LEWIS, FELDMAN, LEHANE & MCATEE, LLC
ATTORNEYS AT LAW
Justice Begins Here

Why you may NOT need an ATTORNEY if you have been in a CAR ACCIDENT

Why do you hire an attorney in the first place? Right a Wrong? Justice? Recover Money for Damages you've incurred? Most people hire attorneys to help them recover MONEY. Why? There is a significant loss of **MONEY** when you or a loved one are injured in an accident, and an attorney can help you recover your losses.

BUT, sometimes hiring an attorney isn't the right decision. Sometimes, if you hire an attorney, you will put yourself in a worse position than you would have been in otherwise.

WHO WANTS THEIR ATTORNEY TO RECOVER MORE MONEY THAN THEY DO?

Would you rather not recover anything?

WHAT IF YOU COULDN'T PAY FOR THE REPAIRS TO YOUR CAR BECAUSE YOU HIRED AN ATTORNEY?

Wouldn't you be kicking yourself?

Below are **SEVEN** things you should consider before you talk to an attorney about your case. Maybe you will want to ask your attorney these questions. Maybe you can answer them yourself so you can make the determination.

No matter what, these are definitely some issues you SHOULD consider before you jump to talk to an attorney. By no means are these the only things you should consider, but they do illustrate why **YOU MAY NOT NEED AN ATTORNEY**.

1. **You only have Damage to your Car, and you were not injured** - A lot of this will depend on whether or not your car is totaled or whether it can be repaired. If the car can be repaired, you will be entitled to recover for the cost of repairs, loss of value, and loss of use (which could include rental car costs). In this situation, let's assume your car is worth $10,000.00, and you have $5,000.00 worth of damage. The insurance company will pay for the $5,000.00 repair along with any rental car expense or loss of use of the car – let's say one week or $250.00. In addition, the insurance company should pay you some compensation for the loss

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of value to your vehicle, but they will argue that if the car is repaired there is no loss of value. We all know that is a false statement, but they will argue it anyway.

Now, would you need an attorney in that situation? We would argue the answer would be no. If you hired an attorney who charged a 1/3 contingent fee, how would you pay for the repairs? Assume the example above with a $1,000.00 loss of value claim. In that situation, the insurance company should pay you $6,250.00 for the repairs, loss of use, and loss of value. If the attorney took 1/3 of that, you would be left with $4,166.67, LESS that the cost of repairs. SO, you would have to pay $833.33 of your own money to get your car repaired.

If your car is totaled in the accident, you are entitled to the value of the car before the accident less the value of the car after the accident. The question becomes: what is a total loss to your car? In Alabama, a total loss is damage to the car which is 75% or greater than the value of the car. See Section 32-8-87 (d) Code of Alabama:

> ***(d) For the purposes of this section, a total loss shall occur when an insurance company or any other person pays or makes other monetary settlement to a person when a vehicle is damaged and the damage to the vehicle is greater than or equal to 75 percent of the fair retail value of the vehicle prior to damage as set forth in a current edition of a nationally recognized compilation of retail values, including automated data bases, as approved by the department.***

For example, if your car was worth $5,000.00 at the time of the accident and the cost to repair your car equals $3,750.00, or more, your car will be deemed a total loss. These figures of value are subjective and typically determined by the insurance company and based upon some "fair" market value. If you financed your car and it was bought not long before the accident, you could be underwater. What do we mean by "underwater"? Let's say you bought the car for $5,000.00 with $500 down and 6% interest over 3 years. You might owe $5,750.00 to the finance company. If your car is only worth $5,000.00, that's all the insurance company for the person who hit you will owe you. Therefore, you still owe $750.00 to the finance company, i.e.: you are underwater $750.00.

In such situations, you don't need an attorney, and most attorneys cannot assist you. The reason? If an attorney charges you a contingent fee of 1/3 of the amount recovered, you could be even further underwater, i.e.: in the example above, if the attorney recovered the $5,000.00 for you and charged you a 1/3 fee, the insurance carrier would pay the $5,000.00 to the attorney, the attorney would get his $1,666.67 fee, and you would have $3,333.33 to pay the $5,750.00 you owe to the finance company – a $2,416.67 deficiency. Are you better off with a $750.00 deficiency or a $2,416.67 deficiency? Obviously, $750.00 because you can probably negotiate with the finance company over $750.00 easier than you can over the $2,416.67 deficiency.

This example also helps explain the significance of GAP insurance. GAP insurance would pay the deficiency for you, and you don't have to worry about this problem.

2. **Subrogation or Hospital Lien Too High** – What is subrogation? Let's say you are involved in a car accident, and you seek medical treatment at a hospital, follow up with an orthopaedic doctor which results in surgery and physical therapy. Let's say the total of those medical bills equals $100,000.00, and you have health insurance with BlueCross BlueShield of Alabama ("BlueCross"). Let's say BlueCross pays the medical providers $60,000.00 (BlueCross has contracts with most medical providers whereby they do not have to pay the full amount of the bill – usually it is much less). If you receive money from the person who hit you, BlueCross will be entitled to SUBROGATE against your recovery, i.e.: BlueCross gets their money back from the money you get from the person who hit you and, potentially, your insurance coverage. The rationale behind this is that you should not be able to get a double recovery by getting money from BlueCross and money from the person who hit you for the same injuries.

How does this work? Assume the person operating the car that hit you has the minimum limits of $20,000.00 (there is a bill pending in the Alabama legislature to up these limits to $25,000). Let's also assume you have underinsured motorist benefits of $20,000.00 and two cars on your policy (you can stack uninsured/underinsured motorist benefits for up to three cars on the same policy). So, you have a total of $60,000.00 available ($20,000.00 from the person who hit you and $40,000.00 from your own insurance carrier). You would technically be entitled to more money, but unless the person who hit you is wealthy, the policy limits available is most likely all you will recover.

So, you get $60,000.00, and you owe BlueCross $60,000.00. BlueCross will probably negotiate with you somewhat. Let's say they do and reduce what you owe them by $20,000.00. Now, you have got $60,000.00 and owe BlueCross $40,000.00, and you recover $20,000.00 for your pain and suffering.

Now, what if you had an attorney who charged you a 40% fee? Your attorney would recover the $60,000.00 for you, and he would take $24,000.00 for his fee, leaving $36,000.00. BlueCross would automatically reduce it's subrogation claim by the attorney's fee, 40%, and they might negotiate more. Let's say BlueCross agrees to take $30,000.00. How much would you get for your pain and suffering? $6,000.00 or $14,000.00 less than if you had an attorney. Even if the attorney agreed to take the fee AFTER paying BlueCross, you would still come out with less: $30,000.00 less 40% or $12,000.00 = $18,000.00.

This used to not be the case. There used to be a rule called the "made whole" rule which our courts have now abolished. Under that rule, BlueCross could not subrogate against the injured person until the injured person was "made whole". In the situation where there is only $60,000.00 of insurance available for $100,000.00 in medical bills, it is clear that the person cannot be "made whole".

The Supreme Court decided to reverse the "made whole" rule in Ex Parte State Farm Fire and Casualty Co., 764 So.2d 543 (Ala. 2000). So, we are now left with the situation we have described above.
What about a HOSPITAL LIEN? Hospital liens are governed by Alabama Code Section 35-11-370:

Lien declared.

Any person, firm, hospital authority or corporation operating a hospital in this state shall have a lien for all reasonable charges for hospital care, treatment and maintenance of an injured person who entered such hospital within one week after receiving such injuries, upon any and all actions, claims, counterclaims and demands accruing to the person to whom such care, treatment or maintenance was furnished, or accruing to the legal representatives of such person, and upon all judgments, settlements and settlement agreements entered into by virtue thereof on account of injuries giving rise to such actions, claims, counterclaims, demands, judgments, settlements or settlement agreements and which necessitated such hospital care, subject, however, to any attorney's lien.

(Acts 1955, No. 488, p. 1098, §1.)

Hospitals are typically less willing to negotiate their lien like BlueCross will negotiate their subrogation interest. In fact, many hospitals in Alabama are now refusing to accept your health insurance if you were involved in an accident because they would prefer to assert their lien and attempt to recover more than what BlueCross or some other health insurance carrier would pay them.

While this is unfair, it is something we have to deal with, and it creates further questions as to whether or not an attorney will help you or hurt you. For example, assume that a hospital has a $100,000.00 lien, and there is only $60,000.00 of insurance coverage available. If you can negotiate with the hospital so that they will take 1/3 or 50% of the $60,000.00, you can walk away with $30,000.00 or $40,000.00. But, if you have an attorney, typically, the best that attorney can do is get the hospital to agree to a 1/3 split across the board, i.e.: 1/3 to the hospital, 1/3 to the attorney, and 1/3 to you. If that is the result, you will end up with only $20,000.00, not the $30,000.00 or $40,000.00 if you are successful in negotiating with the hospital and insurance company yourself.

3. <u>Fees will eat up the value of the case</u>. If you are involved in a car accident and the only coverage available is the minimum limits of $20,000.00, hiring an attorney may really ruin your case. If you have a $30,000.00 hospital lien and the attorney has a 40% fee agreement, where will you be? Say the hospital refuses to reduce its lien by more than 50%. Once the attorney gets his $8,000.00 fee, you only have $12,000.00 left over. That money will have to go to the hospital, and you will STILL OWE the hospital $3,000.00.

Whereas, if you were able to negotiate for the $20,000.00 and pay the hospital $15,000.00, you would at least be left with $5,000.00. Even if you had an attorney willing to work with you and reduce his fee to $5,000.00, you would still be left with nothing if the hospital refused to reduce its lien by more than 50% (you would still owe the hospital $15,000.00 plus the $5,000.00 to the attorney for his fee).

4. Not enough insurance coverage or no coverage - single car collision and UM - deer or animal. If your injuries from the car accident were significant and required major hospitalization, you won't need an attorney if the person who hit you had no insurance or minimum limits and if you had no uninsured motorist coverage. For example, if your hospital bills totaled $100,000.00 and the person who hit you had $20,000.00 worth of coverage, the insurance company will most likely pay you the limits of the other person's policy ($20,000.00). What good is the attorney going to do for you unless she agreed not to take a fee? Only if the attorney could get the hospital to waive its lien would the attorney really be entitled to a fee.

If there is no insurance in the case (neither you nor the person who hit you has coverage), there is not much an attorney can do for you. Given that the attorney is not likely to be able to be paid for the work he performs, the attorney is not likely to agree to assist you in your case.

Many people want to know what to do if they are injured as a result of running into a deer or another animal on the road. Unless that animal was placed there negligently by another person, you have no source for recovery. Obviously, the deer has no insurance, and your uninsured motorist coverage will not cover such a situation. Again, the attorney cannot justify working on such a case where he will not be paid and where he cannot get you a recovery for your injuries.

5. Contributory negligence - not clear liability. Most of the above issues deal with money and damages. However, you must first be able to prove that the other person was at fault in the accident – that they are liable for your damages. Unfortunately, Alabama is a bad state for this. Alabama is one of few states which has "contributory negligence" as opposed to "comparative negligence". In comparative negligence states, the jury determines the percentage of fault on each party. If you are deemed to be 10% at fault in the accident, you will be able to recover 90% of the award.

Contrary to comparative negligence, contributory negligence, means that if you are 1% at fault in the accident, you are completely barred from recovering any damages. Sometimes, that defense is very difficult to overcome.

6. Jury verdicts low, or defense verdicts, on low impact and little damage to car. Juries have changed dramatically over the last ten (10) years. Given all of the media attention on tort reform, juries have bought into the idea that attorneys are evil, money-grubbing individuals and that our clients are looking for something for nothing. You have heard of "Jackpot Justice" and "Litigation Lottery". These phrases were not just thought up in five minutes. These are terms that insurance companies and fortune 500 companies have carefully thought about and presented to focus groups in order to see how the public would react to them. Their reaction: **LOWER VERDICTS!!!!**

7. Guest Passenger. Alabama has a guest passenger law which prevents a passenger from suing the driver of a car for simple negligence. The Code section is § 32-1-2, and it reads as follows:

> The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.

Consequently, unless the passenger pays the driver for gas or to take her to her destination, the passenger cannot recover unless the passenger can show that the driver was driving willfully or wantonly. **What does that mean?** Well, merely speeding is not willful or wanton. However, if a driver is speeding, running a red light, and weaving in and out of traffic, that would probably be considered willful and wanton.

Another issue is the term "guest". Because the statute does not define the term "**guest**," we turn to case law for a definition. The case law states as follows:

> "The general rule is that if the transportation of a rider confers a benefit only on the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, goodwill or the like, on the person furnishing the transportation, the rider is a guest; but if his carriage tends to promote the mutual interest of both himself and [the] driver for their common benefit, thus creating a joint business relationship between the motorist and his rider, or where the rider accompanies the driver at the instance of the latter for the purpose of having the rider render a benefit or service to the driver on a trip which is primarily for the attainment of some objective of the driver, the rider is a passenger and not a guest."

Cash v. Caldwell, 603 So.2d 1001, 1003 (Ala.1992) (quoting *Wagnon v. Patterson*, 260 Ala. 297, 303, 70 So.2d 244, 249 (1954), quoting in turn *Hasbrook v. Wingate*, 152 Ohio St. 50, 56-57, 87 N.E.2d 87, 91 (1949)).

Therefore, you may still be able to get around the definition of being a guest if you can show that the driver benefited in some way by giving you a ride. Otherwise, you will not be able to make a recovery from the driver for simple negligence (running a red light, speeding, etc. - the combination of two or more might, however, lead to wantonness).

- **How do I Contact LEWIS, FELDMAN, LEHANE & MCATEE, LLC?**

You can call us at our toll-free number **(888) 295-7409**, or locally in Birmingham at **(205) 254-3927**. You can also contact us by email at **jsm@lewis-attorneys.com or jon@lewis-attorneys.com**. **OR,** you may visit our website online at **www.LFLMlaw.com**.

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g. products liability claims
h. mis-filled prescriptions
i. dog bite cases
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n. insurance fraud/bad faith
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