

Transport Topics

SPECIAL REPORT:

Trucking and Insurance

A4 How to Tame Rising Insurance Costs

A12 Defending Against Nuclear Verdicts

A14 Mitigating Risk by Enhancing Safety



Winning the Insurance Game

**Risk coverage
when you need it,
how you need it.**



HUDSON
INSURANCE GROUP®

FULL-SERVICE INSURER
hudsoninsgroup.com



RISK AND CLAIMS MANAGEMENT TPA
napariverinsurance.com

THINK YOU KNOW HUDSON?



HUDSON
INSURANCE GROUP®

Think again. Hudson has a seasoned team of professionals focused solely on trucking. We work closely with our commercial auto clients to customize insurance solutions to meet specific needs and help manage the total cost of risk. With over 100 years of experience, more than \$1 billion in gross written premiums and excellent financial security, Hudson is a long-term partner committed to helping its clients succeed.

When you need coverage for the long haul, THINK HUDSON.

Rated A by A.M. Best, FSC XV

HudsonInsGroup.com

All coverages underwritten by Hudson Insurance Company.

As Insurance Costs Rise, Fleets Must Manage Risk



Seth Clevenger
Managing Editor,
Features

Running a successful trucking business involves a long list of major expenses, from purchasing and repairing trucks and trailers to operating terminals, offices and maintenance shops, and of course recruiting and paying professional drivers and other staff.

Insurance is yet another unavoidable cost of doing business as a motor carrier, and that particular cost has been climbing sharply in recent years, a trend that is forcing fleet managers to take a closer look at how they are managing risk.

This TRANSPORT TOPICS special report is our latest effort to help you do exactly that. The stories contained in this publication explore the factors driving up insurance costs, as well as the many ways that individual trucking companies — and the industry at large — are addressing this growing challenge.

On the policy front, the industry has been pursuing tort reform at the state level to help defend against the rising tide of nuclear verdicts in cases involving truck crashes. These multimillion-dollar judgments against motor carriers have roiled the trucking insurance market, raising costs for the entire industry.

Meanwhile, individual fleets can take several important steps to mitigate risk and ease the financial burden of rising insurance rates.

Many trucking companies have equipped their vehicles with driver-assist technologies that can provide automatic emergency braking and lane-departure warnings to help prevent crashes or reduce their severity. At the same time, onboard video and telematics data are enabling fleets to take a more proactive stance on safety by addressing unsafe driving behaviors before they lead to a potential crash.

But technology alone is not the answer. Instead, these investments complement a company's overall safety culture, including hiring practices and driver coaching programs.

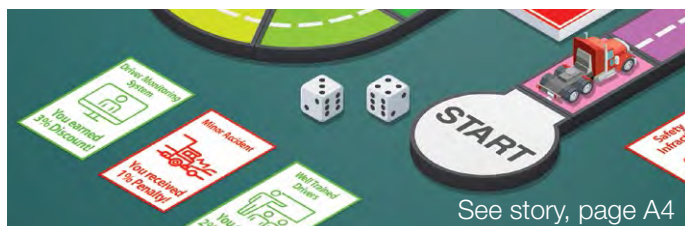
Although today's extremely tight labor market is making it harder than ever for trucking companies to recruit and retain drivers, they can't afford to lower their hiring standards to expand the pool of job candidates.

Fleets that maintain strong safety programs and manage to reduce preventable crashes and safety infractions will be rewarded with more favorable rates from their insurance providers.

At the end of the day, the right mix of technology and training combined with a company-wide commitment to safety will put motor carriers in the best position to succeed in today's litigious, high-cost business landscape.

We hope the information and ideas presented in the pages of this special report will help you and your company better manage the rising cost of protecting your business as it performs the essential task of transporting freight.

Contents



See story, page A4

A4 Insuring Your Fleet

As trucking insurance costs continue to climb, motor carriers and insurance providers are focusing on safety and data to better manage expenses.

A12 Internal Safety Data

Trucking companies can take steps to prevent plaintiff attorneys from turning internal safety investigations against them in court.

A13 Defense Strategies

Trucking lawyers should be sharing defense strategies to help counter the surge in nuclear verdicts against fleets, a prominent attorney says.

A14 Risk Management

Driver coaching and hiring practices are key components of an effective risk management program that enhances safety and provides liability protection.

Cover Design by: Joseph Terry

Trucking's Tough Insurance Market

By Katie Pyzyk, *Special to Transport Topics*

As Nuclear Verdicts Drive Up Costs, Fleets and Insurance Providers Are Focusing On Safety and Data To Manage Expenses And Mitigate Risk

Escalating insurance costs have become a severe financial headwind for trucking companies in an industry already known for tight profit margins. “We first started seeing it five or six years ago,” said Ken Johnson, CEO of Farmington, N.Y.-based transportation provider Leonard’s Express. “We had a good year and were expecting our insurance cost to stay flat or drop, and it doubled. We were taken aback.”

A leading factor driving up trucking insurance expenses are nuclear verdicts — jury awards upward of \$10 million in cases involving truck crashes. Plaintiff attorneys play on jurors’ emotions and convince them that transportation companies are inherently dangerous, regardless of the facts. Trucking companies and insurance providers generally consider these awards to be grossly disproportionate to the case damages.

Nuclear verdicts started ramping up about 10 years ago, but these high-dollar cases aren’t the only ones contributing to trucking’s challenging insurance market.

“It’s not necessarily just 20 or 30 headline cases, but the tens of thousands of smaller cases that are lifted up by the specter of these large verdicts,” said Chris Homewood, senior vice president and head of commercial auto at Hudson Insurance Group. “The insurance market hasn’t made money in 11 years. It’s paying out more in losses and expenses than it’s taking in in premiums.”

Apart from litigation, other factors also are driving the recent increase in insurance costs.

“There has been a lack of proper pricing from the insurance markets over the past decade. They haven’t priced their product where it allows them to make money,” said Don Arrowood, senior vice president at insurance broker Lockton Cos. “For at least 24 months, there has been a strong change in the insurance marketplace with pressure for insurance companies to reprice, or ‘right size,’ the pricing.”

Plus, each insurance claim is larger now than it was a decade ago.

“The average cost of a claim is increasing 5, 6 and 10%. Rates need to go up just to stay where we are. To get back to profitability, rates will have to increase,” said Nick Saeger, assistant vice president of transportation products, pricing and underwriting at Sentry Insurance.





Sentry Insurance

Insurers report that excess, or secondary, insurance especially has taken a hit. They also increasingly implement more stringent caps on coverage limits.

Conditions have prompted some insurance providers to exit the commercial transportation market altogether. With fewer players in the insurance market, prices have risen and carriers have been left scrambling to find coverage.

“For that subset that does get quoted, the companies are careful about the amount of the balance sheet they commit to any one client,” said Dan Cook, principal and practice leader at insurance broker TrueNorth.

Looking ahead, more financial strain could be coming for some carriers after the U.S. House of Representatives recently passed a highway reauthorization bill that includes a provision to hike the minimum liability insurance coverage for motor carriers to \$2 million, more than double the current \$750,000.

But fleets don’t have to sit idly by and accept surging insurance costs, experts said. There are measures that can ease the financial burden, and even small tweaks here and there add up over time.

Building a Culture of Safety

Establishing an effective safety program might seem like an obvious solution, but it really does make a difference in rates, insurers said. The state of the market has made coverage providers pickier about which clients they take on, and a strong safety culture is imperative.

One way to boost safety is by deploying modern technologies such as telematics, collision mitigation, lane-change sensors, automated steering assistance and onboard cameras. In-cab cameras, for example, can provide liability protection. The technology corroborates a solid safety record, which could result in lower premiums.

But just adding the technology is not enough.

A fleet’s safety culture must run deeper than its devices. It starts with its people, insurers said.

“The big thing we’re looking for is not just the presence of technology but how it’s being used in the overall culture of the organization,” said Jeff Davis, vice president of safety at Napa River Insurance Services. “We focus on operations and personnel to see how involved they are when they deal with drivers every single day.”

The most successful safety cultures exhibit

Fleets can reduce risk by strengthening their safety programs and embracing technology.



Sentry Insurance

engagement at all levels of the organization, especially with frontline workers. For example, daily involvement from dispatchers or driver managers — who talk to drivers multiple times a day — can identify safety gaps to address, including driver fatigue or overloaded schedules.

“If you have all the technology in the world but don’t manage it consistently or properly, that becomes a hole in safety,” said Homewood of Hudson Insurance Group.

Frequent, ongoing training on safety practices and technologies is something insurers look for when assessing a fleet.

Driver training and hiring practices remain paramount, even in a tight labor market.

over, greater cost of risk. It actually costs the motor carriers in the end.”

Data-Driven Insurance

Insurance companies typically do not offer fleets up-front discounts for using safety-enhancing technologies. However, the technologies indirectly keep insurance costs in check by reducing incidents, and therefore premiums.

That being said, Arrowood of Lockton Cos. points out that “there are a number of insurance companies subsidizing technology investment installations or monthly costs, especially cameras. ... Insurance companies strongly believe that improving in-cab behavior is a game changer.”

Insurers use considerable amounts of data to determine fleets’ coverage and costs. The companies often incentivize fleets to voluntarily submit in-cab data gathered through telematics or cameras.

“Underwriting is much more rigorous now. There is a great deal more data available,” TrueNorth’s Cook said. “Underwriters are considering things that they didn’t consider in the past, and they make more complete and accurate decisions than 25 years ago.”



“Underwriting is much more rigorous now.

There is a great deal more data available.”

Dan Cook, TrueNorth

“We never advocate for just firing drivers involved in accidents. But rather, try to find ways to educate, train and save drivers and make them better before they have a big accident. That’s critical,” Davis said.

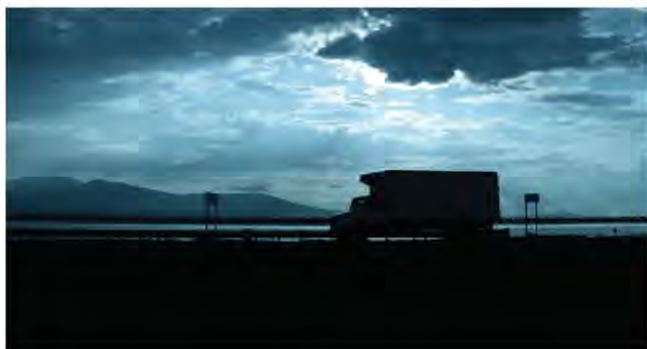
Even in an extremely tight labor market, it’s important for fleets to stand firm on their hiring standards.

“There are times when the driver market is really tough and the temptation is to relax standards and open the labor pool a little more,” Davis said. “We see it over and over again when companies do that, that there is greater accident frequency, greater turn-

Continued on page A11

Is a “nuclear” disaster in your future?

Nuclear verdicts are threatening the trucking industry.



What is a nuclear verdict?

Simply put, a nuclear verdict is an excessive jury award—generally above \$10 million, but they can go much higher than that. Nuclear verdicts result from personal injury attorneys successfully employing reptile theory as a litigation strategy, and they are a growing trend in many industries—especially trucking.

What is reptile theory?

Reptile theory is what every nuclear verdict has in common. It's called “reptile” theory because it is crafted to activate the jurors’ “lizard brain” (or Triune brain), which is responsible for survival instincts like aggression and fear. Plaintiff attorneys use reptile theory to engage jurors on a primal level, stirring up their anger and fear by focusing on safety and security issues to demonstrate how a defendant's actions put a plaintiff in danger. Gone are the days when the goal was to make a jury feel sympathy for the plaintiff. As it turns out, anger is much more profitable.

How are nuclear verdicts affecting the trucking industry?

Though common now, large verdicts were uncommon 15 years ago; moreover, nuclear verdicts have jumped over 300% in the past decade. There have been hundreds of cases with awards over \$1 million against trucking companies in the past five years, including verdicts as high as \$400 million. Alarming, the average verdict size for a lawsuit involving a truck collision has increased by 967%, jumping from \$2.3 million in 2010 to \$22.3 million in 2018.¹

¹American Transportation Research Institute, “Understanding the Impact of Nuclear Verdicts on the Trucking Industry,” June 2020.
“Move Forward Fearlessly” is a trademark of Napa River Insurance Services, Inc.

Can claims adjusters help you avoid nuclear verdicts?

Yes, but to do that, they must focus on outcomes. Trucking accidents have a greater potential for serious injury, are more legally complex than accidents involving private passenger vehicles and can lead to very expensive claims. Claims adjusters should consider these particular challenges and integrate them into their decision-making. For many trucking companies that have self-insured retentions, large deductibles or a serious accident that threatens to exceed their excess layers of coverage, they have a lot to lose and truly count on their adjusters to make good decisions about how that money is spent. The best outcome is swift, cost-effective and fair, which, in many cases, involves a pre-trial settlement. If the facts of the accident are clear and adverse to the trucking company, it's key to prioritize early contact and claim resolution.

When that is not reasonable or possible, it is imperative to invest in the investigation by retaining defense attorneys and experts who understand trucking claims and how to defend proactively against reptile tactics. The defense can take several steps to obtain the best outcome for litigation cases. First, the defense must succeed in humanizing the trucking company, ensuring they are perceived as fair. Additionally, they can push back on corporate depositions and other discovery related to the negligent hiring, training, retention and supervision by the trucking company defendant. These allegations are present in nearly every trucking lawsuit, but there is a growing body of case law that has dismissed them. If a corporate representative must be deposed, ensure they are well prepared to recognize reptile-style questions. Finally, the defense should consider if and when to mediate or arbitrate.

Tort reform

While a few states limit the amount of non-economic damages that can be awarded in a personal injury case, most do not—meaning a nuclear verdict is possible in many states. Even more damaging, the contribution among joint tortfeasor laws of many states can find a trucking defendant only partially negligent for a loss, but still hold them 100% responsible for the damages. Thus, national tort reform is needed to lower caps on settlements and verdicts, curtail uncontrolled third-party litigation financing, and limit a company's liability.

**What can you do
to prevent your claim
from going nuclear?**

Preventing your nuclear disaster

Because many plaintiff arguments involve safety issues, trucking companies must continually follow company safety guidelines and hire safe, responsible drivers. Investing in technology such as dash cameras can pay for itself with just one claim. Connect with the communities you service to help quash negative public perception of big trucks. Finally, choose to work with a company who can help you identify risks and mitigate claims before they happen. Napa River is here to help protect your business and bottom line from claims so you can Move Forward Fearlessly™. Contact us to learn how and be sure to visit our new website for more information.



Rebecca Gregg
Claims Supervisor
Napa River Insurance Services, Inc.
317.810.2028
rgregg@napariverinsurance.com




Sue Shields
Director
Napa River Insurance Services, Inc.
615.519.8519
sshields@napariverinsurance.com



**MOVE
FORWARD
FEARLESSLY™**





Focus on your future. With tailored risk and claims solutions, we'll move you past risk to achieve your business specific goals.

Monitor and stay up-to-date on important driver data like speeding and license status in real time through License Monitor by SuperVision®.

LET'S MOVE YOUR BUSINESS FORWARD
napariverinsurance.com



SuperVision is a registered trademark of Explore Introduction Systems, A Solera Company.

Napa River is a California-domiciled third-party administrator and a wholly owned subsidiary of Hudson Insurance Company that provides specialized risk management and claims services to clients in the healthcare, transportation and public entities markets, as well as funds control services. Everything we do is focused on helping you move past risk towards your future success, allowing you to move forward fearlessly. With five offices nationwide and experts with decades of experience in your industry, we know how to evaluate your specific business, uncover risk, and craft risk and claims management programs that will protect your business and bottom line. Napa River is a licensed insurance agency, CA License No. 0E86548. It owns Pacific Surety Insurance Agency, Inc. and conducts business as MTU Insurance Agency®.

© 2021 Napa River Insurance Services, Inc. All Rights Reserved.



Winning the battle against cargo theft

We all know the trucking industry has faced extraordinary challenges over the past year and a half. These challenges include everything from a growing trend in nuclear verdicts (See Napa River's article in this supplement entitled "Is a Nuclear Disaster in Your Future?" for more information.) to driver shortages and rising fuel prices to a sharp rise in cargo theft—the latter of which has increased by more than 29% in 2020.¹

There are various ramifications to cargo theft; the most obvious includes financial losses to motor carriers. Stolen assets must be replaced, which may be difficult to do because of shortages or other factors, especially in today's market. Even if replaced, the assets may be delivered late, which could tarnish the reputation of the motor carrier's clients and the carrier itself. Also, cargo theft may be a threat to driver safety, which is of the utmost importance. While not all of the issues faced by the industry can be resolved, various proactive measures can be taken against cargo theft.

Communication and training is paramount to help avoid theft. Drivers and staff must be well-informed about security risks, preventative measures and the simple steps they can take to decrease the likelihood of cargo theft. Simple precautionary measures include keeping a full fuel tank, avoiding idling or leaving assets unattended, and, when possible, avoiding areas that may be high-risk. Additionally, it is important for motor carriers to invest in anti-theft technology and monitoring, such as asset-based tracking, which provides the location of assets in real time using GPS or cellular technology. If a truck, for instance, strays from its route, an alert will be triggered and sent to the motor carrier. The carrier can then investigate if something is amiss, contact the driver to ask for status and inquire whether assistance is needed. A carrier's training, again, is important in this instance, since it is vital that drivers and staff know how to respond and use monitoring and anti-theft tools correctly and effectively. Finally, having the right insurer—one that thoroughly understands the particular challenges faced by the industry—will help mitigate losses and risks, and provide support and protection when inevitable losses do occur.

For years, Hudson has provided the commercial auto industry with protection for automobile liability, physical damage, general liability, non-trucking liability, occupational/accident, contingent liability and ancillary cargo through agents, brokers and program administrators. Recently, Hudson expanded its offerings to motor carriers in the inland marine area and developed a new cargo form with terminal and storage capabilities, significant automatic coverages and a menu of additional coverages that can be tailored to meet insureds' needs—all of which has been well-received. Nicole McMurty, head of USI's transportation practice, commented on cargo products and Hudson's new form, "There's great variation in cargo products offered to motor carriers. It's important to have a clear, robust product that can best protect the motor carriers we insure. Hudson has worked strategically and thoughtfully to develop a new, broad form."

Along with the new form, a host of new inland marine capabilities with a focus on cargo theft reduction, supplement these new inland marine investments. Daniel Johnson, Vice President at McGriff who is co-leader of brokering for their transportation and logistics practice, expressed he is "...happy to see Hudson continue to grow and develop further into the inland marine space. Hudson is a strong carrier in the transportation space and recognizes motor carriers that invest in technology advances in the industry."

This new addition to Hudson's suite of products offers coverage that is even more comprehensive—an ever-increasing necessity in today's environment.

Want to find out more ways to help clients win the battle against cargo theft? Hudson welcomes the opportunity to learn about your clients' businesses and offer customized solutions that address their concerns. Please reach out and find out how Hudson can help you grow your business and protect your clients' cargo, drivers and bottom-line.

¹CargoNet, "2020 Supply Chain Risk Report," 2021.



Lauren Cutro Berry
SVP & Head of Inland Marine
Hudson Insurance Group
212 978-2869
lberry@hudsoninsgroup.com



Chris Homewood
SVP & Head of Commercial Auto
Hudson Insurance Group
818 296-5780
chomewood@hudsoninsgroup.com





Continued from page A6

Robust, authentic data is so important to insurance rate calculations that onboard technology is not always optional. Some insurers mandate that fleets turn over data gathered via technology or even provide telematics log-in passwords so they can directly access the granular data. Cook predicts more insurers will do this in the future.

"What were the weather conditions at the time? Was there construction? What were the traffic patterns? ... That is available in real time today, and progressive underwriters gather all that data," Cook said. "You're able to match rate to risk better when you take that into consideration ... and that will be a common rating practice in the not-too-distant coming years."

Those telematics-driven metrics also are the backbone for usage-based, or pay-as-you-go, insurance. More usage-based options are emerging for commercial trucking. They provide a certain amount of flexibility for users to pick different options — even one-trip coverage — and in some cases that can save money.

Some usage-based insurance is offered through traditional agencies, but many are app-based or web-based. The platforms typically allow users to explore options, receive quotes and book different coverage levels on their own.

A number of these products especially target smaller trucking operations. For instance, Cover Whale touts itself as providing "coverage options to owner-operators that were too difficult for conventional insurance companies to write."

Some fleets investigate these platforms to avoid insurance broker fees.

Risky Business

Fleets feeling the squeeze cannot simply forgo insurance altogether due to government regulations and customer requirements, but their buying habits definitely are changing, insurers said.

"Motor carriers, in general, across the country have reduced the amount of insurance they buy by mid-single to double-digit percentages," Arrowood said.

This sometimes occurs because fleets stop purchasing as much insurance coverage when they can't afford it. But in other instances, it is a strategic move. Insurers overwhelmingly advise fleets to take on more risk, or higher deductibles, to reduce costs.

"If a motor carrier takes on more risk because of improved loss control or safety technology, every dollar they save goes right to the bottom line," Arrowood said. "For companies that are willing to bet on themselves, that's a great way to reduce

overall costs."

Generally, large carriers are more fit for higher deductibles.

"We deal with some small carriers, including one-truck operations. I think it hits them proportionately more. Large carriers tend to take on a larger piece of risk themselves — whether that's a larger deductible or they're self-insured," said Johnson of Leonard's Express.

Fleets and insurers alike are getting creative with different coverage plans to manage costs and risk. Self-insurance is becoming a more popular option. And insurers encourage carriers to investigate whether they would receive better coverage and rates by splitting their business among multiple providers.

"We used to have larger policies and a single carrier. Now we need several carriers just to get to where we're comfortable," Johnson said. "It was driven by our insurance carrier, not by us."

Don't be afraid to shop around and to re-evaluate insurance needs as the market and carrier operations change, and seek agents who are well-versed specifically in transportation insurance, experts said.

"The cheapest price is not always the best price. You need a true professional who knows the nuances of handling trucking claims and safety," said Larry Harlow, associate director of claims at Sentry Insurance.

Specialized insurance agents can have hidden financial benefits. They often provide additional services that increase a fleet's return on investment.

"Working with a specialist is my biggest tip, not just because they have access to the best markets ... but a secondary benefit is they often can come [on-site] and help you. A lot of agencies have resources like safety teams. That's a lot of value added to a trucking company to have resources that come in and offer another set of eyes," said Dan Clements, director of sales at Sentry Insurance.

At an industrywide level, insurers said trucking companies can help address the high cost of insurance by getting involved in associations and advocating for state-level laws that impact the court systems and reduce the instance of nuclear verdicts.

"I can't overstate this: There has to be a groundswell of state-level tort reform advocacy by and on behalf of the trucking industry," Arrowood said.



"If a motor carrier takes on more risk because of improved loss control or safety technology, every dollar they save goes right to the bottom line."

Don Arrowood, Lockton Cos.

Trucking Lawyers' Advice:

Protect Internal Data, Share

When a trucking fleet conducts an internal investigation after one of its drivers is involved in a crash, the results can help to improve safety both for the company and the individual driver. But if a plaintiff attorney gains access to that internal post-accident analysis, the information it contains can turn the fleet's good intentions into part of a legal case that leads to a multimillion-dollar jury verdict.

How Fleets Can Stop Internal Safety Reviews From Being Used Against Them in Court

By Eric Miller
Senior Reporter

The good news for carriers is that there are ways to conduct internal analyses that keep the data confidential.

"Carriers will often, as part of their safety programs, have their own accident preventability process, where they go in and evaluate if there was anything that my driver did that contributed to the accident, and if there is any kind of action needed to take against him or her to prevent it from happening again in the future," said Brandon Wiseman, president of Greenfield, Ind.-based Trucksafe Consulting and partner with Childress Law Firm.

Many trucking defense attorneys support the value of post-incident analysis and remediation. Such analysis should be promoted, not punished, in the trucking industry, they argue.

"There's a legal privilege that's called 'the privilege of self-critical analysis,'" said Rob Moseley, a veteran trucking defense attorney with Moseley Marcinak Law Group in Travelers Rest, S.C. "We want motor carriers to look at themselves and honestly evaluate how they're doing and how a particular driver did, so they can do better than they did last time."

But if a plaintiff attorney gains access to that data, it can twist that company's own words into part of a case for their client. The situation is what Wiseman calls a plaintiff attorney's "golden nugget."

"If you do an analysis and say the accident was preventable — and you terminate or suspend or sanction the driver — imagine all of a sudden that gets into a courtroom," said Bradford Hughes, a trucking defense attorney at Clark Hill in Los Angeles.

And plaintiff attorneys often try to access every document they can from a motor carrier — especially internal investigations, said Steven Stanaszak, a Milwaukee-based litigator for the Scopelitis law firm.

"Part of the game is to prevent that," he said. "The plaintiffs' bar is very well organized. Once something like that gets out, it's across the country on the web and it's a matter of hours."

And the implications, Stanaszak noted, can stretch beyond the individual company. "You end up trying the industry, not just the motor carrier."

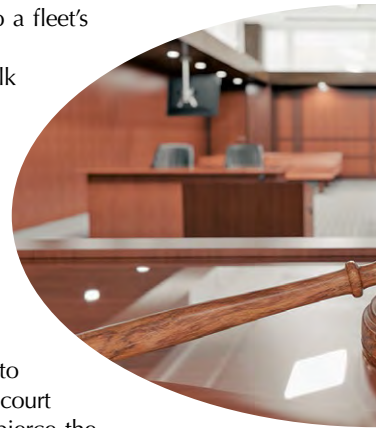
Fortunately, there are ways to keep post-accident analyses private. One way is for a carrier's staff attorney, or a hired attorney, to conduct the internal analysis. This way, the carrier has the benefit of attorney-client privilege. Such treatment could prove valuable to a fleet's defense down the road.

"Have the attorney talk with the driver and the safety supervisor to get details on an incident while it's fresh in the driver's mind," said Jeff Oster, a partner at Vaughan Baio & Partners in Philadelphia. "A plaintiff attorney is going to have an uphill battle in court if he wants to try and pierce the attorney-client privilege."

Any documents the attorney creates are under the attorney work product doctrine, which is nearly impossible for a plaintiff attorney to breach, he added.

When conducting an analysis, Hughes also urged against coming to conclusions that assess fault or determine whether an accident was preventable. Instead, point out what the driver did correctly to mitigate an incident, and what he could have done better.

"The big picture is providing some sort of protection and privilege for the information that is garnered by trucking companies as a result of their efforts to enhance safety," said Douglas Marcello, an attorney with Marcello and Kivisto. "Granted, there are some courts that provide protections for these preventability actions in litigation. But these are neither all-encompassing, nor consistent."



Defense Strategies

For more than a year, prominent San Diego defense attorney Robert Tyson has been scolding his colleagues for not sharing trial defense strategies to beat plaintiff attorneys in the nation's courtrooms.

The plaintiff bar does share strategies, he notes, and in recent years they have won billions of dollars in trucking accident cases.

Tyson, the lead partner in the 200-attorney national firm of Tyson & Mendes LLP, said trucking trial lawyers tend not to share their strategies because they regard each other as competitors. His perspectives on the ongoing challenge trucking attorneys face in matching wits with plaintiff lawyers offer a lesson for truckers and those who defend them in accident litigation.

Tyson, who last year published a book, "Nuclear Verdicts: Defending Justice for All," does not discount the efforts of those who seek tort reform, fight plaintiff litigation funding, attempt to ban inflated medical bills or seek to banish cartoonish plaintiff attorney billboard ads dotting U.S. highways.

He concedes that improving the system is an ambitious goal, but worries that persuading legislatures in 50 states to change unfair aspects of the judicial system is a proposition that can take years.

"Plaintiff lawyers have changed the way they try lawsuits — and the defense has not," Tyson said. "We need to change the way we try cases. We're a slow-moving industry, the defense industry in general, including the trucking industry."

Traditionally, plaintiff lawyers have attempted to make their cases using sympathy for their clients. That has changed. Now, he said, the focus is on anger.

He said the tactics he has been advocating for defense attorneys are no secret. For example, he wonders why plaintiff attorneys are so much more connected with each other than defense counsel.

"They watch each other in trial. They help each other. They share information," he said. "They know

more about me and my firm than I can ever imagine. And it is all very effective for them."

It's different for the defense.

"Each defense firm, and often each defense lawyer, is his own separate island," Tyson said. "We are left to learn on our own. To learn in the trenches against the best plaintiff lawyers in the country."

Tyson, in his book, touts ways defense lawyers can meet the plaintiff bar head-on. Defense attorneys also must educate company drivers and safety executives who take the witness stand and must learn how to recognize and counter some plaintiff attorney set-ups and traps, he said.

Plaintiff attorneys commonly use a tactic known as the "reptile theory," a method that attempts to incite fear and anger in trial juries. The tactic has been highly successful, and its use is no secret to defense attorneys who represent motor carriers in trucking accident litigation. One of the more important aspects of the reptile theory is for a plaintiff attorney to set a trap for a truck driver or carrier safety executive by getting them to attest when testifying or in a deposition to a carrier's universal safety rule — and then corner the witness into affirming that the company violated the safety rule, according to Tyson.

"A defendant who has agreed to a safety rule and admitted he or she violated it will often have admitted liability," the book says.

Tyson recommends four core tactics for defending against nuclear verdicts in jury trial cases:

- Accepting responsibility for an accident when the trucking company is at fault, or partial fault.
- Giving a defense award dollar number to make a plaintiff whole, rather than allowing a plaintiff to suggest an astronomical number.
- Personalizing the trucking company, its drivers and executives.
- Offering strong arguments to limit "pain and suffering" jury damage awards, by far the largest segment of a nuclear verdict.

Defense Lawyers Should Share Tactics to Fight Nuclear Verdicts, Attorney Says

By Eric Miller
Senior Reporter



Photo: imaginima — Getty Images

Fleets Focus on Driver Coaching To Improve Safety, Mitigate Risk

By Hilary Daninhirsch, *Special to Transport Topics*

Professional drivers face a multitude of potential risks every minute their trucks are out on the road. In an era of nuclear verdicts, fleets are finding it essential to maintain an effective risk management strategy to help protect the safety of their employees and the motoring public while shielding their businesses from liability.

The purpose of a risk management strategy is to manage — and mitigate — potential risks. This includes anticipating the possibility of at-fault driver incidences, engaging in prevention and reducing claims against the carrier.

Although there are numerous other risks in the transportation industry, driver performance is a large component.

Having a well-developed risk management strategy just makes good business sense, said Adam Lang, chief risk officer at Halvor Lines, a trucking and logistics company based in Superior, Wis.

“Without a risk management program, when an event happens, you have no guidelines of what you asked the driver to do or not to do. Having a risk man-

agement program sets the baseline of expectations,” he said.

Lang added that risk management is more necessary than ever because of the increase in nuclear verdicts — typically defined as jury awards that exceed \$10 million, or are otherwise much larger than expected.

Trucking companies need to make sure that safety data is accessible and good records are kept, ensuring that drivers are being properly vetted and coached.

Overall, he noted, risk management policies should be transparent and include stringent procedures and guidelines for driver hiring, coaching and discipline, as well as accident reporting, comprehensive investigations and data analysis pertaining to any road incidents.

Lang recommended that all drivers and management should also be held accountable for adherence to safety protocols. Policies should be re-evaluated regularly and communicated to all parties.

When bringing new drivers aboard, Halvor adheres to strict hiring criteria, including reference checks, drug and alcohol checks, and accident and

To help reduce safety risks, PGT Trucking focuses on hiring the right drivers and providing them with coaching support.



PGT Trucking Inc.

safety history to start.

"We also require drivers to do a very large amount of pre-employment training," Lang added. "They need to check a lot of boxes before showing up to orientation."

At PGT Trucking in Aliquippa, Pa., drivers have to meet guidelines set forth by both the U.S. Department of Transportation and the company's requirements. The company's president, Gregg Troian, said the best risk management advice is to hire the right driver in the first place, which he said comes from experience.

PGT Trucking uses various in-house tests to help make those hiring decisions, but unfortunately, the pool of available drivers has dwindled over the years.

"Every trucking company right now is seeking drivers," Troian said.

Preventing risky driver behavior in the first place is the ideal, he added. Troian recommended a coaching program to mitigate risk and hire coachable drivers.

"We try to work with drivers that want to be worked with," he said. "There are drivers who make good students, no matter how long they've been driving a truck. Then we have drivers who don't believe they need any coaching, and we have to make our decisions based on who is coachable and who isn't."

PGT ranks No. 99 on the TRANSPORT TOPICS Top 100 list of the largest for-hire carriers in North America.

In the transportation industry, there is a strong movement toward digitization of risk management. Many carriers utilize comprehensive driver management platforms that provide real-time information about driver performance; the data can then be interpreted to engage in driver coaching.

"The best risk program is preventing accidents from happening in the first place," said Hayden Cardiff, CEO of Idelic, a developer of driver management software that ties in risk, safety, compliance, operations, retention and training.

Idelic's Safety Suite uses artificial intelligence to "understand driver behavior to assign risk proactively and predictively, giving fleets understanding of why that driver is at risk, how much each event contributes to risk scores and allows them to assign corrective action and coaching over subsequent weeks," Cardiff said.

Technology firm Netradyn offers a fleet safety platform called Driveri, which utilizes onboard cameras and artificial intelligence to monitor objects on the road and analyze how well the driver handles those risks.

The advantage of such real-time systems is that safety managers can address issues as they happen, said Adam Kahn, president of Netradyn's commercial fleet team. For example, Kahn noted, a driver caught on his mobile phone may receive some coaching in the form of an audio message to him.

Driveri also analyzes positive and negative

driver behaviors.

"If you're going to coach your workforce, we take the stance of maybe you don't always point the finger, but you can give them a thumbs-up. That is a really powerful thing," Kahn said. "It is hard to replace drivers. The goal shouldn't be how do I get my worst drivers out, but how to get my fleet to act like my best drivers."

PGT's Troian said this type of technology has "allowed us to be more aware of drivers we have to monitor more closely."

It also has enabled his company to engage in better, more targeted coaching.

"On the whole, driver performance has improved," Troian said.

Halvor Lines has noticed a correlation between the company's use of a driver management platform and a decrease in accidents.

Lang cited a decrease in unsafe driving behavior and a 10-point drop in unsafe driving violations.

"We've seen a decrease in DOT recordable collisions," he said. "We've seen a decrease in rear-end collisions, though part of that is implementing more collision mitigation [technology] in our trucks."

Lang observed that in the event of an accident, having real-time safety monitoring "helps change the approach with how you deal with the other party."

He said it's one thing to take gambles in life, but in business, particularly in the trucking industry when human lives are at stake, mitigating risk is the prudent path.

"It's financially more beneficial to be proactive with your risk management. If you wait for things to happen, they will. It is especially true in transportation. The more proactive things you can do to cut off problems before they occur, the more that they will impact the bottom line," Lang said. "By having a camera system, you can settle and take care of claims more quickly, be more proactive with risky driver behavior and minimize the possibility of a claim."

Netradyn's Kahn recommended that companies set clear standards for driver performance.

"The better fleets are very articulate about the expectations they have for the drivers," he said. "If the drivers fall outside the expectations, a good risk management system will have a smooth way of bringing drivers back inside the lines."



Hyundai

Onboard technology such as Netradyn's Driveri can support fleets' driver coaching efforts.

MOVE FORWARD FEARLESSLY™

Master risk with Napa River. Our customized risk and claims solutions focus on moving you past risk to achieve your business goals.

Learn to recognize and stop risk to keep drivers safe through interactive training via our Driver1st® program.

LET'S MOVE YOUR BUSINESS FORWARD
napariverinsurance.com



Driver1st is a registered trademark of Napa River Insurance Services, Inc.

Napa River is a California-domiciled third-party administrator and a wholly owned subsidiary of Hudson Insurance Company that provides specialized risk management and claims services to clients in the healthcare, transportation and public entities markets, as well as funds control services. Everything we do is focused on helping you move past risk towards your future success, allowing you to move forward fearlessly. With five offices nationwide and experts with decades of experience in your industry, we know how to evaluate your specific business, uncover risk, and craft risk and claims management programs that will protect your business and bottom line. Napa River is a licensed insurance agency, CA License No. 0E86548. It owns Pacific Surety Insurance Agency, Inc. and conducts business as MTU Insurance Agency®.

© 2021 Napa River Insurance Services, Inc. All Rights Reserved.