WARNING TRIANGLES, FREIGHT LINES, AND BLIND CURVES

Uncovering the Asymmetry of FMCSR § 392.22 Interpretive Case Law

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To truck drivers, risk mitigators, and transportation litigators, 49 CFR § 392.22 (§ 392.22) provides a framework for commercial stops on shoulders and highways, including requiring a driver to set out emergency warning devices such as reflective triangles. But, figuring out how § 392.22 applies to a specific stopped vehicle under certain circumstances can be a bumpy ride, especially in light of the asymmetric applications of the Federal Motor Carrier Safety Regulations (FMCSRs) throughout the country. Interpretations vary state by state, but some broad themes can be extracted to help if you're stranded.

NEGLIGENCE *PER SE*

Regulations can sometimes be utilized to make a plaintiff's case easier by forming the basis of a negligence *per se* claim. When plaintiffs are permitted to rely on a regulation in this way, it sets the standard of care, and a violation of that regulation will automatically prove a breach of that stan-

dard rather than merely providing evidence of claimed breach of the standard. This can create a major obstacle to defending FMCSR cases. While several jurisdictions allow negligence *per se* claims premised on the FMCSRs–and some have explicitly allowed such claims based on §392.22–other jurisdictions have disallowed FMCSR-based negligence *per se* claims for various reasons.

Some states do not recognize claims for negligence *per se* at all, allowing evidence of relevant statutes/regulations to serve only as evidence of general negligence or of an expanded duty of care. Other states allow only statutes, not regulations, to serve as the basis for such claims. Still other jurisdictions allow negligence *per se* claims for violations of state law only, except where there is evidence that the jurisdiction has adopted the specific rule.

More novelly, some defendants have successfully argued that certain FMCSRs should not serve as the basis of negligence *per se* claims because they are not intended to protect the safety of the public (and, therefore, the relevant class of plaintiffs). While older case law concluded the FMCSRs are broadly directed at public safety, more recent case law indicates that this determination should be made on a case-by-case basis—considering the state's rules surrounding negligence *per se* claims and the FMCSR section at issue.

Most jurisdictions have not explicitly decided whether §392.22 can serve as the basis of a negligence *per se* claim, leaving room for numerous potential arguments in opposition. So, when a plaintiff alleges a violation of §392.22, don't assume the case is a total loss. Instead, evaluate potential arguments against the application of negligence *per se* based on state-specific rules prescribing which regulations are eligible or allowing regulations to serve as evidence of negligence only, or the non-safety focus of the specific regulation.

DEFENDANT DRIVER COLLISION

The majority of cases appear to interpret FMCSR § 392.22's requirements as absolute. When courts have considered potential excuses, a driver's incapacity due to an accident of his own is not usually found to be a defense. Courts have found drivers responsible for violations after becoming incapacitated in a wide range of situations - from accidents involving striking a moose to those resulting in a truck being turned on its side, and even where a driver fled the scene out of fear shortly before a fire broke out.[1] However, courts do not appear to have fully considered whether a driver's own accident would qualify as a "necessary traffic stop"– often overlooked language in § 392.22 and a phrase that has been the subject of much recent litigation.

DEFINING "NECESSARY TRAFFIC STOP"

§ 392.22's inclusion of the phrase "necessary traffic stop" provides another potential loophole in defending claims under this regulation. There is no definition of this phrase in the Regulation itself, and defendants in several jurisdictions have successfully argued that the phrase precludes a finding of a violation when the truck at issue was stopped in traffic due to a separate accident. The Supreme Court of Alaska went further, stating that necessary traffic stops include, at minimum, "exigencies involving other vehicles, law enforcement, animals crossing the road, and other similarly required stops." Even broader, the Alaska Supreme Court concluded that the phrase is "likely susceptible of differing interpretations" and thus obscure. Therefore, they reasoned, a driver is not liable under the regulation so long as the driver takes "reasonable care" to obey it—setting out warning devices if the stop was not necessary, based on a reasonable understanding of that phrase.[2]

In cases involving alleged violations of § 392.22, consider an argument that the stop was necessary. Did exigencies involving other vehicles, law enforcement, or animals cause the stop? Alternatively, may the driver have believed the stop was necessary under the regulations? If so, consider arguing that the phrase is obscure and susceptible to multiple interpretations and that it would be improper to assert liability based on it.

SUFFICIENT ALTERNATIVE ACTIONS

Courts generally interpret the requirements of §392.22 strictly, accepting few, if any, excuses for a driver's failure to comply exactly with the provisions therein. However, sufficient alternative actions can still majorly affect the outcomes of cases involving §392.22, specifically via an argument that the failure to comply was not the proximate cause of the collision because drivers' alternative actions provided equal or better warning than strict compliance with the regulation. Some alternative actions that have been found sufficient include placing warning triangles at improper distances, using incorrect reflective devices, and employing emergency hazard lights. By contrast, courts have been unwilling to rule for defendants when they found their alternative warning actions insufficient—such as "three desultory, and failing, efforts to flag down motorists" as they passed the vehicle, within "a five and one-half hour period."[3] While strict adherence to §392.22 is ideal, it may be worthwhile to equip drivers with information about alternative actions that might be sufficient—and to encourage them to take some action to warn oncoming traffic when perfect compliance is impossible.

CONCLUSION

Ultimately, many of the nuances of §392.22 interpretation vary state-by-state, and checking the local case law is always recommended. But next time you encounter a case involving a trucker's failure to set out reflective triangles or otherwise comply with §392.22, consider whether you can argue that the regulation should not be used as evidence of negligence *per se*, that the stop was necessary, or that your driver took sufficient alternative actions such that the violation was not the proximate cause of the injury. Additionally, to help minimize the effect of §392.22 violations on future cases, consider training drivers on the definitions of necessary traffic stops and alternative warnings.

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[1] *See Shaw v. Stewart's Transfer,* No. CV-09-264-B-W, 2010 WL 2943202, at *3 (D. Me. July 22, 2010); *McIntyre v. Murphy,* No. 5:17-CV-199-FL, 2019 WL 1294645, at *5 (E.D.N.C. Mar. 20, 2019); *Kimberlin v. PM Transp., Inc.,* 264 Va. 261, 268–69, 563 S.E.2d 665, 669 (2002).

[2] *HDI-Gerling Am. Ins. Co. v. Carlile Transportation Sys., Inc.,* 426 P.3d 881, 888 (Alaska 2018).

[3] *See Thurston v. Ballou,* 23 Mass. App. Ct. 737, 740–41, 505 N.E.2d 888, 890 (1987).