CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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Roundtable 1: Thursday, April 10, 2014 (10:10 am – 11:10 am)

Protecting the Trucking Industry Client during the Discovery Process

I. Introduction.

Generally, trucking cases start the same way: an accident happens; the police and medical responders are called to the scene to investigate the collision and treat on-the-scene injuries; the trucker calls in the accident to his dispatch or home office and begins the process of preparing his accident report; and the trucking company and its insurer undertakes to investigate the accident internally, reviewing the drivers' report, reviewing the police report, gathering and preserving information and records, identifying and interviewing witnesses, and using the facts to determine what—if anything—could have been done to prevent the accident.

In most cases, the truck driver and his company are subject to regulations under the Federal Motor Carrier Safety Administration[1] and, if the accident is a recordable accident,[2] the trucking company's obligations to investigate and report the accident are not over. Motor carriers are required to document recordable accidents for the FMCSA's safety rating process.

Naturally, when these accidents move into the realm of litigation, plaintiffs look for any evidence they can find to successfully prosecute their claims. As an industry, we need to do what we can to protect companies during the litigation discovery process and at trial, which includes asserting appropriate

[1] Commercial Motor Vehicles (CMVs) are subject to the FMCSA. A CMV is a self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property that meets at least one of the following criteria: (a) weighs 10,001 pounds or more; (b) is designed or used to transport more than 8 passengers for compensation; (c) is designed or used to transport more than 15 passengers without compensation; or (d) is used in transporting hazardous material.

[2] A recordable accident means an occurrence involving a commercial motor vehicle that results in a fatality; in bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or in one or more motor vehicles incurring disability damages that requires the motor vehicle to be transported away from the scene by a tow truck.

objections and avoiding voluntary disclosure of damaging documents that are protected from discovery or admission by state and federal law.

II. Overview of Privileges and Objections at our Disposal to Prevent Disclosure and Admission of Prejudicial Evidence Underlying an Internal Investigation of a Trucking Accident.

One hallmark of trucking cases involves the amount of documents related to an accident or a driver that may be responsive to a plaintiff's discovery requests. Such documents can include the accident report, the driver's report, witness statements, internal investigation documents, accident reconstruction documents, incident reports, preventability determinations, the recordable accident registry, prior recordable accidents, the driver's history (including prior instances of discipline), and Department of Transportation compliance reporting documents.

In addition to the standard and traditional rules of procedure and rules of evidence, companies and their litigators should rely on the protections afforded by the FMCSA. Protections afforded under 49 U.S.C. § 504 can be used to prevent both discovery and admission of certain damaging materials.

A. Using 49 U.S.C. § 504(f) to Protect Mandatory Reporting Documents and Underlying Materials from Discovery and Admission into Evidence.

Motor carriers are required to document recordable accidents for the FMCSA's safety rating process. 49 U.S.C. § 504(f) states:

> ***No part of a report of an accident*** occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and *required by the Secretary*, and no part of a report of an investigation of the accident made by the Secretary, ***may be admitted into evidence or used in a civil action*** for damages related to a matter mentioned in the report or investigation.

(Emphasis added). There is little doubt that the United States Congress intended the statute to apply to both federal and state courts equally.[3] Cases throughout the Country illustrate this point.

B. The Scope of Protection under 49 U.S.C. § 504(f) and its Application in both Federal and State Courts.

On the federal front, in *Sajada v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009), the plaintiff filed a motion to compel production of internal accident reports withheld by the defendant on the basis of 49 U.S.C. § 504(f). The defendant opposed the motion, arguing "that the DOT Accident Register is barred by 49 U.S.C. § 504(f) from disclosure in discovery." *Id*. at 340. The district court agreed with the defendant and denied the motion, holding:

> Although there is a dearth of case law on this provision, the reported cases all reach the same conclusion. The Supreme Court in *St. Regis Paper Co.* discussed the necessary strict construction of statutes purporting to create a privilege and held that disclosure of

[3] The United States Congress has the power to preempt state laws governing evidentiary rulings under the Supremacy Clause, found in Article VI, Section 2 of the United States Constitution. When a "statute that has evidentiary implications is part of [a] larger federal statutory scheme, the Supremacy Clause demands that states adhere to the statue. To hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the Supremacy Clause." *City of Atlanta v. Watson*, 475 S.E.2d 896, 902-03 (Ga. 1996).

> information through discovery will not be barred absent an express prohibition. 368 U.S. at 218, 82 S.Ct. at 295. In fact, the *St. Regis Paper Co.* opinion specifically listed the earlier version of § 504(f) as an example of just such an example of "when Congress has intended like reports not to be subject to compulsory process" and "has said so." *Id.* …
>
> The plaintiffs counter that the seemingly nonspecific wording of § 504(f) prohibiting admission into evidence or "use" in a civil action for damages lacks the Congressional intent to create a privilege. However, they fail to cite a case in which a court compelled discovery when the statutory privilege of § 504(f) was asserted. Indeed, the plaintiffs discuss a review of the United States Code revealing six statutes in which Congress has created a privilege exempting documents from the discovery process with specific language aimed at the subject of discovery. Similarly, in *Adcox v. Medtronic, Inc.*, 131 F.Supp.2d 1070, 1075 (E.D.Ark.1999), the court reviewed six statutes, including § 504(f), with similarly ambiguous "used in a civil action for damages" language, and found that such language was not specific enough to demonstrate Congress' intent to bar such reports from discovery. This conclusion was vacated upon a writ of mandamus by the Eighth Circuit, holding that the statute precluded discovery of the mandatory reports. *In re Medtronic, Inc.*, 184 F.3d 807, 811 (8th Cir.1999).
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> The burden to demonstrate privilege is on the defendants, and the case law presented to the court supports the interpretation of 49 U.S.C. § 504(f) argued by the defendants. Therefore, the DOT Accident Register assigned Event No. 2008055687 is protected by statutory privilege.

Sajda v. Brewton, 265 F.R.D. 334, 340-41 (N.D. Ind. 2009).

Likewise, courts have found that 49 U.S.C. § 504(f) applies to discovery and evidentiary issues at the state level. For example, the Georgia Supreme Court in *City of Atlanta v. Watson*, 475 S.E. 2d 896 (Ga. 1996) cited 49 U.S.C. § 320(f) (the identical predecessor to 49 U.S.C. § 504(f)), as an example of a statute that Congress intended to apply and create a privilege under state law:

> [T]he legislative history suggests that Congress intended section 47507 to be applied in state courts. When Congress first passed section 47507 in 1980, it did so knowing that the state court had applied comparable federal laws to exclude evidence in state courts. The Senate Report expressly refers to similar statutes, 49 U.S.C. § 320(f) and 45 U.S.C. § 41. These statutes prohibit admission of reports created under certain federal laws in "any civil action." Thus, they are virtually identical to section 47507's prohibition on use of noise maps in "a civil action." Long before the enactment of section 47507, state courts had applied these statutes. Thus, the express reference to these similar statutes in the legislative history of section 47507 supports the conclusion that Congress intended that section to apply in state courts.

475 S.E.2d at 903.

In addition to prohibiting the discovery of any report required pursuant to FMCSA regulations, the Supreme Court of North Carolina found that information ***used to prepare*** a report required by the FMCSA is equally non-discoverable. In *Craddock v. Queen City Coach Co.*, 141 S.E. 2d (N.C. 1965), the plaintiff brought suit against a bus company after the bus on which she was a passenger was involved in an accident with another vehicle. During the discovery process, the plaintiff deposed and requested documents from the bus company's vice president and assistant general manager, Mr. Hal J. Love. During the deposition, the plaintiff asked Mr. Love questions concerning the bus driver's written

statement related to the accident. Additionally, the plaintiff asked Mr. Love to produce the written statement for inspection. Mr. Love refused. After the trial court entered an order directing Mr. Love to appear for deposition with the requested documents in hand, the bus company petitioned the Supreme Court of North Carolina for *certiorari*, which was granted. In its opinion, the Court—relying on language identical to 49 U.S.C. § 504(f) held:

> [S]ince the…statute prohibits the introduction in evidence, or use for any other purpose, of any report made to the I.C.C.[4] in any suit or action for damages growing out of any matter mentioned in such report, it would be violative of the spirit and purpose of the I.C.C. Act to require the defendant to give plaintiff the data upon which the I.C.C. report was based. To do so would make the protective provisions of the statute worthless.

Craddock, 141 S.E.2d at 800.

Thus, the broadest interpretations of 49 U.S.C. § 504(f) have determined that not only is the report to the FMCSA itself non-discoverable and inadmissible, but any information and documents used in the preparation of those reports are equally protected. In fact, the 6th Circuit probably stated the spirit of the statute most concisely in its finding that section 504(f) can only be read as a "flat prohibition against the use of reports or any part of them as evidence." *Blankenship v. General Motors Corp.*, 428 F28 F.2d 1006, 1009 (6th Cir. 1970).

C. Focusing on Specifics: 49 U.S.C. § 504(f) and Internal Preventability Determinations.

1. The problem with varying definitions of a "preventable" accident.

Though the Federal Motor Carrier Safety Regulations (FMCSRs) do not specifically require a company to engage in internal preventability analysis, companies continue to do so for a variety of reasons. First, as a part of the FMCSA's safety rating process,[5] preventability becomes a factor considered by the FMCSA when a trucking company asks for re-evaluation of its initial safety rating. The FMCSA defines a "preventable" accident as an accident that involves a CMV that could have been averted but for an act, or failure to act, by the motor carrier or the driver. In its guidelines to companies regarding Accident Preventability Evaluations, the FMCSA also considers a preventable accident as one which occurs because the driver fails to act in a reasonably expected manner to prevent it. In judging whether the driver's actions were reasonable, one seeks to determine whether the driver drove defensively and demonstrated an acceptable level of skill and knowledge.

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[4] The Interstate Commerce Commission is now referred to as the Department of Transportation.

[5] The Safety Fitness Procedures created and enforced by the FMCSA are used to determine the safety fitness of motor carriers through the assignment of safety ratings and establish a safety fitness standard which a motor carrier must meet to obtain a satisfactory rating. When assigning its initial rating of "satisfactory," "conditional," or "unsatisfactory," the FMCSA considers five regulatory factors used to describe various standards put forth under the procedures. Those factors include the General Factor (Safety Fitness Procedures Parts 387 and 390); the Driver Factor (Safety Fitness Procedures Parts 382, 383, and 391); the Operational Factor (Safety Fitness Procedures Parts 392 and 395); the Vehicle Factor (Safety Fitness Procedures Parts 393 and 396); and the Hazardous Materials Factor (Safety Fitness Procedures Parts 397, 171, 177, and 188). In addition to the five regulatory rating factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate for the past 12 months. If the carrier is not satisfied with its rating, it may appeal the rating through administrative review available under Part 385.15 of the Safety Fitness Procedures. When a motor carrier contests its rating, the FMCSA considers an additional factor—preventability—in its re-evaluation process.

Now, imagine if every document for an accident which a company deemed as "preventable" was admissible before a jury. Imagine the verdict amount a jury may deliver if the plaintiff can produce an internal document from a defendant trucking company calling an accident "preventable." What's more, the jury would likely be left to their own interpretation of the word "preventable" when, in actuality, the definition employed by trucking companies is more stringent than the definition used by the FMCSA or the duty required by law.

For example, in *Ward v. Jones Motor Group, Inc.*, 98-S-162, 2002 WL 34098014 (Pa. Com. Pl. June 28, 2002), the defendant company's safety director issued a preventability letter after an accident in which the plaintiffs were seriously injured. In the letter, the safety director declared the accident a "preventable accident." When asked during deposition to explain his determination, the safety director stated that while the company did not have written criteria for the determination, he would assess an accident as "preventable" if the driver was one percent negligent. Similarly, in *Tyson v. Old Dominion Freight Line, Inc.*, 608 S.E.2d 266 (Ga. Ct. App. 2004), the defendant company's standard for a "preventable" accident was not based on who was legally at fault. Instead, the company standard went beyond its driver's careful observance of traffic laws and depended on whether the driver could have prevented the collision.

2. Using 49 U.S.C. § 504(f) to exclude preventability reports.

Along with showing the varying definitions of "preventability," *Tyson* is also illustrative on the issue of when an internal preventability determination may be protected from discovery and inadmissible at trial. In *Tyson*, the trial court ruled that under 49 U.S.C. § 504(f), the preventability determination was not discoverable. The Georgia Court of Appeals disagreed, saying there was no evidence in the record that the documents in question were prepared to satisfy the requirements of the FMCSA. The court specifically noted that the defendant company failed to submit any evidence to show its internal review was conducted in order to comply with FMCSA requirements and mentioned the absence of an affidavit to show the document was generated in connection with FMCSA requirements. The court's opinion is instructive: one way to protect documents like preventability reports from discovery is to make sure we have affidavits available showing that documents were prepared for the purpose of FMCSA compliance.

A second way to argue against the admission of preventability reports is to rely on the broadest interpretation of 49 U.S.C. § 504(f). As in *Craddock*, practitioners may argue that the admission of documents used in the preparation of an FMCSA compliance report is violative of the spirit and purpose of the statute and would make the protective provisions of the statute worthless.

A final—and potentially the easiest—way to advocate for the non-disclosure and inadmissibility of a preventability determination or other internal documents is to simply attach the document(s) to the report provided to the FMCSA for reported recordable accidents. Doing so eliminates any question that the document was prepared for and a part of an FMCSA report and it increases the likelihood of a court ordering protection of the document under the statute.

III. Another Alternative: Self-Critical Analysis Doctrine.

Some practitioners have successfully argued against the discovery and admission of internal investigative documents related to a trucking accident by using the self-critical analysis doctrine. The self-critical analysis privilege "is grounded on the premise that 'disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law,' " *Morgan v. Union Pacific R.R. Co.*, 182 F.R.D. 261, 264 (N.D. Il1. 1998) (quoting *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6, 7 (E.D.N.Y. 1995)). The self-critical analysis privilege attaches if: (1) the information sought resulted from a critical self-analysis undertaken by the party seeking

protection; (2) the public has a strong interest in preserving the free flow of the type of information sought; (3) the information is of the type whose flow would be curtailed if discovery were allowed; and (4) the document was prepared with the expectation it would be kept confidential, and has in fact been kept confidential. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992); *Morgan v. Union Pacific R.R. Co.*, 182 F.R.D. 261, 266 (N.D. I11. 1998).

Little doubt exists that internal investigations, preventability reports, driver disciplinary actions, and expectations placed on our client drivers beyond the legal duty are in the interest of public policy. Society benefits from companies looking at their policies, procedures, and driver behavior with scrutiny to increase the safety of others on the road. Additionally, a strong argument can be made that a company is less likely to do all it can to prevent accidents and dangerous behaviors if these types of internal evaluations are admissible against a company on the issue of liability. When accepted, the self-critical analysis doctrine can be effective in protecting certain documents from discovery.

IV. Practical Considerations when using 49 U.S.C. § 504(f) and Other Privileges during the Discovery Process.

Trucking cases often come with hundreds if not thousands of documents responsive to a plaintiff's discovery requests. We must be very careful to examine the documents to make sure we do not (a) waive privilege to those documents underlying an FMCSA report; or (b) produce documents revealing internal investigations and outcomes that evidence subsequent remedial measures or self-critical analysis. One way to avoid inadvertent disclosure is to keep a detailed privilege log for documents withheld from production. Practitioners also may find it useful to note when documents are redacted for privileges asserted under common law and under 49 U.S.C. § 504(f). Practitioners should be mindful that documents underlying FMCSA reports are not always marked as such and may not be separated into a folder of documents underlying one particular investigation or another.

V. The Effect on Settlement and Mediation Negotiations when FMCSA Compliance Documents are not Discoverable.

The disclosure in discovery or admission as evidence at trial of accident reports or registries and preventability determinations can have a detrimental, if not fatal, impact on settlement, dispositive pre-trial rulings, and the ultimate outcome at trial or on appeal in trucking litigation. If a recordable accident registry showing prior accidents is discoverable and admissible at trial, a motor carrier will be defending not just one accident, but many. Plaintiffs and their counsel often try to use prior accidents to show conduct in conformity on the occasion in question. Likewise, if a finding that an accident was preventable is produced in discovery or admitted at trial, plaintiffs will argue the motor carrier has already admitted fault. Obviously, this situation is not ideal. Fortunately, as we have discussed, it may be avoidable.