Early and Often: Evaluating Your Claim and Launching Endgame

A. Introduction

Litigation management is one of the hottest topics among insurance personnel and insurance defense counsel, and for good reason. Litigation costs continue to increase. The statistics show that the longer a claim is open, the more expensive it becomes from not only a defense cost perspective, but sometimes even from a settlement value perspective. So how can these costs be controlled? There are many potential answers to this question. But in most instances, the best answer involves early evaluation of your claims and development of a strategic plan on how to achieve the desired outcome. While easy to say, it can be far more difficult to put into practice, particularly when a claims representative handles anywhere from 50 to 150 claims at a time. But by devoting the time necessary to thoroughly evaluate a claim in its earliest stages, the insurance professional will quickly realize that this time investment will yield decreased litigation costs and settlement amounts (in many instances) on claims over time. Likewise, early evaluation, strategic planning, and re-evaluation as the claim continues will result in better defense arguments and a better overall defense posture due to a focus on learning the facts, planning the defenses, and crafting a plan to win the case, whether that means obtaining a defense verdict at trial or settling the case for an amount less than what the claim is worth.

Early evaluation allows the insurance professional, in conjunction with defense counsel, to identify whether the claim has (1) minimal risk and should be aggressively defended; (2) moderate risk and should be defended until certain liability and/or damages issues are resolved and there is an opportunity for a reasonable settlement; or (3) significant risk and should be resolved at the earliest possible moment. Once this decision has been made, the investigation and defense of the claim can be specifically tailored to achieve the best result possible.

B. Early Evaluation of the Claim

When a claim is made against an insured, it is imperative for the insurance professional, with the assistance of private investigators, local claims adjusters, and defense counsel, to thoroughly investigate that claim. Trusted and reliable defense counsel will be able to provide you with a wealth of information, may have more time to conduct a thorough investigation, and will be able to cloak your investigation under the veil of the attorney-client or attorney work product privilege (not every state recognizes an insurer-insured privilege). You need to learn the facts and the law governing the claim. Although it may seem that the "facts" no longer matter in everyday life, they absolutely matter in the investigation of your claim. We've all heard the old quote, attributed to many or none – "If the facts are against you, pound the law. If the law is against you, pound the facts. If the law and the facts are against you, pound the table." You need to know what to pound. And if it is the table, then how to limit that pounding as much as possible.

Identify the relevant documents and review them. Although the quantity and types of documents will vary based on the nature of the claim, every case involves documents or ESI in some form or another. Documents are extremely important. Medical records, emails, logbooks, or social media – all these documents can potentially provide key information to your claim and inform your evaluation. Review them carefully and look for clues that may lead you to other documents – medical records that identify other providers, emails that discuss disability applications, etc.

Identify the relevant witnesses and interview them. Similar to documents, witness testimony may be important in some cases and not as important in others. Figure out which type of case you have. If witnesses are important, then get out (or have defense counsel get out) and interview them. Record the statements if necessary. If what the witness tells you is beneficial, create a written statement for them to sign. Being the first to interview a witness and secure their statement will most times work in your favor.

Identify the types of claims that will be asserted and know the insurance policy. To the extent possible, you should identify what legal claims will be asserted – tort, contract, constitutional, etc. Once the potential legal claims are identified, outline the legal elements in order to determine how the facts will fit into the claims. Consider whether an expert or consultant should be retained and, if so, the type of consultant and

the scope of their work on the claim. Experts can provide a great benefit to the evaluation of your claim. Also, know the insurance policy and identify whether there are any issues related to coverage. Get coverage counsel involved if necessary.

Determine whether there are any liens involved, including Medicare or Medicaid. Liens matter to the analysis of a claim. Everyone has been through the claim that in reality is only worth about $50,000 based on the liability and damages issues, but the liens on the case total $35,000. These claims are some of the most difficult to resolve and early evaluation of these issues can result in a dialogue with the lienholder – whether by plaintiff's counsel or defense counsel – about the strengths and weaknesses of the case in an effort to negotiate the lien down. The process for ensuring compliance with Medicare liens is lengthy and can take months to accomplish. It is best to start that process at the beginning of the case so a favorable settlement further down the claims road is not impeded by the Medicare conditional payments/final settlement detail process.

Know the jurisdiction where suit may be filed, the judges in that jurisdiction, and research the plaintiff's counsel. The "intangibles" in many claims relate to the jurisdiction, the potential judges, and opposing counsel. Learn as much as you can about these facets of the claim. Many times, local defense counsel can be your best avenue for this information. It goes without saying that the jurisdiction can have a significant effect on the value of the claim – Johnson County, KS is the most conservative jurisdiction in the Kansas City area (and perhaps even broader) while Jackson County, MO has been recognized in the past as a "judicial hellhole". These counties are basically right next door to each other. Another important aspect to an early claims evaluation process is consideration of the plaintiff's counsel – his or her experience in this particular type of claim, modus operandi as to discovery and settlement discussions, trial experience, among other things.

How much is this going to cost to defend? Perhaps saving the best for last, this may be one of the most crucial issues in the claim evaluation process. Setting reserves early and accurately in the case is also important. Obtain a 60-day budget. Obtain a preliminary budget for the case through to trial, though understand that it will be a very rough estimate if required before suit is filed.

In short, a complete and comprehensive investigation will greatly assist with an early evaluation of a claim that is made against your insured. Acquiring as much information as possible is ideal. It will result in a knowledgeable approach to the evaluation, the determination of how the claim should be handled, and the ultimate defense of the case should it proceed to litigation.

C. Determine the Risk of the Claim

After you obtain sufficient information about your claim, the next step is to determine how much risk and exposure the claim entails. Generally, there are three categories of risk involved with handling claims – low risk, moderate risk, and high risk. The most difficult and most common claims are those with moderate risk. And moderate to high exposure. Exposure, essentially the damages at issue, can be assessed in the same manner as the risk. Knowing the risk and exposure involved is crucial to establishing and then implementing your "endgame" for that particular claim.

The endgame for these types of claims can be summarized as follows:

(a) Low Risk Claims – usually the type of claim that is, and should be, aggressively defended and settled only if it can be done for nuisance or the so-called cost of defense value;

(b) Moderate Risk Claims – Claims that should be defended, but with an eye toward selecting an opportunistic time to meaningfully discuss or attempt settlement; and

(c) High Risk Claims – These types of claims that should be settled quickly because there are bad facts, bad law, or both. In other words, lots of pounding the table.

Although the particular strategy for achieving a desired outcome for each of these types of claims will differ based on the specific facts of the claim, there are certainly some common steps to be taken when "launching your endgame."

D. Launching the Endgame

Once you know the facts and feel comfortable with the risk associated with your particular claim, it's time to develop your strategic endgame plan and put it into action.

Regardless of the type of claim you are facing, hiring defense counsel to consult about your strategy for resolution and even having the defense counsel lead the charge is a good idea. As mentioned before, local defense counsel may already have established relationships with the plaintiff's attorney, may have specific knowledge about the intricacies of the jurisdiction, or other specialized information or knowledge that can greatly assist the efficacy of your plan.

The Low Risk Claim.

As with any claim, the messaging to the plaintiff's attorney is important. This includes more than just what the plaintiff's attorney is being told. Undoubtedly, it is good to communicate to the opposing counsel that you believe the claim has little merit. But as they say, actions speak louder than words. Be proactive in your investigation, research, and other defense tasks in the case. Encourage your defense counsel to be proactive and to aggressively defend the case, which should not take too much prodding. Once the case is in suit, defense counsel should be in charge of the case, pursuing discovery and depositions in a way that causes the plaintiff's attorney to be reactive. Conduct written discovery and depositions with regard to the timing of any court-ordered mediation. Consider an offer of judgment to communicate the seriousness of your position. In short, defense counsel's actions need to be consistent with the communication that the case has no merit. And the focus needs to be on the litigation and defense tasks, not settlement discussions.

If done properly, many times the outcome will be either a defense verdict at trial or a minimal settlement. Either way, the message has been sent for future claims that your company does not pay more than a claim is worth, will take cases that have little to no merit to trial, and that just because a plaintiff files suit does not mean a check is written. Although this plan of action could cost more in defense fees and costs, it might save money in the long term.

The Moderate Risk Claim.

These are the most common claims. They involve claims where there are questions about liability, damages, or both. Or there are some peculiar facts where there is uncertainty about how a jury might perceive the unresolved issues, witnesses, or other evidence. Discovery and depositions are important in these types of cases. But the

insurance professional and defense counsel should discuss the potential for performing targeted discovery – written interrogatories and document requests focused on the areas of uncertainty, or depositions of the key players but not all the witnesses, before mediation or significant settlement discussions. Mediation or informal settlement discussions may be fruitful at an earlier stage of the litigation – after the targeted discovery has been completed but before the discovery deadline (so that additional discovery can occur should a settlement not occur).

The existence of a fee-shifting provision should be determined early in the case, as that may affect the timing of settlement discussions. Oftentimes, the attorney may not be willing to recommend settlement if his or her time invested in the case will not be adequately compensated with the settlement funds offered. All too often, settlement efforts are stymied by the fact that the case has gone on too long and the plaintiff's attorney is "upside down" in the case.

Defense counsel should establish an open dialogue with the plaintiff's attorney about the prospect of resolution, despite the questionable merits of the claim. In short, the litigation team (insurance professional and defense counsel) should agree on a plan to obtain all the "need-to-know" discovery possible with an eye toward resolving the case, if it can be done for a reasonable amount. Another consideration is whether a summary judgment motion is appropriate and if so, whether it should be filed before or after settlement discussions have begun. Timing is everything.

The High Risk Claim.

We have all had these. The lawsuit as first notice of the claim. The unreasonable plaintiff's counsel who happens to have a really good case. The claim with value that is going to be very close, if not potentially exceed the insurance policy limits. These are the claims that need to be settled as quickly as possible, before the plaintiff's counsel invests a lot of time in the case, the insured receives bad PR, or the words "bad faith" are used. While it may be easy to identify the high risk claim, approaching the prospect of early settlement – without signaling that you are concerned about the claim – is not easy.

Defense counsel can be your savior in these situations. Assuming you utilize well-known and respected defense counsel in the area where the claim will ultimately be filed, your assigned counsel may be able to propel the case into early mediation without

demonstrating a position of weakness. A decision needs to be made whether the claim can be informally negotiated or if formal mediation is more appropriate. If mediation is agreed upon, the choice of mediator is crucial. Stay away from the water carriers, who simply take numbers back and forth between the parties. Instead, select a mediator that will challenge your positions, give you his or her opinions on the value of the case, and has a wealth of experience in the subject matter of the claim. And don't be afraid to use the mediator suggested by the plaintiff's attorney. That usually means that the plaintiff's attorney likes or trusts that mediator and will listen to the mediator. Likewise, don't be afraid to use a (former) plaintiff's attorney as the mediator. The recommendations from a fellow plaintiff's attorney may hold more weight with the plaintiff's attorney handling your claim.

Another aspect to executing your endgame plan on high risk claims is to know your plaintiff's counsel. What types of cases has the attorney handled? Does the attorney have specialized experience in the area of law involved in your claim? Does the attorney take cases to trial? Is the attorney typically reasonable during settlement discussions? Who is driving the bus – the attorney or the claimant? The answers to all these questions will assist you in determining the best timing of the mediation or settlement discussions.

There are significant strategic considerations regarding how to approach the topic of mediation on high risk claims. A less common and more unorthodox tactic, such as the defense making the first and significant offer on the claim, may be the right move. But use caution if considering such a maneuver as making the first offer may be effective in dictating the parameters of the settlement discussions – setting the tone – it could also signal to the other side that you are desperate to settle the case, resulting in a much higher demand and ultimate settlement reached. Regular communication between the insurance professional and defense counsel will help in deciding the right course of action.

E. Conclusion

Early evaluation of a claim and developing a strategic plan is important and will help with managing litigation expenses as well. But it is not a one-size-fits-all exercise. Nor is it a one-time event. Continual and objective reviews and revisions to the evaluation and plan (if appropriate) are necessary and beneficial to achieving your ultimate

endgame. It is axiomatic that the longer a claim is open, the more expensive it is from both a settlement value and defense cost perspective. 98% of cases do not go to trial, so it's highly likely that your claim will be resolved at some stage in the claim process. Early and often evaluation will help ensure that you, not opposing counsel, are in control of the timing and amount of the ultimate outcome.

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