

## TRANSPORTATION

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### IN THIS ISSUE

*Lawsuits involving trucking accidents can include a multitude of document production requests. It is important to be aware of the potential objections available to your client. This article addresses the legal basis for objecting to a plaintiff's request for a motor carrier's accident register in the United States and documentation that may have been submitted by the carrier to the Department of Transportation.*

## A Privilege to Remember: The Protection of Accident Registers in the Discovery Process of a Trucking Lawsuit

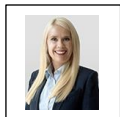


### ABOUT THE AUTHOR

**Adam Rust** is a shareholder with the Lewis Thomason, P.C. firm and is based in Knoxville, Tennessee. His practice includes the representation of local and national transportation companies in litigation, as well as accident investigation and evaluation. He also spends a significant amount of his time handling commercial litigation and insurance coverage disputes. Lewis Thomason, P.C. has offices in Knoxville, Nashville and Memphis. He can be reached at [ARust@LewisThomason.com](mailto:ARust@LewisThomason.com).

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This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Most of us licensed drivers in the United States are familiar with point systems in our given state or jurisdiction and we know I'm not talking about the good kind of points you can score. In many states, if a driver is involved in an accident or is issued a certain type of moving violation, a point or notation is made on the individual's driving record. Similar to regular licensed drivers, the Federal Motor Carrier Safety Administration (FMCSA) uses a system to document the track record of safety for motor carriers that use commercial drivers. When a certain incident occurs that would warrant documentation for a commercial vehicle driver's license, this is considered a recordable accident for the Department of Transportation (DOT).

The FMCSA requires that motor carriers document serious accidents that involve their commercial vehicles (including tractor-trailers and buses). Any accident that meets the criteria of the FMCSA is deemed to be a DOT-reportable accident. Pursuant to 49 U.S.C. § 390.5 and §390.15, any accident involving a commercial motor vehicle that meets any of the following criteria is considered a reportable accident:

1. A fatality is involved;
2. There was a bodily injury in which a person received emergency medical attention away from the scene of the accident;
3. One or more vehicles involved in the accident had to be towed from the scene.

The compilation of information for these accidents is called an accident register and it must include the following information:

1. The date of the accident;
2. The city and state where the accident occurred;
3. The name of the commercial motor vehicle driver;
4. The number of injuries;
5. The number of fatalities;
6. Whether the accident resulted in the release of hazardous materials; and
7. Copies of all accident reports in the case.

This information for each reportable accident must be kept by the motor carrier for at least three years. Additionally, the motor carrier must make the register available to the FMCSA or the DOT, if requested.

As one would expect, personal injury lawsuits involving motor carriers frequently include requests for inspection and/or production of the company's accident register. There has been recent case law regarding this issue, which is usually focused upon the interpretation of 49 U.S.C. § 504(f).

This section states as follows:

"No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may

be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.”

49 U.S.C. § 504(f).

Motor carriers can and should argue that the prohibition within Section 504(f) includes the discovery process in a civil lawsuit. This issue has been decided by a few courts and many place emphasis upon the U.S. Supreme Court’s reasoning in *St. Regis Paper Co. v. United States*, which confirmed that the text of the statute must be strictly construed. See *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). Essentially, the party seeking to use the privilege has the burden of proving that it exists. The Supreme Court stated that the disclosure of information through discovery will not be barred absent an express prohibition. See *id* at 218. In fact the *St. Regis Paper Co.* decision listed the earlier version of section 504(f) as an example of “when Congress has intended like reports not to be subject to compulsory process and ‘has said so.’” See *Sajda v. Brewton*, 265 F.R.D. 334, 340 (N.D. Ind. 2009)(quoting *St. Regis Paper Co.*, 368 U.S. at 218). “Nor are such reports [required or made by the Secretary of Transportation of an accident occurring in the operations of a motor carrier] subject to discovery in any such civil action.” See *id*; See also *Irvine v. Safeway Trails*, 10 F.R.D. 586, 587-588 (E.D. Pa 1950)(“Plaintiffs have requested the production of reports to the Interstate Commerce Commission which under the provision of the Act [now codified as 49 U.S.C. § 504(f)], are privileged. The objection

to this interrogatory, therefore, will be sustained.”).

In the *Sajda* case, the plaintiffs argued that the seemingly nonspecific wording of section 504 prohibiting admission into evidence or “use” in a civil action for damages lacks the Congressional intent to create a privilege. That being said, the Court placed emphasis upon the fact that the plaintiffs failed to cite a case in which a court actually compelled discovery when the statutory privilege of section 504 was asserted. The plaintiffs instead focused upon six statutes within the United States Code in which Congress had discussed a privilege exempting documents from the discovery process with specific language aimed at the subject of discovery. See *Sajda* 265 F.R.D. at 341. Similarly, in *Adcox v. Medtronic, Inc.*, 131 F.Supp.2d 1070 (E.D. Ark. 1999), the court reviewed six statutes, including section 504(f), with similarly ambiguous “used in a civil action for damages” language, and found that such language was not specific enough to demonstrate the intent of Congress to bar such reports from discovery. This conclusion was vacated by the 8<sup>th</sup> Circuit, holding that the statute precluded discovery of the mandatory reports. See *In re Medtronic, Inc.*, 184 F.3d 807, 811 (8<sup>th</sup> Cir. 1999).

The *Sajda* Court noted that the burden to demonstrate privilege is on the defendants and held that the case law presented to the Court supports the interpretation of 49 U.S.C. § 504(f) argued by the defendants. See *Sajda*, 265 F.R.D. at 341. Therefore, the Court held that the DOT accident register



was protected by statutory privilege and thus protected from disclosure during the discovery process.

While defending motor carriers in civil litigation regarding accident cases, defense counsel will undoubtedly encounter requests for this information from the opposition. It is important to take note of the privileges available regarding prior accidents in making decisions related to your clients' discovery responses.

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