Discovery in Trucking Cases

by
Claudia J. Edwards
&
Jason Schultz

Our experience in trucking cases has been that correctly drafted discovery, together with a good working knowledge of the State and Federal Motor Carrier Safety Regulations and a little perseverance, can make the difference between obtaining merely a satisfactory recovery and obtaining a very significant verdict or settlement. Both "informal" and "formal" discovery techniques are equally important when fitting together the discovery puzzle in trucking cases.

I. FEDERAL REGULATIONS AND GEORGIA LAW

A. Federal and State Regulations of Trucks

The Federal Motor Carrier Safety Regulations (FMCSR) apply to common, contract, and private carriers subject to the Department of Transportation Act. The federal regulations pertaining to trucks are generally found at 49 C.F.R. §§ 350-399. With few exceptions, the federal regulations apply to all commercial motor vehicles (CMVs) in interstate commerce. 49 C.F.R. § 390.5 defines "commercial motor vehicle" as follows:

> . . . any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when: (a) the vehicle has a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds; (b) the vehicle is designed to transport more than 15 passengers, including the driver; or (c) the vehicle is

used in transportation of hazardous materials in a quantity requiring placarding under regulations . . . .

Title 46, Chapter 7 of the Georgia Code governs regulation of motor carriers in Georgia. "For hire" carriers are generally divided into "motor contract carriers" (carriers operating under specific contracts) and "motor common carriers" (carriers open to the general public). "Private carriers" are companies that haul their own goods, such as Kroger, Circuit City, and Wal-Mart. The GPSC is vested with the power to regulate common or contract carriers that transport persons or property for hire by motor vehicle on any public highway in Georgia. In addition, the GPSC also has the authority to promulgate rules designed to promote the safety of private carriers.

You may face a situation where the motor carrier defendant contends that it is not subject to the federal safety regulations because it is a small, local trucking company that does not transact business interstate or because it is a private carrier. This claim is unavailing. The motor carrier safety rules of the GPSC 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. Although carriers that 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 GPSC. The GPSC has essentially adopted the federal regulations in whole and added a few safety rules for good measure.

As of April 15, 1996, certain registration requirements and definitions have changed in Georgia's Motor Carrier Act, but these changes do not effect safety rules. Prior to the changes, all motor common and motor contract carriers operating in Georgia were required to obtain a Certificate of Public Convenience and Necessity from the GPSC. Since April 1996, only motor common or contract carriers of passengers or household goods are required to obtain a Certificate. A new term has been coined, "motor carrier of property," which is defined as a ". . . motor common or contract carrier engaged in transporting property, except household goods, in intrastate commerce in this state." "Motor carriers of property" are required to obtain a permit from the GPSC to operate in Georgia.

It is important to note that the tractor and the trailer are each separate CMVs under the federal and state definitions. In instances where the tractor is owned by one entity and the trailer another, each vehicle may be covered by a separate insurance policy which may be available for your clients.

Also essential to understanding the operation of motor carriers is an appreciation of the "trip lease" concept. Often, the owner of a tractor will lease his tractor and his driver to the owner of a trailer. The independent tractor hooks up to the trailer and carries it to various points to deliver freight. Because the tractor must then return, and it is not economical for the tractor to return without pulling a trailer, the tractor and the driver are frequently "trip leased" to a common carrier that has a return load.

The registered motor common or contract carrier is the entity with the operating authority

and usually owns its own tractors and trailers. Licensed motor common or contract carriers also have full direction and control over leased vehicles and will be fully responsible for their operation according to the applicable law and regulations as if the carriers were the owners of such vehicles. Title 49, §11107 of the United States Code formerly gave the Interstate Commerce Commission (ICC) the authority to require motor carriers using owner-operated leased vehicles to employ written leases and to have control of and responsibility for leased vehicles as if the vehicles were owned by the motor carriers according to requirements prescribed by the Secretary of Transportation. Pursuant to that statute, regulations were promulgated requiring the written leases to provide that the carrier has the exclusive possession, control, and use of the equipment and assumes complete responsibility for its operation for the duration of the lease. 49 C.F.R. § 1057.12(a), (c)(1). Effective January 1, 1996, the ICC Termination Act of 1995 abolished the Interstate Commerce Commission. Governance of interstate motor carriers was transferred to the newly created Surface Transportation Board within the Department of Transportation. 49 U.S.C. §§ 701, 702. Former 49 U.S.C. § 11107 has been reenacted substantially unchanged as 49 U.S.C. § 14102, except that the code section now refers to the authority of the "Secretary of Transportation" instead of the "Interstate Commerce Commission." Under 49 U.S.C. § 14102, the common carrier bears sole responsibility for the control of the driver of the leased equipment and is deemed to be the driver's statutory employer for purposes of liability. There are similar rules in Georgia promulgated by the GPSC under the Transportation Rules, Chapter 1-7-1-.02(d)(e). For cases dealing with similar 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).

B. Direct Actions Against Insurers

Of particular interest to most plaintiff's attorneys are the "direct action" statutes, O.C.G.A. § 46-7-12(e), pertaining to motor common carriers, and O.C.G.A. § 46-7-58(e), pertaining to motor contract carriers. Both provide as follows:

> It shall be permissible under this article for any person having any cause of action arising under this article in tort or contract to join in the same action the motor carrier and its surety, in the event a bond is given. If a policy of indemnity of insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action, whether arising in tort or contract.

Generally, if the motor carrier is not exempt and the wreck occurred in Georgia, you can join the insurer as a defendant in your case. In fact, suit can be brought directly against the insurer alone without joining the motor carrier. *Griffin v. Johnson*, 157 Ga. App. 657, 278 S.E.2d 422 (1991); *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585

(1983). Unfortunately, there are numerous exceptions to the definitions of "motor common" and "motor contract" carrier under Georgia law. *See National Indemnity Company v. Tatum*, 193 Ga. App. 698, 388 S.E.2d 896 (1989). Under these exceptions found in O.C.G.A. § 46-1-1(9)(C) *et seq.*, certain motor carriers are exempt under for the purposes of the direct action statute; in such cases, the insurance company cannot be joined as a defendant. Note, however, that a motor carrier's exemption under § 46-1-1(9)(C) does not mean that the motor carrier is exempt from the safety regulations adopted by the GPSC.

An important decision in this area came last year in *Smith v. Commercial Transportation, Inc.*, 220 Ga. App. 866, 470 S.E.2d 446 (1996). The *Smith* court held that the trucking company was not exempt from the definition of a motor common carrier simply because the truck involved in the wreck was hauling exempt commodities at the time. The court found that the defendant trucking company was not engaged exclusively in exempt operations under O.C.G.A. § 46-1-1(9)(C). This decision is important because although some motor carriers claim that they are engaged exclusively in the transportation of certain exempt commodities enumerated in O.C.G.A. § 46-1-1(9)(C), through discovery you may find that one or more of their trucks at one time or another carried commodities that were not exempt under the statute. The *Smith* case should apply under those circumstances to defeat the trucking company's claim that it is not a common or contract carrier.

Generally, in order to keep the insurance company as a party defendant, you must prove: (1) that the trucking company was a motor common or motor contract carrier; (2) that there was a policy of liability insurance covering the incident; (3) that the insurance policy was on file at the GPSC; and (4) that the insurance policy had been accepted and approved by the GPSC. See Glen *McClendon Trucking Company, Inc. v. Williams,* 183 Ga. App. 508, 359 S.E.2d 351 (1987), cert. denied, 183 Ga. App. 906, 359 S.E.2d 351 (1988).

In addition to the above, the plaintiff must also "prove" the policy in order to sustain judgment directly against the insurer. *Carolina Casualty Insurance Co. v. Davalos,* 246 Ga. 746, 272 S.E.2d 702 (1980). Although the existence of insurance is revealed to the jury, the amount of the insurance coverage generally is not disclosed to the jury over objection from any party. Ordinarily, it is preferable to enter into a stipulation as to the policy's authenticity and admissibility with the policy limits redacted.

In direct actions, the motor carrier and its liability insurer are not considered as joint tortfeasors or joint obligors; therefore, proper venue as to one is not necessarily proper venue as to the other. *Thomas v. Bobby Stevens Hauling Contractors, Inc.*, 165 Ga. App. 710, 714(2), 302 S.E.2d 585 (1983). Since the action against the insurer is an independent action on the insurance contract, venue is subject to an independent determination. Generally, an insurer is subject to an action in any county where it has an agent or place of doing business or in the county where the person entitled to the proceeds of the insurance contract maintains his legal residence. O.C.G.A. § 33-4-1(2) and (4).

II. INFORMAL DISCOVERY

Informal discovery is crucial in the tractor-trailer case.

A. Accident Investigation

Your investigation should begin as soon as you sign up the client. In serious injury cases, local authorities frequently will photograph the scene and the vehicles, thereby memorializing such things as skid marks, degree of crush, etc. The investigating officer will sometimes seize all paperwork relating to the load being transported, including the driver's logs. In our experience, unfortunately, this rarely happens. The GPSC sometimes dispatches safety compliance officers to the scene as well, so it is important to check with the GPSC to see if it investigated the wreck. Also, check the local newspapers to see if they sent a photographer and reporter to the scene. When you talk to the reporter, ask if she interviewed any witnesses.

B. Drugs and Alcohol

If there is any indication that the driver was under the influence of alcohol and/or drugs, it is important to follow up with the investigating officer and/or the Georgia Bureau of Investigation (GBI) as soon as possible. In particular, we have found with regard to the drug methamphetamine (a favorite of some truck drivers) that the GBI does not regularly perform a confirmatory analysis to differentiate between the different isomers of methamphetamine (one legal and the other illegal). We suggest that you confirm that the GBI forensic laboratory will maintain the samples, so that at a later date you can have them tested by an independent lab if necessary.

C. Driver's Conduct

The driver's conduct often provides fertile ground for evidence that increases the value of your case against the motor carrier. The driver's operation of his tractor-trailer, his effort and ability to avoid a serious highway collision, and his response to the accident immediately afterward are facts that give a jury an impression of the corporate motor carrier defendant as well as the individual employed by it.

D. Witnesses

Care should be taken to contact all witnesses identified in the traffic accident report or found through other sources, not only to determine what they saw immediately before and during the wreck, but also what they observed and heard afterward. For instance, we have handled a number of cases in which the truck driver claimed to have been totally unaware of having collided with a passenger car during a lane change and simply continued down the highway. Although this conduct is explainable in certain circumstances, testimony that the truck driver had to be chased down by a "good Samaritan" typically helps to incline the jury against the trucking company and its driver. In one case, a truck driver who, incidentally, was illegally inside I-285 in Atlanta, actually admitted to seeing a car flipping behind him, yet he continued down the road without even calling the police on his CB radio because he did not "believe" that he was involved in the wreck.

Eyewitnesses who can provide testimony about the driver's pre-accident conduct can be invaluable. For example, the trucker's speed prior to the collision, his propensity to change lanes in

traffic, and so forth, are important. Most 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.

Too much concern on the part of the driver for her rig, particularly where the driver is the owner of the equipment, is a fact to which juries do not take kindly. Testimony from witnesses that the truck driver spent her time looking at her tractor-trailer and evidenced little, if any, concern for the well-being of others, often provokes the jury.

Witnesses' accounts of the appearance of the equipment itself is also significant. If the vehicle involved in the accident was dirty or appeared poorly cared for, it will generally reflect badly on the trucking company and will help your efforts to create an image of a sloppy, unprofessional organization more interested in holding down costs than in providing safe and reliable service. In addition, truck drivers frequently emblazon their vehicles with slogans, decals, flags, and the like which sometimes are offensive to members of the jury. The driver's CB "handle" can also be illustrative of his personality and character. Knowing the physical appearance of the driver at the scene or thereafter is helpful. The defense can spend a good bit of time "cleaning up" the driver prior to trial; therefore, some evidence concerning the truck driver's pre-trial appearance is of interest. Inappropriate statements made by the driver at the scene perhaps can be used at trial as admissions. Conversely, if the trucking company instructs its drivers to speak only to the investigating police officer, such reticence is often viewed unfavorably by the jury.

E. Records

Information about a particular motor carrier can be obtained from various non-parties such as state public service agencies and various regional offices of the Federal Highway Administration that maintain financial information and other corporate records of the defendant carrier. The GPSC will provide property permits or exemptions, the carrier's application for authority, any safety audits that have been performed, insurance bonds, and insurance declaration sheets for Georgia motor carriers. Since December 1993, information concerning an interstate motor carrier must be obtained through the carrier's home state. There are also private companies, such as Computing Technologies, Inc., located in Merrifield, Virginia, which will provide you with a copy of the carrier's violations, accident histories, and the company "profile." These outside sources, coupled with discovery obtained directly from the carrier, will greatly assist you in the prosecution of your case.

F. Venue for Suit Against the Insurance Company

Venue is proper in a particular county for a suit against the insurer of a motor contract or a motor common carrier if the insurance company has an agent in that county. The Agents Licensing Office of the Georgia Insurance Commissioner will provide a list of all the agents that are authorized to underwrite that insurance company's business in Georgia.

III. FORMAL DISCOVERY

A. Requests for Admissions

Requests for admissions allow you to streamline and simplify the presentation of your trucking cases. Although not strictly speaking a

discovery device, requests for admission should be used early to get the defense to admit to certain jurisdictional and foundational issues concerning the status of the trucking company as a motor common or motor contract carrier and to determine whether the insurance company is a proper party to the action under the direct action statute. These issues should be cleared up and stipulated to well before the first day of trial because if the insurance company is dismissed on a motion for a directed verdict, the jury's belief that there is no longer any insurance coverage available to cover the claim can seriously damage the value of your case.

Admissions or denials should be made early in the case regarding the following issues: proper names of parties, employment status of the driver or for whose benefit she was driving, whether the motor carrier's insignia was on the tractor or power unit of the tractor-trailer at the time of the wreck, whether on the date of the wreck there was a policy of liability insurance that insured motor carrier and driver, whether such policy provided liability insurance coverage to the motor carrier for claims arising from the wreck, whether the policy was on file with the GPSC on the date of the wreck, whether the policy had been accepted and approved by the GPSC pursuant to O.C.G.A. § 46-7-12(c), whether 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 *et seq.*, and whether the motor carrier and the driver were subject to the FMCSR or regulations adopted by the GPSC.

B. Interrogatories

Interrogatories are an economical method of discovering some basic facts and contentions in the lawsuit. In addition to the standard information found in any of your automobile wreck 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 (explain) any other basis);

(2) the basis for all of the driver's 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) responsibility for maintaining company records. These persons should include, but not be limited to, the following persons:

(i) safety director;

(ii) director of fleet safety program;

(iii) medical review officer;

(iv) director of employee assistance program;

(v) medical technologist (for blood, urine and breath tests);

(vi) dispatchers;

(vii) mechanics who worked on the truck;

(viii) supervisors of the mechanics;

(ix) person(s) who administered both the driving test and the written test to the defendant driver;

(x) insurance loss control expert from the insurance company who has inspected operations;

(xi) officer or official in charge of operational safety;

(xii) supervisor of records; and

(xiii) person(s) who investigated the accident in question.

The discovery requests should seek the following information from these individuals: the company's policy as to the operational speeds for trucks; how the company enforces compliance; complaints and/or recommendations by any person or entity made about defects, needed repairs and/or maintenance of the truck for the six month period prior to the wreck; dates of each repair/maintenance and the extent to which such complaints were satisfied (or, if not satisfied, the reason and identity of the person(s) making the decision not to repair); and company policy regarding reporting of wrecks and their aftermath.

You also need to obtain complete information on the vehicle involved, such as

(a) its make and model;

(b) its empty weight;

(c) the weight of its load at the time of the collision;

(d) its length, width and height;

(e) its licenses;

(f) its engine model and horsepower;

(g) its transmission type and model;

(h) the model and types of its brakes;

(i) its speed potential as configured;

(j) the makes, models, and mileage of its tires;

(k) a ny changes from its original configuration (and an explanation as to why each change was made);

(l) the name, street and mailing addresses of the individual or company the truck was purchased from;

(m) the make and model of any governors on the truck;

(n) the names, addresses, and telephone numbers of all operators (including any person who operated the truck within the six months prior to the wreck);

(o) the nature of the employment relationship between company and the driver (lease operator, company driver, temporary driver, owner-operator, etc.);

(p) the load being transported at the time of the wreck (identify where the load originated, who dispatched it, its contents, its weight, and the dates and times of its departure and arrival at the destination);

(q) whether the tractor-trailer involved in wreck had an on-board recording

device, computer, tachograph, trip monitor, trip recorder, or trip master;

(r) whether any tests (blood, urine) were performed on the driver either pre-employment, randomly or post accident, plus the results of any such tests and identification of the persons or entities who are in possession of the results;

(s) whether the company had any policy or procedural manuals pertaining to the operation of the tractor-trailer; and

(t) whether the company has an accident review board and/or internal group that reviews accidents or alleged accidents of its drivers.

C. Requests for Documents

Documents in trucking cases are critical and warrant close inspection. Under the federal regulations, the corporate trucking defendant is required to keep and maintain information which is not required to be kept by most employers. A thorough reading of these regulations will give you some appreciation of the types of material that the defendant motor carrier is required to maintain in reference to each driver and to its equipment.

Our discovery usually contains requests for all operational documents pertaining to the movement of cargo by the driver or his tractor for the period of two weeks before the wreck until to the time of the wreck; the complete "driver's qualification file" 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 and all administrative driver's logs or driving time or work time audits created by the defendant carrier during that time period; the complete maintenance file maintained 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, and daily condition reports submitted by drivers for one year prior to the wreck; all agreements, contracts, written arrangements, and lease agreements to perform transportation services in effect on the date of the incident between defendant company and driver that involve the tractor or trailer at issue; certified copy of the insurance policy; all written materials, educational materials, company manuals, and company issued rules and regulations relating to the drivers' work, activities, job performance, and pickup and delivery of cargo in use by the defendant company at the time the wreck occurred ; all results of any pre-employment, random or post-accident drug testing pursuant to FMCSR, Part 391, or pursuant to company policy; all printouts of any on-board recording device and on-board computer, tachograph, trip monitor, trip recorder, trip master, or device known by any other name which records information concerning the operation of the truck for the 30 days before the collision through the date of the wreck; and all documents generated by the defendant company's accident review board and/or internal organization that reviews accidents or alleged accidents of its drivers concerning the chargeability of the wreck.

Since April 1992, all operators of commercial vehicles, whether in interstate or intrastate

commerce, have been required to have commercial drivers' licenses. There are uniform requirements and qualifications for experience as well as reporting requirements contained in the relevant regulation, 49 C.F.R. § 383 *et seq.* Of particular interest are the driver's responsibility to report violations and the employer's responsibility to undertake annual reviews of violations. 49 C.F.R. § 383.31 and 49 C.F.R § 391.25 and .27. Haphazard or sloppy record keeping or investigation by the motor carrier may suggest that the carrier is more interested in getting its product hauled than in public safety. In one of our recent cases, the president stated, to defense counsel's amazement, that it is hard to find drivers and that he therefore had kept the driver who was involved in the wreck on the road despite his abominable driving record--and that he would keep the driver on the road as long as he possessed a valid license. You can imagine how helpful such a statement can be, especially in light of the requirements that, when conducting the mandatory annual review of its driver's record, 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 that the carrier must give great weight in its consideration 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. In the right case, this type of information can provide the basis for a punitive damages claim on a negligent entrustment or negligent hiring and retention theory.

You must, therefore, review the driver's employment file in detail. Carriers are required to complete background checks on drivers and to inquire into the drivers' past employers. Carriers are also required to pull an MVR and perform annual reviews of the driver's driving history. The motor carrier's file should be cross-checked with your own independent investigation into the driver's driving history through various sources. Oftentimes the carrier will only go back three years from the date of hiring because that is all it is 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 it turns out that the carrier has done 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 at the time of the wreck. We discovered that he had several DUIs prior to the three year period and numerous other traffic violations, both before his "official" hire date and after. 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 pre-empt any state law or the common law; however, 49 C.F.R. § 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."

Id. Thus, even if the minimum federal standards have been met, a jury is still entitled to find that an employer's conduct fell below the standard of reasonable care and, possibly, that the conduct was sufficiently egregious to support an award for punitive damages. In addition, 49 C.F.R. § 392.2 specifically allows for federal laws to be enforced over local standards if the federal law represents a higher standard of care.

Federal regulations contain detailed limits on the time a driver can actually be involved in operating a commercial motor vehicle or be on duty. 49 C.F.R. § 395 *et seq.* There are very specific requirements regarding record keeping and record retention. *Id.* Although drivers are required to prepare and maintain logs on a daily basis, many drivers prepare their logs from memory well after the fact. Interestingly, drivers' logs sometimes are completely fabricated to cover up for a driver operating in excess of the hours permitted by federal regulations. Such evidence is absolutely devastating to the trucking company in subsequent litigation because it immediately enhances the notion that the trucking company is interested only in delivering high volumes of freight as quickly as possible (i.e., making a profit) and that the federal guidelines designed to protect the motoring public are of little importance to the motor carrier. Beware that if there is any significant delay between the date of the accident giving rise to your suit and the date of its filing, the company may well have destroyed the driver's logs, since federal regulations only require that they be kept six months.

It is also important to note that violation of many of these safety regulations constitutes negligence per se under Georgia law. See *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); see also *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193, 202 (1983) (violation of state regulation, i.e., GPSC Transportation Rules, is negligence per se if violation was proximate cause of injury).

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; or produce documents under O.C.G.A. § 9-11-34 or serve a timely written response to document requests.

Procedural requirements for motions to compel are governed by local rules, either Uniform Superior Court Rule 6.4 or Local Rule 225-4 of the Northern District of Georgia. In both state and federal court, there is a duty to confer with opposing counsel in good faith to resolve the dispute before a motion to compel is filed.

All materials received in discovery must be studied in detail prior to taking depositions. Care must be taken to cross-check to determine whether you have received everything that you requested. Oftentimes the defense will tell you

that the company does not have some of the requested information or simply will not produce this information. Diligence in pursuit of such 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 damages potential. Knowing what to seek and what is missing from the documents produced by motor carriers is critical. This knowledge will not only help make sure that you get all the documents you need, but you can attack the motor carrier and its driver for not having documents that they should have created and maintained.

E. Depositions

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

Nothing seems to offend and anger a jury more than knowing that a motor carrier knowingly either placed an unsafe driver behind the wheel or operated defective and dangerous equipment. Surprisingly, many truck drivers, though capable of competently operating their rigs, have little appreciation of the mechanical workings of the modern tractor-trailer unit. Although many drivers maintain that they check the brakes, tires, etc., the majority do not and would not even know what to look for if they did. Occasionally, inspection of the truck's braking system demonstrates that emergency braking components have been purposely disabled so as not to be activated when air pressure in the system is reduced to lower than acceptable levels.

The driver's daily inspection (or lack thereof) of his equipment increases the value of your case. 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. Detailed discovery from the driver by deposition 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 "mislaid" or destroyed required inspection records. If that is the case, the driver will have little, if any, documentary evidence to refresh his recollection concerning his procedures and he will be stuck with the answer he gives you on deposition about his "inspection." Of course, sometimes the testimony from the driver that he carefully inspected his brakes, tires, etc. in accordance with his customary procedures is contradictory to the facts presented at trial. This is very damaging to the defense.

Some highway accidents occur when a passenger car strikes a tractor-trailer that has left the roadway for some reason. In such a case, you should inquire of the driver whether she is conversant with the applicable regulations and whether she was provided with proper equipment

and training. Where excessive speed is a concern, care should be taken to determine if the company employed any governors in its rig and if so, whether the driver or operator has taken any steps prior to the accident to disable 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. Evidence that a recurring problem was not properly addressed and repaired or that scheduled maintenance was overlooked or delayed suggests, once again, that the motor carrier places profit above public safety.

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 pertinent to the bottom line. Deposition of the safety director and/or risk manager is appropriate in certain cases. Questions as to where in the corporate organizational chart the safety department lies, including the number and the backgrounds of the people charged with administering the safety program, are important. The "director of safety" may have had little or no experience on the road or in the business of safe motor carrier operations or, in a small operation, the position may have been given to an inexperienced family member. Discovery concerning the safety director's familiarity with the job and general principles of safe operation of tractor-trailer units is appropriate as is inquiry into the number of educational seminars and trade conventions attended and the type and number of trade publications to which the director subscribes. Inquiry into what percentage of the safety director's time is spent in non-safety related functions within the company can also be revealing.

Maximizing safety begins with the hiring process. Questions as to the role of the safety director in 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 relating to federal safety regulations (beyond what is required) at the time a driver is initially employed?

The trucking company's initial screening process can prove inadequate, either because of lack of diligence on the company's part or a failure by the prospective driver to be truthful. Many trucking companies do little more 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 depositions should be designed to expose these weaknesses in the company's hiring and retention policies. Furthermore, trade publications frequently contain information, articles, and advertisements about the availability of optional

devices which might be used by companies to improve the safety of their operations. For example, the regulations require relatively little in the way of lighting along the sides of a trailer. Recently, some trucking companies have begun to use devices such as reflective tape to make the sides of their trailers more conspicuous to oncoming motorists. The majority of the trailers on the highway, however, do not have this striping and are extremely difficult to see at night. Inquiry into whether your defendant trucking company has kept abreast of safety developments might prove useful in enhancing the value of your case.

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 the result, the 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 its driver to be liable for the accident. If the committee has found the accident non-chargeable, claims of a "cover up" may be fitting, especially if the driver's file reveals a number of incidents, all or most of which were 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.

IV. CONCLUSION

As with most matters, involvement of knowledgeable counsel early in the case can be critical to the discovery and preservation of important evidence. A good working knowledge of the pertinent federal and/or state safety regulations, together with a rigorous and thorough investigation, can make the difference between an average settlement or verdict and an outstanding one.