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TRUCKING-2020
YINS AND YANGS

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I. INTRODUCTION

In Ancient Chinese philosophy, the yin and yang signify a principle that all things exist as inseparable and contradictory opposites. This paper, like the yin and the yang, will present the foundational elements of causes of action most seen in trucking cases and how provisions and statutes can either make the case or defend your carrier/driver. At the onset, we should mention that any attorney seeking to engage in trucking litigation needs to first familiarize himself/herself with the Federal Motor Carrier Safety Regulations (FMCSR). The FMCSR can, at times, make or break your case. Knowing how to navigate the rules, will help you and your client successfully prosecute or defend your trucking case. This paper should provide practitioners with the foundational information they need to consider in signing on or defending a trucking case.

II. SOURCES AND THEORIES OF LIABILITY

A. FEDERAL MOTOR CARRIER SAFETY REGULATIONS

As a preliminary measure to litigating a trucking case, you will need to familiarize yourself with the Federal Motor Carrier Safety Regulations (FMCSR). These regulations dictate the foundational elements of any prosecution and defense of a trucking case. You can order a full handbook from FMCSA or peruse the regulations online at http://www.fmcsa.dot.gov/regulation. The following are some of the most notable and used sections that come up or are used in trucking cases:

- Parts 40 and 382: Drug and Alcohol Use
- Parts 383 and 391: Commercial Driver's License Standards and Qualifications of Drivers
- Parts 387: Insurance Requirements
- Part 392: Rules of Driving: Fatigue, Alcohol Use, Schedules, Inspections
- Part 395: Hours of Service Limitations
- Part 396: Inspection, Repair and Maintenance
- Part 397: Hazardous Materials

The FMCSR forms the basis of many discovery requests and responses in trucking cases. For both sides, some key sets of documents include:

- Driver Logs
- Driver Inspections
- Driver Qualification Files
- Event tracking data
- Dashcam footage
- Dispatch records
- Safety/Training Driver Manuals

1. Spoliation Letters

At the outset of the case, plaintiff attorneys should immediately identify potential defendants (using police reports and other available information) and send out spoliation letters in order to preserve evidence. In order to impose a duty to preserve evidence on potential parties, your letter should indicate that there is a substantial chance a claim will be filed. *See Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014); *Wal-Mart Stores v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). With this notice, the party will have a duty to preserve evidence if it knows or reasonably should know that evidence in its possession or control will be material and relevant to that claim. *See Brookshire Bros.*, 438 S.W.3d at 20. However, the duty to preserve can still arise even without actual notice of a suit as long as there is more than a mere possibility or unwarranted fear of litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993); *IQ Holdings Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861, 867 (Tex. App. Ct. – Houston [1st Dist.] 2014, no pet.). If a producing party is found to have deliberately destroyed evidence, or it cannot explain its failure to produce missing evidence, a presumption arises that the evidence was relevant and harmful to the producing party. *See Johnson*, 106 S.W.3d at 721.

Some documents and information you should have in mind when writing your spoliation letters include: the vehicles involved in the accident, tracking data, text messages, photographs, video/dash cam footage, driver's logs, bills of lading, and vehicle inspection documents.

B. VICARIOUS LIABILITY THEORIES OF RECOVERY

1. Statutory Employer

During the first half of the twentieth century, interstate motor carriers attempted to immunize themselves from liability for negligent drivers by leasing trucks and nominally classifying the drivers who operated the trucks as "independent contractors." *See White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979), cert. denied, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979); *see also Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 304–05, 73 S.Ct. 307, 311–12, 97 L.Ed. 337 (1953) (detailing pre-amendment problems and abuses that threatened public interest and vitality of trucking industry). In order to protect the public from the tortious conduct of the often judgment-proof truck-lessor operators, Congress in 1956 amended the Interstate Common Carrier Act to require interstate motor carriers to assume full direction and control of the vehicles that they leased "as if they were the owners of such vehicles." *See Price v. Westmoreland*, 727 F.2d 494, 495–96 (5th Cir. 1984). The purpose of the amendments to the Act was to ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants. As a result, the carrier-lessee is required to execute a lease for the equipment stating that the motor carrier has exclusive possession, control, and use of the equipment, and assumes complete responsibility for the operation of the equipment, for the duration of the lease. 49 C.F.R. §§ 376.11–.12.

Because under the FMCSR interstate motor carriers have both a legal right and duty to control leased vehicles operated for their benefit, the regulations create a statutory employee

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