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Loss Control Interest Group

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Message from the Chair

by Debra L. Dettmer, CPCU

Debra L. Dettmer, CPCU, is director of risk management claims and insurance operations for FCCServices Inc. and Summit Point Consulting. She manages the claims, policy issuance and loss prevention function for the Farm Credit System's Captive Insurance Company and Summit Point Consulting. Dettmer directly handles all serious injuries and litigated matters; oversees the third-party claims administration business; and develops loss control programs and performs risk assessments. She is an instructor of insurance and ethics courses and a speaker for the insurance and risk management industry. Dettmer is a past president of the CPCU Society's Colorado Chapter.

The Loss Control Interest Group conducted a webinar on pandemic planning on May 7, 2009. Our thanks to the webinar presenter, Mitchell C. Motu, CPCU, ARM, AIM, ALCM, senior vice president, Marsh Risk Consulting, for an excellent job. We had more than 50 participants — the largest for some time. And we managed to plan and produce the webinar in just over one week!

If we're going to continue to provide a valuable service to our members and others, we need to continue to rely on our volunteers. Thanks to all our committee members, who have worked very hard. We appreciate your efforts. Please remember that activities promoting the CPCU designation may qualify for our interest group's annual Circle of Excellence submission, which is due by June 30 of each year.

For the 2009 Annual Meeting and Seminars in Denver, your committee is working on a joint session with the Information Technology and Claims Interest Groups on electronic discovery. We're already discussing possible topics for the Orlando meeting in 2010, as well as participating with other interest groups in determining the appropriate governance structure for the interest groups.

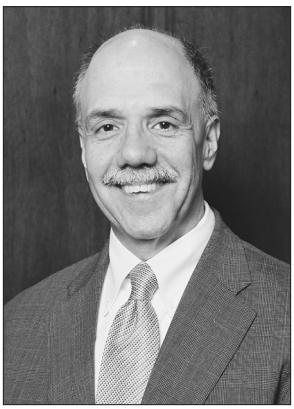
We're always looking for more volunteers willing to share their leadership abilities by helping our committee. Applications are due, so please contact me at (303) 721-3266 if you can assist us. Many of our committee members are unable to attend meetings but do participate in conference calls as well as help on special projects — updating our Web site, writing articles for our newsletter and other publications, assisting in finding speakers for Annual Meeting sessions, and most important, providing strategic insight and planning.

Have a nice summer, and see you in Denver! ■

What's in This Issue

Staying Out of the Employment Practices Liability Quagmire

by Robert Bambino, CPCU, ARM



Robert Bambino, CPCU, ARM, is vice president, risk management, for Wright Risk Management Company LLC (WRM), a New York-based insurance and risk management consulting firm. WRM manages the New York Schools Insurance Reciprocal, the New York Municipal Insurance Reciprocal and WRM America Indemnity Company Inc. Bambino has published several articles in national and state journals and has spoken before numerous groups on risk management and insurance-related topics. He is an instructor of insurance risk management courses in the University College for Continuing Education at Hofstra University.

Abstract: *Employment Practices Liability (EPL) is a legal liability exposure that can affect any organization, regardless of size, industry type or location. Besides having financial implications, litigation involving workplace-based claims of harassment, discrimination, retaliation and wrongful termination can also harm an organization's reputation and have a negative effect on productivity and employee morale. Fortunately, there are risk control measures and insurance coverage that can help motivated organizations control the number of complaints and litigation, and provide a financial cushion in the event lawsuits are filed.*

The EPL Exposure

After several years of a downward trend, the total charge receipts to the U.S. Equal Employment Opportunity Commission (EEOC) in 2008 rose to the highest level since 1997. The EEOC is the federal agency charged with the enforcement of various federal laws prohibiting workplace discrimination. Aggrieved employees file a complaint with the EEOC. Thereafter, they may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC.

As Table 1 indicates, total charges declined from 2002 to 2005, followed by a modest increase in 2006. A severe upwards trend then followed.

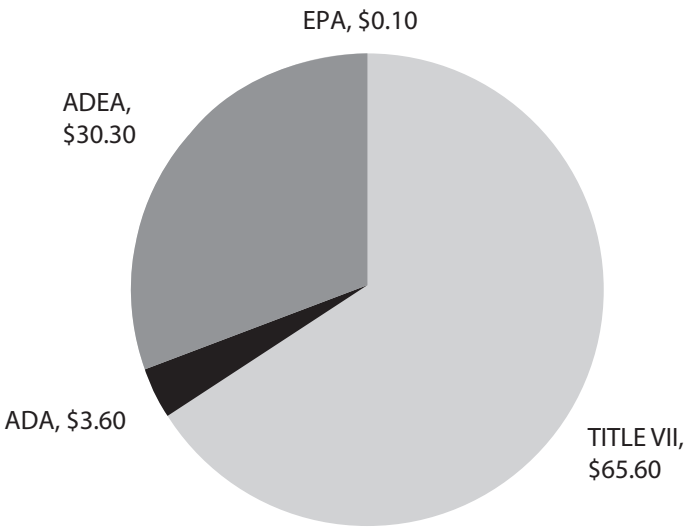
The majority of the charges were those based on race, retaliation, sex and age. In addition, the amount of monetary benefits through the EEOC hit a record high in 2007 at $290.6 million. Monetary benefits are amounts derived from EEOC charges that do not include amounts obtained through litigation. As Figure 1 indicates, in 2008, the majority of the monetary benefits recovered were for Title VII of the Civil Rights Act of 1964 complaints.

Not surprisingly, the cost of EPL-related litigation can be staggering. Depending on the year cited, the median EPL compensatory award can exceed $200,000, with age discrimination commanding the largest payments. Defense costs can easily exceed the award or settlement.

Table 1 — Charge Receipts to the EEOC

Year	2002	2003	2004	2005	2006	2007	2008
Receipts	84,442	81,293	79,432	75,428	75,768	82,792	95,402

Figure 1 — 2008 EEOC Monetary Benefits (In Millions)



The federal laws enforced by the EEOC include:

- **Title VII of the Civil Rights Act of 1964 (Title VII).**
  Title VII prohibits employment-based discrimination involving race, color, religion, sex or national origin.
- **Age Discrimination in Employment Act of 1967 (ADEA).**
  ADEA protects workers who are 40 years of age or older from age discrimination in the workplace.
- **Title I and Title V of the Americans with Disabilities Act of 1990 (ADA).**
  ADA prohibits discrimination against individuals with qualified disabilities.
- **Equal Pay Act of 1963 (EPA).**
  EPA addresses sex-based wage discrimination between men and women engaged in similar employment.
- **Civil Rights Act of 1991.**
  This Act addresses several aspects of workplace discrimination; it strengthens and improves federal civil rights laws to provide for monetary damages in the event of intentional employment discrimination.

The EEOC also enforces Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified individuals with disabilities who work in the federal government. In addition to federal laws, employers also face potential liabilities from state human rights laws. Generally, these laws complement federal statutes by prohibiting employment discrimination based on other categories, such as sexual orientation, receipt of public assistance or genetic information (predisposition to a particular disease because of a person's genetic history).

Insurance as a Risk Financing Technique

EPL exposures are not covered by general liability or workers compensation policies. Coverage may exist in a directors and officers policy, if the coverage is either incorporated into the policy form (usually as a separate section) or added by an endorsement. In many cases, coverage for EPL is provided through a stand-alone EPL policy. This seems to be the trend in recent years. Covered exposures include sexual and other forms of illegal harassment; discrimination based on race, sex, national origin, age, religion, disability and other factors; breach of an employment contract; wrongful termination; and retaliation.

EPL policies include as insureds current and former employees. EPL coverage includes defense for covered lawsuits. The common exclusions in EPL policies vary by insurer. They typically include: punitive damages; injunctive relief; claims alleging violation of Employee Retirement Income Security Act of 1974 (ERISA); a workers compensation, unemployment or social security law; the costs associated with providing "reasonable accommodation" under the Americans with Disabilities Act; labor-management issues; and criminal proceedings.

EPL policies contain unique conditions and provisions. They are almost always written on a claims-made basis; defense costs are often included in the limit of liability. Large deductibles are common. Most EPL policies also include a prior and pending litigation exclusion, which is designed to exclude coverage for claims pending before the inception of the policy. The cost of EPL coverage depends on the size of the organization, type of business, claims history and the viability of the organization's loss prevention program.

Risk Control Measures

Unlike other physical or operational hazards, EPL exposures present an unusual challenge for loss control professionals. With EPL, the focus is on changing ingrained and established patterns of human and organizational behavior, which are difficult to change and sustain. Organizations — regardless of the type of work performed or services provided — should have policies adopted by their governing boards that clearly address EPL.

A workable EPL risk control program should include the following measures:

(1) **Using Anti-Discrimination and Harassment Policies.**
Requirements to develop and distribute anti-discrimination and harassment policies vary. However, properly crafted and administered policies are an effective tool for reducing sexual harassment and discrimination claims.

Strong policies should include:

- Examples of what verbal and nonverbal language and behavior may constitute harassment or discrimination.
- A statement that the employer will not tolerate harassment, discrimination or retaliation.
- Explanation of the manner in which an employee can report harassment or violations of the policies.
- A statement that the employer will make every effort to protect the confidentiality of all involved parties.
- Identifying the administrators who are responsible for accepting complaints.
- Ensuring that the employer will investigate all claims, and, if illegal behavior has occurred, making certain appropriate discipline will be administered.

Drafting the policies is only one part — disseminating information and training about the policies

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Staying Out of the Employment Practices Liability Quagmire

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is equally important. Adoption alone will not get the message out, and it will not be of assistance in a legal action if it is not disseminated to managers and all other staff, including seasonal and second- and third-shift employees. Post the policies. Draft them in a second language if needed. Put them on the organization's Web site. If possible, require staff to sign a document indicating that they have received a copy of the policies. Keep this documentation on file.

2. **Viable Complaint Procedures**
Without a tangible employment action — discharge, demotion or undesirable reassignment — employers can control their own liability exposure resulting from sexual harassment by taking proactive measures to prevent harassment and by effectively dealing with harassment when they are notified. This usually involves hostile work environment claims. If an employer has a viable system, and the complainant fails to utilize it, the employer is in a better position to avoid liability.

   At a minimum, the procedure should include the following components:

   - A clear complaint procedure, with at least two avenues for reporting improper conduct — preferably both male and female employees.
   - Training the intake persons so they know what to do if they are notified of alleged harassment.
   - Encouraging complainants to put their charges in writing.
   - Documenting the complaint. Record the nature of the harassment; dates, times and places it occurred; name(s) of the alleged harasser(s); names of witnesses; and the complainant's response to the harassment.
   - Establishing reasonable time frames to start and complete the investigation.
   - Complaint investigations that are impartial and fair and include prompt interviews of the complainant, alleged harasser(s) and witnesses. Fully document the investigative process and all evidence, and keep in mind that the investigation may be the subject of discovery in litigation at a later date.

3. **Electronic Technology and EPL.**
Electronic technology continues to improve and change the way business is conducted; however, it can also be a facilitator of hostile work environments. Employer-sponsored e-mail and Internet access provides additional avenues for potential harassment and discriminatory actions. The distribution of sexually-oriented e-mail and links to offensive or pornographic Web sites, pictures or videos, jokes, or links to social networking sites (e.g., MySpace, Facebook, You Tube, etc.) can lead to claims and litigation against the employer, managers and other staff.

Exposures arising from e-mail and Internet access can be controlled by enforcing the technology and e-mail policy, engaging the organization's IT manager, and providing information to employees so they understand which activities are prohibited. Any organization that provides e-mail or Internet access should have a policy that indicates acceptable and not acceptable employee use of all technology. In addition, frequently changing passwords and adopting a viable use of a technology policy will also assist the employer to control these exposures.

4. **Managing Wrongful Termination.**
In most cases, employment is "at will." This means that with some exceptions (such as discrimination, a collective bargaining agreement or breach of contract) the employer can fire an employee for any reason. Employers get into trouble when they ignore the provisions of contracts or union agreements, or if the discharge is discriminatory in nature. Discriminatory termination is that which is based on an employee's age, race, sex, national origin, disability or other protected classification. Employers also cannot discriminate against an employee because he or she has reported illegal activity of the employer, or filed a workers compensation claim.

   The best risk control program does not guarantee the absence of wrongful termination claims. However, a properly administered termination process that is well-planned, documented, in accordance with all union and employment agreements and in compliance with federal and state laws, will help an employer with risk control.

Factors to consider include:

At a minimum, the procedure should include the following components:

- Is the termination discriminatory in nature?
- Is the termination retaliatory in nature?
- If termination is based on cause, was an impartial investigation completed?
- Have all disciplinary procedures been followed? Were all progressive and corrective discipline efforts documented?
- If the termination is based on cause, do previous performance appraisals demonstrate average or above average performance?

Special consideration should be given to employees covered by the Americans with Disabilities (ADA) Act and individuals who are 40 years of age or older; are applying for leave through the Family Medical Leave Act (FMLA); are collecting or applying for workers compensation benefits; have recently disclosed substance abuse or psychological problems; or have participated in an action or investigation that was detrimental to the employer's interests (e.g., a witness in a fellow-employee's discrimination claim, or someone who registered a complaint to a state or federal agency). Special consideration is also needed when the employer is anticipating a reduction-in-force.

EPL exposures present a special challenge to loss control and risk management professionals. They also present significant financial and reputational risk to all employers. A partnership between management and general counsel will lead to a better understanding of EPL exposures, as well as to establish the starting point to develop or assess a risk control program. ■

Road Safety and the Law — When Is a License Check Not Enough?

by Paul Farrell

Paul Farrell is a fleet safety specialist with 20 years' experience in both the insurance industry and in private practice. He is chief executive officer of SafetyFirst Systems LLC, a partner to the insurance industry in providing policyholder services to monitor drivers and reduce collisions. He works closely with fleet, safety and risk managers at large transportation, telecom and utility companies. SafetyFirst monitors more than 200,000 drivers from 3,800 fleets in all Standard Industrial Classification (SIC) divisions. Previously, Farrell worked for Fireman's Fund and Reliance Insurance. He often provides presentations and writes articles for various professional groups and associations.

Since the first motor vehicles took to the road, there have been collisions with pedestrians, cyclists and other vehicles. Around the world, deaths and injuries from motor vehicle operations are a serious issue — with staggering statistics. Considering the U.S. alone, there were 37,248 deaths due to traffic crashes in 2007[1].

While insurance programs mitigate most of the financial risk involved in operating a motor vehicle (or a fleet of vehicles), litigation arising from collisions can introduce a time and resource drain on even the best-managed organizations. Judgments may include punitive damages, awards that exceed insurance limits, and, in extreme cases, potential jail time.

This article provides a cursory overview of common legal concepts attached to vehicle collisions and employer strategies that may reduce collision exposure and potential legal consequences. There is also a brief review of case law examples where an employer was held accountable for the acts of its employees or for failing to follow through on its managerial responsibilities.

Before going into detail, I must offer the reader a blanket disclaimer: I am not an attorney, and I cannot provide legal advice in this article. Every case is unique, and every jurisdiction practices law with distinctions that set it apart from others. What I can provide is an introduction to concepts, basic vocabulary and a review of how these theories intersect with companies that operate motor vehicles as part of their day-to-day operations.

Post-Collision Questions

When a collision happens, there may be physical damages to repair, bodily injuries to be healed and financial consequences to be settled. Even with an insurance program in place, there may be uninsured costs and lingering questions that can lead to civil litigation as a remedy for the consequences of the loss.

Questions start with some variation of "Who caused this crash to happen?" and continue into greater detail as the investigation continues:

- Were there violations of traffic safety laws that materially contributed to the crash?
- Was either driver physically impaired?
- Were there roadway-design issues or other "engineered" issues?
- Was each driver "competent" to drive, for example, any valid license issues, etc.?

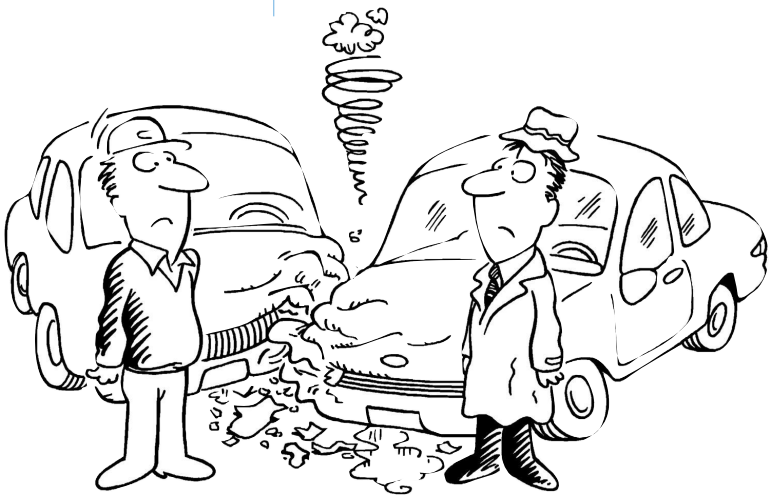
The question "Are any other persons involved through their relationship to the driver(s)?" adds a new twist to the investigation via two legal theories:

- "Vicarious Liability" — Vehicle owner is responsible for the conduct of the driver (such as a neighbor or subcontractor) who has been given permission to operate the vehicle.
- *"Respondeat Superior"* (Latin: "Let the master answer.") — Employers are responsible for the conduct of an employee while the employee is acting in the scope of his/her employment (for example, driving).

Another area of concern that often surfaces following a crash is whether either driver was engaged in "business" driving at the time of the collision. Some questions that help investigators determine whether the trip was "personal" or business driving include:

- Who owns the vehicle?
- What are the normal garage location and the first destination of the day?
- What is the typical use of the vehicle? Is it used for sales calls or the paid carriage of passengers or goods?
- Are trips spontaneously self-selected and self-initiated by the driver or suggested/directed by the employer?

The conduct of the driver during the trip may also be examined. (For example, it has already been suggested via litigation that while driving a personally owned car to a personal appointment outside



of normal business hours or use of a cell phone to transact "business" while driving could create a scenario where the trip is alleged to be a "business" trip and the potential responsibility of the employer.[2])

If determined to be a "personal" trip, then the crash investigation will examine:

- The individual's contribution of fault/negligence.
- Any driver impairment.
- Individual's license to drive (status).
- Whether material traffic laws may have been violated.

If a "business" trip, then the investigation may become substantially broader in scope to determine whether the employer's practices contributed to the event.

Employer Responsibilities — An Added Dimension

When examining the employer's role as a contributory cause to a collision, there are several key areas of concern:

- Hiring practices that relate to the qualification of the driver.
- Driver supervision.
- Vehicle maintenance.
- Whether the vehicle was actually "entrusted" to the driver at the time of the accident.

The investigation of these areas of concern will either build or undermine a case based on various legal theories, including:

- **Negligent Hiring.**
  An employer is responsible for the conduct of an employee if the employer failed to use due care in hiring and/or retaining said employee. For example, if an employee's driving history had been checked, would the employer have found a history of problems that would signal alarm? In other words, an employer could be found negligent for its failure to check a driver applicant's driving record when it would have revealed a reckless driving history or to research a driver applicant's MVR when it would have revealed a background "beyond acceptable limits."
- **Negligent Supervision.**
  An employer is responsible for the conduct of an incompetent employee if the employer failed to use due care in monitoring the driver to detect problems and practices in his or her job (driving) performance. For example, an employer could be found negligent for its failure to ensure that employees understand and comply with stated company driving rules and regulations.
- **Negligent Retention.**
  An employer is responsible for the conduct of an incompetent employee if the employer failed to use due care in retaining the driver after detecting and failing to address problems. For example, if the driver develops an inclination toward alarming behavior (repeated tickets and/or collisions) and is retained without retraining or other remedial management interventions, this might be alleged as negligent retention.
- **Negligent Maintenance.**
  An employer is responsible for the care and upkeep of the vehicle. Failure of the employer to properly maintain the vehicle, which led to an unsafe condition (bad tires, nonfunctioning brakes, etc.) that was materially responsible for causing or contributing to a collision, might be alleged to be negligent maintenance.
- **Negligent Entrustment.**
  Negligent entrustment is to charge someone with a trust or duty in an inattentive or careless fashion or without completing required procedural steps. More specifically to vehicle collisions, it could be rephrased as allowing another person to use a vehicle, knowing, or having reason to know, that the use of the vehicle by this person creates a risk of harm to others.

Negligent Entrustment in Greater Detail

A collision occurs and it is later alleged that the employee or contractor was dispatched without due regard for his or her qualification or ability to safely operate the vehicle. How might an attorney set about to "prove" or "assert" that the management team was responsible for negligently entrusting the vehicle to the operator?

Most commonly, there are five specific "tests" applied to determine whether a case qualifies as a negligent entrustment case:

(1) Was the driver negligent in causing the crash?

(2) Did the driver's negligence proximately cause the crash?

(3) Did the vehicle owner actually entrust the vehicle to the operator?

(4) Was the driver deemed incompetent?

(5) Did the employer know or should have known of this incompetence?

Let's examine each test in more detail.

(1) **Was the driver negligent in the crash?**
If the driver wasn't negligent in contributing to the crash, in theory, a negligent entrustment suit would be stopped short. However, in reality, most crashes cannot be closed without each

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party at least responsible for 1 percent or more of the "blame." Additionally, most plaintiff attorneys would be able to "sell" the contributory involvement of a business driver in many different ways (one brake out of adjustment, a prior crash with similar circumstances, etc.). Accident investigation reports from police officers, citations/tickets as a result of the accident charged against the driver, and emotionally stirring photos from the accident scene could help paint the picture of (or "prove") negligence on the part of the business driver.

(2) Were the driver's actions (or inactions) the "proximate cause" of the crash?

As mentioned above, police reports and witness testimony will help establish if the business driver's actions or inactions were material to the crash happening. "Proximate cause" deals with establishing a direct link between the driver's incompetence/negligence and the cause of the accident.

(3.) Is an employer-entrusted vehicle involved?

Entrustment is the act of giving access to the vehicle and is not based on the nature of the relationship between the owner and the operator. This means that if a supervisor at a construction job site "tosses the keys" to a subcontractor's employee to make a coffee run, that operator has been given permissive access to operate the vehicle without any qualification of his or her ability to drive safely. So, contractors, third-party service providers (for example, security guards) or family members of an employer/employee could be "entrusted" to operate company vehicles.

(4) Has incompetence been demonstrated?

In simple terms, the defendant should be prepared to answer whether the driver was "qualified" to drive. This qualification examination could include experience; training; physical qualifications; past history of "safe operation" of a vehicle; a driver's ability to determine that cargo was loaded and/or secured properly; and more. The examination by the plaintiff's counsel will look at many factors, whether the management team of the negligent driver used those same measures or not. If a fact is discovered by plaintiff's counsel, the management team could have done so as well.

Business drivers can be painted as incompetent by many brushes, including, for example, a past history of tickets, violations, fines, collisions or a previously suspended license.

Additionally, the Federal Motor Carrier Safety Regulations could be cited as a "standard," because it goes into much detail about the characteristics of a federally qualified driver of commercial motor vehicles. Even if a defendant's fleet operation isn't subject to these regulatory standards, it is possible that the standards could be introduced as a "minimally acceptable practice" for those fleets that are regulated by the standard. The question "Why wouldn't the defendant strive to achieve at least these minimal requirements to assure the safety of the general public?" can be raised. New standards could also be introduced, such as the 2006 ANSI Z15.1, "Safe Practices for Motor Vehicle Operations."

(5) What did the employer "know or should have known?"

The employer has a responsibility to know or investigate (to become aware of) the qualifications of operators to whom it entrusts a dangerous instrument — a motor vehicle. An employer's responsibility "to know or should have known" is derived from case law[3] that lays out the burden of "claiming ignorance is never an excuse or a defense."

Because of this broad burden, all employment records may be researched and the operator's background closely examined. Further, any "exceptions" to established business practices (for example, safety, hiring, discipline, etc.) will be reviewed to determine whether the exception led to the incident. (Some may argue that this is a reason to avoid "formalizing" policies, but to abandon safety policy creation isn't a real defense because the employer "should have known" anyway.)

Spoliation

Spoliation of evidence is asserted where a defendant "loses" evidence that may be material to the plaintiff's case. Common examples in commercial vehicle litigation include missing hours-of-duty driver logs, erased camera-in-cab video footage of the incident, erased or overwritten GPS logs, or any other missing documents that would help determine negligence, operator qualifications, etc.

Some jurisdictions allow the filing of a suit as a separate tort action against a management team when spoliation occurs, but others do not. Some handle spoliation as an instruction to the seated jury to assume the evidence was damaging to the defense's case. Clearly, the preservation of evidence following a collision is important, and many firms are revising their document-retention policies and practices to deal with potential spoliation issues.

Business Practices — Prevention and 'Defense' Action Steps.

As a manager responsible for people that drive on the job, you may be asking questions such as:

- How do I prevent collisions, preserve property and protect lives (and avoid lawsuits)?
- How do I develop, document and enforce meaningful policies/practices?
- How do I prepare a defense in case of litigation?

While a complete review of setting up a workable, results-oriented safety program are beyond the scope of this article, there are numerous resources available to help employers set up reasonable policies regarding:

- Driver selection, qualification and training.
- Driver supervision and monitoring.
- Permissive use of vehicles and maintenance.
- Post-accident investigations.
- Governmental regulations (if applicable).

An excellent starting point can be found in the ANSI Z15.1 standard for motor vehicle safety programs. This standard applies to any motor vehicle fleet regardless of industry or fleet size. It can be tailored to fit varied circumstances and is useful as a "self-audit" tool to check existing programs for gaps.

Other standards that may apply (or be useful sources for ideas), include:

- Federal Motor Carrier Safety Regulations (U.S.).
- Carrier Safety Management System (CSMS) Standard (Canada).
- Corporate Responsibility/Driving for Work (U.K.).
- Corporate Manslaughter and Corporate Homicide Act 2007 (U.K.).

Sample Cases

Simply searching the Internet will yield current cases, verdicts and summaries of legal actions resulting from motor vehicle collisions. Sometimes the stories are very tragic, and, unfortunately, evolved as a result of a simple chain of decisions or actions on the part of the employer to make exceptions.

A recent news story highlights a crash that occurred in November 2008[4]. A California man was driving home from work in a company truck. At 6:45 p.m. (likely after sunset), he dropped his cell phone and reached down to retrieve it. At that moment, he felt a bump, but after looking in the mirror and seeing nothing of note (and that none of the trailing cars had pulled off the road behind him), he continued home. The next morning he was arrested on the charge of felony hit-and-run. According to the police, he had hit two teenage boys who had been walking on the side of the road. A negligent entrustment lawsuit was filed against the employer alleging that:

- The company entrusted its vehicle to the California man.
- The employer knew or should have known of competency issues, but allowed the employee to drive anyway.

The competency issues were alleged to include:

- Previous convictions for drunk driving in 1993 and 2006.
- The driver was participating in a drug-treatment program after an arrest in 2007.
- The driver was driving on a restricted-use license. (He was allowed to drive to and from a work location and to and from a treatment program site.)

Another example of a negligent entrustment lawsuit was reported on Jan. 8, 2009[5]. This case involves an intersection collision outside a truck stop, where the plaintiff alleges the truck driver was negligent by:

- Failing to keep a proper lookout.
- Driving in a reckless manner.
- Driving too fast.
- Proceeding into an intersection without first determining whether it was safe to do so.
- Failing to yield the right-of-way.

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- Failing to sound his horn.
- Failing to slow down to avoid a collision.
- Failing to obey traffic laws.
- Entering the intersection while he knew traffic was present.

Further, the plaintiff alleges the employer was negligent by failing to properly:

- Train its employees.
- Monitor its employees.
- Screen applicants in the hiring process to eliminate unqualified drivers.
- Provide proper equipment to its employees.
- Provide proper training to its employees.
- Supervise its employees.
- Determine whether its employees were capable of safely operating trucks.

While these two cases demonstrate that negligent entrustment cases continue to be filed, cases that were filed years ago continue to be settled.

On June 24, 2002, a chartered bus taking youngsters to a church camp crashed into the concrete pillar of an overpass, killing the driver and four passengers. The bus driver reportedly was previously cited twice for driving 90 mph in a 60 mph zone. Also, the driver had at least eight traffic tickets during the last three years for speeding, speeding in a school zone, driving the wrong way on a one-way street and for not having insurance. According to a news release issued by Dallas, Texas, law firm Sayles Werbner on Aug. 9, 2008, Mark Werbner, J.D., won a $71 million verdict for one of the families involved in that crash.[6]

In August 2000, a trucking company became involved in litigation from a tragic crash.[7] The jury found that the company had ignored its own standards when it hired the truck driver accused of causing the crash and awarded the plaintiff a $6.8 million verdict against the company.

Plaintiff's counsel said the driver had:

- Eight preventable accidents and six moving violations in the three years before he was hired.
- Two additional minor accidents and another four tickets in the months before the accident.
- A previous driving record that should have prevented his being hired (that is, negligent hiring), and a record after his hire that should have led to his being fired (that is, negligent retention).

Summary

Anyone who is charged with driving should be carefully qualified at the time of hire and then re-qualified periodically. Business practices covering the qualification, training and supervision of drivers should be in place and followed without exceptions. Managers should take corrective actions, when needed, to address deviations from accepted practices, and these actions should be documented because "not knowing of a problem" is never an excuse or a defense. Standards such as the ANSI Z15.1 provide a reasonable benchmark for minimum practices and practical guidance on how to establish and maintain a driver safety program regardless of industry type or fleet size. ■

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Avoid E&O Exposure and Uncover Hidden Profits — Use a Checklist!

by David Edward Hulcher

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It's safe to say that no agency wants to be involved in an E&O claim and all agencies want to be more profitable. The leading claims made against insurance agents include "failure to procure coverage," "failure to identify client exposures" and "failure to recommend coverage." Using risk analysis exposure checklists can make staff less vulnerable to these types of E&O claims. Reducing an agency's E&O exposure, however, isn't the only benefit of using checklists; they can also uncover hidden profit potential. This brief article will explore the benefits of integrating the use of checklists into your agency's procedures and some key considerations in doing so.

Strictly from an agency E&O risk management perspective, checklists can reduce exposure to both knowledge-based and procedural-based claims. Knowledge-based errors occur because of inadequate staff training, an inability to recognize client risk exposures and a general lack of familiarity with coverages available. Procedural claims result from a lack of timely action or follow-up and include a lack of thorough documentation. Using checklists provides agency staff with a tool to uncover risk exposures in a structured fashion and gives direction on the applicable coverages available to the client. Identifying potential gaps in coverage and recommending available coverages can help avoid the knowledge-based errors of "failure to identify exposure or recommend coverage."

Documentation of customer files continues to be one of the most important areas of E&O risk management. E&O claims commonly involve swearing matches pitting the customer's word against that of the agency. Agency staff may have done everything correctly, but if there is no written documentation in the file, it doesn't matter. Memories fade and staff changes over time, but documentation of customers' files should not. Using a risk analysis exposure checklist not only allows agency staff to better determine coverage needs of customers, but also serves as valuable written file documentation. Checklists can include columns for a client accepting or rejecting coverage along with a place for the customer's signature. This can also be included with the customer's proposal. Quality documentation in the customer file provides a solid foundation for your defense of an E&O claim, and may prevent claims from making it to the courtroom (or at the least may reduce the ultimate loss payment).

Using risk analysis exposure checklists can also facilitate revenue growth within the agency. Checklists can be used not only on new business accounts, but on renewals as well. They can alert producers to gaps in coverage or newly developed areas of exposure, creating opportunities to sell more coverage. This may uncover hidden revenue opportunities while decreasing the agency's vulnerability to E&O claims from failure to recommend adequate coverage. In addition, consider that identifying new exposures and making coverage recommendations may increase the customer's perception of the agency staff's professionalism. The customer will see that agency staff has a very clear and comprehensive understanding of his or her insurance needs. This can lead to greater customer loyalty and increased referrals.

The benefits of using checklists are numerous, but there are some considerations for every agency to contemplate when implementing the use of checklists into the agency's operations. First, does using a checklist increase the agency's required standard of care with its customer? Swiss Re, the preferred endorsed carrier for the Big "I" Professional Liability Program, considers using checklists a best practice for agencies. While an agent's required standard of care varies by state, using checklists as an agency best practice in itself does not necessarily establish an increased standard of care. The key is to implement a procedure for using checklists that all agency staff constantly follow.

The challenge agencies must address is whether it is practical to use risk analysis checklists with every customer. The reality is that it may be difficult to use a

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checklist with every customer for various reasons. The agency's procedures for using checklists should include criteria for identifying which accounts require the use of a checklist. This criteria may be based on the complexity of customer needs, the severity of exposures or the type of transaction (new or renewal). Premium size or account commission is not an accurate method to determine on which accounts a checklist can be effective. For accounts where a checklist is not required, the agency can provide the customer with written confirmation that the agency procured the coverage requested by the customer and offer to provide a more thorough risk exposure analysis upon request.

Agencies must also consider whether to create their own checklists or to purchase checklists commercially available. While it may be tempting to create one's own checklists, it is preferable to purchase industry-standard checklists. These checklists will be thorough, current and standardized. For consistency, all employees should use the same set of checklists based on the stated predetermined criteria as outlined in an agency's procedures. Establishing a consistent pattern and practice that is adhered to by all agency staff will prove beneficial should an E&O claim arise. And remember, implementing procedures is one thing and monitoring adherence to them is another.

Using risk analysis exposure checklists can improve the quality of an agency's operations. They can reduce E&O exposure, unlock opportunities for hidden profits and build the customer's perception of professionalism. All these things will bring your agency a step closer to managerial excellence. ■

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