TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Spring 2012

Commercial Transportation Litigation Committee

THE INDEPENDENT CONTRACTOR DRIVER – AN ENDANGERED SPECIES?

By: Barry S. Rothman, Esq., Michael K. Woolley, Esq. and Jennifer A. Rothman, Esq.*

Courts and administrative agencies are increasingly scrutinizing whether workers are employees or independent contractors, holding on occasion that an employment relationship exists, even when both parties intend to create and maintain an independent contractor relationship. In the trucking industry, drivers fall into one of two categories: (1) employee of an authorized motor carrier; or (2) independent contractor ("IC"), under contract with an authorized motor carrier. The distinction between employees and IC drivers is becoming increasingly blurred by courts, administrative agencies and federal and state tribunals, despite the clear intent of both the trucking company and the IC driver to define the relationship as an independent contractor, and not an employment, relationship.

How a driver is classified has significant implications under federal, state, and local laws. For example, trucking companies are not required to pay unemployment insurance taxes or workers' compensation premiums, and do not make Social Security or Medicare contributions on behalf of IC drivers. Additionally, applicability of

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Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

LETTER FROM THE CHAIR

It has been an honor to serve a second year as the chair of the Commercial Transportation Litigation Committee. The committee continues to explore all legal aspects affecting motor carriers, commercial motor vehicles and truck drivers as is evident by the fantastic articles found in this newsletter. I hope that you enjoy these articles and find them helpful in your practice. I would like to remind you that the Committee remains a forum through which lawyers and non-lawyers have an opportunity to meet, network, and exchange information and ideas on subjects of interest involving the motor transportation industry. The success of this Committee is linked to meeting the needs of our Committee members. To continue to be a relevant and vibrant Committee, we need your active involvement. We welcome your thoughts and ideas regarding any future programs, articles or issues the Committee should address, and if you are interested in a leadership role within our committee, please do not hesitate to contact me for more information on how to do so.

Chad C. Marchand
DeLashmet & Marchand, P.C.
Chair, Commercial Transportation

EMERGENCY RESPONSE TO CATASTROPHIC TRUCKING ACCIDENTS

By: C. Stuart Mauney and Robert T. Green

The old proverb "hope for the best, prepare for the worst" is certainly true when it comes to the legal defense of a catastrophic trucking accident. The initial emergency response to the accident is crucial to ensuring that a case has a solid foundation for a proper defense. This article outlines the importance of being prepared to respond to a catastrophic trucking accident, as well as a number of best practices to employ when responding.

1. Why is it important to assemble the defense team immediately after the trucking accident?

The successful defense of a catastrophic trucking accident starts at the accident scene. The team assembled at that point should be the team that will see the case through to the end. What happens in those first few hours after the accident is critical. When a major accident happens and you have been contacted, it is important to attack the accident scene and the investigation from many angles and at many levels. Investigating the scene of a truck accident is different than investigating any other type of accident. There are technical and legal issues that must be acted upon in order to preserve evidence and build a defense.

2. How can the attorney help coordinate the investigation?

The attorney essentially acts as the client's quarterback for the preparation of a thorough investigation of the accident. By having an attorney get involved immediately, the client has a better chance to protect the investigation. The following are advantages of allowing the attorney coordinate the investigation:

- A qualified transportation defense attorney who is familiar with the issues involved in a trucking case, both technically and legally, has the ability to protect the accident investigation from discovery through assertion of the attorney/client privilege and the work product doctrine.
- The attorney will likely be familiar with the laws of the state in which the accident occurred. The attorney brings an immediate familiarity and legal perspective to any investigation.
- Finally, the attorney is the last person who will

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SAVE THE DATE!

TIPS Spring Leadership and Joint Meeting with GP Solo and UIA

May 16-20, 2012

Charleston Place

Charleston, SC

The Charleston Place Hotel is located at 205 Meeting Street, Charleston, SC 29401. The special group rate being offered is $279.00 single/double per night. Hotel reservations can be made by calling the hotel directly at 843/722-4900 or toll free at 800/831-3490 and refer to the ABA Tort Trial and Insurance Practice Section Spring 2012 Meeting. The room block will be held until exhausted or until **Tuesday, April 24, 2012 5:00pm (CST)**. After that date, reservations will be confirmed based on availability.

Registration information will soon be available on the TIPS website at: www.americanbar.org/tips

WHY PRESERVE EVIDENCE AFTER A CMV ACCIDENT AND GET COUNSEL INVOLVED IMMEDIATELY? HERE'S WHY.

By: Ronald C. Wernette

"The court does not believe that a company of such substantial size and means could inadvertently make so many mistakes."

Alegria v. AAA Cooper Transportation, Inc., No. 10-CV-10597-1, Superior Court of DeKalb County, GA (Jan. 20, 2012).

"The facts and circumstances surrounding the Defendants' destruction of the truck and its tires and the Qualcomm data manifest bad faith."

Ashton v. Knight Transportation, Inc., 772 F. Supp.2d 772 (N.D. Tex. 2011)

What happened in *Alegria v. AAA Cooper Transportation, Inc.* and *Ashton v. Knight Transportation, Inc.*? These two large trucking companies each had a sophisticated internal claim handling organization and established post-accident evidence preservation SOPs. And yet, two findings of intentional spoliation of material evidence and the resultant striking of the trucking companies' pleadings and defenses to liability. The lesson? Evidence preservation mistakes can happen anywhere, not just with unsophisticated operators.

This is not a case synopsis of those decisions, although I recommend reading those opinions closely. The lengthy written opinions and orders in each case, issued after each court held full-blown evidentiary hearings (witness sworn testimony, exhibits, etc.), take great care to describe in detail the factual findings that ultimately led each court to conclude that evidence material to the accident liability issue had been intentionally destroyed after its significance was known to each company's claim handling organization, and despite explicit requests for preservation.

Rather, my purpose is to point out that those cases remind each of us involved in any capacity with investigation and defense of CMV accident claims of two important rules for success:

(1) Any lapse of vigilance in post-incident evidence collection and preservation can be costly -- perfect planning and procedures are useless without 100% execution; and

(2) Get your counsel involved right away when there is any indication of a personal injury or other significant exposure incident (i.e., large property damage, environmental spill, etc.), and certainly upon receipt of any type of preservation notice or spoliation letter.

These cases also highlight the importance of very careful handling of any presuit evidence preservation requests. When an evidence preservation dispute arises, a court will examine the record and assess the conduct of the trucking company after its receipt of a presuit evidence preservation request, with perfect 20-20 hindsight. How will you look?

The Shield: Handling Claimant's Evidence Preservation Notice / Spoliation Setup Letter

Claimant attorneys are routinely sending presuit letters directly to trucking companies following an accident. They request preservation of the involved vehicles as well as a litany of documents and electronically-stored information. The version one of my clients received recently is 10 single-spaced pages, with 53 separate types of information requested (well over 100 including subparts). It seeks to place the burden on my client

to "maintain and preserve, and to not destroy, modify, alter, repair, or change in any manner" everything that is described in the letter, which includes every computer of every employee in the company.

In response to the spoliation setup letter, a good practice may be to promptly respond, and always in writing. The response can acknowledge the scope of the company's evidence preservation duty under applicable state law and FMCSRs, while explicitly rejecting the letter's overly-broad demands and inaccurate description of the truck company's legal duties for evidence preservation.

Then repeat. I typically send a follow-up response letter at 30-day intervals thereafter until either it is clear that the claim has gone away or it goes into suit. The purpose of this practice is three-fold: (1) to minimize the likelihood of a later dispute about evidence preservation by demonstrating to claimant's counsel that my client is sophisticated about this issue and does not acquiesce to overly-broad preservation requests; (2) to demonstrate that my client does not assume a duty to preserve evidence that is any broader than the applicable law of the jurisdiction; and (3) to create a record of diligence that should be helpful in the unlikely event of a later dispute about evidence preservation.

The Sword: Trucking Company's Evidence Preservation Notice / Spoliation Setup Letter

Sometimes those of us on the "defense" side of CMV claims take it too literally. We focus only on staving off attacks and sometimes forget the "Patton Principle" (so-called for General George S. Patton, an ardent proponent): "Nobody ever defended anything successfully; there is only attack and attack and attack some more." The evidence preservation issue is one where the Patton Principle is often apropos. Instead of a focus on "defending" the potential claim, think of yourself as "attacking" the potential claim. The different mindset can make all the difference.

In addition to responding directly to the claimant's spoliation setup letter – a defensive move – a good practice is to send a carefully constructed, claim-specific, evidence preservation letter to claimant's counsel -- an attacking move. It should be sent immediately upon receipt of the claimant's notice. A claim-specific letter tailored to the specific claimant and accident facts will contrast with the generic and patently objectionable form letter typically sent by the claimant. Among other claim-specific and claimant-specific information that may be important, the preservation letter may request that claimant's attorney and claimant collect and preserve the following, all of which will typically be relevant evidence, or reasonably calculated to lead to the discovery of relevant evidence, concerning liability or damages in a motor vehicle personal injury case:

(1) Claimant's vehicle, including its components such as its EDR and GPS, in its post-accident condition (*i.e.*, no further ignition cycles, no repairs, no transfer of ownership, no disposal, no partial or complete destruction);

(2) Any electronic/communication devices owned or used by the claimant on the date of the accident (*e.g.*, phone, PDA, tablet/laptop computer, GPS), and any other relevant time period, and any electronically sent, received, or stored information from those devices;

(3) Records of claimant's computer network and social media sites (after first securing the existing content of any publicly-available sites), with instructions not to edit, alter, or remove the content of any site as it existed at the time of the accident; and

(4) Records of claimant's work activity, recreational activity, and financial activity for the period beginning 12 months before the accident date and continuing forward.

Then repeat. I typically send a follow-up preservation reminder at 30-day intervals thereafter until it is clear that the claim has gone away or it goes into suit. The purpose of this practice is three-fold: (1) to reduce the likelihood that relatively weak claims will be pursued by helping claimant's counsel conclude that there exists too much spoliation risk along with the specter of significant evidence preservation burden and expense; (2) to increase the likelihood of effectively neutralizing any evidence spoliation argument that claimant could later make against the trucking company by creating unclean hands on the part of the claimant; and (3) to create a record that will be difficult for even a plaintiff-friendly court to ignore in the event that the claim goes into suit and the plaintiff failed to preserve any of the material evidence.

Ronald C. Wernette *is a partner in Bowman and Brooke LLP's Troy, Michigan, office where he focuses his practice on trucking litigation and other personal injury defense. Ron is a member of the Trucking Industry Defense Ass'n (TIDA), Transportation Lawyers Ass'n (TLA), DRI Trucking Law Committee, and the ABA Commercial Transportation Litigation Committee, and appreciates the value of those organizations and colleagues actively involved in them*

ABA TIPS Volunteers WANTED!

Assist Charleston's Trident Literacy Association through the TIPS Children's Book Drive!

The ABA TIPS Law in Public Service Committee and GP Solo Division is organizing a children's book drive to line Trident's shelves with new and gently used books for students. Trident has specially requested children's books, magazines, reader's digests, and lower –level literature. Please bring books to the TIPS registration table during the TIPS Spring Meeting May 17th through 20th. Or if you prefer to mail them ahead, send all books to TIPS member, Vic Rawl at Trident Literacy Association c/o Vic Rawl, McNair Law Firm, 100 Calhoun St. #400, Charleston, S.C., 29401-3542. Books benefit from a lower mailing rate through the U.S. Postal Service using *Media Mail*, which is also known as "book rate." Delivery will take 2 – 8 days after posting, so please mail to Vic on or before Friday, May 4, 2012. A prize will be awarded for the TIPS General Committee who submits the most books.

Or Volunteer at the Center on May 18!

In addition, on Friday, May 18, 10 AM to Noon, Charleston practitioners and volunteers from TIPS and GP Solo will meet with adult students in break-out sessions to discuss one-on-one issues involving family law, immigration, employment, landlord-tenant and other substantive practice areas. If you are interested in participating or leading a break-out session at Trident, please contact Michelle Worrall Tilton at 913-909-9419 or michelleworralltilton@gmail.com. Disaster Relief Kits will also be provided to all participants.

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NAVIGATING THE PERILS OF E-DISCOVERY: AVOID THE BUMPS IN THE ROAD WITH A BUSINESS RECORDS MANAGEMENT PLAN

By: Eric L. Probst, Esq.

Motor carriers, no matter the size of their operations, require document-management and electronic discovery ("e-discovery") counseling. The size and lack of legal sophistication of many small to mid-size carriers complicate their ability (and the efforts of their counsel) to locate, preserve, collect and produce electronically stored information ("ESI") in the event the carrier becomes embroiled in litigation. The fact that many motor carriers do not employ in-house attorneys increases the difficulty to efficiently respond to e-discovery requests. If the carrier has an attorney on retainer, the attorney is typically not a litigator, but the corporate specialist who incorporated the company. With these hurdles already in place when a lawsuit commences, litigation counsel must act quickly to ensure their client properly satisfies their e-discovery obligations.

Background

Much has been written over the last several years about e-discovery and ESI. The topics range from document retention/destruction plans, ESI preservation, collection, production, back-up tapes, metadata, litigation hold letters, cloud computing, evidentiary issues, sanctions and the discoverability of social media. Whether sued in federal or state court, motor carriers must preserve and produce paper and electronically-stored documents. To facilitate this process, and to avoid sanctions for improper destruction of documents, motor carriers of all sizes should implement business records management plans, also called document retention plans. Once in place, the plan will assist the motor carrier's response to the threat of a lawsuit, and help it locate, collect, and ultimately produce ESI.

(a) The Document Retention Plan

The heavily regulated trucking industry demands the retention of certain documents for prescribed periods of time. Under 49 CFR § 391.51(a), "[e]ach motor carrier shall maintain a driver qualification file for each driver it employs. A driver's qualification file may be combined with his/her personnel file." The driver qualification file must be maintained for the entire time the driver is employed and for three years thereafter. 49 CFR § 391.51(c) (emphasis added). Likewise, under 49 CFR § 379 Appendix A, bills of lading and dispatching records must be retained for one and three years, respectively. Drivers' logs, critical documents to most cases involving a collision, must be kept for a period of six months from the date of receipt under 49 CFR § 395.8(k). Inspection reports and maintenance records, also important documents in tractor- trailer collision cases, must be kept under the federal regulations. 49 CFR § 396.11(a); 49 § 396.11(c)(2) ("[e]very motor carrier shall maintain the original driver vehicle inspection report, the certification of repairs and the certification of the driver's review for three months from the date the written report was prepared") (emphasis added). Further, maintenance records "shall be maintained where the vehicle is housed or maintained for a period of 1 year and for 6 months after the motor vehicle leaves the motor carrier's control." 49 CFR § 396.3. These federal regulatory document retention requirements can be overwhelming for smaller carriers. Thus, a document retention plan, which every business should implement in some form, should be created to handle the management of these business records.

> The goal of the document retention plan is to establish procedures and guidelines for storing, retaining, destroying, and ultimately producing business records, including ESI, when requested in a lawsuit. The document retention plan must outline the types of documents to be preserved, the length of retention, and when they can be destroyed. The plan should also designate an appropriate business records custodian and a *Federal Rule of Civic Procedure* 30b(6) witness who can testify if required about the motor carrier's business records retention policies and ESI capabilities. In a recent case we handled, a third-party IT consultant had the most knowledge about the client's ESI capabilities; this scenario is very common for small to mid-size businesses in all industries.

Under the regulations, documents do not have to be preserved forever. In fact, document destruction–the flipside of document retention–makes good business sense. Document storage is costly. Further, destroying

documents keeps potentially damaging documents out of the hands of future litigants, including the government. As the United States Supreme Court stated in the *Arthur Andersen* matter:

> "Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.[1]

A consistently applied document retention plan will enable the motor carrier to demonstrate that not only has it managed and maintained relevant business records to the litigation or government investigation, but also has appropriately destroyed records under an established destruction policy. The Federal Rules of Civil Procedure provide a safe harbor from sanctions for destroying documents if the documents are destroyed pursuant to a "routine, good faith operation of an electronic information system."[2] It should be noted, however, that a written or oral document retention plan will not protect a company from the destruction of documents the company reasonably should have known should have been preserved.[3]

Planning is one of the most important components of the e-discovery process and is indispensable to effective, timely and cost-efficient, business records management. The document retention policy accomplishes this and prepares the motor carrier for responding to the phone call advising that one of its tractor trailers has been involved in an accident.

(b) The Litigation Hold Letter

A critical component of a document retention policy is a "litigation hold" procedure. Once a motor carrier "reasonably anticipates" that a legal action or investigation is threatened, contemplated, or underway, the company must draft and disseminate a litigation hold letter to advise employees to preserve documents and suspend automatic deletion and document destruction practices.

The key is for the motor carrier to determine when the letter should be drafted and distributed. Documents, including ESI, must be preserved when litigation is "reasonably anticipated." For motor carriers, it is critically important to recognize that the time to issue a litigation hold letter often precedes the filing of a complaint, especially in cases involving serious injury or death, because a motorist turned plaintiff typically files a complaint months or even years (depending on the statute of limitations) after the accident.[4] Not surprisingly, the duty to preserve is often triggered when the motor carrier receives an investigation letter, notice of claim, demand letter from an attorney, the filing of an administrative proceeding, or written or oral communications that a suit will be filed. Letters from an employee's counsel regarding allegations stemming from workplace issues will also trigger the duty to issue a litigation hold letter before a lawsuit is filed.

The litigation hold letter must explain that documents have to be preserved and advise that destruction policies must be terminated immediately, especially automatic deletion procedures. The letter should identify the types of documents to preserve. Driver's logs are documents usually high on the list for preservation, especially when the company "knows or reasonably should know" that the plaintiff will seek production of the logs in discovery.[5] The company must tell its employees that documents cannot be destroyed even if the employee believes the document will adversely affect the company at trial.

The letter should be sent from a key company employee — the President, General Counsel, CEO or owner — and explain the reason for the letter, why the employee is receiving it, and that the letter should be taken seriously. The letter should identify the parties involved, the relevant dates, where the action is pending and convey the serious nature of the action and certain facts without disclosing too much information or bogging down in legalese. Every employee does not need to receive the letter. Rather, the key records custodian and those employees who possess documents relevant to the incident should receive the litigation hold communication. Finally, the letter should make clear that the failure to preserve documents could result

1 *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005).

2 Fed. R. Civ. P. 37(e).

3 *Stevenson*, 354 F.3d at 750 (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104 1112 (8th Cir. 1988) ("a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy").

4 *See Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 747-748 (8th Cir. 2004) (court sanctioned railroad company for failing to preserve voice tape recording made contemporaneous with railroad grade crossing accident because it failed to implement litigation hold measures despite knowing that litigation traditionally followed fatal crashes);

5 *Ogin v. Muhiddin*, 563 F. Supp.2d 539, 543-544 (M.D. Pa. 2008) (trucking company sanctioned for destroying driver's logs because it was on notice soon after accident that suit would be filed and driver's logs would be sought by the plaintiffs).

in severe sanctions for the company, including fines, adverse inference charges and the inability to defend itself.

> The letter must communicate that the term "document" means more than a printed out piece of paper. For litigation purposes, the definition of "document" generally includes:
>
> > any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. . . .[6]
>
> Thus, not only traditional paper documents—such as letters, memoranda, reports, brochures, and meeting minutes—are documents, but almost any kind of recorded information also falls within the definition. These include e-mails, databases, electronic logs, digital images, audio (*e.g.*, voicemail messages), video recordings, spreadsheets, presentations (*e.g.*, PowerPoint slides) training manuals, transcripts, handwritten notes, phone messages, memos, diaries, calendars, diagrams, and maps. The definition also includes word documents, TIF files, PDFs, and WAV files, to name a few. Even employees' text messages and IMs (instant messages), voicemails, and Facebook and Twitter posts, may have to be disclosed. If a driver takes accident scene photographs, or sends text messages to his driver operations manager or dispatcher about the accident, these "documents" need to be preserved for production during the suit. Likewise, the driver's employment file, log books, receipts, trip records, alcohol and drug screening test need to be preserved because they are potentially relevant to the lawsuit.

When representing e-discovery conversant clients, especially those with a legal staff, defense counsel typically have little to do in the way of educating the client about their e-discovery obligations as compared to small business clients. As in-house counsel are typically familiar with such notable e-discovery cases as *Pension Committee* and *Zubulake*, they understand that they have to implement litigation hold letters when the company knows or reasonably should know that litigation is reasonably anticipated.[7] The litigation hold letter is usually disseminated before outside counsel is retained.

Smaller companies, unfortunately, often miss this initial, critical step because they have never been sued. However, no matter the stage of the litigation at which you are retained, the client must be questioned to determine whether a litigation hold letter was disseminated. If a letter has not been sent out, counsel and the client must not make the same mistake that the plaintiffs made in *Pension Committee*. In that case, certain plaintiffs delayed too long in issuing a litigation hold letter after the matter was transferred to the Second Circuit.[8] As a result, documents were destroyed. Ultimately, the court sanctioned plaintiffs for spoliating evidence. A belated litigation hold letter is better than no litigation hold letter,[9] but avoid what delay you can in issuing the letter.

(c) Communication is Key –"You did what to the computers?"

As with any issues, communicate with your client when handling e-discovery issues. For clients without in-house counsel, the added significance of the client interview cannot be overlooked. The small to mid-size companies who lack permanent counsel need retained counsel to immediately understand and appreciate their IT capabilities. These small to mid-sized companies, like their larger brethren, will scrub clean computers used by key records custodians when those custodians leave the company to prevent new employees from accessing private information the former employee may have stored on the computer, and to remove information from the computers that the new employees do not need to perform their job duties. However, unlike more sophisticated companies, the small to mid-sized company often fails to realize that it has a duty to preserve the documents created by former employees relating to an accident, and, in the interim, potentially destroyed relevant documents.

Another question counsel needs to ask when interviewing the client is whether third-party IT consultants are involved. Many small to mid-size

6 Fed. R. Civ. P. 34(a)(1)(A)

7 *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

8 *Pension Comm.*, 685 F. Supp. 2d at 476-78.

9 *Id.*

companies use IT consultants instead of in-house IT professionals to manage their computer systems. In a recent case we handled, the motor carrier used an IT vendor to install its computers and servers, set up its network and perform periodic maintenance and system upgrades. The consultant, rather than the client, answered questions on document retention, the location of the client's ESI, and physically downloaded the ESI for the client to subsequently produce to the plaintiff.

(d) Preservation of mobile devices and social networking sites

The scope of ESI has changed dramatically over the last couple of years. Blackberries, smart phones, Twitter, Facebook, MySpace, are all sources of ESI. Smart phones store information in several ways: text messages, e-mails, instant messaging, videos, pictures, notes, and voice memos. When defending a motor carrier, counsel should investigate whether the driver, dispatcher, or operations manager used any of the devices, and, if so, whether they contain any information relevant to the accident. Further, employees may post information related to their work and on-going litigation on their personal websites. Whether this information is discoverable or not, counsel should know about it.

Conclusion

Pre-litigation business records management is essential to cost effectively handling the e-discovery process. If a motor carrier is sued in federal court, Federal Rule of Civil Procedure 26(f) requires parties to meet and discuss a discovery plan that includes the production (and protection) of ESI at least 21 days before the initial scheduling conference with the court. The time line is short for counsel to "get their ducks in a row" on the types of ESI the client possesses, where it can be found, and what the cost will be to search, review, and produce it. Likewise, state court litigants must locate, preserve, collect and produce ESI. Since most businesses are not aware of potential e-discovery obligations, retained counsel may need to take a more proactive approach than that of counsel for larger motor carriers who may be more familiar with their client's ESI capabilities and e-discovery obligations. No matter the size of the company or its familiarity with e-discovery, a document retention plan and protocol are essential to ensure proper collection, retention, and ultimately production of ESI in the event of litigation.

Eric L. Probst is principal of Porzio, Bromberg & Newman and a member of the firm's Litigation Practice Group. He practices in the areas of Complex Commercial Litigation, Trucking/Transportation, Products Liability, Consumer Fraud, Professional Liability and Construction Defect and Delay claims. He also counsels clients on e-discovery and document management issues. He is a member of the ABA.

THE INDEPENDENT...

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federal labor and employment laws, and imposition of vicarious liability for a driver's tortious acts will hinge on the question of whether the driver is an independent contractor or an employee.

There is no single test for determining drivers' IC or employee status. Different state and federal laws often focus on different aspects of the independent contractor relationship. Consequently, courts and administrative agencies have long been divided on the issue of driver classification.

The Control Test

Although the U.S. Supreme Court has counseled that "there is no shorthand formula or magic phrase" that can be applied in determining the classification of workers,[1] the degree of control that a company exerts over the worker is an important factor in the adjudication of employee-IC classification disputes.[2] Among the factors that courts have looked at when applying a "control test" are the amount of supervision exercised by the company, the company's right to direct the work, the company's right to control the details and means by which the end result of the work is accomplished,[3] and the entrepreneurial interests of the worker.

Consequences of Worker Misclassification

It has become increasingly important for companies to properly classify workers as independent contractors or employees. In the last several years, there has been a wave of agency investigations and court rulings, as well as potential class action litigation, arising out of the misclassification of workers as independent contractors, resulting in assessments of unpaid taxes, penalties and interest for workers found to be improperly classified as independent contractors. In New York, an inter-agency Joint Enforcement Task Force on Employee Misclassification was created in 2007 and has been active in investigating and prosecuting companies that misclassify workers. In 2010, the Task Force identified over 18,500 instances of worker misclassification, discovered over $314 million in unreported wages, assessed over $10.5 million in unemployment taxes, over $2 million in unpaid wages and over $800,000 in workers' compensation fines and penalties.[4] Other states, including Maine, Michigan, Massachusetts and Iowa, have created task forces to investigate employee misclassification. In Connecticut, a state law was amended to increase the civil penalty imposed on companies who improperly classify their workers as independent contractors to an amount up to $1000 *per day.* California also joined the growing list of states to increase penalties for independent contractor misclassification with a new law, enacted in October 2011, which imposes civil penalties from $5,000 to $25,000 per violation and requires companies to publicize violations on their company websites or in an area accessible to all employees and to the general public. In light of such initiatives, it is not surprising that courts and agencies may view facts less objectively than they would in the absence of such initiatives and programs.

Similar efforts to prevent and penalize worker misclassification have been made on the federal level. In 2010, both the Employee Misclassification Prevention Act and the Fair Playing Field Act were introduced before Congress. The former aimed to amend the Fair Labor Standards Act by imposing notice and record-keeping requirements on companies that use ICs, and subjecting companies who misclassify workers as non-employees to fines of up to $5000. The latter bill would eliminate the safe harbor protection in the federal tax law that allowed businesses to treat workers as ICs for employment tax purposes if the company has a reasonable basis for such treatment and has consistently treated such employees as ICs. Both bills were reintroduced in Congress in the last year, indicating that employee misclassification is still an issue of concern on the federal level. Because different jurisdictions often apply different independent contractor tests, federal legislation in certain industries, such as the trucking industry, may be a sensible approach.

The Interplay of Trucking Regulations

The trucking industry is one of the most heavily regulated industries in the country. In order to maintain its permit to operate, a motor carrier must comply with numerous statutes and regulations meant to ensure the safety of the public. If one wishes to haul freight in the United States, he or she cannot simply purchase or lease a truck, obtain customers and proceed to carry goods over the nation's highways. Cargo can only be transported in interstate commerce by an authorized

1 *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 258 (1968).

2 *N.L.R.B. v. Deaton, Inc.*, 502 F.2d 1221, 1223 (1974).

3 *Id.*

4 http://www.labor.ny.gov/ui/PDFs/2011%202011%20Misclassification%20Report%20to%20the%20Governor%20(4)%20(2).pdf Last visited April 26, 2012.

motor carrier under permit from the Department of Transportation. Pursuant to statute and regulation, a carrier is required to maintain a measure of direction and control over its vehicles and drivers for the purpose of protecting public safety. The Federal Motor Carrier Safety Regulations ("FMCSR") adopted by the Department of Transportation include comprehensive and detailed requirements for operational issues, such as driver qualifications, driver training, hours of service, inspection, repair and maintenance of vehicles, parts and accessory specifications, drug and alcohol testing, transportation of hazardous materials, record keeping, minimum financial responsibility requirements, safety and fitness procedures, and inspection, enforcement and audit procedures, among other things. Interestingly, the motor carrier is required to ensure driver compliance with the regulations, for both employee drivers and independent contractors. At the same time, the regulations direct that the motor carrier's control over independent contractors that is required by regulation is not to be taken into consideration in challenging the driver's independent contractor status.

Generally, a CDL-licensed driver can choose to either be an employee-driver of an authorized motor carrier, or an independent contractor driver. If he or she chooses to operate as a contractor, the driver enters into a contract with an authorized motor carrier. The items that must be included in such an independent contractor agreement are also highly regulated, with the regulations specifying numerous points that must be addressed in the IC agreement. An IC driver accepts both the upside potential of being an owner, including increased earnings, control over how he performs his job (other than with respect to the regulated elements), and when he chooses to work, as well as the downside risks inherent in business ownership. An employee driver, on the other hand, is usually subject to control by his employer over how and when he performs his work, among other things.

Because federal regulations require such a high degree of control on the part of the motor carrier, the question that arises is whether a driver can ever properly be classified as an independent contractor by application of the control test. This issue has come up in several labor and employment law decisions. Where the company did not require more of drivers than the regulations required, courts have generally held that the controls exercised by the motor carrier over IC drivers did not justify classification of the driver as an employee. In *National Labor Relations Board v. Associate Diamond Cabs, Inc.,* the court held that a cab company's requirement that cab drivers keep trip sheets was not "indicative of control" by the employer because it was a requirement imposed not by the employer, but by city code.[5] More specific to the trucking industry, in *Penn v. Virginia Int'l Terminals, Inc.*, the court held that an agreement that designated a truck driver as an independent contractor met all of the standards of the "highly regulated" trucking industry but none of the indicia of control exercised by the trucking company justified a conclusion that the driver was an employee.[6]

A trucking company can run into classification problems when it imposes significant additional controls over its drivers in excess of federal, state and local regulations. In *National Labor Relations Board v. Deaton*, the Fifth Circuit recognized that in interstate truck line cases, the regulations imposed by the Interstate Commerce Commission and the Department of Transportation added an "additional wrinkle" to the control test.[7] However, the court found it unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish employee status due to the existence of "additional controls" voluntarily reserved by the defendant trucking company. For example, Deaton made more thorough inquiries of its drivers than required by federal regulations and exercised significant control over the manner and means by which the drivers performed their work. Based on the company's exercise of these additional controls, the court found the drivers to be employees rather than independent contractors.

Maintaining a Satisfactory Safety Rating

Trucking companies are faced with the risk of misclassification and the accusation of exercising control over the manner and means of the work when they undertake efforts to implement safety controls that help drivers operate more safely. Trucking companies must maintain a satisfactory safety rating to stay in business. To do so, they must follow the Safety Fitness Procedures mandated by 49 CFR § 385, which provides that a "satisfactory safety rating means that a motor carrier has in place and functioning adequate safety management

5 *N.L.R.B. v. Associate Diamond Cabs, Inc.*, 702 F.2d 912 (1983).
6 *Penn v. Virginia Int'l Terminals, Inc.*, 819 F.Supp. 514 (1993).
7 *N.L.R.B. v. Deaton, Inc.*, 502 F.2d 1221, 1223 (1974).

controls to meet the safety fitness standard prescribed in Section 385.5." The federal regulations do not mandate the specific details of a motor carrier's safety policies, but instead lay out a list of factors that the Department of Transportation considers in determining a safety rating, including the adequacy of safety management controls, the frequency and severity of regulatory violations, the frequency of accidents, hazardous material incidents, accident rate per million miles, and the number and severity of violations of state safety rules, regulations, standards and orders.

A trucking company has an overall federally-mandated responsibility for the safe operation of vehicles in its fleet, whether these vehicles are leased under independent contractor agreements, or are company-owned and driven by an employee-driver. Given the broad language of the mandated Safety Fitness Procedures and the grave importance of safety management controls in the trucking industry, fact-finders should not view a company's safety requirements as indicia of supervision, direction or control over drivers.

Recommendations for the trucking industry

Existing case law indicates that compliance with governmental regulations does not evidence control by a motor carrier. Compliance with the regulations and federally-mandated control over an IC driver is not sufficient to lead a court or administrative tribunal to misclassify a driver as a company employee. Notwithstanding, trucking companies should be aware that the employee-independent contractor distinction often involves a multi-factor analysis and is ultimately fact-intensive. Trucking companies must remain vigilant to changes in applicable federal, state and local regulations in order to insure that they are not subjecting workers to any significant controls beyond those required by law. Where a certain control is exercised over workers in the interest of safety and is necessitated by compliance with the regulations and Safety Fitness Procedures, the broad language of the federal regulations and society's interest in promoting safety in the transportation industry should not be used to abrogate the clear intent of the company and driver to define an independent contractor relationship.

Both trucking companies and drivers can benefit from independent contractor status. Indeed, independent contractor status provides opportunities for many individuals to develop their own career and business – opportunities that do not exist for employees. However, the heightened scrutiny that is being applied to driver misclassification on both the state and federal levels highlights the fact that an adverse classification ruling can be costly to a trucking company. Courts and administrative agencies should, especially because of recent trends to implement initiatives regarding this issue, make concerted efforts to view facts objectively understand the impact of the federal motor carrier regulations on the independent contractor analysis. ⚖

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EMERGENCY RESPONSE...

Continued from page 3

be standing between the company and a jury. Having him coordinate the investigation with his closing argument in mind is invaluable.

3. What are the first steps to take in coordinating the accident investigation?

- Contact and obtain the assistance of a qualified local field adjuster.
- Retain an accident reconstruction expert. It also may be a good idea to retain a photographer. Get them to the scene as soon as possible.
- Allow the attorney or the adjuster to coordinate the scene investigation and the retention of the accident reconstruction expert and/or photographer.
- All instructions and communications should be directed through the assigned defense counsel.
- All experts and field adjusters should be instructed, with a letter formally retaining them, that they are being retained in anticipation of litigation.
- Some serious traffic convictions, such as vehicular homicide, are admissible in a civil court against the driver and the company. In some circumstances, it may be necessary to retain a criminal defense attorney to represent the driver.

4. How can the attorney and/or adjuster assist the driver at the scene?

- Comfort the driver. For better or worse, the driver is likely to be your "star witness" at trial. Accordingly, it is helpful to provide him with some level of comfort and support at the accident scene. This can go a long way towards instilling in the driver the proper attitude with regard to the investigation and the company, which might make a difference in whether there will be a successful defense of the case.
- Assist the driver with drug and alcohol testing.
- For better or worse, the statement of the driver becomes the most relied upon version of events because it often is made immediately following the accident. A good defense counsel will always interview the driver before taking any sort of recorded or sworn statement from the driver. This practice allows defense counsel to determine whether the driver is competent, whether the driver is on medication due to injuries from the accident or is too upset to accurately recall the accident, and to determine whether the driver's statement will be favorable.
- Obtain all documentation that is available at the scene, including the driver's logs.
- The driver should be clearly instructed not to discuss the accident facts with anyone at the scene other than a representative of the company.
- The driver should be instructed to avoid guessing or speculating in answering questions concerning the accident when talking to the police, particularly regarding the questions of time, speed, and distance of vehicle movement.
- The driver should be advised to be cooperative, helpful and respectful no matter the situation.

5. How do you communicate with the investigating officer?

- Cooperate with the investigating officer, who has an immense amount of discretion as to how the accident will be "written up." Those at the scene must cooperate with the officer and refrain from interfering with his work. Accordingly, a low key approach to interacting with the officer is always best.
- Try to record the identity of everyone with whom the investigating officer speaks. Be sure to obtain all names, addresses and telephone numbers. Even if a person did not witness the accident, that person may have information that could be useful in the investigation or the reconstruction.

6. How do you interact with occupants of the other vehicle?

- It is a good idea to check on the physical condition of the occupants of other vehicles but a discussion of the accident and facts should be avoided and no admission of liability should be made. The most important information you can obtain is the identity of third-party participants at the scene for the purpose of contacting them at a later date and interviewing them.

7. What about dealing with the media?

- If asked, you should express sympathy for the family of the injured or deceased. The adjuster and/or attorney are often the only voice of the company at the scene and it is important that you come across as sympathetic to the victims.

8. Who else will be at the scene that might provide helpful information?

- Try to obtain the name of the wrecker service and driver who transports the other vehicle from the scene. Wrecker drivers have a unique view of the accident scene, and in rare circumstances, have interesting statements made to them by the witnesses.
- If possible, obtain the identity of any emergency response personnel who responded to the scene.

9. What photographs should be taken at the scene?

- Be very careful about what you record or photograph. Do not perpetuate bad evidence. There is no need to photograph dead bodies or pools of blood on the roadway. These do not help in the defense of the case. Likewise, it is not recommended that you obtain a recorded statement from someone unless you have spoken with the person first and interviewed him or her thoroughly. If the person's statement is adverse to your interests, then there is no reason to record it. If the person is favorable, then not only is it recommended that you record it, but it may be worth obtaining an affidavit from that person.
- If you are going to take photographs, avoid using a Polaroid camera. Instead, use a digital camera so that the photographs can be reprinted or reproduced easily as well as enlarged.
- If there are newspaper photographers and/or television stations at the accident scene, learn the names of the photographers and identify the television stations. Film as well as photographs can be obtained from these sources for a fee and are often of very good quality.
- Preserve and photograph damaged vehicle parts. If you do not have an accident reconstruction expert at the scene, you need to consider preserving damaged vehicle parts which an accident reconstruction expert may be able to use.
- Photograph the motor carrier equipment identification numbers. Identify and photograph the VIN and plate numbers, as well as any other identifying insignia.

10. What is spoliation?

- Spoliation is the improper destruction of evidence. When a party fails to produce evidence within its control, the law presumes that, when produced, the evidence would operate against that party. The presumption is to ensure that a litigant's rights are not impaired by another party's improper destruction of relevant evidence. However, this spoliation presumption arises only after the party who is not in control of the evidence has introduced evidence harmful to the party who had control of the evidence.
- The most important thing to remember with regard to spoliation is that your decision pertaining to retention of any document will be reviewed by a court utilizing the benefit of hindsight. Accordingly, it is often prudent to err on the side of caution. This is especially true if the company or the insurance carrier is contacted early on by plaintiff's counsel with the request that key documents be preserved.

11. What documents should the motor carrier retain?

- The driver's logs, both for the date of the accident and for the 30 days prior to the accident. It is very common for a driver involved in a serious accident to be terminated soon thereafter. In these cases, almost universally, a driver disposes of his logs for the date of the accident and for the week prior to the accident after he is terminated, rather than turning them into the company as required by the regulations. This information is critical in any trucking case and disposal of logs should be prevented if at all possible;
- All scale tickets;
- All receipts, including toll and fuel receipts;
- All shipping papers or bills of lading;
- Any citations;
- Vehicle inspections (pre-trip, roadside, etc.);

- Dispatch or trip records;
- Maintenance records for the tractor;
- Maintenance records for the trailer;
- Driver qualification file;
- Driver personnel file;
- Driver medical file;
- Technical information available from the tractor;
- Drug/alcohol test results;
- Photographs;
- All accident file documentation; and
- Confirm whether the vehicle has an electronic control module (ECM), and download the data, if available.

2012 TIPS CALENDAR

May 2012

10-11 **Fidelity & Surety Committee Spring Meeting** **Westin Hilton Head Island Resort & Spa**
Contact: Donald Quarles – 312/988-5708
Hilton Head Island, SC

15-20 **TIPS Section Spring Leadership Joint Meeting w/ABA General Practice, Solo and Small Firm Division and Union Internationale des Avocats (UIA)** **Charleston Place Hotel Charleston, SC**
Contact: Felisha A. Stewart – 312/988-5672

17 **CLE Program: Disaster Preparedness & Response Series: Disasters Caused by Acts of Nature 2:00 – 5:30 p.m.**

August 2012

2-7 **ABA Annual Meeting** **Sheraton Chicago Hotel & Towers Chicago, IL**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles - 312/988-5708

October 2012

11-15 **TIPS Fall Leadership Meeting** **La Quinta Resort and Club La Quinta, CA**
Contact: Felisha A. Stewart – 312/988-5672

18-19 **Aviation Litigation National Program** **The Ritz-Carlton Washington, DC**
Contact: Donald Quarles - 312/988-5708

November 2012

7-9 **Fidelity & Surety Committee Fall Meeting** **Marriott Hartford Downtown Hartford, CT**
Contact: Donald Quarles - 312/988-5708

January 2013

23- 25 **Fidelity & Surety Committee Midwinter Meeting** **Waldorf-Astoria Hotel New York, NY**

February 2013

6-12 **ABA Midyear Meeting** **Hilton Anatole Dallas, TX**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles - 312/988-5708