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Using Ride Sharing Apps to Set Up Fraudulent Accidents

I. The Proliferation of Staged Accidents.

Fraud is Nothing New.

“Fraud and deceit abound in these days more than in former times.” – Edward Coke

Insurance fraud is anything but a new concern for insurance companies and counsel. A simple online search reveals a litany of articles, investigations and reports of scams and schemes developed by would-be plaintiffs to secure damages based on accidents that were not accidental and injuries that were never sustained. In this context, insurers are often forced to expend time and resources sifting through evidence to determine whether a claim is legitimate or a product of fraud.

States like New Jersey and New York with no-fault statutes, which compel an insurer to provide first-party coverage regardless of liability, are prime targets for fraudulent accidents and claims. The New York’s Department of Financial Services’ Frauds Bureau believed that no-fault insurance fraud accounted for 89% of all health care fraud reports the Bureau received in 2019. E. Krinick & M. Sirignano, *Confluence of Corrupt Interests Can Lead to Massive No-Fault Frauds*, New York Law Journal (Sept. 3, 2021).

Sometimes Finding Fraud is Easy… Sometimes Not.

Insurance fraud can take many forms and arise in any context where someone sees an opening to recover undeserved damages. The case of Alexander Goldinsky is one such example. Mr. Goldinsky explained to medical personnel, as he was transported to the hospital, that he had fallen and injured himself. He claimed a variety of symptoms including headaches, stuttering speech and painful “frozen spasm sensations.” A surveillance video showed Mr. Goldinsky fill a cup with ice, throw the ice on the floor, and then lay on top of it. Mr. Goldinsky was subsequently sentenced to two years’ probation. *State v. Goldinsky*, 2021 N.J. Super. Unpub. Lexis 622 (App. Div. 2021).

While it may be commonplace to think of insurance fraud in the context of the lone fraudster tripped up by his or her own scheme, the reality is that more often, establishing the existence of fraud requires a prolonged investigation and resulting expense as insurers confront schemes that can run the gamut of the staged slip and fall to wide-ranging and multi-party conspiracies. The case of Anthony Rose is an example of the latter. In 2019, Mr. Rose, and 26 other individuals, were indicted on a years-long, multi-million-dollar no-fault scheme. It was alleged that Rose, and his cohorts, bribed 911 operators, medical personnel, and police officers for the confidential information of tens of thousands of individuals involved in motor vehicle accidents. Rose would then contact these individuals and lie to them in an effort to steer them to clinics and lawyers who would then pay kickbacks for the referrals. *United States v. Rose*, No. l:19-cr-00789-PGG (S.D.N.Y.); *see also,* E. Krinick & M. Sirignano, *Confluence of Corrupt Interests Can Lead to Massive No-Fault Frauds*, New York Law Journal (Sept. 3, 2021).

Prior to trial one defendant, Jelani Wray, pled guilty and was later sentenced to 7 years in prison and 3 years supervised release. The disposition of the case against the remaining defendants is unknown.

II. The Evolution of Staged Car Accidents.

The staged car accident remains a go-to scenario for would-be plaintiffs and claimants to set up a fake claim for damages. The private car vs. private car accident is the typical set up one thinks of when considering a staged accident, however, staged accidents under these circumstances can be easier to detect. Investigating the parties can reveal connections that render the accident suspect and too coincidental to be considered legitimate. The other, more practical issue, is that the parties are limited to seeking insurance coverage from either their own insurer or their co-conspirator's insurer, potentially impacting their ability to maintain or procure coverage in the future.

More sophisticated parties looking to set up a fraudulent accident bring in a third party by renting a vehicle or truck. By doing so, the perpetrators, arguably, add a layer of separation between each other bolstering, at least, the appearance of legitimacy. Equally important, the conspirators create an independent line of recovery for insurance proceeds made available under the applicable rental agreement, the payment of which would not impact them personally. The renter can openly admit he or she negligently caused the accident, while the "victim" seeks immediate treatment to facilitate or leverage a quick settlement offer or tender of available coverage. While the Graves Amendment, a federal statute, abrogates any potential vicarious liability for companies like Ryder or Enterprise as the owner of the rented vehicle, the goal is not to secure direct payment from the owner but rather, simply pursue the coverage available to the permissive renter/driver of the rented vehicle. 49 U.S.C. § 30106.

The vehicle owner/insurer is stuck trying to determine whether the accident is legitimate and if not, whether it can produce enough evidence to sustain a denial based on fraud. It is easy to imagine the financial impact a small group of co-conspirators could have by setting up a series of staged accidents, even if only on a limited scale. Presumably, some percentage of the accidents would be viewed as legitimate while others may not be, forcing the insurer to incur expenses to determine the validity of remaining accidents and claimed injuries – all time and resources lost to fraud.

Ridesharing apps and services are now an accepted means of travel or commuting. The raised hand and whistle have been replaced by countless riders staring at their phone as they watch their car drive to them in real time. The convenience of these apps and services, however, has created a further avenue for conspirators to stage an accident.

This scheme still requires at least two individuals or teams, the "renter" and the "rider." The renter rents a truck or vehicle. The rider summons a car on a rideshare service like Uber or Lyft. Through tracking apps or simply text messages, the renter will follow the rider. Since the rideshare apps show the route the Uber or Lyft driver will take, the rider can share their expected route, along with key intersections and cross streets, with the renter. Eventually, the renter reaches the rider and comes into contact with the Uber or Lyft car.

The seemingly randomness of how Uber and Lyft drivers are assigned creates an element of plausible deniability on the part of the conspirators. In addition, instead of being limited to one avenue of recovery where a rented car hits a private car, now a plaintiff has two avenues of recovery by alleging that both the driver of the rented vehicle and the Uber or Lyft driver were negligent.

This scenario creates a series of issues for defendants and insurers who may owe coverage. Initially, this set up presents a stronger impression of legitimacy than the scenarios discussed above. In this instance, there is, at least, an appearance of complete randomness to the accident. The renter can claim he or she was simply traveling to his or her destination when the accident occurred, while the rider claims to be a pure victim. The Uber or Lyft driver may end up being an unwitting witness substantiating the existence of an "accident."

We must acknowledge this scenario creates the potential to injure the individual who is, likely, the only innocent victim in these circumstances – the Uber or Lyft driver. From the conspirators' view, there is no need to involve an Uber or Lyft driver in the scam. The more random the assignment of the driver appears, the more legitimate the accident looks. For the insurer, it must now evaluate coverage for legitimate injuries sustained by a driver unlucky enough to be caught in this staged accident.

Modern apps can not only facilitate these scams but can also make investigating whether an accident was staged exponentially harder. Apps such as WhatsApp and Signal allow users to send end-to-end encrypted texts, voice and video messages. Interestingly, WhatsApp is set to change its security features and allow users to delete messages sent nearly 2 days prior. This means the Uber/Lyft rider in our scenario can delete the messages sent to the individual driving the rented vehicle thereby removing the messages from not only their phone but also the renter's phone. WhatsApp and Signal do not keep communication histories on its servers and will not be able to provide any data relating to their subscribers' communications via a legal request.

III. There is Evidence of Fraud… Now What?

As with other cases involving fraud, preemptive and proactive actions on the part of a defendant or insurer are key. Video or dashboard cams on Uber or Lyft vehicles are extremely advantageous, however some jurisdictions require that riders receive notice that they are being

recorded and a potential rider may simply cancel a car until they are assigned a driver without cameras set up.

Airbag Control Modules (ACM) can provide key information regarding an accident. Immediately downloading and preserving this information can be useful in assessing the veracity of a parties' description of an accident. Insurers should pursue this data from all available vehicles especially where there is a possibility a vehicle could be deemed totaled and discarded. As valuable as this information may be, there are times where it is not available. An element unique to staged accidents is that the parties want the accident to occur, but without actually causing injury. There are instances where an impact could be so minimal that there is no recorded data demonstrating the impact. In such circumstances, it is the absence of data that may, ultimately, prove insightful.

Certainly, social media searches are a commonplace and an invaluable tool in these scenarios. Social media scrubs coupled with ISO claim searches can help an insurer find links between individuals involved in the accident. Again, to the extent it can be established that the parties involved have a family relationship or other established connection, it could render the occurrence of the accident so coincidental that it cannot be seen as legitimate.

Insurers should take the opportunity to conduct an examination under oath once notice of a claim is received. Conducting an examination under oath provides an opportunity to take a measure of an insured and question them about the circumstances underlying the accident. An examination under oath does not require surveillance video or "Perry Mason moment" to be beneficial. At times, the mere fact someone is subject to questioning under oath is enough to obtain contradictory statements, connections between the parties or evidence indicating that the accident is far from legitimate. There is value in seeing a witness struggle to answer straightforward questions about how an accident occurred, or who was in the car at the time, when the goal of the examination is to ascertain if an accident was, in fact, an accident.

Insurers or investigators should inspect, photograph and video the area where the accident occurred. Too often, the first independent party to view the scene is defense counsel years after the incident and, sometimes, on the eve of depositions. Obtaining pictures and video as close in time as possible places a defendant or insurer in a stronger position to compare the claimant's version with the physical structure of the scene including where stop signs are located; whether there is a light controlling the turning lane; whether the turning arrow is on a delay; or whether there is any existing structure or landscaping impeding the view of an intersection.

In the event an insurer has a basis to conclude that the accident or the injuries are fraudulent, that insurer still faces an uphill battle in proving the existence of fraud. An insurer, in an effort to safeguard its position, can send litigation hold letters to claimants identifying information that must be preserved including their phones or other smart devices in their possession at the time of the accident. In the event a claimant fails to preserve this information, the insurer may be entitled to a spoliation instruction in the event the dispute is ever tried. However, these instructions are given infrequently as the intent to destroy discoverable evidence is required. *See*, *Cox v. Swift Transp. Co. of Ariz., LLC*, 2019 U.S. Dist. Lexis 131061 (N.D. Okla. 2019).

Federal Rule of Civil Procedure 34 allows a party to demand production of electronically stored information ("ESI"), including text messages and other data that is stored on a cell phone. So

long as a request is properly made, courts will order the production of a party's cell phone for inspection and copying by the requesting party. Many state courts also allow for such inspection. *See*, *RG Abrams Inc. v. Law Offices of C.R. Abrams*, 2022 U.S. Dist. Lexis 140943 (Cal. Central. 2022). Further, a party's failure to preserve the contents of his or her cell phone for inspection may lead to an adverse jury instruction at the time of trial. *See*, *Goins v. Advanced Disposal Servs. Gulf Cost, LLC*, 33 So. 3d 644 (Ala. 2021) (where a plaintiff deleted the content of his cell phone prior to producing it for inspection the jury was instructed to infer the plaintiff's contributory negligence).

Subpoenas can be served on companies that operate the apps discussed above, but doing so may produce limited information or even compliance. For example, while it has been published that WhatsApp will respond to subpoenas and produce a users' address book, the actual content of the messages sent by the user is not disclosed.

A final consideration is filing a declaratory judgment action. As with any litigation, there is always a series of factors to consider prior to filing, including whether the claimants/defendants would be entitled to fees. For example, in New York, where an insurer affirmatively commences a declaratory judgment action and is unsuccessful, the insurer owes the insured's fees incurred in the coverage action. That risk aside, a coverage action gives the insurer access to wide-ranging discovery, including information from a smart device, which may not be obtainable without the strictures of litigation.

A defendant in a coverage action will have the same opportunity to seek depositions and evidence. Preemptively filing a coverage action too soon may open the insurer up to the discovery of information it is not ready to disclose and undermine its ability to litigate coverage successfully, especially given the high evidentiary burden to prove fraud. These, and many other circumstances, must be considered on a case-by-case basis to determine the viability of a coverage action – with the resolution of this question undoubtedly impacted by the substantive evidence collected and pursued immediately after the accident.