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Distracted Driving: Not the End of the Road

Each year the average American spends 293 hours behind the wheel of a car. With all this time spent driving, it would be unrealistic to expect an individual to focus on the road 100 percent of the time. Unfortunately, a consequence of this loss of focus is an increased likelihood that a car accident will occur. In 2015, 10 percent of fatal crashes, 15 percent of injuries and 14 percent of all police-reported motor vehicle traffic crashes were reported as distraction-affected crashes. When a distraction-affected accident occurs, the first reaction of an adjuster may be to concede liability. After all, the insured driver was distracted. However, just because a person was distracted does not necessarily mean they are legally at fault for an accident. With the right strategy, one can successfully defend and prevail on a distracted driving–related accident claim.

WHAT IS A DISTRACTION?

To be distracted means to have one's thoughts or attention drawn away. Today, when you hear the term "distracted driver," your first thought may be someone using a cell phone while driving. However, distractions come in a variety of forms. Anything that takes your focus off the road can be a distraction, not just electronic devices. Distractions can be boiled down into three categories: visual, cognitive and manual.

A visual distraction takes the driver's eyes off the road. Examples include reviewing or typing a text message, changing the radio station, checking on a child in the backseat and looking at an object on the side of the road.

A cognitive distraction occurs when the driver's mind is no longer focused on the road. The prime example of a cognitive distraction is talking on a cell phone, even when using a hands-free device. Nevertheless, a cognitive distraction can be something as simple as daydreaming or having a conversation with a passenger.

A manual distraction is anything that results in the driver lifting his or her hands off the steering wheel. Drinking or eating while driving are classic examples of a manual distraction. Smoking or applying make-up also would be manual distractions.

Not all distractions are viewed equally by the members of a jury. For example, compare the use of a cell phone to a child-based distraction. Both stimuli have the same effect on a driver: pulling the driver's attention away from

the road. However, the use of a cell phone while driving is much more stigmatized. Fourteen states have banned the use of hand-held cell phones outright and 47 states have banned text messaging while driving. In contrast, a child-based distraction is not met with the same social disapproval. Any juror with a child has likely been in the driver's shoes, and may therefore relate to or empathize with the driver and excuse the behavior.

HOW TO HANDLE A DISTRACTED DRIVER CLAIM

Admitting liability is not always the best route to take in handling a distracted driver claim, at least not initially. Upon receipt of a claim, a claims professional or attorney will need to thoroughly investigate all circumstances surrounding the accident. This initial investigation is the key to setting up a strategy to defend the claim. A number of potential variables may have contributed to the accident, any one of which may excuse or negate

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the driver's liability. The plaintiff may very well have been negligent or distracted, or the vehicle may have malfunctioned. The plaintiff's own negligence may have been a superseding cause of the accident or circumstances unrelated to either driver may have been the cause. It takes time to make such determinations. Ultimately, conceding liability may help facilitate settlement of the case. Until that point, the best course of action is to keep every possible avenue of defense available.

Another important consideration when preparing a defense of the distracted driver claim is the driver's attitude toward the accident. In some cases, it may become necessary to change the driver's attitude. It is a reasonable reaction to feel guilty after an accident, especially if you were distracted in some way. However, it is important to remember that even being a "cause" of an accident does not necessarily mean you are legally culpable. Helping the driver understand the difference between the two can go a long way toward getting the best testimony possible. The way the driver interprets the accident will influence his or her testimony during depositions and trial.

The exact strategy taken at trial will be tailored to the specific facts of the distracted driver claim. As explained earlier, the type of distraction will determine how aggressively you should confront the allegations in front of the jury. If you are dealing with a distraction that is largely disfavored, such as eating or talking on a cell phone, it is best to direct the jury's attention elsewhere. Inevitably, the plaintiff will emphasize that the driver was distracted – do not add to that emphasis. The jury has no incentive to forgive a disfavored distraction. Under these circumstances, intervening variables and the plaintiff's contribution to the accident are going to be the foundation of your defense. It is better to subtly and indirectly fight these types of allegations.

In contrast, if the driver was distracted by a cause likely to gain sympathy, such as checking on a child, then this angle should be highlighted. Emphasize the distraction by explaining to the jury why the driver's actions should be excused. Ask for the jury's forgiveness, appeal to their sense of sympathy. After all, jurors are human, too.

As a claims professional or attorney, never jump to conclusions when you learn about a distracted driver claim. As the facts surrounding the accident begin to develop, various defenses to the claim may arise that can help mitigate or even completely eliminate the claim against your client. By making assumptions of responsibility, you can unintentionally miss the signs of an available defense. Instead, perform a complete investigation and wait until all the facts have been determined before reaching a conclusion as to causation or fault so you can successfully defend and prevail on a distracted driving−related accident claim.

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An Illustration of the Importance of Regulatory Compliance for Logistics Companies

Can a state government impose "quasi law enforcement" responsibilities on private logistics companies when it comes to the products they ship? After a recent 10-day bench trial, one federal judge answered yes, in some cases they can. In doing so, the court effectively fined United Parcel Service, Inc. (UPS) nearly $250 million.

In the case of *The State of New York and the City of New York v. United Parcel Service, Inc.*, the United States District Court for the Southern District of New York found UPS liable for shipping untaxed cigarettes from unlicensed shippers into the City and State of New York in violation of several New York state laws.

The court summarily rejected UPS's defense that its large size and compartmentalized organizational structure made it impossible to establish that it knowingly violated any New York regulations. The court cited not only a wealth of circumstantial evidence demonstrating UPS's apparent indifference to making even minimal efforts to comply with New York's regulatory expectations but also UPS's measurable efforts to identify and curb the shipment of untaxed cigarettes and tobacco products after the inception of the lawsuit filed by the City and State of New York.

BACKGROUND

On February 18, 2015, the State and the City filed their Complaint against UPS alleging, primarily, that UPS violated an Assurance of Discontinuance (AOD) that it had entered into with the State in 2005. The AOD was a negotiated agreement between the State and UPS resolving an investigation into UPS's pre-2005 shipment of cigarettes and other tobacco products in and out of New York. Under the AOD, UPS agreed to implement internal processes for identifying its cigarette retailer customers, compiling a detailed database of their shipment activity and auditing the customers UPS had a reasonable basis to believe may be shipping cigarettes. The AOD also required that UPS institute a series of escalating disciplinary measures that culminate in a three-year suspension of the customer's access to UPS services if it determined that customers were shipping cigarettes into New York. After reviewing the AOD's provisions and considering the evidence before it regarding UPS's compliance, the Southern District of New York concluded that UPS lazily turned a blind eye to the cigarette-shipping activities of its customers and instead relied on its size to justify its passive approach to regulatory compliance.

In concluding that UPS was liable for its violations of the AOD and other pertinent New York regulations, the

court acknowledged that the City and State of New York were required to show that UPS "knowingly" transported cigarettes. To support this conclusion, the court pointed to both the collective and individual knowledge of UPS employees when interacting with their customers. This included UPS's history with particular cigarette-shipping customers, observed activity at a shipper's addresses when picking up shipments, the signage present at the location of shipments, and the use of terms such as "cigar," "tobacco," or "cigarette" in the names of a shipper's internet URL.

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In drawing this evidence together, the court highlighted the well-established principle that a corporate defendant is deemed to have knowledge of a regulatory violation if the means were present by which the company could have reasonably detected the regulatory infractions. The court found overwhelming factual support for the conclusion that UPS had actual knowledge of the unlicensed cigarette-shipping activities of its customers with which UPS was participating as the shipper of this alleged contraband.

When it came time to assess the appropriate compensatory and punitive damages, the Southern District considered UPS's refusal to acknowledge wrongdoing, the prolonged nature of its conduct and the significance of the public harm the operative regulations were put in place to prevent. The court noted an interest in balancing constitutional principles requiring proportionality of the penalty with the need for an award that would have a sufficient deterrent effect on an organization as large as UPS.

Defiantly, UPS disregarded the court's order requiring that UPS submit a package-count for each of the shippers that formed the basis of its liability. Instead, UPS chose to submit its own damages calculations based on only three of the eighteen total customers identified by the City and State, and argued that it could not proffer a calculation of appropriate damages for the remaining customers because the City and State had not established liability for those customers. The court treated UPS's failure to address the remaining shippers as a waiver of any response to the damage calculations submitted by the plaintiffs, and the court awarded $165,817,479.00 to the City and $81,158,135.00 to the State.

ANALYSIS

The federal court's ruling reinforces the principle that logistics companies, like other corporate defendants, are charged with being conversant in the regulations that apply to their industry. Courts will not tolerate willful ignorance and they are prepared to perform a case-specific analysis of all available circumstantial evidence as to the compliance or noncompliance of logistics companies with state and local regulations. The case teaches that in the realm of transporting regulated cargo, a transportation and logistics−based company must be cognizant of these state and local regulations and of the reasonably apparent circumstances of the business transactions that it may be facilitating.

This ruling also establishes that federal courts will not excuse a corporate defendant where it relies on its size and organizational structure in an effort to demonstrate a lack of knowledge to avoid regulatory compliance. The United States District Court for the Southern District of New York displayed a willingness to accept and consider evidence of every aspect of UPS's operations from the executive level down to the activity of its truck drivers, and the court did not hesitate to impute the collective knowledge of each part of the company to the company as a whole. Above all, *New York v. UPS* demonstrates that a logistics company must approach all of its operations with sensitivity to federal, state and local regulations or risk the assessment of substantial, and perhaps debilitating, penalties.

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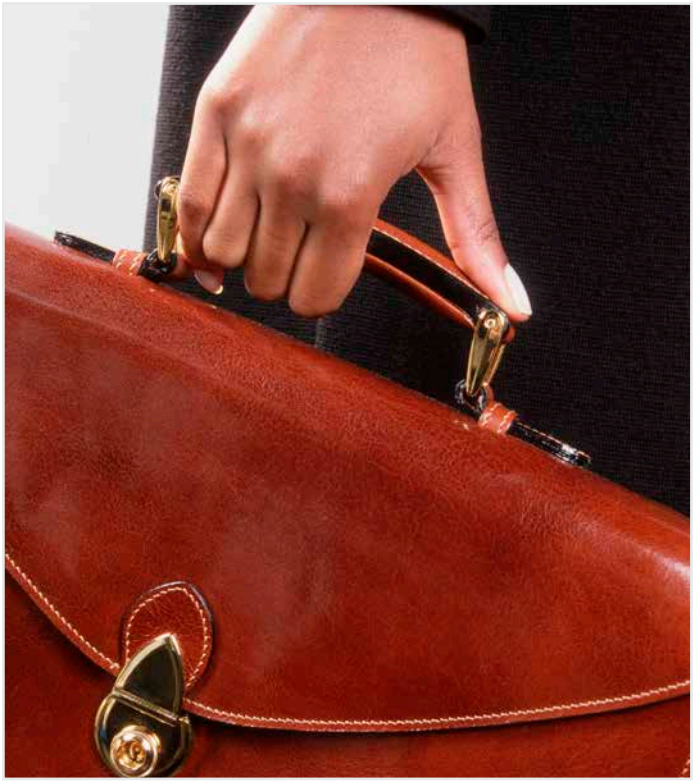
Protecting Insurer-Obtained Statements from Discovery

It is common in trucking cases for insurers or their adjusters to obtain statements from the insured driver or other important witnesses after the accident is reported to the carrier. It also is common for plaintiffs' attorneys to ask for any statements about the accident in discovery, causing the defense to disclose at the very least the existence of the insurer-obtained statements. These statements are particularly desirable from the claimant's point of view because they provide valuable information – a contemporaneous description of the accident. As a result, plaintiffs' attorneys will often fight to obtain these statements, resulting in contentious discovery battles during litigation.



It is important to know the general rules regarding the protection afforded to insurer-obtained statements in federal court, and below you will find some practical suggestions to help insurers and adjusters protect this information at the time it is prepared and thereafter.

THE WORK PRODUCT PRIVILEGE

In federal courts, statements insurers obtain are protected from discovery under Federal Rule of Civil Procedure 26(b)(3)(A), which states:

> *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.

This provision is universally known as "the attorney work product doctrine." Plaintiffs' attorneys typically seem to believe that the attorney work product doctrine extends only to *attorney* work product, arguing that where the statement is taken prior to the hiring of defense counsel, the privilege does not apply. However, the quoted rule clearly states that the privilege extends to documents prepared not only by a party's attorney but also by its other representatives, which expressly includes a party's insurer or agent.

Perhaps the most litigated issue in the work product privilege is whether the statement was "prepared in anticipation of litigation." The rule makes this a condition to its application to any "work product" that might be protected. Certainly, witness statements obtained at or near the time of the incident will have been given before

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a lawsuit is filed. To prove the statement is protected, the burden is on the defendant to establish that the insurer or adjuster obtained the statement because there was the potential for a lawsuit, and that the anticipation of potential litigation was reasonable.

In the case of *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006), the Sixth Circuit Court of Appeals identified a two-part test to analyze whether a document is protected under F.R.C.P. 26(b)(3)(A):

> (1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable.

These conditions should be at the forefront of the insurer's representative's thought process when taking a statement from a driver or witness.

ANTICIPATION OF LITIGATION

On one hand, if there was an accident that was serious enough for the trucking company to report it to the insurance carrier and for the insurance carrier to make the effort to obtain the driver's statement, the defense will have a strong argument that the insurer acquired the statement not for any standard business reason, but because there was the prospect of litigation on the horizon. On the other hand, insurers often run into an argument that because the taking of witness statements is standard practice, and not all claims go into litigation, the statement was taken for an ordinary business purpose and not specifically because the insurer anticipated litigation about this particular case. Indeed, it will be pointed out that an insurer may need the statement simply to adjust the claim made by the injured party, without necessarily any real anticipation of litigation.

Whether the subjective anticipation of litigation is objectively reasonable will be a legal determination by the court. We will generally argue that the facts and circumstances of the accident, which likely involve some claim that an individual was injured in the accident, should make the insurer's subjective anticipation of litigation actions objectively reasonable.

There is, of course, no one method that will satisfy every court to prove that this legal test for the privilege can be met, but below are a few thoughts on what insurers can do to demonstrate for a future court that a driver or witness statement was taken because of the anticipation of litigation. It should be noted that these suggestions come with no guarantees, and their effectiveness ultimately will be determined by the discretion of the court or jurisdiction that hears a discovery dispute about these statements.

STRATEGIES FOR A DISCOVERY DISPUTE

One suggestion is to include as a preface to the statement some comment by the insurer or the person taking the statement explaining why the statement is being taken and noting or acknowledging the potential for litigation. For example, the statement could say the driver was involved in an accident, some third person allegedly suffered injuries from the accident and the statement is being taken to investigate the accident in preparation for potential future litigation. How this is written will need to be tailored to the situation, but the use of this introductory note to explain why the insurer or adjuster believes there may be a lawsuit or claim in the future and the purpose for taking the statement can help satisfy the burden of protecting the statement from future discovery. Of course, the reasons incorporated should not include any admissions of liability or damages, which could undermine the insurer or policyholder's position later in the litigation.

Another suggestion is that the claims handler or adjuster who is either taking the statement or authorizing that the statement be taken, include a note in the claims file explaining the purpose of the statement. That note, made contemporaneously with the creation of the statement, could then, if needed, be produced to the court with a brief opposing the production of an insurer-obtained statement to show that the insurer at the time the statement was taken believed and reasonably anticipated that there could be litigation.

A third suggestion is to use outside counsel to secure statements, particularly in severe accidents. Counsel will generally have experience creating such statements and will know how to do so strategically to help in future

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litigation. The hiring of outside counsel presents a strong argument that this is not a "typical" investigation and that the insurer reasonably anticipates future litigation.

Once these issues are addressed and the defendant's burden to apply the privilege is satisfied, then the bulk of most disputes regarding the discovery of insurer-taken statements turns on the last part of the rule: whether, notwithstanding the protections afforded by the attorney work product doctrine, the plaintiff can show substantial need and undue hardship if the statement is not produced in discovery. This is the exception to the general rule of privilege and protection of these statements.

This exception allows the party seeking the statement to prove it should be produced because the party "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means" even though the statement would otherwise be privileged from discovery. In other words, while there is a qualified privilege that attaches to insurer-obtained statements through F.R.C.P. 26(b)(3)(A), even if the privilege is established, it can be overcome; although the burden to overcome the privilege rests on the party seeking to invoke this exception to the general rule. Because the privilege can be overcome by the demonstration of a substantial need or undue hardship, the person creating this statement should always consider the fact that the statement might be turned over to the plaintiff, even if it is absolutely clear that litigation is imminent and anticipated.

THE SUBSTANTIAL NEED OR UNDUE HARDSHIP ARGUMENT

In litigating these issues, plaintiffs often repeat the same types of arguments to explain why the substantial need or undue hardship test can be met in their case. For instance, they may argue the statement could be useful for impeachment purposes or may include admissions by the driver. They also claim − a claim that sometimes has merit − that the memory of the person giving the statement was better at the time of the statement than when the case is being litigated, often years later, so the statement should be produced as a better representation of the driver's or witness's memory. However, there are several ways to attack these arguments.

Courts have held that plaintiffs must prove a particularized need for the statement *in this case*. Thus, a plaintiff's general argument that the statement

is needed for impeachment or that the driver's memory was better at the time he or she gave the statement should be rejected because the fact that contemporaneous recordings of a person's memory is better than a later recollection is an argument that could be made *in any case*. As such, this argument does not provide a persuasive reason why the statement is needed for the particular litigation.

Plaintiffs also will face the uphill battle of explaining why they need the statement when they can depose the driver or other witness. The primary defense to a plaintiff's argument about substantial need and undue hardship is that the plaintiff does not need the statement because he or she has an alternative avenue to obtain the same information − through a deposition. Because the burden falls on plaintiffs to prove undue hardship or a substantial need, courts have required a plaintiff to prove that he or she cannot obtain the substantial equivalent of the insurer-taken statement by other means. Accordingly, so long as the driver or other witness is available to be deposed and has a memory of the collision, plaintiffs should be hard-pressed to establish

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that taking a deposition is not the substantial equivalent of obtaining the witness's written statement, even when the statement was taken years earlier and closer in time to the incident that is the subject of the litigation. This fact underscores the importance of keeping track of important witnesses following a significant casualty, which could result in future litigation.

While this article addresses how the federal courts can protect insurer-obtained statements, each state will have its own rules on whether or to what extent these statements are privileged. At the end of the day, the court where the dispute will be heard will determine whether the insurer-obtained statement will be protected from discovery. As a result, it is important that claims handlers and adjusters share statements obtained from witnesses with their liability defense counsel at the earliest stages of the litigation, since action regarding a choice of forum (such as removal to federal court, challenges to jurisdiction or transfer of venue) must usually be determined at the outset of a case.

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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.

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