**Foreword**

In the years that I have practiced law in Alaska, we have taken thousands of calls from Alaskans about their car accident claims. Most of the people who call have legitimate claims, but they know nothing about insurance law. They don’t know if they even have a claim. “Do I have a claim?” is the single most common question that I get from prospective clients. Frankly, that question comes from the fact that few people understand insurance. They are required to purchase insurance, and they buy insurances from companies that they think they are supposed to be able to trust because they are the “Good Hands People”, a “Good Neighbor”, or because they have a cute lizard as their mascot. Few people actually understand what liability insurance is.

As to the question, “do I have a claim?”- As you will learn if you ever deal with lawyers, it is rare that you can get a lawyer to answer a straight question with a straight answer. When people ask me the question about whether they have a claim the answer, as it is with so many different questions, is “it depends”. It depends on whether you were at fault. It depends on whether you were hurt. It depends on whether there is any insurance out there to pay you. It depends whether there is enough insurance out there to pay you for the true value of your claim. All of these questions are best answered by an attorney after researching and evaluating your case. The purpose of this book is in no way to give you definitive answers to those questions to the exclusion of the opinions of a competent attorney who has specific knowledge regarding your case.

Instead, what I hope to accomplish in this book is to give injured people a reference that they can use to spot some of the more common issues associated with car accident claims. I do not discuss in-depth any legal concepts or cases or case law. This book is not intended to be a legal reference nor is it legal advice to the people who are reading it. I’m simply explaining some concepts. If you read this book cover to cover and understand every syllable, you are not qualified to handle a serious automobile accident claim on your own behalf. I can tell you that, if myself or someone in my family suffered a serious automobile accident, the first thing that I would do is to hire a lawyer to help us. Representation in a claim that you’re bringing against a multinational, multibillion dollar corporation is not handled appropriately by someone who is going through a very difficult time physically, emotionally and financially. Talk to a few lawyers and hire the one that you like best. You will make more money at the end of the day and have fewer headaches and fewer opportunities to torpedo your own claim. “Do I have a claim?” is a question best answered by a legal professional. With that said let’s explore the question and its implicit subparts more carefully.

**Chapter 1**

**Alaska Fault Law**

The question, “do I have a claim?” begins with the question “is there a liability case?”. As mentioned before, many people don’t know what a liability case is so it may be difficult for people to determine this. Basically a liability case, in the context of an automobile accident, is a question of whether the person that hit you was driving negligently. There are, of course, many other sorts of negligence claims, but we are discussing automobile accidents for the purpose of this book.

**Did the other driver drive carelessly?**

This is not always as cut and dried as it may seem, either. The police report and the investigating officer can indicate that one party is at fault, but that finding is not determinative. At the end of the day, the final determination concerning who is at fault- if there is any dispute- would have to fall to the finder of fact in a trial setting. What the jury thinks about the driving of both parties. Of course, most cases don’t go to trial, and it’s usually fairly easy to determine who caused the accident. If you were a driver in the automobile accident wherein you were injured, it will likely be easy to determine who was at fault. The insurance adjuster will have an opportunity to review the police report and talk with the insured and any eyewitnesses.

**Recorded Statements**

It’s important at this stage to consider carefully whether you want to give a recorded statement. I always have found recorded statements to be particularly galling. Even the police have to tell you that they’re going to use anything you say against you in a court of law. The liability insurance adjuster calls you up and tells you, “hey I’m your buddy, I’m going to take care of your case for you. Let me turn on this tape recorder and get your version of what happened”. That sounds pretty innocuous. It sounds like you could not harm your case at all by talking with this nice lady or gentleman. The truth is you can destroy your case with a poorly chosen answer during a recorded statement.

If you don’t say anything that hurts your case during your statement, you’ll never hear about the recorded statement again. If you say something that damages or eliminates your right to recover or your chances of prevailing at trial, you will never hear about anything other than that statement. In general, recorded statements are not at all required for the adjuster to make a determination of liability, especially where the facts are pretty clear. What the recorded statement is, is an opportunity to get you on tape admitting that you had some role in causing the accident or that you were feeling pretty good after the accident or that you had injured yourself prior to the accident at some previous time. It’s basically a “fishing expedition” for the adjuster to find out things that can hurt your claim.

**Note:** Let me say right now that I have nothing against insurance adjusters. Most of them are nice, law abiding, family-oriented people. I myself have adjusted claims for insurance companies. They are not evil or scheming but they do have a job to do. That job is to pay you as little money as they possibly can. Their job is to lower or eliminate the cost of your claim for the insurance company. To the company, your claim is a business transaction, pure and simple.

**Liability in an Auto Accident**

Liability- who is responsible for damages resulting from an accident- in the context of an automobile accident, it depends on which person caused the car accident. Alaska also contemplates liability where both parties are at fault.

**What can I do if I was also negligent?**

This is a question that comes up quite often. It is very common for two people to cause an accident, not just one. In that context, different states handle liability claims in different ways. As an example, I practiced in North Carolina for years. In North Carolina the rule of the land is ***contributory negligence***. Under contributory negligence if you want to bring a claim against another driver, you cannot have been negligent in any causative way. In other words if you contributed to the accident at all- even 1%- you can recover **nothing**.

Alaska’s rule is much more generous and understanding of the fact that someone who is injured through the carelessness of another should not have their claim barred by the fact that they had done some minor negligent act. Alaska’s rule is ***comparative negligence***. In a comparative negligence system, you can recover for your own damages but only to the extent that those damages conform to the fault of the other party. If that definition is a little bit of a difficult to get your head around, here is an example:

**Example:** If you have an accident and you have $10,000 in damages, and the finder of fact or the jury decides that you were 25% at fault, you would be awarded $7,500 or 75% of your loss since the defendant, according to the finding of the jury, contributed 75% to the accident in this example.

Alaska is also a pure comparative fault state. This can be important in situations where someone is catastrophically injured but primarily at fault for the accident. In most comparative states the rule is ***modified comparative negligence***. Under that structure an injured person cannot collect unless the other driver was more than 50% at fault. If someone is badly injured and a jury finds him or her to be 60% at fault for the accident, then they can recover nothing in a modified comparative state. Here in Alaska, that same person could recover 40% of their damages. Oftentimes that is more than enough to cover their medical bills in a catastrophic loss case.

Review

In other words, when asking the question, “do I have a claim?”, you must consider not only the other person’s fault, but your own fault. Furthermore, you should **not** assume that you have no claim simply because you contributed to the accident.

Of course, not everybody injured in a car accident was a driver. Often, passengers are injured. In nearly every case the passenger is going to have a claim against one or both drivers. Passengers should bring claims against one or both drivers if they are injured. The insurance companies will often arbitrate to decide how much fault each company should bear if there is a dispute about liability. It is almost never the case that the passenger’s recovery is reduced by any amount for comparative negligence. In other words, a passenger should always be able to recover 100% of his/her damages, even if the car he or she was travelling in was at fault. He/she may just have to recover from both insurance companies.

One more thought about passengers. Many passengers- especially spouses of at-fault drivers- will refuse to bring a claim against the person that was driving their vehicle. “That’s my husband” or “that’s my best friend” or that’s my wife’s parents”- we hear it all the time. “I don’t want to bring a claim against them. It will raise their insurance rates.” We’re going to talk about insurance later, but when deciding about whether to bring a claim against someone, it’s important to mention right here and now that the person driving the car in a collision that is severe enough to injure one of his passengers **has already taken all of the insurance hit** that they’re going to take. That person’s premiums will increase in an accident involving bodily injury or an accident involving more than $1,000 in property damage. Regardless of the severity of the injury and regardless of how high the property damage is, they still get the same increase. So, to minimize treatment and suffer needlessly and forgo a legal right for compensation because you don’t want to affect someone’s insurance rates is the result of a poor and uninformed decision. You should always check with an attorney about your options.

**Chapter 2**

**Property Damage**

After one has decided whether one has a claim the next question is, “what claims do I have?”. There are a number of other types of claims and types of insurance that are available to a victim of a careless motorist. Let’s discuss them in turn:

First of all- and with regard to property damage- I should note that the previous chapter which deals with liability and apportionment of fault will apply to property damage just as it does to bodily injury claims. In other words, if you are driving an automobile that is damaged because of someone else’s carelessness, you can recover for property damage only to the extent that the other driver was at fault. If the other driver is 90% at fault, you can only recover 90% of your damages from him or her.

**What is property damage?**

As its name implies, property damage is recovery from a careless driver and his insurance company for damage to your own personal property. Everyone knows that your car is your personal property and should be covered under property damage liability. Some people do not know that other personal property is also covered: Bicycles, telephones, clothes that are cut off during emergency medical treatment, etc… All of those items are covered under property damage and you should be able to submit a claim for any of those items as well as your automobile damage. This chapter, however, will discuss property damage only as it relates to automobiles.

Property damage can be handled through either the liability portion of the at-fault driver’s insurance coverage or, if you have it, through the collision portion of your own policy. We’ll discuss each of those in turn. First of all, property damage under the liability policy of the other driver’s insurance, it should be noted, can be handled separately from your bodily injury. Most legal claims that you may have against other people have to be brought at the same time. In other words if you sue someone over damages that you suffered because of unfair and deceptive trade practice, you also have to, at that time, bring an action against them for other transgressions such as intentional infliction of emotional distress or breach of contract or breach of some statutory duty at the same time you bring the other part of the action- or you will lose the unclaimed causes of action.

With automobile accidents, it’s different. You’re allowed to bring property damage as a claim against a liability policy and to even settle that claim while still keeping open your claim for bodily injury. The reason for this is obvious: insurance companies should not be able to hold off settling your property damage claim because you are not willing to settle your injury claim. By their very natures, property damage claims are quickly identifiable and bodily injury claims may take months to fully manifest. As a result, the legislatures in every state in the Union allows claimants to settle property damage without settling their bodily injury claim, but the legislatures go even further.

As explained later in this book, insurance companies paying under a liability policy have no obligations to a claimant. The claimant does not have a contract with the liability company and therefore no contractual obligation exists, no duty attaches. However, state legislatures have created obligations and duties by statute for insurance companies. These duties and obligations were enacted in order to compel insurance companies to settle property damage claims quickly and fairly.

Many years ago insurance companies held all the cards when it came to property damage. They could offer lowball offers for thousands of dollars less than the automobile was worth because people didn’t have enough money lying around to buy a new automobile without settling on their wrecked car; and because people needed cars to get to work and everything else, oftentimes the consumer was forced to settle for less than his car was worth. On many occasions I heard from a claims supervisor, “keep that offer right where it is. They’ll get tired of walking”.

Legislatures began to allow insurance claimants to separate their claim and also began to compel insurance companies to conform to certain guidelines when it came to property damage claims, even liability property damage claims. Simply put, an insurance company that does not comply with the statutory requirements for a repair or a total loss settlement will be in breach of an implied covenant of fair dealing and will be subject to a lawsuit. Insurance companies don’t like lawsuits very much- so by and large you can expect your property damage claim to be handled promptly and pretty fairly. Insurance companies like to play this prompt and fair settlement of property damage claims up- taking credit for how quickly and fairly they deal with you on the property damage- and using that as a clear example that you can count on them to work with you fairly on your bodily injury claim. Be wary of these claims and these examples.

The insurance company settles your property damage claim with a proverbial governmental “gun to their head” and they take credit for what they have to do anyway. At any rate, what’s covered under liability and property damage is that the car must be either repaired or replaced. We will talk about each of those terms, but first let’s talk about how an insurance company determines whether they’re going to repair or replace a vehicle.

**The Insurance Company’s Decision to Repair or Replace a Vehicle**

The decision about whether an insurance company will replace or repair a vehicle is entirely a financial decision. They do not take into consideration what a nice person you are or how cool your car is or how much you owe on your vehicle. Their decision simply comes down to: will it be cheaper for the insurance company to repair the vehicle or to replace the vehicle? They will get an estimate for the repair of the vehicle from one of their insurance adjusters. That adjuster will argue with the body shop and try to get the vehicle repair cheaper if it all possible. *By the way, be wary of the shops that the insurance company sends you to. Consciously or unconsciously those body shops are somewhat beholden to the insurance companies that send them business every week. In other words, when there is a discussion regarding what measures should be taken to repair your car correctly, a body shop that gets several wrecks a month from the insurance company will likely agree with their plan for repair.*

Repairs can be completed with LKQ parts (like kind and quality). This is a source of frustration for many people. They want all new parts. Unfortunately, the consumer and the claimant do not have the right to compel the use of new parts. The argument goes: the vehicle was used, so it is proper to use like, kind and quality (used) parts to effectuate the repairs. *Note: this does not mean that the insurance company can use inferior quality parts or parts that have rusted or deteriorated.* However, if you have a pretty common vehicle, you can pretty much assume that the parts that are being used to repair your vehicle are being harvested from another wrecked car.

If the insurance company decides that the repairs and the rental, together with any diminution (diminished value) claim, would cost more than it would cost for them to buy the vehicle from you and sell it at salvage, the insurance company will decide to total your car. A car that is declared a total loss is basically the subject of an involuntary sale. You didn’t want to sell your car to the insurance company, but because it makes more sense for them financially, that’s what’s happening. They do not owe you what you think your car is worth. They do not owe you what you owe on your car. They do not owe you what you paid for your car. They owe you the market value of your vehicle. That is what your vehicle would have sold for on the day the accident occurred in an arms-length transaction with another private citizen. That means **private party value**.

If you look up the value of your car on Kelly Blue Book or NADA for comparison, you should be certain that you are looking for the private party value. The retail value, the value that the vehicle could sell for if it were on a used car lot, will be too high. The trade-in value will be too low. As discussed earlier, insurance companies often used to play with these numbers. Now the legislature has ended these games. Insurance companies now have to get an independent, government certified appraiser (all insurance companies in Alaska that I know of use a company called CCC) to give them an honest appraisal of the value of your vehicle. Thereafter they have to make an offer for every dime of that appraisal.

*Here’s a story that may give the reader some insight into how insurance companies try to short claimants: Many years ago a large insurance company decided that they would pay all claimants $100 less than the appraisal cost for each. Of course if you save $100 off of each property damage settlement that your company pays, and you pay tens of thousands of property damage settlements a year, your company will save millions by this slight “adjustment” to the appraisal. State Farm was rightfully sued for this practice and disgorged millions of dollars to the people upon whom they had used this practice.*

Total loss settlements are typically pretty fair. Many people are surprised at how much they get for their vehicle, particularly older vehicles and older trucks in Alaska. They are often quite happy. Of course, as mentioned above the insurance companies like to take credit for this very fair evaluation and use that evaluation to convince the claimant that they can count on the insurance company to give them a fair settlement for their bodily injury claim. As mentioned above, those two things have nothing to do with one another.

The insurance company makes the total loss offer under duress and under penalty of pain- and lawsuits. No such governmental pressure exists for a bodily injury claim. Nonetheless, people are usually pretty happy with what they get for their car. The exceptions to that rule, by and large, are people who have either rare collectible cars or cars with a lot of aftermarket ground effects, spoilers or stereo equipment. Oftentimes the appraisers do not consider these things when they are collecting their comparables. In such cases the claimant will have to approach the liability insurance company in the same way that they would approach a potential buyer for their car. They will have to show that there are new tires, or upgraded wheels, or an upgraded suspension, etc... Whatever the claimant does to show this increased value of their vehicle, they will need to present it in writing and in such a way that it is obvious that the insurance company has not considered the full value of the vehicle.

This will put the claim back into the “bad faith” territory that scares insurance companies, and they may pay more on such a claim- or they may not. When putting together a claim calling into question the appraisal it is important to note that the insurance companies will typically provide you with the appraisal that they received from CCC at your request. This appraisal will contain a number of vehicles that are similar to yours that are for sale in the general area (Alaska and the Northwest United States). This report can be a handy tool both for contesting the valuation that the insurance company places on your total loss and for locating other vehicles similar to yours in the event that you want to replace your vehicle with the same make and model.

**Should I File Liability or Collision for Property Damage?**

We next consider whether one wants to file under liability or under ***collision*** ***coverage*** for their property damage. Collision is first-party insurance. It is typically required on your car if you have a bank loan. Collision will pay for the repair or replacement of your vehicle in the event that it is damaged. The difference between collision and the liability coverage described above is that it does not matter who was at fault. Collision will pay whether you caused the accident or whether another person caused the accident. Another difference is there is typically a deductible associated with a collision claim, usually $500 or $1,000. In other words, the insurance company will pay for repair or replacement of your vehicle if it was damaged in a collision after you pay the first $500 or $1,000.

**Why would I file a collision claim when there is liability insurance and the other guy was at fault?**

Short answer, you probably shouldn’t- but there are times when it comes in handy. First of all, liability carriers under the law can take a reasonable amount of time to conduct a coverage and liability investigation. My experience in the insurance industry was that when a claim came in, the first thing that the adjuster is asked to do is to find a reason that the insurance company does not have to pay. So the adjuster will make certain that the at-fault, insured driver has paid his or her insurance premiums. If not, then there was not coverage on the vehicle at the time and there is no claim for which the liability carrier is liable.

Next, and assuming that there is coverage, the liability adjuster will conduct a liability investigation. In other words, “(1)is their insured at fault?; and, (2) is their insured **totally** at fault? The adjuster will talk with their insured. The adjuster will get the police report and review. She will call any witnesses, talk to the police office and, of course, attempt to record the other driver (that’s you) answering a series of questions about the accident. All of this can take time and during that time the liability insurance carrier will pay nothing. They will not set you up in a rental and they will not start repairs. If it appears that this will take several days or even a couple of weeks (as it often does), a claimant may choose to go through his/her own collision insurance.

The advantage with collision is that there is only a coverage investigation. If you’ve paid your insurance bills, your insurer should begin either repairing or preparing to pay the total loss on your vehicle immediately. Of course, they will later go after the liability insurance company for the money they pay under your collision policy in what is called a ***subrogation claim***. If your collision carrier is reimbursed for all of the money paid under your collision claim from the liability carrier, they will also collect your deductible and send that along to you. Of course, if they prevail on the subrogation claim and get their money back, you will experience no increase in your insurance. So the answer to the question, “why would I ever file under my insurance if the other guy is at fault?” is that your insurance will get started right away. Additionally, if you have a rental rider in your policy, they can put you in a rental car right away- no need to wait for the liability carrier to investigate liability before you have a substitute rental car.

While we’re on the subject of rental cars, please remember that the liability company owes you for a rental car for the time that you do not have use of your own vehicle. Ideally that will start the day that you contact them. In reality, the liability company often takes a few days to investigate coverage and liability. If that happens, you have a couple of choices. First you could rent another vehicle and later, after the liability insurance has determined coverage and liability, present them with the bill for reimbursement. *If you choose to do this, you need to be certain that you rent a comparable vehicle. You can’t total a Tercel and go rent a replacement Escalade and expect the liability insurance company to pay for the rental.*

Or, you could choose not to rent a vehicle until there is a determination about liability and coverage. If you choose this option, be certain that you approach the insurance company for the at-fault driver with a claim for ***lost use*** once they have determined that they are liable. Lost use is just what it sounds like. You get an amount of money that’s fairly close to what it would have cost to rent a car for each day that you did not have your vehicle. Many people forget to make this claim, which saves insurance companies hundreds of thousands (if not millions) each year in unclaimed, lost use claims.

That briefly covers damages to your car, but what about damages to you or to your passengers? The next section begins the discussion of your personal injury claims. I should note that this is what we at the Crowson Law Group do. We are glad to help people with their property damage claim, but under no circumstances do we take any portion of the initial property damage settlement. In fact unless property damage is part of a filed lawsuit, we never charge for our assistance in that regard.

**Chapter 3**

**Bodily Injury**

If you have been injured in an automobile accident through the carelessness of another person, you have a bodily injury claim. Nine times out of ten that bodily injury claim will be paid through the other driver’s liability policy. Of course, that means that it is of some importance that you understand what a liability insurance policy is. If you do, you are in the decided majority. As stated in the Foreword to this book, I have talked to thousands of Alaskans and thousands of people from the state of North Carolina and it is seldom that I talk with someone who actually understand what liability insurance is. I would say on the order of 1 in 100 people actually know what liability insurance and what it does. Think about that.

If you want to drive a car in any state in the Union, you have to purchase liability insurance. Insurance companies sell it to you and market to you for your business but they do not feel any obligation to educate you as to what liability insurance is. They don’t feel any obligation to do that and they certainly do not feel that there is any advantage to doing that because the less that you know, the better for the insurance company- when it comes to liability insurance.

**Liability Insurance-What is it?**

Most people have liability insurance backwards. They say, “well, this person hit me, it’s his fault and he has Geico insurance. Therefore, Geico owes me for my medical bills, lost wages, pain and suffering, etc…” That statement is factually inaccurate. From a legal standpoint Geico owes the injured person in that example nothing. Geico may ultimately **pay** that person, but Geico does not **owe** that person. It is a nice distinction and it is a legal distinction, but it is an import distinction for any claimant to understand. In order to owe someone something one must have received something from that person to begin with.

It is the receipt of that thing, typically money, which creates the debt and obligation from the recipient. In other words, and using the example above again, Geico has no duty or obligation to the claimant in a liability insurance context because they have received nothing that created an obligation on their part from the claimant. Who has given Geico something in that example? The at-fault driver. The at-fault driver paid them money in the form of premiums. It was that payment that created a duty or an obligation from Geico.

Geico says implicitly in their contract, “Pay us this amount of money and we will promise to do two things in the event that you have an accident”. Here are the two things that Geico promises that person: These are also the promises that are made to you in your liability insurance policy with whichever company you have:

**1. The duty to defend.** This is just what it sounds like. Geico promises that if their insured is sued in a court of civil law over the alleged negligent operation of their vehicle, Geico will defend them, and by defend I mean that Geico will hire a lawyer to go to court with them and answer all legal issues. Geico will pay for the court reporter and depositions. Geico will pay for experts that are required to testify at trial to provide an adequate defense. Geico will pay for any court costs or copying and reproduction costs. In short, the unaffordable cost of defending oneself in court is covered by the liability insurance company’s duty to defend.

**2. Duty to indemnify.** First I should explain the word indemnify. Indemnify is a legal word that means essentially “pay on some other persons behalf”. In the context of a liability policy it means that the liability insurance carrier will protect their insured against a jury verdict. In other words, in the example above, if you file a lawsuit, jump through all of the evidentiary hoops, tell your story to the jury, carry the day and get a verdict for money damages against Geico’s insured, Geico will pay that verdict against their insured up to the policy limits and protection that their insured purchased.

There you have it, the long and the short of Geico’s obligations-what Geico owes and who they owe it to. It is important that every claimant understands exactly what that means. The one and only reason that Geico pays any claimant *(remember there are no government threats and good faith statutes here)* is because the claimant (the injured party) represents an exposure. That is, the injured person can trigger the obligations that Geico has to their insured. If the injured person files a lawsuit, Geico will be taxed with the cost of defending the lawsuit, and also risk the exposure of the jury trial (for which they must pay the verdict up to the policy limits).

That’s it. That is the only reason that Geico pays, the only reason that any insurance company pays under a liability policy is because the claimant represents a threat of litigation. Implicit in the fact that their insured has been accused of causing an accident is a threat that the injured person will file a lawsuit, tax them with defense costs and get a fair verdict from a jury of 12 of their neighbors. Insurance companies do not pay because the claimant seems nice or because it’s the right thing to do or because they’re the “Good Hands” people or a “Good Neighbor” or whatever. They pay because they have a risk and they have two obligations to their insured.

If you eliminate that risk, the insurance company will not pay you fairly. I cannot tell you how many times when working for insurance companies that claimants would call and shoot themselves in the foot. “I don’t like lawyers.” “You don’t have to worry about me. I’m not going to file a lawsuit.” “I don’t sue people.” “I need money now. I can’t pay the rent. I’m out of work.” I have heard all of these assertions and I can tell you that an adjuster who hears these assertions is actually hearing is the claimant saying, “I don’t understand the process. I’m unrepresented and I’m not threat to trigger any obligation you have to your insured. Please pay me whatever you will. Please pay me whatever you think I’ll accept.”

**Why do insurance companies pay?**

Now, it’s important to understand why insurance companies do pay. As explained above, they **will** pay you but they **don’t** owe you. They will pay you one time and one time only and in exchange for one thing only. They do not pay as you incur medical expenses or as you miss time from work or as your mortgage payment is due. They pay only in exchange for a ***release***- which is a binding, written promise that you sign, stating that you will not sue their insured. Once that document is signed and money has changed hands, you no longer have a cause of action. You no longer represent an exposure or a risk to the insurance company.

So, it is of vital importance that if you do settle your case- and here I’ll state for the first time that about 90% of our cases settle privately, without ever going to court- you should receive in exchange for your promise not to sue an amount of money that is a fair approximation, a fair guess, of what you would receive from a jury of 12 of your neighbors if you did go to court- if you did take the trouble to put your case on and to tell your story to a jury. That is a fair settlement. The insurance company gets their peace. They avoid paying defense costs. They avoid the exposure of a huge verdict and you get a fair and reasonable guess of what a jury would pay you without having to wait two years for your day in court. Again, that is a fair settlement, but what **really** is a fair settlement?

**What is my claim worth?**

As stated above, your claim is really worth what a jury says. People certainly do not like to hear this but the truth is that everyone involved in your case (you, your attorney, the defense attorney, the insurance adjuster) everyone involved is guessing about what 12 strangers will do with your case. Twelve people that no one has laid eyes on yet would ultimately determine the value of your case. Now, those are educated guesses and those are guesses based upon years of experience, but they are guesses none the less. That’s why settling is often the best course of action for everyone involved. The cases that we have that typically do not settle are those cases where there is a dispute in liability, or where the insurance company has asserted some doubt about whether the injuries complained of were actually caused in the accident, or, frankly, where our client has unrealistic expectations with regard to what a jury will pay for their claim. Without one of those complicating factors just about every case settles.

To discuss further what your case might be worth we should think about what a jury would hear and what a jury would be instructed when a case is tried. Keep in mind that when we discuss what a jury would do, we are doing that only to try to determine what your case might be worth. It is not a certainty or even a likelihood that a given case will need to go to court, but at the end of the day it is the opinion of the potential jury that will drive the value of the case. Accordingly, it is important to understand what a jury would be instructed.

A jury would be instructed to award an injured person an amount of money adequate to cover all of the medical expenses incurred as a result of the defendant’s carelessness. The jury would also be instructed to award money damages to compensate the claimant for any time missed from work, as long as the jury believes that the missed time from work was caused by the injuries suffered at the hands of a defendant.

Those damages are called ***special damages***- damages that you can write on a chalkboard. “This is how much my medical bills were.” “This is how much time I missed from work and how much I get for each day of work.” Easily computed. Where the jury is really leaned on heavily is in the computation of what are called ***general damages***. A lot of people call these damages pain and suffering damages. The jury will be asked to come up with a number- an amount of money that is a fair compensation for the experience suffered by the claimant at the hands of the defendant (physical pain, mental anguish, inconvenience, financial strain, loss of intimacy with one’s loved ones, etc.).

As you can imagine, that number tends to outstrip the special damages. If you have recently suffered injuries in an accident, you no doubt understand the often devastating impact that these injuries have on every aspect of the injured party’s life. It is important for the jury to understand the accident’s true impact so that they can evaluate general damages. Here I should mention the importance of getting proper medical treatment. Medical treatment should consist of following the orders and advice of one or more medical professionals selected by the injured person.

**Medical treatment after an accident.**

It is important that the injured person take control of their medical care and get all of the care necessary- and that they also decide whom to trust. There is no reason that an injured person should follow the medical advice of a personal injury attorney or **especially** an insurance adjuster regarding who to see and how much treatment to get. The rule is this: if you do not need treatment, do not get treatment. If you do need treatment, get the treatment that you think is appropriate and follow through with your physician’s advice.

I cannot over-emphasize how important it is to get medical care. Medical care does a lot of things for a claimant, all of them good. Medical care virtually assures you that you will heal more completely than you would without a doctor’s care. Medical care virtually assures that you will heal more quickly than you would without proper treatment. Medical care likely means that you will suffer less pain than you would going alone without the care of a physician. Lastly and certainly least importantly, medical care will document the problems that you are having and *increase* the value of your case- certainly from a settlement standpoint.

Let me take a moment to explain what I mean by that. I often take calls from individuals who will say that they were badly injured in a car accident- that they couldn’t get off of their couch for two weeks, that they couldn’t work for three weeks, that they are still suffering problems six months after the accident. When I ask them what sort of medical care they have received, they often will reply that they only went to the emergency room and have since relied upon over-the-counter medication. Their case is likely worth very little. Setting aside the issue of whether they could have healed more quickly or completely with medical care-that is not the focus of this attorney or this book-that individual has failed to produce a written documentation of her physical injuries.

Without documentation it is very challenging to convince anyone that you have suffered serious injury. Jurors are skeptical. It would be difficult to go in front of a jury and claim serious injury without any medical treatment. However, if jurors are skeptical, insurance adjusters are *categorical* when it comes to the issue of little to no treatment from an injury claimant. To understand why, one must understand a little about being an insurance adjuster.

Being an insurance adjuster is not a fun job. You have several levels of management looking at everything you do, and when you settle a case the first thing that happens to the file is that it often goes to a claims auditor. The claims auditor carefully reviews the file and asks the adjuster for justification of every item that is paid. “Where did you come up with that number?” “How do you justify paying for this?” The insurance adjuster is stuck with the cold record, as it were- the medical records of the treatment from the claimant. Even if an adjuster subjectively believes that a claimant was injured, she cannot pay that claimant money for pain and suffering absent any documentation. Doing so makes for a short walk to the unemployment line.

In short, insurance adjusters cannot pay you because they think you are a nice person and believe that you were really hurt. They have to document every dime they pay, and without medical records they simply will not pay general damages. Now, a jury may pay for general damages if they hear you tell your story and subjectively believe that you had a hard time and that you deserve compensation for your pain and suffering, but an adjuster cannot. Since every client and claimant that I have ever met has told me that they do not want to litigate their case- that they would rather settle privately- it is important for claimants to understand that they must get proper medical care in order to document their pain and suffering to the extent that they can get a fair settlement privately from a liability insurance carrier.

That is a brief overview of liability insurance and what makes a claim valuable, but oftentimes we get a case where there is liability on the part of the other driver but no liability insurance. What happens then?

**Chapter 4**

**Uninsured Motorist**

**What do I do if I am injured and the other guy doesn’t have insurance?**

That can be a pretty easy question or a pretty difficult question depending upon how good your insurance agent is. If your insurance agent has allowed you to buy a policy that does not have uninsured motorist coverage, then you have a claim for damages against the individual who caused the accident. There is likely no insurance coverage (although you should definitely talk to an attorney to determine whether there is any other avenue for recovery). You are likely stuck with an individual (whom you already know does not exercise the financial responsibility to pay their insurance bills) as your sole source of recovery. Not a very good situation to be in.

If, however, your insurance company and your insurance adjuster convinced you to purchase uninsured/underinsured coverage on your automobile policy, you may have a relatively bright outlook for your claim.

***Uninsured motorist*** coverage is exactly what it sounds like, coverage when there is no coverage for the other driver. When the other driver is uninsured, your insurance company has promised to essentially extend coverage to him. Now, they do not have contractual privity with the other driver and, therefore, do not owe him any obligations or duties. He is on his own. In fact, if you do recover through your own uninsured motorist policy, your uninsured carrier will likely go after the uninsured driver for ***subrogation***. In other words, they will try to get back the money that they pay you from the uninsured driver directly. That doesn’t really concern you, but it is of interest to some claimants who are upset that people are driving around without insurance and causing accidents. For those people, I can assure you that the person who caused the accident and who was uninsured has not walked away scot-free. There are criminal and civil and drivers’ license repercussions that will follow them as a result of this accident.

For your part, though, you have no worry about pursuing that person and making him/her pay for his/her actions. Your uninsured motorist coverage will, for all intents and purposes, function as liability insurance for the other party.

One thing that is often surprising to injured claimants is that their insurance company will still defend their personal injury claim just as aggressively as a liability insurance company. In other words, they will often defend the actions of the uninsured driver. They will also call into question whether your injuries were caused in the accident. They will also call into the question the severity of your injuries and the propriety of awarding you any amount for pain and suffering.

As a practical matter for the claimant, there is no difference between fighting a claim against a liability insurance company representing a negligent driver than there is bringing an action against your own insurance company when the negligent driver did not have insurance. This is difficult for people to accept. Oftentimes people have a romanticized idea about their relationship with their insurance company. Those romantic stories typically end when there is an uninsured claim. If you are convinced that your insurance company will treat you fairly because you have been a customer for 16 years, you need to take a step back and think again. Insurance companies are not evil or mean- but neither are insurance benevolent or nice or loyal.

Insurance companies are multinational, multibillion-dollar corporations that exist to make money. There is nothing wrong with that- as long as you understand that every claim and every interaction with an insurance company is a business matter. They do not have it in for you. They do not hate you. They do not like you and they do not--believe it or not--value your business. Insurance companies make money by charging premiums and lose money by paying claims. They love to do the first and absolutely abhor doing the second. If you have an injury claim with your own insurance company, you should do what your insurance company does- and treat it as a business interaction. Talk with attorneys and find out your rights and the insurance company’s obligations to you. Arm yourself with information and pursue your claim like a businessperson.

Finally, it’s important to understand your uninsured motorist carrier, like a liability carrier, has a limit that they will pay on each claim. You can look at your declarations page or ask your agent to tell you what that limit of payment is. Your insurance company will not pay more than the amount of insurance that you purchased. Next we will look at the other part of underinsured/uninsured motorist coverage.

**Underinsured Motorist Coverage**

**What can I do if there is not enough coverage under the at-fault driver’s liability policy?**

***Underinsured motorist*** coverage is just what it sounds like. If the careless motorist that injures you does not carry enough insurance to compensate you for your loss, including pain and suffering damages, then you can look to your own policy and it’s underinsured motorist provisions. In other words, because the person who hit did not have enough insurance, was underinsured, you can file a claim with your own policy. It is important to understand that you must first establish that the liability carrier for the other party has inadequate limits. If you do not get an offer and settle with the liability carrier first, your own underinsured motorist carrier will not talk with you about your claim.

Special care must be taken to contact your underinsured motorist carrier before settling with the liability carrier. If this part of your claim is not handled properly, you may lose any right to recover under your underinsured motorist policy. This is because the underinsured motorist policy provides that you must give your underinsured motorist carrier notice of the fact that you are going to settle with the liability carrier and also give them an opportunity to advance that money and preserve their subrogation rights against the liability carrier and the at-fault driver. Most times the underinsured motorist carrier will not choose to preserve their claim against the individual and will allow you to settle with the liability carrier. However, if you do not get written consent from your underinsured motorist carrier before settling with the liability carrier, then you have violated the terms of your policy and have no underinsured motorist claim.

The best course of action when dealing with insurance companies is to allow a professional to deal with the insurance companies that way you can be certain that the claim against your underinsured motorist carrier survives the settlement with the liability carrier. As a side note here, it is vitally important that you make certain that your insurance agent sells you uninsured/underinsured motorist coverage. By some estimates there are as many as 15% of the drivers out there that do not have valid insurance. Therefore, if you don’t carry uninsured/underinsured motorist coverage and are in an accident with an uninsured driver, there will be no source of recovery for any of your losses. Parenthetically I would say unless you have medical payments coverage on your automobile.

Even if the person does have insurance, there is a pretty good likelihood that they only carry $50,000 per person in liability insurance coverage. That is the minimum that an individual can carry on their car. While that amount is the largest in the country, anybody who has paid medical bills in Alaska knows that one trip to the emergency room, a few diagnostics and overnight stay in the hospital would easily exhaust $50,000. After that, without underinsured motorist coverage you would be on your own. So talk with your agent about underinsured motorist and discuss the importance of insuring yourself against financially irresponsible drivers.

**Chapter 5**

**Other Insurance**

**Medical Payments Coverage**

People often ask what impact collateral insurance will have on their claim. In other words, if there are other insurances that will pay the medical bills, how does that work? Again, it depends. The first medical insurance that we will look at is the easiest to explain. Medical payments coverage is a first party insurance that you should carry on your automobile. Medical Payments coverage pays all of your medical expenses arising from a car accident. No copay or deductible applies. Medical payments pays from dollar one and pays all of your accident related expenses until you exhaust the coverage. Medical payments coverage also applies if you are at-fault in the accident or if you were in someone else’s car or if you were a pedestrian or on a bicycle.

All you need to prove to your insurance company when filing a medical payments claim is that you were in an accident involving an automobile and you have medical bills because of that accident. Anything paid under the medical payments policy, a portion of your policy, will be subject to a subrogation lien. Subrogation is a fancy legal word that means reimbursement. In other words, if you collect $5,000 through medical payments, your medical payments carrier will insist upon being reimbursed from whatever you are able to get from the liability carrier. In Alaska these transactions are typically handled through the insurance companies themselves.

It may occur to you to ask, well if I have to pay the money back anyway, why should I involve my insurance? Well there are a few reasons. First of all, you pay for that coverage and presumably you wanted to use that coverage in the event that you had unexpected medical expenses arising from a car accident. You should use the coverages that you purchase. You will not experience an increase in your monthly premiums, especially since your insurance company will get that money back later, but more importantly medical payments also will cover deductibles and copays for your health insurance. If you don’t have health insurance, medical payments will likely open the door and allow you to get medical treatment that would otherwise be denied if you simply had no insurance. Many people think that they can simply point their healthcare provider to the liability carrier for the at-fault driver and their medical bills will be paid. This is almost never true.

The medical provider is under no obligation to accept third-party liability insurance. They also know that they will not get paid until and unless you agree to settle your case. This is a huge disincentive for a medical doctor who likely has a waiting room full of people with Aetna or Blue Cross Blue Shield. Why should they take you as a patient when they know that they have to wait months or even years for you to decide to settle your case before they’re paid. Medical payments bridges that gap and gets you in to see a healthcare provider by promising to pay as the bills accrue.

Additionally, if your claim is worth more than the liability carrier’s policy limits, your underinsured motorist carrier (who is always your medical payments carrier) will likely waive their subrogation right when you file your underinsured motorist claim. If that happens, you don’t have to pay back your medical payments carrier for any money received from the liability carrier. Use your med pay.

**Why should I file with my health insurance when it’s someone else’s fault?**

People ask about their health insurance quite often. Rest assured that your health insurance will work very hard to get the money that they paid back from the liability carrier for the at-fault driver. They will submit a subrogation lien just like the medical payments carrier will submit a subrogation lien. What was said above about medical payments goes double for health insurance. If you have health insurance, you can likely go to any healthcare provider that you want to see or that you want to treat your injuries. There will be no penalties or increase in your insurance rates associated with going to the doctor. If you are worried about your health insurance carrier, although it escapes me why anyone would be worried about their insurance carrier, they will likely get their money back when your case is settled. What is certain is that they will be there ready to collect.

Here is where an experienced personal injury attorney can also find money for a claimant. Most health insurance carriers will greatly reduce their subrogation lien in exchange for money now. An attorney can often negotiate those liens with the health insurance carrier by threatening to take the case to court if there is no reduction in the subrogation lien. Simply put, the insurance carrier will be waiting longer for their money and also taking a risk that the jury would side with the defendant and give nothing. Remember you don’t owe anything to the health insurance company until you collect money. If you go to court and lose, then your health insurance carrier loses with you. Most times a discussion on these terms will convince a health insurance carrier to reduce their liens and accept money in the short run. A bird in the hand is worth two in the bush.

Much of what was just said about health insurance will also apply to government assistance. Medicaid and Medicare will typically reduce their liens, but they will also serve to get you in to see the healthcare practitioner of your choice, particularly medical doctors. Furthermore, because there is already a negotiated discount for Medicaid and Medicare recipients, their liens for services rendered are often much, much lower than your health insurance carriers. Every dollar that is saved from a potential medical lien is a dollar that can go right into your pocket. Having a legal professional navigate these subrogation claims and negotiations will definitely result in a better result for you.

**Chapter 6**

**Settlement**

As mentioned above, roughly 90% of the cases that I have handled in Alaska have resulted in a settlement prior to suit being filed, with the exception of claims brought against Geico Insurance Company. The reason that claims settle at such a high rate is because both parties, especially in Alaska, have high exposure and risk associated with going to court. Remember, Alaska has the loser pays rule which states that the loser in litigation will almost always have to pay the costs and part of the attorney fees for the prevailing party. Individuals don’t relish the idea of paying for the lawyer that represents the person who hit them. Insurance companies certainly do not want to pay to defend their own insured and then turn around and also pay for the attorney who is suing them.

As a result and absent any extenuating circumstances, cooler heads typically prevail and most cases settle, but what is a fair settlement? As mentioned elsewhere in this book, a fair settlement is a money settlement that quantifies the insurance company’s risks and also compensates the individual who was injured. The best way to measure a settlement is to compare the money paid by the insurance company to an educated guess concerning what a jury would pay for the case if the case were tried. The liability insurance company will pay an amount of money that they think is likely that they would lose at trial. This allows them to buy their peace with a release.

As mentioned elsewhere, a release is a binding written promise not to sue the at-fault driver. When an insurance company secures a release in exchange for money paid they no longer have an obligation to defend their insured because no suit can legally be brought against their insured. They have also eliminated the high side risk of a runaway jury verdict. For the plaintiff, the plaintiff has received an amount of money that’s a fair guess of the jury’s likely result. They have not had to incur costs or taken a risk that they may receive much less or perhaps nothing at all. They have avoided up to two years of nervousness and inconveniences associated with litigation. Of course not every case settles. The good news is that if you and your attorney do not agree with the insurance company’s evaluation of the likely jury verdict range, you are not stuck with that evaluation. You can file your case and tell your story to an impartial jury and learn the true value of your case through their verdict.

Whether by settlement or by trial by jury a competent attorney will maximize the value of your case while minimizing your exposure and inconvenience. As with every choice in life from plumber to physician, please choose your attorney very carefully.