APPLICATION OF FEDERAL MOTOR CARRIER REGULATIONS TO TRUCKING CASES AND RELATED CONSIDERATIONS

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Lawyers pursuing a claim for bodily injuries against a motor carrier should be aware of the unique characteristics of the Federal Motor Carrier Safety Regulations (FMCSR). Many lawyers unfamiliar with the FMSCR will file the usual motor vehicle petition with a set of ordinary negligence allegations claiming only respondeat superior liability for the truck driver. The lawyer who fails to use the FMCSR is limiting their client's ability to establish negligence for many specific regulatory requirements. The requirements are broad and apply not only to the driver but also to the motor carrier. Their regulatory effect places obligations on the carrier to properly hire, qualify, train, monitor, supervise, and direct the driver. In order to properly litigate these claims you must have a working knowledge of the regulations and their applicability to a specific set of facts. In addition to the FMSCR, the regulations commencing at 49 C.F.R. § 383 - 389 are useful regulations that are related to the FMCSR. Lawyers practicing in this area should be familiar with all regulations from 49 C.F.R. § 383 - 399 in order to have a complete understanding of the laws applicable to truck drivers and motor carriers.

I. THE FMCSR SETS THE APPLICABLE STANDARD OF CARE

The FMCSR are located at 49 C.F.R. § 390 *et seq.* Authority for the FMCSRs is found in the Motor Carrier Act, PL 96-296, 1980 S 2245 and PL 96-296, July 1, 1980, 94 Stat 793. The MCA provides that "a motor carrier shall provide safe and adequate service, equipment, and facilities." 49 U.S.C. § 14101(a). It also provides that "A carrier . . . is liable for damages sustained by a person as a result of an act or omissions of that carrier . . . in violation of this part." 49 U.SC. § 14704(a)(2).

The FMCSRs set the applicable standard of care. Claims can be alternatively made. The petition can make allegations of negligence per se for violation of these regulations. An alternative claim should be made that these regulations set a minimum standard of care in regard to motor carriers and their drivers operating in either interstate or intrastate transportation.

Their applicability in Kansas is further codified through K.S.A. § 66-1,129 and K.A.R. § 82-4-3.

The FMCSR requirements establish a minimum standard of care for the evaluation of driver qualifications. The regulations also provide that trucking companies may enforce 'more stringent requirements relating to safety of operation' than the general requirements found in the federal motor carrier safety regulations, 49 C.F.R. § 390.3(d) (2000), and may require driver applicants to provide information in addition to that required to be disclosed by the regulations. 49 C.F.R. § 391.21(c) (2000). *Cassara v. DAC Services, Inc.,* 276 F.3d 1210, 1212, 1213 (C.A. 10 (Okla.) 2002)

"A motor carrier's duty to ensure that a driver is physically qualified is a continuing one." *Yellow Freight System, Inc. v. Amestoy*, 736 F. Supp. 44, 48, 49, 50 (D.

Vt. 1990). "A driver who is disqualified shall not drive a commercial motor vehicle. An employer shall not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a commercial motor vehicle." 49 C.F.R. § 383.51

"Every employer shall be knowledgeable of and comply with all regulations contained in this subchapter which are applicable to that motor carrier's operations. Every driver and employee shall be instructed regarding and shall comply with, all applicable regulations contained in this subchapter." 49 C.F.R. § 390.3(e)(1)&(2).

"Motor carrier means a for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees **responsible for hiring, supervising, training, assigning, or dispatching** of drivers. . ." 49 C.F.R. § 390.5.

"The rules in this part establish minimum qualifications for persons who drive commercial motor vehicles, as for, or on behalf of motor carriers. The rules in this part also establish minimum duties of motor carriers with respect to the qualification of their drivers." 49 C.F.R. § 391.1(a).

These regulations obligate the trucking company to protect the motoring public. The trucking company typically will be in a position of obligatory monitoring of all drivers for compliance with the FMCSR.

The regulations set forth immediately below are the main regulations that pertain to the usual trucking case. Some, but not all, may be relevant to the normal trucking case.

49 C.F.R. § 392.3 requires that no driver shall operate a commercial motor vehicle while the driver’s ability or alertness is so impaired or so likely to become impaired

through fatigue as to make it unsafe for him to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 395.3 requires that no motor carrier shall permit and no driver shall drive more than 11 cumulative hours following 10 consecutive hours off duty. It further requires that no driver shall drive after having been on duty 60 hours in any 7 consecutive days if the motor carrier does not operate every day of the week. If the motor carrier operates every day of the week then no driver shall drive after having been on duty 70 hours in any period of 8 consecutive days. This was last modified under 68 FR 22516 on April 28, 2003. The prior daily hour rule was known as the ten-hour rule and required 8 hours off in contrast to the modified rule allowing 11 hours of driving but requiring ten hours of off duty time before driving again.

49 C.F.R. § 395.8 requires that every driver shall record his duty status in duplicate for each twenty-four hour period of duty and shall be recorded on a specific grid. Failure to complete the record of duty activities, failing to preserve a record or making a false record is a violation of these regulations. All entries relating to driver's duty status must be legible and in the driver's own handwriting. The total mileage driven during the twenty-four hour period shall be recorded on the form containing the driver's duty status record. The driver shall certify to the correctness of the information recorded.

49 C.F.R. § 391.11(a) requires that an employer "not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle under 49 C.F.R. 391.11(a) (See the discussion below on driver qualification for further explanation.)

49 C.F.R. § 391.23 requires that the motor carrier make an inquiry into the driver's driving record during the preceding 3 years and must make a written record with respect to each past employer who was contacted. The record must include the past employer's name and address, the date he/she was contacted, and his/her comments with respect to the driver.

49 C.F.R. § 383.35 requires that a driver must provide his employment history for ten years preceding the date the application is submitted for hire. It must include the names and addresses of the applicant's previous employer, the dates of hire with the previous employers, the reason for leaving, and be certified that it is true and correct. The applicant must be informed that the employer will use this information for investigation of the applicant's work history.

49 C.F.R. § 383.113 requires that a driver possess and demonstrate safe driving skills which includes proper visual search methods, appropriate use of signals, speed control for weather and traffic conditions, and ability to position the motor vehicle correctly when changing lanes or turning.

49 C.F.R. § 383.111 requires that a driver have knowledge of safe operating regulations, including the effects of fatigue, safety systems knowledge, basic knowledge of basic control maneuvers, and basic information on hazard perception and when and how to make emergency maneuvers;

49 C.F.R. § 383.110 requires that a driver shall have the knowledge and skills necessary to operate a commercial motor vehicle safely.

49 C.F.R. § 390.11 establishes a duty that the motor carrier require its driver to observe and follow the safety regulations.

49 C.F.R. § 392.5 requires that no driver shall be under the influence of alcohol, within four hours before going on duty or operating, or having physical control of a commercial motor vehicle.

49 C.F.R. § 392.22 requires that whenever a commercial motor vehicle is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause other than necessary traffic stops, the driver of the stopped commercial motor vehicle shall immediately activate the vehicular hazard warning signal flashers and continue the flashing until the driver places the warning devices required by this regulation into place.

49 C.F.R. § 392.22(b)(2)(iii) requires stopped or parked tractor-trailers to place hazard warning flashers, triangles, fusees, or other warning devices in a business or residential district when street or highway lighting is insufficient to make a commercial motor vehicle clearly discernible at a distance of 500 feet to persons on the highway.

The Department of Transportation writes interpretations of the regulations that can be found in the Federal Register. These interpretations are useful for determining the applicability of a specific regulation to a particular case.

These are but a few of the many regulations that apply to the average trucking case. The applicability of each regulation to a given case will depend upon the facts. In many cases it will be useful to employ an expert with a background in the trucking industry, especially in the area of safety. More often than not, you will be facing a Motion

for Summary Judgment or Motion in Limine seeking an order of the court eliminating these regulatory claims from the case.

II. FATIGUE AND HOURS OF SERVICE LIMITS

Probably the single most significant claim that can be made against drivers and the companies they work for is the claim of driver fatigue. 49 C.F.R. § 392.3 requires that no driver shall operate a commercial motor vehicle while the driver's ability or alertness is so impaired or so likely to become impaired through fatigue as to make it unsafe for him to begin or continue to operate the commercial motor vehicle. 49 C.F.R. § 395.3 has recently been modified. The regulation on maximum hours has been modified from the old 10 hour rule to the new rule that no driver shall drive more than 11 cumulative hours following 10 consecutive hours off duty. This regulation additionally applies to the maximum hours a driver may drive in any 8-day period. It is limited to 70 hours.

Drivers are notorious for violating these regulations by driving in excess of the period allowed by law. Some drivers routinely carry two sets of logbooks. They keep a partially completed logbook to show to law enforcement when stopped and a second set of books with their actual driving time.

In one particular case I tried in Federal Court in Wichita, the driver drove from the border of California/New Mexico into Kansas. His seventy hours expired when the driver approached the town of Texhoma in Oklahoma. Rather than cease driving, the driver falsely logged sleep time and indicated on the log that the last place of destination for the date was Texhoma, Oklahoma. In actuality, the driver continued to drive into Wichita,

Kansas for an additional five hours making the total time approximately seventy-five hours. The false logs become an admissible piece of evidence that can be used to establish fatigue, negligence, wanton conduct, fraud, and a lack of credibility.

Many lawyers who do not routinely handle trucking cases will attempt to settle a case via the usual route, by settlement brochure. A major problem with waiting is that the trucking companies will retain their driver's logs for a period of only six months. Many trucking companies will use an outside vendor to audit their drivers' logs for compliance with the FMSCR maximum hours requirements. In those instances, the actual log will be scanned into the software program and the original log will be destroyed. The programs are often designed to automatically delete the drivers' logs at the expiration of six months. If you have not already filed suit and sought discovery early on following the accident then the necessary evidence to establish fatigue may be lost.

One manner of avoiding prompt filing of suit is to send out a spoliation letter placing the company on notice of your claim and requesting that they not destroy necessary evidence. In that event, the letter should be by certified mail to their Safety Director, V.P. of Risk Management, or some other officer in the company. The better procedure is to institute litigation shortly after the accident.

In addition to the claim of driver fatigue, you can bring allegations that the trucking company's safety protocols and procedures or lack thereof result in the driver being forced to drive excessive hours to meet the company's profit needs.

Most medium sized companies to larger companies utilize satellite tracking services like Qual Comm. Qual Comm allows the trucking company to have satellite

positions on all trucks in their fleet. Many trucking companies will use this to determine if the truck will be late on arrival. Fleet managers will routinely receive computerized notice from the company's satellite tracking system informing them that a certain driver or tractor is going to be hours or days late on reaching their point of destination.

Most companies do not utilize the Qual Comm software, which will warn them when a driver is close to running out of hours for the day or eight-day period. They choose not to use this software because of the increased risk of liability for allowing their drivers to operate in a fatigued state.

By using appropriate written and deposition discovery you can establish in many cases that the trucking company provides financial incentives to fleet managers for keeping delivery on time. These incentives make the fleet managers push the drivers to meet company goals. In turn, the driver's falsify logs in order to meet company deadlines. This blind eye approach to safety provides the basis for claims for wanton and intentional conduct under punitive damage theories. Likewise, it provides the basis for claims of ratification from the failure to act to prevent egregious violation of the maximum hours of services rules.

Establishing fatigue will usually, but not always require the use of an expert to inspect the driver's logs, log audits, shipping manifest documents, trip receipts, gas receipts, bills of lading, and hours of service records.

Discovery should seek any and all documents created in reference to the FMCSR Part 395 including, but not limited to, driver's record of duty status or drivers' daily logs, time worked cards or other time work records or summaries, administrative driver’s record

of duty status or log audits and/or 70/60-hour log audits or summaries along with any records or reports of violations or, any otherwise described documents advising any of the defendant's drivers for hours of service violations.

Discovery should further seek all receipts for any trip expenses or purchases made by the driver or his co-driver during a trip regardless of type of purchase, such as fuel, weighing of vehicles, food, lodging, equipment maintenance, repair or equipment cleaning, special or oversize permits, bridge and/or toll roads, loading or unloading cost, and all other receipts regardless of the type of objects or services purchased. This will include cargo pickup or delivery documents prepared by any of the driver or carrier defendants, transportation brokers, involved shippers or receivers, motor carriers operations/dispatch personnel, or other persons or organizations relative to the cargo transported and the operations of the defendant trucking company.

Once you have the totality of the shipping documents, trip documents, and other necessary documentation the driver's trip and hours can be reconstructed. Mileage can be computed through PC Miler or other similar software programs.

The routine appearance of compliance with the maximum hours rules does not mean that the driver was in compliance. Proving the noncompliance can be tiring and frustrating. Many defense attorneys will object to production of the documentation until a motion to compel has been filed. Written discovery will only rarely turn up all of the necessary documentation. To establish fatigue you must depose necessary witnesses including the driver, Safety Director, fleet supervisors, risk management personnel, log audit personnel, and operations personnel. Often, more can be learned from the direct

fleet supervisors than from the skilled upper management who are adept at testifying in depositions.

Fatigue claims can prove to be an independent source of negligence against the trucking companies. These claims, when established properly, will lead to a case with substantially more value.

III. CHOICE OF FORUM

Your choice of forum may be the single most important decision you make in the case. Many trucking cases occur in rural settings where a jury panel may end up being comprised of western or northern Kansas juries who award much less than in larger venues.

In analyzing jurisdiction and forum choices the out of state trucking company and driver will always provide a basis for Federal diversity jurisdiction. This will normally allow a case to be filed in Wichita, Topeka, or Kansas City in the Federal courts.

When a driver is an out of state driver and is supervised in another state or dispatched from another state this can provide an alternate venue. In one case that occurred near Garden City, Kansas the driver of the motor carrier lived in a Dallas suburb. He was dispatched from Texas. His return destination was Texas. Fleet managers monitored the driver from out of state locations. In that particular case, the court applied Texas substantive law, which eliminated any cap on pain and suffering from Kansas. While this effect may not occur in every case, where the client has substantial damages, consideration to out of state forums should be given.

IV. NEGLIGENT HIRING, QUALIFICATION, TRAINING, SUPERVISION, AND RETENTION

The use of independent tort claims for negligent hiring, qualification, training, supervision, and retention provides a basis for eliminating defense counsel's admission of fault to minimize the more egregious facts in a case. Skilled defense counsel will attempt to eliminate liability considerations by the jury, thereby allowing the jury to focus only on damages. Depending upon the case, it may be more desirous to have liability determined by the jury. By adding these independent tort claims to your case you can strengthen the case and prevent this common defense strategy from succeeding.

The majority of states follow the McHaffie rule, which prevents a plaintiff from bringing claims against the carrier under the doctrine of respondeat superior and then bringing additional independent tort claims for negligent hiring, training, supervising, and retention. The rule in McHaffie is that once an employer admits liability under respondeat superior the plaintiff may not proceed against the employer on a negligent entrustment or negligent hiring or supervision theory. *Marquis v. State Farm,* 265 Kan. 317, 334, 961 P. 2d 1213 (1998); *see McHaffie v. Bunch,* 891 S.W. 2d 822 (Mo. 1995) That rule of law is totally inapplicable to a case applying substantive law from the State of Kansas.

The Kansas Supreme Court analyzed why Kansas does not follow the majority rule in *McHaffie, Id.* Subsequently, the case of *Patterson v. Dahlsten,* 130 F. Supp.2d 1228 (D. Kan. 2000) analyzed *McHaffie* and why Kansas has lead away from this prior rule of law. The *Patterson* court analyzed the change in Kansas's law from the ruling interpreting the *Marquis* case. The *Marquis decision* recognized that the majority of

jurisdictions preclude a plaintiff from proceeding against an employee on a negligent hiring, supervision, or entrustment theory where liability under respondeat superior has been admitted, so as to avoid confusion, wasted judicial resources, and the introduction of inflammatory evidence irrelevant to any contested issue. The court found that other jurisdictions, including Kansas, have found that an admission that the employee was acting within the scope of his or her employment does not preclude an action for both respondeat superior and negligent entrustment or negligent hiring, retention, or supervision. (*See Kansas State Bank & Tr. Co. v. Specialized Transp. Services, Inc.,* 249 Kan. 348, 819 P.2d 587 (1991); *Quinonez v. Andersen,* 144 Ariz. 193, 696 P.2d 1342 (1984); *Lim v. Interstate Sys. Steel Div., Inc.,* 435 N.W.2d 830 (Minn.App.1989); *Clark v. Stewart,* 126 Ohio St. 263, 185 N.E. 71 (1933)).

After evaluating the *Marquis* decision, the *Patterson* court ruled,

> . . . in Kansas, the torts of negligent hiring, retention, or supervision are torts 'distinct from respondeat superior,' as they are 'not derivative of the employee's negligence.' *Id.* at 1225. 'Liability is not imputed, but instead runs directly from the employer to the person injured.' *Id. See also, Miller v. Dillard's Inc.,* 47 F.Supp.2d 1294, 1299 (D.Kan.1999) ('**Even if the employer admits the employee was acting within the scope of his or her employment, the plaintiff may still bring an action for both respondeat superior and negligent entrustment or negligent hiring, retention, or supervision.')** (internal quotation and citation omitted); *Mart v. Dr. Pepper Co.,* 923 F.Supp. 1380, 1389 (D.Kan.1996) (**'Liability for negligent supervision and retention is not vicarious liability under the doctrine of respondeat superior, but is direct liability....**'). Therefore, the Kansas court held that 'State Farm's admission in this case that Jerry Auck was an employee acting within the scope of his employment at the time of the accident does not prohibit the plaintiffs from maintaining an action based on claims of negligent hiring, retention, or supervision. *Id.* The Kansas Supreme Court's decision in *Marquis* clearly negates Dahlsten's argument in support of its motion for summary judgment. Applying Kansas law, the court finds that **Dahlsten's concession of respondeat superior liability does not preclude plaintiff from proceeding on separate**

> **claims against Dahlsten for negligent hiring, training, retention, or supervision.'** 130 F.Supp.2d at 1232, 1233. (footnotes omitted) (emphasis supplied)

The legal analysis above illustrates why counsel should add the separate tort claims in addition to liability under respondeat superior. These direct liability claims will enhance the injured party's legal position.

Negligent hiring claims arise from the motor carrier's failure to conduct adequate background checks. Many motor carriers will use DAC Services. This is a service throughout the trucking industry that has a system for driver background verification. The members of this service report accidents, terminations, and other relevant information to the service. For a fee, the hiring carrier can conduct a quick and inexpensive background check. Some carriers will simply rely on this service rather than conducting any individual inquiry. Due to the high turnover rate of drivers in the trucking industry, which can be over 100% in a year, the reporting companies inform DAC Services if the driver is available for re-hire. When the trucking companies find the notation that a driver is not eligible to be re-hired or only re-hired after a review this should provide a red flag that the driver has a poor history. Failing to conduct further inquiry into the driver's background, or hiring the driver in this circumstance, may provide the basis to the jury for a finding of negligent hiring. The Tenth Circuit Court of Appeals discussed the development of the DAC stating,

> As often is the case, the federal regulation of one commercial activity gave birth to another new business opportunity--in this case, the gathering and reporting of drivers' records and employment histories for a fee. DAC was formed in 1981 to exploit that opportunity, first by building a database of truck driver employment histories. Beginning in 1983, DAC offered employment histories, employee

> driving records, and other reports to its trucking industry members nationwide, augmenting its database with information reported by its participating employers. In its own words, DAC acts as a 'file cabinet,' storing employment histories on terminated drivers for over 2,500 truck lines and private carriers from across the country. Participating member employers can access the DAC database, which currently contains over four million records, to gather key employment history information. DAC advertises that its employment history files comply with the federal regulations and are accepted by the United States Department of Transportation to satisfy Section 391.23(c) of the Federal Motor Carrier Safety Regulations, governing investigations of driver applicants' employment history. *Cassara,* 276 F.3d 1210, 1214 (C.A. 10 (Okla.) 2002)

49 C.F.R. 391.23 requires that the motor carrier make an inquiry into the driver's driving record during the preceding 3 years and must make a written record with respect to each past employer who was contacted. The record must include the past employer's name and address, the date he/she was contacted, and his/her comments with respect to the driver. Trucking carriers often ignore this regulatory requirement. This regulation makes it necessary to always obtain the application of the driver. The driver's applications should be compared to the actual driver qualification file documents verifying that the company actually followed the regulation.

Negligent qualification of the driver can be established in many different manners. 49 C.F.R. § 391.11(a) requires that an employer "not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle under 49 C.F.R. 391.11(a) A driver may not be permitted to drive until he has a doctor's certification indicating that he is physically qualified to drive under this same regulation. Motor carriers are prohibited from permitting any person who is not in compliance with the applicable regulations to drive a commercial motor vehicle under this regulation. To be qualified the driver "must be medically examined and certified . . as

physically qualified to operate a commercial motor vehicle." The qualification rule is "absolute" such that without qualification a driver may not drive. Qualification requires mandatory drug testing and a motor carrier may not allow a driver to drive until the drug testing qualification requirement has been met. The goal of mandatory drug testing is to ensure a drug free transportation environment which in turn will reduce accidents and casualties in motor carrier operations. Urinalysis is a compulsory part of the mandatory qualification procedure. Both employer and employee have an affirmative duty to ensure that only qualified drivers operate commercial motor vehicles.

Carriers may be negligent for improperly hiring and screening a driver. They may be liable for failing to medically qualify and drug test a new driver. In every case where this claim is presented it is necessary to obtain the driver's medical background checks, drug test results, and other relevant driving history information.

Many companies will place the driver on the road before the drug test results are received. This will violate the FMCSR.

Negligent training claims arise from the regulations. 49 C.F.R. § 383.111 requires that a driver have knowledge of safe operating regulations, including the effects of fatigue, safety systems knowledge, basic knowledge of basic control maneuvers, and basic information on hazard perception and when and how to make emergency maneuvers. 49 C.F.R. § 383.110 requires that a driver shall have the knowledge and skills necessary to operate a commercial motor vehicle safely. 49 C.F.R. § 390.11 establishes a duty that the motor carrier require its driver to observe and follow the safety regulations.

Many trucking companies simply hand a Federal Motor Carrier SAFETY Regulations Pocketbook to the driver. They have the driver certify he has read the pocketbook and place him on the road. These regulations are difficult for a lawyer to interpret, much less, the ordinary truck driver with a high school diploma or less. Truck drivers rarely have sufficient training to understand these far reaching regulations on safety.

Written discovery will help counsel obtain the necessary safety protocols, manuals, bulletins, training materials and videotapes available. Many companies will buy training videotapes from sources like J.J. Keller. Others will produce their own videotapes. Accessing and reviewing training videotapes is necessary to establish company violation of its own training protocols on safety. Some carriers will produce independent training tapes.

Independently produced training videotapes can almost always be used against the carrier to establish that they train the drivers in a completely different safety protocol than what the company actually implements. Counsel should take the time to review each and every minute of training videotapes to look for evidence contradicting management testimony. Without a doubt, the Safety Director, Director of Operations, and Risk Management personnel will testify on behalf of the company that the company followed proper safety protocols. Many of these executives can be proven to be lacking in credibility by using training materials produced by the company during cross examination.

Negligent supervision can be established by proving that the carrier is monitoring and supervising their drivers' daily activities while ignoring the drivers' failure to comply with the FMCSR. (See discussion above on fatigue) Drivers routinely call in to determine where their next delivery will be. Few dispatchers bother to inquire whether the driver has sufficient hours left to make the delivery without violating the maximum hours rules. This failure to inquire is an act of negligence that can convince the jury a carrier is lacking in safety procedures that would have helped prevent an accident.

Negligent supervision includes not only the duty to supervise but also includes the duty to control persons with whom the defendant has a special relationship including the defendant's employees, or persons with dangerous propensities. *See Nero v. Kansas State University*, 253 Kan. 567, 861 P.2d 768 (1993); *C.J.W. v. State*, 253 Kan. 1, 853 P.2d 4 (1993); *Anspach v. Tomkins Industries, Inc.*, 817 F.Supp. 1499, 1519-20 (D.Kan.1993); *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.,* 249 Kan. 348, 819 P.2d 587 (1991)

Negligent retention relates to the prior bad acts and omissions of the driver. The usual claim will arise where a driver has had more than one accident. The carriers, deeply in need of drivers, will continue to use bad drivers in order to meet delivery deadlines. This claim may be established by developing evidence that a motor carrier has knowledge of or ignores its driver repeatedly violating the maximum hours rules. In some instances the motor carrier may learn that a driver has refused a drug test. If so, placing the driver back onto the road may be sufficient to establish that the driver was negligently

retained. These are but a few of the myriad factual scenarios that can support a claim for negligent retention.

V. USE OF EXPERTS

Expert testimony is usually necessary in trucking litigation. Trucking experts come in a variety of types. The most useful trucking experts have prior trucking industry experience as a driver, dispatcher, safety director or all of the above. The expert will analyze the facts in the case to determine compliance with the FMCSR. The more knowledgeable experts will help aid in the creation of discovery documents to analyze the violations.

The PC Miler or Household Movers Guide are two programs that many experts use to recreate the itinerary of the driver. A map can be created by the expert to explain to the jury what route the driver took to arrive at the accident location. The expert can pinpoint the appropriate time to travel between the point of origin and destination point. Many truck drivers will travel an extraordinary amount of miles in a day. Their logs will show on the surface that they are compliant with the FMCSR. The expert can be useful to explain how the driver, if following the proper speed limits and taking required breaks, could not have driven the distance in the time stated. This, in turn, will lead to the conclusion that the logs are fabricated in an effort to comply with the maximum hours rules.

The expert will be useful in accessing Department of Transportation information on the trucking company. The expert can explain how the safety record of the company is higher than the statistical averages of all carriers nationwide. Analysis of the safety record

can help establish a claim that the trucking company has a company wide policy of ignoring safety protocols.

When seeking punitive damages, it is the expert who can provide the necessary opinion of intentional, wanton, fraudulent, or malicious acts and omissions. Without the expert it is likely that the punitive damage claims will not survive summary judgment.

A prior driver or safety director for a trucking company can provide a birds eye view of why the trucking company violated the FMCSR, its own safety protocols, and/or acted recklessly.

Great care should be taken in picking your expert. The experts are expensive and can cost tens of thousands of dollars in additional litigation expense. Very few local trucking experts exist. The best experts will usually be from distant states. Before hiring your expert, you should satisfy yourself that he or she is knowledgeable about the FMCSR and D.O.T. compliance.

VI. ALTER-EGO

You should always consider an alter ego claim in trucking litigation. A substantial number of large carriers set up smaller corporate shells for liability protection. These parent companies will set up a lock box system of revenue. The smaller corporations will transfer all gross income from the smaller trucking company into a central bank account. The larger parent company will pay all expenses and salaries of the smaller company through this lock box system. In effect, the parent retains total control over the smaller trucking company.

When suit is filed against the smaller company the profits are in a much different range than the total gross profit of the entire group of companies. The alter ego claim is beneficial whenever you plan to seek punitive damages. It can help increase the gross profit of the company in order to meet Kansas caps on punitive damages.

The Kansas Supreme Court applied the alter ego doctrine to parent corporations and their subsidiaries in two recent opinions. *See Doughty v. CSX Trasp.Inc.,* 905 P. 2d 106, 109-111 (1995); *Dean Operations v. One Seventy Assoc.,* 896 P.2d 1012, 1016-1018 (1995) These authorities set out a ten factor test, with the ultimate consideration, being "whether, from all of the facts and circumstances, it is apparent that the relationship between the parent and subsidiary is so intimate, the parent's control over the subsidiary is so dominating, and the business and the assets of the two are so mingled that recognition of the subsidiary as a distinct entity would result in an injustice to third parties." *Doughty,* 905 P.2d at 111.

In the event that punitive damages are not an issue then presentation of alter ego claims should be minimized depending upon the facts of the particular case. If the facts are egregious enough, and a shell corporation exists, this avenue is certainly worth pursuing. It will lead to the probable filing of a summary judgment motion by defense counsel and additional work by counsel. Therefore, the risks and benefits associated with this type of claim should be discussed with your client.