

This Week's Feature

Precluding Discovery of Preventability Determinations in Trucking Accidents Under 49 U.S.C. § 504(f)

By Patrick E. Foppe

The discoverability and admissibility of post-accident preventability determinations by trucking companies is often much disputed in truck accident cases. The Federal Motor Carrier Safety Administration's recent adoption of the crash preventability program breathes new life into the argument that 49 U.S.C. § 504(f) affords a statutory basis to keep preventability determinations out of civil lawsuits.

In recent years, courts have reached conflicting results as to whether preventability determinations should be discoverable or admissible at trial. Most legal arguments focused on whether preventability determinations are relevant, confusing, misleading, a subsequent remedial measure, or protected under the work product doctrine. Courts sometimes found preventability determinations discoverable, but not necessarily admissible. However, this approach often unfairly puts the motor carrier in the position during the discovery process of having to explain its actions during its post-accident review of an accident. But it was seldom litigated whether such preventability determinations should be precluded from discovery under 49 U.S.C. § 504(f), which provides:

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 [of Transportation], and no part of a report of an investigation of the accident *made by* the Secretary [of Transportation], may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation. (emphasis added).

In *Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009), the defendants successfully argued that 49 U.S.C. § 504(f) barred a motor carrier's accident register from disclosure in discovery because it is a "required" accident report under Federal Motor Carrier Safety Regulations (FMCSR) § 390.15. The *Sajda* court, however, did not extend 49 U.S.C. § 504(f)'s application to "regularly-gathered information that the carrier acquires . . . used to generate the DOT Official Accident Register Reports," such as preventability determinations.

The result in the *Sajda* case is perhaps understandable because since 1993 preventability determinations were not regarded as "required" accident reports by the Federal Motor Carrier Safety Administration (FMCSA). Long ago motor carriers were required to do preventability determinations under FMCSR Part 394. Nevertheless, the accident reporting requirements under Part 394 were rescinded on March 4, 1993, even though the FMCSA still did preventability determinations when analyzing whether a motor carrier had a satisfactory safety rating under FMCSR § 385.17. Although not "required," many motor carriers continued to do preventability determinations as the practice had been engrained throughout the transportation industry. Because motor carriers were no longer technically required to do preventability determinations pursuant to Part 394, 49 U.S.C. § 504(f) arguably had no application to the preventability reports done by motor carriers. However, 49 U.S.C. § 504(f) still applied to preventability determinations "made by" the FMCSA and published on its website.

What has changed? On August 1, 2017, the FMCSA implemented the crash preventability program expected to run to at least August 1, 2019. See [Crash Preventability Demonstration Program Overview](#), Fed. Motor Carrier Safety Admin. (updated Nov. 20, 2017). In announcing the program, the FMCSA published the following in the Federal Register:

In response to the [FMCSA]'s proposal to remove not preventable crashes from the public SMS display, commenters correctly stated that the [FMCSA] was equating a finding of "not preventable" with a finding of "not at fault." Advocates stated that determinations of fault are "the province of the legal system" and noted that independent investigations of a crash may reach different fault conclusions. Advocates advised that using "only a limited amount of information about the incident, and without all of the benefits provided to a jury during a civil trial, including going to the scene, is grossly misguided." The TSC added that the State court systems are responsible for making determinations of fault. ATA advised that, "The goal of this process should not be to definitely declare fault, but to identify the predictive value of crashes in the same way the agency does with violations."

Fault is generally determined in the course of civil or criminal proceedings and results in the assignment of legal liability for the consequences of a crash. By contrast, a preventability determination seeks to identify the root causes for a crash and is used to prevent the same type of crash from reoccurring. A preventability determination is not a proceeding to assign legal liability for a crash. Because preventability determinations are distinct from findings of fault, Section 5223 does not prohibit the public display of not preventable crashes.

The demonstration program is intended to analyze preventability. The [FMCSA] believes that the public display of all crashes, regardless of the preventability determination, provides the most complete information regarding a motor carrier's safety performance record. The [FMCSA] is committed to the open and transparent reporting of safety performance data.

...

Under 49 U.S.C. 504(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." The crash preventability determinations made under this program are intended only for FMCSA's use in determining whether the program may improve the Agency's prioritization tools. These determinations are made on the basis of information available to FMCSA at the time of the determination and are not appropriate for use by private parties in civil litigation. These determinations do not establish fault or negligence by any party and are made by persons with no personal knowledge of the crash. (emphasis added).

Whether a preventability determination is discoverable will likely still depend in large part on how the determination was created. If a preventability determination is conducted in a company's ordinary course of business, the determination may be discoverable. However, motor carriers participating in the FMCSA's newly implemented crash preventability program should now perhaps better argue that 49 U.S.C. § 504(f) precludes both the discoverability and admissibility of preventability determinations made through this program.



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