

Mining for Gold: Little-Used Regulatory Golden Nuggets That Can Make Life Easier for Shippers, Brokers, and Carriers.

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The transportation and logistics sector has always been one that is heavily regulated, both by pertinent federal agencies and by various state agencies. Although there is now a movement for selected deregulation by DOT, the bulk of the regulatory structure will undoubtedly remain intact. While this smorgasbord of federal regulation involves many parameters, restrictions, limitations, and guidelines, when mining deeply into the regulatory framework, there are various favorable regulatory morsels. These morsels can be extremely helpful to both those who provide transportation services, i.e., transportation brokers, forwarders, and carriers, and also to the consumers of transportation services, i.e., shippers and consignees. Two of the most putatively helpful, but yet rarely used, regulatory golden nuggets involve oft-litigated issues in transportation casualty and (cargo loss and) damage cases-Preventability Determinations and Carrier Selection.

Preventing Preventability Determination Admissibility - A Federal Register Escape Hatch

The FMCSA has an ongoing program to evaluate the “preventability” of 21 categories of crashes, to modify motor carrier information in the FMCSA's Safety Measurement System (SMS) to distinguish non-preventable crashes. This evaluation emanates from submissions of Requests for Data Review (RDR) to its national data correction system, through “Data Qs.” This schematic occurs in the context of the overall FMCSA Safety Measurement System (SMS), which has used safety performance information in the Behavior Analysis and Safety Improvement Categories (BASIC), in addition to recordable crashes involving commercial motor vehicles, to prioritize carriers for safety interventions and to calculate crash indicator basic percentiles for each particular motor carrier. To encourage reporting by motor carriers through this system, the FMCSA noted that preventability determinations made under the program would *not* affect a motor carrier's safety rating or ability to operate, nor would FMCSA issue penalties or sanctions based upon these determinations. The program was intended to more accurately track the safety records of motor carriers, and also give motor carriers the opportunity to contest particular “crashes,” through these submissions. Thus, the system contemplated the possibility that it would have a favorable impact upon motor carriers overall within the SMS system. However, to further encourage, and not penalize, reporting under this system, the FMCSA promulgated, in the Federal Register, a very clear explanation of what preventability determinations cannot do in civil litigation:

“A crash preventability determination does not assign fault or legal liability for the crash. These determinations are made on the basis of information available to FMCSA by persons with no personal knowledge of the crash and are not reliable evidence in a civil or criminal action.

Under 49 U.S.C. § 504(f), these determinations are not admissible in a civil action for damages. The absence of a not preventable determination does not indicate that a crash was preventable. . . . A crash preventability determination does not assign fault or legal liability for a crash. These determinations are made on the basis of information available to FMCSA by persons with no personal knowledge of a crash and are not reliable evidence in a civil or criminal action.”

See, 85 Fed.Regis. 27017, 2018 (updated, December 24, 2024) *See also Cameron v. Werner Enterprises*, 2016 WL 3030181 (D. Miss. 2016) (agreeing that prepared preventability report was inadmissible). This is a relatively narrow window of inadmissibility, since the contested evidence must specifically relate to preventability reporting. However, in the Reptile Theory era, every little bit helps!

Carrier Selection: Another Regulatory Assist from FMCSA! Another very helpful regulatory enactment that really aids in mitigating liability, here in carrier selection situation, is a fairly recent promulgation enacted by FMCSA. The FMCSA made changes to CSA’s Safety Measurement System (SMS) public website to address concerns regarding the display of information on a commercial motor carrier’s safety performance. The key changes that FMCSA made to the SMS public website and contained in the Code of Federal Regulations states that:

“Readers should not draw conclusions about a carrier’s overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385 or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation’s roadways.” *See* Pub. L. No. 114-94, § 5223(d)(2), 49 USC § 31100.

This regulatory proclamation is potent ammunition to dispel the notion, in any case at the trial court level, that there was negligent selection of a motor carrier in a personal injury action-or otherwise. It is a clear pronouncement by the governmental agency specifically charged with regulating commercial transport on the public highways that motor carriers who have received “Conditional” ratings (or those that are unrated) are deemed to be authorized to operate on the nation’s public highways. This regulatory enactment can be used as guidance by brokers and shippers in selecting carriers, and can provide them with a certain level of comfort. It can also be used by counsel, in litigation proceedings, to help to defeat negligent selection claims involving conditional carriers, by having the court take judicial notice of the regulatory promulgation.

An Ounce of Prevention: All that said, *conditional* carriers *do* create greater litigation risk for the broker or shipper that is selecting them. Although no counsel has held that a conditional safety rating carries the day for a plaintiff in a negligent selection action as a matter of law, courts remain skeptical of such ratings. *See, e.g., McKeown v. Rahim*, 446 F. Supp. 3d 64 (W.D. Va. 2020) (granting plaintiff leave to amend complaint to cure negligent hiring claim with allegations regarding a motor carrier’s conditional safety rating). So, plaintiff’s counsel *will* still use a conditional safety rating as ammunition. Consequently, it is advisable to, if at all possible, in the heat of operations, develop some additional due diligence for the qualifications of carriers that have a conditional rating. This due diligence could include a series of follow-up targeted inquiries to the motor carrier (which can be pre-prepared for operations people), a request for backup documentation on the carrier’s response to the rating and/or appeal of the rating, and background documents that support the carrier’s rationale and explanation. Importantly, any additional due diligence efforts in this regard should be

retained by the broker or shipper. So, conditional carriers can be retained, but with an added level of precaution.

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