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**Transportation Practice Group  
Nashville Regional Seminar**

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# Broker Liability

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# Continuing Trend of Plaintiffs to Expand Broker Liability

- Statutory Liability: MAP-21 – Moving Ahead for Progress in the 21<sup>st</sup> Century Act
- Statutory Blending: Double Brokering, De-Facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer
- Clarity & Simplicity Dies on Vine (The Duncan Amendment)
- Recent Cases: Ruan, Puga, Creagan, Saldana, and Brettman

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# 49 USC 13101

- §13101. **Transportation policy**
- (a) **In General.**—To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and—
  - (1) in overseeing those modes—
    - (A) to recognize and preserve the inherent advantage of each mode of transportation;

- (B) to promote safe, adequate, economical, and efficient transportation;
- (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;
- (E) to cooperate with each State and the officials of each State on transportation matters; and
- (F) to encourage fair wages and working conditions in the transportation industry;

# 49 USC 13101, cont.

- 2) in overseeing transportation by motor carrier, to promote competitive and efficient transportation services in order to—
  - (A) encourage fair competition, and reasonable rates for transportation by motor carriers of property;
  - (B) promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required;
  - (C) meet the needs of shippers, receivers, passengers, and consumers;
  - (D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;
  - (E) allow the most productive use of equipment and energy resources;

# 49 USC 13101, cont.

- (F) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions;
- (G) provide and maintain service to small communities and small shippers and intrastate bus services;
- (H) provide and maintain commuter bus operations;
- (I) improve and maintain a sound, safe, and competitive privately owned motor carrier system;
- (J) promote greater participation by minorities in the motor carrier system;
- (K) promote intermodal transportation;

# 49 CFR 390.3 (i)

- (i) Brokers. The rules in the following provisions of this subchapter apply to brokers that are required to register with the Agency pursuant to 49 U.S.C. chapter 139.
  - (1) Part 371, Brokers of Property.
  - (2) Part 386, Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings.
  - (3) Part 387, Minimum Levels of Financial Responsibility for Motor Carriers, to the extent provided in subpart C of that part.
  - (4) Section 390.6, prohibiting the coercion of drivers of commercial motor vehicles operating in interstate commerce to violate certain safety regulations, and subpart E of this part, Unified Registration System.



# FMCSA Guidance

**What is the civil penalty for a broker or freight forwarder who engages in interstate operations without the required operating authority (registration)?**

A broker or freight forwarder who knowingly engages in interstate brokerage or freight forwarding operations without the required operating authority is liable to the United States for a civil penalty not to exceed \$10,000 and can be liable to any injured third-party for all valid claims regardless of the amount. (49 USC 14916(c)). The penalties and liability to injured parties apply jointly and severally to all corporations or partnerships involved in the transportation and individually to all officers, directors, and principals of these business forms (49 USC 14916(d)). Under 49 USC 14901(d)(3), a broker of household goods (HHG) who engages in interstate operations without the required operating authority is liable to the United States for a civil penalty of not less than \$25,000 for each violation. Source: 78 FR 54720.

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# 49 USC 14916

## “Prohibited Activities”

(a) Prohibited activities. - A person may provide interstate brokerage services as a broker only if that person –

(1) is registered under, and in compliance with, Section 13904 [49 USC § 13904]; and

(2) has satisfied the financial security requirements under Section 13906 [49 USC § 13906].

# 49 USC 14916

## “Civil Penalties in Private Cause of Action”

(c) Civil penalties in private cause of action. Any person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person, a violation of subsection (a) is liable

(1) to the United States government for a civil penalty in an amount not to exceed \$10,000 for each violation; and

(2) to the injured party for all valid claims incurred without regard to amount.

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# 49 USC 14916

## “Liable Parties”

(d) Liable parties. The liability for civil penalties and for claims under this section for unauthorized brokering shall apply, jointly and severally

(1) to any corporate entity or partnership involved;

and

(2) to the individual officers, directors, and principals of such entities.

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# 14916 -Purpose and Legislative Intent

49 USC. § 14916 is one part of The Moving Ahead for Progress in the 21st Century Act. 112 P.L. 141 § 32919 (2012).

§ 14916 actually began, not as a component of MAP-21, but as a component of the Fighting Fraud in Transportation Act of 2011. 2011 H.R. 2357 § 6 (2011). That bill was introduced in 2011 and was referred to committee. It was ultimately not enacted, but its provisions were incorporated into MAP-21 the following year. 2011 Legis. Bill Hist. US H.B. 2357.

This brief history of § 14916 is important. As the name of the 2011 bill reflects, the purpose behind enactment of § 14916 was to prevent fraud in brokerage activities, not to expand liability for personal injury actions.

# Allegations by Plaintiffs

1. Carrier and broker share personnel, offices, accounts, and staff.
2. The sharing of personnel, offices, accounts, and staff is in violation of FMCSR 371.7(b), 49 USC § 13901(c), and the Moving Ahead for Progress in the 21st Century Act (MAP-21).
3. As a result of the violations of carrier and broker, and to put the matter at issue, their actions taken as a whole and in consideration of all applicable paragraphs in this Complaint, constitute misrepresentation and unlawful brokering.

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# Allegations by Plaintiffs, cont.

4. The corporate entities, as well as the individual officers, directors, and principals of such entities are jointly and severally liable for unlawful brokering pursuant to 49 USC § 14916(b).
5. Officer in his position as officer with carrier, is ultimately responsible for placing carrier of the brokered load, and its driver, on the road, entering Tennessee, and using the public highways.
6. Officer of carrier, by not ensuring there was separation, as required by law, between carriers and brokers actions in this case, breached his duty as a director and officer of carrier and was negligent.

# Allegations by Plaintiffs, cont.

7. Officer of carrier is thus individually and jointly and severally liable pursuant to 49 USC § 14916(d) for any unlawful brokering of carrier and broker.
8. By reason of, and as a direct and proximate result of officer of carrier's breaches of the above duties, which were a cause of the injuries and eventual deaths of plaintiffs, plaintiffs have suffered economic and non-economic losses for which they are entitled to restitution to the extent allowed by law.

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# Defenses

- Preemption
  - Broad reading required (and creates constitutional concerns)
- Standing
  - Proper Parties
  - Causation
- “Civil Penalties”
- “Valid Claims”
  - Federal Question
  - Statutory Venue
  - Damages – Freight Charges
- Personal Jurisdiction

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# Preemption

- For § 14916 to apply as broadly as plaintiffs propose, the statutory scheme would be sufficiently pervasive to preempt state law. This would include state restrictions and limitations on corporate veil piercing, liability of sister corporations, state restrictions on tort damages, tort reform, comparative fault, and, in general, federal and state due process.
- If a “valid claim” is a claim by any injured third party, to include bodily injury, without monetary limit, any one of the persons or entities to whom § 14916 could apply may be responsible for a judgment in a matter in which they were not involved, and in which they had no right or ability to participate.
- If § 14916 is that broad in application, it must be preemptive, and no recovery may be made against, and no claim maintained against, any transportation broker that is properly registered, and that had and maintains the appropriate amount of financial security. Otherwise, the statute has to be limited to freight charges and civil penalties for lack of registration or lack of proper financial security. There can be no and should be no viable position in-between.

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# Standing

- Standing: Injury, Causation, and Redressability
- Proper parties
  - Those who can sue for freight charges, and have sued for freight charges.
  - Not personal injury/wrongful death
- Causation
  - Broker's failure to adhere to financial requirement is not "but for" cause of accident

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# 14916-Civil Penalties and Valid Claims

- 49 U.S.C. § 13906 includes financial security requirements for both motor carriers and brokers. Under the statute, **brokers** must secure “[a] surety bond, trust fund, or other financial security” in order to “pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation.” 49 U.S.C. § 13906(b)(2)(A) (2017)

# 14916 Civil Penalties and Valid Claims, cont.

- In contrast, motor carriers are subject to a “[l]iability insurance requirement” that “must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property . . . or both. 49 U.S.C. § 13906(a)(1) (2017) (emphasis added).

# 14916 Civil Penalties and Valid Claims, cont.

- There is only one reasonable conclusion as to what “injured party” and “valid claim” mean for a broker under 14916:
  1. “Injured party” means a party injured by the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation, and
  2. “valid claim” means legal claims arising from the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation.

# 14916 Parties ( 49 USC 13906 )

- Plaintiffs – any injured parties
  - who have “valid claims”
    - for failure to pay freight charges under
      - Contract
      - agreement, or
      - arrangements for transportation

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# 14916 Parties - Defendants

Any person who knowingly authorizes, consents to, or permits, directly or indirectly, alone or in conjunction with any other person, a violation of subsection (a)

Any corporate entity or partnership involved, AND the individual officers, directors, and principals of such entities (jointly and severally liable for valid claims and civil penalties).

Liable to the United States government for civil penalties; and to the injured party for all valid claims without regard to amount



# Personal Jurisdiction

- A Court cannot exercise specific jurisdiction over the 14916(d)(1) or (2) defendant unless the plaintiff can show that he/she/it has purposefully established significant contact with the forum State such that he should expect being hailed into court there. A Court cannot exercise general jurisdiction over such a defendant if the contacts with the forum State have been random, sporadic and rare. Tennessee respects the fact that a corporation is a distinct legal entity that exists separately from its officers. Gordon v. Greenview Hosp., Inc., 300 S.W.3d 635, 650 (Tenn. 2009).

**██████████ CARRIER TRANSPORTATION SERVICES AGREEMENT**

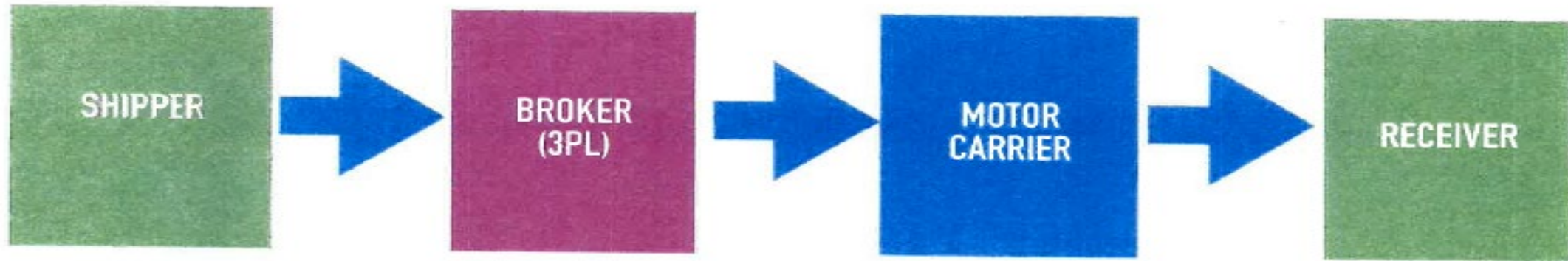
This Carrier Transportation Services Agreement (the "Agreement") is made this ██████████ day of ██████████, 2015 (the "Effective Date"), by and between ██████████ ("Carrier") and ██████████ a Third Party Logistics Provider that is a ██████████ partnership with principal offices located at ██████████ (3PL"). Carrier and 3PL are sometimes referred to herein as the "Parties".

**WHEREAS,** Carrier, an independent contractor, is a motor carrier registered with the Federal Motor Carrier Safety Administration ("FMCSA") under Docket No. ██████████ Sub 342 (and/or registered in Canada and/or Mexico as appropriate) (a copy of which registration is attached and made a part of this Agreement as Schedule D), and wishes to provide carrier transportation service to 3PL and/or its customers for the transportation of general and exempt commodities with origin and destination points within the United States, Canada or Mexico

**WHEREAS,** 3PL, a motor transportation broker, holding broker's license MC ██████████ has need of Carrier's services to transport freight and desires to utilize the services of Carrier for the transportation of 3PL's and/or its customer's freight



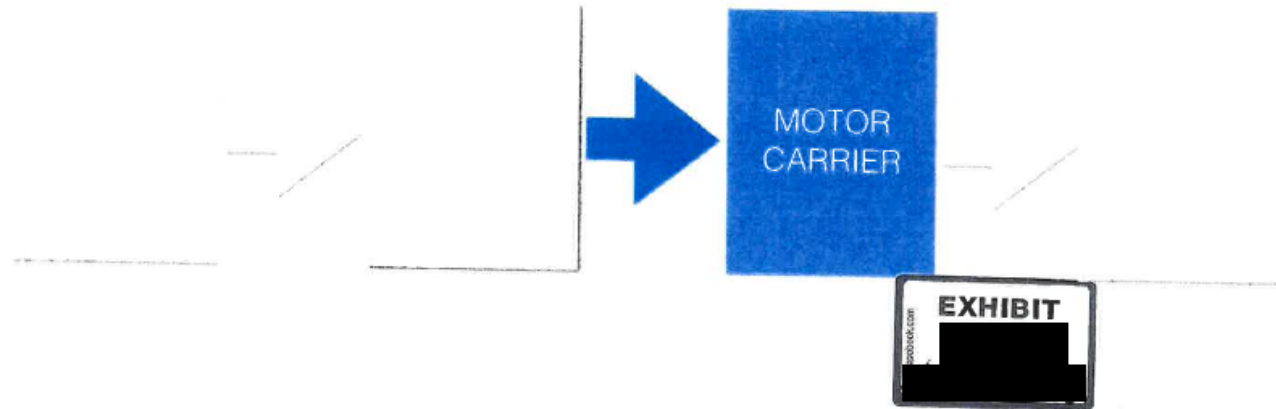
# SUPPLY CHAIN PARTICIPANTS



# SUPPLY CHAIN

## What do **motor carriers** do?

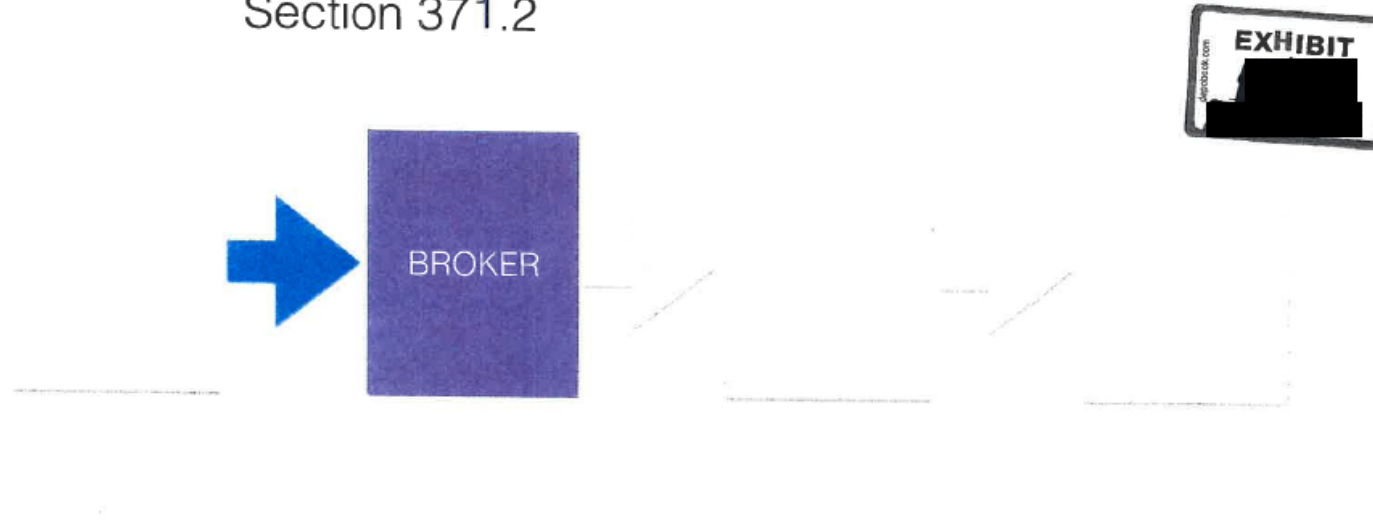
- **Motor carriers**, or persons who are employees or bona fide agents of carriers, *are not brokers* within the meaning of this section when they arrange or *offer to arrange the transportation of shipments which they are authorized to transport* and which they have accepted and legally bound themselves to transport. 49 C.F.R. Section 371.2



# SUPPLY CHAIN

## What do **brokers** do?

- **Broker** – means a person who, for compensation, *arranges*, or offers to arrange, the *transportation* of property by an authorized motor carrier. 49 C.F.R. Section 371.2



49 U.S.C. § 13901(a)

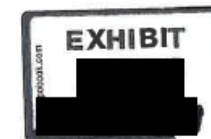
"A person may provide transportation as a **motor carrier** ... or service as a freight forwarder ... or service as **broker** for transportation ... only if the person is registered under this chapter to provide such transportation or service."



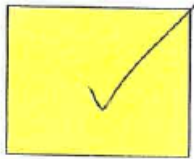
MAP - 21 (signed into law 2012)

49 U.S.C. § 13901(c)

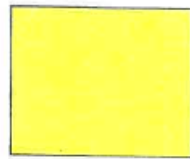
"For each agreement to provide transportation or service for which registration is required under this chapter, the registrant shall specify, in writing, the authority under which the person is providing such transportation or service."



[REDACTED] accepted  
the tender of the load from [REDACTED]



Agree



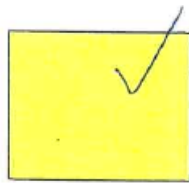
Disagree



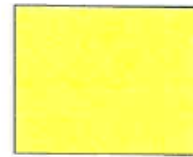


[REDACTED] accepted the  
tender of the load from [REDACTED] under the motor  
carrier authority of

[REDACTED]



Agree

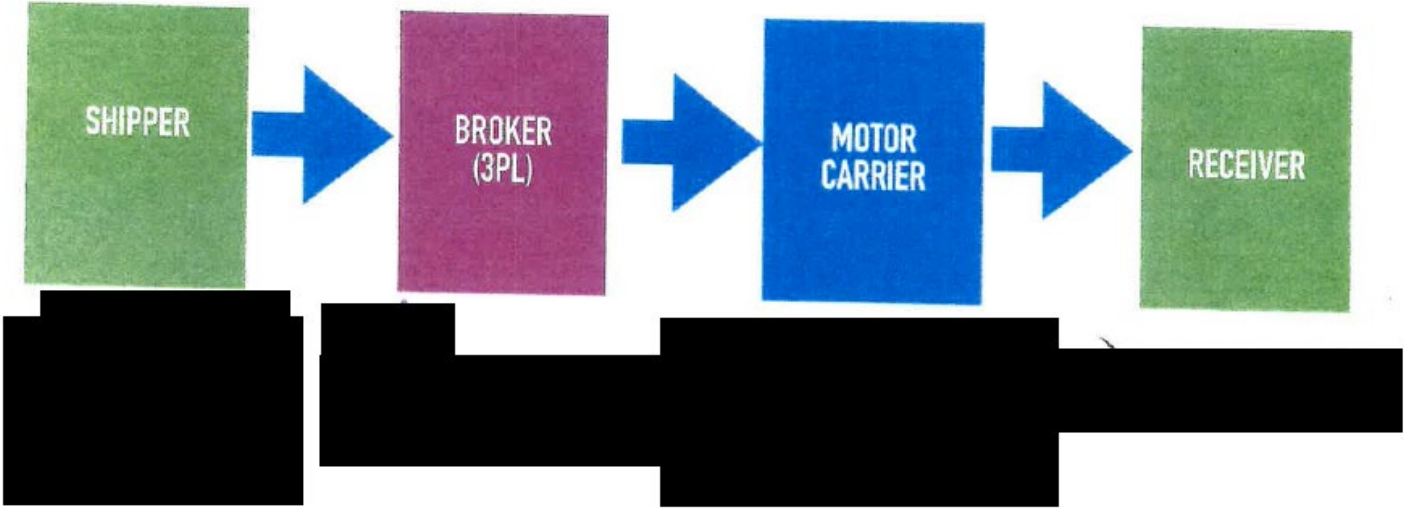


Disagree

[REDACTED]  
[REDACTED]



# SUPPLY CHAIN PARTICIPANTS



# Carrier Transportation Services Agreement Provision

“The parties recognize that for operating convenience in the fulfillment of its duties and obligations under this contract, Carrier may wish to retain the services of other authorized carriers as subcontractors pursuant to lawful substituted service, interlining or other contractual arrangements. As consideration for 3PL’s acceptance of such subcontracting arrangements, Carrier agrees as follows: (1) All subcontracting arrangements will be conducted with subcontractors which meet and maintain all U.S. DOT requirements, (2) Carrier may do so at its expense, in which case Carrier shall continue to be liable for any loss or damage to said shipments and responsible for all other obligations of Carrier under this Agreement to the same extent that Carrier would be liable if it performed the transportation.”

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# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer

- Regulations define a “broker” as one “who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.” 49 CFR § 371.2(a).
- The very statutory scheme upon which most plaintiffs rely to blur the lines between broker and carrier, actually distinguishes between each, and does not subject brokers to any safety regulations regarding the carriage of freight.
- Regulations with regard to brokers are generally administrative and pertain to how brokers should provide their services. Financial responsibility is imposed on carriers to ensure that a carrier can pay for claims pertaining to “bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property.” 49 USC § 13906(a)(1); See 49 CFR § 387.7(a). For brokers, the purpose of the lesser amount of financial responsibility is that it is only anticipated that brokers may be responsible to shippers, carriers, and passengers in their “dealing” with brokers. 49 USC § 13904.

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# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer

- Many state and federal jurisdictions generally agree that logistics brokers are not vicariously liable for the torts of independent contract carriers.
  - As to a de facto carrier claim, many plaintiffs argue that due to the actions of the referring carrier and broker, the broker and/or referring carrier were acting as carrier, co-carrier, or de facto carrier for the load and that they are then, therefore, bound by the same safety regulations of the Federal Motor Carrier Safety Administration as is the actual carrier.
- Plaintiffs attempt to tie what are consistently claimed to be non-delegable duties of the carrier to the broker based upon contracts to which the plaintiff is not a party, the carrier listed on the bill of lading, right of control retained by the broker, and the control exercised by the broker over the carrier.
  - As a practical matter, if the broker appears next to the word “carrier” on a bill of lading, the name of the broker is usually just a placeholder, as, at the time the bills of lading are drafted, a carrier may not yet assigned or has not yet accepted the load.

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# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- The reason for the trend – Motor Carriers may not carry more than the minimum financial security limit for one reason or another. Plaintiff's follow the money.
- For trial purposes, remember its not just what the Broker did wrong (vetting) to cause the accident but did the Broker exercise enough control over the driver, making him an agent of the Broker. (assuming we are talking from a Broker POV)
- Duties of the freight Broker – background checks ; safety stats; following name changes of motor carriers; proof of operating authority; listing of drivers' license info and MVR's; proof of valid insurance with high limits – what is too much/too little?

# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Brokers must be aware of exposure they can create. Right of control; uniforms; appearance of the driver; control of schedules; delivery status checks or other regular communication with the motor carrier; measurements such as load temps or routes; reporting accidents; penalties for not doing these things.
- Try to limit exposure – evaluate all potential carriers through background checks and maybe some kind of benchmark. Separation...limit interaction once a carrier selection is made. Make your selection solid and beyond reproach; keep documentation; then switch to the results of the transaction. Don't focus on how the sausage is made. Make certain your Agreements reflect this.

# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Broker/Carrier Agreement
- Carrier Dispatch Confirmation
- Bill of Lading

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# Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Right to Control – Control Exercised
- Check calls
- Trip instructions
- Fines
- Loading
- BOL
- Contract Language

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# Unlawful Brokering

## The Duncan Amendment to the FAA Reauthorization Act

### AMENDMENT TO H.R. 4

OFFERED BY

MR. DUNCAN OF TENNESSEE Page 267, after line 10, insert the following:

- SEC. II. NATIONAL HIRING STANDARD OF CARE.
- (a) IN GENERAL.—An entity hiring a federally licensed motor carrier shall be deemed to have made the selection of the motor carrier in a reasonable and prudent manner if before tendering a shipment, but not more than 45 days before the pickup of the shipment by the hired motor carrier, that entity verified that the motor carrier, at the time of such verification—

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# Unlawful Brokering

## The Duncan Amendment to the FAA Reauthorization Act

(1) is **registered** with and authorized by the Federal Motor Carrier Safety Administration to operate as a motor carrier or household goods motor carrier, if applicable;

(2) has the **minimum insurance** coverage required by Federal law;  
and

(3)(A) **before the safety fitness determination regulations are issued, does not have an unsatisfactory safety fitness determination issued by the Federal Motor Carrier Safety Administration in force at the time of such verification;** or

# Unlawful Brokering

## The Duncan Amendment to the FAA Reauthorization Act

(B) beginning on the date that revised safety fitness determination regulations are implemented, does not have a safety fitness rating issued by the Federal Motor Carrier Safety Administration under such regulations that would place a motor carrier out-of-service.

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# Unlawful Brokering The Duncan Amendment to the FAA Reauthorization Act

(b) GUIDELINES.—Not later than 30 days after the implementation of the safety fitness determination referenced in subsection (a)(3), the Secretary shall issue guidelines that specifically outline how a motor carrier’s operating authority and registration number could be revoked and subsequently placing them out-of-service.

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# UNLAWFUL BROKERING

## Pelosi Response to Duncan Amendment

“The Duncan amendment provides immunity to brokers and shippers when someone is killed or injured in a road accident, as long as they check three superficial verifications that do not ultimately ensure the trucks they hire are safe. With outdated and woefully low minimum insurance requirements, and with the majority of motor carriers unrated by the Federal Motor Carrier Safety Administration, this amendment would allow transportation intermediaries to escape liability and leave those injured or killed in truck accidents holding the bag.” Nancy Pelosi

# Excerpt of Letter of Plaintiff Groups to House Re: Duncan Amendment

“We also strongly oppose the Duncan amendment, which would result in immunity for broker/shipper companies that negligently hire unsafe trucking companies that cause crashes. Broker/shipper companies are the intermediaries that hire trucking companies that transport goods, so their hiring decisions can have enormous safety implications. They are already incentivized to cut safety corners with normal rules in place, i.e., hiring the cheapest contractor available. The last thing Congress should be doing is passing legislation that would weaken their legal accountability when their negligent hiring leads to deaths or injuries. This is all the more important because under current law, commercial vehicles are grossly underinsured. The insurance minimum requirement is only \$750,000, a limit that has not been increased in over 30 years. That means in order for victims with severe injuries to have any meaningful remedy, a negligent broker/shipper must share legal responsibility.”

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# FMCSA Definition – “Satisfactory”

- “A safety rating received as a result of a compliance review. A Satisfactory rating is defined as: a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in the FMCSRs, Section 385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier.”



# Recent Decisions

- Moran v. Ruan Logistics, 2018 U.S. Dist. Lexis 159648 (USDC SD Ohio)
- Puga v. RCX, 17-41282, 2019 WL 1648440 (5<sup>th</sup> Cir. Apr. 17, 2019)
- Creagan v. Wal-Mart Transportation, 354 F.Supp. 3d (USDC ND Ohio 2018)
- Saldana v. Larue Trucking, 2019 WL 154895 (La. App. 2 Cir. Apr. 10, 2019)
- Brettman v. M&G Truck Brokerage, 2019 IL App. (2d) 180236

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# Ruan-Motion to Dismiss to Tidy Up Kitchen Sink

- Duplicative, non-existent, and unfounded claims
- Compare elements and dismiss duplicative claims
- No private cause of action under FMCSR (or Ohio State law)
- No predicate allegations for negligent entrustment
- Graves Amendment for rental companies (crim or neg. maint)
- No predicate allegations for negligent hiring
- Agency liability duplicative of respondeat superior theory
- 12 claims—2 DWOP and 7 DWP

# Puga-Implied Lease and Second Employer

- The Details
- Original Broker: Sunset
- Original Carrier: RCX (Shares space and all employees with Sunset)
- Equipment Problem and About Tyme
- Carrier Agreement: RCX as broker and About Tyme as Ind. Motor Carrier
- Placard on truck...name in log...defendant in suit...company that paid policy limits (in excess of statutory minimum)

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# Puga-Implied Lease and Second Employer

- RCX as Second Employer (Summary Judgment Rulings)
  - RCX does not have authority to be broker; bill of lading
  - No proof of lease required (*cf.* CFR; “arrangement”)
  - Two employers (*Zamolla*; “exclusive” “complete”; lease; policy)
- Salt in Wound (Jury Instructions)
  - “A person providing motor vehicle transportation for compensation”
  - Did RCX “use motor vehicle(s) it did not own to transport property under an arrangement with [Driver]”

# Creagan-FAAAA Preemption for Broker Negligent Hiring BI Claims

- Airline Deregulation Act, and Federal Aviation Authorization Administration Act
  - Broker v. Motor Carrier – one preempted, the other not
  - Interpreted in the same manner per SCOTUS – broadly
  - Negligent hiring seeks to enforce a duty of care related to how a broker arranges for a motor carrier to transport a shipment rather than regulate motor vehicles– therefore it relates to a broker service, and falls within FAAAA preemption
  - Not within the State safety regulatory authority exception
  - Court focused on distinctions between the financial responsibility provisions of 49 USC 13906

# Saldana-Look to State Law to Determine if Driver in Course and Scope at Time of Accident

- Saldana argued that Carrier was vicariously liable under the FMCSR for actions of an independent contractor
- Court found Saldana's interpretation of the Regulations was "strained" specifically as to the definition of "employee" under 49 CFR 390.5(2)
  - "Individual" refers to human beings and not to corporations or other legal persons
  - Saldana relied on FMCSA Guidance – Court found that the FMCSR do not address tort liability, and, therefore, Guidance could not likely be intended to express FMCSA views regarding tort liability
  - Guidance is not entitled to the degree of deference afforded to formal regulations, but is entitled to "respect" to the extent that it has the power to persuade

# Brettman- Post Delivery Broker Liability for BI Claims

- Broker brokered load to Carrier. Carrier delivered load. 25 miles from delivery, while empty, Carrier/Driver were involved in an accident resulting in BI
- Plaintiff alleged vicarious liability against Broker claiming Broker exercised sufficient control over Driver to establish employment/agency. Plaintiff argued that Driver became fatigued while with load due to Broker's actions and requirements, and that its responsibility continued after delivery.
- Plaintiff claimed that the trip did not end until Driver reached "home base"

# Brettman- Post Delivery Broker Liability for BI Claims, cont.

- Plaintiff claimed negligent hiring
- Court dismissed plaintiff's claims against Broker
  - Cases cited by Plaintiff regarding the "trip" and "home base" are workers' compensation and insurance cases – the Court distinguished and disregarded
  - Broker ceased to exercise any control over Carrier/Driver upon delivery
  - Any agency relationship terminated when Carrier/Driver completed its contractual obligation to deliver the load
  - Parties agreed that Sperl controlled whether or not an agency relationship existed- Court distinguished – in Sperl, the driver was "still acting under the broker's direction"
  - Court found it unnecessary to determine whether or not agency was established and found it dispositive that Broker did not exercise control after delivery



# Brettman- Post Delivery Broker Liability for BI Claims, cont.

- On the negligent hiring claim Plaintiff used an “expert,” but the Court determined, on this issue, the opinions were of insignificant weight
- Court turned to proximate cause finding that it was not a matter for the jury in this case
- The accident has to have occurred by virtue of the servant’s employment. The employer’s liability attaches only where there is demonstrated some connection between the plaintiff’s injuries and the fact of employment
- Carrier/Driver was not operating the vehicle to perform the contracted-for work when the injury occurred. Carrier/Driver was no longer hired or retained by Broker
- “It was the worker, not the work, that went on, post-termination, to injure a third party”
- Postdelivery = Post-termination



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Nashville Regional Seminar**

**November 6, 2019**

# Turning Lemons Into Lemonade



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[Karie N. Wilson]

# So, who are we?

- I am a Partner with Alverson Taylor & Sanders in Las Vegas, Nevada
- My practice focuses largely on transportation matters, as well as premises and products liability
- We represent carriers, independent owner-operators and other commercial entities in transportation-related litigation



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Justin L. Duncan

# So, who are we?

- I am a transportation lawyer.
- I practice with Harlin Parker – Attorneys at law in Bowling Green, Kentucky.
- We represent carriers, freight brokers, and other commercial clients within the transportation industry.



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The background features a light blue world map with a semi-transparent overlay of several bright yellow-orange slices of citrus fruit, likely lemons or oranges, arranged in a circular pattern. The text is centered over this graphic.

We are TRUCKING lawyers – We understand your business and how to defend those claims

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# The Bad Accident has occurred – What happens next?



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- Call your lawyer

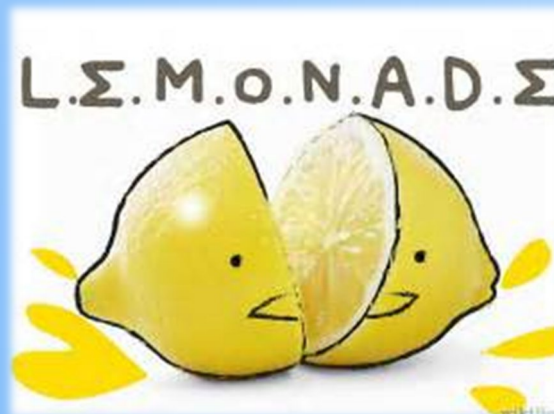


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# Why call your Lawyer?

1. Protect Work Product
2. Your lawyer has the experience in dealing with all aspects of these cases
3. We have the team to serve your complete accident scene needs



# Biggest Mistake to Make

The assumption that all lawyers, investigators, and accident reconstructionists are the same

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# Rapid Response – Step by Step

## 1. Call your Lawyer

- Where is the accident?
- Condition of your driver and others at the scene
- Contact information for your driver
- Available data
- General agreement on scope of the assignment

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# Rapid Response – Step by Step

## 2. Your Lawyer calls the Investigator

- Work Product is Protected– Not so if you call
- I call the investigator
- Transmit accident data
- Get preliminary plan

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# Rapid Response – Step by Step

## 3. Your Lawyer calls the Engineer

- Work Product is Protected– Not so if you call
- Transmit data
- Get plan

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# Rapid Response – Step by Step

## 4. Who goes to the scene?

- Always your Investigator
- Should the Lawyer go? – Mixed views
- Company Representative

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# Rapid Response – Step by Step

## 5. Investigator on the Scene

- Find the Driver
- Find and assist the officer (It's never too early to make a good first impression.)
- Find Witnesses
- Find all of the Vehicles and Occupants
- Get the “personality” of the scene and the parties

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# Rapid Response – Step by Step

## 6. Engineer on the Scene

- Take photos and Measurements of EVERYTHING
  - Tire marks, gouges, view obstructions, etc.
- Consider the facts and learn what happened ASAP
- Make data available to the police
- Get the “personality” of the scene and the parties

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# Rapid Response – Step by Step

## 7. Who does the Investigator see at the scene?

- Everybody
- Trooper/ Police officer
- All Witnesses
- Tow Operators
- Fire and Rescue Personnel
- Ambulance Operators (Precious data here)

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# Rapid Response – Step by Step

8. Constant updates are essential

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# Rapid Response – Step by Step

## 9. What are You and I Doing?

- Talking constantly
- Checking Records and Ensuring Preservation of them (Generally, I am asking you to preserve all records relating to this driver, this equipment and this accident)
- Looking for problems

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# RECORDS

## **This Driver**

- ✓ Hours of Service Records – LOCK THOSE THINGS DOWN
- ✓ DQ File
- ✓ Personnel File

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# RECORDS

## **This Equipment**

✓ Truck File

✓ Trailer File

✓ ECM –

✓ Truck drivable? Consider towing anyway...

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# RECORDS

## This Equipment

- ✓ Truck File, Trailer File
- ✓ ECM
- ✓ Qualcomm Data
- ✓ GPS Data
- ✓ DriveCam
- ✓ Other Truck Data

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# RECORDS

## Trip Documents

- ✓ Bills of Lading
- ✓ Trip Tickets
- ✓ Fuel and Gate Receipts

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# Continue to Communicate with the Officer

- Want positive feelings from the officer
- Want a favorable report
- Nothing to hide with officer

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Case studies on why we do all this work –

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# ACCIDENT DETAILS

## Semi vs. Mustang

- A semi-truck made a right turn onto a three-lane road in Las Vegas
- A passenger vehicle hit the truck from behind and was wedged under the trailer
- The passenger vehicle was dragged several dozen yards before the truck came to a stop

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# Semi vs. Mustang

- Call comes in at 4 am. Defendants' representatives are on the scene by 6:45.
- Investigator is:
  - gathering statements
  - taking photographs of the scene
  - talking with police officer on the scene
- All under the attorney's direction

# Semi vs. Mustang



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# Semi vs. Mustang



# Semi vs. Mustang





# Semi vs. Mustang

## What's the Problem Here?

- Passenger (Plaintiff) in critical condition
- Truck was repaired and resumed its usual route after the accident
- Lengthy ongoing investigation by the Las Vegas Metropolitan Police Department

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# Semi vs. Mustang

## So, What Did We Accomplish?

- Established communications with members of Metro
- An accident reconstructionist was on scene within hours before any evidence had been removed or altered
- Counsel on scene to consult with Defendant driver and passenger

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# ACCIDENT DETAILS

## Delivery Truck vs. Jeep

- The back of a passenger Jeep clipped the front of a delivery vehicle
- The Jeep lost control, spun out, and rolled several times into a ditch
- Driver and passenger were allegedly injured

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# Delivery Truck vs. Jeep



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# Delivery Truck vs. Jeep



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# Delivery Truck vs. Jeep



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# Delivery Truck vs. Jeep



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# Delivery Truck vs. Jeep

## What's the Problem Here?

- Two injured passengers
- Conflicting reports from the truck driver and the occupants of the Jeep as to the cause of the accident
- Delivery truck was a rental

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# Delivery Truck vs. Jeep

- Investigator was sent to the scene as soon as possible to examine the Jeep and the surrounding area
- Attorney advised the delivery company on procedures to preserve the rental truck as evidence
- Attorney worked with the police to stay apprised of any developments

# Delivery Truck vs. Jeep

What was accomplished?

- Investigator spoke to family members of the passenger on-scene
- Favorable accident report and likely no claim

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# ACCIDENT DETAILS

- Semi v. Ford Pick-Up Truck
- A semi was parked in the right lane of four-lane road at night in the rain.
- Driver of pick-up truck hit the parked semi from behind.
- The pick-up truck sustained severe property damage and the driver was injured.

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# Semi v. Pick-Up Truck

- We are on the scene within 20 minutes of the call from client.
- Investigator/reconstructionist are:
  - Taking statements.
  - Photographs and measurements at the scene.
  - Identification of the parties involved.

All under attorney's direction based on communication with client.

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# Semi v. Pick-Up Truck



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# Semi v. Pick-Up Truck



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# Semi v. Pick-Up Truck



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# Semi v. Pick-Up Truck

## What's the Problem Here?

- Driver of pick-up injured.
- Semi driver parked in the right lane of a busy road...at night...in the rain.

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# Semi v. Pick-Up Truck

So, What Did We Accomplish?

- Favorable pre-litigation settlement

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# ACCIDENT DETAILS

## Semi v. Ford Explorer

- Semi jackknifed without rollover during a severe snow storm with trailer coming to rest across roadway
- Ford Explorer impacted back corner of Semi trailer
- Four occupants in Ford Explorer, all of whom sustained injuries

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# Semi v. Ford Explorer



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# Semi v. Ford Explorer



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# Semi v. Ford Explorer



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# Semi v. Ford Explorer

What is the problem here?

- Four injured persons, three of whom were minor children
- Unfavorable accident report
- Unidentified witnesses

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# Semi v. Ford Explorer

- Investigator and reconstructionist sent to the scene as soon as possible
- Attorneys tracked down witnesses with key information regarding the accident and the identity of other witnesses
- Previously unknown witness provided favorable information

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# Semi v. Ford Explorer

So, what was accomplished?

- Favorable settlement at mediation as a result of witness statements

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A faint, light blue world map is visible in the background, showing the outlines of continents and countries. The map is centered on the Atlantic Ocean, with North and South America on the right and Europe and Africa on the left.

So, how do we turn lemons into lemonade??

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# SO HOW DO WE TURN LEMONS INTO LEMONADE??

- ✓ We collect the information as quickly as possible.
- ✓ We protect the information from the start and give it out as it suits us and not someone else.
- ✓ We have control of the data and know how to use it most effectively.
- ✓ We have preserved the data for however it needs to be used.

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My job is to PROTECT you, and  
PREPARATION is the key.

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# Questions?

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Nashville Regional Seminar  
What's New In Trucking Technology  
November 6, 2019

# Introductions

David Chapman

Knoxville, TN

Matt Parsons

Lexington, KY



LEWIS THOMASON



**STOLL**  
**KEENON**  
**OGDEN**  
PLLC

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# Presentation Summary

- Trucking Technology

- Proliferation of Data Sources and Data Volume
- New Technologies
- Front Facing and Rear-Facing Cameras
- Accident Investigation

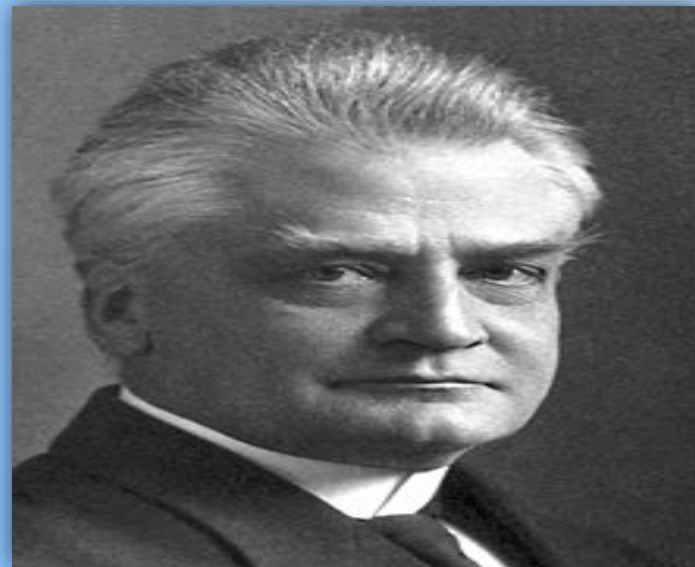
- Litigation Hold Strategies

- Policy, Training, Execution
- Driver Personal Devices
- Preservation Letters

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“Technology is a useful servant but a dangerous master.”



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Where did we come from?

Where are we going?

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# Things That Have Come And Gone...



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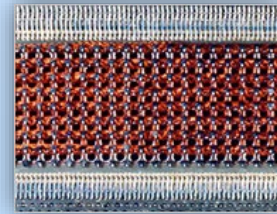
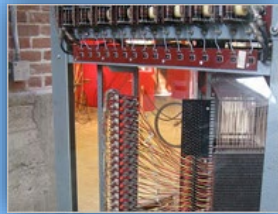
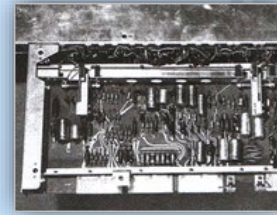
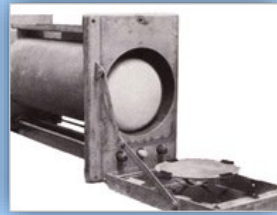
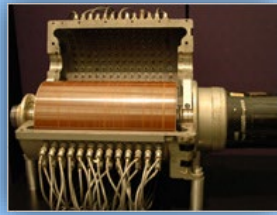
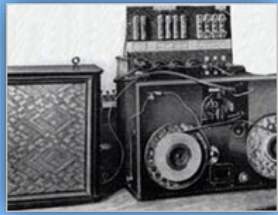
# Things That Have Come And Gone...



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# Information Explosion



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# Information Explosion



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# Information Explosion

Cost For Storage of a Gigabyte of Data

1956 = \$2,000,000

2009 = \$1

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# Ethical Duties of Attorneys

Rule 1.1 of the ABA Model Rules of Professional Conduct states: “competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, and maintaining the knowledge.”

Comment 8 to Rule 1.1 requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with *relevant technology*.”

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# Ethical Duties of Attorneys

Attorneys must “have a general duty to be aware of social media as a potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”

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# The Future



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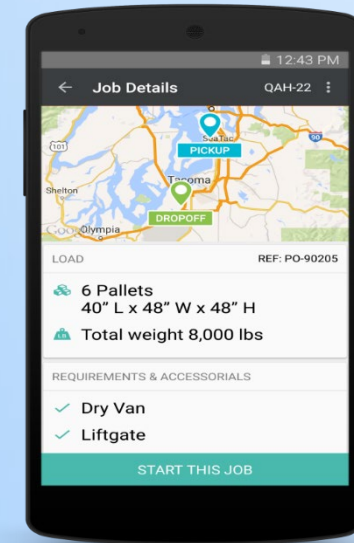
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# Uber For...



**TRANSFIX**

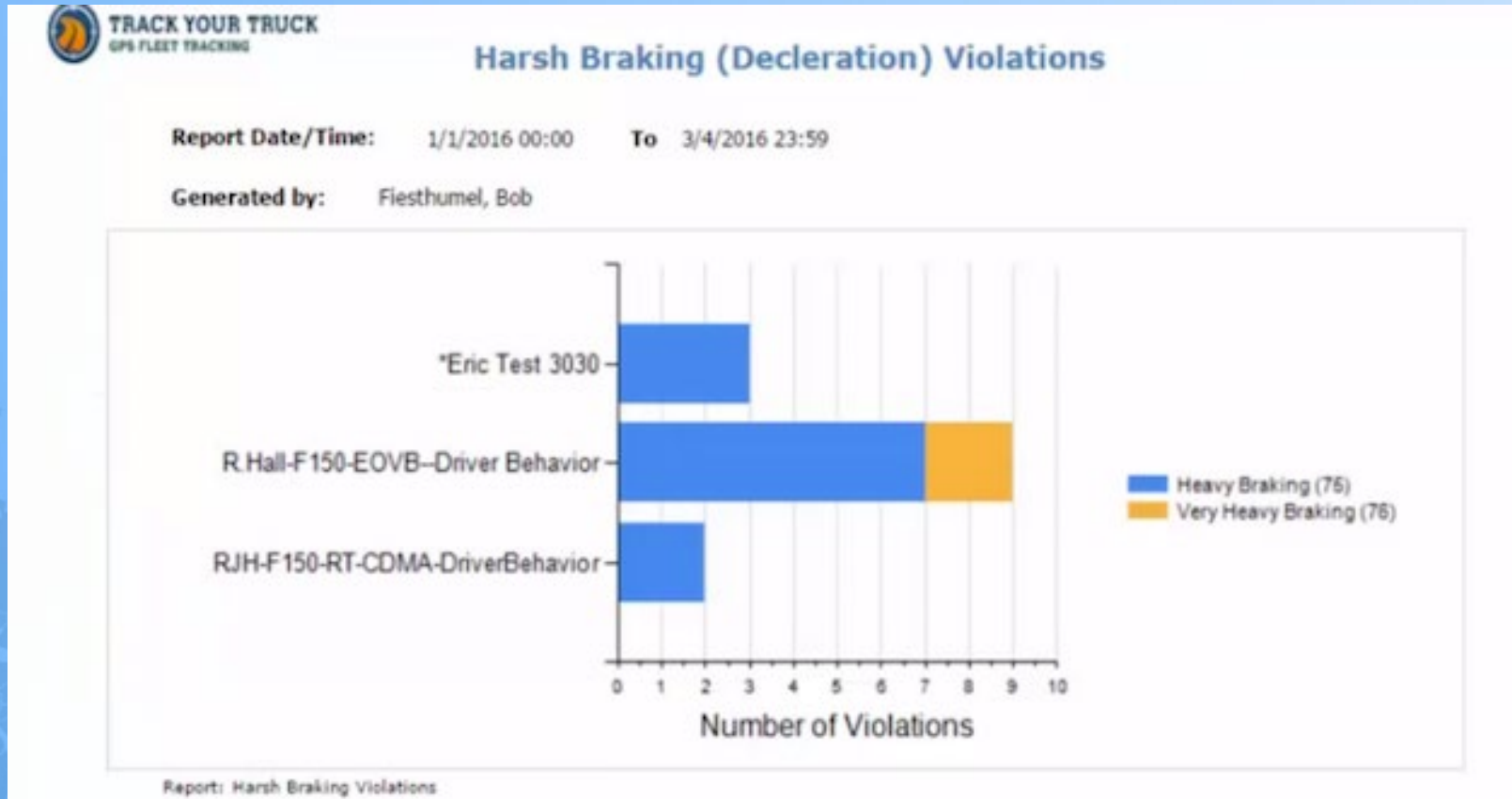
# cargomatic



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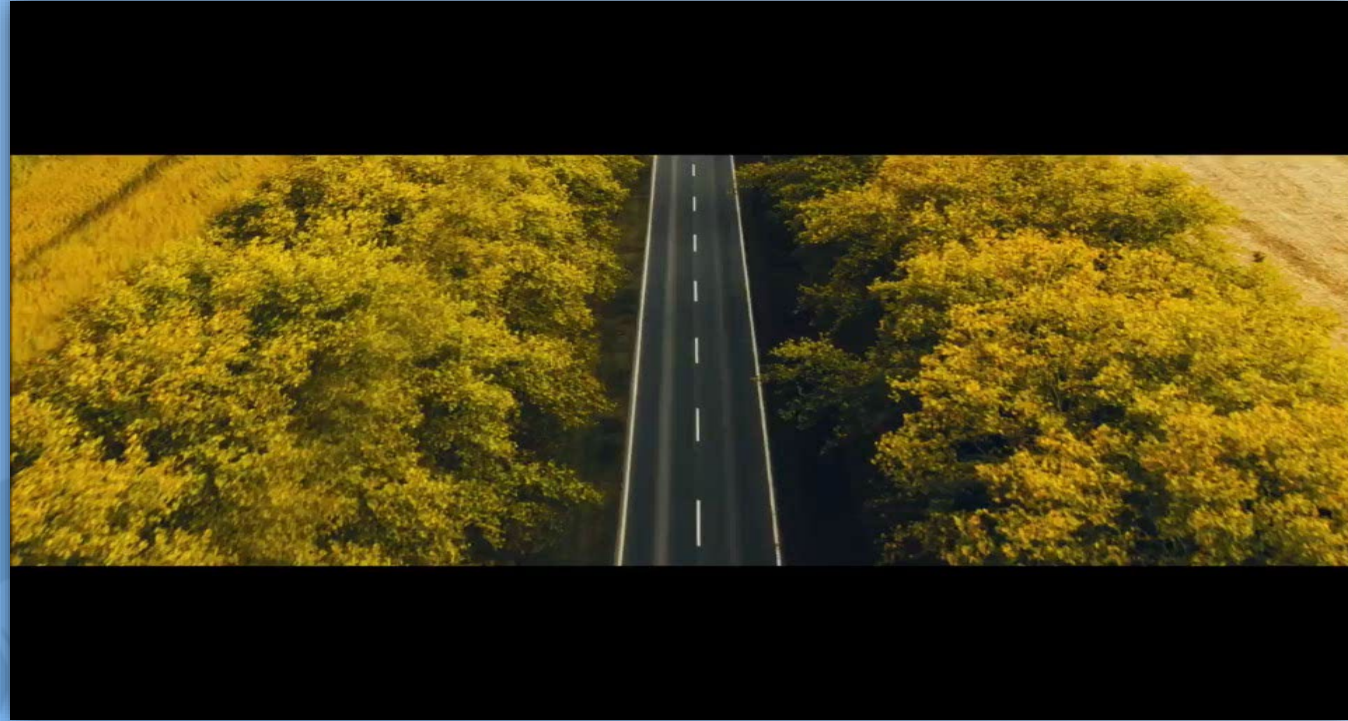
# Real-Time Driver Behavior Tracking



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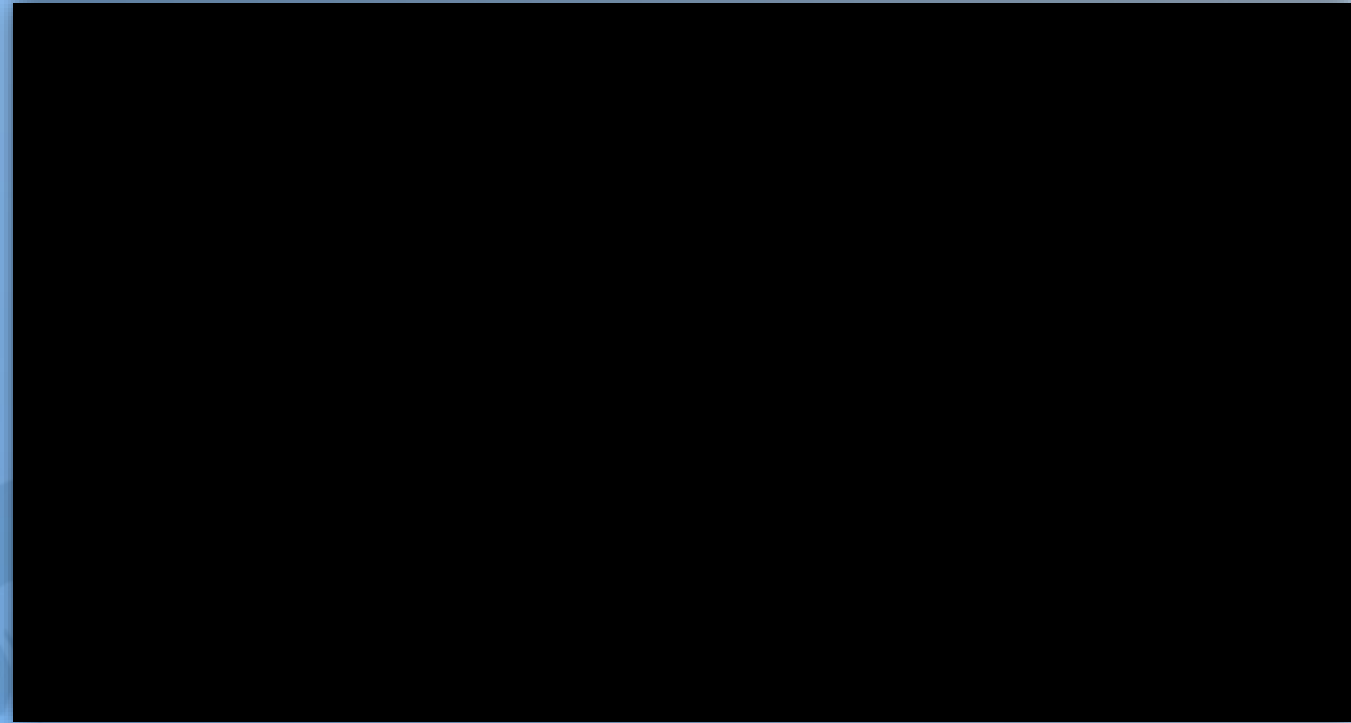
# Vehicle Modifications



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# Platooning Technology



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# Front Facing Dash Cameras



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# Post-Accident Investigation



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# Post-Accident Investigation



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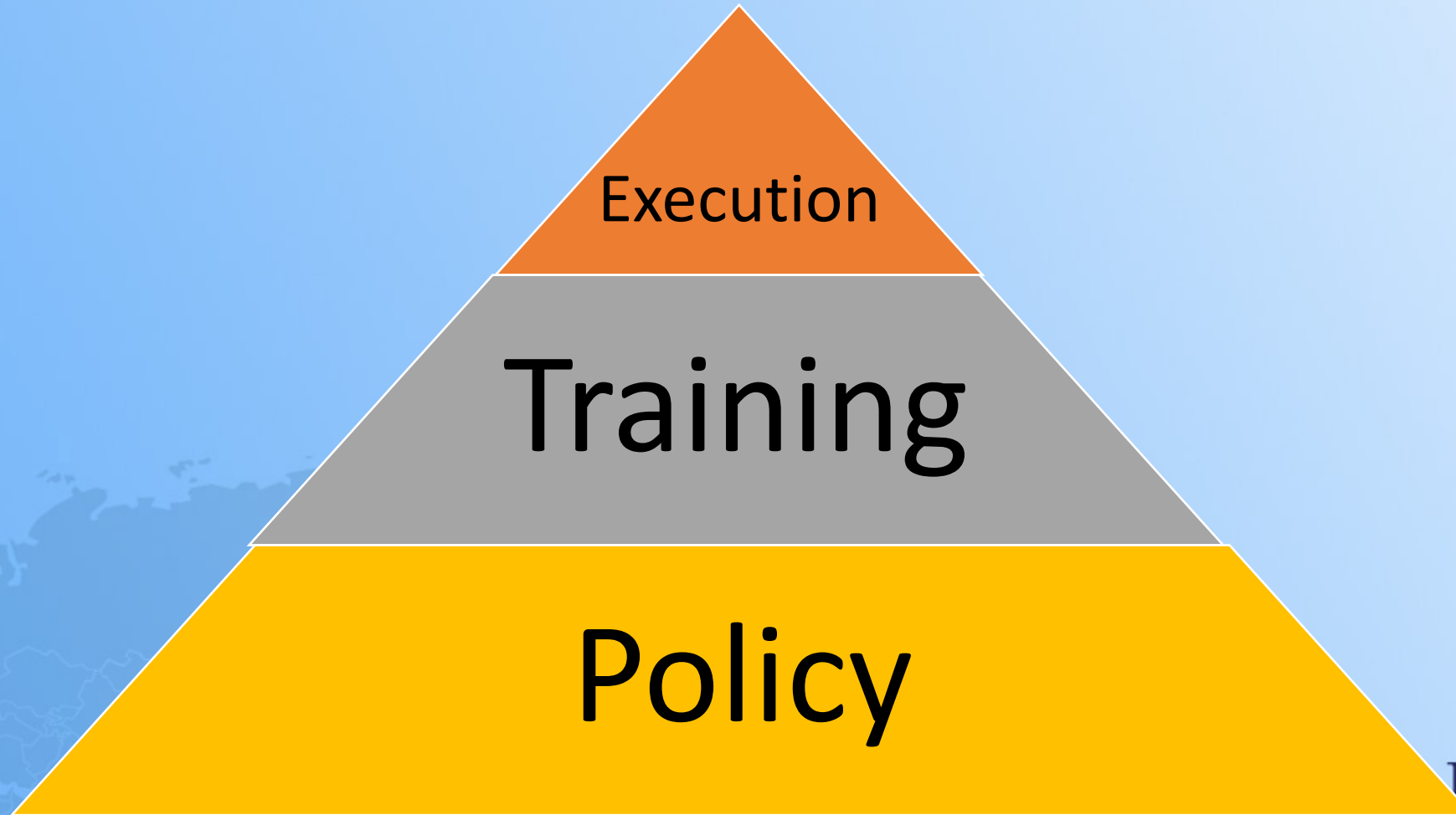
# Litigation Hold



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# Successful Litigation Hold Strategy



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# Litigation Hold: What is Your Policy?



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# Potential Sources of Evidence

- Driver's Logs
- Onboard video recording devices
- External video recording (residences, businesses, tolls)
- Data storage on tractors (ECM, EDR)
- Data storage on passenger vehicles (ECMs, air bag modules, computers, etc.)
- GPS devices
- Driver personal devices

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# Potential Sources of Evidence (cont.)

- Social Media (FB, Instagram, Twitter, YouTube)
- Activity tracking (Nike + Running, FourSquare, Fitbit)
- GeoTracking and Location Services
- Social news (Digg and Reddit)
- Discussion forums, comments and reviews

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# Example of Hidden Data: iPhone Location History

Allow your iPhone to learn places you frequently visit in order to provide useful location-related information.

## HISTORY

### New York, New York

21 locations recorded 2/11/15 - 3/31/15

### Madison Park, New Jersey

1 location first recorded on 2/16/15

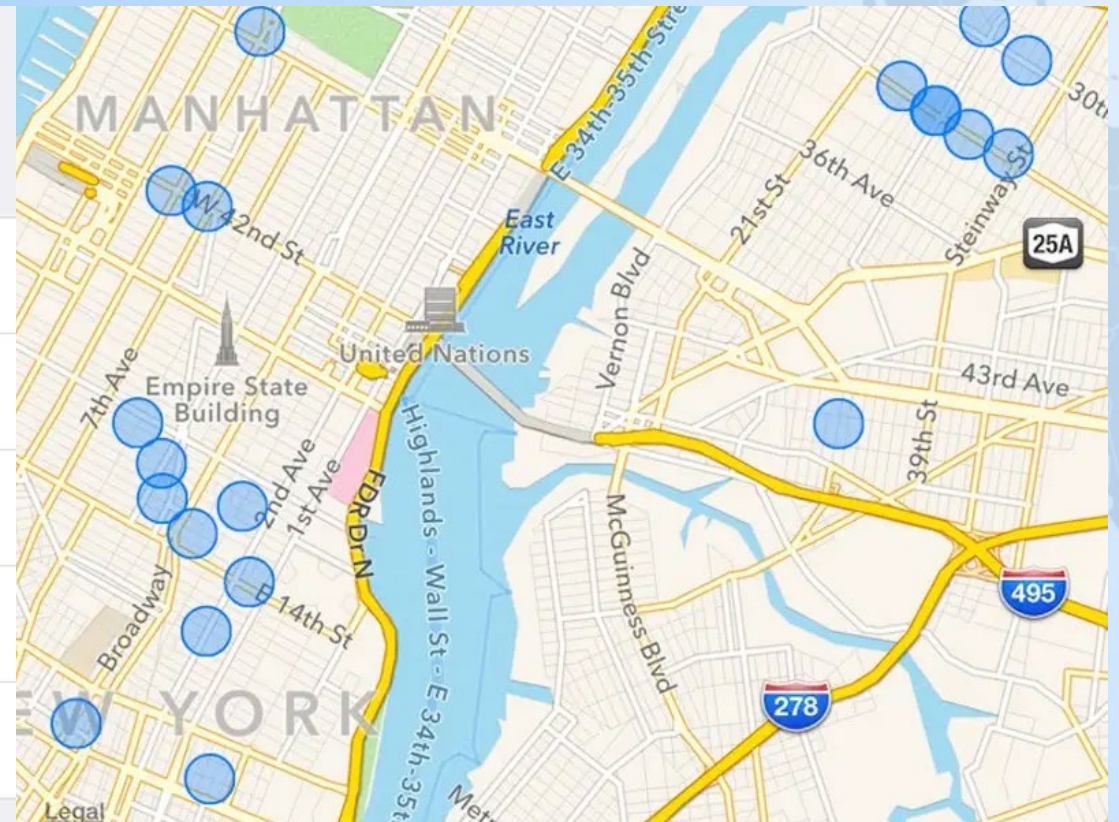
### Oakhurst, New Jersey

1 location recorded on 3/21/15

### New Brunswick, New Jersey

1 location recorded on 3/14/15

[Clear History...](#)



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# Lit Hold Policy: What NOT to do

[REDACTED]

---

**From:** [REDACTED]

**Sent:** Tuesday, April 04, 2006 10:01 AM

**To:** Lisa

**Subject:** RE: 1st Qtr 2006 - royalty statement [REDACTED]

I told u guys to prepare a fire for all the documents.....sericusly....

also, destroy bobo notes and contact information...

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# Litigation Hold – Driver Personal Devices

- Principles at Issue
  - Custody or control
  - Whether ESI is unique or duplicative of other sources
  - Privacy versus Proportionality
- “Bring your own device” policies
  - Sedona Conference Commentary: “Employee owned devices that contain unique, relevant ESI should be considered sources for discovery.”
  - Employee training and acknowledgment of BYOD policy

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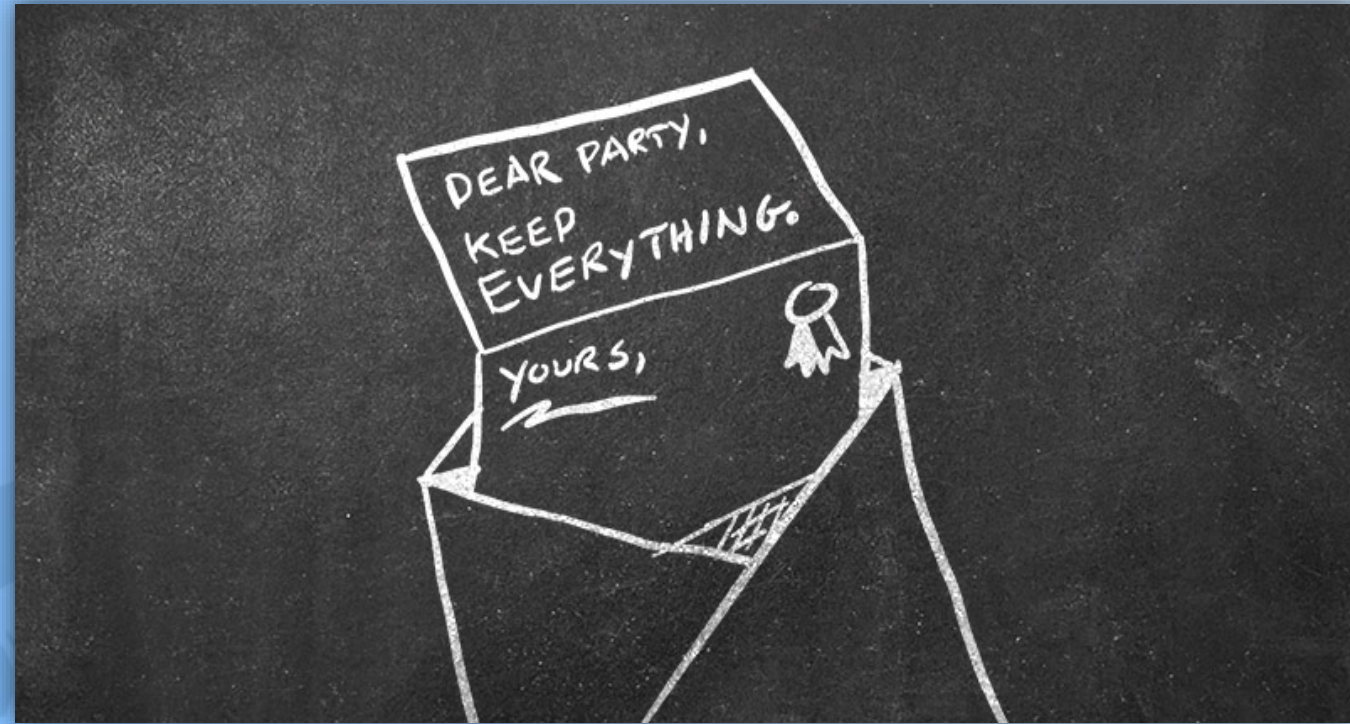
# Litigation Hold – When Does the Duty Attach?

- Possible Triggering Events
  - Complaint
  - Receipt of Litigation Hold Letter
  - Receipt of Claim or Demand
  - Occurrence of Accident
    - Injury or fatality
    - Citation to Driver
    - Serious Property Damage
    - Driver discipline, especially termination
    - Internal Incident Report

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# Preservation Letter



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# Not a One Way Road

- Make requests to the claimant.
- Passenger vehicles may have event recorders



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# Lessons Learned

- Policy → Training → Execution
- If preservation and data use policies exist, they must be followed and reinforced through training
- Carefully consider triggering events and when the duty to preserve attaches

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