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PRECLUDING DISCOVERY OF PREVENTABILITY DETERMINATIONS IN TRUCKING ACCIDENTS

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ABSTRACT

The discoverability and admissibility of post-accident “preventability” determinations by trucking companies is often much disputed in truck accident cases. It is well known that Plaintiff’s attorneys will try to construe a trucking company’s classification of an accident as “preventable” as an admission of fault during the course of a lawsuit. However, statements made by the FMCSA provide significant support to a trucking company’s efforts to preclude discovery or admission of preventability determinations in a lawsuit. This article explores these issues.

INTRODUCTION

The discoverability and admissibility of post-accident “preventability” determinations by trucking companies is often much disputed in truck accident cases. It is well known that Plaintiff’s attorneys will try to construe a trucking company’s classification of an accident as “preventable” as an admission of fault during the course of a lawsuit. Over the years, courts have reached conflicting results as to whether preventability determinations should be discoverable or admissible at trial. This article provides an overview of the case law and provides strategy for handling “preventability” determinations in your case.

There are many standards by which an accident is determined to be preventable floating around the transportation industry. For example, 49 CFR 385.3 defines a “preventable accident” as an accident:

- (1) that involved a commercial motor vehicle, and
- (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver.

Although another party may have been the primary cause of the accident, most preventability standards focus solely on whether the accident could have been avoided by the truck driver, while ignoring the negligence of others. Of crucial importance, these preventability standards do not evaluate whether the truck driver acted reasonably or with ordinary care.

What may be a surprise to some motor carriers is the fact that motor carriers are not required to do preventability determinations since the accident reporting requirements for motor carriers under FMCSR Part 394 were rescinded on March 4, 1993. However, the practice remains seemingly entrenched in the industry. Somewhat confusing for motor carriers is that FMCSA still does preventability determinations when analyzing whether a motor carrier had a satisfactory safety rating under FMCSR § 385.17. As discussed further below, the FMCSA also implemented on August 1, 2017 a crash preventability program expected to run to at least August 1, 2019.

In recent years, courts have reached conflicting results as to whether preventability determinations should be discoverable or admissible at trial. Courts often found preventability determinations **discoverable**, but not necessarily **admissible**. However, this approach often unfairly puts the motor carrier in the position during the discovery

process of having to explain its actions during its post-accident review of an accident.

Whether a preventability determination is discoverable often depended in large part on how the determination was created. If a preventability determination was conducted in a company's ordinary course of business, the determination was often discoverable. Most legal arguments focused on whether preventability determinations are relevant, confusing, misleading, a subsequent remedial measure, or protected under the work product doctrine. Following is a summary of the outcomes of the cases under the various legal theories:

- **Proportional to the Needs of the Case** (Fed. R. Civ. Proc. 26):
 - *Head v. Disttech, LLC*, 2017 WL 3917065 (W.D. Wash. Sept. 7, 2017) (admissible)
- **Relevance** (Fed. R. Evid. 401, 402):
 - *Rogge v. Estes Exp. Lines*, 3:13CV1227, 2014 WL 5824766, at *2 (N.D. Ohio Nov. 10, 2014) (inadmissible)
 - *Nix v. Holbrock*, 2015 WL 733778 (U.S. D. S.C. Feb. 20, 2015) (discoverable)
- **Confusion / Misleading / Danger of Unfair Prejudice** (Fed. R. Evid. 403):
 - *Chavez v. Marten Transp., Ltd.*, 2012 WL 12861607, at *1 (D.N.M. May 2, 2012) (admissible)
 - *Brossette v. Swift Transp. Co., Inc.*, 2008 WL 4809651, at *3 (W.D. La. Oct. 30, 2008) (admissible)
 - *Cockerline v. Clark*, 2013 WL 5539064 (N.J. Super. Ct. App. Div. Oct. 9, 2013) (inadmissible)
 - *Inman v. Sacramento Regional Transit Dist.*, 2003 WL 1611214 (Cal. 3rd Dist. Mar. 23, 2003) (inadmissible)
 - *Villalba v. Consol. Freightways Corp. of Delaware*, 2000 WL 1154073 (N.D. Ill. Aug. 14, 2000) (inadmissible)

- **Materials Prepared in Anticipation of Litigation & Attorney Work Product Doctrine vs. Ordinary Course of Business** (Fed. R. Proc. 26(b)(3)):
 - *Head v. Disttech, LLC*, 2017 WL 3917065 (W.D. Wash. Sept. 7, 2017) (discoverable)
 - *Laws v. Stevens Transport*, 2013 WL 941435 (S.D. Ohio 2013) (discoverable)
 - *Byrd v. Wal-Mart Transp., LLC*, 2009 WL 3055303, at *3 (S.D. Ga. Sept. 23, 2009) (discoverable)
 - *Heartland Express, Inc., of Iowa v. Torres*, 90 So. 3d 365, 367 (Fla. Dist. Ct. App. 2012) (not discoverable)
- **Subsequent Remedial Measure** (Fed. R. Evid. 701):
 - *Harper v. Griggs*, 2006 WL 2604663 (W.D. Ky. Sept 11, 2006) (inadmissible)
 - *Venator v. Interstate Res., Inc.*, 2015 WL 6555438 (S.D.G.A. Oct. 29 2015) (discoverable)
 - *Martel v. Massachusetts Bay Transp. Auth.*, 525 N.E.2d 662 (Ma. 1988) (inadmissible)
- **49 U.S.C. § 504(f)**:
 - *Tyson v. Old Dominion Freight Line, Inc.*, 608 S.E.2d 266 (Ga. App. 2004) (discoverable)
 - *Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009) (discoverable)

It has been seldom litigated whether such preventability determinations should be precluded from discovery under 49 U.S.C. § 504(f), which provides:

- “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 [of

Transportation], and no part of a report of an investigation of the accident **made by** the Secretary [of Transportation], may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.”

In *Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009) defendants successfully argued that 49 U.S.C. § 504(f) barred a motor carrier’s accident register from disclosure in discovery because it is a “required” accident report under FMCSR § 390.15. The *Sajda* court, however, did not extend 49 U.S.C. § 504(f)’s application to “regularly-gathered information that the carrier acquires . . . used to generate the DOT Official Accident Register Reports,” such as preventability determinations.

The result in the *Sajda* case is perhaps understandable because since 1993 preventability determinations were not regarded as accident reports “required” by the motor carrier to complete for the FMCSA. Because motor carriers are not technically required to do preventability determinations pursuant to FMCSR Part 394, 49 USC § 504(f) arguably had no application to the preventability reports done by motor carriers. Nevertheless, 49 USC § 504(f) still applied to preventability determinations “made by” the FMCSA.

However, the FMCSA’s recent adoption of the crash preventability program perhaps breathes new life into the argument that 49 USC § 504(f) affords a statutory basis to keep preventability determinations out of civil lawsuits. On August 1, 2017, the FMCSA implemented the crash preventability program expected to run to at least August 1, 2019. See <https://www.fmcsa.dot.gov/safety/crash-preventability-demonstration-program>. The crash preventability determinations made by the FMCSA under this program to a select few types of accidents do not affect any carrier’s safety rating or ability to operate, but rather

are simply noted (but not removed) on the FMCSA’s Safety Measurement System (SMS). In announcing the program, the FMCSA published the following in the Federal Register:

- “In response to the [FMCSA]’s proposal to remove not preventable crashes from the public SMS display, commenters correctly stated that the [FMCSA] was equating a finding of “not preventable” with a finding of “not at fault.” Advocates stated that determinations of fault are “the province of the legal system” and noted that independent investigations of a crash may reach different fault conclusions. Advocates advised that using “only a limited amount of information about the incident, and without all of the benefits provided to a jury during a civil trial, including going to the scene, is grossly misguided.” The TSC added that the State court systems are responsible for making determinations of fault. ATA advised that, “The goal of this process should not be to definitely declare fault, but to identify the predictive value of crashes in the same way the agency does with violations.”
- Fault is generally determined in the course of civil or criminal proceedings and results in the assignment of legal liability for the consequences of a crash. By contrast, a preventability determination seeks to identify the root causes for a crash and is used to prevent the same type of crash from reoccurring. A preventability determination is not a proceeding to assign legal liability for a crash. Because preventability determinations are distinct from findings of fault, Section 5223 does not prohibit the public display of not preventable crashes.
- The demonstration program is intended to analyze preventability. The [FMCSA] believes that the public display of all crashes, regardless of the preventability determination, provides the most complete information

regarding a motor carrier's safety performance record. The [FMCSA] is committed to the open and transparent reporting of safety performance data.

...
· **Under 49 U.S.C. 504(f), "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." The crash preventability determinations made under this program are intended only for FMCSA's use in determining whether the program may improve the Agency's prioritization tools. These determinations are made on the basis of information available to FMCSA at the time of the determination and are not appropriate for use by private parties in civil litigation. These determinations do not establish fault or negligence by any party and are made by persons with no personal knowledge of the crash.**

Federal Register - Vol. 82, No. 143, July 27, 2017.
In early 2018, the FMCSA reiterated:

· These determinations are made on the basis of information available to FMCSA at the time of the determination and are not appropriate for use by private parties in civil litigation. These determinations do not establish fault or negligence by any party and are made by persons with no personal knowledge of the crash.

Federal Register - Vol. 83, No. 26 /
Wednesday, February 7, 2018.

Clearly, the above statements made by the FMCSA provide significant support to a trucking company's efforts to preclude discovery or admission of preventability determinations in a lawsuit. The FMCSA's statements show how a preventability determination is irrelevant, confusing, and misleading. Further, if the preventability determination is made by the FMCSA it should not be discoverable or admissible under 49 U.S.C. 504(f). Further, motor carriers participating in FMCSA's newly implemented crash preventability program should argue that 49 U.S.C. § 504(f) precludes both the discoverability and admissibility of preventability determinations made by the FMCSA through this program.

BIOGRAPHY

Patrick E. Foppe is a member with Lashly & Baer PC in St. Louis, Missouri. He represents trucking companies, brokers and logistics companies as well as their insurance carriers. He frequently handles disputes involving commercial transportation accidents, federal and state safety regulations, contract disputes, insurance coverage, freight claims, and other transportation related disputes. E-Mail: pfoppe@lashlybaer.com