**HOW TO LOSE FRIENDS AND RECOVER LESS MONEY**

Having practiced law for 27 years I thought I had an idea of the roles that plaintiffs’ and defense counsel play. My understanding was that plaintiffs’ counsel would attempt to put forth the most persuasive case for liability and damages in an effort to maximize their clients’ recovery. As defense counsel our role is to investigate, identify facts and either confirm or refute the claims set forth by plaintiffs. While there are countless ways in which both sides reach their ultimate goal, the basic playbook seemed to stay the same. That is until recently. In the last few years, I have personally seen a new effort by counsel for plaintiffs which appears to place more emphasis on counsel’s desire to prove their way or their knowledge is somehow superior to everyone else involved in our legal system. Although I have spoken with many plaintiffs’ counsel in an attempt to understand the value of this approach I have yet to find anyone on either side of the “v” that can explain the benefit of the strategy. To be clear, it is my belief that this playbook not only fails to gain an advantage for their client but will also eventually damage the credibility with the court. That’s the good news for us and our clients. The bad news, however, is that we need to find a way to quash the unprofessional, unrealistic, and ridiculous tactics that they have chosen to take.

The goal of this presentation is to outline several of the apparently strategic choices that certain plaintiffs’ counsel have chosen to use in their litigation practice and discuss ways that we might highlight the ridiculous nature of their actions and find ways to bring this practice to its inevitable conclusion as fast as possible. There are many facets of the playbook that I will not have time to discuss but have attempted to outline some of the more egregious examples and my thoughts on how to best respond. I have no doubt that others have chosen different approaches which may be superior to mine and I’m hopeful that we can have a discussion as to those possibilities. While not necessary, I do think a common approach from the defense bar will assist in bringing this circus to an end.

Although I have practiced in numerous areas, from product liability to railroad work to premises liability, trucking and motor vehicle accidents this presentation will focus primarily on the automobile side as that is where I have seen the majority of behaviors we will discuss. My assumption is that this playbook is being used, at least to some degree, in multiple areas.

**THE PLAYBOOK**

1. PRELITIGATION ANTICS

Although I receive calls from clients and adjusters on a regular basis for assistance with liability issues and valuation, those calls and discussions have changed in recent times. Specifically, the inquiry revolves around whether or not, with completely imperfect information, the client or adjuster is legally required to respond to a demand, with an offer, in a specific time period. While I believe that most here are familiar with Kentucky’s unfair claims settlement practices act, it appears that plaintiffs’ counsel have a different understanding of the statute. Moreover, they believe it is their ultimate hammer to force insurance adjusters and others into settling cases or risking claims of bad faith.

Kentucky’s unfair claims settlement practices act sets forth 17 separate actions or omissions on the part of the insurers that are precluded. For the purposes of this discussion, I believe we can focus on just a few.“(4) Refusing to pay claims without conducting a reasonable investigation based upon all information,” and “(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.” Although these appear to be the most frequently cited portions of the act by plaintiffs’ counsel, we also see many references to the failure to investigate, the failure to use reasonable standards and other similar phrases. These requirements are not unduly burdensome, and it is the duty of all insurance carriers and others to comply with the act. These requirements, however, cannot be simply looked at in a vacuum. In order for an insurance carrier or other individual to comply with these requirements, they must have sufficient information from which to make reasonable decisions. It is this last portion that plaintiff’s counsel simply ignore.

In addition to the dictates of KRS 304.12 – 230 and in an effort to further pressure insurance carriers, plaintiffs also cite to KRS 304.12 – 235, suggesting that the carrier must respond to any and all demands within 30 days. KRS 304.12 – 235 states:

1. All claims arising under the terms of any contract of insurance shall be paid to the named insured person or health care provider not more than thirty (30) days from the date upon which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished the insurer.
2. If an insurer fails to make a good faith attempt to settle a claim within the time prescribed in (1) of this section, the value of the final settlement shall bear interest at the rate of twelve percent (12%) per annum from and after the expiration of the thirty (30) day period.
3. If an insurer fails to settle a claim within the time prescribed in (1) of this section and the delay without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney’s fees incurred. No part of the fee for representing the claimant in connection with this claim shall be charged against benefits otherwise due the claimant.

While plaintiff’s counsel references part one of the statute in his demand for settlements, it is clearly the interest and fees referenced in sections 2 and 3 that they are ultimately after. Fortunately, plaintiffs simply don’t understand or don’t care whether or not they are entitled to invoke this statute.

Please note the initial phrase contained in the statute which says that it relates only to claims arising under the terms of a contract of insurance. As such, the statute will never apply to 3rd party claims, but only as to 1st party claims. More importantly such payments are only required to be made when proof of the claim has been made **in the substance and form required by the policy**. Although the terms contained in UIM policies may differ slightly, all require a determination of liability on the part of the tortfeasor, a similar determination of liability on the part of the insured, evidence of the damages incurred by the insured and finally, what amount of the insured’s damages exceed the available coverage of the tortfeasor. As many of us have seen, counsel for plaintiffs seemingly ignore these requirements and instead simply refer back to the unfair claim settlement practices act, specifically that portion that requires prompt, fair and equitable settlements. This practice, in my opinion, is deceptive and counsel is fully aware that they are misstating the law.

Plaintiffs’ practice of pushing for timed demands and quick responses is seen most often in matters where legal liability for the accident is clear or appears clear. This allows counsel to reference section (6) and its requirement of prompt settlements in claims in which liability has become reasonably clear. The requirements of this section, however, are not as simple as plaintiffs would like them to be and require more before a settlement is required. *Holloway v. Direct Gen. Ins. Co. of Mississippi Inc.*, 497 SW. 3rd 733 (Ky. 2016) provides specific guidance regarding the meaning of the phrase “claims in which liability has become reasonably clear.” This matter involved a parking lot accident. The Court noted that not only did the insurance carrier question its insured’s liability for the accident, but more importantly contested whether plaintiffs’ injuries and damages were related. “The second, and more important, dispute between Holloway and Direct General is the extent and severity of her alleged injuries from the accident – liability Direct General has seriously contested from the outset.” (*Id.*, at 739). After noting that Direct General had initially thought its insured was at fault, the Court states, “Fortunately, because of the second form of liability invoked in this case, Direct General’s early impressions of the case are not dispositive.” (*Id*., at 738-39) Thus, when the statute speaks of “liability,” it means not only the traditional notion of liability for the accident, but also liability in terms of being responsible for certain items of damage.

If there is a true argument regarding the extent, nature of or causal relation of injuries to the accident in question, the insurer has every right to investigate those issues before offering to settle. Plaintiffs, who have failed to provide sufficient documentation of injuries or damages or refuse to provide medical records pre-dating the accident to prove that the conditions are causally related, cannot enforce the UCSPA, because they have not complied with the terms of the policy. That would also be true in regard to KRS 304.12-235. While *Holloway* was a third-party claim, and dealt exclusively with the UCSPA, the Court’s analysis of the meaning of the sections would certainly hold true in a first party action.

In order to assure that our carriers are complying with the meaning and intent of the statute, it is important that any response to such a demand reference any factual arguments regarding legal liability as well as any unknown factors relating to plaintiff’s damages and injuries. Once those items are relayed to plaintiff in response to these timed demands, I do not believe any potential claim under the UCSPA or KRS 304.12 – 235 would be cognizable. And, if they are truly just misinformed, a quality attorney would begin providing information designed to fill those gaps. What I typically see from a certain subset of counsel, is additional rude, unprofessional, and entirely unhelpful threats.

1. The Complaint

It has become commonplace for plaintiffs to include reference to violations of various motor vehicle statutes within their Complaint. Most of these statutes reference general duties for those operating motor vehicles and do not apply specifically to the accidents which gave rise to the Complaint. These statutory violations are included as under Kentucky law the violation of the statute intended for the protection of persons in the shoes of the plaintiff would suffice for a finding of negligence per se. Although none of us want that in our cases, it really has very little teeth. Because we are a pure comparative fault jurisdiction, a finding of a violation would provide the plaintiff nothing more than a guarantee of a 1% finding of fault on the defendant. As such nothing really changes based on these averments in the Complaint, especially in cases where liability may look reasonably clear. Other than this tactic, I have not seen any other unusual items contained in plaintiff’s Complaint.

1. Endless Discovery

While much of plaintiff’s playbook is only slightly annoying, their use of discovery, specifically written discovery, is certainly the most frustrating. It appears that plaintiffs believe that there is no end to the breadth of discovery allowed in a civil action. The use of endless requests for admission as well as irrelevant and ridiculous interrogatories and requests for production of documents seems to have no end. As a result, many of us have been left to try and figure out how to properly respond without resorting to violence. Unfortunately, the only way to discuss this is to use examples that we have found in our practice. The following is one interrogatory that we have seen on multiple occasions:

INTERROGATORY NO. 1 State the defendant’s contention with respect to all lost wages and medical bills that the plaintiff has submitted in support of her UIM claim, by itemizing all such wage loss and medical bills into the following categories:

(A) all wage loss and medical bills submitted by the plaintiff that the defendant contends were incurred by the plaintiff and caused by the collision at issue;

(B) all wage loss and medical bills submitted by the plaintiff that the defendant contends were incurred by the plaintiff but were not caused by the collision at issue;

(C) all wage loss and medical bills submitted by the plaintiff that the defendant contends were incurred by the plaintiff but for which the defendant is not yet able to make any causation determination;

(D) all wage loss and medical bills submitted by the plaintiff that the defendant contends were incurred by the plaintiff and for which the defendant can make a causation determination, but has not yet made any causation determination;

(E) all wage loss and medical bills submitted by the plaintiff which the defendant contends were not incurred by the plaintiff;

(F) all wage loss and medical bills submitted by the plaintiff for which the defendant is not yet able to make any determination as to whether he contends they were incurred by the plaintiff, and,

(G) all wage loss and medical bills submitted by the plaintiff for which the defendant is able to make a determination as to whether they were incurred by the plaintiff, but the defendant has not made a determination as to whether he contends they were incurred by the plaintiff.

Please note that the above interrogatory was filed with the plaintiff’s complaint making the phrase “all lost wages and medical bills that the plaintiff **has submitted** in support of her underinsured motorist claim,” extremely difficult to understand. To be clear, other than claims submitted for the purpose of no-fault, no documentation of lost wages or medical bills have been received. We have also seen this interrogatory sent later in litigation after thousands of pages of medical records, bills and wage loss records have been received. Obviously if one were to attempt to provide a response to the above interrogatory, in a case where a multitude of records had been received, it would be an extremely difficult task. Using our Civil Rules, however, I do not believe we are required to do so.

It is certainly true that at trial evidence may be presented that suggests certain medical conditions and treatment may not be related to the accident in question. However, during the discovery phase it is normally difficult to make any definitive determinations. It is the job of counsel to identify questionable items and then work with experts or others to determine what is objectionable and what is related. As such, the initial response to all sections of this interrogatory is an objection based on the fact that it requests information protected by the work product doctrine. Although it is arguable that a portion of the request is outside the scope of the civil rules, I try to avoid that objection. After stating my initial objection, I normally continue, subject to the objection, noting that the interrogatory calls for an expert opinion and that I’m not qualified to make that determination. A sample response might read as follows:

Defendant objects to the above interrogatory to the extent it requests information protected by the work product doctrine. Without waiving said objection and subject to the same, defendant states that he is not a medical expert and therefore cannot make a conclusive determination regarding the reasonableness or necessity of any medical bills, certainly without reference to the corresponding medical records and/or notes of those providers. Further, at this stage of discovery, it does appear that some of the bills submitted by plaintiff in his demand package relate to treatment provided to plaintiff that is unrelated to the accident in question and instead relates to pre-existing and degenerative conditions of plaintiff. These issues will be resolved through additional document and records requests and/or discovery depositions of the plaintiff, his nurse, and his medical providers. As discovery has just begun, this defendant cannot provide a full response to the above interrogatory and will supplement the same pursuant to the civil rules and/or any order of the court.

I have initially set forth a valid objection which should stand up to any scrutiny by the court. In case the court does not entirely agree with me, I have also included a great deal of additional information which explains why I cannot fully answer the interrogatory at this time and notes that it will be supplemented pursuant to the rules or any order of the court, which might include disclosure of experts or other deadlines. Thus, in addition to what I believe is a valid objection, I have also included additional information to show the court I am not simply ignoring the request. To date, plaintiffs’ counsel has not pushed back by requesting supplementations or filing a motion to compel with the court.

We have also received in numerous cases an interrogatory that reads as follows: “state the total amount of damages for past pain-and-suffering that the defendant contends that plaintiff has suffered, and the total amount of damages for future pain and suffering that the defendant contends that plaintiff will suffer, as a result of the collision at issue.” As mentioned above, I do not like to object based on the fact that a question is beyond the scope of the civil rules, but clearly make an exception for interrogatories such as the above. In addition to my objection based on the fact that it is beyond the scope of the civil rules I would also note that the interrogatory requests information which is the sole province of the jury and also presumes a breakdown of damages which is not appropriate.

The vast majority of these interrogatories as well as requests for admission are an attempt by plaintiff to shift the burden of proof to defendants. That is improper under our rules, and we need to make sure that we are fully and completely responding to all of them in a manner that makes that clear. I will most certainly share additional examples that we have received in the recent past and that I hope we can discuss during the presentation. Again, it is my hope that as a defense bar we can come to a common understanding regarding how best to respond. If our collective responses are similar, I believe that the courts will eventually recognize the abusive nature of the discovery and hold counsel responsible.

1. Mediation

Plaintiff’s playbook has evolved in multiple ways, but I have yet to see a pattern or any unique practices during mediation or settlement discussions. Overall, however, it has been my experience that all plaintiffs’ attorneys seem to be taking a much harder line during mediation and valuing their client’s claims much higher than would be expected. Either I have forgotten how to value cases after 27 years or plaintiffs are intentionally pushing defendants towards trial. It is my belief that the plaintiffs or at least a significant number of them have decided that the manner in which cases have been evaluated needs to change and that the only way to do so is to try more cases. Although there have not been a great number of trials since the courts opened back up, the ones that I am aware of suggest that plaintiff’s bar is incorrect in their belief that cases are being undervalued.

1. Trial

Unfortunately, I am not able to provide any direct assistance regarding plaintiff’s playbook at trial although my trial calendar suggests that this may change over the next 6 months. I am hopeful that others in attendance may be able to share with us their experience.

1. Miscellaneous

In trying to review all of the unusual aspects of certain plaintiff’s approach to litigation I tried to think of other items that might be of interest. The only other issue, one that is arisen only recently, is counsel’s refusal to provide a notarized or otherwise verified signature for their client on the settlement agreement. Despite numerous discussions with other defense counsel and other plaintiff’s counsel I have yet to hear any valid reason for this refusal. As such it will be my practice moving forward to include the necessity of a signed and notarized or otherwise verified signature on the settlement agreement as one of the ground rules when I start mediation. I suspect that I will include that request in my letter to the mediator and potentially in correspondence to plaintiff’s counsel prior to the same.

**CONCLUSION**

There is nothing earth shattering in the materials that I have provided for the purpose of this presentation. I am hopeful that with additional examples of plaintiff’s antics and a discussion of the same that we can work towards common responses and a strategy that will help persuade plaintiff’s counsel to discontinue the use of many, if not all, of these abusive practices. As mentioned above, it is my expectation that our group can discuss examples of these tactics and work towards responses that can help everyone. If there are any questions or you need any additional information regarding any of the items I’ve mentioned, I am happy to assist. You can reach me by phone at the office or via email at ghughes@cbmlaw.net. Thank you for your time and attention.

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