Horror Story

By Jeffrey M. Baill, Yost & Baill, LLP

When the theme for this issue of the Subrogator was selected, I started to think about the cases I have handled where things went bad. These are not pleasant memories to dwell on. However, ,just like learning from losses at trial is important, it is also valuable to occasionally revisit cases where things went horribly wrong to see if any lessons can be derived.

Many years ago, I was involved in a large, ten figure case that was venued in Missouri. This is important because Missouri is a pure comparative fault state. If the plaintiff is seventy percent at fault, plaintiff still recovers 30 percent of the damages proven.

This case had been moving along in discovery for years. It was being defended by a lawyer from a small insurance defense firm who was capable, but not really putting in the resources that a large product defense firm would have. As we got closer to trial in Federal Court, the defendant suddenly fired its counsel and retained a well-known large national firm. Although discovery was closed, defense counsel immediately started filing motions to be heard on the day of trial.

One of the motions made by new defense counsel was a motion to apply Alabama law to the case. Although the defendant was domiciled in Missouri and the product was made in Missouri, defendant raised a creative argument that, because our insured's plant was in Alabama, Alabama's law should prevail. . While some of the damage in the case occurred in Alabama, the most significant damage occurred in multiple locations around the country. We knew at that time that a ruling in the defendant's favor on the choice of law issue would be a case killer, as Alabama is a pure contributory fault state. This was a case where it was pretty clear that our insured was going to be hit with significant comparative fault. We always thought this was a case where the logical outcome would be 50-50 fault on plaintiff and defendant.

All of the motions were filed and scheduled to be heard and ruled on by the Judge on the first day of trial. All preparation was completed by that time. All witnesses had been arranged to attend the trial, including multiple expert witnesses from around the country. Our insureds' representatives also traveled from out of state to be at the trial to testify and to look out for their significant uninsured losses. At mediation, we had turned down a substantial offer which our clients felt was unacceptable.

On the morning of trial, we made oral arguments on the numerous motions. The Judge then announced he would make his rulings and stated he expected to hear no more discussion after the rulings were announced. He then proceeded to announce that he was going to apply Alabama law to the case. Disaster! One percent fault on our insured and we lose the case. All I could think about was the large offer made at mediation disappearing right before our eyes.

I immediately told our clients that this was a case killer and the end of the line. We needed to urgently engage the other side in negotiations to resolve the case. We proceeded to negotiate

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and ended up with about 25% of what had been offered at the mediation.

The most important lesson I took from this disappointing episode is that even though a defendant is not raising an issue at or before mediation, and even though you think it is too late to raise an issue at trial, you must always consider the possibility that a judge may entertain an issue brought up for the first time at trial that could adversely impact your case. That could result in a true subrogation nightmare. I still don't like even thinking about that case. Risk lurks around every corner for a subrogation trial. Even the most unlikely risks are still possible and must be factored into your analysis of the case.

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