Litigating From the Driver's Seat

Managing claim litigation wisely heads off unnecessary costs and unwelcome surprises.

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It's been said there are three kinds of people: those who make things happen, those who watch things happen, and those who don't know what is happening. In managing litigation involving property/casualty claims, if you are a property/casualty chief executive officer, a self-insured or an insured with a large, self-insured retention, and your claim managers are in one of the latter two groups, fasten your pecuniary seat belt. You may be in for an expensive and dangerous ride.

Litigated claim files are trouble. They are difficult to reserve appropriately, they have long shelf lives, and they present the possibility of surprise verdicts, new unfavorable law, bad publicity and even extracontractual exposure. They also consume a significant piece—70% or so—of a claim organization's allocated expenses. Add in the reality that some insurers, in search of greater claim-handling efficiency, have overloaded their claim handlers with cases. When those claim handlers reflexively "abandon" the management of their litigated claim files to outside defense attorneys, they create a situation in which the claim organization is passively managing the most significant loss-cost exposures. The result? Unnecessary costs and unwelcome surprises.

Fortunately, there are six things any claim organization can do to more effectively manage litigated claim files:

Rigorously triage all litigated claims. The triage process should involve the most experienced claim handlers, those who are able to consider the facts and spot a dangerous situation early enough to make a difference. Some insurers even keep experienced trial attorneys on the payroll to apply an added level of scrutiny to incoming litigation. The idea is to determine, as quickly as possible, how costly the claim is likely to be and what approach to resolving it will be the most appropriate and effective. Some litigated claims need to be settled quickly. Others will require discovery to bring the exposure into perspective. Still others can be identified, from day one, as cases that actually will be tried. The claim-resolution plan developed during the triage process should drive the next steps.

Hire the right lawyer, and communicate the resolution plan. This step is crucial, and it must be cold and calculating. Quite simply, select the lawyer whose skill set, experience, connections and track record align most appropriately with the complexity and exposure of the litigated claim. Avoid the "hourly rate" trap, which prompts claim handlers to assign cases to the firms with the lowest hourly rates. As crazy as it sounds, in the big picture, hourly rates really don't matter. What matters is the suitability and effectiveness of the lawyer for the claim matter being assigned. A good match, enhanced by articulate communication of the resolution plan, will jump-start the litigation management process and produce more favorable outcomes in terms of expenses and monetary losses.

For example, if the claim-resolution plan calls for trial, get the claim to the attorney you plan to have try the case as quickly as possible. But keep in mind only about 5% of litigated claims actually go to trial, so preparing all litigated claims for trial is an unnecessary waste of time and money. This is where triage and the need for aggressive, active litigation management by claim handlers is most acute. Sending a matter to outside counsel "to handle" is neither prudent nor sufficient. The claim handler needs to understand the resolution plan and use it to help actively manage the claim to the most favorable outcome.

Two other points to consider:

-- A well-managed staff counsel operation can produce significant savings in legal costs (some

companies report saving as much as 40%) while producing the same (or better) loss payout results in targeted classes of claims.

-- An insurer's corporate counsel shouldn't get involved in claim litigation matters, unless counsel is an experienced tort litigator. Sure, the law is the law, but asking the average corporate attorney to oversee claim litigation is a bit like asking a polo player to play ice hockey. It's a different game, and polo ponies don't do well on ice.

Keep resolution plans current. New information or other unforeseen developments may alter the litigation landscape to the point that the resolution plan needs to be modified. Perhaps an unexpected settlement opportunity has arisen, or a verdict in a similar case has sent shock waves through the jurisdiction, or a new attorney has come on board for the plaintiff with a track record of securing large verdicts in similar cases, or the law has changed, or a culpable co-defendant has settled. Whatever the development, it needs to be considered thoughtfully and incorporated into the resolution plan. The claim handler and the attorney should be held responsible for keeping the resolution plan current, although a major development should kick the claim back to the litigation triage folks for reconsideration.

Keep tabs on active cases. I'm often amazed at the paucity of useful and actionable litigated file information maintained and considered by many otherwise sophisticated claim organizations. Managing litigation to produce a "no surprises" operating climate requires more than current resolution plans. Claim executives need to maintain a portfolio view of litigated matters. At a minimum, an up-to-date inventory and a current trial calendar are necessary. The trial calendar must contain the probable trial date, the identity of the defense attorney, the loss reserve, the expense reserve and expense incurred to date, settlement demands and offers (if any), the venue, and the identity of the judge and the plaintiff's attorney. Mock trials and focus groups and even jury-selection consultants should be employed on serious cases nearing trial. Sometime before the actual trial setting, a pretrial review involving the attorney and the most seasoned claim handlers should take one more look at the resolution plan. On higher-exposure cases, it makes sense to have a seasoned claim handler (or trial attorney, if available on staff) sit in the courtroom and monitor developments, with daily reports to management.

Track outcome statistics. Knowing which cases have been tried, where, by whom, the outcome and the costs is critical to keeping the litigation-management process effective. What percentage of litigated cases proceed to trial? Are the right cases being tried? How long are litigated files staying open? What percentage of those cases tried are resolved favorably (at an amount equal to or less than the loss reserve)? How are litigation unit costs tracking? How do unit costs compare from law firm to law firm? Are the right law firms being assigned? When information of this type is captured and incorporated into the triage process, it adds to the quality of the decision making.

Conduct after-action reviews. Whether the outcome on a major litigated matter is favorable or not, it makes a lot of sense to extract any lessons learned to apply them to cases still in the pipeline. These after-action reviews often include the defense lawyer, the claim handler, claim management, underwriters and sometimes even senior executives. The focus is on learning and on identifying useful lessons, not on second-guessing, which is particularly important when the result was unfavorable. Frequently, these reviews reveal that policy language requires modification, or the attorney didn't perform as expected, or that an advantageous settlement opportunity was missed. Whatever the takeaway, it's likely to be of use in improving the effectiveness of claim litigation cost management.

Someone once told me (with a sad smile) that managing litigation is a bit like driving on the New Jersey Turnpike: the opportunities to exit are limited, and the longer you wait to exit, the more it costs. It need not be so. Just as it's possible to reach a destination in New Jersey without traveling on the turnpike, it's also possible to aggressively manage litigated file outcomes without

incurring ever-escalating litigation costs. It takes early triage, realistic resolution planning, early assignment to the most suitable and effective lawyer, aggressive management and a healthy dose of what Warren Bennis and Robert Thomas (in their book Geeks and Geezers) call "adaptive capacity"—the ability to look at a problem or crisis and see an array of unconventional solutions. Adaptive capacity is what allows savvy litigation managers to avoid the litigation-cost version of the New Jersey Turnpike.

by Dean K. Harring

Litigating From the Driver's Seat: Savvy Teddy

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One story that illustrates the adaptive capacity concept has little to do with litigation management but everything to do with unconventional solutions. It involves Teddy Roosevelt's 1912 presidential campaign. His campaign managers had printed a brochure with Teddy's photo on the cover for distribution to voters. After they printed 3 million copies, someone realized the photo they used was copyrighted. They hadn't obtained permission, and the potential penalty for using the photo without permission would be $1 per pamphlet, a hefty sum in 1911. Enter Teddy's campaign manager, who fired off the following cable to the studio that owned the photo:

"We are planning to distribute millions of pamphlets with Roosevelt's photo on the cover. It will be great publicity for the studio whose photograph we use. How much will you pay us to use yours?"

The answer, by return cable, was as follows:

"We've never done this before, but under the circumstances we'd be pleased to offer you $250."

Turning a $3 million problem into a $250 revenue item -- now that's adaptive capacity!

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