



## Not Having Adequate Uninsured Motorist Coverage Could Lead to Financial Disaster

by Dan Berexa

Most people know it is necessary to carry adequate automobile liability insurance. If a claim is brought against you, the insurance company provides for your defense and the payment of any judgment or settlement. What many people do not realize is that failing to carry adequate uninsured motorist ("UM") coverage could lead to a financial disaster, even if the other driver is at fault! Statistics show that the number of uninsured drivers is on the rise. According to a recent Insurance Research Council nationwide study, if someone is injured in an automobile accident, the chances are 1 in 7 that the at-fault driver is uninsured. In Tennessee, the estimated percentage of uninsured motorists is 21%.

These statistics reinforce the need for drivers to carry UM coverage. State law requires that every automobile liability policy include UM coverage with limits equal to the liability limits provided for in the policy. The policyholder must sign a written notice to decline the UM coverage. Often UM coverage is rejected because the consumer does not understand the nature of the coverage, or is trying to save money on premiums.

UM coverage steps in and pays for damages caused by the at-fault driver who is uninsured. Similarly, underinsured motorist coverage ("UIM") takes care of the situation where the at-fault driver has some insurance, but not enough to adequately compensate the injured party. Under either scenario, the policy pays for any aspect of bodily injury damages that the injured party could recover from the at-fault

driver, such as medical expenses, lost earnings, pain and suffering, loss of consortium or damages recoverable in a wrongful death suit. UM coverage provides protection not only if you are in your own car, but also if you are in someone else's vehicle. The coverage also extends to the policyholder's family members and covers other vehicle-related accidents, such as hit and runs, or pedestrians or cyclists who are struck by a car. In a serious accident, it is not uncommon for an injured party to incur hundreds of thousands of dollars in damages. While health insurance may pay most medical expenses, it will not cover other out-of-pocket expenses, lost earnings, permanent disability or pain and suffering. Maintaining adequate UM limits is one way to insure that you are able to recover, even if the at-fault driver is uninsured.

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To make sure you are protected, maintain adequate liability and UM coverage. If you are involved in an accident, regardless of who is at fault, there are a few things to keep in mind. First, make sure the police make a report for the accident and try to obtain the other party's insurance information as soon as possible. Secondly, even if the other driver is clearly at fault, put your insurance company on notice of the accident. Placing the carrier on notice will not cause your insurance rates to increase and is essential if it is later discovered that the other driver does not have insurance, or is underinsured. Lastly, if you are involved in an accident, consult with a lawyer to make sure you understand your rights and obligations under the policy.



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## What's New

### J.K. Simms Named Partner

J.K. Simms was recently added to the Cornelius & Collins family as a partner. He will head the firm's Labor and Employment Practice Group. J.K. joined the firm in 2001 after obtaining his law degree from the University of Tennessee, College of Law. While in law school, J.K. was the Lead Student Materials Editor for the Tennessee Law Review. He attended undergraduate studies at Lipscomb University in Nashville.

No stranger to accomplishment in the labor and employment fields, J.K. has made multiple seminar presentations to business leaders and other lawyers related to employment discrimination, sexual harassment, medical confidentiality, and other topics. He has also written articles in these areas which have appeared in such publications as the Tennessee Bar Journal. You can read J.K.'s article that appeared in the TBJ and learn more about the Labor and Employment Practice Group by visiting our website at [www.cornelius-collins.com](http://www.cornelius-collins.com).



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J.K. is a member of the American Bar Association, Tennessee Bar Association, Nashville Bar Association, and Defense Research Institute. He has been admitted to practice in all Tennessee state courts, the U.S. District Court for the Middle District of Tennessee, U.S. District Court for the Western District of Tennessee, and the U.S. Court of Appeals for the Sixth Circuit.

He lives in Franklin with his wife, Suzanne, and three children.

# Medical Malpractice and the “Collateral Source Rule” by Brian Holmes

The general rule in Tennessee is that a plaintiff may recover damages for injuries wrongfully caused by another without reduction for any benefits that the plaintiff has received from some third party, such as private health insurance, as a result of those injuries. This common law rule, known as the “collateral source rule”, has been partially changed in medical malpractice cases by Tennessee’s Medical Malpractice Act, Tenn. Code Ann. § 29-26-119, which states as follows:

In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimant or of the members of the claimant’s immediate family and insurance purchased in whole or in part, privately and individually.

Following the clear language of this section, Tennessee’s appellate courts have held that a plaintiff is barred from proving and recovering medical expenses and lost wages when those losses were reimbursed, but not when the medical expenses were paid from employer provided insurance for which the plaintiff paid part of the premium. This reasoning has correctly been extended to allow proof of damages in a wrongful death case, despite the payment by the decedent’s employer of a death benefit, when the benefit was paid by insurance partially purchased by the employer out of salary deferred by the decedent for that purpose.



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However, in a 1988 decision that has proven to have far-reaching consequences, the Tennessee Supreme Court carved out another exception that has in large part gutted the Medical Malpractice Act’s partial abrogation of the collateral source rule. In that case, the Court ruled that a plaintiff could prove and recover medical expenses paid by his employer under the workers’ compensation statutes, not because he or

his family had contributed anything to purchasing the insurance, but because of the employer’s statutory right of subrogation to recover its payments when and if the plaintiff recovers for the same injuries from a third party wrongdoer. The Court reasoned that this subrogation right meant that the plaintiff’s expenses had not truly been “replaced,

or indemnified” as required by the statute. Thus, the Court held that “[w]here benefits carry a right of subrogation and a legal obligation on the part of the tort victim to repay the collateral source, the tort victim’s losses have not been replaced or indemnified.”

The obvious other option that the Court could have chosen, which had been adopted by some states, would have been to hold that the Medical Malpractice Act’s damages provision destroyed the employer’s

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statutory subrogation claim, because the plaintiff was not entitled to recover for those expenses already paid by the employer. The implicit policy choice that the court made in this case, which choice arguably should have been made by the legislature, was that the malpractice defendant, rather than the employer, should bear the burden of the loss in such a case. This policy choice was made explicitly in a subsequent case, decided by the Court of Appeals, which held that a plaintiff could recover for expenses paid by TennCare because TennCare also had a subrogation right. Relying heavily on the state’s duty under Medicaid to seek reimbursement in such situations, the Court opined that the malpractice defendant, rather than Medicaid, should bear the burden of the loss. The reasoning has since been extended further to allow recovery of expenses paid by noncontributory, employer-provided health insurance when the insurer had a contractual right to reimbursement in the event of third-party recovery. These decisions indicate that whenever a plaintiff’s losses have been paid or are payable by a collateral source with a right of subrogation or reimbursement, the plaintiff may recover for those losses.

One question that remains unanswered is whether a plaintiff is limited under the Medical Malpractice Act to recovering only those expenses actually paid due to discounting or “write-offs” pursuant to insurance or similar agreements, or whether he or she may recover for a medical provider’s base charges. This question was identified but not resolved by the Court of Appeals in 2006, in the context of reduced charges paid by the plaintiff’s private health insurance. Similarly, in a 2000 decision, the Court of Appeals addressed but did not decide the issue in the context of reduced expenses paid by TennCare, although the Court hinted strongly that only the amount actually paid by TennCare should be allowed. This would seem to be the appropriate outcome, as the Medical Malpractice Act’s damages provision is intended to allow recovery only for the plaintiff’s actual losses. However, as the Courts have made clear in their language and decisions, the Medical Malpractice Act’s damages provision, abrogating the collateral source rule, is contrary to the common law and will be construed strictly. Despite the apparent breadth of the provision, it has turned out to mean much less in practice.

# Avoid or Minimize Liability in Harassment and Discrimination Claims by Training Your Workforce

by J.K Simms

Harassment and discrimination claims cost employers across the country hundreds of millions of dollars every year. Jury awards in these types of lawsuits have ballooned in recent years. You may not be aware that employers who have an anti-harassment and discrimination policy, train on the policy and enforce the policy can avail themselves of an affirmative defense to claims of hostile work environment, harassment, and discrimination. Unfortunately, too many employers are unable to assert this defense successfully because while they might have a policy against harassment and discrimination, they have failed to train their employees and supervisors/managers adequately on the policy.

This type of training is absolutely critical because lawsuits filed under Title VII of the Civil Rights Act and/or the Tennessee Human Rights Act alleging discrimination or harassment can cost the employer dearly. Simply having an anti-harassment policy or sexual harassment policy is insufficient. The employer must train on the policy as well.

There have been many recent cases where an employer's failure to appropriately train its employees led to high damage awards in harassment and discrimination lawsuits. Courts have ruled that leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference of laws against discrimination in the workplace. On the other hand, courts have reversed punitive damage awards where the employer demonstrated good faith efforts to comply with workplace harassment and discrimination laws by issuing a policy, training employees in harassment and discrimination prevention and voluntarily monitoring departments to identify workplace discrimination. A prudent employer will adequately train its supervisors/managers and employees on harassment and discrimination in an adequate fashion so that they can avail themselves of the affirmative defense.

We can train your workforce on harassment and discrimination. Please contact us if you would like more information.

## What You Don't Know Can Hurt You – How Well Do You Know Your Commercial General Liability Policy?

by J. Cole Dowsley, Jr.

Claims for defective construction are common and most contractors depend upon their commercial general liability (CGL) insurer to pay for the defense of such claims. That is one of the main reasons you pay insurance premiums every month, right? Well, whether your carrier actually defends you or your company against a claim for defective construction may depend on the fine print contained in your CGL policy. And, knowing the details of your policy and how courts in Tennessee define the terms of your policy can make all the difference when facing a defect claim.

Under most CGL policies, the insurer is obligated to defend the insured if the claim alleges "property damage" caused by an "occurrence." Sometimes, insurers will decline to provide a defense based on the argument that a defective construction claim is not an "occurrence." In fact, courts in Tennessee historically have decided that construction defects are not "occurrences" under CGL policies. Tennessee courts have reasoned that an occurrence must be property damages caused by something more than a contractor's own work. In other words, an insurer would have no duty to defend a contractor against a claim based on the contractor's faulty workmanship because the claim is not an "occurrence," at least as defined by the courts.

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## Firm Practice Areas

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Trucking and Transportation Law  
Warranty Law  
Wills, Estates, Trusts and Probate  
Workers' Compensation  
Wrongful Death

In a recent case, the Tennessee Supreme Court re-examined the meaning of an "occurrence." In this case, a general contractor was sued based on the alleged faulty design and installation of windows. Allegedly, the defective window installation allowed water to penetrate and damage the building. The builder, of course, filed a claim with its insurance carrier. However, the carrier countered that it had no duty

to defend the claim under the terms of the CGL policy because the damages were not caused by an "occurrence."

The Court took this opportunity to redefine "occurrence" and acknowledge that an occurrence includes damages caused by a contractor's faulty work. The court correctly reasoned that a CGL policy would be useless if it did not cover damages caused by the negligence of the contractor. The practical result of this decision is that coverage under your CGL policy has been broadened and contractors in Tennessee have a more solid basis to demand that their carriers provide a defense of a defective construction claim, especially when the claim involves the contractor's own work.

However, contractors must be careful because the exclusions portion of a

CGL policy may specifically exclude from coverage damages to "your work." Additionally, some policies do not apply the "your work" exclusion if the work was performed by a sub-contractor. The exclusions will vary from policy to policy and it would be prudent for all contractors to have an understanding of the specific coverages and limits of their CGL policy. With this awareness, you will not only know when your carrier must defend you, but also you can determine if you have enough coverage and whether you should secure additional or more extensive coverage.

## Three Things You Need to Know if You Have a Website by Ben M. Rose

Many people maintain a website as part of a business or for personal use. If you or others post messages on your site, it's possible that you could find yourself dealing with a lawsuit. Why? Because our legal system is adapting to technology almost as quickly as the rest of society.

What should you do? First, talk to your lawyer about ways to prevent or minimize your website's exposure to cyber-slander. What is cyber-slander? When an individual posts information that might be false or injurious to another, this could be considered cyber-slander.

If your website is the subject of a cyber-slander suit, don't panic. One of the best defenses to such an action is a federal statute. The Communications Decency Act of 1996, 47 U.S.C. §§ 230, et seq. ("CDA"), preempts most cyber-slander actions filed against a provider of what has been defined as an interactive computer service. Most websites are covered by this definition.

Section 230(c)(1) of the CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In addition, Section 230(e)(3) provides, "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." While most courts have interpreted the CDA to pre-empt a cyber-slander lawsuit, there is law to the contrary. Thus, the CDA should not be considered foolproof.

Second, you should post terms and conditions as part of the site. Terms and conditions will not only assist you in defending against cyber-slander lawsuits, they may also provide legal protections for a number of other contingencies in the Internet world. You should fashion the terms and conditions in such a manner as to provide the user with the ability to accept or reject them and maintain a record of the same. This is important.

While there are a variety of standard draft terms and conditions for websites available for use, basic terms and conditions should include the following: restrictions on use of the site, proprietary rights, conditions related to third parties and advertisers, assumption of risk, disclaimer of warranties, a standard release clause, provisions related to incidental damages, indemnification provisions, a system for resolution of disputes, and severability/waiver provisions.

Third, if you encounter a cyber-slander action you should keep in mind that your homeowners' insurance policy may provide coverage for your defense costs, including attorney's fees. According to UCLA Prof. Eugene Volokh of the blog site, The Volokh Conspiracy, standard homeowners' policies generally cover libel suits. However, Prof. Volokh warns that insurance coverage may be excluded if the website in question generates profit, which might even be defined to include a relatively innocuous "tip jar."

As technology continues to advance and the use of websites becomes an integral part of our world, the cyber-slander lawsuit is bound to become more prevalent. Taking these steps will help reduce your risk.



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