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ADVANCING ETHICS, COOPERATION AND EDUCATION

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A TOWtal Loss for Insurers

I.

Introduction

A growing concern for insurance companies and equipment owners are the abusive towing and storage practices by a tow company. Tow companies use their leverage from having possession of the vehicle and cargo to charge excessive towing and storage fees. When insurance companies or equipment owners refuse to pay or challenge the excessive fees, tow companies hold the vehicle or cargo hostage. Some states even hold an insurance company strictly liable for those fees when the vehicle is towed without the consent of the vehicle owner. Despite having the cards stacked against them, insurance companies and equipment owners are not remiss to fight back.

II.

Tow Truck Terror

A. Abusive Towing Practices

Almost all serious vehicular accidents, whether it be personal auto or motor truck cargo, will involve tow companies. In some instances a tow company is called out by law enforcement at an accident scene. This often happens without the consent of the vehicle owner or the insurance company. In situations involving non-consensual tows, insurance companies and equipment owners need to be especially on guard for excessive towing and storage charges. Tow companies are looking for ways to increase their bill and hold vehicles and cargo hostage to get as much money out of these situations as they can. Here are some examples of how tow companies increase their bill:

1. Often times tow companies will allege to have to rent equipment from other providers without any documentation that this occurred or substantiation for the cost

2. Dummy invoices with unsubstantiated charges

3. Unreasonable limitations on access to towed vehicles and cargo to slow down the process and increase storage fees

4. "Clean up" costs – such as spills or debris

5. Holding the vehicle or cargo hostage if there is a dispute on fees in order to increase the storage fees

B. Measures To Limit Tow Truck Terror

Insurance companies and equipment owners have little leverage in situations involving non-consensual tows. However, once an insurance company or equipment owner is notified of an accident, they should gather as much information as possible as quickly as possible including the following information:

1. The tow company's name

2. The number and names of tow company personnel and any subcontractors allegedly hired by the tow company to tow the vehicle or cargo, or clean up the debris

3. Note any witnesses that can attest to how many tow personnel were involved and the extent of the accident scene

4. Did the driver consent to the tow or did law enforcement call the tow company

5. Get a statement from the police officer

6. Get photographs of the accident scene

7. Inspect the vehicle and cargo as soon as possible

A tow company has a right to hold the vehicle and/or cargo until it is paid in full. If an insurer or its insured disputes the charge, then the storage fees are only increasing. It is imperative in these situations to try and get a release of the vehicle or cargo so as to limit the storage fees from continuing to accrue. Many states have laws that require a tow company to provide notice of the fees it charged for towing and storing vehicles and cargo, as well as limitations on the hourly charge for labor in towing vehicle and cargo and daily storage rates. An insurer or equipment owner should be cognizant of the state's notice requirements and fee schedule.

An insurance company or equipment owner should carefully review the towing invoice and object in writing as soon as possible. If a tow company is storing cargo, then make sure the letter specifically describes the cargo and set forth the value of the cargo. If cargo requires care, provide detailed care instructions and allege damages if the cargo is not secured or cared for properly. Use the information from your investigation of the accident to detail any discrepancies in the tow company's invoice. Extend a specific and reasonable offer for release of the equipment and cargo, or in the alternative, offer to place the total amount of the tow invoice in an escrow account for release of the equipment and cargo. If all else fails, threaten legal action and take steps to stop the storage charges.

III.

Tow Company May Be Able To Bring Direct Action Against Insurance Company For Towing And Storage Fees

Normally, a third party does not have standing to bring a direct action against an insurance company. However, an insurance company that issues physical damage insurance for vehicles might be surprised to learn that some states hold an insurance company strictly liable to a tow company for its towing and storage charges when paying a claim on a total loss to a vehicle. In Texas, that is case when a vehicle is towed without the consent of the vehicle owner.

A. Texas Vehicle Storage Facility Act

The Texas Vehicle Storage Facility Act (the "Texas Act") permits a tow company to assert a direct action against an insurance company that pays a total loss on a vehicle for the limited purpose of recovering its fees for towing and storing the insured vehicle. The Texas Act provides that:

> "an insurance company that pays a claim of total loss on a vehicle in a vehicle storage facility is liable to the operator of the facility for any money owed to the operator in relation to delivery of the vehicle to or storage of the vehicle in the facility regardless of whether an amount accrued before the insurance company paid the claim."[1]

Even more surprising, there is potentially no limit or cap on the towing and storage charges for which the insurer is responsible for paying. The Act disregards whether the insurance policy covers towing and storage expenses. Where there is no coverage for towing and storage expenses and an insurance company pays its insured policy limits for a total loss to a vehicle, the insurance company is still liable under the Act for the full amount of the towing and storage charges of the tow company.

The Act has been challenged on only two occasions and both attempts were unsuccessful. Given the right facts, however, there are statutory notice requirements and constitutional defenses not raised in either of those cases that could limit or avoid liability under the Act. Furthermore, an insurance company can take other measures when it appears the Act will apply, such as naming the tow company on the insurance proceeds check, or filing an interpleader to deposit the insurance proceeds into the registry of the court and obtain a discharge from any further liability.

B. Applicability Of The Texas Act

The Texas Act only applies in a situation where the owner of the vehicle did not consent to the tow service.[2] Typically, the Texas Act is implicated where a vehicle is involved in a wreck and law enforcement calls on a wrecker service to clean up the debris and tow the vehicle away. This is considered a non-consent tow because the owner of the vehicle did not contact the tow company of its choosing. Normally a tow company has a possessory lien on the vehicle and will not release it until the tow company is paid for its services. However, if the damaged

[1] TEX. OCC. CODE ANN. § 2303.156(b).
[2] TEX. OCC. CODE ANN. § 2303.003(a).

vehicle has little to no value and is therefore a total loss, then the possessory lien likewise has little to no value and does not ensure collection of the tow company's fees. The Texas Act was codified to protect a tow company when the owner of the vehicle or insurance company abandons the vehicle and does not pay the tow company's towing and storage fees.

The courts that have interpreted the Texas Act have noted that the presence of a wrecked vehicle on or near a public highway presents a public safety risk. To mitigate that risk and increase the likelihood that a tow company will help clear the roadway, the Texas Act shifts the burden of towing totaled vehicles from towing companies to insurance companies.[3] The problem is that the Texas Act puts the full onus on the insurance company when a tow company is not paid for its services, and fails to limit the amount for which an insurance company can be held liable for under the Texas Act. In other words, the Texas Act enables a tow company to extort an insurance company for unconscionably high fees.

C. Two Texas Appellate Courts Have Interpreted The Texas Act In Favor Of The Tow Company

In *Canal Ins. Co. v. Hopkins d/b/a Hopkins Towing and Recovery*, the court held that Canal Insurance Company was liable to the tow company under Section 2303.156(b).[4] *Canal Insurance Company* involved a tractor/trailer hauling a load of peas that rolled over on the highway. Both the tractor and trailer were insured against physical damage under Canal Insurance Company's policy. The police officer at the scene of the accident ordered that Hopkins Towing and Recovery be called in to tow the tractor and trailer. Hopkins initially towed the wreckage to a different wrecker facility but at the request of the owner of the tractor/trailer, moved it to its own facility. When the owner of the tractor/trailer failed to pay Hopkins' bill for its services, Hopkins sought payment from Canal Insurance Company. Hopkins sued Canal Insurance Company under the Act when it refused to pay Hopkins on the grounds that there was no coverage for towing expenses in its policy with the owner of the tractor/trailer.

Canal Insurance Company raised several defenses in the lawsuit challenging the Texas Act. First, it alleged that the owner of the tractor/trailer consented to the tow service. This was an issue of fact for the trial court to decide, and the trial court found evidence from the testimony of the police officer that he called or had someone call Hopkins to the scene.[5] As such, the appellate court upheld the trial court's factual finding that the tow was without the owner's consent.[6] Canal Insurance Company also challenged that the tractor/trailer was a total loss, but the appellate court found there was enough evidence supporting a finding that the tractor/trailer was a total loss because the cost of repairing the tractor and trailer exceeded the fair market value of those items.[7]

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[3] *Canal Ins. Co. v. Hopkins d/b/a Hopkins Towing and Recovery*, 238 S.W.3d 549, 570 (Tex. App. – Tyler 2007, pet. denied).
[4] *Id.* at 549.
[5] *Id.* at 558-59.
[6] *Id*.
[7] *Id*. at 560-61.

Canal Insurance also argued that the legislative history of Section 2303.156 demonstrated that the legislature intended that section to be interpreted in a manner that would impose monetary liability upon an insurer only where there was a post tow transfer of title.[8] The court disagreed, holding that Section 2303.156(b) should not be interpreted to mean something other than what the plain words of the statute say.[9] The court found that the plain language of the statute did not mention that title had to be transferred to the insurance company in order for the insurance company to be liable to the tow company.[10]

Finally, Canal Insurance Company asserted two constitutional challenges to the Texas Act. First, it argued that Section 2303.156(b) is unconstitutional under the Contracts Clause of the United States Constitution because the statute required it to pay insurance benefits to an unrelated third party beyond the scope of its insurance agreement with the owner of the vehicle which did not cover towing expenses.[11] The appellate court noted, however, that Canal Insurance Company changed this argument at the trial court level and therefore did not preserve the point for appellate review.[12] Instead, the question on appeal was whether the trial court's interpretation of Section 2303.156(b) was, in and of itself, an unconstitutional impairment of Canal Insurance Company's contractual obligations.[13] The appellate court held that the Contracts Clause is directed only against impairment by legislation, and not against judgments of courts.[14] Thus, the appellate court held that the trial court's interpretation of Section 2303.156(b) could not violate the Contracts Clause.[15]

Canal Insurance Company also challenged Section 2303.156(b) on the ground that it violated the Takings Clause of the Fifth Amendment to the United States Constitution.[16] The Takings Clause addresses government takings of private property, and money is considered property under Texas law.[17] The court concluded that the applicable public policy considerations weighed in favor of ensuring that totaled vehicles are removed from the roadside.[18] The court also observed that an insurance company is subject to regulation in exchange for the privilege of doing business in a particular state.[19] The court, balancing all the factors, held that the application of Section 2303.156(b) to Canal Insurance Company was not a taking within the meaning of the Takings Clause.[20]

The only other decision interpreting the Texas Act is *Underwriters at Lloyd's of London v. Harris*.[21] In *Harris*, Underwriters' policy at issue included debris removal limits of $6,000.00,

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[8] *Id*. at 562.
[9] *Id*. at 563.
[10] *Id*. at 564.
[11] *Id*. at 567.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 568.
[17] *Id*.
[18] *Id*. at 570.
[19] *Id*. at 572.
[20] *Id*.
[21] 319 S.W.3d 863 (Tex. App. – Eastland 2010, no pet.).

which Underwriters tendered to the tow company.[22] The tow company then sued Underwriters for the balance of the towing charges under Section 2303.156(b).[23] The trial court awarded the tow company its towing and storage charges. On appeal, Underwriters argued that Section 2303.156(b) did not apply to towing *and* storage charges because the language is phrased disjunctively. Underwriters argued that the tow company could only recover either its towing *or* storage charges.[24] The court, however, held that the statute allows for the recovery of both towing and storage charges.[25] But, the court did reverse the trial court's finding that the tow company was entitled to recover its attorney's fees. The trial court had awarded the tow company its attorney's fees under the Declaratory Judgment Act since the tow company sought a declaration of the party's rights under the Act in order to recover its attorney's fees. The appellate court held that a tow company could not recover attorney's fees under the statute, and therefore could not re-frame its claim under the Texas Act as a request for declaratory relief as an alternative means for recovering its attorney's fees.[26]

D. States With Similar Statutes To The Texas Act

Oklahoma has a similar statute to the Texas Act. The Oklahoma Statute provides as follows:

> 4. The operator is authorized to collect all lawful fees from the owner, lienholder or agent or insurer accepting liability for paying the claim for a vehicle or purchasing the vehicle as a total loss vehicle from the registered owner of the towed vehicle for the performance of any and all such services and costs to collect such fees.[27]

The only limiting language in the Oklahoma Statute is the tow company can collect "lawful" fees. The Oklahoma Statute provides very specific towing rates that a tow company can charge, and requires the tow company to provide reasonable documentation to substantiate all lawful fees charges the insurer or owner of the vehicle.[28]

Georgia has a less onerous statute than Texas. The Georgia Statute provides as follows:

> (b) Any insurer, upon acceptance of liability, pursuant to any automobile liability or motor vehicle liability insurance policy, shall pay reasonable benefits for losses, including total losses, to a third party on behalf of any insured for loss of use and towing and storage costs of such motor vehicle . . . in no event shall this Code section be construed so as to relieve the claimant of his or her obligation to mitigate his or her losses or to require the payment of loss of use and towing and storage costs benefits in an amount which is greater than the actual losses suffered.[29]

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[22] *Id.* at 864.
[23] *Id*.
[24] *Id*. at 866.
[25] *Id*. at 868.
[26] *Id*. at 865-66.
[27] OKLA. STAT. ANN. 47 Okl. St. § 953.1B.4. (2013).
[28] *Id*. at § 953.1 et. al.
[29] O.C.G.A. § 33-7-11.1(b) (2013).

The Georgia Statute at the very least appears not to allow a tow company to charge more than what the actual loss is. In Texas, the Texas Act does not limit a tow company from charging excessive towing and storage fees in excess of the value of the totaled vehicle. Missouri has a statute that only requires the insurance company to pay the tow company's towing and storage fees upon payment of a total loss to a vehicle only when the insurance policy covers towing and storage fees.[30]

IV.

Avoiding Or Limiting Liability

There are defenses and alternative strategies that may avoid or limit an insurance company's liability under state laws that aim to protect tow companies.

A. Policy Language

One way to avoid or limit an insurance company's liability is to change its policy language. While an insurance company cannot avoid liability by writing a policy provision that oversteps state law, an insurance company can add language to its policy to help shift the burden of liability to its insured. For example, an insurer could add language in the policy that in the event of a total loss to a vehicle, the tow company, if not already compensated for its towing and storage charges, will be added as a loss payee on any insurance proceeds check issued to the insured. Another possibility is to no longer allow the insured the option to include debris removal coverage and instead make that mandatory coverage. While this option does not guarantee that the insurance company will not be liable for an amount over the debris removal limit as in the *Harris* case, it at least provides coverage if a state statute applies, and the insurance company can collect a premium.

B. Interplead Money Into Court Registry

If the insurance company determines that a state statute applies and there is no coverage or limited coverage for towing and storage expense, then the insurance company may interplead the money into the registry of the court and name the insured and tow company as claimants to the proceeds. By filing an interpleader, the insurance company gets to select the forum and has the potential of recovering its attorney's fees, depending on each state's law, for filing the lawsuit. This option also gives the insurance company a better opportunity to limit or avoid paying over its policy limits when the towing and storage charges exceed the covered limits.

C. Statutory Defenses

The Texas Act requires that a tow company provide notice to the vehicle owner of the charges incurred for towing the vehicle and what the storage rates are for storing the vehicle.[31] Section 2303.151 requires a tow company to provide notice to the owner of the vehicle by certified mail return receipt requested.[32] In *Great West Cas. Co. v. Garza*, the court held that the

[30] MO. ANN. STAT. § 304.156.13 (2014).
[31] TEX. OCC. CODE ANN. §§ 2303.151 and 2303.153.
[32] TEX. OCC. CODE ANN. §§ 2303.151.

tow company had a statutory duty under the Act to notify the owner of the vehicle that it was being held in storage.[33] Neither the *Harris* or *Canal Insurance Company* case dealt with the issue of notice, so it is unclear whether a court would find that a tow company is not entitled to any amount owed for towing and storing the vehicle where the statutorily required notice isn't sent. An insurance company would be well advised to take a cautious approach and check with its insured to determine if it received notice from the tow company as required by the Texas Act. Other states likely have similar notice requirements that the tow company must satisfy.

In addition, the Texas Act only applies when the owner of the vehicle that is totaled cannot consent to the tow. This issue arose in the *Canal Insurance Company* case. The insurer alleged that the driver of the vehicle consented to the tow and thus the Texas Act did not apply. However, the only testimony in the case regarding consent was the State Trooper and he testified that he recalled calling the tow company.[34] The driver of the tractor did not testify. The appellate court thus upheld the trial court's finding of fact that the tow was not consensual. Accordingly, this defense will likely not be successful if a law enforcement official makes the call to the tow company to clean up a wreck.

Another possible defense is that these statutes are not specific as to whether they cover clean-up costs and towing or storage charges for cargo. For instance, Section 2303.156(b) of the Texas Act only mentions towing and storage for a "vehicle." Section 2303.002 defines "vehicle" to mean a "motor vehicle for which the issuance of a certificate of title is required under Chapter 501, Transportation Code, or any other device designed to be self-propelled or transported on a public highway." The *Canal Insurance Company* and *Harris* case did not address this issue.

D. File A Complaint With The Particular State's Department Of Licensing And Regulation

If the insurance company believes that a tow company is extorting its insured or the insurance company with unsubstantiated towing and storage fees, then the insurance company can file a complaint with the particular state's department of licensing and regulation. In Texas, a tow company that is called by law enforcement to clean-up a wreck must have an Incident Management License. If the Texas Department of Licensing and Regulation determines that a tow company has committed any wrongdoing, then the Department could strip the tow company of its license.

V.

Conclusion

Insurance companies and equipment owners need to be aware of this potential liability when they handle any claim for physical damage to a vehicle. Liability can be avoided or limited if an insurance company or equipment owner addresses the towing and storage issues upfront before things escalate.

[33] 2006 Tex. App. LEXIS 7600 (Tex. App. – Corpus Christi 2006, no pet.).
[34] *Canal Ins. Co.*, 238 S.W.3d at 558.