

II. Theories of Liability

A. Employer Liability

When the driver is an actual employee of the trucking company, sometimes referred to as a “company driver,” the company’s liability is governed by state common law theories of agency.¹ In such a situation, the motor carrier, as the employer of the driver, is only responsible for the driver’s actions while he is acting within the scope of his employment.² A driver acts within the scope of his employment if his actions further the carrier’s business in any manner even if the driver’s conduct also benefits himself.³ A driver who violates a trucking company’s policies or procedures still acts within the scope of his employment while his activities are related to the company’s business.⁴ When a driver who has just delivered a load is operating a tractor-trailer while waiting for another dispatch, a jury issue exists as to whether he is acting within the scope of his employment with the motor carrier since his actions are not purely personal.⁵

A driver is outside the scope of his employment as a matter of law when he drops off his trailer at a carrier’s facility and then departs on a personal mission.⁶ A carrier cannot be held vicariously liable for the rape of a hitchhiker by a long haul driver since his actions are not in furtherance of the interests of his employer and are clearly outside the scope of his employment.⁷ However, most jurisdictions hold that common carriers of passengers are responsible for assaults and intentional torts against passengers by an employee, even if the employee’s motivation was entirely personal, under the theory that a passenger carrier has a non-delegable duty to protect its passengers.⁸

****Practice Pointer:** If the driver is employed by the trucking company, review state law governing agency.

B. Lease Liability

Federal regulations require a trucking company that leases a vehicle and driver, commonly referred to as an “owner/operator” lease, to have “exclusive possession, control and use” of the leased vehicle.⁹ Courts have used this requirement to hold the trucking company responsible for accidents caused by a leased driver’s negligence under the theory that the company, by allowing a driver to operate a commercial vehicle under

¹ Warner Trucking, Inc. v. Carolina Casualty Insurance Co., 686 N.E.2d 102 (Ind. 1997).

² Id. at 105.

³ Id.

⁴ Id. at 106.

⁵ Wright v. Transus, Inc., 434 S.E.2d 786 (Ga. 1993).

⁶ Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

⁷ C.C. v. Roadrunner Trucking, Inc., 823 F.Supp. 913 (D.Utah 1993).

⁸ Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4th Cir. 1978); Commodore Cruise Line, Ltd. v. Kormendi, 344 So.2d 896 (Fla. 1977); St. Michelle v. Catania, 250 A.2d 874 (Md. 1969); Berger v. Southern Pacific Co., 300 P.2d 170 (Cal. 1956); But see Sebastian v. District of Columbia, 636 A.2d 958 (D.C. 1994).

⁹ 49 C.F.R. § 376.12(c).

its interstate authorization, permits an otherwise unregulated truck and driver to be on the road in interstate commerce.¹⁰ Prior to the 1986 amendment to the Federal Motor Carrier Safety Regulations (“FMCSR”), a lessee motor carrier was required to remove its placards and other identification markers from its vehicle before returning the equipment to the owner and terminating the lease.¹¹ Based on this former regulation, courts created the doctrine of “logo” or “placard” liability by focusing on the use of a motor carrier’s placards as a method of imputing liability to the carrier.¹² A motor carrier could not eliminate its responsibility for the operation of leased equipment until it removed the identifying placards from the unit even if it had made every attempt to obtain the placards from the driver.¹³ Under the theory of logo liability, the trucking company could be held liable for the driver’s negligence if the placards remained on the vehicle even though the leased truck was not being driven on behalf of the company.¹⁴

In 1986, the provisions requiring the lessee motor carrier to remove the placards before terminating the lease were deleted, and instead the regulations allowed the lease to state which party would remove the identification markers from the vehicle.¹⁵ Since this amendment, courts have shifted away from relying on a carrier’s placards on a vehicle as determinative of the existence of a lease relationship and instead focused on the intent of the parties to the lease.¹⁶ If the trucking company terminates the lease and attempts to retrieve its placards and a cancellation receipt from the owner but is unable to obtain them, then the company is no longer responsible for a driver’s actions even though its placards are on the unit.¹⁷ Although the existence of a carrier’s placards on the truck is no longer determinative in defining the duration of the lease, the use of the placards is still evidence to be considered in determining if the lease was in effect at the time of the accident.¹⁸ If a leased vehicle is under a permanent lease to one motor carrier but then a trip lease is executed to haul a load for another carrier, both carriers can be held responsible under the regulations governing lease liability.¹⁹ The reason that the federal regulations place responsibility on the lessee motor carrier for the operation of the equipment is (1) to prevent carriers from avoiding safety regulations by the practice of leasing equipment from non-regulated carriers, (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of lease agreements do not violate safety regulations in the operation of the leased equipment, and (3) to provide shippers and other members of the public with financially responsible carriers.²⁰

¹⁰ Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006 (Ind. 1986).

¹¹ Cosmopolitan Mutual Insurance Co. v. White, 336 F.Supp. 92 (D.Del. 1972).

¹² Kreider Truck Service, Inc. v. Augustine, 394 N.E.2d 1179 (Ill. 1979).

¹³ Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 (3rd Cir. 1961); Kreider Truck Service, Inc. v. Augustine, 394 N.E.2d 1179 (1979).

¹⁴ Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983).

¹⁵ 49 C.F.R. § 376.12(c).

¹⁶ Jackson v. O’Shields, 101 F.3d 1083 (5th Cir. 1996)

¹⁷ Jackson v. O’Shields, 101 F.3d 1083 (5th Cir. 1996); Graham v. Malone Freight Lines, Inc., 948 F.Supp. 1124 (D.Mass. 1996).

¹⁸ Williamson v. Steco Sales, Inc., 530 N.W.2d 412 (Wis. 1995); Davis v. Rajbar, 266 A.D.2d 828 (N.Y. 1999).

¹⁹ Simmons v. King, 478 F.2d 857 (5th Cir. 1973); Laux v. Juillerat, 680 F.Supp. 1131 (S.D. Ohio 1987); Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994).

²⁰ Indiana Refrigerator Lines, Inc. v. Dalton, 516 F.2d 795 (6th Cir. 1975).

The current lease provisions in the federal regulations require an interstate carrier that leases a vehicle to (1) make the arrangement in writing signed by the parties specifying the duration and the compensation to be paid by the carrier, (2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect, (3) inspect the motor vehicle and obtain liability and cargo insurance on it, and (4) have control of and be responsible for operating the vehicle in compliance with the federal regulations and other applicable laws as if the motor vehicle was owned by the carrier.²¹ Although federal regulations require a written lease, the failure to have a written lease does not absolve a trucking company from liability if an oral lease exists.²²

There is a split in authority as to whether a motor carrier may avoid liability for a driver's actions by showing that the driver was acting outside the scope of his agency relationship when a lease is in effect at the time of the accident.²³ Most jurisdictions hold that a trucking company is always responsible for a driver's operation of a leased vehicle for the duration of the lease.²⁴ Other jurisdictions hold that a rebuttable presumption of agency exists when a lease is in effect, and a motor carrier is only responsible for a driver's acts within the scope of his agency.²⁵ Although the owner cannot be held liable for a driver's conduct under a theory of lease liability, the owner may always be held liable under common law theories of vicarious liability.²⁶ The mere presence of the carrier's logo on the side of a truck in a hit and run accident is not sufficient to hold the carrier responsible for the driver's actions.²⁷

Passengers in leased vehicles are "members of the public" who are protected by the federal provisions governing a motor carrier's liability for the operation of a leased vehicle.²⁸ There is a split in authority as to whether drivers or co-employees in a leased vehicle are "members of the public" who are protected by the federal regulations. Some jurisdictions allow drivers and fellow employees to assert a cause of action against the trucking company as would any member of the public.²⁹ Other jurisdictions hold that

²¹ 49 U.S.C. § 14102(a).

²² Wilson v. Riley Whittle, Inc., 701 P.2d 575 (Ariz. 1985); Fuller v. Reidel, 464 N.W.2d 97 (Wis. 1990); Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994).

²³ Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

²⁴ Baker v. Roberts Express, Inc., 800 F.Supp. 1571 (S.D. Ohio 1992); Wyckoff v. Marsh Bros. Trucking, 569 N.E.2d 1049 (Ohio 1991); Ryder Truck Rental Co., Inc. v. UTF Carriers, Inc., 719 F.Supp. 455 (W.D.Va. 1989); Planet Insurance Co. v. Transport Indemnity Co., 823 F.2d 285 (9th Cir. 1987); Harvey v. F-B Truck Line Co., 767 P.2d 254 (Id. 1987); Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983); Schedler v. Rowley Interstate Transportation Co., Inc., 368 N.E.2d 1287 (Ill. 1977); Simmons v. King, 478 F.2d 857 (5th Cir. 1973).

²⁵ Mensing v. Rochester Cheese Express, Inc., 423 N.W.2d 92 (Minn. 1988); Penn v. Virginia International Terminals, Inc., 819 F.Supp. 514 (E.D.Va. 1993); Wright v. Transus, Inc., 434 S.E.2d 786 (Ga. 1993); Parker v. Erixon, 473 S.E.2d 421 (N.C. 1996).

²⁶ Hiltgen v. Sumrall, 47 F.3d 695 (5th Cir. 1995).

²⁷ Thi v. Schneider National Carriers, Inc., 2005 WL 1703116 (W.D.Mo.)

²⁸ Price v. Westmoreland, 727 F.2d 494 (5th Cir. 1984); Powers v. Meyers, 655 N.E.2d 1358 (Ohio 1995).

²⁹ Proctor v. Colonial Refrigerated Transport, Inc., 494 F.2d 89 (4th Cir. 1974); Johnson v. S.O.S. Transport, Inc., 926 F.2d 516 (6th Cir. 1991); Smith v. Johnson, 862 F.Supp. 1287 (N.D.Pa. 1994).

drivers and co-employees are not intended beneficiaries of the federal regulatory scheme and cannot rely on lease provisions to bring an action against the lessee motor carrier.³⁰

A manufacturer of goods which is not a motor carrier cannot be held liable for a driver's actions based on leasing a vehicle from a registered carrier where the manufacturer does not control the transportation process under the lease arrangement.³¹ A trucking company is not responsible for the actions of a driver escorting an oversized load unless the escort driver is an agent and employee of the driver of the tractor-trailer unit.³² The trucking company is not responsible for the conduct of the owner of the unit while the owner is repairing the vehicle in warehouse or performing other functions outside of the lease agreement.³³ The lease regulations do not render invalid indemnification agreements between carriers, and an owner may be required by contract to indemnify the trucking company for any loss caused by the owner's negligence.³⁴

****Practice Pointer:** Request copies of any lease agreement related to the tractor or trailer.

C. Negligent Hiring, Entrustment or Retention

Negligent hiring involves the claim that the trucking company should not have hired the driver because the company should have known that the driver was incompetent at the time of his application for employment. Negligent entrustment is a slight variation on this theme and encompasses the allegation that the trucking company should not have entrusted a truck to the driver because of his inexperience or his inability to safely operate a commercial vehicle. Negligent retention occurs when a trucking company learns during the course of a driver's employment that the driver is incompetent but continues to retain the driver and allow him to operate a commercial vehicle.

A carrier has a duty to take steps to prevent injury to the driving public by determining the competency of its drivers to operate a commercial vehicle.³⁵ Federal regulations outline a carrier's responsibilities to obtain background information on a driver before the carrier can hire him, and a failure to comply with these regulations will subject a carrier to a claim for negligent hiring if compliance would have identified the driver as incompetent.³⁶ If the driver fails to meet the minimum standards required by the federal regulations, then the trucking company can clearly be held liable for injuries resulting from the driver's operation of a commercial vehicle under a theory of negligent hiring or retention.³⁷ The real issue in most cases concerns the trucking company's

³⁰ White v. Excalibur Insurance Co., 599 F.2d 50 (5th Cir. 1979), cert denied, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979); Riddle v. Trans-Cold Express, Inc., 530 F.Supp. 186 (S.D.Ill. 1982).

³¹ LaPlant v. Cutlip, 258 A.2d 769 (N.Y. 1999).

³² Brown v. Pettinari, 994 P.2d 1231 (Or. 2000); Kahrs v. Conley, 729 N.E.2d 191 (Ind. 2000).

³³ Zimprich v. Broekel, 519 N.W.2d 588 (N.D. 1994).

³⁴ Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 96 S.Ct. 229, 423 U.S. 28, 46 L.Ed.2d 169 (1975).

³⁵ Guidry v. National Freight, Inc., 944 S.W.2d 807 (Tx. 1997).

³⁶ Wallen v. Allen, 343 S.E.2d 73 (Va. 1986).

³⁷ Lakes v. Minor, 620 N.E.2d 1015 (Ohio 1993).

liability for hiring a driver who has been involved in several prior accidents or has prior moving violations but is not disqualified from operating a commercial vehicle under the federal regulations. Whenever a trucking company hires or retains a driver who has more than one accident or moving violation, then the company exposes itself to potential liability for negligent hiring, entrustment or retention.³⁸ A trucking company is also responsible for negligent hiring if the company hires the driver in violation of its own policies and procedures concerning the number and severity of allowable traffic violations.³⁹ As such, a carrier exposes itself to potential liability for negligent hiring whenever it employs a driver who identifies past motor vehicle violations in his application for employment or whose violations are identified in the driver's moving violations report obtained from a State agency.⁴⁰ If the trucking company fails to investigate the driver's qualifications as required by the regulations, the company is deemed to have knowledge not only of the violations and accidents disclosed to it, but also of any facts about the driver's history which would have been revealed had the company performed the appropriate background checks.⁴¹ This doctrine of imputed knowledge keeps the company from being rewarded for its failure to discover a driver's record when it has a duty to obtain this information.⁴²

Effective January 29, 2003, the federal regulations governing driver disqualifications have been amended to provide for disqualification of commercial vehicle drivers for various lengths of time for serious traffic violations.⁴³ Under this comprehensive scheme, drivers are disqualified from operating a commercial vehicle for 60 days for any second conviction within a three year period of any combination of any offense committed in a commercial vehicle of (1) speeding in excess of 15 mph over the speed limit, (2) driving recklessly, (3) making improper or erratic lane changes, (4) following the vehicle ahead too closely, (5) violating any motor vehicle traffic control law arising in connection with a fatal accident, or (6) driving without a commercial driver's license.⁴⁴ (MVR with Disqualification, Appendix of Forms, X-9) A driver is disqualified for one year for driving under the influence of alcohol or controlled substances or leaving the scene of an accident, whether the offense occurs in a commercial vehicle or a non-commercial vehicle.⁴⁵ A driver is also disqualified for a year if he continues to operate a commercial vehicle after having been disqualified.⁴⁶ Motor carriers have an obligation to monitor the drivers for any disqualifying offenses,⁴⁷ and these new provisions should give additional grounds for negligent hiring and retention claims.

³⁸ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

³⁹ Morris v. JTM Materials, Inc., 78 S.W.3d 28 (Tx. 2002).

⁴⁰ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

⁴¹ Smith v. Tommy Roberts Trucking Co., 435 S.E.2d 54, 57 (1993).

⁴² Id. at 57.

⁴³ 49 C.F.R. § 383.51.

⁴⁴ 49 C.F.R. § 383.51.

⁴⁵ 49 C.F.R. § 383.51.

⁴⁶ 49 C.F.R. § 383.51.

⁴⁷ 49 C.F.R. § 383.51(a).

Negligent hiring, entrustment or retention claims are causes of action based on a trucking company's direct negligence in employing an incompetent driver rather than on vicarious liability for the driver's actions.⁴⁸ The company's liability is not dependent upon a finding that the driver was acting within the scope of his employment when the tortious act occurred.⁴⁹ Most jurisdictions will not allow a plaintiff to bring claims for negligent hiring and retention when the trucking company admits an agency relationship with the driver.⁵⁰ The basis for this rule is that a company's admission of agency establishes the liability link from the negligence of the driver to the carrier rendering proof of negligent hiring and retention unnecessary and irrelevant.⁵¹ An exception to this general rule exists when the plaintiff asserts a separate claim for punitive damages based on the issues of negligent hiring and retention.⁵² In this situation, evidence of negligent hiring and retention can be presented to the jury as a basis for an award of punitive damages.⁵³

While a trucking company clearly has a duty to investigate the driving experience and qualifications of a driver, most jurisdictions have held that the company does not have a duty to investigate the driver's non-vehicular criminal background.⁵⁴ Because drivers are hired to transport freight and not to interact with the public as the company's representative, a trucking company does not have to perform an independent investigation into a driver's criminal past to determine if he is a violent individual who may attack or sexually assault a person.⁵⁵ It would also be cost-prohibitive for a trucking company to conduct a criminal search on each driver since the company would have to review court records from every jurisdiction with which the driver had any significant contacts to complete the search.⁵⁶ Accordingly, a trucking company cannot usually be held responsible under a negligent hiring or retention theory for an intentional assault inflicted by a driver.⁵⁷

****Practice Pointer:** Conduct discovery on the issues of negligent hiring and retention by requesting relevant documents and deposing the company's safety director. If there is evidence of negligent hiring and retention, amend the complaint to add these claims and a punitive damages claim based on the hiring of the driver to avoid any chance of having the claims dismissed if the company admits agency.

⁴⁸ Boyd v. L.G. DeWitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. 1991).

⁴⁹ Morris at 14.

⁵⁰ Cole v. Alton, 567 F.Supp. 1084 (N.D. Miss. 1983); Bartja v. National Union Fire Insurance Co. of Pittsburgh, PA, 463 S.E.2d 358 (Ga. 1996); Brown v. Larabee, 2005 WL 1719908 (W.D. Mo.); Lee v. J.B. Hunt Transport, Inc., 308 F.Supp.2d 310 (S.D.N.Y. 2004).

⁵¹ Bartja at 361.

⁵² Smith at 57.

⁵³ Id. at 57.

⁵⁴ Connes v. Molalla Transport System, Inc., 831 P.2d 1316 (Col. 1992); C.C. v. Roadrunner Trucking, Inc., 823 F.Supp. 913 (D.Utah 1993); Guidry v. National Freight, Inc., 944 S.W.2d 807 (Tx. 1997).

⁵⁵ Connes at 1321-1322. But compare, Malorney v. B&L Motor Freight, Inc., 496 N.E.2d 1086 (Ill. 1986) (Because trucking company did not present any evidence that it would be unduly burdensome to conduct criminal background checks on its drivers, company can be held responsible for failing to discover that driver who raped hitchhiker had long history of sexual crimes.)

⁵⁶ C.C. at 924.

⁵⁷ Id.

D. Actions against Insurers for Negligent Hiring

Insurance companies are playing a larger role in the hiring process of new drivers for small trucking companies. Instead of making an independent assessment of a driver's qualifications, small trucking companies rely on their insurance company to make this decision for them. The trucking company obtains the necessary information from the new applicant and then submits the information to the insurance company. The insurance company reviews the information and then determines if the insurer will provide coverage for the new applicant. The trucking company's decision to hire the driver is based entirely on the "insurability" of the driver. In effect, the insurer is screening new drivers for the trucking company and making the decision as to whether to hire the driver. Although the insurer has no duty under state or federal law to screen drivers, the insurer may be held responsible for negligently undertaking this duty if the insurer fails to reject an unqualified or incompetent driver. There are no reported appellate decisions on this theory of liability. However, state law on negligent undertaking appears to support a basis of recovery.⁵⁸

****Practice Pointer:** If the trucking company is a small business and there is not sufficient liability coverage for the plaintiff's injuries, examine the relationship between the insurer and motor carrier to determine if the insurer controlled the screening of new drivers.

E. Broker Liability

Another new theory of liability is broker liability. A broker is an entity that does not transport the load but deals with the shipper and motor carrier in arranging the transportation.⁵⁹ A broker is often the "middle man" between the shipper and motor carrier. Traditionally, the broker has avoided liability for any injuries caused by the driver transporting the load by demonstrating that the motor carrier was an independent contractor.⁶⁰ Because the broker is not the employer of the driver, it cannot be held liable under a theory of agency or vicarious liability.⁶¹ The broker may be held liable under a negligent hiring theory if the broker did not properly screen the motor carrier and failed to investigate the carrier's safety record.⁶² Prior to hiring a motor carrier to transport a load, a broker must at a minimum check the general safety statistics and evaluations of the carrier and review any internal records of the carrier's safety performance.⁶³ A failure to properly evaluate a carrier's safety record will subject the broker to liability for negligent hiring.⁶⁴

⁵⁸ Osowski v. Smith, 586 S.E.2d 71 (Ga. 2003).

⁵⁹ 49 U.S.C. § 13102(2).

⁶⁰ Graham v. Malone Freight Lines, Inc., 314 F.3d 7 (1st Cir. 1999).

⁶¹ Schramm v. Foster, 341 F.Supp.2d 536, 545 (Md. 2004).

⁶² Id. at 551.

⁶³ Id.

⁶⁴ Id.

****Practice Pointer:** Determine if a broker was involved in arranging the transportation and if the broker checked the motor carrier's safety record.

F. Negligent Inspection, Maintenance or Repair

Many accidents are attributable to mechanical failures of parts or systems in a commercial vehicle. Federal regulations require motor carriers to systematically inspect, maintain, and repair all motor vehicles subject to their control.⁶⁵ The regulations also provide that all parts and accessories on a commercial vehicle must be kept in safe and proper operating condition at all times.⁶⁶ A trucking company must maintain the following records for each vehicle under its control: (1) the identification of the owner and style of the vehicle, (2) a list of the nature and due date of various inspection and maintenance operations to be performed on the vehicle, and (3) a record of inspection, repairs and maintenance performed on the vehicle.⁶⁷ These records must be maintained for one year while the vehicle is either housed or maintained by the carrier and for six months after the motor vehicle leaves the carrier's control.⁶⁸ A motor carrier can be held responsible for any injury caused by its failure to properly inspect, maintain or repair any equipment in its control.⁶⁹ For example, if the brakes are discovered to be out of adjustment after an accident, the trucking company can be found liable for failing to properly conduct a pre-trip inspection and failing to properly adjust the brakes to keep them within the federal limits.⁷⁰

****Practice Pointer:** Have a qualified trucking expert conduct an inspection of the vehicle as soon as possible after the accident to determine if mechanical problems played any role in the accident and obtain a copy of any post-accident DOT, PSC or FHWA inspection of the vehicle.

G. Violations of the Federal Motor Carrier Safety Regulations

The Federal Motor Carrier Safety Regulations ("FMCSR") are a comprehensive list of guidelines and specifications governing the operation and maintenance of commercial vehicles. Every interstate motor carrier is required to be knowledgeable of and comply with all the provisions of the FMCSR applicable to that motor carrier's operations.⁷¹ Every driver and employee must be instructed regarding compliance with the FMCSR.⁷² Equipment and accessories required by the regulations must be maintained in compliance with all applicable performance and design criteria.⁷³ No person may aid,

⁶⁵ 49 C.F.R. § 396.3(a).

⁶⁶ 49 C.F.R. § 396.3(a)(1).

⁶⁷ 49 C.F.R. § 396.3(b).

⁶⁸ 49 C.F.R. § 396.3(c).

⁶⁹ Lynden Transport, Inc. v. Haragan, 623 P.2d 789 (Alaska 1981); Knight v. Schneider National Carriers, Inc., 350 F.Supp.2d 775 (N.D. Ill. 2004).

⁷⁰ Indian Trucking v. Harber, 752 N.E.2d 168 (Ind. 2001).

⁷¹ 49 C.F.R. § 390.3(e)(1).

⁷² 49 C.F.R. § 390.3(e)(2).

⁷³ 49 C.F.R. § 390.3(e)(3).

abet, encourage or require a motor carrier or its drivers to violate any safety regulation.⁷⁴ A trucking company can be held liable for any injury resulting from its violation an applicable provision of the FMCSR.⁷⁵ An intrastate carrier or an entity transporting an exempt commodity may not be held liable for injuries resulting from an accident based on a violation of the FMCSR but may be held liable under common law theories of negligence.⁷⁶ As with other federal regulations, agencies in most states have adopted the provisions of the FMCSR as applicable to any commercial vehicles operated within the state.⁷⁷

****Practice Pointer:** Review the FMCSR to determine if the driver's tractor-trailer met federal specifications.

H. Shipper Liability

The shipper may be held liable if the accident was related to improper loading of the vehicle. Under this theory of liability, a shipper who participates in the loading process is responsible under a common law theory of negligence for failing to properly secure the load.⁷⁸ Although the basis of recovery is common law negligence, the FMCSR provides evidence of the applicable standard of care.⁷⁹ If the trailer is sealed before it is picked up by the motor carrier, it is presumed that the shipper participated in the loading process.⁸⁰

****Practice Pointer:** If the accident involved a load shift, overweight vehicle or improperly secured load, consider an action against the shipper for negligently loading the vehicle.

I. Driver Fatigue

Many commercial vehicle accidents are caused by a driver's inattentiveness or fatigue resulting from the operation of a vehicle for an excessive amount of time. Federal regulations prohibit a trucking company from allowing a driver to operate a commercial vehicle while the driver's ability or alertness is impaired by fatigue, illness, or any other cause which would make it unsafe for the driver to operate the commercial vehicle.⁸¹ These regulations also prescribe a maximum number of hours that a driver can be on duty during any day or week and require a driver to maintain a daily log of his work status.⁸²

⁷⁴ 49 C.F.R. § 390.13.

⁷⁵ Hageman v. TSI, Inc., 786 P.2d 452 (Col. 1989).

⁷⁶ Disidore v. Mail Contractors of America, Inc., 2001 WL 506838 (D. Kan. 2001); Stanley v. Fiber Transport, Inc., 470 S.E.2d 767 (Ga. 1996).

⁷⁷ See Transportation Rules of the Georgia Public Service Commission.

⁷⁸ Burke v. J.F. Allen Co., 182 F.3d 907 (W.Va. 1999); Skeie v. Mercer Trucking Co., Inc., 61 P.3d 1207 (Wash. 2003).

⁷⁹ Reed v. Ace Doran Hauling & Rigging Co., 1997 WL 177849 (N.D. Ill. 1997); Symington v. Great Western Trucking Co., Inc., 668 F.Supp. 1278 (S.D.Iowa 1987); Locicero v. Interpace Corp., 266 N.W.2d 423 (Wis. 1978).

⁸⁰ Miller v. Rollins Leasing Corp., 1999 WL 739539 (Ohio 1999).

⁸¹ 49 C.F.R. § 392.3.

⁸² 49 C.F.R. § 395 et. seq.

(Driver's Log, Appendix of Forms, X-5) A carrier has a duty to monitor its driver's logs through an appropriate log verification procedure and to establish proper controls of driving time to ensure compliance with maximum hours of service regulations.⁸³ The purpose of these regulations is to prevent accidents caused by driver fatigue, and any violation of these requirements is admissible to prove negligence for a subsequent accident.⁸⁴ Courts will usually not allow a plaintiff to proceed under a theory of liability based on violations of the maximum hours requirements or driver's logs provisions if there is no evidence that the accident was related to driver inattentiveness or fatigue.⁸⁵

****Practice Pointer:** Retain a qualified expert to examine the trucking company's system of monitoring its drivers' hours of service.

J. Spoliation of Evidence

Federal regulations require interstate carriers to maintain and preserve records for various lengths of time.⁸⁶ After an accident, a carrier will often destroy pertinent records, either purposefully or in the ordinary course of its document retention procedures. The destruction of documents, often referred to as spoliation, can lead to sanctions against the trucking company.⁸⁷ As a sanction for spoliation of evidence by a party to an action, a court may (1) charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator, (2) exclude any testimony about the evidence, or (3) enter judgment against the party which tampered with the evidence.⁸⁸ The severity of the sanction must be determined according to (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence, (2) whether the prejudice can be cured, (3) the importance of the evidence, (4) whether the party who destroyed the evidence acted in bad faith, and (5) the potential for abuse if expert testimony about the evidence is not excluded.⁸⁹ A few jurisdictions even recognize a separate cause of action for spoliation of evidence.⁹⁰ These jurisdictions have set forth the element of the tort as (1) the existence of pending or probable litigation involving the plaintiff, (2) defendant's knowledge of the pendency or fact of the litigation, (3) destruction of evidence by the defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts.⁹¹

⁸³ Torres v. North American Van Lines, Inc., 658 P.2d 835 (Ariz. 1982).

⁸⁴ NeSmith v. Bowden, 563 P.2d 1322 (Wash. 1977); Greist v. Phillips, 906 P.2d 789 (Or. 1995).

⁸⁵ Smith v. Printup, 938 P.2d 1261 (Kan. 1997); Burke v. Maassen, 904 F.2d 178 (3rd Cir. 1990).

⁸⁶ 49 C.F.R. Pt. 379, App. A.

⁸⁷ R.A. Siegel Co. v. Bowen, 539 S.E.2d 873 (Ga. 2000).

⁸⁸ Chapman v. Auto Owners Insurance Co., 469 S.E.2d 783 (Ga. 1996).

⁸⁹ Id. at 783.

⁹⁰ Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993); Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995) Guillory v. Dillard's Department Store, Inc., 777 So.2d 1 (La. 2000); Smith v. Atkinson, 771 So.2d 429 (Ala. 2000).

⁹¹ Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001).

The driving force behind imposing sanctions for spoliation is the concept that it is unfair to have a plaintiff's case adversely affected by the trucking company's failure to preserve and maintain relevant evidence. The company will usually argue that the destruction of the evidence was inadvertent and that the evidence would have been preserved if it had only known that it was relevant to plaintiff's case. The solution to this problem is to send a spoliation letter by certified mail to the trucking company and its representatives as early in the litigation as possible. (Spoliation Letter, Appendix of Forms, X-1) A standard spoliation letter lists in detail certain items of evidence which are to be "maintained and preserved" and not be "destroyed, discarded, changed, repaired, or altered in any manner." The letter states that this evidence is relevant to the plaintiff's cause of action and that the plaintiff will seek all sanctions allowed under the law if the evidence is destroyed. Once the spoliation letter is received, the motor carrier is on notice of the relevance of the listed items and must take affirmative steps to maintain and preserve this evidence or risk the imposition of harsh sanctions. Because of ethical considerations concerning direct contact with opposing parties, an attorney should always review State Bar rules and regulations to make sure the content of his spoliation letter is consistent with any ethical requirements.

Federal regulations designate the amount of time that most records must be maintained.⁹² Trucking companies must exercise reasonable care in choosing retention periods for records that do not have a specific period of time designated in the federal regulations, and the choice of retention periods shall reflect past experiences, company needs, pending litigation, and regulatory requirements.⁹³ States and other governmental entities may prescribe longer retention periods for any category of records.⁹⁴ A carrier may destroy any records at its discretion after the required retention period expires.⁹⁵ Records may be maintained by any technology that is immune to alteration, modification or erasure of the underlying data and will enable production of an accurate and unaltered paper copy.⁹⁶

****Practice Pointer:** Send a spoliation letter as soon as possible to place the trucking company on notice as to the importance of maintaining and preserving all relevant documents.

K. Punitive Damages

Punitive damages are only warranted when the conduct of the trucking company amounts to more than just negligence and instead demonstrates recklessness or a want of care for the consequences of its actions.⁹⁷ In many jurisdictions, a plaintiff can recover punitive damages against a company when the driver's actions are reckless or wanton

⁹² 49 C.F.R. § 379 *et. seq.*

⁹³ 49 C.F.R. Pt. 379, App. A, Note A.

⁹⁴ 49 C.F.R. § 379.3.

⁹⁵ 49 C.F.R. § 379.3.

⁹⁶ 49 C.F.R. § 379.7(a).

⁹⁷ See O.C.G.A. § 51-12-5.1.

under the same guidelines for imputing responsibility for a driver's negligence.⁹⁸ In these jurisdictions, the motor carrier is liable for any award of punitive damages based on the driver's misconduct, i.e., when the driver operates a vehicle under the influence of alcohol or drugs or drives a vehicle with known mechanical problems.⁹⁹ The trucking company may be held directly liable for punitive damages if the driver's history is so egregious as to make the hiring or retention of the driver amount to reckless conduct on behalf of the company.¹⁰⁰ The company can also be held directly responsible for punitive damages if it has a common practice of ignoring federal regulations or failing to monitor its drivers,¹⁰¹ or if it destroys documents to hide any potential violations.¹⁰²

****Practice Pointer:** Retain a qualified expert to determine if the trucking company is complying with its obligations to monitor drivers under the federal regulations.

⁹⁸ Phillips v. Dallas Carrier Corp., 766 F.Supp. 416 (M.D.N.C. 1991).

⁹⁹ Id. at 419-420.

¹⁰⁰ Smith v. Tommy Roberts Trucking Co., 435 S.E.2d 54 (Ga. 1993).

¹⁰¹ Torres v. North American Van Lines, Inc., 658 P.2d 835 (Ariz. 1982).

¹⁰² J.B. Hunt Transport, Inc. v. Bentley, 427 S.E.2d 429 (Ga. 1993).