Risk Management for the Professional Snow Contractor

This panel discussion defines risk in the snow industry and how to manage it from several different perspectives.

- **MODERATOR:** Kevin Gilbride, Accredited Snow Contractors Association (ASCA)
- **PANELIST:** Matthew Peterson, Mills Insurance Group
- **PANELIST:** Joshua Ferguson, Esquire, Kent & McBride, P.C.

Business Insurance should be the last form of risk transfer

- changing attitudes of snow removal insurance — “that’s what I have insurance for”
- Insurance is a form of risk management primarily used to hedge against the risk of a contingent, uncertain loss.
- Controlling your RISK is controlling your costs. (Total Cost of Risk)

- If the policy is last - What should be first?
Standards

- Proper risk management and sticking to the industry standards should reduce the incidents, lawsuits, and outcomes in those suits—many of the top contractors in this room have been doing this for years.

Managing risk to protect from and/or properly defend lawsuits

- How do we do that?
  - Risk Identification - Risk Evaluation - Risk Control - Risk Finance (policy example) - Implementation & monitor
- **Operational Risk Management** is a continual process which includes risk assessment, risk decision making, and implementation of risk controls, which results in acceptance, mitigation, or avoidance of risk.
- Avoidance is the most effective route for eliminating a risk. (not really what we want to do)
- Be comfortable with “High risk” but let’s make it “well controlled”

Insurance complaints about the snow removal industry

- No written standards to judge a good contractor vs. a bad contractor
- Not enough premium to offset claims
  - $1 they take in
  - $2.07 pay out—after claim matures
- The Insurance World has accused the snow removal industry of making bad decisions on risk acceptance in contracts that they sign
- They accused this industry of not enough documentation
- They told us that there is a lack of training.
Industry Response

- If you are following the ASCA standards, the defense will start and end with documentation.
  - Well Written Contract and any addendums
  - Pre-season site inspection records
  - Log notes for each time on site (including employees on site, work performed, exact time performed, equipment used, materials used)

Insurance model

- The business model is simple: to collect more premium in than is paid out in losses
- Insurers then try to offer a competitive price which consumers will accept
- Profit = earned premium + investment income - incurred loss - underwriting expenses

Insurers make money in two ways:

- Underwriting, the process by which insurers select the risks to insure and decide how much in premiums to charge for accepting those risks
- Investment Income
- members of large classes, allowing insurers to benefit from the law of large numbers in which predicted losses are similar to the actual losses.
- Claims management- is not widely viewed as a profit center
A legal contract

- An insurance policy is a legal contract between the insurer and the snow contractor
- The carrier has an obligation to pay damages based on certain circumstances
- The insured and the insurer are bound by a good faith bond of honesty and fairness

Insurance Nerds

- Actuarial practice which is the science of ratemaking is the price-setting of policies (an art and a science)
- Statistics and probability to predict the rate of future claims (in our case slip & falls)
- Mills Insurance looked at frequency and severity
- The thought is that frequency leads to severity

Statistics

- Total Claims with Mills- 362 totaling $4,068,000
- Claims under $5,000 total payout- 234- $173,000
- Claims under $10,000 total payout- 295 $543,000
- Claims greater than 50K- 22 claims totaling $3,066,000
Duty to Defend

- Duty to defend is triggered when the insured is sued and in turn "tenders" defense of the claim to its liability insurer.
- Insurers will either:
  - seek a declaratory judgment of no coverage;
  - defend;
  - Defend under a reservation of rights

Adding Certainty to Uncertain Outcomes

- Documents to show time the exact time the work was performed, or lack of notation, has literally changed the liability evaluation or trial result in numerous cases.
- Even if seasonal contract, the contractor needs to document everything for litigation purposes.
- If you are subbing out work, you need to require the same standards that are asked of you from the client-(Bulk snow removal)

Mills Insurance

- The insurance world is now calling us.
- Property managers are asking us questions.
- Other insurance professionals.
- The outside world is paying attention and they should.
- We believe in the ASCA – support the fight.
The World of the Ridiculous Lawsuit

- SO WHY DO CARRIERS SETTLE DEFENSIBLE CLAIMS?
- A women in Texas was awarded $780,000 by a jury of her peers after breaking her ankle tripping over a toddler who was running inside a furniture store. The award was surprising considering the misbehaving toddler was the Plaintiff’s son.
- In Pennsylvania, a Plaintiff recovered after she slipped on a soft drink and broke her tailbone in a restaurant. The beverage was on the floor because Plaintiff had thrown it at her boyfriend 30 seconds earlier during an argument.

The World of the Ridiculous Lawsuit

- An Appeal court was asked by the defense to overturn a large award in Plaintiff’s favor on the basis that the jury reached its verdict by using Tarot readings to aid in their decision.
- Another example, four jurors allegedly used a Ouija board to ‘talk’ to the decedent in a death claim.

The World of the Ridiculous Lawsuit

- After my first Jury Trial, a $200,000 award was reached in a catastrophic multi-car accident, all counsel had an opportunity to speak with the Jury afterwards. I asked them what they liked and did not like about both my client and me?
- The first answer out of multiple jurors mouths was: They liked our ties…
  (true story)
Putting in the hands of a jury

Bottom Line: Taking any case to jury is a risk, and carriers have to weigh that risk against a multitude of factors

Nuts and Bolts of the Lawsuit

• When a file comes in, the defense attorney hopes for perfection
  – Favorable facts - contractor in the right
  – Beneficial contract - “no ambiguity”
  – Thorough documentation (see: ASCA standards)

Nuts and Bolts of the Lawsuit

• In reality, the situation is not always perfect
  – A contractor has to balance their wants and needs with the demands of a property owner/manager
    • This can result in a one-sided contract that benefits only the property owner/manager
  – Due to being over-worked, lack of staff or lack of education, pre-season and in-event documentation can be missing or absent
  – Mistakes happen to the best of us
**Nuts and Bolts of the lawsuit**

- Cases come in from the carrier with whatever the carrier has obtained from the snow plow contractor
  - The *earlier* the contractor provides the Complaint or whatever paperwork they are served with, the *earlier* a proper investigation into the claim can begin
- Carriers typically require an initial evaluation within 30-60 days, so the initial documentation is key

**Nuts and Bolts of the lawsuit**

- Early discussions involve assessment of potential tender of defense and evaluation of liability and damages
  - within this time frame some carriers ask specifically for “impediments to settlement”
  - in other words, some carriers are asking why they should not settle the claim at the beginning and saving on litigation cost

**# 1 Question I Get**

- Why do the carriers settle?
- In *most reporting*, both after written discovery, depositions and before trial, there is an evaluation of remaining litigation costs and recommendations for settlement
  - The carriers are generally evaluating the claim from the perspective of ability to defend versus litigation costs
Nuts and Bolts of a Lawsuit:
Importance of early reporting

• Late reporting impacts both the carrier and defense counsel’s ability to defend the claim
  – Over time, witnesses move, pass away, or are otherwise unavailable
  – Properties change and late reporting may impact ability to properly investigate the claim

Real Word Examples:
Case Study 1- Contract Ambiguity

• Slip and fall incident that occurred at an apartment complex. The property manager contracted for snow and ice removal with Contractor X, who sub-contracted to Y. The written sub-contract agreement did not specifically state what triggered the work. In other words, it did not state whether the sub-contractor would go to the site independently or whether they needed to be contacted by the initial contractor. There was conflicting testimony in this regard by the various representatives.

Real Word Examples:
Case Study 1- Contract Ambiguity

• A heavy snow storm took place on February 9 and services were performed that day. Follow-up services were performed on the 10th, 11th and 16th. Plaintiff fell on February 19. No calls were made to the contractor or sub-contractor after the 16th by the property owner.

• Finding by Court?
Real Word Examples:
Case Study 1- Contract Ambiguity

- Award for Plaintiff: 50% property owner, 25% percent Contractor X, 25% Contractor Y
- What to take away? The only reason the initial contractor (X) was found partially liable was because of the ambiguity in the contract. If it was clear that the sub-contractor was fully responsible for the site independently, including all monitoring, inspection and work, the results would have been different.

Real World Examples
Case Study 2-Documentation

- A Slip & Fall occurred on a property several days after initial snow removal services ended.
- Snow Contractor entered into a snow removal contract with the property owner to perform snow and ice removal for one season.
- Snow Contractor was not obligated to perform any additional snow/ice removal work once initial operations were completed unless the owner made a specific request and authorized the work.

Real World Examples
Case Study 2-Documentation

- The contractor’s attorney was able to establish through discovery that the owner’s representative had specifically declined any additional services by snow contractor prior to plaintiff’s accident, despite recommendations by the snow contractor that additional salting should be performed.
- The contractor had emails and other correspondence confirming the property managers denial.
Real World Examples
Case Study 2-Documentation

• The plaintiff’s liability expert had opined that if the owner had authorized snow contractor to perform the additional work, the accident would not have occurred.

• On this basis, the Court granted a Motion for Summary Judgment stating that there was no liability against snow contractor.

Real World Examples
Case Study 2-Documentation

• What to take away?

• If the contractor had not maintained all documentation related to their services at the property, including the correspondence with the owner declining additional services, the Motion for Summary Judgment may have been denied.

Real World Examples
Case Study 3- ice monitoring

• Plaintiff was injured when he slipped and fall on an isolated patch of black ice.
Real World Examples
Case Study 3 ice monitoring

• Last snow or ice event was 5 days before
• Seasonal contract between snow plow contractor and property owner was silent on duties regarding monitoring or inspecting of property
• Because it was a seasonal contract, the only records of service performed were hand-written notations of the date of service and length of time at property

Real World Examples
Case Study 3 ice monitoring

• Contractor testified that they put down calcium chloride in sufficient quantities on initial date of service and again at one follow-up service
• No records to demonstrate how much product was used; how many employees on site
• Result?

Real World Examples
Case Study 3 ice monitoring

• 25% against Plaintiff; 25% against owner; 50% against snow plow contractor;
• What to take away?
  – Having a seasonal contract does not mean the contractor or sub-contractor can be less diligent with their documentation
  – If this contractor had documented exactly what was done, how much product was used, the number of employees on site, the results would likely have been different
QUESTIONS
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