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Sorting out all the possible tortfeasors in truck-crash cases

COMPLEX CASE LAW AND FEDERAL/STATE REGULATIONS THAT GOVERN TRUCKING CAN BE USED TO YOUR ADVANTAGE IF YOU KNOW HOW

By the time you receive the first call from the truck-crash victim, the trucking company, their insurance company and their attorneys have already investigated the collision. They typically bring experts, photographers, videographers, and investigators to the collision site on the same day and sometimes within hours of the crash. So, they evaluated the issues before you even received the first call.

Truck-accident cases are not the same as car-accident cases. The players, how the cases are defended, the applicable rules and regulations, and the vehicles themselves differ. For example, federal law requires most trucks traveling in interstate commerce to carry $750,000 in insurance for bodily injury and property damage. (See 49 U.S.C. § 31139(b)(2).) Most states impose minimum insurance requirements on trucks not covered under federal law. California's minimum insurance for most intrastate trucks is $750,000, but some states have lower minimums.

Likewise, trucking cases are far more document intensive. Navigating the truck company's recordkeeping requirements provides critical information *so long as you request the information within the minimum document retention dates under federal regulations.* (See 49 C.F.R. Part 379, Appendix A.) For example, the regulations require motor carriers to retain personnel, payroll, shipping, and agency documents for only one year. The immediate task is to preserve all evidence you have the power to secure and preserve and send a comprehensive evidence preservation letter.

What if the trucking company was uninsured or their $750,000 insurance policy is insufficient to cover the millions needed to provide a lifetime of care to your client or support surviving family members? *How did it come to be that this unsafe driver, truck company, or vehicle got on the road in the first place?*

Applicable regulations and case law impose strict and fault-based liability on numerous individuals and entities. After we send a letter to secure the evidence and retain an accident reconstructionist and other experts (i.e., conspicuity, human factors), we delve into safety data maintained by the Federal Motor Carrier Safety Administration (FMCSA), shipping and corporate documents, camera footage, "black box" information from the vehicles, cell-phone data, transportation contracts, witness statements and telematics data.

The following outlines some of the potential defendants in a truck-accident case.

The truck driver

Trucking lawyers often dogfight about whether a higher standard than "reasonable care" applies to truck drivers.

California courts set a higher standard of care for truck drivers, at least in some circumstances. For example, 49 C.F.R. § 392.14 requires truck drivers to use "extreme caution" when operating during "hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, or smoke ..."

Two California state courts have held that section 392.14 creates a heightened standard of care for commercial drivers. For example, *Crooks v. Sammons Trucking, QInc.*, 2001 WL 1654986 (Cal. Ct. App. 2001) reversed a defense verdict because the trial court instructed the jury on a reasonable care standard without stating the higher standard of extreme caution. (*Accord, e.g., Weaver v. Chavez* (2005) 133 Cal.App.4th 1350 [same result because a "reasonable person standard is not consonant with a standard of extreme care" and "extreme" means the "greatest, highest, strongest, or the like"].)

How do you prove the truck driver's duties without regard to whether a higher or reasonable-person standard applies? Standard of care sources include the Federal Motor Carrier Safety Regulations (FMCSR) and state-law analogs, state motor-vehicle statutes, commercial driver's license (CDL) manuals, industry training resources for safe driving standards, defensive driving standards, preventability manuals, and trucking company standards and policies. Though each case is unique, common fact patterns include left turns, stopped trucks, rear-end collisions,

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improper maneuvers, fatigue or distraction, and alcohol or drugs.

The trucking company

Potential claims against the trucking company include vicarious liability and negligence. Vicarious-liability claims against the truck company stem from common law or FMCSR.

Common-law agency

When the driver is an employee of the trucking company, state common-law theories of agency govern the company's liability. As the driver's employer, the company is responsible for the driver's actions while acting within the scope of employment. As long as the driver's activities are related to the company's business, a driver who violates the company's policies or procedures or drives under the influence of drugs or alcohol still acts within the scope of the employment. Whether a driver acted within the scope of employment at the time of the collision is often a jury question.

Statutory employment and owner-operator drivers

Owner-operators are small-business owners who own and operate at least one for-profit truck and typically lack moto-carrier operating authority. Obtaining operating authority involves substantial upfront costs and compliance with myriad safety regulations. Accordingly, most owner-operators drive their trucks under another motor carrier's operating authority.

Historically, it was advantageous for the trucking company to permit an owner-operator to drive under the company's motor-carrier operating authority. That means the owner-operator puts the carrier's USDOT and MC numbers on the owner-operator's truck. Sharing operating authority with drivers that it did not employ and trucks that it did not own, the trucking company had a minimal investment. The company relied on standard independent contractor defenses to avoid liability for injury and death caused by negligent operation, use, or maintenance of the truck. The use of non-owned vehicles – that is, a truck on public highways displaying a truck company's USDOT and MC numbers on it, but the company does not own the truck – also created confusion about who was financially responsible for tort victims.

> [C]arriers . . . began to use the equipment owned and driven by truckers who had no . . . operating authority. In contracting with such persons the carriers took care to constitute the lessors as independent contractors which enabled them to avoid ... safety, financial, and insurance regulations. Many of the owner-operators without authority were fly-by-night truckers with poor, unsafe equipment who had little financial ability. [T]he trip lease and its attendant evils [] permitted an indifferent carrier to evade its safety and financial responsibility. The practice of leasing made it difficult in accident cases to fix responsibility, and certified carriers could thus escape the consequences of the regulations and responsibility for accidents by employing irresponsible persons as independent contractors who were not financially accountable and who had no insurance or were under-insured.

(*Rediehs Express, Inc. v. Maple* (Ind.Ct.App. 1986) 491 N.E.2d 1006.)

To remedy these issues, FMCSR and the related enabling statute now treat independent contractors as statutory employees of the motor carrier. The regulations require motor carriers to be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants. (See, e.g., 49 C.F.R. § 390.5 [defining the term "employee" to include a "driver of a commercial motor vehicle including an independent contractor while in the course of operating a commercial motor vehicle]; see also 49 C.F.R. § 390.5, Regulatory Guidance, Question 17; see also 49 U.S.C. § 31132(2) [statutory definition of "employee" includes "an independent contractor when operating a commercial motor vehicle]; see also § 49 C.F.R. §§ 376.11 and 376.12 [requires the carrier to enter into a lease or arrangement assuming "exclusive possession, control and use" of the truck and "complete responsibility for the operation" of the truck].)

Most courts hold that these regulations create an *irrebuttable* presumption of statutory employment. Based on a misinterpretation of 1992 amendments to section 376.12, some courts hold that it gives rise only to a *rebuttable* presumption of statutory employment. Accordingly, these courts ignore the regulatory scheme and permit evidence that the driver was not operating within the scope of employment at the time of the collision.

That issue continues to be heavily litigated. But trucking companies often admit vicarious liability as part of a tactic to avoid independent negligence claims against the company. Courts are split on whether the admission of vicarious fault immunizes the trucking company from independent negligence claims. (See, e.g., *CRST, Inc. v. The Superior Court* (2017) 11 Cal.App.5th 1255 [holding that truck driver's employers' admission of vicarious liability did not preclude recovery of punitive damages against employers].)

Negligence

By the trucking company

Even if common-law agency or statutory-employment principles don't apply, the trucking company might have independent negligence for negligent inspection, maintenance, repair, or supervision. For example, if a trucking company fails to comply with vehicle-maintenance regulations, and the collision was caused due to a vehicle issue, that could be negligence per se or evidence of negligence. (See, e.g., 49 C.F.R. § 390.3(e)(3).) Violations of other standards of care – see the resources outlined above for truckers as a starting point – also are evidence of negligence.

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In addition, courts have adopted many exceptions to the general rule that an employer is not responsible for the negligence of an independent contractor, including for negligent hiring. At issue is whether the trucking company knew or should have known that the driver needed to be more competent at the time of his employment application. 49 C.F.R. §§ 381.11(a) and 391.51 specify a motor carrier's minimum duties for vetting their drivers and ensuring their qualifications.

The FMCSA has created a database on truck drivers as part of its Pre-Employment Screening Process ("PSP"). The PSP report contains information on the results of any audits, inspections, or accidents involving the driver.

Negligent entrustment encompasses the allegation that the trucking company should not have entrusted a truck to the driver because of their inexperience or inability to operate a commercial vehicle safely. Negligent retention occurs when a trucking company learns during a driver's employment that the driver is incompetent but continues to retain the driver and allow them to operate a commercial vehicle.

Loading companies

Improper loading can cause burst tires, brake problems, and other serious safety issues. If a loading company fails to weigh or secure a load properly and the failure contributes to the collision, the loading company may be liable. The FMCSR provides detailed instructions and restrictions for loading and unloading. (See, e.g., 49 C.F.R. 393.) If a company does not secure or balance a load properly, or if the load is too heavy for the vehicle, there is an increased risk that the vehicle will roll over or jackknife and that the driver will not be able to stop quickly.

The shipper of goods

Sometimes the shipper is responsible for loading the truck. If so, investigate potential claims against both the motor carrier and the shipper. When the shipper participates in the loading process, it may give improper instructions about securing the load. The shipper may also be liable when it haphazardly loads the cargo, negligently securing the load but assuring an inexperienced carrier or driver that they loaded the cargo correctly. And some shippers load the truck in a manner that hides some defect that is not obvious to the carrier upon a reasonable inspection.

Freight brokers

Freight brokers are intermediaries connecting shippers who need to transport their commodities with motor carriers. By retaining a freight broker, a shipper outsources the expense of finding, vetting, contracting, and dealing with motor carriers. Brokers profit from the difference between the amount the broker charges a shipper-customer and the amount the broker pays a carrier to move the customer's load.

Brokers have attempted to convince legislators and judges to immunize the broker industry from tort liability. Immunizing brokers from tort liability would incentivize them to hire the cheapest carrier regardless of safety. Carriers, in turn, would be incentivized to compromise safety to reduce operating costs to remain competitive. The result would be reducing road safety and putting responsible trucking companies at a competitive disadvantage.

Brokers typically rely on independent-contractor defenses to avoid liability for the negligence of the motor carriers they select.

Courts have rejected independent-contractor defenses when there is evidence that the traditional elements of agency are at play in the relationship between the broker and the carrier. *Sperl v. C.H. Robinson Worldwide, Inc*. (Ill. App. Ct. 2011) 946 N.E.2d 463, is the seminal case holding a broker vicariously liable on an agency theory. More recently, in *Volkova v. C.H. Robinson Company* (N.D. Ill. 2019) No. 16 C 1883, 2019 WL 2436903, the agency claim against the broker resulted in an $18.6 million jury verdict. The written agreement in *Volkova* stated that the carrier was an independent contractor. But the plaintiff introduced evidence that the broker provided the driver specific instructions and would impose fines to enforce them, advanced fuel costs, and was listed as a certificate holder on the carrier's insurance policy.

Even without an agency relationship, a freight broker may be liable for negligence. Though the general rule is that a party is not liable for the negligence of independent contractors, a broker may be liable for their independent negligence in hiring, retaining, or selecting the motor carrier.

Brokers vigorously argue that state common-law negligence claims are preempted by the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"), and they have no duty of care.

Please get in touch with me for a list of over 50 decisions finding that the FAAAA does not preempt the claims. The only federal circuit court to rule on the issue to date is the Ninth Circuit in our case *Miller v C.H. Robinson Worldwide, Inc*. (9th Cir. 2020) 976 F.3d 1016, 1026. The *Miller* court ruled that the FAAAA's safety exception saved the claims from preemption. The broker sought Supreme Court review of the decision. The Court requested the views of the United States. The Solicitor General advised the Court that review was not warranted and, in any event, the FAAAA does not preempt negligent-hiring claims against freight brokers. (See 2022 WL 1670803.) The Court denied review of the Ninth Circuit's decision. (See *Miller* 2022 WL 2295168 (Mem.) (June 27, 2022).)

Some brokers argue that their only duty is to check that a trucking company is legal to be on the road (i.e., has operating authority and insurance). That ostensible limit – a thinly veiled argument that the FMCSR or FMCSA preempts state law negligence claims – is belied by the plain language of FMCSR, the FMCSA's mission, and caselaw. Congress mandated that the FMCSR "shall establish *minimum* Federal safety standards for commercial motor vehicles." (49 U.S.C. § 31136(a)(1) (emphasis added).) The FMCSR implements the mandate, providing that unless an

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FMCSR imposes a "higher standard of care," comply with state law. (49 C.F.R. §§ 392, 391.1.) There often is a battle of experts on what satisfies the standard of care.

Courts repeatedly hold that a carrier's registration and insurance do not immunize a broker from liability for negligent selection or retention of a carrier. (See, e.g., *Miller* (D. Nev. Feb. 22, 2022) 2022 WL 526140, at *1; *Skowron v. C.H. Robinson* (D. Mass. Aug. 14, 2020) 2020 WL 4736070, *2 (same); *Scott v. Milosevic* (N.D. Iowa 2019) 372 F.Supp. 3d 758, 767; *accord, e.g.*, L. *B. Foster Co. v. Hurnblad* (9th Cir. 1969) 418 F.2d 727.) We received the first punitive damages verdict against a broker for negligent selection of a carrier in *Linhart v. Heyl Logistics LLC* (D. Or. March 10, 2012) Case No. 10-03100.

Hidden motor carrier

More than one company may be a carrier for a load. (*Zamalloa v. Hart* (9th Cir. 1994) 31 F.3d 911.) The ostensible freight broker may be a hidden motor carrier. If the company accepted cargo under its motor-carrier authority, did it attempt to create broker status by assigning the load to another carrier? Under statutory employment, a motor carrier is liable for the driver's acts when it uses equipment it does not own to transport the cargo. (See, e.g., 49 U.S.C. § 14102(a); *accord*, e.g., *Puga v. RCX Sols, Inc.* (5th Cir. 2019) 922 F.3d 285, 292.)

The "broker" or "carrier" determination depends on whether the entity legally bound itself to transport the goods. 49 C.F.R. § 371.2 defines a "broker" as one who, for compensation arranges or offers to arrange the transportation of property…*[m]otor carriers are not brokers within the meaning of this section if they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport*." (49 C.F.R. § 371.2 (emphasis added).)

Courts consider how these entities hold themselves out to the world and their relationship to the shipper. The crucial distinction is whether the party legally binds itself to transport – that is, if the broker accepted responsibility for ensuring delivery of the goods, regardless of who actually transported them – in which case it is considered a carrier.

Tryg Insurance v. C.H. Robinson Worldwide, Inc. (3d Cir. 2019) 767 Fed. Appx. 284, is a cargo-loss case, but it may be instructive in personal-injury cases. The shipper hired C.H. Robinson to facilitate the shipment; when the cargo melted during transit, the shipper's subrogated insurer filed suit against C.H. Robinson. C.H. Robinson argued that it could not be liable for the loss since it acted only as the broker for the shipment under the Carmack Amendment. The Carmack Amendment provides that a carrier is liable for damages occurring during a shipment of goods, while a broker, who arranges for transportation only, is not liable. The Third Circuit affirmed the district court's ruling that C.H. Robinson was liable as a carrier for the load.

The Third Circuit reasoned that C.H. Robinson "took responsibility for the goods and arranged for their transportation," and, as there was no agreement to hire a third party to transport the goods, it could not argue that it was "acting as a broker." (*Ibid.*) The court relied on the FMCSR definitions of "motor carrier" and "broker," and the rule against misrepresentation in 49 C.F.R. § 371.7(b). ("A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.")

That C.H. Robinson had broker authority, did not own trucks or equipment needed to transport cargo, had an independent-contractor relationship with the trucking company, and did not consent to be listed on the bill of lading, were not determinative. The Third Circuit determined that the term *carrier* "encompasses entities that perform services other than physical transportation" and that carriers are "person[s] providing motor vehicle transportation for compensation." The *Tryg* court further explained that transportation includes "'services related to' (including 'arranging for') the movement of property." (*Ibid.*)

Insurance companies

Independent negligence

Generally, there is no duty to rescue another in danger. The no-duty-to-rescue rule has many exceptions, including voluntary undertaking. The classic example is a failed rescue attempt. If a person voluntarily renders aid to another at risk, they have a duty to exercise reasonable care in attempting the rescue because other potential rescuers may refrain from volunteering.

Courts rely on the negligent-undertaking exception to include an insurance company's private regulation of their insureds' activities. Insurance companies increasingly play a role in hiring new drivers, especially for smaller truck companies. A truck company may rely on its insurer to assess potential new drivers' qualifications. The insurer argues that they did not perform safety inspections "for the benefit" of the insured, but instead, exclusively for their own benefit to evaluate whether to offer the insurance and, if so, under what terms.

Some courts hold that if the insured or other third parties relied on the insurer's safety inspections, the insurer owes a duty of reasonable care, regardless of whether the insurer was motivated primarily or even exclusively by minimizing its own risk. Some states have enacted statutes limiting these claims.

Direct action

The right of injured third parties to directly sue the truck company's insurer for the tortfeasor's negligence – that is, the right to name the insurance carrier in the personal injury suit – is not available under common law. Some states, including California (Ins. Code, § 11580, subd. (b)(2)), create this right with a "direct-action" statute. California's statute does not permit direct action against the tortfeasor's insurer unless a plaintiff has

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already obtained a judgment against the tortfeasor.

Bad faith

Bad-faith claims are based on the implied covenant of good faith and fair dealing in the insurance contract between the insured (the trucking company and driver) and the insurer (the insurance carrier). The contract grants the insurer the exclusive right to control the defense and settlement of claims against the insured. But the implied covenant imposes a duty on the insurer to act in good faith when settling the claims. In short, the insurer must act reasonably to protect its insured from personal exposure outside the afforded policy limits. Red flags include unreasonable denial of a claim, delays in investigation, low settlement offers, unreasonable documentation requests, and failure to pay.

State statutes and case law vary widely on bad faith claims. For example, under California law, the insured can act against their insurance company for breach of duty. Still, a third-party claimant generally cannot sue the other insurance company for bad faith.

Safety compliance company

We are unaware of any reported opinions that a safety compliance company is liable for a truck company or driver's failure to exercise due care. However, cases find safety compliance companies liable in non-trucking scenarios based on a negligent undertaking theory of liability. For example, in one trucking case, we sued a safety compliance company, resulting in a significant settlement before the court ruled on the company's motion for summary judgment.

Vehicle and part manufacturers

Engineers, accident reconstructionists, and other experts must thoroughly investigate how and why the crash occurred. When a vehicle's defect or parts causes the collision, the manufacturer may be partially or fully liable for any injuries. Responsible parties may include the company that manufactured the truck or defective equipment, the retailer, the trucking company that allowed an unsafe truck to remain on the road, and the driver who failed to inspect and identify any apparent defects, among others.

Section 402(A) of the Restatement of Torts (Second) expanded tort law from a conduct-based liability into a defect-based liability for products. The shift to defect-based, rather than conduct-based, liability requires analysis of the role of the vehicle or mechanism. Did some parts or features of the vehicle cause or contribute to the collision? Or did some aspect of the vehicle increase or exacerbate the injuries? Courts generally recognize three types of defects: design, manufacturer, and marketing/failure to warn. There also are crashworthiness cases when the product does not cause the collision but enhances or worsens injuries.

Mechanic and repair shops

The mechanic or repair shop responsible for maintaining a truck may be liable if the crash results from negligent maintenance or repair. Examples include negligently returning a vehicle after a repair, giving the vehicle a deceptive appearance of safety on which the owner relies, and failing to warn of a dangerous condition the mechanic is or should be aware of.

Construction companies

A contractor with control of a construction site has a duty to warn or guard against the hazards associated with the site under applicable statutes, regulations, and industry standards. We have successfully litigated many cases that started as cases focused on an at-fault truck driver and company and ended up more about unsafe construction practices and improper traffic control.

For example, a couple on their way home from a party was killed on I-75 when their speeding car careened into the back of a dump truck. We almost didn't take the case. But working closely with a team of experts showed the facts in a new light.

John R. Jurgensen Co. won a bid as the prime contractor of an I-75 widening project. The dump-truck driver worked for an independent contractor who owned the truck and sent drivers to move dirt at Jurgensen's construction site. At the time of the collision, the dump truck was going well under the speed limit. Our initial efforts focused on the dump truck and driver. But there were factual hurdles and limited insurance.

Further investigation revealed that Jurgensen designed the site without a dedicated acceleration lane, so that heavily loaded dump trucks needed to enter the high-speed lane of I-75 from a dead stop. It also failed to hire officers to use overhead lights to warn the public or equip dump trucks with high-intensity lights in violation of the Manual of Uniform Traffic Control Devices ("MUTCD").

After six days of trial – which included 21 lay and expert witnesses and over 100 photographs and other demonstrative evidence – the jury returned a $16 million verdict against all the parties, including Jurgensen. We successfully defended the verdict against motions for a new trial, JNOV, and an appeal. When the case was pending in the Supreme Court of Ohio, Jurgensen finally agreed to settle.

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