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

ROAD REPORT

■ **NO WRITING – NO CLAIM** Shippers are required to give carriers an actual written document claiming loss or damage within the nine month claim period in order to sue for freight claim damages. This requirement is not satisfied by exceptions on a delivery receipt or by a carrier's "actual knowledge" of the shipper's damage concerns.

S & H Hardware v Yellow Transportation
3rd Cir. 2005

■ **BOBTAIL COVERAGE – GAPING HOLE?** A "business pursuits" exclusion in many owner-operator bobtail insurance policies may create a major coverage gap involving off duty owner operators. Virtually any non personal use of the vehicle by the operator is a "business pursuit" according to a recent decision, meaning there is no coverage under the bobtail insurance. Either the operator is uninsured or the trucking company becomes liable for the operator's off-duty activities.

Canal Insurance v Underwriters
3rd Cir. 2006

■ **SALES REP CAN'T DUCK ARBITRATION** Provisions of the Federal Arbitration Act exempting "interstate commerce" workers do not allow office employees such as sales staff to avoid arbitration clauses in their employment contracts. Only drivers, package handlers, and their supervisors qualify for this exemption.

Lenz v Yellow Transportation, 8th Cir. 2005

■ **UPS LIABILITY CAP OK** An Illinois court has held that the basic UPS shipping

ON THE DOCK

■ **RIGHT TURN ACCIDENT** With the help of its accident reconstruction expert, D&F successfully obtained a partial summary disposition in a suit against a car hauler for paralyzing injuries to a motorcyclist who attempted to pass on the right while the car hauler was making a right turn. The court ruled that, as a matter of law, the right turn was not improper even though the car hauler had moved to the center lane to initiate the turn.

D&F Attorney: Jerry Swift

■ **WAREHOUSING BUSINESS TRANSFER** D&F is handling the termination and sale of a logistics client's interest in a warehousing joint venture serving a major manufacturing organization. Issues: Negotiating purchase agreement, terminating lease commitments, evaluating warehousing liability, reviewing warehousing purchase order and RFQ documents.

D&F Attorneys: Keith Aretha & John Bryant

■ **OVERWEIGHT FINE REDUCTION** A 36th District Court trial on a Wayne County overweight ticket resulted in a substantial reduction of a fine sought from D&F's client after argument that the County failed to properly consider the statute's 1,000 lb. "tolerance" rule's application to all weight brackets, not just the 1,001 to 2,000 lb. bracket.

D&F Attorney: Neill Riddell

■ **WITHDRAWAL LIABILITY CONTROL GROUPS** D&F is evaluating withdrawal liability issues concerning a group of corporations with varying degrees of

FEATURE:

SPOLIATION – DON'T LOSE BEFORE THE LITIGATION STARTS

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FEATURE ARTICLE

Spoliation – Don't Lose Before the Litigation Starts

By Jerry Swift and Neill Riddell

As a person managing a trucking operation, your role in truck accident or personal injury claims is limited, isn't it? You didn't drive the truck. That was your driver's job. And you don't handle the litigation, that is your lawyer's job.

So, if something goes wrong, no one can say it is your fault, right?

Well, maybe not.

There is a period between the time the truck hits the fender and the summons hits your desk when what you do (or fail to do) can significantly affect litigation results. That does not mean there is something you can do to turn bad facts into good. But, through the magic of lawyers' arguments, good facts can become suddenly bad based entirely on things you did or did not do before litigation even starts.

Say hello to "spoliation."

Spoliation is the term lawyers use to describe a party's failure to preserve and produce evidence. In almost all jurisdictions, if a court decides a party failed to preserve documents or things which could have been relevant to the resolution of disputed facts, sanctions can be imposed. The least of these is allowing the jury to assume that the missing evidence would have been adverse to the party failing to preserve and produce it. Other sanctions are even more injurious, including barring the offending party from introducing its own evidence on involved issues, or even barring certain of that party's claims and defenses.

The duty to preserve and produce evidence does not require that litigation be already started, and sanctions do not require proof of a specific intent to destroy evidence. In most jurisdictions, including Michigan, it is enough that the party knew or should have known that litigation was possible and thereafter failed, for whatever reason, to take affirmative steps to identify and preserve potentially relevant evidence.

A letter from a plaintiff's attorney investigating a claim or merely announcing retention would likely give rise to the duty to preserve evidence. Even without explicit or implicit threat of litigation, the duty may arise from simple knowledge of the accident's seriousness. Destruction or purging of records or data as part of a bona fide internal retention schedule is probably not going to be a defense. These are times and events typically predating involvement of any attorney on your behalf, meaning that the responsibility for determining whether there is a need to start identifying and preserving possibly relevant evidence falls to you.

The "spoliation" concept is not new. In one form or another it has been around at least as long as paper records and fireplaces. But technological advancements have served both to expand the categories of materials coming within the rule's requirements, as well as to increase the variety of ways which even the most careful of managers can inadvertently trip over those requirements.

In the not so distant past, materials or data that a motor carrier may have possessed relating to an accident would have been limited to the standard items created and retained in response to the DOT regulations. Records of Duty Status, such as driver logs and supporting trip tickets, toll and fuel receipts, as well as driver qualification and equipment maintenance records, would have been pretty much it.

Technology has changed this, however. In addition to traditional RODS, almost all carriers now produce, receive or have control over a flood of data in electronic format: computer data files, emails, data from satellite tracking systems, cellular system records, etc. And, today's vehicles generate a wealth of data, all of which may arguably contain evidence of discrete events at the time of an accident, including data from onboard electronic control modules, trip readers, weigh-in-motion systems, and collision avoidance and warning systems.

It is, therefore, essential for carrier management to create and implement a reliable plan of evidence preservation, triggered before litigation ever begins, and reflecting both the reality of the spoliation rule's reach and the increased complexities of today's data generation and retention systems.

(Jerry Swift is editor of the Defense Research Institute's soon to be released compendium of spoliation rules in all state and federal jurisdictions.)

ROAD REPORT

documents, backed up by tariffs and service guides, are sufficient to sustain the standard UPS $100 per package liability limit when a shipper leaves the UPS valuation box blank. (A federal court in Michigan, however, might not follow the same rule.)

Continental Casualty v UPS
N.D. Ill., 2005

■ **NO CONTRACT CARRIER CARGO INSURANCE** Even though Congress ended the distinction between common and contract carriers in 1995, federally required cargo insurance still does not apply to "contract carriers". Shippers with written contracts may not be able to rely on carriers' cargo insurance if the carrier itself cannot pay damage claims.

Fortunoff v Peerless, 2nd Cir. 2005

ON THE DOCK

common ownership. Issue: Under what circumstances would a shutdown by one corporation trigger withdrawal liability in one or more of the related corporations?

D&F Attorney: Ian Hunter

■ **FREIGHT CLAIM DEFENSE** After being denied coverage by its cargo insurer, a D&F client was sued for freight damage by a warehouse operator which had arranged for a steel movement for one of its customers. D&F is pursuing the cargo insurer, defending the damage suit, and arranging for transfer of the case to arbitration.

D&F Attorney: John Bryant

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.