

#### **IV. OVERVIEW OF TRUCKING LITIGATION FROM A PLAINTIFF'S PERSPECTIVE**

##### **A. PRE-SUIT INVESTIGATION**

###### **1. Open Records Requests and "Truck Warning Letter"**

The first thing that you should do after being hired is send what we call a "truck warning letter", by certified mail.<sup>1</sup> This letter instructs the carrier to preserve any information regarding the operation of the truck by the driver for the 30-day period prior to the crash, and warns that failure to preserve such information will constitute spoliation of evidence.<sup>2</sup>

This is an important step if fatigue is thought to be a contributing factor in the crash, as electronic information sometimes becomes pivotal in these cases. For instance, motor carriers are required by regulation to keep *written* log information for six months. However, there is currently no federal requirement to keep information gathered by on-board recording devices, or communication or satellite-location devices. (Many companies use satellite tracking to keep track of their fleet - enabling them to be fully aware of a truck's movements, any mechanical trouble it may be experiencing, accidents, etc.) The letter also includes a request to preserve documentation that can be used to corroborate or disprove log entries, such as scale tickets, trip reports, bills of lading, inspection reports, weigh-station reports, etc. Without such documentation, it may be impossible to discover an hours-of-service violation. Time is of the essence because most companies routinely destroy this data

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<sup>1</sup> Attached as Exhibit A-1-A

<sup>2</sup> Attached as Exhibit A-1-B

after a short time.

Additionally, Open Records Requests should be made to the Department of Motor Vehicle Safety, “DMVS”<sup>3</sup>, and the Federal Motor Carrier Safety Administration (“FMCSA”).<sup>4</sup> Additionally, you should order, at a cost of \$30, a “profile” from Computing Technologies, Inc., P. O. Box 3248, Merrifield, Virginia 22116-3248; (703) 280-4001.

Frequently these reports reveal that the carrier has had other crashes, some with fatalities, and may well have a long list of regulatory violations. The FMCSA participates in *SafetyNet*, whereby states share their state accident reports with the FMCSA. While the FMCSA will not disclose drivers’ names due to personal privacy concerns, the *SafetyNet* printout provides all kinds of good information for further follow up and development should the need arise, including but not limited to the accident state, report number, date, time, location, city, county, reporting agency, the officer badge number and whether there were any injuries or fatalities.<sup>5</sup> The Georgia Carrier Profile Report will detail, for each calendar year, things such as total inspections, inspections with violations, inspections with hazmat violations, names of drivers, and out-of-service violations along with the violation categories in a summary section. Each one of these violations is written up by individual Department of Transportation (“DOT”) enforcement

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<sup>3</sup> Attached as Exhibit A-1-C

<sup>4</sup> Attached as Exhibit A-1-D

<sup>5</sup> Attached as Exhibit A-1-E

officers and the trucking company is notified and required to sign off on the citation, verifying that they are aware of the problem. More detailed citation paperwork can be retrieved from the DOT terminal and the DOT officer who issued the citation. Depending on the type of case and the circumstances involved ( including any defenses posed), further follow up may be warranted and you may discover the goose that laid the golden egg.

## 2. Police Officers, Eyewitnesses and the Participants

As soon as you are hired, your investigation should begin. In serious injury cases, local authorities will frequently photograph the scene and the vehicles, thereby memorializing such things as skid marks, degree of crush, etc. In crashes involving serious injury and death, the investigating officer(s) may seize all paperwork relating to the load being transported, including the driver's logs. The DMVS sometimes dispatches safety compliance officers to the scene as well, so it is important to check with them to see if they investigated the wreck. The local newspaper and newstation may have covered the wreck and sent photographers/ reporters to the scene. When you talk to them find out if they interviewed witnesses as well.

It's important for a plaintiffs' lawyer to put together an accurate and reliable picture of the accident for intelligent and successful case management. Therefore, it is a good idea to hire a reconstruction expert (if the expense is warranted) as soon after the wreck as you possibly can.

Statements should be taken, but only after the investigator receives detailed instruction from the lawyer on how he/she is to proceed. Training your investigator on how to take a statement is critical. Only the trial lawyer really knows how things will “go down” in front of a jury and the lawyer needs to control the pieces on the chessboard or else you may have lots of statements that are worthless, or even worse, hurt your case.

It's a mistake to rely solely on police reports to gather your witnesses and reconstruction information. The police or highway patrol investigate to determine whether there has been a violation of a law that resulted in a chargeable offense, so they often neglect 'redundant' witnesses whose testimony may be crucial or extremely helpful to your case. Go to the scene and interview any witness you can find. Try to find out where they took the driver to wait for further contact by his carrier and with whom he may have spoken.

Truck drivers, whether company employees or owner-operators, often provide fertile ground for evidence that increases the value of your case against the motor carrier. The driver's personal appearance, the appearance of the equipment, the operation of the tractor-trailer<sup>6</sup>, the effort and ability to avoid a serious highway collision, and the driver's response to the accident immediately thereafter are facts that give a jury an impression of the corporate defendant as well as the individual it employs. Truck drivers, as a free-spirited sort, frequently

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<sup>6</sup> Many jurors are willing to believe that tractor-trailer drivers regularly exceed the speed limit in an effort to get to their destinations on or ahead of schedule.

emblazon their vehicles with slogans, decals, flags and the like which, in the proper setting, may prove offensive to a local jury hearing the evidence at a later date. The driver's CB handle may also be illustrative of his personality and character. Some drivers' physical appearance may seem offbeat and sometimes even frightening.

The trucking company and its insurer probably had an investigator and/or expert at the scene before the vehicles were even moved. Some trucking companies and their insurers have 'go-teams' throughout the country who can be on the scene, literally, within hours of a crash. So even if you begin early, you are still probably far behind.

Photograph the accident scene. Obtain all photos from the police, newspaper and anyone else who may have taken photos. You may find that a member of the police department, fire department or EMS team took pictures or even a video that may not be part of the "official" file.

### 3. Insurance Coverage

Motor carriers (including private carriers) operating in interstate commerce transport are required to have at least \$750,000 in financial security.<sup>7</sup> This security may be in the form of a surety bond, insurance policy, or other guarantee.<sup>8</sup> Proof of the required financial responsibility shall be maintained at the motor carrier's

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<sup>7</sup> 49 U.S.C. §31139 (b)(1)(C) and (d); 49 C.F.R. 387.7.

<sup>8</sup> 49 U.S.C. §31139 (e); 49 C.F.R. 387.7.

principal place of business and shall consist of the Form MCS-90 (issued by an insurer), or Form MCS-82 (issued by a surety), or a written decision authorizing the carrier to self-insure.<sup>9</sup> Proof of minimum levels of financial responsibility . . . shall be considered public information and be produced upon reasonable request by a member of the public.<sup>10</sup>

Motor carriers that transport hazardous substances, as defined in 49 C.F.R. § 171.8, in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons are required to carry \$5,000,000 in public liability coverage.<sup>11</sup> Motor carriers that transport certain explosives, poison gas, liquefied compressed or compressed gas, or certain radioactive materials must also carry \$5,000,000 in public liability coverage. Transporters of oil and certain hazardous substances not covered elsewhere are required to carry \$1,000,000 in public liability coverage.<sup>12</sup>

Under a Form MCS-90 endorsement, the insurer agrees to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 ...". The insurer is obligated to pay a judgment against the insured motor carrier under

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<sup>9</sup> 49 C.F.R. §387.7 (d).

<sup>10</sup> 49 C.F.R. §387 (e).

<sup>11</sup> 49 C.F.R. §387.9.

<sup>12</sup> 49 C.F.R. §387.9.

an MCS-90 endorsement, even if the vehicle is not listed in the policy and the insured motor carrier is only vicariously liable. Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc., 930 F.2d 258, 262 (2d Cir. 1991). The required MCS endorsements open up all kinds of avenues for additional insurance coverage given the realities of trip leasing, interchange agreements and other agency considerations. Generally, coverage information is provided on the FMCSA website [www.safersys.org](http://www.safersys.org) as long as you have a USDOT number or the correct name of the carrier.

Georgia also has minimum financial requirements for purely intrastate transportation of property, which unfortunately are only \$100,000 per person/\$300,000 per accident<sup>13</sup> unless the carrier is transporting hazardous materials, substances or waste, which would subject them to the limits outlined in 49 C.F.R. §387.9. A telephone call to the DMVS will usually provide you with instant access to the insurance information.

By virtue of federal and state laws and regulations requiring motor carriers to obtain minimum limits of insurance, a suit against such a defendant guarantees a certain level of solvency and, in some circumstances, may allow the plaintiff to bring a direct action against the insurer of the motor carrier.

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<sup>13</sup> O.C.G.A. §46-7-12 (a); Transportation Rules of the Georgia Public Service Commission effective August 1, 2000, Chapter 7-2.1.

## B. POTENTIAL DEFENDANTS & VENUE

### 1. Agency Considerations

For starters, application of the facts surrounding a trucking accident to the numerous state and federal regulations can illuminate potential causes of actions against a variety of defendants.

In motor carrier cases complicated questions relating to agency often arise. See Chrostowski v. G. & M.S.S. Trucking, Inc., 198 Ga. App. 140 (1990). Ordinarily, a person cannot be the servant of two masters, but Georgia courts have recognized the principle that one may be the servant of two masters and subject to the demands of both or either. Hotel Equipment Company v. Liddell, 32 Ga. App. 590 (1924); Allen v. Landers, 39 Ga. App. 264, 265 (1929).

This principle and the trial court's charge on dual agency was upheld in Reliance Insurance Company v. Bridges, 168 Ga. App. 874 (1983). The Court of Appeals approved the trial court's charge to the jury on dual agency, stating that [w]hile there was ample evidence of record that the driver was the employee of Cox even while on the business of Avant and remained to a large extent under the exclusive direction and control of Cox, Avant painted its name, address, telephone number and PSC certificate number on both sides of the truck, making it an Avant vehicle insofar as the public was concerned. Thus, although Avant might be liable for the negligent acts of the leased driver as a matter of law, Cox also could be liable under the applicable Georgia common law. Id at 202.

Following the enactment of the Motor Carrier Act half a century ago, motor

carriers developed the practice of using non-owned equipment to evade the requirements of the regulatory system. The use of leased or borrowed vehicles led to a number of abuses which threatened the public interest and the economic stability of the trucking industry, because exempt lessors did not observe Interstate Commerce Commission (“ICC”) safety requirements.<sup>14</sup> Congress addressed these abuses by amending the Interstate Commerce Act to allow the ICC to ensure motor carriers would be "fully responsible for the operation of vehicles certified to them". The ICC then enacted regulations requiring that every lease entered into by an ICC licensed carrier must contain a provision stating that the carrier would maintain "exclusive possession, control, and use of the equipment for the duration of the lease," and "assume complete responsibility for the operation of the equipment for the duration of the lease."<sup>15</sup>

Today, the motor carrier that uses motor vehicles not owned by it to transport property is to: 1) make the arrangement in writing specifying its duration and the compensation to be paid by the motor carrier; 2) carry a copy in [the] . . . motor vehicle . . .; 3) inspect the motor vehicles and obtain liability and cargo insurance on them; and 4) have control for and be responsible for operating those motor vehicles in compliance with . . . safety [rules] . . . and with other

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<sup>14</sup> See Empire Fire & Marine Ins. Co. v. Guaranty Nat. Ins., 868 F.2d, 357, 362 (10<sup>th</sup> Cir. 1989).

<sup>15</sup> Older version of 49 C.F.R. §376.12(c) (49 C.F.R. §1057.12(c))

applicable law as if the motor vehicles were owned by the motor carrier.<sup>16</sup> A variety of situations can arise with the leasing and interchange of vehicles, but the overriding principle is that the control and responsibility for the operation of equipment shall be that of the lessee.<sup>17</sup>

The leased driver then becomes the motor carrier's "statutory employee" which makes the carrier vicariously liable for the driver's negligence.<sup>18</sup>

Under the various provisions of federal regulatory scheme, the authorized motor carrier will be deemed to be a statutory employer for purposes of liability. As you might imagine, there are also similar rules in Georgia relating to vehicles operated by a certificated or permitted motor carrier under term, trip or rental lease agreements.<sup>19</sup> For cases dealing with some of these issues in Georgia, *see White v. Transus, Inc.*, 209 Ga. App. 771, 434 S.E.2d 486 (1993), Nationwide Mutual Insurance Co. v. Holbrooks, 187 Ga. App. 706, 371 S.E.2d 252 (1988)(to protect general public common motor carriers must assume direction and control over leased trucks).

Leasing of equipment and drivers by motor carriers remains a prevalent practice today. There are typically two types of leases: the permanent lease and the

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<sup>16</sup> 49 U.S.C. §14102 (a)

<sup>17</sup> 49 C.F.R. §§ 376.12(c), 376.22(c)(2), 376.31(d)(2)

<sup>18</sup> Judy v. Tri-State Motor Transit Co., 844 F.2d 1496, 1501 (11<sup>th</sup> Cir. 1988).

<sup>19</sup> Transportation Rules of the Georgia Public Service Commission effective August 1, 2000, Chapter 8-3.1.

trip lease. The permanent lease is entered into for a fixed or indefinite time period. The trip lease allows a driver to haul cargo back to the point of origin of his/her initial shipment. When possession of the equipment is taken, the carrier must give the owner a receipt identifying the equipment, the date, and time of day possession is taken. Likewise, when the lease ends, the carrier must obtain a receipt identifying the equipment, the date, and the time possession was returned. The lease must specify who will remove all identification showing it as the operating carrier upon termination of the lease.<sup>20</sup>

In furtherance of the policy of protecting the public and providing it with an identifiable and financially accountable source of compensation for injuries caused by leased tractor trailers, federal law in effect creates an irrebuttable presumption of an employment relationship between a driver and the lessee whose placards identify the vehicle.

The Eleventh Circuit, along with many others, has ruled similarly and adopted what has become known as "logo liability."<sup>21</sup> That is, the driver remains the carrier's "statutory employee" as long as the carrier's logo is displayed, even though the driver may not actually be operating under the carrier's authority at the time of the collision.<sup>22</sup>

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<sup>20</sup> 49 C.F.R. §376 *et. seq.*

<sup>21</sup> Simmons v. King, 478 857 (5<sup>th</sup> Cir. 1973); Judy v. Tri-State Motor Transit Co., 844 F.2d 1496 (11<sup>th</sup> Cir. 1988).

<sup>22</sup> Empire Indem. Ins. Co. v. Carolina Ins. Co., 833 F.2d 1428 (5<sup>th</sup> Cir. 1988); *cf.* Wright v. Transus, Inc., 209 Ga. App. 771, 434 S.E.2d 786 (1993)(jury issue as to whether driver of

Thus, a thorough appreciation of how motor carriers operate, general leasing requirements, written lease requirements and the interchange of equipment - on the state and federal levels - is essential to maximizing recoveries through multiple layers of insurance coverage. It is not at all unusual for the owner of a tractor to lease his/her tractor and himself or his driver to an authorized motor carrier. Freight moves by an independent tractor hooking up to a trailer, carrying it to and from various points, and then the tractor returns home. It is not economically practical for the tractor to return without pulling a trailer, so the tractor and driver are frequently "trip leased" to another authorized carrier who has a return load. Two authorized motor carriers may have an interchange agreement. The rules and regulations for such agreements are found in 49 C.F.R. 376 et. seq. The general premise and overriding rule is that written agreements are generally required in any number of leasing arrangements and provide that the control and responsibility for the operation of the equipment falls on the lessee, making the driver a "statutory employee" of the authorized carrier lessee. If there is no lease agreement as required, the bill of lading will have the name of the motor carrier for the trip and will be useful in sorting out the characters and their relationship to one another.

An example from a recent case will help (the names have been changed to protect the innocent??). Truck driver, Sleepy "D", is an owner-operator of his own tractor. He leases himself on with an small authorized motor carrier, Ready-to-Go

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leased tractor trailer rig was engaged in company's business when accident occurred at restaurant where driver had gone between deliveries).

Trucking. Ready-to-Go Trucking decals are placed on his truck with the appropriate DOT numbers. He normally runs trips for Ready-to-Go Trucking, but on occasion, there will not be any loads for him to take. Ready-to-Go Trucking's owner, Mr. Ready, is a good business man with connections to a bigger trucking company (Stinky Skunk Trucking Co.) with lots of loads. Stinky Skunk has more loads than it has drivers and has many connections to businesses (like Party Zone) who need goods shipped. Instead of passing up loads, Stinky Skunk Trucking Co. will call Mr. Ready at Ready-to-Go Trucking and see if anyone is available. Driver Sleepy "D" is available and takes the load from Party Zone headed for Athens, Georgia. The bill of lading shows Stinky Skunk Trucking Co. as the motor carrier for the trip, because after all, that is who will be paid once the freight is delivered by Sleepy "D". The problem is that Sleepy "D" passes out behind the wheel and kills two people on his way to deliver the party supplies to Athens. The decal on the tractor was Ready-to-Go Trucking. Ready-to-Go Trucking only had \$1 million in coverage, which was tendered by Generous Insurance Company shortly after it was convinced that they had a real problem. Ready-to-Go Trucking was ready to go out of business. Initially, a lawsuit was filed against Sleepy "D" and Ready-to-Go Trucking.

The bill of lading for the trip was provided in discovery and it gave us the ammunition to add Stinky Skunk Trucking Company as a defendant because it was vicariously liable for its "statutory employee" (see C.F.R. 376.12 and 376.31). These facts, sprinkled with a healthy dose of the law, ultimately convinced Stinky Skunk Trucking Co.'s insurer, Stingy Life & Casualty, that it had exposure for the minimum

of the financial responsibility laws of \$750,000 even though Sleepy “D”’s truck was not a listed vehicle on the policy and Ready-to-Go was not a named insured on their policy.

By referencing the law, we find that the minimum financial responsibility for an authorized motor carrier transporting property is \$750,000. 49 U.S.C. 31139 (b)(2). Proof of the required financial responsibility shall consist of a Form MCS-90 (or like form), which is attached to the policy of insurance on file with the Secretary of Transportation. 49 C.F.R. 387.7 (d). The form, set forth in 49 C.F.R. 387.15, provides, in part, that

“[i]n consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from the negligent operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . .”

Stingy Life & Casualty balked initially, but finally came to realize that they were not going to hoodwink us and the case settled for well in excess of \$1 million.

Many carriers began as the trucking division of manufacturing corporations, i.e. private carriers. Finding that it was not profitable to make return trips bobtail or empty, the corporations would obtain their own certificates of public convenience and necessity as common or contract carriers so they could earn a fee on the return trip.

Many of these trucking divisions were spun off into separate corporations.

You may discover that there are common employees, executive officers, directors, and such pervasive ownership and control by the shipper that they become liable for the carrier's acts. As with other industries, trucking companies are often organized with a parent company and various trucking or motor carrier subsidiaries to insulate the parent company from liability. Under this structure, profits flow to the parent company. As a result, many of the trucking subsidiaries are under-capitalized and carry only the minimum required liability insurance limits. One may attempt to establish the parent company's liability under any of three different theories. You should consider theories of agency, joint venture, and piercing the corporate veil.<sup>23</sup>

Often, the parent company has hands-on control of the trucking subsidiary. For instance, the parent or related company may directly control and operate the trucking division on a daily basis. Such control may evidence an agency relationship. Generally, the relationship of principal and agent arises when one expressly, or by implication, authorizes another to act on his behalf. Apparent authority may also establish the agency relationship. If an agency relationship is present, the parent company is liable for the subsidiary's negligence.

Based upon their operating structure, a parent company and its subsidiary may, in fact, operate as a "joint venture." A joint venture occurs when two or more persons combine their property or labor in a joint undertaking for profit with rights

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<sup>23</sup> Harris v. Miller Brothers Farms, Inc., 161 Ga. App. 377,288 SE2d 639 (1982); Bowman v. Fuller, 84 Ga. App. 421, 66 SE2d 249 (1951); City of Eatonton v. Few, 189 Ga. App. 687, 377 SE2d 504 (1988); Keller Building Products v. Young, 137 Ga. App. 682,224 SE2d 814 (1976); and Williams Plaza v. Sedgfield Sportswear Division, 164 Ga. App. 720,297 SE2d 342 (1982).

of mutual control, provided that the arrangement does not establish a partnership. The essential characteristics of a joint venture are a joint interest in property , an agreement to share profits and losses, and conduct showing cooperation on the project.

The parent company may be liable for the actions of its subsidiaries where the subsidiary is the "instrumentality" or "alter ego" of the parent. There must be such unity of interest that the separate personalities of the corporations no longer exist and failure to disregard the corporate structure will result in fraud or injustice. The linchpin of this doctrine is control by the parent company. Circumstances supporting this allegation include the parent company's ownership of the subsidiaries' stock, common officers and directors, and mutual payment of expenses.

## 2. Shippers/Receivers

The law of shipper liability is relatively undeveloped. Often the insurance coverage provided by the motor carrier is adequate and lawyers therefore do not fully explore the shipper/ carrier relationship with a view to holding the shipper liable for its own active negligence or vicariously liable for the negligence of the carrier. In appropriate cases, there is no legal impediment to holding shippers liable under these theories.

The owner/shipper can so influence, control, hold out or represent the carrier

as its own, that a master-servant relationship is established as a matter of law.<sup>24</sup> We were recently successful in convincing a federal district court judge that there was ample evidence creating a question of fact to be decided by a jury whether or not the shipper, Wal-Mart, “retained the right to direct and control” the driver or “interfered and assumed control” of the driver.<sup>25</sup> There are many ways in which shippers also control carriers’ operations - - one of the most obvious ways being adherence to “just-in-time delivery” policies. The manufacturing economy's increased dependence on "just-in-time delivery" is one reason for the epidemic of driver-fatigue related crashes. “Just-in-time delivery” allows the manufacturer or retailer to avoid warehousing goods or parts by timing the delivery to coincide with the time the goods are needed, turning trucks into rolling warehouses. Many receiving companies do not want the expense of warehousing the goods, so the arrangement between shipper and carrier is that the load is to be delivered within a specified, limited window of time. The economic incentive is to push this to the limit, so that the carrier must violate hours of service and speed limits to arrive on time. There is no reason that a shipper or receiver, imposing unreasonable delivery demands, cannot be held liable for tired trucker crashes for controlling the time and manner of executing the work, since they often are a prime source of pressure for truckers to

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<sup>24</sup> Transouthern Freight Systems, Inc. v. Astley, 201 Ga. App. 521 (1991); Transus, Inc. v. Crosby, 196 Ga. App. 397 SE2d 135 (1990); *see also* O.C.G.A. §51-2-5 (“An employer is liable for the negligence of a contractor: (5) if the employer retains the right to direct or control the time and manner of executing the work”).

<sup>25</sup> Attached as Exhibit B-2-A

exceed federal hours restrictions.<sup>26</sup>

a. Shifting and Unsecured Loads

The law governing the unique facets of the shipper/carrier relationship as they pertain to cargo loading, securing, shifting and falling is found in the Federal Motor Carrier Safety Regulations (“FMCSR”) as well, but the FMCSR are technically inapplicable to manufacturers/shippers.<sup>27</sup>

Up until June 18, 1998, under the FMCSR, securement of cargo rested with the motor carrier, the motor carrier's employees and the truck driver<sup>28</sup> On June 18, 1998, the regulations were amended adding subsection (4) which states: “[t]he rules in this paragraph do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.”<sup>29</sup>

Shippers/manufacturers will argue that they cannot be held liable for damage

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<sup>26</sup> See O.C.G.A. §51-2-5; 49 C.F.R. §390.13 ("no person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter" including the hours of service and fatigued driver provisions).

<sup>27</sup> See 49 C.F.R. §§390.5 and 390.3.

<sup>28</sup> 49 C.F.R. §392.9 ("[n]o person shall drive a motor vehicle and a motor carrier shall not require or permit a person to drive a motor vehicle unless (1) the vehicle's cargo is properly distributed and adequately secured as specified in §§ 393.100-393.106 of this subchapter"). Subsection (b)(1) provides that "the driver of a truck or truck tractor must (1) assure himself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle."

<sup>29</sup> 49 C.F.R. §392.9(b)(4), effective June 18, 1998.

because the federal and state rules impose an express and exclusive duty on the carrier to secure all loads safely. Courts have recognized that shippers/manufacturers owe a duty to exercise reasonable care to properly secure cargo, even under circumstances where subsection (4) of 49 C.F.R. §392.9 would not be applicable.<sup>30</sup>

Georgia law provides, and many states have similar provisions, that: "no person shall operate any motor vehicle with a load on or in such vehicle unless the load on or in such vehicle is adequately secured to prevent the dropping or shifting of such load onto the roadway. Any person who operates a vehicle in violation of this code section shall be guilty of a misdemeanor." OCGA § 40-6-254. Violation of this statute may be negligence *per se*. Richmond Concrete Products v. Ward, 95 Ga. App. 419 (1957).

While the regulations place the statutory duty with regard to safe loading squarely on the shoulders of the motor carrier and the truck driver, what happens when the trucker is injured under circumstances where he/she was not disallowed by the shipper to open and inspect the cargo, and/or the trailer was not loaded in a manner that makes inspection impracticable? The answer to this dilemma can be

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<sup>30</sup> Reed v. Ace Hauling & Rigging Co., 1997 WL 177840 USDC, N.D. Illinois (1997)(while shipper owed no statutory duty to comply with FMCSR, they did owe common law duty to inspect load and ensure that driver had safely secured the cargo); *see also* Locicero v. Interspace Corp., 83 Wis.2d 876, 266 N.W.2d 423 (1978)("federal safety regulations . . . impose a clear statutory duty on the carrier to secure the load safely, but they do not relieve those who breach a common law duty of care from liability for their negligence . . ."); U.S. v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4<sup>th</sup> Cir. 1953)(primary duty . . . upon carrier. When shipper assumes the responsibility of loading, general rule is that he becomes liable for defects which are latent . . . but if improper loading is apparent, the carrier will be liable notwithstanding negligence of shipper").

found in the contract (bill of lading) and tariff documents existing between the motor carrier and the shipper.

Be sure to get both sides of the bill of lading in discovery, not just the front, and read the fine print. The bill of lading should reference the tariffs that govern the shipment. Both rate tariffs and rules tariffs are required to be filed with the Surface Transportation Board,<sup>31</sup> and the carriers are to keep such tariffs available for public inspection.<sup>32</sup> Rate tariffs set forth the charges for various shipments among destinations. Rules tariffs set forth the rules under which the carriage will be performed. A contract carrier, as opposed to a common carrier, operates pursuant to "Transportation Contracts" entered into between the carrier and individual shippers. The transportation contract will contain the rate and rule tariffs for carriage for the contracting shipper.

In addition to the bill of lading, it is vital to pin down the authority under which the haulage is performed. Carriers can be authorized to haul as common carriers, as contract carriers, or both. The certificates of public convenience and necessity indicate the authority the carrier possesses and these should be gathered during discovery. Depending on whether the haulage is as a common or contract carrier, you must obtain the applicable rate tariffs, rules tariffs, and the "transportation contracts."

There are cases specifically addressing the legal force and effect of tariffs.

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<sup>31</sup> 49 U.S.C. §13702(b)(1).

<sup>32</sup> 49 U.S.C. §13702(b)(1).

The general rule is best set forth in the case of Miller v. Ideal Cement Company, 214 F.Supp. 717 (1963), in which the Court stated, "This court is bound to apply the tariff as it is published. It is treated as though it were a statute binding both the carrier and shipper to the rates, charges, rules and regulations published therein. No concessions may be made contrary to the applicable tariff. No oral contracts or agreements may supersede or vary the tariff. Deviations from the lawful rate and charges duly published in the tariff are not permitted. This conclusion is irresistible, regardless of any negotiations, misunderstandings, misrepresentations, or misquotations by and between the carrier and shipper or their agents." The tariff in this case provided "[a]ny temporary blocking, flooring or lining, racks, standards, strips, stakes or similar bracing, dunnage or supports not constituting a shipping carrier, container or package, or a part of the vehicle when required to protect and make shipments secure for transportation, must be furnished by shipper."

For cases involving personal injury actions regarding the effects of the tariff language, *see* Wintersteen v. National Cooperage and Woodenwear Company, 197 N.E. 578 (1935) and General Electric Company v. Moretz, 270 F.2d 780 (1959).

In proper cases, there are opportunities to expand and define the duties and obligations of shippers. Many of the economic incentives that lead to tractor-trailer wrecks are initiated by the shipper and its decisions.

### 3. Georgia Direct Action Statute

Georgia's direct action statute dealing with motor carriers permits a person injured by a motor carrier to join that carrier's insurer in the same action with the motor carrier and its driver. The pertinent statute found at O.C.G.A. §46-7-12(c) provides:

“It shall be permissible under this article for any person having a cause of action arising under this article to join in the same action the motor common carrier or motor contract carrier and the insurance carrier, whether arising in tort or contract.”<sup>33</sup>

The direct action against the insurer arises in contract rather than tort.<sup>34</sup>

The insurer may be sued along with, or independently of, the motor carrier and its agents/employees.<sup>35</sup>

It appears that since the amendment to O.C.G.A. §46-7-12 in 2000, if the motor common or contract carrier is subject to the rules and regulations of the Department of Motor Vehicle Safety<sup>36</sup>, requiring issuance of a certificate of

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<sup>33</sup> Attached as Exhibit B-3-A

<sup>34</sup> Gates v. L.G. Dewitt. Inc., 528 F.2d 405, 532 F.2d 1052 (5th Cir. 1976).

<sup>35</sup> Har Pen Truck Lines v. Mills, 378 F.2d 705 (5<sup>th</sup> Cir. 1967); Maryland Casualty Co. v. Dobson, 57 Ga. App. 594, 196 S.E. 300 (1938); Thomas v. Bobby Stevens Hauling Contractors, 165 Ga. App. 710, 302 S.E.2d 585 (1983); Spicer v. American Home Assur. Co., 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1969), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L.Ed. 2d 479 (1969).

<sup>36</sup> O.C.G.A. §§46-7-1 and 46-7-2.

public convenience and necessity<sup>37</sup> or a motor carrier of property permit<sup>38</sup>, then only two elements need be proven to maintain a direct action against a motor carrier's insurer.

First, the law still requires that the plaintiff allege an "actionable injury" in the complaint.<sup>39</sup> In addition to merely alleging an "actionable injury", the plaintiff must show that he or she has sustained an "actionable injury." Actionable injury is defined in Spicer v. American Home Assur. Co., 292 F.Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L.Ed. 2d 479 (1969).

Second, the fact of coverage under the policy issued to the motor carrier must be proven.<sup>40</sup> This is most often done at trial by tendering the actual policy into evidence. However, the amount of insurance afforded under the policy is not admissible before the jury, if the defense objects.<sup>41</sup> A preferable method is simply to redact the information reflecting the policy limits prior to tendering the policy into evidence.

The former requirement of proving that the policy was filed, accepted and

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<sup>37</sup> O.C.G.A. §46-7-3

<sup>38</sup> O.C.G.A. §46-7-15.1

<sup>39</sup> Great American Indemn. Co. v. Vickers, 183 Ga. 233, 188 S.E. 24 (1936); Addington v. Ohio S. Express, Inc., 118 Ga. App 770, 165 S.E.2d 658 (1968).

<sup>40</sup> St. Paul Fire & Marine Ins. Co. v. Fleet Transport Co., 116 Ga. App. 606, 158 S.E.2d 476 (1967).

<sup>41</sup> Carolina Cas. Ins. Co. v. Davalos, 246 Ga. 746, 272 S.E.2d 702 (1980).

approved has been effectively removed by the amendment to O.C.G.A. §46-7-12 and the transportation rules of the GPSC ("DMVS").<sup>42</sup> The legislature amended the direct action statute to dispense with the mandatory precondition to suit that the carrier's insurance policy of certificate of insurance be on file with the GPSC. In addition, the amendment to the statute dispensing with this requirement has been held to be retroactive.<sup>43</sup>

It is still important to get any forms filed with the DMVS, such as the Form E, Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance, the Certificate of Public Convenience and Necessity, the Motor Carrier of Property Permit and the application for the Motor Carrier of Property Permit, which are helpful in establishing the type of commodities or property the motor carrier has authority to haul.

Certain carriers do not fit the precise definition of "common" or "contract" carriers<sup>44</sup> and their insurers are therefore exempt from direct action. An interesting question arises when a motor carrier's truck hauls loads that are exempt and is then involved in a wreck hauling exempt cargo or, in the alternative, the carrier's truck hauls predominantly exempt cargo, but occasionally hauls other non-exempt cargo. Some carriers claim that they are

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<sup>42</sup> Attached as Exhibit B-3-B

<sup>43</sup> Devore v. Liberty Mutual Insurance Company, 257 Ga. App. 7, 570 S.E.2d 87 (2002); Jackson v. Sluder, 256 Ga. App. 812, 569 S.E.2d 893 (2002).

<sup>44</sup> See O.C.G.A. §46-1-1(9).

engaged exclusively in the transportation of certain enumerated exempt commodities, but through discovery you may find that one or more of their trucks at one time or another carried commodities that were not exempt under O.C.G.A. § 46-1-1(9)(C). A motor carrier is not "exempt" from the definition of a motor common carrier simply because the truck that was involved in the wreck was hauling exempt commodities at the time.<sup>45</sup> If a defendant trucking company was not engaged exclusively in exempt operations under O.C.G.A. § 46-1-1(9)(C), a good argument could be made that their insurer should be subject to direct action. One must also remember that the burden of proof is on the motor carrier owner to establish it falls within the exemption, and there is no burden on the plaintiff to prove the truck was not within the exemption.<sup>46</sup>

Generally, insurers for intrastate carriers (property between points within Georgia) are subject to the direct action statute<sup>47</sup> and are required by the Commissioner of the Department of Motor Vehicle Safety to file a certificate of insurance. While motor carriers engaged solely in interstate commerce are required to register with the Commissioner, the DMVS has not required purely interstate motor carriers (no routes from one place in Georgia to another place in Georgia) to give and maintain bond or insurance with them since 1994 because

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<sup>45</sup> Smith v. Commercial Transportation, Inc., 470 S.E.2d 446 (1996).

<sup>46</sup> Georgia Cas. & Surety Co. v. Jernigan, 166 Ga. App. 872, 305 S.E.2d 611 (1983).

<sup>47</sup> Williams v. Southern Drayage, Inc., 213 Ga. App. 895, 446 S.E.2d 758 (1994).

that regulation was deemed too burdensome on interstate commerce.<sup>48</sup> On the other hand, if an interstate carrier wants to haul property between points within Georgia, it is subject to the DMVS rules and must file a certificate of insurance and will then be subject to the direct action statute.<sup>49</sup>

As a practical matter, there are several benefits to including the named insurer as a defendant in terms of discovery. All or part of the investigative file from the subject occurrence may be discoverable if the insurer is an actual party. The underwriting file concerning the involved motor carrier often contains useful information reasonably calculated to lead to the discovery of admissible evidence in cases involving negligent entrustment, training, supervision, hiring, and retention. If the defense gets an IME, you can capitalize on the fact that the insurance company is the entity that actually hired him/her which is usually taboo. It can also be beneficial at trial to call a representative of the insurer on cross-examination for the purpose of showing that the insurer is the entity orchestrating the defense, etc. to avoid adequate compensation for the victim.

#### 4. Venue

It is well settled that “[v]enue for suits against individuals ordinarily lies in

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<sup>48</sup> *Cf.* O.C.G.A. §46-1-4 (“[u]nless otherwise provided by Georgia law and not preempted by federal law or unless provided or allowed by federal law, the provisions of this title relating to carriers engaged in the transportation of passengers or goods within this state shall not apply to carriers engaged in interstate commerce.”)

<sup>49</sup> *See* O.C.G.A. §46-7-36.

the county of the defendant's residence, and venue as to corporations, whether foreign or domestic, is established by statute. 1983 Ga. Const., Art. VI, §2, ¶ VI.<sup>50</sup>

Motor common or contract carriers can also be sued in the county where the cause of action arose.<sup>51</sup> While motor common and contract carriers who travel through Georgia solely in interstate commerce are required to register with the state of Georgia and maintain an agent or agents for service<sup>52</sup>, the corporation venue provisions are not applicable to them and venue is only proper in the county where the wreck occurred.<sup>53</sup>

When joined in the same action, the motor carrier and its liability insurer are not considered joint tortfeasors or joint obligors. Thus, proper venue as to one is not necessarily proper venue as to the other.<sup>54</sup> Since the action against the insurer is an independent action on the insurance contract, venue is subject to an independent determination.<sup>55</sup> Generally, an insurer is subject to action in any county where (1) the insurer has its principal place of business; (2) where the

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<sup>50</sup> Gault v. Nat. Union Fire Ins. Co. of Pittsburgh, 208 Ga. App. 134, 135, 430 S.E.2d 63 (1993).

<sup>51</sup> O.C.G.A. §46-7-17(b).

<sup>52</sup> O.C.G.A. §46-7-16

<sup>53</sup> See Southern Drayage, Inc. v. Williams, 216 Ga. App. 721, 455 S.E.2d 418 (1995).

<sup>54</sup> Thomas v. Bobby Stevens Hauling Contractors, Inc., 165 Ga. App. 710, 714(2), 302 S.E.2d 585 (1983); Ga. Const., Art. VI, Sec. XIV, Para. IV permits joint tortfeasors to be sued in the county of residence of either.

<sup>55</sup> Thomas v. Bobby Stevens Hauling Contractors, Inc., 165 Ga. App. 710, 714(2), 302 S.E.2d 585 (1983).

insurer has an agent or place of doing business; (3) where the insurer had an agent or place of doing business at the time the cause of action accrued or the contract was made out; or (4) where the person entitled to the proceeds of an insurance contract upon which action is brought maintains his legal residence.<sup>56</sup>

With regard to possible venue for the insurer of a "motor contract" or a "motor common" carrier, a private company, Assessment Systems, Inc. has been authorized by the Georgia Insurance Department to provide a list of all the agents authorized to underwrite that insurance company's business in Georgia.<sup>57</sup>

### C. THEORIES OF RECOVERY

Trucking accidents are generally more complex than ordinary motor vehicle accidents. Many factors can contribute to causing a trucking accident -- driver negligence being the most common. A safety study published by the National Transportation Board concluded that 33 % of all drivers fatally injured in trucking accidents tested positive for drugs or alcohol. Another major cause is defective equipment, especially defective or out-of-adjustment brakes. Brake system failures cause 31% of all trucking accidents associated with mechanical defects.

A 1990 safety study that examined the causes of 182 accidents resulting in truck driver fatalities found that 31% of those fatalities involved truck driver

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<sup>56</sup> O.C.G.A. § 33-4-1.

<sup>57</sup> Attached as Exhibit B-4-A is the request form.

fatigue.<sup>58</sup> A 1995 study of 107 accidents (62 of which were fatigue-related) examined the factors that affect fatigue in heavy truck accidents. Results of the study showed the three most critical factors that predicted a fatigue-related accident were duration of sleep in the last sleep period, the total hours of sleep obtained during the 24 hours prior to the accident, and the presence of split sleep periods.<sup>59</sup>

1. Liability Theories against Motor Carriers and others for Violation of State and Federal Statutes and Regulations and Private Company Rules

The federal safety rules and regulations are comprehensive; yet, they are not the only rules which may be applicable to a particular truck. Georgia, like many other states, regulates intrastate motor carriers and has adopted the FMCSR, making those standards applicable to intrastate carriers. Other valuable sources of safety standards in a trucking accident case are private company rules and policies. Major trucking companies generally have internal rules relating to vehicle maintenance and driver conduct.

While violation of a state or federal statute or regulation may constitute

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<sup>58</sup> National Transportation Safety Board. 1990. *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes*. Safety Study NTSB/SS-90/01 and NTSB/SS-90/02. Washington, DC.

<sup>59</sup> National Transportation Safety Board. 1995. *Factors That Affect Fatigue in Heavy Truck Accidents*. Safety Study NTSB/SS-95/01 and NTSB/SS-95/02. Washington, DC.

negligence *per se*<sup>60</sup>, private company rules and policies do not constitute negligence *per se*<sup>61</sup>, but should be admissible as evidence illustrative of negligence.<sup>62</sup>

Without exception, most trucking companies have their own internal rules and policies governing the conduct of their drivers, maintenance of their vehicles, and other pertinent aspects of their operations - or at least they should have. Such policies are discoverable and must be identified and obtained through discovery.

## 2. Driver Negligence

The most obvious defendant is the driver. Drivers of commercial vehicles are required to have the qualifications, knowledge and skill necessary to operate a commercial motor vehicle safely. This includes all aspects of operation of the equipment and its systems. A common allegation in trucking accidents is that the accident occurred because the driver was fatigued from driving "out of hours". The number of hours a driver is allowed to drive is limited. He/she cannot drive for more than ten hours at a stretch, cannot drive after performing fifteen hours of combined driving and non-driving duty, and cannot drive after seventy hours on duty in eight

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<sup>60</sup> See Reliance Insurance Company v. Bridges, 168 Ga. App. 874 (1983)(violation of state regulation *i.e.* GPSC transportation rules is negligence *per se* if it was proximate cause of injury).; see also Wallace v. Ener, 521 F.2d 215, 221 (5th Cir. 1975)(affirming district court's instruction that violation of FMCSR §§392.22 and 393.95 constitutes negligence *per se* under Georgia law).

<sup>61</sup> See Southern Railway v. Allen, 88 Ga. App. 435 (1953).

<sup>62</sup> See Luckie v. Piggly Wiggly Southern, Inc., 173 Ga. App. 177 (1985).

consecutive days.<sup>63</sup> Drivers are required to keep daily driving logs to document compliance with these rules. The log measures "off duty" time, "sleeper berth" time, "on-duty driving" time and "on-duty non-driving" time. A log must be completed for each twenty-four hour period and is considered current if it is completed up to the last "change of status." Carriers are required to retain driver's logs for six months. A 1986 survey revealed that more than 63% of long-haul drivers surveyed admitted to committing regular violations of the maximum hours of service regulations.<sup>64</sup> Drivers often falsify logs to create the facade of compliance. The reason for the prevalent falsification of logs is the driver's financial interest. The driver earns more money if he/she can squeeze more miles into a given period of time.<sup>65</sup> When paid by the mile, there is one law of the road and one law only: over-the road truckers say, "If the wheels ain't turning, you ain't making money." Thus, a painstaking reconstruction of the driver's movements during the time leading up to the accident is usually in order to prove that the driver had falsified his log to evade federal regulations.

As identified earlier, another possible defendant who may be liable in a "driver fatigue" scenario is the shipper. Shippers may impose unreasonable delivery

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<sup>63</sup> 49 C.F.R. §395 *et. seq.*

<sup>64</sup> *Regular, Common Conference, 1986 Motor Carrier Safety Survey.*

<sup>65</sup> Begam & Wolfe, *Mindless Mayhem on the Highways: How to Prevail in a Truck Collision Case*, Trial, July 1990. A driver's log can be verified by auditing the driver's trip receipts, such as bills of lading, dispatch and delivery orders, and fuel, food and toll receipts. This task is made easier if the driver uses a credit card fuel-purchase system which provides a printout of the time and location of each fuel stop.

schedules upon trucking companies and their drivers. This may encourage drivers to violate the hours of service regulations and speed limits.

### 3. Motor Carrier's Negligent Hiring and Retention of the Driver

Federal regulations figure prominently when a motor carrier hires a driver. The application process is quite detailed. The written application must set forth prior accidents, prior violations and license suspensions.<sup>66</sup> Motor carriers must also conduct an investigation of the driver's employment history for the past ten years, and driving record for the past three years.<sup>67</sup> In addition, a certification must be obtained stating that the driver is physically fit to drive.<sup>68</sup> Motor carriers are required to keep documents certifying the fulfillment of all of the required procedures in a driver qualification file.<sup>69</sup> Failure to comply with the federal requirements may expose the motor carrier to a "negligent hiring" claim.<sup>70</sup>

Motor carriers are required to monitor driver's logs to prevent "out-of-hours" conduct.<sup>71</sup> A punitive damages claim may arise if it can be proven the carrier was on notice of or failed to do anything to discourage "out-of-hours" conduct. A failure to

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<sup>66</sup> 49 C.F.R. §391.21.

<sup>67</sup> 49 C.F.R. §391.23.

<sup>68</sup> 49 C.F.R. §391.41.

<sup>69</sup> 49 C.F.R. §391.51.

<sup>70</sup> See Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 435 S.E.2d 54 (1993).

<sup>71</sup> 49 C.F.R. §395.3 (“ . . . no motor carrier shall *permit* or require . . .”).

take advantage of technological advances in satellite monitoring may prove helpful as well. Without doubt, evidence of fabricated driver's logs is absolutely devastating to the trucking company as it enhances the notion that the trucking company is interested only in delivering as much freight as it can as quickly as possible and that federal guidelines designed to protect the motoring public are of little significance to this corporate defendant.

#### 4. Equipment and Negligent Maintenance Thereof

Part 393 of the FMCSR provides an exhaustive list of mandatory equipment and accessories for trucks, including lighting devices, reflectors and electrical equipment, brakes, window construction and emergency equipment. Also included are requirements for proper loading to prevent shifting and falling cargo.<sup>72</sup>

Part 396 of the FMSCR provides minimum standards for inspection, repair and maintenance of equipment and specifies the motor carrier and "its officers, drivers, agents, representatives and employees directly concerned with the inspection or maintenance of motor vehicles shall comply and be conversant with the rules of this subpart."<sup>73</sup> First, the motor carrier cannot delegate this duty imposed by statute and if someone else performs the maintenance and inspection, they may also be liable. Failure to comply with these minimum equipment and maintenance requirements not only constitutes negligence *per se*, but really damages the motor

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<sup>72</sup> 49 C.F.R. §393.100 - 393.106.

<sup>73</sup> 49 C.F.R. §396.1.

carrier in the mind of any reasonable juror.

Evidence that a recurrent problem was not properly addressed and repaired or that scheduled maintenance was overlooked or delayed in order to utilize the equipment is strongly suggestive that the corporate defendant puts its profits above its interests in safety.

#### 5. Aggravating Circumstances

The three major factors producing large verdicts in favor of plaintiffs are (1) conduct of the truck driver, either before, during or immediately after the collision in question; (2) the operation of faulty or defective equipment by the trucking company with knowledge, actual or constructive, of the inherent danger; and (3) evidence regarding the company's organization, structure and actions (or lack thereof) which suggests that the company pays little more than "lip service" to the safety of others.

Some examples of conduct that may inspire a jury to return a verdict for exemplary damages include: evidence of a "forced dispatch" system<sup>74</sup>; motor carrier destroyed evidence "in the normal course of business"; history of repeated violations of the FMCSR; failure to maintain truck in safe working order/bad brakes<sup>75</sup>; allowing drivers who have poor driving records to drive; forcing drivers to drive without the

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<sup>74</sup> Driver under "forced dispatch" cannot refuse a load unless he/she wants to be written up or terminated.

<sup>75</sup> The driver may assert bad brakes or a mechanical failure as a defense, thus creating a potential claim for punitive damages and a conflict between the driver and his/her company.

proper amount of rest; and drivers who habitually speed or have alcohol and/or drugs in their system.

Questions to pose when handling a tractor-trailer case include the following:  
Does the driver have a "questionable" driving record? Are drugs or alcohol involved? Was he/she driving on too little rest? Did he/she leave the scene? Did he/she attempt to avoid the accident? Claim mechanical failure? Were the appropriate safety precautions taken (i.e., stopped on side of road illegally or blocking the road illegally)? Was excessive speed involved? Was there a mechanical problem? Was proper maintenance performed? Were there prior complaints/knowledge of a problem? Was the truck properly equipped with lights, reflectors and safety devices? Was the driver's record checked? Was the driver properly trained/supervised/monitored? Were federal/state regulations met? Do the necessary records exist? Has the company destroyed records?

If any of these factors appear singly or in any combination in your case you can generally count on having a "winner".

#### D. USE AND APPLICABILITY OF SAFETY REGULATIONS

The Federal Motor Carrier Safety Regulations (FMCSR) apply to all employers, employees, and commercial motor vehicles, transporting property or passengers in interstate commerce,<sup>76</sup> including "for-hire" carriers, "private"

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<sup>76</sup> 49 C.F.R. §390.3(a).

carriers and “exempt” motor carriers.<sup>77</sup> With few exceptions, the federal regulations apply to all commercial motor vehicles (“CMV's”) in interstate commerce.

The federal regulations pertaining to trucks are generally found at 49 C.F.R. §§325: 350-399. These regulations apply to CMV's engaged in interstate commerce. 49 C.F.R. § 390.5 defines commercial vehicles as follows:

. . . any self-propelled or towed vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle: (1) [h]as a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds; or (2) [i]s designed to transport more than 8 passengers (including the driver) for compensation; or (3) [i]s designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or (4) [i]s used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under the regulations prescribed by the Secretary under 49 C.F.R., subtitle B, chapter I, subchapter C.

Title 46, Chapter 7 of the Georgia Code and the former GPSC govern regulation of motor carriers in Georgia.<sup>78</sup> “For hire”<sup>79</sup> carriers are generally divided into “motor contract carriers” (carriers operating under a specific contract) and “motor common carriers” (open to the general public)<sup>80</sup>. “Private

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<sup>77</sup> See 49 C.F.R. §390.5 for definitions.

<sup>78</sup> Transportation Rules of the Georgia Public Service Commission effective August 1, 2000, Chapter 3-1.1. (“Unless otherwise specifically exempted by law the GPSC has jurisdiction over all motor common and motor contract carriers, . . . for hire and private carriers . . . .”)

<sup>79</sup> O.C.G.A. §46-1-1(6).

<sup>80</sup> O.C.G.A. §46-1-1(9)(A) & (B).

carriers"<sup>81</sup> are companies that haul their own goods, such as Kroger, Circuit City, and Wal-Mart.

In general, the former GPSC adopted the FMCSR as its own rules governing the safe operation of motor carriers.<sup>82</sup> The Commissioner of the Department of Motor Vehicle Safety is now vested with the power to regulate common or contract carriers of persons or property for hire by motor vehicle on any public highway in Georgia.<sup>83</sup> In addition, the Commissioner also has the authority to promulgate rules designed to promote the safety of private carriers.<sup>84</sup>

Defendants occasionally contend that the motor carrier involved is not subject to the federal safety regulations because it is a small, local company that does not "transact business interstate", or because it is a "private carrier", or because it is "exempt". This "ploy" is generally not accurate. The motor carrier safety rules of the DMVS are the minimum safety requirements for all motor carriers operating both "for hire" and in "private" transportation in both intrastate and interstate commerce in Georgia. Though carriers which operate purely intrastate are generally not subject to federal jurisdiction, if carriers operate in and through the state of Georgia, they are regulated by the DMVS.

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<sup>81</sup> O.C.G.A. §46-1-1(13).

<sup>82</sup> Transportation Rules of the Georgia Public Service Commission effective August 1, 2000, Chapter 4-1.1(a).

<sup>83</sup> O.C.G.A. §46-7-2.

<sup>84</sup> O.C.G.A. §46-7-37.

It is critical for you to be familiar with the application of FMCSR's to the facts presented by your case. The regulations are broad and are intended to assure the safe operations of motor carriers. In every case you must look for violations of these regulations. You will probably find them.

E. DISCOVERY

1. Information to Request

a. Request for Admissions

Admissions or denials should be made early in the case regarding the following issues: proper names of parties; employment status of the driver or driving for the benefit of whom; that the motor carrier's insignia was on the tractor or power unit of the tractor-trailer at the time of the wreck; that on the date of the wreck there was a policy of liability insurance which insured motor carrier and driver; that such policy provided liability insurance coverage to the motor carrier for claims arising from the wreck; that said policy was on file with the DMVS on the date of the wreck<sup>85</sup>; that said policy had been accepted and approved by the DMVS; that the motor carrier hauled property for hire over the public highways in and through the State of Georgia as a "motor common carrier" or "motor contract carrier" as defined in O.C.G.A. § 46-1-1(9); and that the motor carrier and the driver were subject to the FMCSR or as adopted by the

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<sup>85</sup> Since December, 1993, interstate carriers need only file insurance information with their home state.

DMVS.

b. Interrogatories

Interrogatories are an economical method to discover some basic facts and contentions in the lawsuit. In addition to the standard information found in automobile interrogatories, the following areas of inquiry will be helpful in the prosecution of your case: (1) the manner in which drivers are compensated (i.e. by the mile, by the load, by the hour, straight salary or any other basis); (2) the basis for all drivers' work-related incentives and reprimands; (3) persons employed by the company or contracted to the company (both at the time of the accident in question and at the time the interrogatories are being answered) who have knowledge of (A) company safety policies and operations, (B) investigation of the accident in question, (C) maintenance and repairs of the truck, and (D) are responsible for maintaining company records.<sup>86</sup> Request information such as the operational speeds for trucks; how the company enforces compliance; and how the company handles complaints and/or recommendations by any person or entity made about defects and necessary repairs and/or maintenance of the truck for six (6) months prior to the wreck and subsequent repairs. Also important to obtain

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<sup>86</sup> These should include, but not be limited to, the following persons: (a) Safety Director; (b) Director of Fleet Safety Program; (c) Medical Review Officer; (d) Director of Employee Assistance Program; (e) medical technologist (for blood, urine and breath tests); (f) dispatchers; (g) mechanics who worked on the truck; (h) supervisors of the mechanics; (i) person(s) who administered both the driving test and the written test to the defendant driver; (j) insurance loss control expert from insurance company who has inspected operations; (k) officer or official in charge of operational safety; (l) supervisor of records; and (m) person(s) who investigated the accident in question.

is complete information on the vehicle involved;<sup>87</sup> whether the company had any policy or procedural manuals pertaining to the operation of the tractor-trailer; and whether the company has an accident review board and/or internal group that reviews accidents or alleged accidents of its drivers.

c. Request for Documents

In trucking cases documents are critical and warrant close inspection. Under federal regulations,<sup>88</sup> the corporate defendant is required to keep and maintain information which is not required to be kept by most employers.

Our discovery usually contains requests for all operational documents<sup>89</sup>

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<sup>87</sup> (a) make and model; (b) empty weight; (c) weight of the load at the time of the collision; (d) length, width and height of the truck; (e) licenses held for the truck; (f) make, model and horsepower of the engine; (g) make and model of the transmission; (h) make, model and types of the brakes; (i) speed potential of the truck as configured; (j) makes, models and mileage on the tires; (k) all changes for the original configuration (and an explanation as to why each was changed); (l) name, street and mailing addresses of the individual or company from whom the truck was purchased; (m) make and model of the governor.

<sup>88</sup> The applicable Federal Regulations which govern interstate trucking companies are found under 49 C.F.R. §§200-399.

<sup>89</sup> Driver's trip envelopes and/or trip reports, daily loads or work reports; fuel purchase reports; receipts for any trip expenses or purchases regardless of type, such as fuel, food, lodging, equipment maintenance or repair; special or oversized permits; bridge or toll road, loading or unloading, or other receipts; cargo pickup or delivery orders prepared by any and all brokers, shippers, receivers or motor carriers; all bills of lading and/or manifests prepared or issued by any shippers, brokers, transportation motor carriers, or receivers of cargo (includes copies of bills of lading, manifests that show signed receipts for cargo along with dates and times of cargo pickup and delivery); all freight bills, inclusive of cargo pickup and delivery copies; any dispatch records indicating assignment of equipment and drivers to cargo pickup and delivery, dates and times of pickup and delivery and any other related factors; driver's settlement sheets along with all final accounting documents and computer

pertaining to the movement of cargo by driver or his/her tractor for the period of two weeks before the wreck up to the time of the wreck; complete "driver's qualification file"<sup>90</sup> maintained by the defendant trucking company; copies of driver's daily logs for a period including two weeks before the wreck through the date of the wreck; all administrative driver's logs or driving time or work time audits created by the defendant carrier during that time period<sup>91</sup>; the complete maintenance file kept by the defendant carrier in accordance with FMCSR, Part 396 on the tractor and the trailer inclusive of any inspections, repairs or maintenance done to the tractor and trailer with daily condition reports submitted by drivers; all agreements, contracts, written arrangements, lease agreements involving the tractor or trailer; all written materials, company manuals, company

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printouts showing expenses and payments to a driver in reference to a trip or trips; all motor carrier- or driver - created fuel, mileage and purchase reports or records.

<sup>90</sup> The file must include the driver's driving history, annual review of driving record, and the application for employment, among other things. 49 C.F.R. §391 et. seq. This request should include at least the following: pre-employment questionnaire; application for employment; all medical examinations and certification of medical examination cards; driver's violation statements for each twelve months of employment or while under contract with company; driver's road test; driver's written test; road and written test certifications issued by defendant carrier or others; all past employment inquiries sent to former employers and their responses; inquiries and answers on driver's license records of violations and accidents directed to and received from any state agencies; and copies of all road or written test cards, medical cards, motor carrier certification of driver qualification and any other cards given to driver by defendant carrier or any other motor carrier.

<sup>91</sup> All documents created in reference to the FMCSR Part 395, including but not limited to, driver's daily logs, time cards and records, administrative logs audits, 70-hour log audits, yearly and monthly summary sheets, and reports of violations. Driver's daily logs or charts are required by regulation to be maintained on a daily basis by the driver. It shows the driver's whereabouts and actions, in graph form, for any given time of the day.

issued rules and regulations in effect at the time of the wreck and any educational materials provided to drivers<sup>92</sup>; all results of any pre-employment, random or post-accident drug testing; and all documents generated by the defendant company's accident review board and/or internal organization/group that reviews accidents or alleged accidents of its drivers concerning the chargeability of the wreck.

d. Motions to Compel

Motions to compel are governed by O.C.G.A. §9-11-37 and permit a party to move for an order compelling discovery where the opposing party or deponent fails to answer questions propounded pursuant to O.C.G.A. §§9-11-30 or 9-11-31; make a requested designation under O.C.G.A. §§9-11-30(b)(6) or 9-11-31(a); answer interrogatories under O.C.G.A. §9-11-33; produce documents under O.C.G.A. 9-11-34; or serve a timely written response.

Procedural requirements for motions to compel are governed by local rules either under the Uniform Superior Court Rule 6.4 or the Local Rule 225-4 of the local rules of the Northern District of Georgia. There is a duty to confer with opposing counsel in good faith to resolve the dispute before a motion to

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<sup>92</sup> Company drivers' manuals usually provide a lot of information regarding the company's own rules and regulations. Obtaining this is important because in Georgia, the violation of a company's rules and regulations is admissible as evidence of negligence. Luckie v. Piggly Wiggly, Inc., 173 Ga. App. 177, 178 (1984). There will be, in any sizeable trucking company, all kinds of employee manuals, safety courses, and internal regulations which should provide you with valuable ammunition in development and presentation of your case.

compel is filed.

All materials received in discovery must be studied in detail prior to taking depositions. Care must be taken to cross-check and determine that you have received everything you requested. Oftentimes the defense will tell you the company does not have some of this information or they will simply not produce this information. Diligence in pursuit of this information is well worth your efforts. Once you have determined that you have all the information, a painstaking review and plotting out of the driver's travel schedule and whereabouts for several days prior to the wreck (using logs, fuel purchases, DOT inspections, point-to-point mileage, toll road receipts, bills of lading, dispatch records, settlement sheets and the like) is in order.

The record keeping required under the regulations can help you overcome liability problems or turn a clear liability case into one with punitive potential. Knowing what to seek and knowing what is missing from the documents produced by motor carriers is critical. This knowledge will help make sure that you get all the documents you need and you can attack the motor carrier and its driver for not having documents that they should have created and maintained.

## 2. Deposing the Driver and the Safety Director

The deposition is often one of a trial lawyer's best discovery devices. There are a number of different subject areas to explore during your depositions of the defendants, their employees, and representatives, and the following

suggestions are by no means either exhaustive or exclusive.

One area is the driver's knowledge in the area of trucking related to the wreck in question. A good source is the Georgia Commercial Driver's Manual,<sup>93</sup> which can be obtained from any Georgia State Patrol post. The manual is loaded with great information from which to "quiz" the driver at deposition. Oftentimes the driver fails the "quiz", which produces great fodder at trial. At trial, the driver will have to admit the following: safety is his/her primary concern when driving a tractor-trailer truck; he/she has a special driver's license to drive a tractor-trailer; he/she is required to take a test to obtain a CDL; he/she has read, studied, is familiar with, and has a copy of the Georgia Commercial Driver's Manual.

Another area is the driver's daily inspection (or lack thereof) of his/her equipment. More often than not, a daily inspection consists of little more than walking around the truck, kicking its tires, and climbing into the cab to start the day's journey. If appropriate, the deposition of the driver should elicit a specific, step-by-step outline of the inspection procedures followed on the day in question. We are amazed each time we find that the trucking company "misaid" or destroyed required inspection records. If that is the case, the driver will have little, if any, documentary evidence to refresh his/her recollection concerning the procedures and will be stuck with the answer given on deposition about the "inspection".

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<sup>93</sup> Attached as Exhibit E-2-A

You should inquire of the driver whether he is conversant with the applicable regulations and whether he was provided with proper equipment and training by the company. Where excessive speed is a concern, care should be taken to determine if the company employed any governors in its rigs and if so, whether the driver or operator disabled the device.

A thorough inquiry into the preventative maintenance program employed by the trucking company will be necessary if some defect is believed to have caused or contributed to the wreck.

Inquiry into the trucking company's safety program is also important. A relatively haphazard organization with regard to safety suggests indifference, particularly if compared to an elaborate structure concerning sales, accounting, and similar functions more reflective of the bottom line. Inquiry of the safety director and/or risk manager by deposition is appropriate in certain cases. Questions as to where in the corporate organizational chart the safety department lies, including the number and background of those people charged with administering the safety program are important. The "director of safety" may have had little or no experience on the road, little experience in the business of safe motor carrier operations, or, in a small operation, the position may have been given to an inexperienced family member. Questions concerning his/her familiarity with the job and general principles of safe operation of tractor-trailer units are appropriate. The number of educational seminars and trade conventions, and the type and number of trade publications to which he/she

subscribes are likewise important. Inquiry into what percentage of his/her time is spent in non-safety related functions within the company is also appropriate.

Maximizing safety begins with the hiring process. Questions as to the role of the safety director with regard to the hiring of drivers and checking of references are important, as are inquiries into whether the driving tests were performed in accordance with applicable rules. Does the driver's qualification or employment file accurately depict the driver's MVR report on the date of hire and periodically thereafter? What was the frequency, timing, and duration of any safety programs conducted by the company? Does the company conduct any in-house education with regard to federal safety regulations beyond those required at the time a driver is initially employed?

The trucking company's initial screening process may prove inadequate due to lack of diligence by the company or a failure by the prospective driver to be truthful. Many trucking companies do little more in connection with background investigation than to initiate some casual telephone inquiries conducted by a clerical employee. Courthouse records searches, credit checks, and MVR printouts for any period longer than three years are rarely pursued. Discovery should be designed to expose these weaknesses in the company's hiring and retention policies.

Once again, haphazard or sloppy record keeping or investigation by the motor carrier may suggest that it is more interested in making money than in public safety. In fact, in one of our recent cases, a company president stated (to

defense counsel's amazement) that it was hard to find drivers and for that reason he kept that particular driver on the road despite his abominable driving record, and would keep him on the road as long as he possessed a valid license. Such a statement can be very helpful in light of the fact that when conducting the mandatory annual review of driving records, the motor carrier must consider any evidence that the driver has violated the FMCSR, the driver's accident record, and any evidence that the driver has violated laws governing the operation of motor vehicles and must give great weight to violations -- such as speeding, reckless driving, and operating while under the influence of alcohol or drugs -- that indicate the driver has exhibited a disregard for the safety of the public.<sup>94</sup>

Oftentimes the company will only go back three years from the date of hiring because that is all they are required to do under the applicable safety regulations. Sometimes the driver does not give an accurate driving history to the carrier or gives an accurate history as requested, but the carrier does only a minimal background check on the driver. One of our recent cases involved a truck driver who had a measurable amount of alcohol, marijuana and methamphetamine in his system. He had several DUI's prior to the three year period and numerous other traffic violations, both before his "official" hire date and thereafter. Although the defense may argue that the federal regulations only require an inquiry into the driving record for the preceding three years and that the federal regulations preempt any state law or the common law, 49 C.F.R.

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<sup>94</sup> See 49 C.F.R. §391.25

§390.9 speaks expressly to this argument:

Except as otherwise specifically indicated, subchapter B of this chapter is not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance of which would not prevent full compliance with these regulations by the person subject thereto.

Thus, even if minimum federal standards are met, a jury would still be entitled to find that an employer's conduct fell below reasonable care and possibly that it was sufficiently egregious to support an award for punitive damages.

Furthermore, trade publications frequently contain information, articles, and advertisements about the availability of safety devices or materials which should be utilized by companies to improve the safety of their operations. Inquiry into whether your Defendant trucking company has kept abreast of safety developments may prove useful.

Many companies employ disciplinary committees acting under the auspices of the safety director to determine whether a given accident is "chargeable" or "non-chargeable" against the driver's record. Regardless of result, committee activity can help your case. If the committee has found the accident to be chargeable against the driver's record resulting in some disciplinary action such as suspension, one can argue that the defendant's own procedures showed their driver to be liable for the accident. If the committee has found the accident non-chargeable, claims of a "cover up" are perhaps fitting, especially if the driver's file reveals a number of incidents which were all

considered non-chargeable. If the company has no organization in place to deal with disciplining drivers for accidents, such an apathetic attitude will be of significant benefit to you in arguing to the jury.