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Cost-Effective Litigation Strategies: Three Lessons From A Barnes & Thornburg Victory

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Imagine your company makes a multi-million dollar claim against a service provider for chronically poor performance over the course of several years. The provider responds that, even if it made some mistakes, you have to prove the fact and the amount of each specific mistake—literally hundreds or even thousands of line items of varying facts and amounts. How can you possibly recover enough to make the litigation effort cost-effective?

That is essentially the situation that was faced by our client Georgia Operators Self Insurers Fund ("Georgia Fund") before it decided to file a lawsuit against the former administrator of its workers compensation claims. On November 10, 2015, the U.S. Court of Appeals for the 11th Circuit affirmed the earlier decision by a federal magistrate to award the Georgia Fund $2.4 million for claims mishandling. Several key strategies helped to achieve that result in a way that made economic sense.

You May Be Able to Estimate Damages on an Overall Basis

The Georgia Fund is a not-for-profit entity formed by most McDonald's franchise owners in Georgia so they can self-insure their workers compensation risks. From 2008 to 2012, PMA Management Corp. was the third-party administrator ("TPA") that handled all of the Georgia Fund's workers comp claims. PMA had sweep access to a Georgia Fund checking account to pay all lost wage and medical benefits for injured workers as well as all out-of-pocket expenses for investigators, lawyers and other vendors. In 2010-2011, the Georgia Fund noticed that annual reports prepared by its actuarial firm showed that its total claim costs were escalating beyond historical norms. At the same time, some of the McDonald's store owners began complaining that the PMA adjuster was not returning phone calls or timely handling ordinary tasks.

By the time of trial in 2014, several years' of annual actuarial reports established a pattern in which the Georgia Fund's claim costs had plateaued at a fairly consistent level from 2000 to 2006, increased dramatically in 2007 to 2010 (generally coinciding with the period when PMA was most egregiously mishandling the claims), and went back down to the earlier rate in 2011 to 2013. The trial judge called this "spike" in costs "quite stunning." We asserted that the Georgia Fund's damages could be estimated by calculating the difference between the historical level of claim costs and the higher level for 2007-2010.

In sharp contrast, PMA argued that the Georgia Fund was required to prove damages separately for each specific claim that was allegedly

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mishandled. Given that PMA had handled 3,500 claims, many of which involved hundreds of discrete payments and claim handling decisions, PMA plainly sought to hold the Georgia Fund to an extraordinarily expensive and impractical burden of proof.

The trial judge and the 11th Circuit rejected PMA's approach and held that the Georgia Fund's method satisfied the standard under Georgia law—and similar in many other states—that damages need only be estimated with reasonable certainty and do not have to be proven to an exact amount. The 11th Circuit explained:

> Ample evidence supports the findings that PMA's deficient practices were widespread and infected its overall performance. The magistrate judge's use of the extraordinary spike in claims costs as a starting point is supported by the fact that the spike occurred in precisely the same time frame during which [the Georgia Fund's outside auditor and expert witness] identified patterns of PMA's mishandling problems. Moreover, as soon as PMA's performance problems were remedied, the claims costs dropped back to approximately the historical rate which preceded the spike. Ample record evidence, as well as common sense, supports the magistrate judge's finding that PMA's performance deficiencies were a major cause of the sudden and extraordinary spike in claims costs.

You Don't Always Need a Damages Expert

Expert witnesses can be an expensive component of litigation. Even a very efficient expert usually needs time to learn the particular issues, develop opinions, write a report, and give a deposition. Sometimes you can avoid all of that.

The damages calculation we just described was presented at trial by the Georgia Fund's actuary. We called him as a fact witness, not an expert, and PMA objected that the calculation should be excluded as expert testimony that wasn't disclosed in expert discovery. The trial judge and the 11th Circuit agreed with us that the actuary gave permissible lay opinions under Federal Rule of Evidence 701. The actuary based his testimony on his own work in preparing annual reports for the Georgia Fund in the ordinary course of its business before, during and after the period when PMA was handling the claims. Those reports were admitted into evidence without objection as business records of the Georgia Fund. The actuary used grade school math to calculate what the Georgia Fund's claim costs would have been if they had continued at historical levels and to subtract that amount from the actual costs during the period of PMA's mishandling. The 11th Circuit explained: "As the magistrate judge noted, the court itself could do that basic arithmetic on the basis of the data already extant in the actuarial reports." Therefore, the actuary did not have to prepare an expert report under Federal Rule of Civil Procedure 26(a)(2), and his testimony did not have to satisfy the standards of Federal Rule of Evidence 702 and *Daubert*.

You May Be Able to Take Advantage of a Few Breaks

Heading into discovery, we and Georgia Fund could not have predicted some of the breaks that helped support the case.

The first break was an internal PMA email. We knew that in 2011, the Georgia Fund engaged an outside auditor, who reviewed about 30 of PMA's pending claim files and found that the overall performance of PMA "fell significantly below industry standards." We also knew that Georgia Fund sent a copy of that report to PMA. We didn't know what PMA did internally in response to that report. In discovery, we learned that PMA's head of quality assurance reviewed the entire report and the files for all the claims discussed in the report. The PMA quality chief then emailed the head of the claims department that the outside audit was "accurate" and that the outside auditor seemed to be "looking for ways to be favorable." Both the trial court and the 11th Circuit deemed this internal email to be an admission of PMA's systemic claim mishandling.

The second break was another email chain. In response to the outside audit, PMA promised to conduct monthly internal audits of the Georgia Fund account and share the findings with the Georgia Fund. The first report sent to the Georgia Fund had a grade of 85%. In discovery, we learned that a PMA quality assurance specialist had originally scored PMA at 52%. In response, the head of quality assurance—the same one who had just admitted rampant mishandling—emailed back that "we can't release the attached results." The PMA quality assurance specialist spent two days changing the file selection and the individual grades—and doing some of the adjusters' work—to raise the score to 85%. The Georgia Fund never heard about the lower score or the revisions until we found it in PMA's internal emails. The trial judge concluded that at least some of the changes in PMA's internal audit were made "for the purpose of increasing the score and avoiding sending a report documenting a failing grade to the client."

The third break occurred during expert discovery. Although the Georgia Fund did not use an expert for damages, it did hire a liability expert who was efficient and compelling in basing his opinions on a review of fewer than 100 of the approximately 3,500 total claims. The expert has been a workers comp adjuster for 40 years, and he wrote the study guide for the Georgia adjuster licensing exam. In response, PMA hired someone who had run the property and casualty claims departments of major insurance companies in New York and Pennsylvania but who had never worked in Georgia and never directly handled even one workers comp claim. The trial court granted our motion to exclude PMA's expert as lacking the necessary qualifications. Consequently, at trial the Georgia Fund had a preeminent expert on the claim handling issues and PMA had no expert at all. Not surprisingly, the trial court relied heavily on the opinions of the Georgia Fund's expert witness, who found widespread systemic mishandling among the claims he reviewed. The trial judge inferred that the patterns of mishandling impacted not only the claims particularly scrutinized by the Georgia Fund's expert but also impacted PMA's overall handling of the claims in the account. The 11th Circuit concluded that his inference was "amply supported" by the report of the Georgia Fund's outside auditor, PMA's internal admissions, the Georgia Fund's expert, and "common sense."

Litigation can be expensive, but it need not be cost-prohibitive. Sometimes a few creative strategies can help not only to contain the costs of litigation but also to achieve a good result.

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phone at (312) 214-5609 or by email at kenneth.gorenberg@btlaw.com with any questions on these issues or if you would like a copy of the 11th Circuit or trial court opinion discussed above.