



## Best's Insurance Law Podcast

### When Every Second Counts: Managing Catastrophic Claims - Episode #209

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**Guest Attorneys:** Jack Delany and Kristen Worley of

**Marshall Dennehey**

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**John Czuba:** Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Insurance Professional Resources*. We're pleased to have with us today attorneys John "Jack" Delany and Kristen Worley from the Marshall Dennehey law firm.

Jack Delany chairs the catastrophic claims litigation practice group at Marshall Dennehey, which is one of the country's largest law firms devoted to civil defense litigation. Residing in the firm's Philadelphia headquarters office, Jack defends catastrophic high profile, high exposure cases against some of the country's most formidable plaintiffs' firms.

He has taken to conclusion more than 60 jury trials, as well as hundreds of bench trials, arbitrations, and mediations. He and his team represent clients and litigation involving fire and explosion claims, sexual assaults, negligent security, and hospitality in dram shop plaintiffs.

Jack also handles specialty high risk claims in the areas of amusements, entertainment, recreational sports, and specialty events.

Kristen Worley co chairs Marshall Dennehey's catastrophic claims litigation practice group. Kristen has 22 years of litigation and trial experience and works closely with Jack in defending the group's clients. Kristen has vast experience in the areas of product liability, premises liability, commercial motor vehicle, and more.

Her results-oriented approach and case management methodology is appreciated by clients facing complex legal challenges. She has tried cases to verdict in Pennsylvania, New Jersey, and New York, and resolved hundreds of cases throughout her career through arbitration and private mediation.

Kristen routinely defends high exposure matters in her practice and is well versed in the type of rapid response required to immediately protect their clients' interests when catastrophic events occur.

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Today's topic is Managing Catastrophic Claims and Making Every Second Count in the process. For our first question, Jack, we'll start with you. What does a strategic rapid response entail from an attorney's perspective when confronted with a catastrophic event?

**Jack Delany:** John, that's an excellent question. I'm fortunate that I could draw from my 35 plus years of experience dealing with every kind of catastrophe you could mention whether it's a power plant explosion, a chocolate plant explosion, a major fire in a residential building, a building collapse, or a big fire in London.

I've been able to draw from that experience and use it to come up with a strategic response plan for the benefit of our clients. What we do, the bottom line, is we are there to protect our clients' best interests.

Basically, you need to make sure that you are not myopic, and that means you understand your client's best interest is their ability to protect their reputation and goodwill, and their ability to be an ongoing viable business. This encompasses the client's relationships with their vendors, their employees, their community, and their ability to move forward from a catastrophic event.

That's a difficult task because you have to realize that if there's a catastrophic event, unfortunately, a lot of times there has been a mass loss of life or people who have been seriously injured. You need to make sure that your client responds in a very sensitive way that doesn't inflame the potential jurors out there or inflame an adverse governmental response.

You need to make sure that you assure the public, your co workers, your clients, your business, and the community at large, that you are investigating the issue and you're going to find out what happened and make sure that nothing like this happens again. The way that we make sure that the client's legal interests are protected is we have a checklist of what we go through.

The very first thing is being prepared to respond to these events, and we have our team, our technology, our policies and our procedures in place to protect our client's best interests. We approach these situations a little bit different than most firms. When I say our team, we literally have a team of experts, a team of different types of attorneys.

When we respond to an event, we'll go to the site and make sure that we do everything, that we preserve all critical and appropriate evidence, not just at the site, but also outside of the site. Whether it's social media or a blood test result within a coroner's reports, we do an expanded search to preserve the evidence.

We also, at the same time, advise our clients to place litigation holds to make sure that they don't destroy any key evidence that may create an issue in the future, spoliation or things of that nature. That's one of the things that we're doing right away.

When I say that we have specialty attorneys, a lot of times, these events also have a layer of potential criminal culpability. They have administrative issues. They have insurance coverage issues. They have ongoing business disputes and their ability to operate. We make sure that there's not just me there or my team there, but they're addressing all those other legal needs as well.

Then we make sure that when we preserve the evidence, we do so in such a way that what we are now doing, it's called visual persuasion. Because, in essence, a trial attorney is a storyteller.

What happens out there at that site is the potential content that you will have for a future story that you're going to tell the public, but more importantly, the jury that you're going to talk to, eventually. You are developing content for that story as this catastrophe unfolds. You have to think ahead, think this thing to the end.

What is the ultimate story and theme that I want to tell? Then we go through the checklist and make sure that we send out notices to all potentially culpable parties, that an incident has taken place and they should put their carriers and key people on notice that there's going to be a site visit and investigation.

That's key because I'm always dealing with the tug-of-war that a business wants to get back up and running versus my ability to give all potentially culpable parties an opportunity to view the evidence and take a look at everything before that evidence goes away. The reality is that a lot of times, you're there and the evidence only lasts for an hour or two, or a day or three days, and then it's forever gone.

Timing is the key, and that's why we say every second counts. After that, we want to make sure that our client tenders to all their potential insurance carriers, their primary, their excess, etc., but they need to expand the scope.

Are they the beneficiaries of any additional insurance? Should they be tendering to anyone else? Should they be tendering to anyone on a contractual defense and indemnity basis? They need to make sure that they do that as well. Then we do a deep investigation in the surrounding areas.

There's so many contraptions out there where things get recorded, and there's amazing cases where you've been able to do this. I'll give you an example. In Philadelphia, we had the 2013 Salvation Army building collapse. Before joining Marshall Dennehey I ran my own law firm and we were one of the firms that was involved in taking a look at the bus videos that actually showed the collapse.

We were also the firm that discovered that there were contractors across the street that actually saw the beginning of the collapse, as well as different people who walked by on a daily basis – their testimony showed that the collapse of the building was in process. It wasn't a singular day event, but it was a building that was slowly collapsing.

We really do a deep dive and make sure that we have all the content that we need to ultimately tell our story. The other thing that we do, that a lot of other firms don't do, is we do a deep dive on an early case assessment.

What is the potential liability in this case? Who are the witnesses that we're going to rely upon? Are there documents that we have to worry about? What we do is we team up with a jury consultant, somebody who's a courtroom psychologist. They assess this, and we make an early assessment because every case eventually resolves or goes to trial.

The question is, do you resolve it early on? Can you resolve it in a piecemeal fashion? Can you resolve it in a global fashion, or is this something that you're going to have to go through years of litigation before that resolution settlement point arises? We make sure that we do that as well.

Then there is the basic framework that we use. We actually set up a safe room. A safe room is a document repository as well as a place where people can collaborate with each other in a timely manner as the situation unfolds, and that is key.

What we draw upon is basically different programs that the defense department uses, different Adobe programs, that there can be timely collaboration with key evidence, etc.

As we're doing that, we make sure that we are protecting our attorney client privilege and our work product. That becomes difficult when sometimes, in these situations, just to give you an example, the site gets taken over by a governmental agency.

For instance, looking at cases we've handled, in the West Reading chocolate plant explosion, the National Transportation Safety Board took over the site. They control the site, they control the information, and it becomes a lot more complicated. With the grain mill explosion, it's the Chemical Safety Board. When it was the Surfside building collapse in Florida, it was the National Institute of Standards and Technology (NIST).

You need to make sure that you have a plan to deal with those agencies to gather the evidence that you need and move forward.

Ultimately, you need to send a message to the public that you're looking at this, you are sorry that this happened, that you are sensitive to all those issues, those emotionally charged issues, but the bottom line when it comes down to everything, is you're there to protect your client's best interests. That's what a strategic rapid response plan addresses.

**John:** Jack, after a catastrophic event happens, are there ways to avoid litigation in judicial hellholes?

**Jack:** It's tough. It's real tough, and it's an area that is really of concern. Just this week, I got a jury verdict, and I was trying the case in Philadelphia for about a week and a half, almost two weeks. While I was in the courthouse in downtown Philly, which is considered one of the top judicial hellholes, there were three mega nuclear verdicts.

One was for \$10.6 million, where the defendant offered \$50,000, another one was for \$175 million, and then the other one was for one billion dollars. As those verdicts came in, I was sitting in the courtroom and my jury was out deliberating my case, and I was scared to death. I didn't want to be the next mega nuclear verdict.

Fortunately, the case came back favorably for my client. We were happy with the result, but ultimately, we would rather have had this case outside of Philadelphia. To get it outside of Philadelphia the first thing you want to take a look at is whether there is any way to remove it to federal court.

Typically, there's not. You need to have complete diversity, or you need to have a federal question. The second way is evaluating whether Philadelphia, in and of itself, is an improper venue for jurisdiction and whether they have jurisdiction over your client.

The problem here is that a lot of times, plaintiffs' attorneys will join different defendants just to make sure that they get the case in Philadelphia, because the way the law is, even if your client doesn't have enough contacts or good enough business in Philadelphia, as long as one defendant has sufficient contacts to Philadelphia, Philadelphia becomes an appropriate jurisdiction.

The next strategy is a concept called foreign non convenience. That seeks to show that another jurisdiction is more appropriate in another venue. We're going through that right now in multiple cases, trying to get cases out of Philadelphia. The key here is to build a record, go out, get affidavits early on.

When an incident happens, we don't wait for a lawsuit to get filed. We act in a proactive fashion and make sure that we start to gather affidavits that would support a record of why this case should be litigated in a different venue, a different county, outside of Philadelphia. The three I just mentioned are the three main ones that you want to concentrate on.

The other one is a little bit novel and a little bit tricky. There's a rule in Pennsylvania called coordinated jurisdiction. Under coordinated jurisdiction, basically, if there is a lawsuit that's filed first in a different county, as long as the cases are similar and have similar interests, that county will dictate that other cases should be transferred to that county.

That's very, very difficult to do. In 37 years, I've only had one case where that has been successful. Unfortunately, a lot of times, if you do business in Philadelphia or have contacts with Philadelphia, you're going to be subjected to the jurisdiction.

Even if you don't, if one of the defendants that is going to be joined to the case has business in Philadelphia, you'll be joined there as well. It's something that needs to be analyzed right away, and a strategy developed right away.

**John:** Jack, catastrophic events can often have a criminal element and governmental response. How do you handle that?

**Jack:** You know what? I'm going through a perfect example. On July 5th this year in Philadelphia, I was going to start a trial on a case that originated in Wisconsin, and it involved a grain mill explosion. Of course, the plaintiffs filed one of those cases in Philadelphia. We got involved in the case later on.

Because it was going to trial, and this happens to us a lot, we got parachuted into an emotionally charged high exposure case at the last second. We were asked to try the case.

One of the first things we did was file a motion to stay because there was a criminal proceeding. Seven people were indicted out in Wisconsin related to this grain mill explosion. We asked the court to stay the case in Philadelphia because none of those people would talk to us because they were worried about the Fifth Amendment.

Also, the government out in Wisconsin had a protective order, so key evidence was maintained and controlled by the Department of Justice. That evidence obviously would have been extremely critical and important to our case and would have adversely affected our ability to handle the case.

A lot of times, we will retain criminal counsel for guidance in those types of situations, but a lot of times, we will also work with criminal counsel in representing the same client.

For example, I represented Sean Benschoop, the crane operator in the Philadelphia Salvation Army building collapse case. He was criminally charged. I worked with his criminal attorney in making sure that we did not adversely affect his ability to defend himself in a criminal case and vice versa.

In these types of cases, as I said earlier, we work with OSHA counsel or special NTSB counsel when the investigations may result in criminal sanctions, penalties, etc. that the Justice Department may utilize in your case. It's key.

If you think there's potential criminal liability or administrative findings of fact and penalties and sanctions, you get attorneys involved who specialize in that area. That's exactly what we do because what happens in those other forums may potentially have adverse impact in your civil litigation. We're very cognizant of that, and we work as a team.

It takes a lot of finesse, sophistication and experience to work in those types of environments. Luckily, we have a network of criminal attorneys as well as special administrative law attorneys who deal with these catastrophic events and we know how to work together and make sure that we're protecting all of our clients' interests.

**John:** Jack, thanks so much for the thoughtful and informative feedback on this topic today.

Kristen, we're going to turn it over to you now. What role does public relations, the media and press, play in a catastrophic response? Can the negative press taint the potential jury pool?

**Kristen Worley:** Good morning, John. The press really has taken on an immediacy recently. The immediacy of that gives us an advantage really in looking at the facts of the case, seeing how people commit to a narrative of an event early on. It gives us an ability really to engage in lines of investigation that otherwise we would not have.

The press is important. We look at it. We monitor it. Many times, it is our first notice that there has been an event. We take that and when we receive an assignment, we take that information, and we utilize it. We hire experts who we believe will best serve the client's interests.

From that, we believe that we can get an advantage for our clients by continuing to monitor it. One of the things that we do know, however, is that, particularly in the early days of an incident, the press is not necessarily going to be favorable to your client. We encourage our clients really to think long term in terms of wanting to respond to anything that's put out into the media.

We really need to focus on defense strategies and orient our clients to thinking long range. We want them, when they are cobbling together a response to something that might not be favorable to them and to the press, to think who are we targeting in terms of a response?

We want to make sure that anything that our clients say is responsive to the timing within which the statement might be proffered, that it's being offered in a way that's sensitive to everyone that is going to receive it, and we want to make sure that anything that's being put out into the public, on behalf of the client, is not something that could ultimately be weaponized, really, against the client.



We want to make sure that we are exceedingly thoughtful in terms of when we utilize the press and when the clients utilize the press.

One of the things that we are potentially mindful of is whether or not the press can taint a jury pool. Jack had mentioned that we obtain jury consultants, and those consultants are constantly monitoring how news articles influence jurors' attitudes.

That's particularly important because the press is really the first one that's putting out a narrative for any given event, and our jury consultants look at how those narratives are received by jurors. What we then do with that information should we hit the trial phase of any given case, we take that information, and we utilize it to our client's best interests.

Our goal is to make sure that we are getting them an unbiased jury who has not had the receipt of any information that we believe would ultimately have them come into a trial biased against our client's interests and not open to receiving the information and the defenses that we are going to put together for them.

**John:** Kristen, do you start analyzing potential exposure to your client when responding to a catastrophic event?

**Kristen:** Our exposure starts immediately. It is really, John, an ongoing analysis that we engage in. When we are called out to a site, as Jack said, we have a team of experts that we go with. It is a dialogue that we are constantly having.

We have experts in so many different disciplines at the ready, depending upon the catastrophic event that comes to us. We have these men and women who are ready to assist us in evaluating the evidence. As Jack mentioned, sometimes we do not have full access to all of the evidence when events occur.

We have situations where, as Jack mentioned, different government bodies come in and take control of sites, take control of evidence. It's not a situation necessarily across the board that we have immediate access to all of the evidence all at the beginning. We do everything that we can to evaluate the information that we have.

We re evaluate it every time new information comes in. It is a situation that is really an ongoing dialogue between us, between the experts, between the clients.

We want to make sure that we have everyone who has critical information at the table so that we can, at every pass, advise the client what their exposure is going to be. It is exceedingly important that we have everyone's input into that. It is a multidisciplinary evaluation that we perform.

**John:** I'm sure it can be a very delicate situation at times. How do you balance human loss, suffering, death and destruction with your obligation to protect your client?

**Kristen:** Jack and I lean into that, really. It's one of those things where, as Jack mentioned, the response from your client always has to be sensitive, and we are exceedingly mindful of that. We look at how jurors will receive information. The press is a perfect example. They will likely generate the first narrative that a potential juror will hear about an event.



These catastrophic events necessarily engender significant human suffering, loss of life, loss of property damage. All of these things come with very in-depth emotional responses from people, and deservedly so. We, as lawyers, want to know how it is that prospective jurors are going to lean into those types of emotions.

We look at that. We try and gauge what those anticipated emotional responses are going to be, and then figure out what the best way is to acknowledge them because they are deserving of being acknowledged.

Then we assess how best to get past those emotional responses, to defuse them, and then get these jurors to a place where they are open to receiving the defenses that we are going to put forth for our clients.

From our perspective, you have to acknowledge what those emotional responses are going to be if you are to best serve your client's interests. They need us to do that because the jurors are only human, and they will have human responses to these events just like everyone does. You have to, in order to adequately protect your client's interests, understand that and then be prepared to defuse it.

**John:** Jack and Kristen, thanks so much for joining us today.

**Jack:** Thank you.

**Kristen:** Thank you.

**John:** You've just listened to John "Jack" Delany and Kristen Worley from the law firm Marshall Dennehey. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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