Ep. 6: Automotive and Trucking Accidents in the U.S. with Foreign Defendants: What Insurers Need to Know

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Host: Welcome to RumbergerKirk's Legally Qualified podcast, where we answer important questions facing businesses today and discuss hot topics in the legal industry, from employment law to commercial litigation, product liability, and everything in between. We've got it covered.

Mike Forte: Hello. This is Mike Forte. I am a partner in the Tampa office of RumbergerKirk. My firm has offices throughout the state of Florida and also one in Birmingham, Alabama. I practice in the areas of trucking, casualty defense, which is car accident defense, product liability defense. I'm here today speaking with Vince Saccomando, who is also an attorney. Vince, why don't you tell us about your firm, where you're located, and your practice areas?

Vince Saccomando: Sure, Mike. Well, thank you for having me on. I look forward to seeing you in person one of these days. It's been over a year. I'm located in Buffalo, New York, with the firm of Barclay Damon. We have offices throughout Upstate New York and also in New York City, Boston, and New Haven, Connecticut. I practice really the same type of law you do, which is insurance defense, dealing with trucking accidents, automobile accidents, products liability, and various other types of scenarios where people and companies find themselves being sued for personal injury cases.

I have to admit, though, that there's one big difference between us, Mike, which is you hail from the home of the Stanley Cup champion Tampa Bay Lightning, and I hail from the home of the first overall draft pick Buffalo Sabres. So I won't hold that against you. Maybe at some point we'll switch roles there, but probably not for a while.

Mike Forte: Hey, that's okay. And it was two years in a row. Just saying. But that's all right. But, Vince, thank you for joining me today and talking with me. We're talking today about US lawsuits, an overview of what they are, some main issues that we see in US lawsuits. This discussion is particularly pertinent to Canadian insurance companies who have their insureds sued in Florida, but a lot of this discussion also is going to apply to US insurance companies who are based here in the States, and their insureds are sued here in the States. Vince, why don't you start first? Just before we get into really the meat and potatoes of it, what are some issues that you see in defending Canadian clients? What are some concerns that the Canadians have?

Vince Saccomando: I think – you know, no one likes being sued, right, whether it's an individual or a company, especially people that have or companies that have not been through the process before. You know, it's their first time. You know, it's bad enough to be sued. It's even worse to be sued in a foreign country, and, you know, Canadians certainly see a lot about the litigiousness in the US, large verdicts, incessant attorney advertising that they see on US TV channels. I've had Canadian clients worry about whether they were going to be able to cross the border because they'd been sued. Obviously, that's not an issue. They're certainly going to be allowed to cross the border even though they've been sued.

So I think one thing that's really helpful is we represent so many Canadians, and I think that tends to make Canadian clients feel more comfortable. You know, we have a bit of knowledge about the Canadian legal system. It helps us compare and contrast those systems, and I think getting the client at least as comfortable under the scenario as can be when the case starts out I think is important to an effective defense.

Mike Forte: Well, let's start at the beginning. The first is what court are we going to find ourselves in? In the US, there are 50 states, and each state has its own state court system, but in addition to that, there's a parallel federal court system throughout the country. What are some differences between in general the state court system and the federal court system that you've seen?

Vince Saccomando: Right. Well, most of the time we want to be in federal court if we can be, and most of the time when we have Canadian defendants, we are able to move or what's actually called remove the case to federal court. And the major differences that we see are that the jury pool in federal courts are typically larger. That's beneficial to the defense, and most cases are sued in a metropolitan area: you know, Buffalo, Rochester, Tampa, Miami. And if they're in state court, there's a limited geographic scope that they pull jurors from, and jurors in metropolitan areas tend to be more plaintiff oriented. Jurors from more rural areas tend to be a bit less plaintiff oriented, a little more defense oriented generally. And the federal court system allows us to expand the jury pool. The court may still be in Buffalo or be in Rochester, but it will pull jurors from outlining more rural counties. That's one of the major benefits we see. What other benefits do you see, Mike?

Mike Forte: Yes, same here in Florida. Also, in Florida and around the country, actually, I imagine, but in Florida, in state court deadlines are – they are there. They are in place. In federal court, deadlines tend to be adhered to more strictly. Also, requirements for experts, for example, in federal court are essentially, you know, do or die if you don't follow the exact letter of what the rule requires. You're going to be out of luck, and that tends to favor defendants. Also, here in Florida, because the defendants like federal court generally over state court, a lot of plaintiff lawyers are averse to it, so plaintiff lawyers are more comfortable in state court. So for that reason as well, we try to here remove cases when we can too.

Vince Saccomando: You know, what I think is if the plaintiff's attorneys wanted to be in federal court, they would've sued it in federal court to begin with, and I've only seen one occasion

in 27 years of practice where a plaintiff's attorney sued a personal injury case in federal court. So what does that tell you?

Mike Forte: Yes, I've seen maybe two. Correct. Yes, yes. Well, once we are in court, one of the main things that we look at is who's at fault? Who's at fault for whatever is being sued for? Obviously, the plaintiff thinks that the defendant is at fault, but here in Florida, we are able to argue that the plaintiff is at fault as well. We call it here comparative fault, and we can ask the jury to assign up to 100% fault to the plaintiff. We don't always do that. It depends on the facts of the case, of course, but the jury is free to assign up to 100% to the plaintiff, and so that means even if there is damages, if it's 100% the fault of the plaintiff, the defendant does not have to pay any. Is there a similar system there in New York?

Vince Saccomando: Yes, it's really exactly the same. We have – we call it pure comparative fault or pure comparative negligence. You know, there used to be back in the distant past what they called contributory negligence, which was a bar – I think it's from the – back to the 1970s where, I believe, if the defendant was – if the plaintiff, rather, was more than 50% liable, I think they recovered nothing, but that's way before my time, and this is thought to be a more fair system. Everybody's responsible for their share no matter how large or small it is.

Mike Forte: Well, after liability is sorted out, the next main component, of course, is damages. I'm going to list out the heads of damages or types of damages, and then I thought we could go through each one and touch on each one individually. But the types or heads of damages are past and future medicals; past lost wages and loss of future earning capacity; past and future pain and suffering; loss of consortium, which most often it is a spouse suing because their husband or wife was involved in the accident and injured, and that injury affected the marital relationship; and then, lastly, punitive damages, which are pretty uncommon, but we'll touch on those as well.

Starting with number one, the past and future medicals. Here in Florida, medicals are very high. Some doctors, what they will do is charge what we consider to be excessive fees for their treatment, tell the plaintiff, "Hey, don't worry. I'm going to charge you all this money, but I won't collect against you until after you get a settlement or after a trial." So what happens is going through the trial or to a jury or in negotiations, the medical bills look very high, but after the settlement or after the trial, the plaintiff goes back to the doctor and ends up paying only a very small fraction of what was originally charged.

That's a problem. It makes cases and injuries look bigger than what they really are. One way that we attack that situation is through cross-exam. We talk to the plaintiff on cross-exam about that arrangement. Also the doctor. We will cross-exam the doctor about that arrangement. And sometimes we will also have our own expert testify about what a reasonable and customary charge is for the types of services that were rendered. What issues on medicals do you see there in New York, Vince?

Vince Saccomando: It's similar, expect we don't have the letters of protection that you're discussing, but what we do have is the plaintiffs will have experts prepare life care plans and try to say, you know, that it'll cost hundreds of thousands of dollars for future treatment, future surgeries, you know, much of which is questionable, and then those numbers are exaggerated. They're essentially like a private pay kind of scenario rather than what Medicaid would pay or private insurance would pay, and if the plaintiff got a recovery, they can certainly purchase private insurance, or they may be on Medicaid.

So recently I had an IME doctor give us what the actual numbers where to show that the plaintiff's life care plan was greatly exaggerated, but that's where they go with it in New York. You know, whatever they can – I guess it's an old-fashioned term, but put on the blackboard in terms of any types of economic damages, medical or lost wages, will presumably increase the value of the pain and suffering as well and try to get the plaintiff the largest number they can get.

Mike Forte: For past lost wages and loss of future earning capacity here in Florida, the past lost wages are usually pretty easy to figure out. You just look at the time off work. We attack that by in the deposition asking why the plaintiff took off all that work. We get employment records confirming what they're saying is true in terms of missed work, but a lot of times the plaintiff will say they can't work anymore, and when you look at the medical records, the doctors have never said that. So that's an important point in Florida that we always look for is what do the doctors actually say? Maybe the doctor will say, "Look, this patient should not lift over 20 pounds," but there are a lot of jobs the plaintiff could do in reality that don't require lifting 20 pounds. So we attack it that way. We also will hire when needed a vocational rehabilitation expert. They'll at least consult with us on claims like that. Do you hire a lot of rehab experts up in New York?

Vince Saccomando: Yes, we do when there's a future lost wage claim, and they're often able to get the plaintiff into a job that is comparable in terms of pay or if not comparable, at least something that would reduce the potential future lost wage claim pretty significantly and maybe do a good job with testing the plaintiffs and interviewing the plaintiffs and looking at the prior employment records.

You know, we also have economists usually as a consultant, usually not somebody we disclose but to examine the economic numbers from the plaintiff and look at the issue of retirement age, which sometimes is really inflated. They'll carry somebody out to working until age 70 or 72. Look at the inflation rate, and, you know, it's important to get those numbers, those future lost wage numbers, down as much as possible. Even if your IME doctor has taken the position that the plaintiff has no disability at all or if the – taken a position that the injuries are not related to the accident at all, you know, it's often a fallback position with the defense of the lost wages.

Mike Forte: You know, I mentioned earlier that down here medical expenses are usually quite large in Florida, but what is a lot of times larger than that component of damage is

the past and future pain and suffering. And the reason for that is in Florida there is no exact standard or formula for measuring pain and suffering.

The jury instruction says essentially that the jury can determine what the pain and suffering value should be just based on all the evidence that they've heard, and unlike the medical specials where they're at least – although they're inflated, there are at least actual numbers you can look at. For pain and suffering, there are no numbers, so it's – going into trial, it can be a question mark going in. Of course, we know what prior juries have awarded on similar facts, so we do have an estimate, but there is no cap on them at trial. So that is potentially concerning go in. Are there any caps on pain and suffering in New York?

Vince Saccomando: No, there is no specific cap. We have a standard that the courts will apply. So after trial, either the plaintiff can move for – arguing that there was an inadequate verdict, which of course, defendants, we love, or the defendant can move to set aside a verdict as excessive. And the standard that's used is whether the award deviates materially from what would be considered reasonable compensation, and those are very tough motions to win. It really has to be out of whack with precedent from other cases, and in those instances, the court will often give the moving party the option of either agreeing to a specific lower number that the court would feel is the maximum most reasonable number or a situation where the party could simply retry the case. But they're few and far between. Usually, they really don't like to – judges do not like to set aside jury awards**.**

Mike Forte: The procedure here in Florida is very similar to that, and it's also very difficult here in Florida as well to win on a motion like that. Next is loss of consortium. In Florida, it's not a really a very big damage component. Is it a big damage component up there in New York?

Vince Saccomando: Not really, unless there's a truly severe injury for somebody. I mean, if a spouse is paralyzed, you know, that certainly is going to be a much bigger issue, but most of the time, you'll have an economist talk about the value of the spouse's contribution

to the household and how they can't cook and they can't clean and they can't drive the kids around or whatever, and they try to come up with a value for that. And then, of course, there's always the dreaded sex question that gets asked in the deposition. That's part of it too, but we don't really see that as a big component in most cases. In fact, I've – there's even cases where the – I noticed that there could've been a loss of consortium claim, and we don't see it. And I always figure there must be something behind that. There's, you know, some – not the best relationship between the spouses or some other issue that they just don't even feel it's worth pursuing.

Mike Forte: That's interesting because I see that too in Florida where the plaintiff, who is allegedly injured, was married, but the spouse does not bring a consortium claim. And I figure the same as you, that probably they looked at it, did a calculation that the amount they would have to disclose and open up about their private life is not going to be worth the likely reward for doing that in terms of damages.

The last element that we have also is not a huge component here in Florida but punitive damages. These are pretty rare, I would say, in trucking or casualty cases. There can be punitives if the defendant driver was inebriated, if there was a DUI, for example, or potentially if the driver was texting on a phone, which is now illegal in Florida. If it's something like that, there could be – so not necessarily always, but there could be punitive damages. Other than that, it really has to be for some type of other intentional conduct. What about New York? What kind of standard is there for punitives?

Vince Saccomando: It's very similar. It really borders on intentional or what they call reckless indifference, depraved type of acts. We don't really see it that much in your standard automobile or even trucking case in terms of the claims. If there are claims, we usually will have a motion to dismiss, which, you know, often we're able to get those claims dismissed, but it's – it'd be an unusual case, or that could be a big part of it.

Mike Forte: When you represent or even when you maybe don't represent, but when there are two or more defendants in New York, is there joint and several liability?

Vince Saccomando: There is. And, you know, by joint and several liability, what we mean is when there's a verdict, the plaintiff can collect either defendant as long – you know, say there's two defendants. They're both held liable. One is held 20% liable. The other is 80%. The plaintiff can collect everything from the defendant that's held 20% liable, and if there's available coverage from the defendant with 80%, they can – the 20% defendant can try to collect that. If there's no issue with coverage or assets, it doesn't become a problem. It's only a problem when one of the defendants does not have enough money either through insurance or assets to satisfy the verdict.

There is a limit on the joint and several liability, which is for pain and suffering. If the individual is liable for 50% or less of the verdict, then in terms of pain and suffering they're only going to be responsible for their portion. So if they're found 40% liable, they will only be responsible for 40% of the pain and suffering but everything for the economic damages, like wages or medical expenses. But there is one big exception that would certainly apply to the conversation we're having, which is the exception is for motor vehicle accidents. There is full joint and several liability for motor vehicle accidents.

Mike Forte: That's interesting. Florida used to have joint liability. It was abolished about 15 years ago or so, so now at a trial, whatever the percentage the jury finds fault to a defendant, that is what they would pay and nothing more, so they've done away with that. But before that, we had a system that was pretty similar to the one that you described. So, Vince, we've gone over the life of a US lawsuit. We've touched on some of the high points, highlights of cases, and some of the issues that come up.

I want to talk now about some of the tools for resolving cases, for shutting cases down. We love going to trial, but sometimes that is not what maybe is in the client's best interest, so we do whatever is in the client's best interest. In terms of shutting down a case, here in Florida mediation is very common, and in fact, it's court ordered

at some point during the life of a case. It's pretty effective. Over half of the cases probably will settle at mediation, and another 25% or so will settle after mediation if we impasse. Does New York use mediation very often?

Vince Saccomando: We do both in the court setting—sometimes mandatory, sometimes voluntary—and also in private mediations. You know, there's companies set up with private attorneys, and that's more so in the New York City area. And then upstate, we have a number of attorneys who devote a large portion of their practice doing mediations. In fact, I've found that compared to, say, 20 years ago, it seems that less attorneys are willing to negotiate directly and are really ready to go straight to mediation. Have you found that as well, it's harder to get people to simply – other – the plaintiff's attorneys just to engage in a direct back and forth negotiation with you without a mediator?

Mike Forte: Yes, it's the exact same here. The one exception is if it is a small-value claim where we know – both sides acknowledge that the claim is worth less than six figures. There I have had some success in negotiating informally over the found because the plaintiff doesn't want to pay their share of the mediator fee. Here, the mediator fee is borne equally by both parties, so – and it could be a couple thousand dollars for each side potentially, so the plaintiff in a small case would rather pocket that money and not have to pay it and get a decent settlement, they hope. But otherwise, anything other than that, we are going to mediation most likely, and here it is almost exclusively private mediators. We do have some court mediations, but most of the mediators are attorneys who used to practice in the same area that people know with a good reputation and who both sides trust. We agree on the person, and then we got to mediate, and it's usually pretty successful.

But when it's not, down here in Florida, we have something called a proposal for settlement. It's a somewhat useful tool where if we can't resolve at a mediation, we serve this proposal, and for whatever dollar amount we want, then if we go to trial and if our proposal ends up being at least 25% higher than what the plaintiff gets at a judgment, then the plaintiff has to pay our attorneys' fees from the date that we

served that proposal through the trial. So what that does is once we serve a proposal, it puts pressure on the plaintiff to really look hard at what a reasonable number will be because if the plaintiff's wrong, they'll have to pay our attorneys' fees, and the attorneys' fees could wipe out any judgment that the plaintiff would be awarded against us at trial. Is there anything like that in New York?

Vince Saccomando: There is something that's similar in concept, but it doesn't really have a lot of teeth in it. It really doesn't do very much. It's not going to force the plaintiff to settle a case. It's unfortunate. I know a lot of other states have something more similar to Florida where – at least that's my impression that it really is meaningful, but it's just not meaningful in New York, unfortunately.

Mike Forte: And in federal court, the court does have something somewhat similar to this under the federal rules, but it applies only to cost, so it is not quite as effective as the full Florida proposal. But I think – the way I run my cases is yes, we want to shut down the case at the best time to get the best result for the client. In the meantime, we always prepare as if we're headed toward a trial, but we don't spin wheels. We figure out what we need to try the case and to get leverage to shut it down, and we do that without wasting time and money. And sometimes the best interest of the client is to go to trial, and we're ready to do that. And you're a trial law firm as well, Vince, right?

Vince Saccomando: Right. We have a general practice throughout the firm, but in each office, we have insurance defense litigators like myself as well.

Mike Forte: Um-hum [affirmative]. Vince, one issue that comes up a lot in casualty cases, car accident cases is the concept of no fault. Here in Florida, in those types of cases, a plaintiff cannot get any pain and suffering damages, so that big component of damages are not available to a plaintiff unless, essentially, the plaintiff has a permanent injury from that accident. So unless they can show some type of permanency – and there are a few different definitions of that, but for simplification,

just a permanent injury. If they can't show that, they cannot get pain and suffering. Is there a no-fault standard in New York as well?

Vince Saccomando: There is. It's called the serious injury threshold, and the plaintiff needs to establish that they've sustained a serious injury in order to be able to sustain a personal injury case arising from a motor vehicle accident. We'll sometimes have motions for summary judgment either by the plaintiff saying they have sustained serious injury or by the defense saying they haven't, but typically the plaintiff's attorneys these days, they make sure that they can cross their t's and dot their i's and get the doctor to say what they need to say to establish the serious injury, even as much as some doctors having forms that will establish – that are – you know, clearly were prepared by an attorney to establish the serious injury, but what we have is something like a significant disfigurement, a fracture, the consequence of limitation of the use of a significant body, organ, or member.

What we don't have is as much – sounds like we don't have as much emphasis on the permanency, you know, the one definition, which is the easiest, I suppose, for the plaintiff to try to satisfy is a real mouthful. I'll kind of speed read it because it's just so amazing to me that they came up with this but "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the first 180 days immediately following the occurrence of the injury or impairment."

So I think we can tell that was probably written by a lawyer and maybe a plaintiff's lawyer {laughs} because that's pretty subjective, and we don't see a lot of cases getting thrown out on the no-fault threshold these days. Plaintiff's attorneys try not to sue those types of cases.

Mike Forte: The same is true here, although even if the plaintiff has a doctor saying there is, in Florida, a permanent injury, the jury is still free to look at that and, of course, disregard it if they want, if they have some basis to disregard it, so it is not a slam

dunk. But like in New York, the plaintiff's lawyers here will get a doctor lined up to say yes, it was essentially permanent from our accident or our event.

Vince Saccomando: Yes. We'll see – with that 90 out of 180 day rule, we'll see plaintiffs who just happen to go back to work, you know, at 100 days instead of the 90 days, and that's their basis for trying to satisfy that definition of serious injury.

Mike Forte: Right. Well, Vince, to wrap this up, what are some words of wisdom that you have for our listeners to leave them with?

Vince Saccomando: Well, I really think one thing we haven't, you know, really touched upon is investigation, and that is just – it's so important. It can be the make or break of a case, getting the witness statements early before the witnesses forget, you know, downloading the plaintiff's Facebook page. You know, whenever there's a possibility of a claim coming in, I think it's important to do that, even if it's hiring a US investigator to take witness statements or, you know, get the accident reports and follow up on that kind of thing. Trying to play catch-up – you know, we have a three-year statute of limitations. So something that's filed close to the deadline, permanent accident three years earlier, and then trying to play catch-up on the investigation can be very difficult.

Mike Forte: Yes, that's very true. And down here in Florida, for example, 911 calls could be a very useful source of even finding additional witnesses to an accident, and law enforcement don't keep them forever. They keep them for only a certain number of months, so if you wait too long to request those, they could be gone. But getting a jump on the investigation early is important. And in terms of social media – you mentioned Facebook. It's very common these days for plaintiffs to have social media accounts and to even post about the accident. I assume plaintiff lawyers tell their clients, "Do not post this stuff," but plaintiffs still do it, and they still make their pages public, so it is still out there. And you want to get that soon as we can. In the off chance they do shut it down later on, you want to get what they have on there early as well.

Well, Vince, thank you for sharing your experiences with us today and talking with us. I appreciate it.

Vince Saccomando: Well, thank you for having me.

Mike Forte: You're welcome. And special thanks to our listeners. We hope you found this episode of Legally Qualified to be informative and insightful. If you have any questions or would like to reach out to us, please email info@rumberger.com.

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