HAPLESS HARVEST

NEGOTIATION

Information for Defense Counsel
Representing Total Insurance and its Insured Harvest Plenty

You are a relatively new partner at a litigation firm specializing in insurance and small business defense. Total Insurance company is a longtime firm client, and you have handled their insureds' cases for many years.

When you first started in this practice, you sometimes thought insurance adjusters and other repeat defense clients were unrealistic and difficult to work with. They seemed jaded, cynical, and cheap. Unfazed by terrible injury claims, their starting assumptions were that plaintiffs' lawyers exaggerate and make ill-supported legal arguments, and that plaintiffs exaggerate, malinger, or just lie to get a much money as possible. Now, after too many years of this work, you see where your defense clients are coming from. All too often they are right. You have no problem recommending that a defendant or its insurer pay a reasonable settlement when liability and damages are real. However, it's your job as a lawyer to "kick the tires" on a claim. Just because an accident happened, the law doesn't necessarily hold someone else liable. Plaintiffs should not be allowed to exploit a little accident to fix their longstanding physical ailments.

Regarding liability

You agree with Harvest Plenty's common sense position that they are not liable for Jan Hapless' fall. It's not their fault when customers walk around in a fog or while reading labels, paying no attention to where they are going. Hapless clearly didn't notice the juice spill in the aisle, even though it was large and orange on a white floor. In answers to interrogatories, Hapless acknowledged hearing a commotion farther down the aisle that sounded like a mother angry at her child. On deposition, the mother and the other customer in the aisle testified that when the 5-year-old spilled the bottle of carrot juice, it was very loud. The child screamed and the mom shrieked. The other woman yelled "watch it" as the carrot juice splashed up on her skirt. Both women saw the spill on the floor and will testify that it was large, orange, and obvious. These witnesses estimated that Hapless slipped within the next minute or so.

Hapless was on the floor, writhing in pain and shouting, "My knee, my knee!" when a Harvest Plenty employee rushed over. Hapless testified on deposition that the employee apologized and said, "we should have cleaned this up." The two witnesses confirmed that a Harvest Plenty employee appeared very quickly. While they didn't remember his exact words, they agreed he said something along those lines. Neither Harvest Plenty nor, as far as you know, the plaintiff has been able to identify or find this employee. (He must have been temporary and perhaps undocumented; you are not going to think about that.)

If the case goes forward, you will file a Motion for Summary Judgment under Ohio's "Open and Obvious" doctrine, which protects property owners from liability for hazards that are "open and obvious." You will argue that undisputed factual circumstances of the aisle and

the carrot juice spill establish that it should have been obvious to a reasonable person taking ordinary care. Given Ohio courts' willingness to apply this doctrine on summary judgment in slip and fall cases, and the other customers' testimony that the carrot juice puddle was clearly visible, you believe there's a high chance of knocking this case out before trial.

You recognize that, in opposition to summary judgment, plaintiff's counsel will rest heavily on some additional facts. First, they may make much of the apology by the store employee and claim a factual dispute about the length of time the carrot juice was on the floor and whether the store could have cleaned it up. They may learn in discovery and then argue that the aisle had seen other spills within a few days of this accident. It's possible that the juice aisle was overstocked, making it easy for a juice bottle to fall when jostled. Also, the tofu display had just been added the week before and prominently featured recipe cards for attractive menu items. The store wanted customers to read these recipe cards while shopping.

On summary judgment and, if need be, in negotiations with plaintiff's counsel, you would argue that the time the juice was on the floor and any other spills or displays are irrelevant under the "Open and Obvious" doctrine. If it fits within the doctrine, it doesn't matter how long it had been there. Pothole cases or cases where storeowners put up orange cones around a spill are good examples. The question before the court is whether the undisputed facts – the witness testimony that the juice puddle was large and highly visible –support an "Open and Obvious" finding under Ohio case law. If so, it should be dismissed.

While your logic is impeccable, you recognize that excessive clutter or distracting displays, making it difficult to see from Jan's vantage point, or overstocking as a cause of the spill, may be factual chinks in the chain. That's where your risk comes in. Of course, if the case gets through summary judgment, Jan's appeal as a witness, the time delay, the overcrowded aisle, previous spills, and all the rest would go to a jury. You see the case as winnable there: a jury could find Jan was at fault and let Harvest Plenty off the hook; or they could find Jan partially responsible and reduce the verdict for contributory negligence.

Damages

It's undisputed that Jan is employed as a senior manager at an upscale pasta grille restaurant and has been for at least ten years. Jan's salary at the time of the fall was $60,000 per year or $5,000 per month.

It seems ridiculous for Harvest Plenty to cover anything but Jan's knee injury. You are highly skeptical about Jan's back injury claim. The doctor's ER notes just say, "may have twisted back in fall." It couldn't have bothered Jan much at the time because the doctors didn't order back scans or treatments. All the emergency room examinations, x-rays, and Jan's report of pain referred to the knee injury. That turned out to be a bad knee ligaments sprain, not a tear or a break. Jan was released from the emergency room and sent home with instructions to care for the knee. That healed in two weeks.

Having now seen Jan's full medical record and your private investigator's report, you believe Jan's back condition was pre-existing. Apparently, Jan played various sports in high school. Jan's older medical records contain a few reports of back pain, and episodic physical therapy to treat it while Jan was twenty to thirty years old. The investigator asked some questions at Jan's health club and suspects that Jan's back may have been stressed just before this incident. While you don't have specifics, one health club manager said Jan had "really been pumping iron" before the accident. If this case goes forward, you will authorize more investigation to see if Jan had been playing backyard football or other sports and sustained any injuries before the Harvest Plenty incident.

As a lawyer, you recognize that even if a pre-existing back condition were established (unless symptoms were active), the other side would invoke the "eggshell plaintiff" principle. "Taking the plaintiff as you find him" could make Harvest Plenty liable for the back injury as triggered by the fall, notwithstanding a pre-existing problem. Your response would be that tort law still requires proximate cause: Hapless bears the burden to prove that Harvest Plenty proximately caused the back injury and need for surgery. Here, your best evidence is that emergency room report describes Jan's knee injury and pain level in detail but barely references a back injury.

Even if you could swallow the back injury, you doubt missing four solid months of work – ten weeks post-surgery – was really necessary. Given that he doesn't wait tables or tend bar, couldn't Jan have sat in an ergonomic chair or walked and stretched every so often?

The inflated special damages, together with the malarkey in the complaint about lost earning potential and quality of life, confirm that this plaintiff is looking for a big payday and the lawyer is intentionally inflating the claim.

Case Assessment and Settlement Negotiations

All things considered: you estimate there to be 60% chance that this case will be dismissed on summary judgment, thus a 40% chance that Jan will get to trial. At that point, it would be a toss-up. A jury could still decide the spill was "open and obvious," find Jan at least 50% responsible and thus Harvest Plenty not liable. You also think it's highly possible a jury would find the fall caused only Jan's knee injury, nothing else.

While Jan is claiming $62,500 in "special damages," most of that relates to the back injury. If you break down the $42,500 in medical costs, only $2,500 was for the knee. ($1,500 for the ambulance and emergency room visit, $1,000 for subsequent treatment). Simple math tells you that lost wages attributable to the knee were only $2,500, because it healed in two weeks. Jan's medical insurance covered these costs. So, really, Jan's out-of-pocket damages from the knee injury were only $5,000.

You also know that neither Jan nor Jan's lawyer will entertain a settlement offer in the $5,000 range. While their $1million demand in the initial complaint was preposterous, you

know they would view a $5,000 offer as insulting and might cut off negotiations. Still, a reasonable settlement should reflect the uncertainty of recovery for a back injury, even if Harvest Plenty were found liable.

On the topic of monetary damages from the back injury: the full medical costs would come in at trial, and the collateral source rule would not allow in evidence of the insurance coverage. You do recognize that if Jan succeeds at trial, and no contributory negligence were assessed, there a realistic damages range for the knee and back injuries together would be $100,000 - $250,000, and $15,000 - $50,000 for the knee injury alone. That should be discounted because, even a jury found liability, a strong likelihood of their also finding Jan to have been approximately 33% contributorily negligent.

Fortunately, as a practical matter for settlement, Jan is not out-of-pocket for those medical costs. Jan's maximum real monetary losses were four months of lost wages - $20,000, and arguably, the $3,000 total for additional physical therapy and house cleaning. Even with the back injury, that's only $23,000. (You have no indication that Jan's medical insurer is aware of this lawsuit and seeking to enforce a subrogation right. If so, that would change the calculus.)

In sum, your strong chances on summary judgment, and the possibilities of a defense verdict, knee injury damages only, and contributory negligence should make this a nuisance value case - $5,000 or less. Experience tells you that's not realistic. Moreover, your client would spend at least $8,000 in attorneys' fees on some additional discovery and summary judgment briefing, and then an additional $35,000 on your fees and an expert witness by the end of a trial.

With all of this in mind, talk with the Total Insurance Representative about your case analysis and try to obtain what you believe to be reasonable settlement authority, even if that means some expansion of the reserve value put on the case.