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AVOIDING DISASTER

DEFENDING CATASTROPHIC INJURY CLAIMS

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The Pre-Suit Investigation

Once a potential catastrophic event has occurred, what happens in the days following that event can make a substantial difference in being prepared for anticipated litigation that will follow the event. The type of catastrophic event will dictate what pre-suit activities that should be taken as soon as possible after the event. However, any type of catastrophic event will typically involve the following necessary activities.

Witness Identification

As soon as possible after the occurrence of the catastrophic event, it is important to identify any and all possible witnesses who may have information regarding occurrence of the event.

Employees

All employees who have any knowledge regarding the occurrence of the event should be immediately identified. While it is common to have investigators or management interview these employees, having your retained attorney do so will provide the best benefit for the following reasons:

- Once retained, any interviews and discussions between your attorney and the employee witnesses will be protected by the attorney-client privilege. This will allow for a frank discussion regarding the events leading up to, during, and after the occurrence of the event without the potential of having to produce the information obtained during discovery should a lawsuit be filed.

- The actual defense of the potential lawsuit can begin at this stage by having your retained attorney work with the employee witnesses. The beginning of a formulation of a defense plan and an analysis of the potential pro's and con's of litigating the matter can be determined early on in the matter. It is important to discover the good, the bad, and ugly as soon as possible so that a plan can be developed early on to deal with such facts.

- By having the employee witnesses meet with your retained attorney early, the attorney and employee witnesses can begin to develop a rapport, relationship, and begin to feel comfortable with one another at an early stage of the matter. This will be helpful later on while responding to discovery and deposition preparation.

Independent Witnesses

It is important to identify and contact any potential independent witnesses as soon as possible for the following reasons:

- Witnesses who do not have a "stake" in the matter tend to forget things quickly. Obtaining what information independent witnesses have regarding an event as soon as possible will allow the key information to be gathered before the witness' memory begins to fade.

- It is easy to lose track of independent witnesses. People move, get different cellphone numbers, and change emails. It is important to get as much contact information as possible about a witness, especially in states with long statutes of limitations. Police reports often redact contact information for witnesses. Therefore, identification and location of any such witnesses is vital.

- By contacting independent witnesses early, you will get the first opportunity to discuss the events at issue without having a plaintiff attorney or investigator retained by a plaintiff attorney have the opportunity to shape the narrative of what the witness may ultimately testify to in the matter. In addition, you can develop a rapport and relationship with this witness before the plaintiff attorney attempts to do so.

Evidence Identification and Preservation

It is vital to discover, obtain, and preserve all potential evidence regarding a catastrophic event as soon as possible and to ensure that such evidence remains secure throughout the pendency of the matter. Some of the key evidence includes:

- Photographs: Photographs depicting the scene of the incident must be retained. Often times employees and other witnesses take pictures on their cellphones and then either change phones or somehow lose the photographs over time. All photographs, no matter how taken, should be downloaded and/or secured in one location so that the same are not mistakenly destroyed or lost.

  If at all possible, photographs depicting the scene of the incident should be taken as soon as possible. If there is a claim that a hazardous condition existed and no such condition can be found to exist, photographs showing the absence of a hazardous condition should be taken and are as important, if not more important, than photographs showing the existence of a hazardous condition.

  For discovery and evidentiary reasons, the person who took the photograph(s) should be identified and the information kept with the other evidence retained in the matter.

- Written Documents: If any written documents are created, including reports or notes leading to the creation of reports, such information should be retained so as to avoid a potential spoliation of evidence claim.

- Surveillance Video: All potentially relevant surveillance video must be retained and kept until the matter has come to a conclusion. This includes surveillance not only of the event, but, depending on the type of event, several hours before the occurrence of the event and until the scene of the event has been completely cleared by all involved. Surveillance of the potential plaintiff arriving, walking through the premises, the event, and the potential plaintiff leaving the event should be retained. In addition, if the surveillance available does not capture the event and you intend to claim that the area was not under video surveillance, any potential surveillance tending to show what was and was not captured by the available surveillance cameras should be retained to prove your claim. Multiple copies of all saved surveillance should be kept to ensure that an accident does not result in the surveillance being lost or destroyed. There is no easier way to lose a good defense than to lose the surveillance regarding the same.

- Social Media: Any social media that can be found regarding an event or the potential plaintiff involved in the event should be secured before the potential plaintiff gets to an attorney, and the social media mysteriously disappears.

- Municipal Information: In cases involves claims of a defective design or something similar, it imperative to obtain the local municipal file regarding the property and/or structure at issue. Often times, local planning commissions and/or zoning boards of appeal mandate requirements regarding the design, location, materials used, or other information regarding a property and/or the structure on the property. There may even been a court file regarding such issues. It is important to review this information to determine if a defense can arise out of having to have had the property and/or structure designed in such a manner due to a municipal or judicial requirement(s).

Identification of Risk Transfer

Can the potential risk associated with the occurrence of an event be shifted to another party? Often times, apart from the property owner or premises possessor, there is another entity or entities that have contractually agreed to take on the risk of such an event occurring. This could include hold harmless, defense, and indemnity agreements contained in vendor contracts, service agreements, or other contracts. Did the potential plaintiff sign any document that may be used to avoid a lawsuit, such as a release, wavier, or indemnity agreement? Are you an additional insured or potential additional insured on some other entity's insurance policy?

If it is determined that there is some type of risk transfer agreement that exists that permits you to tender the defense, seek indemnification, and/or have coverage as an additional insured, the sooner you put that person, entity, or company on notice the better, Obtaining an early decision can potentially save you time and money. Avoiding a claim of prejudice on the part of the entity receiving the tender or request is important. This is especially true if there may be some pre-suit settlement negotiations. Any potentially responsible party should be a part of those discussions.

Handling Matters Proceeding to Litigation

We have discussed the pre-suit investigation and considerations when faced with a catastrophic loss. We turn to handling the actual litigation and eventual resolution by settlement or trial.

Experts Typically Needed in Catastrophic Injury Cases

Even in cases where it is doubtful one wants to proceed to trial, a proper defense will allow the litigant to have leverage positions when negotiating a settlement. When defending catastrophic injury claims, expert witnesses are critical because these cases involve complex medical, financial, and technical issues. Here are the key types of experts to consider:

Medical Experts

- Of course, medical professionals will need to be retained to discuss the nature, severity, and prognosis of injuries such as traumatic brain injuries, spinal cord damage, amputations, or severe burns. These medical professionals can provide the basis for treatment and potential recovery and counter those treatment modalities and future needed care and medication etc. that are often utilized by the plaintiff's experts to inflate the actual economic loss. They can provide credible evidence on treatment needs, long-term care, and whether injuries are permanent.

Vocational Experts

- In cases involving lost earning capacity especially where plaintiffs contend they can no longer be gainfully employed due to their injuries, a vocational rehabilitation expert is a must. This expert will enable the defense to find alternative occupations that are conducive to plaintiff's abilities (even with some vocational training in that area.) This will allow the economic expert (discussed below) to have data points to present to lessen the future loss earnings component. This can be utilized during negotiations or trial if necessary. It is suggested that you have the vocational expert review the case before an interview with plaintiff is scheduled to make sure the expert believes he or she can assist in some fashion so you are not burdened with a contrary finding.

Life Care Planners

- These experts help evaluate whether claimed future care costs are reasonable and necessary. They will utilize the treatment and medication regimen presented by the defense medical experts and determine the costs associated with such . This will allow the economist to provide the medical cost estimate for the future from a defense perspective and offer an alternative to plaintiff's most likely exorbitant figures.

Economic Experts

- As stated above, economic experts will be critical in calculating financial losses, including medical expenses, lost wages, and future care costs. This will enable the defendant to cross examine plaintiff's expert with hypothetical figures that are obtained from the medical and vocational experts to achieve a different set of figures than that presented by plaintiff. The plaintiff's economic expert will be constrained to agree with the end results when assuming the figures obtained from the defense witnesses. The defense economic expert can provide the details needed to craft the hypothetical questions utilized at trial. In some cases the defendant may choose to offer its economic analysis and expert for presentation at trial. Please note, however, that the fact that plaintiff's counsel can present the defense expert with similar hypothetical questions can be damaging to the defense.

Assessing the Exposure

Defense attorneys faced with a catastrophic loss case will need to (as in all cases) assess the exposure to the client so that appropriate decisions can be made in terms of settlement or trial. In these cases, however, the attorney is usually faced with unique aspects of the injury or claim that may not allow for a typical evaluation.

Research centered on a.) Verdicts in similar case and b) Sustainable verdicts in the venue where the case will be tried must be completed. It is critical to undertake both avenues of research as the sustainable verdicts will be utilized during negotiations but the actual verdicts rendered will educate the client on what a jury may find and what may become a public relations issue. This research should enable counsel to provide a range for a settlement value and potential verdict.

As noted above, sometimes the nature of the accident and/or catastrophic injury makes traditional verdict research unreliable. In these circumstances, the attorney may suggest a mock jury trial to further assess potential outcomes and exposure. Additionally, the mock jury trial can assist the attorney in fine tuning the defense based on jury reaction which may also assist in lowering exposure.

Mock juries help attorneys understand how real jurors might perceive the facts, arguments, and evidence. This insight reduces uncertainty and allows lawyers to anticipate potential verdicts and awards. By observing deliberations and feedback, attorneys can pinpoint which aspects of the case resonate and which need improvement. They also can help in assessing credibility of witnesses, strength of evidence and potential jury selection. Mock jurors come in without prior knowledge to the case, and can offer insights that may elude those working on it on a daily basis.

Potential Resolution

Most likely, the client will want to at least attempt to resolve the case prior to jury verdict. In catastrophic injury cases, as in other cases, mediation may serve the purpose of achieving resolution, but may at least make it obvious where the parties positions stand and what issues are preventing resolution.

Another method that is appropriate for consideration, especially in catastrophic loss cases is a “hi-lo” agreement. Below are the benefits of these processes.

Benefits of Mediation

Mediation is a structured negotiation process facilitated by a neutral third party. In catastrophic injury cases, it offers several advantages:

1. **Cost Efficiency**
    - Litigation in catastrophic injury cases can be extremely expensive due to expert testimony, lengthy discovery, and trial preparation. Mediation significantly reduces these costs.
2. **Time Savings**
    - Trials can take years to resolve, while mediation can lead to settlement in a matter of weeks or months.
3. **Confidentiality**
    - Mediation is private, unlike court proceedings, which are public. This protects sensitive medical and financial information.
4. **Control Over Outcome**
    - Parties have more flexibility to craft creative solutions (e.g., structured settlements, future medical care provisions) that courts may not offer.
5. **Reduced Emotional Toll**
    - Catastrophic injury cases are emotionally charged. Mediation avoids the adversarial nature of trial, reducing stress for all parties.

Benefits of High-Low Agreements

1. **Risk Management**
   - Defendants cap their exposure, and plaintiffs guarantee a minimum recovery, reducing uncertainty.
2. **Encourages Settlement**
   - Parties are more willing to proceed to trial knowing their financial risk is limited.
3. **Avoids Extreme Outcomes**
   - Catastrophic injury cases can result in unpredictable jury awards. High-low agreements prevent “nuclear verdicts” or zero recovery.
4. **Streamlines Appeals**
   - Often reduces the likelihood of prolonged appeals since both sides have agreed to boundaries.

Other Considerations for the Entities involved for the Defense

When presented with a catastrophic loss, most likely there will be an exposed client and various layers of insurance coverage whose interests are initially aligned but may diverge as the litigation progresses.

Client wishes vs. insurer goals

The case may present a challenge to the client’s “brand” and the client may want a quick and speedy resolution to avoid public relations issues while the insurers whose coverage is needed to settle the claim may disagree with the value and/or liability assessment.

Similarly, there may be times where the client is adamant about a defense and the insurers upstream do not want to risk a runaway verdict putting to aims of each at odds.

These situations put the attorney in an awkward position as the attorney is duty bound to the client and is getting other direction from the insurance tower representatives.

In such situations, the only solution is blunt communication between the client and its insurers as to their goals and concerns and an attempt to create a plan that can satisfy both parties, if possible. The one result to be avoided is allowing these disagreements to distract from a proper handling of the defense of the matter.