IADC COMMITTEE NEWSLETTER

TRANSPORTATION

FEBRUARY 2017

IN THIS ISSUE

FRCP 37(e) was amended in 2015 to address the growth in volume of electronic information available. If a party fails to appropriately preserve electronically stored information, courts have the power to issue sanctions against the violating party, including potentially entering default judgment. With the rapid evolution of electronic information available in today's commercial vehicles, it is critical companies and transportation attorneys know what information needs to be secured in the unfortunate event of an accident.

The Duty to Preserve Electronic Evidence in the New Age of Transportation Under Amended FRCP 37(e)

ABOUT THE AUTHORS

Larry Hall focuses his practice on matters of transportation, product liability and personal injury. He has extensive experience representing local, regional and national clients in the trucking and rail industries throughout the litigation process. He works with transportation clients in all aspects of their business including immediate response investigations after catastrophic accidents, safety policies/training, regulatory compliance and general risk management. Larry is an active member of the Missouri Trucking Association, Illinois Trucking Association and the American Trucking Associations. He can be reached at Lhall@sandbergphoenix.com.

Mary Anne Mellow has over 30 years of experience representing clients regionally in high-stakes personal injury litigation. Mrs. Mellow enjoys a broad spectrum trial practice including product liability litigation, premises liability, professional liability and medical malpractice defense. Mrs. Mellow is a member of the International Association of Defense Counsel, Defense Research Institute, the Trucking Industry Defense Association, and the Network of Trial Law Firms. She can be reached at mmellow@sandbergphoenix.com.

ABOUT THE COMMITTEE

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. To contribute a newsletter article, contact:

J. Mitchell Smith
Vice Chair of Publications
Germer PLLC
jmsmith@germer.com

The technology in today's trucks has allowed for increased safety, efficiency, and customer service. Before the end of 2017, the Electronic Logging Mandate will take effect, essentially forcing the extinction of traditional paper logs. Cameras, global positioning systems, and collision avoidance systems provide a wealth of data and when appropriately used, can help a company operate with maximum profitability while in compliance with the applicable federal and state regulations. In the event of an accident, the wealth of technology on today's trucks can provide essential data about the driver's actions before and during the incident in question. This objective evidence will undoubtedly play a critical role in determining liability for the driver's actions or inaction. Understanding the need to preserve this data is essential to prevent unfortunate evidence spoliation claims or unintended litigation outcomes as a result of carelessness or oversight.

2015 Amendments to FRCP 37(e)

In 2015, FRCP 37(e) was amended to adequately address the growth in volume of electronic information available. The new rule authorizes and specifies measures a court may employ if information that should have been preserved is lost, and the findings necessary to justify punitive measures. The new rule applies only if the information should have been preserved in anticipation of litigation and a party failed to take appropriate actions.

Amended FRCP 37(e) states, "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or may not presume the information was unfavorable to the party; or

(C) Dismiss the action or enter a default judgment."

The comments to the amended rule note that courts should consider and determine when and whether the duty to preserve arose. One of the major factors a court will consider is whether a party was on notice litigation is likely and the electronic information would be relevant. Courts will also consider whether there was an independent requirement for evidence to be preserved, through statutes, administrative regulations, a Court order in another case, or a party's own information and document retention protocols. The comments acknowledge that because the party had an independent obligation to preserve information, this does not necessarily mean it had this duty with respect to the litigation. Furthermore, the fact that evidence was lost does not itself prove the party's efforts were not reasonable. The

comments recognize, "[d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible."

When a party fails to preserve electronically stored information that should have been preserved and information is lost as a result, Rule 37(e) mandates the initial focus to be on whether the lost information can be restored or replaced through additional discovery. The Court has broad discretion to authorize discovery from sources not ordinarily considered accessible under Rule 26(c)(1)(B). The court may allocate expenses as necessary to help solve such problems. The comments recognize, however, that efforts to locate information should be proportional to the apparent importance of the lost information to claims or defenses in the litigation.

The amendments to FRCP 37(e) do not alter the common law rules for when the duty to preserve evidence applies. "A litigant has a duty to preserve evidence that it knows or should know is relevant to imminent or ongoing litigation, this duty to preserve evidence extends to electronically stored information." *Marten Transport, Ltd. v. Plattform Advertising, Inc.*, 2016 WL 492743, *5 (D. Kan. Feb. 8, 2016). When the duty arises involves two related inquiries: (1) the timing of when the duty to preserve arises, and (2) what evidence must be preserved. *Zubulake v. UPS Warburg LLC,* 220 F.R.D. 212, 216 (S.DN.Y. 2003). While the duty to preserve exists upon the filing of a lawsuit, "[n]otice invoking a duty to preserve may be triggered by different events, but most commonly, a party is deemed to have such notice if the party has received a discovery request, a complaint has been filed, or any time a party receives notification that litigation is likely to be commenced." *Marten Transport, Ltd., 2016 WL 492743, *5.* While the occurrence of a collision could arguably provide notice, especially an injury collision where the commercial operator receives a citation, certainly the receipt of a letter of representation from an attorney representing the injured individual likely triggers these duties. *See D'Onofrio v. SFX Sports Group, Inc.*, 2010 WL 3324964, *7-*8 (D.D.C. Aug. 24, 2010) ("There is no ambiguity in this letter in regards to the plaintiff's intent to pursue her claims in court, if necessary, or to the type of data she requests defendants to preserve . . . The defendants, *i.e., all defendants*, were on notice and should have undertaken steps to preserve potentially relevant information."). Once a party receives sufficient notice, it must suspend routine document retention policies and put in place a litigation hold. *Linnebur v. United Tel. Ass'n, Inc.,* 2012 WL 2370110, *1 (D. Kan. June 21, 2012).

In terms of the scope of evidence to be preserved, it is generally defined as "what a litigant knows or should know is relevant to imminent or ongoing litigation." *Workman v. AB Electrolux Corp.,* 2005 WL 1896246, *5 (D. Kan. Aug. 8, 2005). A party is not allowed to preserve only favorable evidence, and instead should keep all information relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. *Marten Transport, Ltd., 2016 WL 492743, *5.*

If the information that should have been preserved is lost, and a court finds prejudice to another party from the loss of information, the court is authorized to employ measures necessary to cure the prejudice. This process necessarily requires an evaluation of the information's importance in the litigation. These sanctions may include "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument."

If the court finds a party acted intentionally in losing or destroying evidence to prevent its use in litigation, this gives rise to a reasonable inference the evidence would have been unfavorable to the party responsible for the loss or destruction of the evidence. Once the court determines a party acted intentionally, it is no longer necessary for the court to find prejudice. This is because the finding of intent required gives rise to an inference the lost information was unfavorable and that the opposing party was prejudiced. In extreme cases, the Court is authorized to enter a default judgment.

Implications for Transportation Companies

In light of evolving technology and amended FRCP 37(e), it is essential transportation companies know what actions to take in the event of an accident to comply with the rule and place it in the best position possible to defend a potential claim and future lawsuit. This is especially true if the accident is one where the commercial vehicle operator is not at fault for the accident and a creative plaintiff's attorney may look to create liability through discovery sanctions based on a failure to properly preserve evidence. While outside counsel can certainly help advise companies, it is important companies have appropriate planning and policies in place so they know what needs to be preserved and what measures need to be taken in the event counsel is not immediately retained.

Everyone in the industry is familiar with the extensive recordkeeping requirements applicable to transportation companies. These include a record of the driver's duty status and supporting documents for six months, driver daily inspection reports, and driver qualification files, to include relevant training. With the advent of electronic logging devices and other advancements in technology, it will be necessary for companies to make sure documents are safeguarded and not inadvertently lost prior to litigation. This is especially true in states like Missouri, where potential plaintiffs can delay filing suit up to 5 years. Therefore, waiting until litigation is actually filed to place a hold on electronic evidence is not an appropriate policy.

In addition to the documents required to be preserved, it is also important to retain documents from any cameras or tracking systems such as Qualcomm. Many times this data is written over after a period of time if a specific request to preserve is not made. As the industry moves completely to electronic logs, companies and their representatives should be even more vigilant to protect this information as this electronic evidence may well be helpful to the defense of the company and its driver. The past flaws associated with paper driver logs, such as accidental hours of service violations, are less likely to occur with electronic logs. Accordingly, absent

intentional violations, the electronic logs should help reinforce that the company and its drivers are safe and responsible. It is also important that records of the driver's training, qualifications and relevant records are preserved, even if the individual is terminated as a result of the accident. Again, many of these training monitoring systems are now electronic and data may be lost if not preserved shortly after an incident.

It is easy to imagine a situation where the lack of preservation could be very detrimental. As an example, one day a company's driver is involved in a relatively minor accident. The commercial vehicle operator does not receive a traffic citation, and the driver of the other vehicle does not receive medical treatment on scene. Given the use of electronic logs and Qualcomm data, the company knows its driver was operating within the hours of service and not exceeding the posted limit at the time of the collision. After not hearing anything from the motorist for a couple of months, no one at the company thinks to preserve the logs or Qualcomm data, which are destroyed as the result of a document destruction policy a year later. Two years later, the company receives a letter of representation indicating the motorist has experienced serious head injuries and notifies the company it intends to file a lawsuit. The company later learns the attorney intends to argue the commercial vehicle operator was not paying attention, and should have avoided the collision. While the failure to preserve the electronic evidence is not likely to be sanctionable given the unlikeness of litigation, the lack of evidence showing compliance, which was verified shortly after the accident but not timely preserved, will be extremely detrimental to the company's overall defense.

In addition, transportation companies and their counsel should be ready and willing to offensively place other parties on notice of the need for preservation of evidence. Even if the only other vehicles involved in an accident are consumer automobiles, airbag modules and other technology may be available to help shed light on a vehicle's pre-impact speed and driver actions prior to the collision. While exactly when a duty to preserve evidence arises can be a fact intensive question to determine, sending a short preservation letter to trigger the duty to preserve can go a long way to make sure critical evidence remains available for analysis in the unfortunate event of an accident.

While technology can be incredibly beneficial, it is important companies are prepared to take the necessary steps to preserve evidence in the event of an accident. Memorializing the company's preservation policies in writing and then assigning and training specific preservation duties to certain employees will help make sure timely and needed action is taken which should inure to the long term benefit of the company and its drivers.

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

DECEMBER 2016
New Overtime Rules Mean Change is Coming for all Employers – Transportation Industry Included – or Do They?
Larry Hall, Amanda N. Johnson, Mary Anne Mellow and Narcisa Symank

NOVEMBER 2016
General Jurisdiction via State Registration Statute – Consistent with Daimler? – Part II
Nancy M. Erfle, Amanda N. Johnson, Mary Anne Mellow and Steve Walsh

OCTOBER 2015
General Jurisdiction via State Registration Statute – Consistent with Daimler?
Mary Anne Mellow, Michele Parrish and Nancy M. Erfle

SEPTEMBER 2015
Recent Regulatory Interpretations and Court Decisions on the Employment/Independent Contractor Relationship between Drivers and Transportation Network Companies
Donna L. Burden and Andrew J. Kowalewski

AUGUST 2015
Transportation Network Companies: Recent Regulatory Challenges and Proposed Regulations
Donna L. Burden and Andrew J. Kowalewski

JUNE 2015
Proximate Causation, Mitigation of Damages, and Avoidable Consequences - The Best Defense is a Good Offense
Roy Alan Cohen

MARCH 2015
To Fly or Not to Fly? The Current Landscape for Civilian Unmanned Aircraft
Kevin M. Smith and Carolina D. Ventura

JANUARY 2015
Diversity of Citizenship Removal: What Transportation Attorneys Should Know About "Bad Faith" and the One Year Time Limitation
Donna L. Burden and Sarah E. Hansen

SEPTEMBER 2014
Collateral Source Evidence: Different Approaches to the Admissibility of Evidence of Paid or Incurred Medical Expenses
J. Mitchell Smith and Jason C. Petty

AUGUST 2014
Tracy Morgan v. Wal-Mart: An Examination of Punitive Damages
Jeptha "Jep" F. Barbour, Jill F. Bechtold and Heath L. Vickers