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The ~~Brave~~ *Scary* New World Of Truck Accident Litigation

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Joint Convention
Virginia Trucking Association
Virginia Movers & Warehousemen's Association
Richmond, Virginia
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Quality Representation, Personal Service

I. Scope of Topic

- **Approach**
 - **Address “litigation” long before suit filed**
 - **Plaintiff’s bar becoming more sophisticated**
 - **Information used in litigation**
 - **Novel theories of liability**

I. Scope of Topic

B. Format

- Focus on frequent “problem areas”
 - Personnel policies & practices
 - Loss control
 - Accident responses
 - Docs/retention
 - Contracts

I. Scope of Topic

B. Format

- Practical approach (“real world”)
- Questions/comments welcome

C. Key message: you CAN make a difference (\$)

II. Personnel Policies & Practices

- Hiring/retention (“bad drivers”)
 - Driver shortage (“bottom of barrel”)
 - Tension (safety/operations)
 - “Real world” considerations
 - But is a potential “cost”
 - Accidents (*respondeat superior*) [Cost No. 1]
 - Frequency
 - Severity

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Independent theories of tort liability (beyond “driver error”)**
 - **Negl. Hiring/Retention**
 - **Does (like “respond super”)req. “in scope” of employment**
 - **Diff timing re “negligence”**
 - » **Hire – one shot**
 - » **Retention – ongoing duty to monitor/train**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Independent theories of tort liability (beyond “driver error”)**
 - b. Negl. Entrustment
 - Theory – “knew or should’ve known”
 - Not req. “in course of employment”

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Impact on damages**
 - **Additional theories based on personnel decisions may make potentially explosive docs/info. discoverable/admissible**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Impact on damages**
 - b. **Can result in additional damages**
 - **Punitive**
 - » **“Standard” will impact “disc/admiss”**
(varies per State)
 - » **Poss re “hire/retention” count when not**
avail re “driver error”
 - » **Jury will hear re all their decision**
 - » **“Limiting instruction” (but “bell rung”)**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Impact on damages**
 - b. **Can result in addl. damages**
 - **Compensatory**
 - » **Not “additional” per se**
 - » **Real world impact**
 - **Potential Qs re ins. coverage**
 - **CA gen not cover punitive**
 - **AL v. GL**
 - **AL/GL arg “not insure re labor dec”**
 - **GL exclusion re claims “arising out of ownership, maint, or use of veh.”**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees [Cost No. 2]**
 - **Exclusivity of WC remedy**
 - **Gen rule can’t sue (“trade off”)**
 - **Exceptions**
 - » **Statutory**
 - i) **“Intentional acts”**
 - ii) **no WC ins.**
 - » **“Fellow employee” situations**
 - » **“Bargained away”**
 - i) **Agreement to indemnify**
 - ii) **Bailment agreement**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees [Cost No. 2]**
 - **Other laws (“big picture”)**
 - Title VII
 - ADA
 - FMLA
 - Fair Credit Reporting Act (FCRA)
 - Common law claims
 - » Wrongful term.
 - » Invasion of privacy
 - » Intentional/negl. infliction of emotional distress

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees [Cost No. 2]**
 - **Handling driver’s WC claim**
 - **Possibly contested in whole/part**
 - » **Create bad transcript**
 - » **Hostility (carried into civil suit)**
 - » **Possible conflict of interest for Company’s attorney**
 - **Third party claims**
 - » **Subro by Company**
 - i) **Who to represent driver**
 - ii) **Fees/costs for recovery of lien (Collins)**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees [Cost No. 2]**
 - **Handling driver’s WC claim**
 - (2) **Third party claims**
 - (b) **Driver’s claim beyond lien**
 - i) **Possibly different interests**
 - a) **Exaggeration by driver may hurt Co.’s recovery**
 - b) **Co. poss not want to “sue customer”**
 - c) **“Excess” recovery may be credit to E/I re WC**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees**
[Cost No. 2]
 - **Handling driver’s WC claim**
 - (2) **Third party claims**
 - (b) **Driver’s claim beyond lien**
 - ii) **Who to represent**
 - a) **Cooperation of different attorneys**
 - b) **Possible conflict for Company’s attorney**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees**
[Cost No. 2]
 - **Handling driver’s WC claim**
 - **Driver’s return to work following injury (e.g. of “whipsaw”)**
 - » **Take driver back?**
 - i) **Ongoing WC exposure**
 - ii) **Negligent entrustment claim**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees [Cost No. 2]**
 - **Handling driver’s WC claim**
 - **Driver’s return to work following injury (e.g. of “whipsaw”)**
 - » **Not take driver back?**
 - i) **Increased WC exposure now**
 - ii) **Hostility of driver (carried into civil case)**
 - iii) **Labor claims**
 - a) **Diff laws/diff stds. (ADA, FMLA, etc.)**
 - 1) **Often evid “upside down”**

II. Personnel Policies & Practices

- **Hiring/retention (“bad drivers”)**
 - **Exposure for claims by Applicants/Employees**
[Cost No. 2]
 - **Handling driver’s WC claim**
 - **Driver’s return to work following injury (e.g. of “whipsaw”)**
 - » **Not take driver back?**
 - iii) **Labor claims**
 - a) **Diff laws/diff stds. (ADA, FMLA, etc.)**
 - 2) **Examples**
 - a **WC v. ADA**
 - b **TT v. unempl.**
 - b) **NOTE: labor claims sep. from WC**
 - 1) **Gen not barred by “exclusivity”**
 - 2) **Poss. settle WC and “labor Qs”**
 - 3) **Govt./agency as “party”**

II. Personnel Policies & Practices

- Interaction of laws – again, “whipsaw”
 - Dilemmas (eg. decision to hire/retain)
 - Person may meet “min” std and yet not want to hire/retain
 - May need to “pick poison” – labor suit v. liab
 - Speeding and alcohol
 - Epileptic/false med. card
 - Two ‘99 S.Ct. decisions
 - » Monocular vision (Kirkenburg)
 - » High blood pressure (Murphy)

II. Personnel Policies & Practices

- Impact of “bad drivers” re regulatory issues

[Cost No. 3]

- Violations/fines
- Safety fitness audit/rating
 - DOT audits
 - Generally a game of “gotcha”
 - Will gen find something
 - Q of revenue (& polit. grandstanding)
 - May impact contracts (eg req. “satisfactory”)

II. Personnel Policies & Practices

- Impact of “bad drivers” re regulatory issues
[Cost No. 3]

2. Safety fitness audit/rating

b. Triggers

- Generally not “random”
- Disgruntled employee/contractor
- Big accident
- Numbers beyond “average”

II. Personnel Policies & Practices

- **Impact of “bad drivers” re regulatory issues [Cost No. 3]**
 - **Importance of monitoring your co.’s performance**
 - a. **Internal**
 - **Internet (SAFER, etc.)**
 - Available to public (incl. plaintiffs’ bar)
 - Used to target audits
 - Q re accuracy of data
 - » Need to monitor yours
 - » Challenge as “evidence” (disclaimer)

III. Loss control (“cheapest = not happen”)

- Formal policy
- All must “buy in” (“send right signal”)
- Practice (“for real”)
 - Per “policy”
 - “On shelf” not enough (“lip service”)

III. Loss control (“cheapest = not happen”)

- **Tools**
 - **Forms/materials**
 - **Inside help**
 - **Safety**
 - **Risk**
 - **Legal**

III. Loss control (“cheapest = not happen”)

- **Tools**
 - **Outside help**
 - **Ins. co./brokers**
 - **“Consultants”**
 - **Private/hire**
 - **Trade organizations**
 - **Attorneys**

III. Loss control (“cheapest = not happen”)

- **Documentation re safety/loss control**
 - Shows “concern”
 - NOTE – “two edged sword” (support claim against Company if don’t follow own stated procedures)

IV. Accident Response

- Cooperate with insurer (& possibly excess)
 - Impt. to play active role (from outset)
 - Impact on “bottom line”
 - Payout (SIR)
 - Premium/renewal

IV. Accident Response

- **Plan/proc. in place (acc. inevitable)**
 - **“Go team” (24/7)**
 - **Company representatives**
 - **Attorneys**
 - **Government agencies (contact info)**
 - **Checklist to follow**

IV. Accident Response

C. Driver at Scene

- Train/prepare driver (tough situation)
 - Know proc./co policy (game plan)
 - Legal responsibilities
 - » Stop vehicle
 - » Avoid another accident
 - » Flashers/triangles
 - » Aid to injured
 - » Drug and alcohol test
 - Strategy

IV. Accident Response

C. Driver at Scene

- Train/prepare driver (tough situation)
 - Have tools available
 - Forms
 - » Checklist
 - » Accident card
 - » Exoneration card
 - Names, phone, etc. (24/7)
 - Camera (and training re use)

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - No “admissions”
 - Impact of “I’m sorry.”
 - Concern is ok
 - Questions to others re accident/condition
 - Witnesses
 - Good – preserve evid
 - Bad – don’t confront

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Police
 - Attitude (warn driver)
 - » Effect on whether cited
 - » Evidence at trial
 - Inspection of vehicle
 - » External devices
 - » Cab

IV. Accident Response

C. Driver at Scene

– Initial reaction

- Police

- Statements – verbal/written

- » Company policy re giving statements

- » Language/wording

- » Beware estimates

- i) time

- ii) speed

- iii) distance

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Photographs
 - Selective use of
 - Show context
 - Document what taken

IV. Accident Response

C. Driver at Scene

- Initial reaction**
 - Preservation of physical evidence**
 - Skid marks, debris, etc.**
 - Landmarks/location**
 - Vehicles**
 - » Damage (“four corners”) (cars too)**
 - » Point of impact**
 - » Point of rest**

IV. Accident Response

C. Driver at Scene

– Initial reaction

- Make notes re important info

- Location, time, etc.

- Info gathered at scene (admissions, witnesses, etc.)

- » No admissions

- » Don't speculate (e.g. causation)

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Documentation
 - EOBRs (“two edged sword”)
 - » Many available
 - » Cost/benefit
 - » Problems if have (info/docs)
 - » Problems if don’t (“dollars over lives”)
 - » Cars too
 - i) ECM etc.
 - ii) Use as sword

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Documentation
 - Logs (and back-up documents)
 - » More focus in litigation
 - » May hurt credibility
 - i) “Gut equity”
 - ii) Impact on exposure

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Documentation
 - Accident reports
 - » Disc./admiss.
 - » How/who to prepare
 - Statements
 - » Disc./admiss.
 - » How/who to prepare

IV. Accident Response

C. Driver at Scene

- Initial reaction
 - Documentation
 - Background information
 - » DQ file/personnel records
 - » PM records re equipment
 - Gather early/retain
 - All poss. impact acc. recon.

IV. Accident Response

- **Post-accident response**
 - **Typical procedure**
 - **Internal investigation**
 - **Determ. re “preventable”**
 - **Prev. reqd. (49 CFR 394)**
repealed in 1993
 - **Many still use**

IV. Accident Response

- **Post-accident response**
 - **Again, “tension” (safety/labor v. operations/risk)**
 - **Legit. reasons to do inv./assign fault**
 - **Driver incentives**
 - **“Paper the file” re labor actions**
 - **Avoid future accidents**

IV. Accident Response

- **Post-accident response**
 - **Again, “tension” – safety/labor v. operations/risk**
- But**
- b. Legit concerns re risk/exposure**
 - (1) Info/docs gen discoverable**

IV. Accident Response

- **Post-accident response**
 - **Again, “tension” – safety/labor v. operations/risk**
 - **Legit concerns re risk/exposure**
 - **May impact liability**
 - » **“Preventable” as admission**
 - » **Impact on subro claim too**
 - **Impact of fired/bitter driver**
 - **Keep “big picture” in mind (“acid test” re docs)**

IV. Accident Response

- **Post-accident response**
 - **Equipment**
 - **Repairs (impt. re revenue)**
 - **But preservation of evid. impt. too (“spoliation”)**
 - **Timing**
 - **Procedure**
 - **Poss impact**
 - » **Separate legal claim (D.C., Fl.)**
 - » **Inference (Md., Va.)**

IV. Accident Response

- **Cites/charges against driver**
 - **Beware “on his own” approach**
 - **Findings/pleas**
 - **v. Co/you too**
 - **Vicarious criminal liability**
 - **Impact on civil suit (varies by State)**
 - **Finding**
 - **Plea**
 - **Potential conflict of interests**

IV. Accident Response

- **Cites/charges against driver**
 - **Transcript**
 - **Driver's testimony (always can be used)**
 - **“Witnesses” (incl. future plaintiffs)**

V. Docs/retention

(NOTE: increasingly used in lit!)

- **Types**
 - **DQ file (§391)**
 - **Application**
 - **Need to verify credentials**
 - **Spot potential probs (“red flags”)**
 - **Document efforts/results**

V. Docs/retention

(NOTE: increasingly used in lit!)

- **Types**
 - **Logs**
 - **HOS (“hot button” in lit.)**
 - **Recap re time**
 - **Lines/description**
 - **Beware “in a hurry” inference**

V. Docs/retention

(NOTE: increasingly used in lit!)

- **Types**
 - **Logs**
 - **Supporting docs**
 - **Receipts**
 - **Shipping papers**
 - **GPS/ECM data**

V. Docs/retention

(NOTE: increasingly used in lit!)

- **Types**
 - **Logs**
 - **Retention of logs and back-up docs.**
 - **Organization (e.g. match receipts to driver)(compare)**
 - **Destruction (law/reality)**

V. Docs/retention

(NOTE: increasingly used in lit!)

- **Types**
 - **Docs re equipment**
 - **Specifications**
 - **Maintenance**
 - **Repairs re occ. (again, “spoliation”)**
 - **Cargo/freight**
 - **Internal investigations**

V. Docs/retention

- **Organization/purpose of docs.**
 - **“Accident file”**
 - **FMCSR**
 - **“Ord. course” if “do it every time”**
 - **Discoverable**
 - **Poss. Privileges**
 - **Anticipation of litigation**
 - **Atty-client (if atty. involved)**
 - **Self-critical analysis**

V. Docs/retention

- **E-Discovery**
 - **The shift in technology**
 - **What has changed re fed law**
 - **Amendments to FRCP (effective 12/1/06)**
 - **Rules 16, 26, 33, 34, 37, 45**
 - **IMPORTANT: mandatory – even if other party not ask!**

V. Docs/retention

- **E-Discovery**

- 2. **What has changed re fed law**

- **Requirements**

- **Emphasis on early disclosure**

- » **Rules 16 and 26 require discussion at initial conference**

- » **Types of ESI at issue**

- » **Form in which ESI to be produced (“reasonably useable”)**

V. Docs/retention

- **E-Discovery**
 - 2. **What has changed re fed law**
 - **Requirements**
 - Procedure re inadvertent disclosure
 - **Electronically stored information (“ESI”)**
 - **Definition**
 - Broad/vague
 - Basic/obvious (eg e-mails)
 - Obscure
 - **Federal Rule 34(a)**
 - **Form – “stored in any medium from which info can be obtained”**

V. Docs/retention

- **E-Discovery**
 - **Issues re scope of production**
 - **Standard: Not need to produce if “not reasonably accessible because of undue burden or cost” [FR 26(b)(2)(B)]**
 - **Court’s evaluation**
 - **Protecting party’s initial BOP**
 - **Even if met, court may order if “good cause”**
 - **Possible issue/procedure re “cost shifting”**
 - **Vague/uncertain scope**

V. Docs/retention

- **E-Discovery**
 - “Best practices” to follow re new rules
 - Know what ESI you do/don’t have (or poss. “liar”)
 - More complex than often thought
 - » Company/internal
 - » Drivers
 - » Equipment
 - » Freight

V. Docs/retention

- **E-Discovery**
 - “Best practices” to follow re new rules
 - Know what ESI you do/don’t have (or poss. “liar”)
 - Policies re retention/storage
 - » Internal
 - » Third parties
 - Accessibility
 - Forms
 - Ability to retrieve
 - Costs
 - Proof
 - Witnesses (eg “IT geek”)

V. Docs/retention

- **E-Discovery**
 - “Best practices” to follow re new rules
 - Have procedures in place
 - Work with service providers
 - IT vendors
 - Manufacturer/service reps
 - Insurers
 - Attorneys

V. Docs/retention

- **“Litigation Hold”**
 - **Duty**
 - **Triggers (“notice”)**
 - **Response**
 - **Timing**
 - **Scope**
 - **Documentation of steps taken**
- **Docs. Retention per regs (§ 379)**

VI. Contracts

- **Formal/obvious**
 - **Equipment leases (49 CFR § 376.12)**
 - **Proper TSA**
 - Often ignored
 - Specific regs.
 - Real exposure
 - » Liability claim
 - » “Truth in leasing” action
 - **Practices (e.g. escrow)**

VI. Contracts

- **Formal/obvious**
 - **Equipment leases (49 CFR § 376.12)**
 - **Lease – purchase agreements**
 - **Def. “owner” (§ 376(2))**
 - **Charge-backs against LP debts**
 - **Enforceability**
 - **“Gut equity”**
 - **Hauling or broker agreements**
 - a. **Interstate v. intrastate**

VI. Contracts

- **Formal/obvious**
 2. **Hauling or broker agreements**
 - **Whose “operating authority”**
 - **Responsibility/indemnification**
 - **Insurance**
 - **Poss. claim re “selection of MC”**
 - » **broker (Shramm)**
 - » **shipper (Puckrein)**
 - **Attorneys (and courts) creative re “deep pocket”**

VI. Contracts

- **Formal/obvious**
 - **Hauling or broker agreements**
 - **Insurance**
 - Which policy is applicable (e.g. trailer as “insured vehicle”)
 - Poss. viol. coverage (e.g. “insured contracts” exclusion)
 - Your right to control claims

VI. Contracts

- **Other**
 - Verbal (“handshake”/ “friends”)
 - “Forms” (poss use “master agmt.”)

VI. Contracts

- **General approach**
 - **Understand terms/impact (“more than meets eye”)**
 - **Eg “indem for inj to employees on premises”**
 - 3rd pty claims
 - “Bargain away immunity” (“on both sides of v.”)
 - **Decision to accept**
 - » **Market forces**
 - » **Poss. statute (eg. Md; Tx)**
 - **Eg. “Maintain satisfactory rating” (poss. “viol. own std.”)**

VI. Contracts

- **General approach**
 - **Beware “standard” / “forms”**
 - One size NOT fit all
 - Most terms are negotiable (market forces)
 - **Fund exposure**
 - Price
 - Insurance
 - Self-funding (“take chances”)

VII. Conclusion

- **Importance of “big picture” approach**
 - **Real policies**
 - **Real practices (that follow policies)**
 - **Consistency**
 - **Communication (“yolo tango”)**
 - **internal**
 - **external**

VII. Conclusion

- Importance of “big picture” approach
 - Documentation
 - consistent
 - careful preparation
 - retention
- You CAN make a difference (\$)
 - Investment of resources
 - Willingness to change ways

VII. Conclusion

- **Questions**

- **Now**

- 2. Later**

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