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Leadership Note

From the Chair

By Matthew S. Hefflefinger

Come rain or shine, the hard work of our Committee continues. We have three outstanding articles in this edition of *In Transit* which greatly assist us all in handling our day-to-day trucking practice. A special thanks to our authors for providing exciting insight and wisdom.

We held our Trucking Trial Primer at the Hilton Downtown Nashville on June 26. We had a great mix of attendees from young lawyers handling trucking work to seasoned industry professionals. The trial wisdom of the speakers was on full display, and everyone had a wonderful time. It is yet another example of the great CLE put forth by the Committee.

If you are interested in getting involved in the Committee, we welcome you to do so. We are always looking for individuals who are eager to "roll up their sleeves" and assist us in the hard work that continues to make our Committee successful. If you want to get involved, please reach out to me at mhefflefinger@heylroyster.com or Steve Pesarchick at spesarchick@sugarmanlaw.com. There is a place for everyone.

If you have an interest in writing an article, we will help you get published. Please communicate with our publications chair, Patrick Foppe, at pfoppe@lashlybaer.com. If you are interested in assisting with some of our online programming, contact our online programming chair, Melody Kiella, at kiellam@deflaw.com. We have had some tremendous Webinars to date, and our online programming opportunities are expanding in the near future to include both recorded programming and podcasts.

Your next opportunity to join us is at the DRI Annual Meeting, which will take place October 16–19 in New Orleans. This is a great time to meet with various individuals involved in the leadership of the Committee and provides the opportunity to create a path for future involvement. Our speakers at the Annual Meeting are Jim Embrey of Hall Booth Smith in Nashville, and Kelsey Taylor of Murphy Legal in College Station, Texas. The Committee's CLE and business meeting is tentatively scheduled during the afternoon of Wednesday, October 16.

The 2020 Trucking Law Seminar will take place April 29–May 1, 2020, in Austin, Texas. This is a seminar you will not want to miss. Be sure to put it on your calendar now.

We have been very active in our Online Community, and I encourage you to utilize the Online Community as a platform to communicate with the 1,000+ members of the Trucking Law Committee. Remember, we are all here to help each other and this is another great example of the resources we share.

If you have been hesitant to get involved, for whatever reason, we encourage you to take the step forward. We have an outstanding group of people and your career will be forever blessed by plugging into what we do. We work hard, but we also have a lot of fun getting to our destination.

Matthew S. (Matt) Hefflefinger is a shareholder in the Peoria, Illinois, office of Heyl Royster Voelker & Allen PC and is Chair of the firm's Trucking Practice Group. His practice is devoted primarily to the defense of complex personal injury cases in the trucking and construction industries. Matt is an aggressive advocate who has tried many cases to verdict and is frequently contacted by clients immediately after a catastrophic loss to help develop the facts and case strategy. He is a frequent presenter on a variety of litigation related topics at local and national legal seminars. Matt is the currently the chair of the DRI Trucking Law Committee.

MIST Opportunities

Five Common Mistakes that Increase Exposure in MIST Claims

By Paul W. Murphy and Kelsey M. Taylor


Since the birth of the Reptile Theory in 2009, plaintiffs and their attorneys have become steadily emboldened to seek higher damages with every new case. Much like a new world record in the 100-meter dash inspires the next generation of athletes to believe in bigger possibilities, personal-injury plaintiffs are now in an endless game of one-upmanship as they strive to overtake the latest record-breaking verdict.

And sure enough, these days, reports of personal-injury verdicts in the tens or hundreds of millions—often against trucking companies—have become commonplace in the national news cycle. These "nuclear" verdicts tend to get all the press, not only for their dollar amount, but also because the underlying accident typically involves a fatality or other "newsworthy" catastrophic loss. In practice, of course, these multi-million-dollar verdicts represent only a small percentage of the personal-injury lawsuits filed each year. The vast majority are cases involving minor-impact collisions with soft-tissue injuries, aka "MIST" claims.

The Deceptively Dangerous MIST Claim

As we enter the second decade of the Reptile Era, it is pretty clear the Reptile Theory isn't going anywhere. In fact, it's growing, mutating, and evolving. Think: Godzilla. No longer focused solely on trial or catastrophic injuries, Reptile disciples have become savvy at wielding the Reptile Theory in all stages of litigation and in every size of case, both large and small. When executed "effectively," Reptile tactics have the power to transform a typical MIST claim into a high-exposure lawsuit.

The hallmark of any Reptile verdict or settlement is that the dollar amount awarded or paid is *disproportionate* to the underlying injury, usually by a wide margin. And because most MIST cases are settled prior to trial, you'll never hear about them on the news. Nevertheless, the economic toll they're taking on the trucking industry is nothing short of newsworthy.

Sure, the big verdicts are scary. But the MIST claim is the "silent killer," quietly siphoning billions from motor carriers and their insurance companies in confidential settlement agreements where a barely injured (or non-injured) plaintiff receives undeserved funds. It's not uncommon to see $15,000 - $20,000 - $50,000 - $100,000 (or much more) in *extra* funds paid to avoid trial and control risk. In tort law, this is called a "windfall." In the real world, it's called extortion.

Yet the nickel-and-dime nature of this scheme simply does not get enough attention for the Godzilla-sized havoc it's wreaking across the transportation industry. Specifically, claims are more difficult to evaluate, reserves are harder to estimate, premiums are increasing unsustainably, insurers are refusing to write or renew trucking policies, and transportation companies are paying the price with their bottom line.

Common MIST Mistakes

In the past, the dominant approach to defending a MIST claim was pretty simple: ignore it until it goes away. Plaintiff files suit. Defendant digs a trench and responds to the procedural "artillery fire" as it comes in. Answer some discovery, lodge some objections, take a few depositions, give plaintiff the runaround to avoid producing anything substantive, and get a few continuances granted. Sure, you might lob a few grenades over to the plaintiff's side, but just like trench warfare, no one makes much progress. After all, the plaintiff's attorney won't get paid until the end, so why not starve them out? The idea was that, by ignoring them as long as possible, eventually they would lose interest in such a small case and go after the bigger fish on their docket. After growing impatient with the process, the plaintiff would then settle for some trifling amount just to be done with it. Albeit a reactionary approach, it worked pretty well…for a little while.

The Reptile Theory changed all that.

Now, over a decade later, if you sit and wait for the "procedure" of litigation to carry you to the finish line, you're

not only behind the ball, your client is a prime target for a Reptile settlement or verdict. Here are the top five mistakes defendants and their attorneys make when defending MIST claims.

Not Being Proactive

As it turns out, plaintiffs and their attorneys really hate being ignored. So they decided to strike at the exposed Achilles heel of the defense industry: the hourly billing model. Today, even on the smallest cases, plaintiffs are bursting out of the gate, sending extensive discovery, filing motions, and going to battle with newfound zeal. This even includes a new breed of gamesmanship, such as picking small fights, engaging in evasive discovery, and constantly running to the judge with frivolous motions—all of which create additional busywork for defense lawyers.

Naturally, the legal bills began mounting as defense attorneys got buried under a mountain of paperwork, and the old "trench warfare" approach became unsustainable and ineffective. All of a sudden, these "minor" cases started becoming a major expense for companies. Clients must consider the "stop the bleeding" factor in deciding whether to pay a premium settlement to an undeserving plaintiff. In other words, our own attorney fees are the first rung in the Reptile extortion ladder.

Still Believing the Lawsuit Is Just About the Accident

The Reptile Theory gave plaintiff attorneys license to go big—to transform a simple auto accident into a moralistic crusade for justice. And what's a crusade without a good witch hunt? An effective Reptile trial draws the jury's attention away from the accident and shifts the focus to the entire company. Any evidence suggesting that the company is systemically unsafe, or that it habitually prioritizes profits over safety, will support the Reptile story, *regardless* of whether that evidence relates to the actual accident.

As most of us have experienced, Reptile discovery goes far beyond the "fishing expedition," more closely resembling, say, a full-body cavity check. Worse, judges are allowing it, especially when the attorney is unprepared to defend large-scale discovery in a small-scale case. Under the liberal discovery rules of most jurisdictions, evidence is discoverable with minimal relevance requirements. Once the discovery floodgates open, no matter how safe a company is, the Reptile can make a mountain out of any molehill.

Attorneys who rest on their legal laurels and think "Oh, the judge is never going to let that in," or "My driver has no liability for this accident," or "We'll get 'em on contributory negligence," are in for a rude awakening. By failing to defend the company's entire safety record from the outset, your client is primed for an expensive discovery battle, costly settlement, or nuclear verdict.

Not Taking Small Claims Seriously from the Beginning

When companies fail to treat MIST claims seriously from the outset, several new problems are created that cost more money to fix in the long run.

- **Claimants get mad**. Remember, no one likes being ignored. Think of it like a child seeking attention. Ignore them long enough and they will start to pester you, then get louder, then stomp their feet, then kick your shins, and so on. When claimants feel disrespected and unheard, they start "acting out" in damaging ways. It's become personal. Once that happens, the defendant has missed its best opportunity for early resolution. After that, the claimant's resolve strengthens, he digs in his heels, and now he's out for blood.
- **The case gets referred out**. For starters, in some MIST claims, the claimant's first attorney is a referring attorney—perhaps a family friend, or someone who does not really practice personal-injury law or otherwise typically refers out PI cases. Although they might write one or two letters on the claimant's behalf, possibly even file suit, they hand the case off to a "real" plaintiff's attorney as soon as the going gets tough. While the tone of their initial correspondence might suggest otherwise, these attorneys are often open to an early settlement to avoid having to refer the case to someone else and giving away the lion's share of their fee. When defendants dig their "trench" before at least *trying* to make a connection with the initial attorney, they miss key opportunity to resolve the case with diplomacy before the conflict escalates.
- **Damages increase**. After the case is referred, the new hired gun is going to need a bigger case—with bigger damages—to justify splitting the fee with the referring attorney. No problem though. These days, complex networks of doctors, chiropractors, pain management specialists, and imaging professionals are ready and waiting to provide a sea of bogus records and unnecessary treatment to prove up plaintiff's medical damages.

Still think the case is "small" after the plaintiff's $350,000 "back surgery"? The jury won't.

- **Data and documents get lost**. Finally, when a minor accident happens, it simply doesn't raise all the red flags that appear obvious in a large case. When a catastrophic loss occurs, everyone understands that a massive document collection and preservation effort must begin. Attorneys and adjusters are even on the scene gathering information and beginning the complex risk assessment process. Yet these same efforts are rarely undertaken for small claims with the same care and thoroughness, and it is not uncommon to find that records are incomplete or otherwise disposed of through routine procedures. However innocent or accidental this may be, the loss of documents can be a powerful weapon in the Reptile's arsenal.

Not Getting an Attorney Involved in the Pre-Litigation Process

Although attorneys are retained early in the "big" cases, when it comes to MIST claims, cases are usually not assigned to outside counsel until after a lawsuit has been filed. Unfortunately, this often means that *all of the issues* raised in #3, above, may have already occurred by the time an attorney sees the file for the first time. In other words, the plaintiff is already mad, the case has already been referred out, some medical syndicate is already working up plaintiff's "damages," and documents have not been effectively preserved.

That's like parachuting into a gun fight.

To compound matters, many insurance companies and self-insureds assign MIST claims to the newest and least knowledgeable adjusters who, simply from inexperience, may lack the skills necessary to create a strategic plan for early resolution, identify opportunities for connection, or negotiate effectively with the claimant or his counsel. As a result, many plaintiffs feel like they won't be heard or taken seriously until they file a lawsuit. So although some legal expenses may be saved on the front end, without early attorney involvement, many MIST claims can become unnecessarily costly on the back end.

Engaging in Hostility, Passive-Aggressiveness, or Gamesmanship

On the other hand, what good is attorney involvement if it creates more problems than it solves? When attorneys are hired during the pre-litigation phase, the focus should be about diplomatic resolution, not defensive posturing. Although every attorney will have a different take on how to achieve this directive, hostility and aggression are losers in any form. When an attorney engages in saber-rattling or any other show of force, the plaintiff's side becomes further entrenched in its position and less inclined to an early resolution.

Passive hostility is probably even worse. Remarkably, many attorneys still believe that sending disrespectful, insulting, or passive-aggressive emails will somehow convince the plaintiff and his attorney that his MIST claim is meritless and not worth pursuing. This never works. When we avoid face-to-face interactions or take cheap shots in our correspondence and motions, we not only lose credibility, we also lose critical opportunities to form connections with plaintiff and opposing counsel that could have been leveraged for the client's benefit.

And on that note, do not play games. Even if the plaintiff's attorney is doing it. It might feel good to "teach them a lesson" or to "beat them at their own game." However, in the long run, this is counterproductive and angers the judge. If you play games, you can be certain that the opposing party will play games too, not only costing your client money in the form of protracted discovery battles, but restricting access to vital information you will need to properly evaluate and resolve the case.

Help the Reptile Help You

To keep the Reptile away from your MIST claim, first ask yourself what it really wants. Money is the easy answer, but it's actually not the most important consideration. In fact, there are *three underlying needs* that determine whether the Reptile, or just a regular plaintiff's attorney, will show up in your next MIST claim:

- Respect – Because the attorney has become jaded by a lack of respect in the legal profession.
- To feel like the hero or "good guy" – because sometimes the attorney wonders.
- To make a difference – because that's what we're all trying to do.

When you craft a litigation strategy that helps the plaintiff's attorney meet these essential needs, you greatly increase your chances of avoiding Reptile wrath. (Bonus Tip: This works in any case, regardless of size.)

Although not all MIST claims are good candidates for early settlement, when this *is* the goal, here are a few tips

that will help you in resolving the case more quickly and at a lower cost—both in settlement value *and* attorney fees—than the outdated "trench warfare" method.

- **Make connection early**. Take the time to meet with opposing counsel face-to-face to discuss the primary issues in the case (liability and damages). When an attorney or experienced adjuster makes a connection with opposing counsel early in the lawsuit, or better yet, early in the claim process, this signals that the company is treating the claim seriously. This avoids the typical fear and frustration that can arise early on when the plaintiff feels ignored.
- **Be respectful and don't play games**. In this initial meeting, and throughout litigation, show respect at all times. If you say you're going to do something, do it. The Reptile's typical desire for scorched earth tends to shrink when he feels respected and starts believing he can trust your word.
- **Commit to "collision," not conflict**. In any lawsuit or contested claim, there will obviously be points of disagreement—otherwise you'd have already paid the demand. Stay in good communication with opposing counsel, emphasizing the mutual goal of segregating the big issues from the irrelevant ones. If you maintain a respectful and collegial attitude throughout, you can "collide" over contested issues without becoming "combative."
- **Assert some moral authority**. Remember, you both have a mutual purpose: to assess the claim as quickly as possible and, if warranted, get his client paid quickly so he can get on with his life. Opposing counsel already knows that it's usually not in his client's best interest to wait several years for a jury verdict to get funded. By handling this conversation in a confident yet respectful manner, you can help plaintiff's attorney feel like the "good guy" and do the right thing by cooperating to get the case resolved.
- **Get documents exchanged ASAP**. Once you have established your mutual purpose, and agreed to *disagree* only over the truly contested issues, offer to immediately exchange all documents absolutely necessary for each side to evaluate liability and damages. No need to wait on formal discovery or a scheduling order. Not only will this signal that you're treating the claim seriously, it may curb the extensive medical workup that might have otherwise arisen if the case had been allowed to linger for months, and, even more importantly, could help reduce the fishing expedition for mountains of irrelevant information later.

By avoiding common defense mistakes and incorporating proactive tactics early in the claims and litigation process, defendants finally have a real opportunity to control risk, reduce costs, and plug the MIST-claim "leak" that has been draining the transportation and insurance industries since the Reptile Era began. Otherwise, these MIST opportunities become simply—missed opportunities.

Paul Murphy, a founding partner of Murphy Legal in College Station, Texas, focuses his practice on transportation defense. Since the beginning of his career as a litigator, Mr. Murphy has obtained numerous defense verdicts on behalf of individuals and corporations in the State of Texas. As a Murphy Legal partner, he represents a wide variety of clients with claims involving death, catastrophic injuries, personal injuries, and business disputes. He is a member of the DRI Trucking Law Committee, currently serving as webpage chair.

Kelsey Taylor has been a member of Murphy Legal since 2007 and has devoted her career to transportation defense and complex civil litigation. As a partner, Ms. Taylor assists her clients in strategic decisions to manage risk in high-exposure cases throughout the State of Texas. Ms. Taylor routinely prepares for and participates in courtroom proceedings, including trial. She is a member of the DRI Trucking Law Committee, currently chairing its lapsed member initiative.

Handling Preventability Determinations in Trucking Accidents Cases

By Patrick E. Foppe

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 floating around the transportation industry by which an accident is determined to be preventable. For example, 49 C.F.R. §385.3 defines a "preventable accident" as an accident:

- that involved a commercial motor vehicle, and
- 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 necessarily evaluate whether the truck driver acted reasonably or with ordinary care.

What may be a surprise to some is the fact that motor carriers are not required to perform preventability determinations because 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 for various reasons, including safety and to avert employment related suits. 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, on August 1, 2017, the FMCSA implemented a Crash Preventability Demonstration 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. Even if a court deems a preventability determination as admissible evidence at trial, it is likely error for the court to conclude that such evidence alone constitutes negligence. *See e.g.*, *Inman v. Howe Freightways, Inc.*, 2019 WL 2320961 (Ill. App. 1st Dist. May 30, 2019).

Historically, whether a preventability determination was discoverable often depended in large part on how the determination was created. If a preventability determination was conducted in a companies' ordinary course of business, the determination was often discoverable. Most legal arguments seeking to preclude discovery focused on whether preventability determinations were 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)
  - — *Annese v. U.S. Xpress, Inc.*, CIV-17-655-C, 2019 WL 1089098, at *2 (W.D. Okla. Mar. 7, 2019) (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. 3d 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 and Attorney Work-Product Doctrine vs. Ordinary Course of Business (Fed. R. Civ. 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)
- **Business Record/Regularly Conducted Activity (Fed. R. Evid. 902(11)):**
  - — *Franco v. Mabe Trucking Co.*, 5:17-CV-00871, 2019 WL 1304537, at *5 (W.D. La. Mar. 21, 2019) (inadmissible because there was nothing to show the qualifications of the person who made the determination or the reliability of the evidence that was considered in forming such an opinion)
- **Expert Opinion (Fed. R. Evid. 702):**
  - — *Jordan v. Elmer Enrique Ventura*, 4:17-CV-4011, 2019 WL 1089430, at *2 (W.D. Ark. Mar. 7, 2019) (inadmissible because use the term "preventable accident" has a special and distinct legal meaning, it is not a proper subject of expert testimony)

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 *Vorobey v. Cleveland Bros. Equip. Co., Inc.*, 4:18-CV-00865, 2018 WL 6436717, at *3 (M.D. Pa. Dec. 7, 2018), the court relying upon 49 U.S.C. §504(f) found all references and allegations as to "preventable" collisions or accidents should be stricken from plaintiffs' Second Amended Complaint since it is referencing inadmissible evidence. The court, however, failed to analyze whether said reports were "required by" or "made by" the DOT/FMCSA.

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," including 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. Accordingly, because motor carriers are not technically required to do preventability determinations pursuant to FMCSR Part 394, 49 U.S.C. §504(f) arguably had no application to the preventability reports done by motor carriers. Nevertheless, 49 U.S.C.

§504(f) still applied to preventability determinations "made by" the FMCSA.

However, the FMCSA's adoption of the Crash Preventability Demonstration Program perhaps breathes new life into the argument that 49 U.S.C. §504(f) affords a statutory basis to keep preventability determinations out of civil lawsuits. At the very least the FMCSA has provided defense attorneys significant ammunition for arguments on why preventability determinations should not be discoverable or admissible. 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 preventability determinations made by the FMCSA under this program, in 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). Importantly, the FMCSA published the following in the Federal Register in announcing the Crash Preventability Demonstration Program:

> 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.
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> . . . .
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> **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 FMCSA statements 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). Motor carriers participating in FMCSA's newly implemented crash preventability program should also argue that 49 U.S.C. §504(f) precludes both the discoverability and admissibility of preventability determinations made by the FMCSA through this program.

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.

Can They Really Sue Me There?

The Changing Landscape of Corporate Registration as a Basis for Personal Jurisdiction Over Trucking Companies

By Peter D. Cantone

For large trucking companies with a substantial presence in various states, the defense of personal jurisdiction was once nothing more than an obscure civil procedure concept. In recent years, that landscape has shifted dramatically. Today, even for companies with a large multistate presence, personal jurisdiction may indeed constitute a valid defense to the types of transitory causes of action that trucking companies routinely face. Several appellate decisions in the past year have brought this issue to the forefront and directly affect companies' rights to challenge filing of lawsuits in unfavorable forums with no connection to an underlying controversy.

Courts have long recognized two distinct types of personal jurisdiction: specific and general jurisdiction. A court in a foreign state has *specific* jurisdiction over a defendant if the conduct at issue in the lawsuit arises out of the defendant's contacts with that state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Thus, a North Carolina trucking company that is involved in a motor vehicle accident in Tennessee can reasonably expect to be subject to *specific* jurisdiction in Tennessee for a lawsuit related to that accident.

The more imposing type of jurisdiction, however, is *general* jurisdiction, which empowers a court to enter a judgment on a defendant for conduct unconnected to the forum state. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) ("A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State."). If a defendant is rightly subject to *general* jurisdiction in North Carolina, that defendant can be sued in a North Carolina court for *any* conduct – even for a motor vehicle accident that took place in Tennessee.

For decades, the general consensus was that a company who engages in "continuous and systematic" business in a particular state can be subject to general jurisdiction by the courts of that state. *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). The question often hinged on the defendant's volume of business within the state. It was long understood that a large interstate trucking company with a substantial presence in states across the country could often be subject to general jurisdiction in any one of those states. A plaintiff's attorney filing suit against a large corporation could do so virtually anywhere.

For trucking companies routinely faced with transient claims, the personal jurisdiction issue arises frequently. A Nevada plaintiff involved in a motor vehicle accident while driving through Utah might desire to file suit back home in Nevada for her own convenience. Or, a plaintiff's attorney might seek to file suit in a neighboring state that has a more favorable jury pool. Under prior law, that type of forum selection was often acceptable, so long as the defendant trucking company had a substantial presence or volume of business in the forum state.

That principle was turned on its head in 2014, in the seminal case of *Daimler AG v. Bauman*, 571 U.S. 117. In *Daimler*, relying upon Constitutional due process considerations, the Court held that a company's conduct of business in a state is not alone sufficient to confer general jurisdiction. Rather, the *Daimler* Court held that general jurisdiction may only be exerted in a forum where the defendant is truly "at home." For large corporations, even those that engage in substantial business dealings in many states, the *Daimler* Court held that general jurisdiction ordinarily exists in just two forums: the state where the defendant is incorporated; and the state where the defendant has its principal place of business. *Daimler* represented a stark paradigm shift away from the nearly limitless jurisdiction that existed previously. Many types of forum selection that were common prior to *Daimler* are now subject to challenge.

In the five years since *Daimler*, plaintiffs have sought to surpass this new restriction on general jurisdiction by relying instead on corporate registration statutes as a basis for jurisdiction. With minor variations, each of the 50 states requires out-of-state corporations to register with a state agency and appoint an agent for service of process to do business in the state. The overarching purpose of these statutes is generally twofold: (1) to ensure that out-of-state corporations can be held accountable for their actions within the state; and (2) to ensure that out-of-state

corporations obtain actual notice when lawsuits are filed against them in the state.

Pre-*Daimler*, courts took those corporate registration statutes a step further, holding that a corporation's registration to conduct business in a state *also* constitutes affirmative *consent* to general jurisdiction. *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). While that concept might not have been controversial in the pre-*Daimler* world of jurisdiction, it now stands at odds with the "at home" requirement. If registration alone constitutes consent to jurisdiction, and corporations are required to register in each of the states where they conduct business, then *Daimler*'s limits on jurisdiction are essentially meaningless for large corporations.

The *Daimler* decision acknowledged a distinction between consensual and nonconsensual jurisdiction, but did not directly address the consent-by-registration doctrine. In the years since, courts have split on whether the doctrine remains viable. *See, e.g.*, *Brieno v. Paccar, Inc.*, No. 17-cv-867 SCY/KBM, 2018 WL 3675234 (D.N.M. Aug. 2, 2018) (post-*Daimler*, corporate registration in New Mexico continues to constitute consent to general jurisdiction); *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278 (M.D. Pa. 2018) (post-*Daimler*, corporate registration in Pennsylvania continues to constitute consent to general jurisdiction); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016) (post-*Daimler*, corporate registration in Connecticut does not constitute consent to general jurisdiction); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97 (S.D.N.Y. 2015) (post-*Daimler*, corporate registration in New York does not constitute consent to general jurisdiction).

Several cases in the past few months have directly tackled this issue.

On September 25, 2018, a 2–1 majority of the Superior Court of Pennsylvania held that the consent-to-jurisdiction language in Pennsylvania's corporate registration statute survives *Daimler*. *Murray v. American LaFrance, LLC*, 2018 Pa. Super. 267. The *Murray* case had no factual connection to Pennsylvania whatsoever: The case involved an allegation that the plaintiffs suffered hearing loss as a result of excessive sound exposure from fire engine sirens in New York. Nonetheless, the Superior Court held that the defendant, a Delaware corporation with a principal place of business in Illinois, had consented to general jurisdiction in Pennsylvania by registering to conduct business in the state.

A New York appellate court addressed the same issue just a few months later, on January 23, 2019, and came to the opposite conclusion. *Aybar v. Aybar*, 169 A.D.3d 137 (2d Dep't 2019). Like *Murray*, the New York case had no connection to the forum state: The case concerned a motor vehicle accident that took place in Virginia, and the defendants were Delaware corporations with principal places of business in Michigan and Ohio. Unlike the *Murray* court, the *Aybar* court held that the concept that compulsory corporate registration amounts to consent to jurisdiction is incompatible with *Daimler*'s retreat from limitless jurisdiction, and "no longer holds in the post-*Daimler* landscape."

On the surface, the Pennsylvania and New York cases can be distinguished by the fact that the Pennsylvania statute explicitly provides that registration amounts to consent to jurisdiction, 42 Pa. Cons. Stat. §5301, while the New York statute does not. N.Y. Bus. Corp. Law §1301. Indeed, the *Murray* decision hinged on the specific language in the Pennsylvania statute, and the *Aybar* court explicitly declined to rule on a proposed, yet unenacted, codification of the consent-by-registration concept in New York. Still, a dissenting opinion in the *Murray* case explicitly questioned the continued viability of the consent-by-registration regime under the Pennsylvania statute. That dissent prompted the Superior Court of Pennsylvania to withdraw the *Murray* decision and grant reargument *en banc*. A new decision is expected later this year.

As these recent cases reveal, this issue remains in flux. Other state and federal courts are likely to take up this issue in the near future. *Murray* and *Aybar* are both intermediate appellate court decisions in states whose highest courts have not yet addressed the issue. The United States Supreme Court has yet to weigh in. The current trend appears to be moving away from consent-by-registration as a legitimate basis for jurisdiction, which is a welcome development for large corporations that do business in many states, and is consistent with the Supreme Court's retreat from boundless jurisdiction five years ago.

The takeaway is that personal jurisdiction, once nothing more than a law school exam question, is today a viable defense that can change the landscape of a case involving a transitory cause of action. Large companies should no longer assume that their substantial interstate business dealings, or their corporate registration in multiple states, render them automatically subject to litigation everywhere. Particularly when presented with a lawsuit in an unfavorable forum, or a forum that bears no connection to the underlying controversy, litigants should take care

to assess whether there could be a potential personal jurisdiction defense.

Peter D. Cantone is an attorney at Bennett Schechter Arcuri & Will LLP, in Buffalo, New York. His practice is focused on the defense of personal injury and wrongful death claims, particularly for the trucking and retail industries. Peter is a member of the DRI Trucking Law Committee and is the Young Lawyer Liaison to the DRI Steering Committee for Alternative Dispute Resolution. He is also a member of the Transportation Lawyers Association (TLA) and the Claims Litigation Management Alliance (CLM). Peter can be reached at pcantone@bsawlaw.com.