

Transportation Company Policies & Procedures for Retention of Electronic Control Module Data

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On September 11, 2017, the U.S. District Court, Northern District of Alabama issued an opinion in ***Barry v. Big M Transp., Inc.***, Case No. 16-CV-00167, that addresses when, and what type of, sanctions are warranted when a transportation company fails to preserve event data recorder information. Transportation companies should use this decision as an opportunity to reflect on the policies and procedures they have in place for data retention and to guide their retention procedures going forward.

Facts

The case arose out of a motor vehicle accident that occurred on Interstate 20 in Alabama. While driving through a construction zone, the car of one plaintiff was first involved in a side-to-side collision resulting in damage to the driver's side of the vehicle. The plaintiff brought his vehicle to a complete stop in the right lane. Two other vehicles that were traveling behind the plaintiff also stopped.

Shortly after the three vehicles stopped in the right lane, the defendant's tractor trailer (truck) sideswiped the plaintiffs' cars. While the cause of this second accident is in dispute, the official accident report completed by the Alabama state police identified the plaintiffs' "improper parking/stopped in the road" as the primary circumstances contributing to the accident. The defendant's truck was towed from the scene of the accident to a repair shop, and then driven back to the defendant's headquarters.

Less than a month after the accident, the plaintiffs sent the defendant a letter of preservation requesting the defendant to preserve, among other evidence, the subject truck and the electronic data/ electronic control module (ECM) vehicle data recorder/black box and its data. However, by that date, the truck had already undergone accident-related repairs. In addition, prior to the accident, the truck had been selected for sale, which was completed three days after the defendant received the plaintiffs' letter of preservation.

The defendant did not download or otherwise preserve the data prior to completing the sale of the truck. A representative of the defendant testified that it was normal practice to retrieve data if it is known that a collision is severe. He conceded that there was nothing preventing the defendant from preserving the data, but said it would not have mattered because it was his understanding that any

accident-related data would have been gone. He believed that something as simple as moving the truck can start the process of rewriting the data. The defendant's expert later testified that the representative's belief was incorrect.

Plaintiffs' Motion

The plaintiffs brought suit against the defendant alleging negligence. The plaintiffs and the defendant each filed a motion for summary judgment. In addition, the plaintiffs moved the court to impose a spoliation sanction against the defendant for failing to preserve the ECM data following the accident. The plaintiffs sought either a default judgment or an order establishing the speed of the truck and the maneuvers made in a light most favorable to the plaintiffs. The defendant argued that the lack of preservation of the ECM data was well reasoned and justifiable and, in the alternative, if the failure to preserve the data was not reasonable, it does not warrant the imposition of sanctions.

Ruling

Spoliation is the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. When spoliation occurs, the court can impose sanctions to prevent unfair prejudice to litigants and to ensure the integrity of the discovery process. The court found that the defendant was liable for spoliation. The defendant's own representative testified that the company's normal practice was to retrieve ECM data if a collision is severe. He further admitted that there was nothing preventing the company from preserving the data. Here, the accident was certainly severe, as three vehicles were struck by the truck and one of the plaintiffs was rushed from the scene in an ambulance. Finally, the defendant received the letter of preservation three days before the sale of the truck was completed. In light of these circumstances, the court concluded that it was reasonably foreseeable, if not a near certainty, that the accident would lead to litigation. The court also concluded that the plaintiffs were prejudiced by the failure to preserve the ECM data as it was the best and most accurate evidence of the truck's speed in the moments prior to the collision.

Although spoliation had occurred and the plaintiffs were prejudiced, the court refused to impose the severe sanctions that the plaintiffs requested. Rule 37 (e) of the Federal Rules of Civil Procedure determines the circumstances under which a court may enter judgment or establish a presumption in favor of a prejudiced party when spoliation has occurred. The rule limits these sanctions to situations where the party acted with *the intent* to deprive another party of the information's use in the litigation. The court was not convinced the defendant acted with the intent to deprive the plaintiffs of the data. The defendant believed the data had been overwritten as soon as the truck was moved. The defendant's understanding, even if mistaken, is consistent with their insistence that they did not act in bad faith and had no intention of depriving the plaintiffs of the ability to use the ECM data. Further, the defendant believed the plaintiffs were at fault for the accident, as they had stopped their vehicles in a lane of travel. Although it does not absolve the defendant for failing to preserve the data, it does help explain why they concluded litigation was not likely.

In addition, although the plaintiffs were prejudiced, they were not so impaired as to warrant the severe sanctions they sought. Even without the data, the plaintiffs' experts were still able to reconstruct the accident to a sufficient level of certainty to render an opinion on the speed of the defendant's truck. While the data would have been helpful in reconstructing the accident, it was not so important that its loss crippled the plaintiffs' ability to prove their case.

The court imposed what it believed to be a lesser sanction. The court told the parties it would instruct the jury that the ECM data was not preserved and allow the parties to present evidence and

argument at trial regarding the defendant's failure to preserve the data.

Takeaway

The key takeaway from this case is that transportation companies need a policy in place for the retention of electronically stored data following an accident. The policy should look to preserve the data at the earliest stage possible. It should not take a preservation letter to trigger data retention because in most cases, as was the case here, the letter will come long after the data has been erased. From a best practices standpoint, transportation companies would be well advised to have an internal process to retain everything following an accident, regardless of the severity of the accident. A company always can delete information at a later point, once the "dust has settled."

Having a policy to retain ECM data is the first step, but simply putting a policy in place is not enough; transportation companies also must ensure the policy is actually *followed*. The defendant got relatively lucky here. They failed to follow their own policy but the court bailed them out in a sense. The court allowed them at least to counter the plaintiffs' spoliation argument before the jury. That may not always be the case. It is easy to envision a scenario where a court infers intent from a company's failure to follow its own policy or a situation where the lack of ECM data does completely cripple a plaintiff's ability to prove their case. In those situations, a court may believe more severe sanctions are warranted. Bottom line: create a policy for retaining data and make sure it is followed.

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National Law Review, Volume VII, Number 289

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