LANGDON & EMISON

Newsletter

Summer 2022

What's Inside

L&E Litigating Fiduciary Liability Claims

A fiduciary is a person or organization that acts on behalf of another person or persons and who must act in the best interests of those person or persons. When fiduciaries use powers over probate or trust assets for personal gain or otherwise fails to properly manage those assets, people might be at a loss to figure out their options for how to obtain what they believe is rightfully theirs. Fiduciaries have a duty to avoid any conflicts of interest between themselves and their principals or between the principals and any of the fiduciary's own clients, but often that is not the case.

Trustees, executors, directors, and officers are fiduciaries. Breaches of the fiduciary duties owed occur when a fiduciary engages in self-dealing, buys or sells property wherein there is a conflict of interest, fails to prudently invest assets, or damages the property being held by the fiduciary.

For more information on fiduciary duty cases nationwide, turn to p. 12

A breach of fiduciary duty can take many forms. Some of these require examination of fiduciary accounts from experienced counselors who are familiar with this type of investigation and examination. Fiduciary relationships can include but are not limited to:

- Executors of estates and heirs
- Trustees and beneficiaries
- Directors/Officers and shareholders

(Continued on p. 12)

Crash Sensor Defects and Their Roles in Wrecks

In our practice, we have seen that today's automobiles can sometimes have crash sensors that fail to properly deploy airbags and lock seatbelts in certain types of wrecks. These sensor defects can lead to catastrophic injuries.

> Auto manufacturers have known for years that adding fully functioning sensors would help decrease serious injuries, and wouldn't be prohibitively expensive – but they still refuse to do it.

Vehicle airbags and seatbelt locking systems are dependent on sensors and devices called diagnostic modules that determine when a crash has happened thus signaling activation of the airbags and seatbelt locks. The sensors detect the impact and supply data to the sensing diagnostic module that has been set to react to certain data by sending out signals to inflate the airbags and/or lock the seatbelts. These mechanisms are in place to protect the vehicle occupants from injury, but when they don't act as designed, the injuries can be severe.

What happens when crash sensors don't operate correctly

The diagnostic module calibration essentially instructs the vehicle to trigger airbags and seatbelts in certain circumstances and not to do so in other circumstances; for example, by triggering airbags in a high-speed frontal impact but not in a low-speed frontal impact. For instance it has been observed in some GM models that crash sensors are programmed to allow airbags and seatbelt locks to operate only in near-instantaneous crashes and not in wrecks that take a longer amount of time to happen. This leads to casualties when the auto accident takes a longer time to occur.

National Highway Traffic and Safety Administration data suggests that nearly 1,300 people were either killed or injured in front-end collisions involving GM vehicles in which the airbags did not activate. A recent class action lawsuit against GM also alleges that concerns about this short time limit were raised by the engineers who actually designed and developed the sensing diagnostic module at least as early as 1999, and that General Motors was aware of these concerns. (*Continued p. 14*)

Truck Accident Statistics

68%
of truck wreck fatalities are passenger vehicle occupants

52% increase in trucking accidents since 2009

11%
of motor vehicle wreck fatalities are in crashes with semi-trucks

5,000+
casualties per year

40 tons
average tractor trailer weight

500,000
estimated collisions with trucks each year in the US

Data source: NHTSA, FARS, IIHS

Baby Formula Linked to Neonatal Medical Condition in Premature Babies

Similac and Enfamil infant formula products have been the subject of recent lawsuits for families whose premature babies suffered or passed away from necrotizing enterocolitis (NEC) after taking one of these formulas.

Recent media outlets have drawn attention to the fact that medical research has linked cow milk-based infant formulas like Similac and Enfamil to NEC, which is a dangerous neonatal medical condition. The manufacturers of these products did not warn families about this danger.

Effects of NEC can vary widely. Some infants have hardly any outward signs, while for others it is extremely serious and life-threatening. If the infection is not stopped quickly enough it may leave dead tissue in the baby's intestines. If NEC results in surgical removal of intestinal tissue, it can cause short bowel syndrome and impact development and growth.

Global companies, global consequences

Similac is manufactured and sold by Abbott Laboratories Inc., a mammoth medical device and health care product company. Mead Johnson Nutrition Company makes Enfamil, and while not as large of a global footprint as the makers of Similac, it is still a large company with millions in sales every year.

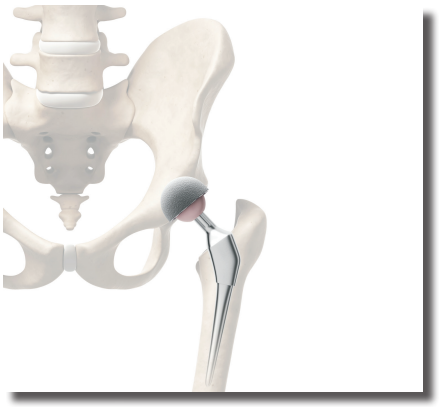
In spite of the above data, Mead and Abbott have continued to present their products to the public as safe, and have not added a warning that might deter sales of these popular products.

Lawsuits being filed allege that the formula makers had a duty to warn about the risks of NEC and their baby formula products, but deliberately failed to include any such warning while continuing to market their products as safe.

NEC only occurs in 1 out of every 2,000 full-term live births in the U.S., but in 10% of all premature babies.

Exactech® Hip, Knee, and Ankle Implant Recalled

The U.S. Food and Drug Administration (FDA) has announced a recall of certain Exactech® hip, knee, and ankle replacements due to a risk of plastic component failure that could lead to health risks and require corrective revision surgery.



Defective packaging made the affected Exactech® devices vulnerable to oxidation that can lead to component failure, tissue damage and bone loss. Recent reports in medical literature have found that affected plastic liners are often prone to a high rate of failure after only a few years of implantation. The FDA reported several complications associated with the recalled Exactech® implants, and L&E is currently accepting cases nationwide.

Theories of Liability with Collision Avoidance Technology (CAT) Failure

According to the National Safety Council, in 2019 more than 4.5 million people experienced medically consulted injuries in motor vehicle accidents, and more than 39,000 died. This marked a 10.6% increase in deaths since 2013. In our practice, we have seen a growth of cases in which some component of Collision Avoidance Technology fails, which contributes to the wreck. Below are just three scenarios that could give rise to claims involving CAT failures.

> CAT systems in trucks are even more important given the heavy weight that they are hauling, making collisions more potentially fatal.

Scenario 1: Failure to Equip
Vehicle 1, an SUV, is driving eastbound in the left lane, while Vehicle 2, a hatchback, is also driving eastbound on the same interstate, but in the right lane. Vehicle 2's front wheels are just ahead of Vehicle 1's rear wheels. Both Vehicle 1 and 2 are driving at the posted speed limit of 70 mph.

As Vehicle 1 and Vehicle 2 approach an exit, Vehicle 1 checks his passenger side mirror for any cars. Seeing none, the driver of Vehicle 1 activates the right blinker and proceeds to move into the right lane to exit, sideswiping Vehicle 2, which is sitting in Vehicle 1's blind spot. Both drivers are severely injured.

Depending on the model year of the vehicle, there may be claims for negligence or products liability (or both) based on a failure to equip blind spot warning / intervention theory of liability. For example, if Vehicle 1 is one of a number of popular model year 2020 vehicles for which blind spot warning technology was only optional, the vehicle is potentially defective and unreasonably dangerous for its intended use.

Scenario 2: Defective CAT System
Vehicle 1, a luxury sedan, is travelling northbound at 50 mph. Vehicle 2, a compact car, is travelling 30 mph approximately 100 feet ahead of Vehicle 1 in the same lane.

As Vehicle 1 is approaching Vehicle 2, the driver of Vehicle 1 is distracted, reading an email on a cell phone. Vehicle 1 is equipped with FCW and AEB, but the system fails to recognize Vehicle 2 and Vehicle 1 rear ends Vehicle 2 at 50 mph. The driver of Vehicle 2 is severely injured.
(Continued on p. 14)

Automobile Ejections

Tempered window glass is prone to shatter into small pieces, thereby creating an opening through which an occupant can be partially or completely ejected. In comparison, laminated window glass does not shatter, maintaining a barrier to ejection.

Every vehicle uses laminated glass for its windshield. Although the use of laminated side window glass first started in the 1960's, it did not gain widespread use in side windows until the mid-2000's. Even today, vehicles remain that are not equipped with this life-saving technology.

According to NHTSA research in 2003, the fatality rate for an ejected occupant is

3 TIMES GREATER

than occupants that remain in the vehicle.

NHTSA further found that fatal injuries occur to belted occupants through partial ejection, where the head is allowed to protrude outside the window.

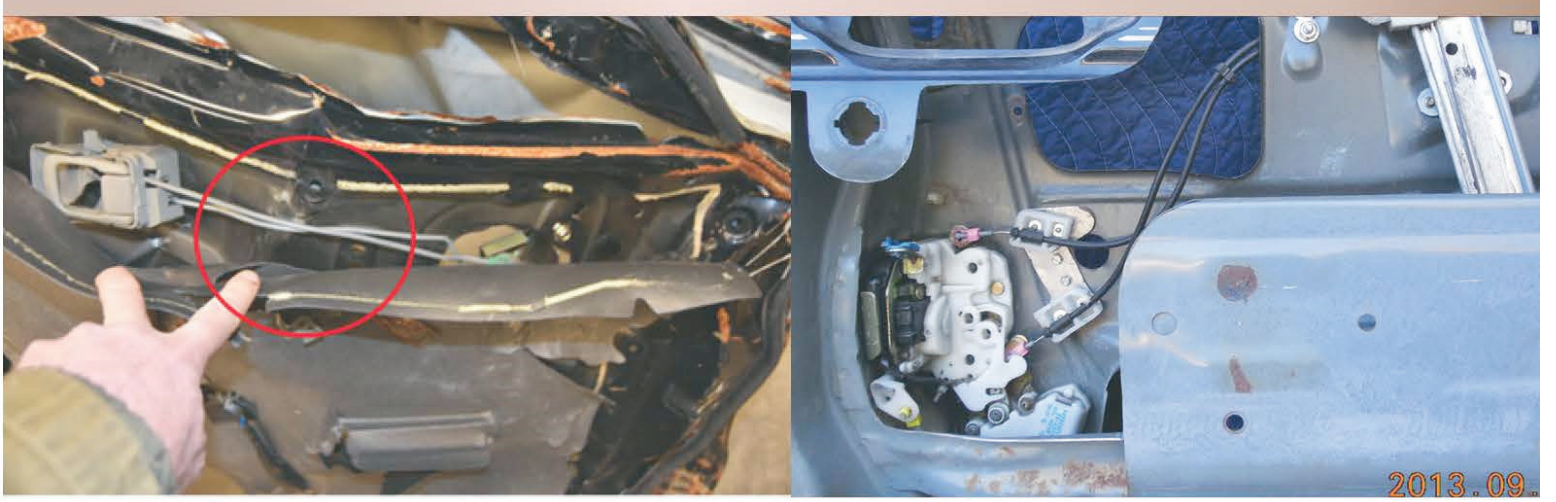
57%

of the occupants killed in rollovers were ejected from the vehicle.

Faulty door designs and non-laminated glass lead to lead to ejections

According to NHTSA research, door latch integrity is a significant contributor to vehicle occupant ejection, especially in rollover crashes. In its 2003 study, NHTSA found 1,660 fatalities and 1,970 seriously injured occupants were ejected through doors. This follows earlier research in the 1990's identifying a mechanism of inadvertent door latch activation when the metal rods used to activate the latch are deformed because of crush to a door. A cable latch system serves to eliminate this risk, as although the cable may be moved by external crush, such movement does not serve to activate the door latch.

▼ Rod vs. Cable Door Latch Mechanisms



7,800 vehicle occupants are killed each year after being ejected through side windows

Five Theories for Your Trucking Case

Often times, trucking companies operate with bare bones insurance coverage and limit their coverage to the minimum level required by law. The present minimum financial requirements, established in 1980, are grossly inadequate.

In the event of catastrophic injury or death, such coverage will be insufficient to provide a full recovery to those involved in accidents with heavy trucks. Even more obstacles to complete recovery exist when the person injured or killed is an occupant of the heavy truck.

Therefore, it is important to consider alternative avenues of recovery. Below we explore five theories to consider when the obvious insurance coverage is inadequate.

In cases of inadequate insurance, there are a number of potential liability theories to consider.

Entities in the Supply Chain – Shipper and Broker Liability

In a catastrophic trucking crash, it is important to identify all entities involved: driver, motor carrier, tractor owner, trailer owner, as well as any applicable shipper, broker, or third-party logistics company. As a cost-cutting measure and attempt to limit liability, more and more shippers contract with independent motor carriers rather than maintaining a company fleet.

There may be viable claims against a shipper or broker for negligently selecting an incompetent and dangerous motor carrier. Additionally, in some jurisdictions a shipper or broker may be vicariously liable for the motor carrier's negligence.

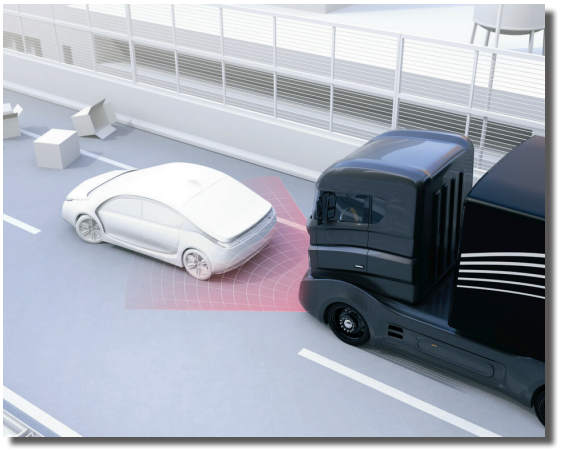
Hidden Motor Carriers

All motor carriers involved in a shipment may not be obvious from the initial crash report. In a recent case, the motor carrier involved in a crash did not match the motor carrier identified in the bill of lading. This raised a red flag for a "hidden motor carrier." In discovery, we learned that the broker initially selected "Motor Carrier A" who then later re-assigned the load to "Motor Carrier B." Motor Carrier B had a horrible safety record, had received multiple warning letters from the FMCSA for critical safety violations, and predictably caused a deadly crash.

Identifying Motor Carrier A — the "hidden motor carrier" who initially accepted the load — added an additional insurance policy to pursue for its unauthorized doublebrokering and negligence in selecting Motor Carrier B.

To vet potential hidden motor carriers, first determine if the motor carrier and DOT number on the crash report matches the placard and DOT number on the actual tractor. If they do not match, that is a red flag to explore additional theories and coverage. Second, investigate the freight chain by obtaining the bill of lading and shipping documents to identify all involved entities.

Trailer Owner



If a trailer is owned or leased by a separate entity than the motor carrier, it is possible the trailer may provide excess coverage. The Graves Amendment insulates the leasing company from traditional vicarious liability claims but does not apply where the trailer owner independently commits negligence. Even if the trailer owner was not independently negligent, it is worthwhile to identify the trailer's insurance policy.

Product Claims for Those Injured by Heavy Trucks

Crash Avoidance Technology (CAT) are safety systems designed to avoid crashes in the first instance. Such systems use sensors, cameras, radars, hardware and software to collect and interpret data from the environment surrounding the vehicle and then provide a form of output. The NTSB has been urging the DOT to require CAT on commercial vehicles since 2001. NTSB determined that up to 2,220 lives could have been saved over a 2 year period from 2011-2012 had the vehicles been equipped with CAT.

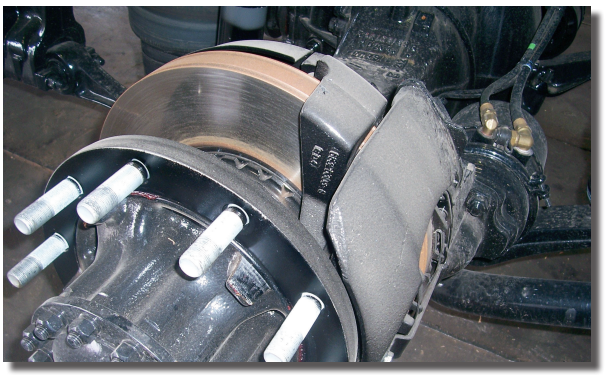
Also, heavy trucks across the world are now equipped with underride guards. However, because there is no U.S. regulation that requires such items, heavy trucks in the American market are devoid of this safety feature. For many years, federal law has required semi-truck trailers to be fitted with rear underride guards.

However, studies analyzing both real world collisions and crash tests demonstrated that the federal minimum requirements for underride guards were not sufficient to protect motorists. Underride can and should be prevented, as it is nothing more than mechanical guarding, a concept that has existed for over a century. However, trailer manufacturers have refused to take these steps in the absence of regulation by the government.

Product Claims for Injured Truck Occupants

Two areas that are of great significance in contributing to fatalities of truck drivers are rollovers and post-collision fires. Forty-seven percent of fatal injuries to truck drivers occurred in rollover accidents, compared to only 20-39 percent in cars, pickups or SUVs.

As of August 1, 2019, all newly manufactured truck tractors must now comply with FMVSS 136, which establishes performance and equipment requirements for Electronic Stability Control on heavy trucks, with the stated purpose of reducing crashes caused by rollover or directional loss-of-control.



Furthermore, large trucks are involved in 17 percent of fatal fires, with an annual average of almost 7,000 commercial vehicle fires resulting in hundreds of fatalities.

Sadly, attempts to increase motor carriers' minimum financial responsibility levels have not yet succeeded. We have seen in our practice countless catastrophically injured clients where the most obvious wrongdoer was not properly insured. In these situations, the above theories are worthwhile to vet.

Identifying Design Defects in ATV, UTV Cases

Polaris has recalled more than 10,000 of its 2020 Ranger utility terrain vehicles (UTVs) because the safety belts malfunction, creating risk of serious injury to occupants. When evaluating an all-terrain vehicle (ATV) or UTV crash case, consider whether design defects could cause injury.

Some UTVs only have mesh, straps or ropes, to contain occupants during rollovers.

ATVs are commonly used for recreation. They contain three or four wheels and a straddle seating position, handlebar steering and the ability to maneuver through a variety of terrain conditions. In contrast, UTVs are built and used for work more than recreation and are faster and more powerful. They are composed of four wheels and handle like a car because they are steered via a steering wheel and have foot pedals to control braking and accelerating. Normally, two or sometimes more passengers can ride inside the occupant compartment in a UTV.

Design Defects

The failure of manufacturers to sufficiently protect occupants is the primary factor in the severity of injuries from ATV and UTV crashes. ATVs lack occupant restraints or an enclosed occupant area, which combined with their propensity to roll over in a crash, make them unreasonably dangerous.

Even when UTV's incorporate safety measures, the technology is known to fail or the restraints themselves fail to work properly.

Even when UTVs are equipped with an enclosed area, they often lack doors or other structures sufficient to keep occupants inside the vehicle during a rollover. In some UTVs, the only safety material between an occupant and the dangers outside of the vehicle are mesh, straps or ropes, which commonly fail to contain occupants during rollover crashes.

Defective Airbags on America's Roads

If a vehicle crash resulted in catastrophic injury or death, did a faulty airbag cause or enhance the injury? Whether the airbag(s) did or did not deploy, evaluate every serious injury case for a potential airbag claim.

Defects to Look For

Injuries can occur if an airbag deployed improperly or failed to deploy.

Deployment

- Late deployment
- Incomplete deployment

Non-Deployment

- Deployment event occurred but airbag did not deploy
- Passenger airbag did not deploy but driver's side did
- Torso or side curtain airbag did not deploy

Failure to Equip

- Side curtain airbags
- Torso airbags
- Frontal airbags in heavy trucks

Over 11 million defective airbags remain in vehicles to date based upon NHTSA replacement figures.

Takata airbags have been used in salvage vehicles; at least 19 deaths have been tied to Takata airbags in the U.S.

Common Airbag Injuries

- Traumatic brain injury
- Vision/eye loss
- Spinal injury
- Facial, neck and chest lacerations
- Ejection

Fiduciary Liability Claims *(cont. from p.1)*

Some common examples of a fiduciary breaching a fiduciary duty include a trustee selling trust assets to a relative or customer of the trustee; ; an executor of an estate paying him or herself for services to the heirs for a higher than agreed upon rate; or, a director or officer making a business decision that benefits him or herself, but harms the company.

Potential recoveries

- Lost profits
- Out of pocket losses
- Mental anguish damages
- Punitive damages

Our team of experienced litigators has experience from coast to coast in high-stakes precedential litigation, including Baker v. General Motors, which we took to the U.S. Supreme Court and won. Law firms across the country work with us as co-counsel on cases that require sophisticated investigation and experts whose reputations in their respective fields are top-notch.

Free No-Obligation Review of Your Potential Case

We can evaluate a fiduciary's actions and can determine whether or not a breach occurred. We enjoy working with co-counsel across the country and are happy to offer a free no-obligation consultation with anyone, as to whether a potential violation may have occurred.

Who's liable for a breach in fiduciary duty?

Third-party liability

A third-party defendant can be held jointly and severally liable for knowing participation in another's breach of fiduciary duty. This can be the case even if the third party doesn't owe its own fiduciary duty to the plaintiff.

Personal liability

A fiduciary can sometimes be held personally liable if they violate their duty. For example, if a trustee breaches his or her fiduciary duty owed, s/he can be held personally liable for the resulting damages.

Joint fiduciary liability

Co-fiduciaries can result from having joint trustees or joint executors, meaning the duty and any resulting liability is joint and several. If one or both of these two co-fiduciaries breach their obligations resulting in harm to the beneficiary, each can be individually liable for the entire sum of damages.

Pro Bono Client Freed From Prison

Michael Politte was 14 years old when he witnessed his mother burning to death on the floor of their trailer. At 18, Michael was wrongly convicted of second-degree murder and sentenced to life in prison.

On April 22, 2022, Michael was finally released from Jefferson City Correctional Center, paroled after nearly two decades behind bars. Langdon & Emison attorneys Mark Emison and Alex Thrasher led the legal team, providing pro bono representation in partnership with the Midwest Innocence Project and MacArthur Justice Center.

Michael was greeted by family and friends and his legal team from Langdon & Emison. Our legal team will continue representing Michael for his full exoneration.

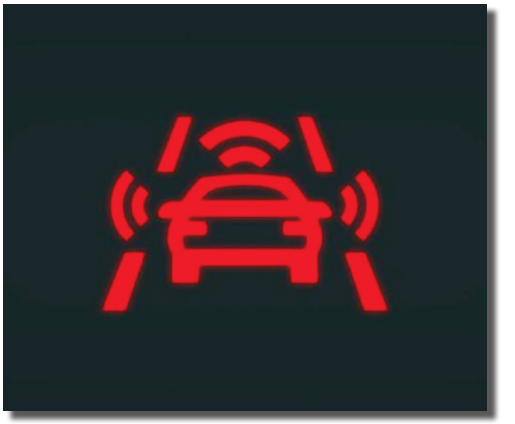
"I never thought this day would come," Michael said the day of his release. "I don't see any barbed wire or any wire. It's all open. It smells different, looks different. It's amazing."

Michael told reporters that he just wants to live, that he wants to get a job and work. He also wants justice for his mother, whom he said "is always in my thoughts, always in my mind."

Michael's mother died in a fire at the family home in 1998. Michael, 14 at the time, and a friend were also in the home but managed to escape. Investigators said the fire was started with gasoline and determined that she had also suffered blunt force head trauma. The investigation focused on her teenage son as the main suspect and four years later, he was convicted as an adult of second-degree murder and sentenced to life in prison.

Defective Crash Sensors

(Continued from p.2)



For some this may look like the well-publicized defects in Takata airbags that have resulted in tens of millions of vehicles being recalled for airbag replacements. Auto manufacturers were aware of these concerns for several years and of the potential for these exploding airbags to seriously injure or kill vehicle occupants. Lawsuits related to the Takata problem date back at least to 2014.

And yet, when NHTSA directed General Motors to recall almost 6 million pickups and SUVs with these defective Takata airbags, the company argued that the dangers were of no consequence, alternately asking regulators to delay the recall due to the hundreds of millions of dollars it would cost GM for airbag replacement.

An experienced team of auto defect attorneys can assist people who have been injured or lost family members in motor vehicle impacts where the alleged defect may have prevented airbags and/or seatbelt locks from activating in order to protect the vehicle occupants. Determining whether such a defect is present and whether or not it contributed to an injury is a highly technical process requiring expert investigation and analysis.

Theories of Liability with (CAT) Failure

(continued from p. 5)

Scenario 3

So far the focus here has been on CAT in general, and incorporation into motor vehicles generally-both commercial and passenger. When commercial vehicles are involved, particularly those of the heavy trucking industry, the landscape of potential issues regarding CAT liability expands. Large trucking companies operate fleets of semi-trucks that crisscross the nation on a daily basis. While heavy trucks accounted for just 182,000 of the almost 2.8 million injuries recorded by NHTSA in motor vehicle accidents in 2019, heavy trucks accounted for 5,244 of the 36,096 fatalities.

In this third scenario, a CAT system works, when the FCW sounds a warning. But the distracted driver didn't brake. On initial review this might not appear to be a CAT case, but CAT product manufactures for the heavy-trucking industry include advanced CAT systems such as AEB.

For example, the OnGuardACTIVE system manufactured by WABCO is marketed as capable of detecting vehicles up to 650 feet ahead, and automatically applying the brakes if necessary to mitigate or avoid a forward collision. The system also comes with adaptive cruise control that, when active, will maintain a safe 3.6 second following distance between the truck and vehicle ahead. If Vehicle 1 in the above scenario had been retrofit with this system, the collision with Vehicle 2 would have been mitigated or avoided. So here again we have, in essence, a failure to equip theory of liability. Although here, potential liability extends also to the trucking company(ies) responsible for the truck that could have been equipped with a retrofit CAT kit.

News and Notes

Kent Emison Receives Lifetime Achievement Award

Kent Emison

On April 29, Partner Kent Emison received the top honor from from the University of Missouri-Kansas City School of Law when he was bestowed its Lifetime Achievement Award. Kent graduated from the School of Law in 1981 where as a law student he graduated with distinction and served as the Business Editor on the UMKC Law Review.

Kent is a Fellow in the International Academy of Trial Lawyers, placing him in the top 1% of lawyers in the world. As an active alumnus and benefactor of the UMKC School of Law, he has sponsored many students from the law school to attend bar association conferences and seminars.

Additionally, Kent and the firm regularly sponsors mock trial teams from UMKC so that students can learn trial skills firsthand. The firm has provided scholarships for several UMKC law students to attend the Missouri Association of Trial Attorneys Annual Convention, and many other actions supporting law students. Congrats to Kent for being recognized as a leader within his profession and his excellence as a trial lawyer for more than three decades.

Mike Manners Receives Icon Award from *Missouri Lawyers Weekly*

Michael Manners

Partner Michael W. Manners will receive an ICON Award from *Missouri Lawyers Weekly*, for his career as a trial lawyer and judge. Each year the paper honors those professionals who have excelled throughout their entire career. Last year he was honored as the "Lawyer of the Year" for Personal Injury Litigation for plaintiffs by *Best Lawyers in America* for the Kansas City region. Prior to Mike's appointment as a judge, he spent 24 years as a trial attorney, and is a member of the American Board of Trial Advocacy, an organization of trial attorneys representing members of both the plaintiffs' and defense bar. He has been with Langdon & Emison since 2013. The award will be bestowed on June 29 in Saint Louis.

New Attorney Joins Langdon & Emison

Alyssa Dockins

Alyssa Dockins has joined Langdon & Emison as an associate attorney, from the University of Missouri-Kansas City School of Law, where she was an active member of the mock trial team that competed for moot court national championships. She also served as president of the Association for Women Law student chapter there. She earned her undergraduate degree from Graceland University in Iowa. As an associate attorney, Alyssa works on the firm's mass torts team, representing consumers nationwide who've been harmed by dangerous drugs and medical devices.

Langdon & Emison Accepting Co-Counsel Opportunities with Firms Nationwide

Maximize the recovery for your client's personal injury case

In this edition of our firm's quarterly newsletter, we share information about the many recovery avenues to explore in personal injury cases and offer practical tips for evaluating and litigating a range of personal injury cases. We deeply value the opportunity to work with law firms across the country to help maximize their clients' recoveries in cases involving defective products, negligence and catastrophic injury. We welcome the opportunity to work with you.

Topics Covered Inside

- Crash sensor defects
- Pro bono client freed
- Fiduciary duty claims
- Airbag defects
- Liability theories for trucking cases
- All-terrain vehicle claims
- Mass torts updates

Our presence on a case adds unparalleled experience and a name that corporate defendants recognize from nealy 40 years of practice in personal injury litigation. Likewise, a co-counsel partnership not only benefits your client's recovery, but also benefits your law firm. We can help you explore all potential recovery avenues and maximize your clients' compensation.

LANGDON & EMISON

Let us help maximize compensation for your clients.

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