The Transportation Practice Group of ALFA International has published the Transportation Update for about seventeen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update Archives.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katie Garcia (kgarcia@alfainternational.com). Please add the Transportation Update to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you want to receive the Transportation Update in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The substantive/informative section headings are as follows: The Editors' Notepad (this section) where the Editors often provide sources of information and points of interest; ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts, Appeals, and Settlements; Practice Tips; and Articles.

The ALFA Member Publications and Speaking Engagements section lets you know what your ALFA lawyers are doing to share their knowledge and experiences to assist in the defense of claims and cases.

Under the Cases, Regulations, and Statutes section of the Transportation Update, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community.

The Verdicts, Appeals, and Settlements section addresses the results of litigation affecting the trucking industry and also provides information about significant results achieved by ALFA firm lawyers. We encourage you to report to the Editors any verdict, appeal, or settlement that you think is of interest to the trucking community. In this edition, see the excellent results achieved by our ALFA attorneys (Robert Clemens and Kelly M. Scanlan) in Indiana.

1 All hyperlinks are in blue. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the contents go to specific points in the newsletter; links to websites take you to the website; and links to email addresses open an email addressed to that person.
The Practice Tips section of the Update features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this issue, we feature the following: “Techniques for Maintaining Contact and Retaining the Cooperation of a Driver who has been Terminated Following an Accident” by Dave Jostad of May Trucking Company.

Articles provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, we feature the following:

“The Impact of CSA 2010 on Motor Carrier Operations and Litigation” by Will Fulton of Dinsmore & Shohl, LLP

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. Our goal is to provide timely relevant information to members of the trucking community. The Editors can be contacted as follows:

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The Editors suggest the following for sources of information and points of interest that we think you will find to be helpful:

“Free” Training Material from the Federal Government

The Federal Railroad Administration (FRA) released in January 2009 an educational video for truck drivers designed to promote safety at highway-rail grade crossings. The video reviews the legal responsibilities of drivers as they approach and travel over highway-rail grade crossings and is available in both English and Spanish. The video is downloadable from the website listed below and should be of interest to your safety and training personnel. We expect the Plaintiffs’ bar and “transportation safety” experts hired exclusively by Plaintiffs will now assert in crossing cases that your company had a poor safety program if your driver had not seen this material prior to the accident. http://www.fra.dot.gov/us/content/2109

A Primer for the FMCSA’s CSA 2010 Initiative

The FMCSA is in the process of rolling out a new methodology to replace SAFER and SafeStat which have been seriously discredited. DOT’s Audit Department was so concerned by a 2004 audit of SafeStat that it barred public access to FMCSA motor carrier ratings and published a Warning. This emerging issue is a very critical one, and we will have articles on this topic in this issue. Also, a good informational website can be found at: http://ai.fmcsa.dot.gov/SafeStat/disclaimer.asp?RedirectedURL=/SafeStat/safestatmain.asp. Contact the Editors or another ALFA attorney if you require additional information.
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The Regional Directors help the Transportation Update Editors gather materials for each issue from their areas. If you have any suggestions for content, feel free to contact them or the Editors.

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FUTURE EVENTS
Each year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2010 Transportation Seminar will be held Marco Island, Florida at the Marriott Beach Resort from April 28, 2010 to April 30, 2010. The official web site of this venue is http://marcoislandmarriott.com. On the site, the web cam tool is particularly useful. The golf course and the beach are beautiful.

Both beach lovers and golf lovers will be delighted with this wonderful facility. Our Program Chair for the 2010 seminar is P. Clark Aspy of Naman, Howell, Smith & Lee, LLP, who can be reached at (512) 479-0300 and aspy@namanhowell.com. If you have a topic that you would like to suggest, please contact Clark Aspy by email or phone.

The Chairman of the Transportation Practice Group for 2009-2010 is Danny M. Needham of Mullin Hoard & Brown, LLP, Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com. Our Vice-Chair is Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com. Our Chair Emeritus is Paul T. Yarbrough of Butt Thornton & Baehr PC, Albuquerque,
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For more information, please also consider contacting Katie Garcia at kgarcia@alfainternational.com.

ALFA’S GO TEAM HOTLINE

The ALFA Transportation Practice Group now presents a new service for its transportation clients. The ALFA Go Team Hotline. ALFA knows that its transportation clients must often confront time-sensitive emergencies. The ALFA Go Team Hotline is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

The service works as follows: An ALFA client needing immediate legal support calls the ALFA Go Team Hotline at 1-866-540-ALFA (2532). An ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts. When you contact the ALFA Go Team Hotline, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA Go Team Hotline. Remember, 1-866-540-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Spring 2010 issue of Transportation Update will be published in April, 2010.

DISCLAIMER

The ALFA Transportation Update does not create an attorney-client relationship between the reader and any attorney nor does it render legal advice on any specific matter. No reader should act or refrain from acting on the basis of any statement in the ALFA Transportation Update without seeking advice from qualified legal counsel on the particular facts and circumstances involved. Readers are responsible for obtaining such advice from their own legal counsel.

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

On March 4, 2010, Peter Doody of Higgs, Fletcher & Mack, LLP of San Diego, California will speak at the annual meeting of the Association of Southern California Defense Counsel. The meeting will be held in Los Angeles. He is speaking on a panel with risk managers from Albertsons, Auto Club of Southern California, and Sulby-Miller Construction. The topic is “What Clients Seek and Expect in Their Defense Counsel.”

Beth Kamp Veath, shareholder in the ALFA International law firm of Brown & James, P.C. of Belleville, Illinois, was given special recognition in the December, 2009 issue of the Illinois Business Journal which spotlighted special Illinois attorneys. For the fifth year in a row, she has been selected a Super Lawyer.

On October 16, 2009, Greg Conforti addressed national counsel for Republic Services on the topic of Accident Response Team Best Practices.

On September 28, 2009, Joseph R. Swift spoke at the 2009 National Safety & Operations Conference for the American Moving & Storage Association in Indianapolis, Indiana. The conference was attended by member companies’ executives and safety directors. He addressed the targeting of the trucking industry by nationwide, plaintiff organizations.
CASES, REGULATIONS, & STATUTES

CALIFORNIA

Plaintiff Permitted to Post Full Medical Specials

The last five years has seen a sea of uncertainty within the California trial courts on the issue of whether a personal injury plaintiff is permitted to seek her full “as-billed” medical specials instead of the amount actually incurred. The issue typically comes up in a trial where plaintiff has private health insurance and her insurer has paid her medical specials at a substantially discounted rate pursuant to a contract between the health insurer and the medical provider. The result is a drastically different amount in medical specials between the bill which was charged by the health provider versus the reduced amount which was actually paid by the insurer. Oftentimes the reduction is as much as 50% from the amount charged by the medical provider.

California trial courts have been going back and forth on this issue with no guidance from either the legislature or the California Supreme Court. The recent appellate case of Howell v. Hamilton Meats, 179 Cal.App.4th 686 (December, 2009) supports personal injury plaintiffs and is a blow to the defense bar. In short, the appellate court held that the plaintiff may seek before the jury her full medical specials “as-billed” by the hospital and doctors. Defense counsel must sit on his hands and cannot introduce any evidence proving that the medical bills actually paid by the plaintiff’s insurer were substantially less. Further, the court will not entertain any post-verdict motion by the defense to reduce the plaintiff’s medical specials to the amount actually paid. This results in a boon to the plaintiff’s bar and a double-recovery by the plaintiff.

In Howell v. Hamilton Meats, the plaintiff was injured when her vehicle was struck by a Hamilton Meats truck. The plaintiff’s medical specials were paid by her private health insurer at a substantial discount. Over the objection of defense counsel, the plaintiff was permitted to post her full medical specials “as-billed.” Defense counsel was prohibited from introducing any evidence to the jury of the amount actually paid. The difference between what was billed and what was actually paid by the health insurer was $130,000. The trial court however did entertain a post-verdict motion by the defense to reduce the medical specials to its true amount, and the court subtracted $130,000 from the “Past Medical Specials” award on the verdict. The plaintiff appealed arguing the collateral source rule.

The court of appeals agreed with the plaintiff’s counsel. It held the trial court was correct in allowing the plaintiff to seek her full medical specials “as-billed” but was incorrect in later reducing the award by $130,000. The appellate court reasoned that the collateral source rule allowed the plaintiff to be reimbursed for her full medical expenses. This is despite the fact that the plaintiff never incurred any debt or obligation for the $130,000 written off by her hospital and doctors pursuant to their contract with the plaintiff’s health insurer.

COMMENT

This case is being appealed to the California Supreme Court, and an Amicus brief is being written by the Association of Southern California Defense Counsel. Before this decision, many trial courts would at least allow defense counsel to bring a post trial motion to reduce the amount of the full medical specials to the amount actually incurred. The Howell case takes that right away based on the court’s tortured interpretation of the collateral source rule. This is a significantly bad ruling and permits the plaintiff a double-recovery which is against California

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CALIFORNIA

Truck Parked in Emergency Lane Owed No Duty to Plaintiff

Cabral v. Ralphs Grocery Store, 179 Cal. Ct. App. 4th 1 (November 10, 2009) is a wrongful death case where the decedent motorist fell asleep at the wheel and collided with a big-rig which was parked in the emergency lane.

The driver of the 18 wheeler was an employee of Ralphs Grocery Store. He took a break on his route and pulled onto the emergency lane of Interstate 10 to eat lunch. Interstate 10 is a busy California freeway which runs east-west. At the time he pulled his truck over, he was 16 feet to the right of the far right hand lane (number four lane). Meanwhile, decedent Mr. Cabral was travelling in the same direction on Interstate 10. Mr. Cabral was observed by several motorists to be driving erratically. Suddenly, Mr. Cabral made a sharp right hand turning movement and crossed over several traffic lanes onto the emergency lane where he collided with the back end of the stopped Ralphs tractor and trailer. It is believed Mr. Cabral either fell asleep at the wheel or had an attack from an unknown medical condition.

The family of Mr. Cabral sued Ralphs Grocery based on the theory the truck driver was illegally using the emergency lane since he was merely eating a sandwich. The jury found decedent to be 90% negligent and Ralphs Grocery to be 10% negligent. Plaintiffs, the heirs of Mr. Cabral, were thus able to recover $450,000 against Ralphs which represented 10% of the total verdict.

The appellate court reversed the verdict against Ralphs Grocery and held that the big rig driver owed no duty to the decedent because the accident was not reasonably foreseeable; the mere fact that it was “possible” for a motorist to leave the freeway and strike something situated off the shoulder did not create a duty on the defendant’s part to ensure a “safe landing.” The court also held that the big rig driver’s negligence did not proximately cause the collision.

COMMENT

The area where the accident occurred is a busy freeway. Signs were posted which stated “Emergency Parking Only.” The Ralphs Grocery driver should not have been parked in this area eating lunch. However, the appellate court found that decedent’s driving was so erratic that it was not reasonably foreseeable that this accident would have been caused by the act of a truck driver pulling over and stopping in the emergency lane. This was a good win for the defense, but the impact of this published opinion will most likely be limited to the unusual facts of the case.

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GEORGIA

Georgia’s Personal Injury Statute of Limitation is Turned on Its Head

The Georgia Supreme Court recently issued a ruling that will dramatically affect the statute of limitation in personal injury cases, and specifically motor vehicle accidents, based on its interpretation of Georgia Statute O.C.G.A. § 9-3-99. In Beneke v. Parker, the Georgia Supreme Court determined that a traffic citation for following too closely constituted a “crime” so as to toll the statute of limitation in a motor vehicle accident, until the prosecution of the traffic citation became “final.” 285 Ga. 733, 734-35, 684 S.E.2d 243 (2009). This holding creates different triggering dates for the statute of limitation in every motor vehicle accident that results in the issuance of a traffic citation to one or more of the parties involved, and is especially of interest to a motor carrier, whose defense of personal injury actions often involve a citation being issued to its driver.

The Georgia personal injury statute of limitation requires that all claims for personal injuries must be brought within two years from the date the cause of action accrues. O.C.G.A. § 9-3-33. The cause of action typically “accrues” in motor vehicle accidents on the date of the plaintiff’s injury, which is almost always the date of the accident. In Beneke, the plaintiff was injured on April 27, 2005, when the vehicle in which she was a passenger was struck by the vehicle driven by the defendant. 285 Ga. at 733. The defendant received a traffic citation for following too closely in connection with the accident. Id.

Under the Georgia personal injury statute of limitation, the plaintiff was required to file her complaint on or before April 27, 2007, or so it was believed. However, the plaintiff did not file her complaint until May 11, 2007. The defendant answered and thereafter filed a motion for summary judgment on the grounds that the plaintiff’s complaint was time-barred by the statute of limitation. Id. The trial court initially granted the defendant’s motion for summary judgment but later denied summary judgment on a motion for reconsideration, relying on a fairly new and somewhat obscure tolling provision of O.C.G.A. § 9-3-99. Id. at 733-34.

O.C.G.A. § 9-3-99, which became effective on July 1, 2005, tolls tort statutes of limitation when the basis of the tort involves or arises out of a “crime,” and provides as follows:

The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years.

O.C.G.A. § 9-3-99 (emphasis added).

On appeal, the Georgia Court of Appeals affirmed the trial court’s denial of summary judgment to the defendant but vacated the trial court’s determination that the defendant had actually committed a crime as a matter of law, which the trial court found triggered the tolling provisions of O.C.G.A. § 9-3-99. Id. at 734; and Beneke v. Parker, 293 Ga. App. 186, 189-90, 667 S.E.2d 97 (2008). The Georgia Court of Appeals held that the question of whether the defendant committed the crime as a matter of law to toll the statute of limitation under O.C.G.A. § 9-3-99 was one for the jury. Beneke, 293 Ga. App. at 189.

The Georgia Supreme Court first affirmed the Georgia Court of Appeals’ affirmation of the denial of summary judgment, agreeing that the rules of statutory construction require a finding that the term “crime” in O.C.G.A. § 9-3-99 must encompass violations of the Rules of the Road, such as following too closely, as there is no distinction between felony crimes or misdemeanor crimes (such as traffic citations) in the plain reading of O.C.G.A. § 9-3-99. Beneke, 285 Ga. at 734. However, the Georgia Supreme Court reversed the Georgia Court of Appeals’ ruling that the jury should decide whether the defendant committed the alleged crime as a matter of law: “no factual determination need be made as to whether [the defendant] acted with criminal intent or
criminal negligence. i.e., whether his violation [of the following too closely statute] constituted a crime . . . in order to apply O.C.G.A. § 9-3-99 here.” *Id.*

The Georgia Supreme Court recognized the effect that its holding will have on personal injury litigation arising from motor vehicle accidents:

Like the Court of Appeals, we recognize that our holding in this case will have a significant impact on personal injury actions arising out of vehicle accidents by tolling the statute of limitation in these situations where a traffic citation is issued. Nonetheless, we are constrained by the language of the statute to reach this result. If the Legislature had intended to limit the application of O.C.G.A. § 9-3-99 to tort actions arising from only certain types of crimes, e.g., felonies or specific intent crimes, it certainly could have done so. It did not, and any undesirable result is a matter properly addressed by the General Assembly rather than the courts.

*Id.* at 735 (internal citations omitted).

In conclusion, in those motor vehicle accident cases involving a motor carrier where the truck driver has received a traffic citation in Georgia, it will be difficult, at least initially, for the motor carrier, its insurer, and defense attorneys to determine the date on which the statute of limitation will or has run. Motor carriers operating in Georgia should be especially cognizant of monitoring the handling and/or disposition of its driver’s traffic citations in order to determine the proper date upon which the statute of limitation has expired or will expire.

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### KANSAS

**Kansas’ Indemnity Statute Amended to Include “Motor Carrier Transportation Contracts”**

Kansas’ indemnity statute, K.S.A. 16-121, severely limits the common-law rule allowing one party to contractually secure indemnity from another party for the first party’s negligence. In addition to these typical indemnification provisions, the statute also proscribes provisions in a contract which require a party to provide liability coverage to another by naming it as an “additional insured” with respect to the other party’s own negligence or intentional acts or omissions. The statute renders both types of contractual provisions “against public policy”, “void and unenforceable”.

Originally enacted in 2004, the indemnity statute was amended, effective January 1, 2009, to include “motor carrier transportation contracts”. The statute defines “motor carrier transportation contracts” as any “contract, agreement or understanding covering: (A) The transportation of property by a motor carrier; (B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or (C) a service incidental to activity described in clause (A) or (B) including, but not limited to, storage of property.” The statute does not apply to the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America or other agreements providing for the interchange, use or possession of intermodal chassis, containers or other intermodal equipment.

Initially, the statute only applied to “construction contracts”. Along with “motor carrier transportation contracts”, the 2008 amendments extended the purview of the statute to include “dealership agreements” and “franchise agreements”. As of this writing, there have been no cases interpreting the 2008 amendments to the indemnity statute. Although similar statutes exist in Georgia, Illinois, Indiana, Maryland, Missouri, North Dakota, Nebraska, New Mexico, North Carolina, South Carolina, Tennessee, Virginia, West Virginia and Wyoming, Kansas appears to be unique in that it explicitly prohibits provisions in “motor carrier transportation contracts” requiring one party to provide liability coverage to another by way of an “additional insured” endorsement.
ILLINOIS

No Duty to Design or Maintain a Vehicle Into Which It Is Safe to Collide

It is well-known that the Federal Motor Carrier Safety Regulations require every trailer and semitrailer on U.S. highways to be equipped with a rear impact guard, which is defined as “a device installed on or near the rear of a vehicle so that when the vehicle is struck from the rear, the device limits the distance that the striking vehicle’s front end slides under the rear end of the impacted vehicle.” See 49 C.F.R. §§ 393.86(a)(1), 571.223. Every rear impact guard, commonly known as an ICC bumper, must meet the requirements of 49 C.F.R. §§ 571.223 and 571.224. The explicitly stated purpose of these regulations is “to reduce the number of deaths and serious injuries that occur when light duty vehicles collide with the rear end of trailer and semitrailers.” Federal regulations of such rear impact guards have been in existence since 1953.

Plaintiffs may assume that these regulations provide a basis to sue trailer manufacturers, owners, and operators when a collision results in injuries to the occupants of a vehicle which drives into the rear of a trailer and sustains injuries based on the purported defects in the rear impact guard. The Seventh Circuit Court of Appeals, relying on long-existing Illinois law, recently held just the opposite: a motorist injured due to an allegedly improperly designed rear impact guard, which failed to prevent the motorist’s vehicle from sliding under the rear of a trailer, had no strict products liability cause of action. Renner v. Great Dane Ltd. Partnership, 543 F.3d 914 (7th Cir. 2008).

In Renner, a minivan collided with a trailer that was being towed by a truck. The rear impact guard, which was designed by the defendant, failed and the minivan slipped under the trailer, injuring the minivan driver and killing his wife. After removing the case to federal court, the defendant filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which the district court granted. Relying on the Illinois Supreme Court’s holding in Mieher v. Brown, 54 Ill.2d 539, 301 N.E.2d 307 (Ill. 1973), the court of appeals affirmed the dismissal.

The court followed the Mieher Court’s bright line rule based on section 435(2) of the RESTATEMENT (SECOND) OF TORTS: “a manufacturer has a duty to design a vehicle that is reasonably safe for the occupants, but it owes no duty to those who collide with that vehicle.” The court also relied on the Illinois Appellate Court’s holding in Beattie v. Lindelof, 262 Ill.App.3d 372, 633 N.E.2d 1227 (Ill. App. Ct. 1994). Like Mieher, Beattie involved an underride accident, but unlike Mieher, the defendant in Beattie was a former owner of the trailer – not a manufacturer – who the plaintiff sued for failing to properly maintain the trailer. Extending the Mieher court’s reasoning, the appellate court in Beattie affirmed the dismissal of the former owner “because if no common law duty exists to design a vehicle with which it is safe to collide, then no such duty could exist to maintain one either.”

While the Renner court recognized that the weight of authority in other states seems to contradict its holding, it reasoned that well-established Illinois law does not recognize a duty to design or maintain a vehicle with which it is safe to collide, and therefore, there is no cause of action in Illinois for failure to properly design or maintain a rear impact guard that protects occupants of other vehicles from being injured in rear-end collisions with trailers.

While not cited by the Renner court, there is a third Illinois decision, Semprini v. General Motors Corp., 2006 Ill. App. LEXIS 1274 (1st Dist. 2006), which reached the same result in regard to a purported design defect in sport utility vehicle which did not minimize the risk of injuries to occupants of cars which collided with the SUV. Moreover, it should be noted that the Beattie court made it clear that the absence of a duty to design a vehicle with which it is safe to collide also means
that no duty exists to maintain a vehicle with which it is safe to collide.

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No Apportionment of Fault Among Good-Faith Settling Tortfeasors

In its recent Ready v United/Goedecke Services, Inc. decision, the Illinois Supreme Court addressed the issue of whether the fault of settling defendants is to be considered when one or more non-settling defendants remain in the case through trial. Ready v United/Goedecke Services, Inc., 905 N.E. 2d 725 (Ill. 2008). The court held that good-faith settling tortfeasors are not to be included in apportioning fault after verdict to determine joint and several liability.

Michael Ready was a maintenance mechanic who died while working on a project at his employer’s premises. His wife, as administrator of his estate, brought a wrongful death action against his employer (Midwest Generation, LLC), the project’s general contractor (BMW Constructors, Inc.), and a project subcontractor (United/Goedecke Services, Inc.). The plaintiff settled with the Midwest and BMW for a combined $1.13 million. United did not object to the respective settlements, and the trial court found that they were reached in good faith. Illinois courts are very reticent to find that a settlement was not entered in good faith.

The case later proceeded to trial against United only. After ruling on certain motions in limine, United was barred from presenting any evidence at trial regarding the conduct of either settling Defendant and was not allowed to list Midwest or BMW on the verdict form for the purposes of allocating fault. The jury eventually returned a verdict of $14.23 million dollars.

Pursuant to 735 ILCS 5/2-1117, the trial court found United jointly and severally liable for the amount of that verdict after offsetting it for Ready's comparative negligence (35%) and the settlement amounts that Midwest and BMW had paid. Therefore, United was found to be liable for $8.137 million.

The version of Section 2-1117 in effect at the time of Ready's accident read as follows:

Joint Liability. Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant, who could have been sued by the plaintiff, shall be severally liable for all other damages.

It should be noted that the current version of Section 2-1117, amended in 2003, is identical to the version at issue in Ready, with the exception that the plaintiff's employer is now excluded from the third-party defendants subject to a finding of fault. The current version, therefore, limits the allocation of fault to “the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff’s employer.”

United appealed, arguing that the trial court should have included the settling defendants on the verdict form so that the jury could determine their share of fault for the accident. United argued that had the jury been asked to consider Midwest and BMW’s share of fault, it might have been found to be less than 25% at fault, and thus only severally liable for the damages under Section 2-1117. The Illinois Appellate Court agreed, and remanded the matter for a new trial on liability.

The Illinois Supreme Court granted leave to appeal and ultimately affirmed the trial court’s ruling based upon its interpretation of a key phrase contained in Section 2-1117: “defendants sued by the plaintiff.” Noting that certain appellate court decisions held that settling defendants were not to be included in the apportionment of fault and further noting that the legislature failed to amend
Section 2-1117 in the wake of those decisions, the court held that the legislature had accepted that interpretation. The Illinois Supreme Court therefore held that good-faith settling tortfeasors are not to be included in apportioning fault after verdicts to determine joint and several liability. A petition for rehearing was filed and the Illinois Supreme Court remanded the case to the trial court for a new trial finding that the trial court erred in excluding evidence that the settling defendants were the sole proximate cause of the accident.

The *Ready* decision has serious ramifications when assessing the propriety of settlement. It greatly increases the risk for a non-settling defendant, as it may find itself at trial as the only party whose fault will be considered by the trier of fact. That said, the *Ready* decision does not exclude consideration of the plaintiff’s comparative fault, nor does it preclude an argument that something or someone else might be the sole proximate cause of plaintiff’s injury.

As defendants have even greater pressure on them to settle, the “good faith” nature of co-defendants’ proposed settlements might have to be challenged. In Illinois, a settlement will not be found to be in good faith if it is shown that the settling parties engaged in wrongful conduct, collusion, or fraud. *Johnson v. United Airlines*, 203 Ill.2d 121, 134, 784 N.E.2d 812, 821 (Ill. 2003). Whether a settlement satisfies the good-faith requirement is a matter left to the discretion of the trial court, based upon the court’s consideration of a totality of circumstances. *Johnson*, 203 Ill.2d at 135. In challenging the good faith nature of the settlement based upon the proposed amount of the settlement, the court is to view it in relation to the probability of recovery, defenses raised, and the settling parties’ potential legal liability. *Johnson*, 203 Ill.2d at 137. The implications of the *Ready* decision upon potential legal liability would certainly provide an argument that a “good faith” finding should be denied when a co-defendant proposes to settle for a relatively low dollar amount. In practice, however, these arguments usually prove to be unsuccessful.

The *Ready* decision results in the “deep-pocketed” and minimally culpable party being exposed to potential liability for all of the damages. In catastrophic injury cases, this results in defendants facing a very difficult decision as they are faced with an all or nothing proposition – either convince the jury that defendant was free from fault or face liability for all of the damages.
SOUTH CAROLINA

Executive Compensation Evidence Permitted for Consideration of Punitive Damages

On August 12th, 2009, the South Carolina Court of Appeals handed down a decision which formally approves prevailing practice on the evidence plaintiffs may offer in seeking to establish the value of their punitive damages claim. The case is Duncan v. Ford Motor Company, 682 S. E. 2d 877 (S.C. App. 2009), a product liability action involving allegations that Ford distributed its Expedition line of products, knowing that the vehicle’s design specifications included a defective speed control deactivation switch. The plaintiffs argued that the failure of the switch in their Expedition caused a fire which spread to their house, burning it to the ground.

Ford appealed on numerous grounds, but the one of particular interest for the industry concerned the propriety of the plaintiffs’ economics expert’s testimony. In describing Ford’s ability to pay a punitive damages award—a matter always proper for the jury’s consideration of the amount such an award—the economist testified to Ford’s net worth, its assets, its gross profits, and the amount of compensation its executives are paid. That the company’s ability to pay is always a proper consideration does not, Ford argued on appeal, establish the propriety of the introduction of evidence of Ford’s executive compensation scheme. Ford argued that this evidence was irrelevant and was likely to lead to jury confusion and unfair prejudice to Ford. Notably, Ford had largely on its side the United States Supreme Court’s ruling in State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003), in which the Court acknowledged the potential for arbitrary punitive damages awards inherent in this type of evidence.

Despite the seemingly obvious irrelevance of the executive compensation evidence and its manifest potential to confuse and to inflame the jury, the South Carolina Court of Appeals found no error in the trial court’s admission of the evidence. The court’s reasoning was that “[a] ppellate courts in our state have allowed testimony beyond a defendant’s mere net worth” before, a statement which, while true, does not account for the fact that executive compensation had never before been formally permitted by an appellate court.

That a large transportation company’s net worth can be admitted into evidence is damaging enough; that plaintiffs now are free to train the jury’s attention on the pay brought home by the company’s executives is downright alarming. Especially in light of the complex regulatory scheme governing the transportation industry, punitive damages exposure is a very common threat. It is no secret that juries in South Carolina—as in other states—often render punitive damages awards on passion and social prejudice, and this new pronouncement from our court of appeals provides an additional weapon to plaintiffs bringing suits against large transportation companies.

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SOUTH CAROLINA

Testifying Expert’s Financial Relationship with Defendant’s Insurer Ruled Inadmissible

Defendants who are being provided a defense under an insurance policy in actions pending in South Carolina just dodged a significant strategic bullet. In Todd v. Joyner, 685 S.E.2d 595 (S.C., November 02, 2009), the South Carolina Supreme Court discouraged trial courts from permitting the plaintiff bar’s developing practice of introducing evidence of the defendant’s insurance via attacks on defense experts’ relationship with the insurance company. Keeping insurance out of the jury’s decisional algebra being highly desirable, this case is a clear victory for insured defendants.

The facts are garden variety: Joyner lost control of her passenger vehicle and collided with Todd, yielding Todd’s claim for personal injuries. Joyner admitted liability and the case was tried solely on the damages issue. Joyner presented as an expert witness an orthopedist, Dr. Friedman, who at his deposition offered the usual damages-reducing testimony: pre-existence, lack of permanency, etc. On cross-examination, Todd’s lawyer elicited the standard information from Friedman concerning his experience as an expert witness: how often he provided such services, how often for State Farm (the carrier), and how much money he’d received from State Farm. Dr. Friedman deflected the questions, stating that he was unclear on how often he’d worked for State Farm, or how much the carrier had paid him, but that the amount of time he contributed to expert services was “very small.”

Evidently dissatisfied with Dr. Friedman’s obtuseness, Todd’s attorney subpoenaed State Farm’s records concerning its relationship with Dr. Friedman. The records showed that State Farm had paid Dr. Friedman as much as $60,000 over the previous three years, for work on eighteen separate claims. Predictably, Todd’s counsel sought to introduce this evidence at trial to show that Dr. Friedman was biased. Proof of the expert’s bias itself is, of course, innocuous: that they are paid to say what they say is brought out before every jury, in every jurisdiction. The more serious prejudice looms in the backdoor introduction of the fact that the defendant has insurance that covers the claim.

Interestingly, a dissenting opinion arguing that the evidence should have been allowed reasoned that what is true of expert bias—that every jury is aware of it—also is true of the existence of insurance: “[I]t is highly probable that every juror already knew that insurance was available. The only unknown was the name of the carrier.” Had that approach—logical, to be sure, but jarring—carried the day, South Carolina litigation would be headed down a treacherous path indeed.

As it turned out, the majority identified the problem inherent in taking a cavalier approach to matters which have the incidental effect of admitting evidence of the defendant’s insurance coverage. Under South Carolina precedent, the question is not whether this form of expert bias evidence is admissible in the first instance: under these circumstances, it was. The question is whether its probative value was substantially outweighed by its prejudicial effect, under Rule 403 of the South Carolina Rules of Evidence. Under the 403 framework, the Court had previously adopted the “substantial connection” framework for ascertaining the admissibility of an expert’s relationship to an insurance company. Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001).

This “substantial connection” analysis considers four factors: whether the expert is an employee of the insurer rather than a consultant; whether the expert provides educational services for the insurer’s employees; whether 10-20% of the expert’s professional services involved work for the insurer, and whether the expert’s yearly salary is based in part on his consulting work for the insurer. Under this analysis, the majority found that Dr. Friedman lacked the requisite “substantial connection” to State Farm and ruled that the trial court’s refusal to admit this evidence was proper.

While the opinion offers little in terms of factual detail concerning Dr. Friedman’s relationship with State Farm, it can be read to establish a fairly
clear rule, which should hold in the large majority of cases: if the expert is truly an outside consultant, the evidence will not be admissible; if he is in-house with the insurer—from a practical standpoint, even if not a technical one—the evidence will be admissible. Thus, the status quo by and large is preserved.

So why the “to do” about a case which does nothing but maintains the prevailing state of affairs? The answer is that the Todd v. Joyner case was an opportunity for the Supreme Court of South Carolina to substantially expand the admissibility of evidence of defendants’ insurance. While the $50,000 to $60,000 that State Farm paid Dr. Friedman certainly is not a huge sum—especially in light of the skyrocketing fees paid today for quality expert services—it certainly could be deemed to constitute a “substantial connection”, as those terms ordinarily are understood. Had the Court gone the other way, rejoicing would have ensued amongst the plaintiff’s bar.
TENNESSEE

Enhanced Physical Harm Caused by the Normal Efforts of Third Persons Rendering Aid to an Injured Party is Subject to Comparative Fault Consideration

In Banks v. Elks Club Pride of Tennessee, No. M2008-01894-SE-S09-CV (Tenn., Jan. 13, 2010), the Tennessee Supreme Court overturned a long-standing common-law principle that provided for the imputation of liability to an original tortfeasor for enhanced physical harm caused by the normal efforts of third persons to render aid to an injured party.

In this case, Alice Banks attended a social event at the Elks Lodge in Nashville, and while at the event she sustained injury to her back when a chair on which she was seated collapsed.

Ms. Banks underwent surgery by Dr. Robert Boyce, who recommended a laminectomy and fusion at L3-4 and L4-5. Unfortunately for Ms. Banks, Dr. Boyce performed the laminectomy and fusion at L2-3 instead of L4-5. After mistakenly performing the surgery, Dr. Boyce discovered his mistake, and Ms. Banks had to undergo a second surgery for the laminectomy and fusion at L4-5.

Following the surgeries, she was transferred to the Cumberland Manor Nursing Home where she developed a serious staphylococcus infection that required additional surgeries and extensive care.

Ms. Banks filed a lawsuit against the Elks Lodge. Subsequently, she filed a separate lawsuit against Dr. Boyce and his orthopedic group. The two cases were consolidated for management and discovery purposes. Following consolidation, the Elks Lodge filed a Motion to Amend their Answer to assert comparative fault on the part of Cumberland Manor, and Dr. Boyce also filed a Motion to Amend his Answer to aver comparative fault on the part of Cumberland Manor. Ms. Banks opposed the Motions to Amend. She argued that the defendants’ effort to assert a “comparative fault defense against a subsequent health care provider for alleged negligent medical treatment that was brought on by the injuries negligently caused by the named defendants is inappropriate’.”

The trial court denied the Motions to Amend. The defendants filed applications for interlocutory appeal, and the Court of Appeals denied the applications. The defendants then filed an application for permission to appeal to the Tennessee Supreme Court, and the application for permission to appeal was granted.

In addressing the “Original Tortfeasor Rule,” the Tennessee Supreme Court emphasized that the Rule actually embodies two distinct principles of law – “the original tortfeasor’s liability for subsequent negligent acts of third parties and the original tortfeasor’s joint and several liability with the subsequent negligent actors.”

With respect to the first element (the original tortfeasor’s liability for subsequent negligent acts of third parties), the Tennessee Supreme Court stated “unequivocally that our decision regarding joint and several liability in McIntyre v. Balentine did not alter Tennessee’s common-law rules with regard to liability for tortfeasors for injuries caused by a subsequent medical treatment for the injuries they caused. ... The rule in Tennessee is now, as it was before McIntyre v. Balentine was decided, that an actor whose tortuous conduct causes physical harm to another is liable for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other’s injury, as long as the enhanced harm arises from a risk that inheres in the effort to render aid.”

With respect to the second element (joint and several liability), the Tennessee Supreme Court held as follows: “We again reaffirm our earlier decision holding that following McIntyre v. Balentine the doctrine of joint and several liability no longer applies to circumstances in which separate, independent negligent acts of more than one tortfeasor combined to cause a single, indivisible injury. ... This decision is not inconsistent with our decision to retain the rule imposing liability on tortfeasors for subsequent negligent medical care for the injuries caused by the original tortfeasor.”
In Tennessee, “comparative fault does not prevent the continuing imposition of liability on an original tortfeasor for subsequent negligent medical care for the injuries caused by the original tortfeasor.”

The continuing liability under the Original Tortfeasor Rule “stems ... from being a proximate cause of an aggravated injury resulting from subsequent medical treatment of the negligent injury that one has caused or aggravated.”

The Tennessee Supreme Court reiterated “that the doctrine of joint and several liability no longer applies to circumstances in which separate, negligent acts of more than one tortfeasor combine to cause a single, indivisible injury .... [A]n actor whose tortuous conduct causes physical harm to another is liable for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other’s injury, as long as the enhanced harm arises from a risk that inheres in the effort to render aid.” Accordingly, the Tennessee Supreme Court ruled that the trial court’s refusal to permit the defendants to amend their answers to aver comparative fault was error.

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TENNESSEE

Other Drivers are Watching

On October 20, 2009, in State of Tennessee v. Jerry Lee Hanning, the Tennessee Supreme Court held that an anonymous tip giving a detailed report of an “18 wheeler” driving recklessly indicated a sufficiently high risk of imminent injury or death to members of the public to warrant immediate intervention by law enforcement officials and justified the brief investigatory stop. Four factors justified this investigatory stop: (1) the offense was reported at or near the time of its occurrence; (2) the report indicated that the caller was witnessing an ongoing offense; (3) the report provided a detailed description of the truck, its direction of travel and location; and (4) the investigating officer, who was nearby, verified these details within moments of the dispatch reporting the tip.

In this case, the Loudon Police Department received a radio dispatch that an anonymous caller had reported a recklessly driven truck headed north on Interstate 75. The caller identified the vehicle as a black “18 wheeler” with “1-800-GoSmith” or “Go Smith Brothers” on the back and stated that the truck had exited at the Highway 72 exit ramp. When the police officer received the dispatch, he was located about one hundred and fifty yards from the top of the Highway 72 exit ramp. The officer immediately drove to the exit ramp where he observed a black truck tractor and trailer with its parking lights on parked in the emergency lane, facing the top of the ramp. The officer approached the truck’s door with the words “Smith” and “transport” and asked the driver to step out. The officer questioned the driver and administered various field sobriety tests. Then, the officer arrested the driver for driving under the influence and transported him to a hospital for a blood alcohol test.

At trial, the driver moved to suppress the evidence. When the motion was denied, the driver entered a conditional plea agreement, reserved the plea and appealed the trial court’s denial of the motion to suppress.

The question presented to the Tennessee Supreme Court was “whether the warrantless questioning and detention of the driver violated the Fourth Amendment to the United States constitution and Article 1, Section 7 of the Constitution of the State of Tennessee.” The court determined that under the facts of this case, the warrantless detention was valid because it was supported by reasonable suspicion that the driver had committed a crime.

Harkening back to Terry v. Ohio, 392 U.S. 1, 27 (1968), this case is characterized as a brief investigatory detention supported by reasonable suspicion of criminal activity. In this case, the parties agreed that the driver and his truck were “detained” when, with its blue lights flashing, the officer pulled his patrol car very closed to the front of the driver’s truck, on the premise that a reasonable person in the driver’s place would have believed he was not free to leave when the patrol car was parked in front of the truck, blocking its exit. Thus, the question for the court was whether the detention was justified by reasonable suspicion of criminal activity. This calls for a “fact-intensive and objective analysis” of “specific and articulable facts, that the defendant had committed, or was about to commit, a criminal offense.” Reasonable suspicion is more than a hunch but less than probable cause.

Although the initial information was received from an anonymous informant whose reliability was difficult to assess, the deficiencies in demonstrating reliability were cured by the investigating officer’s independent corroboration of the anonymously provided information. The court highlighted the fact that the anonymous call suggested that the caller was reporting the reckless driving as it occurred; and, within minutes of receiving the dispatch, the officer confirmed a truck matching the description at the location described by the caller. The officer’s confirmation of this information in close proximity to its receipt was sufficient to demonstrate the caller’s basis of knowledge.

Relying on Florida v. J.L., 529 U.S. 266 (2000) (which held that an anonymous caller’s report that a suspect at a specific bus stop was carrying a concealed gun did not create reasonable suspicion to justify a stop and frisk), the driver
argued that the officer did not personally observe the truck being driven recklessly and thus did not have reasonable suspicion. Citing cases from the Eight Circuit Court of Appeals, Delaware, Vermont, Wisconsin, Alabama, California, Iowa, Kansas, Louisiana, New Hampshire, New Mexico, and New York, the Tennessee Supreme Court rejected the driver’s argument noting that (1) a tipster’s report of readily observing evidence of reckless driving carries a higher degree of inherent reliability than does a report of a concealed weapon; (2) the investigatory stop of a motor vehicle is less invasive than a stop and frisk, and (3) most importantly, the degree of danger and urgency for immediate action is higher than a concealed weapon, that is, reckless or erratic driving suggests that the driver may be under the influence of alcohol or drugs, fatigued or in physical distress and therefore incapable of controlling his or her vehicle.

Notably, the court said “we do not believe that the [the officer] was obligated to wait until the truck was back on the interstate and moving to confirm the report of reckless driving. Had he done so, the first indication that the caller’s report of reckless driving was correct might well have been a collision between the truck and another vehicle, resulting in injury or death to [the driver] and/or other members of the public.” Indeed, the Tennessee Supreme Court likened a tractor trailer being driven recklessly on the interstate to a bomb, which warrants prompt intervention and investigation. Mindful of the tragic outcome of drunk driving, the court cited the recent statistics of the National Highway Transportation Safety Administration which showed that in 2007 approximately 13,000 people were killed by drunk drivers nationally.

In closing, the court emphasized that the detailed content of the anonymous tip in this case was of critical significance coupled with the immediacy of the officer’s independent corroboration. In this case, the anonymous tip reporting reckless driving suggested a sufficiently high risk of imminent injury or death to members of the public to warrant immediate intervention by law enforcement and justified the brief investigatory stop because the offense was reported at or near the time of its occurrence, and the report indicated that the caller was witnessing an ongoing offense; the report provided a detailed description of the truck its direction of travel and location, and the officer verified these details within moments of the dispatch reporting the tip. Thus, the warrantless detention of the driver and his truck was valid because it was supported by reasonable suspicion that the driver had committed or was about to commit a crime.
WASHINGTON

Beware of Successor Corporation Status when Purchasing a Business

In Orca Logistics, Inc. v. Dept. of Labor & Industries, 216 P.3d 412 (Wash. Ct. App. 2009), the Court of Appeals for the State of Washington was confronted with the issue of whether a trucking company which acquired most of the assets of another trucking firm which had gone out of business would be liable to pay unpaid worker’s compensation premiums as a “successor corporation” to the defunct firm.

Madsen Trucking Company was a small trucking firm located in Washington State which was engaged in transportation of goods and products around the nation. Madsen was shut down in 2004 after experiencing financial difficulties. At that time, it owed significant Labor & Industries insurance premiums to the State of Washington for its worker’s compensation coverage.

In December 2004 a separate company was incorporated by separate owners, Orca Logistics, Incorporated. Orca was engaged in transportation, warehousing, logistics, and transloading. The owner of the defunct company, Madsen Trucking, went to work as a manager for Orca. He had no ownership interest in the new company. In addition, Orca purchased the trucks and trailers owned by the defunct company, and a number of employees from Madsen went to work for the new corporation.

Washington State, similar to many states, has a statute governing the obligations of what are known as “successor corporations.” Under that statute, a successor corporation may be liable for unpaid premiums or other assessments of the defunct company. Due to the sale of the trucks and trailers to Orca, the fact that a number of former employees including Mr. Madsen went to work for Orca and because of the common business purpose, the State determined that Orca was a “successor corporation” and must pay the unpaid worker’s compensation premiums owed by Madsen Trucking.

This decision was appealed to the trial court which reversed the decision and concluded that a majority of Madsen Trucking customers, both by dollar value and by number, did not transfer their business to Orca and the majority of the defunct company’s employees did not go to work for Orca and, finally, the majority of Madsen Trucking assets were not transferred to Orca. Based on those conclusions, the trial judge reversed the decision of the administrative agency and concluded that Orca did not have to pay the assessments.

On appeal, the Washington Court of Appeals applied a burden of proof standard which tended to give deference to the findings of an administrative agency. The rule is that, if the administrative agency’s determination is supported by substantial evidence, it will be upheld. The Washington Court of Appeals concluded that there was substantial evidence to support the agency’s decision and that Orca was, in fact and in law, a successor corporation and would be liable for unpaid taxes of the business it succeeded. (Madsen). The appellate court concluded that Orca had purchased a major part of both tangible and intangible assets of Madsen. The intangible assets included goodwill and customer lists.

This case illustrates the need for caution when a trucking company purchases significant assets from a defunct corporation, since it may be treated as a “successor corporation” and run afoul of the state tax collectors who are anxious to add additional revenue to the state’s coffers.

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ALFA attorneys Robert B. Clemens and Kelly M. Scanlan of Bose McKinney & Evans LLP in Indianapolis, Indiana, recently finalized the successful settlement agreement reached in the Fall of 2009 between Claimants and a large international delivery company – an ALFA client – who will be referred to herein as “ABC Trucking.” Pursuant to the terms of the settlement agreement, the parties and venue are to be kept confidential.

Early one evening in July of 2008, a driver for ABC Trucking was driving eastbound on a heavily-traveled interstate in Indiana. Unfortunately, the driver did not realize that the traffic he saw ahead of him was stopped due to a collision and two disabled vehicles further east on the interstate. The driver’s Ford van rear-ended Claimants’ Honda Accord. Witnesses reported to the officer who arrived on the scene that the ABC Trucking driver failed to slow or stop his vehicle when approaching the stop-and-go traffic. A responding Indiana State Trooper gave a television interview from the scene and remarked on camera for the evening news that everyone seemed to be in a “big hurry” and that the collision was the result of the van’s driver “just flat not paying attention to what’s in front of you on the roadway.”

The impact of the collision swung the driver’s van in the opposite direction and caused it to collide with at least one other vehicle. The Honda’s 34-year-old female driver was trapped in the vehicle and was eventually transported by LifeLine helicopter to Indianapolis, where she was determined to be brain dead. She was taken off life support. Her husband, the Honda’s 35-year-old passenger, who also had to be removed from the car, was rendered a paraplegic. He was paralyzed from the waist down. The van’s driver incurred only minor injuries.

The Claimants were high school sweethearts who had married in 1993 and had 3 children together. The couple divorced several years later, and both went on to have children born of other relationships. The Claimants reunited several years later and were remarried in 2006. At the time of the collision, they were reportedly on their way from Texas to Ohio to visit the wife’s teenage son.

Defense counsel proactively sought an early and economical pre-suit resolution in this tragic case with, as described by Claimants’ counsel, “monumental” damages. Separate formal settlement demands were made on behalf of the husband, the wife’s estate, and the Claimants’ children. To ensure appropriate evaluation of the claims, Defendants conducted due diligence, including targeted surveillance. Both Claimants and Defendants retained life care planners to work through assessment of the husband’s future needs.

Mediation was held in Indianapolis in August of 2009 and was attended by multiple
representatives on both sides. Emotions ran high as the Claimants’ family members continued to work through their grief. Fortunately, the parties reached an agreement for resolution of all claims for a confidential sum. The agreement included structured settlements for the interested parties, as well as a cash component to assist the husband with his immediate expenses. The satisfactory result was attributable to the hard work of all involved, including the mediator, counsel for both parties, and Defendants’ structured settlement broker.

Claimants were represented by Michael V. Nakamura of Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

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PRACTICE TIPS

Techniques for maintaining contact and retaining the cooperation of a driver who has been terminated following an accident

After a trucking accident, the driver is a central focus of any ensuing litigation. A trucking company has three primary objectives when dealing with the driver in this situation: 1) the company must maintain contact with the driver, 2) the company must retain the cooperation of the driver, and 3) the company must obtain accurate information from the driver.

Ongoing contact must be maintained so that the driver can continue to cooperate and provide information. The driver’s cooperation will facilitate the process of obtaining accurate information. Achieving these objectives ultimately simplifies the process of defending accident liability and minimizing the cost of an accident.

However, achieving these objectives can be complicated when the trucking company elects to terminate its driver. This article examines practical techniques and provides suggestions that can help a trucking company maintain contact with the driver and retain the driver’s cooperation even after the driver has been terminated.

There are many different methods for terminating a driver’s employment, but it is important to consider which will be the most effective in eliciting the driver’s cooperation because his cooperation is crucial for defending and resolving legal disputes arising out of an accident. Basic considerations often suggest the most appropriate techniques for terminating a driver. For instance, considering how the driver will feel about being terminated points to handling the termination with an appropriate level of respect. Additionally, considering the goals of the company and lawyers suggests the importance of being direct and respectful in order to secure the driver’s cooperation.

An ineffective way to terminate a driver would be to scream at him, call him names, or generally berate the driver. This may make the terminating person feel better, but the result will most likely be a “disappearing” driver or a driver who refuses to cooperate as the company prepares for discovery, depositions, and trial. Of course, perhaps even worse, this approach may result in a driver thinking about retaliating against the trucking company at deposition or trial for the abusive manner in which he was terminated.

One technique for terminating an employee while simultaneously advancing the goals of retaining contact and cooperation is to be direct and ask questions and make statements that seek affirmative responses from the driver. A good example of this approach would be to say the following in a controlled tone: “It is unfortunate that this accident happened, isn’t it? You understand that I am going to have to let you go as a result of the accident, don’t you? Before you leave, let’s take some time to discuss what may happen in the coming months or longer as we work together to resolve this accident. Can we do that now? I’m going to need for you to stay in touch with me and always make sure that I know how to contact you. Will you do that for me? That way we can both continue to work on this accident together and we can make sure that you are represented by an attorney at our cost, either if you are sued or if criminal charges are filed against you. You want us to do that for you, don’t you? You want to help us get this accident resolved, so that we can all put this accident behind us, don’t you? Do you have any questions? If you have any questions later, you can always call me and we will discuss them. OK?”

Calmly asking for affirmative responses and understanding your position will almost always elicit cooperation after termination. This is a process of eliciting favorable responses from the driver so that even if the driver is being terminated, the driver understands why he is being let go and feels compelled to stay in touch and cooperate with the trucking company because they are going to help him. This termination method incorporates some of the following effective techniques:

1. Be Respectful: The most important techniques are to always treat the driver in the manner in which you would want to be treated. Never use derogatory or demeaning language when terminating a driver.
2. Communicate in Person:
Always terminate a driver in person. Never use e-mail or telephone as a method of terminating a driver. A face to face conversation is more respectful, direct, and better for encouraging future contact and cooperation.

3. Promptly Address Driver Expressed Concerns:
Always respond to all of the driver’s questions. If the driver inquires about his job status, always inform the driver that no one is going to make a “continued employment” decision until the accident has been investigated and the accident has been discussed in person with the driver. This is important because a driver will frequently ask questions or be defensive after an accident out of a concern for his job. A driver will almost always ask if he is going to be terminated as a result of the accident. It is common for a driver to make this inquiry at the time the driver initially reports the accident.

4. Delay Driver Termination Decisions:
Never rush to terminate a driver. Initial accident reports are frequently inaccurate. This includes the initial driver statements, which tend to be self-serving and inaccurate. Sometimes, a driver will make an initial statement such as “it was not my fault” regardless of how the accident actually occurred. If you elect not to allow the driver to resume post-accident driving, which is often the case when a major accident has occurred, always place the driver on a paid leave of absence or in a non-driving position until the accident facts can be properly sorted and a litigation plan is formulated. Always inform the driver in person of why he is not being allowed to return to driving; e.g., the potential defense problems that may arise if the driver had another accident.

5. Request Driver Cooperation:
Always ask for the driver’s full cooperation in investigating the accident.

6. Ask for Positive Verbal Responses:
When terminating a driver, always make statements and ask questions in a manner that requires an affirmative driver response. The example in the preceding section contains many of these types of questions and statements. Requiring the driver to verbally commit to cooperating with the company in defending the accident as a team has the effect of solidifying his commitment.

7. Adverse Party Contacts:
Always inform the driver that he can expect to be contacted by an adverse investigator or an insurance company representative. Always inform the driver what to expect when this happens, and always discuss methods that the driver can use to promptly terminate these inquiries. Always have the driver commit to contacting you when this happens.

8. Complaints and Criminal Charges:
Always inform the driver that he may be served with a subpoena, a complaint, or charged with a crime. Always have the driver verbally commit that he will contact you immediately when this happens, and tell the driver that you will provide a defense for him when this happens as long as the driver continues to cooperate with you.

9. Maintain Driver Contact:
Always provide the driver with written company contact information for a specific individual. Always establish a routine contact schedule and guidelines for otherwise contacting the trucking company representative; e.g., periodic contact once a month, when the driver moves or changes phone numbers, when the driver is contacted by an investigator, and when the driver is served. Always docket the contact schedule on the case calendar and if the driver does not contact you on schedule then contact the driver. Never lose contact with your driver. If he disappears, always promptly hire an investigator to locate the driver and thereafter address the reasons that caused the driver not to contact you; e.g., the driver was served with a complaint, got scared, and decided to ignore the problem in the hope that it would resolve itself. Always remind the driver that ignoring the problem is not an option.
These practical suggestions for obtaining post-accident driver cooperation and eliminating the “disappearing driver phenomenon” apply regardless of when the driver is terminated or when the lawsuit is filed. Treating the driver as you would like to be treated throughout the post-accident process will result in continued driver contact and cooperation, and it will significantly contribute to an effective defense of a lawsuit.

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ARTICLES

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The Impact of CSA 2010 on Motor Carrier Operations and Litigation©

INTRODUCTION

The bottom line of your company has never depended more on its ability to obtain and track non-monetary data about your operations. Third parties are increasingly relying upon statistics kept by you and others about your business and its operations that will radically affect its financial health. The new government initiative of the FMCSA CSA 2010 will rely heavily on data about your operations generated by others which is at this time very inaccurate. Your safety and operations personnel and legal team need to take these changing conditions into account now so that you will be prepared when CSA 2010 is implemented in the near future.

Safer, SafeStat and the Need for an Improved Methodology

Safer and SafeStat have been in place for a number of years and during that time they have been criticized by the ATA, FMCSA (Federal Motor Carrier Safety Administration), the Audit Division of the FMCSA and the courts.

Recent additional criticism of the SafeStat methodology as a system designed to assist the FMCSA in identifying at risk motor carriers for intervention has been made in connection with the FMCSA’s new Administrative Initiative CSA 2010. Since a recent audit of the data quality of the states on truck safety in 2004, the FMCSA has initiated numerous initial studies of state data gathering capacity in connection with launching FMCSA 2010 Initiative. I will discuss those in detail in support of the position that it is too soon to launch the ambitious CSA 2010 Initiative. In the alternative, the FMCSA must accompany the CSA 2010 Initiative with a very strong warning that it is to be used for administrative purposes only and no other purpose. Indeed, until data quality is acceptable the ratings of the FMCSA should not be available to the public under DOT’s own data quality standards for publication.

The FMCSA has received increasing pressure from a variety of sources to develop and implement a replacement methodology to SafeStat. There has been pressure from both the American Trucking Association and, indeed, the courts to develop a new methodology. In addition, the FMCSA’s own Office of the Inspector General completed a comprehensive analysis of SafeStat which included many areas of significant criticism.
Because of numerous complaints about SafeStat from the trucking industry, the Office of the Inspector General investigated the SafeStat system. The Inspector General’s report was issued on February 14, 2004, and is entitled Improvements Needed in the Motor Carrier Safety Status Measurement System and can be found at www.oig.dot.gov. This 58-page report is a goldmine of information for defense counsel in combating plaintiffs’ counsels’ attempts to have SafeStat admitted at trial. The Inspector General’s report found material weaknesses in the SafeStat data reported by states and motor carriers and with FMCSA’s processes for correcting and disclosing data problems.


This article was published a number of years ago in the ALFA Transportation Update newsletter. The entire article is available on ALFA’s server in the archive section of back issues of the newsletters at: http://www.alfainternational.com/practices/groupdetail.aspx?pgid=57

It is also available from its author, Pete Doody of Higgins, Fletcher & Mack, at doody@higgslaw.com or this author at wfulton@whf-law.com.

The FMCSA has had to concede that the SafeStat methodology that it has used, in part, to evaluate the safety of motor carriers’ operations has significant data quality and other problems. These problems have been so obvious in the past that the FMCSA has inserted a unique warning in its regulations for SafeStat in 2004 after the audit cited above.

FMCSA Caution Urged in the Use of SafeStat Data (post 2004)

**WARNING:** Because of State data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses. (Emphasis added by the author.)

This warning has been considered strongly by some courts when these issues are before them in litigation, but even this warning is not sufficient given the reports of the FMCSA on the quality of the truck safety data gathered by the States. The ATA is sufficiently concerned about this issue that in its Comments on CSA 2010 filed with FMCSA last winter it has reminded it of the administrative obligation to only “publish” data that can reasonably be considered “reliable.”

“Moreover, we found material weaknesses in the SafeStat data reported by states and motor carriers and with the
Federal Motor Carrier Safety Administration’s (FMCSA) processes for correcting and disclosing data problems. Consequently, while SafeStat is sufficient for internal use, its continued public dissemination and external use require prompt corrective action. **Improvements in the model are important, but getting better data is essential.**” (Report No. MH-2004-034, February 13, 2004 – Final Report) (emphasis added)

The Inspector General’s Office circulated a draft of this report to the FMCSA for comment. The FMCSA took substantial objection to portions of the report:

“Specifically, FMCSA commented that the language in the draft report overstated the problem of out-of-date census data on SafeStat. **FMCSA also disagreed with any implication in the report that some motor carriers, who are categorized by SafeStat as high risk, may be categorized as high-risk carriers only because of the existing data problems.**” (Emphasis added.)

In the Inspector General’s final report, however, Steffani disagreed in principal part:

“On the question of whether some [motor] carriers may be categorized as high-risk only due to the existing data quality problems, we agree with FMCSA that data quality problems are more likely to make a high-risk carrier look good. **However, we continue to maintain that the opposite situation can also occur.** Because SafeStat scoring involves a relative ranking of one carrier against another, missing data may place a lower-risk carrier in a deficient category because data for a higher risk carrier is not included in the calculation. Missing crash data were most significant with six states failing to report any crashes for the 6 months analyzed.” (Italics are in the original document. Emphasis in **boldface type** is added by this author.)

The response of the FMCSA to this independent criticism, further pressure from the ATA, and its own analysis and experience has resulted in the FMCSA’s development of a major initiative, the Comprehensive Safety Analysis (CSA 2010). Unfortunately this initiative is perhaps even more sensitive to defects in data quality than SafeStat. There are many excellent aspects to CSA 2010, but if it is to be watched on a nationwide basis, defects in the underlying database and its ongoing reliability must be corrected prior to full implementation.

**FMCSA Initiative CSA 2010**

A good overview of CSA 2010 can be found in the Federal Register at Vol. 73, No. 180/ Tuesday, September 16, 2008/Notices, Docket No. FMCSA-2004-18898 (at pp. 53483-53490). That section of the Federal Register has been duplicated in its entirety as Exhibit A to this paper. The notice incorporating this material announced a set of listening sessions designed to give the FMCSA an opportunity to introduce its initiative in detail to motor carriers and other “stakeholders” in the trucking industry. A great deal of the information presented at the listening sessions, including a final report, are available on the FMCSA website for inspection and download. The information is located at: [http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm](http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm)

This is a good location to stay reasonably up to-date with developments with CSA 2010. It is not as up to date or as complete as the docket on the Federal Register, Docket No. FMCSA-2004-18898. The FMCSA has been conducting a trial run in a group of states scattered throughout the country and you can expect that initial and final reports of that trial run will appear on this website. Those reports will give the trucking community an even better idea of an implementation schedule and perhaps a rule making schedule, as well.
In CSA 2010 the FMCSA moves to the development of a two-pronged system in which data is provided by motor carriers to the agency and data is also gathered from a variety of sources about drivers. Increasing importance will also be placed on roadside inspections. In its literature explaining CSA 2010 to the trucking community, the FMCSA has stated, “...quality of roadside inspections is more important than ever!” In addition, the FMCSA has stated, “…clean inspections are just as valuable as inspections with multiple violations.” The CSA 2010 website has a pdf which deals in considerable detail with the issue of data quality for roadside inspections. In this information, the FMCSA has made several significant points.

A. Roadside Inspections

“...we can enhance the uniformity and accuracy of our roadside inspection data. There is a need for standardized processes for challenging [roadside and other similar] data. The agency has developed an increased awareness and understanding that all inspections [good and bad] must be uploaded and uniform inspection processes [must be developed]...”

The agency, however, concedes that although national standardization of roadside inspections is essential, it is essentially non-existent. FMCSA points out rather candidly, “...we do not have a national/ international set of guidelines for how data challenges should be handled.” As a result, the agency has conducted studies of data quality with respect to roadside inspections around the country.

B. Data Quality

The results of those data quality studies are very disturbing. This is particularly true since they are recent studies and the states have had ample opportunity since the 2004 audit to improve this important administrative function. One study performed an analysis of data challenges to roadside inspections made during the period from February 2004 to September 2008. During that period of time in the studied area, there were 41,000 data challenges filed. Of these challenges, a full 64% resulted in data updates. The following pie graph is a clear indication of the scope of the problem.

Table 1

I have not seen a chronological grouping of these challenges and the corresponding numbers which required data corrections. This could be significant if the percent requiring correction has declined sharply overtime.

It should be noted that this volume of challenges and the overwhelming percentage of required corrections occurred before the implementation of CSA 2010. It can reasonably be expected that the volume of challenges will skyrocket when motor carriers learn that the results and underlying quality of roadside inspections will be even more important to the FMCSA’s evaluation of the safety of motor carriers under CSA 2010.

In another data quality evaluation commissioned by the FMCSA, it was determined that for the entire period studied from March 2004 through
August 2008 a full 40% of all states had either “fair” or “poor” data quality for safety information of the type that would be used by the FMCSA under the CSA 2010 to evaluate the safety of motor carriers under CSA 2010. The following chart gives the detailed information on these findings by a contractor engaged by FMCSA.

DQ Evaluation Impact...State Safety Data Quality Evaluation

<table>
<thead>
<tr>
<th>Data Quality</th>
<th># States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good</td>
<td>24</td>
</tr>
<tr>
<td>Fair</td>
<td>13</td>
</tr>
<tr>
<td>Poor</td>
<td>14</td>
</tr>
<tr>
<td>Fair/Poor</td>
<td>52.3%</td>
</tr>
</tbody>
</table>

Table 2

The states will have little incentive to improve the quality of this data absent significant funding from the federal government. The current economic crisis, in particular, is hitting state governments very hard, requiring significant across the board cutbacks. State politicians will likely view a federal requirement for better data as yet another unfunded mandate. It would be very revealing to see data for the period from August 2008 to June 2009 added to the FMCSA study shown immediately above in Table 2.

Analysis of the CSA 2010 Initiative by ATA

The FMCSA called for responses to its CSA 2010 Initiative and a comprehensive response was prepared and filed by the ATA. It can be found in public record (the Federal Register) and simply through the use of a Google™ search. This document is also available as a pdf file from the ATA, David Potts, author. If you are interested in this information, you should also obtain a recent detailed press release from the ATA about a new safety initiative of the ATA which was released in June 2009. It is available as a pdf from the ATA or this author. The report is also available as a word document titled, ATA Safety Report.docx. The official comments of the ATA in response to CSA 2010 were filed in the public record on January 28, 2009 and were authored in principal part by the ATA Chair for this area of interest, David Potts. David Osiecki of the ATA was also heavily involved in the preparation of this response. Mr. Osiecki can be reached at dosiecki@trucking.org.

In its response, the ATA made five principle points among others:

1. Data quality relied on by CSA 2010 needs to be extremely high;
2. A nationwide driver qualification database needs to be established;
3. Motor carriers should have access to their own rating file;
4. Vehicle mileage rather than the average number of motor units must be used as a normalizing factor; and
5. Crash accountability determination equity is of paramount importance.

The Comments of the ATA detail its rationale for each of these points. The ATA’s Comments are required reading for those employees at motor carriers.
responsible for safety and risk management. Accordingly I will discuss these topics briefly here. One very encouraging element of CSA 2010 is its dual focus on the company and the driver. To develop the database on drivers that clearly will be necessary for this new methodology, the government will have available a wealth of information that would be of tremendous use on an ongoing basis to motor carriers to identify and resolve driver deficiencies on a proactive basis.

“Also, any comprehensive driver database established under CSA 2010 needs to be accessible by motor carriers so that they can be proactive in resolving driver deficiencies. Access would prove useful in better identifying high risk drivers during pre-employment screening and allow for preemptive intervention practices by management. Providing for motor carrier use of the database would timely solve problems as these are revealed, and thus allow FMCSA to better direct its limited resources toward at-risk and non-compliant motor carriers and drivers.” (Emphasis added.)


The FMCSA certainly understands that an at-risk driver is less likely to self-report in a timely manner to motor carriers when there are problems that will impact his/her disciplinary record.

Providing this information to motor carriers should be a high priority for the FMCSA. Certainly, a major goal of the FMCSA has to be getting at-risk drivers off the road. If the FMCSA chooses to withhold this information from motor carriers, it would be counter-productive to its clear goals and would be doing a great disservice to the motoring public. Indeed, if drivers are aware that this information is available to motor carriers from the FMCSA, it will encourage drivers to promptly report problems to the motor carriers they drive for and when they apply for a new position with a motor carrier.

**The Litigation Environment**

A close analysis of the judicial response to both Safer and SafeStat gives us a reasonably good predictor for how courts will view data gleaned from the implementation of the CSA 2010 initiative. Of one thing we can be certain and that is the plaintiffs’ bar will continue to have a strong interest in using this information (properly or otherwise) to prosecute tort cases. If one has any question whatsoever about this whether the plaintiffs bar will remain interested in this kind of data, a suggestion offered by Peter Doody in his paper states, “…the issue of admissibility of SafeStat data and safety ratings” is compelling. He states in that article:

“In order to appreciate how the plaintiffs’ bar perceives the value of SafeStat and corresponding motor carrier safety ratings, one only needs to click to www.truckaccidents.com. Here, the perspective client need only type in the DOT number or the company name of the motor carrier and it immediately links to the company’s SafeStat history…” Peter Doody, above.

I have included below a portion of the homepage of the website referenced by Pete Doody as the website home page appeared on July 10, 2009.
Flipping through this fascinating website will give you an excellent idea of what you might expect in a catastrophic truck case anywhere in the country from the plaintiffs' bar. CSA 2010 will make available more information in a central location about your company's safety record than ever before. Accordingly, you need to devote additional resources of your company to be certain that the data which is present in the CSA 2010 databases and available through websites of this kind is, in fact, accurate and complete.

Litigation is not the only forum in which this will be important to your company. As pointed out by the ATA in their response to the FMCSA 2010 initiative, this information will impact litigated cases, your company's ongoing expense for insurance, and if your company is publicly traded its stock price. It is against this background that the recent data quality evaluations by the FMCSA appear to be particularly threatening to motor carriers.

The courts, in prior litigation, have been significantly troubled by a number of factors related to SafeStat:

1. Incomplete data – the courts have been particularly troubled by incomplete data as it can skew the analysis in methodologies such as SafeStat and CSA 2010 in either direction. They can make safe companies look unsafe and visa versa. Incomplete data about your company can be monitored. Incomplete data about other companies can also affect your ratings. Push for good data across the board.

2. Incorrect data – this will have its primary impact on individual companies under attack in litigation. The ATA has pushed for a nationwide system of correcting incorrect data. For motor carriers to do this they have to have access to the underlying data. All motor carriers should push for that right. You will need to track your DOT number throughout the database. Recall that the 2004 audit found incorrect DOT numbers in a full 11% of all data.

3. Currency of information – the FMCSA concedes that clean roadside inspections are as important as inspections showing deficiencies. The currency of information will be extremely important to your rating. You should work with the ATA to insist that states raise the quality of data. Given the importance of your CSA 2010 rating to your companies' future, motor carriers should insist that all states have good data quality before there is any consideration of making individual motor carriers' ratings available to the public. If you roadside inspections are trending toward noted improvement track this at lack of currency in the database will wipe out this favorable trend.

SafeStat and SAFER Data in the Courts

A review of all cases on SafeStat and SAFER indicates certain trends:

- SafeStat and SAFER ratings are consistently being admitted by courts in cases involving negligent hiring and retention claims. Courts use these ratings, or the lack thereof, as evidence that the defendant had actual or constructive knowledge of a driver’s incompetence when hired and during the period of employment. Plaintiffs' counsel are also pushing to use this information to attempt to establish a driver should have been fired pre-accident and to establish the degree of knowledge necessary to prove a basis for punitive damages.

- Another approach by defense counsel in cases involving a negligent hiring and retention claim is to first use a motion in limine or motion for partial summary judgment to strike negligent hiring and retention claim in its entirety before attacking the rating by FMCSA.

We have been successful in a series of cases in first striking other evidence typically used to support this claim such as prior accidents and previous driving record. The Western District of Kentucky, in Estate of Presley v. CCS of Conway, 2004 WL 1179448, No. 3:03-CV-117-H, (W.D. Ky. May 18, 2004), followed Flor-Shin to analyze a negligent retention of truck driver claim. Estate of Presley involved a multiple vehicle accident in which two semi-tractor trailers collided with the plaintiff's vehicle. The plaintiff filed suit against both trucking defendants,
CCS of Conway and Shaffer Trucking, for negligent retention of the drivers. In determining whether the defendants negligently retained the drivers this Court held that Kentucky “Courts evaluate whether the employer knew, or reasonably should have known, that (1) the employee in question was unfit for the job for which he or she was employed, and (2) the employee’s ‘placement or retention in that job created an unreasonable risk of harm’ to a third party.” *Estate of Presley*, 2004 WL 1179448, at *5 (quoting, *Flor-Shin*, 964 S.W.2d at 445.). The plaintiff made separate arguments against each trucking company. First, the plaintiff argued that CCS of Conway had negligently retained its driver since it did not have any written policies in place concerning driver safety or training and because it failed to follow the mandatory background check required by the Federal Motor Carrier Safety Regulations before allowing the driver to drive. *Id.* The Court, however, found this proof to be irrelevant. “Plaintiffs must submit proof that [the driver’s] employer knew or should have known that [the driver] was unfit in some relevant way for the job.” *Id.* Although CCS of Conway may have negligently performed a background check, plaintiff produced no proof that the driver had any prior accidents or other adverse marks on his driving record. *Id.* Therefore, the Court dismissed the negligent retention claim against CCS of Conway. *Estate of Presley* has been relied upon by other judges in federal Courts in Kentucky. Those cases are discussed in detail in Joseph Pappalardo article. Defense counsel should try to limit this use of rating data to third party cases of this kind but I do not believe this effort will be uniformly successful. Moreover, if a carrier believes its safety rating is inaccurate, it should take measures to file complaints and/or contact its local elected officials regarding the inaccuracy. Plaintiffs’ counsel will view failure to correct inaccuracies as a concession that the data is accurate. You do not want to start the correction of inaccuracies during the litigation process.

b. Joseph Pappalardo suggests in his paper accompanying this topic that because courts are allowing safety ratings into evidence, motor carriers, brokers, and logistics providers should carefully scrutinize the safety ratings of the parties’ with whom they conduct business. Motor carriers may also start receiving demands from insurance carriers and insurance brokers to divulge their safety ratings as plaintiffs are increasingly looking for additional deep pockets in truck wreck cases. See *Jones v. C.H. Robinson Worldwide, Inc.*, (W.D. Va 2008), 558 F. Supp. 2d 630, No. QQ, 2008 WL 4080870 (W.D. Va. June 13, 2008, and *Schramm v. Foster*, 431 F. Supp 2d (D. Md. 2004). Both cases sought to use rating data to involve such third parties. These cases are discussed in detail in Joseph Pappalardo article. Defense counsel should try to limit this use of rating data to third party cases of this kind but I do not believe this effort will be uniformly successful. Moreover, if a carrier believes its safety rating is inaccurate, it should take measures to file complaints and/or contact its local elected officials regarding the inaccuracy. Plaintiffs’ counsel will view failure to correct inaccuracies as a concession that the data is accurate. You do not want to start the correction of inaccuracies during the litigation process.

c. The Inspector General’s 2004 report on the reliability of SafeStat is a great resource for defense attorneys to cite when opposing counsel seeks to use the safety information during litigation. The report essentially states that the census data is not updated reliably, crash data is unreliable at best, poor data exists on moving violations, and overall the data records are highly inaccurate—in fact, 11% of the errors found by the authors of that report were due to the wrong motor carrier being listed for a SafeStat violation. Most motor carriers should be certain that their DOT number is taken off all power units and trailers that they sell. Defense counsel need to use this and recent data quality surveys to attack the use of CSA 2010 ratings as well.
d. Since the 2004 report, the FMCSA has restricted public access to its safety ratings and issued a disclaimer regarding SafeStat’s credibility when used for purposes other than it was intended for—i.e., as evidence in litigation. FMCSA’s own data quality surveys should be used to pressure it to continue to restrict its ratings under CSA 2010 until such time that data quality is radically improved.

**Cases Where Safety Ratings/Data Allowed in Favor of Plaintiff**

**Action Plan for Motor Carriers**

1. FMCSA’s CSA 2010 initiative will be implemented—while CSA 2010 is certainly coming, full implementation may not occur until 2011. Rule making still needs to occur and that process is not been initiated yet.

2. Follow the rule making process closely and begin gearing up for dealing administratively with these data categories. As these data categories are identified with specificity, you should incorporate them in your safety programs and in your internal document control and preservation policies.

3. Roadside inspections will clearly be a major factor in determining your safety rating. Follow up will be critical on any defective items in a roadside inspection. Document all actions and archive the data. Be certain to review roadside inspections and use any appellate process available to correct incorrect information. Insist that your owner-operators follow up on all roadside inspection deficiencies and require proof of their compliance.

4. Continue all safety programs you have found in your experience to be mission critical, regardless of any importance or lack of importance they receive in CSA 2010.

5. Support the ATA’s important initiatives with respect to 2010. Push at all levels for a nationwide driver qualification database that is available to you. If such a database is developed and made available to you, it will be critical for you to use it extensively.

6. If motor carriers are given access to their own safety rankings and database information mine that information to prove your companies’ safety programs and, in particular, mine that database to spot at-risk drivers.

7. Politically support the funding of database improvement programs at both the state and federal levels.

8. Attack the improper use of CSA 2010 ratings in litigation through aggressive motions in limine and, as appropriate, the use of expert witnesses in trucking safety and statistics.

**CONCLUSION**

The ATA has an extremely strong grasp of the difficulties of CSA from both an administrative point of view and from the point of view of a litigator charged with blocking the abuse of CSA 2010 ratings when defending motor carriers. Support strongly the positions taken by the ATA on your behalf. The most important single thing for you to do is utilize all data made available to motor carriers about drivers and tighten up their administrative control of their own data. In building a case on these issues, good data will be your best ally.

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