victims will hire lawyers immediately, and quite often they will bring claims before the tragedy and its

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1 We are grateful for the panelists’ contributions to this topic and paper, written and edited by Benton Barton of the ALFA International firm of Hall and Evans, LLC of Denver, Colorado and Clark Asp of the ALFA International firm of Naman, Howell, Smith & Lee, PLLC of Austin, Texas.
impacts are fully felt, much less the legal theories fully developed. No matter what your company’s role may have been in arguably contributing to the catastrophe, plaintiffs’ lawyers will find a way to assert that nearly everyone involved should share responsibility.

These concerns are heightened when a garden variety accident rises to the level of a true catastrophe. While there is no universally accepted legal definition of “catastrophic,” the word has been defined thusly: “extremely harmful;” or, “bringing physical or financial ruin;” or, “involving or causing sudden great damage or suffering.”

Catastrophes are rare, and thankfully so are the lawsuits that spring from them. You might only experience one in your career. But when one arises, it is better to be ready with a plan, and not make things worse for you and your company by not being prepared.

Catastrophic litigation presents unique issues and special considerations for your business. It could also be described as “bet-the-company litigation.” The pressures of catastrophic litigation are exacerbated by saturation coverage in the news, and are further ratcheted up by social media. Here, we offer ideas for immediate discussion and

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2 These definitions are found in on-line versions of dictionaries published by Google, The Free Dictionary, and Merriam-Webster.

implementation when your company is embroiled in a tragedy that triggers unwelcome scrutiny and potentially devastating claims.⁴

III. Anatomy of a Catastrophe

To frame our discussion, the following paragraphs summarize a real tragedy that led to catastrophic litigation.

In the middle of the night on August 6, 2007, in a remote Rocky Mountain site, a massive pillar of coal being mined suddenly collapsed. The implosive failure occurred during the controversial practice of “retreat mining.” Six miners were working on the night shift 2,000 feet underground – over four miles from the mine’s entrance – and were instantly entombed. The collapse was felt as a 3.9-magnitude earthquake.

This extremely remote site quickly developed into a 24-hour international news and crisis management center. Since it was possible that the miners were still alive, fellow workers, family members, engineers, equipment operators, healthcare providers, government investigators, investigative reporters and curiosity seekers arrived to support, protest, pray, and report on the search-and-rescue efforts. Plaintiffs’ lawyers appeared soon after.

The mine company’s CEO took personal charge at the site and quickly became the public face of the tragedy. He personally led grieving families, reporters, government

⁴ These materials were written to benefit a national audience. The authorities cited are representative discussions of important legal issues that arise in catastrophic litigation. Please consult your own jurisdiction’s law for more specific guidance.
investigators, scientists and politicians on underground tours, discussed the rescue efforts in great detail, and held emotional press conferences each day. The CEO initially blamed the collapse on natural causes and refused to entertain the possibility that mining the coal pillars might have triggered the event.

As the days dragged on without contact from the trapped miners, criticisms of the mine’s past design and operations came to light. Then, things went from bad to worse. On August 16, ten days after the initial collapse, a second burst occurred while rescuers were tunneling towards the suspected location of the first group. The second tragedy more than doubled the number of victims, adding more deaths and serious injuries.

The media spotlight’s glare had already been intense, but then it became simply overwhelming. The pressures increased as family members, co-workers, and neighbors staged round-the-clock vigils, the Governor and other elected officials took to the airwaves, and federal, state, and local government agencies asked hard questions and uncovered troubling documents about the mine’s efforts to recover “support pillars” that had served as structural support for the mine’s roof. Warnings from old agency and consultant reports were highlighted on the news and before government agencies. Opinions on the causes of the two collapses were offered from international mining experts on nightly news programs.

Within just a few days, the mine’s executives, employees, consultants, and contractors were subpoenaed to provide documents and witness statements to the United States Senate, House of Representatives, Department of Labor, Mine Safety & Health Administration, and the State, among others. The agencies separately sent out
hundreds of written questions, and also requested documents, interviews, and depositions. Criminal charges were discussed. Televised hearings were set.

To complicate matters further, most of the victims came from large families. Over 100 plaintiffs, mostly close relatives represented piecemeal by a dozen different plaintiffs’ firms, filed cases in federal and state courts. There were different judges and potential jury pools; nothing about the lawsuits was coordinated. The scores of plaintiffs included wives and ex-wives, minors and adult children, and undocumented foreign relatives. Some plaintiffs were bystanders who felt the coal bursts and suffered emotional distress. Others were related to one miner who escaped the first collapse, but then committed suicide after being ordered to go back to work. The involvement of foreign plaintiffs triggered thorny questions of legal standing, immigration status, and international law, and caused many procedural entanglements.

There were also collateral administrative proceedings such as workers’ compensation claims. There were property damage claims for damaged and destroyed mining equipment. Suddenly, hundreds of coal miners were out of work and seeking financial assistance. Just as suddenly, a mine that had yielded over 50,000 tons of coal per month was completely shut down. Customers complained. Inevitably, insurance carriers filed declaratory judgment actions to sort out the difficult coverage questions, along with subrogation claims. Hundreds of insurance policies were implicated.
One defendant, Company X for this discussion, was a small engineering company that for decades had provided the mine with recommendations for harvesting the remaining coal pillars. The media, government investigators, and plaintiffs’ lawyers accused the company of misconduct and criminal offenses. There were only a handful of experts in the world who could understand the complex engineering and operations, thus a “standard of care” was difficult to define.

The government investigations proceeded simultaneously with the lawsuits, and the official inquiries were haphazard and inconsistent. Lawyers raised concerns that witnesses could incriminate themselves by answering questions. For a while, Company X and defense counsel received daily messages from CNN and other national media outlets, seeking comment on the latest developments. The mine CEO’s rambling, combative press conferences enraged victims’ family members, who still held out hope for a rescue.

For Company X and many others, these events raised extremely sensitive business and legal concerns, including the impacts of unfavorable press, the wisdom of cooperation with oversight agencies, damage to reputations and commercial relationships, the need to preserve documents and evidence, potential insolvency from fees, costs and uncovered damages, insurance coverage questions, tainting of the jury pool, and the terrifying specter of criminal prosecution. In the lawsuits themselves, unique issues included applying a standard of care to cutting-edge engineering services, sufficiency of

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5 Hall & Evans represented Company X in this matter, and it has granted permission for the panel to generally discuss the public aspects of the claims and litigation.
expert opinions, retaining and producing old documents and electronic information, the logistics of dealing with over 100 plaintiffs bringing wrongful death and survivorship claims, defending serious (and higher-value) bodily injury claims, ensuring that all stakeholders were accounted for in settlement discussions, and responding to the unyielding demands of the investigating governmental agencies.

Ultimately, the lawsuits and most ancillary claims settled, but spin-off litigation continued for several more years. This catastrophe implicated nearly every conceivable issue that might be involved in “catastrophic litigation.” At the end of the discussion, it is the panel’s hope that attendees and readers will benefit from the following “lessons learned.”

IV. Before the Storm: Is it Possible to Prepare for a Catastrophe?

Even though catastrophes may be completely unforeseeable, companies who work on high-risk projects can be prudently proactive when things are quiet.

A. Choosing Work Carefully

All transactions of any complexity present a risk of serious future exposure that will be far in excess of what the work was worth. Since companies that take no risk do no work, it is unrealistic to expect lawyers to advise clients to turn down attractive opportunities, especially in a competitive economy. Instead, it would be our recommendation that your company would at least conduct a careful, up-front business
and legal review of significant engagements (including the reputations of the parties involved) that may contain heightened risk.

In the above-described case, the mine’s ownership had turned over several times during the mine’s long operating life. With the benefit of hindsight, Company X learned of concerns involving the mine’s operations that definitely would have raised “red flags” years before had a proper risk assessment been done. If properly assessed, this information might have led Company X to make different decisions relating to the project, its role, the preparation of design documents and, most importantly, the issuance of warnings and other helpful documentation. The post-accident investigation also revealed problems relating to methods of harvesting coal, safety violations, and deviations from Company X's design recommendations.

The awareness and understanding of red flags at the beginning of a new relationship will, at the very least, guide your team to act more cautiously than usual in executing its work. It will also help reinforce the need for careful documentation. If an accident later occurs, your company will be in a better position to defend itself amid the scrutiny.

B. Reviewing the Adequacy of Your Insurance

At least annually, a well-managed company should undertake a complete top-to-bottom review of its insurance program. The company should consult not only with its broker, but also with in-house and outside counsel, to spotlight any potential gaps or new law that may impact coverage. Prominent items to study include levels of deductibles and self-insured retentions, total policy limits, whether limits erode, the availability of excess
or project-specific policies to supplement limits, and generally whether damages caused by your work might not be covered. If the company later faces catastrophic litigation, these proactive efforts will pay obvious dividends.

Some companies tactically obtain lower levels of insurance, higher deductibles, or might even “go bare” so as to present less of a target to future claimants. This choice might work out sometimes, but it is enormously risky and is not recommended.

Catastrophic litigation is expensive. All too often outside counsel are presented with defensible cases, but are hamstrung by a lack of resources with which to zealously defend the case. In the mine case discussed above, Company X maintained only a $2 million professional liability policy with eroding limits. It had not substantively reviewed its insurance needs for several years, nor had the owner requested higher limits. Company X had no other insurance for its professional services. Initial settlement demands exceeded $100 million. Counsel simply could not mount a thorough, effective defense through trial without exhausting most of the limits, and this would have significantly harmed Company X’s ability to stay in business.

The “reality” Company X faced – insufficient insurance limits v. exorbitant damages – impacted all of the defense decisions and limited Company X’s ability to hire experts, e-discovery vendors, and other consultants. No company wants to be economically hamstrung when facing catastrophic litigation.

Moreover, sometimes higher-tier parties will focus more on the insurance obtained by their lower-tier counterparts, rather than taking a careful look at their own portfolios.
Relying upon the insurance of others is risky, since additional insured ("A/I") coverage is inherently tenuous.

Because catastrophic litigation could put your company out of business, consider revisiting the question of whether insurance coverages are commensurate with the potential exposure arising from complex projects or transactions. When the value of claims dwarfs the available insurance limits, a policy-limits demand will arrive quickly. This will stress the insurer-insured relationship. This will also negatively impact a company’s ability to clear its name through the litigation process when it may not want to settle.

Insufficient insurance limits will mandate a fast, unsatisfactory settlement (assuming the plaintiffs will accept the limits). In another recent case, a company worked on a massive minerals project and faced over $20 million in claims from the owner, most of which were completely meritless. However, to defend itself, the company had only a $1 million professional liability policy with eroding limits. It never occurred to the owner or the company to obtain more coverage before the project began. Without the client and counsel undertaking significant defense efforts, the matter settled quickly for policy limits to avoid the risk of spending the limits fighting the dubious claims, and then still facing the possibility of an excess judgment.6

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6 A good resource on the benefits of a healthy insured-insurer relationship is: John Degroote and Wendy Tolin Breau, Bet the Company Litigation from a Policyholder’s Perspective, 2009 ACC Docket 25. The authors advise on what an insured should be doing with its carriers before and after catastrophe strikes, distilling their recommendations down to four rules: “1) Always act like a reasonably prudent insured; 2) Never try to outsmart yourself; 3) Apply an age-old rule (an insured cannot sue for bad faith without acting in good faith); [and] 4) Remember – insurers hate surprises.”
C. Conducting a Crisis Management Review

Numerous brokers, carriers, and consultants now offer crisis preparedness training. While a business might question the value of these efforts in quiet periods, certainly something positive can always be gained through these proactive efforts. These services are not limited to “public relations coaching.”

As an example, Marsh USA advertises its ability to “implement an effective crisis management program before a crisis ever occurs.”\(^7\) Marsh claims that its training will “enhance an organization’s preparedness capability and culture of prevention…” Such services may be expensive and time-consuming, but the benefits in terms of avoiding catastrophic litigation (through the culture of prevention), or in having a heightened level of readiness when a catastrophe erupts, will pay off.

D. Considering Specialty Insurance

Insurance carriers are always interested in selling new products and distinguishing themselves from competitors. These factors, along with demand, have led to the offering of many types of specialty products that could assist in defending catastrophic litigation.

For example, RLI Design Professionals offers “Crisis Management Coverage” to its insureds.\(^8\) When a well-publicized accident occurs, the insurer and insured will decide how best to implement it to protect the insured’s business and legal positions. In a


more fearful context, Beazley offers Kidnap & Ransom ("K&R") Insurance for companies who send employees abroad to unstable countries. Beazley “will provide both crisis management and personal security guidance that is tailored to each client’s specific needs … [including] evacuation planning, risk mitigation measures and what to do in the event of an incident.”

Since September 11, 2001, insurance for terrorism has become a sought-out coverage, now offered by many carriers. In addition, “many governments have introduced state-funded terrorism insurance and reinsurance facilities…” When conducting a regular insurance review, each company must determine whether it faces any unusual risk, and whether these exotic, but potentially critical, coverages are warranted.

E. Ensuring Your Contracts Properly Shift Risk and Limit Exposure

It is often said that “good risk management starts with a good contract.” In litigation, defense counsel often face avoidable hurdles arising from poorly drafted agreements; this is extremely frustrating when a case is otherwise defensible. Litigation is difficult enough without having to go to battle with one hand tied behind your back. Poor contracts are often drafted – or accepted – by sophisticated businesses.

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A discussion of the myriad ways to shift risk and limit exposure through contracts is beyond the scope of this paper. However, at a minimum, your scope of services should be governed by a written agreement that clearly sets forth what you are going to do, and perhaps more importantly what you are not going to do. The agreement should also contemplate indemnity, A/I coverage, and also less common situations such as force majeure, statute of limitations accrual, waiver of consequential damages and forum selection. While these provisions may not always be of benefit against claims by victims of catastrophes, they are absolutely helpful in litigation positioning and settlement discussions amongst co-defendants.

V. In the Heat of the Moment: First Reactions to a Catastrophe

Whether or not you have taken any precautionary steps, there is no time to waste after receiving news of a catastrophe that implicates your company. You must start protecting your business by preserving its reputation, relationships and, most importantly, future litigation defenses immediately. The following recommendations are important when facing any complex claim; they are essential when responding to a disaster.12

11 Author Benton Barton previously prepared a paper titled, “Shifting Risk and Limiting Exposure Through Contract Language: A Litigator’s Perspective,” presented at a previous ALFA International Client Seminar. That paper provides examples and analyses of twenty-one contractual provisions that businesses can use in written agreements to help minimize claims and limit exposure, and is available from the author.

12 Degroote and Breau, supra at 27. The authors raise the threshold question of whether or not you recognize a “bet the company” case when confronted with it. The authors note that “catastrophic cases often involve: competitors; regulators with political ambitions; novel legal theories; counterclaims (so be careful who you sue); injunctive or equitable relief; patents and business model challenges; aggressive settlement stances; and very good lawyers.” (Emphasis added).
A. Assembling the Company Team

When a catastrophic event occurs, immediately, but carefully assemble a response team. Take all steps to ensure that legal privileges are protected, and that a “litigation hold” on company documents and emails is painstakingly implemented. The team must also include management-level persons with sufficient technical expertise to grasp (and explain to others) precisely what happened. The team should also have a single person tasked with providing information to outsiders (such as inquiring customers and media outlets).

There are numerous court opinions and articles discussing how to protect privileges with in-house counsel. Most corporate attorneys receive training on these issues. For each jurisdiction in which you are headquartered, where the accident happened, and where you could be sued, it is essential to be up to speed on the current law of in-house protections, as these areas are constantly evolving.

13 ALFA International regularly offers webinars and written materials on these topics. Additionally, the Association of Corporate Counsel provides excellent resources. We recommend: William A. Ruskin, Preserving the Attorney-Client Privilege for In-House Counsel, available at http://www.lexology.com/library/detail.aspx (last visited May 30, 2014), which summarizes work by attorneys Thomas E. Zeno and Emily E. Root, and distills tips to assist companies in preserving privileges. The discussion focuses on court rulings in In re Vioxx Products Liability Litigation, 501 F.Supp. 2d 789 (E.D.La. 2007).

14 It is also wise to study actual court opinions from time to time to get a flavor for what to do (or what not to do) to preserve in-house privileges. E.g., U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, U.S. Dist. LEXIS 158944 (M.D.Fla. Nov. 6, 2012) (ruling that hundreds of emails to and from in-house counsel and compliance personnel were not protected because they were not solely related to legal advice).
B. Tendering to Insurance Carriers and Indemnitors

Perhaps you have a significant self-insured retention. Or, you think a claim is meritless, or not covered by insurance. Nevertheless, in the wake of a disaster it is no time to be “penny wise and pound foolish” by simply hoping a claim will not be pursued. Any “circumstance” or “occurrence” that might lead to a claim, even if the possibility is remote, should be reported immediately to your broker and all potential carriers. This includes tendering to your indemnitors and A/I carriers. When in doubt, you should report the potential claim. If you have questions, consult an insurance coverage attorney immediately.

There is no limit on court decisions highlighting the terribly adverse consequences of an insured’s late reporting of a claim. Moreover, insurance carriers prefer to receive notice of a claim as early as possible, for obvious reasons.

Many policies also offer “pre-claims assistance” to insureds who may need legal advice before formal claims are asserted. This is an excellent resource for a company to draw upon after a dramatic event, without the worry of having to limit the scope of the lawyer’s services or pay a large legal bill.

After reporting the event to all potentially involved carriers, follow-up efforts are critical. Set up a series of scheduled conference calls with the claims professionals to ask and answer each other’s questions, and to develop a game plan for exchanging key

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15 “Circumstance” is a term used in claims-made insurance policies as an alternative to “occurrence.” A “notice of circumstance” provision is often included in these policies to extend coverage for events that may later produce a claim, so long as the circumstance is timely reported. Please see, IRMI Online: Glossary of Insurance & Risk Management Terms, available at http://www.irmi.com/online/insurance-glossary/terms/c/circumstance.aspx (last visited January 7, 2015).
information (in a privileged setting) at regular intervals after a catastrophe, whether or not actual claims are pending.

C. Assembling Your Outside Legal Team

A catastrophe can happen anywhere, and it might occur in a far-flung venue where you have no reliable legal contacts. Your insurance carrier will have input into the selection and retention of defense counsel. When facing a particularly large and complex matter, insurer and insured should work together to identify and retain the best possible candidate to serve as lead defense counsel. Insurers generally will accept more of the insured’s input on choice-of-counsel decisions when a claim is large and complex. The defense counsel’s experience in handling catastrophic litigation should be a critical factor in the hiring decision.

Some companies will want to vet defense counsel candidates through a formal request for proposal (“RFP”) process. While this may lead to an excellent hire, it will also waste precious time. You may not realize until the end of the RFP process that the lawyer has a conflict or is not the right fit. This is also not the right time to shop around on price. If you are in an unfamiliar jurisdiction, ask for recommendations from lawyers you already know and trust.

D. Retaining Experts Quickly

The step of retaining experts quickly is often overlooked early in the process and some would consider it premature before a lawsuit has been filed. It is not. Catastrophes
arise from incredibly complex underlying decisions, transactions, conduct, and events. Issues of liability and causation will be hotly contested. There is not a deep pool of qualified expert witnesses who can excel in catastrophic litigation, no matter the area of expertise. Ultimately, these experts must be able to write stellar reports and stand up to aggressive cross-examination by A-list opposing counsel.

In the case described above, the subject matter of the mine’s design and operations – impacting the crucial issues of liability and causation – was so incredibly specialized that only a handful of experts worldwide had the knowledge and sophistication to read, understand, and comment on the company's work. Although the search for experts began within weeks of the tragedy and before litigation was filed, most of the top-tier candidates had already been contacted by government agencies, media outlets, and other potential parties. This factor definitely impacted the evaluation of the case and created a great deal of stress. Everyone on the team will sleep better knowing that you have the right experts on board.

E. Executing the Internal Investigation

After a catastrophe, the most fleeting information is that contained within a witness’ memory. It is crucial to gather and document the recollections of key witnesses quickly. These efforts could be complicated because company employees may be emotionally or physically injured, disenchanted with the company, facing termination or criminal charges, or perhaps they already gave statements to law enforcement or investigating agencies. All due care should be taken – with input from in-house counsel, outside
counsel, investigators, and experts – to conduct employee interviews ethically and effectively and maintain privilege on appropriate portions of the internal investigation.

**F. Retaining Other Litigation Vendors**

Beyond experts, there are numerous non-legal professionals that can assist in catastrophic litigation. Most importantly, you must immediately consult IT specialists and consider retaining an e-discovery vendor for preserving electronic information. Vendors engaged early in the process provide the most value.16

In-house and outside counsel who handle complex lawsuits are bombarded with notices for blogs, articles and seminars dedicated to issues of evidence preservation and e-discovery. These subjects continue to evolve at a breakneck pace, with little standardization other than in some high-profile federal courts. Notably, the State Bar of California issued its Interim Opinion on “ethical duties in the handling of discovery of electronically stored information.”17 Other seemingly “landmark” cases arise several times per year from other jurisdictions.18

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16 Another sometimes overlooked effort involves capturing all photographs and videos of events before, during, and after the catastrophe. Cameras are ubiquitous. Surveillance cameras at nearby businesses must be identified, and the images contained requested, along with news helicopter and cell phone videos. For instance, random cameras (installed for other purposes) captured critical evidence used in the Minneapolis I-35 bridge collapse and the Boston Marathon bombing investigations.

17 Formal Opinion Interim No. 11-0004 (ESI and Discovery Requests), State Bar of California (2014). “An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information (‘ESI’). … Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney’s duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.” (Emphasis added).

Beyond the realm of e-discovery, you should consider hiring a public relations or crisis management firm to assist you in shaping the company’s response to the tragedy amidst the onslaught of publicity. *Defense attorneys are poorly suited for this role.* Defense attorneys are innately and reflexively cautious, and will consider all the risks of making public statements without appreciating any potential benefits. Today, with the way news is reported – and then repeated and amplified on social media – simply saying “no comment” is not helpful and could actually be harmful, especially if others are talking.

Certainly, there is wisdom in the avoidance of offering speculative opinions that may have to be “walked back” later in an investigation. However, this consideration must be weighed against the benefits offered by the opportunity to influence “hearts and minds” through the affirmative telling of your own side of the story.

Also consider the need for a forensic accountant. Such an expert could help on a number of fronts. In the case discussed above, because Company X was insufficiently insured relative to the exposure, the forensic accountant developed reports on the company’s financial status. The information was disclosed in the strictest confidence of settlement discussions to convince the plaintiffs that the insurance limits were all that could be conceivably recovered. These efforts helped get the case resolved quickly, and without a lengthy due diligence process.

Finally, many private investigators and independent adjusters excel in documenting accident scenes and taking witness statements. Witnesses will often talk more freely with non-lawyers or persons outside the company. Sometimes, investigators are
connected with certain communities and can trade on personal favors with law enforcement and other officials. Your company and its carriers should carefully consider the benefits that these additional specialists could bring to your team.

**G. Preserving All Evidence**

In addition to documents, electronic information, photographs, and videos, care must be taken to preserve the *status quo* at the accident scene itself, lock down physical evidence such as equipment and parts, and ensure a legally sufficient chain of custody for all evidence. Often, investigating agencies such as OSHA will gather and retain materials from the site, which can present challenges later when it is time for inspections and testing. Experts should have input into developing evidence preservation recommendations.

State and federal courts will impose substantial penalties against companies that are found to have spoliated evidence. Most of the time spoliation is unintentional, but this factor may not matter when opposing parties seek sanctions. Spoliation orders can also include “adverse inference” jury instructions.

**H. Adding Legal Firepower**

The case discussed above took many twists and turns, some of which were unique and unforeseeable. Beyond retention of many of the non-legal consultants discussed above, defense counsel also eventually vetted and retained several different attorneys – *legal* specialists – to round out the outside counsel team. Though the larger legal team
was a bit unwieldy and expensive, the diverse perspectives offered by these legal specialists were invaluable in shaping the client’s defenses and overall strategy.

From the time of the catastrophe through case resolution, Company X sought out the following additional legal specialists to supplement the main defense team:

- **Local counsel.** Provided insider knowledge of venues, judges, and jury pools. Enhanced the credibility of Company X and its counsel with the court, opposing attorneys and mediator.

- **Insurance coverage counsel.** Provided expertise on Company X’s coverages in place, and assisted in coverage demands and settlement negotiations.

- **Bankruptcy counsel.** Advised Company X on ethical, proactive behavior to enhance the company’s future viability.

- **Criminal counsel.** Analyzed the merits of criminal allegations by government officials, the likelihood of follow-up action by prosecutors, and advised on steps to avoid incriminating conduct.

- **Separate employee counsel.** Dealt with conflicts between the company and employees, especially when employees were threatened with criminal prosecution, or acted outside the course and scope of their employment.

- **Administrative law counsel.** Specialized attorneys who routinely did battle with particular government agencies (e.g., OSHA, MSHA, etc.), advised on how to respond to investigations, document requests, depositions and public hearings.

- **Washington, DC counsel.** Specialized in responding to publicized Congressional investigations.
VI. THE BATTLE BEGINS: RECOMMENDATIONS FOR LITIGATION

Thousands of decisions – many of them judgment calls – will come into play in any complex lawsuit arising from a catastrophe. Because all cases are unique, no paper or treatise can provide a one-size-fits-all litigation roadmap. Here, though, the panel offers some recommendations that could help your company effectively defend and resolve catastrophic litigation.

A. Reaching Across to the Other Side

Beyond the stresses of time and money, catastrophic litigation will exact other business and emotional tolls on all those involved. Every company facing catastrophic litigation eventually will become worn down and express a strong desire to get the matter resolved quickly so that everyone can focus on productive and less-taxing endeavors. While catastrophic litigation can be overwhelming for defendants, it is also challenging and stressful for the victims and plaintiffs’ attorneys. Beyond the factual and legal issues, plaintiffs’ attorneys are juggling the challenging logistics of multiple clients, outsized recovery expectations, familial and legal status of claimants, and variable claim values. Understanding the pressure points that the other side must deal with is helpful for defendants in the context of shaping defense strategies and approaching settlement.

Some might counsel against this, but consider reaching out to plaintiffs’ attorneys early for face-to-face meetings. Couched as confidential settlement discussions, the meetings would include candid exchanges about what each side is dealing with, and
how each side can assist the other with informal disclosures of documents and insurance information in an attempt to expedite resolution, or at least plan for it.\textsuperscript{19}

While there is some risk that these overtures could be interpreted as signs of worry or weakness, this risk is low if your legal team is respected and has a reputation for defending difficult cases. Even if the meetings do not materially advance the ball towards settlement, they are never a waste of time. You will at least learn something important about the facts and the other side’s perspective. You will be able to get a feel for the strengths, weaknesses, and reasonableness of the other attorneys and their clients. At the very least, you will have “broken the ice” with the other parties – both plaintiffs and codefendants – and hopefully enhanced your credibility. This will lead to smoother and more efficient dealings later in the litigation or at mediation (when things get more heated).

In the case discussed above, early meetings with the plaintiffs’ attorneys, and also with other defense attorneys and insurance professionals, allowed Company X to lay helpful groundwork for a joint defense, and this also assisted future settlement negotiations where representations and credibility were in play.

\textbf{B. Locking Down Your Mediator}

As with expert witnesses, the skillfulness of mediators varies greatly, and there are few neutrals with significant experience in shepherding catastrophic cases to resolution. It

\textsuperscript{19} See Rule 408, \textit{Federal Rules of Evidence} (2014), Compromise Offers and Negotiations. This Rule and its state equivalents are routinely used as “cover” for plaintiffs’ and defense attorneys – and their clients and carriers – to have more frank conversations and information exchanges early in a lawsuit.
is essential to retain an excellent mediator who will be accepted by the main litigation stakeholders, and who has unquestioned credibility with plaintiffs, defendants and insurance professionals. Since all good mediators are busy, it is essential to vet mediators and secure their availability early.

For larger cases especially, mediators should be proactive. In complex cases, “managed mediation” is becoming more common. In this approach, parties meet separately, request documents, exchange specific information in particular formats, and then hold multi-day settlement conferences. Good mediators also understand insurance coverage issues, and can talk to claims professionals on their level.

In an incredibly complicated construction case involving a high-profile public project mediated in late 2013, the parties agreed to an out-of-state mediator who specialized in design, construction and insurance coverage disputes. The mediator called several in-person meetings with the main parties and their legal teams, toured the site to understand the design and construction issues, requested shorter mediation letters, summaries and bullet-point research memoranda, and eventually scheduled seven full days of discussions occurring over a four-month period. The mediation efforts were time-consuming and complex for all involved, and many parties complained. Ultimately, the efforts were beneficial and caused all the attorneys, parties, and insurers to maintain focus on resolving the case, even during periods of frenetic litigation activity.

Even if the case is ultimately headed for trial, there is little to lose by mediating early.
C. Reaching Out to Co-Defendants

We also recommend scheduling early meetings with co-defendants and their legal teams, and also with key witnesses if they are not affiliated with a party. Your interests may be aligned or divergent, but the meetings will still yield benefits. These meetings, which can also be governed by evidentiary Rule 408 (relating to compromise offers and negotiations) allow the parties to understand each other’s key factual and legal positions, willingness to stay in the fight or settle, and insurance availability.

D. Considering Joint Defense and Tolling

Research the applicable jurisdiction’s law on the “joint defense” or “common interest” doctrine, and also the enforceability of tolling agreements. With respect to the former, some type of common interest doctrine is recognized in nearly all states and federal courts, but the contours of the privilege are surprisingly variable. The common interest doctrine is addressed in the Restatement (Third), “The Law Governing Lawyers,” at Section 76. A common interest agreement does not mean that one has to defend the case in lockstep with other defendants. It simply means that the parties can share information with each other that will be protected from discovery.20

20 The common interest doctrine is a popular topic at legal seminars, and getting it wrong can expose your company to significant risk. At the ABA’s National Conference on Professional Responsibility in 2012, a prominent California attorney and professor presented: Mark L. Tuft and Brandon Lawrence, What’s Uncommon About the ‘Common Interest’ Doctrine, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session8_whats_uncommon_about_the_common_interest_doctrine.authcheckdam.pdf (last visited January 7, 2015). The authors provide an excellent discussion of the privilege’s history and contours.
A tolling agreement is also very useful between co-defendants. It is “an agreement to waive a right to claim that litigation should be dismissed due to the expiration of a statute of limitations.” 21 There are few downsides to executing these agreements. One can always withdraw from such an arrangement if it is no longer useful or relevant.

The most obvious benefit of a tolling agreement is to allow defendants to avoid feeling as if they have to assert claims against each other early in a case. Seeing cross-claims can embolden plaintiffs’ attorneys and lead to defendants being forced to prove up cases against each other to the plaintiffs’ ultimate benefit.

Another use for tolling agreements involves putting off coverage disputes and apportionment actions between insurers. As with cross-claims, plaintiffs could use collateral insurance litigation to gain leverage in the main case. A tolling agreement will keep these issues in the background.

E. Streamlining the Litigation as Much as Possible

There are many legal tactics that can be considered to consolidate claims and cases. Carefully research the availability of these methods in the relevant jurisdiction as early as possible. In the case discussed above, there were numerous court and government actions filed by different claimants, proceeding against different defendants, simultaneously. Beyond the logistical challenges of coordinating these matters, the risk of self-incrimination and inconsistent rulings may compromise your defense.

21 This is a very basic definition, available at http://definitions.uslegal.com/t/tolling-agreement/ (last visited January 7, 2015). Tolling agreements are particularly useful in deferring potential cross-claims between defendants, and also forestalling ancillary litigation involving insurance coverage.
Assuming jurisdiction, most parties will first look to removing a case filed in state court to federal court. Federal court also offers multidistrict litigation ("MDL"). The procedure is codified at 28 U.S.C. § 1407. One of the goals of MDL is to foster consistent judicial rulings. MDL proceedings have been in place in the federal courts since the late 1960s.\(^2\)

Some states (such as Texas) have their own MDL procedures. Using a state court’s "mini-MDL" procedure where catastrophic litigation is pending may be a preferable alternative to federal MDL (or litigating in multiple courts).\(^3\)

Another procedural streamlining method is known as the "Colorado River Doctrine." The Doctrine is a rule of abstention arising from considerations of judicial economy. It allows a federal court to abstain from resolving a pending lawsuit in deference to a state court action.\(^4\) The Colorado River Doctrine can sometimes be strategically used to consolidate all claims into a single court.

Some trial court judges will also consider staying civil litigation during pending administrative, criminal or grand jury proceedings.\(^5\) When a party can demonstrate a

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\(^2\) 28 U.S.C. § 1407 (a): “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” Please also note subsection (c): “Proceedings for the transfer of an action under this section may be initiated by: (i) the judicial panel on multidistrict litigation upon its own initiative, or (ii) motion filed with the panel by a party in any action in which transfer for coordinated pretrial proceedings under this section may be appropriate.”


\(^5\) Catastrophic litigation can present great challenges in responding to government agency investigations. In the mine case, there were simultaneous requests for documents and statements from MSHA, the Department of Labor, the Department of the Interior, the State of Utah, the House of Representatives,
risk of inconsistent results or, worse, irreparable prejudice that may come from taking a position in an action (such as self-incrimination), a trial court may seriously entertain staying a lawsuit until the tangential actions are played out. Stay rulings are typically subject to the court’s discretion.

Another judicial doctrine that may impact your decision whether to fight in multiple venues, or consolidate, is collateral estoppel. Collateral estoppel prevents the re-litigation of a contested issue, and it can apply to both determinations of fact and law. This can cut for or against you as a defendant. Thus, it is possible that a ruling or verdict in one case may apply in another. Even if the second court does not actually adopt the issue as fully resolved, it may be persuaded by the reasoning used by the first tribunal. This consideration is especially important when the group of victims includes minors who have not yet brought claims, and will not be forced to do so until reaching their age of majority.

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26 Streamlining litigation will increase efficiency and limit defense fees and costs. Additionally, it will reduce the risk of inconsistent factual and legal determinations, and possibly prevent witnesses and the company from facing criminal exposure. Another key issue involves what impact evidence developed in administrative and criminal proceedings will have in the civil case. For instance, some types of standards and findings by government agencies (e.g., the NTSB) are excluded from civil litigation. Others are admissible. For instance, the California Supreme Court has ruled that OSHA regulations are admissible to support proof of negligence. *Elsener v. Uveges*, 34 Cal.4th 915 (2004).

27 States have different limitations periods for minors, which do not begin to run until the age of eighteen or twenty-one. Defense counsel handled a Montana case involving severe injuries to a young mother and infant. The mother proceeded with her lawsuit, but the infant’s prognosis was uncertain. Given the questionable liability facts, the client was determined to try the case. After a fortunate defense verdict against the mother’s claim, counsel is now armed with arguments that the jury’s finding of “no liability” in the mother’s case should bar the infant’s case, if it is ever brought.
F. Considering Challenges to Jurisdiction and Venue

Whether your company is subject to the court’s jurisdiction is a threshold question that you should quickly analyze. Challenges to jurisdiction are common, well-codified and addressed in numerous cases in most federal circuits and states.

Whether you are in the proper venue is often a more difficult question. Plaintiffs' attorneys will purposely file an action in the most favorable venue possible. Especially in catastrophic litigation, great care must be taken – immediately, before you file an answer – to determine whether or not the plaintiffs’ chosen forum is appropriate. In addition to mandatory and permissive venue rules and statutes in all states, consider bringing a motion to transfer venue based upon forum non conveniens by consulting federal law and its state equivalents. You must also be very careful not to waive venue challenges through missed deadlines or active participation in the pending case. You must also consider that an unsuccessful challenge to jurisdiction or venue may alienate the presiding judicial officer.

G. Hiring a Jury Consultant

Cases with significant exposure are often “mock tried” with the assistance of professional psychologists and jury consultants. These confidential proceedings provide valuable insight into what facts, legal arguments, and themes may have traction with a real jury. When defending catastrophic litigation, we have sometimes found it

28 See 28 U.S.C. § 1404. When faced with a timely motion, there are numerous factors courts will consider in deciding whether a more convenient venue exists for hosting a pending action. Most states, including Colorado, also offer procedures for changing venue for “the convenience of witnesses and the ends of justice...” E.g., Rule 98(f)(2), Colorado Rules of Civil Procedure (2014).
useful to retain this type of consultant early in the case. The consultant will force the legal team to focus on core issues, distill and simplify themes and arguments, and provide guidance as to how to present complicated evidence at trial. These efforts will also assist the defense team in the discovery phase.

Hiring a consultant should not be limited to cases that are surely headed for trial. The information derived from these efforts will also help you determine whether the case should be settled, and at what level. If it is still to be tried, the mock findings will help you prepare a better defense.

H. Understanding Punitive Damages

Catastrophic litigation involves dramatic, aggravated facts. Victims often argue that fraudulent or criminal conduct was a factor in causing the disaster. Plaintiffs’ attorneys will therefore include claims for punitive (or exemplary) damages, which increase pressure on all involved.

The law governing punitive damages varies greatly across jurisdictions. Many insurance policies do not cover punitive damages. Because punitive damages present another source of exposure for your company and its key employees, and because the demand for punitive damages will complicate the insurance analysis and settlement negotiations, it is imperative for the company and its legal team to have a firm grasp on how punitive damages are treated in that court, the likelihood of an award, and whether that exposure is insured.29

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29 Every few years, the Supreme Court issues a substantive pronouncement on the purpose of punitive damages, when they are appropriate to be assessed, and limitations on their recovery. E.g., Exxon
I. Discussing the Release in Advance

Although some catastrophic cases go to trial, most will settle. As discussed above, early involvement by an active mediator can be helpful. Moreover, do not wait until the mediation to think about the anticipated release and its scope. Too often, productive settlement talks suddenly go south over release disagreements.

A release following catastrophic litigation should contain many tailored provisions. In addition to provisions for indemnification in the event of future reimbursement claims by third parties, the release should also provide a waiver of subrogation. It is most beneficial to get mutual releases, and also releases among co-defendants and insurers. Discussing these issues up front will help all the attorneys, parties and claims professionals – assisted by a forceful mediator – understand that “this is it” in terms of resolution, and nobody should expect future claims to come out of the woodwork later.

J. Acknowledging the Microscope

Catastrophic litigation is complex, expensive, and stressful; it can bring out the worst type of litigation conduct by both sides. Always remember that a tragedy occurred from which people have yet to recover, or may never recover. Moreover, catastrophic litigation will receive media attention. Thus, taking aggressive or novel positions in litigation, especially in publicly filed pleadings, can backfire. So, too, can being

obstructive in discovery, especially in videotaped depositions. Extra care should be taken to couch litigation positions sensitively, with the understanding that every move you make is under a microscope.

K. Seeking a Judicial Gag Order

Most publicity surrounding catastrophic litigation is sensationalist and bad for defendants. Defensive positions are complicated to explain and usually not worthy of sound bites. Consider asking the court to impose a gag order to prevent lawyers, parties, and witnesses from talking to the media.

The U.S. Supreme Court first approved the use of gag orders on trial participants in 1966. Since then, there have been several notable cases involving these orders and the scope and standards for issuing them. Generally, if a party can show that publicity may taint the jury pool or otherwise interfere with the right to a fair trial, the trial court will serious consider issuing a gag order.30

L. Considering Surgical Dispositive Motions

It is too easy for experienced defense counsel to look at a complicated lawsuit and conclude at the outset that “this is not a summary judgment case.” However, catastrophic litigation often involves aggressively postured, but perhaps tenuous, factual and legal arguments. At the earliest possible moment, consider filing a motion for

30 Sheppard v. Maxwell, 384 U.S. 333 (1966). Attorneys must also be aware of their state bar association’s disciplinary rules to the extent this subject is addressed.
partial dismissal under F.R.C.P. 12(b) and its state equivalents. At the very least, such a motion will cause the other side to show more of its cards early in the process and could buy you valuable time to get your legal house in order. As catastrophic litigation proceeds further, motions for partial summary judgment brought under F.R.C.P. 56 are also helpful to streamline litigation or get a better handle on plaintiffs’ claims and supporting evidence.

VII. DEALING WITH CONGRESS

Congressional investigations often parallel catastrophic litigation. Hopefully, your company will never face such an investigation, but if it is caught up in a situation that has gotten Congress’ attention, the following discussion will provide insight.

Responding to a Congressional investigation must be considered as important, if not more so, than any “bet-the-company” litigation. Given the pitfalls and collateral impacts, assembling a team that can implement a successful damage control strategy will help you live to fight another day. The mine case was the “next big thing” to dominate news headlines at that time, and it set off a veritable “feeding frenzy” in Washington. Every few months, a dramatic scandal or disaster triggers new investigations by Congress. Before and since, we have witnessed high-profile investigations involving federal contractors, steroids in baseball, Toyota vehicle safety, Wall Street bonuses, the BP oil spill, and the VA hospital operations.
A. Congressional Power to Investigate

The rules and law surrounding this type of federal litigation are vague. If your client is subpoenaed by the House or Senate to provide documents or testimony, you cannot rely upon your knowledge of standards, rules, and laws that govern traditional litigation.

It is a dead end to argue that a House or Senate committee is overstepping its power to request information on an issue of public concern. Others have tried to advance this argument without success. The source of Congress’ investigative power can be traced to the Constitution. Congress’ power “to make all Laws which shall be necessary and proper” extends to investigations because Congress must gather facts before it can draft legislation. So long as an investigation is “related to, and in furtherance of, a legitimate task of the Congress,” then it will be upheld under pursuit of “the legislative function.”31

Specific committees have developed their own procedural rules for conducting investigations, issuing subpoenas, and holding public hearings. These rules have slight differences between the House and Senate and even from committee to committee. You should obtain the rules from the specific committee immediately upon learning of a pending investigation. Committees can subpoena documents and testimony, but generally most investigations start by seeking voluntary cooperation via a letter request.32

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The resources of specific committees and their ability to focus on an investigation can vary markedly. All committees have staffers and lawyers on both sides of the political aisle to do the heavy lifting. As with other forms of litigation, the competence and experience of these lawyers will impact what unfolds.

B. Congressional Subpoena Power

If a committee does not get cooperation, it can issue subpoenas for documents and testimony. Committees often ask for documents first, then telephone interviews and depositions. Also different from traditional litigation, Congress will make little effort to accommodate a party’s or lawyer’s schedules. Deadlines can be extraordinarily short, such as a subpoena to produce thousands of documents within a week, or a subpoena to appear for a deposition or televised hearing in Washington just days away. Congress will also ask your client to provide documents in an organized, searchable format, often at great expense.

Since Watergate, the House has increasingly used its power of criminal contempt to secure cooperation from targeted individuals and entities. The Senate most often relies upon civil contempt proceedings initiated in the U.S. District Court sitting in Washington, D.C.\(^3\)

C. Privileges in Congress

There are no governing rules of evidence in Congressional investigations and hearings. The most commonly cited privilege is the Fifth Amendment protection against self-incrimination in response to a question. For maximum impact, Congress will often require that a witness invoke the privilege in person. Alternatively, government lawyers might accept an affidavit in lieu of testimony to establish: “If I am asked questions about [subject matter], for each such question I intend to invoke my Fifth Amendment right not to testify on the grounds that answering the question may be used to incriminate me.” (A corporation does not have a Fifth Amendment right against self-incrimination, but the right can be asserted by individual witnesses.)

Many committees will recognize traditional litigation privileges. Prudent counsel will negotiate and reach agreement on these issues up front before turning over client documents and testimony. If not, a committee has discretion to refuse to recognize basic privileges and protections, and sometimes a waiver can result.34

D. Responding to a Congressional Investigation

Most commentators agree that a Congressional investigation is not about getting to the truth. Sometimes, the investigation is fueled by an agenda which steers the proceedings toward a predetermined outcome. The best a target can hope for is to come out relatively unscathed, without having impacted the civil litigation. The white-hot spotlight will eventually cool down when Congress finds another target to focus on in

another investigation. The following list of general tips may help when facing a Congressional investigation:

- **Hire specialty counsel.** Many lawyers in Washington have Congressional experience as a member, staffer or lawyer. They maintain friendships with key staffers and decision-makers.

- **Be careful with informal requests.** In the case discussed above, Company X wanted to tell its side of the story “to clear its name” and fully cooperate with agencies in its heavily regulated industry. Specialty counsel advised against extensive cooperation because of criminal exposure. Additionally, even voluntary interviews offered *without taking an oath* are subject to perjury laws.

- **Consider civil and criminal impacts.** Witnesses will need careful counsel on whether and how to invoke Fifth Amendment protection. Additionally, subpoenaed documents have a tendency to leak out; informal interviews and depositions can be recorded; and, hearing testimony is often televised. A very important goal of surviving this process must also be for your client to maintain consistency.

- **Consider hiring a media professional:** Targets of investigations will respond to questions from investigators and potentially appear in front of cameras. A single misstep can be disastrous. The legal team must consider bringing on a professional to synthesize themes, project empathy and defuse the impact of problematic information. There are well-

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35 Some commentators advise targets to “run out the clock” on federal investigators as a defense strategy. We have all seen how the news cycle will dictate the level of focus that Congress will give to a particular matter. It is thus possible that another scandal can spark a new investigation and divert resources from the current one. One must also be mindful of the impact of elections and other human events, and their effects on deadlines and officials’ conduct.

36 18 U.S.C. § 1001(2). It is a crime to make “any materially false, fictitious or fraudulent statement or representation” in any matter within the jurisdiction of the Congress.
regarded media firms (many headed by former government officials) who can provide guidance to present your honest, consistent message.

• **Use “turf battles” to your advantage.** Often, a rivalry simmers between different officials or agencies. Sometimes, the putative search for truth is subverted by an instinct to claim credit or rush to judgment. There is also a natural rivalry between committees in the legislative branch, versus enforcement agencies in the executive branch. After the catastrophe discussed above, federal working groups from different committees and agencies each sent questions and requests for documents. Each group rushed to get the first major report on the tragedy published, and their accuracy suffered greatly. By working with counsel, the company was able to streamline this process by providing one set of key documents simultaneously and exploiting the different motives of the investigators.

• **Use criminal threats to your advantage:** Officials do not like to see other agencies threaten criminal prosecutions, because then it will cause the target to stop talking. If testimony is critical, a witness can seek partial or full immunity from Congress. With a majority vote in the House or two-thirds vote in a committee, Congress can petition a federal court to compel a witness to give testimony under either “use” or “transactional” immunity, which can be used to leverage help for your client.\(^\text{37}\)

Dealing with Congress is unusual and stressful. It presents unique legal and public relations pitfalls. No matter how prepared you are to handle and defend catastrophic litigation, this area requires assistance from insiders.

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VIII. CONCLUSION

While catastrophic litigation may at times feel overwhelming, it will not last forever. Understanding the ebbs and flows of catastrophic litigation will help your company be in a better position to deal with sudden and dramatic events when they erupt. Very rarely does catastrophic litigation present a true threat to the future existence of your company. With the right professionals assisting you, your business can resolve catastrophic litigation on favorable terms, while learning, surviving, and thriving in the future.