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Dealing with the state of California's first line of defense – stonewalling any meaningful discovery

By Rahul Ravipudi

When dealing with a case against the State of California involving a dangerous condition on public property case, the first step is to serve discovery and obtain documents and information regarding the dangerous condition, including its accident history, maintenance history, notice of any dangerous conditions, and modifications of the site. This would include Traffic Collision Reports, HT-65s, SWITRS (State Wide Integrated Traffic Records System), and TASAS, (Traffic Accident Surveillance and Analysis System). Historically, when the accident history is scant, the State seems to be ready and willing to produce such information as quickly as possible. But when there is a high volume of accidents at the location at issue, a number of modifications to public property to address the high volume of accidents, or other information which would confirm actual or constructive notice of a dangerous condition, the State will do everything in its power to avoid producing documents.

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One of the popular methods used by the State to stonewall such discovery – whether written or oral – is the assertion of a purported federal privilege under 23 U.S.C. § 409. That provision states, in relevant part:

> ...reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions... for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The State will argue that Section 409 bars discovery of all evidence and documents within the State's control – other than the approved designs of the roadway at issue – because all public roads are built and maintained through some sort of federal funding. The State's assertion of any such blanket objection is inappropriate under the law.

As with any assertion of privilege, it is the moving party's duty to establish that the requirements of 23 U.S.C. § 409 are met before the discovery and admissibility provisions of Section 409 become operative. (*Department of Transportation v.*

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Superior Court (1996) 47 Cal.App.4th 852, 857 [55 Cal.Rptr.2d 2].) As explained below, the State cannot – and never will be able to – meet its burden.

We represented a 17-year-old girl in a case against the State who suffered from traumatic bilateral below-the-knee amputations when a damaged guardrail on the I-10 Freeway in Los Angeles pierced the driver's door. We sought the type of discovery referenced above and were stonewalled with a broad assertion of privilege under 23 U.S.C. § 409. The trial court rejected the State's claim of privilege, as did the Court of Appeal. It turned out that there were dozens of similar – if not identical – incidents at the same location that the State did not want to disclose. It also turned out that Caltrans employees were very aware of the significant accident history and aware of the damage to the guardrail well before the subject incident, but placed the repair on low priority. We ultimately reached a substantial settlement before trial. This article explains why the State's reliance on 23 U.S.C. § 409 is not legitimate.

The California Court of Appeal has explained that, "Since preemption is never presumed, [section] 409 must be construed restrictively to prohibit only what is expressly proscribed." (*Department of Transportation v. Superior Court* (1996) 47 Cal.App.4th 852, 857 [citations omitted.) The appropriately narrow construction of Section 409 precludes the State from meeting its burden of establishing that any of the factors of Section 409 are applicable to any of the documents at issue.

Effects of *Dept. of Transportation v. Superior Court*

Department of Transportation v. Superior Court (1996) 47 Cal.App.4th 852 involved allegations of a dangerous highway condition. According to the plaintiff's complaint, the incident giving rise to the action against the State occurred when a vehicle driven by a third party crossed over the center line and struck the plaintiff's vehicle. The plaintiffs sought the standard discovery from the State – traffic-collision reports, data from the automated databases, traffic investigation reports, project and safety reports, and traffic volume summaries. In response, the Department of Transportation – *without explanation or justification* – refused to produce any responsive documents under 23 U.S.C. § 409. The Court of Appeal determined that the Department of Transportation failed to meet its burden of proof that the documents were privileged and, therefore, compelled their production. (*Id.* at p.858.)

In analyzing the issue, the court determined that 23 U.S.C § 409 covers (1) reports, surveys, schedules, lists, or data; (2) compiled or collected; (3) for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites or hazardous roadway conditions; (4) pursuant to sections 130, 144, and 148 of this title; and (5) at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. (*Id*. at p. 857.)

The court found that the Department did not meet its burden of proving that the documents at issues were *compiled or collected for the purposes of identifying roadway hazards* and pursuant to the expressly identified federal statutes set forth in section 409. (*Id*. at p. 856-857.) As a result, the court determined that the traffic-collision reports, data from an automated database, traffic-investigation reports, project and safety reports, and traffic-volume summaries at issue were discoverable and had to be produced.

Pierce County, Wash. v. Guillen

The State has been known to try and ignore the opinion in *Department of Transportation* and to attempt to rely on the United States Supreme Court's opinion in *Pierce County, Wash. v. Guillen* (2003) 537 U.S. 129 [123 S.Ct. 720] for the proposition that any documents Caltrans collects or compiles which were generated by any other State of California agency are also privileged under section 409 – e.g. if the CHP prepares a traffic collision report and it ultimately falls into the hands of Caltrans, it is privileged. The Supreme Court's opinion in *Pierce County* does not stand for such a proposition. To the contrary, the Court reached the opposite conclusion.

In *Pierce County*, a plaintiff filed a tort action against Pierce County for negligent failure to install proper traffic controls at the intersection at which his wife was killed. In that action, the plaintiff sought access to historical accident reports and other materials and data held by county agencies, relating to the traffic intersection. The county contended that the documents collected and compiled in seeking the funding were protected under section 409. In *Pierce County*, the United States Supreme Court analyzed the scope of section 409.

The Supreme Court held that "section 409 protects all reports, surveys, schedules, lists, or data *actually compiled or collected for section 152 purposes*, but does not protect information that was originally compiled or collected for purposes unrelated to section 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point 'collected' by another agency for section 152 purposes." (*Id.* at 144, emphasis added.)

The Supreme Court stated in *Pierce County* that:

> The text of § 409 evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed. Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies. (*Id*., 537 U.S. at 146.)

It turns out that the State can never meet its burden of proof because all of the documents and information sought will predate the federal privilege. In fact, TASAS and SWITRS were created in the 1960s, well before 23 U.S.C. § 409 was enacted. The Traffic Collision Reports and protocol were also created long before the enactment of section 409. Therefore, since the information at issue was discoverable before 23 U.S.C. § 409 was enacted, it is still discoverable. (*Ibid*.)

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In other words, potential plaintiffs should not – and cannot – be worse off as a result of the enactment of 23 U.S.C. § 409. That is exactly why the California Court of Appeal rejected the State's argument in *Department of Transportation v. Superior Court*.

TASAS and SWITRS are discoverable

It is well-entrenched in case law that such data is discoverable. *Davies v. Superior Court* (1984) 36 Cal.3d 291, 301 [204 Cal.Rptr. 154] (TASAS "data is subject to discovery by a party to a lawsuit arising out of a highway accident at the location without a prior showing that a common cause contributed to the other accidents about which data is sought.)

Furthermore, it is common knowledge in dangerous-condition cases that TASAS and SWITRS data is used and relied upon in lawsuits – even by the State. (See, e.g., *Collins v. State Dept. of Transp.* (2003) 114 Cal.App.4th 859, 863 [8 Cal.Rptr.3d 132]; see also, *Mirzada v. Department of Transp.* (2003) 111 Cal.App.4th 802, 809 [4 Cal.Rptr.3d 205). In *Collins*, the plaintiff filed a lawsuit against Caltrans for injuries sustained from a dangerous condition on Interstate 5. The opinion explains that, in support of a summary judgment motion based on the assertion that it had no notice of the dangerous condition at issue Caltrans submitted a declaration of a retired Caltrans engineer who attested, based upon his review of Caltrans's accident database (TASAS) and review of deposition testimony of a California Highway Patrol (CHP) officer who searched CHP's database, that there had been no reports to the CHP... and no reports of accidents... at that location for a period of approximately nine years. (*Id*. at p 963.)

Caltrans has repeatedly produced SWITRS data in other dangerous condition lawsuits as well. (See, e.g., *Genrich v. State of California* (1988) 202 Cal.App.3d 221, 225 [248 Cal.Rptr. 303]; *McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 682 [10 Cal.Rptr.2d 344].) These authorities highlight the fact that the TASAS and SWITRS databases are discoverable and that the State's argument that they are privileged under section 409 is without merit.

Conclusion

In *Pierce County* the Supreme Court was explicit in stating that 23 U.S.C. § 409 was not meant to place plaintiffs in a worse position than before its enactment. In other words, 23 U.S.C. § 409 was not intended to – *and does not* – prevent the production of otherwise discoverable information. All of this information was available and discoverable before the enactment of Section 409 and, therefore, are still discoverable today.

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