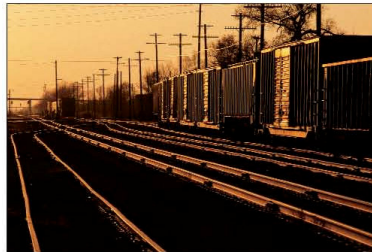


*The Harmonie Group & Canadian Litigation Counsel
present a joint*



Trucking and Transportation Industry Seminar

Wednesday, June 28, 2006

Seminar 1:30 PM • Reception 5:00 PM

Springdale, Arkansas • Holiday Inn • 1500 South 48th Street • Springdale, AR 72762 • (479) 751-8300

Please visit The Harmonie Group website to view our 24 Hour Emergency/Accident Response Directory and the Transportation and Truck Products Liability Directory, where all firms listed provide Transportation/Accident Response.

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Northwest Arkansas Transportation Seminar Agenda

- Welcome Desk: Skip Henry of Barber, McCaskill, Jones & Hale, P.A. - Little Rock, AR
Rob Laney of Ryan, Ryan, Johnson & Deluca, LLP - Stamford, CT
- 1:30 p.m. Welcome to Arkansas: Harvey Mensch, Tim Violet, Manny Sanchez
- 1:35 p.m. Introduction of all participants: Tim Violet
- 1:40 p.m. Introduction to CLC: David Pick
- 1:43 p.m. Introduction to Harmonie: Tim Violet
- 1:45 p.m. Transportation Committee Chair: Mike Harman
- 1:45 p.m. Creative Case Solutions and Techniques: Mike Harman
- 1:45 p.m. *Creative Claims Handling-Mediation Methods* by Al De La Cruz of Manning & Marder, Kass, Ellrod & Ramirez LLP - Los Angeles and San Diego, CA
- 1:55 p.m. *High/low arbitration (ADR)* by Rob Griffin of Cranfill, Sumner & Hartzog, L.L.P. - Raleigh, NC
- 2:05 p.m. *Creative Investigation and Case Management Techniques* by Juli Blanch of Snow Christensen & Martineau - Salt Lake City, UT and Donna Burden of Hurwitz & Fine - Buffalo, NY
- 2:20 p.m. *Courtroom Technologies* by Keith Harris of Braff, Harris & Sukoneck - Livingston, NJ
- 2:30 p.m. *Diversity in Harmonie* by Alice Spitz of Molod Spitz & DeSantis - New York, NY
- 2:40 p.m. *Prevention/Risk Control* by Ken Abbarno of Reminger & Reminger - Cleveland, OH
- 2:50 p.m. Break
- 3:05 p.m. Updates: Manny Sanchez
- 3:05 p.m. *Cross Border Service Issues and the Hague Convention* by David Pick of Brownlee - Calgary, Alberta, Canada
- 3:10 p.m. *Punitive Damages* by George Stewart of Zimmer Kunz, PLLC - Pittsburgh, PA and WV
- 3:20 p.m. *Cargo Handling/Limitation of Damages* by Melanie Margolin of Locke Reynolds LLP - Indianapolis, IN

- 3:30 p.m. *Hiring the Local Adjuster/Investigator-Attorney Client Privilege* by Jeromy D. Hughes of Brown Sims - Houston, TX
- 3:40 p.m. *New US Legislation on Owners/Lessors/Lesseees and Vicarious Liability* by Tom Downey of Burnham Brown - Oakland, CA
- 3:50 p.m. *Choice of Jurisdictions* by Hall McKinley of Drew, Eckl & Farnham, LLP - Atlanta, GA
- 4:00 p.m. *Imputed Liability and Driver's Scope of Employment* by Bob James of Best & Sharp - Tulsa, OK
- 4:10 p.m. *Indicators for Predicting Truck Crash Involvement* by Trystan Smith of Snow Christensen & Martineau - Salt Lake City, UT
- 4:20 p.m. *Seatbelt Laws and the Impact on your Case* by Art Spratlin of Butler, Snow, O'Mara, Stevens & Cannada, PLLC - Jackson, MS
- 4:30 p.m. *Incident Investigation, Root Cause, and Corrective Action Report* by Dan Webb of Sutterfield & Webb, L.L.C. - New Orleans, LA
- 4:40 p.m. Wrap up and Q&A: Manny Sanchez and Mike Harman
- 5:00 p.m. Reception, cocktails, and hors d'oeuvres

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Creative Claims Handling-Mediation Methods

I. Mediate Sooner v. Later: Pre- Suit or immediately after suit is filed

1. Helps with the concept of “we are sorry.”
2. Claims rarely get better with time.
3. Opportunity to see the plaintiff – Significant to evaluation of claim
4. Requires flexibility as to settlement authority.

II. Settlement Conference: “a mediation without a mediator”

1. Get to see plaintiff
2. Have the focus and attention of parties to resolve claim
3. helps with “we are sorry” concept
4. Avoids the risk of a bad mediator who “over-evaluates” claim

III. Group Settlements

1. Meetings with firms which have numerous cases
2. Regional meeting with notice to claimants and/or plaintiff’s attorneys to meet and attempt resolution.

IV. Depose the plaintiff at the beginning of mediation

1. Save later expense if mediation fails
2. Have mediator present to observe and learn the case.

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High-Low Arbitration

Hi-Lo arbitration is a settlement device that should interest both parties in a case because it minimizes the risk of each and represents a termination of the cases. There is no appeal from a Hi-Lo disposition. The parties can agree on a forum where both can obtain a prompt, inexpensive disposition.

The concept of Hi-Lo disposition can be used in a variety of cases and in almost any forum the parties choose to use. The forums available are:

1. American Arbitration Association or some equivalent forum and utilizing either a one or three-person tribunal.
2. A single arbitrator selected by the parties or some tribunal association.
3. A trial of the issues in open court.

The concept is the parties will agree on a high and a low amount. The low of course being the guarantee to the Plaintiff of a specific sum of money. The high being the outside number the carrier would be responsible to pay in the event of an adverse decision of even a higher sum.

The methodology used is that the parties agree on what the high and what the low would be. From that point, if the case is in court, the high and the low could depend on the percentage of liability assessed or it could be absolute depending on the negligence of the parties. It may even be applied when there are cross-claims or third party defendants.

If the matter is not in court, or the parties choose to arbitrate as opposed to a court trial, the forum may be as outlined above and the parties may agree on what witnesses will be used. Generally, documents are used for some parts. It is a very flexible tool.

Whether the liability issues are in question, or the damages are in question, it is equally effective. Carrier history has shown that the mere introduction of the concept of Hi-Lo arbitration and the initial discussion of

the areas involved leads to a significant number of settlements. This has been a tangential benefit of the introduction of the concept.

The areas where it might not be used would be where court approval is required for any agreement, e.g. an infant or a death case. In these instances, court approval to a Hi-Lo arbitration would be required in advance.

Speed is one of the significant advantages for Hi-Lo arbitration. It gives the Plaintiff the settlement within a reasonably short period of time and gives the carrier the opportunity to close a case and not incur both the claim and legal costs for a protracted period of time.

The Hi-Lo concept can be applied as soon as the medical aspects of the case have been reasonably determined.

When the Hi-Lo is chosen and the numbers are finalized, they are never communicated to the arbitrator or to anyone other than the parties involved. This is an essential element of the Hi-Lo concept.

Hi-Lo is thus a very flexible tool, but it is not a technique that is instantly popular; it meets reluctance because it is strange and different.

The questionable liability, but severe injury case, is perhaps where Hi-Lo would be the most attractive to both sides.

The costs of Hi-Lo are low. If the litigants use AAA, the applicant pays a small fee. Most AAA cases are heard in 60 to 90 days and the award is due within 30 days thereafter.

One recurring misunderstanding in a Hi-Lo agreement is that the claimant's attorney often thinks the respondent is going to admit liability by agreeing to a Hi-Lo arbitration.

Claimants are more likely to agree on a range if the Low is high enough to be attractive to the claimant even if they lost the case. But the Low should always be lower than the figure that the defendant was willing to pay to settle the claims now.

If the injury is one that might produce an out-size verdict, the defendant can trade up the Low in return for claimant trading down the High.

Confirming the proposal in writing is a must.

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Strategies for Handling a Catastrophic Injury Case When Your Driver is Completely at Fault

- A. Immediate Considerations**
 - 1. Be sure driver does not speak to media
 - 2. Retain counsel for driver on traffic or criminal charges when appropriate

- B. Confirm Liability**
 - 1. Retain accident re-constructionist (through counsel to protect privilege)
 - 2. Retain investigator (through counsel to protect privilege)
 - 3. Obtain police reports, scene and vehicle photos, vehicle inspection reports and accident investigation and reconstruction reports of authorities
 - 4. Consider fault of potential claimants
 - 5. Find witnesses to verify no conscious pain and suffering if immediate fatality

- C. Immediately Assess Potential Damages**
 - 1. Update potential exposure evaluation as often as you can
 - 2. Understand media reports are often inaccurate
 - 3. Consider jurisdiction where an action is likely to be commenced
 - 4. Attend DMV hearing if scheduled
 - 5. Put excess carrier on notice

- D. Contact Claimants Directly or Through Their Representative or Counsel**
 - 1. Sincere apology on behalf of company and driver
 - 2. Do not allow your driver to contact or communicate with them directly
 - 3. Concede liability and express willingness to settle when they are ready
 - 4. Offer assistance – financial or other
 - a. Advance on settlement
 - b. Child care

- c. Home modifications
- d. Uncovered medical expenses

E. Move Case Toward Early Settlement

- 1. Cases rarely get better with age
- 2. Do due diligence in background of claimants
- 3. Request pre-suit voluntary authorizations to obtain medical, hospital, employment, no-fault, and other records
- 4. Suggest pre-action mediation
 - a. Have company representative present to offer sincere apology directly to claimants and family
 - b. Do not bear complete expense of mediation - claimants will have more of a vested interest in the outcome when they share expense

F. Other Considerations

- 1. Effect of negative publicity
- 2. Long term defense costs
- 3. Strive for settlement at mediation or before commencement of action but always be ready to defend case at trial if necessary
- 4. Not every case should be handled aggressively

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Technology in the Courtroom

This presentation relates to the case of Bastek v. Sealand, Maersk and Bay Container, Inc. and others tried in New Jersey in 2004. The case involved a rear-end collision between a Chevrolet Suburban and a tractor-trailer which rear-ended it on Route 17 in Paramus, New Jersey. The driver of the tractor-trailer alleged that his chassis brakes were out of adjustment at the time of the crash. We represented a sub-contractor for Sealand who maintained chassis, and who provided roadability inspections to chassis prior to their leaving the port.

The crash resulted in the death of Dr. Bastek, the operator of the Chevrolet Suburban together with the death of his mother-in-law who literally bled to death at the crash site as her body rested on that of her daughter, who herself sustained a C1 fracture. Dr. Bastek's two children witnessed the death of their father and grandmother from the accident. The presentation will present our opening statements on behalf of Bay Container and the use of technology in the opening remarks in an effort to visually persuade the Jury of the arguments we intended to make at trial.

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Prevention

I. Equipment

- A. Owned V. Leased Equipment
- B. Proper Maintenance Programs
- C. Importance Of Record Retention

II. New Technologies

- A. Global Positioning Systems (Gps)
- B. Event Data Recorders (Edr)
- C. Retrieving And Maintaining Data, Post-Accident

III. Personnel

- A. Preventing Negligent Hiring, Entrustment And Supervision Claims
- B. Regulatory Compliance
- C. Operations V. Compliance
- D. Good Drivers

IV. Preventing Claims From Getting Worse

- A. "On Scene" Response
- B. Surveillance

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**Issues In Cross-Border Service:
The *Hague Convention* and American Long-Arm Statutes**

With Canadian trucks traveling into the United States on a daily basis, cross-border litigation is increasingly commonplace. As a result, the manner in which service of pleadings is effected on Canadian transport companies and their employees by American plaintiffs is often at issue in such litigation. While both Canadian and American jurisdictions have internal rules regarding service *ex juris*, the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters* (the “*Hague Convention*”) also plays an important role.

The *Hague Convention*

The *Hague Convention* only applies as between its 52 signatories, which include both Canada and the United States. Although the *Hague Convention* does not deal with substantive issues relating to service, it sets out the means by which judicial documents are to be transmitted abroad in order to be served. The *Hague Convention* has three main objectives in this regard:

1. To simplify the method of transmission of documents to be served from the country of origin to the country of destination;
2. To establish a system which ensures, in so far as is possible, that a defendant is given actual notice of the document served in sufficient time to enable the defendant to arrange for a defense; and
3. To assist in proving that service was validly effected in the country of destination, by means of standard form certificates.
- 4.

In large part, the *Hague Convention* standardizes service by requiring signatory states to identify “Authorities” and “Central Authorities” for the purposes of service. In Canada, the Central Authority is the United Nations Criminal and Treaty Law Division in Ottawa. However, each province and territory also has its own Authority which may effect service. For example, the Authorities in Alberta and Ontario are the Sheriff – Civil Enforcement Agency and the Ministry of the Attorney General, respectively. The American Central Authority remains the U.S. Department of Justice, although it has contracted a private process server company, Process Forwarding International, to assume its duties under the *Hague Convention*.

The principal method of service is set out in Article 3 of the *Hague Convention*, which requires the Authority of the originating country to contact the Central Authority of the country of destination by submitting the prescribed form along with two copies of the documents to be served. The country of destination then either serves the document or arranges for its service, and completes a certificate of service which is forwarded to the originating country. Alternate methods of service are provided for in Article 10, and include service through consular or diplomatic channels, the post (including private courier), as well as judicial officers or officials.

Regardless of the method of transmission selected, the *Hague Convention* contains two provisions, Articles 15 and 16, which operate to protect defendants' interests such as where a default judgment has been rendered. Article 15 provides that where a defendant has not

1. The document was served by a method prescribed by the internal law of the country of destination for the service of documents in domestic actions upon persons who are within its territory, or
2. The document was actually delivered to the defendant or to the defendant's residence by another method provided for in the *Hague Convention*.

In either of these cases, the service or delivery must be effected in sufficient time to enable the defendant to defend.

Notwithstanding (1) and (2) above, Article 15 further provides that default judgment may nonetheless be granted (even if no certificate of service or delivery has been received) if all of the following conditions are fulfilled:

1. The document was transmitted by one of the methods provided for in the *Hague Convention*;
2. A period of time considered adequate by the judge in the particular case (but not less than 6 months) has elapsed since the date of transmission of the document; and
3. No certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the country of destination.

Where a judgment or default judgment has been entered against a defendant who has not appeared, Article 16 gives the Court the power to waive expiry of the appeal period if the following conditions are fulfilled:

1. The defendant, without any fault on its part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and
2. The defendant disclosed a *prima facie* defense to the action on the merits.

However, relief under Article 16 may only be granted within a reasonable time after the defendant receives knowledge of the judgment.

When the Party Effecting Service is Canadian

Generally speaking, when all parties to an action reside in the same province (for example, Alberta or Ontario), service of pleadings is effected by the plaintiff on the defendant according to that province's procedural rules (such as the *Alberta Rules of Court* and the *Ontario Rules of Civil Procedure*). When one or more of the defendants are located outside of Alberta or Ontario but nonetheless within Canada, the plaintiff must continue to comply with its own provincial legislation (not that of the defendant) which addresses service *ex juris* in order to serve pleadings within another Canadian jurisdiction. However, when the defendant does not

reside in Canada at all, then the service requirements of the *Hague Convention* apply in addition to the plaintiff's provincial rules governing service.

When the Party Effecting Service is American

Similarly, when an American plaintiff is required to serve pleadings on a Canadian defendant, the plaintiff must comply with both its U.S. state's rules regarding service *ex juris* as well as the *Hague Convention*. In the United States, legislation addressing service *ex juris* is referred to as a "long-arm statute".

Insufficient Service Pursuant to the *Hague Convention*: A Potential Defense Tool

Because compliance with both the applicable U.S. long-arm statute and the *Hague Convention* is required when an American plaintiff serves pleadings upon a Canadian defendant, if the American plaintiff has complied only with its applicable long-arm statute, the Canadian defendant may bring a motion to dismiss the claim against it on the basis that there was improper service under the *Hague Convention*. However, this application should be made at the earliest opportunity, before any briefs or other documents are submitted by the defendant in relation to the action, given the recent U.S. District Court of Delaware's decision of *M & L of Delaware v. Wallace*, [2004] WL 2370708. In this case, the Court acknowledged that the American plaintiff's service on the Canadian defendant was insufficient under the *Hague Convention*, but nevertheless dismissed the defendant's motion to dismiss the action and instead gave the plaintiff additional time to properly effect service. The Court held that because the defendant was aware of the litigation and had previously submitted briefs to the Court, the defendant was not unduly prejudiced by the improper service. In essence, the Canadian defendant had attorned to service.

Conclusion

While the procedural and substantive requirements of service are important in initiating any litigation, proper service is particularly important when the plaintiffs and defendants are from different national jurisdictions. As such, when a Canadian corporation or individual intends to initiate or defend litigation involving a party from outside Canada, whether the United States or any other signatory to the *Hague Convention*, it is prudent to determine whether service has been effected in accordance with the requirements of the plaintiff's jurisdiction (assuming it is the *forum conveniens* for the purposes of the lawsuit) as well as the *Hague Convention*. In the event service is not properly effected, the defendant may apply to dismiss the action on this basis. While in many instances the plaintiff may simply re-serve the necessary pleadings, in some circumstances the plaintiff may discover that the action has become barred entirely by the applicable limitation period. As a result, service of pleadings is of paramount importance in the conduct of any litigation, but particularly so when an action involves parties internationally.

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The Path to Punitive/Putative Damages

I. Corporate Misconduct/Negligence

- A. Negligent Hiring and Retention
 - 1. Monitoring
 - 2. Inconsistent enforcement of corporate policies
 - 3. Annual reviews

- B. Safety vs. Operations
 - 1. Where is dispatch?
 - * physically
 - ** on the corporate organization chart
 - 2. Is the Risk Manager the Safety Director?
 - 3. Inside vs. outside log auditors: improper or inadequate scrutiny of daily logs
 - 4. Illegal routing/lanes of dispatch with inadequate driving or delivery windows
 - 5. Just-in-time delivery/shipping

- C. DOT Audits: Why are They Knocking on my Door Again?
 - 1. Compliance reviews
 - 2. Safetstat/safety ratings
 - 3. Accident ratings
 - 4. FOIA requests
 - 5. Repeat DOT audits

II. Driver Fatigue: Where the Real Money Is!

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate . . . 49 C.F.R. Section 392.3.

- A. Hours of Service Regulations
 - 1. Log book retention:
 - ii. DOT/FMCSR Requirements
 - iii. Counsel notice of representation: demand for retention
 - iv. Spoliation
 - 2. Qualcomm
 - 3. Log book falsification
 - 4. Fuel receipts/toll receipts
 - 5. Comdata
- B. Causal Link
 - 1. Company newsletter
 - 2. Safety manual
 - 3. ECM data
 - 4. Cumulative fatigue and notions
- C. Dispatching Method
 - 1. Forced dispatch
 - 2. Qualcomm features
- D. Plaintiff's Multi-Discipline Team of Experts
 - 1. Sleep/circadian expert
 - 2. DOT/FMCSR expert
 - 3. ECM interpretation expert
 - 4. Accident reconstruction expert
 - 5. Why Plaintiff doesn't seem to care what the accident witnesses say?
- E. Motions in Limine

III. Punitive/Putative Damages

- A. Punitive Damage Claims Against Trucking Company

Independent actions arise against trucking companies for negligent hiring, negligent retention, negligent entrustment, the deliberate use of unsafe equipment, and allowing a truck driver to drive while fatigued represent theories of liability which have been held to justify an award of punitive damages against the employer.

Punitive damage awards have also been held against trucking companies on a theory of vicarious liability. The doctrine of respondeat superior has been utilized to establish a company's obligation to pay punitive damages upon proof of a truck driver's gross negligence or willful and wanton misconduct. See illustrative cases set forth in Nissenberg, The Law of Commercial Trucking: Damages to Persons and Property at Sections 6-11(b), 6-11(d)(3), 7-3(a), 7-17(a), 7-18, 7-19, 7-20, 7-22 and 7-22(e).

Certain factors influence juries to award not only punitive damages against trucking companies but also to apply a putative factor to a compensatory verdict:

1. Overweight trucks: (e.g. overloaded coal trucks crossing from Kentucky into West Virginia-differing weight limits)
2. Improper training of drivers;
3. Forced dispatch;
4. Dispatch driver complaints about the operational or mechanical problems of the truck and instructing him to keep driving; (or to continue on to home terminal for “cheaper repairs”);
5. Driving under the influence of alcohol or drugs;
6. Knowingly allowing drivers to violate hours of service regulations: a pattern of misconduct;
7. Spoliation of evidence such as driver’s logs; Qualcomm, ECM data, etc. and (destruction/non-retention);
8. The use of a forced dispatch or sleeper/driver system, keeping drivers on the road for an inordinate period of time, instead of alternating systems;
9. Failing to properly investigate a driver’s background including his employment history, driving record, criminal record, psychiatric record;
10. Conducting annual review of driver record but overlooking the driver’s bad record and continuing to employ him.

B. Example: West Va. Standards for Recovery:

Punitive damages may be awarded in cases of intentional torts or gross, reckless or wanton negligence. With respect to an award of punitive damages, there must be a reasonable relationship between such damages and the harm that was likely to occur from defendant’s conduct as well as the harm that actually has occurred. Relevant factors include the reprehensibility of the defendant’s conduct, the removal of profit from the wrongful conduct and discouragement of future bad acts, and the reasonable relationship between punitive damages and compensatory damages, and financial position of the defendant. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages, and the cost of litigation alone to the plaintiff is a factor that may justify punitive damages. Of course, any award of punitive damages must also comply with the U.S. Supreme Court’s holding in B.M.W. of North America v. Gore, that grossly excessive punitive damages awards violate due process and are therefore unconstitutional.

Moreover, the United States Supreme Court has held that evidence of defendant’s conduct, relied upon by the plaintiff in arguing for punitive damages, must have a specific nexus to the actual harm suffered by the plaintiff.

Insurability of punitive damages:

Absent an express exclusion for punitive damages, a policy with language to the effect that the insurer agrees to pay “all sums which the insured shall be legally obligated to pay” covers punitive damages. This holds true for uninsured and underinsured motorist insurance.

- C. Profit motive
- D. Spoliation

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Cargo Loss Claims in the U.S.

This paper provides a brief overview of cargo loss claims in the United States. The basic framework of the Carmack Amendment is discussed, including issues relating to subrogation, time deadlines for filing claims, and liability limitations. Finally, a checklist of necessary documentation to assemble when handling a cargo loss claim is provided.

The Carmack Amendment

The Carmack Amendment, 49 U.S.C. § 14706, governs most cargo loss claims. In order to make a prima facie case against a carrier, a shipper must prove the following elements:

1. Delivery of goods to the initial carrier in good condition;
2. Damage to the goods before delivery to their final destination; and
3. The amount of damages.

If a shipper proves all three elements, a carrier may overcome the presumption of liability by proving that it was not negligent **and** the loss was caused by one of the following:

1. An act of God;
2. An act of public enemy;
3. An act of the shipper;
4. An act of public authority; or
5. The inherent nature or vice of the goods.

Cargo Loss Subrogation Claims

A shipper may bring suit against any carrier providing transportation services, regardless of the carrier's negligence. The shipper does not have the burden of identifying a particular negligent carrier from among the numerous carriers handling an interstate shipment of goods. The carrier which pays for the shipper's damages, therefore, may seek reimbursement from the carrier over whose route the loss or damage actually

occurred. The subrogation plaintiff may seek reimbursement of the loss or damage, as well as the amount expended in defending a lawsuit as a result of the loss.

Timeline for Cargo Loss Claims

A cargo claim may be barred if it is not timely made. A carrier may limit the time for making claims (usually in the bill of lading) to a period of not less than nine months. If, however, the bill of lading is silent on this issue, there is no limitation period. Once a claim is made, the carrier is obligated to send an acknowledgment of the claim within thirty days of receipt. The carrier must pay, decline or make a settlement offer within 120 days of receipt of the claim, or explain the reason the claim cannot be compromised. The carrier may limit the time period for bringing a civil action against it (again, usually in the bill of lading) to a period of not less than 2 years. If the bill of lading does not have a limitation of actions provision, the applicable state law statute of limitations will apply. The time limitation for bringing a civil action begins to run when the carrier gives the claimant a written notice that the carrier has denied all or part of the claim.

Checklist of Necessary Documentation in Cargo Claims

The following documentation should be assembled in order to properly handle a cargo loss claim.

1. A complete and legible copy of the bill of lading or airway bill (front and back);
2. Insurance documentation;
3. Commercial invoices;
4. An itemization of the claimed damages;
5. Repair estimates for alleged losses;
6. Complete shipping documentation from other carriers involved in the shipment.
7. Photographs of the cargo, vehicles, trailers and accident scene (if appropriate);
8. Police report, if applicable;
9. Packing list;
10. All correspondence between shipper and carrier regarding the claim.

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Decision Process on Hiring the Local Adjuster/Investigator and the Attorney Client Privilege

The first step is to know what privilege law will apply to your case, to determine how to proceed with the benefit and protection of the privilege. In state court cases, obviously the privilege law of that particular state applies. In federal court diversity cases, state law governs privileges in claims asserted under state law, while federal common law governs privileges asserted in federal question cases. Thus, in almost all trucking accident cases, state privilege law will apply. Under Texas law, there is a difference between the attorney-client privilege and the work product privilege, both of which are important to consider while conducting the accident investigation. The attorney-client privilege ensures that confidential communications between the attorney and the client, made for the purposes of rendering legal services, will not be disclosed. However, the work product privilege is broader in scope. This protects communications made and materials prepared, in anticipation of litigation or for trial between a party and the party's representatives, or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents. This is important because, if done properly, communications between the driver, the investigator, the adjuster, the attorney, and the insurer may all be privileged.

To qualify as work product, material must have been prepared in anticipation of litigation, after the occurrence or transaction on which the suit is based. Whether anticipation of litigation is reasonably expected is determined by a two part test, with an objective and a subjective component. Objectively, the court must determine whether a reasonable person at that time would have anticipated litigation, based for instance on the severity of an accident. Subjectively, the court must decide whether the party believed at that time in good faith that there was a substantial chance that litigation would follow, and conducted the investigation for the purpose of preparing for the litigation. The test looks at the defendant's reaction to the circumstances surrounding the occurrence. Plaintiff's lawyers often try to argue that investigation documents are discoverable if they are made in the ordinary course of business. In other words, they will assert that the defendant trucking company would have conducted the investigation regardless of whether litigation resulted or not. However, these arguments often fail because there is no specific rule that makes ordinary course of business documents discoverable, and the court must look to the reasons that give rise to the ordinary business practice. Thus, if it is ordinary business practice to conduct an investigation immediately after an accident to prepare for litigation that may follow, the privilege will apply.

It is thus very important to retain a local adjuster/investigator to work in connection with counsel in conducting an accident investigation, and to make sure that all of the work done is protected by the work product privilege. This includes knowing what falls within the privilege, and what does not. The following are almost never privileged: photographs taken, results of measurements, and other objective data, and written or recorded witness statements. This is because the privilege only applies to protect mental impressions, thought processes, legal theories and conclusions, and is not intended to hide facts. Thus, when an adjuster or investigator calls witnesses over the telephone and records their statements, or obtains written statements

from them at the accident scene, these are always discoverable. This is true even if the lawyer takes the statement. When a lawyer or adjuster interviews witnesses, or sends an investigator to talk to a witness, the investigator should be instructed not to take a statement (either recorded or signed) if the information is not favorable. When the information is not favorable, the investigator can simply prepare a memo stating the substance of the interview, because that memo itself is not discoverable. Therefore, the best practice is to first find out what it is that the witness will say first, prior to taking a statement, and only take the statement if the information is favorable. Otherwise, the other side will benefit from your hard work, when you have to produce a copy of the unfavorable witness statement that they may never have otherwise known about, but for your investigation.

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Impact of Newly Enacted Federal Transportation Act as to Commercial Auto and Trucking Involving Owners/Lessors/Lesseees and their Vicarious Liability

I. Federal Transportation Act Relevant To Owner Liability Statute, 49 USCA § 30106

- A. “In general - an owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if - - (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

Financial Responsibility Laws - Nothing in this section supersedes the law of any State or political subdivision thereof - - (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.”

B. Definitions.

1. Affiliate. “The term ‘affiliate’ means a person other than the owner that directly or indirectly controls, is controlled by, or is under common control with the owner. In the preceding sentence, the term ‘control’ means the power to direct the management policies of a person whether through ownership of voting securities or otherwise.”

2. Owner. “The term ‘owner’ means a person who is - -
 - a. a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle;
 - b. entitled to the use and possession of a motor vehicle subject to a security interest in another person; or
 - c. a lessor, lessee, or a bailee of a motor vehicle, in the trade or business of renting or leasing motor vehicles, having the use or possession thereof, under a lease, bailment, or otherwise.”
3. Person. “The term ‘person’ means any individual corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.”

II. Federal Preemption

- A. 49 USCA § 30103 includes a preemption clause which states as follows:

“(b) Preemption - (1) when a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.”
- B. Therefore, it appears that any provision of a state’s owner’s liability statute or any other state statute inconsistent with the dictates of 49 USCA § 30106 are now null and void.

III. Effect of the Federal Statute Upon Commercial Trucking

- A. Effect profound on commercial trucking industry that has a regular practice of leasing vehicles.
- B. Short-term lease (i.e., less than 30 days) no longer relevant.
- C. Effect of 49 CFR § 376.31 relating to the interchange of equipment. This section states:

“Authorized common carrier may interchange equipment under the following conditions:

(e) Connecting carriers considered as owner - an authorized carrier receiving equipment in connection with a through movement shall be considered to be the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination or the return of the equipment after the movement is completed.”
- D. Efforts by plaintiffs to create “negligence” on the part of the “owner” to circumvent immunity of owner under § 30106 i.e. negligent entrustment, negligent maintenance, providing an unsafe vehicle, etc.

IV. Financial Responsibility Law of the State

- A. §30106 does not alter any State law regulating or imposing financial responsibility upon an owner.
 - “(b) Financial Responsibility Laws - nothing in this section supersedes the laws of any State or political subdivision thereof - -
 - (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
 - (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.”
- B. Owners must still maintain State mandated coverage.
- C. Owners must still comply with State registration requirements.
- D. Responsibility of “owner” not dealing with owner’s liability situations.
 - 1. Registration requirements.
 - 2. Priority of order of coverage under the Michigan No-Fault statute.
 - 3. Exclusions for coverage when “owner” is in violation of securing mandatory coverage.

V. Jurisdiction

- A. Argument can be made that under 28 USCA § 1337(a), any case asserting the issue of “owner’s liability” in which 49 USCA § 30106 may come into play may be brought within the jurisdiction of the federal courts. §1337(a) mandates that federal district courts shall have regional jurisdiction over any civil action arising under any act of congress regulating commerce...

VI. Effective Date

- A. § 30106 applies to any action commenced on or after the date of the enactment of the statute, August 10, 2005, regardless of when the accident or injury occurred.

VII. Effect of Federal Statute Upon Rental Car Companies

- A. Example MCL 257.401 (Michigan). Imposition of \$20,000/40,000 liability exposure to rental car owners no longer effective.
 - 1. However, owner must still have \$20,000/40,000 of coverage.
 - a. MCLA 257.401(4) which still seems to be in effect so as to allow the lessor right of reimbursement of any \$20,000/40,000 under the statute which states: “That the lessee may be liable to the lessor up to amounts provided

for in subsection (3), (i.e., \$20,000/40,000) and to an injured person for amounts awarded in excess of the maximum amounts provided for in subsection (3).”

-Does insurer have rights of insured owner for reimbursement from lessee?

- B. The question of whether a lease is for less than 30 days is irrelevant.
- C. MCLA 500.3101(g), definition of owner is no longer valid or if valid, only to the extent that does not conflict with § 30106.
 - 1. § 30106 defines an owner as a person who is:
 - “(a) owner of record (registrant);
 - (b) title holder;
 - (c) lessor;
 - (d) lessee;
 - (e) ‘entitled to the use and possession of a motor vehicle subject to the security interest in another; person’; or
 - (f) ‘a lessor, lessee, or bailee of a motor vehicle, in the trade or business of renting or leasing motor vehicles, having the use or possession thereof under a lease, bailment, or otherwise.’”
- D. Efforts by plaintiffs to create “negligence” on the part of the “owner” to circumvent immunity of owner under § 30106.
- E. “Engaged in the trade or business of renting or leasing motor vehicles” is not defined.

VIII. Michigan Owner’s Liability Statute, MCLA 257.401

- A. 257.401 basic original statute.
 - 1. Under §(1):
 - an owner of a motor vehicle is liable for an injury caused by the negligent operation of a motor vehicle.
 - if the motor vehicle is being driven with the owner’s express or implied consent or knowledge.
 - knowledge and consent are presumed if the operator is the spouse, father, mother, brother, sister, son, daughter, or other immediate family member.
 - 2. Under §(2), a 1988 amendment:
 - a person engaged in the business of leasing motor vehicles.
 - who is a lessor under a lease for more than 30 days.
 - is not liable for the negligence resulting from the operation of the leased vehicle.
- B. 257.401 amended June of 1995, effective June 22, 1995 to include §§(3) and (4).

1. Under amended §(3):

- a person engaged in leasing motor vehicles for less than 30 days.
- is liable for bodily injury.
- if operated by an authorized driver under the lease or by a “lessee’s spouse, father, mother, brother, sister, son, daughter or other immediate family member”.
- unless lessor was negligent in leasing of the motor vehicle.
- Lessor’s liability is limited to \$20,000/\$40,000.

2. Under amended §(4):

- a person engaged in the business of leasing a motor vehicle shall notify a lessee that lessor is liable up to \$20,000/\$40,000.
- and lessee may be liable to the lessor up to \$20,000/\$40,000.
- lessee may be liable to an injured person for amounts in excess of \$20,000/\$40,000.

C. Case law application of amended Owner’s Liability Statute:

1. “A person engaged in the business of leasing a motor vehicle”.

- Black v Panian Chevrolet, 239 Mich App 227 (2000). A courtesy car arrangement qualified as “a person engaged in the business of leasing.”
- Ball v Chrysler, 225 Mich App 284 (1997). The Court of Appeals stated, “...nothing in the statute requires the Lessor’s primary business be retain leasing or, for that matter, profitable.”

2. “...shall notify a lessee”.

- doesn’t require in writing.
- Church National v Save-A-Buck Car Rental, (U.S. Fed. Dist. Mich.) (8/4/00). Federal District Court Judge Miles ruled that \$20,000/\$40,000 limitation is applicable regardless of notice:

“Subsection (4) simply does not contain the ‘unless’ or ‘only if’ language which Church reads into it. While §257.401(4) clearly imposes a notice requirement, it does not impose a penalty for failure to give the required notice.”

3. “authorized driver”.

- Biezck v Auis, 459 Mich 9 (1998). In a pre-amendment case, the Court upheld a jury’s finding of no consent where driver was under 25 years of age and therefore in violation of the rental contract.
- Citizens v Federated, 448 Mich 225 (1995). In another pre-amendment case, the Supreme Court held that a garage keeper could not exclude coverage to user of courtesy car though as condition invalid the policy was reformed to provide State minimum benefits of \$20,000/\$40,000.
- Ryder v Auto-Owners, 235 Mich App 411 (1999). The Court of Appeals allowed for trucking rental contract to limit liability insurance coverage to lessee to \$200,000 while providing \$7,000,000 coverage to lessor.

- MEEMIC v Turow, ___ Mich App ___ (2000). In yet another pre-amendment case (1994 accident), where rental contract had no provision providing for duty to defend lessee (in this self-insured situation), no duty existed to provide defense by lessor to lessee.
- “immediate family member” not defined; however, reference may be made to Michigan election law, MCLA 168.12, and Liabilities Regulation Act, MCLA 4.414(2).
- Remember, total bar to liability of \$20,000/ \$40,000 from lessor if vehicle driven without consent or authorization by lessor.

4. “Negligent in leasing”.

- Does the statute support prior existing case law that lessors have no common law duty to investigate a potential lessee’s driving record? Barksdale v National Bank of Detroit, 186 Mich.App. 86 (1990) lv denied 437 Mich 1055 (1991), or otherwise make sure that its lessee is a safe driver and has insurance; Conkright v Barney, ___ Mich App ___ (12/15/95) COA #167652; Bednarski v Fairlane Ford, ___ Mich App ___ (8/9/96) COA #178713 (unpublished).
- “Negligent in leasing” as in negligent in informing or negligent in entrusting.
- Church National, supra. The Court maintained that “negligent in leasing cannot possibly refer to the failure to comply with (§4); instead it must refer to actions which would have made the lessor liable under common law, such as negligent entrustment (i.e., leasing the vehicle to a plainly incompetent or unqualified driver) or negligent in failing to provide the lessee with a reasonably safe vehicle.”

IX. Michigan’s First Party No-Fault Act’s Definition Of Owner, MCLA 500.3101(G)

A. “Owner means any of the following:

- i. A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
- ii. A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is a lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by a lease for a period that is greater than 30 days.
- iii. A person who has a right of possession of a motor vehicle under an installment sales contract.

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Choice of Jurisdiction

I. Personal Jurisdiction Over Non-Resident Interstate Carriers.

In most states personal jurisdiction exists over an interstate motor carrier regardless of whether they do business in a state if they have a registered agent in that state. Some interstate carriers attempt to restrict jurisdiction by designating an agent that is designated only for actions that occur in that state. Examine whether jurisdiction exists with respect to the driver. Do not assume that if jurisdiction exists with respect to the carrier that jurisdiction exists with respect to the driver.

II. Federal Jurisdiction Under Motor Carrier Act.

A foreign motor carrier must designate an agent for service of process. 49 U.S.C. § 13303. A motor carrier shall provide safe and adequate service, equipment and facilities. 49 U.S.C. § 14101(a). A motor carrier is liable for damages for any violation of the Motor Carrier Act and attorney's fees shall be awarded to prevailing party. 49 U.S.C. §§ 14704(a)(2) and 14707(e).

III. Jurisdiction Over a Foreign Insurance Company.

Examine individual state's long arm statute to determine limits of personal jurisdiction. Analyze jurisdiction under general and specific jurisdictional principles in connection with a particular state's long arm statute. General jurisdiction arises out of a non-resident defendant's contacts that are substantial, continuous and systematic. Specific jurisdiction arises out of a non-resident defendant's case specific contacts with the state. Factors to consider when determining whether jurisdiction exists over a foreign insurance company include: territory of coverage clauses, service of suit clauses, MCS 90 endorsements, and insurer's knowledge of area where carriers may be traveling/transporting.

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Imputed Liability and Driver's Scope of Employment

A trucking company's tort liability often arises out of the negligent or intentional actions of the company's employee/driver. The company may have imputed liability under the doctrine of *respondeat superior* ("let the superior answer").

I. NEGLIGENCE ACTS vs. INTENTIONAL ACTS

A. Negligence of Driver

Under *respondeat superior*, an employer is liable for the wrongful acts of its employee committed while the employee is acting within the scope of his employment. In Oklahoma, a trucking company may be sued for its employee's negligence, even if the employee/driver is not named in the lawsuit. *Hooper By and Through Hooper v. Clements Food Co.*, 1985 OK 6, 694 P.2d 943, 944.

B. Intentional or Willful Acts of Employee Driver

Generally, a party will not be responsible for the intentional or willful acts of others. However, if an employee committed the intentional or willful acts while performing the duties assigned to him by his employer, the employer may be liable. Oklahoma has addressed the issue of an employer's liability for the intentional acts of an employee in the trucking industry on more than one occasion.

In *Mistletoe Express Service, Inc. v. Culp*, 1959 OK 250, 353 P.2d 9, the trucking company was determined to be liable for an intentional act of physical violence. A driver, who had a history of violent altercations, was sent to deliver a package which the customer was unwilling to accept, and a physical altercation erupted wherein the driver forced acceptance of the package. Mistletoe was found liable for the personal injury to the customer. The Oklahoma Supreme Court noted that an employer, generally, should not be liable to a third person, one not an invitee upon its premises, for the intentional and willful acts of its employee. However, the Court held, the employer will be liable if the employee was acting within the scope of his employment, and the act complained of was committed as a means of carrying out the job assigned to the employee by his employer. The intentional and willful act complained of, battery, was done by Mistletoe's employee as a means of carrying out the job assigned to him by Mistletoe.

In *Allison v. Gilmore, Gardner & Kirk, Inc.*, 1960 OK 48, 350 P.2d 287, the Oklahoma Supreme Court took the opposite approach. Plaintiff was an officer of a gasoline retailer's association, whose job it was to test the temperature of gasoline while in the tank compared to the temperature of gasoline found in the underground storage tanks at the gas station. In the performance of his duties, the plaintiff climbed onto the top of the tanker while the fuel was being delivered. This apparently angered the driver who then climbed up on the tank and battered the testing officer. The Court concluded that nothing in the driver's duty to deliver fuel warranted his assault on Plaintiff, as the delivery of the fuel did not necessitate removal of Plaintiff from the tanker.

Therefore, the driver's actions were outside the scope of his employment, and his employer was not liable for his actions.

Mistletoe and *Allison* were affirmed and extended thirty years later by the Court, in *Rodebush By and Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241. In *Rodebush*, a nursing home orderly slapped a patient while giving him a bath. The Oklahoma Supreme Court held that an employer will be liable for the intentional and willful acts of its employees when the acts are fairly and naturally incident to the employer's business, and are done while the servant is engaged in doing his employer's business and with a view toward furthering his employer's interests, or the acts resulted from some impulse or emotion which naturally grew out of or was incident to the employee's attempt to perform his employer's business. Thus, the nursing home was liable for the orderly's acts because the orderly acted on an impulse of emotions which naturally grew from his attempts to do his job, i.e., bathing the patient.

The Oklahoma Supreme Court revisited this exception to the general rule in *Baker v. Saint Francis Hospital*, 2005 OK 36, 126 P.3d 602. In *Baker*, the Court held a hospital could potentially be held liable for injuries to an infant child caused by the employee of a day care owned by the hospital. An infant, under the care of the day care center, would not stop crying. An employee of the day care center struck the infant's head on the edge of a shelf. The child sustained two compressed skull fractures and suffered traumatic brain injury. Following *Rodebush*, the Court noted that an employee's act could, under certain factual circumstances, fall within the scope of employment if it is incident to some service being performed for the employer, or arises out of an emotional response to actions being taken for the employer. The Court delivered a fairly complete primer on the issue:

To hold an employer responsible for the tort of an employee, the tortious act must be committed in the course of the employment and within the scope of the employee's authority. *Hill v. McQueen*, 1951 OK 47, ¶¶ 3, 4, 230 P.2d 483, 484-485. As a general rule, an assault on a third person is not within the scope of an employee's authority. *Rodebush v. Oklahoma Nursing Homes*, 1993 OK 160, ¶ 12, 867 P.2d 1241, 1245. The exception to the general rule is well established. An employer may be held responsible for the tort committed by the employee where the act is incidental to and done in furtherance of the business of the employer even though the servant or agent acted in excess of the authority or willfully or maliciously committed the wrongs. *Ada-Konawa Bridge Co. v. Cargo*, 1932 OK 790, ¶ 31, 21 P.2d 1, 7, citing *Mansfield v. Wm. J. Burns Detective Agency*, 171 P. 625 (Kan. 1918). This is not to say that the commission of the tort was within the scope of the employee's authority, for no authority for such commission could be conferred, but where the employee was acting within the scope of authority to do the particular thing rightfully that was subsequently done in a wrongful manner. *Ada-Konawa*, 1932 OK 790, ¶ 32, 21 P.2d at 7, citing *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 P. 943 (1905). *Rodebush* summarized the exception to the general rule as applying where the act is "fairly and naturally incident to the business," and is done "while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business." *Rodebush*, 1993 OK 160, ¶ 12, 867 P.2d at 1245, citing *Russell-Locke Super-Service v. Vaughn*, 1935 OK 90, ¶ 18, 40 P.2d 1090, 1094, and *Ada-Konawa*, 1932 OK 790, ¶ 33, 21 P.2d at 7. *Rodebush* added that : "An employee's

act is within the scope of employment if it is incident to some service being performed for the employer or arises out of an emotional response to actions being taken for the employer.” *Rodebusch*, 1993 OK 160, ¶ 12, 867 P.2d at 1245.

Baker at ¶ 10. The Court reversed the summary judgment initially granted to the hospital, holding that whether a servant was acting as an agent for her master is a question of fact and not of law. The Court determined it was for a jury to decide if the employee’s personal motivation was the sole moving force behind the act, or if the acts were an attempt to carry out the employer’s business.

II. RELEASE OF LIABILITY

Under Oklahoma law, when an employee is released from liability, through the affirmative actions of the releasor, his employer is also released from liability. However, a plaintiff’s claims against an employer will not be released if the employee is not sued, and the statute of limitations is allowed to run, or where the plaintiff dismissed his claims against the employee without prejudice.

A. With Prejudice to Claims Against Employer

In *Alfred William Sisk v. J.B. Hunt Transport, Inc.*, 2003 OK 69, 81 P.3d 55, J.B. Hunt moved to dismiss the claims against it based on the release rule, after its employee driver was released by Plaintiff for the second time. The trial court denied the motion, and at trial, an \$800,000 jury verdict was entered against the trucking company. On appeal, the Oklahoma Supreme Court explained that the uninterrupted viability of the claim against a servant is the *sine qua non* of the master’s continued liability under *respondeat superior*, once the servant becomes impervious to legal responsibility by an act of the plaintiff, the master stands released. The Court thus held that the complete release of the driver, at the hands of the Plaintiff, also released the trucking company from liability. The Court established the following test for determining whether the release rule applies:

The plaintiff’s affirmative act must occur first, and

the plaintiff’s affirmative act must create an absolute bar to re-prosecution of the servant.

To destroy the servant’s liability, both elements must coincide. Finally, the Court noted that a bar that arises by force of law from a plaintiff’s voluntary act of dismissal is as effective as any other form of express release that would extinguish the claim against the servant. Once the servant’s liability is destroyed, so goes the master’s liability.

B. Without Prejudice to Claims Against Employer

In *Martin v. Mid-Cal Express*, 2003 OK CIV APP 106, 83 P.3d 898, Plaintiff sued the trucking company under *respondeat superior* for injuries caused by its driver while acting within the scope of his employment. The trucking company moved for summary judgment, arguing that because the statute of limitations had run on any claims Plaintiff could have asserted against its driver, the release rule barred any claims against the master. The trial court granted the motion. The Oklahoma Supreme Court reversed.

The Court noted that *Hooper v. Clements Food Co.*, 1985 OK 6, 694 P.2d 943, allows an action to be brought against the trucking company only, without suit against the driver. The Court also noted that the release rule reflected in *Sisk* applies only if some affirmative act by the Plaintiff bars an action against the servant. The Court then held that because the driver was never a party, and suit against him was barred by operation of the statute of limitations, and not by any affirmative act of Plaintiff, Plaintiff’s claim against the trucking company under *respondeat superior* remained viable.

C. Settlement Releases

Where a party settles with the servant, even after attempting to reserve his/her rights to continue suit against the master, where those claims are only derivative, i.e., based on *respondeat superior*, even a specific release will not allow the suit to continue against the master. Only where there are claims of independent liability against the master, will such a release of the servant not result in the end of the suit. *Burke v. Webb Boats*, 2001 OK 83.

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Report Authored by the American Transportation Research Institute Indicators for Predicting Truck Crash Involvement

The Concern

Efforts by government and industry over the years to reduce large truck crashes have led to a number of significant positive trends. The U.S. Department of Transportation (USDOT) recently reported a decrease in the fatal crash rate for large trucks from 2.2 fatalities per 100M vehicle miles traveled (VMT) in 2000 to 1.9 fatal crashes per 100M VMT in 2003. In spite of increasing VMT and increased congestion over the years, the trucking industry has seen a general downward trend in fatal, injury and property damage crash rates over the last 20 years.

However, both industry and government recognize that more must be done to reduce the overall number of large truck crashes. Prior research studies, including the Federal Motor Carrier Safety Administration (FMCSA) Large Truck Crash Causation Study, point to driver-related factors as a critical reason for the majority of crashes involving large trucks. Therefore, focusing on driver behaviors will have the most profound impact on crash reduction.

Research Methodology

The objective of ATRIP'S research was to design and test an analytical model for predicting future crash involvement based on prior driver history information. A second objective of the research, conducted in conjunction with the Commercial Vehicle Safety Alliance (CVSA), was to identify effective enforcement actions to counteract the driving behaviors and events that are predictive of future crash involvement.

This research is one of the first studies of its kind to analyze several available subsets of driver-specific data and statistically relate the data to future crashes. Data sources included the Motor Carrier Management Information System (MCMIS) and the Commercial Drivers License Information System (CDLIS).

The main dependent variable is crash involvement. For purposes of this research, crash involvement is the objective measure of driver "safety." The independent variables are driver-specific performance indicators mined from the data including: specific violations; driver traffic conviction information; as well as past accident involvement information.

Driver data was gathered across a three-year time frame, and was analyzed to determine future crash predictability. For each of the drivers in the selected samples, driver history regarding past inspections and crashes were derived from MCMIS, and past conviction data was derived from CDLIS. Descriptive statistics were run on this entire dataset to develop the targeted samples.

Findings

The predictive model included data on 540,750 drivers. The analysis shows reckless driving and improper turn *violations* as the two violations associated with the highest increase in likelihood of a future crash. The four *convictions* with the highest likelihood of a future crash are: improper or erratic lane change; failure to yield right of way; improper turn; and failure to maintain proper lane. When a driver receives a conviction for one of these behaviors, the likelihood of a future crash increases between 91 and 100 percent. The Table below ranks the top 10 driver events by the percentage increase in the likelihood of a future crash.

The targeted surveys and interviews indicated that successful enforcement programs and strategies for addressing problem driver behaviors are those that exhibit one or more of the following components:

- Center on aggressive driving apprehension programs/initiatives;
- Target both commercial motor vehicle (CMV) and non-CMV behavior patterns;
- Utilize both highly visible and covert enforcement activities; and
- Incorporate an internal performance-based system for managing enforcement by specific crash types, driver behaviors, and locations.

Table

Summary of Crash Likelihood for all Data Analyzed	
If a driver had:	The crash likelihood increases:
A Reckless Driving violation	325%
An Improper Turn violation	105%
An Improper or Erratic Lane Change conviction	100%
A Failure to Yield Right of Way conviction	97%
An Improper Turn conviction	94%
A Failure to Maintain Proper Lane conviction	91%
A Past Crash	87%
An Improper Lane Change violation	78%
A Failure to Yield Right of Way violation	70%
A Driving Too Fast for Conditions conviction	62%

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The Seat Belt Defense: A Summary for Mississippi, Arkansas, Tennessee, Texas, and Missouri

The uncertainty surrounding the use of a seat belt defense can be quite frustrating and can make it very difficult to evaluate an automobile personal injury case. This paper provides an outline of the Seat Belt Statutes in five different states and an analysis of how evidence of use or non-use of seat belts may be admitted. All of the states examined have a mandatory seat belt use law. In these five states, evidence of the use or non-use of the seat belt is restricted in one way or another. All of the statutes, except Texas, generally prohibit the admission of seat belt non-use evidence. Where the states differ is on the issue of whether the evidence of seat belt non-use may be admitted at all, and if so, in what instances.

I) A summary of instances in which each state will allow non-use evidence

Mississippi - Mississippi law allows for evidence of seat belt non-use if the evidence has probative value other than as evidence of negligence. The admission of seat belt non-use has been allowed with regard to the issues of causation and damages.¹

Tennessee - The law allows for the use of the evidence on the issue of proximate cause in cases with a product liability claim. It does not allow for admission where the defense is contributory negligence, assumption of risk, or mitigation of damages.

Arkansas - Arkansas's seat belt law is almost identical to Tennessee's law. The law allows for the use of the evidence on the issue of proximate cause in cases with a product liability claim. A recent district court case stated that the evidence may also be relevant in strict liability claims.²

Texas - On June 11, 2003, the Governor of Texas signed House Bill 4, which omitted the portion of the statute that made seat belt evidence inadmissible. Thus as it stands now, Texas' statutory law does not prohibit the admission of evidence of seat belt use or non-use. However the common law that preceded the mandatory seat belt statute did not allow for evidence of seat belt non-use to show contributory negligence or failure to mitigate damages.

Missouri - Missouri law allows for the admission of evidence of seat belt non-use to mitigate damages, "but only under certain circumstances." One such enumerated circumstance is to show the reasonableness of the automobile's design. This was the case where a plaintiff claimed a car was not designed correctly. The defendant car manufacturer argued that the seat belt was a part of the design and had the plaintiff been wearing it she would not have sustained her injuries. The court also allowed non-use evidence for the purpose of showing causation.³

¹ *Hunter v. General Motors Corp.*, 729 So.2d 1264, 1268 (Miss 1999). *See also, Palmer v Volkswagen*, 904 So.2d 1077 (Miss 2005).

² *Lovett v. Union Pacific Railroad Company*, 201 F.3d 1074 (8th Cir 2000)

³ *LaHue v. General Motors Corp.*, 716 F.Supp. 407, 417-18 (W.D. Mo. 1989).

II) A more detailed look at each state’s law regarding evidence of seat belt non-use.

Mississippi

Mississippi has a mandatory safety belt law. The statute requires the use of a safety seat belt by every operator, front seat passenger, and child between the ages of 4 and 8.⁴ However, the statute prohibits the introduction of evidence of use or non-use to show contributory or comparative negligence.⁵ The relevant portion of the statute states:

Failure to provide and use a seat belt restraint device or system shall not be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual.”⁶

Early Mississippi cases interpreting the statute held that the admission of evidence of non-use of safety belts was reversible error. In *Roberts v. Grafe Auto Company, Inc.*,⁷ the Supreme Court of Mississippi held that “the passenger could not be cross-examined as to whether she had been wearing a seat belt,” even though the question was only asked and answered and the defense counsel didn’t repeatedly argue the point.

The Supreme Court subsequently held that the mandatory safety belt statute did not completely bar admission of seat belt non-use in all cases. In *Hunter v. General Motors Corporation*,⁸ the Court maintained that the evidence could not be used to show contributory or comparative negligence; however it stated there *may* be instances in which evidence of seat belt non-use constitutes relevant evidence.⁹ The evidence is relevant so long as:

1. the evidence has some probative value other than as evidence of negligence; (2) this probative value is not substantially outweighed by its prejudicial effect, and is not barred by some other rule of evidence and (3) appropriate limiting instructions are given to the jury, barring the consideration of seat belt non-usage as evidence of negligence.¹⁰

In *Herring v Poirrier*,¹¹ the Court held that evidence of seat belt *use* was not prohibited by the statute. The defendant in this case stipulated to negligence, but wanted to introduce evidence that the plaintiff remained in his seat upon impact.¹² The Court found this evidence relevant to the issue of whether the plaintiff “sustained injuries from the impact as well as to the extent of those injuries.”¹³

Tennessee

Tennessee also has a statute that mandates the use of seat belts while driving. In 1994, the Tennessee General Assembly passed the Tennessee Automobile Safety Act (TASA).¹⁴ The statute states that evidence of non-use of safety belts may not be used in a civil action, except in certain instances. The 1986 version of the seat belt law excluded all seat belt evidence in a civil trial.¹⁵ The federal district court of appeals decided a

⁴ Miss. Code Ann. § 63-2-1 (1)

⁵ Miss. Code Ann. § 63-2-1 (3)

⁶ *Id.*

⁷ 701 So.2d 1093, 1100 (Miss 1997).

⁸ *Hunter*, 729 So.2d at 1268.

⁹ *Id.* See also *Palmer*, 904 So.2d at 1094-95 (court stated that “where a plaintiff claims inadequate warnings, the defendant must be allowed to introduce evidence which would tend to persuade the jury that even if the warnings were adequate the plaintiffs would not have heeded them).

¹⁰ *Id.*

¹¹ 797 So.2d 797 (Miss. 2000)

¹² *Id.* at 806

¹³ *Id.*

¹⁴ Tenn. Code Ann. § 55-9-604

¹⁵ Tenn.Code Ann. § 55-9-604 (1986)

case involving the seat belt law in *MacDonald v. General Motors*.¹⁶ The *MacDonald* court held that the 1986 version of the seat belt law did not allow for the introduction of evidence of non-use of seat belts where the defense is contributory negligence, assumption of risk, and mitigation of damages.¹⁷ However, the court found that the evidence could be admitted on the issue of proximate cause.¹⁸ The *MacDonald* holding was codified by the current version of the TASA which states:

- a. The failure to wear a safety belt shall not be admissible into evidence in a civil action; provided, that evidence of a failure to wear a safety belt or receipt of a citation or warrant for arrest for failure to wear a safety belt, as required by this chapter, may be admitted in a civil action as to the causal relationship between non-compliance and the injuries alleged, if the following conditions have been satisfied:
 1. The Plaintiff has filed a products liability claim;
 2. The defendant alleging non-compliance with this chapter shall raise this defense in its answer or timely amendment thereto in accordance with the rules of civil procedure; and
 3. Each defendant seeking to offer evidence alleging non-compliance with this chapter has the burden of proving non-compliance with this chapter, that compliance with this chapter would have reduced injuries and the extent of the reduction of such injuries.
- b. Upon the request of any party, the trial judge shall hold a hearing out of the presence of the jury as to the admissibility of such evidence in accordance with the provisions of this section and the Tennessee Rules of Evidence.¹⁹

The statute generally prohibits the use of the seat belt defense, but allows for the proximate cause exception outlined in *MacDonald*. The statute also limits the use of the evidence to cases which involve product liability claims.

Arkansas

The Arkansas seat belt law is almost identical to the Tennessee law. The Arkansas legislature passed the Mandatory Seat Belt Use Act (MSBUA) in 1995.²⁰ The Act was passed in response to the Arkansas Supreme Court decision in *Baker v. Morrison*.²¹ The relevant portion of the statute states:

- a.
 1. The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action.
 2. Provided, that evidence of such failure may be admitted in a civil action as to the causal relationship between noncompliance and the injuries alleged, if the following conditions have been satisfied:
 - A. The Plaintiff has filed a products liability claim other than a claim related to an alleged failure of a seat belt;

¹⁶ 784 F. Supp. 486 (M.D. Tenn. 1992)

¹⁷ *Id.* at 497-499

¹⁸ *Id.* at 499

¹⁹ Tenn.Code Ann. § 55-9-604

²⁰ Ark.Code Ann. § 27-37-701

²¹ 829 S.W.2d 421 (Ark. 1992)

- B. The defendant alleging noncompliance with this subchapter shall raise this defense in its answer or timely amendment thereto in accordance with the rules of civil procedure; and
- C. Each defendant seeking to offer evidence alleging noncompliance has the burden of proving;
 - i. Noncompliance;
 - ii. That compliance would have reduced injuries; and
 - iii. The extent of the reduction of such injuries.^{22, 23}

As in Tennessee, Arkansas law limits the admission of evidence that the plaintiff was not wearing a seat belt to cases involving a product liability claim. The *Baker* court focused on whether the non-use of the seat belt caused the plaintiffs injuries, not whether the non-use caused the accident.²⁴ The court held that the non-use of seat belts may be admissible as evidence of comparative fault if such non-use was the proximate cause of the injuries.²⁵ In 1999, the Supreme Court of Arkansas held in *Grummer v Cummings*²⁶ that evidence that a plaintiff was not wearing a safety belt was not admissible because the prejudicial effect outweighed its probative value.²⁷

In *Lovett v. Union Pacific Railroad Company*, a district court in Arkansas held that the Arkansas Supreme Court would allow evidence of seat belt non-use in strict liability crashworthiness cases.²⁸ The Court of Appeals did not decide whether the district court's holding was correct because the plaintiff failed to show she was prejudiced by the evidence.²⁹

Texas

With the passage of House Bill 4 in 2003, Texas has repealed the portion of its seat belt law that prohibited admission of evidence of seat belt non-use.³⁰ There is now a question as to what the law is in Texas regarding seat belt use or non-use. The common law that applied before the mandatory seat belt statute was enacted also barred the evidence to show contributory negligence or failure to mitigate damages. In *Carnation Co. v. Wong*,³¹ the plaintiffs, Bobby Wong and King Wong, sued the Carnation Co. after their automobile was struck by one of the company's trucks. A trial court judgment found Bobby's and King's failure to wear their seat belt made them 70 percent and 50 percent responsible for their injuries, respectively.³² The Court of Appeals reversed the decision and the Supreme Court affirmed the reversal. The Court rejected cases from other

²² Ark.Code Ann. § 27-37-703

²³ In *Newton v. Ryder Transportation Services, Inc.*, 206 F.3d 772, 776 (8th Cir 2000), the court held that the testimony of a consulting physician, pictures of the wrecked truck and the plaintiff's testimony of what happened in the accident was sufficient evidence to show the extent to which the injuries were enhanced by the absence of a functioning seat belt.

²⁴ *Baker*, 829 S.W.2d at 423.

²⁵ *Id.*

²⁶ 986 S.W.2d 91, 92 (Ark. 1999)

²⁷ *Id.* at 93 (the court held that the limiting instruction given to the jury about the seat belt evidence was not sufficient to cure the prejudicial effect of the evidence).

²⁸ *Lovett v. Union Pacific Railroad Company*, 201 F.3d 1074, 1080 (8th Cir 2000); "Crashworthiness is a products liability doctrine established in *Larson v. General Motors Corp.* in which auto manufacturers are liable for the failure to construct their vehicles free from defects." *The Seat Belt Defense in Tennessee: The cutting edge*, 29 U. Mem. L. Rev. 215, 223 (1998)

²⁹ *Id.* at 1080

³⁰ V.T.C.A. Transportation Code § 545.413 (g)

³¹ 516 S.W.2d 166 (Tex. 1974)

³² *See also*, *The Seat Belt Defense in Texas*, 35 St. Mary's L.J. 707, 727 (2004)

jurisdictions that allowed for a complete bar of recovery in the event of contributory negligence. The Court also upheld the appellate court's holding that the plaintiff had no duty to wear a seat belt to mitigate damages. Furthermore, the Court held there was no evidence to show that the injuries would have been reduced if a seat belt was worn.

Interestingly, in 1994, the Texas Supreme Court stated that the plaintiff could use evidence that proved she was wearing her seat belt.³³ Due to the recent legislative changes, it is unclear whether Texas will recognize the seat belt defense and to what extent.³⁴

Missouri

Missouri also has a mandatory seat belt law, which prohibits the admission of seat belt non-use in civil actions. Section 30.178 of the Missouri revised statutes states in relevant portions:

4. In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
 1. Parties seeking to introduce evidence of the failure to wear a safety belt in violation of this section must first introduce expert evidence proving that a failure to wear a safety belt contributed to the injuries claimed by plaintiff;
 2. If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of this section contributed to the plaintiff's claimed injuries, and may reduce the amount of the plaintiff's recovery by an amount not to exceed one percent of the damages awarded after any reductions for comparative negligence.³⁵

In *LaHue v. General Motors Corp.*,³⁶ the court held that the seat belt defense could not be used in order to establish contributory negligence, assumption of risk, or failure to mitigate damages. However, the court did allow the evidence to show the reasonableness of design, and for purposes of causation.³⁷ The court reasoned that the element of causation is missing if evidence shows that all or part of the injury is attributable to something besides a design defect.³⁸

In *Newman v. Ford Motor Company*,³⁹ the court held that under the plain reading of the statute, "contributory negligence on the part of a plaintiff for not wearing a seatbelt is disallowed in any action for damages arising out of operation of a motor vehicle, whether or not the defendant was the one operating the vehicle."⁴⁰ The

³³ *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W. 2d 132, 134 (Tex. 1994) (In this case the plaintiff wanted to use evidence that she was wearing her seat belt to show that it was defective because she was thrown from the car. The defense argued that Texas' mandatory seat belt law barred her from admitting the evidence).

³⁴ Before the mandatory seat belt statute the Supreme Court had recognized a distinction between negligence that adds to the accident and negligence that worsens the accident. In *Kerby v. Abilene Christian College.*, 503 S.W.2d 526, 528 (Tex. 1973) the court compared an open door to not wearing a seat belt and found that neither were "actionable negligence but instead were negligence contributing to the damages sustained."

³⁵ V.A.M.S. § 307.178

³⁶ 716 F.Supp. 407 (W.D.Mo. 1989)

³⁷ *Id.*

³⁸ *Id.*

³⁹ 975 S.W.2d 147 (Mo. 1998)

⁴⁰ *Id.* at 155

court also mentioned that the most a defendant could benefit from evidence of seat belt non-use is to mitigate damages by no more than one percent of the amount awarded.⁴¹

Conclusion

As set forth above, the ability to use the seat belt defense varies from state to state, and even then, it is often unclear as to whether it will be allowed at trial. This confusion creates a significant problem in evaluating and settling a case where there are significant injuries that could have been avoided by using a seat belt. With current technology, a biomechanical engineer can create video animation to compare and contrast between the injuries resulting with and without a seat belt. Having this information, and being able to use this information as evidence at trial, is critical to the defense of a seat belt case.

⁴¹ *Id.* at 154

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Incident Investigation, Root Cause and Corrective Action Report

Did you shoot yourself in the foot?

I. The Form

- A. Investigation;
- B. Determine root cause;
- C. Determine preventability; and
- D. Determine corrective action.

II. Is It Discoverable? The Law Of Critical Self-Analysis

- A. State
- B. Federal

III. The Standard

- A. Where the communications sought to be protected were made with the understanding that they were confidential;
- B. The Information resulted from a critical self-analysis undertaken by the parties seeking protection;
- C. The public has a strong interest in preserving the free-flow of the types of information sought; AND
- D. The information must of the type whose flow would be curtailed if discovery were allowed.

IV. How To Help Your Attorney

- A. Accident prevention board “mission statement;”
- B. Non-disclosure agreements;
- C. “Confidential” stamp;
- D. Separate ruling factual/evaluation

Supplemental Materials

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Avoiding Common Pitfalls Adjusting Claims in Montana

Over the past decade, the Montana Supreme Court, through a series of decisions, has constructed a common law framework guiding the evaluation and settlement of accident claims that is unique to Montana. It is important for carriers to understand the more subtle nuances of adjusting insurance claims in Montana and avoid common traps for the unwary and unsuspecting claims adjuster. By understanding these idiosyncrasies, carriers can better serve their clients and proactively guard against claims of unfair settlement practices and bad faith.

Discussed below are the pillar cases interpreting, creating and expanding insurers' obligations under Montana's Unfair Trade Practices Act ("UTPA"). In addition to these cases, several other recent cases have reviewed and considered other aspects of the UTPA. Understanding all of these cases is important to fully understand Montana's legal environment.

Advance Payment of Medical Expenses; *Ridley*

Insurers are obligated to pay an injured third party's medical expenses prior to final settlement when liability is reasonably clear and the medical expenses are causally related to the accident in question. A failure to do so will be an unfair claim practice. Ridley v. Guaranty Natl. Ins. Co. (1997), 286 Mont. 325, 951 P.2d 987.

Ridley, arose as a declaratory judgment action requesting a determination that the UTPA requires an insurer to pay the actual medical expenses of an injured third-party when liability is reasonably clear. Under Montana law, it is an unfair claims practice to "neglect to attempt in good faith to effectuate prompt, fair and equitable settlements" where liability is reasonably clear, or "fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. . ." Mont. Code. Ann. § 33-18-201(6) and (13).

Reversing the lower court's conclusion that no legal obligation exists to advance payment for medical claims, the Montana Supreme Court turned to public policy under the mandatory motor vehicle coverage statutes "to protect members of the general public who are innocent victims of automobile accidents." The *Ridley* Court concluded that "[i]f the insurer has no obligation to pay those expenses in a timely fashion, even though liability is reasonably clear, then the protection provided by Montana's mandatory liability laws would be of little value." Thus, under the UTPA, advance medical payments are required when liability is reasonably clear. However, the Court cautioned that before advance medical payments are due, liability must be reasonably clear for **both** the accident **and** the medical expenses incurred.

Advance Payment of Other Types of Expenses; *Dubray*

Expanding Ridley, the Montana Supreme Court held that an insurer has an obligation under the UTPA to advance pay expenses causally related to an insured's negligence, including lost wages which are reasonably certain and directly related to an insured's negligence. DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 Mont. 134, 36 P.3d 897.

Dubray arose out of a declaratory judgment action seeking a determination that, in addition to an obligation to advance pay medical expenses, an insurer is obligated to advance other types of damages suffered by an injured third party when liability is reasonably clear. Although that facts and language of *Ridley* appeared limited to medical expenses, the Court concluded that nothing in its earlier decision limited an insurer's obligation to advance payment to injured third parties where liability is reasonably certain to medical expenses. Again, relying on public policy, the Court concluded that medical expenses are just one type of obligation suffered by injured third parties which mandatory liability insurance laws were designed to alleviate. Thus, the *Dubray* Court held that lost wages which are reasonably certain and directly related to an insured's negligence must be advanced.

Conditioning Payment of Statutory Minimum Coverage on Release of Claims is Bad Faith per se; *Watters*

"[W]here an insured's liability for damages caused to a third party in an auto accident is reasonably clear, and those damages undisputedly exceed the mandatory limits . . . , it is an unfair trade practice per se . . . for an insurer to condition the payment of mandatory minimum policy limits on the third party's agreement to provide a full and final release of all liability in favor of an insured." Watters v. Guaranty Natl. Ins. Co., 2000 MT 150, 300 Mont. 91, 3 P.3d. 626, overruled in part by, Shilhanek v. D-2 Trucking, Inc., 2003 MT 122, 315 Mont. 519, 70 P.3d 721.

With one week of an accident, the insurer determined that its insured was liable for a third-party's injuries but refused to pay the statutory mandated policy limits without a release of liability. The injured third-party refused to sign the release, ultimately filing a claim against the insurer for bad faith. Overruling precedent, the *Watters* Court found that an insurer had a duty to pay the statutory minimum liability limits for an automobile policy even though an injured third party refuses to execute a full and final release of the insured. In rejecting the insurer's argument that a full and final release is an indispensable part of a settlement, the *Watters* Court concluded that the plaintiff may settle part of a claim which represents the statutory minimum policy limits, and reserve the right to pursue a claim for amounts in excess of the policy limits.

The *Watters* Court limited its holding to payment of the minimum coverage mandated by statute. The Court left open the question of whether an insurer could condition payment of policy limits in excess of the statutory minimums on receipt of a full release. Further, *Watters* left open the question of whether an insurer would similarly be precluded from conditioning payment of minimum coverage mandated by other state or federal laws, e.g., federal law requiring transport companies to maintain minimum limits of \$1,000,000.

Prohibition Extended to Policy Limits; *Shilhanek*

Insurer's obligation to advance pay special damages where liability is reasonably clear extends to the limit of coverage and may not be conditioned on the execution of a full and final release Shilhanek v. D-2 Trucking, Inc., 2003 MT 122, 315 Mont. 519, 70 P.3d 721.

Prior to trial the insurer offered to settle all claims for the payment of the \$1 million liability limit in exchange for a full release. The injured third party refused to sign a release and damages in excess of \$3 million were

awarded. The *Shilhanek* Court concluded that *Ridley* was dispositive, finding that the carrier was obligated to advance special damages where liability is reasonably clear and such obligation is not limited to statutory mandatory minimum liability limits. Importantly, the *Shilhanek* Court for the first time disconnected its reasoning from the mandatory minimum liability limit, concluding that its holding in *Ridley* "is not circumscribed by" the mandatory minimum liability statutes and to interpret otherwise construes *Ridley* too narrowly. To the extent the language of its decision in *Watters* indicated otherwise, that decision was expressly overruled.

Suggestions for Proactive Steps to Avoid Pitfalls

As evident by the ever-expanding boundaries of the *Ridley* decision, it is obvious to any carrier operating in the State of Montana that special attention must be made to the evaluation and handling of third party claims. The following steps should be considered in each case.

1. Factual investigations should be conducted early and a decision reached whether liability is reasonably clear.
2. Where liability is reasonably clear, evidence supporting out-of-pocket medical expenses and other special damages should be sought and a determination reached regarding each expense and its causal connection to the accident. In review of questionable expenses, medical reviews may be used to support determinations.
3. Upon finding a causal connection between an accident and the claimed damage, steps should be taken to make advance payments to service providers and the injured third party as promptly as possible.
4. Follow-up inquiries should be scheduled periodically to determine what, if any, additional expenses are being incurred by the injured third party and whether an obligation exists to make advance payment of the expenses.

Moreover, after concluding that an obligation exists under *Ridley* to make advance payments, affirmative steps may be taken to limit a carrier's exposure and protect its investment in advance payments. Under Montana law, any voluntary partial payment made prior to judgment shall be treated as a credit against such judgment and deducted from the judgment amount. Mont. Code. Ann. §26-1-706. However, if the judgment is for less than the amount of voluntary payments, there is no right of action to recover the excess amount.

Using the protection of this provision, rather than making payment solely on the basis of *Ridley*, the insurer would usually characterize each advance payments in terms of voluntary payments under the policy with an express reservation of its right to an offset against any future judgment. Such approach does not run contrary to the prohibition under *Watters* and *Shilhanek* against conditioning payments on a release, fulfills a carrier's obligation to advance payments where liability is reasonably clear and provides a clear right to an offset in the event an unfavorable judgment is ultimately rendered.

The limitation of this approach is that if a defense verdict is rendered or a judgment of less than the amount advanced, the insurer has no right to seek a return of the excess advanced. However, recently, a Montana district court has concluded that where advance payments are made in accordance with *Ridley* and a jury ultimately finds no liability, the injured third party is obligated to return the advanced funds in a manner agreeable to the defendant. *Rider v. Blair*, Flathead DV 01-526. The Montana Supreme Court has not addressed this issue. In reaching its decision, the district court concluded that because advanced payments were premised on liability and the jury subsequently negated that premise, legal justification for the payment no longer existed.

Although it's unknown whether this case will advance to the Montana Supreme Court, it raises an interesting issue, and perhaps window of opportunity, for insurers. If the issue is decided, it likely will rest on the Court's interpretation of the interplay between the obligations set forth in Ridley and the statutory language under the voluntary payment statute. Only time will tell if an insurer can firmly rely on Ridley to seek the return of advanced payments where no liability is ultimately found at trial. Until then, advance payments made under Montana's voluntary payment statute provides

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