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Combatting Nuclear Verdicts and Other Defense Strategies



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The Adversary: Plaintiffs' Bar

- Increasingly unified
- Share resources and successes freely and frequently
- Defense bar & insurance industry reluctant to share; “knowledge is power”
 - Trucking exceptions
 - Medical malpractice exceptions

- **How Plaintiff Firms Craft Cases**
 - Drive emotion
 - Emphasize “safety” and threat to community at large
 - Use consultants
- **Defense Strategies**
 - Never allow client to offer opinion answer at a deposition
 - Be on the lookout for “safety” related opinion questions
 - Assume every significant case has a reptile component



- **Covenant Not to Sue as Means to Trash Co-Defendants**

- \$49M CT Verdict Over Alleged Failure to Diagnose Cancer
 - Treating MD and hospital were defendants; MD targeted in deposition
 - Plaintiff counsel executed covenant not to sue on eve of trial
 - Used “settling” defendant to testify against facility
- Issues
 - Release or settlement agreement?
 - Done behind the scenes with no transparency

- **Truck Broker Liability – Montgomery v. Caribe Transport (USSC)**

- Broker has duty of reasonable care in selecting carrier to transport goods
- No Federal Aviation Administration Authorization Act (FAAAA) preemption as to state court suits against brokers that allege negligent truck transport with an unsafe carrier
- Standard of Care for Broker unclear at present



- **Pre-Incident Protocol**
 - First 48 hours post-incident represents critical period
 - If first notice to carrier is receipt of complaint, defense case is hampered
- **Immediate Post-Incident Response**
 - Limit incident reports to facts rather than opinions
 - Involve experienced counsel early; don't wait for complaint
 - Can cloak investigation in attorney/client privilege



- **Retain The Right Counsel From the Start**
 - Don't go cheap on defense counsel
 - Reassess or evaluate long-term law firm relationships (friendship ≠ performance)
- **Know When and When Not to Try A Case**
 - Shock verdict sets value and expectations beyond the case at hand
 - Shock verdicts occurring everywhere; Western Oklahoma example





Benefits & Takeaways

- Implement better risk management strategies
- Give specific directives and expectations to defense counsel
- Provide strong guidance to policyholders



20 26 PROPERTYCASUALTY
CLAIMSSEMINAR

Thank You!



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