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"What does the Crystal Ball Foresee for Trucking Litigation?"

I. DRIVER SHORTAGE, FMCSA's YOUNG DRIVER PILOT PROGRAM, AND THE LIABILITY IMPLICATIONS

The American Trucking Associations estimates that there is a truck driver shortage of 80,000 drivers, a historic high.

The fleet of drivers is growing older. There are indications that more current and eligible drivers are unwilling to do the job. Some factors which make drivers and potential drivers reticent are long and uneven hours, the grueling nature of driving in traffic, detention at shippers and receivers, increasing regulatory demands, and so forth.

This shortage of truck drivers is estimated to surpass 160,000 by 2030. While the national shortage of truck drivers predates COVID-19, this shortage now coupled with the pandemic has played a significant factor in the present supply chain crisis.

Statistics demonstrate that the average age of a Truck Driver is 48 years. About 83% of drivers are men. Turnover is high and retention is low; about 40% of drivers stay on the job for less than one year and only 27% remain drivers for two years.

Motor Carriers, in cooperation with Trucking organizations, State and Federal authorities, as well as shippers, receivers and other stake holders are attempting to address the problems. Better pay and benefits, creative and flexible scheduling, use of team drivers, and increased dedicated routes are some of the changes which have been implemented. But it is clear that more needs to be done to address the driver shortage and attendant problems.

In response, part of Congress' Infrastructure Investment and Jobs Act—signed into law by President Biden in November of 2021—mandated that the Federal Motor Carrier Safety Administration (FMCSA) establish an apprenticeship program for qualified 18, 19, and 20-year-old drivers, which would allow these drivers to operate commercial motor vehicles in interstate travel as long as certain conditions are met.

On January 14, 2022, the FMCSA, in accordance with Congress' mandate, established the "Safe Driver Apprenticeship Pilot Program." For participating motor carriers and drivers, the normal requirement under Federal Motor Carrier Safety Regulation ("FMCSR") 391.11(b)(1), restricting drivers under 21 from interstate travel, will be waived, allowing qualified 18-20 year old apprentice drivers that meet the program requirements to operate commercial motor vehicles in interstate travel. In order to be part of the program, qualified motor carriers must apply on the FMCSA website and the program will be limited to 3,000 drivers. It should be noted that the FMCSA currently does not restrict younger drivers from operating in intrastate commerce, though state laws vary in this regard.

In addition to having proper operating authority and minimum levels of insurance, the requirements for a motor carrier to be a part of the program include: not being classified as a moderate or high risk motor carrier by the FMSCA; a satisfactory safety rating from the FMCSA; no open enforcement actions; and below national average crash and driver/vehicle Operations Out-of-Service ("OOS") rates. The requirements to be an apprentice driver include not having the following in a 2-year period preceding the driver's date of hire: more than one license; license suspended/revoked; any conviction of a traffic violation (other than parking) in relation to a traffic crash; and any conviction of other enumerated violations related to drugs/alcohol or negligent/reckless driving.

Before the apprentice driver is allowed to operate a commercial motor vehicle alone, the program requires that the apprentice driver go through two probationary periods with the motor carrier: an initial 120-hour period of on-duty time (80 hours driving a commercial motor vehicle) and an additional 280-hour period of on-duty time (160 hours driving a commercial motor vehicle). During both of these probationary periods, the apprentice driver must be accompanied at all times by an experienced driver (as defined under the program), and the commercial motor vehicle being operated by the apprentice driver must have certain technologies installed, such as forward facing video cameras and a governed speed of 65 MPH. Additionally, the motor carrier is responsible during these probationary periods for ensuring the apprentice driver is competent in the categories enumerated under the program, including but not limited to, speed and space management, safety awareness, hours of service compliance, backing and maneuvering in close quarters, pre-trip inspections, etc.

The program will last three years, and the FMCSA will report its findings to Congress. Participating motor carriers will have reporting requirements, including monthly reporting to the FMCSA on the apprentice driver's activity. The FMCSA has not yet announced the application process for the program; however, interested motor carriers should not wait to begin reviewing and, if need be, implementing the necessary policies and procedures to participate and comply with the program.

Some in the industry are concerned about the concept of putting 18 to 20 year olds in Trucks which a significant segment of the population perceives as larger, heavier, more difficult to drive and therefore less safe than passenger vehicles. It is crucial that any pilot program or eventual permanent program be carefully designed to address these concerns.

Of course, there is risk to allowing younger drivers to be qualified to operate Commercial Motor Vehicles in interstate commerce. Surely there will be claims and litigation implications; for plaintiff lawyers will argue that younger drivers are by definition less safe. Negligent hiring, retention, and training claims will invariably be presented. Time will tell how these claims will be addressed by the defense. But, it is evident that claims and lawsuits involving young drivers will need careful attention regarding training, monitoring of behavior, and witness preparation.

Meanwhile, the FMCSA, responding to a mandate from Congress, will launch this interesting pilot program to address a serious issue facing the trucking industry and indeed the entire country. It will be interesting to see what develops.

II. NUCLEAR AND POTENTIALLY ASTRONOMICAL VERDICTS, WILL THE TREND CONTINUE?

Verdicts in trucking cases are no longer in the range of $1 million-$2 million. Nuclear trucking verdicts, defined as verdicts greater than $10 million, have increased at an exponential rate. One of the seminal cases in terms of nuclear verdicts is the $90 million verdict against Werner in 2018 (as of the writing of this paper, this case was still on appeal). In Werner, Plaintiff's attorney used a *Reptile Theory* attack against Werner for its safety and training. The case involved a vehicle which lost control and crossed over the highway median and hit the Werner truck, which was traveling within its lane of travel and within the speed limit. Plaintiff was a passenger in the vehicle that lost control and crossed over the highway median and there were catastrophic injuries. Plaintiff's attorney put Werner on trial by way of the *Reptile Theory* and argued that the Werner truck should not have been in the left lane, which is reserved for passing only, that the driver was inexperienced, and that Werner knew the adverse weather conditions before the truck was dispatched.

There were then a trilogy of $100 million verdicts in 2018 out of Texas, although one was overturned on appeal as being excessive.

Nuclear verdicts are often based on aggravating factors that the Plaintiff's attorney uses to drive anger, fear, and emotion into the jury, arguing that it is their job to protect their community from needless danger and the conduct of the trucking company. These aggravating factors can be categorized as the "Dirty Five" aggravating factors which can lead to a nuclear verdict including fatigue; cell phone and distracting driving; alcohol and controlled substances; maintenance; and training. Nuclear verdicts have increased to a $280 million verdict in Muscogee County, Georgia in August, 2019; to a verdict of $352 million for a family of a paralyzed airport worker in Houston in October, 2021; to a $411 million Zoom jury award in state court in Florida in January 2021; as well as to a $730 million verdict involving a wrongful death lawsuit in November, 2021 in rural Texas, which was based on a violation of the Defendant's safety rules and Plaintiff also argued that the Defendant accepted no responsibility.

A $1 billion verdict was entered in August, 2021 in Nassau County, Florida involving a fatality of an 18 year old who was stopped in traffic as there was an accident in front of him, involving the first truck driver. While the decedent was stopped, a second truck hit him from the rear, killing him. The jury found that the second trucking company was responsible for 90% of the

compensatory wrongful death damages, which were $100 million in total, with 10% of the compensatory wrongful death damages to be paid by the first trucking company. However, the jury found that the first trucking company must pay $900 million in punitive damages as they found that its wrongful conduct was motivated by "unreasonable financial gain", which was known by the company's management.

In terms of the aggravating factors, with regard to the first truck, the driver did not have a CDL; the driver was on his cell phone; he was hired with no background check; and had previous crashes/violations for aggressive driving and speeding. The aggravating factors for the second truck were that the driver was on cruise control at 70 mph; braked only one second before the crash; and was driving over his hours of service, 25 hours over the road. The insurance carrier for the first truck filed a declaratory judgment action following payment of the full policy limit of $1 million pursuant to settlement, and argued that there was no coverage for the $900 million punitive damage portion of the verdict, and this declaratory judgment action is pending.

Insurers, TPA's, and defense counsel must immediately investigate, evaluate, and defend those cases involving the "Dirty Five" aggravating factors for a successful outcome of the case.

III. WHAT TYPES OF LITIGATION AND DEFENSES DO WE EXPECT FROM AUTONOMOUS TRUCKS?

Litigation for autonomous vehicles may evolve from Plaintiff's attorneys' creative argument that the trucking company did not have the safest technology on the truck when the crash occurred. This argument was made in a suit filed in the U.S. District Court of Pennsylvania wherein the Plaintiff, Mr. Shimmel, alleged both a negligent count against the driver of the truck, as well as a product liability theory against Navistar, and other product liability Defendants, asserting that the truck was sold without a forward collision warning system and automatic braking as standard equipment. Plaintiff further alleged that the product liability Defendants made careless business decisions to increase and maximize profits over safety. Plaintiff further argued that the purchaser of the Navistar truck, the owner/lessor, failed to purchase these safety features which were an option. It is important to note that the Court denied the product manufacturer's Motion to Dismiss holding that the Plaintiff adequately pled a case and the case subsequently settled with the product manufacturers still in the case.

A case out of the U.S. District Court of Kansas involved a similar cutting-edge theory that there was a design defect since the Daimler manufactured truck failed to have front collision warning and automatic emergency braking systems for crash prevention or crash mitigation. At the time of the submission of this paper, Daimler's Motion for Summary Judgment on this issue was still pending.

Plaintiff's attorneys will argue that the trucking company did not have the safest in-cab cameras, collision avoidance system, roll stability, lane departure protection, and automatic braking. It is crucial for defense counsel to identify, with the trucking company, TPA, and insurer, which types of electronic safety features are on the truck in order to defend a *Reptile Theory* attack.

Careful consideration should be given to determining if the trucking company purchased another company in the past. If so, it is important to know whether or not they had the same type of technology. If not, Plaintiff's counsel will argue that the company put profits over safety if there is an accident with the trucking company that was purchased, which did not have the same type of safety technology. The same type of argument can be made if the trucking company only has forward-facing cameras and not rear-facing cameras, which may show that the driver was distracted or on his/her cell phone.

The defense should, early on in the litigation, identify the appropriate corporate representative/30(b)(6) witness to defend the business decisions and evaluations of the trucking company in terms of technology. For example, a significant number of trucking companies, in the order of 9 out of 10, do not purchase rear-facing cameras as it may be deemed an invasion of privacy. Further, it is crucial to argue that the Federal regulations are "safety" regulations and no where in those regulations are a requirement for cameras or other types of safety technology. A strong closing argument can be made that Federal law governs the operation and safety of commercial trucks to defend the case.

It is quite possible that there will be lawsuits in the future with one count against the trucking company for its actions/inactions in causing the accident, as well as a second count, sounding in products liability, against the manufacturer of the truck alleging that they did not have the safest technology as a standard feature.

There are various levels of driving automation, from Level 0 to Level 5. In Level 3, there is a driver in the seat, but he/she is not driving when the automatic driving features are engaged. However, when the feature requests it, the driver must drive. Future litigation with respect to Level 3 may also have two counts, one sounding in negligence for the conduct of the driver and a second count against the manufacturer of the truck, or potentially the component part manufacturers of the safety technology, based on a products liability theory. It may be difficult for Plaintiff's attorneys to argue both negligence (a one-time action) while, at the same time, arguing that there was a design defect, which would lead to a systemic issue and numerous accidents if the design was unreasonably dangerous. This may lead to counterclaims being brought between the Defendants. Plaintiff's attorneys may also target either the driver or product manufacturers for early settlement, and then try the case against the remaining Defendant(s).

All companies are targeting Level 4, where there is no need to have a driver. Level 4 autonomous driving has the benefit of taking certain driver conduct out of the case, including the "Dirty Five" factors like fatigue, hours of service, impaired and distracted driving, and lack of training. Plaintiff's attorneys may argue typical negligent tort theories as the issue may be whether or not the artificial intelligence technology company's actions were "reasonable". AI's in the trucking space include TuSimple Waymo, Embark, Aurora and Kodiak. It is the AI's software and algorithms, which are the "brains" behind the system as they perceive, plan and control the truck.

Plaintiff's attorneys may also name the original equipment manufacturers, and manufacturers of the safety technology components, as direct Defendants. There may be risk transfers by way of indemnification agreements whereby the AI technology company would indemnify the OEM's, component part manufacturers, as well as the trucking company.

In terms of legislation relating to autonomous vehicles, Automated Vehicles 3.0 allows Level 4 trucks to not need a driver, although Automated Vehicles 4.0 is in place. In terms of the FMCSA rule making, there previously was an Advanced Notice of Proposed Rulemaking, and there is now an FMCSA Notice of Proposed Rule Making, with a projected publication date of November 23, 2022 ensuring the safe introduction of automated driving systems (ADS) – equipped commercial motor vehicles onto the Nation's roadways. The commercialization of Level 4 trucks may occur in calendar year 2024 or 2025. NHTSA has Federal motor vehicle safety standards, which governs OEM's. As they may not be a change in the configuration of the truck, as drivers are needed for both the first and final miles, there may not be any changes. Currently, there is a patchwork of State law which allows for Level 4 deployment in approximately half of the states and it does not appear that Congress has enacted any new legislation in this regard.