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ATTORNEYS AT LAW

2017 MINNESOTA AUTOMOBILE LAW SEMINAR

SEPTEMBER 28, 2017 | METROPOLITAN BALLROOM – GOLDEN VALLEY, MINNESOTA

AGENDA

9:00 a.m. – 9:15 a.m. **Welcome and Introductions**
Shayne M. Hamann

9:15 a.m. – 9:45 a.m. **Key Things You Need to Know Pertaining to Uber, Lyft and Rental Car Scenarios**
Eugene C. Shermoen and Stephen M. Warner
Gene and Steve will discuss unique insurance coverage issues pertaining to the popular phone applications for use with Uber and Lyft. The duo will also discuss various rental car scenarios. They will cover Minnesota and federal statutes that will come into play, the priority of coverages, the duty to indemnify and how long that duty lasts. Their discussion will take into account liability claims as well as first party coverage scenarios.

9:45 a.m. – 10:15 a.m. **What You Must Know and Be Aware of in Order to Properly Handle and Defend Minnesota No-Fault Claims**
Shayne M. Hamann
Shayne will discuss the ever-changing landscape of Minnesota No-Fault claims and how claims adjusters can stay ahead of the crafty claimant and claimant's attorney. What are the top ten things that are important when handling Minnesota No-Fault claims and what is on deck for future No-Fault claims.

10:15 a.m. – 10:30 a.m. **Refreshment Break**

10:30 a.m. – 11:00 a.m. **Case Law Update: Recent Trends in Coverage**
Stephen M. Warner and Beth A. Jenson Prouty
Steve and Beth will discuss the practical implications of recent decisions of the Minnesota state and federal courts that may impact liability, UM, and UIM automobile coverage. They will also highlight recent developments in coverage for cutting edge technologies.

11:00 a.m. – 11:30 a.m. **Social Media, Surveillance, and Staying a Step-Ahead of the Always Sneaky Injured Party**
Shayne M. Hamann
How can you stay ahead of an injured party in monitoring their activity after an accident and claimed injuries? Shayne will discuss the benefits of social media, and the good and bad of surveillance as well as how to preserve the evidence you find and when it is best to use it in the defense of your case.

See reverse for continued agenda…

11:30 a.m. – 12:00 p.m. **Auto-Related Panel Discussion**

Paul J. Rocheford, William J. McNulty, Gregory J. Duncan, Steven J. Erffmeyer, and Brendan M. O'Connell – Moderated by Shayne M. Hamann

Our panel of automobile law experts will discuss a varied compilation of situations that they have encountered over the last couple of years that will aid you in claims handling. We encourage you to request a topic to be discussed when you send in your RSVP for our September seminar. The discussion topics include PIP indemnity, subrogation principles, and dealing with the workers' compensation lien in your liability claim. In addition, the panelists will discuss: the necessity and quality of recorded statements of injured parties and insureds; judicial estoppel and when it may be applicable in your case; an update pertaining to the Minnesota collateral source rule; and discussion of the anti-assignment provision in an automobile policy.

12:00 p.m. – 1:00 p.m. **Lunch**

1:00 p.m. – 2:00 p.m. **Vehicle Technology Trends that Will Make a Difference: from Electronic Stability Control to Autonomous Cars**

Guest Speaker, Hernán Mercado-Corujo, P.E., CFEI, CVFI, Crane Engineering

Hernán will focus on explaining the different technologies available on vehicles today that are paving the way for autonomous vehicles. He will discuss the impact from the investigation standpoint and potential theories of liability. Case studies may be used to illustrate some concepts.

2:00 p.m. **Questions and Answers and Closing Remarks**

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Safety Engineering Associates

a CRANE ENGINEERING company

Curriculum Vitae

Hernán Mercado-Corujo, P.E., CFEI, CVFI
Mechanical Engineer

Professional Practice

Hernán Mercado-Corujo is an accomplished, licensed professional engineer with over 15 years of experience in mechanical engineering practice, particularly research and development in the automotive industry. He has extensive experience with hands-on testing and numerical methods (Finite Element Analysis, Multibody Dynamics Simulation), with in-depth knowledge of strength, durability, fatigue, and overall vehicle reliability. His combined experience is ideal to understand vehicle systems and technologies, and offers a unique perspective in investigating vehicle fires. Bilingual in English and Spanish.

Employment History

Mechanical Engineer, Crane Engineering, Plymouth, Minn., 2013-present. Address claims of alleged product defects or malfunctions related to design, production, and recalls, among others. Most cases involve product liability litigation, personal injury, and/or insurance subrogation. Provide clients with expert consultation regarding complete vehicle reliability, motor vehicle and component testing, product evaluation and validation, product and standards research, as well as simulation-test correlation. Perform mechanical investigations on transportation vehicles, including passenger vehicles, light trucks, SUVs, bicycles, motorcycles, scooters, snowmobiles and agricultural equipment, among others. Conduct root/cause failure analysis and investigations of individual components, engines, transmissions, chassis, and other vehicle systems. May include vehicle/component testing/instrumentation. Perform fire origin and cause (O&C) investigations, focusing on motor vehicles (cars, motorcycles, trucks, engines), agricultural / farming equipment (tractors, combines, skid steer), and transportation equipment (cranes, haulers). Experience with Maritime law cases. Perform powertrain failure investigations and analysis. May involve collection and analysis of fluids. Provide artifact/scene documentation, evidence preservation, incident investigation, expert reporting, and expert witness testimony. Experience with MAP21 whistleblower cases involving motor vehicle part suppliers. Assist other Crane engineers during accident reconstruction efforts, including vehicle crash data retrieval and imaging via CDR tool, and data interpretation.

Senior Engineer II, Honda R&D Americas, Inc., Raymond, Ohio, 2010-2013.

- Measurement and instrumentation of vehicle and component loads for strength and durability.
- Set component specifications based on measured loads and computer simulation, including bolted joints.
- Perform full vehicle multibody dynamics simulations of passenger cars and light trucks.
- Testing of dampers, struts, bushings, sway bars for component characterization.
- Lead development of 16MY Honda Pilot in areas of Durability, Quality, and Reliability.
- Lead team in acquiring 3D digital scans of proving grounds road data, including vehicle dynamics and reliability test courses.
- Competitor vehicle benchmark testing & driving evaluation activities.

Engineer III, Honda R&D Americas, Inc., Raymond, Ohio, 2004-2010.

- Perform finite element analysis and correlate to experimental data.
- Product verification and validation in terms of strength and durability, including aluminum welds.
- Hands-on laboratory testing and analysis of suspension assemblies, engine and sub-frame mount systems, wheel hubs and bearings, bolted joints, wheels, open-close systems for strength and durability, based on internal Honda requirements.
- Vehicle and track testing to acquire loads generated with low profile tires.
- Design and build equipment to perform hub durability and bearing drag measurements.
- Basic driver's training at Transportation Research Center.
- Hands-on line training at assembly plant.
- Involved in Zenbara (vehicle teardown or dismantling) activities.

Product Engineer, Eaton Corporation, Southfield, Mich., 2001–2004.

- Perform finite element analysis and correlate to experimental data.
- Analyze powertrain components, including engine valves, lifters, air management systems (superchargers, compressors, and turbos).
- Perform failure and fatigue analysis, modal and harmonic analyses on powertrain components.
- Develop and execute reliability and performance test plans, procedures, and schedules to ensure compliance of product to customer requirements.
- Experience with impact response equipment, signal analyzers, laser vibrometers, and related electronic equipment.
- Experience as Mechanical Lead responsible for product design and project management.
- Product design includes bearing selection and critical speed analysis.

Professional Licenses

Registered Professional Engineer – Puerto Rico, Ohio, Minnesota and Wisconsin

Certified Fire and Explosion Investigator (CFEI)

Certified Vehicle Fire Investigator (CVFI)

Professional Affiliations and Honors

National Fire Protection Association (NFPA)

Society of Automotive Engineers (SAE)

National Association of Fire Investigators (NAFI)

American Society of Mechanical Engineers (ASME)

Society of Hispanic Professional Engineers (SHPE) – President Twin Cities Professional Chapter

Northwest Loss Association, Inc.

Recipient of Honda R&D "Annual Business and Technology Award" for 2011 Odyssey sliding door development

Excellence in Oral Presentation, SAE World Congress, Detroit, Mich., 2009

Education

M.S. Mechanical Engineering, Georgia Institute of Technology, Atlanta, Ga., 2001.

B.S. Mechanical Engineering, Massachusetts Institute for Technology, Cambridge, Mass., 1999.

Continuing Studies

ATV RiderCourse, ATV Safety Institute, Silver Lake, Minn., 2016

Tire and Wheel Safety Issues, SAE, Troy, Mich., 2015.

Applied Vehicle Dynamics, SAE, BMW Performance Driving School, Greer, S.C., 2015.

Hazardous Waste Operations and Emergency Response (Hazwoper) 40-Hour Waste Site Worker Training (29 CFR, 1910.120), Minneapolis, Minn., 2015.

Bicycle Repair and Maintenance Class, Park Tool School, Minneapolis, Minn., 2014.

Traffic Skills 101, The League of American Bicyclists, Minneapolis, Minn., 2014.

SolidWorks Flow Simulation, Symmetry Solutions, Brooklyn Park, Minn., 2014.

Advanced Fire, Arson & Explosion Investigation Program, NAFI, Richmond, Ky., 2014.

Snowmobile Safety Education Program, Minnesota Department of Natural Resources, Sherburne Co., Minn., 2013.

Engine Failure Investigation and Analysis, SAE, Troy, Mich., 2013.

Basic Fire and Arson Investigation, MNDPS, Willmar, Minn., 2013.

The Recreational Off-Highway Vehicle Safety E-Course, Recreational Off-Highway Vehicle Association, cbt.rohva.org, 2013.

Vehicle Fire, Arson & Explosion Investigation Science & Technology, NAFI, Lexington, Ky., 2013.

Design and Analysis of Fasteners and Bolted Joints, EduPro, Raymond, Ohio, 2013.

The Use of Control Charts, Business Improvement Solutions, San Juan, Puerto Rico, 2012.

SAE World Congress, Detroit, Mich., 2012.

Vehicle Dynamics for Passenger Cars and Light Trucks, SAE, Troy, Mich., 2011.

Motorcycle Ohio Basic Rider Course, ODPS, Columbus, Ohio, 2007.

Languages

Bilingual – fluent in English and Spanish.

Publications

Mercado-Corujo, H., Flores, L., Loyd, A., *Bringing Things Full Cycle – How to Approach Bicycle Crash Investigations From Every Perspective Amid Rising Use*, CLM Magazine, January 2017.

Mercado-Corujo, H., *¿Qué? Speaking your Client's Language in Forensic Investigations - Literalmente*, Subrogator, Fall 2016.

Yoshimoto, H., Pearce, K., Rodrick, T., Slabach, B., Gagliano, C., Mercado-Corujo, H., Tener, D., *Enhancement of Multi-Body Simulation Data Sharing*, Honda R&D Technical Review, April 2012.

Mercado-Corujo, H., *Utilization of MotionView for Automotive Strength and Durability Analysis*, paper number 2009-01-1196, 2009 SAE World Congress and Exhibition, 2009.

Kulkarni, A., Iannuzzelli, R., Seyedi, J., Mercado-Corujo, H., *Development and Application of a Press-Pin/PTH Reliability Model*, Conference Proceeding and Journal Volume 15-3, SMTA Journal of Surface Mount Technology, 2002.

Lynch, D., Mercado-Corujo, H., *Thermal Finite Element Analysis of X9 and X29 X-Ray Ring Crotch Radiation Absorbers*, BNL-66762, KC0204011, Energy Citation Database, 1999.

Presentations

Three-hour seminar provided, Passenger & Commercial Vehicle Fire Origin & Cause Investigations, Professional College of Engineers & Surveyors of Puerto Rico (CIAPR), San Juan, PR, May 2016.

Large Loss Incidents in Industrial Settings: Tools and Techniques for Site Management and Root Cause Analysis, 27th Annual Product Liability Conference, Department of Engineering Professional Development, University of Wisconsin-Madison, WI, 2015.

Forensic Engineering Investigations – Applications and Case Studies, SHPE/SWE Meeting, Plymouth, Minn., 2015.

Vehicle Technology Trends That Will Make a Difference: A Forensic Engineering Perspective, Farmers Mutual Hail – Adjuster's School, Story City, Iowa, 2014.

Frequency & Amplitude Dependent Bushing Model Implementation in Full-Vehicle Simulation, 6th European Altair Technology Conference, Turin, Italy, 2013.

Full-Vehicle Multibody Simulations on Virtual Roads – The Challenges of Success, 5th European HyperWorks Technology Conference, Bonn, Germany, 2011.

MV / MS Application and Correlation: Automotive Strength and Durability Analysis, Dynamics 2009, Troy, Mich., 2009.

Utilization of MotionView for Automotive Strength and Durability Analysis – Application and Correlation, SAE 2009 World Congress, Detroit, Mich., 2009.

Customization of MotionView for Automotive Strength and Durability Analysis, 2008 Americas Hyperworks Technology Conference, Novi, Mich., 2008.

Thermo-Mechanical Analysis of Water-Cooled Brakes, 2004 International ANSYS Conference, Pittsburgh, Pa., 2004.

2017 Minnesota Automobile Law Seminar

September 28, 2017

Arthur Chapman
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Agenda

I. Key Things you Need to Know Pertaining to Uber, Lyft, and Rental Car Scenarios
II. What You Must Know and Be Aware of in Order to Properly Handle and Defend Minnesota No-Fault Claims
III. Case Law Update: Recent Trends In Auto Coverage
IV. Social Media, Surveillance, and Staying a Step-Ahead of the Always Sneaky Injured Party
V. Auto-Related Panel Discussion
VI. Guest Speaker, Hernán Mercado-Corujo, P.E., CHEI, CVFI - Vehicle Technology Trends that Will Make a Difference: from Electronic Stability Control to Autonomous Cars

Key Things You Need to Know Pertaining to Uber, Lyft, and Rental Car Scenarios

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Transportation Network Law (Minn. Stat. § 65B.472)

- Driver or company he/she drives for must provide primary auto insurance while:
  - Driver logged on to company's network
  - Driver engaged in pre-arranged ride
- What about ride that is not "prearranged"?

Transportation Network Law – Coverage Timeline

- Driving but not logged in: personal policy
- Driving and logged in: trans. net. policy
- Driving with prearranged rider: trans. net. policy
- Driving after drop-off (still logged in): trans. net. policy
- Driving after drop-off (logged out): personal policy

Determining Where Accident Falls on Timeline

- Transportation network driver required to disclose upon request whether logged in or engaged in prearranged ride.
- Transportation network company required to document and disclose driver log-on activity and when engaged in prearranged ride.

Transportation Network Law – Insurance Requirements

Insurance Requirements While Logged on Only:

- BI Liability: $50,000/$100,000
- Prop. Damage Liability: $30,000
- PIP: Statutory
- UM/UIM: $25,000/$50,000

Transportation Network Law – Insurance Requirements

Insurance Requirements While Engaged in Prearranged Ride:

- BI/Prop. Damage Liability: $1,500,000 CSL
- PIP: Statutory
- UM/UIM: $25,000/$50,000

Transportation Network Law – Who May Exclude Coverage?

- Insurers that write auto insurance in MN
- What about self-insured entities?
- What about insurers who do not write in MN?
  - Possible different outcomes for personal auto vs. commercial auto policies
  - "Nothing in this section implies or requires that a personal auto insurance policy provide coverage . . ." § 65B.472, subd. 4.

Transportation Network Law – If Policy Doesn't Exclude Coverage

- "Nothing in this section shall be deemed to preclude an insurer from providing coverage for the transportation network company driver's vehicle, if it so chooses to do so by contract or endorsement."

BUT

- Have a right of contribution and indemnity against insurer subject to statutory requirements if insurer does defend/indemnify.

Transportation Network Law – What About Excess Coverage?

- MN Transportation Network Law only governs primary coverage.
- If personal auto policy does not exclude coverage, could owe excess liability coverage for driver.
- MN Transportation Network Law does not change rules for excess UM/UIM.

When Rental Car is Used For Transportation Network Driving

- Priority of Coverage
- Can Rental Company Decline the Defense?
- Right of contribution/indemnity?

Rental Car Owner Liability

- Graves Amendment eliminates liability for rental car owner as vehicle owner.
- Only exceptions are criminal wrongdoing or negligence by owner.
- Possible examples:
  - Failing to adequately vet renter
  - Failing to properly maintain vehicle

Rental Car Coverage Priorities

- Personal auto policy, wherever issued, must extend PIP, Liability, and UM/UIM coverage for rented private passenger vehicle (Minn. Stat. § 65B.49, subd. 5(a);
- Commercial auto policy must provide coverage for rented vehicles as required in Ch. 65B, but it can be excess (Minn. Stat. § 60A.08, subd. 12);
- Rental car owner must provide coverage in absence of any other available insurance.

Rental Vehicle Coverage Under Commercial Auto Policy

- Non-owned auto exclusion likely not enforceable where rental car involved.
- If policy does not provide rental coverage, it will likely be written up to provide at least statutory minimums.
- Coverage priority may be an issue (closeness to risk/total policy insuring intent analysis).

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What You Must Know and Be Aware of in Order to Properly Handle and Defend Minnesota No-Fault Claims

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Agenda

- Maintenance and Use of a Motor Vehicle
- No-Fault Priorities
- No-Fault investigation/EUOs/ROR's
- No-Fault Start-Up Letter and Application
- IME
- Denial of No-Fault Benefits
- Interest Calculation /*Kiess*
- Arbitration Petition
- Award
- Post Arbitration To Dos

Maintenance and Use of Motor Vehicle

- PIP Claims – Essential Elements of a No-Fault Claim:
  - Injury resulting in a loss;
  - Caused by an accident;
  - Arising from maintenance or use;
  - Involvement/use of a motor vehicle.

Identifying Priorities for No-Fault Coverage – § 65B.47

- General Rules for PIP priorities – who is primary?
  - What kind of vehicle is it?
  - What is the person's status in relation to the vehicle?

Identifying Priorities for No-Fault Coverage – § 65B.47

VEHICLE	DRIVER	OCCUPANT	PEDESTRIAN
Personal Vehicles	1st — policy where driver is statutorily defined insured. 2nd — policy covering occupied vehicle.	1st — policy where occupant is statutorily defined insured. 2nd — policy covering occupied vehicle.	1st — policy where pedestrian is named insured. 2nd — submit claim to any involved vehicle. 3rd — if no insurance on involved vehicles — go to assigned claims plan.
Business Vehicles Used In Business Of Transporting Persons Or Property (at the time of the accident) * See Exceptions	1st — policy covering business vehicle. 2nd — policy where driver is statutorily defined insured.	1st — policy covering business vehicle. 2nd — policy where occupant is statutorily defined insured.	1st — policy covering business vehicle. 2nd — policy where pedestrian is named insured. 3rd — submit claim to any involved vehicle. 4th — if no insurance on involved vehicles — go to assigned claims plan.
Business Vehicles Exceptions	**The rule governing vehicles used to transport persons or property does not apply to the following:** • Bus • Commuter Van • Passenger in a taxi • Taxi driver (for policies issued/renewed between 9/1/96 & 9/1/97) • Vehicle being used to transport kids as part of a family or group family day care program • Vehicle being used to transport kids to school/school-sponsored activity		
Business Vehicles Employer Furnished (accident need not occur in course & scope of business)	1st — if driver is an employee, spouse of employee, or resident relative of employee – policy covering business vehicle. 2nd — if none of the above, policy where driver is statutorily defined insured.	1st — if occupant is an employee, spouse of employee, or resident relative of employee – policy covering business vehicle. 2nd — if none of the above, policy where occupant is statutorily defined insured.	1st — policy covering business vehicle. 2nd — policy where pedestrian is a statutorily defined insured. 3rd — submit claim to any involved vehicle. 4th — if no insurance on involved vehicles — go to assigned claims plan.
Fleet Vehicles In Interstate Commerce	If the vehicle occupied is 1 of 5 or m ore vehicles under common ownership, **and** regularly used in the business of transporting persons or property — PIP coverage is **not available** if the accident occurs **outside the State of Minnesota**.		
Exclusions to PIP	**The following exclusions bar no-fault coverage in Minnesota:** • *Converted Motor Vehicles* (car thieves & joy riders) — if under age 14 can go to the assigned claims plan • *Races* - if injury/death results from official racing contest • *Intentional Injuries* - if intentionally causing or attempting to cause injury to self/others • Motorcycles - unless a pedestrian, or motorcycle PIP coverage purchased		

Personal Vehicles

Where to go for PIP coverage

Driver	Occupant	Pedestrian
1. Driver's Own Policy	1. Occupant's own policy	1. Pedestrian's own policy
2. Occupied Vehicle's Policy	2. Occupied vehicle's policy	2. Any involved vehicle
		3. Assigned Claims Plan

Business Vehicles Used in Business of Transporting Persons or Property

- Where to go for PIP coverage

Driver	Occupant	Pedestrian
1. Business policy	1. Business policy	1. Business policy
2. Driver's own policy	2. Occupant's own policy	2. Pedestrian's own policy
		3. Any involved vehicle
		4. Assigned Claims Plan

Business Vehicles - Employer Furnished - Need not be in Course & Scope at the Time of the Accident

Driver	Occupant	Pedestrian
1. Business policy if employee, spouse or resident relative	1. Business policy if employee, spouse or resident relative	1. Business policy
2. Driver's own policy	2. Occupant's own policy	2. Pedestrian's own policy
		3. Any involved vehicle
		4. Assigned Claims Plan

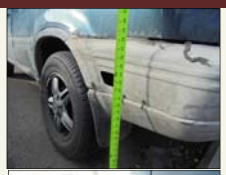
Key No-Fault Documents

- Start-Up Letter
- PIP Application
- Denial of No-Fault benefits letter
  - See our samples

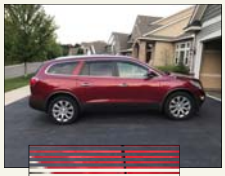
No-Fault Investigation

- Tape-Recorded Statement of Insured;
- Examination Under Oath - fraud or suspicious claims or priority of coverage issues;
- Property Damage Information - photos and estimate.

No-Fault Investigation – Less Helpful

No-Fault Investigation – Helpful!


No-Fault IME

- Use an appropriate IME examiner;
- Give appropriate notice;
- Schedule IME for city, town or statutory residence of claimant; and
- *Generally* – *a* two-week turnaround or sooner on the IME report.

No-Fault IME

1. What injury or injuries, if any, do you feel _____sustained as a proximate result of the _____ (date of accident) motor vehicle accident?
2. Did _____sustain any injury or aggravation to a prior injury or condition as a result of the _____motor vehicle accident? If so, please describe said injury, condition or aggravation, indicate if it is temporary or permanent injury and include any objective findings and prognosis, including any future care or diagnostic testing you deem necessary as a result of the _____motor vehicle accident.

No-Fault IME

3. What care, treatment and diagnostics testing, if any would _____have required relative to any claimed injuries from the _____ motor vehicle accident. Is _____in need of any future medical care, treatment, or surgery for any alleged injuries from the _____motor vehicle accident?
4. Do you feel that _____is capable of performing his/her activities of daily living including social activities and household chores and tasks?
5. Is _____capable of working full time/part-time in their capacity as a _____?

Reservation of Rights Letter

- Additional Investigation and Discovery
  - EUO;
  - IME;
  - Excessive chiropractic/massage therapy treatment; and
  - Coverage issues - priority or otherwise
  - Premature filing of an arbitration petition.

Denial Letter Following IME

- Cite the IME language justifying denial of the claim.
- Consequently, based upon the IME report, all No-Fault benefits otherwise payable for this loss will be terminated as of _____.
- *Discuss Kiess* and interest.
- Use our sample denial letter.

No-Fault and UM/UIM Interplay with Experts

- Be mindful of the UM/UIM portion of the case when selecting a No-Fault examiner.
- Communicate with the UM/UIM adjuster, if it is conceivable that another first party claim will be advanced.

Interest

- Minn. Stat. § 65B.54, Subd. 1 provides that basic economic loss benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of loss. Minn. Stat. § 65B.54, Subd. 2 mandates that overdue payments bear simple interest at the rate of 15% per annum.
  - The 15% interest penalty is not part of the $20,000 in coverage for either medical expenses or income loss.
  - It must be paid in addition to the $20,000 in coverage. *McGoff v. AMCO Ins. Co.*, 575 N.W.2d 118 (Minn. Ct. App. 1998).

Petition for Arbitration

- Be ready … It will likely come when:
  - Following receipt of an IME by claimant; or
  - When claimant's counsel asks for an updated PIP log.
  - Six year statute of limitations from date of denial of No-Fault benefits.

Petition for Arbitration

- Petition
  - Venue
  - Jurisdiction
- Itemization of claim
  - Names and amounts outstanding by medical provider;
  - Wage loss calculation and documents supporting alleged wage loss;
  - Replacement services - calculation and documents supporting alleged services;
  - Mileage - IRS - 17 cents per mile versus 53.5 per mile
  - Costs
  - AAA Rule 5 (e) - 30 days after filing petition, Claimant has to file itemization of claim and supporting documents.

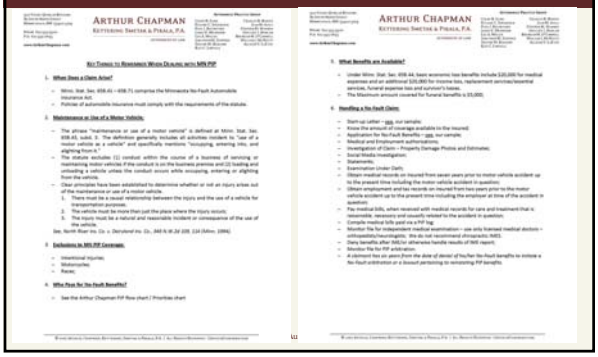
Post Award Dealings

- Full award - need a new IME to continue to deny No-Fault benefits;
- Partial award - maintain denial/new IME;
- Full denial - maintain denial of No-Fault benefits based upon existing IME.

Post Award Dealings

- Do you need another IME to continue to deny No-Fault benefits that remain;
- Take a wait-and-see approach;
- Try and negotiate a full and final No-Fault close-out with claimant/claimant attorney.

Key Things to Remember when Dealing with MN PIP


ARTHUR CHAPMAN
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Key Things to Remember When Dealing with MN PIP

1. When Does a Claim Arise?
   - Minn. Stat. Sec. 65B.41 – 65B.71 comprise the Minnesota No-Fault Automobile Insurance Act.
   - Policies of automobile insurance must comply with the requirements of the statute.
2. Maintenance or Use of a Motor Vehicle.
   - The phrase "maintenance or use of a motor vehicle" is defined at Minn. Stat. Sec. 65B.43, subd. 3. The definition generally includes all activities incident to "use of a motor vehicle as a vehicle" and specifically mentions "occupying, entering into, and alighting from it."
   - The statute excludes (1) conduct within the course of a business of servicing or maintaining motor vehicles if the conduct is on the business premise and (2) loading and unloading a vehicle unless the conduct occurs while occupying, entering or alighting from the vehicle.
   - Clear principles have been established to determine whether or not an injury arises out of the maintenance or use of a motor vehicle.
     1. There must be a causal relationship between the injury and the use of a vehicle for transportation purposes;
     2. The vehicle must be more than just the place where the injury occurs;
     3. The injury must be a natural and reasonable incident or consequence of the use of the vehicle.

   See, North River Ins. Co. v. Dorsheid Ins. Co., 340 N.W.2d 339, 114 (Minn. 1984).
3. Exclusions to MN PIP Coverage.
   - Intentional Injuries;
   - Motorcycles
   - Fares;
4. Who Pays for No-Fault Benefits?
   - See the Arthur Chapman PIP flow chart / Priorities chart

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5. What Benefits are Available?
   - Under Minn. Stat. Sec. 65B.44, basic economic loss benefits include $20,000 for medical expenses and an additional $20,000 for income loss, replacement services/essential services, funeral expense loss and survivor's losses.
   - The Maximum amount covered for funeral benefits is $5,000.
6. Handling a No-Fault Claim:
   - Start-up Letter – see, our sample;
   - Know the amount of coverage available in the insured;
   - Application for No-Fault Benefits – see, our sample;
   - Medical and Employment authorizations;
   - Investigation of Claim – Property Damage Photos and Estimates;
   - Social Media Investigation;
   - Statements;
   - Examination Under Oath;
   - Obtain medical records on insured from seven years prior to motor vehicle accident up to the present time including the motor vehicle accident in question;
   - Obtain employment and tax records on insured from two years prior to the motor vehicle accident up to the present time including the employer at time of the accident in question;
   - Pay medical bills, when received with medical records for care and treatment that is reasonable, necessary and causally related to the accident in question;
   - Compile medical bills paid via a PIP log;
   - Monitor file for independent medical examination – use only licensed medical doctors – orthopedists/neurologists; We do not recommend chiropractic IME's.
   - Deny benefits after IME/or otherwise handle results of IME report;
   - Monitor file for PIP arbitration.
   - A claimant has six years from the date of denial of his/her No-Fault benefits to initiate a No-Fault arbitration or a lawsuit pertaining to remaining PIP benefits.

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Refreshment Break

Case Law Update: Recent Trends in Coverage

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Overview

I. Accrual for UIM/UM claims
II. Choice-of-law
III. Motorcycles & UIM
IV. Bad Faith
V. Loss accrual
VI. Drones
VII. Autonomous cars

Accrual for UIM/UM Claims

- A claim for UIM benefits accrues on the date of settlement with or judgment against the tortfeasor.
  - Settlement or judgment is a condition precedent to bringing a UIM claim.
  - If statute of limitations runs on tort claim, a UIM claim does not accrue.

Ronning v. State Farm Mut. Auto. Ins. Co., 887 N.W.2d 35 (Minn. App. 2016)

Accrual for UIM/UM Claims

- In response to a Schmidt-Clothier notice, an insurer must substitute its check for the proposed settlement amount in order to protect its subrogation rights.
  - This includes preservation of the right not only to seek additional recovery from the tortfeasor – but also from the tortfeasor's insurers – and to challenge what coverage is available to the tortfeasor.

White v. American Family Ins. Co. (Minn. App. March 27, 2017).

Accrual for UIM/UM Claims

- Claims for primary and excess UM both accrue on the date of the accident.
  - Exception: when a tortfeasor is insured at the time of the accident but, within six years of the date of the accident is deemed uninsured because his or her insurer becomes insolvent.

Hegseth v. Am. Family Mut. Ins. Grp., 877 N.W.2d 191 (Minn. 2016).

Choice-of-Law

- Business auto policy providing liability coverage for vehicles owned by Papa John's pizza drivers around the country, but not providing UIM coverage
- Policy issued in Kentucky – UIM not required
- Accident in North Dakota – UIM is required
- Which state's law applies?

Am. Fire & Cas. Co. v. Hegel, 847 F.3d 956 (8th Cir. 2017).

Choice-of-Law

- "When insurance coverage is at issue, the location of the accident has 'less significance' when the policy covers risks that are scattered throughout two or more states."

Am. Fire & Cas. Co. v. Hegel, 847 F.3d 956 (8th Cir. 2017).

Choice-of-Law

Two-prong choice-of-law test:

1. Determine all of the relevant contacts which might logically influence the decision of which law to apply.
2. Leflar's five choice-influencing factors: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rules of law.

Am. Fire & Cas. Co. v. Hegel, 847 F.3d 956 (8th Cir. 2017).

Choice-of-Law

Do Minnesota No-Fault and liability requirements apply to insurers not licensed to write insurance in MN?

Minn. Stat. § 65B.50

- **Subd. 1:** Every insurer licensed to write motor vehicle accident reparation and liability insurance in this state shall, … afford at least the minimum security provided by section 65B.49 to all policyholders …
- **Subd. 2:** Notwithstanding any contrary provision in it, every contract of liability insurance for injury, wherever issued, covering obligations arising from ownership, maintenance, or use of a motor vehicle, … includes basic economic loss benefit coverages and residual liability coverages required by sections 65B.41 to 65B.71, while the vehicle is in this state…

Founders Ins. Co. v. Yates, 888 N.W.2d 134 (Minn. 2016).

Choice-of-Law

- UIM coverage is not required for nonresidents, and so if nonresidents have UIM coverage, it need not comply with MN law.
- If a MN resident insured is injured in an auto accident in MN, and the insured obtained UIM coverage in another state from an insurer licensed to sell in MN, the resident insured is entitled to the UIM coverage required by MN law.
- Residence is determined at the time of the accident, not the insurance application.

Hedrington v. Am. Standard Ins. Co., (Minn. App. 2016).

Motorcycles & UIM

- UIM coverage is not required for motorcycles.
- The UIM endorsement excludes coverage for injury sustained by any insured while "occupying" any motor vehicle owned by that "insured" which is not insured for this coverage.
- Motor vehicle is not defined; its plain meaning includes a motorcycle; the exclusion applies.
- But the PIP endorsement adds a definition of "motor vehicle" to the Definitions section of the main policy form – the definition expressly excludes motorcycles.

Frauendorfer v. Meridian Security Ins. Co., (Minn. App. 2017).

Motorcycles & UIM

Limits-less-paid UIM coverage is enforceable to determine whether UIM benefits are available to an insured injured in a motorcycle accident

- The No-Fault Act mandates that all UIM coverage issued in the state be damages-less-paid add-on coverage
- But the No-Fault Act does not regulate UIM coverage for motorcycles

Mordini v. American Fam. Ins. Co., (Minn. App. Nov. 7, 2016).

First-Party Bad Faith

- Minn. Stat. § 604.18
  - Liability requires that the insurer act with "the absence of a reasonable basis" for denying benefits of the insurance policy **and**
  - The insurer must **know** of the lack of a reasonable basis for denying the benefits of the insurance policy;
  - **Or** act in a reckless disregard "of the lack of a reasonable basis" for denying benefits
  - "Reasonable basis" provides an objective standard

First-Party Bad Faith

- Examples of bad faith can include:
  - Denying a claim that exceeds the policy limits
  - Insurer's investigation has been ignored
  - Destruction of evidence
  - Lack of claim file documentation

First-Party Bad Faith

- A court may award:

  an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less. . . .

- "Proceeds awarded" are capped by the insurance policy's limit.

Wilbur v. State Farm Mut. Auto. Ins. Co., 892 N.W.2d 521, (Minn. 2017).

Loss Accrual

- Under the No-Fault Act, loss accrues when the medical expenses are incurred
- Medical expenses are incurred when the insured receives bills for medical treatment
- Minn. Stat. § 62Q.75 applies to health-care providers seeking reimbursement from no-fault insurers:
  - A health care provider or facility that does not make an initial submission of charges within the six-month period after providing the service shall not be reimbursed for the charge and may not collect the charge from the recipient of the service or any other payer.

Western Nat'l Ins. Co. v. Nguyen, (Minn. App. Sept. 18, 2017).

Drones

- Coverage
- Can insurers legally use them?
- How?

Autonomous Cars

Automobile accident litigation accounts for 2/3 of all claims, 3/4 of all lawyers' fees, and 3/4 of all payouts in the personal injury liability system.

Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation In American Society 103 (2002).

Autonomous Cars

Theories on who may be at fault when an accident happens

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Social Media, Surveillance, and Staying a Step-Ahead of the Always Sneaky Injured Party

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Agenda

1. Why should claims professionals care about social media?
2. Social media and the courts.
3. Social media's use in automobile law claims and its relevance.
4. Social media – *makes information available to anyone with a computer, cell phone, iPhone, Android and cell phone with computer-like capabilities.*

Social Media

Variety of interactive, online media, built around sharing information; Online Forums/Bulletin Boards

Social Media Sites

Top Social Networking/Interactive Video/Blogging Websites:

A. facebook
B. LinkedIn
C. myspace.com
D. twitter
E. YouTube
F. CaringBridge
G. Instagram
H.

Social Media information / Examples

- Photos
- Videos
- Information - education/friends/employment/hobbies likes/dislikes....endless things
- Social Media Posts about: topics/happenings/events/questions advice/opinions.
- Places - check-ins - where you are at or have been.

Actions Speak Louder than Words

Social Media Statistics

- More than **one billion people** are active on Facebook
- More than **one billion people** use Instagram every day.
- More than **100 million people** have Facebook, Instagram and Snapchat on their phone.

Why Should Claims Professionals Care About Social Media

A. Technological Age: Most everyone is using social media in some form; it's popular!
B. Client Contact: all electronic
C. Improving Efficiency: research and investigation, discovery, marketing/communication and professional development.
D. Free surveillance.

Examples of Social Media's Use in the Legal Context Currently

- Individual's willingness to share the details of their lives on social media has created an unrivaled source of evidence which represents fertile ground for trial lawyers and adjusters seeking discovery.
- Social media evidence can be particularly helpful in the areas of personal injury, insurance coverage, employment and family law.

Social Media In Discovery

- Regardless of how many times individuals are cautioned not to post their status, photos, or check-ins at local establishments that may reflect poorly on them or their company, many people still turn to social media to express themselves openly and often in a carefree way.
- Check on injured party and your insured.

Privacy

- There is a limited expectation of privacy in information shared on social media sites.
- Because of this, it makes for wonderful cross exam at an arbitration hearing, trial, etc.

Privacy

Courts generally have rejected the idea of a "social network site privilege" and broadened discovery rules to include relevant social media data, even if technically considered by the poster to be "private".

Sample Discovery Request

Are you aware of any websites, social networking sites, blogs, online media sites, or any other electronic or online source which contain information, comments, photographs, documents, or other data relating to the subject matter of this litigations? If so, state the name of the site, its web address, and the information it contains.

Sample Discovery Request

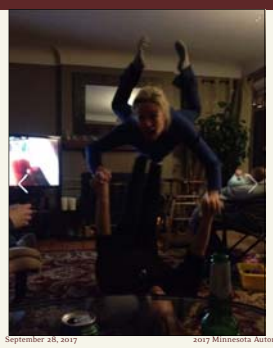
-Identify all social media outlets to which you subscribe and state the nature and frequency of your use.

-Identify and produce all copies of social media information you have obtained on plaintiff.

What's The Big Deal About Social Media in Auto-Related Cases?

- Increased use of social websites and the internet makes it necessary for us to be concerned about the potential consequences of our use of the internet.
- A party to lawsuit (whether a plaintiff or a defendant) forfeits a number of privacy rights – when using social media.
- What is out on the internet may not be as private as someone may believe.
- **Investigating what is on the internet about someone is akin to surveillance**. Is the information embarrassing, is someone depicted in an unfavorable light or will a potential future juror be offended by what is on the internet or a social media site if used at trial?

Case Sample #1



Case Sample #1

- I am sending this email as I am a little disturbed about a fraudulent injury lawsuit taking place and filed by the law firm of _____ on behalf of _____. Attached is a recent photograph of the plaintiff off of her fiancé's Facebook. She recently legally changed her name back to _____. She will be marrying _____ in a private ceremony in Santa Barbara, California on June 21, 2014. Then she will be _____.

  I prefer to remain anonymous but fraudulent and frivolous lawsuits hurt all of us. I highly recommend having an investigator look into her activities.

Arbitration Award - Example #2

MEMORANDUM

While I am very sympathetic to the health issues that is dealing with, she has not met her burden of proving by a preponderance of the evidence that these problems are directly caused by the motor vehicle accident. My conclusion was that the impact was minor and that testimony regarding the accident was not credible. There is very little property damage. The emergency room record indicates that stated at that time that she was "rear-ended by another car at slow speeds." At the hearing she testified that her head hit the headrest twice and she was then twisted sideways and slammed her shoulder and head into the driver's door. This testimony defies the laws of physics. then testified that her rearview mirror flew past her head into the backseat and the ashtray, which had previously been stuck, came three-fourths of the way out of the dashboard. None of this testimony was credible to me. This leads me to conclude that was exaggerating her injuries. That also seemed to be the opinion of many of her treating doctors. The Facebook excerpts, although certainly not conclusive, do tend to show that she was not as disabled as she claims.

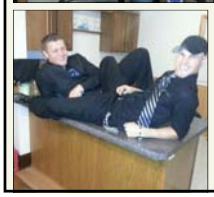
In conclusion, I did not feel that there was sufficient evidence to support the conclusion that sustained any permanent aggravation to her many prior medical and physical conditions.

Example of a Frequent Poster of Information - Example #3

Hostas are now planted. I took the photo before I cleaned up the mess. I really like the end look. Heck. I like the whole thing. I spent my summer well. And of course. I can take pride and say that I did it myself. 9/4/2014

Share
4 people like this.

Social Media - Facebook Example - #4



Social Media - Facebook Example #5

Social Media - Facebook Example #6

Implications in Personal Injury Cases

1. Photos on a social media site - facebook - relevant and ***probative to the issues of wage loss, permanency, physical restrictions, pain and suffering and emotional distress***.
2. CA case - discussing social networking - states a person who makes information **available to anyone with a computer made the information available to the public at large**. *Moreno v. Hanford Sentinel Inc.*, 91 Cal Rptr. 3d 858, 862 (Cal.Ct.App. 2009)

Implications in Personal Injury Cases

Workers' Compensation case out of Arkansas:

Clements v. Johnson's Warehouse Show-Room, Inc., 2012 Ark. App. 17, 2012 Ark. App. LEXIS 18 (January 4, 2012) -

- The Arkansas Appellate Court held that photos of the employee partying and drinking while claiming to be in excruciating pain could certainly have a bearing on the employee's **credibility**, (albeit a negative effect), and held that the judge's ruling allowing their introduction (photos) into evidence was not an abuse of discretion.
- Photos came in and Plaintiff's credibility was impeached at trial.

Implications in Personal Injury Cases

1. The fact that a plaintiff may intend a limited audience does not change the fact that the information is available to the public at large.
2. Social media information is discoverable.
3. Plaintiff may have been engaged in many physical activities – relevant for the lawsuit considering assertions of permanent injuries and decreased physical activity.
4. Goal is to stay "one step ahead" of the injured party. See what they are posting on social media sites prior to any litigation!

Implications in Automobile Law-Related Cases

- Minnesota Rules of Evidence 401 and 403 – **Balancing Act**.
- **401 – "Relevant evidence"** means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- **403 – Although relevant, evidence may be excluded if its probative** value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.
- *The rule favors admissibility of relevant evidence, as the probative value of the evidence must be substantially outweighed by prejudice.*

Implications in Personal Injury Cases

Social Media to be used as impeachment or direct evidence – "you have to let the cat out of the bag" at some point.

A. A lot will depend upon what you have and when you want to use it.
B. Credibility of the party/witness
C. Facts of case – damages/liability
D. What are your goals – hopes for the end result of the case?
E. Will releasing the information pre-suit help resolve the case and save you money?

Implications of Social Media in Auto Claims

Defense Perspective – Discovery Tool

A. Form of surveillance - cost effective;
B. Help build a defense or reduce potential damage claims;
C. Checking honesty/integrity of injured person;
D. Keep record of what you get. Print out and save information!
E. Check on your client / insured as well.

Plaintiff Perspective – Social Media Auto Claims

Plaintiff Perspective - Know your client

A. Know your client's social media / internet habits;
B. Find out what is and has been posted;
C. Keep copies of any documents your client has deleted or removed from Facebook / social media / internet sites since date of accident to the present time.
D. Rule of Thumb . . . Is to not post anything that you wouldn't feel comfortable sharing in court.
E. Anything you find *should* be disclosed prior to a final resolution of case.

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Auto-Related Panel Discussion

Panelists – Paul J. Rocheford, Steven J. Erffmeyer, Gregory J. Duncan, Brendan M. O'Connell, and William J. McNulty
Moderated by Shayne M. Hamann

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Collateral Source Refresher

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Collateral Source Issues

- Who / What is the Collateral Source?
  - Public program providing medical expenses **or**
  - Exception for payments made pursuant to the United States Social Security Act (USSSA).
  - Subrogation right asserted ➡ not C.S. offset
  - Do the math: subtract C.S. and add back premiums.

Collateral Source Issues

- Payments made pursuant to USSSA
  - **Medicare**: no offset Renswick.
  - **Medicare Advantage Plans**: hybrid, split district court.
  - **Minnesota Care**: unlikely USSSA but some federal funding?
  - **MA/Medical Assistance**: hybrid, split district court.

PIP Indemnity and Subrogation

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PIP Subrogation and Indemnity

- No-Fault Subrogation and No-Fault Indemnity.

The Importance of Pre-Suit Investigation

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Foundation of Pre-Suit Investigation

- Recorded statements
  - Get the story and "nail down" what happened
  - Preserve recollections
  - Potential MSJ issues (bankruptcy and judicial estoppel)
- Photographs
  - Scene and vehicles
- Damage or repair estimates

Photographs & Repair Estimates

- Can assist in evaluation of Plaintiff's case
- Can indicate how accident really happened

Anti-Assignment and Medical Bills

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Anti-Assignment
SUMA MRI v. Am. Fam.

- Background of case: Stand Up Multipositional Advantage MRI, P.A. required its patients/customers to sign its Assignment and Lien Agreement prior to the performance of any imaging services.
- The language of SUMA's assignment and lien agreement required the insureds/patients to assign the right to payment to SUMA directly for MRI or other imaging services.

SUMA MRI's Demand

- SUMA demanded direct payment from insurers for services performed.
- The insurers had made payments other than directly to SUMA. Payments were made to the insureds or their attorneys according to settlements or arbitration awards.
- SUMA also claimed that the agreement provided a secured interest under the UCC.

The Anti-Assignment Clauses

- The insurers targeted by SUMA had anti-assignment clauses in their policies.

  Examples:
- "Interest in this policy may be only assigned with [insurer's] written consent,"
- "The rights and duties under this policy may not be transferred to another person without our written consent,"
- "This policy may not be transferred to another person without our written consent."

The District Court

- Am. Fam. argued that the anti-assignment issue was irrelevant; the court disagreed.
- Court applied auto glass cases and an unpublished court of appeals decision and concluded, without much analysis, that the assignment was made post-loss; and the assignment of post-loss benefits does not run afoul of the anti-assignment clause of the policy.
- The court found for SUMA and determined that an assignment and lien are enforceable if:

District Court *continued*

1. It complies with applicable law;
2. The patient manifested an intent to transfer his or her right to the insurance proceeds to SUMA;
3. The insurer had notice of the assignment before it disbursed the funds in breach of the assignment; and
4. Such notice included an obligation that the insurer pay SUMA directly and exclusively.

- The court also concluded No-Fault benefits are health care receivables under the UCC and as such there is a securable interest which perfects attachment.

The Court of Appeals

- The Court of Appeals reversed and held:
  - The assignments involved were made pre-loss as opposed to post-loss because the insureds executed their respective assignments before American Family was billed by SUMA.
  - A patient's pre-loss assignment of a No-Fault insurance claim to a medical provider is invalid and unenforceable if the applicable automobile insurance policy forbids such an assignment and if the patient makes the assignment before the medical provider bills the patient for medical services.

The Supreme Court

- The MN Supreme Court concurred with the Court of Appeals that whether the assignment was pre-loss as opposed to post-loss was the key inquiry.
- Court looked to the no-fault act which defines "loss" as "economic detriment resulting from the accident causing the injury, consisting only of medical expense, income loss," and other specified losses. Under the statute, "[l]oss accrues not when injury occurs, but as . . . medical . . . expense is incurred." Minn. Stat. § 65B.54, subd. 1. Affirmed.

Subsequent Arguments

- Several similar cases were stayed pending the Supreme Court outcome.
- SUMA argued that these cases could still go forward under the theory that the Supreme Court did not address the UCC security interest issue.
- However, the district court in these stayed cases concluded that SUMA itself did not raise the issue on appeal of whether the UCC liens were valid.
- Cases were dismissed based upon stipulations that the stayed cases would turn on the Supreme Court's decision.
- Perhaps SUMA MRI will continue with this argument in future cases.

Judgment Collection

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Judgment Collection

- Minn. Stat. §171.182.
- Claims arising out of ownership, maintenance or use of motor vehicle.
- Docket the judgment.
- If person fails to satisfy judgment within 30 days, creditor can submit affidavit to court administration that judgment has not been satisfied.
- Court administration must immediately forward to the commissioner a certified copy of the judgment and affidavit of identification.

Judgment Collection

- Commissioner shall suspend the license of the debtor if:
  - At the time of the accident, the person did not maintain insurance as required by Minn. Stat. §65B.48.
  - Judgment has not been satisfied.
- Debtor may be relieved of suspension by filing affidavit stating that at the time of the accident he/she was insured, that the insurer is liable for the judgment, and the reason, if known, why the judgment has not been paid.

Judgment Collection

- If commissioner is satisfied that insurance covered loss, commissioner shall not suspend license or shall reinstate license if already suspended.
- Otherwise, license remains suspended until every judgment is satisfied in full or has expired.
- Typically, judgments can be enforced for 10 years.

Judgment Collection

- Debtor may be relieved of suspension by filing affidavit stating that at the time of the accident he/she was insured, that the insurer is liable for the judgment, and the reason, if known, why the judgment has not been paid.
- Affidavit must include copy of the insurance policy and other documents demonstrating insurance covered loss.

Judgment Collection

- Docket the Judgment
  - Judgment is docketed by filing an "Affidavit of Identification of Debtor" form with Court Administration.
  - Begins process of collecting judgment and is official notice to all parties that a judgment has been entered.
- Writ of Execution
  - Need to know where the debtor has their property and assets.
  - Garnish debtor's wages or bank accounts
  - Creditor must provide a written notice to the debtor of their intent to garnish earning at least 10 days (or 13 days if notice by mail) before the writ can be served.

Judgment Collection

- Request for Order for Disclosure
  - Requires debtor to respond to creditor by completing a "Financial Disclosure Form" listing all "non-exempt" property.
- Affidavit of Order to Show Cause
  - If hearing required, Judge will issue Order to Show Cause.
  - If debtor fails to appear, Judge may issue warrant for arrest.

Unlimited Medical Records

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Unlimited Records Authorizations

Dewitt v. London Road Rental Center, Inc., 899 N.W.2d 883 (Minn. Ct. App. 2017)

- "[O]ne of the downsides to pursuing a personal injury lawsuit is opening yourself and your medical history up for scrutinizing. Under the Minnesota Rules you voluntarily waive your medical privilege and cannot deny the opposing side access to records that may lead to admissible evidence."

Workers' Compensation Lien

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Kettering Smetak & Pikala, P.A.
Attorneys at Law

Workers' Compensation Subrogation Liens

- Global
- *Naig*
- Reverse-*Naig*

Case Evaluation

Arthur Chapman
Kettering Smetak & Pikala, P.A.
Attorneys at Law

Case Evaluation – Liability

- Accident/Incident
  - Provide as many facts of how accident/incident occurred as possible. Occasionally, facts deemed irrelevant or unimportant may have legal significant.
- Identify Parties
  - Any other persons/companies involved in the accident/incident.
- Identify Witnesses
  - Police Report
  - Any other persons able to corroborate

Case Evaluation – Damages

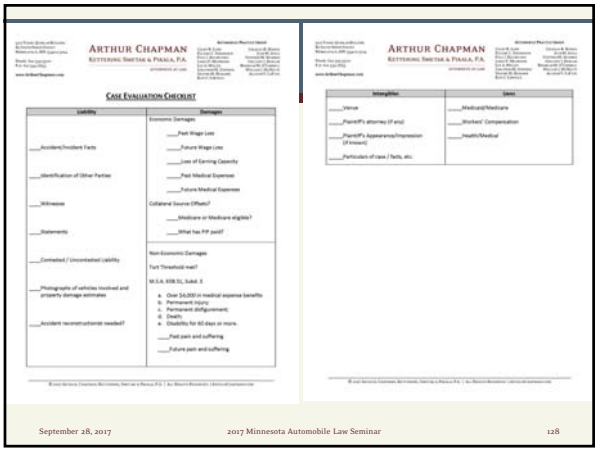
- Economic Damages
  - Past Wage Loss
  - Future Wage Loss
  - Loss of Earning Capacity
  - Past Medical Expenses
  - Future Medical Expenses
- Collateral Source Offsets?
- Liens?

Case Evaluation – Damages

- Non-Economic Damages
  - Pain and Suffering
    - Permanent Disfigurement?
    - Surgery?
    - Diagnostic Testing?
    - Objective Findings?

Case Evaluation

- Jurisdiction
- Venue
- Counsel
- Plaintiff



Shoulder Injuries and MVAs

ARTHUR CHAPMAN
KETTERING SMETAK & PIKALA, P.A.
ATTORNEYS AT LAW

Shoulder Injuries & Auto Accidents

- Facts of Loss;
- Mechanism of injury;
- Immediacy of symptoms
- Pre-suit investigation;
- Information in existing medical records;
- Obtain information in discovery and deposition;
- Appropriate IME doctor;

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Lunch Break

Vehicle Technology Trends that Will Make a Difference: from Electronic Stability Control to Autonomous Cars

Guest Speaker

Hernán Mercado-Corugo, P.E., CHEI, CVFI

Arthur Chapman
Kettering Smetak & Pikala, P.A.
Attorneys at Law

Vehicle Technology Trends From ESC to Autonomous Cars

Arthur Chapman Auto Seminar
Golden Valley, MN

Crane Engineering www.CraneEngineering.com

Introduction

- Hernán Mercado-Corujo
  - BS and MS in Mechanical Engineering
    - MIT and Georgia Tech
  - Licensed PE
  - Vehicle Fire Investigations: CFEI, CVFI
  - Failure Analysis of Automotive Systems
    - 3+ years at Eaton Automotive
    - 9+ years at Honda/Acura Reliability
  - 4 years at Crane Engineering
    - Vehicle inspections, failure analysis, testing, vehicle dynamics
    - Manager, Vehicle Investigations & Testing

Crane Engineering

Crane Engineering

- 40 years providing expert multi-disciplinary forensic engineering and consulting services
- Investigate all facets of failure analysis, research and testing: why and how it happened
  - ➢MACRO → micro
- Servicing industrial clients, property and liability insurance claims, and product liability litigation
- Offices in Plymouth, MN and Madison, WI

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Crane Engineering

Delivering Best-in-Class Forensic Engineering

Forensic Engineering Investigations

Product Liability, Large Loss Scene Investigations, Biomechanical Analysis, Site Management and Documentation, Litigation Support

Fire & Explosion Investigations

Origin and Cause, Fire Protection Engineering, Fuel Gas Systems, Vehicle and Marine Fire

Building Science

Construction Defects, Premise Liability, Collateral Damage Assessment, Catastrophic Events

Safety Engineering Associates

Accident Reconstruction, Accident Investigation, Vehicle Testing

Data Forensics

Critical Data Recovery in Physical, Mobile and Virtual Environments, Cyber Liability Investigations

Consulting Engineering and Lab Services

Failure Analysis, Materials Characterization, Imaging Services, Hazard and Risk Assessment

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Outline

- Modern Vehicle Systems
- Autonomous Vehicle Technologies
- Impact on Forensic Investigations

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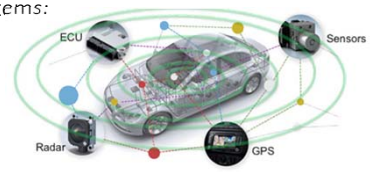
Definitions

Vehicle Control Systems:



- Control aspects of the vehicle
- Aid the driver
- More and more use of these systems
  - Growth helped by advances in data acquisition and processing
- Passive, warnings, active

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Passive

Passive systems – will not take over for the driver

- Crumple zones
- Pedestrian protection systems
- Seat belts (pre-collision systems, pre-tensioners)
- Airbags (1 stage, multi-stage, passenger position)
- Headrests (active)
- Rain sensing wipers

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Warnings

Perceptible warnings – assist?

- Back-up sensors (rear view camera)
- Blind spot detector
- TPMS 
- Auto sensing headlights
- Steering wheel vibration (lane departure warning)
- Audible warnings

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Active

Active Systems – may take over for the driver

- Focused on sensing dangerous situations and attempting to prevent damage or injury altogether
- Use information obtained from the vehicle's surroundings, including traffic, road configuration and condition, and nearby objects, and work together with passive safety features to mitigate damage in the event of an unavoidable collision
- Through many sensors, increased predictive capability
- On/off

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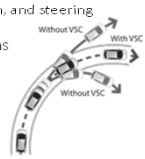
Active

Most Basic – Electronic Stability Control (ESC)

- Typically measure wheel velocity, yaw rate, lateral acceleration, and steering wheel angle
- Prevent loss-of-control, typically under or over-steer conditions
- Differential braking and throttle control



OEM trade names: ESC + several other systems

- Toyota – Vehicle Stability Control
- GM – StabiliTrak®
- Chrysler – Electronic Stability Program
- Ford – AdvanceTrac®
- BMW – Dynamic Stability Control
- Honda – Vehicle Stability Assist
- Hyundai – Vehicle Stability Management
- Subaru – Vehicle Dynamics Control

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Active

Federal Regulations

FMVSS 126

- Electronic Stability Control Systems
- Requires ESC on passenger cars, multipurpose passenger vehicles, trucks, and buses with GVW of 10,000 lbs or less
- Final ruling in 2007 for MY 2012

FMVSS 136

- ESC Systems for Heavy Vehicles – Notice of Proposed Rulemaking
- Truck tractors and certain buses with a GVW greater than 26,000 lbs
- Proposal and hearings in 2012

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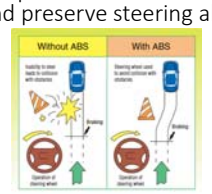
Active

Anti-lock **B**raking **S**ystem – Automated cadence braking. Hydraulic pressure modulator. Prevent wheel lock-up and preserve steering ability.



Traction **C**ontrol – Uses ABS + active throttle control. Limits torque to the driven wheels to prevent slip at acceleration or on slippery surfaces.

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Active

Electronic **B**rake **D**istribution or EBFD – coupled with ABS

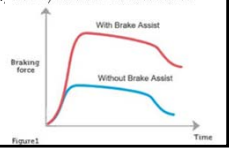
- Varies braking pressure to each wheel, based on road conditions, speed, loading, etc.
- Maximize stopping power while maintaining control of the vehicle.
- Manage weight transfer effects.

Emergency **B**rake **A**ssist (EBA) / Brake Assist (BA or BAS)

- Increases braking pressure in an emergency situation.
- Interprets brake pedal speed and force
- Detects if the driver is trying to execute an emergency stop
- When brake pedal is not fully applied, the system is overridden

Forward collision warning with brake assist

- Honda/Acura CMBS example



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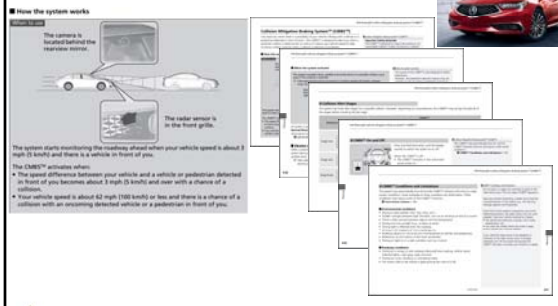
Active

Example: **C**ollision **M**itigation **B**raking **S**ystem



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Nine (9) pages in owner's manual detailing operation, limitations, and expected care.

Active

Lane Departure Warning

- Designed to warn the driver (visual, audible, vibration) when the vehicle begins to move out of its lane.
- Uses radar and lane markings. Addresses driver error, distractions and drowsiness.
- Lane keep assist: can control *Electronic Power Steering (EPS)* and apply counter-steering

Adaptive Cruise Control

- Allows driver to maintain a pre-set speed while the system automatically monitors the traffic patterns and adjusts the approach distance
- Uses cameras and/or radar. In the end, driver must still take over for full stop

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Active

Others: Hill Descent Control, Hill Start Assist, Trailer Sway Control, Back-up Collision Intervention, Park Assist, Pedestrian Detection, Auto High Beams

Toyota – Smart Stop Technology

- Response to sudden acceleration claims
- In most cases, it was determined to be driver's mistake
- Reduces engine power when both brake and accelerator are pressed at the same time
- Activated when the accelerator is depressed first and the brake pedal is pressed firmly for longer than one-half second when the vehicle is traveling more than 5mph

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Active

Systems are somewhat intuitive, but drivers are relying more and more on them.

- Language: assist, avoidance, control, mitigation, warning, alert, intervention, support
- It is a tool to help the driver, not auto-pilot (i.e. adaptive cruise control).

Systems only noticeable to driver when something is abnormal.

3 Failure Scenarios

- Driver used it improperly
- Programming or other mistake by the manufacturer
- System might not have been designed in a reasonably safe way

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Outline

- Modern Vehicle Systems
- Autonomous Vehicle Technologies
- Impact on Forensic Investigations

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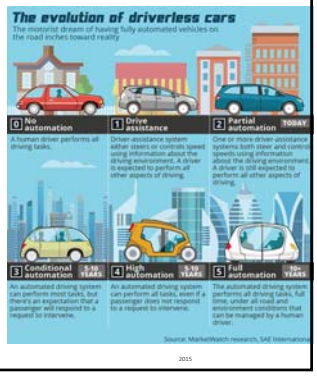
What is an Autonomous Vehicle?

SAE currently identifies six levels of vehicle automation:

- 0 – No automation. Human driver in complete control.
- 1 – Driver assistance (i.e. electronic stability control and adaptive cruise control).
- 2 – Partial automation (i.e. driver can deactivate automated accelerating, braking and steering, and regain control).
- 3 – Conditional automation (i.e. autonomous in limited environments such as freeways).
- 4 – High automation (i.e. all environments except severe weather).
- 5 – Full automation. Humans are cargo.



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Why?

- More than 30,000 people die on our roads every year
- 94% percent of crashes are tied to a human choice or error
- Driver distraction is increasing
- Impaired driving (alcohol, marijuana, prescription medications, sleep) continues to be a challenge
- Urban sprawl and population growth has led to more traffic and congestion
- Cars and trucks account for almost 20% of all US carbon emissions
- Autonomous Vehicles are Coming!
  - According to the Google Self-Driving Car Project, as of June 2016, there were 24 Lexus RX450h SUVs on the road and 34 other prototype vehicles. 1,725,911 miles were driven autonomously, and 1,158,921 miles were driven in manual mode.

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Technology

LiDAR/Radar

- Short Range → 0.2 – 30 m (1 – 98 ft)
  - Parking Assistance

Mid Range → 60 m (197 ft)

- Emergency Braking
- Pedestrian Detection
- Collision Avoidance

Long Range → 200 m (656 ft)

- Adaptive Cruise Control

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Technology

Optics

- Video Cameras – markings & signals

Lidar

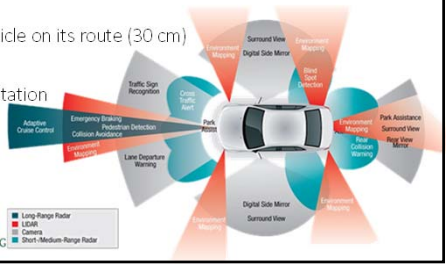
- Objects in vehicle's path <100m

GPS

- Keeps vehicle on its route (30 cm)

Processors

- Instrumentation



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Potential Uses

Commercial Cargo

Private Consumer
- Aging population
- People with disabilities
- Car sharing
- Everyone else

Livery

Public Transportation

Emergency Services

There are very few limitations on how they will be used

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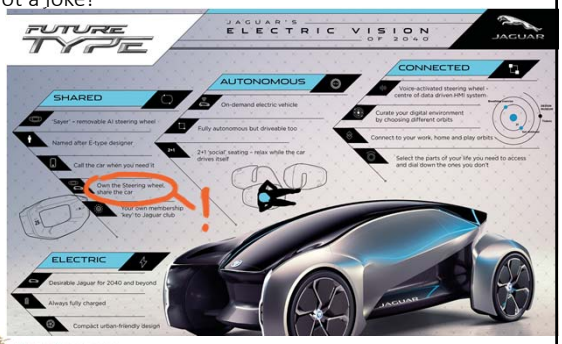
Potential Uses

Not a joke!



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Challenges

Infrastructure
- Roads and bridges
- Signs/Signals/Barriers

Everything else on the road
- Non-autonomous cars interaction
- Pedestrians
- Bicycles/motorcycles

Technology
- Inclement weather effectiveness
- Emergency maneuvers

Role of the "driver"
- Ability to override?
- Completely distracted "driving"

The new automaker?
- Apple
- Google

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Challenges – Cyber Security

Pranks
Theft
Terrorism
Kidnapping
Resist remote cyber attacks
Resist close proximity threats
Functionality of key safety systems (braking, throttle, power, steering) in the event of a cyber breach
Private Information
- Location history
- Real-time location

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Outlook

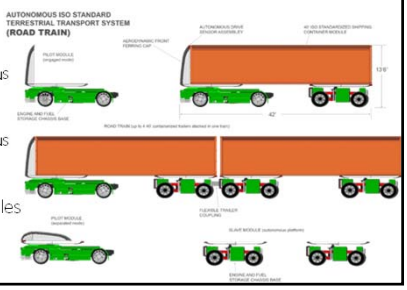
5 year
- Vehicle to Vehicle communications

10 year
- Low speed autonomous vehicles

2025
- 3.5M autonomous vehicles

2030
- 4.5M autonomous vehicles

A quarter of global sales by 2035?



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Safety Implications

Autonomous vehicles will reduce traffic accidents

Technology learning curve

New drivers will not develop driving skills

The Social Dilemma
- Autonomous vehicles are programmed with a set of safety rules
- Generally, utilitarian rules apply
- A car with one rider will swerve off the road to save 10 pedestrians
- However, individuals generally want their own car to protect themselves at all costs

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Public Expectations

- Example – 2011
  - Messerly v. Nissan NA
  - 2002 vehicle
  - Nissan granted summary judgement
  - KY SC oral arguments 10/13

- Sept 2013 - U.S. Department of Transportation sued for lack of mandatory backup cameras by consumer advocacy groups
  - 2008 proposed to be mandatory by 2012

- NHTSA adds them to list of recommended items to be mandatory by 2015

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Liability Implications

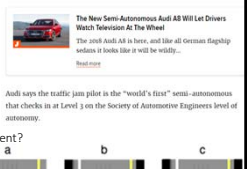
In 2015 Tesla Motors Inc. activated its Autopilot mode, which allows autonomous steering, braking and lane switching.

- In July 2016 the first fatality from an autonomous vehicle was reported. Tesla said autopilot sensors failed to detect a truck that was turning in front of a Model S against a bright sky. The crash killed the vehicle's owner.

States are each responsible for regulating motor vehicle insurance and liability.

Liability Implications

- Who's at fault?
  - Driver?
  - Manufacturer of the Auto?
  - Software designer?
  - Supplier of the sensor?
  - Municipality?
  - Weather?
- Underwriting the vehicle vs underwriting the driver
- No fault model to encourage technological development?
- How much driver interaction at the time of accident?

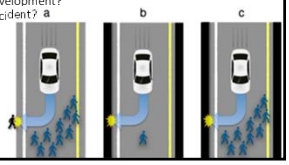


Distribution of Losses

- High Frequency to Low Frequency
- Severity?

Pedestrian Care

- The hand in the elevator



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The Law

SELF DRIVE Act – 9/6/17

Gives the federal government authority to exempt automakers from safety standards not applicable to the technology, and to permit deployment of up to 100,000 of the vehicles annually over the next several years.

Codifies decades of historical precedent in automobile industry regulation.

Delineates the purview of federal versus state regulation for autonomous vehicles.

In short, federal regulatory bodies have authority when it comes to the car, while states have authority when it comes to the driver.

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Cost Implications

Insurance premiums (and jobs) depend on driver error–which is a problem if there are no more drivers.

While the number of accidents is expected to drop significantly as more crash avoidance features are incorporated into vehicles, the cost of replacing damaged parts is likely to increase because of the complexity of the components. It is not yet clear whether the reduction in the frequency of crashes will lead to a reduction in the cost of crashes overall.

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Outline

- Modern Vehicle Systems
- Autonomous Vehicle Technologies
- Impact on Forensic Investigations

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Effects

What effect can ACS have on forensic investigation efforts?

- Introduction of ABS was a game changer: with reduced or non-existent skid marks
- Advanced materials (crumple zone)…how to determine k? Not all vehicles are tested, depending on NHTSA/IIHS capacity.
- Active systems can have non-negligible effects on vehicle dynamics and affect accident reconstruction speed estimates.
- Need to understand which vehicle we are dealing with and systems involved. What was active? Did the user choose an "off" setting?
- Future considerations: deteriorating infrastructure vs. car-to-car (who owns the risk, from a legal perspective?), interactions with bicycles and pedestrians

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Effects

Interesting thoughts…

- Is there an argument for differences in injury biomechanics if the vehicle is taking control as opposed to a human?
  - Human motor skill or reaction time would be insufficient to mitigate injury.
- Increasing vehicle autonomy for crash prevention (i.e. brake assist) means the vehicle may brake harder prior to impact.
  - Are the driver and passengers in different positions from those currently being employed in crash testing?

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On the fly…

Wi-fi

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Thank You!

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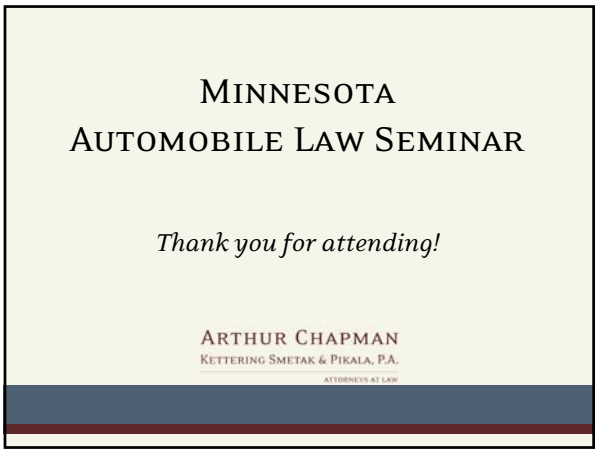
MINNESOTA
AUTOMOBILE LAW SEMINAR
Thank you for attending!
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CASE EVALUATION CHECKLIST

Liability	Damages
____Accident/Incident Facts ____Identification of Other Parties ____Witnesses ____Statements	Economic Damages ____Past Wage Loss _____Future Wage Loss _____Loss of Earning Capacity _____Past Medical Expenses _____Future Medical Expenses Collateral Source Offsets? ____Medicare or Medicare eligible? ____What has PIP paid?
____Contested / Uncontested Liability ____Photographs of vehicles involved and property damage estimates ____Accident reconstructionist needed?	Non-Economic Damages Tort Threshold met? M.S.A. 65B.51, Subd. 3 a. Over $4,000 in medical expense benefits b. Permanent injury; c. Permanent disfigurement; d. Death; e. Disability for 60 days or more. ____Past pain and suffering ____Future pain and suffering

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Intangibles	Liens
_____Venue	_____Medicaid/Medicare
_____Plaintiff's attorney (if any)	_____Workers' Compensation
_____Plaintiff's Appearance/Impression (if known)	_____Health/Medical
_____Particulars of case / facts, etc.	

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KEY THINGS TO REMEMBER WHEN DEALING WITH MN PIP

1. **When Does a Claim Arise?**

   - Minn. Stat. Sec. 65B.41 – 65B.71 comprise the Minnesota No-Fault Automobile Insurance Act.
   - Policies of automobile insurance must comply with the requirements of the statute.

2. **Maintenance or Use of a Motor Vehicle:**

   - The phrase "maintenance or use of a motor vehicle" is defined at Minn. Stat. Sec. 65B.43, subd. 3. The definition generally includes all activities incident to "use of a motor vehicle as a vehicle" and specifically mentions "occupying, entering into, and alighting from it."
   - The statute excludes (1) conduct within the course of a business of servicing or maintaining motor vehicles if the conduct is on the business premise and (2) loading and unloading a vehicle unless the conduct occurs while occupying, entering or alighting from the vehicle.
   - Clear principles have been established to determine whether or not an injury arises out of the maintenance or use of a motor vehicle.
     1. There must be a causal relationship between the injury and the use of a vehicle for transportation purposes.
     2. The vehicle must be more than just the place where the injury occurs;
     3. The injury must be a natural and reasonable incident or consequence of the use of the vehicle.

   See, North River Ins. Co. v. Dairyland Ins. Co., 346 N.W.2d 109, 114 (Minn. 1994).

3. **Exclusions to MN PIP Coverage:**

   - Intentional injuries;
   - Motorcycles;
   - Races;

4. **Who Pays for No-Fault Benefits?**

   - See the Arthur Chapman PIP flow chart / Priorities chart

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5. **What Benefits are Available?**

- Under Minn. Stat. Sec. 65B.44, basic economic loss benefits include $20,000 for medical expenses and an additional $20,000 for income loss, replacement services/essential services, funeral expense loss and survivor's losses.
- The Maximum amount covered for funeral benefits is $5,000;

6. **Handling a No-Fault Claim:**

- Start-up Letter – see, our sample;
- Know the amount of coverage available to the insured;
- Application for No-Fault Benefits – see, our sample;
- Medical and Employment authorizations;
- Investigation of Claim – Property Damage Photos and Estimates;
- Social Media Investigation;
- Statements;
- Examination Under Oath;
- Obtain medical records on insured from seven years prior to motor vehicle accident up to the present time including the motor vehicle accident in question;
- Obtain employment and tax records on insured from two years prior to the motor vehicle accident up to the present time including the employer at time of the accident in question;
- Pay medical bills, when received with medical records for care and treatment that is *reasonable, necessary and causally related* to the accident in question;
- Compile medical bills paid via a PIP log;
- Monitor file for independent medical examination – use only licensed medical doctors – orthopedists/neurologists; We do not recommend chiropractic IMES.
- Deny benefits after IME/or otherwise handle results of IME report;
- Monitor file for PIP arbitration.
- *A claimant has six years from the date of denial of his/her No-Fault benefits to initiate a No-Fault arbitration or a lawsuit pertaining to reinstating PIP benefits.*

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SAMPLE –NO-FAULT APPLICATION FOR BENEFITS

To enable us to determine if you are entitled to benefits under the provisions of the No-Fault insurance law, please complete this *entire* form and return it promptly.

Date	Our Policyholder	Date of Accident	Claim Number
Applicant's Name	Cell Phone	Home Phone	Work Phone
SSN#	Date of Birth		
Home Address (#, Street, City, Zip)			
Date and Time of Accident	Place of Accident (Street, City, State)		
Description of Accident and whether it is a vehicle you own.			
Vehicle Riding In (or struck by if a pedestrian)			
Describe vehicles owned by you or household members. If other Insurance policies also apply, please list next to each vehicle. 1. 2.			
Were you injured as a result of this accident? (check the appropriate box.) Yes ☐ No ☐	Did police investigate accident? (check the appropriate box.) Yes ☐ No ☐		
Was a police report filed? What police department responded?			
Describe your injury / injuries:			
Were you transported to a hospital via ambulance? (check the appropriate box.) Yes ☐ No ☐			
Were you treated by a doctor? (check the appropriate box.) Yes ☐ No ☐	Name, address, phone # of doctor(s)		
Were you treated at a hospital? (check the appropriate box.) Yes ☐ No ☐	Name, address, phone # of hospital		
Amount of Medical Bills to Date $_____	Will you incur more medical bills? (check the appropriate box.) Yes ☐ No ☐	Were you working at the time of accident? (check the appropriate box.) Yes ☐ No ☐	
Did you lose wages as a result of your accident? (check the appropriate box.) Yes ☐ No ☐	If yes, $ amount lost to date	Average weekly wage	
If you lost wages: Date disability began.	Date you returned or anticipate to returning to work.		
Are you eligible to receive workers' compensation benefits as a result of this accident? (check the appropriate box.) Yes ☐ No ☐			
Are you eligible to receive Medicare? (check the appropriate box.) Yes ☐ No ☐ If yes, what is your Medicare ID # _____.			
Have you ever made a workers' compensation or automobile no-fault claim before? (check the appropriate box.) Yes ☐ No ☐ If yes, describe how injury occurred, injuries received and date of claim.			
Have you ever suffered similar injuries to the injuries suffered in this accident? (check the appropriate box.) Yes ☐ No ☐ If yes, describe injuries, cause of injuries, date of injury, and places & addresses of prior providers			
List names and addresses of your current employer and other employers for two years prior to accident date.			
List all prior medical providers for 7 years prior to accident date.			
As a result of this accident, will you have any other medical treatments? If yes, please explain.			
Signature of applicant or guardian.	Print Name	Date	

The State of Minnesota requires that we tell you: "A person who files a claim with intent to defraud or helps commit a fraud against an insurer is guilty of a crime."

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RECORDED STATEMENTS: 15 TIPS

1. CLAIMANT: Confirm at beginning of statement if they are represented by counsel. If so, obtain name of counsel and terminate discussion.

2. Identify yourself and your role in the claim. Explain that the statement is being recorded. Confirm they are ok physically and mentally and "now is a good time."

3. Tell the Claimant that providing a recorded statement may allow the claim to proceed more quickly.

4. When interviewing your insured, tell them that the statement is being taken in anticipation of a potential claim being brought against the insured.

5. Use English words and require the interviewee to use English words. Avoid "unh-huh" and "mm-hmm." If they use these words for responses, ask if that is a "yes" or a "no" response.

6. Make certain that only one person speaks at a time!

7. Take notes of the discussion in the event of an equipment failure.

8. Ask them if they have given any other recorded statements or interviews.

9. Claimant: Review all claim and medical/injury history.

10. MVA: Create a diagram for you to follow; use landmarks if directions are not known.

11. Do they have any documents? Insured may give you authorization to obtain police report.

12. Do they have any photographs? If a slip and fall, get them to take pictures immediately.

13. Are there any witnesses known? Get names, addresses, and phone numbers.

14. At the close of the interview, ask if they have anything to add and ask if all of their answers have been truthful.

15. Minn. Stat. §602.01: "Certain Statements Presumed To Be Fraudulent." Provide a copy of the recorded statement to the injured person. Transcribe the tape or just send an e-copy as soon as possible.

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SAMPLE --DENIAL OF NO-FAULT BENEFITS LETTER

LETTER SHOULD BE SENT TO INSURED AND ATTORNEY
EMAIL | U.S. MAIL | CERTIFIED MAIL (HOWEVER THE COMPANY PREFERS)

Date: _____

Insured Name:
Policy Number:
Loss Date:
Claim Number:

Dear Mr./Ms./Mrs. _____:

Enclosed is a copy of the Independent Medical Examination report, relative to the above-captioned matter, dated _____, and prepared by Dr. _____. As the report states, any treatment beyond _____ from the date of the accident in question is not reasonable, necessary or causally related to this accident.

It is Dr. _____'s opinion that your condition has stabilized to the point where you have received maximum benefit from _____ care. Further, Dr. _____ has opined that you require no additional medical care, or diagnostic testing. Moreover, you are capable of performing your activities of daily living and are not in any way disabled from working.

Consequently, based on Dr. _____'s report, all No-Fault benefits otherwise payable for this loss will be terminated as of _____. *(Date of IME, or date you want to deny No-Fault benefits, date of ROR or suspension letter. Use the earliest possible date to deny benefits, to protect company.)*

Pursuant to *American Family Insurance Group v. Kiess, 697 N.W.2d 617 (Minn. 2005)*, we require that your medical providers continue to submit all medical bills and medical records, to my attention in order to maintain any claim for the accrual of interest on outstanding medical bills. In addition, any continued wage loss or replacement services should also be sent to me, in order to maintain a claim for interest on these benefits as well.

Under the Minnesota No-Fault Statute, you have the right to demand arbitration of any payments in dispute up to $10,000 through the American Arbitration Association. Information on arbitration procedures may be obtained from the American Arbitration Association at U.S. Bank Plaza, Suite #700, 200 South Sixth Street, Minneapolis, MN 55402-1092, or via email at Minnesotanofaultarbinfo@adr.org. Please note that _____ Insurance Company is not bound to submit any claim over $10,000 to voluntary arbitration with the American Arbitration Association.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

Claims Representative
_____ Insurance Company
Enc. IME Report

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SAMPLE –KIESS LETTER

Date: _____

Address of Plaintiff Attorney

Insured Name:
Claimant / Plaintiff Name:
Policy Number:
Date of Loss:
Claim Number:

Dear Mr./Ms./Mrs. _____:

_____ *(Insurance Company)* is in receipt of your letter dated _____, in which you state that you will no longer send medical bills to _____ *(Insurance Company)* because of your client's recent termination of No-Fault benefits pursuant to the independent medical examination conducted by Dr. _____ on _____ and the denial of No-Fault Benefits on _____.

Please be advised that _____ *(Insurance Company)* still requires that all medical bills and corresponding medical records continue to be sent to us in a timely fashion. As you are aware in the case of, *American Family Insurance Group v. Kiess*, 697 N.W.2d 617 (Minnesota 2005), interest on any outstanding medical bills does not begin to accrue until 30 days after an insurer receives copies of both your client's medical records and medical bills from various medical providers. If medical bills *and* medical records are not sent to _____ *(Insurance Company)* after your client undergoes treatment, we will dispute any allegation that interest is due from the date of treatment to the time of any arbitration hearing.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Claim Representative

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MINNESOTA NO-FAULT BENEFITS
WAGE LOSS BENEFITS CHEAT SHEET
M.S.A. 65B.44: Basic Economic Loss Benefits

**Compensate for 85% of the injured person's loss of gross income from the inability to work, proximately caused by an injury related to the subject motor vehicle accident and subject to a maximum of $500.00 per work.

**Disability and income loss (wage loss) benefits are not intended to compensate for loss of earning capacity. Instead, the benefits are intended to reimburse the actual economic loss resulting from a disability and the related inability to work.

- ✓ Does Claimant have a disability?
  - Disability = Reduction in physical function that leads to inability to work caused by motor vehicle accident.
  - Once a person is released to return to work without physical disability, entitlement to No-Fault wage loss benefits ends, even though income loss may continue.
  - Is part-time or a reduced work schedule available?

- ✓ Does Claimant have an inability to work?
  - Inability to work = lack of ability to work full time or return to **same type of work** formerly performed by injured person due to disability caused by the motor vehicle accident.
  - Substitute work is material in computing amount of benefits, but usually does not go to initial question of inability to work.

Require proof of disability and inability to work with disability slip from medical provider.

- ✓ To what extent is economic loss suffered as result of disability and inability to work?
  - Must be an actual, calculable economic **loss** suffered based upon:
    i. Insureds employment and wages as time of accident;
    ii. Definite offer of employment at a certain wage existing at time of accident; or
    iii. Consistent history of employment such that a specific period of employment at a certain wage can be reasonably predicted.
  - Includes salary, wages, tips, commissions, and earnings.
  - Also includes income (including vacation or sick leave) that is lost due to medical treatment.

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Requirements - provide proof of economic loss with pre/post-incident timesheets, payroll information, paystubs, certifications from employer of lost time/profits, disability slip, etc.

- **Substitute work.** Amount of income earned from substitute work will reduces the amount of PIP disability income loss benefits.

- **Self-employed persons.** May recover income loss benefits by proving (1) cost incurred for substitute employees, (2) loss of tangible things of economic value, or (3) a reduction in gross income produced by self-owned business.

- **Job unavailability after release to return to work.** Disability income loss benefits are only payable during the period of disability from your job and inability to work due to injuries sustained in the automobile accident.

- **Loss of eligibility for unemployment benefits.** During the time of disability, can recover up to 100 percent of the amount of unemployment benefits, subject to a maximum of $500 per week

- **Be wary of flexible employers.** Many employers these days allow employees who miss time from work, to make-up the time and not deplete paid-time-off (PTO). *A wage verification form substantiating missed time from work or depletion of PTO is necessary.*

- **IME.** Make sure the independent medical examiner addresses the wage loss issue and is aware of any claimed past or current wage loss and has the documentation to examine. The IME doctor can also inquire as to additional information, or job specifics that he/she can incorporate into your IME report, that may further assist in defending the case.

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SAMPLE – PIP START-UP LETTER TO INSURED

Date:

Insured Address:
Insured:
Claim Number:
Date of Loss:
Injured Party:

Dear _____:

We have received notification of a claim under the Personal Injury Protection (PIP) benefits of _____ Automobile Policy for _____. All further correspondence regarding this claim should be directed to the attention of _____ Insurance Company's No-Fault Department and at the above address. Please be sure the claim number referenced-above is clearly identified on all correspondence as well as my name.

In accordance with the Minnesota No-Fault Automobile Insurance Act, the PIP benefits available to you for the above date of loss, are as follows: $_____ for medical expense benefits and $_____ for wage loss/replacement service benefits.

Loss of income will be paid to a maximum of $_____ not to exceed $500.00 per week at a rate of 85% of your gross wages.

For replacement services, we will pay for such services, not exceeding $200.00 per week; which would be payable under the maximum coverage of the loss of income benefits available of $_____.

Please note that a $_____ deductible for medical expenses and a $_____ deductible for lost wages will also apply.

To consider payment of this claim for personal injury protection benefits, we need the following information:

The _____ Insurance Company's completed PIP application, which is attached to this correspondence. If the injured person is under the age of 18, a parent or guardian will need to sign and date the PIP application.

The enclosed medical and wage loss authorizations will need to be signed and dated. Again, if the person is under the age of 18, a parent or guardian will need to sign and date the attached authorizations.

A listing of *any and all* medical providers from **seven years prior to the above-referenced motor vehicle accident up to the present, including any and all medical providers for your alleged accident-related injuries.** See the attached form for providing the requested information. In addition, this is an ongoing request for medical provider information, so if you treat with additional medical providers as your care and treatment continues, you need to provide the additional medical provider information to my attention.

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In order for _____ Insurance Company to consider payment of related charges for medical care, we need your medical providers to send us both medical records and medical bills. Your medical bills will not be paid without the corresponding medical records, so please advise your providers of this and they can contact me with any questions. Medical records in support of *any and all* medical bills/charges are necessary for consideration of payment for any and all medical care and treatment you receive.

If lost wages are being claimed, we will request a wage loss verification form from your employer upon receipt of the wage authorization from you. A disability slip/statement from your treating physician/medical provider is also required.

Medical expense benefits include mileage expense incurred to and from your medical providers. Please note the _____ Insurance Company, reimburses mileage at __ cents per mile, with appropriate documentation concerning mileage to and from treatment. Mileage is paid out at the IRS medical mileage rate.

If replacement services are being claimed, a disability statement from your treating physician is also required. Verification of the services provided and the amount paid is required from the service(s) provider as well. Documentation is also required pertaining to the alleged services where assistance is needed or claimed, along with appropriate documentation pertaining to what you need assistance for, and the type of tasks you cannot perform.

Please be advised that all medical expenses submitted for payment under the Personal Injury Protection coverage may be audited to determine the reasonableness of the charge. Expenses may also be reviewed for necessity of treatment and care provided. Upon confirmation of coverage, payment will be mailed separately.

If there is a lapse of a period of one year for disability and medical treatment, your eligibility for No-Fault benefits will be terminated under this policy.

Pursuant to Minnesota Insurance Code 60A.955, Section 5, a person who files a claim with intent to defraud or helps commit a fraud against an insurer is guilty of a crime.

Please promptly return the requested information as soon as possible, so that we can begin processing your claim. Please note – Insurance Company will not be paying any medical charges associated with your care until the attached PIP application and authorizations are completed and documents are executed.

If you should have any questions regarding the above information, please feel free to contact me directly.

Very truly yours,

Adjuster's name
Title and
Insurance Company Contact Information
Including Email Address

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MINNESOTA NO-FAULT BENEFITS
REPLACEMENT/ESSENTIAL SERVICES BENEFITS CHEAT SHEET
65B.44: Basic Economic Loss Benefits

Reimbursement is required for all expenses reasonably incurred by or on behalf of an injured claimant in obtaining substitute services for his/her household (normal and ordinary duties), up to a maximum of $200 per week, beginning at least 8 days after the accident.

**Note ~ Replacement Service Benefits are not compensable for the day of the accident, or the entire week following the accident.

** Note ~ Similarly there should be a corresponding disability slip which describes what and how the claimant requires assistance with normal and ordinary household duties/chores

- ✓ What value of services is Claimant entitled to?
  - Whichever is greater between:
    i. Reasonable value of service to be replaced OR
    ii. Expenses of providing the same
    iii. Documentation required showing what was done/incurred

- ✓ Does Claimant usually provide the services being replaced?
  - Not required to be a full-time homemaker
  - Is required to show they are "primarily responsible for [service being replaced]"
  - There can be only one primary homemaker
    i. Even if they are employed full-time, a Claimant can still make a claim for replacement services as long as they are primarily responsible.
    ii. Documentation required showing what was done/incurred

- ✓ What evidence must Claimant provide?
  - Claimant must show:
    i. out-of-pocket expense OR
    ii. that such expense was actually incurred
    iii. Documentation required showing what was done/incurred

  - If services involve fulltime responsibility, where Claimant is alleging status as the "primary homemaker" of the home ~ Claimant must show:
    i. Necessity for service OR
    ii. Reasonable value of the service
    iii. Documentation required showing what was done

Practice Tips:

- Cross-reference claimant's disability slips from medical records with work they claim to be unable to do
  - Ask for updated disability slips from treating provider before continuing to honor replacement services claims

- Watch out for construction or remodeling projects that are passed off as normal work
  - Hiring friends to remodel kitchen
  - Constructing barn outside of house from start to finish

- Watch out for the infamous 20 hours of vacuuming/week, heavy cleaning for multiple hours each week, extensive gardening and landscaping charges, etc.
  - Is the amount of time appropriate for the task?

- Does Claimant have children?
  - If he/she is hiring snow-removal services. Are the kids able to do it?
  - If he/she is claiming his/her kids performed the replacement work, are they not already required to perform chores and assist around the house?
    - Replacement services are only available if the injured person was *primarily* responsible for the work being replaced.

- Recorded Statements can be used to verify that the claimant is/isn't the person primarily responsible for the work before the accident
  - Useful later on during arbitration for impeachment purposes, or if the Claimant decides to expand the scope of services being replaced
  - Insured has reasonable duty to cooperate with Insurer's investigation

- EUOs
  - More expensive and time consuming than recorded statements, but will provide more information
  - Must be reasonable part of investigation
    - If claimant/counsel objects – the arbitrator has to decide
    - Arbitrator decides if request is reasonable

- To Pay or Not to Pay?

  - Do the medical records support inability to perform service to be replaced?
    - Up to date disability slips?

  - Is there something that does not "sit right" with the claimed replacement/essential service request?
    - Are these services necessary everyday tasks?
    - Is it reasonable that the Claimant would be the one expected to perform all of these activities?
    - Is the frequency of the tasks performed reasonable?
    - Has the claim for replacement services gone on longer than it should?

  - Make sure the IME doctor addresses any claimed replacement services

  - If in doubt, ask for more information or do not pay the claimed charge until you investigate further.
    - Claimant will have to prove the claim at arbitration. If it seems odd to you, it's likely that an arbitrator could be convinced as well.

MN NO-FAULT

Minnesota Rules of No-Fault Arbitration Procedures

American Arbitration Association®

Available online at **adr.org**

Rules and Fees Amended and Effective September 1, 2016

Table of Contents

Minnesota Rules of No-Fault Arbitration Procedures

Rule 1. Purpose and Administration

a. The purpose of the Minnesota no-fault arbitration system is to promote the orderly and efficient administration of justice in this State. To this end, the Court, pursuant to Minn. Stat. 65B.525 and in the exercise of its rule making responsibilities, does hereby adopt these rules. These rules are intended to implement the Minnesota No-Fault Act.

b. The Arbitration under Minn. Stat. 65B.525 shall be administered by a Standing Committee of 12 members to be appointed by the Minnesota Supreme Court. Initially, the 12 members shall be appointed for terms to commence January 1, 1975, and the Supreme Court shall designate three such members for a one-year term, three for a two-year term, three for a three-year term, and three for a four-year term commencing on January 1 of each succeeding year. After July 1, 1988, no member shall serve more than two full terms and any partial term.

c. The day-to-day administration of arbitration under Minn. Stat. 65B.525 shall be by an arbitration organization designated by the Standing Committee with the concurrence of the Supreme Court. The administration shall be subject to the continuing supervision of the Standing Committee.

Rule 2. Appointment of Arbitrator

The Standing Committee may conditionally approve and submit to the arbitration organization nominees to the panel of arbitrators quarterly in March, June, September and December of each year, commencing March 1988. These nominees then may be included in the panel of arbitrators that the Standing Committee shall nominate annually for approval by the Supreme Court. The panel appointed by the Supreme Court shall be certified by the Standing Committee to the arbitration organization.

Rule 3. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Minnesota No-Fault Arbitration Tribunal.

Rule 4. Administrator

When parties agree to arbitrate under these rules, or when they provide for arbitration by the arbitration organization and an arbitration is initiated thereunder, they thereby constitute the arbitration organization for the administrator of the arbitration.

Rule 5. Initiation of Arbitration

a. *Mandatory Arbitration* (for claims of $10,000 or less at the commencement of arbitration). At such time as the respondent denies a claim, the respondent shall advise the claimant of claimant's right to demand arbitration.

b. *Nonmandatory Arbitration* (for claims over $10,000). At such time as the respondent denies a claim, the respondent shall advise the claimant whether or not it is willing to submit the claim to arbitration.

c. *All Cases.* In all cases the respondent shall also advise the claimant that information on arbitration procedures may be obtained from the arbitration organization, giving the arbitration organization's current address and email address. On request, the arbitration organization will provide a claimant with a petition form for initiating arbitration together with a copy of these rules. Arbitration is commenced by the filing of the signed form, together with the required filing fee, with the arbitration organization. If the claimant asserts a claim against more than one insurer, claimant shall so designate upon the arbitration petition. In the event that a respondent claims or asserts that another insurer bears some or all of the responsibility for the claim, respondent shall file a petition identifying the insurer and setting forth the amount of the claim that it claims is the responsibility of another insurer. Regardless of the number of respondents identified on the claim petition, the claim is subject to the jurisdictional limits set forth in Rule 6.

d. *Denial of Claim.* If a respondent fails to respond in writing within 30 days after reasonable proof of the fact and the amount of loss is duly presented to the respondent, the claim shall be deemed denied for the purpose of activating these rules.

e. *Commencement Notice.* The claimant shall simultaneously provide a copy of the petition and any supporting documents to the respondent and arbitration organization. The arbitration organization shall provide notice to the parties of the commencement of the arbitration. The filing date for purposes of the 30-day response period shall be the date of the arbitration organization's commencement notice.

f. *Itemization of Claim.* At the time of filing the arbitration form, or within 30 days after, the claimant shall file an itemization of benefits claimed and supporting documentation. Medical and replacement services claims must detail the names of providers, dates of services claimed, and total amounts owing. Income-loss claims must detail employers, rates of pay, dates of loss, method of calculation, and total amounts owing.

g. *Insurer's Response.* Within 30 days after receipt of the itemization of benefits claimed and supporting documentation from claimant, respondent shall serve a response to the petition setting forth all grounds upon which the claim is denied and accompanied by all documents supporting denial of the benefits claimed. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the arbitration organization's auspices.

Rule 6. Jurisdiction in Mandatory Cases

By statute, mandatory arbitration applies to all claims for no-fault benefits or comprehensive or collision damage coverage where the total amount of the claim, at the commencement of arbitration, is in an amount of $10,000 or less. In cases where the amount of the claim continues to accrue after the petition is filed, the arbitrator shall have jurisdiction to determine all amounts claimed including those in excess of $10,000. If the claimant waives a portion of the claim in order to come within the $10,000 jurisdictional limit, the claimant must specify within 30 days of filing the claims in excess of the $10,000 being waived.

Rule 7. Notice

Upon the filing of the petition form, the arbitration organization shall send notice to the other party together with a request for payment of the filing fee.

Rule 8. Selection of Arbitrator and Challenge Procedure

The arbitration organization shall send simultaneously to each party to the dispute an identical list of four names of persons chosen from the panel. Each party to the dispute shall have seven business days from the date of transmission in which to cross out a maximum of one name objected to, number the remaining names in order of preference, and return the list to the arbitration organization. In the event of multiparty arbitration, the arbitration organization may increase the number of potential arbitrators and divide the strikes so as to afford an equal number of strikes to each adverse interest. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.

One of the persons who have been approved on both lists shall be invited by the arbitration organization to serve in accordance with the designated order of the mutual preference. Any objection to an arbitrator based on the arbitrator's post appointment disclosure must be made within seven business days from the date of transmission of the arbitrator disclosure form. Failure to object to the appointed arbitrator based upon the post-appointment disclosure within seven business days constitutes waiver of any objections based on the

post-appointment disclosure, subject to the provisions in Rule 10. An objection to a potential arbitrator shall be determined initially by the arbitration organization, subject to appeal to the Standing Committee.

If an acceptable arbitrator is unable to act, or for any other reason the appointment cannot be made from the submitted list, the arbitration organization shall have the power to make the appointment from among other members of the panel without the submission of additional lists. If any arbitrator should resign, be disqualified, or unable to perform the duties of the office, the arbitration organization shall appoint another arbitrator from the no-fault panel to the case.

Rule 9. Notice to Arbitrator of Appointment

Notice of the appointment of the neutral arbitrator, whether appointed mutually by the parties or by the arbitration organization, shall be transmitted to the arbitrator by the arbitration organization, and the signed acceptance of the arbitrator shall be filed with the arbitration organization prior to the opening of the first hearing.

Rule 10. Qualification of Arbitrator and Disclosure Procedure

a. Every member of the panel shall be a licensed attorney at law of this state or a retired attorney or judge in good standing. Effective January 1, 2004, requirements for qualification as an arbitrator shall be: (1) at least 5 years in practice in this state; (2) at least one-third of the attorney's practice is with auto insurance claims or, for an attorney not actively representing clients, at least one-third of an ADR practice is with motor vehicle claims or no-fault matters; (3) completion of an arbitrator training program approved by the No-Fault Standing Committee prior to appointment to the panel; (4) at least three CLE hours on no-fault issues in the last year; and (5) arbitrators will be required to recertify each year, confirming at the time of recertification that they continue to meet the above requirements.

b. No person shall serve as an arbitrator in any arbitration in which he or she has a financial or personal conflict of interest. Under procedures established by the Standing Committee and immediately following appointment to a case, every arbitrator shall be required to disclose any circumstances likely to create a presumption or possibility of bias or conflict that may disqualify the person as a potential arbitrator. Every arbitrator shall supplement the disclosures as circumstances require. The fact that an arbitrator or the arbitrator's firm represents automobile accident claimants against insurance companies or self-insureds, including the respondent, does not create a presumption of bias. It is a financial conflict of interest if, within the last year, the appointed arbitrator or the arbitrator's firm has been hired by the respondent to represent the respondent or respondent's insureds in a dispute for which the respondent provides insurance

coverage. It is a financial conflict of interest if the appointed arbitrator received referrals within the last year from officers, employees or agents of any entity whose bills are in dispute in the arbitration or the arbitrator's firm has received such referrals.

c. If an arbitrator has been certified and has met the requirements of subdivision (a) for the past five years but becomes ineligible for certification under Rule 10(a) due to retirement or change in practice, the arbitrator may continue to seek annual certification for up to five years from the date of retirement licensure or practice change if the following requirements are satisfied:

The arbitrator completes and files an annual No-Fault Arbitrator Recertification form which certifies that:

1. He or she is an attorney licensed to practice law in Minnesota and is in good standing or a retired attorney or judge in good standing;
2. He or she has retained current knowledge of the Minnesota No-Fault Act (Minn. Stat. §§ 65B.41-65B.71), Minnesota appellate court decisions interpreting the Act, the Minnesota No-Fault Arbitration Rules, and the Arbitrators' Standards of Conduct; and
3. He or she has attended CLE course(s) in the last year containing at least three credits relating to no-fault matters.

The rules regarding bias and conflict of interest as set forth in subdivision (b) remain applicable to arbitrators who recertified under this subdivision (c).

Rule 11. Vacancies

If for any reason an arbitrator should be unable to perform the duties of the office, the arbitration organization may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

Rule 12. Discovery

The voluntary exchange of information is encouraged. Formal discovery is discouraged except that a party is entitled to:

1. exchange of medical reports;
2. medical authorizations directed to all medical providers consulted by the claimant in the seven years prior to the accident;
3. employment records and authorizations for two years prior to the accident, when wage loss is in dispute;
4. supporting documentation required under No-Fault Arbitration Rule 5; and
5. other exhibits to be offered at the hearing.

However, upon application and good cause shown by any party, the arbitrator may permit any discovery allowable under the Minnesota Rules of Civil Procedure for the District Courts. Any medical examination for which the respondent can establish good cause shall be completed within 90 days following the commencement of the case unless extended by the arbitrator for good cause.

The Minnesota Rules of Civil Procedure shall apply to claims for comprehensive or collision damage coverage.

Rule 13. Withdrawal

A claimant may withdraw a petition up until 10 days prior to the hearing, thereafter the consent of the respondent shall be required. The claimant will be responsible for the arbitrator's fee, if any, upon withdrawal. If the petition is withdrawn after a panel of arbitrators is submitted and if the claimant shall file another petition arising from the same accident against the same insurer, the same panel of arbitrators shall be resubmitted to the claimant and the respondent. If the petition is withdrawn after the arbitrator is selected and if the claimant shall file another petition arising from the same accident against the same insurer, the same arbitrator who was earlier assigned shall be reassigned. The claimant who withdraws a petition shall be responsible for all parties' filing fees incurred upon the refiling of the petition.

Rule 14. Date, Time, and Place of Arbitration

An informal arbitration hearing will be held in the arbitrator's office or some other appropriate place in the general locale within a 50–mile radius of the claimant's residence, or other place agreed upon by the parties. The arbitrator may fix the date, time and place for the hearing. If the claimant resides outside the state of Minnesota, the arbitration organization shall designate the appropriate place for the hearing. At least 14 days prior to the hearing, the arbitration organization shall transmit notice thereof to each party or to a party's designated representative. Notice of hearing may be waived by any party. When an arbitration hearing has been scheduled for a day certain, the courts of the state shall recognize the date as the equivalent of a day certain court trial date in the scheduling of their calendars.

Rule 15. Postponements

The arbitrator, for good cause shown, may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall also grant

such postponement when all of the parties agree thereto. The party requesting a postponement will be billed for the cost of the rescheduling; if, however, the arbitrator determines that a postponement was necessitated by a party's failure to cooperate in providing information required under Rule 5 or Rule 12, the arbitrator may assess the rescheduling fee to that party.

Rule 16. Representation

Any party may be represented by counsel or other representative named by that party. A party intending to be so represented shall notify the other party and the arbitration organization of the name, mailing address, and email address of the representative, at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

If counsel or other representative named by the claimant withdraws from representation of any pending matter, the claim shall be dismissed, unless the claimant advises the arbitration organization of the intention to proceed *pro se* or a replacement counsel or representative is named within 30 days of the sending of notice of withdrawal.

Rule 17. Stenographic Record

Any party desiring an audio or stenographic record shall make arrangements directly with a stenographer and shall notify the other party of these arrangements at least 24 hours in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceedings, it must be made available to the arbitrator and to the other parties for inspection, at a date, time, and place determined by the arbitrator.

Rule 18. Interpreters

Any party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service. The arbitrator may assess the cost of an interpreter pursuant to Rule 42.

Interpreters must be independent of the parties, counsel, and named representatives. All interpreters must abide by the Code of Professional Responsibility for Interpreters in the Minnesota State Court System.

Rule 19. Attendance at Hearing

The arbitrator shall maintain the privacy of the hearings. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness.

Rule 20. Oaths

Arbitrators, upon accepting appointments to the panel, shall take an oath or affirmation of office. The arbitrator may require witnesses to testify under oath or affirmation.

Rule 21. Order of Proceedings and Communication with Arbitrator

The hearing shall be opened by the recording of the date, time, and place of the hearing, and the presence of the arbitrator, the parties, and their representatives, if any. Either party may make an opening statement regarding the claim. The claimant shall then present evidence to support the claim. The respondent shall then present evidence supporting the defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure, but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence. Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and description of the exhibits in the order received shall be made part of the record. There shall be no direct communication between the arbitrator and the parties other than at the hearing, unless otherwise advised by the arbitration organization or by agreement of the parties and arbitrator. However, an arbitrator may directly contact the parties, but such communication is limited to administrative matters. Any direct communication between the arbitrator and parties must be conveyed to the arbitration organization, except communications at the hearing. Pre-hearing exhibits can be sent directly to the arbitrator, delivered in the same manner and at the same time to the opposing party. Parties are encouraged to submit any pre-hearing exhibits at least 24 hours in advance of the scheduled hearing. If the exhibits are not provided to opposing counsel and the arbitrator at least 24 hours before the hearing or if the exhibits contain new information and opposing counsel has not had a reasonable amount of time to review and respond to the information, the arbitrator may hold the record open until the parties have had time to review and respond to the material or reconvene the arbitration at a later

date. Any other oral or written communication from the parties to the arbitrator shall be directed to the arbitration organization for transmittal to the arbitrator.

Rule 22. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

Rule 23. Witnesses, Subpoenas and Depositions

a. Through the arbitration organization, the arbitrator may, on the arbitrator's initiative or at the request of any party, issue subpoenas for the attendance of witnesses at the arbitration hearing or at such deposition as ordered under Rule 12, and the production of books, records, documents and other evidence. The subpoenas so issued shall be served, and upon application to the district court by either party or the arbitrator, enforced in the manner provided by law for the service and enforcement of subpoenas for a civil action.

b. All provisions of law compelling a person under subpoena to testify are applicable.

c. Fees for attendance as a witness shall be the same as for a witness in the district courts.

Rule 24. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the issues. The arbitrator shall be the judge of the relevancy and materiality of any evidence offered, and conformity to legal rules of evidence shall not be necessary. The parties shall be encouraged to offer, and the arbitrator shall be encouraged to receive and consider, evidence by affidavit or other document, including medical reports, statements of witnesses, officers, accident reports, medical texts and other similar written documents that would not ordinarily be admissible as evidence in the courts of this state. In receiving this evidence, the arbitrator shall consider any objections to its admission in determining the weight to which he or she deems it is entitled.

Rule 25. Close of Hearing

The arbitrator shall specifically inquire of all parties as to whether they have any further evidence. If they do not, the arbitrator shall declare the hearing closed. If

briefs or documents are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of said documents. The time limit within which the arbitrator is required to make his or her award shall commence to run upon the closing of the hearing.

Rule 26. Re-opening the Hearing

At any time before the award is made, a hearing may be reopened by the arbitrator on the arbitrator's own motion, or upon application of a party for good cause shown.

Rule 27. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the arbitration organization shall specify a fair and equitable procedure.

Rule 28. Extensions of Time

The parties may modify any period of time by mutual agreement. The arbitration organization or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The arbitration organization shall notify the parties of any extension.

Rule 29. Serving of Notice

Each party waives the requirements of Minn. Stat. 572B.20 and shall be deemed to have agreed that any notices or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection herewith including application for the confirmation, vacation, modification, or correction of an award issued hereunder as provided in Rule 38; or for the entry of judgment on any award made under these rules may be served on a party by mail or electronic means addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

Rule 30. Time of Award

The award shall be made promptly by the arbitrator, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the

hearing, or if oral hearings have been waived, from the date of the arbitration organization's transmittal of the final statements and proofs to the arbitrator. In the event the 30th day falls on a weekend or federal holiday, the award shall be made no later than the next business day.

Rule 31. Form of Award

The award shall be in writing and shall be signed by the arbitrator. It shall be executed in the manner required by law.

Rule 32. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable consistent with the Minnesota No-Fault Act. The arbitrator may, in the award, include arbitration fees, expenses, rescheduling fees and compensation as provided in sections 39, 40, 41, and 42 in favor of any party and, in the event that any administrative fees or expenses are due the arbitration organization, in favor of the arbitration organization, except that the arbitrator must award interest when required by Minn. Stat. 65B.54. The arbitrator may not, in the award, include attorneys fees for either party.

Given the informal nature of no-fault arbitration proceedings, the no-fault award shall not be the basis for a claim of estoppel or waiver in any other proceeding.

Rule 33. Delivery of Award to Parties

The award may be delivered by the arbitration organization to the parties or their representatives by mail, electronic means, personal service, or any other manner permitted by law.

Rule 34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

Rule 35. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. All other rules shall be interpreted by the arbitration organization.

Rule 36. Release of Documents for Judicial Proceedings

The arbitration organization shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any documents in the arbitration organization's possession that may be required in judicial proceedings relating to the arbitration.

The arbitration organization shall not release documents that are privileged or otherwise protected by law from disclosure. This includes, but is not limited to, any notes, memoranda, or drafts thereof prepared by the arbitrator or employee of the arbitrator that were used in the process of preparing the award, and any internal communications between members of the standing committee made as part of the committee's deliberative process.

Rule 37. Applications to Court and Exclusion of Liability

a. No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

b. Neither the arbitration organization nor any arbitrator in a proceeding under these rules can be made a witness or is a necessary party in judicial proceedings relating to the arbitration.

c. Parties to proceedings governed by these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

d. Neither the arbitration organization nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

Rule 38. Confirmation, Vacation, Modification, or Correction of Award

The provisions of Minn. Stat. § 572B.01 through § 572B.31 shall apply to the confirmation, vacation, modification, or correction of award issued hereunder, except that service of process pursuant to the Minn. Stat. § 572B.05 shall be made as provided in Rule 29 of these rules.

Rule 39. Administrative Fees

The initial fee is due and payable at the time of filing and shall be paid as follows: by the claimant, $40.00; by the respondent, $150.00. In the event that there is more than one respondent in an action, each respondent shall pay the $150.00 fee.

Upon review of a petition, if the arbitration organization determines that a claim was filed in error, the organization may require that payment of respondent's filing fee be assessed against the claimant.

The arbitration organization may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fee.

Rule 40. Arbitrator's Fees

a. An arbitrator shall be compensated for services and for any use of office facilities in the amount of $300 per case.

b. If the arbitration organization is notified of a settlement or a withdrawal of a claim at any time up to 24 hours prior to the scheduled hearing, but after the appointment of the arbitrator, the arbitrator's fee shall be $50. If the arbitration organization is notified of a postponement, settlement or a withdrawal of a claim 24 hours or less prior to the scheduled hearing, the arbitrator's fee shall be $300. Unless the parties agree otherwise, the fee in a settlement shall be assessed equally to the parties, the fee in a withdrawal shall be borne by claimant, and the fee in a postponement shall be borne by the requesting party. Regardless of the resolution of the case, the arbitrator's fee shall not exceed $300 and is subject to the provisions of Rule 15.

c. An arbitrator serving on a court-ordered consolidated glass case shall be compensated at a rate of $200.00 per hour.

Rule 41. Rescheduling or Cancellation Fees

A party requesting to reschedule or cancel a hearing shall be charged a fee of $100.00, provided that the request does not fall within the provisions of Rule 40(b) that specifically address settlement or withdrawal.

Rule 42. Expenses

Generally each side should pay its own expenses. An arbitrator does, however, have the discretion to direct a party or parties to pay expenses as part of an award.

Rule 43. Amendment or Modification

The Standing Committee may propose amendments to these rules as circumstances may require. All changes in these rules and all other determinations of the Standing Committee shall be subject to review and approved by the Minnesota Supreme Court.

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April 6, 2017

Minnesota Supreme Court Applies First-Party Bad Faith Statute

By Beth A. Jenson Prouty

On April 5, 2017, the Minnesota Supreme Court issued *Wilbur v. State Farm Mut. Auto. Ins. Co.*, applying "proceeds awarded" for purposes of Minnesota's first-party bad faith statute to unambiguously mean the judgment amount entered by the district court on the claim for benefits, an amount which is capped by the insurance policy's limit.

* * * * *

The Minnesota Supreme Court has answered a question that has been on the minds of insurance coverage attorneys since Minnesota first enacted Minn. Stat. § 604.18, Minnesota's first-party bad faith statute. The statute allows an insured to tax certain costs and fees against an insurer that unreasonably denies an insurance benefits claim knowing that it lacked a reasonable basis to deny benefits, or acting in reckless disregard of the lack of a reasonable basis to deny benefits. In particular, subdivision 3(a) provides that when an insurer is found to have unreasonably denied first-party benefits, the court may award as taxable costs:

> an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less. . . .

Since enactment of the statute, coverage attorneys have queried whether "proceeds awarded" means the total damages determined by the jury (adjusted for collateral source payments), or the amount of the judgment entered by the district court on the claim for benefits (the jury verdict, adjusted for collateral source payments, and capped by the policy limits) – in other words, the amount for which the insurer ultimately is liable under its policy. The difference can be significant because the judgment entered by the district court on the claim for benefits is capped at the policy limits.

In the April 5, 2017, opinion of *Wilbur v. State Farm Mut. Auto. Ins. Co.*, the Minnesota Supreme Court concluded that the phrase "proceeds awarded" as used in Minn. Stat. § 604.18, subd. 3(a), is unambiguously capped by the insurance policy's limit.

In this case, Wilbur was injured in a car accident. He recovered $100,000 from the at-fault driver's insurance company, and then sought to recover the $100,000 limits of underinsured motorist ("UIM") benefits from his own insurer, State Farm. State Farm paid Wilbur $1,200 in UIM benefits, and offered to settle his claim for an additional $26,800. Wilbur rejected this offer. The UIM case was tried to a jury, and the jury determined Wilbur's personal injury damages to be $412,764.63.

The district court reduced the verdict by collateral sources of $156,808.05 (including the $100,000 payment from the at-fault driver's insurer), thus determining that Wilbur's underinsured loss was $255,956.59. But because Wilbur's policy with State Farm provided only $100,000 in UIM coverage, and State Farm had already paid $1,200 to Wilbur as UIM benefits, the district court ordered that judgment in the amount of $98,800 ($100,000 minus $1,200) be entered in Wilbur's favor.

Before judgment was entered, Wilbur amended his complaint to allege State Farm had unreasonably denied his claim for UIM benefits. Wilbur sought to tax costs under Minn. Stat. § 604.18, subd. (a), and argued the "proceeds awarded" were $255,956.59 – the $412,764.63 jury verdict reduced by the collateral source offsets of $156,808.04. Wilbur then reduced the $255,956.59 by $28,000 (the amounts offered by State Farm to settle at least 10 days before trial (the $1,200 in UIM benefits State Farm had paid, and the additional $26,800 State Farm had offered to pay)) for a total of $227,956.59. Wilbur sought to tax costs in the amount of $113,978.29 – which is one-half of $227,956.59.

The district court instead determined the "proceeds awarded" was the $98,800 judgment on the claim for benefits. To determine taxable costs under Minn. Stat. § 604.18, subd. (a), the court then reduced the $98,800 judgment by the $26,800 State Farm had offered to pay to settle Wilbur's claim, for a total of $72,000 ($98,800 - $26,800 = $72,000). The court then awarded Wilbur taxable costs of $36,000 – which is one-half of $72,000. The Minnesota Court of Appeals and Minnesota Supreme Court affirmed the taxable cost award of $36,000.

The members of Arthur Chapman's Insurance Coverage Group and Automobile Law Group stand ready to answer your questions.

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CASE LAW UPDATE

***Michael Ronning v. State Farm Mut. Aut. Ins. Co.*, A16-0538 (Minn. App., Nov. 7, 2016)**

BACKGROUND

In April 2012, Ronning suffered permanent injuries after a pickup truck in which he was a passenger collided with a vehicle driven by Krueger in Iowa. State Farm insured the truck under a policy that included $1 million in underinsured motorist ("UIM") coverage.

Ronning retained an attorney to sue Krueger. Krueger's only liability insurance was a bodily-injury policy issued by Farm Bureau with a coverage limit of $100,000. However, Ronning's attorney failed to sue Kruger within Iowa's two-year statute-of-limitations period for personal injury claims. In August 2015, Ronning sued State Farm for underinsured motorist benefits. State Farm moved to dismiss Ronning's claim for failure to state a claim upon which relief can be granted. Ronning also commenced a malpractice lawsuit against his former attorney for failing to timely sue Krueger, which eventually resulted in a settlement. Ronning subsequently sent State Farm a purported *Schmidt-Clothier* notice of the settlement.

State Farm did not substitute a payment to Ronning in the amount of the settlement; State Farm responded by amending its motion to dismiss and asking the district court to declare the *Schmidt-Clothier* notice invalid, or, in the alternative, to stay the 30-day notice period until the court determined whether Ronning had pleaded a legally viable UIM claim. The district court granted State Farm's motion to dismiss, concluding that because Ronning

continued on next page . . .

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Our group of automobile law attorneys has extensive experience representing uninsured, underinsured, liability, No-Fault, automobile coverage and appellate matters. Contact us today to discuss your automobile law needs.

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admittedly could not resolve his time-barred tort claim against Kruger through adjudication or settlement, he could not satisfy the condition precedent for bringing a UIM claim against State Farm.

Holding

Ronning appealed to the Minnesota Court of Appeals, challenging the district court's Rule 12.02(3) dismissal of his claim for UIM benefits. The court of appeals noted that underinsured motorist coverage is available to insureds who are *legally* entitled to recover damages for bodily injury from owners or operators of underinsured motor vehicles, but that here, Ronning's UIM claim was dismissed because he failed to first recover from Krueger – a condition precedent to bringing underinsured claims. The court recognized that the two ways in which Ronning could have satisfied that condition precedent were either concluding a tort action against the underinsured tortfeasor and seeking underinsurance benefits if the judgment exceeded the limits of the tortfeasor's policy, or obtaining his "best settlement" from the tortfeasor, providing a *Schmidt-Clothier* notice to the UIM carrier, and then bringing a UIM claim.

Ronning conceded that, because of his former attorney's negligence, he could not resolve a tort claim against Kruger through adjudication or settlement but nevertheless asserted that he could still claim UIM benefits from State Farm because the only *statutory* condition precedent for this type of claim is that the insured is "legally entitled to recover damages." The court of appeals rejected Ronning's reading of Minnesota Supreme Court case law and noted there is nothing to suggest that the supreme court intended to eliminate the non-statutory condition precedent for underinsurance claims. The court of appeals also rejected Ronning's contention that an insured has a ripe underinsured motorist claim merely because he can show damages and the tortfeasor's fault.

Further, the court rejected Ronning's argument that the district court prematurely dismissed his complain because a fact issue exists as to whether State Farm has been prejudiced. The court noted that because satisfying the condition precedent is necessary for the *existence* of a valid UIM claim, Minnesota courts have engaged in prejudice analyses only when the insured brought a timely action against the tortfeasor but failed to provide the UIM insurer with adequate notice of a tentative settlement. Thus, the court held, "[b]y leapfrogging to the question of prejudice, Ronning ignores case law demonstrating that his claim is not ripe until he recovers from Krueger. Because no underinsurance claim exists here, the question of prejudice is irrelevant."

Finally, the court of appeals rejected of Ronning's attempt to circumvent the condition-precedent requirement by suggesting that he may proceed with his unripe UIM claim so long as he "credits" State Farm for the full liability limits of Krueger's insurance. The court noted that an underinsured's liability is statutorily tied to the damage exceeding a recovery from the tortfeasor's insurance, not the insured's willingness to "credit" a certain amount, and that allowing an insured to claim UIM benefits without first recovering from the tortfeasor risks inappropriately elevating UIM coverage to the status of primary coverage.

Practical Effect

In conclusion, the Minnesota Court of Appeals made it clear that it "did not leave insureds like [Ronning] remediless" because, as the lower court had also recognized, Ronning could and did address the lost UIM claim in a lawsuit against the negligent attorney. Ronning had settled the malpractice claim for $200,000, which was $100,000 more than Krueger's bodily-injury coverage limit. The settlement amount indicated to the court that the settlement appeared to contemplate the UIM benefits which Ronning now improperly sought to recover from State Farm.

***Lindstrom v. Progressive Direct Ins. Co.*, No. A16-0189, 2016 WL 4421473 (Minn. App. Aug. 22, 2016)**

Background

On March 9, 2010, Lindstrom applied by phone and obtained a six-month auto policy from Progressive. Lindstrom then filled out an application for insurance online, providing his mother's mailing address, with an incorrect zip code, as the address for the policy. On March 24, 2010, Progressive mailed a premium bill to Lindstrom at the address listed in his application. Progressive also emailed the bill to the email address Lindstrom had provided. Lindstrom did not pay the premium. Accordingly, Progressive mailed a Cancellation Notice to Lindstrom, again to the address he had provided in his application, indicating that the policy would be cancelled effective April 26, 2010 if the premium was not received. Lindstrom failed to pay the premium by the cancellation date, and the policy was cancelled. Lindstrom was the at-fault party in an accident on June 8, 2010 in which the other involved driver sustained injury.

Progressive denied coverage for Lindstrom with regard to the other driver's injury claim because the policy had been cancelled before the accident occurred. Lindstrom brought a declaratory judgment against Progressive, arguing that he should be entitled to coverage under the policy because he never received the Cancellation Notice.

Holding

The district court granted summary judgment and the court of appeals affirmed. The court of appeals noted that the statutory requirements for cancellation of an auto policy are met by proof of mailing of the Cancellation Notice to the address listed on the policy. Therefore, actual notice of cancellation is not required, and cancellation for nonpayment of premium is not conditioned on the insured's actual receipt of the premium bill. As long as the insurer can provide proof that the Cancellation Notice was mailed to the address listed on the policy, cancellation will be effective.

Practical Effect

Lindstrom provides further ammunition for insurers against post-cancellation claims by insureds that they did not receive actual notice of cancellation. It is also a reminder that documenting proof of mailing of the Cancellation Notice is an absolute administrative necessity in order for the cancellation to be considered valid.

***Founders Ins. Co. v. Yates*, 876 N.W.2d 344 (Minn. App. 2016), review granted (Minn. May 17, 2016)**

The Minnesota Supreme Court, reversing the 2016 decision of the Minnesota Court of Appeals, found that an out-of-state insurer that is not licensed to write motor vehicle accident insurance in Minnesota, but is licensed to write other lines of insurance in Minnesota, is still obligated under Minn. Stat. § 65B.50, subd. 2 (2014) to pay basic economic loss benefits to the insured when the insured vehicle is in Minnesota and an accident occurs in Minnesota.

Background

Shortly after moving to Minnesota from Illinois, Yates was driving on a snowy Minnesota highway when his car collided with a vehicle that had lost control on an exit ramp. At the time of the accident, Yates's car was insured under a Founders policy issued to him as an Illinois resident, and he had not notified Founders of his move to Minnesota. Founders does not write or issue motor-vehicle insurance in Minnesota, but has been licensed to write Dram Shop liability insurance in Minnesota since 2005.

Following the accident, Founders denied Yates' No-Fault claim for over $17,000 in chiropractic expenses. The subject policy, written and issued in accordance with Illinois laws, capped medical-payments coverage at $1,000. Minnesota basic economic-loss benefits under the No-Fault act have no counterpart under Illinois law. Yates filed a petition for no-fault arbitration, to which Founders objected. Founders then brought a declaratory-judgment action in Minnesota district court, seeking a ruling that it had no duty to provide basic economic-loss benefits under Minnesota's No-Fault Act. The arbitrator held a hearing and awarded Yates over $19,000 in benefits, over Founders' objection. Yates moved the district court to confirm the arbitration award and Founders moved to vacate it. The district court erroneously determined that Founders was licensed to write and issue motor-vehicle insurance in this state because it wrote Dram Shop liability insurance. Accordingly, the district court concluded that Founders was required under Minn. Stat. § 65B.50, subd. 1 to provide basic economic-loss benefits to its insured. Founders appealed.

Holding

Minnesota Court of Appeals

The court of appeals reversed, finding that an out-of-state insurer that is not licensed to write motor vehicle accident insurance in Minnesota, but is licensed to write other lines of insurance in Minnesota, has no obligation under the No-Fault Act to provide basic economic loss benefits to its insured who was injured in an accident in Minnesota.

The court first analyzed the plain language of the policy, which both parties agreed did not provide for the benefits requested by Yates. The court then addressed Minn. Stat. § 65B.50, subd.1, which requires every insurer licensed to write auto insurance in Minnesota to certify that it will afford at least the minimum security required by the No-Fault Act to all policyholders for accidents occurring in Minnesota. The court noted that Founders' license to write Dram Shop liability insurance in Minnesota does not authorize it, without further licensing, to write motor-vehicle insurance in Minnesota. Consequently, the court held that § 65B.50, subd. 1 did not apply.

The court further concluded that the plain language of § 65B.50, subd. 2, which requires every auto policy, wherever issued, to provide basic economic loss benefits while the insured vehicle is in Minnesota, did not require Founders to provide economic loss benefits because that provision only applies to insurers licensed to write automobile policies in Minnesota. While recognizing a split in Minnesota authorities on the issue, the court ultimately concluded Subdivisions 1 and 2 must be read together such that the limitation in Subdivision 1 to insurers licensed to write auto policies in Minnesota would be essentially imported into Subdivision 2.

Minnesota Supreme Court

The Minnesota Supreme Court disagreed with Founders and the Court of Appeals that it should read subdivision 1 and subdivision 2 together. The Court noted that subdivision 1 imposes additional requirements on licensed insurers that subdivision 2 does not impose on nonlicensed insurers, and therefore, applying subdivision 2 to nonlicensed, out-of-state insurers does not make subdivision 1 unnecessary. The Court also disagreed that applying subdivision 2 to nonlicensed, out-of-state insurers would "void [] directives which limit the types of insurance for which an insurance company can conduct business in Minnesota," pointing out that multiple statutory rights and obligations accrue to licensed insurers that do not apply to nonlicensed insurers. Finally, looking at the plain language of subdivision 2, the Court emphasized that it clearly states it applies to "every contract of liability insurance for injury, wherever issued" and nothing suggests that it is limited to insurers licensed in Minnesota. The Court also recognized, in a parting footnote, that applying subdivision 2 to nonlicensed, out-of-state insurers could present one or more constitutional issues in certain cases, but it expressed no opinion on the constitutionality of Minn. Stat. § 65B., subd. 2, since that issue had not been raised before the court.

Practical Effect

The importance of this decision is its clarification that an insurance company does not have to be licensed to write motor-vehicle insurance in Minnesota before it can be compelled to pay No-Fault benefits under Minn. Stat. 65B.50. This decision settles the recognized split in authorities regarding the interpretation of § 65B.50, subd. 2. The supreme court's footnote about the constitutionality of subdivision 2 indicates possible such future challenges. For now, however, out-of-state insurers must pay basic economic loss benefits to the insured when the insured vehicle is in Minnesota and an accident occurs in Minnesota.

***Auers v. Progressive Direct Insurance Co.*, 878 N.W.2d 350 (Minn. Ct. App. April 25, 2016)**

Background

In June 2012, Karen Auers was injured in a motor vehicle accident. At the time of the accident, Ms. Auers was insured by Progressive under a policy that included underinsured motorist (UIM) benefits of up to $100,000. As a result of the crash, Ms. Auers incurred $178,083.44 in medical expenses. Progressive paid $20,000 of the bills through No-Fault medical benefits, and the remaining expenses were satisfied by Ms. Auers' health insurance carrier, Blue Cross and Blue Shield of Minnesota (BCBS). BCBS negotiated approximately $85,869.59 in discounts with her medical providers, paying $72,216.85 to these providers and asserting a medical lien in that amount.

In March 2013, Ms. Auers received a settlement offer from the tortfeasor's insurer for the liability insurance policy limit of $100,000. In June 2013, respondent obtained a "Release of Subrogation Interest and Claim" From BCBS, after which BCBS accepted $5,000 in exchange for an assignment of its right of subrogation, "to the extent permitted under *Swanson v. Brewster*" to respondent.

Auers' estate then sued Progressive, and the district court determined that she was entitled to UIM benefits for damages exceeding the tortfeasor's liability-insurance limits. Progressive appealed, claiming that the negotiated discount was a collateral source offset. The Minnesota Court of Appeals, (Rodenberg, J).

Holding

1. Pursuant to *Swanson v. Brewster*, 784 N.W.2d, 264 (Minn. 2010) a negotiated discount of medical expenses is a collateral source subject to offsets.
2. A subrogee that has negotiated a discount of medical expenses may not assert a subrogation right for the discount under *Swanson*, and the subrogation right is limited to the amount of the subrogee's payment.
3. An injured plaintiff who purchases the subrogation interest of a health-insurance carrier is not entitled to collateral-source offset under Minn. Stat. § 548.251 in his personal injury case.

As a result, the tortfeasor was deemed not to be underinsured.

Practical Effect

- Negotiated Discounts Remain Collateral Sources to be Deducted from an Injured Party's Verdict or Settlement under Minn. Stat. § 548.251.
- When considering whether a case has the potential for UIM exposure, the total medical specials may not be an accurate barometer if the outstanding expenses have not yet been negotiated down by the Plaintiff's health insurance provider.

***Amer. Fam. Mut. Ins. Co. v. Donaldson*, 820 F.3d 374 (8th Cir. 2016)**

Background

Donaldson was passenger in a vehicle operated by his friend, Patton, who was driving while intoxicated. A pedestrian saw Patton driving erratically and called 911. A police officer responded and Patton attempted to flee, losing control of the vehicle in the course of his efforts to evade police and colliding with a tree. Donaldson sustained serious injuries in the accident. Patton was ultimately convicted of felony criminal vehicular operation.

American Family insured the vehicle under a policy issued to Patton's father with a $100,000 liability limit. Patton's father also had an umbrella policy from American Family with a $1,000,000 limit. Donaldson entered into a *Drake v. Ryan* agreement with American Family whereby American Family agreed to pay the limit of the underlying liability policy in exchange for Donaldson's agreement that any further damages claim could only be asserted against the proceeds of the umbrella policy, such that the Pattons could have no personal exposure for the claim. American Family then denied coverage under the umbrella policy pursuant to intentional-acts and criminal-acts exclusions.

After reaching the *Drake v. Ryan* settlement, Donaldson commenced a personal injury action against Patton and his father. American Family provided the Pattons with a defense in the personal injury action under a reservation of rights and brought a declaratory judgment action seeking a declaration of no coverage under the umbrella policy. In response, Donaldson entered into a *Miller-Shugart* Agreement with the Pattons in the personal injury action.

Holding

The Eighth Circuit affirmed summary judgment in favor of American Family, holding that the Pattons had violated the cooperation clause in the umbrella policy by entering into the *Miller-Shugart* Agreement with the Pattons after their *Drake v. Ryan* settlement with American Family. The court noted that there are two prerequisites that must be met before a *Miller-Shugart* Agreement may override the insured's duty to cooperate: (1) the insurer must deny the existence of any coverage for the underlying claim; and (2) the insured must be at risk of personal exposure for damages in the underlying case. In the court's view, Donaldson's *Miller-Shugart* Agreement with the Pattons did not satisfy the second prerequisite because the earlier *Drake v. Ryan* settlement had insulated the Pattons from any possibility of personal exposure for Donaldson's damages. Consequently, the Miller-Shugart Agreement violated the cooperation clause in the umbrella policy.

The court also concluded that the Pattons' violation of the cooperation clause was both material and prejudicial to American Family because it foreclosed the possibility of a later settlement in which American Family could participate and compromised American Family's right to contest liability and the amount of damages. Accordingly, the breach of the cooperation clause entitled American Family to deny coverage under the umbrella policy.

Practical Effect

Donaldson demonstrates the pitfalls litigants can encounter when they stretch insurance-related settlement methods beyond the boundaries of their intended use. It is a reminder that *Miller-Shugart* settlements are only appropriate in circumstances where the insured has risk of personal exposure. The decision clearly illustrates the tension created between an insured's duty to cooperate and their right to protect themselves from personal exposure, and provides a potential roadmap for challenging coverage where *Miller-Shugart* agreements are utilized.

***Hegseth v. American Family Mut. Ins. Group*, 877 N.W.2d 191 (Minn. 2016)**

Background

On March 30, 2007, Jamy Hegseth was a passenger in a vehicle driven by another when that vehicle and a semi-truck were involved in an accident that injured Hegseth. The semi-truck left the scene before the identity of the driver could be determined. Hegseth sought UM benefits from two policies – one that covered the vehicle she was riding in (issued by West Bend Insurance), and an American Family policy that covered her own vehicle. The parties agreed that under Minn. Stat. § 65B.49, subd. 3a(5), the American Family policy was excess UM protection. On June 14, 2012, Hegseth settled her claim for primary UM benefits with West Bend for the policy limits. Two months later, on August 17, 2012, she demanded that American Family pay her excess UM benefits. On September 13, 2012, American Family denied the claim, concluding that Hegseth had been fully compensated for her injuries. On July 9, 2013, Hegseth brought suit against American Family, which moved for summary judgment arguing that the excess UM claim was barred by the 6-year statute of limitations for contract actions (Minn. Stat. § 541.05, subd. 1(1)). The district court granted American Family's motion, concluding that the excess UM claim accrued over 6 years earlier, on the date of the accident. The court of appeals affirmed. Hegseth sought review, arguing that: (1) resolution of the primary UM claim is a condition precedent to the assertion of an excess UM claim, and it is unjust for the excess claim to accrue before the occurrence of the condition; and (2) excess UM claims should accrue on the date the insurer denies the claim for excess benefits.

Holding

1. The resolution of the primary UM claim is not a condition precedent to the assertion of a claim for excess UM benefits under the No-Fault Act.
2. Claims for excess UM benefits accrue on the date of the accident.

Practical Effect

- All claims for UM benefits, both primary and excess, accrue on the date of the accident.
- Keep in mind, however, that when a UM claim arises due to an insurer's insolvency, the statute of limitations begins to run when insurer is declared insolvent. *See Oganov v. Am. Family Ins. Grp.*, 767 N.W.2d 21 (Minn. 2009).
- UIM claims, on the other hand, accrue on the date of settlement with or judgment against the tortfeasor. *See Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000).

***Saengkeo v. Minnesota Automobile Assigned Claims*, 877 N.W.2d 568 (Minn. Ct. App. 2016)**

Background

A passenger in an uninsured vehicle owned and operated by a third-party brought an action against the assigned claims plan seeking recovery for economic loss benefits for injuries suffered in a single vehicle accident in the uninsured vehicle. The assigned claims plan is designed to provide basic economic loss benefits to injured persons who may not otherwise be covered by personal injury protection coverage due to circumstances such as lack of vehicle ownership. Minnesota law disqualifies from participation in the assigned claims plan any vehicle owner who fails to insure a vehicle. The plaintiff did not own a vehicle. However, Minnesota law also disqualifies from the plan "[p]ersons, whether or not related by blood or marriage, who dwell and function together with the owner [of an uninsured vehicle] as a family." These disqualifying provisions do not apply if the owner of the uninsured vehicle demonstrates by clear and convincing evidence "to have [not] contemplated the operation or use of the vehicle."

Holding

In this case, the passenger's brother, with whom the plaintiff lived, was the co-owner of an uninsured vehicle. The brother had co-signed on a loan for a vehicle with a girlfriend and therefore co-owned a vehicle. The brother was no longer in a relationship with the girlfriend at the time the plaintiff moved in with his brother and the vehicle was used solely by the former girlfriend. She alone was insured under the vehicle's policy. Plaintiff argued that the disqualifying provisions did not apply because his brother did not contemplate using the vehicle he co-owned with his ex-girlfriend and was not required to insure the vehicle. However, the court held that a plain reading of the statute required the brother as an owner to maintain insurance on the vehicle if it was contemplated that anyone would use or operate the vehicle. Since the ex-girlfriend was clearly using and operating the vehicle the court reversed the trial court and precluded plaintiff's recovery from the assigned claims plan.

Practical Effect

There are strike scenarios of when someone is eligible for No-Fault coverage through the MN Assigned Claims Plan.

***Stand Up Multipositional Advantage MRI, P.A., v. American Family Insurance Co.*, 878 N.W.2d 21 (Mn. Ct. App. 2016)**

Background

Plaintiff Stand Up Multipositional Advantage MRI, P.A. (SUMA) provides MRI testing to patients. Prior to providing MRI services, SUMA required each patient to sign a one-page document that purported to create an assignment and lien agreement. In July 2013, SUMA initiated a lawsuit against sixteen different defendants, including eight patients, seven attorneys who represented the eight patients, and American Family, the insurance company that provided No-Fault insurance benefits to the eight patient-defendants. SUMA alleged that American Family failed to make payments of No-Fault benefits directly to SUMA pursuant to the assignments that it had obtained from its patients.

Holding

The Minnesota Court of Appeals held that a patient's assignment of a No-Fault insurance claim to a medical provider is invalid and unenforceable if the applicable automobile insurance policy forbids such an assignment and if the patient makes the assignment before the medical provider bills the patient for medical services. In support of its holding, the Court of Appeals relied on the statutory definition of when a "loss" occurs for the purpose of a claim for medical expense benefits—which is when that medical expense is incurred. Therefore, the Court held that the pre-loss assignments to SUMA at issue in this case were invalid and unenforceable.

Practical Effect

This holding has broad implications. An assignment of a No-Fault claim will only be valid before receipt of a medical bill if the applicable insurance policy does not include an anti-assignment provision. If the policy does include an anti-assignment provision, the assignment will only be valid if entered after the patient receives the bill for services. This may ultimately result in the refusal of medical providers to treat claims without prior payment as there is no assurance that the insured will sign a post-billing assignment of his or her right to personal injury protection benefits under the policy. In addition, careful review of the date of any assignments should be undertaken before issuing payment of a No-Fault claim directly to a claimant.

The Minnesota Supreme Court granted Stand Up Multipositional Advantage MRI, P.A.'s petition for review on June 21, 2016, and the Court heard oral arguments in the case on October 11, 2016.

***Wilbur v. State Farm Mut. Auto. Ins. Co.*, 880 N.W.2d 874 (Minn. Ct. App. 2016) Review Granted**

In *Wilbur v. State Farm*, the Court of Appeals interpreted the amount of taxable costs that may be available to a prevailing property when an insurer unreasonably denies UIM benefits. Specifically, the appellate court concluded the phrase "proceeds awarded" in the "Good Faith" Minn. Stat. 604.18, subd. 3(a)(1) means the amount of the net judgment entered by the district court as UIM benefits, not necessarily the proceeds awarded by a jury.

Background

Wilbur sustained severe injuries in a motor vehicle collision. He recovered the full $100,000.00 policy limit in damages from the at-fault driver's insurance company. He then pursued additional insurance coverage from his own insurer, State Farm, under his underinsured motorist (UIM) coverage. State Farm made an initial offer and payment of $1,200, then later offered an additional $26,800 to settle the UIM claim. Wilbur declined the offer and sought the $100,000 policy limit. Ultimately, Wilbur sued State Farm and the matter proceeded to a jury trial. The jury awarded Wilbur $412,764.63 in damages. After collateral source offsets, the district court determined the damages Wilbur was entitled to recover were $255,956.59. Because the UIM limits were $100,000 and State Farm had already paid $1,200, the district court entered judgment in the amount of $98,800.00.

Following the jury verdict, Wilbur moved to amend his complaint to add a claim of bad faith against State Farm pursuant to Minn. Stat. §604.18. The statue provides, in part, that if an insurer unreasonably denies benefits to an insured, the district court may award taxable costs of "an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less." Minn. Stat. §604.18, subd. 3(a)(1) (emphasis added). The statute also allows for reasonable attorney fees, pre-judgment interest, post-judgment interest, costs, and disbursements.

The parties agreed that the statute provides for taxable costs, but disagreed on the meaning of "proceeds awarded." According to State Farm, the phrase should be construed to be capped by the policy limit and should be one half of the policy limits less the $28,000 that had been offered by State Farm before trial. According to Wilbur, the phrase should be construed as the net jury verdict for damages after collateral source offsets (or one-half of the $255,956.59 net verdict).

Holding

As a matter of first impression, the Court of Appeals concluded that the term "proceeds awarded" was ambiguous. Therefore, the Court of Appeals considered the legislative intent of the statute. In so doing, the Court of Appeals upheld the district court's decision that the term "proceeds awarded" referred to the amount of judgment entered by the court after applying the offsets. Plaintiff was awarded as taxable costs one half of the policy limits less the amount State Farm had offered before trial.

Practical Effect

The amount of taxable costs allowed on a successful bad faith claim is limited by the UIM policy limits. However, an insurer must still be cognizant of its exposure for attorney fees, interest, costs, and disbursement for a wrongful denial of benefits.

This case is currently being reviewed by the Minnesota Supreme Court.

***Hamilton v. Allstate Ins. Co.*, Civ. No. 15-2520 ADM/FLN, 2015 WL 9412525 (D.Minn. Dec. 22, 2015)**

Background

Plaintiff Hamilton, a 52-year-old self-sufficient man, was injured in a one-vehicle accident. Plaintiff was driving a car owned by his girlfriend, Dahlquist, who was a front-seat passenger. The vehicle crashed after Dahlquist negligently grabbed the steering wheel from her passenger seat. After collecting the liability limit from Dahlquist's policy, Hamilton sought UIM benefits from a policy that Allstate had issued to his brother, arguing that he was a resident relative of his brother's household.

Plaintiff had a "fluid" residence history. At the time of the accident, he was living with Dahlquist but stored his belongings with his brother. His relationship with Dahlquist was tumultuous. When he and Dahlquist were on the outs, Plaintiff would stay with either of his two brothers until he and Dahlquist reconciled.

Holding

The court granted summary judgment in favor of Allstate, concluding that Hamilton was not a resident relative of his brother's household. In particular, the court noted that Hamilton was not living under his brother's roof when the accident happened and his close, intimate and informal relationship was with Dahlquist, not his brother. Moreover, there was no indication that the brother considered Hamilton when he contracted for insurance with Allstate. The fact that Hamilton was middle-aged and self-sufficient also supported the conclusion that he was not a resident of the brother's household.

Practical Effect

Hamilton does not break any new ground regarding the question of when an individual may be considered a resident relative. It does, however, provide some helpful insight into the factors that courts emphasize in making the determination. In particular, the age and self-sufficiency of the individual seeking resident relative status are predominant factors.

Non-Permissive Use Exclusion In Liability Policy

***Marshall v. Hoglund*, No. A15-0520, 2015 WL 8549187 (Minn. App. Dec. 14, 2015)**

Background

Dylan Marshall was killed in a one-vehicle accident while a passenger in a car driven by Owen Hoglund, who was under the influence of alcohol, marijuana and the drug Ecstasy. The involved vehicle belonged to Casey Pederson, at whose home Marshall and Hoglund had attended a bonfire party. Hoglund had taken the car without Pederson's express permission, though he was assured by someone else at the party that Pederson would not mind.

Hoglund was a minor when the accident occurred. His parents were divorced and his mother had sole custody. Both of his parents' auto policies excluded liability coverage if a vehicle was used without a reasonable belief that the person was entitled to do so.

Marshall's mother commenced a wrongful death action against Hoglund, his parents, and their insurers, among others. The district court granted summary judgment in favor of the insurers, finding that the non-permissive use exclusions in the policies precluded coverage. Marshall appealed, arguing special circumstances existed creating an inference that Pederson had given Hoglund implied permission to drive his car. Marshall relied on cases construing the Safety Responsibility Act in which it was held that the a vehicle owner can be presumptively held negligent for the conduct of a driver using the vehicle without permission when special circumstances exist that make the risk of negligent conduct foreseeable. Marshall argued that it was foreseeable to Pederson that someone attending a party at his home might borrow his vehicle without his permission, particularly when he left the vehicle parked in his driveway with the keys in the ignition.

Holding

The court of appeals declined to apply cases construing the Safety Responsibility Act, noting that the issue presented was not liability for the accident, but coverage under the policies. The court ultimately concluded that the non-permissive use exclusions in the policies barred coverage because the undisputed facts showed that Hoglund did not have permission to drive Pederson's car. The court rejected the argument that simply leaving the keys in the vehicle while it was parked in his own driveway constituted implied permission from Pederson for anyone to use it. The court further reaffirmed that non-permissive use exclusions in liability policies are valid and enforceable under Minnesota law.

Practical Effect

While this decision does not break any new ground, it is notable in reflecting the Minnesota appellate courts' continued willingness to apply non-permissive use exclusions to auto liability coverage. This is in stark contrast to the courts' much more restrictive approach to PIP, UM, and UIM exclusions.

***Schumacher v. State Farm*, 2015 WL 6174537 (D.Minn. 2015)**

Background

In *Schumacher v. State Farm*, Judge Frank of the United States District Court held that the underlying bodily injury arbitration agreement between the plaintiffs and the tortfeasors was a binding final adjudication of damages, and because the damages awarded ($125,000) were less than the bodily injury limits ($200,000) the plaintiffs did not have an underinsured motorist (UIM) claim. State Farm's motion for summary judgment was granted.

Holding

The Federal District Court found that the underlying arbitration met all of the requirements for collateral estoppel because the plaintiff had a full opportunity to be heard, it was a final adjudication, and the issue of damages was identical to the issue to be decided in the UIM claim.

Practical Effect

This decision also underscores the importance of the actual arbitration agreement language when arbitrating a bodily injury (BI) case. In this case, the parties indicated that the arbitrator's final decision shall show the amount of damages awarded, if any. The parties indicated in an addendum to the arbitration agreement that plaintiffs reserved the right to present a *Schmidt v. Clothier* notice to the UIM carrier, but neither the arbitration agreement nor the addendum contained any language indicating that it was a "settlement" or "best settlement." The federal district court found that the arbitration agreement was intended as the conclusion of the tort action rather than a method to achieve the "best settlement."

A UIM carrier presented with a *Schmidt* notice pursuant to a binding arbitration agreement should make sure to get a copy of the binding arbitration agreement as the language may dictate whether it needs to intervene to protect its interest.

***Sleiter v. American Family Mutual Insurance Co.*, 868 N.W.2d 21 (Minn. 2015)**

Background

Sleiter was one of 19 individuals injured when a school bus was struck by an underinsured, at-fault vehicle. Because there were so many people injured, a special master was appointed to allocate the proceeds of the available liability coverage and the $1,000,000 limit of UIM coverage for the bus. The special master determined that Sleiter was entitled to $1,600.33 from the liability policy and $34,543.70 from the UIM policy. Because Sleiter's damages exceeded the allocated amounts, he then sought excess UIM benefits from American Family, which insured his family's vehicle with a $100,000 UIM limit.

Under the Minnesota No-Fault Act, a person entitled to UIM benefits first seeks benefits from the vehicle he/she is occupying. If the injured person is not a named insured or resident relative of the named insured under the policy covering the occupied vehicle, that person can seek excess UIM benefits from a policy where he/she person is an insured. However, excess UIM benefits are limited to the difference between the "coverage available" from the primary UIM policy and the coverage available under the excess policy. Thus, Sleiter sought $65,457 in excess UIM benefits from the American Family policy (the difference between the benefits available to him under the bus' UIM policy and the $100,000 limit of the American Family excess policy).

American Family denied coverage for excess UIM benefits, arguing that the "coverage available" to Sleiter under the UIM policy for the bus was the $1,000,000 limit, even though Sleiter had only recovered a small fraction of the limit. The district court granted summary judgment in favor of American Family, and the court of appeals affirmed.

Holding

The Minnesota Supreme Court reversed. In doing so, the court found that both the insurance company's and Sleiter's interpretations of the phrase "coverage available" in the No-Fault Act were reasonable, and that the statute was therefore ambiguous. Ultimately the court held that Sleiter's interpretation was the better interpretation because it allowed individuals such as Sleiter to access their personal insurance coverage, giving them nothing more than the amount of coverage that they selected and purchased.

Practical Effect

In situations involving multiple claimants for primary UIM benefits under a single policy, the excess UIM carrier cannot use the primary UIM limit as the benchmark for determining whether excess UIM benefits are available. Rather, after Sleiter, the measuring stick for determining whether, and how much, excess UIM benefits are owed will be the fraction of the primary UIM limit that the insured actually received.

***State Farm Mutual Insurance Co. v. Lennartson*, 872 N.W.2d 524 (Minn. 2015)**

Background

The Minnesota Supreme Court consolidated *State Farm v. Lennartson* and *State Farm v. Foss* in this decision. In the underlying Lennartson and Foss cases, the plaintiffs were injured in auto accidents and sought No-Fault benefits through State Farm. Upon discontinuance of their No-Fault benefits, both plaintiffs brought negligence actions against the at-fault drivers, recovering past medical expenses. Post-suit, both filed arbitrations to recover additional No-Fault medical expense benefits, and both prevailed in those arbitrations. State Farm moved to vacate the awards, arguing that collateral estoppel batted the No-Fault arbitrator from considering medical expenses claim as part of the tort action and that they had secured double recovered in contravention of the No-Fault Act.

Holding

The Minnesota Supreme Court ruled that a No-Fault insurer is not entitled to offsets against claimants who first secure a recovery in a negligence action before seeking the remainder of their No-Fault benefits, even when the benefits claimed are identical to those awarded by the jury in the tort action.

In support of this decision, the court cited 1) that the plain language of the Minnesota No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41-71 (2014), does not bar an insured from recovering No-Fault benefits for medical expenses already recovered in a prior negligence action, and (2) that collateral estoppel does not preclude an insured from seeking medical expense or income-loss benefits in No-Fault arbitration for the same losses recovered as damages in a prior negligence action.

Practical Effect

Lennartson is significant for two reasons: First, it allows a double recovery to claimants by not allowing a No-Fault insurer to offset damages awarded in a prior tort action arising from the same incident. And second, because of this, Lennartson may affect the timing with which the Plaintiffs' bar chooses to pursue its paths of recovery in tort and No-Fault arbitration.

Lennartson arguably encourages Claimants to game the No-Fault system by making litigation against the tortfeasor the first move in the process rather than the last. Therefore, it is possible that No-Fault claimants will delay the filing of No-Fault arbitration petitions after denials until the parallel action against the tortfeasor is fully litigated to trial (which has its inherent risks), in an attempt to secure the double recovery that the Minnesota Supreme Court has allowed. This will result in more personal injury litigation and may also impede and prolong the conclusion of No-Fault claims. ✦

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