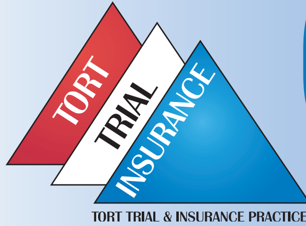

Committee News

ABA Defending Liberty Pursuing Justice

Summer 2009

Commercial Transportation Litigation Committee

WHAT'S IN THE BLACK BOX? A SHOW AND TELL WITH CAR AND TRUCK EDR'S

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Within the last three decades, there has been an emergence of new technology, which literally turns a motor vehicle or commercial truck into a database on wheels, via an event data recorder (EDR). An EDR is a device that stores data about the physical properties of a vehicle that is involved in an "event," which can include an accident or near accident.[1]

The National Highway Traffic and Safety Administration (NHTSA) has defined EDR as "a device or function in a vehicle that records the vehicle's dynamic time-series data during the time period just prior to a crash event (e.g., vehicle speed vs. time) or during a crash event (e.g., delta-V vs. time), intended for retrieval after the crash event." 49 C.F.R. § 563.5 (2009).

EDR's are also known as "black boxes," and are commonly referred to as ECM's (electronic control modules), but the EDR is actually a part of the ECM. It is typically a four-inch square metal box, which is quickly becoming installed on all vehicles.[2] After an accident, the EDR can reveal the following information about the vehicle generally about five seconds before and after impact:

- Vehicle speed
- Engine RPM's
- Pre-crash vehicle dynamics and system status
- Driver inputs
- Whether the driver's seatbelt was buckled
- Post-crash data
- What warning lights were on

Conitnued on page 13

[1] Heavy Vehicle EDRS (2007) http://www.heavytruckedr.org/what-is-an-edr.html.

[2] Harris Technical Services (2004) http://www.harristechnical.com/crd2.htm.

* This paper was prepared with the assistance of John Dollarhide and Hillary Blalock, students at Mississippi College School of Law.

IN THIS ISSUE:

What's In The Black Box: A Show And Tell With Car And Truck EDR'S 1
Message From The Chair 3
When Can Pension, Disability Payment Or Similar Benefit, Be Used To Set Off The Economic Loss Portion Of A Plaintiff's Personal Injury Award? . . . 4
Intermodal Container Chassis 5
The Use Of Criminal Convictions During Civil Trails. 6
Fighting Hindsight With Foresight In emergency Settings: Do Computer Animations And Simulations Help Or Hinder?. 7
Drivecamdrive Cam Exemption 9
South Carolina 9
2009-2010 TIPS Calendar 17

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MESSAGE FROM THE CHAIR

Greetings from (finally) sunny Maine! I hope you have all enjoyed your spring and are ready for a wonderful summer. I also hope your plans include joining us for the ABA Annual Meeting in Chicago at the end of July. We will be having a business meeting, and are also sponsoring a program about technology in trucking that I hope you will attend. It promises to be an excellent meeting, and, as always, is a great opportunity to catch up with old friends.

I would like to thank all of you who participated in our recent efforts to publish another 50 state legal compendium. I think we have a great product that is on its way to the printers, and I'm sure it will be something appreciated by your clients and colleagues, so please be sure to send it around when it comes out.

I look forward to seeing you all in Chicago!

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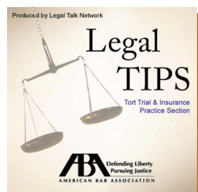

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WHEN CAN A PENSION, DISABILITY PAYMENT OR SIMILAR BENEFIT, BE USED TO SET OFF THE ECONOMIC LOSS PORTION OF A PLAINTIFF'S PERSONAL INJURY AWARD?

Under traditional common law principles, a plaintiff's recovery from a tortfeasor would not be diminished by any other source of compensation.[1] This principle was premised on the idea that a negligent defendant should not benefit from the proceeds of the plaintiff's insurance or other similar source of compensation, to which said negligent defendant had not contributed to in any way.[2] However, the New York Legislature significantly altered this rule over the years. One of the most important modifications came in 1984 when CPLR 4545(a) was enacted which, together with further amendments the following year, extended the "collateral source reduction…to all medical and dental malpractice awards for *future* economic losses that would, 'with reasonable certainty,' be reimbursed or indemnified."[3] Then, in 1986, CPLR 4545(c) was enacted, which applied to all personal injury, property damage and wrongful death suits commenced on or after June 28, 1986.[4] CPLR 4545(c) provides in pertinent part: "In any action brought to recover damages for personal injury…where the plaintiff seeks to recover…loss of earnings or other economic loss, evidence shall be admissible…to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance…social security…or employee benefit programs…"[5]

The Court of Appeals in *Oden v. Chemung County Indus. Dev. Agency* stated that "[t]he Legislature's goal of eliminating plaintiffs' duplicative recoveries is served by subtracting from the total award those collateral source payments that duplicate or correspond to a particular item of economic loss."[6] However, in *Oden* the Court would not reduce the plaintiff's award for lost future earnings by the plaintiff's retirement pension benefits.[7] The Court reasoned that the plaintiff's retirement pension benefits were paid "in lieu of ordinary pension benefits and do not necessarily correspond to any future earning capacity plaintiff might have had."[8] The Court further reasoned that, had the plaintiff not retired, he would have been free to earn income in other capacities without losing his disability retirement pension benefits so the benefits were not duplicative of plaintiff's award for future lost earnings.[9] In spite of this, the Court did reduce the plaintiff's award for lost ordinary pension benefits, which the Court determined were replaced by the plaintiff's disability pension. [10]

How to Establish a Collateral Source Set-Off

In any case in which a plaintiff alleges a loss of past or future earnings due to a permanent disability, there could be a significant claim for economic damages. This often arises in cases involving injured Firefighters, Police Officers, or other plaintiff's with pensions. For example, a plaintiff who is permanently disabled at age 40, making $50,000 per year, will be able to project earnings for approximately 20 more years and will potentially have a claim for lost future earnings in the area of $1,000,000. This example does not even take into account factors such as inflation and whether or not the plaintiff would have received any bonuses or raises. However, it is a good indication of how claims for lost earnings can expose a defendant to substantial damages. Therefore, it is critical to explore during depositions and discovery whether or not the plaintiff is receiving any payments from any source, which may then be used to reduce plaintiff's economic damages.

The most common types of collateral source payments, which can be used to set-off a plaintiff's lost earnings recovery, are Social Security disability benefits and disability pension benefits. In order to prove that either of those benefits are a collateral source, a defendant must prove (1) a direct correspondence between the type of loss alleged and the type of collateral reimbursement and (2) that the plaintiff is legally

Continued on page 12

1 *Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d 81, 637 N.Y.S.2d 670 (1995).
2 *Id.*
3 *Id*, at 672.
4 *Id.*
5 *See* N.Y. C.P.L.R. 4545(c) (2009).
6 *Oden*, 87 N.Y.2d at 88, 637 N.Y.S.2d at 673.
7 *Id.*
8 *Id.* at 674.
9 *Id.*
10 *Id.*

INTERMODAL CONTAINER CHASSIS

By: Andrew Thor Stevenson, *Franklin & Prokopik*, The B & O Building, Two N. Charles Street, Suite 600, Baltimore, MD 21201

A. Background

Within the world of intermodal trucking, the intermodal motor carriers are typically not the owner of the trailers that they haul. The trailers are merely bare chassis which are specifically designed to hold and carry shipping containers. There are nearly one million such chassis in operation across the states. The chassis are usually owned by railroads, ocean carriers, steamship lines, terminal operators, and chassis pools. As a practical matter, an intermodal trucker will report to his port of call where he is assigned a chassis and container; and instructed to haul the same. Usually, there is no discussion and no debate; the trucker takes the chassis and container he is ordered to take, and he has no choice in the matter. Moreover, intermodal drivers are usually paid based on the number of trips they can complete in any given day and they are not interested in wasting time inspecting chassis or fighting with the union dock workers. A driver who reports a defect with a chassis is sure to face extensive delays in leaving the ports or terminal facility while waiting for a container chassis to be repaired or replaced.

In many cases, the intermodal trucker then pulls into a local weigh station and is subject to a commercial vehicle inspection, which reveals several deficiencies with the chassis. The trucker is often subjected to a hefty penalty. The penalty is then transferred to the motor carrier. Intermodal motor carriers have been unfairly penalized under the current SafeStat calculations, due to a high degree of chassis out-of-service problems related to equipment that the carriers do not even own. Several hours following the weigh station, a mechanical defect in the chassis causes the driver to lose control of his vehicle, or prevents him from properly slowing his vehicle, which results in a serious motor vehicle accident. This, in turn, begets a considerable civil litigation involving claims of bodily injury. Add to that the fact that there is limited or no identifying information on the chassis and it is next to impossible to trace its actual owner. These sorts of complaints from our intermodal carriers have been all too common. This manifestly unjust scenario has unreasonably dogged the intermodal trucking industry for many years.

For years, trucking groups had pushed the FMCSA to regulate the care and maintenance of intermodal trucking equipment. These efforts had been historically resisted by intermodal groups and ocean carriers who did not want to be subject to the FMCSA's jurisdiction. Congress has been weighing the so called "roadability" legislation since at least 2003. The resistance seemed to subside in 2005, when the ATA joined together with a number of prominent intermodal groups, including the Ocean Carrier Equipment Management Association and the Association of American Railroads, to petition Congress to direct FMCSA to increase its attention on intermodal chassis oversight.

B. New regulation

On December 17, 2008, the FMCSA issued its final rule on Roadability, significantly strengthening safety requirements for intermodal container chassis, and providing a means to effectively respond to driver and motor carrier reports about intermodal container chassis mechanical defects and deficiencies. The rule applies to intermodal equipment providers (IEP) (ocean carriers and railroads), motor carries and drivers operating intermodal equipment (IME).

Each IEP must do the following:

Register and file using FMCSA Form MCS-150C.

Mark each item of IME offered for transportation in interstate commerce with a U.S. Department of Transportation (USDOT) identification number.

Establish a systematic inspection, repair, and maintenance program to assure the safe operating condition of IME.

Maintain documentation of its maintenance program.

Develop and provide a means to effectively respond to driver and motor carrier reports about IME mechanical defects and deficiencies.

IEPs must submit the IEP Identification Report (Form MCS-150C) and must establish systematic inspection, repair, and maintenance programs by no later than December 17, 2009. IEPs must mark their IME by no later than December 17, 2010.

Continued on page 13

THE USE OF CRIMINAL CONVICTIONS DURING CIVIL TRIALS

By: Michael P. Mezzacappa and Stephanie B. Gitnik

Oftentimes there is great confusion as to when a party's prior criminal convictions can be utilized during a subsequent civil trial. Developing the prior criminal history of a party or a witness can always be a favorable trial technique as it, obviously, imputes doubt as to that individual's veracity and character in the eyes of both the jury and the judge.

The New York State Civil Practice Laws & Rules § 4513 governs this particular situation. It states:

> A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

This is different than in a criminal prosecution where the rules regarding prior crimes are much stricter based primarily on the higher burden of proof needed to find someone guilty of a crime, as opposed to merely liable in the context of a civil litigation. *See generally Guarisco v. E.J. Milk Farms*, 90 Misc.2d 81, 393 N.Y.S.2d 883 (Civ. Ct. 1977). In a criminal case, a *Sandoval* hearing is held to determine whether the prior convictions bar logically and reasonably to a credibility issue. *See People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974). Only in those instances is the conviction admissible. Alternatively, in a civil case, precluding a party from impeaching the credibility of a witness by use of his prior criminal convictions can constitute reversible error. *See Sansevere v. United Parcel Service, Inc.*, 581 N.Y.S.2d 315 (1st Dept. 1992).

The key in utilizing this provision in the most useful manner is the last sentence of the statute, which has been interpreted by Courts as allowing the development of the facts and circumstances surrounding plaintiff's conviction. *See Moore v. Leventhal*, 303 N.Y. 534, 104 N.E.2d 892 (1952); *see also Able Cycle Engines, Inc. v. Allstate Insurance*, 84 A.D.2d 140, 445 N.Y.S.2d 469 (2nd Dept. 1981). Further, that sentence avails the cross-examining attorney of the opportunity to obtain outside evidence regarding the witness's prior criminal history, which they can then use to impeach the witness's credibility.

The most important tool for impeaching a witness with regard to past criminal history is establishing what requirements must be met for the past crime to be admissible. The Courts have held that there are two ways to go about proving a past crime, either through the past official record, i.e. an official certificate of disposition, which can be obtained from the criminal court in the county where the witness was convicted or pled guilty to the crime, or by admission of the witness upon cross-examination. With the proper foundation laid, it should come into evidence and can be reviewed by the jury once it is published to them. The statute is clear, however, that these are the only two methods by which a conviction can be proved and, therefore, alternative methods will be rejected by the Court.

It should be noted, however, that if plaintiff pled to a violation as opposed to a crime, it would not be admissible. *See Landt v. Kingsway Equipment Leasing Corp.*, 159 N.Y.S.2d 453 (N.Y. Sup 1956); *see also See v. Wormser*, 113 N.Y.S.1093 (2nd Dept. 1908). Therefore, it is important to establish what constitutes a "crime" under New York Law. A crime in New York includes a felony, which is punishable by imprisonment of more than one year; and a misdemeanor, which may be punishable by jail sentences of more than 15 days but not more than one year. Also, admissible are court martial convictions and dishonorable discharges from the United States Armed Forces. *See generally People v. Lee*, 35 A.D.2d 542, 313 N.Y.S.2d 139 (2d Dept. 1970).

The Courts have alternatively ruled that a "violation" (such as most traffic violations, which are punishable by jail terms of no more than 15 days in jail) are not crimes and cannot by utilized at the time of trial. Additionally, imprisonment for a breach of military discipline, a youthful offender adjudication, and the suspension or revocation of a license by the Commissioner of Motor Vehicles for reckless driving are not convictions for which proof can be used for impeachment purposes. *See generally* 8 Carmody-Wait 2d §56:272 (2009).

Importantly, evidence that a witness committed a crime in a state other than New York is admissible at trial even if, under the law of the state where the crime was committed, it could not be used for impeachment purposes. *See Able Cycle Engines, Inc. v. Allstate Ins. Co.*, 84 A.D.2d 140, 445 N.Y.S.2d 469 (2d Dept. 1981).

Based on the significant impact a prior criminal conviction could have on the trustworthiness of a witness at trial, it is imperative that any witness be questioned as to their criminal history during their

Continued on page 12

FIGHTING HINDSIGHT WITH FORESIGHT IN EMERGENCY SETTINGS: DO COMPUTER ANIMATIONS AND SIMULATIONS HELP OR HINDER?

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The assessment of responsibility or fault for a motor vehicle crash typically focuses on a threshold question: Could the crash have been prevented? The standard against which a defendant driver's conduct is judged is the "reasonable person standard." The reasonable person is an imaginary, good natured, well meaning, hypothetical "ideal" person whose conduct is considered ordinary and against whose imaginary conduct the actions of the alleged negligent person should be judged by the jury or judge. The reasonable person is assumed to act with ordinary care, or the care a reasonably careful person would use under circumstances similar to those shown by the evidence. A jury is not told how a reasonable person acts – that is for them to determine.

Emergency settings often impact the determination of the reasonableness of a defendant's conduct. Under the emergency doctrine, the law does not require a person to act with the deliberation and care one might have in a non-emergency situation because of the suddenness of a situation not caused by that person's actions or inactions. Some state's jury instructions point out that if at that moment the defendant driver does what appears to him/her to be the best thing to do, and if his or her choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he/she does all the law requires of him or her.

This is true even though in the light of after-events, it should appear that a different course would have been better and safer. This is so even if it later appears that her or his choice was not the best or safest choice. This is so even though, **in hindsight**, some other or better course of conduct could or should have been followed under normal conditions.

The concepts of hindsight and hindsight bias should be considered by defendants, their insurers, and their lawyers in determining how a defendant's actions will be judged by a trier of fact, usually a jury of his or her driving peers. As Justice Cardozo stated many years ago, post-event evaluators (like jurors, trial judges, or appellate judges) **should not look back at the mishap with the "wisdom born of the event.**" *Green v. Sibley, Lindsey & Curr. Co*., 257 N.Y. 190, 192, 177 N.E. 416, 417 (1931). Whether a jury uses foresight as opposed to hindsight to evaluate the alleged errors of a defendant is subject to strenuous debate both in the legal arena and social psychological arena.

Some social scientists have suggested that decision makers, such as jurors, may be subject or susceptible to a human judgment phenomena known as "hindsight bias." *See* Casper, J.D., Benedict, K. & Perry, J.L., *Juror Decision Making, Attitudes, and The Hindsight Bias, Law* and Human Behavior, 13, 291-310 (1989). This tendency was first highlighted in the writings of Fischhoff. Fischhoff, B., *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Uncertainty*, Journal of Experimental Psychology: Human Perception and Performance, 1, 288-299 (1975). The concept of "creeping determinism" has provided an explanation for the hindsight phenomena. That concept asserts that a retrospective evaluator attempts to make sense out of all that he or she knows about an event and assimilates outcome knowledge with what they already know about the event. In so doing, decision makers rewrite the story of what occurred, and in so doing it is difficult sometimes for these individuals to realize how alternative outcomes or "counterfactuals" could have occurred. In the social psychological literature, it appears that when an evaluator knows the results of an event, he or she is twice as likely to conclude that the actor involved should have been able to anticipate events of which the actor has no knowledge before the event occurs. Such a phenomenon will clearly impact a jury's assessment of whether the defendant could have prevented the traffic crash.

A. The Effect of Accident Reconstruction Animations.

Although, jurors are supposed to set aside the fact that an outcome has occurred and decide the case based solely on the evidence available before the incurred outcome, *see* Devit, E.J., Blackmar, C.B., & Wolff,

Continued on page 10

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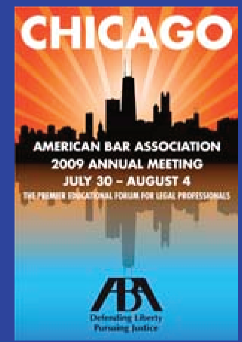


Join TIPS at the ABA Annual Meeting
July 30-August 4, 2009---Chicago, IL

Developing Technology in On-Board Data Recording For Motor Vehicles

Friday, July 31, 2009 - 2:00pm - 3:30pm

This program will discuss several on-board technologies in use on motor vehicles that can significantly impact litigation in accident cases. A panel of experts, attorneys and industry participants will discuss ECM, VORAD, Satellite positioning systems and electronic log book programs and their uses in accident reconstruction and litigation, including the information these technologies make available and how that information may be used and may impact litigation.

Conflict of Interest and Ethical Considerations in Representing Insured's and Insurers in Personal Injury Litigation

Sunday, August 2, 2009 - 2:00pm - 3:30pm

This program will feature a panel discussion examining issues related to conflicts of interest, which commonly arise in the context of representing insureds and insurers involved in personal injury litigation and will be based on an analysis of the ethical considerations under the Model Code of Professional Conduct.

For more information and to register, visit:
http://www.abanet.org/tips/market/Annual09/TIPS09Annual.html

DRIVECAMDRIVE CAM EXEMPTION

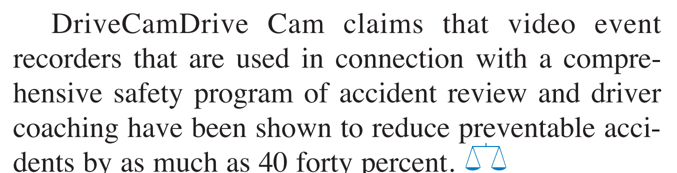
DriveCamDrive Cam, an innovative development in monitoring driver behavior, also used in reconstructing highway accidents, has received an endorsement from the Federal Motor Carrier Safety Administration ("FMCSA").

As expected, FMCSA granted a two-year exemption to DriveCamDrive Cam, Inc., from a provision of the Federal Motor Carrier Safety Regulations that will allow video event recorders to be mounted lower in the windshield than previously permitted. Under the exemption, cameras cannot be mounted more than 50 mm, or two inches, below the upper edge of the area swept by the windshield wipers, and outside of a driver's sight lines.

The principal driver for this exemption has been the motorcoachmotor coach industry. MotorcoachMotor coach design has evolved over the last two decades to include frontal windscreens that comprise much more of the front of a bus than older designs, and extend well beyond a driver's useable sight line – up to the roofline in some cases. Bus manufacturers have correspondingly added longer windshield wipers that increase the swept area well beyond what is required of bus manufacturers under Federal Motor Vehicle Safety Standard No. 104, which addresses windshield wiping and washing systems. At the same time, motorcoachmotor coach operators have been experimenting with video cameras to record the conduct of passengers and the behavior of drivers. Optimally, these rearward-facing video cameras would be positioned inside the bus windshield, but under the current regulation at 49 CFR 393.60(e)(1), which provides that a device cannot't be mounted more than six inches below the upper edge of the windshield, a video camera would be useless. The exemption allows video cameras to be placed lower in the windscreen area, where they can accomplish the desired result. Using the same mounting for a forward-facing lens allows a view of the roadway that can be useful in the event of a highway accident. Many fleet operators use DriveCamDrive Cam for driver training, as well as for accident investigation.

The Commercial Vehicle Safety Alliance ("CVSA"), comprised of commercial motor vehicle safety enforcement officers throughout North America, petitioned FMCSA in 2007 for a similar amendment to the regulation to allow video event recorders to be mounted not more than two inches below the upper edge of the area swept by windshield wipers. The exemption accomplishes CVSA's goal, albeit for a two-year period, during which time additional data on the value of DriveCamDrive Cam will be generated. The exemption expressly pre-empts inconsistent state regulations, like California's., that are inconsistent with the exemption.

DriveCamDrive Cam claims that video event recorders that are used in connection with a comprehensive safety program of accident review and driver coaching have been shown to reduce preventable accidents by as much as 40 forty percent.



SOUTH CAROLINA

"South Carolina Court Sets Dangerous Precedent in Refusing to Strike Potentially Biased Jurors"

In a recent case involving allegations of negligent hiring and supervision against Wal-Mart, South Carolina's Court of Appeals validated a frightening level of discretion on the trial judge's part with respect to jury qualification and exclusion. In *Hollins v. Wal-Mart Stores, Inc., 672 S.E.2d 805 (S.C. Ct. App. 2008)*, the plaintiff alleged that while she and her minor daughter shopped at the local Wal-Mart, a store employee had exposed himself to the daughter and had then committed a lewd act upon her. The details are beyond sordid but, mercifully, are not pertinent for present purposes.

The interesting aspect of the case is the trial judge's refusal to strike two jurors, despite significant ties to parties and attorneys in the case. During jury qualification, the Court learned that Juror B, an attorney, had been adverse to plaintiff's counsel in a recent case; later, Juror B informed the Court that one of his partners had represented Wal-Mart. Upon learning of each entanglement, counsel for plaintiff requested that the trial judge strike Juror B- in both instances, the court refused.

More surprisingly, the Court refused a request to strike Juror D, despite Juror D's acknowledgement that

his brother was employed at the very Wal-Mart store where the alleged indecent exposure had transpired. Indeed, one of the Wal-Mart representatives at trial was the direct supervisor of Juror D's brother. Once again, plaintiff's counsel requested that the juror be excused; once again, the Court refused.

Wal-Mart secured a defense verdict, the jury evidently accepting the retailer's explanation that it had no knowledge and was not on notice of the employee's tendencies. On appeal, the primary issue was the trial judge's decision to seat Jurors B and D. The Court of Appeals dismissed the plaintiff's protestations more or less out of hand, stating merely that "[t]he decision to disqualify a juror is within the sound discretion of the trial court," and relying very heavily upon each juror's bare representation that he could be impartial.

With the juror rulings in the *Hollins* case going against the plaintiff, the rulings' significance is easily dismissed. Yet, such rulings easily could go against a motor carrier in the future. Especially in light of the many small, close-knit communities in which a significant amount of tort actions are tried in South Carolina, the Court of Appeals' ruling is alarming. Minimally extrapolated, the Court's opinion approves a scenario in which a personal injury plaintiff's co-worker's father sits on a jury panel, or his neighbor's brother. In the small, already plaintiff-friendly towns of South Carolina, these connections are quite likely to surface. The presence of such jurors on the panel would have seemed, pre-*Hollins*, to support a robust appellate argument, but now the onus is that much greater on defense counsel to prevail at trial.

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HINDSIGHT...

Continued from page 7

M.A., *Federal Jury Practice & Instructions: Civil* (4th ed. 1987), the chances of that happening may be compromised when computer animations or simulations are used. Some researchers suggest that more studies should be conducted on whether the common usage of traffic accident reconstruction animations may actually increase the chances that jurors use hindsight bias in making their decisions.

Social psychologist Neal Roese, a professor at the University of Illinois and noted expert on hindsight bias, has noted that because traffic accidents involve a sequence of rapidly changing events that begin and end within seconds, it is difficult to mentally simulate how they happened. As he and his co-authors, Michael Dilich and John Goebelbecker of Foresight Reconstruction, noted in their first publication on the subject, Accident Reconstructionists often use computer animation technology to illustrate their conclusions about how and why a traffic crash happened and, perhaps, how an incident could have been prevented. Roese, N.J., et al., *A Distorted Perception of Foreseeability: Computer Animation of Traffic Accident Reconstruction*, Transportation Research Board Annual Meeting (2005).

It would be one thing if the animation is played once, in real time, only from the driver's point of view, and only up to the time when the threat of a collision was becoming apparent and then abruptly stopped. However, such is not the case with animations used in courtrooms throughout the country. Instead, the animations are played repeatedly as the experts, the lawyers, and eventually the jurors themselves dissect in minute detail every second and fraction of a second of an incident with information that the defendant driver never had when he faced his emergency situation.

Roese and his colleagues followed up this statement of concern to an academic transportation research audience by conducting research comparing the use of computer animations on the one hand with text descriptions and diagrams on the other hand. Roese, Fessel, Summerville, Kruger & Dilich, *The Propensity Effect – When Foresight Trumps Hindsight*, 17 Psychological Science 305 (2006). In this article, they point out that hindsight bias is the inability to disregard known outcome information when estimating earlier likelihoods of that outcome. After acknowledging that the phenomenon known as "propensity effect," a reversal of this hindsight bias, is apparently unique to judgments involving momentum and trajectory, the researchers made important conclusions. First, the propensity effect occurred only in judgments involving

dynamic stimuli (computer animations of traffic accidents versus text descriptions) but only when foresight judgments were temporally near (versus far from) a focal outcome. Second, hindsight bias was more than doubled when computer animations, rather than text-plus-diagram descriptions, were used.

Their conclusion is important. Computer-animated reconstructions of real accidents hold the power to alter likelihood judgments made in legal contexts.

B. Fighting or Minimizing Hindsight Bias

Several researchers have studied attempts made to eliminate or reduce hindsight bias. Some have found strategies which were ineffective, and some have found strategies which had limited success. Some have suggested that an expert witness should be allowed to testify regarding the robustness of hindsight bias, and to discuss the bias and strategies to reduce the bias. However, they acknowledge that the admission of such expert testimony is contingent upon the discretion of a court and such strategy may be of limited use. *See* Wexler, D.B. & Schopp, R.F., *How and When to Correct for Juror Hindsight Bias and Mental Health Malpractice Litigation: Some Preliminary Observations*, Behavioral Sciences and Law, 7, 485-504 (1989).

Some have suggested that hindsight bias can be reduced using attorney closing arguments. Stallard, M.J. & Worthington, D.L., *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments,* Law and Human Behavior, 22, 671-683. Others have suggested that the use of hindsight debiasing comments or questions should be made in *voir dire*, opening statements, forms of questioning witnesses, and closing argument. Getzoff, Worthington, & Stallard, *Confronting Juror's Hindsight Bias*, For the Defense, Dec. 2001 at 20.

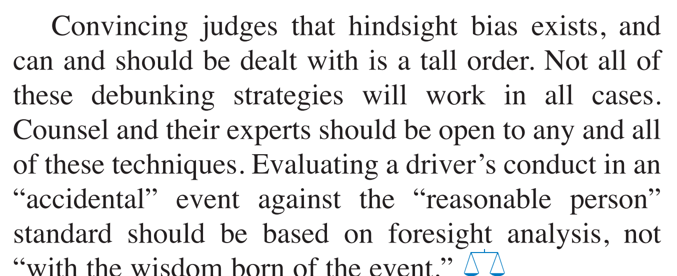
Some researchers have explored whether or not multiple admonitions from a judge about the proper use of evidence or bifurcation would assist in debiasing a jury. Their conclusion was that admonitions were generally ineffective and bifurcation was relatively more effective. Smith, A.C., Green, E., *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, Law and Human Behavior, 29, 505-526.

Some have suggested that counterfactual thinking should be used repeatedly with a jury, giving them ample opportunity to explore how counterfactual thinking can eliminate or soften the effects of hindsight bias. Broda-Bahm, K., *Your Counterfactual Strategy: How You Influence Juror's Thoughts About What Might Have Been*, Manuscript, 1-6. Others have suggested that one should be careful using computer animations versus text plus a diagram, since computer animations may enhance the presence of hindsight bias. Roese, N.J., et al., *The Propensity Effect: When Foresight Trumps Hindsight*, Psychological Science, 17, 305-310.

Juxtaposed with these studies, at least one well regarded researcher in this field has found the legal system does a fairly good job of mitigating the effects of hindsight bias and suggests that "the law might have figured it all out on its own." Rachlinski, Jeffrey J., *A Positive Psychological Theory of Judging and Hindsight*, 65 U. Chi. L. Rev. 2, 571-625 (1998). Rachlinski concludes that all the evidence suggests that this bias has an important effect on judgments of liability in the legal system, but a careful analysis suggests the legal system already incorporates an understanding of the bias' implications. Whether or not all trial lawyers would agree with this conclusion is subject to doubt.

There are at least a baker's dozen of ways in which hindsight bias could be debunked:

1. Bifurcation
2. Effective deposition cross-examination
3. Motion for summary judgment
4. Trial Brief on Hindsight Bias
5. Motion in Limine – Post Remedial Measure Rule
6. Motion in Limine – Regarding Post Event Expert Testimony
7. Voir Dire – Jury Selection
8. Opening Statements
9. Counterfactual Questioning
10. Limiting Instruction on Testimony
11. Expert Testimony on Hindsight Bias
12. Closing Arguments
13. Jury Instructions



Convincing judges that hindsight bias exists, and can and should be dealt with is a tall order. Not all of these debunking strategies will work in all cases. Counsel and their experts should be open to any and all of these techniques. Evaluating a driver's conduct in an "accidental" event against the "reasonable person" standard should be based on foresight analysis, not "with the wisdom born of the event."

CRIMINAL CONVICTIONS...

Continued from page 6

deposition. If the witness denies a prior criminal history and one is later uncovered, the trial attorney is in the advantageous position of not only addressing the criminal conviction with the witness at trial, but exposing their prior testimony denying a history to the Court and the jury. Separately, if they admit to a criminal conviction, the circumstances surrounding that crime still can be researched prior to trial and used to impeach the witness's character. It must be noted, however, that a witness cannot be asked about "arrests" or "indictments," because these are accusations of guilt and not findings of guilt. *See Dance v. Town of Southampton*, 95 A.D.2d 442, 467 N.Y.S.2d 203 (2d Dept. 1983); *see also Hirschman v. Cohn*, 38 A.D. 351, 56 N.Y.S.2d 602 (1st Dept 1899), *Zara Contracting Co. v. State*, 42 Misc.2d 737, 249 N.Y.S.2d 337 (1964).

We note, however, that this technique can be used against your client and/or witness in the same manner as it is used against an adverse party. As a result, it is imperative to question every client and every adverse witness about any prior criminal history. It is better to know when preparing them for their deposition, than to be caught by surprise at a deposition or at a trial.

In the event that one is producing an individual with a criminal record, attempt to minimize the damage by attempting to have the individual either explain the circumstances, assert his continued innocence, or admit it was a mistake but testify that he has changed his ways. *See Schindler v. Royal Ins.*, 258 N.Y. 310, 179 N.e.711 (1932); *see also People v. Tait*, 234 A.D. 433, 255 N.Y.S.2d 455 (1st Dept.). While these techniques won't erase the past altogether, they can, in the proper circumstances, redeem the witness to some degree.

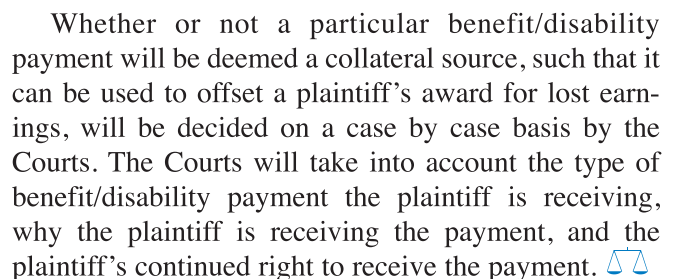
PERSONAL INJURY...

Continued from page 4

entitled to the continued receipt of the payments. *See Terranova v. New York City Transit Auth*.[11] If a defendant can establish both prongs then the collateral source payments in question may be used to reduce a jury award or at least be used as leverage for better positioning in settlement negotiations. The Courts have been willing to reduce a plaintiff's award for lost earnings by the amount of the disability payments in question, where it is evident that the plaintiff is only receiving said disability benefit as a result of their injury. In other words, where a plaintiff is receiving the benefit early or where a plaintiff is receiving the disability pension in addition to their ordinary pension, the Court may reduce that plaintiff's award for lost earnings by the amount of those payments.

The Courts have been fairly consistent regarding whether Social Security disability benefits will serve as a collateral source set-off. Several Courts have held that as long as the defendant can show the plaintiff's continued eligibility to the Social Security disability benefits in question, said benefit will offset and reduce the plaintiff's award for lost earnings. [12]

A more case by case analysis is used by the Courts in determining whether or not disability pension benefits will act as a collateral source set-off. It appears that the Courts have utilized a "but-for" test in making their determination as to whether the disability pension benefit can reduce plaintiff's award. For example, it was determined in *Terranova* that, but for the plaintiff's accident, he would not have been entitled to any pension benefits for another ten years, which demonstrated the necessary correspondence between the pension benefits and the award for lost earnings. [13] The defendant in *Terranova* was then able to prove that the plaintiff had a legal right to continue receiving the disability benefit by eliciting testimony that the plaintiff had not sought comparable employment and would not be able to engage in physical labor in the future due to his injury. [14]



Whether or not a particular benefit/disability payment will be deemed a collateral source, such that it can be used to offset a plaintiff's award for lost earnings, will be decided on a case by case basis by the Courts. The Courts will take into account the type of benefit/disability payment the plaintiff is receiving, why the plaintiff is receiving the payment, and the plaintiff's continued right to receive the payment.

Please feel free to contact Lee E. Berger at lberger@kbrlaw.com, Rocco P. Matra at rmatra@kbrlaw.com or Mark L. Mascolo at mmascolo@kbrlaw.com if you would like further information on this issue or to discuss the evolving law in this area. Please also visit our website at www.kbrlaw.com

[11] *Terranova v. New York City Transit Auth*., 49 A.D.3d 10, 850 N.Y.S.2d 123 (2d Dep't. 2007).

[12] *Caruso v. Russell P. LeFrois Builders, Inc*., 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dep't. 1995); *Manfredi v. Preston*, 246 A.D.2d 580, 667 N.Y.S.2d 288 (2d Dep't. 1998).

[13] *Terranova*, *supra*.

[14] *Id*.

INTERMODAL...

Continued from page 5

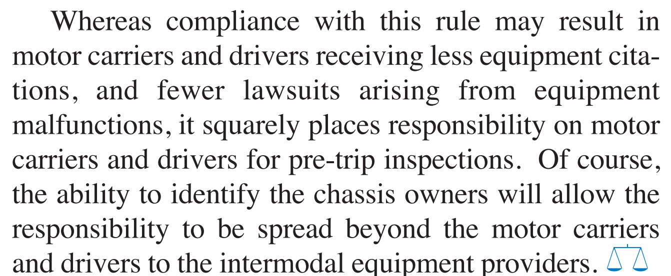
The obligations of drivers and motor carriers have also been codified, and they must do the following:

> Before operating IME over the road, the driver accepting the equipment must inspect the equipment components listed in § 392.7(b) and be satisfied that they are in good working order.
>
> A driver or motor carrier transporting IME must report to the IEP, or its designated agent, any known damage, defects, or deficiencies in the IME at the time the equipment is returned to the IEP or its designated agent.
>
> If no damage, defects, or deficiencies are discovered by the driver, the report shall so indicate. The report must include, at a minimum, the items in § 396.11(a) (2).

The IEPs will be subject to on-site reviews by the FMCSA to ensure compliance with the new rules. Penalties for violating these rules range from civil fines to a prohibition on providing or operating intermodal equipment found to pose an imminent hazard.

C. Conclusion

Whereas compliance with this rule may result in motor carriers and drivers receiving less equipment citations, and fewer lawsuits arising from equipment malfunctions, it squarely places responsibility on motor carriers and drivers for pre-trip inspections. Of course, the ability to identify the chassis owners will allow the responsibility to be spread beyond the motor carriers and drivers to the intermodal equipment providers.



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EDR's are installed in commercial trucks as well as personal automobiles. Accident investigators now routinely use information from EDR's to determine the causes and events surrounding an accident. Moreover, the same information is often sought by attorneys representing motor carriers to show that their driver was not at fault in an accident. While EDR's are a useful and effective device, many issues have arisen with respect to privacy interests, and whether EDR data can be admitted into evidence at trial.

EDR's IN PASSENGER MOTOR VEHICLES

The federal government does not currently require manufacturers to install EDR's in motor vehicles,[3] but NTHSA will require all passenger vehicles (8,500 pounds or less) that do have an EDR to meet certain guidelines after September 1, 2012. 49 C.F.R. § 563.3 (2009). However, as of May 2009, there are hundreds of different makes and models of personal automobiles that have EDR's installed. Generally speaking, if a car has an airbag system, it will record some type of information. It is estimated that 65 percent of automobiles being built today have some type of EDR capability (although there may not be commercially available equipment to download the data). For the most part, passenger automobiles beginning with Model Year 2002 have some type of recording capability.

There are three events that may trigger the recording of data: (1) air bag deployment, (2) a "deployment level" event, and (3) a "non-deployment" event. When an air bag deployment collision occurs, the data is recorded onto a computer chip, which can be retrieved and presented in a report. A "deployment level" event relates to impacts that are not severe enough to cause a deployment of air bags. Although the airbag does not deploy during these impacts, information is nonetheless recorded. This usually occurs when the driver is out of position before deployment. "Non-deployment" events refer to the data that can be recorded during rollovers, sideswipes, and side impact accidents.[4]

Privacy Issues

One of the most important steps one must take at an accident scene is making sure the EDR is preserved. It is much more advantageous not to move the vehicle after an accident until the EDR has been collected and stored for examination. This act alone presents a problem in many states because the owner of the vehicle or the vehicle owner's attorney are the only persons who can give consent to remove the EDR module from the vehicle or access the data contained in the module. In criminal investigations, a search warrant or the vehicle owner's consent may be required absent a determination by legal counsel that a search authorization is not necessary given the circumstances.[5] The NHTSA is of the position that the owner of the subject vehicle owns the data from the EDR. This implies that

[3] National Highway Traffic Safety Administration http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Rulemaking/.../EDR_QAs_11Aug2006.pdf.

[4] Heavy Vehicle EDR's (2007) http://www.heavytruckedr.org/what-is-an-edr.html.

[5] Harris Technical Services (2004) http://www.harristechnical.com/cdr2.htm.

the owner may withhold the data or erase it. The data can be obtained by court order or subpoena, but that is not a quick process and the information may be erased by the time the subpoena is issued.[6]

Consumers feel very strongly about protecting their privacy rights with respect to EDR's. In fact, a group of consumers filed a class action lawsuit in New Jersey alleging that personal information was being gathered via EDR's without the vehicle owners' knowledge or consent. However, in *Valan v. General Motors Corp*., No. L7990-00 (N.J. Super. Ct. Law Div. 2001), the court dismissed the complaint and held that there can be no expectation of privacy for information recorded that is readily observable.

Many states have enacted laws which require that the presence of the EDR in a vehicle be disclosed to the consumer and/or prohibit the removal of data from EDR's from persons other than the owner of the vehicle, unless the owner gives consent. The first state to pass a law addressing this issue was California (2004). The California law requires this information to be disclosed to the consumer by the manufacturer through the owner's manual. Many other states have followed California's trend. (See state statutes for AR, CA, CO, CT, ME, NH, NY, NV, ND, OR, TX and VA).

As a precautionary measure, a technician should be familiar with any applicable state and local laws before proceeding to retrieve a module, or accessing or releasing an EDR data file.

Proposed Federal Legislation

The National Motorist Association proposed the Black Box Bill, H.R. 1015, 110th Cong. (2007) designed to protect motorists against misuse of black box information. The bill is sponsored by Congressman Michael Capuano (D-MA). It was introduced on February 13, 2007 and referred to the subcommittee on Commerce, Trade, and Consumer Protection. The bill considers the EDR and data obtained from the EDR to be property of the vehicle owner. Retrieval of such data by a third party is unlawful unless the owner consents, it is by court order, it is necessary for servicing the vehicle, or it will further motor vehicle safety research. The bill requires any new vehicle containing an EDR sold in the U.S. after 2009 to allow vehicle owners to disable the EDR. It also requires automobile dealers to inform consumers about EDR's in new vehicles at the time of purchase and automobile manufacturers to include this information in the owner's manual. Though there have been no actions regarding this bill since its introduction, the sponsor intends to reintroduce it later this year.

EDR's IN COMMERCIAL TRUCKS

EDR's used in commercial trucks are more sophisticated than those in passenger vehicles. EDR's in commercial trucks normally perform the following tasks:

- Monitor engine functions, tire pressure, truck speed
- Monitor driver functions such as hours worked and the times and places the truck is at rest.
- Hard stops
- RPM's
- Truck monthly activities
- Whether the truck was being misused

However, the type of data that may be available in a commercial truck EDR is dependent upon four factors:[7]

- Brand of engine
- Type of engine control module (ECM)
- Dependent on the year model of the engine and ECM/EDR
- Settings the end-user has (or has not) selected
- Specifics of the crash in question

Not all types of accidents can be expected to trigger data recording. Some accidents can be so severe that the ECM is destroyed.

The most common EDR's in commercial trucks are part of the truck's Engine Control Module (ECM). Other EDR's may be part of a safety feature, such as a collision avoidance, brake or rollover protection system.[8]

Downloading data from commercial trucks requires the services of someone with specialized training. If the individual retrieving the data from the EDR does not follow the necessary protocols, important data may be erased or overlooked.[9] The services of a certified mechanic or technician to download EDR data adds to the authentication of data and makes it less susceptible to evidentiary challenges.

ADMISSIBILITY OF EDR DATA IN COURT

EDR data can be used as an interpretive tool to aid in the presentation of the case. The data must be

Continued on page 16

6 Lemle Rozelsky, *Using Technology as a Weapon to Defend Trucking Claims,* Trucking Law, March 2006, at 35.

7 Heavy Vehicle EDR's (2007) http://www.heavytruckedr.org/information-in-edr.html.

8 Heavy Vehicle EDR's (2007) http://www.heavytruckedr.org/getting-data.html.

9 Heavy Vehicle EDR's (2007) http://www.heavytruckedr.org/retrieving-edr-data.html.

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BLACK BOX...

Continued from page 14

introduced via the testimony of an expert witness, someone who is allowed to interpret and opine.

Cases Regarding Admissibility in Courts

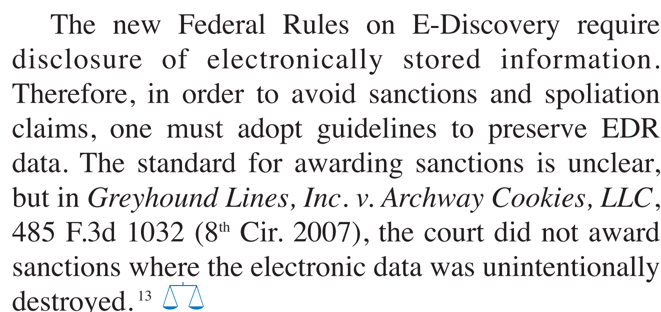
With utility comes litigation, and parties on both sides of the "v" have a stake in whether or not this information makes its way into the record. As the existing research informs, the actual data downloaded from the EDR is of such technical complexity that courts require an expert opinion as the method of introducing the evidence into the record.[10] This requirement implicates the federal standards regarding expert testimony under *Frye* and *Daubert*.[11]

A recent case detailing the admissibility of EDR data is *Commonwealth v. Zimmerman*, 873 N.E.2d 1215 (Mass. App. Ct. 2007). In *Zimmerman*, the defendant appealed the denial of her motion in limine to exclude EDR evidence as unreliable and inaccurate. The judge held extensive hearings on the reliability of the EDR data, and through the opinion of the Commonwealth's expert determined that such data was generally accepted in the scientific community. The Appeals Court of Massachusetts followed state precedent adopting the reasoning of *Daubert*, and held that a plaintiff seeking to introduce expert testimony in the form of EDR interpretation may lay a foundation by showing that the theory underlying the testimony is "generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means." The court held that admission of the EDR data was not an abuse of discretion and went on to say: "Although as yet there are not many decisions on the admissibility of EDR data, most seem to support admission."

In *People v. Muscarnera*, 842 N.Y.S.2d 241 (N.Y. Dist. Ct. 2007), the defendant moved to suppress data obtained from the Powertrain Control Module (PCM) on the basis that such evidence is scientifically unreliable, and in the alternative, requested a *Frye* hearing. The appellate court ultimately held that a *Frye* hearing was necessary before the PCM data could be admitted. The appellate court stated that the test for admissibility of "black box" expert testimony is the general acceptance test under *Frye*, and not the newer *Daubert* standard. The court went on to state that trial courts in New York have held that data from "Sensing Diagnostic Modules" (SDM) seized from a defendant's automobile are reliable, and do not require a *Frye* hearing on such evidence. The court held, however, that the lack of appellate ruling on admissibility disallowed the admission of such evidence without a *Frye* hearing. The court also stated that the device at issue was a Powertrain Control Module, not a Sensing Diagnostic Module, and the court was uncertain if the two were like devices.

In *Matos v. State*, 899 So. 2d 403 (Fla. Dist. Ct. App. 2005), the defendant appealed his manslaughter conviction, putting at issue the admissibility of the State's experts. The trial court held a *Frye* hearing, and the State's two experts gave ample testimony that EDR technology is generally accepted, thus satisfying the requirements for admission under *Frye*. The appellate court reviewed the *Frye* analysis *de novo*, and concluded that "recording and downloading [EDR] data is not a novel technique or method" and that the State had proved that EDR data is "generally accepted in the relevant scientific field, warranting its introduction."[12]

New Federal Rules on E-Discovery; Spoliation:



The new Federal Rules on E-Discovery require disclosure of electronically stored information. Therefore, in order to avoid sanctions and spoliation claims, one must adopt guidelines to preserve EDR data. The standard for awarding sanctions is unclear, but in *Greyhound Lines, Inc. v. Archway Cookies, LLC*, 485 F.3d 1032 (8th Cir. 2007), the court did not award sanctions where the electronic data was unintentionally destroyed.[13]

[10] Lemle Rozelsky, *Using Technology as a Weapon to Defend Trucking Claims,* Trucking Law, March 2006, at 35.

[11] However, surviving an expert challenge does not prevent further challenges to the validity of the data presented on other grounds, such as chain of custody issues. Harris Technical Services EDR Protocol (December 2005) http://www.harristechnical.com/cdr2.htm. That is why it is so important to establish a chain of custody for the EDR data as soon as it is known that the data has evidentiary value.

[12] *See, e.g. Harris v. Gen. Motors Corp.,* 201 F.3d 800 (6th Cir. 2000); *Perez v. Hyundai Motor Co.,* 440 F. Supp. 2d 57 (D. Puerto Rico 2006); *Bachman v. Gen. Motors Corp.,* 776 N.E.2d 262 (Ill. App. Ct. 2002); *Batiste v. Gen. Motor Corp.,* 802 So.2d 686 (La. Ct. App. 2001).

[13] Kenneth P. Abbarno, *Changing the Faces of Trucking Litigation,* For the Defense, January 2008, at 36.

2009-2010 TIPS CALENDAR

July/August

July 30-August 4

	ABA Annual Meeting Contact: Felisha A. Stewart – 312/988-5672 Speaker Contact: Donald Quarles - 312/988-5708	**Marriott Hotel** **Chicago, IL**

October

6-11	**TIPS Section Fall Meeting** Contact: Felisha A. Stewart – 312/988-5672	**Hotel Del Coronado** **San Diego, CA**
22-23	**Aviation and Space Law Litigation** Contact: Donald Quarles – 312/988-5708	**Ritz Carlton Hotel** **Washington, DC**
28-30	**FSLC Fall Program** Contact: Donald Quarles – 312/988-5708	**Four Seasons Hotel** **Philadelphia, PA**

November

5-6	**Premises Liability National Program** Contact: Debra Dotson – 312/988-5597	**Loews Don Cesar Beach & Resort** **St. Pete Beach, FL**

2010

January

14-17	**Annual TIPS Midwinter Symposium on Insurance, Employment and Benefits** Contact: Debra D. Dotson – 312/988-5597	**Hyatt Regency Coconut Point Resort and Spa** **Bonita Springs, FL**
26-30	**FSLC Midwinter Meeting** Contact: Felisha A. Stewart – 312/988-5672	**Westin St. Francis Hotel** **San Francisco, CA**

February

3-9	**ABA Midyear Meeting** Contact: Felisha A. Stewart – 312/988-5672	**TBD** **Orlando, FL**