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EOBRs, CSA, and the Plaintiffs' Bar

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Quality Representation, Personal Service

I. EOBRs

A. Use by Plaintiffs' Bar in Litigation

1. Not "new"
 - a. Has been done for years
 - b. Will now be more widespread
2. Objective evidence re facts
 - a. Speed
 - b. Times
 - c. Hard stops

I. EOBRs

A. Use by Plaintiffs' Bar in Litigation

3. Use re "entrustment" claims

- a. Evidence of "bad guy"
 - (1) Driver
 - (2) Company
 - (3) Both

I. EOBRs

A. Use by Plaintiffs' Bar in Litigation

2. Use re "entrustment" claims

- b. Possibly make inflammatory evidence admissible
 - (1) Impact on jury of "smell test"
 - (2) Draw attention away from facts of accident
 - (3) Possibly support punitive claim
 - (a) Often unlimited damages
 - (b) Insurance issues
 - i) Coverage (policy language)
 - ii) Enforceability (law)

I. EOBRs

A. Use by Plaintiffs' Bar in Litigation

2. Use re "entrustment" claims

- b. Possibly make inflammatory evidence admissible
- (3) Possibly support punitive claim
- (c) Tactics
 - (1) Possibly stipulate to liability
 - (2) May exclude bad evidence
 - i) Admissible
 - ii) Discoverable

I. EOBRs

A. Use by Plaintiffs' Bar in Litigation

4. Potential spoliation issues

- a. Duty to preserve evidence
- b. Procedures
 - (1) Driver training
 - (2) Expert network
- c. Impact of failure to preserve
 - (a) Inference
 - (b) Separate cause of action

I. EOBRs

B. Regulatory Exposure

1. Easier to monitor and enforce
2. Increased fines
3. Issues with owner operators
 - a. Costs
 - (1) Company pays
 - (a) Profit
 - (b) Pricing

I. EOBRs

B. Regulatory Exposure

3. Issues with owner operators
 - a. Costs
 - (2) IC pays
 - (a) "Forced purchase" prohibition [49 CFR 376.12(i)]
 - (b) Solutions
 - i) "Opt out" provision
 - ii) Reduced compensation

I. EOBRs

C. Importance of Back-Up Documents

1. In litigation
 - a. Objective evidence
 - b. Potentially inflammatory (“liar”)
2. Regulatory (easy to compare)

D. Potential Silver Lining of EOBRs

1. Drivers more apt to be accurate
 - a. Awareness of objective evidence
 - b. Coupled impact with new CSA driver scores

I. EOBRs

D. Silver Lining

2. Impact of more accurate logs
 - a. Litigation
 - (1) Jurors generally assume worst
 - (2) Objective evidence re “good facts”
 - (a) Re occurrence
 - (b) Re “entrustment” claim
 - b. Regulatory
 - (1) Better CSA scores
 - (2) Less fines

I. EOBRs

D. Silver Lining

3. Help company better monitor drivers

- a. Enforce policies
- b. Weed out problem drivers
 - (1) Before litigation exposure
 - (2) Further reduce fines

II. CSA

A. Perceptions

- 1. Easily misunderstood
- 2. Impact of media



II. CSA

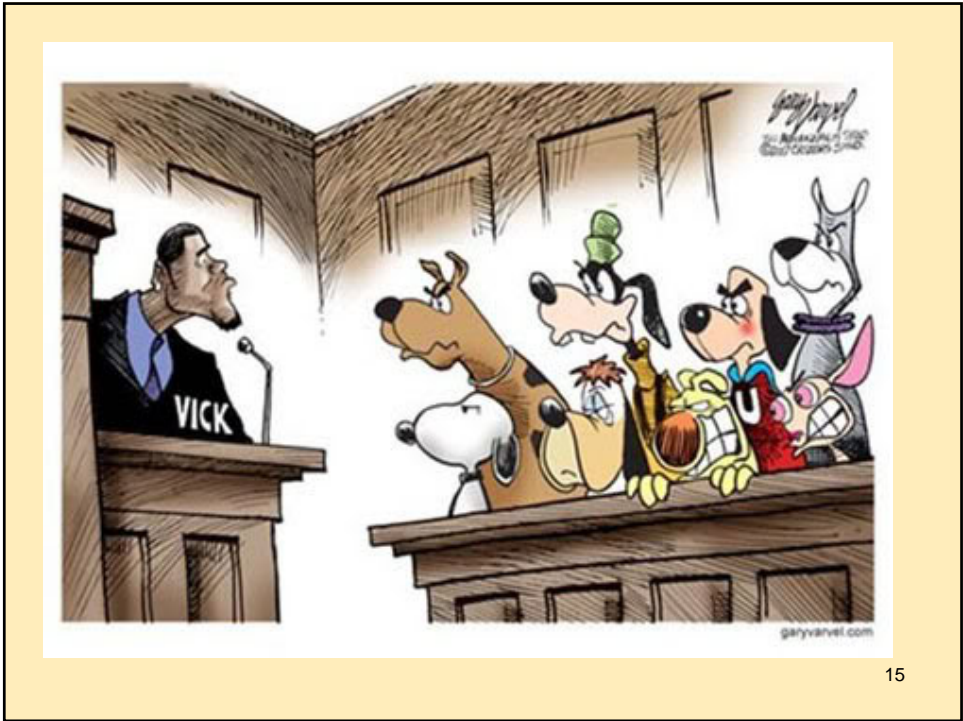
B. Use by Plaintiffs' Bar in Litigation

1. They are "gearing up"
 - a. History of use re Safestat
 - b. Increased awareness (e.g. "Danger on the Road" article (2/11))
2. Likely little/no impact re facts of occurrence
3. Use re entrustment claims
 - a. Evidence of "bad guy"
 - (1) Driver
 - (2) Company
 - (3) Both

II. CSA

B. Use by Plaintiffs' Bar in Litigation

3. Use re entrustment claims
 - b. Possibly make inflammatory evidence admissible
 - (1) Impact on jury of "smell test"



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II. CSA

B. Use by Plaintiffs' Bar in Litigation

- 3. Use re entrustment claims
 - b. Possibly make inflammatory evidence admissible
 - (2) Draw attention away from facts of accident
 - (3) Possibly support punitive claim
 - (a) Increased exposure
 - (b) Insurance issues

II. CSA

C. Regulatory Exposure

1. Easier to monitor and enforce
 - a. Audits have generally been limited
 - (1) Seldom random
 - (2) Could monitor “red flags”
 - b. Now not need audits
 - c. Less opportunity to prepare
2. Increased fines

II. CSA

D. Insurance

1. Insurability
 - a. Driver
 - b. Company
2. Impact on premiums

E. Contracts

1. Your warranties and representations
 - a. May breach/default via CSA scores
 - b. May disqualify you from certain work
 - c. Shippers/brokers likely to use in selecting MCs

II. CSA

E. Contracts

2. Indemnification

- a. Beware scope in contracts
 - (1) Language varies
 - (2) Enforceability
 - (a) Law
 - i) Generally “strict construction”
 - ii) Possible “anti-indemnification” (30 states)
 - (b) Impact of contract provisions (e.g. choice of law)

II. CSA

E. Contracts

2. Indemnification

- b. Potential insurance issues
 - (1) Basis to deny coverage
 - (2) Best practices
 - (a) Carefully vet and negotiate contracts
 - (b) Approval
 - i) By insurer (not broker)
 - ii) Written
 - iii) Have procedure in place

II. CSA

E. Contracts

3. Beware including CSA criteria in your contracts

- a. Cumbersome to monitor/enforce
- b. Impact of not following
 - (1) Breach/default
 - (a) Possibly automatic
 - (b) Trigger remedies
 - i) Termination
 - ii) Owe balance
 - iii) Potential “poison pill”
 - (2) “Violate your own standard”
 - (a) Clear evidence of negligence
 - (b) Possibly support punitive claim

II. CSA

E. Contracts

3. Beware including CSA criteria in your contracts

- c. Best practices
 - (1) Argue “good enough for DOT”
 - (2) Do vetting re those to whom you tender loads
 - (a) Reality re litigation
 - (b) Use “smell test”
 - (3) DOT disclaimers
 - (a) Can use
 - (b) Questionable impact

II. CSA

F. Potential Silver Lining of CSA

1. Heightened awareness of safety by all

a. Company

- (1) Policies
- (2) Resources

b. Drivers

- (1) "Skin in game"
- (2) More apt to be safety conscious

II. CSA

F. Potential Silver Lining of CSA

2. Impact of good scores in litigation

a. Better "gut equity" position

b. Reduce "entrustment" claims

- (1) Keep evidence out
- (2) Less exposure

II. CSA

F. Potential Silver Lining of CSA

3. Regulatory

- a. Increased awareness may improve scores
- b. Less fines
- c. Help company better monitor drivers
 - (1) Enforce policies
 - (2) Weed out problem drivers
 - (a) Before litigation exposure
 - (b) Further reduce exposure
 - i) Fines
 - ii) Litigation

II. CSA

F. Potential Silver Lining of CSA

4. Possibly strengthen pricing

- a. Eliminate drivers/companies
- b. Reduced capacity
- c. Stronger market leverage

III. Broker/Shipper Liability Update (Sperl)

A. Broker/Shipper Theories Generally Only in Catastrophic Claims

1. Two dead; others seriously injured
2. \$23.775M awarded by jury
 - a. Compensatory only
 - b. Post-judgment interest
3. Affirmed on appeal 3/30/11 (Appellate Ct. of Ill., 3rd District)

III. Broker/Shipper Liability Update (Sperl)

B. IMPORTANT – Liability **Not** Premised Upon “Negligent Selection of Motor Carrier”

C. Liability Due to “Agency” re Driver

1. Key standard: “right to control”
2. Key facts
 - a. Driver contracted directly with CHR

III. Broker/Shipper Liability Update (Sperl)

C. Liability Due to “Agency” re Driver

2. Key facts

- b. Multiple special instructions from CHR
 - (1) Calling in
 - (2) Temperature checks
 - (3) Route and schedule
 - (a) CHR acknowledged violation of HOS if complied
 - (b) Could have supported punitive claim
 - (4) Fines on driver if not comply

III. Broker/Shipper Liability Update (Sperl)

C. Liability Due to “Agency” re Driver

3. Other facts

- a. CHR owned cargo
- b. Handling to CHR facility

4. Finding: driver was agent of CHR re accident

- a. Driver's negligence imputed to CHR (*respondeat superior*)
- b. No allocation of fault

III. Broker/Shipper Liability Update (Sperl)

D. Impact as Precedent

1. Potential review by IL Supreme Court
2. Limited scope per facts

III. Broker/Shipper Liability Update (Sperl)

E. Lessons Learned (or Not) (e.g. Schramm)

1. Beware selection criteria re motor carriers
 - a. Standards
 - (1) Per DOT
 - (2) Other (e.g. TIA "Framework")
 - b. Policy
 - (1) Verbal
 - (2) Written
 - c. Procedure

III. Broker/Shipper Liability Update (Sperl)

E. Lessons Learned (or Not) (e.g. Schramm)

1. Beware control
 - a. Promotional materials
 - b. Actions
 - c. Compensation

IV. Conclusion

A. CSA and EOBRs are “Game Changers”

1. Public/media perceptions
2. **Will** be used in litigation
3. Likely result in increased regulatory exposure
4. Likely impact insurance availability costs

B. Companies Must Adapt

1. Gear policies to new rules
2. Monitor compliance
3. Take corrective measures
4. Awareness in contracts

IV. Conclusion

C. May Have Silver Lining

1. Increased awareness (especially drivers)
2. Less likely to have logs altered
3. Positive impact of good scores in litigation
4. Possibly result in reduced fines

D. Importance of Effective Communication



Dear Mrs. Jones,

I wish to clarify that I am not now, nor have I ever been, an exotic dancer or stripper.

I work at Home Depot and I told my daughter how hectic it was last week before the blizzard hit. I told her we sold out every single shovel we had, and then I found one more in the back room, and that several people were fighting over who would get it. Her picture doesn't show me dancing around a pole. It's supposed to depict me selling the last snow shovel we had at Home Depot. From now on I will remember to check her homework more thoroughly before she turns it in.

**Sincerely,
Mrs. Smith**

Quality Representation, Personal Service

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V. Questions

1. Now

2. Later

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