

**USING TRUCKING REGULATIONS TO TURN THE TIDE IN TRUCKING CASES**

**Association of Trial Lawyers of America – New Jersey  
Personal Injury Trials: Turning the Tide Seminar**

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## I. INTRODUCTION

The number of commercial truck wrecks resulting in serious injuries and deaths each year is staggering: Each year, roughly 5,000 people are killed and over 120,000 are injured in collisions involving large commercial trucks,<sup>1</sup> with Texas, California and Florida leading the nation in truck wreck fatalities.<sup>2</sup>

As federal and state safety regulations are weakened, enforcement personnel are reduced due to budget cuts, and the borders are thrown open to foreign trucks, these numbers are likely to rise. Understanding the trucking industry and the economics of trucking, knowing the laws regulating the industry, and knowing how and where to find critical information are all keys to prosecuting a trucking case successfully.

## II. TRUCKING REGULATIONS

The trucking industry is huge, its lobbying efforts are powerful, and its public-relations campaigns are compelling. And serious truck collision cases, particularly those involving fatalities, are often defended to the hilt in expensive and protracted litigation. The single most important key to turning the tide in favor of injured consumers in these cases is to know and utilize the Federal Motor Carrier Safety Regulations (FMCSR).<sup>3</sup>

As with many governmental rules and regulations, jurors tend to place great emphasis on the FMCSR. In the minds of much of the public, such regulations set the standard for behavior in the area to which they pertain, particularly when that area is outside of the public's common experience. Most everyone drives a car, and thus the "rules of the road" typically just confirm or validate the jury's perception of the parties' actions. However, in commercial trucking cases, lay jurors often look to the regulations as the final word when forming opinions about the case. Seize upon this fact when you present your case to the jury, emphasizing the defendants' choices and actions that resulted in violations of governmental regulations that exist for the safety of us all.

Bear in mind that most states have incorporated, in whole or in part, the federal regulations into their companion state statutes. Along with the FMCSR, use your state's regulations to further emphasize the defendants' liability, but be mindful that in some situations the federal and state regulations may differ somewhat (usually depending on whether the truck is engaged in interstate or local-only commerce).

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<sup>1</sup> <http://www.fmcsa.dot.gov/facts-research/facts-figures/analysis-statistics/cmvfacts.htm>

<sup>2</sup> <http://www.trucksafety.org/docs/HOS-death%20by%20state%20%282%29.doc>

<sup>3</sup> The FMCSR can be found at 49 C.F.R. §§301-399 and may be accessed online at [www.fmcsa.dot.gov](http://www.fmcsa.dot.gov).

### III. USING THE REGULATIONS TO INVESTIGATE THE CASE

From the initial intake of a case, consider the various regulations that may be applicable and take immediate steps to preserve evidence such as the tractor and trailer (seek a temporary restraining order, if necessary), maintenance records, log books, electronic on-board recorders, email and electronic communications, and so forth. Send spoliation letters to the driver and the carrier demanding that evidence be preserved.

The FMCSR address the length of time that motor carriers must preserve certain information, such as a driver's record of duty status (a/k/a "log books") (6 months; *see* 49 CFR §395.8(k)(1)), inspection, repair and maintenance records (1 year and 6 months after the equipment leaves the carrier's control; *see* 49 CFR §396.5(c)), and driver's qualification files (so long as driver is employed and 3 years thereafter; *see* 49 CFR §391.51(b)(8)). Additional information that the carriers are required to maintain include detailed records documenting their day-to-day operations and safety compliance, such as accident registers and accident reports.

In many cases, it is wise to retain a trucking industry expert early in the case to assist you in developing the evidence, crafting your discovery requests, drafting your complaints, preparing for depositions, and so forth. The regulations change every now and then, so having a trucking expert familiar with the industry and the current rules can be invaluable.

### IV. USING THE REGULATIONS TO ESTABLISH LIABILITY

For many truck wreck cases, the most relevant sections of the FMCSR are §390 (knowledge and compliance with regulations), §391 (driver qualifications), §392.3-.5 (illness, fatigue, drug use, alcohol), §395 (hours of service) and §396 (inspection, repair and maintenance), but a review of other regulations which may be applicable to a particular case is always important. Remember: The FMCSR are the *minimum standards*. A higher standard may be reasonable depending on the circumstances.

In the interest of space, the entire texts of §390, §391, §392, §395 and §396 are not set forth here in full. However, a few of the more common regulations follow and plaintiff lawyers are encouraged to become familiar with the specific sections and use them accordingly in individual cases. These regulations make great outlines for pleadings and discovery and should be used liberally.

#### A. *General Qualifications of Drivers (§391):*

1. *Must be at least 21 years old;*
2. *Able to read and speak English;*
3. *Can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;*
4. *Be physically qualified to drive a commercial motor vehicle;*

5. *Have a currently valid commercial motor vehicle operator's license issued only by one state or jurisdiction;*
6. *Have prepared and furnished the motor carrier that employs him/her with the list of violations or the certificate as required by §391.27;*
7. *Not disqualified to drive a commercial motor vehicle under the rules in §391.15; and*
8. *Have successfully completed a driver's road test and has been issued a certificate of driver's road test in accordance with §391.31, or has presented an operator's license or a certificate of road test which the motor carrier that employs him/her has accepted as equivalent to a road test in accordance with §391.33.*

**B. *Ill or Fatigued Driver (§392.3):***

*No driver shall operate a motor vehicle, and a commercial motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.*

Note that the regulations require the motor carrier to provide effective training to its drivers, and often a specific violation by a driver (e.g., driving while fatigued) can be expanded to establish a separate violation – and possibly an independent act of negligence – on the part of the motor carrier (e.g., failing to provide training regarding fatigue).<sup>4</sup>

**C. *Maximum Driving Time (Hours of Service) (§395.3):***

*No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:*

*(a)(1) More than 11 cumulative hours following 10 consecutive hours off duty;  
or*

*(a)(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of §395.1(o) or §395.1(e)(2).*

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<sup>4</sup> For example, in TRUCK ACCIDENT LITIGATION, 2<sup>nd</sup> Edition, Jeffrey Burns points out that “[i]nterpretations for the federal regulations published in the Federal Register of April 1997 by the Office of Motor Carriers (predecessor to the FMCSA) confirmed that carriers are liable for the actions of their employees. Neither intent to commit, nor actual knowledge of, a violation is a necessary element of that liability. Carriers ‘commit’ violations...of...regulations by their employees if they fail to have in place management systems that effectively prevent such violations.” At 127.

- (b) *No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after-*
  - (b)(1) *Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or*
  - (b)(2) *Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.*
- (c)(1) *Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or*
- (c)(2) *Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.*

Note that these are general guidelines and are subject to many variables. They can also hard to follow, so when in doubt consult a trucking expert for assistance.

**D. *Driver Vehicle Inspection Reports (§396.11):***

*Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated and the report shall cover at least the following parts and accessories:*

1. *Service brakes including trailer brake connections*
2. *Parking (hand) brake*
3. *Steering mechanism*
4. *Lighting devices and reflectors*
5. *Tires*
6. *Horn*
7. *Windshield wipers*
8. *Rear vision mirrors*
9. *Coupling devices*
10. *Wheels and rims*
11. *Emergency equipment*

Note that this report shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown.

**E. Driver Inspection (§396.13):**

*Before driving a motor vehicle, the driver shall:*

- 1. Be satisfied that the motor vehicle is in safe operating condition;*
- 2. Review the last driver vehicle inspection report; and*
- 3. Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed.*

There are a host of other regulations that provide fertile ground for establishing liability under various circumstances, such as drug and alcohol use (including carrier's failure to implement adequate drug or alcohol testing policies), failure to secure cargo, and so forth.

In considering your parties and your theories of liability, note that for every regulation pertaining to the commercial driver, there is typically a companion regulation that pertains to the motor carrier imposing a similar obligation. For example, §396.13 requires the driver to inspect the vehicle and be satisfied that it is in safe operating condition. Likewise, §396.3 requires the motor carrier to systematically inspect, repair and maintain its vehicles. Thus, violations of separate obligations by both driver and carrier often spring from the same incident, enabling you to go after the carrier for both vicarious and direct liability.

Use the FMCSR as drafting guidelines in your pleadings and discovery. The drivers, the trucking carrier representatives and your trucking experts will all use the terminology found in these regulations, and so should you throughout the lawsuit. Also, violations of the FMCSR are, in many cases, considered negligence *per se* and should be framed as such in the plaintiff's pleadings.

**V. USING THE REGULATIONS TO MOTIVATE THE JURY**

Everyone on the jury has likely seen a truck being driven dangerously or has felt intimidated by a truck on the highway. For the most part, jurors tend to view truck drivers favorably but trucks unfavorably. In fact, Federal Highway Office of Motor Carriers studies show that most people:

- Believe that passenger car driver error is the main cause of car/truck wrecks.
- Like truck drivers but dislike trucks.
- Are intimidated by the size, weight and speed of trucks.
- Believe that commercial driver license training should be upgraded (longer training, periodic retraining).
- See a need for public education programs on how to safely share the road with trucks.
- Believe that large trucking companies have better equipment than smaller companies.

Jurors need to be educated about trucks and their operation, especially industry standards, safety regulations, truck driver's responsibilities (*e.g.*, pre-trip inspections), division of responsibility between driver and company, and so forth. Many jurors are vaguely aware that the trucking industry is regulated to some degree, but they have no idea just how extensive the regulations are regarding their inspection, maintenance and safe operation.

Use the FMCSR liberally throughout trial. Enlarge the definitions and use them during direct examination of your expert and cross-examination of the driver and the carrier's representative. Educate the jury on the regulations so that they have them as guideposts when deliberating on the defendants' actions and the appropriate compensation for the plaintiff.

## **VI. CONCLUSION**

An unfortunate reality is that truck wrecks will increase in number and severity. Plaintiff attorneys are obligated to not only seek just compensation for victims of these wrecks, but also to use these cases and our efforts to help forge a safer trucking industry for the benefit of all citizens.