



# Finding coverage when the defendant driver is underinsured

## The *Moradi* deposition can unlock additional coverage from a previously unidentified defendant

By DANIEL DESANTIS

I am coming up on my eight-year anniversary of being a plaintiff's personal-injury trial attorney, and every year that passes, I am more confident about this: Medical care through insurance is better than treating on a lien. It is better for a variety of reasons, but some of the main ones are: (1) the insurance companies value the injury – not the medical bills; (2) if you present your case correctly, the jury should also value the injury – not the medical bills; and (3) treatment through insurance is “clean” and does not subject your client to harsh cross-examination questions by the defense (attorney-referred care, how many other times the physician has worked with your firm, etc.).

Unfortunately, a lot of our clients who have been injured from the negligence of a defendant do not have health insurance. When this is the case, they treat their injuries on a lien basis. But what if your client's injuries require extensive medical attention and the negligent defendant that caused the injuries had little to no insurance coverage? You could not advise your client to sign a lien agreement because there would be no money to pay the bills off at the conclusion of the case and the physicians would have significant contract reimbursement rights against your client.

Is your client out of luck? Not yet. Don't give up.

### The limited deposition

Ask the insurance adjuster for a limited, prelitigation deposition targeted toward finding additional avenues of

recovery. Tell the adjuster that if they do not agree, you will immediately file the lawsuit and get the deposition anyway. On the other hand, this limited, prelitigation deposition will streamline the process and can lead to a quick resolution. Spoiler: They always agree to the deposition.

Below is the law that you need to be familiar with so that you can tailor your prelitigation deposition questions to find an additional insured and more coverage for your client.

### The going and coming rule

An employee going to and from work, or to meals, is ordinarily considered outside the scope of employment during the period. (See *Carnes v. Pacific Gas & Elec. Co.* (1937) 21 C.A.2d 568, 571.) Their employer is therefore not liable for their conduct when it falls within this rule.

### Vehicle-use exception to going and coming rule

Broadly, the rule is that if an employee is *required to use their vehicle for work purposes*, their commute to and from work falls *within* the course of employment. (*Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907-908; *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624-630.)

Given this very important exception established by the *Moradi* case, my law firm calls these prelitigation depositions, “*Moradi*” depositions.

The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job, as opposed to employees who use a vehicle to commute to a definite place of business. (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481.)

Commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297.)

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied. (*Pierson*, 4 Cal.App.5th at pp. 624-630; *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815.)

### Social or recreational activities

“[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are ‘conceivably’ of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become ‘a customary incident of the employment relationship,’ an employee engaged in such pursuits after hours is still acting within the scope of his employment.” (*Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620; see also *Childers*



*v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804.)

### Business-errand exception

If the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons. (*Jeevarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435-436.)

### Compensated travel time

If an employer has agreed to compensate an employee for his or her commuting time, then the employee's conduct is within the scope of his or her employment as long as the employee is going to the workplace or returning home. (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1111.)

"[T]he employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Kobe v. Industrial Acci. Com.* (1950) 35 Cal.2d 33, 35.)

### Taking the "Moradi" deposition

Now you have the law in order to bring in the defendant's employer with the insurance coverage they need to get the medical care they require. Here is what a *Moradi* deposition might look like. Please note these are just jump-off topics for questions and you should always follow up!

#### •Introduction, rules, documents

•**Background information:** Renters or homeowners' insurance; other vehicles; all insurance policies.

•**Work experience:** Current employment/ at time of incident; ownership interest; title/duties; work vehicle(s); car allowance; work pay for cell phone or insurance; known insurance with the business.

•**Vehicle information:** Type; own/lease/rent; title; primary drivers and permissive drivers; registered to a business; insured under a business; policy limits; excess/umbrella coverage; personal or work vehicle.

### Moradi questions

Is one of your work responsibilities developing new business? Do you use your personal vehicle to engage in sales or client development? If you use your personal vehicle to engage in sales or client development, at which type of places? Would you regularly conduct such sales and client development activities?

Are you required to use your personal vehicle for business travel? Does your employer reimburse you for mileage? Do you drive to work in your personal vehicle? Do you drive home from work in your personal vehicle? Does your employer require you to drive to and from your office in your personal vehicle? Does your employer expect you to be able to use your personal vehicle for work-related activities on a regular basis?

Do you use your vehicle to visit prospective clients? Do you use your vehicle to meet with prospective clients before regular work hours? Do you use your vehicle to meet with prospective clients during regular work hours? Do you use your vehicle to meet with prospective clients after regular work hours? Do you use your vehicle to develop new business before regular work hours? Do you use your vehicle to develop new business during regular work hours? Do you use your vehicle to develop new business after regular work hours?

Do you use your vehicle to transport company materials to work-related destinations? Do you use your vehicle to transport co-employees to work-related

destinations? Does your employer permit you to stop and see perspective clients on the way home from work?

Since starting employment, did you regularly carpool to work in another person's vehicle? Since starting employment, did you regularly walk to work? Since starting employment, did you regularly use public transportation to get to work? Since starting employment, did you regularly get dropped off at work by someone else? Since starting employment, did you ever travel from your home directly to a work-related activity outside of your office? Since starting employment, did you ever use your personal vehicle to attend off-site appointments and meetings?

### Day of incident

On [date of loss], did you use your personal vehicle to drive to work? On [date of loss], did you use your personal vehicle to drive home from work? On [date of loss], did you use your personal vehicle for work-related activities? Before you got to your office on [date of loss], did you go anywhere in your personal vehicle before getting to the office? If you went somewhere before getting to the office in your personal vehicle on [date of loss], where did you go? If you went somewhere before getting to the office in your personal vehicle on [date of loss], who, if anyone, were you with when you stopped at the location(s)?

After you left your office on [date of loss], did you go anywhere in your personal vehicle before going home? If you went somewhere before going home in your personal vehicle after you left your office on [date of loss], where did you go? If you went somewhere before going home in your personal vehicle after you left your office on [date of loss], who, if anyone, were you with when you stopped at the location(s)?

Did you have any plans to use your personal vehicle for business travel on the day after the subject incident? Did you have any work-related materials inside of your personal vehicle at the time of the



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subject incident? If you had any work-related materials inside of your personal vehicle at the time of the subject incident, please identify those materials. At the time of the subject incident, were you driving away from a location where you were engaged in work activity?

**Assets**

All bank account details; 401k; stocks/bonds and accountant information.

You are looking for a benefit to the employer from having the defendant employee's car available to the business. Hopefully, you get favorable testimony such that your client can move forward with a lawsuit against a collectable defendant and get the medical care they desperately need.

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