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TRANSPORTATION

NEWSLETTER

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Illinois Appellate Court: A Contingent Automobile Liability Policy Is Not an Excess Policy

The Appellate Court of Illinois, First Judicial District, was recently confronted with the interpretation of a Contingent Automobile Liability insurance policy and the coverage available to the insured where the policy stated that coverage "shall not apply" if the insured has "valid and collectible Automobile Liability insurance of any nature."

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Defending Against the Reptile

The Reptile Theory, the strategy of generalizing the defendant's conduct so that the jury members feel personally threatened by the alleged dangerous actions, is now a threat to defendants as plaintiffs' firms are implementing the technique with great success. Currently, the Reptile Theory's official website claims that the strategy has resulted in more than $ 6.1 billion in verdicts and settlements across the country.

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To Comply or Not to Comply: The California Transparency in Supply Chains Act

Although California's Transparency in Supply Chains Act does not specifically target the transportation, cargo and/or container community, these companies, whether doing business inside or outside California, should be aware of the statute's requirements. While suppliers to companies located outside of California are not legally bound to comply with the Act, they will be affected by their business partners' requirements to adhere to what is expected to become a *de facto* standard of performance for all companies throughout the country.

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Illinois Appellate Court: A Contingent Automobile Liability Policy Is Not an Excess Policy

In *Bartkowiak v. Underwriters at Lloyd's, London*, 2015 IL App (1st) 133549, the Appellate Court of Illinois, First Judicial District, was confronted with the interpretation of a Contingent Automobile Liability insurance policy and the coverage available to the insured where the policy stated that coverage "shall not apply" if the insured has "valid and collectible Automobile Liability insurance of any nature." The Appellate Court held that the defendant insurer had no duty to defend or indemnify because the insured had other automobile liability insurance that, although it did not cover the full amount of the insured's loss, was "valid and collectible" such that the contingent policy was never triggered.

BACKGROUND

On October 31, 2009, a truck delivering road-resurfacing materials struck and killed road-construction flagger Joseph Bartkowiak. The plaintiff, decedent's wife, brought a wrongful death action against (1) the truck driver, Stan Wdowikowski; (2) the driver's employer, trucking company Denise Wdowikowski Trucking, Inc. (DWT); and (3) the truck broker that assigned the job to DWT, Jack Gray Services, Inc. (Jack Gray).

The truck driver had a $1 million automobile liability policy through Northland Insurance (Northland). Truck broker Jack Gray was an additional insured on the Northland policy for the delivery at issue. In addition, Jack Gray had a separate insurance policy with defendant titled "Contingent Automobile Liability." Under this policy, the insurer agreed to pay "damages resulting from automobile liability that may arise on a contingent basis" because of an individual's bodily injury and death "caused by an occurrence and arising out of the transportation of merchandise" as part of Jack Gray's truck brokerage. Underwriters' policy required Jack Gray to obtain a current Certificate of Automobile Liability Insurance for any vehicles brokered by it. Jack Gray obtained a Certificate of Insurance that indicated Northland provided automobile liability coverage for the involved motor carrier and Jack Gray was named an additional insured on that policy.

There was no dispute that the Northland policy was the primary insurance here. Northland, in fact, defended Jack Gray in the underlying action and ultimately paid out its policy limit to settle the underlying action (discussed below).

In the fall of 2010, Jack Gray tendered its defense of the underlying action to the defendant, seeking coverage under the contingent policy. The defendant denied

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coverage on the basis of the policy's Condition IV, which stated:

> APPLICATION OF CONTINGENT LIABILITY. It is expressly understood and agreed that the coverage provided under this Certificate of Insurance shall not apply if there is **valid and collectible Automobile Liability insurance of any nature**.

Defendant's position was that Jack Gray had "valid and collectible" insurance through Northland.

On February 28, 2012, the court presiding over the underlying action entered an order approving the parties' settlement agreement. Pursuant to the agreement, the plaintiff received $7.8 million, including $1 million from Northland. Jack Gray remained exposed in the amount of $4.2 million, and thus agreed to assign to plaintiff its rights under the defendant's policy.

The plaintiff (standing in Jack Gray's shoes) filed a declaratory judgment action seeking a declaration that the defendant (1) owed a duty to defend and indemnify Jack Gray for its liability stemming from the truck accident, (2) was required to cover the excess $4.2 million referenced in the settlement and (3) acted in bad faith in denying coverage. The plaintiff asserted that Condition IV did not preclude coverage for her underlying action because the Northland policy did not constitute "valid and collectible" insurance because it failed to wholly cover the loss.

The trial court granted the defendant's motion to dismiss on two grounds: First, the defendant's policy was a "*contingent* automobile liability policy, and the specific contingency it covered – the complete failure of the primary coverage – never occurred." Second, the Northland policy was "valid and collectible" because Northland defended Jack Gray in the underlying action and the plaintiff had, in fact, collected that policy's $1 million limit when the underlying action settled. The trial court concluded that "to accept the proposition that Northland's policy was not collectible because the policy limits have been exhausted leaving a portion of the underlying settlement unsatisfied would require the court to transform the Contingent Automobile Liability coverage into excess coverage – something this court cannot do."

ANALYSIS

The Appellate Court affirmed, reasoning as follows:

- The court noted first that the parties' dispute centered on the word "collectible" in Condition IV of the defendant's policy. According to the plaintiff, "collectible" implies a monetary limit: "In plaintiff's view, if the insured has a valid policy but it does not wholly cover the insured's loss, that policy is 'collectible' only to the extent it covers the loss and is otherwise 'uncollectible.'"

- "[A] more fundamental way to look at plaintiff's position is that plaintiff views Condition IV as 'excess' coverage – coverage for any loss that exceeds the limit of the underlying insurance's coverage."
- "In defendant's view," by contrast, a policy is "collectible" if "the insured is capable of collecting on it – even if the policy does not wholly cover the insured's loss."
- As the court explained, "defendant views Condition IV (and indeed the heading of Condition IV suggests as much) as providing only 'contingent' coverage – coverage only if a certain event does or does not happen, here if the insured has other 'valid and collectible' automobile liability insurance. That provision is sometimes referred to as an 'escape clause.'"

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Because the policy did not define "collectible," the court looked to dictionary definitions for its "plain, ordinary, and popular" meaning. The court determined that these definitions supported both sides, but found that this did not "necessarily render it ambiguous. Among our commands in interpreting insurance policies is not only to examine the words in controversy but to examine them in light of the policy as a whole." In so doing, the court looked to the policy's "other insurance" provision at Condition VIII:

> OTHER INSURANCE. The coverage provided herein **is excess over and above** any other valid Contingent Automobile Liability Insurance that provides coverage for any loss that otherwise would be covered by the terms and conditions of this Certificate.

Because Condition VIII specifically referred to excess insurance while Condition IV contained no such reference, the court concluded that the parties knew how to express their desire to contract for excess liability coverage as they clearly did in Condition VIII with the language "excess over and above."

"If the intent of the policy was to provide excess coverage above and beyond any standard automobile liability insurance that the insured procured, we can think of no reason why the policy would not have expressed that intent in Condition IV in precisely the same way it expressed that concept in Condition VIII, concerning other *contingent* liability insurance."

The court thus held that the parties' intent was clear: "Pursuant to Condition IV, defendant undertook to provide primary coverage where, for some reason, the automobile liability insurance for the trucks brokered by the insured, Jack Gray, completely failed due to invalidity or insolvency. If Jack Gray could collect at all from that primary insurance, then defendant's policy would not apply. A complete reading of the policy does not permit us to convert Condition IV into an excess coverage provision."

Finally, the appellate court rejected the plaintiff's contention that this interpretation of the policy rendered it illusory. "We agree with defendant that the point of the policy was to cover the insured's loss in the very specific contingency that the underlying insurance failed, either because it was invalid for some reason or because it had become uncollectible for some reason such as the insurance company's insolvency… That is the deal the parties struck, and we will not alter it."

Plaintiff filed a petition for leave to appeal to the Illinois Supreme Court in late fall 2015, which remains pending.

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Defending Against the Reptile

In 2009, Don Keenan and David Ball authored a book entitled *Reptile: The 2009 Manual of the Plaintiffs Revolution*, which arguably glamorized jury nullification and created a "new" trial strategy for plaintiffs' lawyers across the country known as the "Reptile Theory." It is based on a plaintiff's attorney generalizing the defendant's conduct so that the jury members feel personally threatened by the alleged dangerous actions. The theory is that the "reptilian," or fundamental, part of jury members' brains responds to the fear of danger and they will find the defendant liable in an attempt to eliminate danger from the community and to protect themselves. The strategy has been especially conducive to cases involving trucking accidents.[1]

THE REPTILE THEORY IN PRACTICE

The Reptile strategy is now a "ubiquitous threat to defendants across the nation,"[2] and plaintiffs' firms are self-proclaimed "strong believers" in it.[3] Currently, the Reptile Theory's official website claims that the strategy has resulted in more than $6.1 billion in verdicts and settlements across the country.[4] In 2014 alone, there have been almost 50 notable cases where the Reptile strategy was implemented. Of those cases, one Florida attorney received a $2.6 million verdict for his client who was run over by a beach patrol truck while sunbathing; a New Mexico attorney settled a deadly car accident involving a semi-truck for $2.5 million; and a South Carolina attorney received a record $50 million verdict for a motor vehicle death case.

It is crucial that defense attorneys recognize and respond to their opponent's use of the Reptile approach early in the litigation process to disarm the strategy and execute their counter-attack.

Plaintiffs' attorneys representing clients injured in motor vehicle accidents involving trucking companies have employed a strategy, from discovery to closing argument, of attacking the company as opposed to focusing on the accident. If the plaintiff could find one relevant and admissible thing that the company did improperly, then the plaintiff could try the "out of control" company and instill fear in the jurors. Plaintiffs' attorneys also attempt to leverage the jurors' fear of the sheer size of trucks as a means to scare their way to victory. The two avenues taken together have helped plaintiffs' counsel motivate jurors to issue enormous awards to plaintiffs in trucking accident cases.[5]

The science behind the Reptile Theory, namely that the "reptilian complex" in the brain focuses on personal safety and controls the rest of the brain, has been largely refuted.[6] Nonetheless, the Reptile trial strategy (often coupled with strategies outlined in *Rules of the Road* by Rick Friedman and Patrick Malone) has been an effective method of impassioning jurors to give pro-plaintiff verdicts and should therefore be recognized and addressed by defense counsel.

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[1] Richard P. Traulsen, *A Trucking Case: So Much More Than the Average Auto Case*¸ 2012 Winter AAJ-Papers 40.

[2] Bill Kanasky, I*nvalid, Yet Potentially Effective, Debunking and Redefining the Plaintiff Reptile Theory*, 56 No. 4 DRI for Def. 14 (2014).

[3] *See* The Herrera Law Firm of San Antonio, TX, *Case Themes and Closing Argument in Trucking Litigation,* 2013 Annual AAJ-Papers 213.

[4] http://www.reptilekeenanball.com/ (last visited November 5, 2014).

[5] http://www.reptilekeenanball.com/reptile-results/#tab-id-1 (last visited November 5, 2014).

[6] *See* Bill Kanasky, *loc. cit.;* Ken Broda-Bahm, *Taming the Reptile,* The Jury Expert, November 2013.

Attorneys using the Reptile approach generally develop and substantiate one primary theme through the use of a broad "safety rule" that the defendant allegedly violated and thereby caused the plaintiff's injury.

Each safety rule generally adheres to six characteristics:

- The rule must prevent danger
- The rule must protect people in a wide variety of situations, not just the plaintiff
- The rule must be in clear English
- The rule must explicitly state what a person must or must not do
- The rule must be practical and easy for someone in the defendant's position to have followed
- The rule must be one that the defendant will either agree with or be deemed stupid, careless or dishonest.[7]

An example of a safety rule: "A truck driver is not allowed to needlessly endanger the public."[8] Such safety rules are more rigid and pro-plaintiff than the "reasonable person" standard that generally governs these cases. If plaintiffs'

attorneys are allowed to impose their safety rule during trial in lieu of the reasonable person standard, it is more likely that the plaintiff will prevail.

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[7] Keenan and David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution,* 52-53.

[8] http://atcounseltable.wordpress.com/2013/05/20/beware-the-reptile-lawyer/ (last visited November 4, 2014).

RECOGNIZING THE REPTILE STRATEGY THROUGHOUT THE PROGRESSION OF A CASE

In practice, the implementation of the Reptile Theory is simple and straightforward. Counsel for the plaintiff will expose a violation of a safety rule that the defendant will ultimately concede it was supposed to follow and, in turn, the jury will view this violation as a societal safety concern. The application of the Reptile approach does not begin at trial, but rather is usually introduced early and developed throughout the entire course of litigation.

Discovery

At the outset of litigation, plaintiffs' attorneys set out to develop the Reptile Theory principles. Defense attorneys may recognize the Reptile approach at this stage because discovery requests are tailored to acquire as much information as possible pertaining to a corporate defendant's safety polices, protocols and records. This is noticeable in the commercial transportation world as plaintiffs' attorneys are requesting documents that are arguably irrelevant and/or have nothing to do with how an accident or incident occurred.

Common requests might include:

- Company handbooks
- Safety policies, procedures and protocols
- Document retention policies
- Accident investigation policies
- SafeStat and CSA records
- DOT audit results
- Unrelated prior accidents.

The purpose of acquiring this information is to establish broad safety rules the commercial transportation company was supposed to follow. After the initial information is secured in written discovery, the plaintiff's counsel will attempt to obtain an admission that the rule was violated from the driver or corporate defendant(s) during the written and oral discovery stages. If counsel for the plaintiff can establish that a safety rule existed and that the commercial transportation company violated the rule, then the attorney for the plaintiff has obtained the necessary facts to use in arguments that are expected to motivate jurors to protect the community.

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Voir Dire

Even before a jury has been selected and the opening statements begin, plaintiffs' attorneys using the Reptile Theory will aggressively target jurors they believe will litigate from the jury box and be willing to protect society from an unsafe defendant. Instead of the typical questions asked of jurors during *voir dire*, plaintiffs' attorneys will narrow their questions to further their reptilian goals.

Examples of reptilian *voir dire* questions:

- Do you believe that trucking companies and their drivers have a responsibility to protect other drivers on the road?
- Do you believe that a company with its own safety standards and policies has an obligation to the general public to follow those standards and policies?
- Do you believe that a trucking company with a history of accidents and safety violations is a danger to the general public?
- Are you a person who is willing to decide whether a trucking company and its driver acted in a safe and proper manner?

These sample questions illustrate the two goals plaintiffs' attorneys seek to achieve during *voir dire*: (1) identify individuals who will protect the public from a dangerous defendant and (2) prime the eventual jury for the reptilian theme the plaintiff will present throughout the trial.

Opening Statements, Witness Examinations and Closing Arguments

Once a jury has been selected, plaintiffs' attorneys prime the jury during opening statements and exploit their reptilian responses throughout witness examinations and closing arguments. It is during these phases of the trial that plaintiffs establish the safety rule, expose the violation and create a danger that the jury members feel compelled to protect against. Plaintiffs' attorneys may very well spend little time discussing the actual facts of an accident, and instead focus on appealing to the jury's sense of minimizing danger as a whole. For instance, during closing arguments counsel for plaintiffs focus on demonstrating how the defendants' behavior can affect the community, state and country, and follow up with statements that implore the jury to protect society.

DEFEAT THE REPTILE

Once a defense attorney recognizes that the plaintiff is using the Reptile Theory, there are multiple ways the defense can counter the technique. Defense attorneys should implement an aggressive approach at first sight of the strategy, which can be as early as the discovery phase of litigation.

Readily Object to Discovery Requests

While the discovery rules throughout the country and in the federal court systems are becoming more relaxed in favor of disclosure, counsel for defendants should set a tone early that "pulling at the heart strings" of the jury is unacceptable and will be challenged at trial. For instance, if there appears to be no reason for producing SafeStat or CSA information, do not turn it over. If certain portions of a handbook or safety manual are irrelevant to the specific issues contained in your case, seek to redact those portions.

Prepare Your Witnesses for a Reptilian-Style Deposition

Prepare your witnesses for the plaintiff's attorney's questions at depositions and ultimately at trial.[9] The best way for drivers and corporate representatives to respond to "reptilian" safety questions, which are typically vague and overly broad, is to be honest and say that the answer "depends on the circumstances." It is paramount that defense counsel prepare witnesses to avoid agreeing to hypotheticals.[10]

File a Motion **in Limine** ***Barring Reptilian-Type Arguments***

The first line of defense at the trial stage in minimizing the Reptile Theory is to file motions *in limine* barring any mention, comment, reference, testimony or argument regarding the Golden Rule, personal safety, community safety, community fear and community conscience. The argument should be made that the jurors should not be asked to step into the shoes of the plaintiff, decide the case as if they were faced with similar circumstances or send a message to the defendant or society. It is arguable

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[9] *See* Bill Kanasky, *loc. cit.*
[10] *See* Bill Kanasky, *loc. cit.*

that these types of approaches are improper, the issues are irrelevant and the probative value would be outweighed by prejudice to the defendant.

Prepare the Jury During **Voir Dire**

During *voir dire*, defense attorneys should take the opportunity to prime the jury for their trial themes. For example, if the plaintiff's counsel primes the jury with the following question: "Do you believe that the top priority for a trucking company should be safety?" then the defense counsel should take the opportunity to re-prime the jury with its own defense themes such as, "Do you believe that the top priority for a trucking company is to move products for the benefit of the community from one location to the next in the most efficient and safe manner?" Doing so will enable the defense to rebut any attempt by the plaintiff to establish their reptilian themes.

Refocus the Jury at Trial

Because reptilian safety rules are clear-cut and widely applicable, the plaintiff using the Reptile approach will commit to a simplistic view of the law and facts of the case to make the case conform to the espoused rule. The plaintiff's argument is vulnerable because truth is not on their side. Defense attorneys should shed light on the plaintiff's simplifications, and appeal to the view that simple rules rarely exist and complex rules with carve-outs and exceptions are the norm. Defense counsel can take this one step further by asserting that the plaintiff is attempting to cloud the judgment of jurors by tapping into their natural desire to simplify a complex situation. Counsel may also expose the Reptile Theory to the jury and demonstrate what the plaintiff is intending to do. These messages should be raised in the defense opening statement or *voir dire* to prevent the plaintiff's view from poisoning the jurors' minds.

The defense should also present opening statements and closing arguments that refocus the story at trial. The defense should aggressively explain alternative liability, the standards of care that apply in the case, and how the standard of care applies to the facts.[11] Defense attorneys should remind jurors that their purpose is to consider all of the evidence and reach a fair, honest and just verdict based on the jury instructions they are provided. This can be an effective way to refocus the jury and reframe the defense theories so that societal concerns do not enter into the jury's decision and the case is decided on its specific facts.

CONCLUSION

The Reptile Theory is a technique that plaintiffs' attorneys are undoubtedly implementing with great success. Like any trial strategy, however, there are ways to defuse the intended results of the strategy plaintiffs' attorneys seek to employ. It is imperative from the outset of any case where the plaintiff is using the Reptile approach that the defense proactively attack the strategy so that the jury can decide the specific issues at hand rather than the simplistic rules and broader societal questions plaintiffs' attorneys seek to exploit.

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[11] *See* Bill Kanasky, *loc. cit.* at 10.

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To Comply or Not to Comply: The California Transparency in Supply Chains Act

Is your business a transportation, cargo and/or container company or do you own or manage a retail or manufacturing operation? Do you do business in California and maintain worldwide gross sales of at least $100 million? If you've answered "yes" to these questions, then this article, which outlines the California Transparency in Supply Chains Act and how to comply with it, is for you.

In October 2010, former California governor Arnold Schwarzenegger signed into law Senate Bill 657, the California Transparency in Supply Chains Act, which requires all retailers and manufacturers in California to disclose their efforts to eradicate slavery and human trafficking from their supply chains. Since going into effect on January 1, 2012,[1] it is likely that hundreds, if not thousands, of retailers and manufacturers have received letters from the attorney general inquiring about their compliance with this legislation.

ABOUT THE ACT

The stated purpose of the Act is "to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains and thereby improve the lives of victims of slavery and human trafficking."[2] Some groups have suggested that the Act will provide companies in California with the opportunity to lead the fight against human trafficking and empower consumers to reward companies that proactively engage on these issues.

The Act applies to all retailers and manufacturers (as designated by companies in their California tax filings) with worldwide gross sales of at least $100 million that do business in California. A company is "doing business in the state" if it actively engages in any transaction for the purpose of financial or pecuniary gain or profit, as defined in the California Revenue and Taxation Code.[3]

APPLICABILITY TO THE TRANSPORTATION INDUSTRY

Although the Act does not specifically target the transportation, cargo and/or container community, as an integral part of retailers' and manufacturers' supply chains, these companies, whether doing business inside or outside California, should be aware of the statute's requirements. While suppliers to companies located outside of California are not legally bound to comply with the Act, they will be affected by their business partners' requirements to adhere to what is expected to become a *de facto* standard of performance for all companies throughout the country.

A myriad of transportation, cargo and/or container companies are responsible for moving goods and services cross-border on a daily basis. It is not clear how the Act will directly impact these companies; however, we believe that given the definition of "supply chains,"[4] the Act will likely apply to them as well.

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[1] Cal. Civ. Code § 1714.43(e).

[2] California Senate Bill 657 Section 2(j).

[3] https://www.ftb.ca.gov/professionals/taxnews/2011/March/Article_14.shtml.

[4] The network created among different companies producing, handling and/or distributing a specific product. Specifically, the supply chain encompasses the steps it takes to get a good or service from the supplier to the customer.

At a minimum, the Act requires companies to publicly disclose steps they are taking in the following areas:

- Engaging in verification of product supply chains to evaluate and address risks of human trafficking and slavery, specifying if the verification was not conducted by a third party
- Conducting audits of suppliers to evaluate compliance with company standards for trafficking and slavery in supply chains, specifying if the verification was not an independent, unannounced audit
- Requiring direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business
- Maintaining internal accountability standards and procedures for employees or contractors that fail to meet company standards on slavery and trafficking
- Identifying company employees and management who have direct responsibility for supply chain management and training on human trafficking and slavery, particularly concerning the mitigation of risk within supply chains.

The required disclosures must be posted on a company's website with a "conspicuous and easily understood link." If a company does not have a website, it must provide written disclosures within 30 days of receiving a written consumer request for the information.[5] For examples of how and where disclosures should appear on company websites, you can visit the websites of three automobile companies known to be compliant with the Act – BMW, Mercedes and Rush Truck Centers.

While the exclusive remedy under the Act for a violation is an action by the California attorney general for injunctive relief,[6] the Act expressly states that nothing in the section shall limit the remedies available for a violation of any other state or federal law.[7] This presents the opportunity for a government regulator, private citizen or competitor to pursue an action, such as an unfair business practices claim, against a company for noncompliance.

SUMMARY AND NEXT STEPS

Increasing regulation related to slavery in supply chains is coming at state, national and international levels. There are currently no actions or pending prosecutions against companies deemed noncomplaint; however, given California's reputation for being a legislative leader at pushing progressive agendas, it is foreseeable that other states will continue to pass similar legislation. For instance, H.R. 2759, Business Transparency on Trafficking and Slavery Act was introduced by Rep. Carolyn Maloney in New York to compel disclosures in annual reports filed with the SEC to identify and address forced labor, slavery, human trafficking and child labor issues in supply chains. Furthermore, consumers are turning to social media and other platforms to voice their desire for socially conscious business practices. Investors are also growing concerned with the risks associated with human rights violations within a company's supply chain.

Like many people, you may be thinking that the Act is vague. However; whether the Act applies to your company or not, disclosing your supply chain practices is simply the right thing to do and may – on a practical level – make good business sense.

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[5] Cal. Civ. Code § 1714.43(b).
[6] Cal. Civ. Code § 1714.43(d).
[7] *Id.*

Limiting Exposure in Negligent Hiring and Retention Claims: The FAST Act's Exclusion of CSA Data from Public View

The passing of the Fixing America's Surface Transportation Act (FAST Act) ushers in comprehensive reforms to the Federal Motor Carrier Safety Administration (FMCSA). One notable provision is the overhaul of the Compliance Safety Accountability (CSA) program. CSA uses roadside violation, inspection and crash data to quantify on-road safety performance of motor carriers. CSA data, however, is often criticized for its seemingly inaccurate results across the entire spectrum of motor carriers.

In recent years, plaintiffs have aggressively pursued negligent hiring or retention claims against shippers, brokers and third-party logistics providers (3PLs). CSA data has been introduced by plaintiffs in an attempt to prove negligence or the negligent hiring of a carrier. Some courts even have held that – at a minimum and before hiring a motor carrier – CSA data should be reviewed to determine whether a prospective carrier is "safe" to hire. Such rulings require assessing a prospective motor carrier's "safety" based on data compiled and analyzed by the FMCSA but not tied to the FMCSA's official safety determination of a given carrier, such as a "satisfactory fitness determination." As a result, brokers, shippers and 3PLs making a hiring decision based on CSA data could potentially find themselves at odds with the FMCSA's own safety determinations.

The FAST Act directs the FMCSA to commission a study of the CSA program and institute a corrective action plan within the next two years or so to address inaccuracies in CSA data compilation and analysis. In the interim, the FMCSA must remove certain data from public view. Specifically, the public will not be allowed to access data on safety violations, crashes in which the motor carrier or driver is not at fault, alerts, or motor carrier peer-group percentiles under the Behavior Analysis and Safety Improvement Categories (BASIC). Accordingly, plaintiffs will no longer have access to that CSA data for purposes of introducing it against brokers, shippers and 3PLs until the inaccuracies in the CSA program are cured.

The FAST Act, however, scaled back the level of protection for brokers, shippers and 3PLs envisioned in the House's version of the bill. The House Surface Transportation Reauthorization & Reform Act of 2015 (STRR Act) included an "interim hiring standard" that provided for an evidentiary exclusion of CSA data while reforms were under way. This latest attempt to standardize motor carrier hiring was, however, stripped from the final version of the bill.

CONCLUSION

The evidentiary exclusion under the House version would have applied in negligent hiring and retention cases where a broker, shipper or 3PL satisfied certain standardized motor carrier hiring requirements. Had it been included in the final bill, the "interim hiring

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provision" would have been a valuable tool to combat an increasingly aggressive plaintiff's bar. While the FAST Act does not permanently exclude CSA data in negligent hiring or retention claims, removing such data from public view during the reform period will ensure potentially inaccurate data is not unfairly used against brokers, shippers and 3PLs.

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