DON'T OVERLOOK LOSS OF USE

UNDERSTANDING STATE-BY-STATE NUANCES IN THIS LITTLE-RESEARCHED AREA WILL GIVE YOU THE ADVANTAGE

BY ASHTON KIRSCH

Far too often, subrogated auto insurance carriers fail to submit loss-of-use claims or simply waive loss-of-use damages for marginal value while negotiating a third-party auto-property settlement. Many adjusters undervalue loss-of-use claims, viewing these damages as small bargaining chips as opposed to independently sustainable claims.

The skepticism of loss-of-use damages is largely caused by the adverse carrier's blanket denials or refusal to give appropriate weight to loss-of-use claims. Whether $250 in rental-car fees for personal auto claims or $40,000 for a commercial auto downtime claim, these damages should not be ignored.

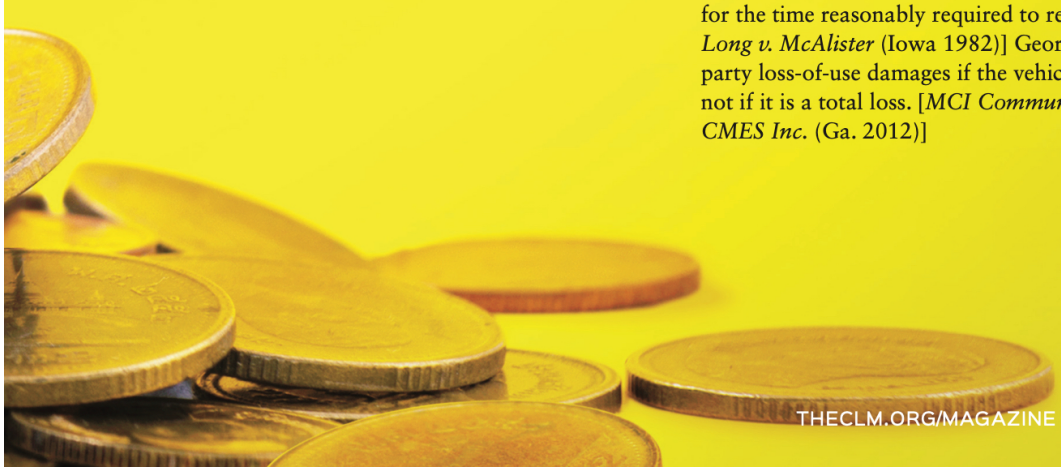
LOSS OF USE 101

Loss of use in general refers to the inability to use a vehicle, living quarters, business facility, or equipment due to damage caused by the negligence of a third party. However, where auto insurance is involved, we are usually talking about vehicle damages caused by a collision, and loss of use would be the amount claimed for the reasonable rental value of a replacement vehicle during the time it takes for a vehicle to be repaired or replaced (or lost profits, in a commercial context).

There are two primary types of loss-of-use claims that we will consider: personal auto loss of use, typically taking the form of rental fees for a replacement vehicle during repairs or replacement; and commercial downtime claims, where the commercial vehicle is out of commission for a repair period, often leading to a damage claim for rental cost or lost profits. Each state has different rules relating to what type of loss-of-use damages may be asserted and in what scenarios a claim can be sustained. (Visit mwl-law.com for a 50-state chart that covers the ability of a vehicle owner, or a subrogated carrier, to seek recovery of damages for third-party loss of use.)

When a third-party tortfeasor causes an accident that results in repairable damages to an insured's vehicle, tort law usually allows the owner of the damaged vehicle to sue the tortfeasor and recover all damages allowable under tort law (note that a few no-fault states do not). Usually this period of time must be "reasonable," meaning the damages will be limited to a period in which it would reasonably take to have the vehicle repaired.

Things get a little more complicated if the vehicle is declared a total loss. Many states allow a plaintiff to prove damages for loss of use of a damaged vehicle by establishing the reasonable rental value of a substitute car for the time reasonably required to repair or replace it. [See *Long v. McAlister* (Iowa 1982)] Georgia allows for third-party loss-of-use damages if the vehicle is repairable, but not if it is a total loss. [*MCI Communications Services v. CMES Inc.* (Ga. 2012)]



Yet other states have flip-flopped on the issue. For example, for many years, Texas law allowed a person whose vehicle was totally destroyed to recover only the value of the lost vehicle, while a person whose vehicle is repaired may also recover the loss of use of the vehicle. In 2016, however, the Texas Supreme Court announced for the first time that owners of vehicles determined to be a total loss could also recover loss-of-use damages. [*J&D Towing LLC v. Am. Alternative Ins. Corp.* (Tex. 2016)]

Third-party claims for loss of use vary and depend greatly on state law. For example, some states will allow loss-of-use claims even when a replacement vehicle is not actually rented. Similarly, states vary on whether loss-of-use claims can be sustained on a non-repairable or total-loss vehicle.

Adding even greater complexity is the fact that some states have not set forth rules, formulas, or calculations to be used in awarding such damages, but simply require that they be causally related to the negligence of the third-party tortfeasor. Some states limit loss-of-use damages by declaring that they cannot exceed the value of the vehicle; while others have no such limit.

WHAT ABOUT PERSONAL AUTO LOSS OF USE?

Personal auto loss-of-use claims are usually very simple. Most states will allow for a recovery of loss of use for a reasonable time when a vehicle is being repaired or replaced. The value of the loss-of-use claim will be based upon the cost of a rental vehicle of like kind and quality.

States vary on whether a replacement vehicle must be obtained and whether this will apply to a totaled vehicle. These damages will often be simple to prove and sustain so long as the repair period was reasonable and the replacement vehicle was similar.

In one recent Texas case, a totaled Toyota 4Runner with over 170,000 miles became the subject of prolonged first-party litigation between the owner and his insurance company over the vehicle's value. [*Balderas-Ramirez v. Felder* (Tex. App. 2017), *rev. denied* (Apr. 6, 2018)] The loss-of-use damages would have been over $120,000, so the court ruled these damages must be "reasonable."

COMMERCIAL AUTO LOSS OF USE

The stakes get much higher and the law becomes more complex when the owner claiming loss-of-use damages to a vehicle is a commercial rental car company, fleet operator, or trucking company. When a commercial vehicle is involved, significant lost profits can result if the vehicle is taken out of service for repairs or replacement. These claims, also referred to as downtime claims, can involve huge damages due to the potential for loss or delay of business. For example, ABC Towing may only have one heavy wrecker, thereby limiting its ability to conduct business when that wrecker is down.

Most, but not all, states have ways that the commercial entity can seek recovery for the actual lost revenue/profit rather than the much lower cost of a replacement vehicle. However, these claims for lost profit will often require additional evidence.

The majority of states operate on the presumption that the appropriate level of damages for loss of use is the cost of a replacement vehicle, requiring additional evidence—such as showing that a replacement vehicle was not reasonably available—to sustain a claim for lost profits. This is similar to the idea of mitigating damages, as the injured party must do all that it can to limit its injury, such as renting a replacement truck in order to continue business operations. Some states, it should be noted, have an outright prohibition on lost-profit damages and will limit recovery to replacement value across the board.

Most states will require that the injured business show that it could not obtain a replacement vehicle during the reasonable period of downtime. Time

and the specific nature of the damaged vehicle will determine the reasonableness of a claim that a replacement vehicle was not available. The courts will look to the amount of time that the vehicle was down and ask whether the injured business should have been able to obtain a replacement during that period.

For example, it may be possible to show that a replacement could not be obtained within three days because the nearest similar replacement was several hundred miles away or required a minimum rental period of several weeks. The court will apply a reasonableness standard to determine whether a reasonable party could have located a replacement vehicle during the period of downtime being claimed.

Additionally, the court will look to the unique nature of the vehicle to determine whether downtime was reasonable. For example, it may take just hours to locate a replacement pick-up truck, but it may be impossible to find a replacement drill rig repair vehicle with custom equipment. The more unique or custom the vehicle, the better a company's chances are when it comes to proving their lost-profit claims.

The states also vary on what evidence is needed to support the amount of damages in lost-profit claims. Some jurisdictions will require actual evidence of rejected business, while others will allow for an assumption of lost profits based on produced accounting records substantiating the loss.

ASSERTING LOST-PROFIT CLAIMS

Given the profound variation between states, it is essential that you know where to find the legal arguments for loss of use so that you appear as an expert to your adversary. It is my experience that many liability claims professionals are uninterested in researching these issues and will have limited knowledge on how loss of use will apply.

Loss-of-use claims are often not taken seriously, so liability claims professionals are likely to continue to deny a claim until they have been provided a detailed statement of law. By asserting a well-researched statement of law supporting your legal theory, you will show your expertise and hopefully convince your adversary that you mean business. Take the time up front to research the law for your jurisdiction and put your best foot forward by including your research in your initial demand letter.

Due to the typical variations in damages on these claims, it is often that the top recoveries will go to the best negotiators. Some important tips are as follows:

1. First impressions are key, so you want to send a bomb-throwing demand letter with an accurate statement of law, while setting an anchor on your demand amount. (By "anchor," I mean demanding that highest amount that you can reasonably justify given the facts of the case.) Also consider adding other elements of damages, such as diminution in value. Through anchoring, you can set higher expectations and appear more reasonable when you reduce to the actual point at which you hope to recover.
2. Befriend your adversary and catch flies with honey, using the relationship to maximize the likelihood of early recovery. Sometimes just talking about a local sports team or family can be enough to create a lasting connection. Adverse adjusters on loss-of-use claims typically will have significant discretion on whether to pay your claim, so relationships are key.
3. Be willing to litigate loss-of-use claims. Few cases are litigated and many liability carriers have decided to deny all loss-of-use claims on a blanket basis. By filing suit, you will show that you are serious and can often convince even the stingiest of carriers to negotiate.

Finally, when in doubt, retain knowledgeable counsel. You should associate with an attorney who specializes in commercial-auto subrogation and has experience handling complex loss-of-use claims. ■

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