



In Transit

The newsletter of the
Trucking Law Committee

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WHAT HAPPENED?
Complex Questions Answered.



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Leadership Note

From the Chair

By Matthew S. (Matt) Hefflefinger



Hello Everyone!

I don't know about you, but I am ready for spring! We have some fantastic things going on in the TLC, and the trend will continue throughout 2019.

Registration just opened up for our [Trucking Trial Primer](#) scheduled for June 26, 2019, at the Hilton Nashville Downtown. Our program chair, Sarah Hansen of Burden Hafner & Hansen in Buffalo, has done an incredible job putting together a top shelf primer. The primer is geared towards younger lawyers or lawyers newer to trucking. I encourage you to review the [primer brochure](#) on the DRI website. We will take a case from openings through closings during our day in Music City. We have an excellent lineup of speakers with a tremendous amount of trial experience, and I strongly encourage attendance at the primer.

Our first [webinar](#) was March 13, 2019. Jennifer Wood, Patrick Foppe and Chris Cotter addressed "Challenging Plaintiff's Use of Federal Regulations to Bolster Negligence Claims." Our star-studded speakers provided insight into effectively defeating attempts by plaintiff's counsel to turn the federal regulations into "safety rules." Please be on the lookout for information concerning other superb upcoming webinars.

We plan to expand our online programming throughout the course of 2019. In addition to webinars, we plan to develop some recorded programs and podcasts. If you have a topic that you think will be worth exploring through our online programming, please communicate with our online programming chair, Melody Kiella of Drew Eckl & Farnham in Atlanta, at kiellam@deflaw.com.

We are always looking for individuals willing to author articles. The deadlines for our upcoming *In Transit* Newsletters are June 7, 2019 and September 13, 2019. Lastly, we will have a number of articles published in *For The Defense* during December 2019. Please reach out to

our publications chair, Patrick Foppe of Lashly & Baer in St. Louis, at pfoppe@lashlybaer.com if you want to submit an article for publication.

I strongly encourage you to visit and become familiar with the [DRI website](#). The members of our [steering committee](#) are identified, and you can reach out to any of us with a question. [LegalPoint](#) provides access to a number of great resources from the DRI library, and DRI also offers some fantastic expert witness resources. Posting on our DRI [online](#) Community page is a great way for each of us to communicate with each other. If you have a question about an expert, need insight regarding your opposing counsel, want to discuss a recent decision or trucking-related topic, I encourage you to utilize the Community page. We are all here to help each other.

We are always looking for energetic individuals who want to get involved and make a difference. We continue to expand the scope of our committee's work, and you will be greatly rewarded by getting involved. We work hard, yet we have fun. If you have any interest in getting involved, or simply have some questions about the Trucking Law Committee, please do not hesitate to reach out to me at mhefflefinger@heyloyroyster.com or our vice chair, Steve Pesarchick at spesarchick@sugarmanlaw.com.

Let's have a great year!

Matthew S. (Matt) Hefflefinger is a shareholder in the Peoria, Illinois, office of Heyl Royster Voelker & Allen PC and is chair of the firm's Trucking Practice Group. His practice is devoted primarily to the defense of complex personal injury cases in the trucking and construction industries. Matt is an aggressive advocate who has tried many cases to verdict and is frequently contacted by clients immediately after a catastrophic loss to help develop the facts and case strategy. He is a frequent presenter on a variety of litigation related topics at local and national legal seminars. Matt is the currently the chair of the DRI Trucking Law Committee.

Feature Articles

Managing the Storm: Making a Case for the Duty of Life Balance

By Kelsey M. Taylor and Paul W. Murphy



When you think about it, accidents aren't all that different from hurricanes. They both cause damage, result in loss, and create chaos for those they affect. They

both leave the world a little different from how it was before, no matter how well things are cleaned up afterward. Both are unpredictable yet absolutely certain to occur.

Unstable Conditions

As any claims professional, risk manager, general counsel, or attorney (plaintiff or defense) will attest, the atmospheric conditions have become pretty...unstable out there. And it's easy to see why. Every day the news is filled with stories of personal-injury plaintiffs who obtain astronomical verdicts, even with seemingly minor injuries. As a result, plaintiffs' attorneys are under increasing pressure to produce big results for their clients to stay ahead of the competition. This means that personal-injury claims are at an all-time high, both in number and in dollar amount. However, claims that were once easily resolved are now more frequently—and more speedily—ending up in litigation.

Plus, thanks to aggressive plaintiffs' tactics like the Reptile Theory, the defense industry is experiencing an entirely new phenomenon wherein the facts of the case may have little (or no) bearing on the ultimate judgment. Depending on the discovery rules and the judge in the particular venue, jurors may be permitted to hear volumes of "evidence" related to a company's policies, procedures, safety record, regulatory audits, and citations, regardless of whether this data is related to the case at hand.

As a result, the payment of large settlements and judgments has put financial strain on the insurance and transportation industries. These days, in addition to increased premiums and general insurability concerns, our clients are faced with two new challenges:

- Claims have become more difficult to evaluate accurately, and
- Legal fees have increased.

And that's just on the professional front. For claims and risk professionals, each new claim represents a possible "storm"—some are minor showers, others are tropical storms, and a few become hurricanes. But whatever the size, these storms don't always stay at the office at the end of the day. In fact, storms have a sneaky way of following people home and creating high-pressure systems in *other* areas of their lives. Storms make them miss baseball games, dance recitals, and date nights. Storms make them lose sleep and adopt unhealthy lifestyle habits to deal with stress. Storms make them feel angry, disconnected, fearful, and untrusting. Storms create chaos professionally, emotionally, physically, and spiritually.

No Port in the Storm

Naturally, when storms occur, these folks look to their trusted attorneys to guide them to safety. Unfortunately, many attorneys can't reliably navigate these storms because they are dealing with their *own* chaos. Specifically, defense attorneys are often under constant pressure from their law firms to produce billable hours. Although every firm's requirement is different, total compensation is often based primarily on hourly production.

Moreover, for decades, law firms have helped create a dangerous industry culture of self-righteous workaholicism. This is perhaps due to accidental conflation of two ethical duties: (1) the duty of zealous representation, and (2) the duty to avoid conflict of interest with your client. Although well-intended, what results is something of an ethical Frankenstein that sounds more like: "The zealous duty to zealously place the client's interests first in all circumstances."

Translation: "I owe a duty to put my client's interest before my family, my sleep, my nutrition, my spiritual life, my personal finances, my relationships, or any other personal interest."

That's actually not a thing. Nevertheless, many law firms have developed professional cultures that implicitly (or explicitly) require their attorneys to adopt this quasi-duty in the name of "client service." As a result, the well-known caricature of the exhausted, depleted attorney is practically a badge of honor in this profession. In the long run, however, this lifestyle is unsustainable, ineffective, and completely counterproductive.

Chaos in the Forecast

To start with, most lawyers are natural over-achievers with ultra-competitive personalities. Add to that the constant pressure to produce, a culture of zealous workaholicism, and the ceaseless conflict inherent to litigation, and what results is a recipe for chaos in attorneys' lives—often an unholy cocktail of depression and anxiety.

As the over-achieving bunch we are, lawyers perform well above the national average in terms of mental-health problems and substance abuse. See, e.g., National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being* (2017), available at www.lawyerwellbeing.com. In fact, the legal profession is famously good at creating alcoholics, drug addicts, pornography/sex addicts, spousal abuse, eating disorders, divorces, estrangements, nervous breakdowns, heart attacks, overdoses, and suicides.

So how exactly are stressed, sick, and strung-out attorneys supposed to confidently guide their clients through the storm? In short: They simply can't.

No matter how brilliant or ethical an attorney may be, if he or she does not purposefully cultivate life balance inside this challenging profession, the *client* is more likely to remain embroiled in the storm's chaos throughout the duration of the lawsuit.

Signs of chaos include: untimely reporting (or lack of reporting), lack of clear resolution strategy, delayed responsiveness, frequent reports of dramatic or emotionally charged encounters with opposing attorneys, inability to stay within budget, and of course, unpleasant surprises of any kind.

As chaos increases, so does the likelihood of full-blown malpractice, including missed deadlines, lack of communication, misrepresentations, and financial malfeasance.

It's time for us to think differently about how we serve our clients.

A Higher Duty

None of this is anything new, of course. Many industries, professions, and religions have already acknowledged that to truly take care of other people, you must care for yourself first. Heck, even the airlines remind us to put on our own oxygen masks before helping others. On top of that, every year, boatloads of new scientific research reveals how stress is making people sick, sad, and unproductive. Unfortunately, lawyers are no exception.

Although today “life balance” receives a great deal of lip service in law firms and bar associations throughout the country, it is not yet a term of art. Interpretations vary widely from firm to firm, including benefits such as gym memberships, fitness classes, child care, counseling, addiction support, flexible schedules, casual dress code, remote working, and firm-wide community-service projects. All great things. However, the predominate mindset has focused more on these items as job perks for recruitment purposes rather than acknowledging any real connection with client results.

Nevertheless, some firms have begun to discover that whole, healthy, happy lawyers are the real secret to high-quality legal work. These thought-leaders are part of an industry-wide paradigm shift advocating for, not just professional excellence, but wellness across *all* aspects of the person: physical, mental, emotional, and spiritual.

In fact, the American Bar Association highlighted these issues in its recent publication, *The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional, and Spiritual Wellness* (Levine 2018), supporting this evolving professional paradigm. In this well-researched collection of essays, the authors highlight many of the wellness challenges facing today's lawyers, including the stress and negative health effects caused by the hourly billing model, and the resulting negative impact on client results.

So if lawyer wellness has a direct impact on client results, don't we indeed owe a *duty* of life balance to our clients?

Navigating Uncharted Waters

For many law firms, however, the concept of life balance might be unfamiliar territory. Where to begin?

First, examine your firm's culture. What does your firm truly value? Are there any unspoken rules equating commitment with “face time”? Do life-balance perks frequently get pushed aside by a “higher priority”? Do your attorneys regularly work nights and weekends? Are they unofficially discouraged from taking vacations? Are new attorneys expected to “pay their dues” by working long hours? To avoid becoming a “lip service” firm when it comes to life balance, you must get clear on where you *are* before real change is possible.

Second, examine your firm's billing system. Do you offer alternative fee arrangements, or are you entrenched in the hourly billing system? Alternative arrangements not only provide greater certainty to clients, they also decrease overall competition among attorneys and lead to greater collaboration, information sharing, problem solving, and

case efficiency. Good for the client and good for attorney well-being.

Third, examine your firm's compensation system. How are attorneys rewarded? If the sole focus is on billable hours and collections, you can bet that many of the lawyers in your firm are secretly struggling with life balance. Consider putting a compensation system in place that rewards *results* according to the client's most important criteria, such as speed of resolution and timeliness of reporting.

As we approach a new decade, it's time for the legal profession to consider the possibility that an industry-wide paradigm shift is upon us. Our clients face greater exposure than ever before and deserve lawyers who are willing to bring the best version of themselves to battle—who are willing to rise.

This is our higher duty.

Kelsey M. Taylor and Paul W. Murphy are the co-owners of Murphy Legal, a Texas-based commercial trucking defense firm. Murphy Legal handles claims throughout the State of Texas for wrongful death, catastrophic collisions, personal injury, premise liability, and business disputes, and advises clients on regulatory compliance and safety matters. Kelsey is a member of the DRI Trucking Law Committee and vice chair of the Lapsed Membership Subcommittee. She is also a member of the Transportation Lawyers Association (TLA) and actively involved with the Texas Trucking Association (TXTA). Paul is certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and webpage chair of the DRI Trucking Law Committee. In addition to DRI, Paul is a member of the Trucking Industry Defense Association (TIDA), TLA, TXTA, and the American Board of Trial Advocates (ABOTA).



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The Rise of Diffusion Tensor Imaging in Mild Traumatic Brain Injury Cases

By Tiffany B. Hunter



Cases involving an alleged traumatic brain injury (TBI) are not new for defense attorneys in trucking litigation; however, with jury awards topping \$30 million, the defense industry has seen an explosion of lawsuits alleging mild TBIs in recent years. Although severe TBI claims have always presented significant risks of exposure, mild TBI claims are becoming a growing risk, as they often involve claims of permanent cognitive and neurological impairment that appear disproportionate to the severity of the incident. In cases involving alleged mild TBIs, conventional diagnostic imaging typically demonstrates no objective signs of brain damage and thus, plaintiffs are turning to emerging, advanced neuroimaging techniques, such as diffusion tensor imaging (DTI), to prove through an “objective” means their theory of permanent brain damage. Given the increase of DTI in mild TBI cases, this article will present defense counsel with a brief overview of DTI, the risks they present in defending mild TBI claims, as well as strategies for attacking this evidence in litigation.

First, a brief introduction into the mechanism of a TBI is necessary to understand the appeal of DTI for the plaintiff bar. The human brain is comprised of two main components: gray matter and white matter. Gray matter refers to the cell bodies of neurons, while white matter refers to the connections between various cortical areas, subcortical structures, brain stem, and the spinal cord. Both white and gray matter is vulnerable to damage when mechanical force is applied to the brain, such as when an individual is involved in a motor vehicle accident, with the mechanism for injury classified as either focal or diffuse. A focal injury refers to damage occurring in the brain at the site of impact that occurs when the brain collides with the inner wall of the skull after the head receives a forcible blow. A diffuse injury, on the other hand, refers to scattered damage throughout the brain tissue, typically depicted by damage to the white matter. While a closed head brain injury can include focal injury, diffuse injury, or both, a brain injury can sometimes include only evidence of diffuse axonal injury, which is most commonly seen when there is little direct impact to the head, as is usually the case in motor vehicle accidents. A diffuse axonal injury is an injury that results from acceleration or deceleration of the head,

which can cause stretching of the brain tissue, thereby leading to shear injuries of the white matter.

TBIs are diagnosed, in part, based on neurological signs present during or shortly after a traumatic incident and positive findings on diagnostic imaging such as computerized tomography (CT) and magnetic resonance imaging (MRI). In cases of suspected brain injury, CT is commonly used in the emergency room setting to assess for intracranial injury, such as swelling, bruising, and bleeding based on x-ray scans. CT is a quick, inexpensive method for detection of brain injuries that may require immediate emergency intervention, and as such, CT is usually the first imaging performed in cases involving suspected brain injury. Unlike CT scans, MRI uses radio-frequency waves rather than x-rays to provide higher resolution images of tissues, including damage to tissues in the brain.

Although most individuals suspected of having a mild TBI undergo CT or MRI scans of the brain, these scans often demonstrate normal results, even if a mild TBI has actually occurred. Even where an individual suffers a mild TBI, medical research finds that typically 95 percent of these individuals will recover fully within a few weeks to months after the incident with no lasting cognitive or neurological deficiencies. In contrast, individuals who suffer from a moderate to severe TBI will typically experience some degree of permanent brain damage, particularly in the gray matter, which is more readily apparent on conventional imaging modalities. The differences between temporary brain dysfunction and permanent brain damage represents one of the most significant areas of contention between experts in litigation involving an alleged mild TBI with plaintiffs claiming they have suffered permanent cognitive function even in the absence of positive MRI or CT findings.

Plaintiff experts often rely upon the presence of microscopic injuries to the white matter as evidence of permanent cognitive impairment after a TBI. They argue that traditional imaging, such as an MRI, is unable to detect and demonstrate diffuse axonal injury, which would be reflected as damage to the white matter in the brain. Because conventional imaging methods may underestimate or exclude the extent of white matter damage following a TBI, plaintiffs, who seek to persuade jurors that they have

suffered permanent brain injury, are increasingly turning to emerging advanced neuroimaging technologies that can allegedly demonstrate deeper white matter pathology attributable to cognitive and neurological changes in the brain. One such technology that plaintiffs are using to bring a degree of objectivity to an alleged mild TBI involving permanent cognitive defects is DTI.

DTI is a relatively recent advancement that uses MRI technology to analyze movement of water molecules in the white matter of the brain, allowing for detection of microscopic pathology or abnormality of the white matter. Water flows through healthy tissue at different rates and directions than it does in damaged tissue. DTI relies upon the differences in the movement of water molecules to present conclusions regarding the integrity of white matter pathways in brain tissue. According to plaintiff attorneys and their experts, DTI can show abnormalities in white matter that traditional MRI or CT imaging cannot detect. Because white matter damage is an indicator of permanent cognitive and neurological changes, plaintiffs believe that DTI presents objective evidence of the relationship between white matter abnormalities and cognitive dysfunction following a mild TBI.

From the defense perspective, the explosion of DTI in mild TBI cases is concerning because several issues make DTI results difficult to interpret and thus, unreliable. DTI cannot distinguish between white matter abnormalities that are naturally present and those that result from trauma. In particular, DTI cannot differentiate between white matter changes that are caused by chronic alcoholism, diabetes, depression, or other diseases and conditions known to affect white matter. Although DTI can demonstrate the existence of white matter abnormalities, it cannot identify the cause of such abnormalities from several possibilities, thus raising concern about the reliability of DTI as an objective measure of a TBI following a motor vehicle incident.

It is likewise difficult to decipher the meaning of DTI findings in terms of cognitive and neurological function. While white matter damage may be an indicator of cognitive or neurological impairment, it remains difficult to connect a particular abnormality to a specific brain injury symptom. This raises obvious concerns about the reliability of expert opinions that rely on DTI to establish a diagnosis and prognosis for a plaintiff's TBI claim. Finally, in terms of accuracy, DTI is susceptible to inaccurate interpretation of data points that can result if an individual makes even the tiniest of movements while the scanner is in use. Because DTI relies upon the measurement of water movement

through the brain, tiny movements by an individual while the scanner is in use can cause errors that result in white matter abnormalities where none are actually present.

The issues with DTI should mean that it is not a sufficiently reliable for use in TBI litigation but courts across the country have recently admitted into evidence expert testimony in which DTI was one of the methods the expert used to form an opinion that a plaintiff suffered from a TBI. For example, in *Anderson v. Patterson Motor Freight*, 2014 WL 5449732 (W.D. La. Oct. 23, 2014), the United States District Court for the Western District of Louisiana admitted DTI evidence to support plaintiff's expert testimony that plaintiff sustained a severe TBI in a motor vehicle incident with a tractor-trailer, finding that DTI has been tested, is subject to peer review and publication, and is generally accepted as a method for detecting TBIs. Other courts across the country have similarly found DTI to be admissible evidence. (See *White v. Deere & Company*, 2016 WL 462960 (D. Colo. 2016); *Ruppel v. Kucanin*, 85 Fed. R. Evid. Serv. 859 (N.D. Ind. 2011).)

Given the increased willingness of courts to admit DTI evidence, defense attorneys challenging the admissibility of DTI can expect plaintiff attorneys to aggressively respond with sophisticated arguments backed by scientific and medical literature and court opinions regarding the admissibility of DTI. Rather than focus on generalized arguments regarding the acceptance or unreliability of the technology, defense attorneys should focus on a case-specific approach that challenges a particular expert's use or interpretation of DTI in forming his or her opinions. Where DTI seems to be the only objective evidence of an alleged TBI, a plaintiff's expert will be more open to challenge. Defense attorneys should leverage this reliance to challenge the credibility of plaintiff's experts. While DTI and expert opinions may remain ripe for admissibility challenges in some jurisdictions, given that trend towards admission of such evidence at trial, it is critical for defense counsel to be prepared to use depositions to reduce the credibility of the witness and challenge DTI evidence prior to trial by focusing on differential diagnosis, the accuracy of DTI data, and the correlation between abnormalities and plaintiff's alleged cognitive issues.

Tiffany B. Hunter is an attorney at Clark Hill, LLP, who represents small, mid-sized, and large businesses in litigation matters involving personal injury and wrongful death cases arising from trucking and transportation accidents, general liability claims, and business disputes.

You Break It, You Buy It: Collision Mitigation Systems

By M. Garner Berry



I don't have answers. So if you're reading this article for black and white answers to your grey questions, then this ain't for you! But I'll tell you what I have—more questions! So let's call this a retrospective piece based on some recent experiences that have made me rethink how I defend my motor carriers in certain situations. Hopefully it does for you as well. After all, some of our best future successes come from our past experiences, right?

Also, let me say at the outset that this is not a products liability article. We are not a products liability group. By God, we are truckers and a trucking group! And Trucking Moves America Forward! However, more and more in our industry, we are seeing products liability issues creep into our practices. The primary area where you see this development is the unending safety features on the tractors that our carriers and drivers operate. Autonomous and semi-autonomous vehicles are increasing on the roadways, including tractors. Collision mitigation systems for rear-end collisions, lane departures, and rollovers are becoming more prevalent. Tractors without just side-mirrors, but all-around view, and blind spot cameras to increase the field of vision for a driver hitting the roads. The list goes on, and this is a good thing, a great thing even.

Although the below perspective may be applicable to any new technology geared towards increasing the safety of tractors and decreasing accidents, I'm using rear-end collision mitigation systems as the example. According to the National Highway Traffic Safety Administration (NHTSA), in 2015, over 33 percent of all police-reported crashes involved a rear-end collision. So let's just say they are prevalent.

So what are these systems? Generally speaking, the systems include one or both of either automatic emergency braking systems or forward collision warning systems. NHTSA's website explains that automatic emergency braking systems are designed to "detect an impending forward crash with another vehicle in time to avoid or mitigate the crash [by] first alert[ing] the driver to take corrective action and supplement the driver's braking to avoid the crash." Similarly, NHTSA describes the forward collision warning system as "an advanced safety technology that monitors a vehicle's speed, the speed of the vehicle in front of it, and the distance between the vehicles. If vehicles get too close due to the speed of the rear vehicle, the FCW system will warn that driver of an impending crash."

Manufacturers of these systems have also weighed in on the design and intent of this technology. In a recent Transport Topics article, "Collision Mitigation Advances," manufacturers describe the systems, particularly the newer generation systems, as providing the capability of applying half to two-thirds of the available braking power, reducing the speed at impact by 25–35 mph, and maintaining following distances of around three seconds. One spokesperson stated "We've seen fleets go as high as 70–90 percent reduction in the number of rear-end collisions that they're having, or that they had been having, and even a reduction upwards of 70 percent in the severity of the remaining rear-end collisions that they still had."

The FMCSA "Large Truck and Bus Crash Facts 2015" showed an 8 percent increase in bus and large truck fatalities from 2014–15. From 2009 to 2015, there was a 62 percent increase in injury causing crashes. However, with the development of technology and mitigation systems, these rates have fallen. Insurance Institute for Highway Safety reported in a 2016 study that vehicles with automatic braking systems reduced rear end crashes by 40 percent. Most strikingly, the same study showed that forward-collision warning alone reduces accident by 23 percent.

According to a study published in September 2017 by the AAA Foundation for Traffic Safety and authored by the Virginia Tech Transportation Institute, installing collision mitigation systems on CMV's would prevent 5,294 crashes, 2,753 injuries and 55 deaths annually. In fact, as far back as 2015, NHTSA began calling for the DOT requirement of the systems on all commercial motor vehicles.

What giveth also taketh away though. Shortly after the emergence of this technology, low rumblings of issues began. In the infamous 2014 Tracy Morgan accident, the National Transportation Safety Board's investigation revealed: "[b]ased on the data recorded by the . . . system, the system did not provide a pre-crash alert [although investigators say it's possible an alert was sent, but not recorded due to limitations in the device's storage capacity]. Also, false alerts have been an issue. In the aforementioned Transport Topics article, one motor carrier stated that after two years of trying the systems with cattle guards (which are allowed under the specifications), they finally removed the systems due to constant false alerts.

Without a doubt, the systems reduce the number of accidents, as well as the severity of accidents. But what happens when they don't? Or even when you have a high suspicion that it may not have worked as intended? Who does that fall on? The driver? The carrier? The manufacturer? All of the above? Those are the questions that we have to address in representing motor carriers.

In our era of technology, the data is almost endless. The data at our fingertips helps explore what worked and what happened in the accident. We have ECM modules, air bag modules, outward facing video, inward facing video, and the collision mitigation systems "black box." We have a wealth of information available, which may serve to corroborate a suspicion that the collision mitigation system may not have functioned properly. Take outward and inward video for instance. Assume you have video from earlier in the day showing the system works properly, yet several hours later, your client rear-ends a slow moving vehicle without the slightest of warning, or application of brakes from the system. How do you handle this situation? What is your obligation to your motor carrier and driver?

In our industry, someone is always looking for a deeper pocket than our own. Or maybe you are the deeper pocket being picked! So it got me wondering . . . in defending our clients, should we also look for the deeper pocket to justly and adequately defend and protect our client? I recently handled a fascinating bus/train crash case that also involved a products claim against the manufacturer. I'll give you one guess who the manufacturer pointed to as the main culprit!

Dan Murray, Vice President of Research for American Transportation Research Institute, stated "when there are crashes, regardless of fault, the trucking industry always finds itself in the courtroom . . . these devices [collision mitigation systems] are negligence agnostic and will kick in and do it at a speed faster than human reaction, so the investment is a win-win."

The user and service manuals for these systems always come back to an attentive driver, and the manuals are unequivocal about what to expect from the system. Stealing from the recent Geico commercials, we wouldn't expect the manufacturers to advertise the systems are "okay." They don't say it "may" do X, or "we think" it will do Y. They say this is what our system does; it "will" do Z.

So put aside whether a design or manufacturing defect may or may not have existed at the time of the accident. If based on nothing more than in-cab video leaving a suspicion that the system didn't engage, is that enough to pursue, or

direct a plaintiff to pursue, a claim for breach of warranties and representations?

What I'm proposing is not a novel idea; it is utilized in various types of litigation. For example, the scooter rental company, Lime, was recently sued in Florida over allegedly advising riders to "break the law" when using its electric scooters. The plaintiff posits that the company instructs riders not to ride the scooters on sidewalks, which is both dictated in the company's terms of service and on the physical scooter itself. However, this is in direct contradiction of Florida law that allows riders on these motorized scooters to use sidewalks because riding them on streets is prohibited. Prior to usage, riders must agree to the terms of service that release companies from legal liability for injuries on their devices, and Lime's contract stipulates that operators must acknowledge that "riding the products involves many obvious and not-so-obvious risks, dangers, and hazards, which may result in injury or death to you or others" and that "[riders] agree that such risks, dangers, and hazards are your sole responsibility, including, but not limited to, choosing whether to wear a helmet or other protective gear." Whether you agree or not, companies have attempted to use terms of service (or user manuals) to protect themselves from liability while the "waiver" very well may be invalid.

Is it all about deep pockets? Is it about fairly sharing liability among potential tortfeasors? Don't we have an ethical obligation to zealously represent and protect our clients from potential exposure? Are we doing our clients a disservice by not seeking to share the liability when there may be a malfunction in the system?

You can decide and fall on whatever side of the fence you choose. As I said, I have all the questions to your answers.

M. Garner Berry is a of counsel at Heyl Royster Voelker & Allen PC law firm in Ridgeland, Mississippi, where he practices throughout the state, as well as the southeastern region. Garner has significant experience in personal injury defense litigation with an emphasis on transportation/trucking defense. Over the last several years, he has devoted himself to the industry and expanded his representation to include matters involving broker liability, cargo claims, corporate structuring, insurance coverage issues, contract review/formation, employment matters and worker's compensation, all within the transportation industry. He is intimately involved with the Mississippi Trucking Association, including sitting on its Maintenance and Safety Council, and is active within the DRI Trucking Law Committee and its various subgroups where he holds leadership positions.

Towing and Storage Liens: What to Do When Your Towing Bill Looks Like “Highway Robbery”

By Nicholas A. Rauch



A semi-trailer owned by EZ Trucking is hauling a propane trailer down a two-lane highway. It is around 2:00 a.m. on a cold, mid-winter night. As the snow falls and winds escalate, the cabin and trailer hit a patch of black ice. The driver loses control of the trailer. The cabin and trailer overturn, blocking one lane of traffic. Luckily, the driver is uninjured. Pursuant to EZ Trucking’s corporate procedures, the driver radios the local dispatch to report that the cabin and trailer were damaged in a no-fault accident. The driver states that the cabin and trailer were overturned and currently blocking one lane of traffic.

Aside from the potential property damage, EZ Trucking worries about the potential environmental problems that may arise from the overturned propane trailer. It notifies the local highway patrol and requests an immediate response. EZ Trucking also determines that a regular “mom and pa” towing company would not have the equipment necessary to properly overturn the trailer and clear the debris. Without receiving bids or estimates for the towing job, EZ Trucking contacts OK Towing, a local heavy-duty towing shop. OK Towing, who has a longstanding reputation for prompt response time, also has the adequate manpower and heavy-duty machinery necessary for this type of accident. It agrees to send a crew to upturn the trailer and clear debris.

Realizing the nature of this accident, OK Towing immediately assembles a crew of ten workers, a 60-ton heavy duty rotator truck to lift the overturned trailer, a 30-ton wrecker truck with under-lift capabilities, a bobcat tractor, a full service work truck, and a flat-bed towing truck. The trucks and crew arrive at the scene, arrange a plan of action with the highway patrol, and begin upturning the propane trailer. The crew also assists the highway patrol in clearing the debris and the trailer from the road. Despite pressure from the highway patrol and environmental agencies to reopen the roadway, the process takes almost four hours.

After the highway is cleared, the crew from OK Towing tow the cabin and trailer back to their shop. However, OK Towing also begins charging a daily storage fee on the cabin and trailer. The next morning, OK Towing notifies EZ Trucking that it will retain their cabin and trailer until OK Towing’s bill is paid in full.

One month later, Tom, EZ Trucking’s current, Safety Director, receives an invoice in the mail from OK Towing. The invoice includes charges for the use of heavy-duty machinery, hourly rates of all ten workers, towing expenses, charges for the clean-up of debris, and storage fees. Overall, the bill exceeds \$100,000! Tom has worked in the trucking industry for over 25 years and believes the fees are excessive. He acknowledges that the accident required special equipment and an immediate response time due to the potential environmental hazards and blockage of traffic. He also acknowledges that this accident required heavy duty machinery. However, Tom believes the charges are exaggerated and inconsistent with industry standards. Tom looks through his corporate records to see if they include any past receipts from OK Towing. Interestingly enough, an OK Towing statement of charges from the previous year shows that a similar accident incurred only a \$60,000 bill. Tom calls Chuck, EZ Trucking’s outside legal counsel, to ask whether these excessive charges are legal.

Chuck likely begins formulating his response by researching the state-specific towing and storage lien statute. Most states, such as Wisconsin, Nebraska, Indiana, Oregon, Mississippi, and Kentucky, have a statute that allows the towing company to have a mechanic’s lien on towed vehicles for “reasonable” or “agreed upon” towing and storage expenses. For example, Kentucky Revised Statutes §376.25(3)(a) provides:

Any person engaged in the business of storing or towing motor vehicles, who has substantially complied with the aforementioned requirements of this section, shall have a lien on the motor vehicle and its contents... for the *reasonable or agreed charges* for towing, recovery, storage, transporting, and other applicable charges due on the vehicle, as long as it remains in his possession.

(emphasis added).

The problem for Chuck is that most state statutes do not define “reasonable” charges. Additionally, the state towing and storage lien statute does not regulate prices for towing, service, and storage fees charged. Without regulation, towing businesses can take advantage of trucking companies, like EZ Trucking, by charging unreasonable fees that may be in excess of what is regularly charged for the same services. Towing businesses may “mask” these

fees, by arguing they are comparable to similar industry or regional pricing. How is Chuck to combat these fees and what tools are at his disposal?

Tips for Challenging “Reasonable” Fees

1. Investigate the Charges

Chuck should first consult with an expert in the towing or trucking industry who can review each charge on the bill. This expert may be a professional from a trucking agency or a similar, local towing company who has knowledge and experience with these types of charges. Advice from another local towing business may be helpful in determining the common prices for using the same machinery. The local towing business may have worked with OK Towing on similar jobs and may know whether OK Towing has a history for charging outrageous fees. If an expert cannot be obtained, Chuck can also compare OK Towing’s rates to the rates of other nearby towing companies. Some towing companies list their prices for the use of equipment and for storage online. If not, it may be worth calling other local towing companies to ask for an estimated price for a similar accident.

Next, Chuck should request a copy of OK Towing’s documents and communications regarding this accident, along with a list of their standard towing fees. Most likely, this request will be denied. If so, OK Towing’s failure to provide standard pricing or publicly list their standard towing fees evidences the outrageousness of their fees.

Third, Chuck should request all crash reports, statements, and documents from the local highway patrol and environmental agencies on this specific accident. The materials from the highway patrol may provide valuable information in combatting the charges, such as how many workers actually arrived at the accident scene, how many workers contributed to the use of machinery and clean-up, statements from OK Towing workers about the nature and extent of the clean-up, and the specific time OK Towing left the accident scene.

In addition to documents, Chuck should request video associated with the accident and clean-up activities thereafter (either through squad car video or from local businesses). If this footage can be obtained and reviewed, it may provide Chuck with other valuable information, such as whether all ten workers actually worked on the accident site, whether any worker made statements not captured in the accident report, and whether all the equipment was actually used. As part of the investigation, it is incumbent upon Chuck to request surveillance camera footage from any nearby store, gas station, or rest stop whose cameras might have captured meaningful information.

Once enough evidence has been collected, Chuck should have enough information to evaluate whether EZ Trucking has a valid defense against a challenge to the “reasonableness” of the lien. By motion, complaint filing, or potentially an administrative hearing, Chuck may then follow the state-specific rules of procedure for challenging the lien.

2. Look at the Towing and Storage Lien Statute

If all else fails, the state towing and storage lien statute may also provide relief. Almost every state requires that the truck owner receive notice within a certain number of days after the towing company takes possession. See Wis. Stat. Ann. §779.415(1m)(a) (West 2018). If proper notice is not provided, the trucking company may challenge a substantial part of the storage costs, or even the entire amount of the lien. Additionally, some states allow municipalities to adopt a common fee schedule for towing and storage fees. See N.J.S.A. 40:48-2.54 (West 2019). If the state or municipality has adopted a common fee schedule, any prices outside of the schedule may be voided.

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