Allegations of Regulatory Violations & How to Exclude Them

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I. Use of Negligence *per se* Claims by Plaintiffs

Claiming a defendant driver or transportation company was negligent *per se* in causing an accident and the plaintiff’s resulting injuries is standard operating procedure for plaintiffs’ attorneys. So common, in fact, it is part of the publicly available materials various plaintiffs’ firms publish on their websites.¹ They put together actual playbooks on how to use regulations like the Federal Motor Carrier Safety Regulations (FMCSR) and its respective state equivalents against us. This makes fighting back against these claims that much more important.

A. FMCSR Used Against Drivers and Companies

Plaintiffs often allege violations of well-known regulations contained in the FMCSR or rely upon DOT regulations. These may be generically categorized as “safety rules,” which Plaintiffs may then use to argue or assert that a heightened standard of care applies to the Defendants. Depending on the facts of the case and the skillset of the plaintiff’s attorney, these types of claims may hold water and they may not. Here are some examples:

• In a case out of the Eastern District of Tennessee, Plaintiffs argued that Defendant was negligent per se for failing to properly secure a load of paper products in violation of FMCSR 49 C.F.R. 392.9. The Court noted that the FMCSR were meant to establish “minimum safety standards” and drivers of commercial vehicles were meant “to act in a certain way for the benefit of the public.” Further, 49 C.F.R. 392.9 required Defendant to ensure the load was properly secured and Defendant essentially conceded that “the load was done wrong.” The Court therefore granted Plaintiffs’ motion for partial summary judgment.

• A Texas appellate court found that a negligence per se instruction was proper with respect to the FMCSR prohibition against an employer knowingly allowing a person to operate a commercial vehicle without a commercial driver’s license.

• A U.S. District Court in Colorado found that a violation of the FMCSR log rule was negligence as a matter of law based on FMCSR 395.3 and 305.5 which provide specific limitations on the number or hours a commercial vehicle operator can drive during certain periods of time. The Court found that the “tie between safety and fatigue is clear” and that “this regulation was intended to promote the safe operation of commercial vehicles.” The judge further noted, however, that Plaintiff was still required to prove a causal relationship between the alleged violation and the accident.

• A Middle District of Pennsylvania Court allowed use of FMCSR violations to support a claim for punitive damages. The Defendant driver had allegedly operated a vehicle in violation of the hours of service regulations and without recording his duty status. The driver testified that he was aware that the hours of service regulations were intended to prevent drivers from falling asleep and causing death or serious injuries. The Plaintiff’s experts opined that the Defendant company was aware of hours of service issues and that these violations caused the subject collision.

B. Local Statutory Schemes

Plaintiffs also seek to hold commercial drivers and their employers liable for violations of state statutes and regulations, or a company’s own policies and procedures, in the same way they use the FMCSR.

• A Plaintiff utilized Nevada statutes that address turning left on a highway (NRS 484B.227 and NRS 484B.413) to argue that the Defendant driver was negligent
per se. The investigating officer, who had never been deposed before, was confused as to the meaning of “divided highway” and incorrectly admitted that Defendant violated the statute.

- In a case out of the U.S. District Court for District of South Carolina, Charleston Division, Plaintiffs attempted to use a driver’s alleged violation of company policy and procedure regarding use of headlights and accident reporting to establish negligence.

- A Plaintiff in Nevada attempted to use an alleged violation of DOT inspection requirements to establish negligence, even though Plaintiff’s own expert admitted that the cause of the accident was unrelated to maintenance issues.

- Plaintiffs have referenced required “habits” of drivers or driver “statements of responsibility” to argue that Defendants violated some type of rule or regulation.

- Plaintiffs have attempted to rely on alleged violations of state-specific Commercial Drivers’ License manuals as evidence of negligence.

II. Motions Practice to Dispute and Dismiss Negligence per se Claims

Given Plaintiffs’ ongoing claims of negligence per se for alleged regulatory violations, defense counsel must work in conjunction with transportation companies’ in-house legal and risk management teams to eliminate or diffuse claims of negligence per se as quickly and efficiently as possible. We have several tools that allow us to attack these types of claims at various stages of litigation.
A. Demurrer/Rule 12(b)(6) Motion

First and foremost, filing demurrers or motions to dismiss pursuant to Rule 12(b)(6) may be the quickest way to eliminate a plaintiff’s claim of negligence per se, depending upon jurisdiction.

B. Motion for Summary Judgment

Again, the success of a motion for summary judgment may depend on jurisdiction and venue (state v. federal court). In some cases, negligence per se is alleged as a matter of course, but the Plaintiff does not – or cannot – develop the evidence to support the claim. Even if the motion is not granted, it may also serve as an opportunity to educate the judge regarding potential issues.

C. Motions in Limine

Motions in Limine often focus on the fact that the alleged violations – FMCSR, local statute, or company policy – are irrelevant because they do not tend to prove or disprove a material issue in dispute. For example, if the subject accident occurred on a “bright, sunshiny day,” it is irrelevant that the driver allegedly violated the company’s policy regarding use of headlights.

The second issue is whether the alleged violation is more prejudicial than probative. Generally, relevant evidence may be excluded if its probative value is
substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. “To merit exclusion, the evidence must unfairly prejudice an opponent, typically be appealing to the emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to evaluate evidence.” *Krause, Inc. v. Little*, 117 Nev. 929 (2001).

Also use the motion *in limine* to argue against any heightened standard of care based on the alleged statutory or regulatory violations. Plaintiffs often use these regulations or statutes in the hope of creating a false legal standard, attempting to convince the jury that there are “safety rules” that the Defendants violated.

D. Motions to Strike

A potential last line of defense is making a motion to strike the negligence *per se* claim, or motion for directed verdict after the close of the Plaintiff’s case in chief and again after the presentation of all evidence at trial, if the motion to strike did not work the first time.

III. Don’t Forget to Use Negligence *per se* Against the Plaintiff, Too!

One option to keep in mind, if available, is to defend your case on the grounds that the plaintiff herself was negligent *per se*. 
