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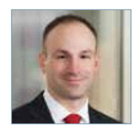
Authors


Joseph C. Baiocco
Partner
Stamford/White Plains
203.388.2403
joseph.baiocco@wilsonelser.com


Daniel E. Tranen
Partner
Edwardsville
618.307.4895
daniel.tranen@wilsonelser.com


Robert M. Campobasso
Associate
Chicago
312.821.6124
robert.campobasso@wilsonelser.com


Michael J. Horne
Associate
Stamford
203.388.2423
michael.horne@wilsonelser.com

For more information about Wilson Elser's Transportation practice, visit our website.

Pre-trip Inspections: Are You Doing Enough?

Serious or fatal accidents involving tractor trailers or other commercial vehicles often arise or result in part from some maintenance defect in the vehicle. When this occurs and the matter goes into litigation, counsel for the plaintiff will shine a very bright spotlight on the pre-trip inspection that was or should have been performed by the driver. How much time was spent and what the driver actually did – and especially what the driver actually knew how to do – will factor into how much liability exposure the operator and owner of that vehicle may face.

The U.S. federal regulations governing this issue provide that "*Every* motor carrier, its officers, drivers, agents, representatives and employees directly concerned with the inspection or maintenance of commercial motor vehicles must be knowledgeable of and comply with the rules of this part." Those rules, particularly CFR 396.11, provide that "every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated…" regarding the driver's inspection of the following:

- ☐ Service brakes, including trailer brake connections
- ☐ Parking brake
- ☐ Steering mechanism
- ☐ Lighting devices and reflectors
- ☐ Tires
- ☐ Horn
- ☐ Windshield wipers
- ☐ Rear vision mirrors
- ☐ Coupling devices
- ☐ Wheels and rims
- ☐ Emergency equipment

Because these inspections are mandated by federal regulations, failure to do them or to do them competently may result in a finding of negligence per se against a driver and his or her employer. In those states that recognize a negligence *per se* cause of action, such a finding may be sufficient to allow a plaintiff to demonstrate liability as a matter of law simply based on the violation of the regulation. In such cases, the damages can be quite high. Courthouses around the United States routinely see judgments and settlements in the seven-figure and even eight-figure range when the significant injury or death of a third party flows from the failure to conduct or adequately conduct a pre-trip inspection.

Below we address three key liability issues that commercial vehicle owners and operators should consider − and hopefully will address − in their practices, policies and procedures pertaining to pre-trip inspections:

- The amount of time a driver spends conducting these inspections and maintaining records for them
- Whether a driver is compensated for that time
- Whether drivers are trained and knowledgeable about how to conduct these inspections.

HOW MUCH TIME IS ENOUGH TIME FOR A PRE-TRIP INSPECTION?

Unfortunately, there is no "right" answer to this question. Case law and expert opinions vary widely regarding how much time is enough. Some plaintiffs' lawyers will argue that the pre-inspection should take approximately 30 to 50 minutes. Others within the industry may argue that 5 to 20 minutes is sufficient.

Before driving any truck, the driver is supposed to be satisfied that the commercial vehicle is in a safe operating condition. If a driver testifies that he or she conducted a thorough inspection of the 11 vehicle systems required under the regulations in 10 or 15 minutes, he or she is going to be cross-examined regarding the thoroughness of that inspection and likely

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will be challenged regarding the meaningfulness of such an inspection. If the driver is just "going through the motions" and never finds anything wrong with a vehicle after years of doing these inspections, the driver's pre-trip inspection logs will be called into question when an accident does occur.

The plaintiffs' lawyer's ultimate goal is not to go after the driver regarding the time spent on pre-trip inspections. This is just the first step. If the driver is not performing full and adequate pre-trip inspections, the lawyer will then go after the company for failing to put systems in place to ensure that compliant pre-trip safety inspections are being conducted by the transportation company's drivers.

In the end, these lawyers will argue − including to a jury − that it is the company's responsibility to make certain that its drivers are complying with safety regulations. That means having policies and procedures regarding the completion of adequate pre-trip inspections, adequate training on those policies and procedures, and an adequate system to enforce those policies and procedures. If that spotlight were directed at your company, would it wilt or would it thrive?

ARE DRIVERS COMPENSATED FOR THEIR PRE-TRIP TIME?

While many truck drivers − employees or independent contractors − are compensated on a mileage basis, there have been a number of recent class-action lawsuits against transportation companies claiming that the failure to compensate drivers for activities that are integral to their trips, such as rest times and inspection times, amounts to a violation of state minimum wage laws. In the context of a claim for property damage or personal injuries resulting from a mechanical defect, a plaintiff's attorney may argue that if the driver were compensated only for mileage, the employer gave the driver no incentive to conduct an adequate pre-trip inspection to detect that defect.

If drivers are not compensated for their time performing pre-trip inspections, a plaintiffs' lawyer will argue at trial that the commercial carrier, by setting up a compensation system that omits pre-trip inspections, effectively dis-incentivizes a driver from performing an adequate or complete inspection. The lawyer will point out that there is no one to check on the activities of a driver on the road, and the inspection log filled out by the driver is the only contemporaneous record of the compliance. If the driver is compensated only for miles driven and efficient completion of a route, the lawyer will argue that the driver may spend minimal time on the uncompensated inspection, and even to lie about it on the log to get a bigger payday by focusing on the activities for which the driver is compensated.

If a driver's compensation includes spending time thoroughly inspecting the commercial vehicle, and completing the inspection log, not only will the owner/operator of the vehicle be promoting this important safety activity, but it will eliminate the plaintiffs' counsel's opportunity to attack the company's policies and procedures and potentially shut down one avenue that a plaintiff might have to secure punitive damages at trial.

DO DRIVERS UNDERSTAND THE REQUIREMENTS AND KNOW HOW TO FULFILL THEM?

Every driver who earns a commercial driver's license (CDL) must demonstrate that he or she knows how to conduct a thorough pre-trip inspection. However, as technology on commercial vehicles changes, it is important to make certain that each driver in a fleet understands how to conduct a proper pre-trip inspection on the particular vehicle that he or she is driving.

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For example, in New Jersey, a wrongful death case was filed against a trucking company because a driver failed to stop at an intersection due to maladjusted rear brakes on the vehicle, killing a pedestrian. The driver, who had a CDL, testified that he knew how to check the brakes by pushing them but not how to adjust them. He therefore did not realize that the brakes were maladjusted. The driver testified that he repeatedly had conducted a pre-trip inspection and logged those inspections, but admitted that he really did not understand the braking system on the vehicle he was assigned to drive. Not only was a five-figure award entered against the trucking company under the New Jersey wrongful death statute, but the company also was slapped with a seven-figure punitive damages award based on the company's reckless conduct of allowing this driver to drive and conduct inspections of a vehicle he did not understand.

Taking steps to train and periodically review the training of drivers is important. Equally important is ensuring that each driver actually understands how to inspect the vehicle he or she is operating. The changing technology on commercial vehicles is a significant risk-management challenge for any commercial carrier. One failure can lead to tragedy, which can lead to a substantial, and perhaps uninsurable and crippling, damages award against the company.

For additional information, contact:

Daniel E. Tranen
Partner (Edwardsville)
618.307.4895
daniel.tranen@wilsonelser.com

Transportation Alert: Picking the Wrong Freight Forwarder Can Obligate the Shipper to Pay Twice

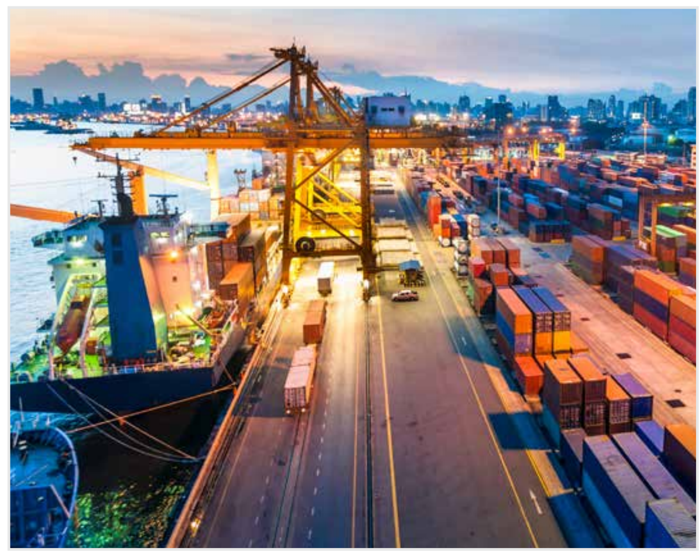
In the United States, the general rule is that the carrier gets paid. *Excel Transportation Services, Inc. v. CSX Lines, LLC*, 280 F.2d 617, 619 (S.D. Tex. 2003). In other words, if a shipper pays an intermediary, but the intermediary does not forward the funds to the carrier, then the shipper is obligated to issue a second payment to the carrier. A shipper bears the risk when it chooses to pay for freight charges through a broker rather than directly to the carrier. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 959 (9th Cir. 2008).

There are a number of policy considerations that support this general rule. The *Excel Transportation* court did recognize that it is unfair to force a shipper to pay twice for the same shipment. However, the court believed allowing a shipper the benefit of carriage without compensating the carrier would eventually cripple the shipping industry, as the carriers would be forced to devote their time to investigating potential customers. In addition, the *Oak Harbor* court found that the shipper is in the better position to avoid liability for double payment by dealing with a reputable freight forwarder by contracting with the carrier to eliminate the shipper's liability, or by simply paying the carrier directly.

Finally, in *Strachan Shipping Co. v. Dresser Indus, Inc.*, 701 F.2d 483, (5th Cir. 1983), the court explained that the carrier expects payment will come from the shipper, although it may pass through a freight forwarder's hands. The carrier may extend credit to a freight forwarder, but there is no economically rational motive for the carrier to release the shipper. The more parties that are liable, the greater the assurance the carrier has that it will be paid.

LIABILITY

Generally, the bill of lading will determine who is liable. *Oak Harbor Freight Lines, Inc.*, 513 F.4d at 954. Liability also can be determined by a contract entered into prior to the preparation of the bill of lading. *See Toyo Kisen Kaisha v. W.R. Grace & Co.*, 53 F.2d 740, 742 (9th Cir. 1931).



If the bill of lading controls, the abbreviated notations will determine who is liable:

- **Prepaid** means the shipper is obligated to pay
- **Collect** means the consignee is obligated to pay
- If the **nonrecourse** box has been signed by the shipper, then the shipper is free from liability
- **Bill to third party** means a third party will be paying but does not relieve the shipper of liability (unless the nonrecourse box is signed).

There are two main defenses to double payment liability for a shipper: contract modification and estoppel. If the shipper has a written contract with the carrier, then the contract will govern the payment, even if the terms of the bill of lading conflict. Parties are free to assign

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liability for payment through a contract. *Oak Harbor*, 513 F.3d at 956. The contract must be between the shipper and the carrier directly. A contract between a freight forwarder and a carrier does not absolve the shipper's liability to the carrier. *See Id.* at 956-957.

Estoppel applies if (1) the carrier makes a misrepresentation, such as a false assertion of prepayment on the bill of lading, and (2) the shipper relies on the representation to its detriment. Double payment alone is not enough to establish estoppel. As a result, shippers have a difficult time proving estoppel. As explained above, courts believe the shipper should bear the risk of double payment and so do not view them as "an innocent party."

TAKEAWAY

While the end result is certainly unfair, a shipper can easily avoid the risk of double payment − the easiest way is to deal with the carrier directly. Unfortunately, cutting out the middle man is not always possible. Intermediaries exist for a reason. Some shippers do not always have the time, energy or expertise to arrange for the carriage of their goods.

In the event an intermediary is a necessity, it's important to do the research to ensure that the shipper you are dealing with is reputable! A simple Google search can reveal a lot about a company. You are placing a great deal of trust in the intermediary you select, not only to ensure payment to the carrier but also to complete any transaction. Before selecting an intermediary, make sure they are worthy of your trust because their actions can impact your relationship with your purchaser.

For additional information, contact:

Joseph C. Baiocco
Partner (Stamford/White Plains)
203.388.2403
joseph.baiocco@wilsonelser.com

Michael J. Horne
Associate (Stamford)
203.388.2423
michael.horne@wilsonelser.com

U.S. Supreme Court Set to Weigh in on Binding Arbitration Clauses in Trucking Industry Independent Contractor Agreements

"Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peace-maker, the lawyer has superior opportunity of being a good man. There will still be business enough." – Abraham Lincoln

If Dominic Oliveira has his way, the Supreme Court of the United States may soon encourage costly, full-blown litigation involving even minor contract disputes between trucking companies and the independent contractor truck drivers whose services they engage. The issue before the Supreme Court is whether a trucking company can enforce an arbitration clause in its independent contractor agreement with its driver, or whether such arbitration provisions are unenforceable under the Federal Arbitration Act (FAA). Because arbitration clauses in independent contractor agreements are so common in the trucking industry, this case could have a far-reaching impact on how disputes between drivers and trucking companies are adjudicated.

OLIVEIRA'S CASE AGAINST NEW PRIME, INC.

Oliveira filed a class action in Massachusetts federal court against New Prime, Inc. (New Prime), an interstate trucking company that engages independent contractors to drive the company's commercial vehicles. The basis of the action certainly appears to be within the purview of the arbitration clauses contained in the independent contractor agreements into which the parties entered, as the agreements addressed issues such as lost wages, breach of contract and the alleged

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misclassification of the driver as an independent contractor. The agreement stated that "the intent of this Agreement is to establish an independent contractor relationship at all times…" and that "any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, including the arbitrability [*sic*] of disputes between the parties, shall be fully resolved by arbitration in accordance with Missouri's Arbitration Act and/or the Federal Arbitration Act." This language is quite standard in the trucking industry.

In general, the FAA and federal law both favor arbitration as a preferable form of dispute resolution. Arbitration is by and large a less expensive way to litigate disputes, and perhaps more importantly, it relieves the U.S. court system of the congestion that would inevitably occur should each of these disputes end up before a judge. Based on obvious benefits of arbitration, federal (and state) courts typically interpret the law in favor of arbitration. However, arbitration clauses are not always enforceable, and Oliveira has thus far convinced two courts that his independent contractor agreement is actually a "contract for employment," which would immunize him from being forced to arbitrate disputes with the trucking company with which he has engaged in an independent contractor arrangement.

THE CENTRAL ISSUE IN DISPUTE

The central issue lies within federal courts' interpretation of the relevant portion of the first section of the general provisions of the FAA, which reads in part:

> "[N]othing herein contained shall apply to *contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*"

Based on this language, federal courts must determine whether independent contractors engaged by transportation companies are considered to be under "contracts of employment" of "workers engaged in foreign or interstate commerce" for purposes of the FAA. Since over-the-road truck drivers are certainly engaged in "interstate commerce," the key issue for the Supreme Court to decide is whether an independent contractor agreement qualifies as a "contract of employment" (a broad construction of that term in the FAA), or whether an actual employee/employer relationship is necessary to implicate this provision (a narrow reading of the FAA). The reason for the Supreme Court's agreement to hear this case is that there are a number of differing views among federal courts as to whether these arbitration agreements are enforceable.

In the most literal sense, some courts have defined "contracts of employment" as just that, contracts between employers and employees – not contracts between companies and independent contractors. However, because the FAA does not include a definition for the phrase "contracts of employment," the First Circuit Court of Appeals applied the definition according to dictionaries from the era during which the FAA was enacted – "agreements to do work." This definition fails to distinguish between "employees" and "independent contractors" and supports Oliveira's argument that section 1 of the general provisions of the FAA excludes independent contractor agreements from the FAA. On the other hand, New Prime has argued that such a broad interpretation conflicts with a contextual reading of section 1. Before the FAA was enacted, Congress had already enacted law governing alternative dispute resolution for "seamen" and "railroad employees." Therefore, their inclusion in section 1 would support a narrow interpretation of section 1 that would not include independent contractors as workers not subject to the FAA's provisions.

NEW PRIME'S MOTION TO COMPEL ARBITRATION

After Oliveira brought suit in the Massachusetts federal district court, New Prime moved to compel arbitration based on the parties' contractor agreement and the agreement's arbitration clause. The district court denied New Prime's motion, holding that the district court must first determine if the FAA's reference to "contracts of employment" includes this independent contractor agreement.

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New Prime immediately appealed the district court's decision to the First Circuit Court of Appeals. While the First Circuit acknowledged that federal appellate districts have reached different conclusions on the issue of whether a district court can determine whether the FAA exception applies to any particular agreement, it held that the district court must resolve the FAA section 1 question before determining whether to dismiss or stay the case in favor of arbitration. To New Prime's dismay, two members of the First Circuit judicial panel took it upon themselves to go beyond the immediate issue before the court, and they determined that a plain reading of the FAA term "contracts of employment" included independent contractor agreements.

If this ruling is upheld by the U.S. Supreme Court, it would in effect prevent all interstate transportation companies from enforcing arbitration agreements within their independent contractor agreements. The appellate court acknowledged that "the weight of district court authority to consider the issue has concluded that the [section] 1 exception does not extend to contracts that establish or purport to establish an independent contractor relationship." Nonetheless, it disagreed with the weight of district court authority, and adopted a broad interpretation of the term "contracts of employment" to include independent contractor agreements.

THE POTENTIAL CONSEQUENCES OF THE U.S. SUPREME COURT'S DECISION

New Prime is asking the U.S. Supreme Court to reverse the First Circuit's determination that the FAA's use of the phrase "contracts of employment" includes independent contractor agreements. If the Supreme Court affirms the First Circuit Court of Appeals, this will undoubtedly have a far-reaching national impact given the benefits of arbitration and the comfort that transportation companies (and owner-operators) have knowing that contract (and other) disputes with their independent contractors will be resolved swiftly and without the costs associated with lengthy, contentious litigation. In addition to the cost-savings of this alternative form of dispute resolution, arbitration rulings and awards are very difficult to overturn, providing more finality than is typically seen in the court system where appeals can drag on for years. Arbitration also provides a private forum (as opposed to the courts), so the ultimate adjudication or award (if any) can be kept confidential. All things considered, there are measureable benefits to the enforceability of arbitration clauses within independent arbitrator agreements.

Indeed, many trucking companies rely on this cost-saving measure to stay profitable in a highly competitive market. Arbitration provides such an opportunity by offering a trucking company a typically less inexpensive avenue for dispute resolution with its independent contractors. Should the U.S. Supreme Court find that arbitration clauses in independent contractor agreements are not binding upon the parties, the cost of doing business would inevitably rise for trucking companies.

Moreover, a Supreme Court ruling invalidating binding arbitration clauses in transportation-based independent contractor agreements would have an adverse effect on the independent contractors as well. The owner-operators, the most common form of independent contractors involved in the trucking industry, typically may have minor and individualized contract disputes with trucking companies. As a result, arbitration, which is usually much more informal than full-blown litigation, may provide a more cost-effective opportunity for owner-operators to seek affordable and swift relief for minor contract disputes. A ruling invalidating the arbitration clauses of these agreements would subject owner-operators to the mercy of more financially capable motor carriers who engage them as independent contractors. Generally speaking, owner-operators may in many cases rely on the lower-cost option of arbitration as a preferable alternative to litigation.

Finally, a decision invalidating binding arbitration clauses would have a less obvious, but equally harmful, affect on the third-party beneficiaries of independent contractor agreements – shippers and consumers. The increased costs associated with litigating minor disputes (as opposed to arbitrating them) would naturally and ultimately be passed on to those who enlist the motor carriers' services, as well as the end consumer. In effect, all that extra money being paid to lawyers to litigate these disputes in court, and to insurers to

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help pay those lawyers, will ultimately be distributed to everyone involved directly and indirectly in the industry.

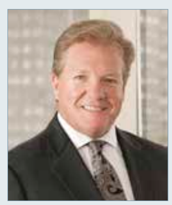
The Chamber of Commerce of the United States, which submitted a brief to the U.S. Supreme Court in support of New Prime's position, noted that "[i]ndependent contractors play an essential role in the modern economy." In its brief, the Chamber referenced a study that showed that between 2010 and 2014, the number of independent contractors increased by 2.1 million workers, accounting for 28.8 percent of all jobs added in America. Given the upward trend of the independent contractor's role in the trucking industry, any ruling that negatively affects the cost efficiency with which the industry operates will have far-reaching consequences on companies, individuals, and indirect market participants.

On its face, Dominic Oliveira's lawsuit against New Prime appears to be a simple situation where a truck driver feels cheated out of his paycheck and decides to bring the trucking company with which he has a contract to court. However, the repercussions of a Supreme Court decision limiting the binding effects of arbitration clauses would unquestionably be felt throughout the trucking industry.

For additional information, contact:

Robert Campobasso
Associate (Chicago)
312.821.6124
robert.campobasso@wilsonelser.com

Brian Del Gatto and Stuart Miller, co-chairs of Wilson Elser's national Transportation, Cargo & Logistics practice, can assist you with any and all legal or regulatory matters relative to the transportation industry. The practice offers extensive claims handling and litigation management experience together with major trial sophistication. Our nationwide 24/7 response program helps ensure that team members are engaged during the first critical hours following a catastrophe.



Brian Del Gatto
Regional Managing Partner
Stamford, Hartford and Phoenix
brian.delgatto@wilsonelser.com

Stuart Miller
Partner
stuart.miller@wilsonelser.com

The Wilson Elser Transportation Newsletter Editorial Committee

Deputy Practice Chair:
Joseph Baiocco | Partner
Stamford/White Plains
joseph.baiocco@wilsonelser.com

Daniel Tranen | Partner
Edwardsville
daniel.tranen@wilsonelser.com

Beata Shapiro | Partner
Boston
beata.shapiro@wilsonelser.com

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