LOW LIABILITY, HIGH EXPOSURE:
Those Cases Everyone Loves To Try ….

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Every case has its ups and downs. We all want the case that has a very strong liability defense, and the damages are minimal. However, more times than not, the cases that cause the most heartburn are those with questionable liability and huge damages. These are the types of cases that involve a significant death or severe injury (paralysis, burns, amputations, etc.). One can expect to see life care plans in the millions, significant lost wages, and the sympathetic day in the life videos. Nothing can be more frustrating than knowing that you did absolutely everything correctly, yet you are faced with the possibility of paying millions of dollars because a jury of 12 feels sorry for the plaintiff, and someone needs to compensate them. These are the cases where you have to spend half a million dollars to prove everything that you thought you knew and you may not be able to recover one dime of the expenses you have just utilized to defend your client. These are the types of cases that can be frustrating, time consuming and ultimately result in some of the most polarizing outcomes. Below are some things to take into consideration when addressing these types of cases.

A. Pre-Suit Investigation

If you get a notice of a claim that clearly has significant exposure, one cannot sit idly by and hope suit does not get filed. If an insured contacts you and says, "there was a shooting on our lot, but it wasn't our fault," that does not mean a claim will never be brought. Assume it will because those are the types of cases that plaintiff's attorneys love to see if they can get something out of nothing. A thorough investigation needs to be done as soon as possible. It is important to get someone on the ground to start investigating a significant claim as soon as possible. This is the opportunity to begin formulating your defense. Not when suit is filed. Collect medical records, witness statements, documents from insured and consider experts. The collection of evidence early is always better than a year or two down the road.

Consider the use of local claim adjusters or private investigators. Even though you are not able to take depositions at this time, a claims adjustor or private investigator should be utilized to locate important witnesses and obtain their statements. If the claim involves a motor vehicle accident, obtain statements from all of the witnesses listed on the accident report. Take photographs of the scene. In a significant accident, get an accident reconstructionist on board as soon as possible. In a medical malpractice case, do not just rely on your insured physician's opinion of his care. Have an independent review of the chart. Consider whether starting surveillance on a claimant could capture the plaintiff performing activities they now claim they can no longer perform. Pre-suit is the time to capture a claimant on video because they may be more careful once suit is filed. However, note that in most states video surveillance is considered to be a statement, and will have to be produced in discovery.

The plaintiff has an attorney, so consider retaining defense counsel early to assist in the investigation. Retaining Defense counsel as soon as possible on catastrophic cases is beneficial for a number of reasons. First, it protects the interest of the insured, and will ensure a great deal of the pre-suit investigation is privileged. Second, the claims adjuster and the Defense counsel work in conjunction instead of having to bring the attorney up to speed when suit is filed. Finally, the Defense counsel can act as a buffer when dealing with the difficult plaintiff's attorney.

Ask for a demand package immediately with their theory of liability. Send medical authorizations to begin collecting records and bills. Any information obtained early is beneficial. The more information you obtain pre-suit, the better position you will be in if a lawsuit is filed. Being aggressive early on in the case also is laying the groundwork to defend the "bad faith" claim the plaintiff's attorney will throw out when the policy limit demand is made. Send a letter to plaintiff's attorney asking for information and place a reasonable deadline to respond. In the event the plaintiff's attorney attempts to make a bad faith claim, use these letters to how they slowed down your investigation and hindered your ability to provide a thorough evaluation of the claim.

B. Reserving cases

Setting appropriate reserves as soon as possible is crucial. Every company likely has a different way of establishing a reserve. Here are six common methods:

1) Individual case method
2) Roundtable method
3) Average value method
4) Formula method
5) Expert system method
6) Loss ratio method.

Each method has pros and cons. Obtain as much information as soon as possible. Most of the methods require having the following information:

Age
Gender
Occupation
Level of education
Dependents, if any, their ages, and to what extent they rely on the claimant financially and for companionship
Nature and extent of the injury
Whether the injury is permanent
Extent of pain and suffering
Extent of disruption the injury creates in the individual's lifestyle
Special damages
Anticipated medical bills incurred to date and for future care
Lost any wages
Typical value of local court verdicts
Liability factors (factors in calculating compensatory and/or punitive damages)
Whether the case involves ordinary negligence or gross negligence

Whether the case involves any comparative or contributory negligence
Any legal limits to recovery, such as a cap on certain types of damages
Any other parties' contributions to the loss
The insured's credibility as a witness
The claimant's credibility as a witness

1) Individual case method

This method involves setting a case reserve for the claim or cause of loss based on the expectation of what the insurer will pay. That expectation is derived from the claim's circumstances and the representative's experience in similar claims. High exposure claims are difficult to reserve using the individual case method because of the subjective nature of the evaluation and the vast array of factors that can be considered in these cases. Additionally, at the time the initial reserve is set, much of the information is often unknown. The reserves should be updated throughout the management of a file, whether on a quarterly or monthly basis. Increasing or decreasing the reserve should be well documented in the claim file.

2) Roundtable method

The Roundtable method is fairly self-explanatory. Several members of the company review the file and discuss what the reserve should be. Ideally, at the start of this process, everyone except the claim representative presenting the information should not know the reserves recommended by the primary file handler. After evaluating and discussing the claim, they may reach a consensus reserve figure, or they may calculate an average of all the figures. Because this method is time-consuming, it is not appropriate for setting initial reserves. However, for serious or prolonged claims, it is a suitable method to set reserves on a long, complicated case.

3) Average value method

The average value method comprises of calculating average values usually based on data from past cases and adjusted to reflect current factors. This method works best with similar types of claims. It can be useful initial guide with death cases, automobile collisions, etc. The problem arises when some claims are have such a specific fact pattern with multiple variables. The catastrophic claims could simply be too unusual to have an average value.

4) Formula method

Using the formula method, the insurer creates a formula for setting a reserve based on the facts of a claim. For example, a formula could rely upon certain assumptions that a ratio exists between the medical cost and the indemnity (or wage loss) in a workers' compensation claim. Based on an insurer's loss history with many similar claims, the indemnity reserve may be set at a certain percentage of the medical reserve.

5) Expert system method

The expert system method also utilizes a computer program to set a reserve. The details of a particular claim are entered into the computer, and the program applies the appropriate rules to estimate the amount of the loss and the loss adjustment expenses (LAE). While similar in operation to the formula method, the expert system includes more subjective information, such as loss location or the name of the treating physician, in creating the reserve.

6) Loss ratio method.

The loss ratio method of setting claim reserves is used to establish aggregate reserves for all claims within a type of insurance or a class of loss exposures. The actuarial department uses this method when other methods of establishing claim reserves are inadequate. For example, in medical malpractice insurance for physicians and surgeons, claims are often reported long after the expiration date of the policy that provided the coverage. To ensure that the insurer has adequate reserves for those claims, the actuarial department may project reserves using the loss ratio method.

Reserving is very important to ensure that everyone is well aware that an excessive verdict could be in the millions of dollars. Updating the reserves is critical throughout litigation.

C. *The case has been filed what now? – Offer of judgments, Early Expert Retention – Mock Trial*

Suit has been filed, so defending the case at trial has become a reality. With a low liability/high exposure case, one has to start preparing the case for trial immediately. Have a plan to defend the litigation. Do not react simply to plaintiff's attorney's actions. Be aggressive and defend the case.

1. Offer of Judgment

If you have a strong liability case, consider whether or not you want to use an offer of judgment. In some jurisdictions, this can be an effective tool in recouping some of the costs of an expensive case if the case results in a defense verdict. The offer of judgment stems from Federal Rule of Civil Procedure 68. Most states have an offer of judgment, and each state's law on the offer of judgment is different, so consult the attorney in your state. There are about 5 states that do not have any form of an offer of judgment. There are strict timelines for when an offer of judgment can be filed. Additionally, some costs may not be recouped at all. In Missouri, only taxable court costs (deposition transcript fees, subpoenas) can be recouped after an offer of judgment is field. In Kansas, the law is similar but may allow for mediation costs.

The concern with an offer of judgment on a catastrophic case is that it will be public. If you make an offer of judgment of $150,000, and plaintiff accepts, then it will be a public record. For it to be truly effective, the offer has to be significant enough to make the plaintiff's attorney at least think about it. Also, an offer of judgment will typically include paying plaintiff's court costs up until the time the offer of judgment has been made.

2. Expert Retention

Make sure you have experts evaluate the case early. This means retaining liability, causation and damages experts long before any depositions have been taken. Have an economist, life care planner and vocational rehab experts look at the catastrophic injury cases. Plaintiff's attorney will likely have all of these experts, so getting them to the table early will help set reserves and put a value on the case. The experts will help plan your defense. Experts can point out potential deficiencies that will need to be addressed early on in the case. It is better to know in advance any weak link as opposed to finding out at the insured's deposition.

3. Mock Trials/Focus Group

If the attorney, the insured and the insurer, all think the case has little to no liability, yet the exposure is in the millions, a mock trial/focus group will certainly give you an idea if the defense side is right or wrong. Focus Groups have their limitations. Typically, the focus group is hearing a limited presentation of the facts in a span of 3-4 hours. A catastrophic injury trial could take weeks. Further, there is no voir dire to eliminate jurors. Finally, mock trials/focus groups could cost close to $100,000 or more depending upon the number of jurors requested. Having more than one panel of jurors will provide more feedback, and likely provide a better indication as to what to expect from your eventual jury. Consider having at least 2 panels at a minimum.

It is important to put on the strongest plaintiff's case possible in a mock trial. Exclude evidence if you think there is any chance it will not come in at trial. You can always provide the focus group the evidence later on in their deliberations. Make sure the attorney playing the role of the plaintiff's attorney acts like the real plaintiff's attorney. Try to videotape depositions, so those can be played to the focus group. Have the mock trial as far from trial as possible. Having a mock trial two weeks before trial may not give you enough time to realize your case is not as great as you thought. Finally, have a strong jury consultant to conduct questioning during the deliberations.

4. The Insured, Whether Bad Faith Will Be Alleged

At some point when the plaintiff's attorney will make a policy limit demand, the attorney will likely throw out the term "bad faith." This is a scare tactic. Obviously be familiar with your state's laws on fair claims handling to avoid any subsequent bad faith claim. In addition, keep the insured informed of all developments of the case. Insureds are usually unfamiliar with the litigation process. Advising them on the eve of trial that the case is worth millions and there could be exposure to the insured is never a good idea. Keep the insured appraised of your evaluation of the case. The insured can provide valuable insight, and you will need them at trial.

D. ***Trial*** – expect the unexpected

Do not skimp on costs. A large enough case is going to require at least two attorneys if not more to put on an adequate defense. In preparation of the trial, have all witnesses put through a mock version of their testimony. Do not pull any punches with your witnesses because the plaintiff's attorney will not. Preparation is key to a good defense.

Have an adjuster present for the entire trial. With a case of this magnitude, someone from the insurance company should be present everyday to personally witness the flow of trial. At some point during trial, Plaintiff's attorney will revisit settlement. They know the case has tough liability. Being at trial allows the adjuster to determine whether settlement should be considered.

Plaintiff's attorney may use the reptile theory to scare the jury into awarding a big verdict. They will say things such as "don't we all want a world that is completely safe. Wouldn't you agree a defendant should do everything possible to ensure a safe outcome?" Have a persuasive narrative ready to respond to the safety theory. Be ready to challenge their statements as merely trying to deflect from the real issue at hand: that their case has no merit. Another tactic is to talk only about the damages because they know the liability stinks. Again, point out that this is a case with two parts: liability and damages.

E. Post-Trial Motions and Appeal –

If Plaintiff's attorneys lose a large case where they spent thousands in expenses, they will appeal. The well funded plaintiff's attorneys want their money back any way possible. Expect a reduced settlement demand with a caveat that they will say "the defense can save money on the future re-trial." They will drag out the appeal because the record on appeal alone could take six months to a year to complete. If you have already invested hundreds of thousands of dollars on a case and won, it is unlikely you are going to want to pay plaintiff's attorneys anything. Evaluate the costs of the appeal and future trial. But after thousands of dollars have already been expended, why pay them now?

If you have lost the big case, winning on appeal is never a given. First, all courts require paying a supersedeas or appeal bond. Each state has different rules on how much the bond should be. However, expect it to be very pricey, even greater than the actual judgment. Missouri statute 512.080.1 states:

> "When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond."

In other words, if you have a $1 million dollar verdict, the appeal bond could be $1.3 million or more. The bigger the verdict, the more interest and costs that has to be calculated into the appeal bond. Have a discussion about the cost of appeal BEFORE trial that the verdict could be much worse even if appealed. There are no guarantees the appellate court will agree with your side. Consider approaching the plaintiff's attorney about settling the case for less than the verdict. Even the plaintiff's attorney will want to get money faster to avoid the lengthy appeal, if it is a reasonable amount.

Conclusion

Low liability and high exposure cases can be the most challenging cases to evaluate. Assemble a team of adjusters, attorneys and experts to formulate a defense to these cases that will properly evaluate and reserve the case. Preparation and obtaining all information as soon as possible will avoid unexpected outcomes.

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