

Motor Carrier Claims for Negligent Entrustment, Hiring and Retention

Discovery, Apportionment of Fault, Impact of Motor Carrier's Admission of Vicarious Liability, and More

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MOTOR CARRIER CLAIMS FOR NEGLIGENT ENTRUSTMENT, HIRING & RETENTION



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TOPICS

- I. Negligent entrustment, hiring and retention: elements
- II. Defense theories and strategies
- III. Discovery strategies
- IV. Best Practices

TRUCKING INDUSTRY FACTS

- According to American Trucking Associations, US trucks moved 10.8 billion tons of freight in 2017.
- Trucking accounts for the vast majority of freight in America, with trucks carrying almost 71% of the tonnage moved about the country.
- Truck drivers drive an average of 100,000 miles per year, while non-commercial drivers average only 13,500 miles per year.
- A fully loaded truck weighs about 80,000 pounds. Some can weigh more with proper permitting.
- Of the approximately 450,000 police-reported crashes involving large trucks in 2017, there were 4,237 (1%) fatal crashes and 344,000 (23%) injury crashes.
- Twenty-seven percent of fatal crashes occurred on Interstate highways.

TRUCKING INDUSTRY FACTS

- The trucking industry is regulated by the US Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA").
- The FMCSA enacts and enforces Federal Motor Carrier Safety Regulations ("FMCSR") which govern all aspects of the trucking industry
- The regulations are codified in 49 CFR Parts 300 to 399.
 - The regulations are far reaching and govern everything from record retention (§ 390.29), to minimum standards for inspections, repairs, and maintenance of equipment (§ 396).
- The FMCSR serve as a "floor" and preempt any state law on the subject.

I. ELEMENTS OF CLAIMS

Becky's Butter Cake

4.4 ★★★★★ (24) · 0 min · Yield: 15 servings

Butter cake recipe reminiscent of the 1-2-3-4 cake that Grandma may have baked. The numbers refer to ...

INGREDIENTS

Cake

3 cups all-purpose flour

2 teaspoons baking powder

1/2 teaspoon salt

2 cups sugar

ELEMENTS OF CLAIMS

- Derivative actions against motor carriers:
 - **Negligent entrustment:**
 - Makes owners of vehicles liable for the negligence of another to whom the vehicle was entrusted.
 - **Negligent hiring and retention:**
 - Imposes liability upon an employer for negligently vetting and training its driver.
 - Unlike negligent entrustment, negligent hiring and retention generally require an employer-employee relationship.

ELEMENTS OF NEGLIGENT ENTRUSTMENT

- Restatement (Second) of Torts § 390 (1965):
 - **(1)** One who supplies, directly or through a third person; **(2)** a chattel for the use of another; **(3)** whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise; **(4)** to use it in a manner involving unreasonable risk of physical harm to himself and others; **(5)** whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.
- The “chattel” in question may be a motor vehicle.
- As such, most states recognize some form liability against one who entrusts a motor vehicle to another who negligently operates it, resulting in injury.
 - Florida: *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 631 (Fla. 1920).
 - Alabama: *Bruck v. Jim Walter Corp.*, 470 So. 2d 1141 (Ala. 1985).
 - California: CAL. VEH. CODE § 17150 (2019).
 - New York: N.Y. VEH. & TRAF. LAW § 388 (2019).

ELEMENTS OF NEGLIGENT HIRING & RETENTION

- A prima facie case for negligent hiring and retention require a plaintiff to show that:
 - (1) the employer was required to make an appropriate investigation of the employee and failed to do so;
 - (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and
 - (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.
- See *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002).

PRACTICALITIES

- Regardless of the legal theory, motor carriers are vicariously liable for the negligence of their commercial driver.
- The FMCSR do not distinguish between independent contractors and employees.
- Commercial drivers driving for a motor carrier are deemed “employees,” for the purpose of compliance with FMCSR, including “an independent contractor while in the course of operating a commercial motor vehicle[], a mechanic, and a freight handler.” 49 CFR § 390.5.
- Therefore, motor carriers are responsible for vetting their drivers and ensuring their qualifications pursuant to §§ 391.11(a) and 391.51.

WHY BRING A NEGLIGENT HIRING CLAIM, WHEN THE MOTOR CARRIER IS ALREADY RESPONSIBLE FOR ITS DRIVER?

- A claim for negligent hiring and retention opens the door to discovery and relevancy of a motor carrier's policies and procedures, hiring practices, internal safety programs and driver compliance, and prior driving record.
- Effective plaintiff attorneys will seek this information and carefully analyze it against the driver's personnel and qualification files.
- Any deviation from the FMCSR or the motor carrier's internal policies and procedures may be admissible at trial and have a major impact on the jury.
- Likewise, a motor carrier's failure to maintain records can also be used against them as evidence of indifference to the safety of "the motoring public."

COMPLAINT ALLEGATIONS

- The initial complaint will usually have a count for conventional negligence against the driver and some form of derivative liability against the motor carrier.
- Depending on who owns the commercial vehicle, there may also be a count against the vehicle's owner. This issue is beyond the scope of this presentation and is governed by the Graves Act.
- Plaintiff lawyers should attempt to use the FMCSR as a **substitute for your state's standard of care.**
 - Aren't commercial drivers, **professional drivers?**
 - Don't the FMCSR impose **greater** responsibilities upon commercial drivers and motor carriers?

EXAMPLES OF SUBSTITUTE “DUTIES” OF DRIVERS

COUNT I
WRONGFUL DEATH FOR NEGLIGENCE AGAINST DEFENDANT, [REDACTED]
[REDACTED] by PLAINTIFF, THE ESTATE OF [REDACTED], deceased minor, by and
through the Personal Representative of THE ESTATE, [REDACTED]

49. At all times material hereto, Defendant, [REDACTED] owed the following duties of reasonable care to Plaintiffs:

- g. To comply with limiting the use of wireless communication devices pursuant to the applicable rule by the Federal Motor Carrier Safety Administration, DOT, and/or Florida Statute 316.305; and/or

See 49 CFR § 392.82

- j. To abstain from driving while tired/fatigued; and/or

See 49 CFR § 392.3

- q. To comply with all applicable rules and regulations of the Federal Motor Carrier Safety Administration; and/or

EXAMPLES OF SUBSTITUTE “DUTIES” OF MOTOR CARRIERS IN NEGLIGENT HIRING CLAIMS

COUNT III
WRONGFUL DEATH FOR NEGLIGENT HIRING, TRAINING, RETENTION AND/OR
SUPERVISION AGAINST DEFENDANT, [REDACTED] by PLAINTIFF, THE ESTATE OF
[REDACTED], deceased minor, by and through the Personal Representative of THE
ESTATE, [REDACTED]

69. At all times material hereto, Defendant, [REDACTED], owed a duty of reasonable care to Plaintiffs in the hiring, training, retaining, and supervising its drivers, including, but not limited to, Defendant, [REDACTED]

70. Said duty of reasonable care includes, but is not limited to, the following:

- a. To conduct a **reasonably thorough background investigation** on each prospective driver, including, but not limited to his/her criminal history, **employment history, driving history, medical history**, psychological history, and substance abuse history; and/or

See 49 CFR §§ 391.21 to 391.27

SUBSTITUTE “DUTIES” – CONT’D

- f. To ensure that each driver has completed a **physical examination** within the most recent twelve-month period (including any drug test required by applicable laws) by a licensed physician or advanced registered nurse practitioner **showing the applicant to be free from any physical or mental defect and to be of sound health**; and/or

See 49 CFR §§ 391.41 to 391.49

- k. To comply with 49 C.F.R. §390.11; and/or

General qualifications of drivers

- o. To ensure that each driver complies with 49 CFR Parts 383, 384, 390, 391, and 392; and/or

II. DEFENSE THEORIES AND STRATEGIES



“Attack is the secret of defense; defense is the planning of an attack.”

-Sun Tzu, The Art of War

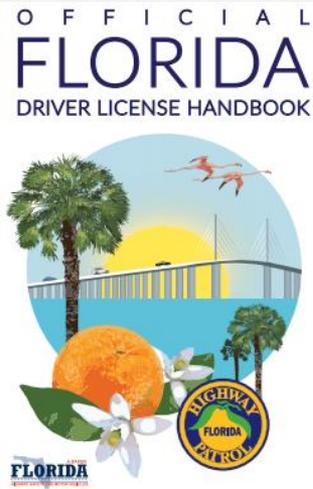
ANSWER AND AFFIRMATIVE DEFENSES

- In addition to the standard affirmative defenses in any motor vehicle accident case, consider asserting defenses based on state traffic laws, such as:
 - Prohibition against window tinting.
 - Absence of certain safety equipment, such as working lights, conspicuity tape (in large vehicles), mirror(s), seatbelt, airbags, etc.
 - Statutes governing passing or overtaking.
 - Speeding.
 - Cell phone and other device usage.
 - Prohibition against pets on the front passenger compartment.

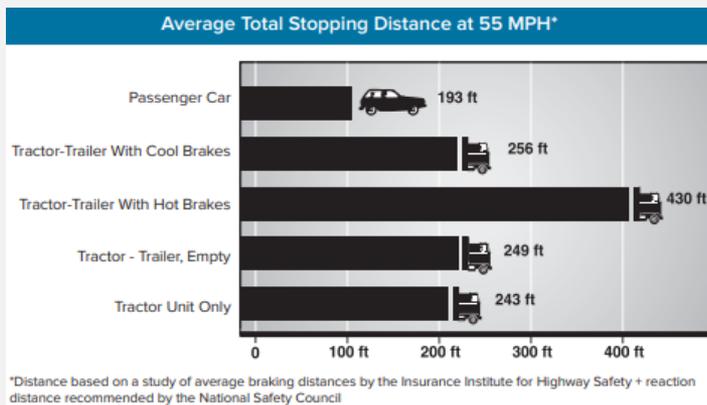
IN EVERY CASE

- In every case:
 - Consider the need for liability experts.
 - Consider the need for evidence preservation.
 - Consider comparative or contributory fault, or the fault of third-parties (state specific).
 - If a third-party is at fault, consider a third-party complaint. If your state allows the “empty chair defense,” be sure to name the third-party in your affirmative defenses.
 - Rely on the commercial driver’s experience and credibility (if possible).
 - Remember, the commercial driver is almost always the “expert.”*
 - They drive an average of **86,500 miles** a year more than the average commuter.
 - They have seen it all and will likely have done everything within reason to avoid the accident or avoid a **worse** accident.
 - Driving is their **livelihood**. It is in their **best interest to drive safe** and avoid collisions. If injured or with damaged equipment, a commercial driver cannot earn a living.

** However, never refer to your driver as an “expert” or you may fall trap to the substitute duties alleged in the complaint. Instead, use the commercial driver’s experience as an explanation for why he/she would not have acted as the plaintiff alleges (e.g. following too closely, speeding, straddling, etc.).*



- Rely on your state's driver license handbook.
- Many states' driver license handbook contain a section on driving near or around commercial vehicles (e.g., FL, NY, CA, TX). The handbooks discuss blind spots, vehicle speeds, length, and weight.
- Plaintiffs are unlikely to know or recall these guidelines.
- States like FL and NY, attempt to educate non-commercial drivers regarding speed and stopping distances, which most drivers fail to appreciate.
- All drivers share the same duty to comply with basic traffic laws and regulations, including the plaintiff.



- Rely on the FMCSR when it is helpful.
 - The FMCSR recognizes some of the realities of the trucking industry and attempts to regulate realistically.
 - For example:
 - Use of a cell phone while driving **is** allowed, so long as it is a **hands-free or Bluetooth device**. 49 CFR § 392.82. Drivers must be able to communicate with their dispatchers while on the road. Obviously, text messaging and other hand-held activities are not permitted.
 - Commercial drivers may maintain their own commercial vehicles under certain circumstances, including inspections and brake replacement. 49 CFR §§ 396.19 and 396.25.
 - Inability to speak English **does not** disqualify a commercial driver if he/she can communicate with the general public, understand highway traffic signs and signals in English, respond to official inquiries, and make entries on reports and records. 49 CFR § 391.11.

IN HIGH DAMAGES/EXPOSURE CASES

- In high exposure cases:
 - Quickly ascertain whether evidence still exists and needs to be preserved. Follow your state's laws on evidence preservation and spoliation.
 - Retain an accident reconstruction expert, who is qualified and testifies well, to:
 - Inspect vehicles.
 - Visit and measure scene of accident.
 - Prepare demonstrative aides (if helpful).
 - Consider whether human factors played a role in the accident (e.g., fatigue, distraction, impairment). If so, hire an expert.
 - This consideration should be made with respect to all individuals involved in the accident, including your client and other parties.
 - Consider the need for a fleet safety expert.
 - Generally applies where the motor carrier or driver were non-compliant with the FMCSR or internal policies and procedures.

SPECIAL CONSIDERATIONS IN NEGLIGENT HIRING & RETENTION CASES

- Most states do not allow more than one derivative theory of liability against an “employer.”
- If no anticipated conflicts in admitting the commercial driver was an “employee” (as defined by the FMCSR), defense counsel should consider admitting this allegation, regardless of the driver’s employment status.
 - Once the motor carrier admits vicarious liability for the driver’s conduct, the negligent hiring and retention claim becomes moot, since the theory of liability is now duplicative and does not provide additional recovery.
 - The count for negligent hiring and retention becomes vulnerable to summary judgment or judgment on the pleadings.

SPECIAL CONSIDERATIONS IN NEGLIGENT HIRING & RETENTION CASES – CONT'D

- A minority of states allow for multiple derivative theories of liability.
 - In the negligent hiring and retention context, the reason is that the employer committed active negligence in the selection and retention of the employee.

III. DISCOVERY STRATEGIES



INITIAL INVESTIGATION

- The more you know...
 - Of course, always investigate the opposing party, his/her background, driving and criminal history, and other pertinent information.
 - It is just as important to investigate your own client.
- Whether you represent the plaintiff or the motor carrier and commercial driver, you should always try to conduct an initial interview with them, **in person**.
- Ask the driver to sign an authorization for release of his/her cell phone records. You need to know before the other side if your client was on the phone.
- Check your client's litigation history for pertinent lawsuits, prior testimony, etc.
- Pull the motor carrier safety rating (you will need its DOT number):
 - <https://www.fmcsa.dot.gov/safety/company-safety-records>

INITIAL INVESTIGATION – CONT'D

- If representing the motor carrier, contact the company immediately upon assignment of the claim to:
 - Determine existence of letter of preservation of evidence.
 - Determine status of commercial vehicle's repair and cost.
 - Interview driver, dispatcher and safety director.
 - Obtain the driver qualification file and personnel file (if kept separately).
 - Obtain the commercial vehicle's maintenance records.
 - Obtain the driver's record of duty status, if not included in DQ file (to determine whether fatigue contributed to the accident).

INITIAL INVESTIGATION – CONT'D

- Contact the investigating agency for the crash report.
 - If death case, determine whether your jurisdiction compels a traffic homicide investigation and report to be prepared.
 - If so, consider being present for your client's interview.
 - Depending on the law enforcement agency and complexity of the accident, the investigation may last several months.

DISCOVERY REQUESTS

- The FMCSR require motor carriers and drivers to keep detailed records of its drivers and equipment.
- These records can be very useful to the motor carrier or to a plaintiff, depending on the motor carrier's level of compliance with the FMCSR.
 - Counsel representing plaintiff OR the motor carrier should pay particular attention to driver qualification records, vehicle repair and maintenance, internal policies and procedures regarding vehicle maintenance and driver safety.
 - A motor carrier's failure to retain these records for the minimum retention period reflects poorly on the motor carrier and may result in spoliation of evidence.

DISCOVERY REQUESTS – CONT'D

- The **driver qualification file** must contain the following records:

Document	Reg.	Retention period
Driver application	§391.21	Employment, plus 3 years
Motor vehicle report (MVR) from hire	§391.23	Employment, plus 3 years
Road test/certificate or photocopy of CDL	§391.31 §391.33	Employment, plus 3 years
Safety Performance History (10/30/2004 to present hire dates) Previous employer checks (prior to 10/30/2004)	§391.23	Employment, plus 3 years
Annual MVR & annual review of driving record	§391.25	3 years
Annual list of violations	§391.27	3 years
Medical examiner's Certificate & any exemptions/waivers	§391.43	3 years

DISCOVERY REQUESTS – CONT'D

- Records of the **driver's hours of service** (§ 395):
 - Drivers must:
 - Complete a record of duty status (log) in duplicate
 - Carry a copy of the previous 7 days' worth of logs with them for inspection.
 - Motor carrier must retain the logs for 6 months.

DISCOVERY REQUESTS – CONT'D

- Vehicle inspection **repair and maintenance records** (§396.3):
 - For vehicles under the motor carrier's control for 30 or more days:
 - An identification of the vehicle including: company number, if so marked, make, serial number, year, and tire size.
 - **If the motor vehicle is not owned by the motor carrier, the name of the person providing the vehicle (e.g., lessor, independent contractor);**
 - A means to indicate the nature and due date of the various inspection and maintenance operations to be performed; and
 - A record of inspection, repairs, and maintenance indicating their date and nature.

DISCOVERY REQUESTS – CONT'D

- Maintenance records:
 - May include minor repairs or preventative maintenance to major repairs and must be kept where the commercial vehicle is either stored or maintained for at least 12 months.
 - Records on vehicles sold must be kept for either:
 - (1) The remaining time left on 12 months; or
 - (2) Six months from when the vehicle leaves the motor carrier's control, whichever occurs first.

DISCOVERY REQUESTS – CONT'D

- Annual inspections records pursuant to §396.17:
 - Performed by someone qualified in accordance with §396.19.
 - An inspection report must contain:
 - Name of inspector, motor carrier name, date, vehicle, and components inspected; and
 - A statement certifying accuracy and completeness of inspection;
 - Report must be kept for 14 months where the vehicle is stored or maintained.

DISCOVERY REQUESTS – CONT'D

- Daily Vehicle Inspection Report (DVIR):
 - Post-trip inspection (§396.11)
 - Pre-trip inspection (§396.13)
- Must be kept with the certificate of repairs and driver's pre-trip review for 3 months at principal place of business or where vehicle is stored.

OTHER SUGGESTED REQUESTS

- While not expressly required by the FMCSR, motor carriers are also expected to implement:
 - Training in all major areas of the FMCSRs;
 - Policies and procedures on major areas; and
 - Systematic monitoring and tracking of records.
- Retention of these records is not mandatory.
- THIS IS NOT AN EXHAUSTIVE LIST OF DOCUMENTS TO BE MAINTAINED BY THE MOTOR CARRIER.
 - Counsel should tailor his/her discovery requests to obtain records pertinent to the facts and theory of the case.
 - Excessive requests for production in these types of cases may result in protective orders.

OTHER IMPORTANT DOCUMENTS

- THIS IS NOT AN EXHAUSTIVE LIST OF DOCUMENTS TO BE MAINTAINED BY THE MOTOR CARRIER.
- Counsel should tailor his/her discovery requests to obtain records pertinent to the facts and theory of the case.
- Excessive requests for production in these types of cases may result in protective orders.

THIRD-PARTY DISCOVERY

- Often, the time of the accident plays a major role in litigation.
 - Speed is nothing but an object's movement in time. Therefore, it is important for counsel to do what is necessary to determine when the accident happened.
 - Crash reports will often incorrectly state the time of the accident.
 - Counsel should attempt to obtain 911 calls and 911 dispatcher call logs, which can assist in narrowing down the time of the accident.
 - The logs may also assist counsel identifying first-responders by name or badge number as well other witnesses.
 - Toll road receipts and cameras.
 - Records from government entities can often be obtained through FOIA requests, even before suit is filed.

IV. BEST PRACTICES

- Counsel should be thoroughly familiar with:
 - The Federal Motor Carrier Safety Act;
 - Your state's motor vehicle and traffic laws;
 - Your state's driver license handbook;
 - Your state's commercial driver license handbook.
- If you represent a motor carrier, the client's business, its internal policies and procedures, training manuals, and record-keeping practices.

DOS

- In general, counsel should always:
 - Interview and investigate his/her own client;
 - Obtain records from client, especially motor carriers, early on;
 - Obtain records from the law enforcement agency in charge of the accident investigation;
 - Familiarize him/herself with the location of the accident;
 - This includes knowledge of the volume of traffic, the timing of traffic lights, distances, visibility, speed limits, and other details that will help you better understand the accident.
 - Google Earth can be a very good source for this information. If you need to know what the scene looked like in the past, Good Earth Pro contains historical images of a given area dating back several years.

DON'TS

- Counsel should avoid the following pitfalls:
 - Assume he/she knows how the accident occurred.
 - Accident reconstruction experts are paid a lot of money to make that determination for you. Even when they do, it is generally stated in terms of “probability.”
 - Take the traffic crash report or traffic homicide investigation at face value.
 - While law enforcement officers are trained to investigate crashes, they are not engineers. Their conclusions are often based on broad assumptions, or eye witness statements which are often unreliable.
 - Officers who investigate death cases, generally have better training. However, their focus is to determine whether a crime was committed, not negligence.

QUESTIONS:

THANK YOU

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Q&A

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