TRACY MORGAN SETTLED HIS SUIT, BUT LEFT BEHIND POTENTIAL ISSUES CONCERNING A DRIVER'S UNCOMPENSATED OFF DUTY ACTIVITIES

By: Heidi E. Ruckman, *Heyl, Royster, Voelker & Allen*

Anyone who watches the news is probably aware that comedian Tracy Morgan recently settled his lawsuit against Wal-Mart for the injuries he sustained in an auto accident involving one of Wal-Mart's tractor trailer drivers. For most, the undisclosed settlement terms prompted speculation and interest as to the amount. However, for those involved in the field of commercial transportation, interest was generated in the on duty/off duty issues the Morgan Complaint's allegations attempted to create; despite the fact they fall outside of the definitions provided by the Federal Motor Carrier Safety Administration Regulations.

Morgan's Complaint

On July 10, 2014, Morgan filed a complaint against Wal-Mart in a New Jersey District Court. He alleged driver Kevin Roper (Roper) lived in Jonesboro, Georgia, but commuted 700 miles to the Wal-Mart distribution facility in Smyrna, Delaware. *Morgan v. Wal-Mart Stores, Inc.*, 3:14–cv-04388-MAS-LHG, (U.S.D.C., N.J. July 10, 2014) ¶ 15. Per the complaint, that commute would have taken Roper 11 hours if he had been driving at 60 miles per hour. *Morgan*, ¶ 79. On June 6, 2014, Roper started his shift at 11:22 a.m. *Id*. ¶ 16. The accident occurred in the early morning hours of June 7th at approximately 12:54 a.m.

Morgan had just finished a show and had been traveling in a limo northbound on the New Jersey Turnpike. Roper was also traveling northbound on the Turnpike. *Id*. ¶ 24. The road was under construction and the speed limit was reduced from 55 miles per hour to 45 miles per hour. *Id*. ¶ 26. Warnings of this speed reduction and construction were posted at least 4 miles out from where the accident occurred. *Id*. ¶ 27. Despite traffic slowing for the construction, Roper was traveling 65 mph at the time his tractor trailer collided with Morgan's limo. *Id*. ¶ 31. It was alleged that, as a result of Roper's fatigue, he fell asleep while driving and failed to slow down for the traffic ahead of him. *Id*., ¶ 70.

Morgan's complaint also alleged Wal-Mart knew or should have known Roper had been awake for more than 24 consecutive hours immediately before the June 7th accident. *Id*., ¶ 68. Furthermore, Wal-Mart knew or should have known that it was unreasonable for Roper to commute more than 700 miles from his home in Georgia to his employer in Delaware before his shift began. *Id*. ¶ 69. The complaint went on to allege that, even if the driver had complied with the maximum hour limits provided for by the FMCSA Regulation, Wal-Mart did not factor in the driver's commute time. *Id*. ¶¶ 67, 81. As a result, Morgan claimed Wal-Mart's acts and/or omissions amounted to reckless and intentional failures to take proper actions to combat the danger of its driver from suffering from fatigue. *Id*. ¶ 82. The complaint provided that such acts resulted in the careless and negligent ownership and operation of its motor vehicle, which were the causes of his injuries. *Id*. ¶ 41.

For those involved in the field of commercial transportation, interest was generated in the on duty/off duty issues the Morgan Complaint attempted to create.

A Driver's "Off Duty" Activities

Morgan's complaint alleged that even if Roper's hours did not exceed the maximum allowed, his commute time to work should have been considered. Despite this allegation, none of the Regulations would require a driver's uncompensated commute time to work be included when calculating service hours.

It is well accepted that the Regulations control what constitutes on duty and off duty time for a driver. "On duty" time is defined as the time when the driver begins to work or is required to be ready to work and lasts until such time when the driver is relieved from all work responsibilities. *See* 49 CFR 395.2. For example, "on duty" time includes the time spent at a plant, facility or shipper's property, as well as time waiting to be dispatched. It also includes time spent inspecting or servicing a commercial motor vehicle, all driving time, all time spent in a commercial motor vehicle (other than time spent resting in a parked vehicle), up to 2 hours riding in the passenger seat (subject to conditions), loading or unloading the vehicle, supervising or assisting with the

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same, repairing the vehicle, remaining in readiness to operate the vehicle, providing a specimen, performing any other work for a motor carrier and all time spent performing any compensated work for a person who is not a motor carrier. *See* 49 CFR 395.2. Nevertheless, the Morgan case did not involve an instance where the driver worked a side job, such as a roofing job, for pay. Therefore, applying the language of the Regulation to these facts, uncompensated commute time to work is "off duty" time and is not considered when calculating service hours.

49 CFR 392.3 provides, in part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle while the driver's ability or alertness is so impaired or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial motor vehicle.

The question becomes: how far, if at all, might a motor carrier's obligation to inquire about its driver's uncompensated off duty activities extend when it attempts to determine whether the driver's alertness or ability will likely become impaired through fatigue or any other cause in light of the well established definitions found in 49 CFR 395.2 and maximum driving time provided for in 49 CFR 395.3?

On duty and off duty time is essential in determining whether a driver is complying with his maximum driving time. However, the Morgan complaint seems to allege that even when the driver complies with maximum hour limits established by the Regulations, motor carriers should consider the uncompensated off duty activity of a driver's commute to work when determining whether a driver's ability or alertness may be impaired or become impaired. If that were to happen, the lines drawn by the Regulations set forth under 49 CFR 395.2 and 49 CFR 395.3 may become blurred or altogether ignored. If one's uncompensated commute time is examined, would other off duty activities such as a driver participating in an athletic event (i.e. running a race), repairing his personal vehicle, or staying up late into the night to care for a sick child be considered? Furthermore, if uncompensated commute time is to be considered, where would an employer's obligation end? Would a driver's personal and psychological circumstances need to be examined? It may be that a driver is going through a divorce, a bankruptcy or recently experienced a death of a loved one which could impose a stress that would cause his alertness to be or to become impaired as well. Of course, these circumstances are not currently included in the Regulations as they are written. As such, the Regulations can be relied on to provide the framework needed to address this issue.

As time passes, one can expect that the sensationalism of the Morgan settlement will pass from the public mind. However, the issues surrounding uncompensated "off duty" activities of drivers and the potential impact those activities may have on litigation involving motor carriers under the current Federal Motor Carrier Safety Administration Regulations will remain at the forefront. ⚖

Heidi E. Ruckman, a Partner at Heyl, Royster, Voelker & Allen, concentrates her practice on the defense of commercial motor vehicles and their insurers. She also handles legal malpractice, toxic tort and premises claims. She received her undergraduate degree from Northern Illinois University and her J.D. degree from The John Marshall Law School. She is a vice-chair of the ABA Commercial Transportation Committee and a member of the Association of Defense Trial Attorneys (ADTA). She is active in her local bar association and recently served as chair of the trial and appellate section, and is a frequent presenter at various claims handling seminars. Ms. Ruckman was admitted to practice in the State Courts of Illinois and the United States District Court, Northern District of Illinois in 2000.