

How to Deal With Disappearing Drivers

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Motor carriers are generally liable for the negligent acts of their drivers. The most direct way to impute liability to motor carriers is through the doctrine of *respondeat superior* — “let the master answer” — which holds motor carriers vicariously liable for drivers’ negligent acts committed within the course and scope of employment. This doctrine makes company drivers critical witnesses in the defense of tractor-trailer cases.

But what if the driver disappears before or after litigation has commenced?

Sometimes, a discharged company driver will view the litigation as the “company’s problem” and refuse to cooperate with defense counsel after being served with a lawsuit. Defense counsel cannot represent an uncooperative driver, which may cause a plaintiff’s lawyer to seek a default judgment against the driver so as to pursue the company under *respondeat superior*.

Now what?

From the outset, defense counsel should try to buy more time to locate the driver and to avoid the driver’s default. Counsel must ensure the driver was properly served. A driver who does not want to be found will avoid contact with all strangers — especially process servers. Thus, defense counsel must scrutinize the proof of service to determine if the driver was served properly. In California, for example, defense counsel may appear specially to challenge substituted service with evidence that the driver did not dwell at the residence where service was effected. By successfully challenging service, defense counsel may buy more time to locate the driver.

If locating the driver is a lost cause, another strategy to avoid the driver’s default is to have the company (or insurer) intervene in the case. The motor carrier or its insurer may intervene to set aside a default, upon a showing of a direct and immediate interest, such as protecting an insurance policy.

The California Court of Appeal addressed this intervention issue after the trial court refused to allow State Farm Insurance Co. to intervene when the driver disappeared after litigation had begun. The court of appeal reversed the trial court because “unless State Farm is allowed to intervene, it may have no other opportunity to litigate fault or damage issues in any action brought by plaintiff on its judgment under Insurance Code section 11580.”

Therefore, even if the driver disappears in the middle of litigation, “intervention” allows the motor carrier or the insurer to protect itself from a defaulted driver imputing liability to the company.

Despite defense counsel’s efforts to avoid entry of a default judgment, what happens if the driver is defaulted? Can the driver’s default be imputed to the company?

Most jurisdictions will not enter a default judgment until the court adjudicates the liability of the trucking company. This delay allows the defense of the company to result in the benefit of a defaulted driver where the company is alleged to be vicariously liable.

For example, the issue of whether a driver’s default affects the liability of his employer was addressed by the Michigan Supreme Court in *Rogers v. J.B. Hunt Transport Inc.* “Rogers” involved a wrongful death case in which a motorist was killed when he collided with a parked tractor-trailer.

The motor carrier fired the driver of the tractor-trailer. The plaintiff, Rogers, then sued both the motor carrier and the driver. The driver failed to appear at his deposition, which resulted in his default.

The trial court and then the court of appeal ruled that, as a result of the default, the motor carrier could not contest that its driver was negligent in causing the fatal injuries of the other motorist.

The Michigan Supreme Court disagreed. The state’s high court noted that the doctrine of vicarious liability, in which an employer is held liable for wrongful acts committed by employees, does not apply when that employee is acting outside the scope of his or her employment.

The court ruled that even though the driver may have been acting as an agent of the motor carrier at the time of the incident, the same could not be said when he refused to participate in the lawsuit after he had been fired. As such, the court held that the default of the driver was not an admission of liability of the employer; thus, the default did not bar the trucking company from litigating the driver’s negligence.

As a practical matter, most plaintiffs’ lawyers will prefer that the missing driver stay missing, because doing so eliminates a critical witness from the case and bolsters the plaintiff’s version of the accident. While some plaintiffs’ attorneys may attempt to hold a motor carrier vicariously liable, based on a driver’s default, defense counsel usually can prevent the entry of default judgment from imputing to the company by invoking the legal principles discussed above. Doing so will ensure the motor carrier has an opportunity to defend the case on its merits.

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