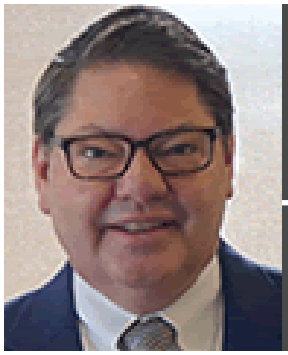

DO YOU BELIEVE IN MIRACLES?: THE ROAD TO PRE-SUIT RESOLUTION OF A HIGH-EXPOSURE CLAIM

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The Road to Pre-Suit Resolution of a High-Exposure Claim - Do You Believe in Miracles?

Lyndon Sommer

Wouldn't it be nice if the claim against your client, Widgets & Things, for substantial damages could be resolved before a lawsuit is filed? Widgets & Things receives a letter from an attorney representing a potential Plaintiff, Mr. Greedy, who alleges the company was grossly negligent. Mr. Greedy seeks substantial damages which, if recovered, would threaten the existence of your client. Widgets & Things will want strict proof to support the allegations and will expect Mr. Greedy to provide convincing evidence that it did anything wrong.

Widgets & Things also wants strict proof its alleged negligence caused financial damage, and will likely take a hard line even if some damages could be proved. Widgets & Things believes damages to be far less than anything Mr. Greedy will claim.

Despite this, Widgets & Things would like to settle the case before it is exposed to significant negative publicity. The company believes a lawsuit could cause it to lose significant future business and may threaten the company's existence.

It is understandable Widgets & Things would like to have the case settled as soon as possible. Yet, no written discovery has been conducted. Depositions of Mr. Greedy and fact witnesses have not been taken. Widgets & Things does not have the benefit of a report by an opposing expert which specifies the alleged negligent actions or inactions. There is also no expert report (on either side) to quantify or refute damages and explain how they may be related to the alleged negligence. If the case was being litigated, Widgets & Things would be able to consult with in-house and outside experts to critique the position of the opposing expert. Because suit is not filed, there are no Court rules or orders requiring Mr. Greedy to produce all information – good or bad – which he has concerning the claim.

Even with these limitations, a pre-suit resolution should be considered. A large majority of cases settle sometime prior to trial. This is particularly true in high exposure cases. In the majority of litigated cases, there is significant time and expense incurred - often with an uncertain outcome.

There are many benefits to pre-litigation settlement which can occur through mediation.[1]

First, Widgets & Things may be able to avoid negative publicity if suit is not filed. The settlement should contain confidentiality and non-disparagement clauses. This can significantly decrease the chance a competitor will use the claim to its advantage. Lawsuit publicity is a significant concern among accounting, architecture, engineering, and law firms. After a lawsuit is filed, counsel frequently hears complaints that a competitor was able to receive work because they told the potential client about the lawsuit. In the client's mind, this shows they are somehow not competent because of litigation, regardless of whether the claims have merit.

Second, a pre-suit resolution will significantly reduce

1 See generally, Tony Rospert, Keeping the Floodgates Closed: Benefits of Pre-Litigation Mediation. Tony Rospert is a Partner of Thompson Hine which is a member of the Network of Trial Law Firms, https://www.linkedin.com/pulse/keeping-floodgates-closed-benefits-pre-litigation-tony-rospert/.

the amount of time Widgets & Things' employees would spend in the discovery process, much less preparation for and attendance at trial. For many high exposure cases, the amount of time a company devotes to gathering discoverable information can be staggering. This is especially true with high volume electronic discovery.

Third, the legal fees and expenses associated with pre-suit resolution will be significantly lower than engaging in full blown discovery, motion practice and trial. The work needed to prepare for a pre-suit mediation should be considered an investment. Even if the case is not settled, the work that is put in on the front end would be required if the case goes forward to litigation.

There are cases which are good candidates for a pre-suit resolution. Professional liability cases are an example. The professional almost always knows a client or former client is unhappy. Frequently, the source of the displeasure is discussed and a lawsuit is threatened and counsel representing the former client makes a demand on the professional firm. The professional then obtains counsel and an investigation begins.

In our example, Mr. Greedy's counsel is interested in settling the case before suit is filed. It will significantly reduce the time Mr. Greedy's counsel will need to engage in discovery and prepare for trial, which is attractive to plaintiff's lawyers who frequently take cases on a contingency. So, there can be substantial benefit to both parties to resolve the case early. The defendant saves money, since experts who analyze the breach of a professional's standard of care and alleged damages represent a significant cost and because attorneys' fees are predictably high once litigation commences.

However, there are claims which are not good candidates for pre-suit resolution. Product liability claims fall under this category. In general, manufacturers do not want to voluntarily produce any product information. If suit is not filed, the company cannot rely on an enforceable court order to limit future disclosure of its documents. While the parties can reach an agreement on document production, those contracts do not have the teeth of court orders precluding future use of the documents. Manufacturers are justifiably concerned attorneys would use information learned to file future lawsuits on similar fact patterns. They are also concerned the information would be shared with other lawyers who have potential lawsuits.

In addition, many product cases involve substantial fault of the operator who may have misused the equipment. Obtaining depositions of the product operator and key fact witnesses is often at the core of product liability cases, and suit must typically be filed to obtain this information under oath.

Another issue is that it can be difficult to engineer a pre-suit settlement for multi-party cases. The alleged tortfeasors are often not on the same page, and some parties may not have the same commitment to the negotiation process. All parties need to be fully engaged for significant exposure cases to be resolved pre-suit. For instance, defense parties often disagree about the allocation of fault and it is difficult pre-suit to force a party to articulate what evidence supports their claim or that other parties have more responsibility for the accident.

What is Required to Settle a Catastrophic Claim

The first step is to consult with your client and walk them through the process which could lead to a pre-suit settlement. Your client may need conditioning on the benefits of early settlement. Some clients presume settlement is an admission of fault. Obviously, settlement agreements contain a no admission of liability clause. It will be useful to explain the high percentage of litigated cases which settle. Consequently, the fact that a claim is settled and the presumed implications of that will not change whether the claim is settled pre suit or after litigation occurs. One could argue a settlement after years of litigation could be perceived as worse than early resolution of the claim.

Your client will be required to voluntarily provide substantial information, which can be a significant issue. Again using professional liability cases as an example, your client will be required to produce its entire file. The logistics and costs of the production should be discussed, and your client should understand there are no absolute assurances the other side will provide all information. Understandably, this can be a deal breaker or at least cause serious heartburn for many clients.

If there are other potential parties, then you will need to tell your clients the chances of success will be decreased if other parties are not committed to getting the case settled before suit is filed. It is certainly possible to settle the case solely on behalf of your client but the client may then be subject to future discovery. In some states, settling parties can be subpoenaed to obtain documentation or give a deposition. This would result in additional time and money, but it is unlikely it would be as substantial as if a lawsuit was filed.

Almost all high exposure cases settle prior to trial through mediation. You need to advise your client on the mediation process and what is involved in preparing.

For the process to be successful, the decision makers must be involved. The executives of a company who are responsible for making the final decision should be involved in the process from the beginning, and should attend the mediation. If there is insurance coverage then it should be communicated to the insurer at an early stage that the personal attendance of the insurance company's decision maker at mediation is required.

You must assess whether to retain an expert(s) on standard of care and damage issues. There is a significant advantage in having experts investigate the claim and prepare a report -- if the other side agrees to do the same. Unless liability is clear, it may be hard to convince your client that there could be breach of the standard of care (or that the trier of fact could find such a breach).

With a retained expert playing "devil's advocate", it opens the door for your client to consider the benefits of early resolution. But, be sure to let the client know the expense of retaining experts.

Assuming the client is on board with a pre-suit mediation, it is critical to work with opposing counsel to develop a game plan. This process is akin to a mini scheduling order. First, a written agreement covering the production of documents and information exchanged should be reached. It should be understood that the documents produced are subject to confidentiality to prevent use in the future. Second, it is advisable to enter a pre-mediation agreement that the claim, negotiation, and result are confidential. There should be no publication in the press or any local verdict reporting services. There should also be a non-disparagement clause in the eventual settlement agreement.

Third, the parties should jointly make a decision about retaining experts. This is a critical step in the process and there must be deadlines for the parties to exchange expert reports. The parties may want to agree that the expert reports are not subject to discovery if suit is filed. In that case, the parties will not need to worry that if an expert makes assumptions without the benefit of formal discovery that these would be held against him or her at a later date. Because there are many unknowns, it is reasonable that opinions could change in the future. In my experience, however, when pre-suit mediation is not successful, the same experts and substantially same reports are used in the suit. This is an example of an investment at the pre-suit stage that would translate to litigation if suit is filed.

Obviously, the selection of a mediator is key. This is true whether suit has been filed or not.

Hot Tubbing

"Hot Tubbing" is a process whereby two or more opposing experts are in the same room to debate issues while others observe. The procedure is common in Australia and is now being used in other jurisdictions.[2] In Australia, there is a pre-trial joint expert conference which is used to clarify areas of agreement or disagreement followed by a joint report being prepared.[3] The second phase of the process involves concurrent expert evidence being presented at trial. It is during this phase when the experts will sit together at court in a "hot tub" which is, literally, witness boxes.[4] While the experts still provide separate expert opinions, and are cross examined by counsel, the viewpoints are presented concurrently.[5] It is far less adversarial than expert testimony presented at trial in our judicial system. The concept of hot tubbing is very well received in the formal process in Australia. One study reported a 95% satisfaction rate among judges, experts, and attorneys.[6]

Hot tubbing can be effectively used in the mediation process and can be employed before suit is ever filed. While hot tubbing is formally used during trial in Australia, a modified version can be used in extremely high exposure cases before suit is filed. Typically, hot tubbing is used when a mediation is staggered over several weeks. It is often employed when the parties (or the carriers) need additional information to evaluate the case and obtain authority in instances where negotiations have reached a stalemate. It is more commonly used in multi-party suits.

A mediator will typically meet with the parties where opening presentations are made. Settlement negotiations occur but this is a prelude to the parties' experts providing reports and then engage in a hot tub session with the mediator. In advance of the second phase of the mediation, the mediator should impose some ground rules on the number of experts, the format and timing of the presentations which the experts will make to all of the parties, and who is allowed to present questions to the experts. It is recommended these ground rules are put in writing and agreed to by all parties in advance so there is no later claim of "sandbagging" or surprise.

The goal is to identify areas where the experts agree and, if possible, the reason for disagreement. The mediator

2 Adam Butt, "Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for 'Hot Tubbing'", 40 Hous. J. Int'l L. 1, 2(Fall 2017)

3 Id.

4 Id.

5 Id.

6 Expert Opinion: Hot Tubbing as an Alternative to Adversarial Expert Testimony, https://ap-ls.wildapricot.org/resources/EmailTemplates/2018_04%20April%20AP-LS%20Newsletter/ExpertOpinionApril.pdf.

will question the experts and then allow the experts and may solicit questions from the parties for the mediator to ask. Experts may also be allowed to ask questions of each other and sometimes the principals of the parties may ask questions directly. These questions are encouraged to clarify issues rather than to be used as cross examination. For instance, many times experts are asked questions whether if their opinion would change if they knew of a fact that perhaps the expert was not aware. Experts may also be allowed to make some type of closing presentation after the "hot tub" session.

During the hot tubbing process, it is critical to have a protocol which is enforced. Given the magnitude of these cases, all parties need to be prepared and late submissions of expert reports or other failures significantly decrease the likelihood of success. Given the hot tubbing process is voluntary (and often pre-suit) the mediator has little to no authority to enforce the protocol; thus the parties must be willing to proceed in good faith.

After the expert hot tubbing, the parties then meet at a later date in an attempt to settle a case. Even if the case does not settle, this process can be beneficial for all parties. First, both sides should have a better understanding of the adverse parties' claims and the potential risks. Second, there could be a piecemeal resolution of claims or issues which would reduce future discovery costs. Third, the process is beneficial when there are multiple levels of insurance for one or more of the parties. It assists the primary and excess insurers to evaluate their exposure. Finally, it provides the parties an opportunity to evaluate how their respective experts may perform in front of the ultimate trier of fact.

The significant disadvantage of the process is cost. The experts are typically very expensive. For catastrophic cases, the prolonged mediation process is expensive. It also takes substantial commitment by the parties. It is critical to have the principal decision makers present throughout the process. This can result in significant loss to the businesses.

Moreover, the hot tubbing process by its very nature is expected to be a transparent and non-adversarial process. In order to achieve the goals of the process, it means both parties may be exposing weaknesses (or strengths) at an early stage which, if the case does not resolve, gives time to pivot to address those issues during litigation. While the hot tubbing process gives a unique sneak preview of the other side's theories and case, the opposite is true as well. Therefore, parties must be cognizant of this issue and weigh the costs and benefits before entering into the process. Given the adversarial nature of the U.S. legal system, this may be a major reason why "hot tubbing" has yet to become a more standard practice, even in high exposure cases.

Hot tubbing should be considered in complex, high exposure cases where all parties (and their respective insurers) are motivated to settle early or pre-suit. High profile parties involved in the complex matters are more likely to view "hot tubbing" as a valid option in order to avoid the spotlight of public litigation. For instance, two high profile corporate clients in a high value business dispute are more apt to consider "hot tubbing" as opposed to an individual plaintiff which may want the publicity or to leverage a more favorable settlement.

Conclusion

If parties obtain sufficient information to evaluate liability and damages before a lawsuit is filed, then a settlement can be negotiated. This is also true for high exposure cases. If the parties properly plan the process which almost always includes mediation, then there are reasonable chances of success. Engaging experts to evaluate the claim significantly increases the chance a case can be settled. Although hot tubbing is an expensive option for the mediation process, the alleged damages may justify this tactic.

It's not for everyone.

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Hot Tubbing

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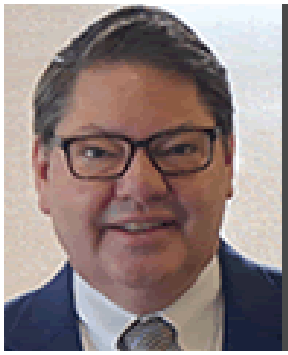

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Lyndon Sommer, Registered CPA (Ill.) M.Acct., J.D., is a shareholder of Sandberg Phoenix & von Gontard and member of the firm's Business Litigation and Products Liability Practice Groups. He focuses his work in the areas of commercial, product liability and toxic tort litigation, frequently handling cases involving asbestos and benzene.

Having tried cases in federal and state courts in Missouri and southern Illinois, Lyndon has received jury verdicts on behalf of both plaintiffs and defendants. He has also argued multiple cases before the United States Courts of Appeal for the Seventh and Eighth Circuits, as well as the Missouri Courts of Appeal and Illinois Appellate Courts.

Lyndon specializes in professional negligence cases involving certified public accountants, who he has successfully defended at trial and on appeal. He is experienced in defending accountants in federal court and is very familiar with federal procedure and expert requirements. Lyndon has also defended actuaries, architects, attorneys, engineers, financial advisers and insurance brokers. Throughout his career, he has handled more than 100 professional negligence cases.

Lyndon is also experienced in representing shareholders of closely held companies involved in shareholder disputes. He has represented shareholders in trial courts and argued several appeals. These appeals have been argued in both state and federal courts.

Services

- Product and Toxic Tort Liability
- Professional Liability

Professional Activities

- Admitted to practice law in Missouri and Illinois, Lyndon is also a Registered Certified Public Accountant in Illinois.
- He is member of the Missouri Society of CPAs and the American Association of Attorneys/Certified Public Accountants.
- For his outstanding work in the area of Product Liability Litigation – Defendants, Lyndon has been included in the 2017 and 2019 Editions of Best Lawyers in America.

Education

- Attending Southern Illinois University School of Law, Lyndon earned his Juris Doctor in 1992 and served as the Editor in Chief of the Southern Illinois University Law Journal.
- Lyndon earned a master's degree in Accountancy in 1989 and a B.S. in Accounting, in 1987 from Southern Illinois University, Carbondale.