

AUTOMOBILE AND TRUCKING LIABILITY IN TEXAS

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I. UNINSURED/UNDERINSURED COVERAGE

A. OVERVIEW

Uninsured/undersinsured motorist coverage is insurance coverage intended to protect responsible drivers from irresponsible drivers who either do not buy insurance at all, or drivers who have insufficient insurance to cover the damages that they have caused.¹ Therefore, UM/UIM coverage serves to act as a mechanism for which an injured party can be made whole when the negligent motorist either does not have insurance or an insufficient amount of insurance coverage to compensate the injured party. A common application is when an injured party has sustained \$60,000 in actual damages, but the negligent motorist only has \$20,000 in insurance coverage. In this example, the negligent motorist is underinsured and the injured party is entitled to make a claim for UM/UIM benefits under his own insurance policy in an effort to recover the difference between his actual damages and the amount tendered by the negligent motorist.

Under the Texas Insurance Code, uninsured motor vehicle is defined as “an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.”² Logically, a motor vehicle that does not have any liability insurance is also an “uninsured motor vehicle.” Additionally, uninsured motorist can include an insured that has been denied coverage

¹ James Cornell and John Thomisee, *Uninsured/Underinsured Motorist Coverage*, 62 TEX. BAR. J. 342, 342 (1999).

² TEX. INS. CODE ANN. § 5.06 – 1 (Vernon 2002).

by his insurer.³ It also follows that if that if the insurer becomes insolvent, the insured's vehicle will be considered an "uninsured vehicle."

Conversely, an underinsured motorist is defined as "an insured motor vehicle on which there is valid and collectible liability insurance coverage with limits of liability for the owner or operator which were originally lower than, or have been reduced by payment of claims arising from the same accident to, an amount less than the limit of liability stated in the underinsured coverage of the insured's policy."⁴ Simply, if the damages sustained by an injured party exceed the policy limits of the negligent motorist, the negligent motorists will be considered "underinsured" for purposes of UM/UIM coverage.

When the issue arises with regard to whether a motor vehicle is uninsured, the carrier has the burden of proof.⁵ That is, the insurer has the burden of proof of establishing that the negligent motorist has *some* insurance. Conversely, when the issue is whether a motor vehicle is underinsured, the burden of proof is on the claimant.⁶ Therefore, once it can be shown that the negligent motorist has some insurance, the burden of proof is on the insured to show that the negligent motorist is underinsured.⁷

B. INSURER'S AND INSURED'S OBLIGATIONS

1. Waiver of UM/IUM Coverage

³ See *Milton v. Preferred Risk Ins. Co.*, 511 S.W.2d 83 (Tex. Civ. App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.).

⁴ TEX. INS. CODE ANN. § 5.06 – 1 (Vernon 2002).

⁵ *Supra* note 1.

⁶ *Id.*

⁷ *Id.* at 344 (citing TEX. INS. CODE ANN. § 5.06 –1 (7)).

The Texas Insurance Code requires that every insurance policy sold in Texas have at least minimal UM/UM coverage, which is \$20,000 per person, \$40,000 per accident.⁸ UM/UM coverage is presumed to exist as matter of law unless it is rejected in writing by the insured.⁹ This presumption, however, only applies to the minimum amount required by the statute, which is \$20,000 per person.¹⁰

Additionally, if the insured has rejected the UM/UM coverage in writing, any subsequent renewal of the policy will not contain UM/UM coverage unless the insured specifically requests the coverage in writing.¹¹ In the event that the renewal policy is issued by a new carrier, the written rejection in the first policy is no longer effective and therefore, UM/UM coverage is presumed as a matter of law in the subsequent policy issued by the second carrier in the amount of \$20,000.¹² Therefore, a careful attorney faced with the possibility of litigating an UM/UM case should not only determine whether UM/UM has been waived by a insured's written consent, but whether it had been waived in a previous policy and whether the insured has been involved with multiple carriers.

2. Consent to Sue

In *Millard*, the court held that a judgment for damages arising out of a suit by an insured against a negligent motorist without an insurer's written consent is not binding on the insurer –

⁸ TEX. INS. CODE ANN. § 5.06 – 1 (Vernon 2002).

⁹ *Supra* note 1 at 344.

¹⁰ *Id.*(citing TEX. INS. CODE ANN. § 5.06 –1(1); *Employer's Cas. Co. v. Sloan*, 565 580, 583 (Tex. Civ. App. – Austin 1978, writ ref'd n.r.e.).

¹¹ *Id.*

¹² *Id.*

even if the insurer has notice of the suit – written consent is required.¹³ The consequence of not obtaining written consent from the insurer prior to securing a judgment against a negligent motorist is that if the insured wishes to make a claim for UM/UIM benefits under his policy, the issues of liability and damages must be re-litigated. The rationale for the consent to sue clause is to protect UM/UIM insurers from paying claims arising out of default judgments and from an insubstantial defense of the uninsured or underinsured motorist.¹⁴

Therefore, there are three options an attorney representing an injured party in an UM/UIM case:

- (1) File suit against the insurer seeking UM/UIM benefits without naming the negligent motorist as a party; or
- (2) Obtain written consent from the insurer and sue the UM/UIM negligent motorist alone; any judgment obtained against the UM/IUM motorist is binding on the insurer; or
- (3) Sue the UM/UIM negligent motorist without consent of the insurer; any judgment obtained against the UM/UIM motorist would not be binding on the insurer, and liability and damages would have to be re-litigated.¹⁵

Obviously, the facts of each case will determine which course of action an attorney representing a client with a possible claim for UM/UIM benefits will choose.

3. Consent to Settle

In addition to the consent to sue requirement, before an insured can settle a claim against an uninsured or underinsured motorist, the insured must first obtain their insurer's consent if they wish to later obtain UM/UIM benefits under their policy. Appellate courts have consistently

¹³ *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App. – Houston [1st Dist.] 1993, no writ).

¹⁴ Don E. Weiss, *The ABC's of Uninsured/Underinsured Motorists Claims: Getting What You Paid For*, State Bar of Texas, Prosecuting and Defending a Trucking or Auto Accident Case (2004) (citing *State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177 (Tex. 1995)).

upheld the validity of the consent to settle exclusion.¹⁶ This exclusion serves to protect the subrogation rights of the insured against the uninsured or underinsured motorist or another person or entity legally responsible for the insured's damages due to the fact that a settlement without consent effectively eliminates an insurer's subrogation rights.¹⁷ Therefore, as an attorney representing an injured party wishing to obtain UM/UIM benefits, be certain to obtain consent to settle any claim you may have against an uninsured/underinsured motorist or else face the harsh reality that you will be barred from obtaining UM/UIM benefits for your client under their policy.¹⁸

Waiver, however, works both ways. If an insurer unconditionally denies liability before its insured settles with a negligent motorist, the insurer has waived any right to consent to the settlement and cannot assert the lack of written consent to sue as an affirmative defense.¹⁹ On a related note, if it is determined that the insurer has not lost any subrogation rights, the consent to settle exclusion has no effect.²⁰ Furthermore, if the insured settles with a non-motorist tortfeasor, the insured does not violate the settlement without consent clause since the clause is only applicable where there is a settlement with an uninsured or underinsured motorist.²¹

¹⁵ *Id.*

¹⁶ *See, e.g., United States Fidelity and Guar. Co. v. Casico*, 723 S.W.2d 209 (Tex. App. – Dallas, 1986, no writ); *Miller v. Hanover Ins. Co.*, 718 S.W.2d 429 (Tex. App. – Eastland 1986, writ ref'd n.r.e.).

¹⁷ Don E. Weiss, *The ABC's of Uninsured/Underinsured Motorists Claims: Getting What You Paid For*, State Bar of Texas, Prosecuting and Defending a Trucking or Auto Accident Case (2004).

¹⁸ *Id.* (citing *Guaranty County Mut. Ins. Co. v. Kline*, 845 S.W.2d 812 (Tex. 1992)).

¹⁹ *Id.* (citing *Ford v. State Farm Mut. Auto Ins. Co.*, 550 S.W.2d 663 (Tex. 1977)).

²⁰ *Id.* (citing *Travelers Indem. Co. of R.I. v. Lucas*, 678 S.W.2d 732 (Tex. App. – Texarkana 1984, no writ) (jury determined that the allegedly negligent motorist was in fact, not negligent, and therefore, insurer was not entitled to assert failure of consent to settle exclusion as a defense since they did not lose any subrogation rights)).

²¹ *Id.* (citing *Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App. – Houston [1st Dist.] 1995, no writ)).

The Texas Supreme Court, however, has limited the harsh impact of the consent to settle rule to only apply when an insurer can prove that it was prejudiced by its insured's breach of this provision in order to void UM coverage, or else the breach is not a material one that would excuse the carrier from paying UM/UIM benefits.²² After *Hernandez*, the insurer must prove that the negligent motorist would have been able to pay the carrier's subrogation interest in order to enforce the settlement without consent exclusion against its insured.

C. COVERAGES AND EXCLUSIONS

1. Covered Person

A “covered person” defined in the standard Texas Personal Automobile Policy as:

- (1) you or any family member;
- (2) any other person occupying your covered auto; and
- (3) any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described as “you” or any family member or any other person occupying the insured’s covered automobile.²³

“Family member” is defined in the standard Texas personal auto policy as a person who is a resident of the same household as the named insured and who is related to the named insured by blood, marriage, or adoption.²⁴ The named insured and any “family member” can make a claim under the UM/UIM coverage if they are injured by an uninsured or underinsured motorist, and this is true even if he or she is not occupying a vehicle at the time of the accident.²⁵ An

²² *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 694 (Tex. 1994).

²³ *Id.*

²⁴ James Cornell and John Thomisee, *Uninsured/Underinsured Motorist Coverage*, 62 TEX. BAR. J. 342, 343 (1999).

²⁵ *Id.*

example would be if a named insured or “family member” is injured by an uninsured or underinsured motorist while riding a bicycle or even as a pedestrian.²⁶

If a corporation is named as an insured on a policy, however, no individual person can qualify as a covered person for purposes of UM/UIM benefits.²⁷ This is a situation that may crop up when a commercial driver, such as a flower delivery employee, is injured in auto collision – the driver will not be entitled to UM/UIM benefits if his corporation is named as the insured.

2. Legally Entitled to Recover

In order to recover UM/UIM benefits, the insured must show that the UM/UIM negligent motorist would be or is liable to him for his damages.²⁸ Consequently, an insured wishing to seek UM/UIM benefits must prove that the UM/UIM motorist was negligent and therefore, legally responsible for his damages.

3. Arising Out of Use

Additionally, in order to recover UM/UIM benefits, the liability for damages that a covered person seeks must arise out of the ownership, maintenance or use of the UM/UIM motor vehicle.²⁹ “Arising out of the use” means the use of the automobile as an automobile, or in other words, UM/UIM is intended to insure against automobile collisions and accidents.³⁰

²⁶ *Id.*

²⁷ Don E. Weiss, *The ABC's of Uninsured/Underinsured Motorists Claims: Getting What You Paid For*, State Bar of Texas, Prosecuting and Defending a Trucking or Auto Accident Case (2004) (citing *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997)).

²⁸ *Valentine v. Safeco Ins. Co.*, 928 S.W.2d 639, 643 (Tex. App. – Houston [1st Dist.] 1996, writ denied); *see also Essman v. General Acc. Ins. Co. of Am.*, 961 S.W.2d 572, 573 (Tex. App.--San Antonio 1997, no writ).

²⁹ James Cornell and John Thomisee, *Uninsured/Underinsured Motorist Coverage*, 62 TEX. BAR. J. 342, 343 (1999).

³⁰ *Id.*

Specifically, in the context of UM/UIM litigation, drive-by shootings are not included under the “arising out of the use” umbrella.³¹

Under the Texas Supreme Court’s holding in *Lindsay*, the following three-prong test is utilized for construing the “use” requirement of UIM coverage:

- (1) Did the accident arise out of the inherent nature of the automobile;
- (2) Did the accident arise within the natural territorial limits of the automobile; and
- (3) Did the automobile itself produce the injury (rather than merely contributing to the cause of the condition that produced the injury).³²

An analysis under *Lindsay* is extremely fact-intensive and will require careful and thorough consideration by counsel in order to determine whether UM/UIM benefits are recoverable.

4. Named Driver Exclusion

The standard format Texas Personal Auto Policy sets forth the “named driver” exclusion. This exclusion dictates that UM/UIM coverage is not available for bodily injuries sustained while occupying or when struck by any motor vehicle owned by the insured or any family member which is not insured for UM/UIM coverage under the policy in question. The insurance policy will specifically set forth who is a “named driver” or “excluded driver,” and will serve as a rejection of UM/UIM coverage while the covered auto or any other motor vehicle is operated by the excluded driver. The “named driver” exclusion has been upheld as valid and

³¹ See *State Farm Mut. Auto. Ins. Co. v. Whitehead*, 988 S.W.2d 744, 745 (Tex. 1999); *Le v. Farmers Tex. County Mut. Ins. Co.*, 936 S.W.2d 317, 321 (Tex. App. – Houston [1st Dist.] 1996, no writ); *Collier v. Employers Nat’l Ins. Co.*, 861 S.W.2d 286, 289 (Tex. App. – Houston [14th Dist.] 1993, writ denied); *contra Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999).

³² See *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999).

enforceable.³³ Courts have reasoned that the exclusion furthers public policy by enabling drivers to secure affordable insurance when they have family members with poor driving records.³⁴

5. Physical Contact Requirement

If the owner or operator of a motor vehicle that causes bodily injury or property damage is unknown, the insured must establish that actual physical contact occurred between the unknown UM/UIM vehicle and the person or property of the insured before an insured can recover UM/UIM benefits from his insurer.³⁵

D. APPLICATION/EXAMPLES/PRACTICAL CONSIDERATIONS

1. Stacking

When an injured motorist is covered by more than one first-party insurance policy, he or she will attempt to recover UM/UIM benefits for damages arising out of the same accident in order to be fully compensated for their damages. This is referred to as “stacking.”

Stacking occurs when an insured who is covered by more than one insurance policy seeks to obtain benefits from the second policy on the same claim when any recovery under the first policy would be inadequate.³⁶ “Intra-policy” stacking is the aggregation of limits of liability for UM/UIM coverage of each car under one policy.³⁷ “Inter-policy” stacking is the aggregation of coverage under more than one policy.³⁸ Intra-policy stacking is not permissible and the

³³ *Zamora v. Dairyland County Mut. Ins. Co.*, 930 S.W.2d 739, 742 (Tex. App.--Corpus Christi 1996, writ denied).

³⁴ *Id.*

³⁵ Don E. Weiss, *The ABC's of Uninsured/Underinsured Motorists Claims: Getting What You Paid For*, State Bar of Texas, Prosecuting and Defending a Trucking or Auto Accident Case (2004).

³⁶ James Cornell and John Thomisee, *Uninsured/Underinsured Motorist Coverage*, 62 TEX. BAR. J. 342, 342 (1999).

³⁷ *Id.*

³⁸ *Id.*

UM/UIM limits are the most an insurer is required to pay regardless of the number of covered persons, claims made, policies, or vehicles.³⁹

While intra-policy stacking is not permissible, inter-policy stacking is.⁴⁰ Therefore, when an insured has one or more first-party policies, the insured is allowed to stack these policies in addition to any damages paid by the liability carrier or the negligent motorist.⁴¹

2. Offsets

It is not uncommon for injured motorists to seek personal injury protection (PIP) in addition to asserting a cause of action against a negligent motorist. Additionally, these same injured motorists, when not fully compensated by the negligent motorist and their PIP, will attempt to secure UM/UIM benefits under their insurance policies in order to make themselves whole. Consequently, the issue arose as to whether an insured could stack their PIP and UM/UIM benefits.

In 1999, the Texas Supreme Court held in *Mid-Century Ins. Co. v. Kidd* that off-set provisions contained in standard insurance policies were valid and did not violate the UM/UIM statute.⁴² The court reasoned that the purpose of the off-set provision was not to deny or otherwise invalidate any UM/UIM benefits, but rather to prevent a double recovery.⁴³

The off-set provision, however, does not prevent stacking of UM/UIM benefits and PIP protections to cover the actual damages sustained and therefore, the off-set provision does not

³⁹ *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 632 to 633 (Tex. 1992).

⁴⁰ James Cornell and John Thomisee, *Uninsured/Underinsured Motorist Coverage*, 62 TEX. BAR. J. 342, 342 (1999).

⁴¹ *Id.*

⁴² *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265 (Tex. 1999).

⁴³ *Id.*

cause an insured to recover less than the actual damages sustained.⁴⁴ Policy limits are required to be applied after deducting the PIP credit and therefore, if the damages sustained by an insured less PIP credits exceed his UM/UIM policy limits, then the insured is entitled to recover the maximum possible benefits under his UM/UIM policy.⁴⁵

3. Other Considerations

- In *Lane*, the Texarkana Court of Appeals, in a case of first impression, held that an insurer faced with multiple claims to UM/UIM benefits does not breach its contract by settling reasonable claims with one or more claimants, even if the settlement reduces or exhausts the proceeds available to other claimants.⁴⁶
- In *Henson*, the court held that an insured is not entitled to recover pre-judgment interest on UM/UIM benefits until he establishes that is “legally entitled to recover” the benefits.⁴⁷ Therefore, pre-judgment interest does not begin to accrue when the insured submits his claim, but rather when the insured can show that he is legally entitled to recover, and this usually means obtaining a judgment against the UM/UIM driver.⁴⁸

⁴⁴ Don E. Weiss, *The ABC's of Uninsured/Underinsured Motorists Claims: Getting What You Paid For*, State Bar of Texas, Prosecuting and Defending a Trucking or Auto Accident Case (2004).

⁴⁵ *Id.*

⁴⁶ *Lane v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 545, 552 (Tex. App. – Texarkana 1999, pet. denied); *see also, Carter v. State Farm Mut. Auto. Ins. Co.*, 33 S.W.3d 369 (Tex. App.-- Fort Worth 2000, no pet.); *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994).

⁴⁷ *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17S.W.3d 652 (Tex. 2000).

⁴⁸ *Id.*

- Texas appellate courts have consistently held that punitive damages are not recoverable in an UM/UIM claim on public policy grounds, reasoning that punitive damages would not be appropriate to serve the purposes behind UM/UIM benefits.⁴⁹

II. DOT/Trucking Law

Each year, thousands of people are killed in trucking accidents and thousands others are seriously injured.⁵⁰ These trucking accidents cost nearly twenty *billion* dollars each year.⁵¹ As a result, both federal and state regulations concerning the operation of large trucks have become increasingly stringent in order to ensure the safety of motorists on American highways. Consequently, with stricter regulations, in addition to more and more drivers on the road, there are many pitfalls for the commercial driver and his employer in the context of trucking litigation.

One of the factors that distinguishes a trucking collision case from a general auto collision is that a trucking defendant obligated to follow both federal and state regulations concerning every aspect of its operations, both pre and post-accident. Therefore, each driver must have a copy of the Federal Motor Carrier Regulations in his/her possession and become familiar with these regulations. It follows that every plaintiff or defense counsel should also keep a current copy of the Federal Motor Carrier Regulations Pocket Book for use in their investigation of the accident and in discovery.

⁴⁹ See e.g., *Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546 (Tex. App. – El Paso 1990, writ denied).

⁵⁰ *National Highway Transportation Safety Administration, Fatality Analysis Reporting System and General Estimates* (in 2002 4,897 people died in trucking accidents nationwide and estimated 130,000 were injured).

⁵¹ Ted Miller and Eduard Zaloshnja, *Revised Cost of Large Truck and Bus Involved Crashes*, (2002) (estimating that trucking accidents cost an average of 19.6 billion dollars between 1997 and 1999).

The first question that must be answered in analyzing any trucking accident begins with a determination of whether the driver was operating on an “interstate” or “intrastate” trip at the time of the accident.⁵² Section 390.5 defines interstate commerce as:

Interstate commerce means trade, traffic, or transportation in the United States –

- (1) between a place in a state and a place outside of such state (including a place outside of the United States);
- (2) between two places in a state through another state or a place outside of the United States; or
- (3) between two places in a state as part of trade, traffic, or transportation originating or terminating outside of the State or the United States.

Intrastate commerce means any trade, traffic, or transportation in any state which is not described in the term “interstate commerce.”⁵³

Logically, if a driver begins a trip in Texas and concludes it in Florida, he is subject to the federal regulations. Another scenario that triggers the application of the federal regulations is if Driver A starts a trip in Brownsville that will ultimately finish in Wichita, Kansas, and drops off his cargo in Dallas with Driver B, who then transports the cargo to Denton to Driver C, who then finishes the trip by delivering the cargo to Wichita, Kansas. Under Section 390.5(2) all three drivers are subject to the federal regulations because this trip is considered an interstate trip – even if two of the drivers never left the state of Texas.

⁵² David Wenholz, *Important Federal and State Motor Carrier Regulations*, STATE BAR OF TEXAS PROSECUTING OR DEFENDING A TRUCKING OR AUTO ACCIDENT CASE (2004).

⁵³ 49 C.F.R. § 390.5.

A. Legal Duties of a Driver

1. Requirements and Qualifications

Before one can operate a commercial motor vehicle in interstate commerce, one must possess a commercial driver's license.⁵⁴ It has been suggested that an attorney prosecuting a trucking case on behalf of a plaintiff should drill the driver during his deposition with questions that would be on a typical written examination for a commercial driver's license.⁵⁵ This line of questioning has the potential for exposing the driver to attack at trial due to the fact that an applicant for a commercial driver's license must receive an eighty percent score on a written examination consisting of thirty questions before receiving their license.⁵⁶ If a driver cannot effectively answer these basic questions in his deposition, it is almost a certainty that plaintiff's counsel will attempt to paint the driver as incompetent and raise questions concerning his employer's hiring practices. Therefore, defense counsel should prepare the driver for this line of questioning prior to the deposition and otherwise establish that the driver is well-trained and knowledgeable in the operation of a commercial motor vehicle.⁵⁷

Additionally, a driver is logically required to have certain knowledge, experience and training not required of a standard operator of a motor vehicle. Driver qualifications are contained in 49 C.F.R. 391.11, in addition to the qualifications required for the securing of a

⁵⁴ 49 C.F.R. § 383.23.

⁵⁵ Baldemar Garcia, *Important Federal and State Trucking Laws*, STATE BAR OF TEXAS – PROSECUTING OR DEFENDING A TRUCKING ACCIDENT CASE (2002).

⁵⁶ 49 C.F.R. §§ 383.133, 383.135.

⁵⁷ Baldemar Garcia, *Important Federal and State Trucking Laws*, STATE BAR OF TEXAS – PROSECUTING OR DEFENDING A TRUCKING ACCIDENT CASE (2002).

commercial driver's license under Section 522 of the TEXAS TRANSPORTATION CODE. Section

391.11 reads as follows with regard to prerequisite driver qualifications:

- (a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. Except as provided in § 391.63, a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.
- (b) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he/she—
 - (1) Is at least 21 years old;
 - (2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;
 - (3) Can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;
 - (4) Is physically qualified to drive a commercial motor vehicle in accordance with subpart E--Physical Qualifications and Examinations of this part
 - (5) Has a currently valid commercial motor vehicle operator's license issued only by one State or jurisdiction;
 - (6) Has prepared and furnished the motor carrier that employs him/her with the list of violations or the certificate as required by § 391.27;
 - (7) Is not disqualified to drive a commercial motor vehicle under the rules in § 391.15; and
 - (8) Has successfully completed a driver's road test and has been issued a certificate of driver's road test in accordance with § 391.31, or has presented an operator's license or a certificate of road test which the motor

carrier that employs him/her has accepted as equivalent to a road test in accordance with § 391.33.⁵⁸

If a driver fails to meet any of the above referenced qualifications, the driver is *automatically disqualified* and a motor carrier cannot allow the driver to operate a commercial vehicle.⁵⁹ Other grounds for disqualification of drivers are set out in Sections 391.15 and 383.51, including disqualification for operating a commercial motor vehicle under the influence of alcohol or refusing to undergo testing for alcohol or a controlled substance or using a commercial motor vehicle to distribute or dispense a controlled substance, leaving the scene of an accident or by committing a felony.⁶⁰ Additionally, under Section 383.51, a driver is subject to disqualification if he is convicted of a serious traffic offense or a violation of an out of service order. A “serious traffic violation” is defined as speeding fifteen miles per hour in excess of a posted speed limit, reckless driving, improper/erratic lane changes, following too closely, or any violation arising in connection with a fatal accident.⁶¹

2. Certificate of Medical Examination

Another requirement that a commercial motor vehicle driver must meet in order to be qualified to operate a commercial motor vehicle is that the operator must have on their persons a certificate of medical examination.⁶² The list of physical qualifications necessary to be physically qualified to drive a commercial motor vehicle is extensive, and the protocol that must

⁵⁸ 49 C.F.R. § 391.11.

⁵⁹ 49 C.F.R. § 391.11 (a), (b)(6).

⁶⁰ 49 C.F.R. §§ 383.51; 391.15.

⁶¹ 49 C.F.R. § 383.5.

⁶² 49 C.F.R. § 391.41.

be followed by a medical examiner is detailed and thorough.⁶³ A certificate of physical examination must be obtained at every least twenty-four months or when a driver's ability to operate a commercial vehicle has become impaired by a physical or mental injury or disease.⁶⁴

3. Convictions and Traffic Violations

A driver must also furnish to his employer a list of all convictions of violations of motor vehicle traffic laws.⁶⁵ It is important to note that the notices and yearly list a driver must furnish need only disclose convictions, while an employer's annual investigation will consider all violations, regardless of whether a conviction resulted from the alleged violation.⁶⁶ Therefore, it follows that an employer cannot rely solely on the information provided to it by its drivers, but rather, the employer must conduct its own independent inquiry in ascertaining a driver's risk to the public.⁶⁷

Drivers must notify both their employer and the appropriate state official of any convictions for violations of motor vehicle laws, excluding parking tickets, within thirty days of conviction.⁶⁸ Drivers are also required to notify their employers of any disqualification, suspensions, revocations, or cancellations of their right to operate a commercial motor vehicle before the end of the business day after the day they learned of their loss of driving privileges.⁶⁹

⁶³ *Id.*

⁶⁴ 49 C.F.R. § 391.45.

⁶⁵ 49 C.F.R. § 391.27.

⁶⁶ 49 C.F.R. §§ 391.25; 391.27; 391.31.

⁶⁷ Baldemar Garcia, *Important Federal and State Trucking Laws*, STATE BAR OF TEXAS – PROSECUTING OR DEFENDING A TRUCKING ACCIDENT CASE (2002).

⁶⁸ 49 C.F.R. § 383.31.

⁶⁹ 49 C.F.R. §§ 383.33; 391.15.

A driver who is issued an out-of-service order associated with alcohol use must notify his employer within 24 hours and the designated state official within thirty days.⁷⁰

4. Alcohol, Drugs and Disqualification

Possessing a commercial driver's license or operating a commercial motor vehicle implies consent to alcohol testing.⁷¹ Additionally, under Section 392.5, a driver must immediately be placed out-of-service if he is not sober at least four hours before being "on-duty," which is defined in Section 395.2, or who is under the influence of alcohol, using alcohol, or has any measured alcohol concentration or detected presence of alcohol while operating a commercial motor vehicle.⁷² Driving under the influence or refusing to undergo alcohol testing subjects a commercial motor vehicle driver to automatic disqualification, while being under the influence of alcohol four hours before being on duty or the use or presence of alcohol during operation results in an out-of-service order. Additionally, disqualification requires a conviction, an out-of-service order does not.⁷³

5. Driving and Operations

Drivers are required to document every hour of every day.⁷⁴ Drivers are required to document, in a chart format, each hour of each day as either being off duty, on duty – not driving, driving, or spent resting in a sleep berth.⁷⁵ Drivers are expressly forbidden to drive more than ten hours consecutively or if they drive for any period of time after being on duty for fifteen

⁷⁰ 49 C.F.R. § 392.5.

⁷¹ 49 C.F.R. § 383.72.

⁷² 49 C.F.R. § 392.5.

⁷³ 49 C.F.R. §§ 391.15; 383.51; 392.5.

⁷⁴ 49 C.F.R. § 395.1 *et seq.*

⁷⁵ 49 C.F.R. § 395.8.

hours.⁷⁶ Drivers are also prohibited from driving after being on duty for more than sixty hours in any period of seven consecutive days or seventy hours after any period of eight consecutive days, depending on the motor carrier's schedule of operations.⁷⁷ Drivers are required to create, maintain, and remit to their employers their records of duty status or logs within thirteen days of completion.⁷⁸ Additionally, drivers must retain copies of their records for the past seven consecutive days and motor carriers must keep these records for six months after receipt.⁷⁹

Additionally, a driver is required under the Regulations to exercise "extreme caution" when hazardous road conditions exist.⁸⁰ Extreme caution entails reducing speed and discontinuing driving.⁸¹ A driver is also required to properly locate, distribute, and secure their cargo.⁸² A driver must also check his cargo's security before a trip, after the first twenty-five miles, and again every three hours or one hundred and fifty miles, whichever occurs first.⁸³

B. Legal Duties of an Employer

1. Overview

Section 390.11 imposes a duty on the motor carrier to require strict adherence to all duties and prohibitions by their drivers, which precludes motor carriers from turning a blind eye

⁷⁶ 49 C.F.R. §§ 395.3; 395.13

⁷⁷ 49 C.F.R. § 395.3.

⁷⁸ 49 C.F.R. §§ 395.8 (i); 395.15 (h)(1).

⁷⁹ 49 C.F.R. § 395.8 (k).

⁸⁰ 49 C.F.R. § 392.14.

⁸¹ *Id.*

⁸² 49 C.F.R. § 391.13.

⁸³ 49 C.F.R. § 392.9.

toward a safety violation.⁸⁴ This mandates that both drivers and motor carriers must be familiar with the Federal Motor Carrier Safety Regulations.⁸⁵

Additionally, motor carriers must test their drivers for controlled substances and/or alcohol use prior to employment, randomly upon reasonable suspicion, and as a follow-up prior to a driver's return to duty following an accident.⁸⁶ Finally, the Regulations prohibit motor carriers from creating schedules that would cause a driver to feel compelled to drive in excess of the applicable speed limits.⁸⁷

Furthermore, an employer is prohibited from allowing drivers to operate commercial motor vehicles while their licenses are suspended, revoked, or cancelled, if they have lost the right to operate a commercial motor vehicle, or they are subject to an out-of-service order.⁸⁸

2. Insurance

All motor carriers are required to maintain certain levels of financial responsibility before they can operate a commercial motor vehicle in the United States.⁸⁹ The minimum amount of coverage for a commercial vehicle for hire with a gross vehicle weight that exceeds 10,000 pounds transporting non-hazardous materials is \$750,000.⁹⁰ The \$750,000 can be composed of insurance, surety bonds, and endorsements. The minimum amount of coverage is increased to

⁸⁴ 49 C.F.R. § 390.11.

⁸⁵ 49 C.F.R. § 392.1.

⁸⁶ 49 C.F.R. §§ 382.301; 382.303; 382.305; 382.307; 382.309; 382.311.

⁸⁷ 49 C.F.R. § 392.6.

⁸⁸ 49 C.F.R. § 383.37.

⁸⁹ 49 C.F.R. § 387.9.

⁹⁰ *Id.*

\$5,000,000 for certain commercial carriers transporting hazardous materials.⁹¹ A complete listing of the minimum insurance limits is set forth in a table incorporated into Section 387.9.

3. Employment Applications and Screening

Applications for employment of commercial motor vehicle drivers must solicit detailed information before a driver can be hired.⁹² An employment application must inquire as to licensing, any denial, revocation or suspension of licenses, driving experience, former employers for the past ten years, motor vehicle accidents and violations of motor vehicle laws for the past three years, and must be certified as true by the applicant.⁹³ Additionally, the applicant is required to provide the dates and reasons for leaving any previous employment involving the operation of a commercial motor vehicle.⁹⁴ Thirty days after a driver is hired, a motor carrier is required to investigate the driver's employment history and driving record for the previous three years and the results of the investigation must be contained in a written record.⁹⁵ Additionally, the motor carrier has a continuing duty to make an annual inquiry into the driving record of its drivers to ensure that its drivers have not been disqualified and that they meet the minimum requirements for the safe operation of a commercial motor vehicle.⁹⁶ This annual inquiry must be written, dated and the individual conducting the investigation must be identified.⁹⁷

⁹¹ 49 C.F.R. § 387.1.

⁹² 49 C.F.R. § 391.21.

⁹³ *Id.*

⁹⁴ 49 C.F.R. § 383.55.

⁹⁵ 49 C.F.R. § 391.23.

⁹⁶ 49 C.F.R. § 391.25.

⁹⁷ *Id.*

Additionally, a motor carrier is required to maintain a qualification file for each driver it employs. The file must contain a driver's completed application for employment, a copy of the driver's commercial driver's license, responses to requests for employment references, annual driving record inquiries and reviews, certificates relating to motor vehicle convictions, and the medical examiner's certificate.⁹⁸ This duty to maintain a driver's file extends to three years after the driver is no longer employed with the motor carrier.⁹⁹ Motor carriers also have a duty to maintain Inspection Reports, Driver Vehicle Inspection Reports, Periodic Inspection Reports, and records concerning the qualifications of the inspectors performing the Periodic Inspection Reports.¹⁰⁰

4. Maintenance of Vehicles

Regulations concerning the equipment, inspection, repair, and maintenance of commercial motor vehicles are spelled out in Parts 393 and 396 of the Regulations. Additionally, the following regulations are worth noting:

- 393.52 – mandatory braking performance requirements
- 393.75 – detailed characteristics for tires
- 393.100 – 106 – specific measures required to be taken to protect against shifting or falling cargo

Additionally, motor carriers and drivers are required to be “conversant” with the regulations pertaining to the inspection, maintenance, and repair of commercial motor vehicles and they are expected to be able to identify any unsafe conditions that mandate the immediate

⁹⁸ 49 C.F.R. § 391.51.

⁹⁹ 49 C.F.R. § 391.51(c).

¹⁰⁰ 49 C.F.R. §§ 396.3 (c); 396.11 (c)(2); 396.21 (b)(1); 396.19 (b).

ceasing of further driving.¹⁰¹ Motor carriers must also document in a report for every commercial motor vehicle under their control the nature and due date of all inspection and maintenance operations to be performed and a record of repairs and inspections actually performed.¹⁰² Drivers are also required to document in a daily vehicle inspection report the condition of each vehicle they operated.¹⁰³ Before a particular vehicle can be operated again, a motor carrier must certify in the report that any conditions requiring attention have been addressed, and the driver must also certify the report before any subsequent operation.¹⁰⁴

Regulations require that motor carriers maintain records reflecting all inspections, repairs and maintenance on each vehicle they control for at least one year and an additional six months after a vehicle leaves their control.¹⁰⁵ Additionally, a motor carrier shall not allow a vehicle on the streets if it is likely to cause an accident or breakdown.¹⁰⁶ A motor carrier is also required to take all necessary corrective actions to repair or correct any deficiency listed on the driver vehicle inspection report that is likely to affect the safe operation of the vehicle.¹⁰⁷ This is a lower and broader standard than the duty not to let a vehicle out on the streets if it is likely to cause a wreck or breakdown.¹⁰⁸

¹⁰¹ 49 C.F.R. §§ 396.1; 396.7.

¹⁰² 49 C.F.R. § 396.3.

¹⁰³ 49 C.F.R. § 396.11.

¹⁰⁴ *Id.*

¹⁰⁵ 49 C.F.R. § 396.3 (b), (c).

¹⁰⁶ 49 C.F.R. § 396.7.

¹⁰⁷ 49 C.F.R. § 396.11 (c).

¹⁰⁸ 49 C.F.R. § 396.7 (a).

C. Legal Requirements in the Event of an Accident

A motor carrier is required to maintain all accident reports required by the state or other governmental entity or their insurer for at least one year.¹⁰⁹ Additionally, a motor carrier must maintain an accident register for one year after the accident occurs, which contains the following information:

- (1) the date of the accident;
- (2) the city or town in which or most near where the accident occurred and the state in which the accident occurred;
- (3) the driver's name;
- (4) the number of injuries;
- (5) the number of fatalities; and
- (6) whether hazardous materials, other than fuel spilled from the fuel tanks involved in the accident were released.¹¹⁰

III. Investigating/Litigating the Auto/Trucking Case

A. Investigation

1. Investigating the Driver

The qualifications of a driver should strictly scrutinized in a truck collision case, as the driver's training, education, experience, traffic violations, physical attributes and mental status will always be in issue. Counsel should thoroughly examine a driver's application, employment file, traffic violations, log book, certificate of mental examination, drug test results, driving record and criminal background when investigating a driver during the course of litigation. Furthermore, this investigation should be done as soon as possible.

¹⁰⁹ 49 C.F.R. § 390.15 (b)(1)(2).

¹¹⁰ *Id.*

Additionally, in terms of securing discovery or conducting a thorough investigation, below is a list of documents that may be generated during the course of a trip by a commercial motor vehicle that may assist counsel in his investigation:

- Driver logs
- Accident and incident reports
- Bills of lading
- Border crossing reports
- Waybills
- Cash advance/ATM receipts
- Credit and debit card receipts
- Customs declarations
- Delivery receipts
- Dispatch and assignment records
- Driver reports
- Expense vouchers
- Freight bills
- Fuel billing statements
- Fuel receipts
- Gate receipts
- Data provided by global positioning and cellular systems
- Inspection reports
- Invoices
- Interchange reports

- International Registration Program receipts
- International Fuel Tax Agreement receipts
- Lessor settlement sheets
- Lodging receipts
- Lumper receipts
- On-board computer reports
- Over/short damage reports
- Overweight/oversize reports and citations
- Ports of entry receipts
- Telephone billing statements
- Toll receipts
- Traffic citations
- Transponder receipts
- Trip permits
- Trip reports
- Weight/scale tickets¹¹¹

2. Investigating the Accident

There are several obvious sources of information one can use to investigate an accident. First, counsel should attempt to question the peace officer that investigated the accident or hire an accident reconstruction expert to question the officer. Additionally, any and all witness

¹¹¹ *Id.*

statements should be collected, including the tow truck driver, who may be able to tell you whether there were any mechanical problems with the truck.¹¹²

When the investigating the actual site, below is a list of ways to document your investigation of the accident scene:

- Ground Level Photography
- Measurements
- Videotape
- Aerial Photography

Additionally, below is a list of ways to document your investigation of the vehicles involved:

- Ground Level Photography
- Overhead Photography
- Interior Photographs
- Crush Measurements
- Tires, Steering, Suspension, and Brakes
- Lamp Filaments
- Electronic Control Module
- Crash Data Retrieval

It cannot emphasized enough that any investigation of the accident site and the vehicles involved be done as soon as possible. Critical evidence such as skid marks, the condition of the vehicles, gas, oil and other fluid leaks, witness statements and the like are more likely to have an impact if captured immediately following the accident. If you or your firm routinely handles trucking cases, it may be beneficial to have a plan of action in place in the event of an accident, including which attorney will go to the scene, which experts are available (accident reconstructionists), ensure that access to video and photograph equipment is made available for the attorney who will be going to the scene, and have a procedure in place for storing vehicles.

¹¹² Frank Branson, *Handling Catastrophic Injury Cases*, STATE BAR OF TEXAS PROSECUTING OR DEFENDING A TRUCKING OR AUTO ACCIDENT CASE (2004).

3. Investigating the Company

It has been suggested that any investigation of a trucking accident should begin with an investigation of the owner's policies regarding the operation of his fleet, and not with the accident itself.¹¹³ Defense counsel must be prepared for this attack or risk exposing the client to liability that could have easily been avoided with the exercise of caution.

Concerning the investigation of the owner's policies, a prudent plaintiff's attorney should inquire – and likewise, a prudent defense counsel should prepare for – an investigation of the following:

1. *Does the company have a Safety Director?*¹¹⁴

If there is a safety director, and if so, he should be prepared to account for what type of training he has and how much control he has over the operations of the fleet.¹¹⁵

2. *Is there a Fleet Safety Program?*¹¹⁶

Counsel must carefully examine the program, ascertain whether the program is followed, determine whether the drivers are made aware of it, and if the program is enforced.¹¹⁷

3. *What type of drivers are hired?*¹¹⁸

As mentioned in more detailed above, there are certain requirements that must be followed with regard to driver applications and the investigation into the driver's past

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

employment and driving history.¹¹⁹ This will be a treasure trove of information if it is determined that either the driver falsified his application or if the employer failed to conduct a proper investigation.

4. *What type of insurance is carried on the vehicle?*¹²⁰

Whether an investigator has been sent by the insurance company to evaluate a carrier's safety program and the investigator's findings will be information plaintiff's counsel will likely be seeking in an effort to fortify their case.¹²¹

5. *Is there a maintenance program?*¹²²

Counsel should be prepared to investigate whether there are preventative maintenance checks performed on the carrier's equipment, as well as whether the carrier employs an in-house mechanic and if so, what are his qualifications.¹²³

6. *Where does the owner buy his parts?*¹²⁴

Counsel should be prepared to investigate whether the carrier buys good quality parts or whether they buy used/bargain parts.¹²⁵

7. *Are the drivers paid by the load?*¹²⁶

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

If drivers are paid by the load, it is likely that plaintiff's counsel will attempt to paint a picture that the trucks keep rolling no matter what shape they are in.¹²⁷ Additionally, defense counsel should be prepared for the argument to be made by plaintiff's counsel (or plaintiff's counsel should consider arguing) that drivers have no incentive to get any rest if they can make more money by cramming in as many runs as possible; which, in turn, encourages drug use to stay awake.¹²⁸

B. Defenses

Defense counsel will likely already be aware of the traditional defenses available in any tort action, such as comparative fault, responsible third parties, sole cause, statute of limitations and standing (specifically, in survival actions). Defense counsel, however, should not overlook possible defects in the carrier's vehicle caused by a defective component part or defective product. It is no secret that products liability actions involving motor vehicles are prevalent in our jurisprudence and counsel should exhaust all means to determine whether an accident was caused by a manufacture, design or marketing defect on the part of the manufacturer in an effort to absolve its client of at least some liability. It also follows that plaintiff's counsel will eagerly attempt to determine whether there is a manufacture, design or marketing defect involved with the truck, as this means an additional defendant and theories of liability.

Furthermore, defense counsel should be prepared to attack the lack of proximate cause, if the facts warrant such a challenge, to any negligence per se cause of action plaintiffs may be able

¹²⁷ *Id.*

¹²⁸ *Id.*

to maintain based on a statutory violation. Texas law is clear in that even if a defendant violated a statute, the plaintiff still must prove that the violation was a proximate cause of his injuries.¹²⁹

C. Liability

1. Criminal Charges Against the Driver

First, a prudent defense lawyer would be wise to act as quickly as possible to dispose of any traffic citation or criminal charges that may have been issued against the driver following an accident.¹³⁰ Regardless of the merits of the citation or criminal charges, a plea of *nolo contendere* should always be considered in order to avoid the negative effects the traffic citation or criminal charges may have on the civil case.¹³¹ Additionally, after any criminal matters have been resolved, counsel should not overlook redacting, if necessary, the accident report in which a peace officer may make reference to the traffic citation or criminal charge.¹³²

2. Negligence Per Se

The federal regulations that apply to trucking accidents can be found in Chapter 49 of the Code of Federal Regulations and have been discussed at length in this paper. With regard to a negligence per se cause of action, the most commonly utilized sections by plaintiffs against a driver include: 391.11 (driver qualifications); 40.1 *et seq.*; 382.101 *et seq.* (drug and alcohol

¹²⁹ *Texas Brine Corp. v. Loftin*, 751 S.W.2d 197, 204 (Tex. App. – Houston [14th Dist.] 1988) *rev'd on other grounds*, 777 S.W.2d 384 (Tex. 1989).

¹³⁰ Baldemar Garcia, *Important Federal and State Trucking Laws*, STATE BAR OF TEXAS – PROSECUTING OR DEFENDING A TRUCKING ACCIDENT CASE (2002).

¹³¹ *Id.*; *see also* TEX. R. EVID. 410.

¹³² *Id.*

testing); 383.1 (commercial driver's license); 392.1 (driving regulations); and 395.1 *et seq.* (hours of service).¹³³

As for employers, Sections 393.1 *et seq.* (parts and accessories) and 396.1 *et seq.* (inspection and maintenance) are commonly asserted by plaintiffs.¹³⁴ Employers, however, also bear the responsibility for ensuring that its drivers are qualified and do not violate any of the above mentioned rules concerning driver liability.

Additionally, a prudent plaintiff's counsel should not overlook Texas statutes that could give rise to a negligence per se cause of action against a driver and his employer:

- TEX. TRANSP. CODE ANN. § 522 – Requirements for Commercial Driver's License
- TEX. TRANSP. CODE ANN § 548.053 – Necessity for Re-inspection Following Repairs After an Accident
- TEX. TRANSP. CODE ANN § 644.152 & 644.052 – Safety Standards
- TEX. TRANSP. CODE ANN § 522.088 – Disqualifications for Driving
- TEX. TRANSP. CODE ANN § 547.401 – 408 – Braking Requirements
- TEX. TRANSP. CODE ANN § 547.504 – Warning Devices
- TEX. TRANSP. CODE ANN § 522.101 – 106 – Alcohol and Drug Use
- TEX. TRANSP. CODE ANN § 547.351 *et seq.* – Lights and Lighting
- TEX. TRANSP. CODE ANN § 545.351 *et seq.* – Speed
- TEX. TRANSP. CODE ANN § 621.001 *et seq.* – Size and Weight
- TEX. TRANSP. CODE ANN § 545.151 *et seq.* – Right of Way

¹³³ Frank Branson, *Handling Catastrophic Injury Cases*, STATE BAR OF TEXAS PROSECUTING OR DEFENDING A TRUCKING OR AUTO ACCIDENT CASE (2004).

¹³⁴ *Id.*

- TEX. TRANSP. CODE ANN § 550.001 et seq. – Parking
- TEX. TRANSP. CODE ANN § 725.021 – Loads
- TEX. TRANSP. CODE ANN § 541 – 600 – Rules of the Road
- TEX. TRANSP. CODE ANN § 601 – Motor Vehicle Safety Responsibility
- TEX. TRANSP. CODE ANN § 726 – Municipal Testing of Motor Vehicles
- TEX. TRANSP. CODE ANN § 621.101 – Maximum Weight
- TEX. REV. CIV. STAT. ART. 6701d §§ 52, 62; *Moughon v. Wolf*, 576 S.W.2d 603, 606 (Tex. 1978) (driving on the wrong side of the road)
- TEX. REV. CIV. STAT. ART. 6701d § 61; *Texas Hwy Dept. v. Broussard*, 615 S.W.2d 326, 329 (Tex. Civ. App.– Fort Worth 1981, writ ref’d n.r.e.) (following too close or failing to keep a safe distance)
- TEX. REV. CIV. STAT. ART. 6701d § 79; *Caskey v. Bradley*, 773 S.W.2d 735, 737 (Tex. App. – Fort Worth 1989, no writ) (failure to blow horn for child/disabled pedestrian)
- TEX. REV. CIV. STAT. ART. 6701d §138(a); *Allen v. Knippa*, 552 S.W.2d 528, 534 (Tex. Civ. App.– Corpus Christi 1977, writ diss’d) (failure of a truck/trailer to actuate hazard signs when stopped on roadway outside urban district)
- TEX. REV. CIV. STAT. ART. 6701d §71(a); *Sheppard v. Judkins*, 476 S.W.2d 102, 108-9 (Tex. Civ. App. – Texarkana 1971, writ ref’d n.r.e.) (failure to stop at a controlled intersection)

3. General Negligence

Counsel should be prepared to fully investigate the facts of each trucking accident to ascertain whether a negligence, negligent entrustment, negligent hiring or retention cause of action can be established. In trucking litigation, causes of action for negligent hiring, retention, and entrustment are viable claims. For example, it has been held that the failure to conduct thorough background checks constituted a breach of reasonable care.¹³⁵ If the defendant asserts

¹³⁵ *Guidry v. National Freight, Inc.*, 944 S.W.2d 807 (Tex. App. – Austin 1997, no writ).

vicarious liability as a defense, however, information concerning negligent hiring, retention and entrustment is limited to the issue of punitive damages.¹³⁶

Additionally, negligent training and supervision claims are also viable in trucking litigation. In Texas, an employer is required to take an active role in monitoring a driver's driving hours, and help reduce the number of fatigue and stress-related accidents.¹³⁷ Counsel should anticipate negligent training, re-training, and supervision claims in every trucking case.¹³⁸ It has been suggested that plaintiff's counsel will have more success by establishing sub-standard training, re-training and supervision policies.¹³⁹ It has been recommended that defense counsel should advise their clients to take certain pre-accident precautions such as safety courses, harassment seminars, defensive driving programs, and fatigue awareness at the training level.¹⁴⁰ Additionally, at the re-training and supervision level, counsel should advise the company to require standard safety meetings and mandatory re-training sessions after an established number of years or accidents.¹⁴¹ Simply, the more in-house safety programs in place, the less likely a motor carrier will be found to have been negligent in training and re-training their drivers.

4. Products Liability

Counsel should carefully investigate whether there is a factual basis to support a products liability cause of action against the truck's manufacturer. Counsel should especially be mindful of a possible products liability action if the accident could have been caused by a truck's tire

¹³⁶ *Estate of Arrington Fields*, 578 S.W.2d 173, 175 (Tex. Civ. App. – Tyler 1979, writ ref'd n.r.e.).

¹³⁷ *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 731 (Tex. App. – Texarkana 1996, no writ).

¹³⁸ Jeff Ray, *Truck Collision Claims*, 15TH ANNUAL ADVANCED PERSONAL INJURY LAW COURSE.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

failure, retread tire failure, rim failure, brake failure, defective brake drums, loose wheel studs, defective or inadequate underride protection, or defective lighting on the truck. Additionally, effort should be expended to determine whether there has been any entity or individual responsible for installing the truck's tires, rims, brakes, brake drums or wheel studs if any of these components are the cause of an accident, as the installation may have been performed in a negligent manner.

5. Punitive Damages

Punitive damage actions have been successfully asserted by plaintiffs based on theories of negligent hiring, negligent retention, negligent entrustment, the deliberate use of unsafe equipment, allowing a driver to drive while fatigued, and on theories of vicarious liability. Evidence that has helped drive these successful punitive damage actions include:

- Overloading the truck;
- Improper driver training;
- Allowing or forcing drivers to drive without the proper rest;
- Ignoring driver complaints about the poor operation of a truck and instructing him to keep driving;
- Parking the truck in a travel lane;
- Failing to display flares when the truck is either stopped or disabled;
- Driving under the influence of drugs or alcohol;
- Allowing drivers to violate the hours of service rules without monitoring their time behind the wheel;
- Spoliation of evidence such as driver logs;
- The use of a forced dispatch or sleep/driver system, keeping drivers on the road for an inordinate period of time, instead of the driver-relay system;

- Failing to properly investigate a driver's background, including, his employment history, driving record, criminal record, and psychiatric record;
- Conducting an investigation of the above but overlooking the driver's bad record and employing him anyhow;
- Providing the driver with a radar detector.¹⁴²

Punitive damages are likely to be part of every trucking case when considering the gravity of the injuries usually sustained by the plaintiffs. As in most cases, the best strategy for defending a punitive damage cause of action is to ensure that every possible option at increasing safety and driver competence has been exhausted. If a carrier can establish that it takes safety seriously, and implements programs emphasizing safety, it will have a better chance in front of a jury than a company with a *laissez-faire* attitude towards safety.

D. Damages

The damages recoverable in a personal injury action are well-established and a competent attorney should already be familiar with what damages are recoverable in a personal injury matter. Therefore, how to demonstrate and prove damages – or disprove them – is beyond the scope of this paper. Damages, however, are still critically important in a trucking case, as the injuries usually sustained are often severe. Below is a punch list of damages available in a trucking case:

- Physical Pain & Mental Anguish
- Pain and Suffering
- Disfigurement
- Loss of Earning Capacity
- Loss of Earnings
- Mental Anguish
- Medical Care
- Physical Impairment
- Spousal Consortium
- Parental Consortium

¹⁴² David Nissenberg, *Truck Accident Litigation in a Nutshell*.

- Wrongful Death and Survival Damages
- Exemplary Damages
- Personal Property Damages

E. Experts

Challenges to expert witnesses under *Daubert/Robinson* are beyond the scope of this paper. It is fundamental, however, that counsel carefully read the applicable cases and understand the requirements for qualifying an expert witness *prior* to retaining his or her expert witnesses. In the context of a trucking case, expert testimony will often determine the outcome of the case, particularly if a product defect is involved.

Following is a list, by no means exhaustive, of issues that ordinarily require the use of expert testimony in trucking cases:

- Maintenance and repair of trucks and trailers
- Crashworthiness
- Construction and maintenance of trucks and trailers
- Forensic engineering
- Metallurgical engineering
- Failure analysis
- Accident reconstruction
- Premises liability of truck terminals and loading dock areas
- Injury causation
- Fastener design
- Truck driving skills and standards
- Heavy truck technicians and mechanics
- Analysis of data from ECMs, Black Boxes, satellite tracking systems

- Compliance with Federal Motor Carrier Safety Regulations
- Driver log compliance, analysis and audits
- Mechanical engineering
- Tire failure analysis
- Wheel loss causation
- Truck and trailer conspicuity
- Underride protection
- Compliance with federal safety standards
- Traffic management
- Commercial vehicle inspection
- Accident site evaluation
- Driver training and qualification
- Drug and alcohol testing compliance
- Still and video photography
- Computerized accident reenactments
- Proper load securement
- Loading and unloading practices
- Safety in transporting hazardous materials
- Speed analysis
- Driver Fatigue
- OSHA and Hazmat compliance¹⁴³

¹⁴³

David Nissenberg, *Truck Litigation Resource Center, L.L.C., Discovery and Trial Guide*.

Needless to say, the stakes are usually high in trucking cases and choosing the right experts is paramount to your success at trial. Ensure that you have qualified and competent expert witnesses for each issue that you feel expert testimony may be beneficial to the jury. This requires a careful and thorough examination of the facts of your case in order to determine which issues will require expert testimony.