

**CLAIMS HANDLING:**  
*TRANSPORTATION, TRUCKING &  
MOTOR VEHICLE CASES*

**PRESENTED BY:**  
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH, A PLC  
WWW.GALLOWAYJOHNSON.COM

**ANDREA L. ALBERT**  
LICENSED IN LOUISIANA  
THREE SANCTUARY BLVD., SUITE 301  
MANDEVILLE, LA 70471  
TELEPHONE: (985) 674-6680  
AALBERT@GALLOWAYLAWFIRM.COM

**DAVID M. MORAGAS**  
LICENSED IN LOUISIANA  
THREE SANCTUARY BLVD., SUITE 301  
MANDEVILLE, LA 70471  
TELEPHONE: (985) 674-6680  
DMORAGAS@GALLOWAYLAWFIRM.COM

**GALLOWAY**  
Galloway Johnson Tompkins Burr & Smith

**PRINCIPLES OF LIABILITY**

**NEGLIGENCE**

- Negligence is the most common theory of liability encountered in claims.
- Negligence relates to actions, whether it is something someone does or something they fail to do.
- Reasonable Man Tests
  - "...the omission to do something...which a reasonable man would do, or the doing of something which a reasonable and prudent man would not do." Black's Law Dictionary

## PRINCIPLES OF LIABILITY

### ELEMENTS OF NEGLIGENCE

- Four Elements:
  - Duty Owed
    - The defendant had a duty to conform his conduct to a specific standard .
  - Duty Breached
    - The defendant's conduct failed to conform to the appropriate standard.
  - Proximate Cause
    - The negligence of the defendant must be the cause of the accident.
  - Damages

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### OVERVIEW

- Electronic discovery is invading almost every facet of litigation... even the trucking industry!
- Since 2006, discovery of electronic information in the litigation process has become not only commonplace, but has been specifically incorporated into the very rules governing discovery.
  - Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45 were all amended to include "electronically stored information within the scope of discoverable information."
- The number of technological advancements in the transportation industry have increased the availability of electronic information, particularly when it comes to understanding the underlying mechanisms involved in a collision.

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### TRADITIONAL SOURCES OF ESI

- Electronic Control Modules
  - “Black Box”
- Airbag Control Modules (passenger vehicles)
  - The availability depends on the make and model year of the vehicle.
- Satellite or GPS Tracking Systems
- Phone records/Voicemail
- Qualcomm or other messaging systems
- Email



## ELECTRONIC DISCOVERY: LEGAL ISSUES

### NEW(ER) SOURCES OF ESI

- Video Dash Cameras
- Collision Radar Warning Systems
- Electronic Logging Devices
  - Mandatory in most CMVs on or before Dec. 18, 2017.
- Text Messages/Cell Phone photos
- Social Media
  - Facebook, Twitter, LinkedIn, Instagram, Snapchat, etc.
- IN THE FUTURE - Automated Driving Systems
  - (Mercedes and Volvo currently have prototypes)

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### SOCIAL MEDIA

- Obtain early and often.
- Be mindful of ethical considerations.
  - Only view information on public profiles.
  - Do not “friend” or “follow” a Plaintiff.
- Propound discovery tailored to requiring Plaintiff to retrieve and produce complete social media account. (Fed. R. Civ. P. 34 and 45).
- Don’t forget to also check your driver’s social media accounts.



## ELECTRONIC DISCOVERY: LEGAL ISSUES

### PRE-LITIGATION BEST PRACTICES

- Become familiar with your carrier’s business structure and their retention policies for electronically stored information.
- Work with your insured to create or implement a Litigation Hold
  - Consider suspension of routine maintenance and segregating potentially relevant electronic information.
- Anticipate the ESI that may be sought by an opposing party and that which you will likely seek from an opposing party.
- Communicate with your insured and monitor compliance of their litigation hold.

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### SPOLIATION

- Because of the requirements of the Federal Motor Carrier Safety Regulations, the trucking industry is usually held to a higher standard when it comes to data preservation.
- Preservation of records includes: tractor and trailer maintenance records, hours of service for driver(s), personnel records, safety inspections, trip messaging data, dispatch logs, GPS data and tractor unit electronic downloads.



## ELECTRONIC DISCOVERY: LEGAL ISSUES

### SPOLIATION

“Under the spoliation doctrine, a jury may draw an adverse inference that a party who intentionally destroys important evidence in bad faith did so because the contents of those documents were unfavorable to that party.”

*Whitt v. Stephens Cnty.*, 529 F.3d 278, 284 (5th Cir. 2008)  
(internal quotation marks omitted).



## ELECTRONIC DISCOVERY: LEGAL ISSUES

### SPOLIATION: BURDEN OF PROOF

Federal District Courts, under the jurisdiction of the United States Fifth Circuit Court of Appeals, provide two elements that must be proven for spoliation to apply:

- 1) The party having control over the evidence had a duty to preserve the evidence at the time it was destroyed; AND
- 2) The destruction of the evidence was intentional.

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### SPOLIATION: BURDEN OF PROOF (CONT.)

Yet, state courts vary with regard to spoliation standards. For example, Louisiana requires:

- 1) A duty to preserve the evidence;
- 2) The intentional (?and negligent?) destruction of evidence; AND
- 3) That the destruction was for the purpose of depriving the other party of its use.

## NEGLIGENT SPOILIATION

- Reynolds v. Bordelon, 2014-2362 (La.6/30/15), 172 So.3d 589.

## ELECTRONIC DISCOVERY: LEGAL ISSUES

### DUTY TO PRESERVE

- A duty to preserve arises from statute, contract, or affirmative agreement or undertaking to preserve the evidence.
- Even further, “once litigation is reasonably anticipated, a potential party to that litigation has a duty not to destroy ‘unique, relevant evidence that might be useful to the adversary.’”

*Hunt v. Marquette Transp. Co. Gulf-Inland, LLC*,  
2011 WL 3957254 (E.D.La. 9/6/11).



## PERSONAL INJURY PROTECTION

- PIP is sometimes referred to as "no-fault" coverage.
- Most states have a "traditional tort" liability system for auto insurance in which recovery is governed by the principles of negligence.
- "No Fault" systems have insurance policies that cover bodily injury of the insured and the insured's passengers caused by the accident, regardless of which party was at fault.
- States that require PIP coverage:
  - Arkansas
  - Delaware
  - Florida
  - Hawaii
  - Kansas
  - Kentucky
  - Maryland
  - Michigan
  - Minnesota
  - New Jersey
  - New York
  - North Dakota
  - Oregon
  - Pennsylvania
  - Massachusetts
  - Utah

## RAPID RESPONSE IN TRUCKING CLAIMS

- Rapid Response Teams are necessary to ensure the best evidence critical to the defense of the motor carrier is obtained and preserved.
- They often originate with defense counsel and typically consist of independent investigators and accident reconstruction experts.
- Upon notification of an accident, it is incumbent for a rapid response team to secure the necessary evidence. This encompasses the retention of an independent adjuster to document the accident scene, which includes but is not limited to photographs, witness statements, and coordinating efforts with law enforcement. Additionally, an accident reconstruction expert can complete accident investigation and electronic data downloads (if necessary), as well as document evidence needed to aid in defense strategy.

## RAPID RESPONSE IN TRUCKING CLAIMS

- At the scene of the accident, a Rapid Response team should confirm that the driver completes compliant drug and alcohol screening. Defense counsel will most often advise and work with the motor carrier, insurance carrier and law enforcement to secure the tractor/trailer equipment to best preserve physical and electronic evidence. Further, they will coordinate the independent adjuster's efforts to substantiate that the carrier meets or exceeds state and federal regulations.
- Once the accident scene and equipment are secure, defense counsel should work with the motor carrier and insurance carrier to enact the litigation hold on all necessary documents and data. This includes, but is not limited to, tractor and trailer maintenance records, hours of service for driver(s), driver logs, personnel records, safety inspections, Qualcomm or similar data, fuel data, and GPS data.

## UNINSURED/UNDERINSURED MOTORIST LAW

- La.R.S. 22:1295 (1)(a)(ii) sets forth the law regarding the proper way to reject UM coverage:
 

“Such rejection...shall be made only on a form prescribed by the commissioner of insurance. The prescribed form shall be provided by the insurer and signed by the named insured or legal representative. The form signed by the named insured or his legal representative which initially rejects coverage...shall be conclusively presumed to become a part of the policy or contract when issued and delivered, irrespective of whether physically attached thereto. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage...”

## UNINSURED/UNDERINSURED MOTORIST LAW

- The preeminent case in Louisiana regarding UM coverage is *Duncan v. USAA*, 950 So. 2d 544 (La. 2007). *Duncan* listed 6 requirements to complete the UM form:
  - 1) Initialing the selection or rejection of coverage chosen;
  - 2) If limits lower than the policy limits are chosen then the amount of coverage selected for each person and each accident must be completed;
  - 3) Printing the name of the named insured or legal representative;
  - 4) Signing the name of the named insured or legal representative;
  - 5) Filling in the policy number; and
  - 6) Filling in the date.

## UNINSURED/UNDERINSURED MOTORIST LAW

### COMMISSIONER OF INSURANCE BULLETIN NO. 08-02

- On August 29, 2008, the Commissioner of Insurance changed the UM form and provided Bulletin No. 08-02 to set forth how to properly complete this form. Most notably:
  - The inclusion of the policy number is “optional for identification purposes only.”
  - The prescribed area “may” be used for policy purposes but that the box “need not be filled in for the form to be properly completed.”
  - The revised UM form does not have to be physically attached to the policy to conclusively become part of the policy.

# GALLOWAY

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**THANK YOU!**

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