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In Transit

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Leadership Notes

From the Chair

By MaryJane Dobbs

Happy Summer!!

As I write this message, the DRI Trucking Law Committee is celebrating the success of the May 2018 Trucking Law Seminar, which was held in Chicago. We had over 500 attendees and the reviews have been fabulous. Many thanks to Clint Cox (Program Chair), Terrence Graves (Program Vice Chair), and Garner Berry (Marketing Chair), who worked tirelessly on a spectacular production.

It is with great pride that I serve as chair of this committee and continually watch it flourish. The success of our group, however, is grounded on the volunteers who support the committee by writing articles, speaking at seminars and webinars, and working to push our boundaries. We are not just looking to add members. The DRI Trucking Law Committee is seeking energetic practitioners who want to be leaders in the defense of the trucking industry. Check out the DRI website and join our committee. You can also email me at mjdobbs@bressler.com or Trucking Law Committee Vice Chair Matthew Hefflefinger at mhefflefinger@heylroyster.com to get more involved.

We will be gathering again at the DRI Annual Meeting in San Francisco on October 17–21, 2018. On Friday, October 19, 2018. at 1:30 p.m.. the Trucking Law Committee will sponsor two presentations: (1) Gene Zipperle, Jr., of Ward Hocker & Thorton will provide a discussion regarding "Reptile Update 2018: How Practitioners are Defeating Reptile During Discovery and Other Pre-Trial Proceedings"; and (2) Jennifer Wood, General Counsel for Sunset Transportation, and Garner Berry of Markow Walker will discuss "Trial and Tribulations of Broker Liability in the Uncharted Waters of CSA." The Annual Meeting is a "must" and a great way to meet the people involved in the best trucking group in the country.

See you soon, and come along for the ride!!

MaryJane Dobbs is a partner in the law firm of Bressler Amery & Ross PC in Florham Park, New Jersey. She has substantial experience in handling defendant personal injury matters, including premises liability, products liability and trucking negligence actions. Ms. Dobbs has defended numerous corporations in their general personal injury cases, including a variety of transportation-related entities. She has worked extensively with expert witnesses in the medical, pharmaceutical and scientific fields. Besides transportation cases, Ms. Dobbs also specializes in employment matters including litigation and counseling. Ms. Dobbs is the Chair of the DRI Trucking Law Committee.

Feature Articles

Defense of Truth-in-Leasing Claims for Trucking Companies

By David H. Levitt

When the Seventh Circuit recently affirmed summary judgment for the defendants in *Mervyn v. Atlas Van Lines, Inc.*, 882 F.3d 680 (7th Cir. 2018) ("*Mervyn II*"), it affirmed compliance with the federal Truth-in-Leasing regulations that apply to owner-operator contracts that are often used in the trucking industry—and provided important lessons for participants in that industry.

Perhaps the most important lesson is this: a strong dispute resolution procedure, requiring that the owner-operator provide notice of a dispute about compensation within a specified period of time, can go a long way towards defeating both class certification and the claim on the merits. The owner-operator agreement at issue in *Mervyn II* included a provision that: "Financial entries made by [the trucking company] on payment documents shall be conclusively presumed correct and final if not disputed by Contractor within [a specified number] days after distribution." The provision was upheld as effective where there was no evidence that Mr. Mervyn had disputed any particular payment document within the specified time period.

In *Mervyn II*, this meant that Mr. Mervyn's individual claim was barred, which effectively ended his attempt to act as class representative.

There are other lessons for trucking companies facing such claims, as well as for trucking companies looking to firm up their compliance with the regulations so that such claims are never even brought.

The Statutory and Regulatory Background

Lawsuits like *Mervyn II* are brought under the federal Truth-in-Leasing Act and regulations promulgated under that Act. The statutory provisions, 49 U.S.C. §14704(a) and (e), create remedies for injunctive relief, damages, and attorney's fees arising from violations of the Act. The regulations, 49 C.F.R. §376.11 (requiring a written lease) and §376.12 (listing certain required terms in such leases), form the primary basis for these lawsuits. The remedies are specified in the Act, whereas the substantive bases of the claims are based in the regulations.

The primary meat of claims under the statute comes from the various subsections of §376.12. These subsections require, among other things:

- That the amount to be paid must be "clearly stated on the face of the lease or in an addendum which is attached to the lease." §376.12(d).
- That the lease clearly specify which party is responsible for certain costs and expenses, such as fuel, fuel taxes, empty mileage, permits, tolls, and the like, as well as who is responsible for loading and unloading the goods. §376.12(e).
- Where the revenue paid to the owner-operator (referred to in the regulations as the "lessor") is based on a percentage of the gross revenue for a shipment, the lessor is to receive a copy of the rated freight bill or a computer-generated document containing the same information, as well as the right to examine copies of the underlying tariff or contract provisions with the carrier's customer. §376.12(g).
- That the lease clearly specify all items that will be initially paid for by the carrier but will be deducted from the lessor's compensation, "together with a recitation as to how the amount of each item is to be calculated." §376.12(h)—a frequently asserted regulatory violation.
- That the lease specify that the lessor is not required to purchase or rent products, equipment, or services from the carrier as a condition of entering into the lease agreement. §376.12(i).
- That the lease clearly specify whether the carrier will charge back to the lessor any amounts for required insurance, as well as the conditions for any deductions for cargo or property damage. §376.12(j).
- That the lease specify any escrow requirements, and that any escrow amounts be refunded to the lessor within 45 days from the termination of the lease. §376.12(k).

Defense Strategies to Consider

Fight Class Action Allegations and Discovery

While there are any number of dangers arising from an individual claim—such as setting precedent that can be used by subsequent claimants—the largest part of the expense and exposure will most often arise from the class action allegations. Individual claims may or may not be relatively small, but facing claims from the entire fleet of owner-operators creates exponentially more at risk.

Therefore, the first effort should be to evaluate the merits of the putative class representative's individual claim. If that person does not have a valid claim, or if individual issues involving that person's own claim are significant even if the claim might otherwise have some merit, the defendant has legitimate and strong grounds for resisting or seeking to substantially limit class discovery and urging the court to consider the merits of the individual claim first.

The class action plaintiff will undoubtedly assert that Fed.R.Civ.Pro. 23(c)(1) requires that the court consider class certification as soon as practicable. But as noted by the Seventh Circuit in *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995):

> Class actions are expensive to defend. One way to try to knock one off at low cost is to seek summary judgment before the suit is certified as a class action. A decision that the claim of the named plaintiffs lacks merit ordinarily, but not invariably, [citations omitted] . . . disqualifies the named plaintiffs as proper class representatives. The effect is to moot the question whether to certify the suit as a class action unless the lawyers for the class manage to find another representative.

As to the merits of class certification, while there are cases going both ways in the district courts, Circuit Court opinions that have considered the issue have rejected class certification due to the predominance of individual issues. For example, the court in *OOIDA v. New Prime, Inc.*, 339 F.3d 1001, 1012 (8th Cir. 2003), affirmed denial of class certification because a court would have to examine each class member's operating account, including offsets, advances, and other items, so that individual issues predominated over class issues. Similarly, the court in *OOIDA v. Landstar System, Inc.*, 622 F.3d 1307, 1326–27 (11th Cir. 2010), affirmed class decertification because proof of actual damages required proof of detrimental reliance on an inaccurate or incomplete disclosure—a predominately individual issue.

Defeating class certification or, even better, convincing the court that the parties ought not even be required to brief or have discovery on the question of certification carries many benefits. Aside from the obvious issue of avoiding the expense of discovery and briefing certification—a potentially very substantial expense—success on this issue can also avoid roiling the waters of the fleet of owner-operators, most of whom will have no idea that a lawsuit is pending until they receive a class certification notice. Thus, if the defendant has a good case on the merits, successfully establishing that defense before class certification can have the laudatory effect of limiting the likelihood that other claims (equally defensible) will be asserted.

Have Good Contract Language—and Apply It Accurately and Equitably

As noted earlier, a well-written dispute resolution procedure can, by itself, result in victory on the merits as well as being a solid basis for arguing that individual issues predominate over class issues.

Even better—the defendants in *Mervyn II* provided substantial documentation to the owner-operators in connection with each shipment. This evidence supported the notion that the owner-operator had, in a timely fashion, the documentation needed to confirm whether his or her compensation had been properly determined.

Equally important, however, is to clearly spell out how compensation and charge-backs will be handled. Companies have gotten in trouble, for example, in cases such as *OOIDA v. Bulkmatic Transport Company*, 503 F.Supp.2d 961 (N.D. Ill. 2007). There, the lease provided that the owner-operator's compensation would be a specified percentage of "gross revenue." The term "gross revenue" was not defined in the lease, but the defendant calculated such revenue as only that part of the revenue attributable to the owner-operator's actual services—excluding from the calculation that part of the revenue that may have arisen from services performed by others in regard to the shipment. The court rejected the defendant's argument that such limitations were common knowledge; instead, the court accepted as reasonable the plaintiff's interpretation of the undefined term "gross revenue" as including *all* revenue on the shipment. As such, the court held that the lease violated §376.12(d) because the compensation was not "clearly stated"—at least if interpreted as suggested by the defendant.

Bulkmatic's problem could have been avoided if it had simply better defined "gross revenue" explicitly in the contract.

Moreover, once clear contract terms are in place, follow them. Failing to follow the contract strictly is a recipe for trouble. If something comes up that requires a change in the compensation structure, a new lease or addendum should be drafted and executed that makes those changes. Engaging in extra-contractual compensation structures is one of the surest ways to get sued—and to lose.

In the end, there is a reason that the Act and its regulations are called "Truth-in-Leasing." Clear *disclosure* of all the relevant terms is the goal. Where a lease is drafted with that in mind, and then the carrier actually pays or deducts as specified in the contract terms, the chances of an after-the-fact "gotcha" are substantially reduced.

Conclusion

There are many more possible issues likely to arise in Truth-in-Leasing compliance and litigation. The amounts potentially at stake, however, suggest that a comprehensive review of owner-operator agreements can be extremely beneficial to carriers.

David H. Levitt is a partner in the Chicago office of Hinshaw & Culbertson LLP. He received his J.D. in 1979, and his LL.M., with honors, in Intellectual Property in 2000. David's practice includes both transactional and litigation intellectual property work, particularly in the fields of copyright, trademark, trade secrets, right of publicity, and software licensing. He is a past chair of DRI's Intellectual Property Specialized Litigation Group (before it became a stand-alone Committee) and was Editor-in-Chief for the DRI Defense Library Series volume, Defending Intellectual Property Claims. David has also served as the Leader of Hinshaw's Intellectual Property Practice Group.

The Ship Has Come in—and Shippers Aren't Happy About It

By Garner Berry

Everyone remember the girl or guy that hit puberty before the rest of us? Yeah, I can tell you are already thinking, "What the hell is this article getting at?" But bear with me…

I remember those guys for sure. And I know you do too. I was a late bloomer around the end of eighth grade. But there was this one kid, a friend of mine actually, who was the dude that started shaving by the end of sixth grade. For years, I was not sure if he even had parents or just lived along and subsisted off of raw meat and tattoo ink. Come seventh grade, Bull was ripped and was mowing people over on the football field. Just as fast as chicken grease!!! Most of us were doing good to figure out how to put our pads on while this guy was rolling like Earl "The Cannonball" Campbell.

But time has a tendency of changing things. A few years passed and Bull was still big and athletic. But it was not quite as impressive once us late bloomers caught up with him. Come junior/senior year, I had the guy by thirty pounds and four inches.

Well, in the trucking context, the shippers are the early bloomers. But by God, the carriers have grown up and our muscles are just as big now!!

Here is the bottom line. Plaintiffs go for deep pockets these days and their theories of liability are extending to targeting brokers and shippers when a carrier has an accident that is within what I call the "trilogy" (shipper-broker-carrier).

And plaintiff's attorneys aren't the only ones catching on this to this fact. On February 2, 2018, Transport Topics published "Audit: Excessive Detention Time Contributes to Higher Crash Rate, Reduced Income." [http://www.ttnews.com/articles/audit-excessive-detention-time-contributes-higher-crash-rate-reduced-income]As reported, a new audit by the Department of Transportation estimates that truck driver detention time increases the number of fatal, injury and tow-away crashes (*i.e.* DOT "reportable"), and costs drivers and motor carriers a significant loss of income.

"Based on data from 2013, we estimated that a 15-minute increase in average dwell time—the total time spent by a truck at a facility—increases the average expected crash rate by 6.2 percent," the audit said. "In addition, we estimated that detention is associated with reductions in annual earnings of $1.1 billion to $1.3 billion for for-hire commercial motor vehicle drivers in the truckload sector. For motor carriers in that sector, we estimated that

detention reduces net income by $250.6 million to $302.9 million annually."

The audit pointed to the results of two FMCSA driver detention studies from 2007 and 2014. The 2007 research indicated that time at shipping and receiving facilities beyond that legitimately needed for cargo loading and unloading may reduce driving hours and cause income loss for commercial motor vehicle drivers. The research also indicated that drivers who experience detention may drive unsafely due to fatigue or desire to recover lost income—increasing the risk of crashes that result in fatalities, injuries and financial costs.

In 2014, the FMCSA study found that drivers experience detention at approximately one in ten stops for an average duration of 1.4 hours. Medium-size carriers experienced detention about twice as often as large carriers, and for-hire truckload carriers experienced detention more frequently than for-hire less-than-truckload and private carriers.

Traditionally: Insulated Shippers

In the "old days,, it looked like this...

Brokers and shippers have had a very limited duty of reasonable care when choosing a carrier. ATRI studies found 96.8 percent of shippers use CSA scores in determining a carrier to hire for transportation. And brokers and shippers were primarily doing this because of *Schramm v. Foster*.

Schramm and its progeny held that the duty of reasonable care of a broker/shipper selecting a carrier should include the broker/shipper checking the carrier's safety statistics using SafeStat (now CSA/SMS), and maintaining internal records of the carrier to assure the carrier is not manipulating its safety ratings.

Shippers then piggybacked off of this and started inserting heavy language in their contracts placing the onus of the burden on the carriers to pick up the tab for accidents, even in instances when the shipper was liable. But that has caught up with them as well.

To date, 43 states have passed anti-indemnification statutes preventing carriers from assuming all liability for accidents. Essentially, the majority of the country subscribes to "you break it, you buy it."

In the days of old, a shipper's end-around anti-indemnification statutes was by obtaining additional insured status. This helped insulate shippers in the event that the contractual indemnity provision of the contract was deemed unenforceable, such as under anti-indemnification provisions. However, the Insurance Services Office closed this gap with standard language to the additional insured endorsement of insurance policies and added language stating that additional insured coverage is available only "to the extent permitted by law." New standard language provides that additional insured coverage will not be broader than the contract requires and liability limits for additional insured's will be no greater than required by contract.

The New Normal: Direct Liability Against Shippers

I had the pleasure to speak to one of my clients last year on this very topic. My motor carrier hosted a customer event and asked me to speak to their customers and give them the "what-not" on why shippers are not insulated as they once were and are now in the weeds with all of us. And the best example I could come up with was this:

Let's say a driver is "fatigued" by his or her own perspective, even one still within their legal Hours of Service. He or she arrives to pick up their load but experience a two to three hour detention at the shipper's facility, which is very standard. Further, the shipper expresses the need for on-time delivery, which again is normal. Our driver still has cushion in the trip to complete it within the 14 hours of service. But let's say he or she is traveling slightly above the speed limit to be on time, maybe even just three to four miles per hour over. And then the accident happens...

The Problem

In this situation, the first thing a plaintiff's attorney will look at is control. The more involved a shipper is in communication and oversight of drivers, the greater the risk of classifying the driver as an employee. This is seen a lot in misclassification suits for hours and wages, and frankly, the same holds true for what plaintiff's attorneys are doing in accident situations holding a shipper or broker liable for a crash.

"If a driver is involved in an accident, any plaintiff's lawyer is going to go upstream as far as they can go,"..."and if a shipper euphemistically has just touched a driver, that creates the potential for liability."

Schramm did not help this in that it directed brokers and shippers to look to a system that is filled with statistical errors, is not necessarily a valid predictor of carrier safety, and does not accurately predict future crashes by a carrier. Some carriers may be new and safe, but do not have enough information available for a shipper to make

a reasonable decision on hiring under *Schramm*. Other carriers may be long-standing companies with a safe record but due to meaningless roadside violations could have multiple alerts.

If a broker or shipper fails to follow the dictates of *Schramm*, they open themselves widely to liability in their selection of a carrier.

My Solution

I have had the luxury of representing carriers, shippers and brokers in both crashes and in a general counsel role. So I have been able to be involved before the accidents happen and trying to prevent them, and responding to them and defending them after they happen. And this is what I have come up with…

Truckers tend to be loyal to their customers. However, many times, this is a one-way street. Often times, carriers have misguided loyalty to longtime shippers. Carriers need to provide excellent service and respect their customers while also using smart math for pricing and capacity allocation.

On the flip side, shippers who have been shortsighted and not relationship-oriented should take the trucking industry's positive direction as a wake-up call and become better customers. Shippers that have focused only on low rates will pay the price when demand exceeds capacity, which now seems to be the clear case.

Shippers and carriers should consider contractual provisions that adhere to the limitations of state laws and statutes, as well as the language of carrier's liability policies. Be clear on responsibilities that the carrier and shipper have. And be careful how you hold yourself out to others and define your roles. But most importantly, work together closely, particularly from a safety standpoint, and engage fair contracts, fair rates, and fair detention pay.

Conclusion

I wish I could finish with my own brilliant conclusion that would leave you all feeling like I am a genius. And I am. But some say it even better than I do….

In a May 14, 2018, Transport Topics printed, "Tables Have Turned: Shippers Now Courting Truck Drivers." The article notably stated,

> Once at the mercy of shippers, truckers now are turning the tables, thanks to surging freight demand and a shortage of drivers. Gone are the days when customers used reliability scorecards to reject some truckers and kept others waiting for hours with no place to take a break but portable canopies and grimy restrooms. Now, companies…are rushing to make drivers feel welcome. And shippers that hinder rigs from quick turnarounds or treat operators shabbily are paying a premium.

The trucking industry has about 280,000 fewer truck drivers than it needs. This has prompted shippers to go the extra mile to make sure they can get drivers when they need them, whether by sprucing up break areas or taking steps to speed truck turnaround.

So for shippers thinking that they can still pass the buck to the carrier and not have any responsibility, that ship has sailed. Instead, let's all row the boat together and be safe out there.

Garner Berry is a partner at Markow Walker law firm in Jackson, Mississippi, where he practices throughout the Southeast with an emphasis on transportation/trucking defense. Garner currently serves as the Marketing Chair for the DRI Trucking Law Committee. Over the last several years, he has devoted himself to the industry and expanded his representation to include matters involving broker liability, cargo claims, corporate structuring, insurance coverage issues, contract review/formation, employment matters and worker's compensation, all within the transportation industry. Garner can be reached at gberry@markowwalker.com.

How to Obtain Records or a Deposition from the Veterans Administration

By Mark Perkins

According to the United States Department of Veterans Affairs, there are over nine million veterans presently enrolled in the VA Healthcare system. The Veteran's Administration (VA) estimates there are presently over 20 million veterans.

Although the VA believes there will be decline over the next 20 years to about 14 million veterans, the implications of an aging society have been receiving an increasing amount of attention in the last several years. Specifically, what impact will the growing population of aging veterans have on the comprehensive services offered by the VA medical care system?

Without going into more statistics, keep in mind that as of August 2018, the United States has been in a military conflict in the Middle East for 28 years. Following September 11, 2001, enlistments in the military drastically increased. All of this to say: VA hospitals and clinics across the United States are at an all-time high and will likely increase even if the overall veteran population decreases.

As a result, the likelihood that you will need to obtain medical records from VA hospitals and clinics will increase. Lawyers must know the obstacles we face and how to get information when defending (or prosecuting) a personal injury claim.

If you have ever tried to obtain medical records or depose a VA medical doctor, you know how difficult it can be. If you have not, then get ready because soon enough, you may have to request medical records and/or depose a doctor employed by the VA. The process is complicated. A routine subpoena or notice of records deposition likely will be ignored.

Our firm was confronted with this problem a few years ago when defending claims brought by veterans injured after their convoy was rear-ended as they were returning from hurricane assistance in southern Louisiana (we could not pick a worse set of facts). We needed to depose doctors at the VA hospital who had treated one of the plaintiffs before the accident.

When contact was made with the VA hospital to get available dates for the doctors, the VA informed us that we would first have to seek approval for the depositions from the VA's general counsel and that he would likely require the plaintiff to sign a release allowing the doctors to give their depositions.

This was new. Getting releases takes time so why not just issue a subpoena?

The VA Hospital has both the authority and a duty to get a patient's consent before the VA produces medical records regarding that patient. 38 C.F.R 14.809 and 38 C.F.R. 1.511. However, it was not clear if consent was necessary and applicable for depositions. In fact, there is no language found in 38 C.F.R. 14.800 *et seq.* that would require the VA to receive consent from the patient before producing a doctor for a deposition, but the answer lies in the *Touhy* regulations.

Touhy Regulations

Pursuant to 5 U.S.C.A. §301, executive branch agencies may prescribe regulations for their own internal governance, conduct of business, record keeping, and document custody. Such regulations are commonly known as "housekeeping" regulations, and do not authorize the agency to withhold information from the public. Housekeeping regulations that create agency procedures for responding to subpoenas are often termed "Touhy regulations," in reference to the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).

In Touhy, the Court ruled that agency employees may not be held in contempt for refusing to answer a subpoena, if prohibited from responding by a superior. Touhy regulations have been enacted by many U.S. departments, including the VA Hospital. 38 C.F.R. 14.800 – 810 governs the testimony of department personnel and production of department records in legal proceedings.

To the best of our knowledge, there are only four cases in which the VA Hospital and Touhy regulations are mentioned in the same case. (*In re Motion to Compel Compliance with Subpoena Direct to Dep't of Veterans Affairs*, 257 F.R.D. 12, 13 (D.D.C. 2009); *Kelley v. Kelley*, 1:13CV224, 2013 WL 5963045 (N.D.W. Va. Nov. 7, 2013); *CCA of Tennessee, LLC v. Dep't of Veterans Affairs*, 09CV2442 WQH CAB, 2010 WL 1734953 (S.D. Cal. Apr. 27, 2010); *Advanced*

Orthopedic Designs, L.L.C. v. Shinseki, 886 F. Supp. 2d 546, 552 (W.D. Tex. 2012)). Three of the four cases all support the *Touhy* regulations as enacted by the VA Hospital. The fourth is neutral on the subject.

Although an analysis of the specific regulations regarding testimony by VA doctors is appropriate, we have a thirteen page research memorandum that you can request from me if you would like an exhaustive legal analysis.

The only requirement set by the regulations that we, as attorneys of a party, must provide is a written statement summarizing the nature and relevance of the testimony requested. In simple bullet points, we need to:

- Request the deposition in writing
- Tell how the deposition is relevant and needed (summary of the relevance of the testimony)
- Provide the topics which the deposition will cover (covers the nature of the testimony).

For the sake of brevity, nothing in the regulations requires consent to depose a VA medical doctor, but remember you are dealing with a huge bureaucracy, so get consent. You can tell them all the legal reasons why you do not need it, but they will demand it anyway.

Section 14.807 provides the procedure the VA follows when the demand or request is made. The General Counsel, the Regional Counsel, an attorney in the Office of General Counsel designated by the General Counsel, or an attorney in the Regional Counsel office designated by the Regional Counsel are the VA officials authorized to determine whether VA personnel *may be interviewed, contacted or used as witnesses*, including used as expert witnesses (we were told VA personnel could not be used as experts, but this may differ across jurisdictions), and whether VA records may be produced; and what, if any, conditions will be imposed upon such interview, contact, testimony or production of records (we were allowed only two hours, but no one was present to enforce this rule and we were able to exceed that time limitation).

Section 14.807(e) provides the procedure followed by the VA if a court denies the VA's request for a stay on requests or demands. If the court does not award the VA a stay when it requests a stay, the VA personnel is required to provide the testimony or records... *unless* the appropriate VA official instructs them not to.

Basically, the VA does what it wants.

Section 14.804 provides the factors the VA personnel consider when deciding whether to comply with a request to produce someone for a deposition or for records. Those factors are summarized as:

a The need to avoid spending time and money of U. S. for private purposes;

b How the testimony or production of records would assist the VA;

c Whether the disclosure of records or presentation of testimony is necessary to prevent fraud or other injustice;

d Whether the demand or request is unduly burdensome;

e Whether compliance with the request or demand is necessary under the rules of procedure governing the case;

f Whether compliance with the request or demand would violate some law;

g Whether the testimony or records would reveal classified information;

h Whether the testimony would interfere with law enforcement proceedings, compromise constitutional rights, compromise national security interests, hamper VA or private health care research activities, reveal sensitive patient or beneficiary information, interfere with patient care, disclose trade secrets or other confidential information;

i Whether such release or testimony could be reasonably expected to result in the appearance of the VA or Federal government favoring one litigant over another;

j Not wanting to appear that the VA or Federal government is endorsing or supporting a position advocated by a party;

k The need to prevent the public's possible misconstruction of variances between personal opinions of VA personnel and VA or Federal policy;

l The need to minimize VA's possible involvement in issues unrelated to its mission;

m Whether the demand or request is within the authority of the party making it;

n Whether the demand or request is sufficiently specific to be answered;

o Other matters.

The criteria listed provide the VA broad discretion whether to comply with a *Touhy* request. The good news is that that they almost always comply, unless they do not want to comply. If you are obnoxious and demanding, the VA can delay the process. A VA hospital has no authority

and no duty to require written consent from the veteran to produce doctors for their depositions, but if you have a tendency to bully your way to get what you want, this is where it is important to learn to be nice.

5 U.S.C.A. §552a(b) appears to say that a subpoena would allow depositions to be compelled without written consent. In *Robinett v. State Farm Mut. Auto. Ins. Co.*, 83 F. App'x 638, 639 (5th Cir. 2003), the Fifth Circuit Court of Appeals held that the VA did not violate a patient's right by disclosing medical records pursuant to a state court order, when that patient did not give prior written consent. The court cited paragraph (11) in 5 U.S.C.A. §552a(b) in support.

Nevertheless, the VA continues to rely on the *Touhy* regulations, and specifically 38 C.F.R. 14.807(b) to assert that their "General Counsel" *must review and give approval* to a request to depose the VA doctors prior to scheduling their depositions.

The next inquiry in this process is determining whether the "government is involved." Most likely, the government is not involved even if it is intervening as the worker's compensation payor. If for some reason, it is determined that the matter "involves the government," then to proceed, the proper paragraph in 38 C.F.R. §1.511 is either paragraph (b) or (c), depending on whether it is a suit in federal court or state court.

If the lawsuit is in state court, paragraph (c) applies and a *court order would be necessary. A simple subpoena would not suffice.* If a court order is required, it "should be addressed to either the Secretary of Veterans Affairs or to the head of the field facility at which the records desired are located." 38 C.F.R. §1.511(a)(1).

Conclusion—Specific instructions

In conclusion, an attorney wishing to depose a doctor that works for a VA hospital or clinic should follow these steps:

1 Get a signed consent from the veteran. See OMB Number 2900-0260 (Request for Authorization for Release of Medical Records).

2 Submit a letter to the Office of Regional Counsel saying who you want to depose and why.

3 Determine if the government is involved. Usually it will not be, but if it is, then:

   a Determine if the case is in federal court or state court.

   b If the case is involved in state court, you will need to file a motion and order from the district court allowing you to obtain the medical records or the deposition of VA doctors.

   c Submit the court order, consent and letter to Office of Regional Counsel advising who you want to depose and why.

The same procedure may be used for requesting records. This can be a difficult process in which the Office of Regional Counsel can always request additional information before complying, so honing your skills of diplomacy, kindness, and gentleness (as well as patience) will be helpful in negotiating the process.

Mark Perkins, owner of Perkins & Associates, L.L.C., in Shreveport, Louisiana, began his legal career as a prosecutor, litigating hundreds of bench and jury trials. As a prosecutor, Mark was one of the first prosecutors in Louisiana to use DNA evidence, which was novel-evidence at the time, to convict a serial rapist. Later he transitioned to private practice and in 1998, he formed a law firm focusing on the defense of complex and catastrophic claims, particularly trucking defense. He is a member of numerous Bar Associations and is also a member of DRI, Louisiana Association of Defense Counsel, Trucking Insurance Defense Association, Transportation Lawyers Association, and Louisiana Motor Transit Association. He routinely blogs about the defense of trucking and has recently created a mobile rapid response form that can be used by permission at www.perkinsfirm.com. Special thanks goes to Kyle McGuire who did the initial research for this article.

Laden with Flexibility

FMCSA Issues New Guidance on Personal Conveyance

By Sydney M. Warren and Brian J. Fisher


In the age of the electronic logging device (ELD) mandate, motor carriers and drivers alike have faced a number of new and unique issues that have, in many instances, created more questions than answers on proper compliance with regulations promulgated by both the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA). One of the most problematic matters has centered on the options available to those drivers who are out of service, but need to find a safe place to park. Fortunately, for the first time since 1997, the FMCSA recognized and has finally addressed several questions related to the "personal conveyance" provision of the hours of service (HOS) rules and regulations.

Out with the Old, in with the New

On May 31, 2018, the FMCSA issued—for the first time in more than twenty years—new guidance on the issue of personal conveyance, which has been utilized by many motor carriers and drivers to provide the much-needed flexibility to operate a commercial motor vehicle (CMV) for personal use while off-duty. However, both motor carriers and drivers were unclear on some of the terminology used in the guidance in determining how to properly comply with the HOS regulations while also taking advantage of the flexibility afforded by the personal conveyance provision. This led to inconsistent application of the personal conveyance provision by drivers, motor carriers, and even law enforcement officials.

Due to the increased use of ELDs, what was previously an issue that was decidedly more relaxed suddenly became a major point of contention for ensuring HOS compliance. With mandates related to ELDs requiring the recording of essentially all movement of CMVs, the laissez faire attitude of recording personal conveyance in the paper log era by some drivers and motor carriers would no longer be sufficient. By implementing the new guidance, the FMCSA appears to have recognized these issues on personal conveyance that both pre-dated and followed the ELD requirements.

The "Laden" Commercial Motor Vehicle

Prior to the new guidance, drivers were prohibited from operating a "laden" CMV as a personal conveyance. The use of the term "laden," in itself, caused confusion for both drivers and employers, with some motor carriers requiring drivers to empty their trailers before their vehicle could be used for personal matters, and others prohibiting drivers from pulling a trailer at all while on personal conveyance time. This ambiguity often led to drivers running afoul of their available HOS while looking for a safe place to park after being delayed by a shipper or receiver.

While the 1997 guidance was written with combination vehicles in mind, where the driver could readily attach the trailer and use the unladen tractor for personal use, the unladen requirement was also disparately impacting drivers of single-unit work trucks who cannot as easily unload and reload and leave their cargo unattended. Fast forward twenty years later, and the new guidance permits drivers to find a safe spot to rest or grab a bite to eat, even with a trailer full of cargo.

Shifting Focus to the Purpose of the Move

Simply put, personal conveyance refers to personal use of a CMV while a driver is off-duty. The guidance is clear that to be off-duty, the driver has to be relieved from work and from responsibility by the driver's employer. Under the new guidance, the focus has effectively shifted from a question of whether the CMV is laden or not to a determination of the purpose of the movement by the off-duty driver (whether the personal conveyance is for the driver's personal use or for the commercial benefit of the carrier). Some permissible examples of personal conveyance include:

- Time spent travelling from a driver's en route lodging, such as a motel or truck stop, to restaurants and entertainment facilities;
- Commuting between the driver's terminal and his or her residence;
- Time spent travelling to a nearby, reasonable, safe location to obtain rest after unloading or unloading; and

- Moving a commercial vehicle at the request of a safety official during the driver's off-duty time.

On the other hand, personal use of a CMV cannot advance the load, enhance operational readiness, or commercially benefit the motor carrier. An impermissible situation would include a driver passing the nearest safe parking spot in order to get to another location that is closer to the next delivery or pickup. Simply put, if the driver is operating off-duty at the direction of the motor carrier or advancing the business of the motor carrier, it is not personal conveyance.

Effect on Hours of Service

Drivers are required to document their hours of service while they are on-duty (*i.e.*, doing work other than driving, such as fueling), driving, sleeper berth (*i.e.*, resting in sleeper area), and even while off-duty (*i.e.*, not working). Most drivers are required to record their hours through ELDs, which are meant to capture essentially all movements of the CMV and assign those movements to a driver, thereby recording when and how long the driver is behind the wheel. The purpose of the ELD policy is to increase compliance with HOS regulations. Personal conveyance, as an off-duty status, does not count against a driver's available hours of service, but drivers are still required to log their personal driving trips.

Clearly, personal conveyance is a component of off-duty driver status, and the new guidance on the personal conveyance provision has no effect on a driver's on-duty time for HOS purposes. As the FMCSA pointed out in the new guidance, there is no impact on either the 11-hour or 14-hour limitations for drivers," "the 60/70-hour limitations, the 34-hour restart provisions, or any other on-duty status."

Motor Carriers Retain Discretion in Allowing Personal Conveyance

While the new guidance clearly and unequivocally allows motor carriers to utilize personal conveyance, those motor carriers still have discretion in deciding whether to allow personal conveyance in the first place as well as what types of personal conveyance are appropriate. This discretion includes the authority to set mileage restrictions and specific times of day for when personal conveyance is allowed. To avoid confusion, motor carriers should have policies in place that clearly outline what their drivers are and are not allowed to do regarding personal conveyance.

Conclusions and Takeaways

Although the new guidance provides both drivers and motor carriers alike much-needed increased clarification on the personal conveyance provision, especially in terms of complying with HOS requirements, responsible drivers and motor carriers need to ensure familiarity with the new guidance. Certain motor carriers that have simply not permitted drivers to utilize personal conveyance time will very likely maintain that practice, as the new guidance in no way requires the adoption of a policy allowing for personal conveyance time. For those motor carriers that either already do allow, or plan to begin allowing personal conveyance time, although there are no limits on mileage limits or times of day during which personal conveyance time may be utilized, responsible motor carriers will want to ensure reasonable limitations on issues such as mileage and ensure that those company-specific policies and limitations are adequately communicated to drivers.

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