



Theories to Explore in Your Trucking Case

When the Obvious Insurance Coverage
is Inadequate

David Brose & Mark Emison



Often times, trucking companies operate with bare bones insurance coverage and limit their coverage to the minimum level required by law. The present minimum financial requirements, established in 1980, are grossly inadequate.¹ In the event of catastrophic injury or death, such coverage will be insufficient to provide a full recovery to those involved in accidents with heavy trucks. Even more obstacles to complete recovery exist when the person injured or killed is an occupant of the heavy truck. Therefore, it is important to consider alternative avenues of recovery. Below we explore five theories to consider when the obvious insurance coverage is inadequate.

1. Entities in the Supply Chain – Shipper and Broker Liability

In a catastrophic trucking crash, it is important to identify all entities involved: driver, motor carrier, tractor owner, trailer owner, as well as any applicable shipper, broker, or third-party logistics company. As a cost-cutting measure and attempt to limit liability, more and more shippers contract with independent motor carriers rather than maintaining a company fleet.² There may be viable claims against a shipper or broker for negligently selecting an incompetent and dangerous motor carrier.³ In addition, in some jurisdictions a shipper or broker may be vicariously liable for the motor carrier's negligence.⁴

Many shippers and brokers screen motor carriers by merely confirming the motor carriers (1) have DOT authority, (2) are insured and (3) have a satisfactory rating or are unrated. With over a million motor carriers with DOT authority in the U.S., only a small fraction are audited. The vast majority of motor carriers have no safety rating.

When shippers and brokers solely rely on the three steps above, they select unrated carriers and new entrants without knowing anything about the motor carrier's operations or safety record. Even worse, this system allows for motor carriers that lose their operating authority to slip through the cracks if they re-open under

a different name ("chameleon carriers"). If shippers and brokers do no further investigation on new entrants, dangerous chameleon carriers re-join brokers' and shippers' "stable" of carriers.

Industry standards require shippers and brokers to do more to vet motor carriers. In *Schram v. C.H. Robinson*, the Court ruled that "it seems entirely reasonable to require firms, including third party logistics companies, who assist newcomers with market entry, to evaluate their safety control measures in the absence of a DOT rating."⁵ Industry publications further support that if a motor carrier has no safety rating, shippers and brokers must conduct an investigation of the motor carrier's safety history, compliance with regulations, and its safety program.^{6,7}

2. Hidden Motor Carriers

All motor carriers involved in a shipment may not be obvious from the initial crash report. In a recent case, the motor carrier involved in a crash did not match the motor carrier identified in the bill of lading. This raised a red flag for a "hidden motor carrier." In discovery, we learned that the broker initially selected "Motor Carrier A" who then later re-assigned the load to "Motor Carrier B." Motor Carrier B had a horrible safety record, had received multiple warning letters from the FMCSA for critical safety violations, and predictably caused a deadly crash. Identifying Motor Carrier A – the "hidden motor carrier" who initially accepted the load – added an additional insurance policy to pursue for its unauthorized double-brokering and negligence in selecting Motor Carrier B. For an in-depth analysis of holding a hidden motor carrier liable under the statutory employment doctrine, see Eric Penn and Darrin Walker's article "Statutory Employment and the Hidden Motor Carrier" in this issue.

To vet potential hidden motor carriers, first determine if the motor carrier and DOT number on the crash report matches the placard and DOT number on the actual tractor. If they do not match, that is a red flag to explore additional theories and coverage. Second, investigate

the freight chain by obtaining the bill of lading and shipping documents to identify all involved entities.

3. Trailer Owner

If a trailer is owned or leased by a separate entity than the motor carrier, it is possible the trailer may provide excess coverage. The Graves Amendment insulates the leasing company from traditional vicarious liability claims but does not apply where the trailer owner independently commits negligence.⁸ Even if the trailer owner was not independently negligent, it is worthwhile to identify the trailer's insurance policy. Coverage is regularly excluded, but not always. Some trailer policies may be construed to include the motor carrier as an "insured" and provide coverage.^{9,10}

4. Product Claims for Those Injured By Heavy Trucks

Crash Avoidance Technology

Crash Avoidance Technology (CAT) are safety systems designed to avoid crashes in the first instance. Such systems use sensors, cameras, radars, hardware and software to collect and interpret data from the environment surrounding the vehicle and then provide a form of output. CAT systems may be categorized into two separate categories based upon the nature of such output: (1) systems designed to warn the driver of a risk, and (2) systems designed to act autonomously to avoid a risk. There are various types of CAT, but the most prevalent are: Forward Collision Warning (FCW), Automatic Emergency Braking (AEB), Blind Spot warning (BLIS) and lane departure.

The NTSB has been urging the DOT to require CAT on commercial vehicles since 2001.¹¹ NTSB determined that up to 2,220 lives could have been saved over a 2 year period from 2011-2012 had the vehicles been equipped with CAT. Moreover, beyond preventing crashes, NTSB recognized the ability of this technology to mitigate the effect of crashes, finding CAT would have prevented or lessened the severity of injuries in 93.7 percent of those crashes.

Various CAT systems are utilized by heavy truck manufacturers, including those made by Bendix (Wingman) and Meritor WABCO (OnGuard). These systems have been available for use on heavy trucks for over a decade. Although most heavy truck manufacturers have made these systems available to purchasers for many years, they typically did so only as an optional feature. It was not until very recently that these manufacturers began to equip these systems as standard safety equipment on their trucks.

Underride Guards

Anyone who compares a passenger vehicle to a semi-truck/trailer will note the obvious geometric mismatch between the 2 vehicles. Other countries have taken steps to deal with this geometric mismatch. In 1994, the United Nations ECE published a standard for the design of a front underrun protection device (FUPS). A FUPS prevents underride and engages the energy absorbing structures of the vehicles. By 2003, European trucks were required to be equipped with FUPS. This was followed by Australia's adoption of a FUPS requirement in 2009, effective as to new trucks in 2011 and all trucks in 2012. As such, heavy trucks across the world are now equipped with FUPS. However, because there is no U.S. regulation that requires such items, heavy trucks in the American market are devoid of this safety feature. Although, their use may be drawing near, as Volvo Trucks now equips FUPS on its American buses.

The geometric mismatch is at its most noticeable and deadly level with semi-trailers. For many years, federal law has required semi-truck trailers to be fitted with rear underride guards. However, studies analyzing both real world collisions and crash tests demonstrated that the federal minimum requirements for underride guards were not sufficient to protect motorists.

Underride crashes are particularly lethal, with more than 400 drivers and passengers killed each year due to underride crashes, with around 5,000 additional people injured.¹² As a passenger vehicle collides with

the rear or side of the semi-truck's trailer, the vehicle underrides the deck of the trailer, serving to shear into the occupant compartment. The nature of this impact oftentimes further deprives the occupants of the car's safety features (i.e. deployment of the airbags).

Underride can and should be prevented, as it is nothing more than mechanical guarding, a concept that has existed for over a century. However, trailer manufacturers have refused to take these steps in the absence of regulation by the government. It is only when the manufacturers have recognized an economic benefit to themselves that they have acted to improve these guards. One example is rear underride guards that comply with the CMVSS 223. Many American manufacturers now comply with such standard, not because they care about safety, but because they want to sell their trailers in Canada.

5. Product Claims For Injured Truck Occupants

Beyond product claims that can serve to enhance recovery for someone in an accident with a heavy truck, there are many product claims that can be pursued against manufacturers on behalf of heavy truck occupants.¹³ According to IIHS, 4,119 people died in large truck crashes in 2019, with 16 percent of these deaths being the heavy truck occupants. The number of those deaths have only continued to increase over the past decade (an increase of 51 percent). Two areas that are of great significance in contributing to fatalities of truck drivers are rollovers and post-collision fires.

Heavy Truck Rollovers

Forty-seven percent of fatal injuries to truck drivers occurred in rollover accidents, compared to only 20-39 percent in cars, pickups or SUVs. As of August 1, 2019, all newly manufactured truck tractors must now comply with FMVSS 136, which establishes performance and equipment requirements for Electronic Stability Control on heavy trucks, with the stated purpose of reducing crashes caused by rollover or directional loss-of-control.¹⁴ Through its Final Rule, NHTSA stated the incorporation of ESC would prevent 40-56 percent or

untripped rollover crashes.¹⁵ Although the adoption of this ESC requirement will serve to lessen the number of heavy truck rollovers over time, there are still a substantial number of heavy trucks on the roadways without these systems which have been found on passenger cars since the late 1990's.

Moreover, little has been done to protect heavy truck occupants in rollover crashes, as heavy trucks generally lack the rollover protection systems found in passenger vehicles.¹⁶ Scania was the first manufacturer to develop a side curtain airbag for heavy trucks (debuting in 2016), with the airbag incorporated into the headliner molding above the door, similar to what is seen in passenger vehicles. However, other heavy truck manufacturers have failed to develop this rollover solution. Certain manufacturers have incorporated other rollover protection systems such as the RollTek Seat. This RollTek Seat employs a variety of functions, including a seat belt pretensioner, a suspension seat that lowers and an airbag cushion that deploys in rollovers to reduce occupant movement and provide occupant protection.¹⁷ However, American manufacturers still generally only make this system available as an optional feature, despite its introduction in 2007.

The lack of these readily used and recognized safety features is only heightened when one considers the lack of occupant protection and containment found in the design of the cabs of these trucks. For example, many heavy truck manufacturers do not make use of laminated/safety glass in side windows, creating a significant ejection risk. That is true despite their use in other areas of the trucks (i.e. windshields, sunroofs, sleeper windows), as well as their prevalent use in passenger vehicles.¹⁸

Further, there is little structure to the cab itself, thereby creating significant risks of roof collapse and other intrusion to the occupant compartment. As NHTSA has recognized, heavy truck cabs are distinct modules that attach to the chassis; as such, the chassis does not

contribute significantly to the structural integrity of the cab structure.¹⁹ Although certain European countries have adopted crashworthiness requirements for heavy trucks, American heavy trucks are essentially unregulated in this regard. As such, it is unsurprising that NHTSA has found that the probability of being killed or severely injured in a heavy truck in a rollover accident is actually higher than if that same truck is hit by a train, and more than twice that of hitting a hard fixed object. Although almost 90 percent of heavy truck rollovers involve only ¼ turn, when the truck turns 2 or more quarters, substantial crush occurs compromising the greenhouse structure, with over 1/3 of the trucks studied having less than 50 percent of the greenhouse left.

Heavy Truck Fires

Large trucks are involved in 17 percent of fatal fires, with an annual average of almost 7,000 commercial vehicle fires resulting in hundreds of fatalities.²⁰ The use of side-saddle mounted fuel tanks has long been abandoned by vehicle manufacturers, as such configurations were brought to a heavy and hasty end, following General Motors' \$51 million settlement with the government related to its side-saddle pickups. However, heavy truck manufacturers remain as holdouts on this antiquated design.

The risks presented by side-saddle mounted fuel tanks on heavy trucks has been the subject of extensive NHTSA study and peer reviewed literature since at least the 1970's.²¹ In 1983, the University of Michigan published its study on fires and fatalities in heavy trucks which found that the rate of fire-associated fatalities in diesel fuel heavy trucks was 15 times as high as the corresponding fatality rate among passenger car occupants. This study further recommended that fuel tanks be moved; also suggesting strengthening/protection of the heavy truck's front axle. In 1986, the DOT published its Truck Occupant Protection study, including various crash scenarios that served to rupture the side-saddle mounted fuel tanks, including frontal collisions causing displacement of the front axles and

components forward of the fuel tanks and side impacts/impacts with fixed objects causing direct impact to the fuel tanks.

Clearly, the risks presented by these side-saddle fuel tanks is not limited to situations of direct contact with the fuel tank in a collision, such as the tank being struck by a guardrail post. Instead, other parts of the truck that are involved in a collision may serve to pierce the fuel tanks as they are pushed rearward, such as suspension parts of a front axle displaced in a frontal collision. This is especially hazardous when the fuel tank is located directly aft of the front axle, as is often seen in day cab semi-trucks. Although manufacturers have recognized these risks and moved fuel tanks rearward along the frame rails towards the rear duals, especially among sleeper cabs, they still fail to account for the fact that other components now located in this vacated area can still serve to damage the fuel tank if not protected from impact themselves. Although intended to prevent passenger cars from under-riding the front of heavy trucks, FUPS provides a secondary benefit of protecting the truck's steering axle and fuel tanks in frontal collisions, given the truck's geometric mismatch to other vehicles and lack of structure outboard of the frame rails.

Conclusion

Sadly, attempts to increase motor carriers' minimum financial responsibility levels have not yet succeeded. We have all represented catastrophically injured clients where the most obvious wrongdoer was not properly insured. In these situations, the above theories are worthwhile to vet. Many times, there may end up being no viable potential claims to pursue, but at least your clients have peace of mind that all potential avenues have been investigated.

-
1. Motor Carrier Act of 1980.
 2. See David Cantor; Heidi Celebi; Thomas Corsi and Curtis Grim; "Do Owner-Operators Pose a Safety Risk on the Nation's Highways?" Transportation

Research, Part E, Logistics and Transportation Review, 59 (2013), pp. 34-47.

3. *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008); *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004).
4. See *Sperl v. C.H. Robinson*, 946 N.E.2d 463 (Ill. App. Ct. 2011).
5. 341 F. Supp. 2d. at 552, fn 10.
6. Augello, William, "Hiring Carriers with Due Diligence" Carrier411.com (April 5, 2006).
7. Brewer, Darren, "Analyzing Safety Ratings and SafeStat Scores" Carrier411.com.
8. 49 U.S.C. § 30106.
9. Michael Walsh and Caitlyn Malcynsky, "A Case Study: Finding Coverage in Trucking Litigation." Connecticut Trial Lawyer Association Forum, Spring 2019, pp. 37.
10. See *Great Am. Ins. Co. v. Moore Freight Servicer, Inc.*, 737 Fed.Appx. 475 (11th Cir. 2018).
11. *The Use of Forward Collision Avoidance Systems to Prevent and Mitigate Rear-End Crashes*, Special Investigation Report, NTSB/SIR-15/01, PB2015-104098, National Transportation Safety Board.
12. ABC News, "Feds take their time addressing safety concerns about the rear of tractor trailers," May 4, 2012.
13. Large Trucks Fatality Facts 2019, Insurance Institute for Highway Safety.
14. 49 C.F.R. §571.136.
15. Fed. Reg., Vol. 80, NO. 120, 36060, Tues., June 23, 2015.
16. <https://www.sae.org/news/2016/08/scania-debuts-heavy-truck-safety-first-rollover-side-curtain-airbags>.
17. <https://www.imminet.com/products/airbags/rolltek/>.
18. <https://www.aaa.com/AAA/common/AAR/files/Laminated-Glass-Vehicle-List.pdf>.
19. *Heavy Truck Crashworthiness: Injury Mechanisms and Countermeasures to Improve Occupant Safety*, U.S. DOT, NHTSA, DOT HS 812 061, August 2014.
20. *Risk of Commercial Truck Fires in the United States: An Exploratory Data Analysis*, Jonathan Pearlman & Neil Meltzer, John A. Volpe National Transportation Systems Center, U.S. Department of Transportation Research and Innovative Technology Administration.
21. *Heavy Trucks - Fatal Accident Reporting System Special Report of Heavy Trucks*, M. Cassidy, NHTSA, May 1978; *Fires and Fatalities in Tractor-Semitrailer Accidents*, J. O'Day, UMTRI Research Review, Vol. 14, No.2, Sept.-Oct. 1983; *Truck Occupant Protection*, DOT HS 807 081, NHTSA Technical Report, Dec. 1986; *Heavy Truck Safety Study*, DOT HS 807 109, Final Report, Clarke, et al.; *Heavy Truck Fuel System Safety Study*, DOT HS 807 484, NHTSA Technical Report, Sept. 1989.



David Brose

David Brose is an attorney at Langdon Emison in Lexington, MO and can be reached at (660) 259-6175 or david@lelaw.com.

Mark Emison

Mark Emison is an attorney at Langdon Emison in Lexington, MO and can be reached at (660) 259-6175 or mark@lelaw.com.

