THREE COMMERCIAL VEHICLE CLAIMS ISSUES TO REMEMBER

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I. Federal Protection for Lessees Who Are Authorized Carriers of Household Goods

Federal regulations, many adopted by the states, protect the public by placing obligations and responsibilities on the leasing and operation of commercial vehicles engaged in interstate commerce which are intended to protect the public and to increase the transparency of the entities actually benefitting from the vehicles' operations. An authorized carrier, see 49 C.F.R. § 376.2(a), leasing equipment to be used in interstate commerce is required to have a written lease which not only sets out the terms of the agreement, 49 C.F.R. § 376.11(a), but also provides that:

> [T]he authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 C.F.R. § 376.12(c)(1).

This provision is often cited in claims holding the leasing carrier liable despite allegations of nontrucking use and alleged deviations from company business. Hartford Ins. Co. of the Se. v. Occidental Fire & Cas. Co. of N.C., 908 F.2d 235 (7th Cir. 1990); Carriers Ins. Co. v. Griffie, 357 F. Supp. 441 (W.D. Pa. 1973). But, in both the former ICC rules[1] and the current Federal Motor Carrier Safety Administration regulations[2] an exception to these lease requirements exists for "an authorized carrier of household goods [who] leases equipment for the transportation of household goods . . . ." 49 C.F.R. § 376.12(c)(3). Qualified moving and storage companies may use a provision in their leases which limits the "exclusive possession, control, and use of the equipment for the duration of the lease" to "only during the time the equipment is operated by or for the authorized carrier lessee." 49 C.F.R. § 376.12(c)(3). The moving and storage industry routinely includes language incorporating these provisions in leases but, although the language seems clear-cut, some courts have refused to enforce it.

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[1] 49 C.F.R. § 1057.12(c)(3) (repealed).

[2] 49 C.F R. § 376.12(c)(3).

Surprisingly little caselaw exists interpreting either 49 C.F.R. § 376.12(c)(3) or its ICC predecessor 49 C.F.R. § 1507.12(c)(3) (repealed). Most of the reported opinions which include a citation to either one mention it in passing, and none confirm a jury verdict, summary judgment, or directed verdict. In the most detailed case, a United States district court magistrate judge in Massachusetts considered whether this lease provision was sufficient to invoke the protections allowed by 376.12(c)(3):

> [C]ompany . . . shall have the exclusive possession, control, and use of the equipment . . . in accordance with the leasing regulations of the Interstate Commerce Commission, 49 C.F.R. 12(d) [sic], and the Company further assumes responsibility for the operation of the equipment while such is being operated for the Company.

Granath v. Beasley, No. 90-11972-K, 1992 WL 129587, at *6 (D. Mass. May 1, 1992).

After concluding that "the contract hauling agreement between [the carrier] and Beasley was the type of leasing contract in which the parties were entitled to provide for the exemption permitted by § 1057.12(c)(3)," Granath, 1992 WL 129587, at *6, the court denied the moving company's motion for summary judgment by holding that the lease as a whole still provided the company with exclusive control at all times, despite the provision expressly referring to 49 C.F.R. § 1057.12(d) (current codification 49 C.F.R. § 376.12(c)(3)). This finding was based on the court's conclusion that the lease failed to:

> [L]imit the operation of the first provision of 49 C.F.R. § 1057.12(c)(1) [current codification 49 C.F.R. § 376.12(c)(1)]. In other words, [the carrier] retained the "exclusive possession, control and use of the equipment for the duration of the lease," not only while it was being operated for the Company.

Granath, 1992 WL 129587, at *6.

In finding that the lease limitation coexisted in the lease with the exclusive possession required by 49 C.F.R. § 376(c)(1), the court expressed an inability to clearly determine what the lease was to provide, and determined the lack of clarity required the carrier to be liable to the public for the lessor's negligent operation during the term of the lease:

> At a minimum, an ambiguity appears to exists [sic]. On the one hand, [the carrier] purports to limit its responsibility to the period during which the equipment is being operated on its behalf. At the same time, [the carrier] purports to retain the right to exclusive possession, control and use of the equipment for the duration of the lease. An argument could certainly be advanced that, having bargained for the benefit of this exclusivity, [the carrier] should

> bear the legal consequences flowing from these retained rights, particularly with respect to third parties. Put another way, should not [the carrier]'s legal responsibility, the limitation notwithstanding, be co-extensive with its right to possession, control and use? May carrier lessee pick and choose among the provisions of 49 C.F.R. § 1057.12(c)(1) [current codification 49 C.F.R. § 376.12(c)(1)] which are to be applicable " . . . only during the time the equipment is operated by or for the authorized carrier lessee?"

Granath, 1992 WL 129587, at *6 (omission in original).

Per the Granath opinion, in order to take advantage of these protections on summary judgment, a household goods carrier must make sure the record includes proof that the carrier is "an authorized carrier of household goods," that the goods being carried at the time fit the definition of "household goods," see 49 C.F.R. § 375.103, and that the lease both invokes 49 C.F.R. § 376.12(c)(3) and limits the duration of the leases in accordance with 49 C.F.R. § 376.12(c)(3).

In 2001, a Texas court rendered an opinion in an accident case that involved a moving company vehicle which had been leased to a national moving company for interstate work, and to that carrier's subsidiary for intrastate work. The interstate company's lease expressly limited its exclusive possession and control of the equipment and allowed that the "equipment may be used by, for, and in behalf of Agent when same is not being operated for Company." In an adverse opinion for the company, largely guided by the jury's findings of fact on questions of conspiracy and agency, the court's dicta seems to approve the lease language which both invoked 49 C.F.R. § 376.21(c)(3) and expressly provided that the equipment could be used by others when not in the service of the company:

> An authorized carrier of household goods and the lessor "may provide in the lease that the provisions required by [section 376.12(c)(1)] apply **only during the time the equipment is operated by or for the authorized carrier lessee**." (emphasis added). Here, the lease did just that by providing that the Company [North American] "assumes responsibility as a common carrier by motor vehicle to shippers and the general public **with respect to operation of the aforesaid vehicular equipment for Company**." (emphasis added).

N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 118 (Tex. App. 2001) (alterations in original).

In the unpublished case of Dietrich v. Albertsons, Inc., 57 F.3d 1080 (10th Cir. 1995), the

court acknowledged the validity of the provision:

> Because [the carrier] is an "authorized carrier of household goods," however, the regulations permit the parties to "provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee."

57 F.3d 1080, 1995 WL 355246, at *2 (10th Cir. June 14, 1995) (quoting 49 C.F.R. § 1057.12(c)(3) (current codification 49 C.F.R. § 376.12(c)(3)).

II. Federal Protection for Interstate Deliveries To Municipal Areas

Commercial vehicles stopped in a lane of travel in daylight hours, although large and conspicuous, are sometimes impacted by drivers who later make claims in which they seek to avoid the consequences of their actions by claiming statutory violations on the part of the stopped vehicles. Federal regulations place detailed safety obligations on commercial vehicles involved in interstate commerce who stop on, or aside, thoroughfares. When a truck engaged in interstate commerce is stopped in the road in a residential or business district of a "municipality," application of the "Special Rules" included in 49 C.F.R. § 392.22(b)(2) can sometimes avoid the liability the imposed by state statutes on intrastate commercial vehicles engaged in the same activities.

Title 49 C.F.R. § 392.22(b)(2)(iii) ("Business or Residential Districts") provides:

> The placement of warning devices is not required within the business or residential district of a municipality, except during the time lighted lamps are required and when street or highway lighting is insufficient to make a commercial motor vehicle clearly discernable at a distance of 500 feet to persons on the highway.

49 C.F.R. § 392.22(b)(2)(iii).

States, such as Florida, have enacted laws prohibiting the conduct allowed by the federal rules, and claimants may seek to rely on state statutes relating to intrastate commercial activity to claim that a truck complying with 49 C.F.R. § 392.22(b)(2)(iii) was illegally parked, and therefore negligent per se. Continuing to use the Florida example, subsection 316.301(1), Florida Statutes, provides:

> Whenever any truck, bus, truck tractor, trailer, semitrailer, or pole trailer 80 inches or more in overall width or 30 feet or more in overall length is stopped upon a roadway or adjacent shoulder, the driver shall immediately actuate vehicular hazard-warning

> signal lamps meeting the requirements of this chapter. Such lights need not be displayed by a vehicle parked lawfully in an urban district, or stopped lawfully to receive or discharge passengers, or stopped to avoid conflict with other traffic or to comply with the directions of a police officer or an official traffic control device, or while the devices specified in subsections (2)-(8) are in place.

§ 316.301(1), Fla. Stat.

In Florida it is not necessary to argue about whether the state statute has been pre-empted because section 316.302, Florida Statutes, adopts the federal regulations:

> (1)(a) All owners and drivers of commercial motor vehicles that are operated on the public highways of this state while engaged in interstate commerce are subject to the rules and regulations contained in 49 C.F.R. parts 382, 385, and 390-397.

§ 316.302(1)(a), Fla. Stat. Although not facially apparent by reading the statute, due to section 316.302's incorporation of 49 C.F.R. part 392, Florida Statutes, 316.301(1), Florida Statutes will not apply to, for example, a claim where a someone drives into a moving and storage company making a daytime delivery within a municipality on an interstate job, if it is visible for 500 feet.

III. I Didn't Do It When I Could Have, So Give Me Yours: Addressing a Plaintiff's Efforts to Obtain Work Product Photographs and Estimates of His Vehicle's Property Damage

Traffic accidents involving commercial vehicles can generate third-party claims for both property damage and personal injury. Insurers often obtain photographs, statements and estimates anticipating a potential property damage claim which may never be used as exhibits or evidence in a trial, but are entitled to be protected from discovery by the work product privilege in a subsequent personal injury action.

Federal work product privilege claims are governed by Federal Rule of Civil Procedure 26, which reads, in part:

> (3) **Trial Preparation: Materials.**
>
> > (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means

Fed. R. Civ. P. 26(b)(3).

The level of protection work product is entitled to receive is determined by its content:

> Stated differently, Rule 26(b)(3) establishes two tiers of protection: first, work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, "core" or "opinion" work product that encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" is "generally afforded near absolute protection from discovery."

In re Cendant Corp. Secs. Litig., 343 F.3d 658, 663 (3d Cir. 2003).

Property damage estimates and photographs created solely to deal with third-party claims, which could be evidence, are the kind of fact work product that courts can compel a party to produce.

> Even when documents and tangible things are prepared in anticipation of litigation or for trial, to the extent they do not involve the mental impressions, conclusions, opinions, or legal theories concerning the litigation, they may be discoverable on a showing of "substantial need." The documents falling within this classification are clothed with a qualified immunity that is grounded on a proprietary aspect of the work. The immunity for this class of document is little more than an "anti-freeloader" rule designed to prohibit one adverse party from riding to court on the enterprise of the other.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., 967 F.2d 980, 984-85 (4th Cir. 1992).

Generally, the decision of whether to force fact work product to be produced involves application of several factors which include:

> [1] importance of the materials to the party seeking them for case preparation; (2) the difficulty the party will have obtaining them by other means; and (3) the likelihood that the party, even if he

> obtains the information by independent means, will not have the substantial equivalent of the documents he seeks.

Sanford v. Virginia, No. 3:08cv835, 2009 WL 2947377, at *3 (E.D. Va. Sept. 14, 2009).

Exceptions to the work product protections routinely require production of things such as photographs taken at the scene of an accident, see Reedy v. Lull Eng'g Co., 137 F.R.D. 405, 407 (M.D. Fla. 1991); surveillance tapes showing an incident, see Sowell v. Target Corp., No. 5:14-cv-93-RS-GRJ, 2014 WL 2208058, at *3 (N.D. Fla. May 28, 2014); and photographs of a defendant's equipment, see Huggins v. Fed. Express Corp., 250 F.R.D. 404, 406 (2008). These applications of the rule 26(b)(3)(ii) exception often hinge on the parties' respective opportunities to obtain the information.

When claimants seek to force a defendant in a personal injury case to produce photographs and property damage estimates of the plaintiff's own vehicle which were created during the handling an associated property damage claim, defendants should assert the work product privilege in lieu of producing them. The adverse arguments to be expected may include that the information was created in the normal course of the insurer's business; that the privilege protecting damage photographs was waived if the plaintiff was provided a copy of the estimate when settling the claim; that providing the estimate to the vehicle owner allows the estimator to be deposed to authenticate it; and that a plaintiff, who was not incapacitated, but did not photograph his or her damaged vehicle prior to repairing or disposing of it, can no longer "obtain their substantial equivalent by other means."

Years after a vehicle has been repaired or destroyed it is impossible for anyone to obtain the "substantial equivalent" of photographs of the vehicle's damage. If a plaintiff fails to secure damage photographs and estimates about his or her own property, should the resulting lack of evidence be deemed a hardship sufficient to invade otherwise privileged work product so they may be obtained from a defendant who created them to deal with his or her property damage claim? The answer should be "no," absent circumstances which would have prevented the plaintiff from undertaking the same activities the defendant performed.

Commonly, the decision about photographs depends whether the parties had equal opportunity to obtain them. Courts have held that when counsel was retained, McDougall v. Dunn, 468 F.2d 468, 474 (4th Cir. 1972), and the incapacity of the plaintiff, are factors to be considered when determining whether retained evidence about an incident will have to be disclosed. That court opined:

> Statements of either the parties or witnesses, taken immediately after the accident and involving a material issue in an action arising out of that accident, constitute "unique catalysts in the search for truth" in the judicial process; and where the party seeking their discovery was disabled from making his own investigation at the

> time, there is sufficient showing under the amended Rule to warrant discovery.

McDougall, 468 F.2d at 474; see also McDonald v. Clubb, 143 F.R.D. 103 (W.D.N.C. 1992) (compelling production of photographs and witness statement).

Whether the defendant's insurer "totalled" the plaintiff's vehicle is also a factor when determining if a vehicle owner can show good cause to obtain the insurer's photographs of the plaintiff's vehicle. In the McDonald case the court ordered production, writing:

> The plaintiffs were unable to secure photographs of the automobile on their own because plaintiff . . . was immediately transported from the scene to Piedmont Medical Center . . . and was hospitalized [for months].
>
> . . . .
>
> The defendants' insurance carrier paid for the property damage of the totalled automobile, and the car is no longer available to obtain photographs of the damage.
>
> Plaintiff['s] . . . severe closed head injury caused post-traumatic amnesia and he is unable to describe the actual damage to the automobile.

McDonald, 143 F.R.D. at 104.

When a defendant is in a "unique position" to obtain certain discovery, work product may need to be produced:

> Defendant was in the unique position of being able to interview key witnesses within a day of the incident, while the same opportunity was unavailable to Plaintiff. See Stout v. Norfolk & W. Ry. Co., 90 F.R.D. 160, 162 (S.D. Ohio 1981) (statements' "contemporaneity renders them so unique and unduplicable that need and hardship are clearly established"). Presumably, these statements provide facts essential to Plaintiff's case.

Howard v. Fowler Bros., No. 5:10-CV-198, 2011 WL 3438407, at *2 (W.D. Ky. Aug. 5, 2011).

It is the business of an insurer to adjust and resolve claims, but–like statements–photographs, and estimates created to deal with a third-party claim are not "created in the ordinary course of business" and have been created in "anticipation of litigation."

> While not accepting that every document an insurer may prepare in the "wake of an accident" is protected work-product, we do find it perceptually and logically implausible that an insured's statement, which is taken as a consequence of an occurrence which has engaged his insurance coverage, could be for a purpose other than anticipated litigation. Here, the filing of the Plaintiffs' claim, which placed the Defendant's insurer on notice that they were alleging that their injuries and losses had resulted from the Defendant's fault, resolves any doubt, however remote, we might otherwise have had as to the purpose of the Defendant's statement. Although not obtained in response to a request from trial counsel, the express language of Rule 26(b)(3) includes documents prepared by a "surety, indemnitor, [or] insurer," among others, within the scope of its coverage as privileged work-product.

Banks v. Wilson, 151 F.R.D. 109, 112-13 (D. Minn. 1993) (alteration in original) (citation omitted). But cf. McDougall v. Dunn, 468 F.2d 468, 475 (4th Cir. 1972) (ordering production of witness statements obtained by insurance company).

The rules governing information in an insurer's claim file in a third-party claim differ from those applicable when the litigation has been brought by the insured.

> In contrast to . . . situations [relating to first-party claims], in the instant case the accident did not just involve the insured's vehicle but rather another automobile in which the passengers were severely injured or killed, and where it was immediately apparent that the negligence, if any, would likely be solely with the insurance company's insured. In this latter situation, the prospect of litigation is immediate and the purpose of the insurance investigation will likely be so focused. There is no reason to deny work product protection to investigation documents in these circumstances. Considering the affidavit from the insurance company adjuster and the nature of the case, it is determined that the insurance company obtained the witness reports in anticipation of litigation.

Suggs v. Whitaker, 152 F.R.D. 501, 506-07 (M.D.N.C. 1993) (citation omitted).

The opinions of a party's experts are discoverable only when the expert is designated to testify at trial. The Federal Rules of Civil Procedure read:

> (4) **Trial Preparation: Experts.**

> (A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

Fed. R. Civ. P. 26(b)(4)(A).

An estimator, hired or in-house, is a consultant to the insurer who could be called upon to testify, if needed, in an action concerning the property damages caused. One court has explained:

> In determining whether an expert was hired in anticipation of litigation, the court must examine "the total factual situation in the particular case." To conclude that an expert was hired in anticipation of litigation, a lawsuit need not have been filed, but there must have existed "more than a remote possibility of litigation." . . . . The fact the parties were involved in an appraisal process and that this appraisal process itself was the subject of litigation shows . . . that was there more than a remote possibility of litigation . . . .

Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001) (citation omitted). Notice of a third-party property damage claim also shows that the possibility of litigation is not "remote."

In-house experts, such as property damage estimators, are afforded the same protections as retained experts. In re Shell Oil Refinery, 132 F.R.D. 437, 441 (E.D. La. 1990) ("The court finds that the persuasive authority favors application of Rule 26(b)(4)(B) to non-testifying in-house experts. To rule otherwise would encourage economic waste by requiring an employer to hire independent experts to obtain the protection of Rule 26(b)(4).").

The party who retained the expert gets to decide whether the estimator will be called to testify in a subsequent personal injury action. Merely showing that an expert's opinions would be helpful to prove a claim or defense is insufficient to overcome a valid work product objection, the adverse party must meet the much higher burden of showing "exceptional circumstances" to overcome the privilege be allowed to call an opponent's expert to testify at trial or obtain discovery from the expert's file. "Rule 26(b)(4)(B) "has been construed to require as an exceptional circumstance, a basic lack of ability to discover the equivalent information on the part of the party moving for discovery." Delcastor, Inc. v. Vail Assocs., Inc., 108 F.R.D 405, 409 (D. Colo. 1995); see also Spearman Indus., 128 F. Supp. 2d at 1151 (when a potential witness "qualifies as a non-testifying expert consulted in anticipation of litigation or preparation for trial, ... only exceptional circumstances would justify admission of the testimony and records of [the expert] under Rule 26(b)(4)(B).").

Few decisions directly address whether a party who squandered the opportunity to obtain the "needed" evidence themselves can later obtain it from an adversary. The burden of showing the "exceptional circumstances" required to obtain access to the testimony of an expert who has not been designated to testify at trial is, of course, a heavy one. In a case involving roof damage, the defendant insurer sought to introduce into evidence the opinions and report of an appraiser the insured plaintiff had retained to participate in a dispute resolution process. Holding that the appraiser was a "non testifying expert" the court explained the burden a party must meet to obtain the opinions of a non-testifying expert over the objection of the retaining party:

> Under Rule 26(b)(4)(B), the party seeking discovery from the non-testifying expert consulted in anticipation of litigation "carries a heavy burden in demonstrating the existence of exceptional circumstances." Exceptional circumstances are shown if the party seeking discovery is unable to obtain equivalent information from other sources. The party seeking discovery may meet this exceptional circumstances standard in one of two ways. First, the moving party may show that the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party's expert has an opportunity to observe it. Second, the moving party may show there are no other available experts in the same field or subject area.

Spearman Indus., 128 F. Supp. 2d at 1151-52 (emphasis added) (citations omitted).

In Spearman the court excluded the potential testimony, in limine, because the defendant could not prove the subject of the damage claim had been "destroyed or deteriorated . . . before the moving party's expert ha[d] an opportunity to observe it," stating:

> Here, defendant fails to allege either that an alteration of the roof prevented it from obtaining necessary information about the condition of the roof . . . . In fact, defendant has substantial information relating to the condition of the roof and the cause of damage. Defendant had ample opportunity to conduct whatever investigations it desired . . . . ["T]he very purpose of [Rule 26(b)(4)(B)] is to protect [a plaintiff] from having [its expert's] testimony used by [its] opponent. . . . The Rule was intended to prevent an advisor from becoming an involuntary witness." Defendant has not met its heavy burden of showing that the present situation qualifies as an exceptional circumstance.

Spearman Indus., 128 F. Supp. 2d at 1152 (fourth, fifth, sixth, seventh, and eighth alterations in original) (emphasis added) (citations omitted).

It is not only the non-testifying expert's testimony which is beyond the reach of an adverse party who is unable to show the "exceptional circumstances" needed to invade the opponent's work product. The protections also apply to the records of the expert:

> In addition, the "exceptional circumstances" standard of Rule 26(b)(4)(B) also applies to a non-testifying expert's reports, notes, and records that were developed or acquired in anticipation of litigation. Thus, defendant is prohibited from eliciting the testimony or records of [the expert] regarding the opinions he developed or information he acquired in preparing for the appraisal process and in anticipation of litigation.

Spearman Indus., 128 F. Supp. 2d at 1152 (citations omitted). But compare Huggins v. Federal Express Corp., 250 F.R.D. 404, 406 (2008), where the court overruled an insufficient and unsupported work product objection to order production of "any and all photographs taken of the vehicles involved in the accident in question.").

Although motor carriers and their insurance companies may secure photographs, witness statements, and other factual materials in anticipation of litigation, a court may later order those materials provided to claimants who are able to establish the requisite "substantial need" and "undue hardship" under rule 26(b)(3). It is justifiably difficult for a party to make a showing of the "exceptional circumstances" required discover the opinions and records of an opposing party's experts who will not testify at trial and were retained to form opinions needed to defend a third-party claim. Although it should be expected that photographs from an accident scene, or information about damage to a defendant's equipment suffered in an accident, will be discoverable, a defendant is usually not required to provide a plaintiff with photographs, repair estimates, or expert testimony concerning the damage to a plaintiff's vehicle when the plaintiff chose to not obtain that information do it despite ample opportunity to do so.