

TRUCKING LITIGATION: THE PLAINTIFF'S PERSPECTIVE

With a focus on Evidence (preservation, gathering and spoliation)

and Strategy (settlement and trial)

David H. Marsh, Esquire

Marsh, Rickard & Bryan, P.C.

800 Shades Creek Parkway

Suite 600D

Birmingham, AL 35209

(205) 879-1981

www.mrblaw.com

www.mrbtrucklaw.com

TRUCKING LITIGATION 101

**With a focus on Evidence (preservation, gathering and spoliation)
and Strategy (settlement and trial)**

Introduction – trucking cases are different

The most important thing to remember when a potential case comes into your office involving a commercial motor vehicle is this: DO NOT treat it like a typical car wreck case. Trucking cases are different. And they require a different strategy from you, from the very beginning.

The difference comes from two primary places:

1. The trucking industry is heavily regulated by the federal government; and
2. There is a much better chance to find significant insurance coverage if you look.

The Federal Motor Vehicle Safety Regulations (FMVSR), discussed below in greater detail, impact every aspect of the truck litigation case – from proving negligence to preserving evidence. Those same regulations also require federal motor carriers to maintain at least \$750,000 in liability insurance.

Preserving evidence – act quickly

The amount of evidence available in a trucking case – both the paper trail and the electronic footprints left behind – dwarfs that in a typical car wreck. This evidence can prove

invaluable in smoking out other potential defendants, developing varied theories of liability and defending against accusations of contributory negligence. But to do any of this, you have to get it first. And to get it, it has to still exist.

The first order of business for any lawyer who looks at an injury involving a truck accident should be preservation of the evidence. This process should begin immediately after the client interview and even if you are not 100 percent convinced you are going to take the case.

You need to do three things:

1. Send preservation letters. These should go out immediately and be sent to every potential defendant or nonparty that may have important evidence in their possession. Federal regulations require that certain evidence be kept for six months, 49 C.F.R. § 395.8, but these regulations do not protect for everything and may actually create an excuse for potential defendants to destroy crucial evidence after six months. A properly worded preservation letter serves to notify the recipient that they may possess crucial evidence in a potential civil trial and that they are under a legal duty to preserve that evidence. These letters can also help prove notice in a later spoliation claim where evidence does disappear.
2. Find and secure the truck. Rest assured that the insurance company will be on the scene immediately – examining the truck, moving the truck and securing the truck. No matter how quickly you're on the case, you will be behind the other side, so you

have to act fast. This is even more important in cases where there are murmurings about the truck driver claiming “my breaks failed” or “my tire blew out.” There may be a potential products case or failure to repair claim. But finding the truck and making sure no one is manipulating it in any way without notice to you is important in every trucking suit: there may be a “black box” (discussed in more detail below) on board that can make or break your case.

3. Find and secure the plaintiff’s vehicle. Today, many passenger cars contain their own black boxes. When the defendant points at your client and says he or she was speeding, the black box data might prove them wrong. Your expert will also want to inspect this vehicle to complete his reconstruction.

Gathering evidence – search far and wide

Gathering evidence in a truck accident case serves two purposes:

1. It helps you prove liability (just like in any lawsuit);
2. But it also helps ensure you have discovered and named every potential defendant.

The mechanics

Every lawsuit provides a multitude of ways to gather information. Sometimes, we can be too reliant on the formal discovery process and forget about alternatives that don’t require us to wait on production.

Like any standard car wreck case, there is some quick but very important informal discovery

and evidence gathering you can do. If the accident was recent, go look at the scene – and take your expert. If the truck is at a friendly, easily accessible place, set up an inspection – and bring your expert. Take a look at the accident report and track down any eye witnesses. But unlike a standard car wreck, there is a wealth of information in a trucking case that you can access outside of the discovery process and access immediately online. Freedom of Information laws give you the right to almost the entire file on a certain carrier maintained by the Federal Motor Carrier Safety Administration (FMCSA). Much of this information is available on the FMCSA website, <http://www.safer.fmcsa.dot.gov/>. You can also obtain a cheap and quick copy from Computing Technologies in Virginia, (703) 280-4001. This same information, including comprehensive reports on carriers, is available at <http://www.safersys.com/>. In fact, these two websites are great resources to check out in any trucking case.

It's important early on that you get familiar with as much of the Federal Motor Carrier Safety Regulations as you can. You can order a full handbook from FMCSA or read over them online at <http://www.fmcsa.dot.gov/rules-regulations/rules-regulations.htm>. The most important sections include:

- Parts 40 and 382 drug and alcohol use
- Parts 383 and 391 commercial driver's license standards and qualifications of drivers
- Part 387 insurance requirements

Part 392	rules of driving: fatigue, alcohol use, schedules, inspection
Part 395	hours of service limitations
Part 396	inspection, repair and maintenance requirements
Part 397	hazardous materials

Inspecting the scene and the vehicles

Inspections are a must. You'll want to be involved (or have your investigator involved), but these are set up to help your expert. In certain situations, you might even want an expert to examine a vehicle or an accident scene before deciding whether or not to take the case.

As for the scene investigation, the key is speed. The scene will change quickly. Tire marks wash away; debris is picked up. It's even possible that intersections are repaved and repainted. Sometimes you don't get in a case until too far down the road. But if the accident has just happened, try to get your expert to the scene quickly. He can look over tire marks, record debris and assess visibility in a much more sophisticated manner for his eventual reconstruction. Don't forget to look up the weather conditions of the day to verify what you were told by witnesses to the crash.

Your expert will also want to look at both vehicles. This can tell him the force of impact and the angle of impact, so he can better reconstruct the accident. But it also can provide an automotive or tire expert the opportunity to assess potential maintenance issues with the truck. Did the brakes fail? Were they clearly in disrepair? Further, you can look for violations of

federal safety standards. They require certain reflective and other devices that might be missing and could have prevented the accident.

Don't forget to check the driver compartment if possible; you never know what you might find left in there after the crash.

Electronic data extraction

While this is still a developing area – many trucks and cars on the highways still have no recording device – it has become more and more important over the recent years, important enough, in fact, to warrant its own section in this paper. More and more trucks on the highways have at least one system – and sometimes more – from which electronically stored information can be mined, interpreted and ultimately developed to help win your case.

This is much more likely for recently manufactured trucks and trucks in service for larger companies. But no matter when your truck was made or whom it was running for, your preservation of evidence letters should also specifically request that all electronic data be preserved, and not just preserved, but preserved in a manner so that it is useful to the plaintiff and not just the defendant. Every initial set of discovery should request access to any electronically stored data.

This data can come from two sources. The more common is the “black box.” These are generally called ECMs (Electronic Control Module) or EDRs (Event Data Recorders), but you will usually hear them referred to as the “black box.” There are too many versions of

these to discuss here. You will certainly need your expert's help in figuring out how to download the information, and usually, how to interpret it.

But there are a few things you should know going in. First, this information can be invaluable; it can contain the silver bullet that is so often sought but so rarely found in any lawsuit. The most useful information from the black boxes is the data surrounding the crash. This is recorded as either a "hard brake" event or a "last stop" event. In a hard brake event, the box will record data whenever the driver applies the brakes in a way indicating an emergency maneuver to the computer. In a last stop recording, the box just records and stores information back a certain amount of time, 15 seconds for example, from the last time the truck came to a stop. This is why it is so important to ensure that a truck is not "operated" (turned on and driven) after an accident. You could lose your most important black box data. This information can tell you the speed before impact, brake actuation, whether or not the clutch was engaged, throttle position and more. It will be crucial to your accident reconstruction expert in his attempt to put together a clear picture of what happened and who was at fault. Be aware that ECM clocks are often faulty and that you may need to readjust timing information to account for this problem. Your expert should also be able to test the ECM "audit trail" to see if anyone else has previously downloaded or manipulated the data in any way.

As important as this information can be, the evidence in the black box tends to be a bit slippery, and it can disappear before you know what hit you. Some of the older versions can wipe out the valuable information if the truck is operated (driven) after the accident. Some only allow one download of the data. Some can only be downloaded by a dealership. The new models, of course, preserve more evidence and are easier to download. But it's best to assume you are dealing with an older model and that the insurance agents aren't going to be too concerned about being careful with the black box evidence. So you need to be quick and diligent about making sure that evidence is preserved in a usable format. Try to involve your expert early on and every step of the way.

And it is not just trucks that have black boxes, either. Although there is no federal requirement, many more passenger cars are now equipped with ECMs and EDRs. The defendant may forget to ask to for your client's black box, but you should always check it out. Trucking companies often try to avoid liability by pointing the finger at the injured plaintiff: they were speeding or they didn't stop. The data recorder in your client's car might prove otherwise. Don't forget to check this.

The less common – but more and more prevalent – form of electronic data is from satellite tracking. Just like you see more and more GPS devices in passenger cars today, there are more and more of these in trucks as well. Large trucking companies and shipping companies will keep tabs on their entire fleet 24 hours/day via GPS trackers. This information can be

available from several different sources: the truck's online navigation system, the company's records or straight from the satellite company itself.

The big one is Qualcomm, but there are others. This information can tell you with very little error rate where the truck has been over the last few hours or days. It can be compared to the driver's own log books (discussed below) to see whether or not he was keeping accurate records. This data can also be used to determine if the shipping companies or carriers were scheduling routes to encourage overdriving.

Paper trail

One of the biggest impacts of federal regulation is on how many records drivers and carriers are required to generate and maintain. These records can help you find defendants and prove liability. There are five broad areas to focus on: the crash, the job, the truck, the driver and the carrier.

Below is an attempt, an attempt, at a comprehensive list of everything you should ask for, or at least think about asking for when representing a client injured in a truck accident, and when necessary, an explanation. Some are repeated in more than one category.

INFORMATION ON THE CRASH

Telephone records. Cell phone records are easily available and might tell you that the defendant driver was on the phone at the time of the accident.

Fax transmissions generated regarding trip.

Records from on-board computers.

Photographs of the scene and the vehicles involved. You will want to take your own photos during your investigation, but chances are the defendants were on the scene first. Their pictures might be more complete and may include things, such as skid marks, that the weather has gotten rid of by the time you can inspect the scene. If a fatality was involved, then the state troopers will have taken photos of the scene and the final resting place of the vehicles.

Accident report.

Internal incidents/accident reports. Most large companies or their insurers will conduct an internal investigation. Try your best, over work-product and attorney-client objections, to get your hands on this information.

Communication system documents. Try and determine how and when home base communicates with their drivers.

Documents and recordings sent to other entities relating to the accident. Depending on the circumstances, outside and government entities may investigate the crash. FMSCA classifies every trucking accident as either “preventable” (driver error/carrier liability) or “non-preventable,” and the carrier will often communicate or challenge these classifications. The classification and the communications from the carrier about the accident can prove invaluable.

Satellite tracking information. This can be useful in reconstructing the accident itself but also in determining the trip route, where the driver was headed, how long he had really been driving that day or the day before.

Disciplinary records. If the driver was disciplined in any way by his employer because of the accident or for similar misconduct, these can be powerful facts.

INFORMATION ON THE TRIP/JOB

Driver's logs. Federal regulations require drivers to keep detailed logs of how much time they spend driving, off-duty and in the sleeper berth each day during the entire trip. If you have a fatigued driver on your hands, this can be an important source of information for why he was fatigued.

Dispatch records. These will tell you about the trip and the job. They can also help provide insight as to whether or not the driver was sent out on a trip that virtually required him to break the FMSCA 10-hour limit.

Telephone records. This is one of several sources of information that can help contradict driver logs on the chance they were not filled out honestly. If a driver is on his cell phone when he's supposed to be sleeping, then there is something wrong.

Pick-up and delivery records. These can provide a good deal of insightful information. They can contradict other records with time and date stamps of when goods were delivered. They can potentially bring in new defendants if the records reveal

overloading or improper loading.

Trip summaries.

Delivery manifests.

Driver credit card receipts. These are again useful to help get an honest picture of the trip. If a driver is on the road according to his log, but actually paying for something at the same time, that discrepancy will help. These can also give you insight into the driver, who he is, what his predilections, etc. might be.

Fuel receipts.

Weigh tickets. This can create, support and/or foreclose an overloading theory.

State entry and departure records.

Expense sheets.

Lease agreements or rental contracts. These might reveal potential new defendants and provide insight into who was controlling the job and the driver as well as who actually owned the truck.

INFORMATION ON THE TRACTOR-TRAILER

Wrecker or tow-truck receipts. Your expert will want to know everything he can about the vehicles for his reconstruction.

Truck and trailer licenses. This can show ownership and control, potentially revealing new defendants for a negligent entrustment action.

Lease and employment agreements.

Weigh tickets and records.

Registration and title for the truck and trailer.

Photographs of the scene and the vehicles involved. If there is a potential claim of equipment malfunction, this changes your case dramatically.

Maintenance records. Drivers and carriers both have duties imposed by common law and the federal government to keep their trucks in good repair. These records can reveal negligent maintenance that can help win a case against the trucking defendants for failed brakes rather than have to prove defective design or manufacture against the automaker.

Pre-trip inspection records.

Repair invoices.

Annual inspections policies and reports.

Vehicle's lifetime history.

Vehicle repair history and repair file.

INFORMATION ON THE DRIVER

Driver credit card receipts.

Driver qualification, employment and personnel files. These are key files both in terms of proving any kind of negligent hiring and retention claim and also proving punitive damages against the carrier for continuing to employ someone they knew was dangerous or

could hurt someone.

Responses by governmental agencies to inquiries regarding the driver's records.

Records related to the driver's previous employment and those employers contacted at the time of the driver's employment. If the employer failed to do a thorough background check on the driver, that can support a powerful negligent hiring claim.

Driver's CDL.

Driver's workers' compensation file.

Medical evaluations of the driver.

Drug test results. Federal law requires drug testing at three times: at hire, randomly during employment, and after any accident involving a fatality.

Any and all pre or post employment queries.

Drivers DAC report. This is essentially a central database of information on truck drivers and can include information such as why a driver left previous employment, crash record, etc.

Driver training and testing documents.

Driver's DOT file.

Correspondence between company and driver.

Prior and subsequent violations. Again, this is very important in terms of proving notice against the carrier to support a claim for punitive damages.

Sign-in sheets showing attendance at company safety meetings/seminars.

Driver's annual reviews. Federal law requires that these be done. Failing to do them, when you have a driver with significant problems, can look nearly as bad to a jury as having poor reports.

Disciplinary records.

INFORMATION ON THE CARRIER

Policy and procedure documents. For all of these, it is important that you be able to prove not only that the driver caused the accident, but that the carrier was independently responsible as well: by failing to train, failing to hire the right people and failing to focus on safety over speed.

- *Hiring policy.*
- *Driver training process.*
- *Safety documents.*
- *Safety procedures/policy.*
- *Disciplinary procedures.*
- *Accident classification policies and systems.*
- *Maintenance policy and procedures.*
- *Dispatch policy.*
- *Document retention/destruction policy.*

Compensation and bonus practices. Juries will not want to hear that a carrier is encouraging its drivers to break federal safety standards by promising increased pay and bonuses for fast delivery.

Employee and training manuals.

Mission statement. This likely includes something about safety and can stand in stark contrast to the carrier's actual policies and procedures.

Compliance audits (logs).

Documents distributed to drivers and employees at company safety meetings/seminars.

Prior accidents and lawsuits.

Changes in company policy as a result of the accident. Whether or not you can figure out a way to admit this at trial, it can give you insight into problems that existed with the carrier's system of training and safety before the crash.

Finding all potential defendants

Every lawyer instinctively knows how to use the evidence above to prove liability. But trucking cases present another unique factor different from the standard car wreck. There are potentially many more defendants than just the driver and his employer. As you sift through the information above, always have your antenna up for potential defendants.

Imagine this:

John Doe spent five years driving trucks in Texas for Z&Z Trucking, a large but family owned business in San Antonio. He had gone to high school with young Fred Z, so he was one of the company's most trusted drivers. But after five years, he moved over to California where he got mixed up with a bad crowd. He started using drugs, had several accidents (one where two people were severely injured when he was found to be driving under the influence), was fired from two trucking jobs and even spent six months in jail. When he got out, he wanted to turn things around so he headed back to Texas and found his old friend Fred Z. Unfortunately for John, Z&Z didn't need any more drivers, but his old buddy told him that he might have some jobs here and there if John could get access to his own tractor. John called one of his dad's old friends, Bob, who he knew owned a tractor that he now only drove a few days a week. Bob agreed to lease the truck to John for jobs when he wasn't using it. That Friday afternoon, Fred Z got an order from a company in Alabama he had been trying to get work from for years. They needed cargo delivered by Sunday at 5 a.m. They had contacted him through an intermediary scheduling company. Fred knew such a quick delivery would require a violation of federal regs governing how long drivers can stay on the job, but he didn't want to lose this business. So he called his old buddy, John. He knew he could trust him, and this way it would be off the radar if anything bad happened. John jumped at the chance, found Bob, borrowed

the tractor and headed to the load site. When he arrived, the trailer was already fully loaded. He was delivering a large quantity of tools – heavy wrenches, hammers, etc. The Texas tool manufacturer had overproduced this year, but found the Alabama company willing to take the product off their hands. The manufacturer had borrowed the trailer from their sister company down the road that handled distribution and retail. They rarely shipped out of state and never loads this large; in fact, they had no idea about any federal regulations governing load size and weight. John set off; he made great time. By the time he was pulling into Alabama, he was exhausted but knew he would be right on time. Coming through Pell City on I-20, he looked up just in time to see another tractor-trailer pulled off on the side of the interstate, but so close to the edge that John had to swerve into the left lane to miss it. The Smith family, on their way back home to Birmingham from a Saturday baseball tournament in Atlanta, was in his way....

Two weeks later, what's left of the Smith family sits in your office, devastated, asking for your help, and telling you that, as far as they know, John Doe had absolutely no insurance. All they can give you is the first two pages of the accident report that says John was solely responsible for the accident and that the other truck disappeared from the scene.

It is this kind of scenario that makes it so important in a truck accident case to use the evidence, not only to help prove liability against the primary defendant, but to help find all the potential defendants.

1. What about Bob? Don't you have a negligent entrustment action against him? Does he have insurance on the tractor?
2. What about the distributor/retailer who owned the trailer?
3. What about the manufacturer that overloaded the trailer?
4. What about the folks who scheduled the route so that it would require John to drive too many hours on Saturday?
5. And of course Z&Z for hiring John without checking his background.
6. But how about that other truck? The accident report says only John was at fault, but if John blames the other truck, you have to find it. Maybe a witness saw the name on the side? You can get that company's routes and schedules; you can see if they track their vehicles via satellite. You could even attempt to go directly to the satellite companies to see if they have a truck in that position at that time. Don't forget: more than one truck means more than one potential insurance policy.

As you begin to gather evidence and plow through it, always be looking for potential new defendants, not just liability. And when you find one, make sure you send them a preservation letter immediately.

Of course, the real point of seeking and finding every liable defendant is to find more insurance so that your client can be compensated adequately. As you know, once you file suit, you are entitled to know the insurance limits of the defendant. But you can often find out this information before filing suit by looking on the FMSCA website at <http://www.safer.fmcsa.dot.gov/>. Search by name or DOT number for the company snapshot, access the “Licensing & Insurance” link and then look at the report. Knowing how much insurance you are working with gives you a head start and lets you know how hard (or not hard) you will have to look for other defendants.

While the federal minimum is \$750,000, 49 C.F.R. § 387.9 requires higher limits when a truck is carrying a hazardous load and in some other circumstances. Further, 49 C.F.R. § 376.11 can help you combat defense attempts to label the driver an independent contractor and avoid liability. While the theories above exemplify how you can hold the carrier directly liable, this federal regulation requires the carrier to assume – at least for liability purposes (not for the driver’s worker’s comp) – liability when drivers that they call independent contractors cause injury while driving company trucks.

Remember, too, that defense attorneys may be dealing with insurance companies threatening to withhold coverage. This is especially true when you are dealing with a driver who tested positive for drugs or alcohol. If it helps your case, and you have a strong relationship, offer to help the defendant prove coverage. Federal law requires that the “MCS-90” endorsement

be attached to trucking insurance policies to provide for a form of “public liability” when the policy language itself might exclude coverage under certain circumstances. 49 C.F.R. 387.15.

Dealing with evidence gone missing – spoliation

First of all, resist the temptation early on to rely on a spoliation claim. What you want (and you should be quick and dogged in pursuing it until it is clearly and absolutely hopeless) is the *EVIDENCE* that proves your case. Spoliation is only a last-ditch, no-other-options avenue when there really has been some wrongdoing on the part of a defendant or an insurer. Michael Roberts and Greg Cusimano’s book on Alabama Torts provides an invaluable resource on nearly every tort question you may have, and the section on spoliation is especially helpful. If you find yourself in a position where you do not think you can win your case without a certain piece of evidence that has now mysteriously disappeared, check out § 44.07 and consider your options on spoliation.

Alabama law gives you two different options. First, you can claim spoliation to create an inference of guilt or negligence against one of your primary defendants, whereby the judge will actually read charges to the jury that instruct them in such a manner.

Second, you can maintain a spoliation claim when you can prove that a third party had a duty to preserve evidence and negligently failed to do so. But the Court has made the standards of proof difficult, requiring a plaintiff to prove “that the lost or destroyed evidence was so important to the plaintiff’s claim in the underlying action that without that evidence the claim

did not survive or would not have survived a motion for summary judgment.” *Brown Electro Mech. Sys. v. Thompson Eng'g*, 848 So. 2d 238, 241 (Ala. 2002).

So keep this second option in mind when the insurance company loses your crucial evidence, but remember that case law seems to present an “either/or” scenario: either you can proceed against the underlying defendant with the evidence you have and a spoliation instruction to the jury, or you can sue the third-party on an independent spoliation theory because you can no longer maintain the underlying suit without the missing evidence.

This is yet another reason that a separate spoliation claim should be a last option. However, when there is clearly a violation, spoliation can play a pivotal role in your settlement or trial strategy.

Getting a good result for your client – settlement and trial

It’s always tough when I’m asked to discuss strategy. That’s the whole thing about strategy – you have to have something to strategize about. Without the underlying facts, strategy is impossible. But here are some thoughts applicable to trucking cases and most litigation in general about how to get the best result for your client.

Truck specific

Assess your driver. At the end of the day, this is the man the jury will be looking at, either sitting at the defense table, on the witness stand or both. This is the person they

have to find fault with. Think about how the jury will see him and feel about him and evaluate your case accordingly.

Assess your jury pool through effective voir dire. This probably goes without saying, but make sure you do not leave the wife or the mother of a truck driver on your jury no matter how plaintiff friendly she may seem. This can be a particularly tricky issue in truck cases where the kind of folks that might be great for a plaintiff in a typical case might also be a plaintiff's worst nightmare in a trucking case.

Use Rules of the Road and federal regulations to your advantage. While violations of the Alabama Rules of the Road can constitute negligence per se, the Alabama Supreme Court has strongly implied that violations of the Federal Motor Carrier Safety Regulations cannot constitute negligence per se. *Osborne Truck Lines v. Langston*, 454 So. 2d 1317 (Ala. 1984). However, that same case clearly holds that these regulations can be admitted at trial and can be read to the jury as a part of the instructions. Also realize that those regulations are the minimum standards. Oftentimes, the defense will be able to capitalize on an area where his clients have met the standards. Make sure you use violations to your advantage, but have the evidence and the arguments ready to marginalize the importance of the standards when necessary: explain that any violation is inexcusable

because these are minimum standards, but that compliance shouldn't necessarily excuse conduct the jury finds fault with.

Work truck stats into trial. The statistics on truck deaths in America and Alabama are overwhelmingly scary. People are naturally scared and suspicious of trucks. If you have a notice issue, work the stats into trial: 5,200 deaths and 114,000 injuries in America each year; 150 deaths and 3,300 injuries in Alabama each year. See *Alabama Power Co. v. Brooks*, 479 So. 2d 1169 (Ala. 1985).

General

Always work up your case as if you will be trying it. Being in the best position to try and win a case is what puts you in the best position to settle a case. This doesn't mean go out and spend \$300,000 in the first month only to find out a week later that your total retail meds are \$50,000. But if you work efficiently from point A (meeting the client) to point B (judgment or settlement) and on a timetable (six to 18 months), you will likely have the other side on their heels and therefore be in a good position to settle.

Use trial strategies to convince the adjuster settlement makes sense. Often, the same strategies that are so effective at convincing a jury in the courtroom can be just as effective at convincing an adjuster and his lawyers during a mediation. Have your animation

ready to go for mediation. If you have a particularly heart-breaking, catastrophic injury, have your “Day in the Life” video ready and send the other side a copy to watch. If you have assessed the case much higher than what they are offering and are confident in your assessment, come to mediation prepared to give a trial-like opening, and deliver it powerfully if it makes sense under the circumstances.

Understand the intricacies of negotiating with multiple defendants and insurers.

In trucking cases perhaps more than any other, especially those involving catastrophic injuries, there is the potential to be facing off against multiple defendants, each of whom may be dealing with multiple insurers themselves (primary and excess). Add to that picture the sure existence of confusing contractual indemnification and defense agreements among and between each defendant, and you can have a negotiation mess on your hands. Be aware of this reality during settlement negotiations and mediation. You could spend a full day stuck on your opening demand because the primary insurer – small, inexperienced and in over their heads – won’t put up their initial \$1 million even though the excess carrier, for example, is ready to go to \$2.5 million immediately once the primary tenders its limits. Don’t be afraid to use the mediator or talk privately with certain lawyers in an attempt to figure out what is going on. Don’t be afraid to settle pro tanto when some defendants “get it” and others don’t.

Understand your venue and help the other side understand it as well. Imagine this hypothetical. You are preparing for a breach of contract and fraud trial in Shelby Co. You represent an older, fairly comfortable small business owner against a large, out-of-state supplier with pervasive business in Alabama. In settlement negotiations two weeks before trial, the defense lawyer scoffs at your latest offer and exclaims, “that’s preposterous, we’re in Shelby County.” Don’t let him get away with this. Shelby County jurors may not like certain types of cases, but probably one-third of the population are fairly comfortable small business owners who have been defrauded by large, out-of-state corporations. Census data on the web and other information can help persuade defense counsel and adjusters that, while the county may be generally unfriendly to suit, it won’t be unfriendly to *your* suit.

Don’t forget other sources of funding. If you have catastrophic injuries and there really are problems finding enough insurance on the defense side, don’t forget other potential sources of recovery. If your client was on the job when the crash occurred, there is always worker’s comp. And the client is likely to have an under-insured provision in his own insurance policy that can help fill the gap and pay the bills.