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Challenging Discoverability and Admissibility of FMCSA Reports on Accidents

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Imagine your motor carrier client submits to a Federal Motor Carrier Safety Administration (FMCSA) mandated compliance review wherein the main topic of discussion is its CSA score and, specifically, the number of company involved crashes. Now imagine one of those crashes discussed in the compliance review (concluded before your retention) was the subject of the very litigation you have been hired to defend. In the litigation, opposing counsel gathers the compliance review materials from the FMCSA, which contains specific statements and alleged admissions about the subject crash, and begins aggressively utilizing the reports during discovery.

This precise scenario occurred in an active and unresolved litigation pending in Oklahoma. In that case, the parties argued whether a little known code section in the FMCSA's rules and regulations protected the motor carrier from use of the reports. Considering the applicability of the section, the trial judge ruled the reports can be used during discovery primarily because they were publicly available, essentially ignoring the clear text of the code section.

Introduction

Buried deep within the FMCSA rules and regulations is the section that defense counsel should utilize to shield motor carrier clients from the information contained in the compliance review or other reports. That code section is 49 U.S.C. § 504(f). In order to maximize the potential benefit of § 504(f), it is necessary to make a careful review of its birth, evolution and past reported decisions applying it.

The Birth and Evolution of 49 U.S.C. § 504(f)

The first version of § 504(f), then known as § 320(f), originated in a large amendment to Title 49 in 1940. *See* Interstate Commerce Act of 1940, Pub. L. No. 76-785, § 24, 54 Stat. 910, 927-28 (1940). Under § 320(f), the Interstate Commerce Commission ("ICC") held the authority to investigate and require reports of any accidents involving motor carriers. *Id.* Upon creation of the Department of Transportation in 1966, however, the newly minted Secretary of Transportation assumed many ICC duties as they related to the regulation of interstate transport. *See* The Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966). Subsequently, in 1982, Congress delegated to the Secretary —among many other duties—full control over all motor carrier reporting duties and requirements, and § 320(f) became § 504(f). *See* Department of Transportation and Motor Carrier Safety Act, Pub. L. 97-449, 96 Stat. 2413, 2433 (1982). The language in the new provision nonetheless remained the same, save for replacing "the Commission" with "the Secretary." So it is today:

> **"(f)** No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by *the Secretary*, and no part of a report of an investigation of the accident made by *the Secretary*, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation."

See 49 U.S.C. § 504(f) (2012) (emphasis added).

Published Opinions

There have been five reported decisions that directly address the applicability of § 504(f), or its predecessor § 320(f). These cases, as discussed below, draw a distinct line between required accident reports made by the motor carrier for a federal agency or by the Secretary (which are arguably protected) and purely internal investigations made by the motor carrier for some other purpose (which are not). Courts remain divided on *how* § 504(f) protects accident reports; some courts only prevent admissibility at trial, while others preclude discovery entirely.

An upside for defense counsel arguing for exclusion of accident reports made by or for the FMCSA is that each of the five decisions attempting to interpret this provision carry the same precedential effect, regardless of whether they discuss § 320(f) or § 504(f). To avoid unnecessary confusion, this article refers to the provision exclusively as § 504(f).

Now, to the text interpretation. As one federal court noted, primarily due to the provision's relatively humble origins, Congress did not engage in any apparent debate or discussion relating specifically to that provision. *Blankenship v. General Motors, Inc.*, 428 F.2d 1006, 1009 (6th Cir. 1970). Thus, absent any cognizable legislative history, courts have been left to interpret the statute solely on text alone. *St. Regis Paper Co. v. U.S.*, 368 U.S. 208, 295 (1961). *See also Blankenship*, 428 F.2d at 1009. As the following cases demonstrate, those courts generally find that the provision applies to any report or investigation undertaken pursuant to the direction of a federal agency, and it does not apply to any report or investigation made solely for company in-house use.

The earliest published decision mentioning § 504(f) involved no analysis, but simply a blanket prohibition against producing a report generated for the ICC following a highway trucking accident *Irvine v. Safeway Trails*, 10 F.R.D. 586, 587-88 (E.D. Pa. 1950). Fifteen years later, the Supreme Court of North Carolina reached a similar, but more expansive conclusion. *Craddock v. Queen City Coach Co.*, 141 S.E.2d 798, 800 (N.C. 1965). That court ruled that ICC accident reports, plus *any data* used to compile those reports, fall within § 504(f)'s ambit, and were therefore undiscoverable. *Id.* To allow otherwise would render the provision "worthless." *Id.*

Subsequent case development saw § 504(f)'s protections at once limited and enlarged simultaneously. The Sixth Circuit (the highest court to rule on its applicability) concurred with *Irvine* and *Craddock* by applying § 504(f) to accident reports made directly to the ICC, but added that *any* party—not just the motor carrier—could invoke § 504(f)'s protection. *Blankenship v. General Motors Corp.*, 428 F.2d 1006, 1009 (6th Cir. 1970). That case, however, only addressed ICC accident reports as it pertained to their *admissibility* at trial, so whether the same protections extend to discoverability remains an open question in the Sixth Circuit. *Id.*

After *Blankenship*, the section was not raised in appellate courts for more than 34 years, until a Georgia court limited its applicability in *Tyson v. Old Dominion Freight Line*, 608 S.E.2d 266 (Ga. App. 2004). There, defendants sought § 504(f)'s protections over a company investigation report into a recent trucking accident. *Id.* at 899. The trucking company admitted that they only developed the report to assess potential employee punishments, and on that basis the court denied § 504(f)'s application. *Id.* Because "there [was] simply no evidence in the record that the documents in question were prepared to satisfy the requirements of the FMCSA," the report could neither stand as "made" nor "required" by the federal agency; thus, § 504(f) did not apply, and the report was discoverable. *Id.*

The most recent case to discuss § 504(f)'s applicability partially confirmed a general tenet of the code section, but also injected uncertainty into what *other* documents may fall under the it's protections. *Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009). The *Sajda* court recognized that reports subject to a general accident register compiled pursuant to federal regulations (*see* 49 C.F.R. § 390.15) fall within § 504(f)'s purview, while any information compiled to complete that accident register does not. *Id.* at 341. The court believed that this narrow but important distinction existed because § 504(f) apparently only protects "investigations" made by the Secretary; any other investigation made by any other entity could not meet that description. *Id.* According to the *Sajda* court, then, a report made by a motor carrier would fall under § 504(f)'s protection, but any investigation to build that report would not. *Id.*

As a matter of opinion, the *Sajda* court respectfully missed the point here. By that logic (that only the Secretary's investigations are protected), then § 504(f) retains no value for a motor carrier whatsoever, because any effort a motor carrier undertakes to complete a report would then be discoverable and apparently admissible. This is the result the *Craddock* court specifically (and correctly) wanted to avoid. *See* 141 S.E.2d at 800.

Considerations for Practitioners

Two noteworthy challenges facing motor carriers and its counsel are educating the trial Court about the protections of § 504(f) and establishing the documents at issue are reports on accidents. As worded, § 504(f) clearly states no reports generated by the Secretary can be used in a civil action for damages. It stands to reason that if the documents sought to be excluded are "reports on accidents," the trial Court should properly limit their use completely in both discovery or trial. From the cases interpreting § 504(f), the general point of contention about whether an accident report can be protected revolves around whether the report was "made by" or "required by" the Secretary of Transportation. As far as the FMCSA is concerned, the argument exists that any documents requested or required by the FMCSA pursuant to an accident or accidents would fall under a "report" protected by § 504(f). The Secretary of Transportation specifically delegated to the FMCSA the duty of carrying out § 504. *See* 49 C.F.R. § 1.87(j).

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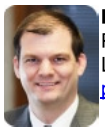

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Therefore, any documents required by the FMCSA, such as those used during a compliance review, would fall under § 504(f) protection, because it can reliably be argued that the FMCSA stands in the Secretary's shoes for purposes of that provision.

Practical consideration should be taken in advising motor carrier clients with respect to the creation of internally created accident reports and in information provided to the FMCSA during a compliance review or other situation wherein the FMCSA seeks information from the motor client related to accidents. The published opinions provide limited direction on recommended practices, but the best practice may be to classify all reports discussing or addressing accidents as having been requested by the FMCSA, considering such reports must be provided without objection if a compliance review is instigated, and qualifying all information provided at FMCSA's request as such as well. That is, assuming the motor carrier is interested in maintaining it's CSA rating.

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