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Motor Vehicle Liability Issues and Developments

By Peter W. Wanning

Some pertinent motor vehicle liability issues and developments have recently arisen that should be of interest to motor vehicle liability carriers throughout Minnesota and the surrounding region. The following is a discussion focusing on some of these issues.

"Child Restraints Exception" – Not Just for Product Liability Cases Anymore

In general, Minnesota law states that proof of the use, or failure to use, a seat belt is not admissible in evidence in any litigation involving personal injuries. See Minn. Stat. § 169.685 (2006).

However, Minn. Stat. § 169.685 provides an exception to the general rule that evidence of the use, or failure to use, a seat belt is inadmissible in personal injury actions. Subdivision 4 (b) of the statute states that the aforementioned general rule does not affect the right of a party to bring a lawsuit for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restraint system. The exception also states that the general rule does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system.

Recently, Minnesota courts have weighed in on the "child restraint exception". In *Harrison v. Harrison*, 713 N.W.2d 74 (Minn. Ct. App. 2006), a minor child sued his parents, alleging that they negligently maintained and installed the passenger restraint in which he was riding during a motor vehicle collision.

The *Harrison* Court determined whether the exception in Minn. Stat. § 169.685, subd. 4 (b) applies only to a product liability action. Affirming the lower court's decision in favor of the child, the Court of Appeals held that the plain meaning of the statute, and its exception, applies to an action for damages arising out of an occurrence or event that involved a child passenger system that had a defect or fault. The court emphasized that the exception's application hinges on the manner in which the restraint system was connected or prepared for use, regardless of the theory of liability in the case. The Court stated that "Whether the exception applies to a particular action depends on the *nature* of the incident from which damages arose, rather than the theory of liability." *Harrison*, 713 N.W.2d at 78. (Emphasis added).

The Court of Appeals also rejected the parents' argument that applying the "child restraint exception" to a situation where a parent installs a child restraint system would effectively nullify the general rule contained in the statute because every system has to be installed in a vehicle before it is used. *Id.* at 79.

The Court's aforementioned ruling was appealed to the Minnesota Supreme Court, and review was granted on July 19, 2006. Oral arguments for the case were heard on January 4, 2007. The Supreme Court has yet to issue a decision on the case.

Damages Involving Rental Vehicles in Minnesota – Who Picks Up the Tab?

Is a motor vehicle liability insurer on the risk when its insured operates and damages a rental vehicle? If it is a policy written in the state of Minnesota, the answer to that question is "yes".

All insurance policies written in Minnesota must contain a provision providing insurance for rental vehicles. The insured named on the policy need not buy additional insurance offered by the rental car agency. *See* Minn. Stat. § 65B.49 Subd. 5a (2006).

In the event an insured does purchase additional liability coverage from the rental car agency, that insurance will provide primary coverage and his or her personal car insurance will provide secondary coverage. *See* Minn. Stat. § 65B.49 Subd. 5a (2006) and *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686 (Minn. 1998).

Federal laws have also spoken as to the issue of what entity is liable for payment of damages to a rental vehicle. In August of 2005, the "Graves Amendment" (49 U.S.C. § 30106) was passed as part of the 2005 Transportation Equity Act. The Graves Amendment prevented leasing or rental companies from being held vicariously liable under state law for

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Medicare Set-Asides: What You Need To Expect, Know and Do Part One: Where Were These Monsters Spawned?

by Thomas J. Misurek

According to Minnesota Department of Labor and Industry statistics, for every claim brought by an employee in Minnesota for workers' compensation benefits, there's about an 18.5% chance that some element of the claim will launch some type of dispute. One of the tools to address those disputes that claims adjusters and their counsel have always kept within easy reach - the full, final and complete settlement, including future medical claims - has been made quite a bit more unwieldy to use, especially in those disputes involving claims from older workers, thanks to an increased interest of the federal government in recent years.

The recent increased interest of the federal government is in the collection of information (from states' workers' compensation programs and other sources) and in the collection of dollars from workers' compensation insurers. The federal government is acting aggressively in both collection efforts as it believes that workers' compensation insurers have been unfairly saving themselves from paying medical bills at the expense of taxpayers' dollars that pay the evergrowing bills of Medicare.

A Medicare Primer

The ABC song for any federal program cannot be sung until you sort out some of the initials. So, are you ready? We're about to go from FICA to HCFA to HHS to CMS before we get to HIPAA and COB and finally to the newest initial sets, WCMSA and MSPRC.

The Medicare program is a federal plan providing health insurance for the elderly and disabled and collects part of its funds for its payouts through those infamous "FICA" initials (Federal Insurance Contributions Act) that you see in the withholding sums on your paycheck stubs. (Part of your FICA deductions support Social Security, part supports Medicare). The Medicare Secondary Payer Act of 1980 refined prior Medicare legislation to try to assure that it was not the program or the insurer of first resort for the elderly and the disabled; if there was any other insurer whose liability was able to stand in line ahead of it, Medicare was going to try to assure that it paid bills only after potential Medicare recipients first exhausted the dollars available from other insurers, including workers' compensation insurers.

The United States administers the Medicare program through the Centers for Medicare and Medicaid Services (CMS), an agency of the U.S. Department of Health and Human Services headed by the Secretary of the Department of Health and Human Services, a cabinet-level post serving the U.S. president. CMS' predecessor actually first had been established in 1977 under the title of the Health Care Financing Administration (HCFA). The Medicare and Medicaid programs together provide health care to about one in every four Americans. Medicare provides health insurance for more than 43 million elderly and disabled Americans. Enrollment is expected to reach 77 million by 2031 when the baby boom generation is fully enrolled. The sister program also administered by CMS, Medicaid, is a joint federal-state program that provides health coverage for some 51.6 million low-income persons, including 25.1 million children, and nursing home coverage for low-income elderly. CMS also administers the State Children's Health Insurance Program that covers more than 4.6 million children. The fiscal year 2007 budget of CMS is $597 billion.

It took some years before the "secondary payer" plan built into Medicare by the 1980 legislation grew some teeth. It may have been actually more than 19 years after the enactment of Medicare as a "secondary payer" status before the federal government acted in a way that said it would also have to learn where those new teeth should take their bites.

Question: What did the federal government employ to help it learn where to put the bite? Answer: COB or "Coordination of Benefit" contractors.

As the then U.S. Secretary of the Department of Health and Human Services, Donna Shalala related in a December 31, 1999 news release, the Health Care Financing Administration (HCFA, remember?) issued the federal government's first contract for a national "coordination of benefits" contract to coordinate Medicare payments with other payments from other insurance plans by collecting, managing and reporting claims information to ensure that health care expense claims are paid by the primary insurer (WC, liability, group health) before any expenses uncovered by those plans are directed for payment by Medicare, the secondary insurer. Secretary Shalala noted some of the goals of the plan in that 1999 news release:

"Further expanding the Clinton administration's campaign against waste, fraud and abuse, HCFA also announced a new contract to help Medicare increase the roughly $3 billion saved each year by ensuring that private insurance companies pay their share of Medicare beneficiaries' health care bills. By consolidating these efforts into a single contract, HCFA also expects to improve service to Medicare beneficiaries, health care providers, insurance companies and employers."

What was the means toward this primary goal to save Medicare dollars? "We are using private-sector techniques and expertise to modernize Medicare's accounting systems to better protect beneficiaries and taxpayers," said the HCFA Administrator in 1999, Nancy-Ann DeParle. "Medicare dollars must be spent on legitimate services for elderly and disabled Americans, not to pick up the tab for other insurance companies. This new contract builds on our successes in fighting waste, fraud and abuse, while ensuring that beneficiaries receive the maximum coverage from all their health benefits."

The authority of HCFA to contract for this coordination-of-benefits work came from the Medicare Integrity Program, which was created by the Health Insurance Portability and Accountability Act of 1996. ("HIPAA," a familiar set of initials that perhaps you might not have expected to find in this article.)

Who were and are the holders of these COB contracts that possess this supposed cutting-edge expertise and familiarity with "private-sector techniques" that were planned to be employed to save Medicare dollars? Take a clue from the fact that very first COB contract that HCFA inked back in 1999 went to Group Health, Inc.

And what did these COB contractors begin to do and continue to do? Well, one thing for certain, COB contractors collect and aggregate information in pursuit of determining (some might say "guessing") when Medicare should declare that benefits that it has paid or is paying to a Medicare beneficiary are secondary to some other primary insurance program; Medicare then begins its primarily internal-rules-based collection efforts that may end up with the U.S. Department of the Treasury quite literally telling a workers' compensation insurer, "Pay U.S."

Where do the Centers for Medicare and Medicaid Services and their COB contractors get the information that is behind these "determinations" that launch collection efforts against alleged primary insurers such as workers' compensation insurers? They mine workers' compensation databases from participating states' workers' compensation programs. They strong arm employers or use carrot-and-sticks programs with employers such as the Voluntary Data Sharing Agreement (VDSA) program. One carrot is the Beneficiary Automated Status and Inquiry System (BASIS); it is available to employer-participants of the Voluntary Data Sharing Agreement (VDSA) program. "The BASIS allows you to make on-line Medicare entitlement queries to CMS' Enrollment Data Base (EDB) to determine if an individual is a Medicare beneficiary and if so, obtain available entitlement information," says the final web page on the CMS website dedicated to "Employer Services". Guess what the first web page on the

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Firm News

Jardine, Logan & O'Brien, P.L.L.P.'s **2007 Periodic Table of Basic Workers' Compensation Elements** was mailed out in December of 2006.

If you would like a copy (or additional copies) of this informative and useful resource on workers' compensation law and rates, etc., please submit a request to Tom Cummings at 651-290-6565 or tcummings@jlolaw.com.

Congratulations to **Alan Vanasek** for being voted one of the Top 40 ADR Professionals in Minnesota in a poll conducted by *Minnesota Law and Politics*.

Congratulations to **Marlene Garvis** and **Elisa Hatlevig** on their defense victory at trial in their employment § 176.82 lawsuit in Kandiyohi County District Court.

Set-Asides *continued from page 2*

CMS website under "Employer Services" says?

"Employers must provide the Centers for Medicare & Medicaid Services (CMS) with information regarding health coverage of their Medicare-eligible workers and spouses of Medicare-eligible individuals whenever CMS identifies those individuals to the employer. This process, the IRS/SSA/CMS Data Match, is used to identify situations where another payer may be primary to Medicare. The Data Match process helps Medicare intermediaries and carriers identify claims on an ongoing basis for which Medicare should not be the primary payer."

COB contractors mine data from multiple sources to help CMS guess/determine when it is going to send a contemporary workers' compensation insurer a series of letters and begin a collection effort that largely proceeds by internal-collection rules and may ultimately result in a collection agency contracted to the U.S. Treasury saying to a Minnesota workers' compensation insurer, "Where is the re-payment you owe for the $20,000 Medicare paid for 2004 right-knee replacement of worker John Jones?"

Do you think it just might be possible that the data:

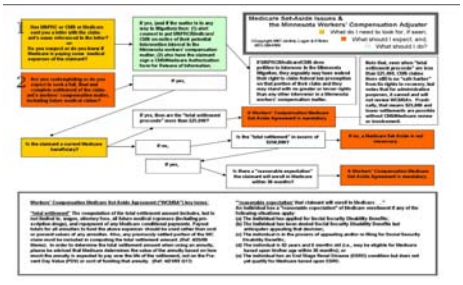
- was COB collected (and that Medicare used to determine that its $20,000 payment in 2004 was a mistake, and that your company, as Mr. Jones' workers' compensation insurer in 1997, needs to repay Medicare),
- was from a minimal electronic record, perhaps shared from Minnesota Department of Labor and Industry,
- that electronic DOLI record was not much more than a diagnostic code showing that Mr. Jones had a 1997 work injury to a lower-extremity injury, and showing that your insurance company, the workers' compensation insurer, paid some indemnity benefits and some medical expenses, and
- was so in exact that it did not state even which lower extremity was involved?

So, is it just possible that John Jones' minor personal injury of a work-related left-ankle sprain in 1997 which caused him to miss a week of work, is now behind Medicare's claim for repayment of a $20,000 right-knee replacement 10 years later? While I would love to say, "No," I fear that I have to say, "It's possible".

As you will learn in Part Two of this article series on Medicare Set-Aside Agreements in the next Legal•ease, the very letterhead on which Medicare's claim and collection effort may begin, will now be on "MSPRC" (Medicare Secondary Payer Recovery Contractor) letterhead from a P.O. Box in Detroit. (Alas, no more fond letters to you from Noridian in Fargo; CMS has entered a contract with Chickasaw Nation Industries to be the national Medicare Secondary Payer Recovery Contractor; regional recovery contractors such as was Noridian for Minnesota claims were replaced on October 2, 2006 by the single national contractor, Chickasaw Nation Industries, which, since it is now the only player in the game, does not even use its name on the letterhead; rather, the letterhead now just reads MSPRC, and includes the CMS logo).

This is the first part, the background and stage-setting part, of a two-part article series about Worker's Compensation Medicare Set-Aside (WCMSA) agreements. You or a workers' compensation adjuster that you know may already be seeing the murder by torturous delay that the issue of Medicare Set-Asides is bringing to the hopes of resolving some number of workers' compensation claims fully, finally and completely including future medical claims. Part Two of this article series in Legal•ease will explain more about WCMSA agreements and the analysis that an adjuster needs to employ to decide if a WCMSA agreement is necessary.

Want a preview of Part Two, a tool to use in deciding if a WCMSA agreement is necessary? *Call 651-290-6577 or email tmisurek@jlolaw.com and request a copy of the JLO Medicare Set-Aside aid, a decision-tree flowchart that will help you determine if a WCMSA is necessary in a workers' compensation case in which you want a full, final and complete—including future medical claims—settlement.* •



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damages sustained in a motor vehicle, except in cases of active negligence or criminal wrongdoing. The Amendment attempts to not supersede the law of any state which imposes financial responsibility or insurance standards on the owners of motor vehicles or business entities engaged in the business of renting or leasing motor vehicles. 49 U.S.C. 30106 (b)(1) and (2).

While several courts have applied the Graves Amendment to bar any claims against rental or leasing companies, the State of New York has held the Graves Amendment unconstitutional. In *Graham v. Dunkley*, 2006 WL 2596327 (N.Y. Sup. Ct. Sept. 11, 2006), the New York Supreme Court held that there was no rational basis for the Graves Amendment. The Court opined that the Amendment had no rational basis because it seemed to preempt New York's Traffic Law § 388, which imposes vicarious liability upon owners of vehicles used or operated in the state, and therefore exceeded Congress' powers under the Commerce Clause. *Graham* at *11.

Under the Minnesota No-Fault Act, a rental car company/owner is not vicariously liable for legal damages resulting from the operation of a rented motor vehicle in an amount greater than $100,000.00. See Minn. Stat. § 65B.49, subd. 5a(i)(2) (2006); and *Boatwright v. Budak*, 625 N.W.2d 483, 488 (Minn. Ct. App. 2001). Unlike the State of New York, Minnesota courts have not been presented with the opportunity to evaluate the Graves Amendment and how it would impact Minnesota's No-Fault Act. Regardless, in the context of legal damage associated with the operation of rented motor vehicles, it seems the owners of the vehicles and the rental companies are somewhat protected under Minnesota law. •

In Memoriam

June 26, 1939 - February 1, 2007

We prematurely lost Jim Galman, a long-time partner, friend and colleague to all of us at Jardine, Logan & O'Brien, P.L.L.P. Jim's infectious sense of humor, wit and charm will not be forgotten.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Spring 2007 Issue...

Medicare Set-Aside, Part Two

A Primer on Releases

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