
HIGH EXPOSURE LITIGATION

CEU INSTITUTE

MARCH 22, 2016

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Overview

- **Developments in Damage Litigation**
 - Trends and Limiting Exposure to Attorneys' Fees
 - Class Action Litigation
- **Dynamic Discoveries for Damages**
 - Discovery
 - Social Networking
 - E-Discovery
 - Expert Witnesses
- **Litigation Relationships in the Claims Management Industry**
 - Proof of Loss

Developments in Damage Litigation

- Recent developments in other areas of damages
- Recovery on future contract damages
- Expansion of attorney's fees awards
- The use — and abuse — of experts in damages litigation
- New approaches for pre-trial motions to include or exclude evidence
- Developments in punitive damage strategies

Trends and Limiting Exposure to Attorney's Fees

- Attorney's Fees and where they are available:
 - Federal Statutes – FCRA & FDCPA
 - Civil Rights
 - Employment Discrimination
 - Deceptive Trade Practices Act
 - Insurance Code
 - Human Rights
 - Declaratory Judgment Act

Trends and Limiting Exposure to Attorney's Fees (CONTINUED)

- Offers of Judgment and other Settlement offers
 - *Campbell-Ewald v. Gomez*
 - Court held that an unaccepted offer that would fully satisfy a plaintiff's individual claim is insufficient to render that claim moot in a class case
- Challenging a Plaintiff's Attorneys' fee application, including:
 - Who is entitled to receive Attorney's Fees
 - The "Lodestar" Method
 - Interest on Fee Awards
 - Challenging the Rates and Hours
 - Challenging the "Expenses Portion" of the Fee Application

Class Action Litigation

- The unique nature of class action litigation under Fed. R. Civ. P. 23
- High exposure multiplier of liability on systematic issues
- Exponential liability and attorney's fees
- Class notice and administrative costs

Dynamic Discoveries for Damages

- Questions that defense counsel need to ask to support their case for — or against — damages
- What lawyers need to do to prepare both themselves and their witnesses
- Strategies to ensure that you ask the right questions and get the right documents
- Deponent difficulties: common challenges in damage claim discovery

Social Networking – Is it Discoverable?

- Litigation over what is, and what is not, discoverable
 - Informal (web surfing)
 - Check for Claimants with public profiles
 - See portions of profiles through “friends of friends”
 - Written Discovery
 - Subpoenas

Social Networking – Is it Discoverable?

(CONTINUED)

- *Romano v. Steelcase, Inc*, 907 N.Y.S.2d 650 (2010)
 - no reasonable expectation of privacy for information posted to the internet
 - burden on requesting party to demonstrate relevance via deposition questions or access to the public account
- *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2011)
 - Subpoenas to Facebook and Myspace quashed because pages were “set to private”
 - Basis was the Stored Communications Act, 18 USC § 2701, et. seq.

Social Networking Is it Discoverable?

(CONTINUED)

- Other Challenges:
 - Establishing Authenticity of Posts
 - Hearsay
 - Strategy: Take depositions of “friends” who authorized the postings.
 - Network security (“I didn’t post that”)

E-Discovery Big Picture

- Recent Amendments to Federal Rules
- Production from back-up media, mobile devices and text messages
- Costs of fighting discovery battles is significant
- Preservation & process failures lead sanction cases
- Most common sanction – costs and attorney's fees

E-Discovery

Court Requires Insurance Company and Attorneys To Pay Sanctions For Deleting E-Version of Policy

- Zurich American Insurance Company and its attorneys hit with costly monetary sanctions for failing to preserve and produce electronic documents
- Mishandling e-discovery
- Court ordered Zurich and two firms to pay \$1.25 million for failing to produce an electronic version of a primary liability policy that was at the center of the insurance dispute over coverage for 9/11 damage to World Trade Center properties
- Version of the policy as it existed (but not yet delivered) on September 11, 2001 gave "additional-insured" status to several entities, including the Port Authority of New York and New Jersey

E-Discovery (CONTINUED)

Fidelity Nat'l Title Ins. v. Captiva Lake Invs., LLC, Case No. 4:10-CV -1890, 2015 U.S. Dist. LEXIS 1350 (E.D. Mo. January 7, 2015)

- Plaintiff failed to issue legal hold, failed to systematically search computer systems, lost millions of emails while implementing an email retention policy, and failed to preserve data from a former employee as well as a key database
- During litigation, Plaintiff began new email policy of deleting emails older than 180 days if not subject to legal hold; but b/c of no hold in this case – relevant emails likely lost

E-Discovery (CONTINUED)

Blue Sky Travel & Tours, LLC v. Al Tayyar, 2015 WL 1451636 (4th Cir. Mar. 31, 2015)

- Magistrate judge held that once litigation began, Defendant had a duty to stop its document retention policies “and to preserve **all documents** because you don’t know what may or may not be relevant.”
- The Fourth Circuit held “[t]he standard applied by the magistrate judge constituted an abuse of discretion, because a party is not required to preserve all its documents but rather only documents that the party knew or should have known were, or could be, relevant to the parties’ dispute.”

What to Do When You Need an Expert?

- How to know what type of expert(s) you'll need
- What do you need to prepare before you retain an expert?
- How to find the expert you need: referrals, resources and research
- Considerations in hiring an expert:
 - Costs vs. benefits
 - How to work with your expert to gather evidence
 - Their ability and experience in testifying

What to Do When You Need an Expert?

(CONTINUED)

- Preparing your expert for direct and cross-examination
- How to ensure that your expert is not perceived by the court as an advocate
- The difference between accountants, actuaries, and economists
- How to hire an expert, what to expect from them, and how to work effectively with them
- What experts do wrong: common errors and how to detect them

What to Do When You Need an Expert?

(CONTINUED)

- Recent developments in damages calculations for:
 - commercial damages
 - personal injury damage
 - other damages

Litigation Relationships in the Claims Management Industry

- Important factors in the inter-relationship between the insurance adjuster, the attorney, and the client
 - Duties and Liabilities
 - Insurance Code
 - Disciplinary Rules of Professional Conduct
- Common ethical dilemmas in insurance litigation

Litigation Relationships in the Claims Management Industry (CONTINUED)

- Ethical Dilemmas
- Insurance Litigation
 - Specific Issues:
 - Who does the insurance company really represent?
 - *Navigators Ins. Co. v. Sterling InfoSystems, Inc.*, 2015 NY Slip Op 31402(U) (July 28, 2015)
 - Duty to defend and indemnify national background screening company in two Fair Credit Reporting Act actions despite the policy's exclusions of fines and penalties.
 - Malpractice Liability
 - Relationship between insurance defense counsel and the insurance company relating to:
 - Duties and obligations
 - Billing guidelines and examples as related to the Ethics opinion
 - Disciplinary Rules regarding Fraudulent conduct by the Insured

Proof of Loss

- Duties of the insured
 - Notify insurer
 - Inventory of damaged property
 - Sworn proof of loss
- How does an insured prove loss?
 - Protecting the property from further damage
 - Keep track of temporary/emergency repair costs
 - Separate damaged and undamaged property
 - Submit to examination under oath
 - Cooperate with the investigation

Proof of Loss (CONTINUED)

- Determining value
 - ACV
 - Fair market value
 - Replacement, less depreciation
 - Broad evidence rule
 - Repair or replace
 - Appraisal
- General value considerations
 - Return the insured to pre-loss status
 - Depreciation
 - Betterment
 - Diminution
 - Unrealized expenses
 - Value is not what the insured paid originally or might pay to replace.

Proof of Loss (CONTINUED)

- Value bottom line
 - Be prepared to prove the value you calculate
 - Think about all the value components

QUESTIONS?



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