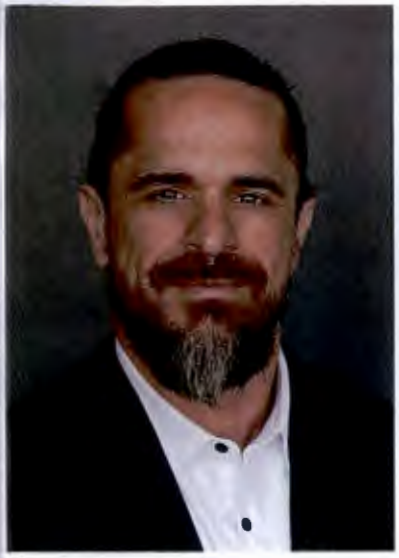

Attacking the Roadway Defect Defense in Trucking Cases

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Our firm has had the experience of litigating truck collision cases in state and federal courts throughout the United States. The stakes are high in these cases because the injuries are often catastrophic or fatal and the insurance coverage can be substantial. Because more is at stake, Defendants fight liability aggressively and rely in greater frequency on attorney-crafted defenses that blame the occurrence of a truck wreck on weather conditions and/or the conditions of the roadway instead of the conduct of the driver. This type of dangerous roadway defense often is alleged as a claim of non-party fault against a local/state DOT or a third-party claim.[1] The purpose of this article is to provide a basic framework, guidance, and strategies for how to address a dangerous roadway defense that is asserted by a trucking company.

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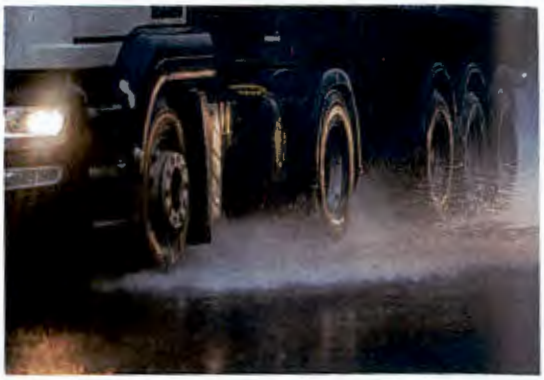
Dangerous roadway defenses and truckdriver expectancy

Before delving into strategies for combatting such a claim, it is important to define the scope and nature of a dangerous roadway defense. A dangerous roadway defense is any defense asserted by a trucking company/driver that seeks to blame the wreck on unexpected weather and/or roadway conditions. Weather conditions, such as rain, sleet, ice, and snow, go hand in hand with roadway conditions in the sense that such weather conditions can impact the surface condition of the road by causing a reduction in friction and/or loss of tire traction. These weather conditions can also cause reduced driver visibility, which further impedes a commercial driver's duty of keeping a proper lookout. Extreme weather can magnify the hazardous nature of a roadway defect or negligently maintained roadway, though drivers are trained to exercise extreme caution and adjust speed for the conditions of the roadway.[2]

Beyond weather conditions, a dangerous roadway defense can include roadway engineering and design flaws, such as inadequate

signage, lighting, lack of guard rails, traffic controls, uneven pavement, rutting and potholes, improperly maintained roadway surfaces, or violations of the Manual on Uniform Traffic Control Devices (MUTCD).



Although the scope of what can constitute a dangerous roadway defense is broad, almost all roadway defenses have one thing in common: The defense must allege the roadway condition is one that would not be expected by a reasonable truckdriver. Undeniably, roadway surface conditions and driver expectancy are inextricably linked because a driver's experience with a roadway creates expectations. When these expectations are not met, then this can lead to delayed driver reaction times, driver confusion, and increased risk of accidents.

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Ultimately, the essence of a dangerous roadway defense is that the driver's conduct was either reasonable or not causative because the roadway hazard that the driver encountered was unexpected. Accordingly, an effective strategy is to refer to the required knowledge and skill[3] of truck drivers that would require them to expect or anticipate or be on the lookout for the very hazard they encountered prior to causing the wreck. Use CDL Manual and company training materials to assert that the driver has been specifically trained to detect roadway hazards. For example, tractor-trailer drivers are taught to be on the lookout for roadway defects such as tar bleeding[4] and drivers are supposed exercise extreme caution and reduce their speed by about 1/3 of the posted speed limit when roads are slippery because the industry knows a tractor-trailer can easily break traction or hydroplane in the rain.[5] If drivers are trained to be on the lookout for such hazards, then the hazard encountered by the driver is arguably expected. Further, if extreme weather conditions are a component of the dangerous roadway defense, then rely on the CDL manual, company training, and regulations like 49 C.F.R. § 392.14 to argue that drivers are trained to anticipate and adjust their speed for extreme/unexpected weather conditions.

Should you make the local or state DOT a party?

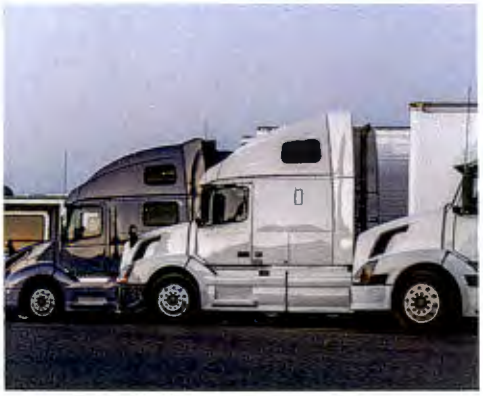
Frequently, when a trucking company asserts a dangerous roadway defense, it will also blame the local and/or state department of transportation (DOT) for the existence of the dangerous roadway condition. In many states with apportionment, the defense strategy is to allege a dangerous roadway defense in the form of a non-party fault affirmative defense, seeking the jury to apportion uncollectible damages to the DOT as a non-party. In states that do not have apportionment, the dangerous roadway defense may be asserted by the trucking company in a third-party claim against the DOT.

If no third-party claim has been filed by the defense, a plaintiff's counsel must decide whether to make the local DOT a defendant in the case. However, a plaintiff's counsel may not be able to confirm whether the trucking company intends to blame the

local and/or state DOT prior to statutorily being required to give the local and/or state DOT notice of such claim. Many states require a plaintiff to serve an "ante litem notice" within 6 months or 1 year of the subject collision.[6] This creates tension because the underlying civil action usually has a statute of limitations of 2 year,[7] and the case may not be ready to file until after the period for providing notice of a claim to the local and/or state DOT.

If the plaintiff wants to maintain the option of adding the DOT as a defendant until they have the benefit of discovery, then a common requirement is that the plaintiff must file a timely statutory notice of claim/*ante litem* to preserve the ability to add the DOT as a defendant later in the case. This must be done with great care because the statutory/*ante litem* notice will contain allegations of fault and could possibly be admitted by the trucking company in a trial to demonstrate that Plaintiff is really blaming the DOT. As a result, a plaintiff's counsel should try to err on the side of using neutral and unemotional language when drafting the notice that asserts the claim without undercutting the negligence of the trucking company. If the defendant has communicated that it will be blaming the DOT, then try to state the statutory/*ante litem* notice in terms of "Defendant claims or asserts" that the DOT created an unreasonable hazard or failed to maintain the roadway. In addition, make a note for later to file a motion in limine on the ante litem notice by arguing it is a legal requirement that will not be understood by the jury and should be excluded because there is a substantial risk of unfair prejudice that is greater than the probative value of presenting the notice to the jury.[8]

Once the option of adding the DOT has been preserved through a timely statutory/*ante litem* notice, the next step is to learn more about the nature of the claim against the DOT so that counsel can ultimately decide whether to add the DOT as a party defendant. The plaintiff's counsel will need to propound interrogatories to the trucking company about whether it is asserting non-party's fault or take a corporate representative deposition to determine the nature of the claim against the DOT. If the case is in a state where damages are apportioned between parties and non-parties, the defendant trucking company will often be required to file a formal notice of non-party fault that directly identifies why the DOT is being blamed.[9]



In either case, the decision on whether to add the DOT as a party will have to be made. This decision must be addressed with care and should be guided by several case-specific considerations. First, consider the size of the trucking company and the amount of its insurance coverage.[10] If the case is against one of the largest trucking companies in the US, then that company most likely has a tower insurance that greatly exceeds the value of the injuries alleged, and there is less incentive to add the DOT as a defendant to locate additional insurance. Second, consider the relative strength or weakness of the trucking company's claim against the DOT. If it is a weak

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claim, then consider not adding the DOT as a defendant because doing so can have the unintended effect of validating the trucking company's allegations of fault against the DOT. Third, be mindful of the resources and complexity required to make out a claim against the DOT. Most roadway defect cases require expert testimony in the form of a highway engineer or accident reconstructionist, or combination thereof. While the defense will hire experts to support these claims, a plaintiff's counsel will most likely need to hire their own experts in order to meet the burden of proving the claim against the local DOT.

If the DOT remains a non-party, it is incumbent upon the plaintiff's attorney to build a case that emphasizes the driver's and trucking company's negligence and undercuts the defense's claims against the DOT.

The fourth and arguably most important consideration is the affirmative defense of immunity. Even if there is evidence of the DOT's fault, plaintiff's counsel must determine if there is a danger that the local and/or state DOT will be shielded from paying a judgment by the defenses of sovereign immunity and/or government immunity[11] or will have the amount of its damages statutorily capped[12] or will have the benefit of the additional process associated with a state's Tort Claims Act.[13] If the DOT is likely to get out of the case on immunity grounds or the damages are substantially capped, then it does not make sense to add the DOT as a party defendant, especially if large trucking company is the target defendant. In most catastrophic cases against major motor carriers, the totality of these factors will weigh against adding the DOT as a party unless there is strong evidence against the DOT.

If the DOT remains a non-party, it is incumbent upon the plaintiff's attorney to build a case that emphasizes the driver's and trucking company's negligence and undercuts the defense's claims against the DOT. Make early contact with the law firm that handles the defense of the local/state DOT and discuss the key witnesses and documents that prove the DOT is not at fault. Prepare rebuttal experts to poke holes in or point out the flaws in the defense expert opinions. An advantage of not trying to prove the DOT's liability is that the plaintiff will not have the burden of proof and instead can hire experts to focus on rebutting and criticizing the specific methodology of how the defense expert arrived at their opinions. If, for example, a highway engineer for the defense did not take a coefficient of friction but claims the road had unsafe friction levels, the plaintiff's counsel can hire a rebuttal expert to point out that the defense expert's methodology is flawed and unreliable.

DOT Contractors

A final consideration in this section is to determine whether you want to add DOT contractors. DOT contractors often have separate insurance coverage and may or may not be shielded by the defense of immunity, depending on whether

the governmental entity directed the contractor in the injury-causing conduct.[14] Depending on the nature of the roadway defense, it may be difficult for a plaintiff to simultaneously assert a claim against a DOT contractor while maintaining the DOT did nothing to cause or contribute to the injury. Furthermore, some states recognize the acceptance doctrine that "shields contractors from liability for injuries to third parties resulting from their work at the moment the work is turned over to and accepted by the owner."[15] The same basic considerations (amount of insurance, strength of claim, etc.) apply in determining whether or not to add a DOT contractor.

Experts to hire in a dangerous roadway case

Apart from making the decision of whether to add the DOT as a party defendant, the plaintiff's counsel will most likely need to hire expert witnesses if they are working on a catastrophic injury case where the trucking company has asserted a dangerous roadway defense. The selection of experts in this scenario can be confusing because there are a myriad of different experts that you may need to hire depending on the nature of the defect. First and foremost, you will likely need to hire an accident reconstructionist whose job is to reconstruct or prove how the wreck occurred. This is the expert who principally goes to the scene of the accident, takes photos, shoots drone footage, inspects the vehicles, and downloads the black box (ACM/ECM) from the involved vehicles. You will need this expert to tell the Court and the jury how the wreck occurred.

In addition to the accident reconstructionist, 2 different types of engineering experts may be needed: Highway engineers focus on the overall planning, design, construction, and maintenance of roadways, including bridges, tunnels, and related infrastructure. For example, if the claim is the state DOT did not properly maintain the roadyway because it failed to screen the roadway's crash frequency to determine if repairs were needed, then plaintiffs counsel would want to hire a highway engineer. The second type of engineer that might be required is a pavement engineer. This type of engineer focuses on the material science of pavement and specializes in the design, preservation, and rehabilitation of the pavement surface itself, ensuring it can withstand traffic loads and environmental factors. If the trucking company claims that pavement was not properly mixed or applied to the roadway surface, then counsel should hire a pavement engineer to rebut that claim.

In addition to these experts, counsel should be mindful that other specialty experts may be required to defend against a dangerous roadway defense. A meteorologist, for example, might be hired to question the amount of precipitation in the area of the crash if water or rain is a component of the dangerous roadway defense. An expert on topography may be required if unique terrain is involved. A professional hydrologist

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can be hired to explain the drainage patterns on a roadway or the surrounding area. The key is finding the correct specialist for the opinion that is required by the facts. Avoid hiring in this area that advertise themselves as multi-disciplinary, such as an accident reconstruction that claims they are also a highway engineer. These experts tend to have more credibility problems than experts that specialize and focus on one discipline.

Conclusion

Dangerous roadway defenses in catastrophic truck accident cases are asserted with greater frequency in recent years. To combat a dangerous roadway defense, develop a response to the defense's theory by showing the driver has been trained to look for and expect the hazard. Take care in the language you use when filing a timely statutory/ante litem notice notifying the DOT about the existence of the claim. In discovery, seek information on which non-parties, including the DOT, the defense claims caused or contributed to the wreck. Weigh factors like the amount of available insurance coverage and the existence of immunity defenses in deciding on whether to add the DOT as a defendant to the case. If the DOT remains a non-party, then hire rebuttal experts to challenge the opinions of the defense experts asserting the roadway is dangerous. Hire the correct type of experts (reconstructionist, highway engineer, pavement engineer, etc.) depending on the nature of the roadway defect/hazard. Following these steps will help you not make rash or panicked decisions and maximize the value of your client's case if a dangerous roadway defense is alleged.

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Bio

Nathan Gaffney is a trial lawyer with Fried Goldberg LLC in Atlanta, Georgia, where his practice is dedicated exclusively to representing plaintiffs in catastrophic trucking litigation. For nearly a decade, he has worked alongside his partner Joe Fried, contributing to numerous seven- and eight-figure resolutions in complex commercial motor vehicle cases across the country.

Nathan has litigated cases involving a wide range of trucking industry issues, including adverse weather, stopped vehicles, and evolving technologies such as forward collision avoidance systems, AI-based cameras, and app-based independent contractor platforms. He also serves as appellate counsel in high-stakes matters, with a particular focus on preserving and defending expert testimony.

A frequent national speaker, Nathan is recognized as an authority on Daubert and the application of Federal Rule of Evidence 702, and he lectures regularly on the management of expert witnesses in complex litigation. He serves on the faculty of the Academy of Truck Accident Attorneys' (ATAA) New Trucking Lawyer's Division (NTLD) Bootcamp, where he helps train the next generation of trucking trial lawyers.

Outside the courtroom, Nathan is a dedicated father to two teenage sons and maintains an active lifestyle as a runner, weight lifter, and aspiring yogi.

[1] A dangerous roadway defense often overlaps with and/or includes the "sudden emergency doctrine" or "act of God."

[2] To the extent that rain is involved, do not forget to establish and prove in your case that commercial drivers are trained to exercise extreme caution and reduce their speed by about 1/3 of the posted speed limit. 49 C.F.R. § 392.14; Model CDL Manual § 2.6.2 (slippery surfaces).

[3] 49 C.F.R. § 383.111.

[4] Model CDL Manual § 2.14.2 (watch for tar bleed).

[5] 49 C.F.R. § 392.14; Model CDL Manual § 2.6.2 (slippery surfaces).

[6] You should never assume the period for filing an ante litem notice is the same for state and municipal entities. In Georgia, for example, a plaintiff has 6 months to serve an ante litem notice against a municipality and 1 year against the state. See O.C.G.A. § 36-33-5 (against municipalities); O.C.G.A § 50-21-26 (against the State)

[7] Apart from the statute of limitations, scheduling order that have deadlines for adding claims and defendant, particularly in federal court must also be complied with and considered by counsel to ensure the claim is preserved.

[8] Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.")

[9] See, e.g., CCP § 877.6 (California); O.C.G.A § 51-12-33 (Georgia); Rule 26 of Arizona Rules of Civil Procedure (Arizona).

[10] Note, there is no legal requirement to disclose insurance limits in discovery or otherwise in the State of Tennessee. See Thomas, Jr. v. Oldfield, 279 S.W.3d 259 (Tenn. Sup. Ct. 2009).

[11] See, e.g., Section 8521(a) of the Judicial Code, 42 Pa. C.S. § 8521(a) (Pennsylvania); Foster v. City of Council Bluffs, 456 N.W.2d 1 (Iowa 1990) (immune despite creation of dangerous condition).

[12] See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 101.023(b); O.C.G.A. § 50-21-29 (capping damages at $1,000,000 against the state).

[13] Some states require a claim against a DOT to be asserted through the state's Tort Claims Act, which is the process and circumstances under which government immunity can be waived. See Phillips v. N.C. Dep't of Transp., 200 N.C. App. 550, 560 (2009).

[14] See, e.g., Melchert v. Pro Electric Contractors, 374 Wis. 2d 439 (Supreme Ct. Wis. 2017) (finding immunity a subcontractor hired to install traffic lights by the Department of Transportation for a 2011 project).

[15] Thomaston Acquisition, LLC v. Piedmont Constr. Group, Inc., 306 Ga. 102, 104 (Ga. Supreme Ct. 2019).