

Adopt an Aggressive Defense in Trucking Suits

By Doug Marcello, Marcello & Kivisto, LLC



The battlefields of history are littered with carcasses of those perfectly prepared to fight the prior war. Their failure to recognize and develop new strategies and tactics, their failure to adapt, spelled their doom.

An effective defense of trucking claims, call it a form of loss prevention, begins with pre-planning for and immediate response to an accident, incident or theft. Completion of this phase is not a time to rest and await a course set by a plaintiff. Instead, we must continue to capitalize on our advantage of immediacy by pressing the defense and dictating the pace.

We must adopt a proactive approach so they follow our pace. We must dictate to them. We must respond and respond immediately, and proactively engage them to reach a successful outcome with limited exposure. We have an advantage that no plaintiff attorney possesses—immediacy. Let us not squander that.

The following is a brief overview of some of the tactics that can be employed to the success of a motor carrier.

1. VIDEO SURVEILLANCE CAMERAS - Upon arrival at the accident, incident or theft scene, immediately check for video cameras—public or private. Sure, it's a long shot that any are present or even longer that the

event was caught on film, but you must act immediately to have any chance of preserving any possible capturing of the accident on video.

Video cameras can be both public and private. From municipal intersection cams to business security cameras, the myriad of possibilities constantly increases. Remember that it was a security camera outside a business that captured the landing of the US Airways airliner on the Hudson River. And, recently, a convenience store surveillance cam captured the accident and provided documentation of a driver's version in an intersectional accident involving a police car. Lucky? Maybe. But isn't luck the residue of preparation?

2. SELF SURVEILLANCE - Social media is today's life stream. Younger generations live there. Even older generations engage regularly. People constantly post their activities and photos. Those who do so before or after they assert a claim against our companies are handing us a gift. We cannot waste this resource of self surveillance. Act fast. Check available public sources immediately upon the accident, before it can be taken down. Download and preserve photos and videos. Then follow up regularly. You can often save the expense of iffy surveillance by capitalizing on their "self surveillance."

3. **EARLY SURVEILLANCE** - If you do traditional surveillance, do it early, immediately after the accident / incident. Frequently this is far more productive than later when claimants are warned by an attorney or guarded for the sake of litigation.

4. **PUSH BACK** - When the notice letter comes from plaintiff's counsel, push back. Let them know they are in for a fight. This is not "hit-a-truck, get-a-check." You're not an 18 wheel ATM. If there is a loss, it is not automatically the driver's fault. If an accident, fire back a letter enclosing medical and employment releases and requesting a list of providers and employers. Follow up in at least thirty days, reminding them of your prejudice due to their delay. If it's a loss or damage claim, assert your company's position first. Information does not flow just one way. Prejudice is not limited to the plaintiff. Push back immediately and set the tone for the long run.

5. **PRE-LITIGATION MEDICAL AND VOCATIONAL EVALUATIONS** - Request Independent Medical Examinations (IME's) and vocational interviews early. Assert your right to investigate - even before a suit is filed. For us, it is a no-lose proposition. If plaintiff agrees, you have early evaluation by your expert to rebut their claims. If they refuse, we have documented our attempt and their rejection, raising questions of their validity and motives.

This combats the too frequent occurrence where plaintiffs delay for months or years while they build their case, one visit at a time, before filing suit. In the case of accidents, this removes the argument that initial claims of injury and disability must be justified as our experts never saw the plaintiff until much later.

6. **SUE THEM FIRST** - I can't tell you how many cases we filed suit first to establish jurisdiction and take the initiative. When we sense that plaintiffs intend to sue in a "plaintiff friendly" jurisdiction, we look to file suit in

the jurisdiction of the accident/incident/theft or residence of the plaintiff to recover property damage or cargo loss. If the case is one of arguable liability, this can keep the action where it will properly and fairly be located. Further, having responded rapidly to the accident, documented the scene, and "statementized" the witnesses, we can capitalize on our preparation by taking and maintaining the initiative.

7. **READ THE "PLAINTIFFS' PLAYBOOKS"** - Plaintiffs tactics and strategies are no secret. They publish them in books and sell them to anyone. Each year, we invest significantly to purchase plaintiffs' publications and CD's of seminars. Take advantage. Read their books. Learn their strategy. Prepare to respond. Capitalize on this intelligence to anticipate deposition questions and trial tactics.

8. **DATA MINE** - Undermine plaintiffs' claims of "no prior similar injuries" by digging into the data. Request the identity of all prior medical insurers. Subpoena their files. These records can lead to prior treatment that plaintiff previously denied.

Identify all pharmacies filling prescriptions for any reason. These can often reveal prescriptions that can again be traced to similar previous maladies. Alternatively, they can reveal abuse that may be admissible based upon their effect on life expectancy.

Research may also show a pattern by the shipper, broker and/or consignee to file claims, and the history of those claims -

