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News on industry developments and transportation projects from the Transportation and Logistics Law Group at Dean & Fulkerson

ROAD REPORT

(INDUSTRY LEGAL NEWS)

■ **THE BUCK (PASSING) STOPS HERE** Michigan is the latest state to pass indemnification legislation protecting truckers from shipping contracts imposing on carriers all responsibility for accidents even though they may not be at fault. Public Act 480, which takes effect on March 28, 2013, is a product of MTA legislative efforts.

■ **LIMITATIONS NOT AVAILABLE TO SUBCONTRACTOR** An accident involving a carrier's truck driven by a subcontractor produced a $750,000 cargo claim. Although enforcing the carrier's $250,000 limitation of liability, the Court refused to extend that limitation to the subcontractor under the Carmack amendment, holding that, the contract was silent as to subcontractor, and thus no contractual intent to limit liability.

Royal & Sun Alliance Ins. v Int'l Management Serv. (Cir. 2, 2013)

■ **WE'VE PASSED THIS WAY BEFORE** Finding a truck company to be the reincarnation of another, the subject of numerous enforcement actions and penalties, the FMCSA put the new carrier out of service. Examining dates of key actions, commonality of ownership/officers/management, physical location of principal offices, source of equipment/drivers, and similarity in names, the FMCSA found a substantial continuity between the two truck companies.

In Re: KB Express (US DOT 2013)

■ **INSURER-INSURED PRIVILEGE IN DISCOVERY DISPUTE** A Federal Court exercising diversity jurisdiction and applying Missouri law held that post-accident statements made by defendant's safety director to defendant's liability

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **DETROIT AREA TRUCKING SEMINAR** D&F and the Michigan Trucking Association are co-sponsoring the annual Detroit Area Trucking Seminar on **June 5, 2013** at the Sheraton Detroit Metro Airport. More details to come, but in the meantime, **SAVE THE DATE!**

■ **SAFETY SYMPOSIUM** D&F presented at the MTA and Michigan Center for Truck Safety's annual Michigan Truck Exposition and Safety Symposium in late February. Janet Lanyon and Jim O'Brien's topics included Responding to Pre-Employment Inquiries regarding Safety Sensitive Employees and Independent Contractor vs. Employee Status.

■ **STAA RETALIATION CLAIM** D&F recently successfully completed defense through the OSHA investigation and ALJ review stages of a truck driver's Surface Transportation Assistance Act retaliation claim seeking both wages and punitive damages.

D&F Attorney: Neill Riddell

■ **TICKET REDUCTION** D&F negotiated three civil infraction tickets down to one violation for impeding traffic. The original infractions involved a tanker crash that closed a major expressway.

D&F Attorney: Kevin Summers

FEATURE: HAZARDOUS MATERIALS TRANSPORTATION

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Hazardous Materials Transportation: How a Carrier Can Turn into a Hazardous-Waste Generator (By Accident)

By Jim O'Brien

This is not your first time transporting hazardous materials. Safeco, your trucking company, is familiar with and follows every DOT regulation governing the transportation of hazardous material. It knows just what to do if a shipment of hazardous material is damaged, or begins to leak. 49 CFR 177.854 gives the answer. Essentially, if the hazardous material container is damaged and begins to leak in transit, the carrier can:

- Repair the package "in accordance with the best and safest practice known and available" and take it to the nearest available location for safe disposal. The repaired package must be safe for transportation; adequate to prevent contamination of other shipped materials on the truck; and clearly marked with the address of the consignee.
- Overpack the leaking container in a salvage drum that complies with 49 CFR 173.3(c), along with the spilled material, and transport it back to the shipper, or on to the original destination.
- If the leaking container cannot be made safe for transport, "it shall be stored pending proper disposition in the safest and most expeditious manner possible."

What if you choose storage pending disposition, and you decide to overpack leaking hazmat containers, but store them first until you have a truckload for efficient disposal? If you satisfy DOT regulation 177.854, have you done all you need to do?

Not necessarily. Depending on how long you store hazardous materials damaged in transit, and in what quantity, you may fall under an entirely different statutory regime governing hazardous materials: the Resource Conservation and Recovery Act ("RCRA"). RCRA covers landfills, solid waste, underground storage tanks, to name a few, and most importantly for the trucking industry – ***hazardous waste***.

Immediately when that leaking hazardous material hits the floor (or the soil or the groundwater) and can no longer be used, it is often transformed, in legal terms, into hazardous waste. And what about the sawdust or kitty litter used to soak up the liquid hazardous material? That material may become hazardous waste as well. And the nonhazardous cleaning fluids or water that mixes with the spilled hazardous materials? More hazardous waste.

<u>CAUTION</u>: the DOT definition of "hazardous material" does not precisely correspond with the RCRA definition of "hazardous waste"; several hundred pages of federal regulations are devoted to describing exactly what constitutes RCRA hazardous waste. This is not a situation where guesswork is adequate.

Depending upon how many pounds of hazardous waste are created by spills or leaking containers, a trucking company that handles hazardous materials can quite easily become subject to escalating levels of legal requirements under RCRA.

In addition to your DOT duties, RCRA imposes numerous requirements on any party that generates hazardous waste (yes, accidentally spilling hazardous materials makes you a "Generator").

Depending on the monthly weight of hazardous waste generated, you could be deemed a conditionally exempt quantity generator (less than 220 lbs), a small quantity generator (220 - 2200 lbs), or a large quantity generator (over 2200 lbs), the latter of which you do not want to be. It could only be worse if you store the waste at your site for more than 90 days. You're then a treatment, storage or disposal facility – exactly the same in the EPA's eyes as that place with barbed wire fence that causes a county-wide evacuation when it catches fire.

But, you say, it only happened once. Surely these requirements don't apply to a one-time situation. Yes, they do. You become an "episodic generator" during any month where you exceed the weight threshold, and are subject to the legal requirements for that weight class.

Obviously, there are a great many requirements imposed on the storage, handling and transportation of hazardous waste, and this article can only provide a generalized outline of those requirements. One basic point to keep in mind: when you suffer an accidental spill of hazardous materials, it's time to read up on RCRA.

ROAD REPORT

(CONTINUED)

insurance carrier were protected by an insurer-insured privilege, and denied plaintiff's motion to compel production.

<u>Crowe</u> v. <u>Booker Transp. Serv.</u> *(W.D. Mo., 2013)*

LOCAL TOW REGULATIONS ESCAPE FAAA PREEMPTION ALMOST INTACT A Court reviewing a San Francisco ordinance imposing permit, insurance and rate regulation on tow companies found that most of the ordinance fell within the "safety exception" to "rates, routes and services" preemption under the Federal Aviation Administration Authorization Act. San Francisco's attempt to regulate tow company charges on consensual tows through declaration of maximum rates was preempted, however.

<u>Cal. Tow Truck Assn</u> v <u>City & County of San Francisco</u> *(N.D. Ca., 2013)*

ON THE DOCK

(CONTINUED)

RIGHT TO WORK D&F has been increasingly counseling clients regarding the impact of recently enacted Michigan and Indiana "Right to Work" legislation on various labor issues, including withdrawal of union recognition.

D&F Attorney: Bob Cleary

RETALIATION DEFENSE D&F prevailed on a workers' compensation retaliation claim involving a national trucking company and a former employee in Illinois Circuit Court.

D&F Attorney: Ken Zatkoff

BUSINESS AS USUAL D&F routinely handles corporate matters for its transportation clients, including contract review, tax issues, updating corporate organizational documents, and succession planning in family-owned businesses.

D&F Attys: Keith Aretha & Jerry Byrd

The information contained in this newsletter is not intended to be legal advice. Readers should not act or rely on this information without consulting an attorney.