

WORKER'S COMPENSATION CASE

The insurance issues in this case involved contractual liability and the calculations under a workers' compensation dividend plan. This case also illustrates the value of conferring with an expert early on to identify the arcane insurance issues so that counsel can devise the best case strategy.

A large manufacturer hired a catering company to supply food to its employees at the manufacturer's factory. The vendor positioned its canteen truck in such a way that the manufacturer's employees were exposed to traffic entering and leaving the plant. One of the employees was struck and seriously injured. The contract between the manufacturer and the vendor included an indemnity agreement in which the vendor would be liable for any injuries it caused.

The manufacturer had thousands of employees and it annually paid an eight-figure workers' compensation premium. The insurer's dividend plan called for the insurer to pay a dividend if losses were less than the premium. As workers' compensation claims may extend over many years, the dividend calculations were based on a ten-year period, effectively making the program the same as self-insurance or cost plus insurance. At the time of the employee's injury, the manufacturer was expecting a substantial dividend from the plan. The injured employee's claim affected the calculations and the manufacturer sued the vendor for the loss of the anticipated dividend.

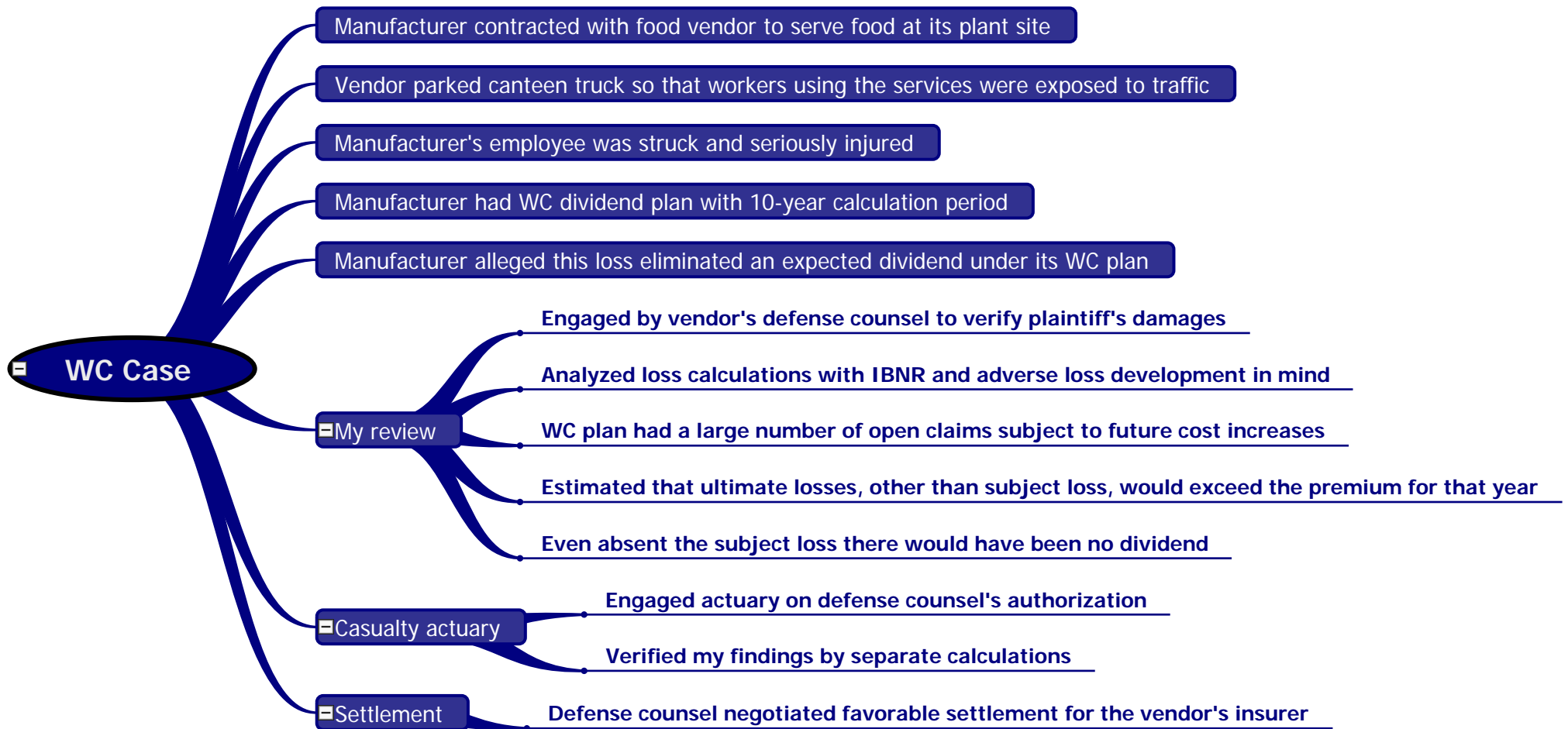
The litigation took place about six years after the accident in question, at which point the ultimate value of the injured employee's claim was expected to be \$1 million. I was engaged by the vendor's defense counsel to evaluate the plaintiff's damage allegations—the amount of the lost dividend. When I reviewed the dividend plan documents, the manufacturer's workers' compensation losses (payments and reserves), including the \$1 million claim in question, equaled about 80% of the premium.

In the insurance industry, claims are reserved for expected future payments. Claims adjuster reserve individual cases, whereas actuaries analyze entire claims portfolios. In doing so, actuaries take into account Incurred But Not Reported losses, termed as IBNR, as well as the phenomenon known as adverse development — that the cost to settle claims increase the longer that they remain open. Within the manufacturer's loss portfolio there were still a large number of open claims with significant reserves, to which adverse development would apply. By my own calculations, the ultimate losses for that accident year would exceed the premium by more than \$1 million. Even if this loss had not occurred, the manufacturer had so many other losses that the insurer would not pay a dividend for that year.

As I am not an actuary and could not testify to my calculations, and the deadline for filing of experts had passed, I obtained authorization from the vendor's counsel to engage a casualty actuary. The actuary's report validated

my findings and a settlement favorable for the vendor was reached in short order.

The map associated with this case is an outline depicting certain aspects of the case and is not intended as a complete description of the facts or of my testimony.



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