

## **SUBROGATION AND THE SEAT BELT DEFENSE**

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Every state except New Hampshire requires adults to wear seat belts while traveling in a motor vehicle. Lap belts have been mandated on new vehicles since 1968. Rear outboard lap belts have been required since 1989, and shoulder harnesses since 2008. Subrogation professionals, like trial lawyers, must come face to face with an increasingly used defense within the civil justice system. In cases involving automobile accidents, even if the plaintiff/insured is totally free from negligence, not wearing a seat belt could result in a reduction of the damages the plaintiff will be allowed to recover. And with increasing frequency, it is being used by liability adjusters as an argument for significantly reducing offers of settlement. Trial lawyers are also using the argument offensively and with some success. In some states, through the interplay of the Made Whole Doctrine or other state statutes, this defense could have an affect on a carrier's rights of subrogation or reimbursement.

### **Seat Belt Defense Generally**

The seat belt defense has been integrated into the comparative fault system of many states to distribute equitably the costs of first and second collision injuries on the basis of their respective causes. "First collision" injuries, of course, are the injuries resulting directly from an insured being rear-ended by a tortfeasor. "Second collision" injuries are those injuries which result inside the plaintiff's vehicle which would not have occurred had the insured been properly wearing his or her seat belt. With a growing number of state mandatory seat belt use laws, we will see a proliferation of the seat belt defense in the coming years.

Thirty states currently have no seat belt defense in place: Alabama, Arkansas, Connecticut, **Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming.** Twenty six of these states actually have laws prohibiting evidence of non-use of a seat belt - all except Idaho, Indiana and Tennessee. In most of these states, comparative fault or contributory negligence laws are in place which allows the jury to compare the plaintiff's negligence as compared to the defendant. However, for example, in Maryland, state law requires that

occupants of motor vehicles wear seat belts. Trans. Art., Md. Code Ann. § 22-412.3. Nonetheless, Maryland does not consider failure to use a seat belt as contributory negligence. The accident, they feel, was caused by the negligence of the driver's operation of the motor vehicle – NOT the plaintiff's failure to wear a seat belt.

On the other hand, 15 states do have some mechanism in place which could result in reduction of plaintiff's damages for not having a seat belt on at the time of an accident: **Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, West Virginia and Wisconsin**. These states rationalize that while the accident itself may have been caused by the driver's negligence, the actual injury for which damages are sought is often exacerbated by the "second collision" which occurs within the plaintiff's vehicle as a result of his/her not wearing a seat belt.

These 15 states have adopted the seat belt defense, some by common law with no statutory approval, some by case decision, and some specifically by statute. These states have provisions for allowing the introduction of evidence that the plaintiff was not wearing a seat belt in order to affect the allocation of fault by the jury or have a more structured statutory scheme which assesses fault or limits the percentage of fault which can be attributed to the failure to wear a seat belt. Clearly, a driver not wearing a seat belt and injured when his car is rear-ended by an inattentive driver can't conceivably be 100% at fault for his injuries, but that could be the result in some states.

Two states, **Hawaii and North Dakota**, do not have a specific statute addressing the seat belt defense but have considered it and indicated they might move toward one. The North Dakota Supreme Court, for example, has indicated that it would probably be inclined to accept the seat belt defense. *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983).

Three states, **Indiana, Mississippi and Nevada**, do not have fully developed seat belt defense laws, because no statute or case specifically prohibits application of the seat belt defense based on a comparative negligence or failure to mitigate damages theory. *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981); *Rhinebarger v. Mummert*, 362 N.E.2d 184 (Ind. Ct. App. 1977); Miss. Code § 63-2-3 (1997); *Roberts v. Grafe Auto Co., Inc.*, 701 So.2d 1093 (Miss. 1997).

There are a number of ways the seat belt defense comes into play – depending on the state. Usually, it arises under a "comparative negligence" or a "failure to mitigate damages" theory. Florida is an example of the former. Fla. Stat. Ann. § 316.614(9) (West 1997); N.Y. Vehicle and Traffic Law § 1229-c(8) (McKinney 1997). **New York** is an example of the latter. *Spier v. Barker*, 323 N.E.2d 164 (N.Y. 1974). In New York, as in most states which allow it, the seat belt defense can be submitted to the jury only if the defendant can demonstrate, by competent evidence, a causal connection between the plaintiff's non-use of an available seat belt and the injuries and damages sustained. In **Oregon**, if there is evidence from which the jury might conclude that the plaintiff's injuries were exclusively or primarily the result of his/her failure to wear a safety belt, the jury can find that such failure to do so is not reasonable under the circumstances. Little guidance beyond this is given. *Dahl v. BMW*, 748 P.2d 77 (Or. 1987).

The seat belt defense is controversial and is not always fair. To ameliorate its potential harshness, some jurisdictions affirmatively limit the percentage of fault which can be attributed to an otherwise-blaameless driver who wasn't wearing a seat belt. In **Missouri**, only 1% can be attributed to the person who failed to use a seat belt. Mo. Rev. Stat. § 307.178(4). In Iowa, **Michigan** and **Oregon**, the maximum percentage is 5%. Iowa Code Ann. § 321.445(4) (West 1997); Mich. Comp. Laws Ann. § 257.710(e)(6) (West 1997); Or. Rev. Stat. § 18.590 (1996). But perhaps the state with the most litigated and most clearly defined seat belt laws is **Wisconsin**, where the percentage is a statutory 15%.

Wisconsin Stat. § 347.48(2m)(g) provides as follows:

(g) Evidence of compliance or failure to comply with par. (b), (c) or (d) is admissible in any civil action for personal injuries or property damage resulting from the use or operation of a motor vehicle.

Notwithstanding § 895.045, with respect to injuries or damages determined to have been caused by a failure to comply with par. (b), (c) or (d), such a failure shall not reduce the recovery for those injuries or damages by more than 15%. This paragraph does not affect the determination of causal negligence in the action. The fact that jurisdictions have dealt with the seat belt defense in such varying ways is testament to the defense's controversial nature. This paper will outline some of the ways to combat the questionable and damage-reducing seat belt defense. Part I of the paper will discuss how to legally combat the defense in jurisdictions where the law may still not be completely settled on the issue. Part II will discuss how to factually combat the seat belt defense in jurisdictions where it does exist.

In **California**, juries are allowed to hear evidence of seat belt non-use to prove comparative fault. California Vehicle Code §27315(i), provides that "In a civil action, a violation of [the seat belt use law] does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as fact without regard to the violation." Although a violation of the California seat belt statute does not "constitute negligence as a matter of law or negligence per se," the statute does not "totally ban use of the seatbelt statute as a factor in determining negligence." *Housley v. Godinez*, 4 Cal. App.4th 737, 746 (1992). In California, for purposes of determining comparative fault, not only may the jury learn of a plaintiff's failure to use his or her seat belt, the jury may also decide what weight, if any, to give the seat belt use statute in determining the plaintiff's standard of reasonable care.

As mentioned in the introduction, the state of the seat belt defense is not completely settled in many jurisdictions including **Hawaii, Indiana, Mississippi, Nevada** and **North Dakota**. Some states seemingly cannot make up their mind on the issue. In **Kentucky**, § 189.125(5) overruled *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987) so that now Kentucky does not employ the seat belt defense. In Ohio, § 4513.263(f) overruled *Vogel v. Wells*, 566 N.E.2d 154 (Ohio 1991) so that now Ohio does not allow for application of the seat belt defense. Furthermore, the following states have adopted the seat belt defense, but only by common law with no statutory approval: **Alaska, Arizona, Georgia** and **New Jersey**. If you are practicing in a jurisdiction where seat belt defense law is not completely settled, or where it is settled only by common law, the following arguments may help you avoid a damaging seat belt subrogation reduction:

1. Argue that the defense is not technically causative of the accident in question and can't be considered comparative negligence because your insured's failure to wear his or her seat belt did not help to actually cause the accident itself in any way. The traditional application of comparative negligence is that it applies only when the plaintiff's misconduct is the "but for" cause of the accident, not the "but for" cause of the damages. Failing to wear a seat belt may have made the plaintiff's injuries worse, but it certainly did not help to cause the accident itself. Stress that the failure to wear a seat belt cannot logically be considered comparative negligence.
2. Argue that the seat belt defense does not logically fit into the doctrine of mitigation of damages. The traditional mitigation of damages rule states that a plaintiff has a duty to mitigate his or her damages after an accident has already occurred. Obviously, it would do a plaintiff no good to secure his or her seat belt after a car accident. Thus, failure to wear a seat belt cannot accurately be described as a plaintiff's failure to mitigate damages either.
3. Argue that the seat belt defense runs counter to the traditional tort doctrine that defendants take their plaintiffs as they find them, also known as the "egg-shell" plaintiff's doctrine. The plaintiff would not be assessed a percentage of fault if he or she had exceptionally brittle bones which allowed fractures to occur from a minor impact – why should it be any difference with the "seat-beltless" condition of the insured in which the defendant found the insured?
4. Argue that plaintiffs should not have to anticipate other peoples' negligence.
5. Argue that a jury will have trouble speculating about what kind of damages to award a plaintiff if the seat belt defense is allowed and speculation should not play a role in causation. In other words, if the seat belt defense is asserted, juries will essentially have to guess what damages a plaintiff would have sustained with seat belt use as compared to what they actually sustained. Even with the help of experts, this kind of calculation could become nothing more than mere guesswork.

## Subrogation and the Seat Belt Defense

The seat belt defense can be used to thwart legitimate subrogation interests in a number of ways. Obviously, a defense attorney or third-party liability adjuster can claim they are entitled to a significant reduction in your subrogation damages due to the failure to use a seat belt. However, plaintiff's attorneys who have settled their cases in made whole jurisdictions can also claim that they were not made whole because they had to reduce their damages due to the application or potential application of the seat belt defense, even in otherwise clear-cut cases of defendant liability. The same arguments above should be used to counter the reasonableness of the plaintiff's "reduced settlement." Diligent subrogation investigation also enters the picture here.

If you happen to be practicing in one of the 15 jurisdictions which allow seat belt evidence to reduce a plaintiff's damages, it is important to know whether your client was actually wearing a seat belt or not. Obviously, you need to ask that question during your investigation, especially if this fact is not noted in the police report. It is also important to know what kind of seat belt, if any, they were wearing. The following are some issues for your consideration:

1. If it is argued that government tests verify the efficacy and injury-reducing benefits of wearing a seat belt, you can argue with some authority that those tests are generally flawed and cannot universally be applied to everybody. First note that many of those tests are performed using anatomical dummies which represent only 50% of the population. Thus, the results of the tests are generally only valid as to 5'7", 165-pound males. Also note that the government tests are performed with the seat belts snugly secured around the dummies' waists so as to get the maximum benefit out of the belts. Since the average person does not use a seat belt in this way, the tests cannot be representative of how seat belt use would have affected the average person, including your client, who wears his or her seat belt less formally.
2. Look at your insured physically. A short client, for example, may sit closer than "normal" to the steering wheel. Thus, a short plaintiff, even if they wore a seat belt, may have sustained damages that an "average" person would not have sustained. Also, consider that your plaintiff may be physically heavier than others. A heavy plaintiff, even if they wore a seat belt, may have pushed the seat belt system past its maximum limits thereby making it less effective, or even ineffective.

If it is alleged, by a police officer or the defense that your insured was not wearing a seat belt when they in fact were, it is certainly possible that the seat belt was simply ineffective. If your client claims to have worn a seat belt, but you are faced with a seat belt defense nonetheless, the first thing you should do is thoroughly inspect the vehicle itself to look for physical signs of seat belt use. You may want to have an expert help you perform this task. Some things to

look for include: stretch marks on the seat belt, scuffing on the belt buckle, and physical deformation of the "D-Ring" which holds the seat belt system in place at its height.

In addition to checking the vehicle for physical signs of seat belt use, and possibly seat belt failure, you may want to find out if the seat belt system in question had what is known as the "Window Shade Device." If it did, then you should explain to the defense counsel, and the jury if necessary, that the "Window Shade Device" can make seat belts less effective to the point that even if a seat belt was worn, the aftermath of an accident makes it look like there was no seat belt use. The "Window Shade Device" is a comfort feature, and arguably a defect, that is included in some seat belt systems that allow the wearer of the seat belt to introduce slack into the belt. This introduction of slack can be accomplished intentionally or accidentally by pulling on the belt. For example, if a driver reaches forward to turn on the air conditioning, the "Window Shade Device" may introduce slack into the belt which never gets re-tightened. If a car passenger is then in an accident with a loosely fitted seat belt, it may appear as if no seat belt was worn at all. Not only is it obvious, but it has also been well documented that slack in a seat belt system seriously compromises the effectiveness of the seat belt as a whole. Thus, if your client's seat belt system had the "Window Shade Device" feature, it is certainly possible that your client was wearing a seat belt, and that it just didn't work.

If your insured was only wearing a "lap belt," which are often the only kinds of belts available in the back seats of cars, some studies show that your client could have actually been more injured because of seat belt use. Indeed, internal damage from the lap belt may be worse than if your client was wearing no seat belt.

## Conclusion

The seat belt defense has emerged as one of the most controversial issues in recent tort law history. Although a clear majority of jurisdictions have rejected the defense, a substantial number of large and influential states, including **New York, California** and **Florida**, have adopted at least some version of it. As the controversial doctrine establishes itself more firmly, there are sure to be new issues relating to its application to subrogation claims. The very fact that you are familiar with the seat belt defense, its applicability in a particular jurisdiction, and some rather cutting-edge arguments with which to diffuse it, will go a long way in bolstering your negotiating strength and your overall subrogation recovery.

For laws or particulars relating to a specific state's seat belt laws or the existence of a seat belt defense, please feel free to contact Gary Wickert at [gwickert@mwl-law.com](mailto:gwickert@mwl-law.com)

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*Gary Wickert is an insurance trial lawyer and is regarded as one of the world's leading experts on insurance subrogation. He is the author of several subrogation books and legal treatises and is a national and international speaker and lecturer on subrogation and motivational topics. Gary is also a published commercial fiction author and a politician in Wisconsin. After 15 years as the youngest managing partner in the history of the 30-lawyer Houston law firm of Hughes, Watters & Askanase, L.L.P., Gary returned to his native Wisconsin in 1998 and co-founded the subrogation firm of Matthiesen, Wickert & Lehrer, S.C. He oversees a National Recovery Program which includes a network of nearly 300 contracted subrogation law firms in all 50 states, Mexico, Canada and the United Kingdom and boasts more than \$500 million in recoveries and credits for more than 250 insurance companies since 1983. Licensed in both Texas and Wisconsin, Gary is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization. He is also certified as a Civil Trial Advocate by the National Board of Trial Advocacy, for whom he has both written and graded product liability questions contained on the NBTA national certification exam taken by trial lawyers around the country. For more than 25 years, Gary has served as an expert witness and insurance consultant on subrogation and insurance related issues and has been consulted by insurance carriers, lawyers, and legislative bodies from several states. He is a licensed arbitrator and has attended more than 750 mediations in more than 30 different states. He is one of only a few lawyers to have ever appeared before the United States Supreme Court on a subrogation issue, and was named as one of Law & Politics and Milwaukee Super Lawyers' magazine's Super Lawyers from 2005 to 2010.*