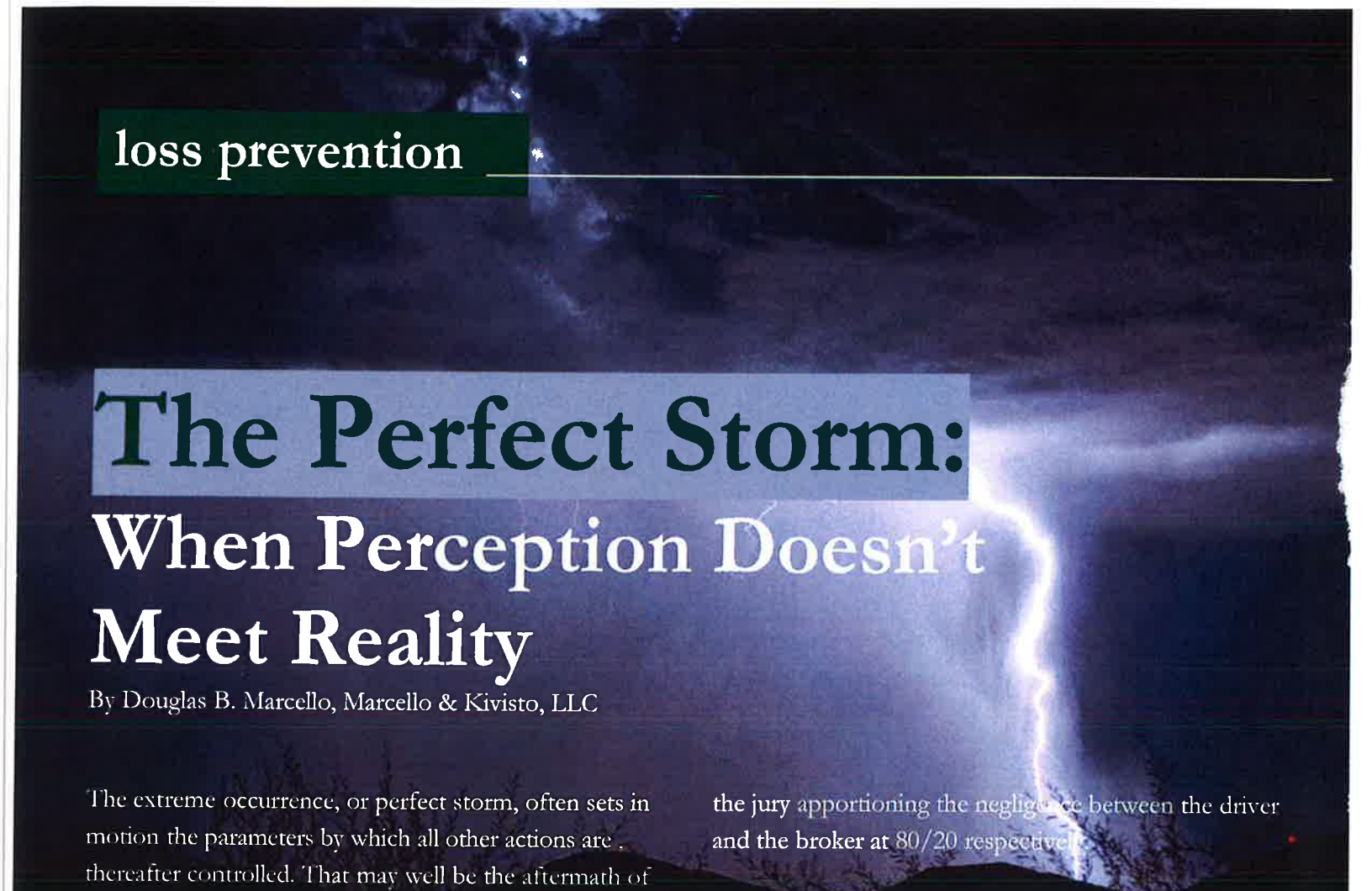

The Perfect Storm: When Perception Doesn't Meet Reality

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The extreme occurrence, or perfect storm, often sets in motion the parameters by which all other actions are thereafter controlled. That may well be the aftermath of a recent verdict against a motor carrier that brokered a load that was later involved in an accident. The multi-million dollar verdict included over a million dollars in punitive damages against the broker/carrier. The reaction to this verdict arising from a unique factual scenario could result in a significant burden to commercial carriers in the future.

The allegations in this case present an extreme factual scenario, the product of a harmonic convergence of facts rarely seen. Nevertheless, the broker community's potential reaction to the case could likely be driven by the perception of the verdict's meaning rather than the reality of the facts upon which it is based. What does all this mean? Let's start with the unique facts.

There was an accident that resulted in the death of a commercial driver who was struck by another tractor trailer. The trial resulted in a $5.2 million verdict, with the jury apportioning the negligence between the driver and the broker at 80/20 respectively.

The verdict included $1,678,000 in punitive damages against the trucking company that had brokered the ill-fated load. The allegation against the brokering carrier, as summarized in the plaintiff's brief, was that ***"the hiring fly-by-night, uninsured, unsafe, undocumented and wholly illegal truck company ... put an intoxicated and fatigued [driver] on a public roadway in a tractor-trailer that was not even legal to be on the road."*** The allegation, if true, presents the worst-case scenario of a broker's engagement of a carrier.

Yet, as we have seen in other cases, the results of a case irrespective of the extreme factual scenario may set the bar for future cases and in this case, future dealings with brokers. Extreme results often determine the stringency of the standards. Whether established by regulation or business practice, we frequently find our industry subject to substantial standards because of a unique occurrence produced by an extreme factual scenario.

Too often the specifics of such a verdict are either difficult to ascertain or wholly ignored. It is the headline rather than the detail that drive the reaction and the impact. Thus, we should be concerned that the headline, "$5.2M Verdict Levied against Broker," will result in a knee-jerk overreaction by the broker community. The concern is that the verdict will generate shock waves of fear among brokers who will now demand the highest of standards by any carrier to whom a load is brokered.

If there is a lesson to be gleaned from this case, it's a reminder that brokering of a load cannot be performed cavalierly. There must be, at the least, some level of scrutiny of the carrier by the broker in performing its due diligence. The questions is – in the wake of this case – how much more will brokers require of carriers?

A broker should at least verify the most basic of requirements, e.g., that the carrier has operating authority and has insurance. Both are readily accessible; both can be found in an online search. Similarly, some brokers are now conducting online reviews of carrier CSA scores which provide insight into the carrier's history of compliance with FMCSA regulations. The most egregious carriers can be vetted by a computer search of its CSA standing. These computer accessible resources provide a broker with confirmation of the carrier's fundamental qualifications. Having confirmed the carrier's authority, insurance and fundamental compliance with FMCSA regulations puts the broker in a better position than the brokering carrier in the case discussed above.

The concern is that the verdict in the above case will create a perception that a more thorough investigation is required of a broker or higher standards required of a carrier. To do either would be to ignore the reality of broker-carrier interaction on a daily basis.

One of the concerns is that it will ratchet up the scrutiny by brokers of the carrier CSA scores. Our industry is still adjusting to the impact of CSA. We have had to make this adjustment on the fly as the FMCSA continues to adjust and refine the program (or, in some areas, decline to make adjustments). A verdict like the one discussed above creates the risk that brokers will lower their acceptable CSA score threshold or increase their requirements as a pre-requisite for a carrier to transport their load. In doing so, brokers would be ignoring the fact that CSA is a comparison between supposedly similar carriers (depending on the BASIC) that changes on a monthly basis.

Beyond CSA, what other standards may be invoked by brokers overreacting to the verdict? The concern is that such standards may arise from the reaction or overreaction to one verdict of unique and extreme allegations. The key will be for brokers to maintain a perspective of the verdict in light of the allegations of the case. Overreaction will only be to the detriment of both broker and carrier.

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