

A WORD FROM THE PRACTICE CHAIR

Welcome to our first COVID-era Trucking Newsletter. Although we've been busy handling a variety of matters for all of you in a number of different jurisdictions, we felt it was time for us to touch base again to address some emerging issues in trucking litigation and update you on our trucking practice.

We have three phenomenal articles written by some of our rising trucking litigators in this issue. [Devin Taseff](#), in our Peoria, Illinois office, addresses collision avoidance technology and its impact on the trucking industry and litigation. From our Edwardsville, Illinois office, [Nate Henderson](#) addresses the evolving issue of personal conveyance and log fraud with ELDs. And lastly, [Joe Rust](#) of our Chicago office addresses the impact of the pandemic upon juries in trucking litigation.

Joining Heyl Royster in April 2020, we are pleased to welcome [Larry Hall](#) working out of our St. Louis office. For those of you who have worked with Larry, his passion and dedication in representing the trucking industry are unmatched. Awarded the Missouri Trucking Association's Allied Member of the Year in 2021, Larry is licensed in both Missouri and Illinois.

We also need to highlight a recent victory in Federal Court where we obtained summary judgment for a freight broker ([Crouch v. Taylor Logistics Company, LLC, et al.](#)), ___ F.Supp. 3d ___, 2021 WL 4355403 (2022). [Doug Heise](#) of our Edwardsville office represented the broker in a double fatality. We argued that the Federal Aviation Administration Authorization Act preempted state law claims. We also argued that our client did not have any direction or control over the truck driver. The District Court denied the preemption argument based upon the Ninth Circuit's decision in *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (2020). However, the District Court entered summary judgment on the basis that there was no evidence of any control to create an agency relationship between our client and the truck driver. There was also an issue of a double brokered load. Our client retained a DOT-approved motor carrier who then, unbeknownst to our client, retained the driver as an independent contractor. Plaintiffs attempted to argue that our client failed to prohibit the load from being double

brokered. Although there was an agreement between our client and the motor carrier it retained, there was nothing that required our client to take action to prohibit the double brokered load preemptively. This was an excellent victory. Plaintiffs had settled with the driver and the motor carrier retained by our client prior to the court granting our client summary judgment right before trial.

On July 1, 2021, Illinois enacted prejudgment interest at a rate of 6% per annum in personal injury actions. The statute applies to all damages except punitive damages, sanctions, statutory attorney's fees, and statutory costs. The key provision requires defendants to make their best-written settlement offer within 12 months after the later of the effective date of the Act (7/1/21) or the filing of the action. If the judgment is equal to or less than the amount of the highest written settlement offer provided within the above time frame, no prejudgment interest shall be added to the amount of the judgment. Accordingly, we stress the importance of properly evaluating cases early on and providing the best (or most reasonable) settlement offer in writing to plaintiff's counsel. For those cases that were pending on July 1, 2021, the one-year expires on July 1, 2022. With the July 1 deadline approaching, this is an issue that you want to address with your Illinois counsel to make sure that you make your best-written settlement offer on a timely basis.

We also need to note the November [2021 ATRI study](#) of small verdicts and settlements in the trucking industry. Among the many findings, the study found settlements were approximately 38% larger than verdicts and more likely to occur when a case is venued in State Court. We all prefer to remove a case to Federal Court whenever possible. The study suggests that taking a smaller case to trial in State Court will potentially yield greater benefit than attempting to settle in State Court. Obviously, this issue needs to be assessed on a case-by-case basis. Litigation payments were highest, not surprisingly, in those cases involving poor driver history, phone use, HOS violations, and fatigue/asleep at the wheel. Lastly, the study found that insurance premiums rose between 2018-2020 despite motor carriers paying less in annual out-of-pocket incident costs, having fewer incidents, and implementing three new safety technologies on average. This dynamic is without question the ongoing pressure upon the industry in the litigation arena.

As always, we extend our utmost gratitude to you for placing your trust and confidence in us. We continue to attract and add talented trucking litigators to our practice. We are pleased to convey that your trust and confidence have led us to have professional existence in eight states, including Arkansas, Illinois, Indiana, Iowa, Louisiana, Mississippi, Missouri, and Tennessee. Many of our relationships with you run many years, while others are in their early stages. Regardless, we place great value in each client relationship and work hard to represent your interests zealously.



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**NEW TECH, NEW PARTIES?
 THE EFFECT OF COLLISION
 AVOIDANCE TECHNOLOGY
 ON TRUCKING LITIGATION**

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Introduction

In a world in which our reliance on technology is increasing, the trucking industry is no stranger to adopting cutting-edge technology, whether to get ahead in the marketplace, further safety and reduce accidents, or comply with constantly evolving regulations. In fact, as of 2015, fifteen percent of large carriers (>100 tractors) have already implemented forward collision warning (FCW) and/or automatic braking (AB) systems into their respective fleets, despite there being no current regulatory requirement to do so.¹ In particular, Volvo, Mack, Kenworth, Peterbilt, and Navistar all have made such systems standard on some trucks, and fleets such as United Parcel Service and Schneider have been utilizing them for years.² But many in the industry believe it will take a federal mandate to propel these systems beyond a solid foothold in major motor carriers to the larger pool of commercial motor vehicles (“CMVs”) operating nationwide.³ Accordingly, with the emergence of collision avoidance technologies, both in the personal and commercial realms, it appears that a federal mandate to include such technologies in new commercial fleets is inevitable.⁴

Similar to all safety features implemented in the trucking industry, the obvious goal with collision avoidance

technologies is to reduce, mitigate, or outright prevent collisions on the roadway. At the core of this preventative endeavor is to limit the effects of driver error: one National Highway Traffic Safety Administration (NHTSA) study found that roughly 94 percent of accidents could be tied directly to driver behavior, rather than environmental conditions or vehicle malfunctions.⁵ Per a recent study conducted by the Insurance Institute for Highway Safety (IIHS), trucks equipped with forward collision warning had 22 percent fewer collisions, and trucks with automatic braking had 12 percent fewer collisions than those without either technology, including a reduction in rear-end collisions by 40 percent.⁶

Despite the proven effectiveness of collision avoidance systems, no technology, especially in the early-adoptive stages, is perfect. As regulators and carriers continue to utilize the same to limit the effects of driver behavior, there have, and will undoubtedly continue to be, issues with performance giving rise to potential product liability litigation. As collision avoidance technology becomes a standard by which to reduce driver error, the next question becomes: who do we blame if (and more likely, when) such technology fails to perform as represented? Alternatively, who do we blame if the carrier did not utilize such technology in the first place? This article attempts to answer these very questions.

From Emerging Technology To Standard Issue

At approximately 12:55 a.m. on Saturday, June 7, 2014, a black 2012 Mercedes-Benz limousine van was traveling north in the center lane of the New Jersey Turnpike near Cranbury, New Jersey. The limo van was transporting five passengers in its passenger compartment. The limo van and surrounding traffic had slowed due to traffic congestion associated with construction work.⁷

At the same time, a semi-tractor trailer was traveling in the center lane and rear-ended the limo van at approximately 65 miles per hour. Of the five passengers, one was pronounced dead at the scene, and the remaining four passengers sustained serious and life-threatening injuries.⁸

The National Traffic Safety Board (NTSB) investigated this accident and discussed the Bendix Wingman ACB system installed in the tractor. Said system consists of an automatic braking feature when cruise control is in use. When cruise control is not in use, the Wingman ACB system could issue radar alerts to the driver as to following distance, a stationary object in the roadway, and/or an imminent impact.⁹

Although the NTSB concluded that the accident would have occurred even if the ACB system were active, it also concluded that, based on the data recorded by the ACB system, it did not provide a pre-crash alert to the

driver. Further, the NTSB noted that the Wingman ACB system's limited capability to store data constrains both the company's ability to analyze and enhance system performance and investigators' ability to reconstruct events accurately.¹⁰

Ultimately, the NTSB concluded that this accident highlighted the need for reliable collision avoidance systems on heavy trucks with performance parameters different from those for lighter vehicles. As a result, the NTSB recommended the following actions:

- Complete rulemaking on adaptive cruise control and collision warning system standards for new CMVs, including but not limited to detection distance, alert timing, and human factors guidelines;
- Require that all new CMVs be equipped with a collision warning system;
- Determine whether equipping CMVs with collision warning systems with active braking and electronic stability control systems will reduce CMV accidents and, if so, require their use also.

Over the next four years, Congressional progress on implementing the NTSB's recommendations was nearly nonexistent. The public and private sectors, however, conducted extensive research to test the effectiveness of such technologies on traffic safety,¹¹ concluding that forward-collision avoidance and mitigation systems have the potential to save lives by preventing or reducing the severity of rear-end crashes."¹²

On June 11, 2021, the NHTSA announced a new proposal that would set standards and require CMVs to be equipped with automatic emergency braking systems.¹³ Currently, it is estimated that upwards of forty percent of all carriers utilize at least some form of collision avoidance technologies including but not limited to, blind-spot monitoring, lane-departure warning, smart cruise control, automatic emergency braking systems, and/or electronic stability control.¹⁴

If such technology becomes an industry standard, carriers will face immense pressure to implement their fleets with such systems quickly and for designers, developers, manufacturers, and retailers to ensure that said systems perform as represented. In time, trucking litigation will change dramatically, such that nearly every major accident involving a CMV will inevitably involve data extracted from collision avoidance system modules, likely leading not only to new respondents in discovery but also new parties in litigation. Designers, developers, manufacturers, and retailers alike will be called to answer for the performance of said technologies in each case, and carriers will be called to answer for their decisions on implementing such technologies in their respective fleets.

Pointing The Finger At The Product, Not The Driver

While collision avoidance technology has been proven effective in reducing accidents, to the point at which courts have found manufacturers liable in negligence for failing to equip such systems in the first place,¹⁵ there have been a myriad of past and ongoing concerns with the technology. The automatic braking systems can act on a false positive, with the computer applying the brakes in the absence of a road threat.¹⁶ In 2015, the NHTSA opened an investigation into 95,000 Jeep Grand Cherokees following reports that the SUV was braking for no reason.¹⁷ Similarly, Nissan's Automatic Emergency Braking (AEB) system has reportedly malfunctioned, and vehicles have stopped in unexpected situations, due to broken sensor, a misaligned radar and software defects.¹⁸ In the last year, Tesla consumer complaints alleging that its semi-autonomous driving technology falsely alerts to various off-road objects such as a full moon in a low night sky, LED billboards, and perhaps most puzzling, a Burger King sign.¹⁹

While legal precedent involving litigation against such parties is limited at this time, the Ninth Circuit's ruling in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 81 Fed.R.Serv.3d 489 (2012) presents a case well before its time. *Mazza* involved Honda's Collision Mitigation Braking System (CMBS). Honda represented that the CMBS detected the proximity of other vehicles, assessed the equipped car's speed, and implemented a three-stage process of warning, braking, and stopping to minimize the damage from rear-end collisions.

In December 2007, Plaintiffs filed a class action complaint against American Honda Motor Co., Inc. alleging that Honda misrepresented and concealed material information in connection with the marketing and sale of Acura RL vehicles equipped with the CMBS.²⁰ The Ninth Circuit later upheld that the Plaintiffs had standing to sue Honda for alleged deceptive conduct with respect to its CMBS collision avoidance technology.²¹ Post-*Mazza*, federal courts have legitimized product liability claims not only on failure to warn theories, but also product negligence claims for failing to include collision avoidance technologies where there is ample economic opportunity to do so. For example, in 2014, the Northern District of Texas denied Volvo summary judgement on Plaintiff's claims of design defect, negligence, and gross negligence, where Volvo equipped its European fleets with collision avoidance technology, but failed to do so in its American fleets, including its truck involved in a preventable rear-end collision with Plaintiffs.²²

More recently, the Western District of Pennsylvania denied a Motion to Dismiss where Plaintiff asserted claims of strict liability and product negligence against Navistar for failing to equip its truck with safety features, includ-

ing collision avoidance systems.²³ With a potential industry mandate looming, instructive case law will only continue to develop nationwide.

Conclusion

Even in the absence of formal regulation, there is increasing pressure for carriers to adapt their fleets with collision avoidance technologies and for designers, developers, manufacturers, and retailers to ensure that their products perform as represented. This will only continue should the federal government mandate said technologies in commercial motor vehicles, as they have recently indicated. As collision avoidance technology becomes the new safety standard in commercial motor vehicles, emerging legal precedent suggests potential product liability litigation in trucking accidents involving these new parties. Or, at the very least, where collision avoidance technology is at issue (or a lack thereof), said parties will inevitably be involved in the discovery process.

Accordingly, the author makes the following recommendations to carriers from now on:

- If economically feasible, consider outfitting some or all trucks with at least some form of forward collision avoidance technology, as it is likely to be federally mandated in the near future;
- Prior to purchasing a particular avoidance technology, scrutinize the firm’s representations designing, developing, manufacturing, and/or retailing said technology and compare them with publicly available performance data.
- KNOW YOUR TECHNOLOGY INSIDE AND OUT, ESPECIALLY ITS LIMITATIONS

¹ Mike Monticello, Reducing the Risk of Big Rigs, <https://www.consumerreports.org/car-safety/reducing-the-risks-of-big-rigs/>

² Aaron Marsh, Collision Mitigation: Require it or Wait?, <https://www.fleetowner.com/technology/article/21701782/collision-mitigation-require-it-or-wait>

³ *Id.*

⁴ Eric Miller, US to Seek Automated Braking Requirement for Heavy Trucks, <https://www.ttnews.com/articles/us-seek-automated-braking-requirement-heavy-trucks>

⁵ National Highway Traffic Safety Administration, Critical Reasons for Crashes Investigated in the National Motor Vehicle Crash Causation Survey, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812115>

⁶ Alan Adler, IIHS: Truck safety equipment could cut 40% of rear-end collisions <https://www.freightwaves.com/news/iihs-truck-safety-equipment-could-cut-40-of-rear-end-collisions>

⁷ NTSB Highway Accident Report No. 15/02 at 1.

⁸ *Id.* at 1-2.

⁹ *Id.* at 43-45.

¹⁰ *Id.* at 44.

¹¹ See *supra* Note 4.

¹² *Id.*

¹³ See *supra* Note 4.

¹⁴ Pitman, Kalkhoff, Sicula, & Dentice, How Can Truck Companies Make Their Vehicles Safer?, <https://www.ttnews.com/articles/us-seek-automated-braking-requirement-heavy-trucks>

¹⁵ *Greene v. Toyota Motor Corp.*, No. 3:11-CV-207-N, 2014 WL 12575717 (N.D. Tex. June 13, 2014).

¹⁶ The Lyon Firm, Collision Avoidance System Defects, <https://www.thelyonfirm.com/auto-defects/collision-avoidance-malfunction/>

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Levin, Tim, Tesla’s Full Self-Driving tech keeps getting fooled by the moon, billboards, and Burger King signs, <https://www.businessinsider.com/tesla-fsd-full-self-driving-traffic-light-fooled-moon-video-2021-7>

²⁰ *Id.* at 587.

²¹ *Id.* at 595.

²² *Greene v. Toyota Motor Corp.*, No. 3:11-CV-207-N, 2014 WL 12575717 (N.D. Tex. June 13, 2014).

²³ *Shimmel v. Navistar Int’l Corp.*, 440 F. Supp. 3d 438, 447 (W.D. Penn. Feb. 24, 2020).

THE WHEN, WHERE, AND WHY OF PERSONAL CONVEYANCE

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We are all familiar with the changing climate in trucking. The industry is under attack by Plaintiffs’ attorneys attempting to elevate what was once treated as simple auto accidents into high-dollar lawsuits. Gone are the days when a collision involving a commercial motor vehicle (CMV) became a case of negligence against the driver. Now, Plaintiffs’ attorneys are finding larger verdicts and settlements by aiming the case not toward the driver alone but also against the motor carrier. This tactic is often accomplished by painting a picture of a negligent company that forgoes safety for the sake of profit. While there are many tactics used, commonly, these attorneys look for violations of the limits imposed on a driver’s hours-of-service. If ignored or undiscovered by the motor carrier, these violations are used as evidence of negligence against the company.

For many years, CMV drivers used paper logs to track hours-of-service. Inaccurate recording of hours-of-service

in paper logs or log fraud was common. On December 15, 2015, the Federal Motor Carrier Safety Administration (FMCSA) made electronic logging devices (ELDs) mandatory for non-exempt commercial drivers. As stated by the FMCSA, one main goal was to “improve roadway safety by employing technology to strengthen commercial truck and bus drivers’ compliance with hour-of-service regulations that prevent fatigue.”¹ In other words, the FMCSA believed that electronic tracking of a driver’s hours-of-service would be more accurate and, therefore, safer. And based on data collected by the FMCSA, the requirement of ELDs did reduce the number of hours-of-service violations. In November 2017, before implementing the ELD mandate, up to 1.16 percent of driver inspections had at least one hour-of-service violation. In January 2018, the HOS violation ratio dropped from 1.16 percent to 0.83 percent. In May 2018, after full enforcement of the ELD mandate, it dropped even further to just 0.64 percent.²

But this data may be partially misleading. J.J. Keller & Associates, Inc. gathered information from its customers’ use of ELDs from January to June 2019. Their research revealed an interesting trend. Fourteen (14) percent of drivers used personal conveyance in January of that year. By the end of June, that number increased to twenty-one (21) percent.³

This trend came on the heels of the FMCSA’s clarification of its rules regarding the use of personal conveyance, published on May 31, 2018, that added more flexibility for drivers. Clearly, commercial drivers were figuring out how to use personal conveyance to their benefit, allowing them to avoid hours-of-service violations while off-duty. The negative implication of this trend is the possible misuse of personal conveyance by CMV drivers, intentionally or otherwise. Such misuse could mean fines and out-of-service time for the drivers, fines and lowered safety ratings for the carriers, and the potential for evidence of damaging safety violations to be used by Plaintiffs’ attorneys (i.e., log fraud). Drivers and motor carriers must first understand personal conveyance to avoid these consequences.

What is Personal Conveyance?

The FMCSA defines “personal conveyance” as the “movement of a commercial motor vehicle for personal use *when the driver is off duty.*”⁴ A driver may record time operating a CMV for personal conveyance only when the driver is relieved from work and all responsibility for performing work by the motor carrier.⁵

The FMCSA does not require motor carriers to authorize personal conveyance in its vehicles. Nor does it require that motor carriers have a written policy concerning personal conveyance. Instead, the FMCSA has elected to allow each motor carrier to determine its own policy regarding personal conveyance. In fact, the FMCSA has not even

established maximum amounts of distance or time during which personal conveyance can be registered. Safety officials employ a reasonableness standard to determine whether the use of personal conveyance by a driver was reasonable, evaluating data from ELDs, mapping software, driver interviews, and other documents. This subjective standard can be somewhat controlled by implementing distance or time limitations by the motor carriers themselves, as long as their policies comply with FMCSA regulations.

When is Personal Conveyance Allowed?

The following are examples of appropriate uses of a CMV while off-duty for personal conveyance include, but are not limited to:⁶

1. Time spent traveling from a driver’s lodging (such as a motel or truck stop) to restaurants and entertainment facilities.
2. Commuting between the driver’s terminal and his or her residence, between trailer-drop lots and the driver’s residence, and between work sites and his or her residence. In these scenarios, the commuting distance combined with the release from work and start to work times must allow the driver enough time to obtain the required restorative rest to ensure the driver is not fatigued.
3. Time spent traveling to a nearby, reasonable, safe location to obtain required rest after loading or unloading. The time driving under personal conveyance must allow the driver adequate time to obtain the required rest in accordance with minimum off-duty periods under 49 CFR 395.3(a)(1) (property-carrying vehicles) or 395.5(a) (passenger-carrying vehicles) before returning to on-duty driving, and the resting location must be the first such location reasonably available.
4. Moving a CMV at the request of a safety official during the driver’s off-duty time.
5. Time spent traveling in a motorcoach without passengers to lodging (such as motel or truck stop), or to restaurants and entertainment facilities and back to the lodging. In this scenario, the driver of the motorcoach can claim personal conveyance provided the driver is off duty. Notably, other off-duty drivers may be on board the vehicle as they are not considered passengers.
6. Time spent transporting personal property while off-duty.
7. Authorized use of a CMV to travel home after working at an offsite location.

It is important to note that the guidelines issued by the FMCSA do not require drivers to return to their last on-duty location following the use of personal conveyance. Also,

if a driver is operating under personal conveyance and is stopped and inspected, he or she must change their status to “on-duty, not driving” during the inspection. Once complete, they can again operate under personal conveyance.

When Is Personal Conveyance Not Allowed?

In general, any use of a CMV that benefits the business for which it is being operated should not be considered personal conveyance. The following are examples of when the use of a CMV **would not qualify** as personal conveyance include:⁷

1. The movement of a CMV in order to enhance the operational readiness of a motor carrier. For example, bypassing available resting locations in order to get closer to the next loading or unloading point or other scheduled motor carrier destination.
2. After delivering a towed unit and the towing unit no longer meets the definition of a CMV, the driver returns to the point of origin, under the direction of the motor carrier, to pick up another unit to be towed.
3. Continuation of a CMV trip in interstate commerce in order to fulfill a business purpose, including bobtailing or operating with an empty trailer in order to retrieve another load or repositioning a CMV (tractor or trailer) at the direction of the motor carrier.
4. Driving a passenger carrying CMV while passenger(s) are on board. Off-duty drivers are not considered passengers when traveling to a common destination of their own choice within the scope of this guidance.
5. Transporting a CMV to a facility to have vehicle maintenance performed.
6. Driving to a location to obtain required rest after being placed out of service for exceeding the maximum periods permitted under part 395, unless so directed by an enforcement officer at the scene.
7. Traveling to a motor carrier’s terminal after loading or unloading from a shipper or a receiver.
8. Operating a motorcoach when luggage is stowed, the passengers have disembarked, and the driver has been directed to deliver the luggage.

As stated above, even when the reason for personal conveyance is allowed and justified, the method by which it is used must still be reasonable. For example, it would not be considered reasonable for a driver to travel 100

miles towards his or her final destination to find lodging while passing other appropriate locations.

What Are Motor Carriers To Do?

Motor carriers must be proactive when it comes to personal conveyance. If a motor carrier has decided to allow personal conveyance, it must develop a firm policy for its use. The policy should restrict the use of personal conveyance to times when drivers are off duty. Personal conveyance should only be allowed for the personal needs of the drivers. It must be made clear to drivers that no personal conveyance should ever benefit the motor carrier unless the conveyance is made at the direction or order of a shipper, receiver, or safety official, and the driver is already out of hours, the movement is limited to the nearest safe location, and the driver on the ELD immediately documents the incident. Motor carriers should also consider limiting the amount of time or distance a driver can operate under personal conveyance each day and/or per use of personal conveyance.

But the creation of a policy is not enough. Enforcement of the proper use of personal conveyance is critical. A motor carrier should audit its drivers’ use of personal conveyance. Any violations of the company’s policies must be addressed with the driver and cannot be ignored. Companies should create a paper trail of education, enforcement, discipline, and reeducation. Failure to take these steps while allowing personal conveyance can potentially inject issues into a case that can create the threat of a nuclear verdict.

¹Electronic Logging Devices to be Required Across Commercial Truck and Bus Industries. U.S. Department of Transportation, 10 Dec. 2015.

²Electronic Logging Devices: Improving Safety Through Technology. U.S. Department of Transportation Federal Motor Carrier Safety Administration.

³Bray, Tom. “Use of ‘Personal Conveyance’ and ‘Yard Move’ Increasing Significantly.” *JJKeller*, 2 Dec. 2019, www.jjkellerlibrary.com/news-article/use-of-personal-conveyance-and-yard-move-increasing-significantly.

⁴FMCSA (2018). *Regulatory Guidance: Personal Conveyance*. www.fmcsa.dot.gov/hours-service/elds/regulatory-guidance-personal-conveyance-0.

⁵FMCSA (2019). *Personal Conveyance*. https://www.fmcsa.dot.gov/regulations/hours-service/personal-conveyance.

⁶“Regulatory Guidance Concerning the Use of a Commercial Motor Vehicle for Personal Conveyance.” *FMCSA*, Federal Motor Carrier Safety Administration, 31 May 2018, www.fmcsa.dot.gov/regulations/regulatory-guidance-concerning-use-commercial-motor.

7“Regulatory Guidance Concerning the Use of a Commercial Motor Vehicle for Personal Conveyance.” FMCSA, Federal Motor Carrier Safety Administration, 31 May 2018, www.fmcsa.dot.gov/regulations/regulatory-guidance-concerning-use-commercial-motor.

THE IMPACT OF COVID-19 ON JURIES IN TRUCKING LITIGATION

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There is no doubt COVID-19 has substantially affected all aspects of our lives. Whether it be how we work, shop, or socialize, while we all have been affected by COVID-19, each of us understandably experienced the pandemic differently. As attorneys, we continue to monitor whether the impact of COVID-19 has carried over to juries in civil trials. The trucking industry is one that can be poised to take advantage of the potential changes in jurors' attitudes and opinions.

Prior to the pandemic, jury verdicts for crashes involving a semi-truck were skyrocketing. According to data analyzed by the *American Transportation Research Institute*, jury awards over the last decade have increased nearly 1000%.¹ Their data looking at a period from 2010-2018 found the average verdict size for a lawsuit awarding above \$1 million rose from \$2.3 million to \$22.3 million. Unfortunately, one-off nuclear verdicts against truckers may never go away, and over the past year, we have still seen several massive awards.

In 2020, a Florida jury awarded an injured motorcyclist \$411 million in damages. The case derives from a 2018 accident. Severe weather caused visibility issues for motorists. When a semi-truck attempted to avoid an accident, he jackknifed across the road that led to a 45-car pile-up. The jury trial was conducted virtually over Zoom, with jurors doling out the massive award from the confines of their own homes.

In Illinois, a woman who was rear-ended by a truck five years ago was awarded \$43.5 million in damages in the first in-person civil trial held in Cook County since the Covid-19 pandemic began.

A Texas jury awarded more than \$352 million to the family of a former United Airlines employee who was paralyzed when a van driver struck him from behind on an airport tarmac. In September 2019, a 50-year-old man had on a bright yellow vest and was holding bright orange wands while working his wing walker job at George Bush Intercontinental Airport in Houston. A driver for Allied Aviation Fueling Company of Houston struck the plaintiff from behind with his van, which ultimately left him paralyzed from the waist down. Following a two-week trial and two days of deliberations, the jury awarded the family \$352.7

million, one of the largest awards ever handed down in Harris County, Texas.

In an even more frightening verdict, another Florida jury awarded the family of an 18-year-old killed in a wreck with two trucking companies a whopping \$1 billion. The case derived from an accident in 2017, wherein an 18-year-old college student was sitting in his car waiting for a separate wreck to be cleared on Interstate 95 in Florida, when a rig slammed into a parked line of cars behind the initial wreck, pancaking the decedent's sedan. He was killed instantly. While the \$1 billion verdict was mostly symbolic as the main trucking company-defendant is no longer in business and the family will likely never collect \$1 billion, it still presents an alarming warning for truckers and how far a jury will go to punish the trucking industry.

A Titus County, Texas jury awarded \$730 million following the death of a 73-year-old great-grandmother in November 2021. The accident involved an oversized cargo truck hauling a propeller for a U.S. Navy nuclear submarine. The 73-year-old great-grandmother was traveling in a portion of the opposite lane when the impact occurred on a narrow bridge. The jury awarded \$480 million in compensatory damages for the surviving family members and \$250 million in punitive damages.

Since the pandemic began, we have seen an upward trend in the positive feelings and biases towards truckers, which could help curtail these nuclear verdicts if sustainable. During the pandemic, the trucking industry regained the essential status it once had in the eyes of the public — commercial drivers kept shelves stocked, delivered essential medical supplies, and over the past several months have been indispensable in the role out of COVID-19 vaccines. The trucking industry will need to maintain this momentum moving forward. Public perception will be vital in overcoming recent litigation tactics, such as the Reptile Theory, that have led to nuclear verdicts. The question is whether the goodwill of the trucking industry will have a material impact in a case that has nuclear verdict potential moving forward.

So, how do we maximize public perception about the trucking industry in light of COVID-19? While we do not yet know whether the decreased bias against truckers has affected jury deliberations on a large scale, we can employ a few practical tips to ensure goodwill makes its way to those twelve individuals on the jury.

COVID-19 has undoubtedly caused economic burden, financial losses, as well as emotional stresses such as anxiety, paranoia, and depression on the American people. These financial and emotional stresses experienced by jurors due to the pandemic may alter their opinions about a damage award and their opinions about claims for damages. For example, a juror who has suffered recent financial hardship

might have much less sympathy for someone asking for an excessive economic award. However, we also need to be aware of some jurors' willingness to throw millions of dollars at a plaintiff. There are jurors who have truly lost sight of the value of money. They look at the trillions of dollars spent by the US government during the pandemic and think that several million dollars is not a particularly large sum of money.

We can expect jurors to have shifting attitudes and opinions in sympathy or indifference towards others who have suffered an economic loss; praise for frontline workers; support for small businesses; trust or distrust of government; and trust or distrust of science. As a result, we need to flesh out these attitudes early during jury selection. Voir dire is critical to weed out jurors who may be willing to award sums of money grossly disproportionate to the real value of the case.

Finally, jurors may have a change in perception about stricter adherence to rules and minimalized tolerance for rule-breaking. Most likely, this will be particularly challenging for heavily regulated industries like trucking. While this issue can be explored during jury selection, the industry can avoid this altogether by ensuring regulatory compliance beforehand.

The trucking industry needs to adapt to these changes in juror perceptions by assessing COVID-19's impact on jurors and how it may affect a potential verdict. The trucking industry needs to stay ahead of the curve, taking advantage of and anticipating further changes in public perception. Our collective job is to assist in changing the narrative about the trucking industry. Further, it is incumbent upon us as your counsel to be proactive in assessing potential nuclear verdict issues early on in the accident investigation. If the case may go to trial, we need to consider engaging a good trial/jury consultant to assist in deposition preparation of key company representatives as well as assist with trial-related issues.

"New Research Documents the Scale of Nuclear Verdicts in the Trucking Industry", *American Transportation Research Institute*, Arlington, VA, 2020, <https://truckingresearch.org/2020/06/23/new-research-documents-the-scale-of-nuclear-verdicts-in-the-trucking-industry/> (accessed 7/13/21).

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