



## **CHANGES IN TRUCKING LITIGATION TAKE EFFECT IN SEPTEMBER**

Over the past decade, Texas lawsuits arising out of commercial motor vehicle accidents have risen by nearly 120%. In addition to the jump in filings, plaintiffs' lawyers have increasingly utilized evidence of separate and unrelated safety violations by drivers and trucking companies to provoke exorbitant damages awards.

HB 19 was introduced in the Texas Legislature to combat these attacks upon small businesses<sup>1</sup> and to address the mounting insurance costs<sup>2</sup> associated with the boom in trucking litigation. Although the bill was weakened as it made its way through the House and Senate, it retained important tools that should be useful when it takes effect on September 1, 2021.<sup>3</sup> Below are some highlights to keep in mind.

- **Bifurcated (Two-Phase) Trials**

Under the new framework created by HB 19, commercial motor vehicle company defendants will have the option to split trial proceedings into two phases. Companies are entitled to seek bifurcation by the later of: (1) within 120 days of filing an original answer; or (2) within 30 days of an amended petition adding a new claim.

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<sup>1</sup> According to the Texas Senate's analysis of the bill, 88% of all commercial trucking companies in Texas are considered small businesses.

<sup>2</sup> The Texas Senate also noted that commercial vehicle insurance rates annually increased between 10-30% in 2018 and 2019.

<sup>3</sup> HB 19 will be codified in Chapter 72 of the Texas Civil Practice & Remedies Code.

## ○ Phase One - Focus on the Accident at Hand

Phase One will generally center on the underlying accident, the comparative fault between the plaintiff and the defendant driver, and the plaintiff's compensatory damages.

If, within the deadline for moving for a bifurcated trial, the company also stipulates that the defendant driver was its employee and acting within the course and scope of employment at the time of the accident, the plaintiff is barred from presenting evidence regarding negligent entrustment or any other ordinary negligence claim against the company.<sup>4</sup>

Additionally, regulatory violations are only admissible in Phase One if the evidence tends to prove that failure to comply with the regulation was the proximate cause of the injury, and the specific regulation is an element of an applicable duty of care question. Consequently, Phase One's focus will be on whether the defendant driver acted negligently and caused injuries to the plaintiff, prohibiting the use of inflammatory evidence to broadly paint the company as a bad actor for not strictly adhering to various regulatory items that have nothing to do with the facts of the accident.

Despite these prohibitions, and in an apparent attempt try to maintain some balance, the statute still permits plaintiffs to introduce the following evidence where a trucking defendant is regulated by the Federal Motor Carrier Safety Improvement Act of 1999:

1. whether the defendant driver was licensed to drive the vehicle at the time of the subject accident;
2. whether the defendant driver was disqualified from driving under 49 CFR §§ 383.51, 383.52 or 391.15 at the time of the subject accident;
3. whether the defendant driver was subject to an out-of-service order, per 49 CFR § 390.5 at the time of the subject accident;
4. whether the defendant driver was under a license restriction imposed under 49 CFR § 383.95 or Texas Transportation Code § 522.043 at the time of the subject accident;

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<sup>4</sup> However, HB 19 does not preclude a plaintiff from pursuing ordinary negligence claims based upon the company's own independent negligence, including the company's alleged failure to maintain the commercial motor vehicle involved in an accident. Likewise, HB 19 does not prohibit a plaintiff from presenting evidence relevant to such claims during Phase One.

5. whether the defendant driver had received a certificate of driver's road test from the company under 49 CFR § 391.31 or equivalent certificate or license under § 391.33;
6. whether the defendant driver was medically certified as physically qualified to operate the truck under 49 CFR § 391.41;
7. whether the defendant driver was operating the vehicle when prohibited from doing so under 49 CFR §§ 382.201, 205, 207, 215, 395.5 or 37 TAC § 4.12, as applicable on the day of the subject accident;
8. whether the defendant driver was texting or using a handheld device in violation of 49 CFR §§ 392.80 or 392.82 at the time of the accident;
9. whether the defendant driver provided the company with an employment application as required under 49 CFR § 391.21(a) if the accident occurred within 180 days after the defendant driver began employment with the company;
10. whether the defendant driver refused to submit to a controlled substance test as required by 49 CFR §§ 382.303, 305, 307, 309, or 311 within the 2 years preceding the accident;
11. whether the company allowed the defendant driver to operate the vehicle on the day of the subject accident in violation of 49 CFR §§ 381.201, 205, 207, 215, 382.701(d), 395.3, 395.5, or TAC § 4.12, as applicable;
12. whether the company has complied with 49 CFR § 382.301 in regard to controlled substance testing of employee driver if:
  - (a) the defendant driver was impaired because of use of controlled substance at the time of the subject accident; and
  - (b) the accident occurred within 180 days after the defendant driver began employment with the company;
13. whether the company had made the investigation and inquiries as provided by 49 CFR § 391.23(a) in regard to defendant driver if the subject accident happened on or before the first anniversary of the defendant driver's employment with the company;
14. whether the company was subject to an out-of-service order at the time of the accident, per 49 CFR § 390.5.

- **Phase Two - Exemplary Damages**

If the jury finds negligence in Phase One, the trial advances to Phase Two wherein the jury then evaluates whether exemplary damages should be awarded against the company, and, if so, the quantum of exemplary damages that should be awarded. The wider range of evidentiary items precluded during Phase One may come into play during Phase Two.

- **Photos and Video of Vehicles Involved in an Accident Are Generally Admissible**

The admission of photographic and video evidence of vehicles involved in an accident has typically been within the discretion of the trial judge. A picture can go a long way in refuting a plaintiff's lawyer's attempt to exaggerate a minor fender-bender. Thus, the exclusion of such evidence can severely hurt defense efforts in these situations.

HB 19 promotes the admission of such photographic and video evidence by stating that it is presumed admissible if authenticated and does not require expert testimony to be admitted. This evidence is admissible even if it runs counter to the plaintiff's claims regarding the severity of the accident. Consequently, companies will have an easier time introducing such evidence to refute plaintiff's lawyers' overblown characterizations of the severity of an accident.

- **The Likely Impact of HB 19 Remains an Open Question**

As noted above, the enacted version of HB 19 is substantially weaker than the version of the bill that was initially introduced. HB 19 fails to squarely address plaintiffs' lawyers' wide-ranging and costly discovery tactics to seek historical company safety information that has little, if anything, to do with the actual facts of the accident, and instead focuses upon the late stages of litigation when the parties have finally reached the courthouse for trial. Given these circumstances, it remains to be seen whether HB 19 will have a meaningful impact upon litigation expenses.

Although these upcoming changes may not have a significant impact upon the activities leading up to trial, it will be interesting to see how they play out in the courtroom and whether they will help rein in some of the wildly inflated damages awards that have been issued in recent years. Regardless of their shortcomings, they are a good start.

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