

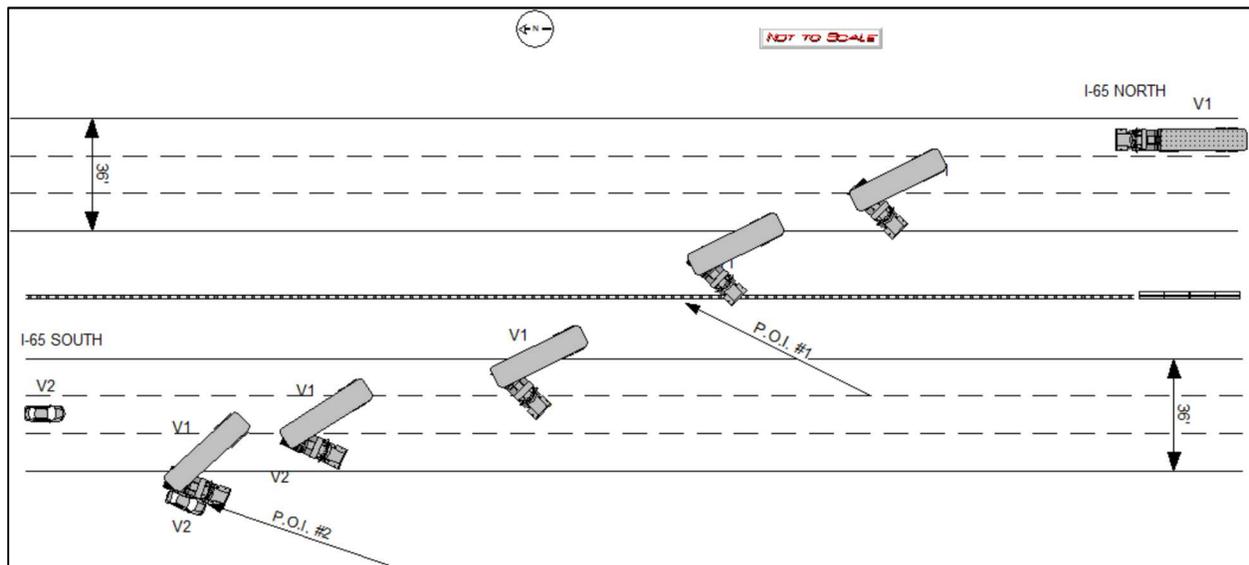
Trucking Cases

Who to sue and theories of recovery

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I. Case Illustration No. 1

On the night of Friday, February 20, 2015, a driver for Company ABC was driving northbound on I-65 in Alabama when he lost control of his tractor-trailer crossing a bridge under winter weather conditions. His tractor-trailer slid through the median barriers, just north of the bridge, and across the southbound lanes, causing the jack-knifing, side-sliding tractor-trailer to crash into a Nissan Maxima in which Brody, age 6, was a backseat passenger. Brody survived the crash but suffered multiple injuries and was taken to Children's Hospital in Birmingham for treatment.



Crawford and Company investigators/adjusters from Birmingham were on the scene, talking to Troopers before the vehicles were moved. The wreck investigation was limited at best. The Troopers did conclude that the primary contributing cause of the wreck was the truck driver driving too fast for conditions. The Troopers did not perform a reconstruction, or perform a DOT driver/vehicle inspection or perform an ECM download. The next week we were contacted by Brody's mom seeking our representation.

A. Who are the known potential defendants at this time?

1. The Driver

In determining whether to pursue a trucking case, you should first determine whether the truck driver contributed to the cause of the wreck. Due to the extreme differences in size and weight of tractor-trailers compared to average vehicles on the highway (a loaded tractor-trailer will weigh close to twenty times that of the average motor vehicle), wrecks involving tractor-trailers have the potential to cause substantially greater harm. Because of this greater risk of harm, tractor-trailer drivers and the trucking companies which employ them are required to follow safety regulations that are above and beyond the requirements of other drivers. The federal and state

regulations as well as trucking industry standards place a higher obligation to safety for drivers and trucking companies than obligations of other drivers.

In order to legally operate a tractor-trailer in interstate commerce, the driver must at a minimum meet the “General Qualifications of Drivers” established by 49 C.F.R. §391.11. Tractor-trailer drivers are also required to meet the minimum physical qualifications which exceed the requirements of other drivers¹. In order to receive a commercial driver’s license, a truck driver must pass a knowledge and skill test which far exceeds the requirements necessary to obtain a regular driver’s license. Tractor-trailer drivers must have knowledge of the following areas:

- Safe operations regulations;
- Safe vehicle control systems;
- CMV safety control systems;
- Basic control;
- Shifting;
- Backing;
- Visual search;
- Communication;
- Speed management;
- Space management;
- Night operation;
- Extreme driving conditions;
- Hazard perceptions;
- Emergency maneuvers;
- Skid control and recovery;
- Relationship of cargo to vehicle control;
- Vehicle inspections;
- Hazardous materials;
- Mountain driving;
- Fatigue and awareness;
- Airbrakes; and
- Combination vehicles.²

In order to obtain a commercial driver’s license, a driver must possess basic pre-trip vehicle inspection skills for the vehicle class that the driver operates or expects to operate (for a list and description of these skills please see 49 C.F.R. §383.113 Required Skills.)

a. Determining whether the truck driver was driving responsibly and meeting the standard of care for truck drivers

As we all know, it is imperative in every trucking case to determine whether the truck driver was driving responsibly at the time of the wreck. Did the truck driver’s actions or inactions violate federal or state regulations for motor carrier operation? Did the truck driver’s actions or

¹ 49 C.F.R. §391.41(b)

² 49 C.F.R. §383.111

inactions fall below established trucking industry standards? If the truck driver did violate federal or state safety regulations and/or trucking industry standards, did such violations contribute to the cause of the wreck? These questions must be asked in every trucking case and ultimately answered in the affirmative to establish liability against the driver.

Resources for the practitioner to utilize to determine whether a truck driver is driving in compliance with federal and state regulations as well as trucking industry standards include, but are certainly not limited to, the following:

1. *The Federal Motor Carrier Safety Regulations Handbook* published by JJ Keller and Associates, Inc.;
2. Any applicable state statutes covering the safe operation of motor vehicles, including commercial motor vehicles;
3. The Commercial Driver's License Manual for the applicable state;
4. JJ Keller's *Tractor-Trailer Driving Training Manual*;
5. JJ Keller's "*Preventable Accident Manual*";
6. *CSA Handbook: The Complete Guide For CMV Drivers*, also published by JJ Keller and Associates, Inc.; and
7. The Smith System – Five Principles Of Safe Driving.

As established by federal regulations and industry standards, tractor-trailer drivers are responsible for: (1) maintaining documentation of "Driver Vehicle Exam Reports" and the "Driver's Daily Log" (showing drive time, on duty non-driving hours, off-duty hours, sleeper berth hours, etc.); (2) perform specific vehicle pre-trip inspections as well as safety equipment inspections at the completion of each day's work; and (3) following safe driving practices and requirements (which includes, but is not limited to, obeying all traffic laws, maintaining a reasonable speed at all times, avoiding distracted driving practices, not overdriving one's headlights, adjusting driving practices for weather and roadway conditions, compliance with Hours of Service regulations, compliance with drug and alcohol regulations, and insuring that cargo is properly secured). Needless to say, the Federal Motor Carrier Safety Regulations and trucking industry safe driving standards are too comprehensive to cover in this paper.

b. Evaluation of negligence/wantonness of the truck driver in case illustration 1

By the time we first spoke with Brody's mom about representation, we had obtained the Uniform Traffic Crash Report prepared by the investigating Trooper. Based on the findings of the Trooper's report, we started our investigation with the understanding that the truck driver had lost control in the winter weather conditions and thus, at a minimum, was driving too fast for conditions. The Trooper's report, however, did not provide us with any information to support a

claim of wantonness and potential punitive damages under Alabama law. When we took the case, we immediately sent out a comprehensive spoliation letter and requested an opportunity to conduct an inspection of the tractor-trailer including an ECM download. Based on the ECM download we were able to determine that the tractor-trailer driver was operating on cruise control at 68 miles per hour under a winter weather advisory. Operating the tractor-trailer on cruise at 68 miles per hour under the existing winter weather conditions violated 49 C.F.R. §392.14 Hazardous Conditions – which required, at a minimum, that the driver reduce speed under the existing conditions. The failure of the driver to reduce his speed in response to the winter weather advisory and the existing hazardous conditions is also a violation of the general rule of thumb in the trucking industry that a driver should reduce speed by at least one-third when operating under winter weather conditions and should make every reasonable effort to get to a safe place to stop in the event of unsafe roads. (See Model Commercial Driver License Manual) The downloaded data from the ECM also indicated that the driver had been operating the tractor-trailer during the 24-hour period preceding the wreck well in excess of the federal HOS regulations.³

Later, during the discovery process, we obtained Qualcomm records, fuel purchase records from ComData and records from a repair shop in Indiana, which verified that the driver had been on duty for thirty-three and a half straight hours prior to the wreck. Of course, also through the discovery process, we were able to confirm that the driver’s log entries were completely fabricated. Further, the ECM download showed that the driver reacted to his encounter with icy conditions by slamming on the brakes which contradicts industry standards on safe driving practices. These blatant violations of the above-stated applicable federal regulations and industry standards on safe driving practices, were sufficient evidence to prove both negligence and wantonness (a reckless disregard for the safety of others) claims against the driver under Alabama law.

2. Theories of liability against the motor carrier

a. When the driver is an employee of the motor carrier

When the motor carrier, like Company ABC in case scenario number one, is the actual employer of the truck driver, the state common law theories of agency should be your guide to determining the liability of the motor carrier under the specific set of facts of your case. The doctrine of respondeat superior provides that an employer is vicariously liable for the actions of an employee when the actions take place within the line and scope of the employment or agency. Since there is no set national standard for respondeat superior, you will need to familiarize yourself with the laws governing agency and applicable tests to prove respondeat superior in the state having jurisdiction over your wreck case, if the driver is employed by the trucking company.

b. When the truck driver is an “owner-operator” of a tractor-trailer leased to the trucking company

In an “owner-operator” situation, the tractor is owned by one party (usually the “owner-operator”) but leased to the trucking company. Such leases must comply with the federal statutes

³ 49 C.F.R. §395.3

and regulations if the truck will be used in interstate operation. Under the federal statutes and regulations: (1) the lease must be in writing; (2) the lease must provide that the carrier-lessee has the exclusive possession, or control and use of the equipment for the duration of the lease⁴; and (3) the motor carrier-lessee must assume the full direction and control of the leased vehicle(s) as if the motor vehicle(s) was/were owned by the motor carrier.⁵

The lease may also contain other provisions, which can impact the overall liability evaluation in the event of a wreck, such as: (1) contractual indemnity provisions or (2) contractual insurance requirements (these may include that the owner-operator maintain “bobtail” insurance to cover the owner-operator when he/she is not using the tractor for purposes related to the trucking company’s business). Note: Always request a copy of the owner-operator lease agreement in discovery.

As noted above, when a trucking company enters into a leasing arrangement with an owner-operator (or other individual or entity) by statute, the trucking company is deemed to have the exclusive possession, control and use of the equipment for the duration of the lease and must assume the full direction and control of the leased vehicle as if the vehicle were actually owned by the trucking company.⁶ So, under federal law, the trucking company is allowed to freely contract with drivers and “owner-operators” under independent contractor contracts; however, the trucking company’s responsibility to the members of the motoring public for a wreck will be the same as if the driver was its actual employee. Courts across the country have held for years that a statutory employee-employer relationship exists between a trucking company and the drivers it uses to drive on its behalf, including independent contractors.⁷ The Eleventh Circuit has “[e]ndorsed the holding ... that federal law creates a statutory employment relationship between interstate carriers and the drivers of the trucks leased to them.”⁸ Many courts have held that state common law concepts of liability under the respondeat superior doctrine are irrelevant and that the interstate trucking company is vicariously liable as a matter of law for the negligent actions of the “statutory employee” driver.⁹ This doctrine of liability has sometimes been called “Logo” or “Placard” liability in that if the interstate trucking company’s logo or placard was being displayed at the time of the wreck liability of the driver will be imputed to the trucking company.

In 1986, the Interstate Commerce Commission (“ICC”) adopted some changes which eliminated a requirement for lessee motor carriers to remove their placards before the termination of lease and allowed the terms of the lease to dictate which party would remove the identification “logo” or “placard” from the vehicle.¹⁰ At that time, the ICC issued some clarifying comments disavowing the reasoning of some cases which previously held that the motor carrier was strictly liable in the event its logo was displayed on a vehicle at the time of the wreck and stated that the

⁴ 49 C.F.R. §376.11-.12 (2000)

⁵ 49 USCA §14102(a)(4)

⁶ 49 USCA §14102(a)(4)

⁷ “Insurance Coverage In A Trucking Case” by David Schubert (2013), citing *White v. Excalibur Insurance Company*, 599F.2nd 50 (5th Cir. 1979)

⁸ *Lancer Ins. Co. v. Newman Specialized Carriers, Inc.*, 903 F.Supp.2d 1272 (2012) citing *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1501 (11th Cir. 1988).

⁹ *Id.* Citing *Empire Indem. Co. v. Carolina Cas. Ins. Co.*, 838 F. 2nd 1428 (5th Cir. 1988); *Omega Contracting, Inc. v. Torres*, 191 S.W. 3rd 828 (Tex. App. - Ft. Worth 2006)

¹⁰ 49 C.F.R. §376.112(c)

leasing regulations were not intended to completely override state tort, contract and agency law to create carrier liability where liability otherwise would not have existed.¹¹ Since 1986, some courts seem to recognize that a change in regulations eliminated the strict liability aspects of the “logo liability” doctrine.¹² Thus, in situations where the evidence has shown that the parties to the lease have treated it as having been terminated, the motor carrier was not held to be liable despite the fact that the truck continued to bear the motor carrier’s logo and the lessor/lessee had not fully complied with the regulations and/or termination of the lease.¹³

Currently, the law varies relative to cases involving leased trucks as to whether some kind of respondeat superior analysis should be applied or whether the logo liability rule of strict liability still applies during the duration of the lease. So, if you have a case in which the motor carrier disputes that it is responsible for the actions of the owner-operator driver be sure to familiarize yourself with any court cases addressing “logo” liability in the applicable jurisdiction. The Alabama Supreme Court has held that a motor carrier operating under the authority granted by the government (i.e. U.S. DOT) assumes liability for truck drivers who the motor carrier allows to drive under such authority (whether or not the driver is an “independent contractor”).¹⁴

As previously stated, the driver in case illustration number one above was a company driver, therefore, these lease liability issues were not a factor.

c. Potential direct liability claims against the trucking company

i. Negligent hiring

Federal regulations establish the minimum qualifications for truck drivers and address a trucking company’s responsibility to obtain background information on a driver before hiring him/her.¹⁵ The minimum requirements for investigation and inquiry of a motor carrier prior to hiring a driver are outlined in 49 C.F.R. §391.23. A motor carrier must at a minimum investigate the driver’s safety performance history by contacting any DOT-regulated employer who the driver has worked for within the previous three years and obtain a motor vehicle record (MVR) for each state where the driver has held or holds a driver’s license during the preceding three years.¹⁶ A trucking company who fails to comply with the minimum standards for hiring drivers established by the federal regulations may be subject to liability if compliance would have shown that the driver was unfit/incompetent.

In addition to the required minimum background check in the federal regulations, the motor carrier may also, with written permission of the applicant, request a pre-employment screening program (PSP) report for the driver applicant. PSP information is obtained from the FMSCA’s

¹¹ “Insurance Coverage In A Trucking Case” by David Schubert (2013), citing Ex Parte No. MC-43(Sub.-No. 16) Lease and Interchange of Vehicles (identification devices), 3 I.C.C. 2nd 92-3 (1986)

¹² “Insurance Coverage In A Trucking Case” by David Schubert (2013), citing *Jackson v. O’Shields*, 101 F. 3rd 1083, 1086-7 (5th Cir. 1986).

¹³ *Id.*

¹⁴ See *Ex parte Hicks*, 537 So.2d 486 (Ala. 1988).

¹⁵ 49 C.F.R. §391.1-.71

¹⁶ 49 C.F.R. §391.23.

Motor Carrier Management Information System (MCMIS). A motor carrier can obtain five years of crash data and three years of roadside inspection data on a prospective driver applicant via a PSP report.¹⁷ PSP reports must only be used for pre-employment screening purposes and, thus, may not be used for current employees.¹⁸ The primary differences between PSP records and an MVR for pre-employment screening purposes have been outlined by HireRight, a national company who provides employment background checks, as follows:

- MVR and PSP records are maintained by different sources. MVR driving records are reported by each State's Department of Motor Vehicles ("DMV", or similar State agency), and there is no national database housing driver records. The FMCSA is responsible for the PSP report. An important point to remember is that the two records are not linked, so the information may not match.
- A PSP report may include traffic citations or warnings which prompted a roadside inspection but will not include all of the driving record activity. The list of DOT crashes represents a driver's involvement only, it does not determine responsibility.
- An MVR will provide the driver's driving history as reported by a given State's DMV. PSP reports only contain entries of traffic convictions and warnings related to roadside inspection.
- Citations, warnings, and tickets yet to be settled in the courts will not appear on an MVR.
- Use of the PSP in hiring decisions for drivers is not required by regulations. However, it is becoming a fairly common best practice among motor carriers and bus operators.
- FMCSA regulations require that a three year MVR report be checked within 30 days of hiring and then rechecked annually.¹⁹

Failure on behalf of a motor carrier to investigate a driver's qualifications in compliance with the federal regulations, will subject the motor carrier to liability for negligent hiring in the event such background check would have revealed evidence of prior accidents, traffic violations or disqualifications of the driver which should have been red flags as to his competency.²⁰

In case illustration number one, we filed claims against Company ABC for the negligent hiring, supervision and retention of its driver. We obtained discovery relative to both the hiring and supervision of the driver. During discovery, we realized we did not have adequate evidence to support a negligent hiring case; however, as discussed below, there was substantial evidence to support negligent supervision and retention claims.

¹⁷ "PSP vs. MVR: What's The Difference?" – The HireRight blog, March 2014.

¹⁸ Id.

¹⁹ Id.

²⁰ *Smith v. Tommy Roberts Trucking Company*, 435 S.E. 2nd 54, 57 (1993) (Finding that a claim for punitive damages against a truck driver's employer was supported by evidence that the employer had knowledge that the driver had received two traffic violations while driving company vehicles, the employer failed to follow federal regulations requiring it to check into a driver's driving record, and that such a check would have shown that the driver had several other traffic violations on his record.)

ii. Claims for negligent supervision and retention

Trucking companies operating in interstate commerce have a clear, non-delegable duty to monitor, control, and supervise the conduct of their drivers and employees, including any independent contractors driving on their behalf.²¹ Per 49 C.F.R. §385.5:

“To meet the safety fitness standard, the motor carrier shall demonstrate that it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

- (a) Commercial driver’s license standard violations (part 383),
- (b) Inadequate levels of financial responsibility (part 387),
- (c) The use of unqualified drivers (part 391),
- (d) Improper use and driving of motor vehicles (part 392),
- (e) Unsafe vehicles operating on the highways (part 393),
- (f) Failure to maintain accident registers and copies of accident reports (part 390),
- (g) The use of fatigued drivers (part 395),
- (h) Inadequate inspection, repair, and maintenance of vehicles (part 396),
- (i) Transportation of hazardous materials, driving and parking rule violations (parts 170 through 177), and
- (k) Motor vehicle accidents and hazardous materials incidents.”

Trucking companies must maintain supervision practices to monitor: (1) compliance with federal regulations dealing with drug and alcohol use; (2) driver compliance with maximum hours of service regulations to reduce the risk of fatigued driving; (3) driver and company practices to make sure that vehicles and equipment are being properly maintained in compliance with the regulations; (4) any traffic citations or out of service violations received by its drivers; and (5) any motor vehicle collisions involving its drivers. (This list of areas for which a trucking company is required to monitor and supervise its employees and drivers is certainly not comprehensive.)

As previously mentioned, in the case illustrated above, we were able to establish through downloaded ECM data combined with Qualcomm reports, ComData records of fuel purchases and a receipt from a repair shop that the driver had been on duty for thirty-three and a half hours consecutively at the time of the wreck. Through discovery we also obtained six months of the driver’s logs and we were able to show that he had not only falsified the logs for the day of and the day before the wreck, but also had a history of pattern logging (always averaging the same daily rate of speed) which is known within the trucking industry to be a red flag and a clear indication that the driver is falsifying his log book recordings. In addition, the times and locations listed within the fuel purchase records from ComData regularly did not match the driver’s log entries. The year prior to the wreck, Company ABC had been fined by the DOT following two separate compliance reviews for failure to have adequate systems in place to monitor hours of service compliance and for dispatching drivers on hauls which would require them to violate the

²¹ See generally, 49 C.F.R. §385.

hours of service regulations in order to meet the delivery requirements. Company ABC had prior to, and even following, the wreck consistently maintained a BASIC score of 98 to 99 (the bottom one to two percentile) in the area of HOS compliance. After completion of the safety director's deposition, it was clear that we had a strong case for negligent supervision and retention (negligent retention is based on the company's failure to discipline and/or terminate the driver for the multiple and repeated violations of the hours of service regulations). We also felt that we had a good claim against Company ABC for failing to properly monitor for winter weather advisories and advise the driver to wait until such conditions were clear before proceeding further on the haul.

In many jurisdictions, Plaintiffs are not allowed to proceed forward with negligent hiring, supervision and retention claims against a trucking company if the trucking company admits to being vicariously liable for the actions of its driver. Fortunately, Alabama is not one of those jurisdictions. If you have a case in one of the jurisdictions which does not allow for negligent hiring, supervision, or retention claims when the trucking company admits to vicarious liability for the driver, it is wise to claim wanton conduct and seek punitive damages so that you will at least be allowed an opportunity to conduct discovery on those theories of liability.

Note: Shortly after taking in a trucking case, it is good practice to make a FOIA request to the Federal Motor Carrier Safety Administration for data, correspondence, reports, etc. which they have on file for the trucking company in your case. Unfortunately, receiving a response to a FOIA request made to the FMCSA will likely take anywhere from nine months to a year, at a minimum.

B. Potential sources of insurance

1. Minimal level of financial responsibility

When you take in a trucking case, it is always best practice to look up the trucking company on www.saftersys.org to investigate the information which the FMCSA has on its website relative to the trucking company in your case. As part of your review of the information provided on the FMCSA's SAFER website, you should look to see the amount of insurance coverage, including the name of the insurance carrier, which is on file for the trucking company with the FMCSA. **(Note: Trucking companies may have excess policies which are not listed on the FMCSA website.)** The minimal limits of financial responsibility for trucking companies is set pursuant to 49 C.F.R. §387.9. Such minimal limits were established in January of 1985 and have remained the same since that time. Below is a copy of the schedule of limits provided for under §387.9.

SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,001 or more pounds)	Property (nonhazardous)	\$750,000
(2) For-hire and Private (In interstate, foreign, or intrastate	Hazardous substances, as defined in 49 C.F.R. 171.8, transported in cargo tanks, portable tanks, or hopper-type	5,000,000

commerce, with a gross vehicle weight rating of 10,001 or more pounds)	vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2 and 1.3 materials. Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 C.F.R. 173.403	
(3) For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,001 or more pounds)	Oil listed in 49 C.F.R. 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 C.F.R. 171.8 and listed in 49 C.F.R. 172.101, but not mentioned in (2) above or (4) below	1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,001 pounds)	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 C.F.R. 173.403	5,000,000

Many times when the trucking company only has minimum coverage of \$750,000.00, such limits will be woefully inadequate to cover your client’s losses. In such cases, you will need to look for potential additional sources of coverage covering either the tractor or trailer or covering other potential defendants who share in liability for the wreck.

2. MCS-90 Endorsements

The Motor Carrier Safety Act of 1980 requires that all interstate motor carriers have a Motor Carrier Safety (MCS-90) endorsement attached to their insurance policies.²² The purpose of the MCS-90 endorsement is to protect the public from the negligent operation of a truck being operated in interstate commerce and requiring that the policy provide at least the statutory minimum amounts established under §389.9 for third-party injury or damage claims regardless of any coverage defenses which might otherwise exist under the policy.²³ The MCS-90 endorsement may override policy exclusions and conditions as well as make someone who is not an insured under the policy into an insured or make a vehicle that is normally not covered into a “covered auto”.²⁴ Per the MCS-90 endorsement, a trucking company’s insurer has a right of reimbursement from the trucking company if the insurer is required to pay a claim which would have been excluded but for the MCS-90 endorsement.²⁵

With an MCS-90 endorsement an insurance company must provide 35 days notice in writing to cancel a policy which contains an MCS-90 endorsement as well as at least 30 days written notice, using a prescribed form, sent to the FMCSA in Washington, D.C. (the 30 days begins to run from the time that the FMCSA actually receives the form).²⁶ An MCS-90 endorsement may extend coverage to persons or vehicles that otherwise would not be covered

²² 49 USC §13906 (2000); 49 C.F.R. §387.7, 387.15 (2002)

²³ “Insurance Coverage In A Trucking Case” by David Schubert (2013)

²⁴ Id.

²⁵ Id.

²⁶ Id. Citing 49 C.F.R. §387.15 (2002)

within the terms of the policy covering the trucking company, absent the endorsement.²⁷ Majority rule is that the MCS-90 endorsement will only apply while the truck is being used to transport property in interstate commerce and, therefore, will not create coverage in a “bobtailing” scenario when the driver is not presently driving within the line and scope of the trucking company’s business.²⁸

3. Coverage for the trailer

In every case, you will want to find out whether the tractor and trailer are owned or leased by the motor carrier. In some cases both may be owned by the motor carrier, or both may be leased by the motor carrier from a single individual or company, or one may be owned and the other leased by the motor carrier. Regardless, in an effort to find all available insurance in your case, you will need to try to determine whether the trailer was insured under a separate policy or covered under a separate MSC-90 endorsement than the tractor, or whether there are separate limits of coverage for the tractor and trailer under the same policy. If the trailer is covered under a separate policy, the driver using the trailer with the permission of its owner should be covered as a “permissive user”.²⁹ Also, the MCS-90 endorsement for the trailer owner should extend coverage to both the driver and owner of the tractor as “permissive users” even if the trailer is not specifically listed under the trailer owner’s policy.³⁰

4. Coverage Under The Lessor’s Policy

The lessor/owner of the tractor-trailer may maintain a policy of insurance which would extend coverage to the driver as a permissive user. You will likely need to subpoena a copy of the policy and thoroughly review it as there may be specific exclusions related to the leased vehicle. Additionally, the lease agreement terms may negate your chances of arguing that the driver was a “permissive user”.

In the event that the truck involved in the wreck was leased from a leasing company (as opposed to an owner-operated lease), the truck will most likely be covered under a garage policy issued to the leasing company. You should issue a subpoena to the leasing company to seek any policies (including umbrella policies) which provide coverage for the truck at issue. The garage policy will most likely have an exclusion for “leased autos”; however, you should look for any “Leasing or Rental Contingent Coverage” endorsements. Under the terms of a “Leasing or Rental Contingent Coverage” endorsement you may find additional coverage for the driver in your case.

In case illustration number one above, the trucking company had adequate coverage to cover our client’s claims. Therefore, we did not have to look for additional sources of insurance.

C. Potential additional defendants

²⁷ Id. Citing *John Deere Ins. Co. v. Nueva* 229 F. 3rd 853 (9th Cir. 2000); *Integral Ins. Co. v. Lawrence Fullbright Trucking, Inc.*, 930 F. 2nd 258 (2d. Cir. 1991).

²⁸ *Canal Ins. Co. v. Coleman*, 625 F. 3d 244 (5th Cir. 2010)

²⁹ *Integral Ins. Co. v. Lawrence Fullbright Trucking, Inc.*, 930 F 2d. 258 (2d. Cir. 1991)

³⁰ *Id.*

1. The Broker

A broker or third-party logistics provider is an entity within the chain of transportation which does not haul loads but instead contracts with motor carriers to make hauls on behalf of shippers. Basically, shippers hire brokers/third-party logistics providers to select and hire motor carriers to transport their goods. If a broker does not exercise reasonable care in the selection and hiring of competent and careful motor carriers to make hauls it may be held liable under the theory of negligent hiring. Whether a broker can be held liable under the theory of negligent hiring of a motor carrier will be dependent upon common law in the state of jurisdiction. Many states have adopted Restatement (Second) of Torts §411 which addresses negligence in the selection of an independent contractor and provides that

“an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.”

In Alabama, our courts have recognized that one may be held liable for the negligent hiring of any independent contractor; but, there has been no official adoption of §411 of the Restatement (Second) of Torts.³¹ Several other states, such as Virginia, have adopted § 411 and applied it in the context of broker liability for hiring incompetent motor carriers. Recognizing that negligent hiring of an independent contractor was a viable claim in the State of Virginia, the U.S. District Court in the case of *Jones v. C.H. Robinson Worldwide, Inc.* held that a broker/third-party logistics provider could be subject to liability for the negligent failure to exercise reasonable care in the selection of a competent motor carrier to make a haul.³² The *Jones* court provided that a plaintiff must also be able to prove that “the contractor was, in fact, incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of that incompetence, and that the principal knew or should have known of the incompetence.”³³ (Note: The evidence required for proving negligent hiring of a motor carrier as stated by the court in *Jones* is very similar to the requirements noted by the Alabama Supreme Court in *McGinnis*.)

Another potential theory of liability against brokers in trucking cases has involved liability claims under the doctrine of respondeat superior. The court in *Sperl v. C.H. Robinson Inc.* determined that an agency relationship existed between the broker, C.H. Robinson, and the truck

³¹ A direct cause of action for negligent hiring of an independent contractor is recognized in *McGinnis v. Jim Walter Homes*, 800 So.2d 140 (Ala. 2001), in terms of whether Jim Walter Homes was directly liable to plaintiffs for wrongful death for failing to hire competent and qualified electrical contractors to complete construction of its homes thereby resulting in a deadly electrical fire. See also *Hathcock v. Mitchell*, 173 So.2d 576, 584 (Ala. 1965). In *McGinnis*, the court held that the Plaintiff’s failure to provide evidence showing Jim Walter “either knew, or should have discovered during the exercise of due diligence,” that the contractor was not competent to install electrical systems in homes, precluded plaintiff’s claims against Jim Walter for the negligent hiring of the electrical contractor. *Id.* at 148.

³² *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F.Supp.2d 630 (2008)

³³ *Id.*

driver based upon extensive evidence presented by the plaintiff of the control that C.H. Robinson maintained over the driver.³⁴ Therefore, in the *Sperl* case, C.H. Robinson was held to be vicariously liable under the doctrine of respondeat superior for the actions of the at-fault truck driver.

Recently in the case of *Riley v. C.H. Robinson Co., et al.* in the Eastern District of Missouri the Court denied C.H. Robinson's motion for summary judgment on the issue of agency in a broker liability case on the grounds that there was sufficient evidence to create a question of fact as to whether C.H. Robinson had maintained a level of control over the trucking company to create an employer/employee relationship.

The load being hauled by the driver at the time of the wreck in case illustration number one was not a brokered load. Thus, the issue of broker liability was not applicable.

2. Shipper liability

Like broker liability cases, theories of shipper liability for the negligent hiring of trucking companies are contingent upon the common law in your state of jurisdiction. States which have adopted Restatement (Second) of Torts §411 should also recognize claims against shippers as being viable if there is sufficient evidence that the shipper failed to exercise reasonable care in the selection and hiring of a competent motor carrier to haul its goods. In shipper liability cases, courts may make a distinction between “sophisticated” shippers (shippers who regularly ship goods in interstate commerce) and “casual” shippers as part of the evaluation as to whether a given shipper has exercised reasonable care in the selection of a motor carrier.³⁵ The case law covering shipper liability is limited in comparison to the multiple cases across the country which have held that a broker may be liable for the negligent hiring of a motor carrier.

In relation to case illustration number one, we did not consider a claim against the shipper as Company ABC had adequate insurance to cover our client's injuries. The facts of the case, however, would likely have been enough for us to have at least pursued the claim had insurance coverage been inadequate. (ABC's BASIC scores fell within the bottom two percentile for all carriers in the category of Hours of Service/Driver Fatigue compliance, such scores were posted on the FMCSA website for public viewing at the time of the wreck and could have been ascertained by the shipper with a five-minute search.)

3. The Insurance Company For The Trucking Company

Some small trucking companies rely on their insurance carrier or agent to perform background checks on new applicant drivers before making a decision on hiring. The insurance company in such cases will likely order the MVR for the new applicant and let the trucking company know whether the insurer is willing to cover the new applicant as a driver. If the driver is deemed non-insurable by the insurance company or will cause the trucking company's premium to increase the new applicant likely will not be hired. When the insurance carrier engages in the

³⁴ *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E. 2d 463 (Ill. 2011)

³⁵ *Puckrein v. ATI Transport, Inc.*, 897 A. 2d 1034 (NJ 2006).

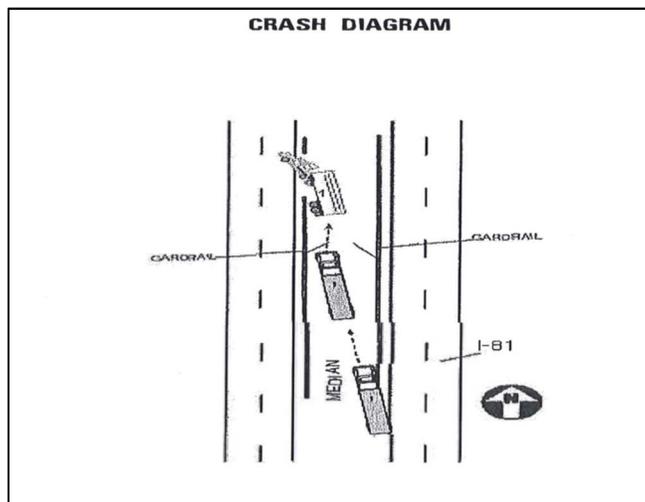
process of performing background checks it could be argued that they have assumed a duty to use reasonable care and may be held liable in the event that it approves for hire an incompetent driver.

Personally, I have not pursued a claim against an insurance carrier for its involvement in the hiring process of a truck driver. That said, I do believe that with the right jurisdiction and the right set of facts (i.e. the insurance carrier or agent for a small trucking company became intricately involved in the hiring decision process of truck drivers – creating a duty to exercise reasonable care which otherwise would not exist – and provides advice or information which leads to the hiring of an incompetent or unqualified driver) a claim for negligent hiring against the insurer or insurance agency would be worth pursuing.

II. Case Illustration No. 2

On April 1, 2014 at 3:00 a.m., Phil Emiabata was driving a tractor-trailer truck northbound on I-81 in Wythe County, Virginia. The tractor-trailer truck was owned by Phil and Sylvia Emiabata (aka Phil Emia and Sylvia Emia). The Nova Express tractor and trailer had brakes which were dangerously out of adjustment, the trailer's suspension was in dangerous disrepair and the tires on both the tractor and trailer were worn beyond the allowable limit. At that time Phil Emiabata had driven the Nova Express truck well in excess of the maximum hours allowed under the FMCSRs and was driving fatigued and/or fell asleep while driving. While traveling on a straight, dry grade of marked highway, Emiabata failed to maintain control of the truck, driving off the road and into the edge of the median. He was unable to regain control or slow the truck down causing the truck to strike the guardrail in the northbound lane, cross the median of I-81 and through the guardrail for the southbound lane. The cab of the Nova Express truck came to rest on its passenger side blocking the left southbound lane of I-81. A section of damaged metal guardrail came to rest across the left northbound travel lane of I-81.

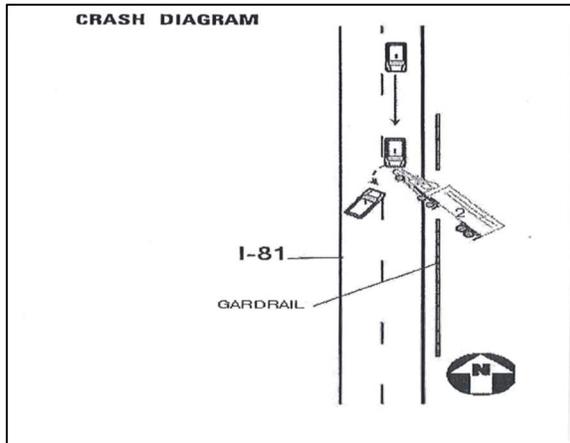
First Wreck (Emiabata)



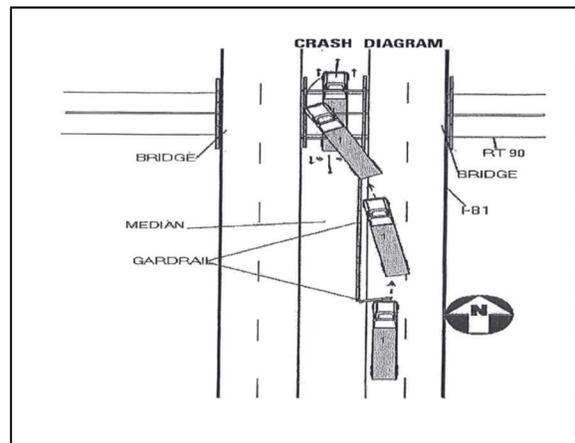
A few minutes after Emiabata crashed his truck through the guardrail for I-81 South, a southbound SUV being driven by Mrs. Mann slammed into Emiabata's overturned cab. Mrs. Mann died from this collision. About five minutes after this fatal crash in the southbound lane, Mr.

Anderson was operating a tractor-trailer truck in the left northbound lane of I-81. Mr. Anderson's truck struck a piece of the guardrail that was blocking the roadway, causing him to run off the road and crash. After the crash, Mr. Anderson's truck engulfed in flames and he was burned to death in his cab. Mr. Anderson's passenger, Mr. Johnson, survived the crash but suffered life-altering injuries.

Second Wreck (Mann)



Third Wreck (Anderson)



Following the wreck, a DOT inspection was performed by the Virginia State Police which found that Mr. Emiabata was guilty of out of service violations for being in violation of the HOS regulations, for multiple inoperable brakes and for an inoperable trailer suspension. He was also cited for multiple worn tires.

At the time of the wreck, Emiabata was hauling approximately 38,000 pounds of laundry detergent which he had picked up on March 28, 2014 at a warehouse in Laredo, Texas and was scheduled to deliver to a store in Bronx, New York on April 1, 2014. The haul was brokered by C.H. Robinson pursuant to the contract carrier agreement between Phil Emia and Sylvia d/b/a Nova Express and C.H. Robinson. Prior to C.H. Robinson hiring Nova Express to haul the laundry detergent on March 28, 2014 it had reports and information readily available (either internally or easily accessible through the SAFER System website) showing the following relative to Nova Express (a carrier which operated with one to two trucks and drivers at any given time):

1. Nova Express's DOT number had been deactivated effectively on March 1, 2014 for failure to file a biennial report and as a result **was prohibited from transporting goods in interstate commerce as of March 28, 2014;**
2. In the three-year period preceding March 28, 2014, C.H. Robinson had records showing that Nova Express had had over 30 equipment breakdowns resulting in delayed or canceled hauls;
3. Prior to March 28, 2014 C.H. Robinson's internal "Carrier Notes" indicated that it had received sixteen "Do-Not-Use" requests from either C.H. Robinson's employees or customers relative to Nova Express – most of the requests were directly related to a lack of reliability based on equipment failures;

4. Two prior “involuntary revocations” of the Nova Express’ operating authority;
5. Two prior wrecks in May of 2013;
6. A history of out of service violations for filing false log reports, driving with a suspended CDL, overly worn tires, and failure to have a periodic maintenance inspection; and
7. A history of citations for inoperative and inadequate brakes as well as inadequate tire tread depth.

The Motor Carrier Safety Profile for Nova Express was also readily available to C.H. Robinson online prior to March 28, 2014, and showed that for every month from November 2011 through March 2014 Nova Express ranked as one of the worst motor carriers under the vehicle maintenance safety category (ranging from the bottom .3 to 7.5 percentile). During the same time frame (November 2011 through March 2014) there were seven months in which Nova Express ranked as one of the worst motor carriers for fatigued driving violations (ranging from the bottom 13.5 to 23.5 percentile) and for the 10-month period from June 2013 through March 2014 Nova Express ranked as one of the worst motor carriers under the category of unsafe driving (ranging from the bottom 3.9 to 9.3 percentile). These BASIC scores placed Nova Express in the “high-risk carrier” category as such term has been defined by the FMCSA for ten consecutive months preceding the wreck.

A. Claims against Phil and Sylvia Emia d/b/a Nova Express

Three separate lawsuits were filed by Mrs. Mann’s estate, Mr. Anderson’s estate and Mr. Johnson against Emiabata and Nova Express in the Western District of Virginia based on negligence and wantonness and seeking compensatory and punitive damages. Both the Nova Express tractor and trailer were covered under the same policy with Hallmark County Mutual Insurance Company with total limits of \$1 million dollars per accident. The Emiabatias had no known collectible assets above and beyond the Hallmark policy. The three sets of plaintiffs collectively rejected Hallmark’s policy limits offer based on our argument that the Mann wreck and the Anderson wreck constituted two separate “accidents” and thus the total available coverage was actually double the policy limits which were being offered by Hallmark. The argument that there were two separate accidents was not supported by Virginia law, but that was ok as Texas law applied to the interpretation of the Hallmark policy (a Texas company) which was issued to Nova Express (a Texas motor carrier). Eventually, after discovery, the case against the Emiabatias and Nova Express settled for a confidential amount between the policy limits for one accident and the total policy limits for two accidents.

B. The Case Against C.H. Robinson

Three separate lawsuits were also filed by the same plaintiffs against C.H. Robinson in the Western District of Virginia. The cases were consolidated for both discovery and trial. The plaintiffs’ cases survived summary judgment and a motion in limine to exclude plaintiffs’ standard

of care expert. Also, plaintiffs filed a motion to exclude the testimony of C.H. Robinson’s standard of care expert, which was granted in part. Rulings on said motions were entered July 27, 2017 and the case was scheduled to be tried in mid-October. Prior to the trial, each of the three cases settled. The plaintiffs’ claims and C.H. Robinson’s defenses as well as the legal arguments and the information obtained through discovery in the Mann/Meeks/Johnson cases are covered below.

1. Broker Liability

A broker is defined as a “person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.” 49 CFR 371.2. Transportation brokers may also be referred to as third party logistics providers. In a trucking case, one should investigate whether the load being hauled by the motor carrier was brokered – i.e., a broker acted as the middle person between the shipper and the motor carrier.

Brokers earn the difference between the amount the shipper allocated to ship the load and the amount the broker pays to the motor carrier. This obviously creates an incentive for brokers to hire the small, financially insecure motor carriers. One study examined the relationship between a motor carrier’s financial condition and its safety performance and reached the predictable conclusion that a weak financial position in a previous year is associated with a poorer safety performance in a subsequent year.³⁶ A financially unstable carrier is likely to pay less on vehicle maintenance and pay less attention to driver hours of service regulations.

In our case, we discovered that C.H. Robinson Worldwide (“Robinson”) hired financially unstable motor carriers that seemed to survive load to load by borrowing against every load they hauled for Robinson through its “Quick Pay” program and also frequently obtaining advances from an entity formerly owned by Robinson called “T-Chek.” Under Robinson’s Quick Pay Discount Agreement, Robinson discounts by 15% what it owes the motor carrier in exchange for agreeing to expedite payment to the carrier. The system resembles the payday lending system. T-Chek is like an ATM card except Robinson charged a \$10.00 fee each time the card was used. The carrier in recent case was so financially strapped that it used Quick Pay on every load and frequently paid for fuel and food with T-Chek.

A. Theory of Liability

i. Proving Negligent Hiring by a Broker

When making a claim against a transportation broker for the negligent hiring of a motor carrier, the plaintiff must be able to prove that: (1) the motor carrier employed by the transportation broker was, in fact, incompetent or unskilled to safely perform the job for which it was hired; (2) that the harm which resulted arose out of the incompetence of the motor carrier; and (3) that the transportation broker knew or should have known of the motor carrier’s incompetence.³⁷

³⁶ Britto, et al., “The Relationship between Motor Carrier Financial Performance and Safety Performance,” *Transportation Journal*, Vol. 49, No. 4, pp. 42-51 (Fall 2010).

³⁷ See *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F.Supp.2d 630 (2008)

a. Non-governmental evidence

In our recent case, the evidence we offered included Robinson's internal notes from its Navisphere system showing a number of complaints it had received about the mom-and-pop motor carrier (Nova) in the years preceding the crash. Approximately sixteen times, either shippers or Robinson employees requested that Nova be put on Robinson's "Do Not Use" list, either because of violent or dishonest behavior by Nova's principal owner/driver or because of canceled pick-ups and late deliveries, many of which were caused by equipment break-downs. We showed that Nova only owned two tractors and trailers, yet had approximately 30 breakdowns in the three years preceding the crash. We claimed that Nova was financially unstable - it borrowed against every load it hauled for Robinson through Robinson's Quick Pay program and frequently took advances against payment for the load from T-Chek. We alleged that from the first date that Robinson contracted with Nova (seven years prior to the wreck), Robinson knew that Nova's principals were using false names. This was relevant because the principals (husband and wife) admitted in deposition testimony to having been fired by other motor carriers, including for having alcohol onboard the tractor. We alleged that Robinson could have discovered this past employment information prior to hiring Nova. After hiring Nova, Robinson became a named certificate holder on Nova's liability insurance policies. Nova's insurance coverage was cancelled almost annually, requiring it to switch insurance carriers with great frequency. Robinson never investigated the reason for this or the circumstances of any of the above evidence of incompetence.

b. FMCSA's Programs to Reduce Crash Rates

In addition to the information cited above, we also alleged, as did the plaintiff in *Jones v. C.H. Robinson*, that Robinson was negligent for failing to take into account publicly-available information from the Federal Motor Carrier Safety Administration (FMCSA) website, which contains, *inter alia*, ratings and a scoring system for motor carriers.

The FMCSA was established by Congress with the primary mission "to reduce crashes, injuries and fatalities involving large trucks and buses."³⁸

There are two types of scores assigned to carriers by FMCSA. One is a static rating of "satisfactory," "unsatisfactory," or "conditional." A carrier rated "unsatisfactory" is prohibited from operating a commercial motor vehicle in commerce.³⁹ A carrier's assigned safety rating remains in place until it receives a subsequent compliance review. These ratings result from a formal compliance review by FMCSA of the carrier. FMCSA conducts only a limited number of compliance reviews per year.

Unfortunately, only about 7% of motor carriers are actually evaluated through a formal compliance review, which means that the vast majority of carriers are "unrated." Brokers like Robinson routinely use "unrated" carriers. Notwithstanding rulings in *Jones* and other cases involving Robinson, it is Robinson's position that it's only duty in hiring an "unrated" carrier is to ensure that it has operating authority, is insured, and does not show up on the terrorist watch list.

³⁸ Motor Carrier Safety Improvement Act of 1999.

³⁹ 49 CFR 385.13.

(1) SafeStat

In the 1990s the FMCSA contracted with the Volpe National Transportation Systems Center to develop a Motor Carrier Safety Status Measurement System (SafeStat) to evaluate and rank the safety performance of motor carriers based on their ongoing record of safety performance, as opposed to a single, static assessment of their safety profile. From December 1999 through November 2010 (when the replacement Safety Management System came online), SafeStat percentile scores were made available online.

(2) Safety Management System (SMS)⁴⁰

In 2010, at Congress' direction, the FMCSA launched the Comprehensive Safety Analysis 2010 Initiative. CSA 2010 developed a new methodology to provide a more detailed assessment of the ongoing safety performance of individual carriers. The SMS associated with CSA 2010 defines safety performance in six Behavior Analysis and Safety Improvement Categories (BASICS) as well as a crash involvement measure (Crash Indicator). The six BASICS are: Unsafe Driving, Fatigued Driving, Driver Fitness, Controlled Substances and Alcohol, Vehicle Maintenance, and Hazardous Materials Compliance.

Just as with SafeStat, the BASICS time-weight violations and size-adjust carrier performance so that carriers are compared to their size peers in the ranking system. The scores in the individual categories are converted to percentile scores and the FMCSA set threshold percentile scores for each BASIC. Carriers exceeding the threshold score for a BASIC are identified as candidates for monitoring or intervention by FMCSA. The higher the score the worse the safety performance. The threshold score for Unsafe Driving and Fatigued Driving (or Hours-of-Service) is 65. The threshold score for Vehicle Maintenance, Driver Fitness, Controlled Substances/Alcohol, and Hazardous Materials is 80.

Importantly, peer reviewed studies (including studies by organizations whose research committees include Robinson executives) show that crash rates for motor carriers with above threshold percentile scores had significantly higher crash rates in the subsequent 18 months than did carriers without above threshold scores. Moreover, carriers with above threshold Unsafe Driving BASICS are 93 percent higher than the national average. The increased crash rates for above threshold scores in other BASICS are as follows: 85 percent for Crash Indicator; 83 percent for Hours-of-Service; and 65 percent for Vehicle Maintenance. Carriers with multiple above threshold BASIC percentile scores had significantly higher crash rates in comparison to carriers with no BASIC percentile scores above the threshold. In fact, the Volpe study showed that carriers with two BASICS above the threshold had crash rates during the 18-month period following the scores that were more than twice as high as the crash rates for carriers with no BASICS above the threshold.⁴¹

⁴⁰ See generally Volpe National Transportation Systems Center, *The Carrier Safety Measurement System (CSMS) Effectiveness Test by Behavior Analysis and Safety Improvement Categories (BASICS)*, prepared for the Federal Motor Carrier Safety Administration, January 2014.

⁴¹ *Id.* See also attached briefs from the Mann/Meeks/Johnson v. C.H. Robinson Worldwide, Inc. consolidated cases for an in-depth discussion of the peer reviewed studies analyzing the BASICS.

These percentile BASIC scores were publicly available, including to carriers, shippers, and brokers, until December 2015.

(3) Trucking Industry Attacks FMCSA data

Even prior to the *Jones* decision, the trucking industry fought tooth-and-nail against the notion that it should have a duty to consult the FMCSA website prior to hiring a motor carrier to haul a load. It should be noted that there are vendors who brokers can and do hire to monitor the FMCSA website. These vendors have the ability to take a list of motor carriers and provide the broker with real-time, daily updates of all of the carrier data on the FMCSA website. Brokers like Robinson often contract with these vendors to provide limited information, such as whether a carrier has lost its operating authority or insurance coverage, but affirmatively choose not to receive information about safety scores. Stakeholders in the trucking industry have for decades lobbied Congress to take down the FMCSA website.

At the time of the *Jones* decision (2008), the intensive lobbying had resulted in the following warning on the FMCSA website:

Because of State data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses.⁴²

In *Jones*, the Court found that Robinson had a duty to investigate the fitness of the motor carrier prior to hiring it to carry the load on the public highways.⁴³ The Court noted Robinson's argument about the warning; the FMCSA studies showing the correlation between deficient SEAs and crash rates; the fact that the website contained other useful information about motor carrier safety, including insurance cancelations and citations for federal safety regulations, and the fact that the parties' experts disagreed about the impact of the website warning.⁴⁴ The Court concluded that the question of whether Robinson breached the appropriate duty of inquiry in selecting a competent carrier must be submitted to the jury, which was free to weigh the evidence regarding the FMCSA website.⁴⁵

ii. Causation

Another element in the negligent hiring analysis is proving that the harm that resulted arose out of the independent contractor's incompetence. One of the broker's defenses to these cases is to argue that the plaintiff failed to prove a causal connection between the broker's negligent investigation into the carrier's competence and the cause of the wreck. For example, if a reasonable investigation would have revealed that a particular carrier had a terrible Vehicle Maintenance record but nothing else, such information would be of limited use in a case where the

⁴² *Jones* at 645-646.

⁴³ *Id.* at 646.

⁴⁴ *Id.* at 643-648.

⁴⁵ *Id.* at 647

defendant truck driver fell asleep at the wheel and did not awaken in time to brake or steer out of the situation. The following dicta in *Jones* illustrates the point: “While the court believes that the causation element is not particularly strong in this case, the court does find that the plaintiff has proffered evidence sufficient to withstand summary judgment.”⁴⁶

Counsel must determine whether he/she can prove that the harm resulting from the wreck arose out of the incompetence about which the broker knew or should have known. In our recent case, the expert and trooper testimony was that the truck’s brakes, tires and suspension system combined with the driver’s fatigued driving were proximate causes of the wreck. The truck company in our case had BASIC percentile scores that were consistently in the 90s in all relevant categories, including Unsafe Driving, Vehicle Maintenance, and Fatigued Driving.

iii. Defendant’s Knowledge

One reason the brokerage industry fights so hard to take down the FMCSA website is that it is easy in broker liability case to allege that a broker should have known about publicly available information, especially since brokers contract with vendors to provide part of the data available on the website. As will be discussed below, one of the broker’s main lines of attack against using the FMCSA website to prove knowledge is the FAST Act.

Because the FMCSA data is under constant attack from the industry and its hired witnesses, it is critical in these cases to develop proof of knowledge from non-government sources. As discussed above, the broker’s own data base is a rich resource for such proof. Robinson’s Navisphere program tracks load data for every single load handled by each carrier. Within this program are notes from Robinson dispatchers, which we found to be chock full of helpful evidence about Robinson’s actual knowledge of this particular carrier’s poor safety record and competence. In addition, the documents obtained by the broker from or about the carrier when the carrier service contract is first entered into may provide useful evidence. The survey completed by the carrier in our case gave Robinson notice that this carrier owned only two decrepit power units and trailers that had almost no value. From the subsequent insurance papers that Robinson received as a Certificate Holder each year, Robinson knew that this equipment was not replaced over the course of the following six or seven years. From the breakdown history found in Robinson’s Navisphere load data, it was evident that Robinson knew that the carrier did not maintain its old equipment.

The industry attack on the FMCSA website data is focused primarily on the data that goes into the algorithm that creates the percentile scores. There is other useful safety data about the carrier on the website that should be mined for evidence of what the broker knew or should have known.

B. The FAST Act

i. Background

⁴⁶ *Id.* at 648.

The FMCSA made most of the BASICs available to the public on its website from 2010 through 2015, and so, in our recent case, they were available to Robinson at the time it hired Nova to haul the load in question. Counsel need to have a strategy to address the fact that for wrecks occurring after December 2015, BASIC percentile scores were not publicly available. This strategy will be discussed below.

From 2011 until the end of 2015, the FMCSA website cautioned users that they “should not draw conclusions about a carrier’s overall safety condition simply based on the data displayed in this system.”⁴⁷ The disclaimer further noted that unless a carrier had an “unsatisfactory” rating or had been “otherwise ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation’s roadways.”⁴⁸

Under intense pressure from industry lobbyists, Congress directed the Government Accountability Office (GAO) to investigate whether BASICs accurately assessed accident risk. The GAO issued a flawed report in February 2014 that was highly critical of the BASICs as a predictive risk assessment tool for individual carriers.⁴⁹ FMCSA rebutted the GAO report and pointed out its many flaws.⁵⁰

Nonetheless, on December 2015, President Obama signed into law the Fixing America’s Surface Transportation (FAST) Act.⁵¹ The FAST Act recommended that FMCSA fund a study by the National Academy of Sciences in collaboration with the Transportation Research Board to analyze the SMS methodology and its ability to discriminate between low and high risk carriers, to assess the public use of SMS data, and to provide advice on safety assessment methodologies.⁵² The Act directed FMCSA to remove BASIC scores from its website until the study was completed and the issues identified therein were addressed. BASICs are now unavailable to the public, but the FMCSA website still displays a warning symbol to denote those carriers who are considered “high risk” in a particular BASIC category.

ii. Use of FAST Act as a Defense

Brokers point to the FAST Act and argue that they should not be required by courts to review BASICs before hiring a motor carrier. They ignore the many studies which support the Volpe study and they cite the GAO study as proof that BASICs are a poor predictor whether a small carrier would later be involved in a crash. This argument is addressed in the *Mann/Meeks/Johnson v. C.H. Robinson, Inc.* Memorandum Opinion by Judge Dillon. The Western District of Virginia also addressed the effect of the FAST Act on broker liability in *Turner v. Syfan*

⁴⁷ *Alliance for Safe, Efficient & Competitive Truck Transp. V. Fed. Motor Carrier Safety Admin.*, 755 F.3d 946, 948-49 (D.C. Cir. 2014)(emphasis added).

⁴⁸ *Id.*

⁴⁹ GAO, *Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers*, GAO-14-114 (Feb. 2014), available at <http://www.gao.gov/assets/67/660610.pdf> (last visited October 20, 2017).

⁵⁰ See *Mann/Meeks/Johnson v. C.H. Robinson Worldwide, Inc.* briefs appended hereto for an in-depth analysis of the GAO Report and FMCSA’s response.

⁵¹ Pub. L. No. 114-94.

⁵² *Id.*

*Logistics, Inc.*⁵³ In *Turner*, the defendant argued at the motion to dismiss stage that the addition of the newer disclaimer in 2011 and passage of the FAST Act in 2015 distinguished the case from *Jones*. Judge Urbanski rejected these arguments, stating:

Though the disclaimer added in 2011 contains specific language regarding carriers' overall safety performance, this addition does not render the present case distinguishable from *Jones*, particularly given that *Jones* was decided on summary judgment. Like the disclaimer in *Jones*, the disclaimer here goes to the reliability of the data contained in the FMCSA website. As such, the facts at issue in the present case align squarely with those in *Jones*.

The FAST Act took effect after the alleged conduct by Syfan occurred. Though the FAST Act, like the disclaimer, casts doubt on the reliability of the data and rankings on the FMCSA website, Syfan's argument goes to the weight of the evidence alleged by Turner and does not render Turner's claim implausible.⁵⁴

The National Academy of Sciences/Transportation Research Board issued its report in July 2017.⁵⁵ Unfortunately for the broker industry, the report concluded as follows:

We believe that the general approach taken by SMS is sound, and shares much with similar programs in other areas of transportation safety. Further, we have examined, to the extent possible, the various issues that have been raised in criticism of SMS. We have found, for the most part, that the current SMS implementation is defensible as being fair and not overtly biased against various types of carriers, to the extent that data on MCMIS can be used for this purpose.

....

Conceptually, SMS is structured reasonably. Using the number of violations found during inspections, and the number of crashes, with violations bundled into groups that represent related areas of safe operations, weighting these frequencies by severity and time weights, properly standardizing these counts, stratifying carriers into similarly sized peer groups, and then seeing which carriers are doing worse than the others, is a reasonable approach to the identification of unsafe carriers.⁵⁶

The National Academy also reached a consensus that the evaluations carried out by FMCSA supports the judgement that six of the seven BASICS are positively (sometimes very strongly) associated with future crash risk, and that the unconditional correlation of Driver Fitness's percentile ranks with future crash frequency is insufficient to remove it from SMS.⁵⁷ The

⁵³ Case 5:15-cv-0081-MFU (4/18/16)(appended hereto).

⁵⁴ *Id.* at p. 20.

⁵⁵ National Academy of Sciences/Transportation Research Board, *Improving Motor Carrier Safety Measurement*, National Academies Press, Washington, D.C., July 2017.

⁵⁶ *Id.* at p. 2-29.

⁵⁷ *Id.* at 2-18.

panel did not make a recommendation whether FMCSA should make all BASIC percentile scores public.⁵⁸

For crashes occurring after December 2015, brokers argue that the BASICs were not publically available for them to see, so they could not have known about the data. This argument is disingenuous for the following reasons. First, even after the FAST Act was passed, the BASIC scores remained available to motor carriers. Brokers could add a provision to their carrier contracts requiring the carriers to make available to the broker the carrier's BASICs. Second, the vendors (e.g., DAT) who purchase the FMCSA data and provide it to brokers for a fee have the algorithm necessary to translate the data into BASIC percentile scores. Finally, even after the Act was implemented, the website continued to identify "high risk" carriers via warning symbols.

⁵⁸ *Id.* Summary-6