



Keeping Small Claims **SMALL**

How a Penny Saved is Not Always a Penny Earned

By Martin A. Levinson and Ycedra Wilson

Most people involved in claims management or litigation know the importance of early investigation and analysis of high-dollar, disputed liability claims. No matter the jurisdiction, these days it is scarcely possible to avoid hearing of multimillion-dollar verdicts that seem to be handed down on a daily basis.

In some cases, large verdicts are unavoidable — or at least highly probable — despite all the necessary investigation and preparation. Most cases, though, start out smaller, and those smaller cases are often just one misstep or oversight away from becoming much more problematic. Whether a claim involves premises liability, a truck accident or property damage loss, diligent handling of a few key areas can limit the client or company's exposure and potential liability and keep that small claim from becoming a big one.

Claims handlers, risk managers and attorneys must play an active role in investigating and analyzing claims and lawsuits in order to protect the interests of their client, company or insured. Here are a few simple ways to limit or at least gauge potential liability and damages so that a smaller claim or lawsuit is less likely to become a more significant one. Not all of these will apply to every claim or lawsuit, but more often than not, these simple suggestions can help limit the client or company's long-term exposure.

Early Investigation

Less is typically not more when it comes to early investigation and analysis of claims and lawsuits. When a risk manager or claims handler receives notice of an incident or claim, the investigation should begin immediately. Hire an investigator, independent adjuster or attorney to gather facts and interview witnesses. If there is a vehicle or scene to inspect, have it inspected. Document the file with any investigation that is performed, and keep the file up to date.

By the same token, quicker is always better when an attorney receives a new lawsuit. Sure, the answer may not be due for a few weeks and there may not have been discovery requests served with the complaint, but there are still witnesses to be contacted. Depending on the jurisdiction, an "open records" request may be sent even before the answer has been filed. A call to the investigating police officer or a witness early on may save the time and expense of an out-of-state deposition later.

Early Case Assessments

Analyze the claim or case with an eye toward how it may evolve or worsen over time. Is this a case that

will become more expensive if the claimant retains an experienced attorney? Claims handlers and risk managers should make sure a realistic reserve is set for a claim as early as possible. By the same token, attorneys should help come up with realistic settlement and/or verdict values.

As new facts or evidence are developed, adjust those figures accordingly. Obviously, it is not always possible to provide a realistic estimate of potential liability, and attorneys are always afraid they will be second-guessed in the future if their estimates turn out to be too low. The client's interest is best served by everyone involved attempting to get a realistic handle on the potential exposure as early as possible.

Preserve Potential Evidence

Nothing can increase potential liability faster than a spoliation of evidence claim. Sanctions for spoliation can be quite severe depending on the circumstances, even including striking a defendant's answer, thereby preventing the client from contesting liability and significantly increasing the potential settlement value of a case.

The types of evidence to be preserved vary from case to case. Document the scene of the incident with photographs and video. Regardless of the type of incident, immediately consider whether there may be video or some other form of recording of the incident, and make sure that any recording is preserved in its original format. After an incident involving a motor vehicle, particularly a commercial vehicle, make sure any electronic data from the vehicle is preserved in its original form, and maintain and preserve all documentation from the trip during which the incident occurred (as well as a reasonable period beforehand for the vehicle and driver involved — probably at least 30 days). For any incident where it applies, also make sure to preserve any documentation of inspections or maintenance of the vehicle, premises, machine or other subject matter involved in the incident. Where an employee is involved in the incident, make sure personnel records are preserved.

In determining specifically what should be documented and preserved, think about the types of claims that will be asserted in any future claim or lawsuit. For a trip-and-fall, for example, document the condition that is alleged to have caused the claimant to trip. For a third-party criminal act case, document security measures on the premises and potential or actual points of entry to the premises (deadbolts, doors, windows, gates, etc.). For a product liability case, get whatever information is available about the particular lot or run from which the allegedly defective product originated.

It is important to remember that this does not apply only to avoiding potential spoliation claims. When a matter goes into litigation, litigation counsel will have a much better time defending the case if all potential evidence has been preserved. Plaintiff's attorneys make big money on personal injury claims, so the smart and successful ones are not afraid to spend money early in a case to do their own investigation. Where possible, avoid ending up in a position where the plaintiff's attorney knows more about the claim or case.

Potential Witnesses

Risk managers and in-house attorneys should consider advising those who make personnel decisions to give careful consideration before terminating an employee who was involved in an incident that resulted in injury or significant property damage. Obviously, companies have an interest in protecting themselves against future liability and employment claims, and that often is the intent in firing an employee after an incident. But where there is a pending claim or a known potential claim, careful consideration should be given before firing a person who may be the best witness in a future lawsuit on that claim. By the same token, think twice before putting something into an employee's personnel file that may be less than helpful when it is produced in discovery during a subsequent liability lawsuit.

If an employee who is the only eyewitness to the incident leaves the company, get his or her contact information and make efforts to maintain a positive relationship. Claims handlers and outside attorneys also can help by maintaining periodic contact with important witnesses. As the case moves forward, periodically contact the most important witnesses and make sure they have not moved and their recollection or opinions regarding the case have not changed.

Hire an Expert

Many times, claims handlers hire an expert to investigate an incident where liability or fault for the incident are unsettled or clearly in dispute. Experts can be just as helpful in cases where liability or fault seems clear. If the insured, company or client appears to be at fault, a competent expert may be able to provide potential defenses. If it seems clear that fault lies elsewhere, early documentation and confirmation of that fact by an expert could help resolve the claim favorably and inexpensively before it goes into suit.

When an incident is likely to result in a claim or lawsuit, don't wait until the claim or lawsuit is filed before hiring an expert. If there is a vehicle or scene to inspect, have the

expert do the inspection in person. Ask the expert what specific types of evidence or proof are needed to render an opinion while those items can still be preserved or obtained. The expert's testimony at deposition or trial is likely to be more effective and credible if it is based on the expert's own personal observations and perceptions.

Engage Counsel Early

Particularly where a claim is in a jurisdiction or area unfamiliar to the person handling the claim, engaging local counsel can be crucial to ensuring that a potential defendant's interests are adequately protected. Requirements for preservation of evidence and spoliation letters, responding to demand letters, and the manner of proof that will be admissible or advisable differ greatly from one jurisdiction to the next. If there are issues regarding coverage or liability, don't wait for a time-limit settlement demand or a lawsuit to get an attorney's opinion on those issues. Even before that point, an attorney may have helpful ideas on how to move a claim toward early resolution or how to better protect the interests of the insured, company, or client.

Moving Forward

Whenever possible, keep a claim or lawsuit moving forward toward resolution. The plaintiff or claimant who claims she needs a four-level spinal fusion may actually get the surgery. The plaintiff or claimant who is pro se may retain competent legal counsel. The plaintiff whose claims completely depend on expert testimony to be successful at trial may go out and find one who supports his claims. Witnesses can be lost or become uncooperative. If there are other defendants or potential at-fault persons or entities, the claimant/plaintiff may settle with some parties. Any of these things can drive up the verdict or settlement value of a case tremendously.

Furthermore, in cases where the claimant or plaintiff's attorney is working by the hour (instead of on contingency) or where the case involves a significant number of depositions or costly expert fees, the risk of making a case "unsettleable" increases the longer it continues. And of course, the longer a lawsuit continues, the more is being paid to outside counsel to defend it.

There is no foolproof way to ensure that a claim does not become more significant or more costly as time goes on. But by taking a sensible, proactive approach to handling claims and lawsuits, the number of surprises can be limited and, most often, small cases can be kept small. [LM](#)

Martin A. Levinson is a Partner with Hawkins Parnell Thackston & Young LLP. Ycedra Wilson is a Claims Examiner II with Sedgwick CMS.

