



## Anatomy of a trucking case

### USING MYRIAD TRUCKING REGULATIONS TO FURTHER YOUR CASE, FROM INVESTIGATION THROUGH DEPOSITION AND TRIAL

Commercial tractor-trailer collisions, whether fast or slow, are generally more severe than collisions involving only passenger cars. Likewise, litigating trucking cases is generally more complex than a typical motor-vehicle case. From the moment the case appears on your desk, all the way through trial, there are critical steps that should be taken to ensure your clients receive the best possible representation. This article covers the most important steps to take in every trucking case.

#### When a trucking case arrives

An accident has just happened. For this example, let's presume it involves a tractor-trailer stopped on a shoulder alongside a highway and a passenger vehicle goes into the back of it. It's a terrible accident, likely fatal or, at a minimum, with severe injuries. As in every case, your early investigation will involve inspecting the scene, interviewing clients and witnesses, searching for possible video or photographic evidence in this modern era full of cameras, and of course, seeking law enforcement and other first-responder reports as you try to get a general read on the incident. So, let's look at the additional first steps that need to happen in a trucking case.

Due to the nature of this incident, it is likely the law-enforcement agency in charge will not be done with its investigation for quite some time. In a car crash, getting the preliminary report (at least a face page), from law enforcement to get some idea of fault as well as insurance information is paramount. With a trucking case, you need not wait for a law-enforcement report or accept their findings as persuasive. Indeed, in this scenario, law enforcement may be blaming your clients. With a trucking case, there are other avenues to follow.

First, before you even ask for a collision report, find out if there are media reports of the incident or whether your clients have photos or information from the scene. Why? Because the Federal

Motor Carrier Safety Regulations ("FMCSRs") mandate that every tractor trailer must display prominently on the vehicle itself in very specific detail the information for the motor carrier driving that commercial motor vehicle ("CMV"), including its registration number with the Department of Transportation ("USDOT"). (49 C.F.R. § 390.21T.)

While a later investigation may uncover other entities that might have fault in this case, obtaining the motor-carrier information from the side of that CMV at that location is imperative at an early stage. So, let's presume that in this case, it appears the motor carrier is XYZ Trucking, based on the name and USDOT number that shows up on the side of the truck.

The USDOT number then enables you to find a great deal of information about XYZ Trucking by visiting the Federal Motor Carrier Safety Administration ("FMCSA")'s Safer website: <https://safer.fmcsa.dot.gov/>. This website will provide you with a number of resources, including a link to the "Company Snapshot" – a portal that will bring you to webpages containing a wealth of information about XYZ.

Here you will find XYZ's physical address, how many trucks it operates, its safety record in comparison to national averages, FMCSR violations and safety audits, and even insurance policy information. All this information is available without a police report or truck driver, trucking company or insurance adjuster's cooperation – it's just right there on the side of the truck.

#### The letter of representation

Having this information allows you to act quickly to preserve and collect evidence. The next step is to send a letter of representation with a lengthy and thorough letter of preservation to XYZ Trucking and the insurance company listed in its licensing information with the FMCSA. This letter is a formal request to preserve all the documents and things

you will later be asking for in discovery, including the truck and all its electronic devices.

Again, the FMCSRs are your friend. The FMCSRs contain multiple sections on what documents motor carriers must retain in various categories and how long they must keep them in their normal business operations. (49 C.F.R. §§ 382.401, 387.31, 387.7, 390.15, 391.51, 395.8, 396.11, 395.21, 396.3.) So, getting that letter out within these time frames for record retention can help to ensure XYZ preserves documents and/or ensures XYZ Trucking has no excuse if the documents were never kept or were lost or destroyed after receiving your letter. Keep these regulations in mind as you review responses to production requests, which must state whether such documents ever existed or have gone missing for some reason.

Another important early step is sending a Freedom of Information Act ("FOIA") request to the FMCSA. The agency can provide you with valuable information about a carrier and its operations upon a detailed and specific request. It is now even possible to submit such requests in writing by email. But it's important to make this request early and to comply with the agency's requirements since these requests can take a great deal of time to be fulfilled due to the number of requests made and the budget constraints of any governmental agency.

Finally, as you wrap your head around the causes of the accident, and even before you get additional information about the crash from law enforcement or discovery, it's a good idea to look at regulations and safety standards that might be implicated in the factors leading to this crash. What may at first appear to be the fault of your clients may become something entirely different once you've backed up the timeline a bit and consider safety violations that occurred long before the crash.

This exercise also brings us to the second key step in trucking cases –

determining your rules of the road. Understanding the many regulations and safety standards governing trucking companies and their drivers can uncover numerous ways in which XYZ and its driver contributed to this incident long before the collision.

### Determining trucking rules of the road

There are three essential sources for these rules – federal regulations, state laws and industry standards of care. You should consider all of them from the very start of your case.

#### **Federal**

By its own definition, the FMCSA is the “lead federal government agency responsible for regulating and providing safety oversight of commercial motor vehicles (CMVs). FMCSA’s mission is to reduce crashes, injuries, and fatalities involving large trucks and buses” operating in interstate commerce. (<https://www.fmcsa.dot.gov/mission/policy>) The agency regulations, the FMCSRs, are “applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce.” (49 C.F.R. § 390.3(a).) Every motor carrier is required to know and comply with these safety regulations and ensure employees and equipment also comply. (49 C.F.R. § 390.3(e)(1)-(3).) As a consequence, this should be your first source in looking at the rules and safety standards that apply to XYZ and its truck driver.

It should also be remembered that even intrastate carriers (those operating solely within California) are required to follow the FMCSR safety rules. (Cal. Code Regs. tit. 13, §1202.2.) Thus, it can be argued the FMCSRs are authoritative as to any CMV operating in California.

The following is a list representing some of the most important sections of the FMCSRs where you will most likely find the regulations that pertain to your case. Looking for the rules should start here:

379 – Preservation of Records: What they keep and how long

382 – Drug & Alcohol Testing: Pre-hire/ random/post-accident

383 – Commercial Drivers License: Standards and requirements

387 – Financial Responsibility: Insurance requirements

390 – Applicability & Definitions: Important starting point

391 – Driver Qualifications: Documents required

392 – Operating a CMV: Weather/cell phones/emergency stops

393 – Parts & Accessories: Tires, conspicuity equipment, etc.

395 – Hours of service – Fatigue

396 – Inspection, repair & maintenance

In our XYZ scenario, there are numerous regulations governing the CMV as it sat alongside the road with potential violations that could have contributed to the crash, including:

- Conspicuity equipment requirements. There are a series of regulations concerning lights and reflectors required on tractors and trailers to ensure the vehicle is visible in precisely the conditions present in this scenario. (49 C.F.R. §§ 393.11, et seq.) A failure of these would also implicate the many regulations regarding inspections and maintenance. (49 C.F.R. §§ 392.7, 392.33, 396.11, 396.13)

- Rear underride guards. These must conform to a whole series of design and use requirements, and if these are not followed, it is the underride which ultimately can cause the severe injury and death – not the crash itself. (49 C.F.R. § 393.86.)

- Warning or emergency equipment. Presuming the XYZ driver was pulled over due to an emergency, he was required to use emergency-warning devices and ensure the proper functioning of the conspicuity devices before he even began to drive that day. (49 C.F.R. §§ 392.22, 392.33.)

Beyond the truck itself, any number of safety regulations governing the driver’s operation of the truck could explain why he was parked alongside the road at that location. For example:

- Perhaps the driver was fatigued or nearing the end of his or her allotted hours of service, requiring the driver to pull over at an unsafe location. (49 C.F.R. § 395.3.)

- Perhaps something went wrong mechanically with the truck, which should have been noted in the driver’s mandatory pre-trip inspection and addressed before starting the trip. (49 C.F.R. § 396.13.)

- Perhaps the driver was at that location due to weather conditions or was feeling ill – both conditions which should have stopped the driver before pulling over at a dangerous location. (49 C.F.R. §§ 392.3, 392.14, 395.2.)

#### **State Vehicle Code**

California’s Vehicle Code contains any number of operator violations that may pertain to the XYZ driver in this scenario. California Vehicle Code sections pertaining to the stopping and/or parking of vehicles on a shoulder, whether attended or unattended, have been used to establish fault in just this scenario going as far back as 1944. (See *Thomson v. Bayless* (1944) 24 Cal.2d 543, 545; Veh. Code, § 22504.)

However, one should look beyond these statutes to establish authoritative standard of care in California. The California Commercial Driver Handbook includes more specific safety standards applicable to drivers and motor carriers licensed in this state.

Importantly, the California CDL manual is not simply a booklet for training or safety recommendations. Rather, federal regulations require states to “provide an FMCSA pre-approved driver information manual” which includes “the substance of the knowledge and skills that drivers must have.” (49 C.F.R. § 383.131(a).) These regulations are written in mandatory language. These are not opinions or suggestions, but authoritative safety standards which the FMCSA requires the states impose on drivers and motor carriers.

The California manual instructs commercial drivers that they may park alongside the roadway “only if your work

requires it.” The manual further instructs drivers to “do so only briefly.” (See *California Commercial Handbook* § 9.6.2.) The manual even warns commercial drivers to ensure emergency flashers are immediately started and to follow other emergency procedures because other motorists have “crashed into the rear” of trucks parked on shoulders believing those trucks to be moving normally. (*Id.* at § 2.5.2.)

#### **Industry regulations**

Trucking trade groups and large commercial carriers all have safety regulations and recommendations that should apply throughout the trucking industry. One of the most commonly known is the “Smith System” which should become a trusted resource. With respect to the XYZ Trucking scenario here, the trade group American Trucking Associates, published a flyer to warn drivers that trucks on shoulders are targets and drivers should try to get to a safe pull-over area *even in emergencies*.

Some of the nation’s largest carriers, Swift, Werner and Knight Transportation, have written policies prohibiting parking on a shoulder except in extreme emergency. Knight even calls it their “Sitting Duck” policy, and all of them recognize the foreseeability of motorists running into the rear of these vehicles parked on shoulders. Thus, at a minimum, it can be established that industry leaders know about and follow these rules because they understand the safety risks involved.

Having researched the rules of the road and mandatory safety standards that are pertinent to how the XYZ truck ended up alongside the shoulder, you can then ensure you are seeking documents and information through discovery to determine what violations occurred long before the crash that led to the incident. Often, as discovery proceeds, it becomes apparent that the collision was not the result of a momentary lapse but was the result of systemic violations and behaviors which could and should have been prevented.

#### **Key documents in trucking discovery**

Once discovery has begun in the case against XYZ and its driver, there are a number of documents which will be necessary to obtain through discovery. When properly used, these documents illuminate how this incident arose far earlier in time than the seconds before the crash. These are some of the items you must request in discovery and what they might reveal in the XYZ illustration:

- Driver hours of service logs for 30 days to six months prior to the collision. (49 C.F.R. § 395.8.) The FMCSRs now require all drivers to use electronic logs. Thus, there can be no excuse for a log that does not exist because a driver “forgot” to turn in paper logs at the end of a trip. A 30-day window is the minimum amount of time necessary to look at whether XYZ’s driver was fatigued at the time of this incident. A six-month window will show whether the company itself was failing to monitor and control the hours their drivers were being forced to operate. This is an unfortunately common practice with smaller carriers, and if there is any sign of such abuse in the 30-day window, you should fight for a full six months of logs.
- Driver qualification file/all incident reports. (49 C.F.R. § 391.51.) There are a whole host of important records about the driver that could be important. They show the required medical examination/certification which often shows dangerous conditions like sleep apnea or diabetes, which could have contributed to the reasons the truck was parked. They are required to inquire into past employers and the knowledge and skill of the driver, and if they did not, there is every reason to question whether the driver fully understood the dangers of making himself a sitting duck alongside the road.
- Bills of lading and operational documents. These show where and when a load was picked up as well as who may have actually been responsible for this load. Some of this information may not match what the driver or his employer is saying.

- Trip receipts, weight tickets. These are documents a carrier is supposed to retain and can be used to match up with logs to determine if the driver or the company is being entirely forthright about driver hours.

- Pre- and post-inspection reports, as well as maintenance records.

In addition to these documents, every trucking discovery plan should seek broker confirmation documents; satellite or computer app tracking information taken from truck electronic/computer devices (and occasionally driver cellphones); all the information from ECMs, as well as on-board devices that monitor everything from communications to driver attention and fatigue; emails and other communications between the driver, the dispatcher, and brokers or shippers; and you will want to set up an inspection of the tractor and trailer as soon as possible.

All of these documents fall within categories that motor carriers are required to maintain and to preserve for a period of time. In the XYZ example, maintenance and inspection reports will allow you to explore whether a CMV was put on the road in an unsafe condition which inevitably led to the driver needing to park the vehicle on the shoulder. It may also show problems with conspicuity equipment as well as careless driver behavior.

Because commercial interstate trucking is a complicated process with many regulations, it is helpful to use the FMCSA website’s searchable regulation database. It provides not only regulations which can be found with a keyword search, but also guidance from the FMCSA as to the interpretation of the regulations and how drivers should implement them on the road. When documents come in, spend time reviewing what story the documents tell and how the regulations apply to them. This way, once you have the documents and are planning depositions, you will understand how the regulations operate and can ask intelligent, rule-based questions.

## Depositions

Once you have obtained these key documents, you will want to take depositions of the key players within the trucking world. This means the driver, the safety director, the corporate representative of the motor carrier and, potentially, the dispatcher, the hiring and training supervisor, the head of maintenance and any of the representatives of the other entities within the transportation cycle involved in this trip such as a broker or shipper. While the deposition of the truck driver might be a familiar exercise, there are some important concepts to keep in mind with the driver, and more importantly, the company representatives.

Start with a well-crafted notice for the Person Most Knowledgeable (PMK) deposition. Don't forget the company has the burden to produce the correct witness and ensure they can respond. Code of Civil Procedure section 2025.230 states the entity shall "designate and produce... officers, directors, managing agents, employees" who are most qualified to testify as to "information known or reasonably available." Caselaw states "the deponent must make reasonable efforts to educate themselves about the subject matter they have been designated to testify about." (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390.)

"I don't know" is simply not an appropriate response. Attorneys can and should ask about the reasonable efforts made to obtain information and ensure the witness understands their testimony is binding on the company. If the witness does not know a driver's pre-trip inspection requirements, that means the trucking company does not know, which in itself, is a violation of federal safety regulations.

Every deposition of a motor carrier should begin with the acknowledgement that the FMCSRs represent the minimum safety standards that control the carrier and their drivers and equipment with questions that follow along these lines:  
**Q.** So as the Safety Director of XYZ Trucking, you are familiar with the

Federal Motor Carrier Safety Regulations; correct?

[*Practice pointer:* Be sure to have the regulations with you, that you understand them and have them ready to use.]

**A.** Yes, as how they apply to motor carriers and drivers.

**Q.** Okay. What is XYZ's understanding of the purpose of the FMCSR as it pertains to motor carriers and drivers?

**A.** They are the law or the regulations pertaining to the driver and/or the motor carrier.

**Q.** And you would agree FMCSR are mandatory safety standards for motor carriers and drivers of commercial motor vehicles?

**A.** As they pertain to such, yes.

If necessary, you will want to pull out the regulations under 49 C.F.R. § 390.3 to establish that these regulations govern XYZ and its driver. You will want to do the same for the California CDL Manual, using the regulations to establish its authority as necessary.

Then, you can move to the regulations that apply to facts of the case at hand. If, for example, the XYZ truck was along the roadside because of a blown tire with a low-tread depth, you can use the FMCSRs to establish the rules and how they would have applied.

**Q.** You would agree that FMCSR 393.75(c) is the regulation that governs the safe condition of non-steer tires on XYZ's trucks, correct?

**A.** Correct.

**Q.** And a driver is required to check the tires as part of their mandatory pre-trip inspection, fair?

**A.** Yes. Fair.

**Q.** And, according to 393.75(c), the driver is supposed to ensure the non-steer tires all have at least 2/32nds of tread depth, right?

**A.** Yes.

**Q.** And if the tire does not have at least 2/32nds of tread depth, then the truck is supposed to be put out of service, right?

**A.** Yes.

**Q.** So we can definitely agree that the safe and prudent thing for an XYZ driver would be to not take a tractor out on the

roadway with a tire that has below 2/32nds?

**A.** I would agree with that.

**Q.** And if an XYZ driver does do that, that is not being reasonably prudent, is it?

**A.** Right.

A reasonable motor carrier should agree these important safety standards must be followed, and if not, it speaks volumes about the company's concern for safety or lack thereof. If they do agree, you will have managed to make the corporate representative of the defendant your best witness.

## Evidence at trial, *Diaz v. Carcamo*

With all the various regulations and safety standards governing trucking cases, a great number of violations may be uncovered – some critical and others fairly minor. It's important to focus only on those with a direct causal link to the incident – even if this means backing up the timeline a bit. It also means thinking about what evidence will be admissible and why, under current California case law.

You should be prepared to argue on motions in limine as to the authoritative nature of both the FMCSRs and the California Driver's Manual. Defendants will often argue that the CDL Manual is merely a set of instructions for training or suggestions for operations. As mandated in 49 C.F.R. § 383.131(a), the California CDL manual is required by the FMCSRs, reviewed and approved by the FMCSA and governs the knowledge and skills that *must* be utilized by FMCSA licensed trucking companies and commercial drivers in California.

If you are not already, you should become very familiar with *Diaz v. Carcamo* (2011) 51 Cal.4th 1148. In *Diaz*, the California Supreme Court was reviewing what evidence could be admitted at trial in a trucking case where the trucking company conceded course and scope for its driver and argued only the driver's negligence at the moment of the collision was at issue – so none of the extremely damning evidence of what a terrible driver he'd been in the past and the many

violations of FMCSRs by the company in hiring him should be admissible. The Supreme Court agreed.

The *Diaz* court held “...an employer’s admission of vicarious liability for an employee’s negligent driving in the course of employment bars a plaintiff from pursuing a claim for negligent entrustment ...” and the trucking company would not bear any separate percentage of fault under Prop 51, with fault only divided between the plaintiff and the driver. The carrier’s liability was merely coextensive of the driver and thus absorbed into the driver’s slice of the liability pie. Accordingly, the driver’s past and the company’s failure to learn of it was considered prejudicial “character” evidence, since direct claims against the company were effectively eliminated. In other states, this has come to be known as the *McHaffie Rule*, after a case that spawned a line of decisions and legislation nationwide. (*McHaffie v. Bunch* (Mo. 1995) 891 S.W.2d 822.)

Remember that California still has extremely broad discovery parameters and the *Diaz* case only considered what was admissible at trial under a very specific set of circumstances. Nothing in the *Diaz* case should prevent attorneys from delving deep into a motor carrier’s operations. However, the *Diaz* ruling should encourage attorneys to carefully consider what evidence of the trucking company’s conduct is necessary and ultimately helpful in trying the case.

In this respect, *Diaz* did not entirely close the door on all evidence of trucking company acts or omissions at trial, although defendants often argue it did. The court expressly noted the decision did not pertain to punitive damages claims or cases involving a company’s negligence with direct links to the accident. *Diaz* used mechanical issues as one example, but the language clearly indicates this was simply one example and not exhaustive. (*Diaz, supra*, 51 Cal.4th at 1159, fn1.)

Other examples could include failure to train a driver on a critical function that led to this crash or pushing drivers to violate hours-of-service rules that led to a fatigued driver. The key is establishing a direct link between the company’s violation and the crash.

So, in our XYZ illustration, it would be important to determine if the truck was stopped on the shoulder: 1) without proper conspicuity measures because the driver had never been given or trained in the use of emergency signals 2) because the driver was too sleepy to continue due to company-compelled hours-of-service violations; or 3) because the truck had not been properly maintained by the company. Evidence may show noncompliance by the truck driver that implicates a conscious disregard for the safety of others by XYZ – e.g., he continually parked on shoulders despite warnings or prior accidents involving such conduct, and the company never retrained or took any action to stop the conduct.

Thus, while the *Diaz* case can be a source of frustration (especially when too broadly applied), it also helps in the important process of pruning your case for trial. Using too many regulations, especially those which are minor or have no relationship to the cause of the accident, can leave a jury feeling like they are lost in an alphabet soup of regulation and create sympathy for a trucker trying to keep up with too many regulations. Your expert and your evidence should focus on just those violations that have some direct bearing on what led to this incident.

Finally, because some believe the idea that companies are “over-regulated,” it is important to remind jurors that most truckers do comply with the regulations and do so to keep us all safe. By understanding the trucking transport cycle and building lines of discovery around authoritative safety standards, you will be positioned at trial to make the trucking company’s representative your best witness that these regulations can and should be followed because those who violate these rules put everyone at risk.

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