

**CAN LOSS OF USE RECOVERY
BE AFFECTED BY UNDERGROUND CABLE CASES?
YOU BETCHA!!**

Recovering loss of use has been a stable and consistent part of car rental damage claims since the car rental business started. Individual loss of use claims may be small but over the life of a rental business total recoveries for loss of use can amount to hundreds of thousands of dollars. Third party claims administrators have been so confident of recovering loss of use that their fees for services are often covered—at least in part—by sharing loss of use recoveries with the rental company. But now a string of cases involving damaged underground telephone cables threatens to rewrite some state laws and run roughshod over car rental loss of use claims. The cases hold that loss of use cannot be recovered unless the owner of the damaged property suffers lost revenue or lost profits. In the car rental setting this could be the same as holding that a car rental company cannot recover loss of use when the company had less than 100% utilization during the period the damaged unit was out of service for repair.

The worst decision came in 2008 in the Supreme Court of Florida. The car rental industry's most fertile state is Florida so the case merits serious attention. It all started in 2002 in Miami when a construction company named Mastec inadvertently severed an MCI fiber optic cable while digging underground on a project unrelated to MCI. It cost MCI only \$23,000 to repair the damaged cable but MCI sued Mastec in U. S. Federal District Court in Miami for another \$868,000 for loss of use of the damaged cable.

Prior to trial it was discovered that MCI suffered no interruption of service because it was able to reroute its signal to an undamaged redundant cable. The trial court had no trouble denying the loss of use claim as a windfall profit. Judge Gold disposed of MCI's claim on simple grounds (*MCI Worldcom v. Mastec*, Case No. 01-2059-CIV). He ruled on March 13, 2002 that:

The court concludes that [MCI] shall not be entitled to loss of use damages because there has been no complete loss of use of property.

That was an easy call and should have ended the case. But MCI appealed to the U. S. Eleventh Circuit Court of Appeals. That Court wandered off-topic. Despite a 76-year history of clearly reasoned Florida cases on loss of use, the Circuit Court stated that it could not decide how the common law of Florida measured damages for loss of use. *MCI Worldwide v. Mastec*, 370 F.3d 1074 (May 19, 2004). The Circuit Court passed the ball out of the federal system to the Florida Supreme Court asking for an answer to this loaded question: does Florida common law require proof of lost revenue before an owner of damaged property can recover loss of use. In other words will a car rental company have to prove 100% utilization and lost reservations for the damaged vehicle before it can recover loss of use.

The Florida Supreme Court in *MCI Worldwide v. Mastec*, 995 So.2d 221 (Supreme Court of Florida, July 2008) floundered to an awful decision based not on Florida law but on underground cable cases from Ohio and Virginia. This court sent an answer back to the Eleventh Circuit saying that loss of use could not be recovered unless the claimant could show lost

revenue. The effect is that loss of use in Florida now becomes loss of revenue, and the ability to prove lost revenue is far greater than the ability to prove loss of use.

Private auto carriers are already denying loss of use claims by car rental companies based on the MCI case. Claims adjusters are pushing harder than ever to force car rental companies to submit utilization statistics. So how are car rental companies going to recover loss of use in this climate? My suggested technique involves:

- Understanding the MCI case. The best part of the Florida Supreme Court case is a dissenting opinion in the case by Judge Lewis. He articulated clearly that lost revenue or lost profits have never been conditions precedent to recovery of loss of use in Florida. He scolded the court for ignoring decades of Florida law and for relying on cases from other states to reach its decision. Car rental risk managers should read the dissent. It is available on line at www.laplacalaw.com/MCIcase and at www.rentalclaims.com/MCIcase.
- Taking the position with an auto insurer claims adjuster that the MCI case applies only to underground cable cases. The cable cases from Florida, Virginia and Ohio involved really bad facts—specifically the outrageous loss of use claims by cable companies for huge sums that would have resulted in windfall profits. Courts were inclined from the outset to decide against the cable companies. Car rental losses are far different with established law favoring recovery of loss of use recoveries.
- Inserting a definition of loss of use in rental agreements that is not dependent on lost revenue or lost profits and having the renter promise to pay loss of use as the rental company defines it. If the insurer refuses to pay, the rental company can file suit against the renter for breach of contract.

Until a Florida Court recognizes in a future case that the MCI decision should not apply to car rental claims, car rental companies and their TPA's are going to have to cope with this string of unfavorable cases.

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