

**TEXAS INSURANCE AND TORT LAW UPDATE 2009**  
**SHERATON-HOUSTON-BROOKHOLLOW**  
**SEPTEMBER 10, 2009**

**WHAT DO WE DO NOW?**  
**INVESTIGATING, EVALUATING AND DEFENDING**  
**THE TRUCKING ACCIDENT CLAIM**

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# **WHAT DO WE DO NOW? INVESTIGATING, EVALUATING, AND DEFENDING THE TRUCKING ACCIDENT CLAIM**

## **I. INTRODUCTION**

### **A. Not Just a Car Accident**

The investigation, evaluation, and defense of a commercial trucking case is vastly different from a typical passenger car collision lawsuit. According to the American Trucking Association, there are over 3 million truck drivers in the United States, who annually log over 450 billion miles on the country's roadways. The vehicles they operate weigh upwards of 80,000 pounds – nearly 25 times the size of a normal passenger car with which they share the road. Simple physics of mass and momentum demonstrate that when the two types of vehicles collide, the lighter vehicle will, undoubtedly, be structurally compromised much more than the heavier tractor-trailer. The size of the tractor-trailer will also affect vehicle dynamics, stopping distance, and the ability to initiate emergency maneuvers. For such reasons, there is a greater proportion of fatalities and severe injuries in each tractor-trailer accident than in those accidents involving only passenger cars.

The investigation, evaluation, and defense of the motor carrier claim must be viewed by the carrier's representative as a unique and complicated endeavor. This primer on trucking accident law will provide the claims professional and the trucking representative with an overview of the trucking industry. The paper will explore the statutory regulations that govern the trucking industry and the necessity of developing a post-accident/pre-suit investigation to vigorously defend the claim. The paper also discusses several key issues of Texas law relevant to the defense of trucking accident claims venued in the state.

### **B. Key Federal Regulations**

The responsibility for regulating motor carrier safety shifted from the Interstate Commerce Commission to the United States Department of Transportation following that department's creation in the late 1960s. Recently, a new agency, the Federal Motor Carrier Safety Administration ("FMCSA"), was created for the specific purpose of overseeing motor carrier safety in the country. The purpose of the FMCSA is to: "help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner." It is critical to have an understanding of some of the applicable safety regulations, such as hours of service rules, driver qualifications/disqualifications, pre-employment procedures, and drug and alcohol testing, in order to properly assess a trucking accident claim.

## 1. Hours of Service Rules

Commercial carriers are responsible for knowing what their drivers are doing every hour of every day. It is the driver's responsibility to document, in a chart format, each hour of each day being off duty, on duty-not driving, driving, or time spent in the sleeper berth. The resolution of the question of "off duty" versus "on duty" is determined by a provision of Federal Motor Carrier Safety Regulations, and generally includes any type of conduct that furthers the motor carrier's purpose. 49 C.F.R. §395.2. Drivers must create, maintain, and forward to their employers their duty status included in their "drivers logs" within thirteen days of completion. 49 C.F.R. §§395.8(i), 395.15(h)(1).

The new service rules became effective on January 1, 2004:

- a driver cannot drive for more than 11 consecutive hours, and cannot drive after being "on duty" for more than 14 hours. 49 C.F.R. §395.3(a)(1), (2);
- before a driver can drive 11 consecutive hours or be on duty for 14 hours, they must be off duty for a period of 10 hours. *Id.*;
- operators cannot drive more than 60 hours in a 7 day work period or 70 hours in an 8 day work period. 40 C.F.R. §395.3(b);
- a new work period can begin only after a 34 consecutive "off duty" period. 40 C.F.R. §395.3(c).

The provisions were developed to require the enforcement of an average 10 hour driving day, with a complete day off per work week. One must be mindful of the definition of "on duty," which is defined as driving, inspecting a tractor and trailer, preparing forms, but does not include time spent in the sleeper berth. Sleeper berth time is subject to additional restrictions, which include a requirement that 8 of the 10 consecutive hours must be spent in the sleeper berth. The remaining 2 hours can be used as "off duty" time at the discretion of the driver. 49 C.F.R. §395.1(g)

The penalty for exceeding the duty regulations is that the driver is declared "out of service." 49 C.F.R. §395.13.

## 2. Driver Qualifications

The Federal Motor Carrier Safety Regulations contain the following minimal qualifications that the driver must possess to engage in commercial driving:

- be at least 21 years old;
- can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in English, can respond to official inquiries in English, and can make entries in English on reports and records;
- can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;

- is physically qualified to drive a commercial motor vehicle;
- has a current, valid commercial motor vehicle operator's license, issued by only one state;
- has prepared and furnished the motor carrier that employs the driver with a list of violations;
- is not disqualified to drive a commercial motor vehicle; and
- has successfully completed a driver's road test, or has presented an operator's license or certificate of road test which the motor carrier that employs him/her has accepted as an equivalent to the road test.

49 C.F.R. §391.11.

### **3. Driver Disqualification**

A motor carrier cannot require or permit a driver who has been disqualified to operate a commercial motor vehicle. If a driver is convicted of a disqualifying offense, and the motor carrier knows or should have known about the infraction, the motor carrier is prohibited from using the driver during the period of disqualification.

#### **a) Disqualification for Loss of Driving Privileges**

- if the driver's operator's license is revoked, suspended, withdrawn, or denied, that driver is disqualified until such time the license is reinstated by the suspending authority;
- a driver whose license was revoked, suspended, withdrawn, or denied must notify the carrier for which he or she drives by the end of the business day following the date of receipt by the driver.

#### **b) Disqualification for Criminal and Other Offenses.**

A driver who is either convicted or forfeits bond or collateral upon a charge of a disqualifying offense is disqualified for the period of time specified by the regulations if:

- the offense was committed during on-duty time or as otherwise specified; and;
- the driver is employed by a motor carrier or is engaged in activities that are in furtherance of a commercial enterprise in interstate, intrastate, or foreign commerce.

#### **c) Disqualifying offenses**

The following are deemed disqualifying offenses by the Federal Motor Carrier Safety Regulations:

- driving a commercial motor vehicle while under the influence of alcohol, which includes:

- driving a motor vehicle while the person's blood alcohol content is 0.04% or more;
- driving under the influence of alcohol, as prescribed by state law; or
- refusal to undergo such testing as required by any state in the enforcement of its regulations;
- driving a commercial motor vehicle under the influence of a controlled substance, and amphetamine, or formulation of an amphetamine, a narcotic drug, or a derivative of a narcotic drug;
- transportation, possession, or unlawful use of a controlled substance, amphetamines, narcotic drugs, formulations or derivatives while the driver is on duty;
- leaving the scene of an accident while operating a commercial motor vehicle; or
- committing a felony involving the use of a commercial motor vehicle.

40 C.F.R. §§391.15, 383.51.

#### **4. Application for Employment Requirements**

A person shall not drive a commercial motor vehicle unless the prospective driver has completed and furnished the motor carrier with an application that meets the following requirements:

- the name and address of the employing motor carrier;
- the applicant's name, address, date of birth, and social security number;
- the applicant's address for 3 years preceding the application date;
- the issuing state, number, and expiration date of the operator's license held by the applicant;
- the nature and extent of the applicant's experience in the operation of commercial motor vehicles, including the type of equipment which the applicant has previously operated (*e.g.*, bus, truck tractors, full trailer, poll trailer, etc.);
- a list of all motor vehicle accidents in which the applicant was involved in during the 3 years preceding the date of the application, including specifying the date and nature of each accident and any fatalities or personal injuries caused;
- a list of all violations of motor vehicle laws (other than parking violations) of which the applicant was convicted for the preceding 3 years from the date of the application;
- a statement setting forth that the applicant's operator's permit has not been denied, suspended, or revoked. In the alternative, a statement setting forth in detail the facts surrounding the denial, suspension, or revocation.
- a list of the names of and addresses of the applicant's employers for the 3 years preceding the application date, including the reason for leaving the employ of the former employer.

## **5. Physical Qualification of Drivers**

The physical qualifications standard covers 13 areas that are deemed necessary for the physical demands of commercial driving. Most of the standards are reviewed at the discretion of a qualified medical examiner, who, based on his or her training, will certify the physical qualifications of the candidate driver. Vision, hearing, insulin dependent diabetes, and epilepsy are conditions that are not subject to the discretion of the medical examiner.

The Federal Motor Carrier Regulations mandate that all drivers have satisfied the minimum standards if the candidate driver:

- has no loss of a foot, leg, hand, arm or has been granted a skill performance evaluation certificate;
- has no impairment of:
  - hand or finger which interferes with prehension or power grasping;
  - an arm, foot, leg, or any other significant limb defect or limitation which interferes with normal tasks associated with operation of a commercial motor vehicle;
- has no established medical history or clinical diagnosis of insulin dependent diabetes;
- has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, any other cardiovascular disease known to be accompanied by syncope, dyspnea, collapse or congestive cardiac failure;
- has no established medical history or clinical diagnosis of respiratory dysfunction likely to interfere with the ability to control and drive a motor carrier vehicle safely;
- has no clinical diagnosis of high blood pressure likely to interfere with the ability to control and drive a motor carrier vehicle safely;
- has no clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease likely to interfere with the ability to control and drive a motor carrier vehicle safely;
- has no clinical diagnosis of epilepsy likely to interfere with the ability to control and drive a motor carrier vehicle safely;
- has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with the ability to control and drive a motor carrier vehicle safely;
- has distant visual acuity of at least 20/40 in each eye without corrective lenses or visual acuity separately corrected to 20/40 or better with corrective lenses, distant binocular acuity in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal

meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;

- is able to hear a whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid.

49 C.F.R. §391.43.

## **6. Investigation and Inquiries**

Each carrier shall make the following inquiries with respect to each driver it employs:

- the driving record for the last 3 years in every state the driver held a motor vehicle permit (a copy of the result of the response from each state must be kept in the driver's qualification file);
- investigation of the driver's employment file for the previous 3 years (a copy of the results must be kept in the driver's qualification file).

Each motor carrier shall, at least every 12 months, make an inquiry into the previous 12 month record of each driver employed, to determine whether that driver meets the minimum requirements for safe driving, or has been disqualified to drive a commercial motor vehicle. When conducting the analysis, the employer must consider all evidence that the driver has violated any applicable Federal Motor Carrier Safety Regulations. The employer must also consider the driver's accident record and any evidence that the driver has violated any laws governing the operation of motor vehicles. Great weight must be paid to violations such as speeding, reckless driving, or driving under the influence of alcohol or illegal drugs. 49 C.F.R. §391.27.

For the driver, every 12 months he or she must furnish a list of all violations or certify that there have been none. All non-parking violations must be included in the submission. 49 C.F.R. §391.27.

## **7. Driver Qualification File**

All of the information that the motor carrier is required to obtain and keep should be maintained in a driver qualification file. The Driver's Qualification file may be combined with the driver's personnel file and **must** include the following:

- the driver's application for employment;
- a written record with respect to each past employer;
- a certificate of a driver's road test;
- the responses to initial and annual record inquiries and reviews;
- a note of the annual review of the driver's operator's record;
- a list or certificate relating to the motor vehicle convictions; and
- the medical examiner's certificate.

49 C.F.R. §§391.51, 391.53.

## **8. Post-Accident Testing**

### **a) Alcohol**

The federal regulations mandate that as soon as practicable following an occurrence involving a commercial motor vehicle operating on a public roadway in commerce, each employer shall test for alcohol for each of its involved drivers who were performing a safety sensitive function with respect to the vehicle, and

- if the accident involved the loss of a human life;
- or if the driver received a citation within 8 hours of the occurrence and the accident involved:
  - bodily injury that requires any person to immediately receive medical treatment from the scene; or
  - if there is disabling damage to one or more motor vehicles requiring the vehicle to be towed from the scene.

The alcohol screening must be given within 2 hours following the accident. A test is not required if 8 hours have elapsed since the time of the accident, but it must be properly documented as to why a toxicology screen was not completed. 49 C.F.R. §382.303

### **b) Controlled Substance Testing**

The presence of controlled substances are monitored post-accident similar to alcohol testing. The chief difference is that an employer must test for the presence of controlled substances if:

- the driver receives a citation within 32 hours of the occurrence and it involved:
  - bodily injury that requires any person to immediately receive medical treatment away from the scene; or
  - if there is disabling damage to one or more motor vehicles requiring the vehicle to be towed from the scene.

If a mandatory test is not conducted within 32 hours following the accident, proper documentation must be prepared as to why the drug screen was not conducted. 49 C.F.R. §382.303

## **9. Random Intoxicant Testing**

In addition to post-accident drug screenings, the regulations require that a driver submit to random alcohol and controlled substance testing. The following guidelines apply to such category of testing:

- the selection of drivers shall be made by a scientifically valid method;
- the employer shall ensure that the random tests remain random, and are unannounced and sufficiently distanced throughout the year;
- the employer ensures that drivers selected for random testing immediately proceed to a testing center following notification that their lot has been chosen;
- the employers select both interstate and intrastate drivers for testing in the same pool;
- in the event a driver who has been randomly selected is on vacation or extended medical leave, the employer can select an alternate driver and test the absent driver upon their return.

49 C.F.R. §382.303.

### **10. Reasonable Suspicion Intoxicant Testing**

Code provision 382.307 requires a driver to submit for drug and/or alcohol screening when the employer has a reasonable suspicion that a positive test will be revealed. The employer's suspicion can hinge on a variety of factors, including the driver's demeanor, the driver's behavior, or if the driver exhibits other indicators such as bloodshot eyes, unsteady gait, belligerence, etc. The indicators need to be evaluated by only one company official in order to require the testing. 49 C.F.R. §382.307.

The institution of random and reasonable suspicion testing has resulted in a considerable downturn in positive offenses. Data maintained by the American Trucking Association shows that drivers tested positive for illegal drugs at a rate of only 1.5%, which is 75% lower of a rate found in other industries. Alcohol testing revealed a positive rate of only 0.1%.

## **II. PRESERVATION OF EVIDENCE AND EARLY RESPONSE**

When faced with notice of a serious trucking case, preparation *before* the incident occurs, along with a prompt and thorough investigation, are key elements to a successful defense of the claim. It is recommended that an "Advance Accident Response Team" be created to facilitate an early assessment of the accident. The response team should be comprised of an attorney, a licensed investigator seasoned in motor carrier collisions, an adjuster, and an accident reconstruction engineer. Attached as Appendix "A" to this paper is a checklist to greater assist efforts in conducting a thorough and successful accident investigation. It is important to keep in mind, however, that each case will turn on its own set of facts. An accident reconstructionist, for example, may not always be necessary in the first response for every accident.

## **A. Driver Interviews**

By the time the driver is contacted by the insurance adjuster or the assigned attorney, it is likely that the he or she has already offered an account of the accident to an investigating state authority. Unfortunately, such statements are usually given when the driver is emotional and anxious, having just been involved in a serious accident – sometimes involving a fatality. However, once the first contact is made to the driver by the attorney or adjuster, every effort must be made to protect the driver's (and the motor carrier's) best interest.

First, the attorney or adjuster should confirm that the driver is not injured, and if so, to arrange suitable medical care. If not injured, the responding personnel should also confirm that the driver will submit to the required toxicology screening, and arrange same if necessary. It is imperative that the interviewer determine the content and the party to whom any statement or recount of the accident was offered by the driver. The driver should also be asked to give an oral account of the precise facts surrounding the accident, which details the driver's actions as far back as 36 hours preceding the accident. Exercise caution before committing anything from the interview in writing or on recording, because, depending on the jurisdiction, the written interview or recording is likely discoverable if taken by a non-attorney. Lastly, secure the driver's logs, shipping papers, vehicle inspections, trip reports, and fuel receipts from the tractor. It will not always be known at the accident scene if the tractor will be salvaged, but if it is, these key documents will be lost along with it.

A special circumstance arises if it is learned that the driver has been charged with a criminal offense stemming from the accident. Be cognizant of any conflict of interest issues that may arise as a result of the offense. If criminal charges are filed, the attorney or adjuster should recommend the driver seek independent criminal counsel to address the charges.

## **B. Eyewitness Statements**

It is important that any eyewitness, either located independently or included in the investigating police officer's accident report, be thoroughly interviewed following the accident. In Texas, should litigation ensue, any recorded statement by a non-party is discoverable and is not shielded by the work product doctrine. That being said, it will depend on the circumstances of each case, and the jurisdiction of same, to determine the manner in which the interview is conducted.

In addition to eyewitness accounts, any emergency medical personnel who were assigned to the treatment of the injured persons in the accident need to be located and interviewed. While federal privacy laws will prevent the witnesses from discussing the medical care rendered at the scene and in route to the hospital, these are still critical first responder witnesses who can offer testimony regarding seat belt use, final resting position of the vehicles, roadway forensics, admissions by party opponents, and other valuable information to assist in the investigation and ultimate assessment of liability in

the case. It is also good practice to determine if the accident received any media coverage, and if so, to arrange an interview with the responding personnel. Of course, during the interview it is prudent to request copies of any video footage of the accident scene. In situations where weather or roadway conditions are at issue in the lawsuit, such media accounts will prove valuable in the defense of the case. Also, do not forget to locate and interview the wrecker driver to confirm the final resting position and conditions of the vehicles following the collision.

### **C. Law Enforcement Accident Scene Investigations**

As soon as practicable, a representative of the involved trucking company should procure a copy of the official state report for the accident. In Texas, the report can be obtained merely by directing an open records request to the Texas Department of Public Safety in Austin, Texas. The request must recite sufficient detail to assist the file attendants in their efforts to locate the correct crash records.

Because of the fatalities and severe injuries that usually accompany a tractor-trailer / passenger vehicle accident, the crash report from the state will often contain several supplements. An open records request should, therefore, be directed not only to the filed version of the report, but also should request any “fatal” supplements, data templates, photographs, and the in-board video footage from the police cruiser.

An official law enforcement report will contain a host of data, including the make and model of all involved vehicles and trailers involved in the accident. The report will also include identifying information of the vehicle’s occupants, such as names, dates of birth, driver’s license numbers, and insuring information. The report will recite the injuries involved in the accident, and will also quantify the location and extent of any damage to the involved vehicles. Ultimately, the report will also contain a narrative of how the state’s investigator determined the accident occurred, as well as his or her final conclusions on the factors which caused or contributed to the accident (speeding, faulty evasive action, defective equipment, etc.). Criminal charges that were filed as a result of the collision will be noted as well. If the state agency requested a reconstruction of the accident scene, the report will also contain the survey data and measurements relied upon by the reconstruction team.

Practical aspects of the duties of the police will prevent an interview with the investigating police personnel until their investigation is completed. However, once completed, an interview with **all** police personnel who took part in the investigation should be conducted as soon as possible. Remember: the longer the time period between the accident at issue, the more accidents the police personnel will investigate. The result? It is more likely that the police officers will not have as fresh of a recollection of the events as they would have had an interview been conducted sooner.

#### **D. The Accident Scene**

The initial accident scene investigation will serve as the basis for all future accident reconstruction efforts conducted in the case. Truck crashes can leave a variety of forensic evidence behind including tire marks, gouge marks, brake marks, yaw marks, furrow marks, scrapes, fluid spills, debris patterns, and impact damage to barriers, signage, and other obstacles. As soon as practicable, the advance accident response team should inspect the scene and collect as much data as allowable under the circumstances. A trained accident reconstructionist, if available, should also begin his or her initial consultation at this stage in the proceedings.

What to look for? Inspect the roadway for any forensic data in the form of marks or collision debris which might be attributed to the accident. Of course, the crash scene should be evaluated only for evidence related to the accident at issue to the exclusion of other scene evidence left from previous accidents in the area. When conducting the inspection, all marks and all debris should be photographed, diagrammed, identified in writing, and measured with precision. Measurement of the marks will prove vital when determining vehicle speeds by the reconstructionist. In addition, any transfer marks on trees, signage, buildings, or highway components should also be documented, photographed, and measured. Such marks can demonstrate the path of travel of the involved vehicles.

The trucking company representative should also determine the physical makeup of the roadway (concrete, blacktop, dirt, etc.) along with documenting the environmental conditions present at the time of the incident. Tractor-trailers will behave differently on varying roadway toppings, which are also affected by different weather conditions. By example, a large tractor-trailer tire will have differing coefficients of friction depending upon the composition of a roadway, which will affect the physical interpretation of speed data in the collision. The representative should also note any significant departures in the roadway surface such as potholes, dips, or cracked materials. The roadway topography should also be noted, including any drastic change in the line of travel such as curves or hills. Lastly, it is important to note the existence of highway warning signs in the area, as the presence or absence of same can affect the liability facts of the case.

While good investigation practices should always prevail, it is still wise to conduct a scene investigation even after a considerable amount of time has elapsed following the accident if one has yet to be initiated. One cannot assume that all physical evidence has deteriorated. Gouge marks can last for years, and some types of tire and brake marks can last for weeks after the accident depending upon how much traffic the roadway experiences. It is also worthwhile to contact the investigating police officers who will often accompany the trucking company representative to the scene to assist in determining which forensics at the scene were relied upon him or her when formulating their causation opinions for the crash.

Depending on the circumstances of the accident, aerial photography of the accident scene and surrounding roadway can be obtained. While the bends of the

roadway can be documented with accuracy by a reconstructionist, the topography in a photograph is the best available evidence to show to a jury for them to appreciate the specifics at the scene. Common needs for aerial topography involve situations where roadway construction is underway, which might be completed before a reconstructionist visits the scene for an inspection.

#### **E. The Accident Vehicles**

As with all evidence in a trucking accident, the evidence gleaned from the vehicles is short-lived and must be preserved as soon as notice of a claim is received. It is not uncommon that a trailer escapes damage during an accident and is placed back in service shortly after the accident.

The advance accident team member should document the final resting position of the vehicles and secure the evidence by photography. Next, all involved vehicles should be thoroughly inspected – both inside and outside. The inspection should begin by identifying the make, model, and VIN of the involved vehicles. When examining the outside of the vehicles, the team member should note the fragility of any evidence that may be lost following wrecker transport from the scene such as broken mirror systems and light covers. The team member should photograph in detail all vehicle damage including crush zones and scratch patterns. Any crush detail should also be measured to the best of the representative's ability, which will reveal the degree of force and change in velocity ("Delta V") involved in the accident. An often overlooked area of the tractor-trailer inspection is to confirm that the connection between the two components is properly affixed.

When conducting an inspection of the inside of the involved passenger vehicle, the representative should document the position of the seats, seatbacks, and headrests. The occupant restraint system should also be photographed, as well as any indication of airbag deployment. If possible, any intrusion into the passenger compartment should be noted.

The investigator should also document, and photograph if necessary, the trailer's contents, type of load, the load resting position, and any methods to secure the load. How a vehicle is weighted can greatly affect vehicle dynamics, and plays an important role in accident reconstruction.

#### **F. On-Board Electronics**

Many of today's motor carriers have equipped their tractor-trailers with a wide variety of on-board electronic equipment, which allows the fleet managers to track loads, improve maintenance, evaluate costs, and measure driver performance. The fleet manager can monitor all the above in real time when the systems are equipped with advanced communication systems. While the systems are chiefly adept at increasing the economic health of the carrier's business, the data from the systems can also be utilized

in the prosecution of trucking accident litigation, and should be secured for subsequent evaluation.

## **1. Event Data Recorders**

Event data recorders, also referred to as electronic control modules (“ECM”), are found in almost every modern truck on the market and also common in passenger cars and SUVs. ECMs are tiny computers located in the tractor that control several components in the vehicle including anti-lock braking and power train systems. In passenger vehicles, ECMs also control airbag deployment and the vehicle’s stability control systems.

In addition to the ECMs operative functions, manufacturers have also included additional functionality to the computers to allow detailed reports of trip activity. For example, Detroit Diesel and Cummins have ECMs that can record driving time, miles driven, fuel economy, engine RPM, cruise control usage, hard brake events, and periodic maintenance. The data can be harvested with the use of commercially available software and a personal computer. The data can be used to gather a variety of vehicle and event data before and during a crash event. The majority of the systems will record in intervals of a few minutes at a time, and are automatically overwritten unless an event occurs. Once an event does occur, the recorder “wakes up” and preserves data for a customary period of time of 45 seconds before and 15 seconds following a crash.

The ECM data will certainly be requested in discovery, and should be preserved by the motor carrier to avoid later allegations of spoliation. Care should also be taken when conducting the download to avoid losing the data, which very well might show that the involved driver in a trucking accident acted safely and without actionable negligence. It is also wise not to overlook the potential that the lighter vehicle involved in a trucking accident might also be equipped with an ECM. In some situations, *i.e.*, cases with claims of questionable seatbelt usage by the vehicle occupant, preparations should be made to secure and download the ECM data from the passenger vehicle as well.

Just because a litigant has successfully retrieved the data, however, does not mean that the data will automatically be admissible at trial. Moreover, the data is not written in text that can be processed independently by a jury; rather, the data is extracted in a series of computer code that must be interpreted by an expert using computer software and mathematical algorithms. The use of the results implicates evidentiary concerns, chiefly the court’s gate keeping function for expert testimony. In order to be admissible, the expert must be qualified, and the data relied upon and the methodology arriving at the opinion must be reliable. FED. R. EVID. 702, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Further, the electronic data is transient and fragile. Special care to document chain-of-custody issues should also be a top priority when handling, preserving, and downloading ECM data.

## **2. Wireless Satellite Communications**

Several manufacturers offer a variety of wireless communication packages which are marketed as on-board fleet management systems and operate with the assistance of a Global Positioning System. The systems are designed to allow the replacement of paper log books; provide for easy state-to-state fuel tax calculations; automatic arrival, departure, and load status reporting; provide routing information; provide real time traffic conditions and roadway closure notification; and issue data to the fleet manager regarding the truck's mechanical status. The satellite systems can also alert a carrier if a truck strays from a designated route.

While the financial benefits for GPS monitoring systems are legion, so, too, is the information that can be utilized by the parties in a trucking accident claim. Documentation of where a driver was located at the start of the work day can be used to validate driver's logs. The GPS data can also be used to determine the precise time of an accident, and can validate the extent of the motor carrier's involvement. For example, while written driver's logs might indicate time spent in the sleeper berth, GPS data can be used to confirm or repudiate such a claim. Also, the GPS data can act as a supplement to bills of lading to show where a load was first picked up and when such load was dropped off. Plaintiff's counsel will utilize this data to determine the distance traveled, and can extrapolate known distance against time to determine vehicle speed and possible duty hour violations.

### **III. LITIGATION**

#### **A. Negligence of the Driver / Respondeat Superior**

By federal regulation, a motor carrier is vicariously liable for the acts of its drivers, even if those drivers are "independent contractors" or "owner / operators" who lease their trucks from the motor carrier. 49 C.F.R. §§376.11, 376.12(c), (j). A motor carrier cannot escape liability by claiming that the operator was outside of the driver's scope and course of employment at the time of the accident.

The vast majority of claims made in trucking litigation will be for alleged negligent actions of the driver that are imputed to the company. The general elements of negligence are that a defendant owed a legal duty to the plaintiff; the defendant breached the duty; and the breach proximately caused the plaintiff's injury. *Western Invs. Ins. V. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Negligence allegations in the trucking case commonly include the following: failure to maintain a safe distance, failure to maintain a safe speed, failure to keep a proper lookout, and failure to timely apply the brakes, etc.

#### **B. Negligence Per Se**

Negligence per se (sometimes referred to as negligence as a matter of law) applies in situations where courts have determined that the violation of a federal or state statute is actionable as a matter of law. *Parrott v. Garcia*, 436 S.W.2d 897, 900 (Tex. 1969).

When such a situation exists, the language of the statute will determine the standard of care, rather than the “reasonably prudent person” of ordinary negligence actions. *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979). It is important to note that simply violating a regulation, law, or statute does not amount to negligence per se. *Perry v. S.N.*, 973 S.W.2d 301, 305-06 & note 4. Rather in order to bring a successful claim for negligence per se, the claimant must show:

- the claimant belongs to the class of persons the statute was designed to protect, and the injury sustained is of the type the statute was designed to prevent;
- the statute is one for which tort liability may be imposed when violated;
- the defendant violated the statute without excuse; and
- the defendant’s act or omission proximately caused the claimant’s injury.

*Id.*; see also *Rudes v. Gottschalk*, 324 S.W.2d 201, 205 (Tex. 1959); *Ambrosio v. Carter’s Shooting Center*, 20 S.W.3d 262, 265 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2000, pet. denied). A plaintiff will argue that a violation of Federal Motor Carrier Safety Regulations by a driver constitutes negligence per se if the aforementioned elements are completely satisfied.

### **C. Direct Negligence by the Carrier**

More and more prevalent is the trucking accident lawsuit which combines both the negligence case for the acts of the driver against the carrier by way of vicarious liability **and** claims of direct negligence by the carrier including negligent entrustment, negligent hiring, negligent supervision, negligent training, and negligent retention. The plaintiff’s bar’s motivation is to stack on as many “bad acts” as possible to make the plight of the motor carrier less appealing when the jury retires to deliberate.

#### **1. Negligent Entrustment.**

Negligent entrustment occurs when the owner of a vehicle allows and incompetent, unlicensed, or reckless driver to operate the vehicle, and liability is incurred for the negligent acts of that driver. Liability will be fixed if it is proved that the owner knew or should have known that the driver was unlicensed, incompetent, or reckless, and that such acts were the proximate cause of the claimant’s injuries. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987).

The plaintiff will seek to prove that the accident should have never happened, because the driver should never have had an opportunity to operate the cab in the first place, and was allowed to drive on the day in question only as a result of the negligence of the motor carrier. Unlike the doctrine of respondeat superior, liability for negligent entrustment is not vicarious. Rather, a successful showing of negligent entrustment requires two acts of negligence – one by the entruster and another by the driver. If the

owner is found liable for the acts of the driver by way of entrusting the vehicle for their use, the owner is held liable for the negligent acts or omissions committed by the driver.

## **2. Negligent Retention, Hiring, and Supervision**

Other categories of direct carrier negligence are the torts of negligent hiring, supervising, training, or retaining an employee. *Morris v. JTM Materials*, 78 S.W.3d 28, 49 (Tex. App. – Fort Worth 2002, no pet.). In Texas, it is not required that the plaintiff show that the driver was within the scope and course of his employment when the incident occurred to be successful on a negligent hiring claim. Instead, the employer is liable if its negligence in hiring, supervising, training or retaining the unfit employee was the proximate cause of the plaintiff's injuries. *Id.* An employer has a legal duty to use ordinary care in determining whether a prospective employee is competent for the job before hiring. *Labella v. Charlie Thomas Ford*, 942 S.W.2d 127, 137 (Tex. App. – Amarillo 1997, writ denied). The duty applies to **all** employees, including independent contractors and owner-operators. *Jones v. Southwestern Newspapers*, 649 S.W.2d 455, 458 (Tex. App. – Amarillo 1985, no writ).

As a defense to claims of negligent hiring, training, and retention, the motor carrier must be able to show that their internal human resources agenda complies thoroughly with the Federal Motor Carrier Safety Regulations. There is little doubt that plaintiff's attorneys will conduct extensive discovery of the carrier's policies to determine compliance. Failure to carefully comply with the Federal Motor Carrier Safety Regulations for driver applications, driver investigations, and physical qualification and examinations will serve as a springboard for the plaintiff's liability case against the motor carrier.

### **D. Expert Testimony**

Due to the complexities of motor carrier litigation, the use of expert testimony is a must-have in the defense of allegations of motor carrier/driver negligence.

#### **1. Accident Reconstruction**

Accident reconstruction is an engineering exercise which relies on forensic evidence, mathematics, and physics to recreate how the accident occurred. A typical accident reconstruction can reveal:

- speeds of the vehicles at selected points during the crash sequence;
- vehicle dynamics and potential avoidance maneuvers;
- sight visibility;
- ultimate causation and fault assessments.

Accident reconstructionists will generate their reconstruction following an examination of the accident scene, an examination of the involved vehicles, and a review

of eyewitness accounts of the crash. The scene is evaluated by collecting the following data:

- the geometry of the roadway;
- collection of pre and post-impact trajectory paths of the involved vehicles by locating brake marks, yaw marks, skid marks, furrow marks, and gouge marks on the roadway;
- an analysis of the debris field;
- an analysis of the involved vehicles' final point of rest;
- any roadway obstructions such as signage, trees, or other vehicles;
- the police report, police photographs, and total station<sup>1</sup> data;
- a detailed inspection of the involved vehicles damage pattern including scratch patterns, crush, ECM collection;
- eyewitness and deposition testimony;

Particularly, in an under ride collision, the reconstructionist should pay specific attention to any interaction the passenger vehicle had with the tractor-trailer components such as dollies, rear dual frames, rear dual wheels, and underbelly cages. Counsel should request that the reconstructionist methodically document the crush zones of all involved vehicles. The work will also require the notation of any deformation of the passenger car roof system, including any deformation in the vehicle's support pillars, as well as documentation of the angle of intrusion.

The opinions of the accident reconstructionist will be relied upon by every other liability expert in the defense of the case. It is, therefore, of the highest importance that the final accident reconstruction be as accurate as possible. The best way to ensure accuracy (in addition to hiring qualified individuals) is to employ aggressive investigation procedures as soon as notification of an accident is received.

## **2. Event Data Recorder Downloads**

The expert witness, usually a commercial transportation accident reconstructionist, will be able to download, interpret, and maintain relevant data captured on the tractor's ECM. The data harvested can reveal the VIN, engine serial number, governed speed, cruise control parameters, transmission style, "hard" stop events (brake and clutch engagement), engine codes, and fuel efficiency parameters. The data recovered can make or break a driver's account of how the accident occurred, which is, of course, not lost on the sophisticated plaintiff's attorney.

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<sup>1</sup> A total station is an optical instrument used in modern surveying. It is a combination of an electronic theodolite (transit), an electronic distance measuring device (EDM) and software running on an external computer.

### **3. Federal Regulations Expert**

The expert witness may be retained to offer opinion testimony regarding compliance with motor carrier administrative law through adherence to Federal Motor Carrier Safety Regulations. The witness will be able to succinctly explain the finer details of the business practices of the motor carrier, equipment operations, and regulatory and industry standards to a jury, and will confirm that the motor carrier's procedures in hiring, retaining, supervising, the involved driver were done "by the book."

### **4. Biomechanics/Occupant Kinematics**

The expert witness will offer testimony regarding the application of engineering mechanics to the study of human movement, particularly the study of internal and external forces acting on the human body and how the body reacts to outside trauma. Relevant to the trucking accident, the biomechanist will testify as to how the human body reacts within a vehicle following a collision, including the identification of any structures in the vehicle the body came into contact. That being the case, the biomechanist can offer opinions regarding when an injury occurred. In fatal accidents, the witness can assess whether the decedent experienced conscious pain and suffering prior to their death. Because of the severe crush sustained by lighter vehicles when involved in collisions with tractor-trailers, knowing if a decedent's death was instantaneous or if the death occurred only after the decedent experienced conscious pain and suffering will have a profound effect on the damage model for the claim. The biomechanist will also rely on the accident reconstructionist's "Delta V<sup>2</sup>" calculation, and will use same to render opinions regarding the likelihood of survivability.

### **5. Damage Experts**

As a result of the monumental damages that often accompany a trucking accident, the following damage experts may need to be retained to defend the claim.

#### **a) Life Care Planner**

The expert witness will generate a "life care plan," which is a medical and economic determination of present and future costs associated with a plaintiff's injuries. From home nursing, to supplies and equipment, to ongoing medical consultations, to architectural renovation, each expense is considered by the life care planner when calculating the true cost of a plaintiff's injury.

#### **b) Economist**

The expert witness is also used in cases where litigants have made a plea for pecuniary damages for loss of past earnings and for loss of earning capacity. Economic

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<sup>2</sup> "Delta V" is an engineering term which means a change in velocity. The calculation is used by the biomechanist to predict the degree of injury expected in a given accident.

experts calculate the value of those earnings over time, so the difference, if any, between the two income streams is clearly understood by the fact finder.

### **c) Vocational Rehabilitation**

The expert witness can be utilized in cases where the litigants future working capacity is placed in issue. The witness will conduct a vocational assessment by evaluating pre/post injury vocational learning capacity, transferability of skills, rehabilitation potential, and will reconcile same against the then-current labor market. Vocational experts identify what the person could have earned prior to the incident, compared to what they are likely to earn following the incident.

## **IV. EVALUATION**

### **A. Proportionate Responsibility and Comparative Fault in Texas**

Proportionate responsibility is the process by which the finder of fact determines the percentage of fault that each entity submitted in the charge to the jury will pay. Determining which entities will be submitted is the first step in determining comparative fault. A litigant will only be submitted if the pleadings and evidence in the case support a prima facie showing of liability. The categories of submitted entities are as follows:

- “Claimant:” any person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third party plaintiff. If the damages sought are derivative in nature (for the injuries to a family member), the definition of “claimant” includes not only the person seeking the recovery of damages, but also any person who has sought recovery of damages, any person who could seek recovery of damages, and the person who died, was injured, or was otherwise harmed. TEX. CIV. PRAC. & REM. CODE § 33.011(11).
- “Defendant:” a defendant is a person from whom the plaintiff seeks recovery of damages. TEX. CIV. PRAC. & REM. CODE §33.011(5)
- “Settling Person:” a person who has, at any time, paid or promised to pay money or anything of monetary value to the plaintiff in consideration of potential liability for the damages sought. TEX. CIV. PRAC. & REM. CODE §33.011(5)
- “Responsible Third Party:” any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by a defective product or unreasonably dangerous product, or by other conduct or activity that violates an applicable legal standard. TEX. CIV. PRAC. & REM. CODE §33.011(6). The definition specifically includes persons not subject to the court’s personal jurisdiction; a person who the plaintiff could not sue (or chose not to sue); a person who is bankrupt; an unknown criminal; or an employer. *Id.*

The responsible third party need not be pleaded into the case via traditional third party practice. Rather, the entity can be joined upon timely motion to the court for leave to designate. The motion must be filed at least 60 days before the date set for trial. It is, however, good practice to file the motion for leave to designate as soon as the responsible third party is identified. A special consideration exists for the “John Doe” unknown criminal. The procedure for designating same requires the defendant to amend its live answer no later than 60 days from filing the original pleading, and must contain facts that allege that a person committed a criminal act, to plead sufficient facts to support the allegation that the act was criminal in nature, to plead all known identifying characteristics of the “John Doe” defendant; and to plead all facts concerning the “John Doe” defendant’s civil culpability. TEX. CIV. PRAC. & REM. CODE §33.004(j)

Most of the aforementioned definitions were codified by sweeping legislative change in 2003. The amendments now allow the trucking defendant to submit for consideration by the jury a range of potential liable parties that were previously off limits. As soon as notice of the claim is received, and certainly following receipt of summons of the lawsuit, an assigned attorney should determine the identity of any party not expected to be named in the suit, and to be prepared to preserve jury consideration of their respective fault for the accident by following the pleading requirements set forth above. A representative jury charge with the submission of the responsible third party is attached as Appendix “B”.

To determine percentages of fault, each entity is submitted to the jury for their consideration. One caveat is that the defendant sued under a respondeat superior theory is not submitted – just the tortfeasor is submitted. Once a percentage of responsibility is assigned by the jury, it must be determined how much, if any, are the damages awarded to the plaintiff. In Texas, if the fact finder attributes **more than 50%** to the plaintiff, the plaintiff’s claims are wholly barred. If the fact finder attributes **50% or less** to the plaintiff, the plaintiff’s award is reduced by that percentage of fault. Each state is different on what the affect of comparative fault will have on a plaintiff’s damage award.

The plaintiff’s award will also be reduced by a settlement credit for all money paid by settling persons in the case. An additional concern when discussing comparative fault is the notion of joint and several liability. In Texas, a defendant is jointly and severally liable, *i.e.*, the defendant is liable for the entire amount of damages regardless of the defendant’s percentage of responsibility, if the defendant’s comparative fault is **more than 50%**.

## **B. Damages**

### **1. Actual Damages**

In Texas, the following damages for a successful negligence claim against the motor carrier and/or driver are recoverable:

- physical pain, past and future;

- mental anguish, past and future;
- disfigurement, past and future;
- physical impairment;
- loss of earning capacity;
- loss of consortium;
- medical expenses; and
- loss of services;

## 2. Punitive Damages

Punitive damages are recoverable in Texas, and are designed to penalize a defendant for outrageous, malicious, or otherwise morally culpable conduct and to deter such conduct in the future. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994); see also TEX. CIV. PRAC. & REM. CODE §41.001 (5). Recovery of punitive damages is only available upon a finding of gross negligence. TEX. CIV. PRAC. & REM. CODE §41.001(11). To prove gross negligence, the plaintiff must show that: (1) the act or omission, when viewed objectively from the defendant's standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; **and** (2) the defendant had actual, subjective awareness of the risk but proceeded anyway with a conscious indifference to the rights, safety, or welfare of others. *Id.*

Plaintiffs will seek to recover punitive damages in instances, for example, where the trucking company has condoned a violation of the driver's hours of service requirements; have had a practice of not keeping tractor-trailer units in good working order and in a safe condition; or have failed to properly screen the involved driver prior to employing him or her. As for the driver; he or she may have been drinking or using drugs at the time of the incident; may have been grossly violating the speed limit; or may have been knowingly operating the tractor-trailer with defective brakes or tires.

On the positive side, punitive damages are capped in Texas and cannot exceed twice the amount of economic damages, plus any noneconomic damages (up to \$750,000) or \$200,000. Economic damages include medical expenses, loss of earning capacity, loss of support, and funeral and burial expenses. Noneconomic damages include physical pain and suffering, mental anguish, disfigurement, loss of consortium, and loss of companionship and society. Damages are also limited under recent Supreme Court opinions which hold that punitive damage awards cannot be excessive. *State Farm v. Campbell*, 538 U.S. 408, 416 (2003); *BMW v. Gore*, 517 U.S.559, 568 (1996). The statutory cap does not apply when a plaintiff seeks recovery incident to the commission of certain felonies by the defendant.

## C. Wrongful Death and Survivor Actions

Recovery for wrongful death claims are governed by statute. The elements of a wrongful death case are:

- the claimant is a statutory beneficiary of the decedent;
- the defendant is a person or corporation;
- the defendant's wrongful act caused the death of the decedent;
- the decedent would have been entitled to bring an action for the injury if the decedent would have lived; and
- the claimant suffered actual injury.

TEX. CIV. PRAC. & REM. CODE §§ 71.001-71.005. Who qualifies as statutory beneficiaries? Most notable is the spouse of a decedent, which can include the spouse from a ceremonial marriage, a spouse from a common law marriage, a spouse who was separated at the time of the decedent's death, and a spouse who had remarried after the decedent's death. Of course, children of the decedent also qualify as beneficiaries under the statute. As the statute requires only that the children be "filial descendants" (*i.e.*, biological children), both legitimate and illegitimate children can bring a wrongful death suit for the passing of their biological parents. Further, a legally adopted child has standing to bring a claim for wrongful death of an adoptive parent; but, an adopted child cannot bring a claim for the death of a biological parent. Lastly, parents of a deceased child are statutory beneficiaries and include divorced parents and adoptive parents (legal adoption not simply caretakers). Foster parents, stepparents, and grandparents cannot bring claims as wrongful death beneficiaries.

Actual damages for wrongful death claims include mental anguish on behalf of the wrongful death beneficiary for the death of the decedent, loss of advice and counsel, loss of services, loss of inheritance, loss of companionship and society, funeral expenses, and reasonable medical expenses to treat emotional trauma following the death. A claimant can also recovery exemplary damages for wrongful death.

In truck accident cases, the statute of limitations period for wrongful death actions is 2 years from the date of the accident. TEX. CIV. PRAC. & REM. CODE §16.003.

Survival claims are, likewise, governed by statute. The Texas Survival Statute abandoned the common law rule that a cause of action for the deceased's personal injury abates at death. Under the statute, a representative of the estate is able to pursue the personal injury damages sustained by the deceased prior to their demise. To successfully prosecute a survival action a plaintiff must show:

- the plaintiff is the legal representative of the decedent's estate;
- the decedent had a cause of action for personal injury to their health, reputation, or property before she died;
- the decedent would have been entitled to bring an action for the injury if she had lived; and
- the defendant's wrongful act caused the decedent's injury.

TEX. CIV. PRAC. & REM. CODE §71.021. The "legal representative" who will prosecute the claim for the decedent is either the personal representative of the estate and includes an executor, independent executor, administrator, independent administrator, or

temporary administrator. Also, if no probate administration is necessary, a legal heir of the decedent may bring a survival claim.

When it is proven that the defendant caused the decedent's death, the plaintiff can recover any damages on behalf of the estate that the decedent suffered before his demise which includes: pain and mental anguish to the extent the deceased had some awareness of their impending death, medical expenses, funeral expenses, and exemplary damages.

The statute of limitations period for a survival action is the same 2 year period as for wrongful death claims. TEX. CIV. PRAC. & REM. CODE §16.003. Texas law does provide a "tolling provision" for the filing of survival actions, which extends the period of time to bring a case to allow for an appointment of a personal representative. TEX. CIV. PRAC. & REM. CODE §16.062. The tolling provision extends the limitations period for the earlier of: (1) the time of the appointment, or (2) 12 months following the death of the decedent. *Id.* In practice, the tolling provision can allow a survival claim to be brought up to 3 years after the accident even though the wrongful death claims will be barred under the 2 year limitations period.

## **V. TEXAS JURISDICTIONAL ANALYSIS**

### **A. Venue Rules**

Determining where a case may lie in Texas requires an analysis of the Texas Venue statutes. All lawsuits in Texas are brought under one of three venue provisions: (1) Mandatory Venue under Texas Civil Practices and Remedies Code Section 15.011-15.020, (2) General Venue rule under Texas Civil Practices and Remedies Code Section 15.001(b)(2); or the Permissive Venue Provision under Texas Civil Practices and Remedies Code Section 15.001(b)(3).

If no mandatory venue provision applies (it would be the rare exception in trucking litigation cases for mandatory venue to apply), the plaintiff has the option to decide where to lay venue according to the general venue rule. Under the general venue rule, a plaintiff may bring suit in one of the following counties:

- in the county where all or a substantial part of the events giving rise to the claim occurred – usually where the accident occurred. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).
- in the county of defendant's residence at the time the accident occurred, if the defendant is a natural person such a driver.
- in the county of the defendant's principle office in Texas, if the defendant is a corporation. Note that a defendant may have more than one principle office in Texas, and that a principle office is defined by statute as a county where the "decision makers for the organization within this state conduct the daily affairs of the organization." Of

course, it is also possible that a defendant will not have a principle office in Texas.

- if the county where the plaintiff resided at the time the action accrued, only if none of the other provisions apply. TEX. CIV. PRAC. & REM. CODE §15.002(a)(4). The purpose of this provision is to allow a Texas resident to bring suit against an out-of-state defendants when the accident occurred outside of Texas.

The venue rules also contain a “venue against all” provision, which provides that if a plaintiff can establish proper venue against one defendant, then venue is proper for all other defendants as long as the claims pleaded in the case arise out of the same occurrence.

The aforementioned venue provisions were amended by the Texas Legislature in 1995 with an eye towards limiting what was, at the time, pervasive forum shopping. While the 1995 amendments have stemmed the tide of cases which find their way into plaintiff-friendly venues, defendant trucking companies are still faced with defending lawsuits in forums with no connection to the accident or the involved parties. The rules allow recourse by the defendant trucking company to move for a venue transfer based on the following circumstances:

- maintenance of the suit in the county of plaintiff’s choice will work an economic and personal hardship on the defendant. TEX. CIV. PRAC. & REM. CODE §15.002(b)(1);
- the balance of interests of all the parties predominates in favor of the action being brought in the other county. *Id.*, TEX. CIV. PRAC. & REM. CODE §15.002(b)(2);
- the transfer will not work an injustice on any other party. *Id.* TEX. CIV. PRAC. & REM. CODE §15.002(b)(3).

Lastly, if the motion to transfer venue is denied, the ruling by the court is not reviewable as an interlocutory order. Any challenge to the ruling will have to wait until post-trial appeal. However, if the reviewing court finds that the transfer should have been granted, the case will automatically be reversed and remanded.

## **B. Judicial “Hot Spots”**

As trucking accident litigation is openly referred to as a safe haven from Texas tort reform, there will always be a drive to lay venue in notorious judicial “hot spots” traditionally known for excessive jury verdicts. Despite tort reform aimed at reducing the likelihood of the runaway jury, Texas still lays claim to several counties deemed “Judicial Hellholes” by the American Tort Reform Foundation which include: Jefferson County (Beaumont); Nueces County (Corpus Christi); Brazoria County (Angleton); Cameron County (Brownsville), Hildago County (McAllen), and Starr County (Rio Grande City). Other trouble spots in Texas that are favorable venues for plaintiffs in trucking litigation

include, Orange County (Orange), Webb County (Laredo); El Paso County (El Paso); and Duval County (San Diego).

When a plaintiff files a lawsuit in the aforementioned counties, special attention should be paid to the venue rules to determine if transfer to a more favorable county is an option. The caveat is that it is typically an uphill battle to transfer a case out of a jurisdiction that has historically been tied to the plaintiffs' bar.

# APPENDIX "A"

## ADVANCE ACCIDENT RESPONSE CHECKLIST

### I. FIRM TRUCKING ATTORNEYS WITH CONTACT INFORMATION

Thompson, Coe, Cousins & Irons, LLP, maintains offices in Houston, Dallas, and Austin, Texas, and can, therefore, coordinate an investigation for a trucking accident that occurs in any part of the state. The Advance Accident Response Team at Thompson Coe is comprised of the following:

- a. Houston: William Moye. Office: 713.403.8389. Cell: 281.415.6125.
- b. Dallas: Richard Mosher. Office: 214.871.8269. Cell: 817.995.5146.
- c. Austin: Brian Hensley. Office: 512.703.5083. Cell: 512.659.8633.

The Advance Accident Response Team members are available for consultation 24 hours a day, 365 days a week.

### II. ACCIDENT RECONSTRUCTIONIST WITH CONTACT INFORMATION

- a. Assemble and complete a listing of one or more accident reconstructionists that may be used including office phone numbers, cell numbers, and home numbers.
- b. An Advance Accident Team member can assist with referring a qualified accident reconstructionist if necessary.

### III. CRIMINAL DEFENSE ATTORNEY WITH CONTACT INFORMATION

- a. Assemble and complete a listing of one or more criminal attorneys that may be required in the case including office phone numbers, cell numbers, and home numbers.
- b. An Advance Accident Team member can assist with referring a qualified criminal defense attorney if necessary.

### IV. INVESTIGATORS

- a. Assemble and complete a listing of licensed investigators that will be involved in the case including office phone numbers, cell numbers, and home numbers.
- b. An Advance Accident Team member can assist with referring a licensed investigator if necessary.

### V. PHOTOGRAPHERS

- a. Assemble and complete a listing of photographers that will be involved in the case including office phone numbers, cell numbers, and home numbers.
- b. Consider the need of the following:

- i. Aerial photography, video photography, and still photography
- c. An Advance Accident Team member can assist with referring a photographer if necessary.

#### VI. CHAIN OF COMMAND

- a. Establish and communicate a chain of command regarding the investigation.

#### VII. CONTROL OF INVESTIGATION AND POSSIBLE ACTION STEPS- DETERMINE WHO WILL CONDUCT EACH STEP-CONSIDER THE ATTORNEY CLIENT PRIVILEGE AND HOW IT MAY APPLY.

- a. Identify and interview all witnesses.
- b. Identify and interview all police on the scene and secure any available accident reports.
- c. Identify and interview all emergency medical personnel at the scene.
- d. Interview, control, and protect driver.
- e. Interview, control, and protect all ECM/black box/computers.
- f. Photograph and control debris field.
- g. Photograph and control roadway surface.
- h. Photograph and control vehicles.
- i. Identify and control all driver records, including logs, fuel receipts, toll receipts, trip envelopes, and other travel documents.
- j. Photograph all vehicles and accident scene.
- k. Aerial photograph of scene.
- l. Drug and Alcohol Testing.
  - i. Federal requirements;
  - ii. Client policy;
  - iii. Manage process.
- m. Identify all involved towing, storage and/or repair facilities.
- n. Make plans with client to secure cargo if necessary.
- o. Ascertain if there are any environmental or hazardous materials issues/spills.
  - i. Governmental notifications;
  - ii. Containment, remediation and clean up.

#### VIII. MEDIA RESPONSE ISSUES

- a. Communicate company policy on media relations to all involved. Provide contact information to all involved on your public relations professional for referral and comment to the press.
- b. Identify all media representatives at scene.

IX. ON SCENE RESPONSE EQUIPMENT AND SUPPLIES FOR RESPONDERS TO THE SCENE

- a. Draft witness forms.
- b. Disposable camera.
- c. Dictaphone.
- d. Business cards.
- e. Evidence log.
- f. Tape measure (100' or longer is preferable).

# APPENDIX "B"

EXAMPLE JURY SUBMISSION

**QUESTION NO. 1.**

Did the negligence, if any, of those listed below proximately cause the injuries to Paul Plaintiff?

Answer "Yes" or "No" for each person or company named below.

Paul Plaintiff	_____
Don Defendant	_____
Sue Settlor	_____
Responsible Ray	_____

Answer the next question only if you answered "yes" for more than one person in response to Question 1. If you did not answer "yes" for more than one person in response to Question 1, do not answer this question.

**QUESTION 2**

The percentages you find in response to this question must total 100 percent. The percentages must be expressed in whole numbers. The percentage attributable to any one named below is not necessarily measured by the number of facts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

What percentage of the conduct that caused the occurrence do you find to be attributable to each of those listed below for which you answered "yes" in response to Question 1?

For each person found by you in your answers to below for which you answered "yes" in response to Question 1, find the percentage caused by:

Paul Plaintiff	_____
Don Defendant	_____
Sue Settlor	_____
Responsible Ray	_____

Total:	<u>100%</u>
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