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Discovery Tips For Determining Value of Wrongful Death Claims

By Bill Schrank

Trying to determine the value of a wrongful death claim is different than determining the value of a bodily injury claim. If your investigation and discovery are not focused on the right elements, you risk overlooking the appropriate information needed to properly evaluate the potential value of a wrongful death claim. This article offers some suggestions for pre-suit investigation and post-suit discovery to assist in the proper evaluation of wrongful death claims.

Do the claimants have standing to make a claim for wrongful death damages?

By Arizona statute, A.R.S. §12-612, the only individuals who have a claim for wrongful death are the decedent's surviving spouse (legally married), children (natural offspring and legally adopted), and parents. If none of these individuals survive the decedent, the wrongful death claim belongs to the decedent's estate. Ex-spouses, live-in companions (no matter how long the relationship),[1] step-children, step-parents, grandparents,

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[1] Note that although a "common law" marriage cannot be created in Arizona, Arizona courts will recognize a "common law" marriage that was created and completed in another state before the decedent and his spouse moved to Arizona.

New Case Provides Additional Guidelines for Complying with UM/UIM Coverage Offers and Rejections

By John DiCaro

The uninsured/underinsured (UM/UIM) motorists statute, A.R.S. §20-259.01, has generated much litigation over the past several years. One of the purposes of the statute is to ensure that insureds are provided with information so they can make an educated decision on whether or not to purchase uninsured or underinsured motorist coverage. Arizona appellate courts have found that the UM/UIM statute's mandate of a written offer of coverage to insureds reflects a legislative intent to protect responsible members of the public from financially irresponsible drivers. These courts have made it clear they will not apply the UM/UIM statute (including for the purpose of assessing the sufficiency of an offer) in a way that conflicts with the Legislature's intent to provide protection from uninsured and underinsured motorists.

The central purpose of the Underinsured Motorist Act is to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones (as well as others), with appropriate UM/UIM motorist coverage. In order to guarantee that insureds are presented with this opportunity, the statute provides that insurers must make offers of UM/UIM coverage available to their

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In This Issue

Dram Shop Liability in Arizona: The Sobering Truth

By David L. Stout, Jr.

We have all heard the story where someone attends a happy hour or holiday party with co-workers, consumes a few cocktails, and drives home. The story inevitably ends with that person getting into an accident and injuring an unsuspecting driver. If you are the bar owner (the "liquor licensee") or social host, you wonder where your liability starts and ends, and what can be done to protect yourself from a lawsuit. If you are the injured driver, you wonder who is going to pay for your medical bills and compensate you for your pain and suffering. The Arizona Legislature has attempted to answer these questions by enacting statutes designed to regulate the circumstances under which a liquor licensee or social host can be liable for injuries caused by an intoxicated patron or guest. Although definitive answers in the law can be elusive, Arizona's dram shop statutes serve as the starting point for evaluating liquor liability.

Liquor Licensee vs. Social Host

A liquor licensee is a person or entity that has been issued a license to sell alcoholic beverages. A social host is a person - other than a liquor licensee - who furnishes alcohol to his or her guests. Whether a person can be liable to others for injuries caused by intoxicated patrons or guests depends upon the classification of the person or entity serving the alcoholic beverage. A social host is not liable for injuries or damages caused by a guest who was served alcohol *so long as* the intoxicated guest is of the legal drinking age. *See* A.R.S. § 4-301. On the other hand, a liquor licensee can be liable for injures or damages caused by a patron who was served alcohol while "obviously intoxicated." *See* A.R.S. § 4311(A). This generally means that an individual gracious enough to host a holiday party is insulated from liability for injuries caused by an intoxicated guest. For a liquor licensee, however, the same protection is not afforded. The liquor licensee can be liable for the injuries and damages caused by a patron who was served alcohol while obviously intoxicated. This remains true even if the injuries are to the intoxicated patron himself. *Schwab v. Matley*, 164 Ariz. 421, 793 P.2d 1088 (1990).

What Can Liquor Licensees Do to Limit Liability?

Liquor licensees should take steps to limit potential liability related to over-serving alcohol to patrons. As the statute creates liability for serving "obviously intoxicated" patrons, the most apparent safeguard is to refrain from serving patrons whose impairment is shown by "significant uncoordinated physical activity or significant physical dysfunction." *See* A.R.S. § 4-311(D). But is this really enough to provide meaningful protection from multi-million dollar lawsuits? Probably not.

In *Carillo v. El Mirage Roadhouse*, 164 Ariz. 364, 793 P.2d 121 (App.1990), the liquor licensee identified an intoxicated patron and refused to serve him. The licensee continued to serve the patron's friends, however, who in turn passed cocktails to the intoxicated patron. There was evidence that the bartenders were aware of this exchange, yet continued to serve the patron's friends. The Court of Appeals determined in *Carillo* that the duty set forth in the dram shop statutes "was broad enough to include the duty not to sell, serve or furnish alcohol to anyone regardless of their condition if a licensee has actual or constructive knowledge that an intoxicated person will ultimately receive and consume alcohol." Thus, in addition to refraining from serving an obviously intoxicated patron, a liquor licensee should refrain from serving those with the intoxicated patron when there is a reasonable basis to believe that the cocktails are ultimately being furnished to the intoxicated patron.

What happens after a patron is intoxicated and is preparing to leave the bar or restaurant?

To limit potential liability, a liquor licensee should take action to ensure the safety of the patron and public. In *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 153 P.3d 1064 (App. 2007), the intoxicated patron backed into another vehicle while attempting to leave the liquor licensee's bar. The licensee confiscated her keys and called a taxicab to transport the patron home. When the taxicab failed to arrive, an employee of the licensee drove the patron home and returned her keys. Unbeknownst to the employee and licensee, the intoxicated patron returned to the bar shortly thereafter to retrieve her car. While driving home, the patron was involved in a head-on collision with an unsuspecting driver, who subsequently sued the licensee for personal injuries. The unsuspecting driver argued that the licensee had a duty not to serve alcohol to an obviously intoxicated patron. Having violated this duty, the driver argued that the licensee did not extinguish liability merely by driving the intoxicated patron home. The liquor licensee, on the other hand, argued that it had fulfilled its duties, and the intoxicated

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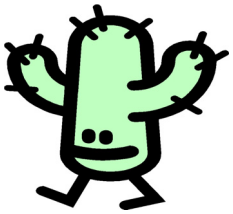

Arizona: A Friendly State for Defendants in Strict Product Liability Cases Involving Insolvent Defendants in the Chain of Distribution

By Jeremy Johnson

In most product defect cases, the plaintiffs sue the product manufacturer and seller (and frequently several component part manufacturers and distributors) alleging that each defendant is strictly liable for the plaintiff's damages by allowing a defective product to be designed, manufactured, distributed, and sold into the stream of commerce. In many instances, the product manufacturer (or another defendant in the chain of distribution) is an insolvent or otherwise judgment-proof corporation. This can be especially true when dealing with foreign corporations that are not subject to federal or state jurisdiction. This can create a troublesome and potentially costly situation for the local distributors and sellers in many states because they can be required to satisfy judgments for not only their portion of liability, but also for the portion of liability associated with insolvent defendants in the chain of distribution. Arizona is a different, friendlier place for defendants in cases involving insolvent defendants because it has abolished joint and several liability, even in strict product liability cases.

In 1987, the Arizona legislature enacted a statute, A.R.S. § 12-2506, which abolished joint and several liability in all but a few circumstances. The legislature carved out three exclusive exceptions to the abolishment of joint and several liability, exempting only those situations where: (1) multiple defendants caused plaintiff's damages when acting in concert; (2) one defendant acted as an agent or servant of another; or (3) the defendant's liability arose from a duty created by the federal employer's liability act. Notwithstanding the statute, plaintiffs involved in strict product liability cases argued for approximately ten years that defendants in the chain of distribution of a defective product were to be held jointly and severally liable for a plaintiff's damages. More specifically, plaintiffs alleged that the relationship between the defendants in the chain of distribution of a defective product fell into one of the three exceptions to A.R.S. § 12-2506. In December, 2007, however, the

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Announcements & Speaking Engagements

JS&H is pleased to announce that **Matthew McLaughlin** and **Elizabeth Yoo** have joined the firm as associates.

Steve Leach has been named Chairman of the Fiesta Bowl Committee for the 2010-2011 season.

David Cohen has been appointed to serve another term on the Arizona Health Care Association's (AHCA) Public Policy Committee.

Kevin Broerman has been appointed to serve another two-year term on the State Bar of Arizona's Civil Jury Instructions Committee.

Ed Hochuli and **Phil Stanfield** will present a webinar, "The Basics of Arizona Law," at Sedgwick's Long Beach, California office on Tuesday, May 4, 2010 which will be broadcast to all Sedgwick offices nationally. **Ed** will also be presenting "Negotiating with the Big Boys" at the CNA A&E Program on May 18, 2010 in Tucson and "Negotiation Skills and Tips" at the CNA Risk Management Seminar on May 25, 2010 in Phoenix.

Don Myles and **Ed Hochuli** presented, "Negotiations and Settlement Techniques," at the 2010 Combined Claims Conference on April 6, 2010 in Long Beach, CA.

Michael Hensley, **Bob Berk** & **Doug Cullins** presented, "Mental Health and the Law," to 75 mental health professionals on March 31, 2010 at the invitation of Southwest Behavioral Health Services, Social Service Contractors Indemnity Pool and Southwest Risk Services.

John DiCaro provided an update on Arizona Law to Nationwide Insurance Claims representatives from Arizona, California, Denver and New Mexico on March 10, 2010.

Navigating the Minefields: Drug Testing for Public and Private Employers

By Barry H. Uhrman

In response to a perceived problem of drug use in the workplace, many employers have implemented post-offer, pre-employment drug testing to detect and deter the use of substances that impair workplace activity. The circumstances under which testing may occur, however, vary greatly and present several significant concerns for an employer, depending upon whether the employer is a public or private one.

When a drug test is performed by a public employer, it is a "search" that must satisfy the reasonableness requirement set forth in the Fourth Amendment to the United States Constitution. In determining what is reasonable, the practice in question must be judged by balancing its intrusion on the individual's Fourth Amendment rights against its promotion of legitimate government interests. A public employer is therefore restricted in pre-employment drug testing unless there is a compelling governmental interest that outweighs the privacy, due process, and search and seizure rights of the employee.

The United States Supreme Court has provided some guidance on when drug testing of employees is permitted. If a policy applies to all employees, not just to those in positions implicating safety issues, a desire to promote a drug-free workplace is an insufficient justification. If a public employer is not experiencing an actual drug problem among its current employees, it should limit drug testing to positions that require the candidate to execute safety-sensitive tasks or involve the enforcement of drug laws.

The Constitution does not restrict private employers from drug testing their employees. Nevertheless, an employer's drug testing policy must satisfy the requirements of various state statutory provisions. In general, a private employer may require the collection and testing of samples for any job-related purpose or business necessity consistent with the employer's written policy.

Supreme Court Guidance - The Validity of Governmental Drug Testing Programs

In several key decisions, the Supreme Court has sought to delineate the parameters of the balancing analysis required to determine the constitutionality of an employment drug testing program. The Court has clearly stated that a public employer's interest in drug testing its employees must be weighed against an individual's privacy interests and the nature and scope of the intrusion into that reasonable expectation of privacy.

In 1989, the Supreme Court issued rulings in two companion cases[1] and held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs an individual's privacy interest. In *Skinner*, the Court found that public safety was such a special need. Applying these standards, a suspicionless drug testing program designed to test railroad employees after they were involved in an accident was held constitutional. The government's compelling interests in regulating the conduct of employees engaged in safety-sensitive tasks and ensuring the safety of the traveling public justified the intrusion into the covered employees' privacy.

Similarly, in *Von Raab*, the Court addressed the issue of suspicionless drug testing of U.S. Customs Service employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms. Given the extraordinary safety and national security hazards involved with these sensitive positions, the Court held that such testing was lawful and reasonable under the Fourth Amendment.

These cases and their progeny demonstrate that any government intrusion upon privacy rights must be justified by a "compelling" government interest to justify the particular drug testing search. Notably, however, the Supreme Court has resisted expanding the scope of the "special need" requirement to encompass large sections of the workforce. For example, the Court struck down a Georgia law[2] requiring candidates for state offices to certify that they had tested negative in drug urinalyses. Such mandatory drug tests were unconstitutional, suspicionless searches, as Georgia failed to show a "special need" substantial enough to override the candidates' privacy interests (such as a demonstrable problem of drug abuse by its elected officials).

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[1] *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989)*; Skinner v. Railway Labor Executives' Association.,* 489 U.S. 602 (1989).

[2] *Chandler v. Miller*, 520 U.S. 305 (1997).

Parameters of Drug Testing Programs for Public Employers

Subsequent challenges to drug testing programs have focused on whether a public employer has shown the "special need" for such testing. Although showing a problem with drug abuse among current public employees may not be necessary in every case to demonstrate the validity of a testing regime, it would shore up the assertion of "special need" for a suspicionless, general search program. Courts are also more inclined to permit testing programs with respect to employees performing safety-sensitive tasks (based on a review of the job responsibilities of the tested employees) or where the government has a reasonable suspicion of drug use.

Even though the government may possess a legitimate interest in having a drug-free workplace and maintaining a positive public image, these ideals are insufficient to pass constitutional scrutiny for purposes of suspicionless drug testing programs. Many public employers have tried to argue that large segments of their workforce have critical responsibilities that justify random testing, but this is an insufficient reason to require candidates for all positions to pass a pre-employment drug test as a condition of a job offer. Even random, suspicionless drug testing of firefighters, which most people consider a safety-sensitive position, might not pass constitutional scrutiny absent evidence that there is a significant drug problem among firefighters.

The Supreme Court has provided limited exceptions for drug testing of public employees in "special needs" cases. In implementing a post-offer, pre-employment drug testing program, a public entity must demonstrate an interest important enough to justify an intrusion into a legitimate expectation of privacy. The procedure must be as unobtrusive as possible, such as post-accident testing or testing based on a demonstration of reasonable suspicion. Absent a showing of an actual drug problem among its workforce, testing by a public employer should be limited to safety-sensitive positions, such as those involving the enforcement of drug laws, use of firearms, or circumstances that would justify the intrusion into an individual's reasonable expectation of privacy.

Practical Advice for Implementing a Drug Testing Program for Private Employers

Although drug testing by private employers does not have the same Fourth Amendment implications, there may be statutory limitations and requirements for drug testing in the private sector. Many states provide that drug testing programs for private employers may be conducted for any job-related purpose consistent with business necessity, including:

- Investigation of possible individual employee impairment;
- Investigation of accidents and for safety reasons;
- Maintenance of safety for employees, customers, clients or the public at large;
- Maintenance of productivity, quality of products or services, or security of property or information; and
- Reasonable suspicion that an employee may be affected by the use of drugs, and the use may adversely affect the job performance or the work environment.

Before a private employer compels drug testing of its employees, the employer should implement a written policy that is distributed to all employees. The policy should be distributed in the same manner in which the employer informs its employees of other employment policies and procedures, such as through inclusion in an employee handbook. Prospective employees also should be advised about the drug testing requirements. At a minimum, the written policy should include:

- A statement of the employer's policy respecting drug and alcohol use by employees;
- A description of those employees or prospective employees who are subject to testing;
- The circumstances under which testing may be required;
- The substances for which testing may be required;
- A description of the testing methods and collection procedures to be used;
- The consequences of a refusal to participate in the testing;
- Any adverse personnel action that may be taken based on the testing procedure or results;
- The right of an employee, on request, to obtain the written test results;
- The right of an employee, on request, to explain in a confidential setting, a positive test result; and
- A statement of the employer's policy regarding the confidentiality of the test results.

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Appellate Highlights

Frederico v. Maric
AZ Court of Appeals
A physician performing an independent medical examination cannot be held liable for aiding and abetting an insurance carrier in committing bad faith if the physician had no actual or inferred knowledge of the carrier's intent to commit bad faith.

Riendeau v. Wal-Mart Stores, Inc.
AZ Court of Appeals
So long as a notice of appeal is timely filed from a compulsory arbitration, the late filing of a cost bond does not render the appeal jurisdictionally defective, because the trial court has discretion to extend the time for perfecting an appeal from compulsory arbitration.

Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.
AZ Supreme Court
In construction defect cases, the economic loss doctrine applies strictly to prohibit plaintiffs from recovering in tort for purely economic loss, unless the construction contract provides otherwise or the economic loss is accompanied by physical injury to persons or other property.

Solimeno v. Yonan et. al.
AZ Court of Appeals
A defendant in a medical malpractice case who testifies to the applicable standard of care is subject to all pre-trial expert disclosure requirements, and where failure to meet those requirements results in mistrial, monetary sanctions such as attorneys fees can be assessed.

Wilshire Insurance Co. v. S.A.
AZ Court of Appeals
Even where language in a commercial general liability insurance policy may imply an agreement to cover injuries arising out of criminal acts, such coverage is disallowed in Arizona, where insurance contracts must be construed consistent with the public policy that "forbids contracts indemnifying a person against loss resulting from his own willful wrongdoing."

Strategic Development and Construction v. 7th & Roosevelt Partners
AZ Court of Appeals
A motion to dismiss under Rule 12(b)(6), which refers to a contract or other document attached to the complaint does not convert the motion into one for summary judgment, because such matter is not "outside the pleadings" under the rule. Nor must a 12(b)(6) motion to dismiss referencing a matter of public record be treated as a motion for summary judgment.

Gamboa v. Metzler
AZ Court of Appeals
A trial court can properly hold a party to an agreed-upon schedule regarding time limits on cross-examination of the other party's expert witness in a personal injury action, particularly where that party was primarily responsible for delay and difficulties during trial, the party did not request additional time or attempt to arrange for the witness' return the following day, and the party made no offer of proof showing prejudice.

UM/UIM continued from Page 1

insureds in writing. Arizona courts also recognize that the statute's purpose is best furthered if all persons who purchase automobile liability insurance are offered, in writing, the opportunity to purchase additional UM/UIM coverage in limits up to those they choose for their bodily injury coverage.

In assessing compliance with A.R.S §20-259.01, Arizona courts have adopted a broad definition of what constitutes an "offer" of such coverage. The Arizona Supreme Court in *Tallent v. National General Insurance Company*, 185 Ariz. 266 (1996), held that in order to make an offer in compliance with the statute, an insurer must simply bring to the insured for acceptance or rejection the opportunity to purchase UM/UIM coverage. *Tallent* interpreted §20-259.01 to require insurers to offer UM/UIM coverage in a way reasonably calculated to bring to the insured's attention that which is being offered. The *Tallent* court stated that the insurance form is not required to provide a "treatise on UM/UIM coverage." Other Arizona courts have stated that these forms do not need to include pricing information, but are required to refer to the applicable policy limits and provide a means by which insureds can accept and/or reject UM/UIM coverage up to the limits of their bodily injury policy.

Recently, the Arizona Court of Appeals once again addressed A.R.S. §20-259.01 in *Ballesteros v. American Standard Insurance Company of Wisconsin*, 223 Ariz. 269 (2009). In *Ballesteros*, the insured brought a class action suit against American Standard, his agent, and the adjuster alleging that they failed to effectively offer UM/UIM motorist coverage under the policy. The insured complained that the form offered to him to accept or reject coverage was written in English. Mr. Ballesteros is Spanish-speaking and cannot read English. American Standard argued that the form provided to Mr. Ballesteros had been approved by the Arizona Department of Insurance. It maintained this was dispositive evidence that it acted appropriately in presenting an offer of UM/UIM coverage to Mr. Ballesteros.

Ballesteros rejected American Standard's argument, holding that simply using a form approved by the Department of Insurance is not, in and of itself, sufficient to establish that the insurer adequately offered UM/UIM coverage to its insured. The Court stated that when an insurance agent knows or has reason to know that the approved UM/UIM coverage selection form does not, standing alone, convey an offer of UM/UIM coverage in a way reasonably calculated to apprise a potential insured of its contents, the agent is required to take additional action reasonably calculated to inform the insured of the written offer's contents. *Ballesteros* places the burden upon the insurer to adequately explain the contents of the form to customers. Thus, if an agent has a Spanish speaking customer, simply providing him a form in English is not sufficient to meet the statute's requirements. An insurance agent is required to make sure *all* customers understand offers of UM/UIM coverage and their right to reject such coverage. The *Ballesteros* Court added that providing a form written in English to a non-English speaking customer might be appropriate, so long as the insurance agent can show he or she adequately explained the coverage to the insured.

As a practical matter, it would certainly be appropriate for an insurer to utilize the standard Department of Insurance form with a non-English customer, provided that the customer understands he is being is offered UM/UIM coverage and has properly rejected the coverage. As reiterated in *Ballesteros*, however, A.R.S. §20-259.01 and the cases interpreting it *squarely* place the burden upon the insurers to demonstrate that a proper offer and rejection have been made. In light of this burden, the best way to ensure compliance with the statute is to use the approved Department of Insurance form, but tailor it for the individual customer's use in the customer's primary language. It would be advisable to also attach an acknowledgement to the form showing that the customer has read and understands the form and has chosen to reject the offer for UM/UIM coverage made by the insurer.

Keep in mind that whenever a court determines that a proper offer and rejection have not been completed, A.R.S. §20-259.01 and the cases interpreting it "write into" the insurance policy at issue UM/UIM coverage up to the policy's bodily limits. It is therefore in an insurer's best interest to take the extra steps required by *Ballesteros* when offering UM/UIM coverage and when obtaining proof that the customer understands and rejects that coverage. ◆

WRONGFUL DEATH continued from Page 1

siblings, aunts, uncles, cousins and other relatives never have a claim for wrongful death. Consequently, the legal relationships between the claimants and the decedent need to be verified and confirmed through discovery. It is important to obtain valid copies of the birth certificate, death certificate, marriage licenses and divorce decrees of the decedent. Likewise, it is important to obtain a valid copy of the birth certificate for each of the decedent's children and the adoption decree for any adopted children.

It is also crucial to determine the identity, whereabouts and status of any other beneficences who may have a claim, but have not yet "appeared." This is particularly true where a decedent is born out of wedlock and lived with only one parent, or the decedent's parents have divorced. A decedent's natural parent still retains the right to bring a wrongful death claim even though he/she may be divorced or may have "abandoned" the decedent. The exception is when the natural parent's legal rights have been terminated by the Court. The fact that a parent may not have had a close relationship with the decedent - due to divorce, "abandonment" or otherwise - goes to the quality of the relationship and the value of the claim, rather than the right to bring a claim.

What was the quality of the relationship between decedent and each claimant?

In a wrongful death action, the jury will make a separate award for each claimant, rather than a collective lump sum award for all claimants. Each wrongful death beneficiary has the right to present evidence as to how the decedent's death has affected him/her individually. The jury is not obligated to award each claimant with the same amount of money. The jury is instructed to consider: (1) the loss of love, affection, companionship, care, protection and guidance since decedent's death and in the future; (2) the pain, grief, sorrow, anguish, stress, shock and mental suffering already experienced, and reasonably probable to be experienced in the future; (3) the income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future; (4) the reasonable expenses of funeral and burial; and (5) the reasonable expenses of necessary medical care and services for the injury that resulted in the death of the decedent.

Usually, it is money well spent to retain a private investigator to conduct a full background search on the decedent and each of the claimants. This background search should include court records (civil, criminal, family and probate), property ownership records, school and academic records, employment history, and social internet websites.

Investigation and discovery should delve into the relationship the decedent had with each claimant, recognizing that the claimant's relationship with the decedent may have changed at different stages of his/her life. Factors that should be explored include the quantity and quality of time spent with the decedent, shared interests and activities, similar and different personality traits, goals and ambitions, sources of conflict and subjects of dispute, and financial support. It is critical to require the claimants to give specific examples of guidance, advice and/or comfort they received from the decedent, as well as specific examples of shared interests, activities, and events.

You should also determine if the decedent left a will, and if so, obtain a copy of it. Likewise, you should request a copy of any life insurance beneficiary designations made by the decedent. Such documents may shed light on the decedent's priorities in life and how the decedent viewed his relationship with various family members. Don't overlook organizations, clubs, community activities and other memberships to which the decedent belonged. This discovery may lead you to individuals who are not related to the decedent, but who may have a different perspective of the decedent and his/her family relationships.

Pictures are worth a thousand words. For this reason, I normally request numerous photographs over a 7 year time span depicting the decedent with each of the claimants, and I ask opposing counsel to identify the date and place of each photograph, the occasion at which the photo was taken, and the names of each person in the photograph. Such photographs can reveal a lot about the lifestyles of the decedent and claimants, highlight important events in their lives, and lead to other questions regarding other events.

How are the claimants coping?

Most everyone experiences the loss of a loved one, but a crucial factor in determining the value of a wrongful death claim involves finding out how each claimant is coping with the decedent's death. In this regard, it is important to discover what support system is in place for each claimant, what (and who) is their source of strength, where and how they find comfort, and whether they have sought any grief counseling (be it from a professional, clergyman or friend). I sometimes depose a claimant's

friends, neighbors, co-workers and other relatives, not simply to hear them talk about the claimant's adjustment to the loss of the decedent, but to establish that they are genuinely concerned and supportive of the claimant in his/her grief. It is vital for the jury to understand that although claimants have lost a loved one, they are not alone, but are surrounded by people who care and are willing to help them.

Another "positive" coping mechanism of claimants is to do something special to honor or remember the decedent. Sometimes a claimant copes better if he/she has a few keepsakes to help remember and cherish the decedent. Investigation and discovery should explore these factors.

How critical is taking depositions of the claimants?

Once the case is in litigation, it is necessary to depose the claimants. Although you might anticipate what they will say, it is equally, if not more important, to know how sympathetic and effective they will be as witnesses. Additionally, because wrongful death cases may be appropriate for a focus group or mock jury, the claimants' depositions should be videotaped for later viewing. Taking depositions of the claimants also serves other purposes. For some claimants, the deposition is a cathartic experience, allowing them to vent their emotions and feelings, and have someone listen to their memories of the decedent. Often after depositions, claimants are ready to settle their claims and move on. And, in some cases, a claimant's testimony is not nearly as effective or emotional at trial after he/she has already "vented" during deposition.

How do you arrive at a monetary value?

Admittedly, there is no set formula for valuing a wrongful death claim. It is subjective for the most part. Still, one way to get an idea of verdict and settlement potential is to obtain a compendium of jury verdicts from the county or district in which the case is pending. Additionally, a focus group may give insight as to the value of the claims. A more expensive and extensive means of assessing the potential value of wrongful death claims is to conduct a mock jury trial. One readily available and free resource I use is to seek feedback from my neighbors, friends, and acquaintances through various organizations and community activities. Although most do not have a legal background or any experience in evaluating cases, they are exactly the type of people who will make up a jury. I simply give them a summary of the good and bad facts, and learn from their responses.

Are punitive damages being sought?

One final note is Article II, Section 35 of the Arizona Constitution, which prohibits punitive damages from being awarded to any claimant who is present in Arizona in violation of Federal Immigration Law. In short, individuals who are in Arizona illegally cannot make a claim for punitive damages. Consequently, if punitive damages are alleged, you have the right to investigate and discover whether any of the claimants are residing illegally in Arizona.

Obviously, this is not an exhaustive list of avenues to pursue in evaluating wrongful death claims. These basic suggestions should help, however, in determining the right of claimants to proceed with their claims and in assessing the value of those claims. ◆

DRAM SHOP continued from Page 2

patron's return for her car constituted a superseding, intervening event that precluded recovery. The Court of Appeals in *Thunder Pass* agreed with the licensee, finding that the act of driving the intoxicated patron home fulfilled the licensee's duty of "affirmative, reasonable care" to the patron and public. This broke the chain of legal causation and relieved the licensee of liability.

Is a Liquor Licensee Relieved of Liability if the Intoxicated Patron Makes it Home?

In dram shop lawsuits, the injury-causing accident does not always occur immediately after the intoxicated patron leaves the bar. Often, the accident occurs hours later and after the patron has returned to his or a friend's home. If the patron arrives home without intervention from the licensee, is the chain of legal causation for later injuries broken? Despite the holding in *Thunder Pass*, the answer is unclear.

The *Thunder Pass* court placed weight on the liquor licensee's fulfillment of its legal duty of affirmative, reasonable care by separating the intoxicated patron from her car and arranging safe transportation home. The facts from *Thunder Pass*, however, are somewhat unique. Practically speaking, how often will a licensee receive notice of an intoxicated patron backing into a car, so it can take steps to separate the patron from the car and arrange for alternate transportation?

Liquor licensees generally do not have sufficient manpower to: 1) determine when each patron is going to leave its bar, 2) evaluate whether each patron's transportation is appropriate, and 3) analyze whether each patron will later engage in behavior that could give rise to dram shop liability. Considering the nature of liquor sales, it is unlikely that that a licensee will have answers to these questions with any degree of frequency. And without knowledge of the patron's plans, the licensee may be unable to meaningfully fulfill its duty of affirmative, reasonable care as was done in *Thunder Pass*.

This is not to say that *Thunder Pass* can be disregarded when defending a dram shop lawsuit. The efficacy of *Thunder Pass* is reduced, however, where the licensee did not take any affirmative steps to protect the patron and public because it lacked knowledge of a patron's plans. This could mean that in a lawsuit where an intoxicated patron arrives home without intervention from the licensee and later causes an injury, the court will be hard-pressed to rely on *Thunder Pass* to find the chain of legal causation broken. Thus, in defending a dram shop lawsuit, the focus should be on identifying any affirmative steps taken by the liquor licensee to protect the intoxicated patron and the public. ◆

PRODUCT LIABILITY continued from Page 3

Arizona Supreme Court directly addressed this issue in *State Farm v. Premier Manufactured Systems*, 217 Ariz. 222, 172 P.3d 410 (2007), and resolved the dispute in favor of defendants.

In *Premier*, the Supreme Court held that there is no exception for strict product liability cases to A.R.S. § 12-2506. Rather, each defendant in the chain of distribution of a defective product is only severally liable for that portion of liability directly apportioned to that defendant, unless a particular defendant is specifically engaged in conduct otherwise constituting one of the three exceptions.

In states that have not abolished joint and several liability for strict product liability cases (which includes most states), the plaintiff is able to collect the full judgment from *any* defendant found to be at fault for the plaintiff's damages, regardless of the percentage of fault attributed to that defendant. For example, if a jury in California awards a plaintiff $1 million apportioned as 90% against an insolvent manufacturer and 10% against a solvent seller, the plaintiff can collect the full $1 million judgment from the seller, despite the fact that the seller's portion of liability amounted to only $100,000. The seller would then have a right of indemnity or contribution from the insolvent manufacturer, but it would likely be left paying the entire $1 million judgment and never collect the manufacturer's share because the manufacturer is insolvent. States like California place the risk of an insolvent defendant in the chain of distribution of a defective product on the defendants.

Here in Arizona, that same jury verdict would have a very different practical result. The plaintiff would collect a judgment for only $100,000 from the seller for the liability directly apportioned against it. The seller would not be required to pay the manufacturer's share of liability, and the plaintiff would simply not be able to collect that portion of the award. In contrast, the verdict in California would have cost the seller $900,000 more, despite the fact that the verdicts were identical in amount and liability apportionment. Arizona is therefore a friendlier jurisdiction than most for defendants being sued for strict product liability because here in Arizona, the plaintiffs, not the defendants, bear the risk of insolvent defendants in the chain of distribution of a defective product.◆

DRUG TESTING continued from Page 4

Although an employer may designate the type of sample to be used in drug use or impairment testing, samples must be collected and testing conducted in accordance with each state's own statutory provisions. Communication received by private employers regarding drug tests is considered confidential and may not be used or disclosed in any public or private proceeding, unless the proceeding relates to an action by an employer or employee in regard to the testing.

Many states permit private employers to refuse to employ job applicants who fail a drug test or who refuse to take a drug test required to complete the application process. Employers may also take disciplinary action against employees who test positive for drugs or refuse to submit to testing. Discipline for a positive test result or refusal to take a drug test should be set forth in an employer's policy and may include any of the following:

- A requirement that the employee enroll in an employer-provided or employer-approved rehabilitation, treatment or counseling program in which participation may be a condition of continued employment and the costs of which may or may not be covered by the employer's health plan;
- Suspension of the employee, with or without pay, for a designated period of time;
- Termination of employment; or
- Any other adverse employment action.

Impact of the Americans with Disabilities Act

Under the Americans with Disabilities Act, which prohibits discrimination against the disabled and those perceived to be disabled, a test to determine the illegal use of drugs is not considered a medical examination. The administration of drug tests by a private employer to its job applicants or employees is not a violation of the ADA. Employers are not prohibited from conducting drug tests of their job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

Although individuals who are currently using illegal drugs are explicitly denied protection under the ADA (even if their drug use causes them to meet the statutory definition of "disability"), no such exclusion applies to those who are erroneously regarded as disabled because of drug use. The ADA prohibits discrimination against individuals who are erroneously regarded as engaging in illegal drug use because of a false positive drug test, but who are not actually engaging in such use. Thus, an individual who is denied employment or suffers an adverse employment action because of a false positive test result may be able to claim that his employer discriminated against him because his employer perceived him to be disabled.

Practical Advice and To Do List for Employers

Drug testing presents several significant concerns for both public and private employers, some of which are set forth in this article. Employers must understand their legal obligations and requirements with respect to statutes and regulations, as well as any constitutional implications for public employees. Employee handbooks and other written policies need to be continuously updated to comply with state and federal laws governing drug testing. Most importantly, employers must ensure that all human resources personnel and supervisors are trained regarding statutory requirements to avoid costly litigation landmines.◆

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