Best Practices in Claim Handling:
*In-House and Outside Counsel Perspectives*

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A large number of retail, restaurant and hospitality companies are self-insured, and therefore, they are responsible for handling and resolving their own claims. This is done either with an in-house claims department or a third party administrator (TPA) is hired to handle claims. The following are recommendations for claim handling practices for self-insureds from the perspective of the in-house claims departments and TPAs and also from the perspective of outside defense counsel hired to defend and litigate the claims.

I. In-House Perspective

The claims department of a self-insured company is very similar to that of the claims department of an insurance company. The goal is to have efficient claims management by cutting costs, reducing fraud and keeping customers satisfied. The primary difference with a self-insured company is that the claims department, whether in-house or at a TPA, is more vested in the company and has better access to the company, which greatly improves the resolution of claims.

A. Basic Steps of Claim Handling

When a claims department is run well, claims can be handled efficiently, effectively and many can be resolved without the need for outside defense counsel. The basic steps to claim handling are as follows.

1. Investigation

The initial claim investigation should be done as quickly as possible. There should be a set procedure in place so the managers at the scene know exactly what is needed and what is expected from them after a claim is reported. The corporate office should provide the required forms to complete following an incident and the managers must be trained on what information to collect, if photographs are to be taken (including what should be photographed), if surveillance footage is to be preserved (including how much) and if any witness statements should be prepared. If the location has regular inspections, having the manager collect those inspection sheets is also recommended. Lastly, printing or copying the employee schedule for the date and time of the incident is another good practice. There should be a checklist for what the manager is to collect and then it should all be forwarded to the claims department with a copy kept at the location.

2. Statements

There are typically two types of statements taken after an incident – handwritten witness statements prepared the day of the incident and recorded statements taken days or weeks later by the claims department. Both types of statements have their own use and purpose and the claims department should have a procedure in place regarding which type of statements should be taken and by whom.

In general, on the day of the incident, any actual witness to an incident should be asked to prepare a handwritten witness statement, including the customer who was injured if the injury does not prevent a statement from being written. Handwritten statements from the employee and/or manager who was significantly involved after the incident can also be useful because they will provide details that are often later forgotten, such as specifically what was found during the scene investigation. If a lower level employee was a witness at the scene just after the incident and involved with the customer, a handwritten statement is recommended.
because often times that person will no longer be an employee, and may not be reachable, once the case goes into litigation.

The decision of when, and if, to take a recorded statement is a lot more complex. There are differing thoughts on this topic so often whether statements are taken depends on who is in charge of the claims department. In most cases, a recorded statement should be taken of a claimant whenever possible because it helps focus the issues and document the alleged incident, oftentimes before the claimant has spoken with an attorney. Recorded statements of non-employee witnesses can also be very useful for the same reasons. It is the employee witnesses that can be problematic. If an employee recorded statement is going to be taken, be sure to speak with the employee first and go over what will be discussed. If there are issues or problems with the information, do not take the statement but instead summarize the discussion in the claim notes.

3. Scene Investigation

Whenever possible, the claim handler or an investigator for the company should go to the scene. This allows for photographs to be taken, surveillance footage to be preserved and for any reports or documents created after the incident to be collected and preserved. It also allows for the collection of relevant information that the employees may not have thought to document.

4. Obtain Medical Information

Once the claimant has started treating, or is done treating, be sure to obtain the medical records and bills. There are many services available that can do this for you so you obtain records fast and more efficiently as the process can be tedious. Requesting the records directly from the provider is highly recommended as counsel tends to redact pages of records that are not supportive of their claim. Obtaining all of the records, and hopefully pre-incident records, allows for a complete understanding of the claimant and the alleged injury.

5. Develop Action Plan and Reserve

If all of the above information is collected, a claim examiner has everything he or she needs to analyze liability and determine potential case value so a thorough action plan and proper reserve can be set. This allows for efficient claim handling.

B. Staffing and Training

One of the primary keys to efficient claims management is having the right staff and ensuring that staff is properly and continuously trained. For claims examiners to efficiently and effectively perform their job, they need to understand the company and be familiar with how the company operates. If at all possible, this includes getting them into the field so they meet the people they will later need information from and see how the company functions.

If the claims department is local, or visits every 1-2 years for a meeting, schedule a tour of a restaurant, store, hotel or facility so the claims handlers can see first hand how it functions and the role of the individual employees. This personal knowledge can be valuable when later resolving a claim. Another suggestion is to have claims handlers personally meet employees working in departments such as human resources, real estate, maintenance, security, operations and regional management because those are the people they will need information from when defending claims and litigation. Meeting someone face to face typically helps the communication process for everyone.

On the flip side, people working in the operational functions must learn why responding to the claims department is so important and how it directly impacts the company. The operational employees also
need to be taught, and re-taught, how to respond when an incident takes place and how to preserve evidence. How the operations employees respond to a claim has a strong impact on how the claim can later be resolved so it is imperative that these employees are taught well and their training must be on-going.

Often times when a customer is injured or reports a claim, employees become nervous, they back off and they treat the customer differently (and not always in a good way). This behavior alone can aggravate a customer and make resolving the claim more difficult. Whenever possible, teach employees how to properly respond to customers after an incident. One can apologize for the customer being injured and provide assistance without admitting liability.

When working with operational staff, it is important to decipher between lower level employees and management. The lower level employees may be the first contacted and the first at the scene of an incident, but they are also likely the least trained and the most likely to be gone from the company within the year. There tends to be high turnover in the retail, restaurant and hospitality industries at the lower level positions so the key to their training is – get a manager. This allows the company to focus its time, effort and money on training the most stable management staff.

C. When to Involve Outside Counsel

Regardless of how experienced a claim examiner, there are times when outside defense counsel should be retained sooner rather than later. Often times, it takes experience to know the best time counsel should be retained and typically a higher manager or in-house counsel will make this decision. The rule of thumb is that outside defense counsel should be retained as soon as possible in any catastrophic-type cases and in cases where there is a potential or threat of evidence being lost. The retaining of outside counsel is useful because it allows for a confidential investigation and the preservation of evidence in a timely manner.

D. Technology

The goal for any claims department is to have the best technology available. There is always a cost/benefit analysis which must be taken into consideration but technology is key in analyzing claim trends, investigating claimants and preventing fraud. An added bonus to having updated technology is that it helps attract the younger generation to claim positions as they expect it and they are very experienced in working with technology.

E. Use of Vendors

Whether a claims department is in-house or part of a TPA, certain vendors can provide valuable information while being cost-efficient. Some of the most value vendors provide assistance with social media searches, Medicare compliance, surveillance and investigations of claimants and medical record collection. These vendors, as well as others, can also be used once the case is in litigation.

F. Advice to Outside Counsel

The following are pieces of advice to outside counsel that have been given over and over by in-house counsel and claims examiners, so it is time for outside counsel to listen and react:

- Learn as much as possible about the company as possible.
- Know current events surrounding the company.
- Personally visit the company and take a tour to better learn the operations aspect.
• Whenever possible, meet people in human resources, real estate, maintenance, security and management so they know who you are and they are comfortable when outside counsel approaches them in the future during a case.

• Know and understand company policies in general, especially evidence preservation policies. However, it is not necessary or expected that outside counsel should understand and know every policy and policy change.

• Rely on the in-house / TPA claim examiners to determine which policies are relevant and produce them to you when necessary.

• Give feedback to the claim examiners as to what information is needed and how the relationship can work different to ensure the best possible claim handling.

Outside counsel should be part of the team whenever working with a claims department of a self-insured company.

II. Outside Defense Counsel Perspective

Even though the in-house attorneys, claim handlers and TPAs are the “boss”, outside defense counsel have a lot of valuable information and recommendations that can improve claim handling. Outside defense counsel is part of the team, not just a vendor, so working together to develop a claim handling plan is the first recommendation.

A. Panel vs. Non-Panel Defense Counsel

Any self-insured company should insist on using panel counsel, rather than allowing any old firm or attorney to be hired at whim. In fact, not only should panel counsel be used, but the list for each geographic area should be small. Using panel counsel allows for a stronger relationship between claim and defense counsel and it ensures counsel is not only knowledgeable about the company, but vested in the company. Ask any claims examiners how difficult, stressful and inefficient cases become once non-panel counsel take over a lawsuit after tender is accepted – especially when that attorney must handle answering discovery. This is proof enough as to why a small panel counsel list can greatly improve claim handling practices.

B. Panel Counsel Meetings

Once the panel counsel list is in place, it is highly recommended that regularly scheduled panel counsel meetings take place – typically once a year or once every two years. These meetings are invaluable to defense counsel because they allow counsel to learn more about the company, which is a big part of what the in-house claims department demands. Give counsel updates on what the company is doing and where it is going in the future. Also, specifically discuss those areas that are often topics of litigation, such as inspection policies, security and flooring. As an added bonus, these meetings allow the claims department and outside attorneys to get to know each other as people, which always results in a better working relationship.

Panel counsel meetings do not need to be expensive. Counsel will always pay their own travel and room expenses and the meetings can occur on-site at the corporate headquarters or at seminars, such as the DRI Retail & Hospitality Litigation Seminar.

C. Claim Investigations

Most of what makes or breaks a case once it is in litigation occurs before defense counsel ever knows about the incident. The investigation done by the employees at the property and then the claims examiner
greatly impacts how well a case can later be defended. The following a few type tips from the defense bar to ensure a thorough and efficient claim investigation:

- When a claim occurs, the employees should ensure the customer is comfortable and immediately call for a manager. The employee should not have any further involvement in the incident, unless clean-up is needed.
- Have a packet to use for claims. The packet should include the required reports and provide concise instructions on what should be done to investigate the claim, including who should prepare a witness statement, taking photographs and securing footage.
- Have a clear process on how records, statements, photographs and video are to be sent to the claims department.
- Have a place at every property where the original reports, photographs, etc. can be stored for at least a year after the statute of limitations expires – this helps prevent loss of evidence and spoliation claims.
- After an incident, collect all inspection reports and copy/print employee schedules for the day. These should go to the claims department with the reports and be kept at the property with the original reports.
- Have a claim examiner review the packet immediately to ensure all evidence was preserved and secured.

Typically, judges and juries rely most heavily on reports, statements, photographs and video from the day of the incident because they seem more reliable and they were done before attorneys and advisors became involved. Therefore, there needs to be a focus on obtaining, preserving and securing the best evidence possible as that allows for better claims handling and claim resolutions.

D. Staffing and Training

Defense counsel understands that training and staffing is expensive, but just one lawsuit involving a death or paralyzed customer can be quite costly as well. By teaching lower level employees to immediately contact a manager, the number of employees who require detailed and ongoing claim investigation training is reduced. The employees who must be trained on claims handling and evidence preservation are any managers who could be in charge of the property and who could be put into the situation of handling a claim.

E. When to Use and Retain Outside Counsel

Outside defense counsel should be used both before and after litigation is filed. Many companies ignore how useful outside defense counsel can be before suit so the following are a few recommendations for how to best utilize panel counsel:

- Once incident reports are drafted, have defense counsel review them because they will be forced to defend that report in litigation. Litigation attorneys will see things in the form that are likely to cause issues during deposition so counsel can provide suggestions on how to better word different sections of the reports.
- Once there is a checklist on what items should be collected and preserved after an incident, have outside defense counsel review the list and provide suggestions.
- Work with defense counsel to develop a plan on what security footage should be preserved after an incident, including the amount of time and cameras.
• Have defense counsel speak with managers during regularly scheduled meetings to review claim investigation and evidence preservation.

• Work with defense counsel to ensure proper evidence preservation when things other than documents are involved, such as chairs, ladders, etc.

• Utilize defense counsel whenever policies and procedures are developed that could later be the source of litigation, such as incident investigation, security manuals, snow/maintenance vendors, etc. Litigation counsel will review these from a different perspective and can recommend changes that can reduce future problems in the courtroom.

Most panel defense attorneys will not charge their clients to assist with the items listed above as it is part of the relationship.

When an incident is involved, outside defense attorneys agrees it should be called as soon as possible with catastrophic cases and where crucial or unusual evidence needs to be preserved. However, it may be useful to retain counsel for other significant claims as well for the same reasons. Outside defense counsel can be retained to thoroughly investigate a recent incident, but once the investigation is completed and the evidence is preserved, counsel can close their file. The claims examiner will then proceed with the claim and outside counsel can be contacted again if the case goes into litigation. There is no requirement that the attorney remain active in the file simply because she performs the initial claim investigation.

There are many ways to utilize defense counsel. Having a panel counsel list ensures claims department have many people who are always available and willing to help.

F. Advice to In-House Claims Departments

Outside defense attorneys are available and willing to help and offer advice. They want to be part of the team, not your vendor. Utilize them in any and every way possible, not just to defend a claim. The more you include outside defense counsel and make them feel part of the company, the better job they will do for the company. Also, if you would like things handled differently, reported differently, etc. – say so.