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Excess Insurance Carriers: Monitoring a Nuclear World with 'Fresh Eyes'

The Strategic Advantages of Hiring Monitoring Counsel

These days, “Nuclear Verdicts”—those civil jury awards over \$10M—are popping up more and more all over the country. They are fueled by aggressive lawsuit ads, savvy and coordinated tactics from the plaintiffs’ bar, and a growing anti-corporate bias. For excess insurance carriers, this means big headaches.

Excess insurance carriers monitor large catastrophic personal injury litigation through reports from lawyers they did not hire, who may not be reporting up the insurance tower as thoroughly or as often as the excess carrier would like, and who may not be defending the insured in the context of the entire insurance tower. Many times, excess insurance carriers are blindsided by an email notifying them of an upcoming mediation, an enormous and unexpected settlement demand, or a request that the excess carrier contribute to a settlement from its layer of coverage. These “hot potato” situations put an excess carrier in a precarious position of playing catch up.

Continue reading the article below or watch this short video for key points and takeaways.

Nuclear Verdicts are happening with more frequency in all areas of the country, including venues that were not traditionally in the “judicial hellhole” category. The U.S. Chamber of Commerce Institute for Legal Reform finds there have been 1,288 Nuclear Verdicts over the last 10 years, with half of them exceeding \$20M. Product Liability verdicts, in particular, have been on the rise, with the median Product Liability verdict increasing 50% over the last 10 years. On top of that, plaintiffs’ attorneys are emboldened by the high verdicts and have ratcheted their settlement demands up at an alarming rate.

If you are an excess insurance carrier with coverage \$10M excess of \$10M, you are likely thinking about these Nuclear Verdicts a lot. If you are 10x of \$5M or 5x of \$1M, chances are this concerning trend affects you every day.

That is why bringing in monitoring counsel is a smart move to keep things in check and make sure the insured’s defense is comprehensive and complete.

When Should You Hire Monitoring Counsel?

Yesterday! Time is of the essence. The earlier you get monitoring counsel on board to review and evaluate the case, the quicker an excess carrier can identify hot cases that could get to its layer. At the very least, an excess carrier should retain monitoring counsel when there is any chance of a case impacting its layer (or possibly the layer below). Finally, if trial is approaching or a settlement is being discussed, a second set of eyes on the claim is invaluable.

Who Should You Hire as Monitoring Counsel?

Someone with subject-matter expertise. If your case involves a truck wreck, you need a truck wreck lawyer. If it involves a dram shop claim, you need a dram shop lawyer. Subject-matter expertise is the most important factor in selecting monitoring counsel.

In addition to subject-matter expertise, trial experience is an absolute must. Defending Nuclear Verdicts is not for the faint of

heart. In order to monitor and evaluate a potential Nuclear Verdict case, a lawyer must have tried these types of cases. Real trial experience is a critical requirement for monitoring counsel, especially since there is a chance they one day could be lead trial counsel in the case.

Expertise in the subject matter and trial experience trump geography when selecting monitoring counsel. Lawyers who have national trial practices litigate across borders all over the country. Picking the right lawyer for the case is more important than picking the closest lawyer geographically.

What Can You Expect from Your Monitoring Counsel?

Fresh eyes. Monitoring counsel provides an excess carrier with a fresh set of eyes to evaluate the defense of the insured up to that point. Have the right experts been hired? Have the key witnesses been located and deposed? Have the insured's witnesses been adequately and properly prepared for testimony? Has there been a mock trial conducted or scheduled? Have all investigative avenues been pursued (social media searches, cell phone forensic downloads, etc.) Evaluating the current posture of the case allows monitoring counsel and the excess carrier to flip a case from a defensive to an offensive position.

Monitoring counsel can also evaluate the underlying defense counsel. That is not to say this will result in a critique. Nobody likes an armchair quarterback, and more often than not the defense counsel hired by the underlying insurance carrier is doing a good job. If that is the case, monitoring counsel can develop a cooperative team working together to defend the insured. However, sometimes defense counsel is not preparing the case adequately for trial given the relative risk exposure to the insured and the excess carriers up the insurance tower. That is when monitoring counsel is most helpful to an excess carrier. Monitoring counsel can push and assist defense counsel in preparing the case for trial.

Similarly, monitoring counsel can assist the defense team with developing trial themes. Perhaps liability should be stipulated. Perhaps the defense team should counter-anchor a low damage number at trial. These types of strategy decisions sometimes are

better evaluated with a fresh set of eyes.

Evaluating the case for settlement is the most critical role monitoring counsel can play. This may require getting directly involved in settlement negotiations with plaintiffs' counsel or simply providing the excess carrier with a trusted opinion on case value. In situations where monitoring counsel participates directly in settlement negotiations, negotiations often go further without the natural friction associated with lengthy and emotional litigation.

Finally, monitoring counsel may need to "parachute in" and try the case as lead counsel or monitor the trial from the background.

Why Hire Monitoring Counsel?

By enlisting monitoring counsel, an excess carrier gets an unbiased evaluation of the case and specifically whether it will get to the excess carrier's layer. Monitoring counsel also makes sure the insured is being defended to the extent necessary and not just to the extent of the underlying insurance policy limits. Finally, if monitoring counsel eventually becomes trial counsel, they will be ready to go at a moment's notice.

Frost Brown Todd's product, tort, and insurance litigation team has represented companies in all 50 states and taken more than 500 jury cases to verdict, with significant experience defending results on appeal. For more information or assistance evaluating an excess carrier's litigation exposure, please contact the author or any attorney with Frost Brown Todd's [Product, Tort, and Insurance Litigation Practice](#).

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