# INSURANCE COVERAGE IN A TRUCKING CASE

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## I. INTRODUCTION

Truck accidents involve a host of insurance issues that are unique to trucking insurance. Thus whether you represent the injured Plaintiff, the trucking company, the driver or the insurer, you necessarily need to be familiar with some of the commonly encountered industry terms, the ways in which trucking insurance policies are different than many other standard liability policies, and how the policy/coverage may be impacted by the somewhat complex statutory and regulatory schemes governing trucking.

Among the numerous issues more likely to be encountered are the following:

- Drivers that appear to be independent contractors rather than employees of the trucking company but, by statute and case law, may be treated as employees both for liability as well as coverage purposes;

- Federally mandated statutory minimum coverage schemes and endorsements that may trump otherwise clear coverage exclusions or coverage defenses;

- Written lease agreements between "owner-operators" and the trucking company that affect coverage;

- The interplay between a "non-trucking liability" policy and a "trucking liability" policy and issues as to which applies to a particular factual scenario.

This paper will attempt to provide some basic understanding of these and other issues so that a practitioner who may not regularly practice in this area, can at least identify the possible issues that have to then be further explored.

## II. TERMINOLOGY

The trucking industry has its own lingo. Understanding what some of the most commonly encountered terms mean is important. Among the most often encountered terms are the following:

- **"Motor Carrier"—**typically means the actual trucking company that has been hired by someone to haul cargo somewhere. Their company logo will typically be displayed somewhere on the truck along with their Dept. of Transportation carrier number. The motor carrier typically will have a Commercial Auto Trucker's Liability insurance policy covering it and its drivers (who may be employees or, more frequently "owner-operator" drivers that it has contracted with).

- **"Owner-Operator"—**a person who owns and operates his/her own truck, typically just the cab/power unit. The "owner-operator" may act as driver as well or may hire someone else to drive his truck for him. Some "owner- operators" are independent, meaning that they contract with various "motor carriers" to haul for the "motor carrier". Other "owner-operators" may only drive for one particular "motor carrier" for months or years at a time, typically under a long term lease arrangement that typically involves a lease of not only the truck itself but also a driver, who may be the "owner-operator" himself or some driver employed by the "owner-operator". The "owner operator" will typically be covered on the Motor Carrier's insurance while engaged in the motor carrier's trucking business. But many owner-operators also carry their own insurance to cover them when they are not so engaged.

- **"Power Unit"—**the actual truck with cab and engine that hooks up to the chassis or trailer to be hauled. Sometimes also referred to as the "tractor". Will be treated as a "covered auto" on the motor carrier's insurance policy while it is being used to haul for the motor carrier.

- **"Chassis"—**a trailer pulled by the Power Unit onto which containers of cargo (typically coming off of a ship or train) are then loaded and affixed onto. The Chassis may be owned by the Motor Carrier, the shipper of the cargo, or some third party that leases it to the shipper or motor carrier. May also be considered as its own

"covered auto" on the motor carrier's insurance policy if it is being used to haul container cargo by the motor carrier.

- **"Trailer"—**a large box containing cargo that the Power Unit pulls. May be owned by the shipper or the Motor Carrier. Will typically be treated as a separate "covered auto" on the motor carrier's insurance policy while being hauled by the motor carrier.

- **"DOT"—**U.S. Dept. of Transportation. It regulates the interstate trucking industry and passes numerous regulations regarding driving times allowed, required equipment and inspections, driver log books, maintenance requirements etc.

- **"Tandem Driving"—**a team of two drivers that make runs together, sometimes married, so that one can take over when the other has driven all of the hours allowed by DOT regulations. Tandem or "team driving" allows long trips to be made without as many sleeping/rest stops required.

- **"Deadheading"—**driving a truck with an empty trailer or chassis attached. This typically occurs when the driver has to go to another location to pick up the load he is to haul but has no load to take to that location or can happen if a truck and empty trailer is just needed at a different terminal due to logistics issues but there is no load to be taken to that location.

- **"Bobtailing"—**a driver, typically an owner-operator, driving just his/her power unit without anything attached to it. Typically occurs when the driver is headed to or from the terminal to pick up or after dropping off his/her load or otherwise is not under dispatch to any motor carrier at the time. Includes times when the driver is driving the power unit to his home at the end of the day as well as numerous other personal uses of the power unit as a source of the driver's personal transportation (i.e. "bobtailing" to church, to the doctor's office etc.). Owner-operators may or may not have a separate policy (i.e. a "bobtail policy" or "non-trucking liability policy") covering them when they are "bobtailing" in the power unit. Can frequently be messy coverage fights between the insurer on the "bobtail" or "non-trucking liability" policy and the motor carrier's "trucking liability" policy if the facts involved make it unclear as to whether the driver was acting in the business of the motor carrier or not at the time of the accident.

- **"Uniform Intermodal Interchange and Facilities Agreement"**—an industry agreement between most major motor carriers and ship lines that governs the "interchange" (*i.e.* the use almost as fungible items) of chassis, trailers and cargo containers as they are moved all over the country and world on ships, trucks etc. Most trucking firms and ship lines are parties signatory to the agreement which is periodically revised every few years by the Uniform Intermodal Association based in Maryland. The agreement may come into play as to issues of liability, indemnity, insurance coverage and equipment responsibility as between the trucking firm and the ship lines whose goods or cargo the trucking firm is hauling. The current agreement contains a Maryland choice of law clause, although it is unclear whether that choice of law clause will be enforced if it runs afoul of important Texas public policies or statutes.

## III. TRUCKING POLICY COVERAGE ISSUES

### A. LESSOR/LESSEE CONTRACT ISSUES

In the typical "owner-operator" situation, the power unit/tractor is owned by one party (typically the "owner-operator") but leased to another (typically the motor carrier). These leases must comply with the federal statutes and regulations to the extent that interstate operation of trucks is involved. Under those federal statutes and regulations:

- The lease must be in writing;

- The lease must provide that the carrier-lessee has the exclusive possession, control and use of the equipment for the duration of the lease. 49 C.F.R. Sec. 376.11-.12 (2000);

- The motor carrier-lessee must assume the full direction and control of the leased vehicles "as if the motor vehicles were owned by the motor carrier." 49 U.S.C.A. Sec. 14102(a) (4).

If the lease does not comply with these provisions, some courts nevertheless read these requirements into the lease as a matter of law.

The lease may or may not contain other provisions that can significantly impact the overall liability picture in the event of an accident or claim including:

- Contractual indemnity provisions;

- Contractual insurance requirements (sometimes including a provision that the owner-operator maintain "bobtail" insurance covering him when he is not using the power unit for any business purpose related to the motor carrier's trucking business); and

- Choice of law provisions mandating that the relationship/contract is to be construed under a particular state's law.

## B. WHAT VEHICLES ARE "COVERED AUTOS" ON THE POLICY?

One of the very first steps in analyzing any trucking insurance question is to determine if the vehicle(s) involved (i.e. the power unit as well as any trailer) are "covered autos" on the policy. The standard policies use numerical defined symbols to designate which autos are covered on the policy. You will typically find the list of numerical symbols listed in a box for each coverage afforded by the policy and the symbol used for one type of coverage (i.e. cargo coverage for example) may not be the same symbols covered under a separate coverage (i.e. property damage or liability coverage). The typical, industry standard symbols used include the following under the 2011 ISO Motor Carrier Coverage Form:

- 49—any auto other than private passenger vehicles;
- 51—trucks, tractors and trailers leased by "you" under a written lease of 30 days or more;
- 52—only specifically listed leased trucks, tractors and trailer that are under lease;
- 53—trucks, tractors or trailers that are leased, hired or borrowed without a driver for less than 30 days;
- 61—"any auto"
- 62—only autos that the motor carrier owns and trailers connected to them;
- 67—only the vehicles that are specifically described and listed in the policy and trailers while attached to them;
- 68—autos leased, hired rented or borrowed
- 71—autos that the insured does not own, does not lease, does not hire, does not rent, and does not borrow but are used in the insured's business, including private passenger autos owned by employees while used in the business.

## C. PERMISSIVE USERS AND OTHER ADDITIONAL/OMNIBUS INSUREDS UNDER THE INSURANCE POLICY LANGUAGE

Once you have determined whether the truck and/or trailer involved is a "covered auto" on the policy, the next step is to determine if the party seeking coverage is an "insured" on the policy for the coverage being sought. Once again, a party may be insured for one type of coverage on a policy but not for other types of coverage. For purposes of this paper, we will focus on the Liability Coverage.

The standard 2011 version of the ISO Commercial Auto Coverage Part Motor Carrier Coverage Form (CA 16 00 06 11) provides that the following are insureds for purposes of the liability coverage:

- "you" [i.e. the named insured, typically the trucking company] for any covered auto;

- Others that are "using" with the named insured's permission a covered auto that the insured owns, hires or borrows (*i.e*. "permissive users"). But then this is subject to certain exceptions so that the following will NOT qualify as "permissive users":

    - The owner from whom the auto has been hired or borrowed and any agent or employee or hired driver of that owner;
    - The named insured's employees if the auto involved is owned by that employee or member of his/her household;
    - Certain others not affiliated with the trucking company (i.e. a shipper or customer's employees) if they are moving property to or from a covered auto;
    - Anyone who has hired or borrowed an auto from the named insured but is using it in their own business, rather than the named insured's business, UNLESS there is a lease that requires the named insured to indemnify them;
    - Anyone using the named insured's auto under a written Trailer Interchange Agreement UNLESS the named insured is required to indemnify them.

- The owner or someone else from whom the named insured has borrowed or hired a trailer while the trailer is connected to a covered power unit or while it is otherwise being used in the named insured's business.

- The lessor (typically an "owner operator") of a covered power unit and that lessor's driver or agent, but only while the power unit is being used in the named insured's business and only if there is a written lease in place that does not require the lessor to indemnify the named insured/trucking company.

As is clear from this list, the determination of who is covered on the policy often significantly interplays with which vehicles are "covered autos" on the policy.

The Motor Carrier's trucking liability policy may also contain "additional insured" endorsements extending coverage to the various main customers of the motor carrier who hire the motor carrier regularly to haul their goods and cargo. If the motor carrier leases its chasses or trailers from some equipment leasing company, the lessor may also be specifically named by endorsement on the policy.

Note that where the tractor is pulling a trailer, both can qualify as "covered autos". This can affect the answer to the question as to who is an insured on which policy. For example, the following cases found that the driver was using the trailer with the permission of the trailer's owner so as to qualify as a "permissive user" on the policy covering the trailer:

- *Aetna Cas. And Surety Co. v. Merchants Mut. Ins. Co.,* 78 A.D.2d 176, 435 N. Y. S.2d 125 (N.Y.A.D. 3 Dept. 1980) (both policy on tractor and policy on trailer covered driver for his negligence);

- *Vanliner Ins. Co. v. Sampat*, 320 F.3d 709 (7th Cir. 2003)(suggesting that if driver had not been unlicensed, and thus in violation of the operating agreement, driver would have qualified as permissive user of trailer so as to be covered on the policy on the trailer);

- *Pullman Inc. v. Johnson*, 543 So. 2d 231 (Fla. App. 4th Dist. 1987)(driver covered on trailer policy as permissive user of trailer);

- *Lafleur v. Aftco Enterprises, Inc.* , 927 So. 2d 1200 (La. App. 3 Cir. 2006)(both tractor and trailer were covered autos on trailer lessor's policy that only listed trailer and in effect became one vehicle so that driver was permissive user of both).

To qualify as a "permissive user", the driver's use must be within the scope of the owner's permission. In Texas, permission = consent to use the vehicle at the time and place in question and in a manner authorized by the owner, whether express or implied. *Adams v. Travelers Indem. Co*., 465 F.3d 156 (5th Cir. 2006). Thus, permissive use can be found where:

- The driver has technically violated some company policy by a deviation from the express scope of permission or has gone somewhere that he was not supposed to go but there is evidence that the employer knew of prior incidents of deviation but did not reprimand the driver or take other corrective or disciplinary action thereby constituting "mutual acquiescence or lack of objection under the circumstances signifying consent." *Coronado v. Employers Nat. Ins. Co.*, 577 S.W.2d 525 (Tex. Civ. App.—El Paso), *aff'd*, 596 S.W.2d 502 (Tex. 1979);

- The driver asks the insured if he could take the vehicle home after work and then return it that night and the insured did not object. *USAA v. Stevens*, 596 S.W.2d 955 (Tex. Civ. App.—Amarillo 1980, no writ);

- Where there was a prior course of conduct of acquiescence by the company in its drivers not following express rules requiring that they take the most direct route to the home base and not going to their homes instead. *Employers Mut. Cas. v. Mosqueda*, 317 F.2d 609 (5th Cir. 1963).

However, even if there would be implied permission to use a vehicle in a manner that normally would be in violation of company policy under the facts and circumstances, such implied permission does not extend even to the driver going beyond that implied permission:

- Where supervisor gave driver secret permission to violate company express policy and drive company truck home and bring it back the next morning because the driver's personal vehicle was broken, but driver that night took his wife to her work at a bar about 25 miles away, stayed and got drunk and then was involved in an accident on the way home. *James v. Vigilant Ins. Co.*, 674 S.W.2d 925 (Tex. App.—Amarillo 1984, writ ref. n.r.e.).

And often the issue of permission may have to be decided by a jury as a fact issue in coverage litigation:

- Where truck owner allowed driver to drive truck to and from work but driver instead takes truck to his sister's house, gets drunk and is involved in an accident, the court held that there was a fact issue on permissive use due to the past course of conduct between the parties, including that the driver had a prior DWI and drug felony, his employer did not request his driving record, but had been told not to drive if he had been drinking but may not have told him of the employer's zero tolerance policy. *Minter v. Great Am. Ins. Co.*, 423 F.3d 460 (5th Cir. 2005)

### D. "LEASED" AND "HIRED" AUTOS AND LESSEES/BORROWERS

As noted, the policy may require that a "covered auto" be one that the named insured own, hire or borrow. The starting point, of course, is the policy language in defining these terms. If they are defined, then the court will simply construe the definition. But even if they are not defined in the policy, case law provides some help:

- "Hired"—there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control. *Toops v. Gulf Coast Marine Inc.* , 72 F.3d 483 (5th Cir. 1996); *Sprow v. Hartford Ins. Co.*, 594 F.2d 418 (5th Cir. 1979)(Miss. Law); *Griffin v. Travelers Indem. Co.*, 4 S.W.3d 915 (Tex. App.—Dallas 1999, pet. denied).

- "Lessee" or "borrower":

    - The simple act of shipping cargo via a truck does not convert the shipper into a borrower or lessee of the truck. *Gary Safe Co. v. Transport Ins. Co.*, 525 S.W.2d 64 (Tex. App.—Houston [14th Dist.] 1975, no writ).
    - Merely because someone has permission to remove or unload goods from a truck is no evidence that the person unloading or removing is a "borrower" of the truck without the truck being also in his possession with the owner's permission. *Liberty Mut. Ins. Co. v. American Employers Ins. Co.*, 556 S.W.2d 242 (Tex. 1977).

These cases show, again, that when dealing with issues of scope of permission, rights of control or possession, and "leased", "borrowed" or "hired" issues, review of the applicable lease or other contracts involved may be critical to the answers.

## E. BOBTAIL A/K/A "NON TRUCKING" LIABILITY COVERAGE

"Bobtailing" is when the driver is not pulling anything behind the tractor. It should not be confused with "deadheading" which means that the tractor is pulling an empty trailer. The issue can arise because "Owner Operators" may separately maintain a special "bobtail" or "non- trucking use" policy to cover them when they are using the vehicle in their personal capacity rather then while working for the trucking company. Or the issue may arise due to exclusion in the trucking liability policy stating that it does not apply if the driver is not engaged in the business of the trucking company at the time of the accident. And, as noted above, some the provisions regarding who is an "insured" on the policy also incorporate the concept of being engaged in the named insured trucking firm's business as a threshold requirement.

In short, the "bobtailing" issue can arise in a variety of contexts and under a variety of factual scenarios such as:

- The accident occurs as an "owner operator" or his driver is on a purely personal mission between dispatches;
- The accident occurs before the driver has been dispatched to pick up or deliver a load, but while he is involved in repair or maintenance trips related to the truck;
- The driver is not yet under dispatch but is en route to or from the terminal to check in; and
- The driver has completed his run, dropped the trailer off at the terminal and is on his way home.

The language used in "bobtail" policies is not at all standardized. Some policies restrict "non-trucking liability" to situations where the "covered auto" is not being used to carry any property in any business. Others may speak in terms of the driver simply not being engaged in any trucking related business. Others still may include provisions to address the situation where a driver is en route to or from the terminal. Thus, it is vitally important to focus on the language actually used in the relevant policy(ies) as compared to the facts involved. But, if the driver is actually engaged in some activity necessary or related to the trucking business of the lessee/motor carrier at the time of an accident, then the bobtail insurance likely will not apply.

Issues arising under "bobtail" insurance provisions give rise to many insurance disputes, including between the insurer that issued the trucking liability policy and the bobtail "non-trucking" liability insurer, as one might expect:

- Where truck owner was under long term lease to motor carrier and truck was being driven to a repair shop for service and not carrying anything at the time of the accident, the court found that his bobtail coverage language was ambiguous; on one hand, the truck was still under lease to the lessee at the time of the accident and repairs furthered the interests of the lessee so as to still be "engaged in the business of transporting property", but on the other hand it was not actually carrying any property at the time of the accident; thus the exclusion in the bobtail coverage was construed against the bobtail insurer. *Assicurazioni Generali, v. Ranger Ins. Co.*, 64 F.3d 979 (5th Cir. 1995).
- On the other hand, where the bobtail policy contained a "business use" exclusion, it applied unambiguously to an accident that occurred as the truck driver was going to a nearby service facility to have some work done on his truck while he was waiting at the customer's location to pick up a load; the court held that the tractor was still engaged in the business of the motor carrier at the time of the accident as the driver was just biding his time waiting and distinguished the different language at issue in *Assicurazioni. Empire Fire and Marine Ins. Co. v. Brantley Trucking*, 220 F.3d 679 (5th Cir. 2000).
- Where the driver is going to or from his home, the general rule is that he is not engaged in furtherance of his employment and thus bobtail coverage has been found to apply to that scenario. *RLI Ins. Co. v. Great Am. Ins. Co.*, 2006 WL 1207899 (E.D. Tex. 2006).

## F. THE FMCSR AND STATUTORY EMPLOYEES

Reacting to the perception that trucking companies were hiding behind independent contractor arrangements and equipment interchanges to avoid being held liable to the motoring public, Congress amended the Interstate Commerce Act in 1935 to authorize the Interstate Commerce Commission to regulate interstate trucking safety. Over the years numerous regulations have been passed, amended from time to time and the ICC has been abolished with the regulatory function now vested in the Department of Transportation. Now the Secretary of Transportation, through the Federal Motor Carrier Safety Administration ("FMCSA") is the regulator.

As noted earlier, under the federal statutory and regulatory scheme, when motor carriers enter into leasing arrangements with owner-operators or other forms of independent contractors, the trucking company, by statute, is deemed to have the exclusive possession, control and use of the equipment for the duration of the lease and must assume the full direction and control of the leased vehicles "as if the motor vehicles were owned by the motor carrier." 49 U.S.C.A. Sec. 14102(a)(4). In short, the while the motor carrier is allowed to contract with drivers and "owner operators" under independent contractor contracts, as to the members of the motoring public, the motor carrier is responsible for accidents as if the driver was its employee. As a result, over the years the courts across the country have held that there is a statutory employee-employer relationship between the motor carrier and the drivers that it uses to operate vehicles on its behalf, even if the drivers by contract or otherwise would be considered independent contractors. *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir. 1979). Thus, traditional common law concepts of master-servant and respondeat superior liability, were held by many courts to be irrelevant so that the interstate motor carrier was vicariously liable as a matter of law for the negligence of the "statutory employee" driver. *Empire Indem. Co. v. Carolina Cas.* Ins. Co., 838 F.2d 1428 (5th Cir. 1988); *Price v. Westmorland*, 727 F.2d 494 (5th Cir. 1984); *Simmons* v. *King*, 478 F.2d 857 (5th Cir. 1973); *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828 (Tex. App.—Ft. Worth 2006, no pet.); *Mata v. Andrews Transport, Inc*., 900 S.W.2d 363 (Tex. App.—Houston [14th Dist.] 1995, no writ). This liability rule has sometimes been called "logo liability" in that if the interstate carrier's company logo is being displayed, as required, at the time of the accident, then it will be liable.

In 1986, however, the ICC issued some clarifying comments disavowing the reasoning of some of these cases and stating that the leasing regulations were not intended to completely supplant state tort, contract and agency law to create carrier liability where none would have otherwise existed. Ex Parte No. MC-43 (Sub.-No. 16) Lease and Interchange of Vehicles (Identification Devices), 3 I.C.C. 2d 92-3 (1986); See also, *Jett v. Ven Eerden Trucking Co*., 2012 WL 37504 *3 (W.D. Okla. Jan. 9, 2012). Then in 1992, the ICC amended 49 C.F. R. 376.12 to add a new provision expressly stating that nothing in the regulations was intended to affect whether a lessor or driver provided by the lessor is an independent contractor or employee of the motor carrier and further stating that if the lease complies with the regulations, then it may create an independent contractor relationship. See, *Jett*, 2012 WL 37504, *3.

As a result, in more recent years, cases like *Jett* and a few others, have held that the older cases predating the more recent amendments to the regulations and seeming to impose almost strict "logo liability" may not be good law any longer. *Jett*, 2012 WL 37504, *3; *Ross v. Wall Street Systems*, 400 F.3d 478, 479-80 (6th Cir. 2005); *Brown v. Truck Connections Int'l. Inc*., 526 F.Supp.2d 920, 925-26 (E.D. Ark. 2007); *Knight v. Swift Transp. Co*., 2006 WL 2189700 *3-4 (N.D. Ga. 2006). However, there are only a few cases that have taken up that analysis.

The 5th Circuit appears to recognize that the change in regulations eliminated the "logo liability" doctrine. *Jackson v. O'Shields*, 101 F.3d 1083, 1086-7 (5th Cir. 1996). Thus, in *Jackson*, where the evidence showed that the parties to the lease of the truck had treated the lease as terminated, the motor carrier was not liable even though the truck continued to bear the logo of the motor carrier and the parties had not strictly complied with the regulations in effecting the lease termination.

Even in some jurisdictions that still otherwise apply the strong "statutory employee" doctrine , courts are still willing to find no liability on the motor carrier if, under the facts involved, there would be no liability even if the driver were, in fact, an employee:

- Carrier not liable for driver's negligence where driver was off duty at the time of the accident. *Pace v. S. Express Co.*, 409 F.2d 331 (7th Cir. 1969);

- Carrier not liable under ICC regs using leased equipment if it would not be liable had it been using its own equipment instead. *Wilcox v. Transam. Freight Lines, Inc*., 371 F.2d 403 (6th Cir. 1967); *Brannaker v. Transam. Freight Lines, Inc*. 428 S.W.2d 524 (Mo. 1968); *Saullo v. Douglas,* 957 So.3d 80 (Fla. App. 2007)(noting confusion on issue but holding carrier only liable for driver's negligence if using leased equipment in course of lessee's business);

- Carrier not liable for driver's intentionally caused damage and applying a traditional respondeat superior course and scope analysis. *Gaza v. L. Fisher Freight Inc*., 2006 WL 2818070 (Tex. App.—San Antonio 2006, no pet.).

Obviously, as with the bobtailing issue, there can often be very interesting issues as to whether the particular facts involved meet the test of the driver being sufficiently engaged in the motor carrier's business as to make the carrier liable:

- Minor side trip by driver to his home following repairs to truck and stop at dry cleaners even though not yet under dispatch were in course and scope of carrier's business—*Planet Ins. Co. v. Anglo Am. Ins. Co.,* 711 A.2d 899 (N.J. Super. 1998);

- Side trip by driver to friend's shop to borrow tools and purchase of gas before driving to carrier's yard still in course of carrier's business when accident occurred en route to gas station—*Great West Cas. Co. v. Carolina Cas. Inc*. 2006 WL 1704125 (Minn. App. 2006);

- But where driver drives tractor home and not at carrier's direction, he was not in furtherance of carrier's business—*McLean Trucking Co. v. Occidental Fire & Cas. Co*., 324 S.E.2d 633 (N.C. 1985); *Le Blanc v. Bailey*, 700 So.2d 1311 (La. App. 1997).

- Driver still in course of carrier's business when driving tractor home from terminal at instruction of carrier—*MGM Transport Corp. v. Cain*, 496 S.E.2d 822 (N.C. 1998).

Other courts, however, have applied the logo liability rule of strict liability even where the trip involved served no purpose of the carrier-lessee:

- Interstate carrier liable for driver's negligence even though accident occurred while driver was transporting goods for the equipment owner-lessor without carrier-lessee's knowledge. *Rodriquez v. Ager,* 705 F.2d 1229 (10th Cir. 1983).

- Carrier liable for driver's negligence even though accident occurred while driver was trip-leasing for owner-lessor, and not carrier, and without carrier's knowledge, where carrier knew of owner-lessor's practice to use equipment to trip-lease for other companies when equipment was not being used by carrier. *Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc., 289* F.2d 473 (3d Cir. 1961).

Texas courts do not appear to have arrived at any clear answer to the question of whether a driver is sufficiently engaged in furtherance of the carrier-lessee's business as to satisfy the logo liability test. On one hand, in *Minter v. Great Am. Ins. Co*., 423 F.3d 460 (5th Cir. 2005) the court failed to address whether the driver was in the business of the carrier but found the carrier liable even though the accident occurred at night while the driver was intoxicated and not under dispatch or hauling any load. On the other hand, *Gaza* suggests that some kind of respondeat superior analysis may still be appropriate because the court found the carrier not liable for the driver's intentional ramming of his tractor into his ex-girlfriend's trailer because such intentional acts were outside of the scope of the business interests of the carrier.

Significantly, courts, including the 5th Circuit, have not confined the "statutory employee" doctrine to the issue of the motor carrier's liability to the injured party. It has also been incorporated into determining coverage issues, such as the application of the standard exclusions found in most policies excluding coverage for injury to an employee or fellow employee of the insured:

- *White v. Excalibur Ins. Co*., 599 F.2d 50, 53 (5th Cir. 1979)--death claims by family of an off duty, tandem driver, who was asleep in the sleeper cab, caused by the negligence of the other co-driver who was driving at

the time, was limited to Georgia workers compensation benefits notwithstanding the argument that the deceased co-driver was not on duty and was performing no duties related to the operation of the vehicle and thus not a statutory employee at the time of the accident since, according to the court, he was "part of the two man team actually engaged in operating the vehicle on Superior's business" and "indispensible to continual vehicle operation for federal law generally permits each driver to work only ten hours at a time and then to obtain at least eight hours of rest."

- *Consumers County Mut. Ins. Co. v. P.W. Sons Trucking, Inc*., 307 F.3d 362 (5th Cir. 2002)—employee injury exclusion applied to bar coverage for claims by part-time, non-driving tandem driver against the motor carrier notwithstanding trucking company's argument that drivers were independent contractors; court noted that the policy was designed to comply with federal trucking insurance requirements, so that "employee" as used in the policy should be given the same meaning as under the federal regulations whether the issue is tort liability to the public or insurance coverage for the driver.

- *Perry v. Harco Nat'l Ins. Co*., 129 F.3d 1072 (9th Cir. 1977)—also rejecting the argument that the statutory employee doctrine did not apply to insurance disputes between the insurer and insured.

- *OOIDA Risk Retention Group, Inc. v. Williams*, 579 F.3d 469 (5th Cir. 2009)—fellow employee exclusion applied to bar coverage for claims by the non-driving, sleeping driver, who was the "owner operator" against his hired driver, who was driving; relying on the federal regulations, the court held that driver was a "fellow employee" of the owner-operator notwithstanding that the he was also his employee as well.

- *Amerisure Mut. Ins. Co., v. Carey Transportation Inc*., 2007 WL 29235 (Mich. App. 2007)-- "employee injury" and "fellow employee injury" exclusions applied to exclude coverage for injuries sustained by the non-driving co-driver asleep in the sleeper cab occurring during a leg of the cross country trip after their third driver change as they "were operating as one."

- *Basha v. Ghalib*, 2008 WL 3199464 (Ohio App. 2008)--relying, in part, on the *Consumers County Mutual* case from the 5th Circuit (see above), policy did not apply to injuries sustained by a co-driver who was asleep in the cab at the time of the single vehicle accident.

- *United Financial Cas. Co. v. Hershberger & Sons Trucking*, 2012 WL 457715 (Ohio App. 2012)—employee/fellow employee injury exclusions applied to claims of co-driver riding along as a trainer for younger driver even though the trainer had never actually driven any part of the trip prior to the accident.

### G. MCS-90 ENDORSEMENTS

The Motor Carrier Safety Act of 1980 mandates that all interstate motor carriers have a Motor Carrier Safety (MCS)-90 endorsement attached to their policies. 49 U.S.C. Sec. 13906 (2000); 49 C.F.R. Sec. 387.7, 387.15 (2002). The MCS-90 endorsement is designed to protect the public at large from the negligent operation of an interstate motor carrier vehicle and requires that the policy afford certain statutory maximum amounts of liability coverage for third party injury or damage claims notwithstanding any coverage defenses that otherwise might exist under the policy. It can thus transform someone that is not an "insured" into an "insured" and make a vehicle that otherwise would not be covered a "covered auto". It can also trump exclusions and policy conditions. The MCS-90 endorsement provides that the insurer has a right of reimbursement from the insured in the event that the insurer is required to pay a claim that it would not have been required to pay but for the MCS-90 endorsement.

The MCS-90 endorsement can give rise to a host of interesting issues:

- A carrier must give 35 days' notice in writing to cancel a policy that contains an MCS-90 endorsement, along with 30 days written notice sent to the FMCSA in Washington, D.C. using the prescribed form; and the 30 days is measured from when the federal agency actually receives the form as opposed to when it was mailed. 49 C.F.R. Sec. 387.15 (2002). Thus, in a Texas case where the insurer of a bus company gave only 32 days' notice of cancellation, the cancellation was invalid and the insurer was on the hook for a multiple fatality accident. *Republic Under. Ins. Co. v. Rockmore*, 2005 WL 57284 (N.D. 2005).

- Since MCS-90 only purports to apply to interstate trips, it does not mandate coverage for an accident that happens outside of the U.S. *Lincoln Gen. Ins. Co. v. DeLa Luy Garcia*, 501 F.3d 436 (5th Cir. 2007).

- Since MCS-90 only purports to apply to interstate trips, it does not apply to a completely intrastate trip. *Thompson v. Harco Nat. Ins. Co.*, 120 S.W.3d 511 (Tex. App.—Dallas 2003, no pet.).

- Since the purpose of the MCS-90 is to protect innocent members of the public from the actions of interstate carriers the MCS-90 has no bearing on the reimbursement rights between multiple carriers. *John Deere Ins. Co. v. Truckin USA*, 122 F.3d 270 (5th Cir. 1997); Carolina *Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304 (5th Cir. 1978). A few courts, clearly a small minority, have held, however, that the MCS-90 endorsement can affect the relative apportionment of coverage between carriers. *Empire Fire and Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989).

- Since the MCS-90 only is designed to protect members of the public from the actions of interstate carriers, it generally has been found to afford no protection to drivers or employees of the trucking firm. *OOIDA Risk Retention Group, Inc. v. Williams*, 579 F.3d 469 (5th Cir. 2009).

- The MCS-90 Endorsement even operates to extend coverage to persons and vehicles that otherwise would not be covered by the terms of the policy absent the MCS-90 Endorsement. *John Deere Ins. Co. v. Nueva, 229 F.3d 853 (9th Cir. 2000)* (owner/driver of uninsured power unit covered on policy covering chassis as permissive users by virtue of MCS-90 endorsement even though basic policy would not have covered them); *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc., 930 F.2d 258 (2d. Cir. 1991)* (even though policy only covered specified vehicles, not including the trailer involved, trailer's owner's policy nevertheless covered driver in light of MCS-90 endorsement since driver was using trailer and endorsement made it a covered auto).

- The MCS-90 endorsement expressly provides that it does not alter the rights and obligations between the insured and insurer under the policy, does not contain any defense language at all, and was designed solely to make sure that judgments in favor of Plaintiffs against interstate trucking companies were paid. Thus, the courts have held that it does not separately impose any *duty to defend* claims or persons that are not otherwise covered on the policy itself. *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604,612 (5th Cir. 1989); Harco Nat. Ins. Co. v. Bobac Trucking, Inc., 107 F.3d 733, (9th Cir. 1997); *T.H.E. Ins. Co. v. Larsen Intermodal Services*, 242 F.3d 667, 677 (5th Cir. 2001).

- The majority rule is that the MCS-90 endorsement only applies while the truck is being used to transport property. Thus, it does not apply to create coverage in a "bobtailing" scenario where the driver is not engaged in the trucking company's business. *Canal Ins. Co. v. Coleman*, 625 F.3d 244 (5th Cir. 2010) (driver "bobtailing" of his empty truck driving it home; the court says: "In sum, the weight of authority from this Circuit and beyond supports our conclusion that the MCS-90 does not cover vehicles when they are not presently transporting property in interstate commerce.") See also, *Canal Indemnity Co. v. Williams Logging and Tree Services, Inc*., 714 F.Supp.2d 654, 656 (S.D. Tex. 2010) (MCS-90 endorsement's language stating that coverage will apply whether or not a vehicle is scheduled on the policy did not expand the coverage of the policy to cover the trucking company's owner's operation of an unscheduled company pick-up where the pick-up was not being used at the time to transport property for hire and thus the federal statutory regime governing the MCS-90 endorsement was not implicated).

- Exhaustion of limits under the policy ends any MCS-90 coverage as well; it is not an absolute guarantee of coverage for everything. *Minter v. Great American Ins. Co.*, 423 F.3d 460 (5th Cir. 2005);

- An excess insurer issuing a policy with an MCS-90 endorsement cannot be forced to drop down and become the primary carrier and satisfy a judgment clearly within a self-insured primary layer that is bankrupt since the FMCSA clearly allows insured motor carriers to self-insure and thus contemplates that insolvency may affect a self-insurance program, the excess policy attachment point was higher than the required limits of coverage under the federal regs so the excess policy did not even have to contain an MCS-90 endorsement,

and the MCS-90 contemplates only that the carrier is liable for claims within its limits. *Wells v. Gulf Ins. Co.*, 484 F.3d 313 (5th Cir. 2007).

## H. COVERAGE OF PUNITIVE DAMAGES-FAIRFIELD INS. V. STEPHENS MARTIN PAVING

Injury suits against truckers frequently seek punitive damages, perhaps even more often than in other types of litigation given the often serious, even fatal, consequences of accidents involving 18-wheelers. Thus, there often will be a coverage issue presented as to whether a punitive or exemplary damage award is covered by the liability policy or, instead, coverage is prohibited either by statute or the state's public policy.

The Texas Supreme Court's main opinion on this issue, of course, is *Fairfield Ins. Co. v. Stephens Martin Paving*, LP, 246 S.W.3d 653 (Tex. 2008). *Fairfield*, as discussed more below, does not purport to lay down any across the board rule. It does, however, hold that depending on the circumstances, policy and policy language involved, it is now against public policy in some cases for a punitive damage award to be foisted onto the bad actor's liability insurer and, indirectly, onto its other policyholders.

### 1. Facts of *Fairfield*

*Fairfield* was an employer's liability case under a worker's compensation/employers liability policy. In Texas, an employer that is a worker's compensation subscriber can still be sued in a wrongful death case if the employee died as a result of the employer's gross negligence. The only damages that can be awarded in such an action are punitive damages based on gross negligence. Accordingly, Texas employers purchase a worker's compensation policy that comes with a Coverage B for employer's liability designed to cover such death claims. It was this context that gave rise to Fairfield's declaratory judgment action challenging coverage for punitive damages as against public policy.

### 2. Holding

The *Fairfield* court held that to determine whether punitive are covered or not requires a two-step analysis:

1. Does the plain language of the policy appear to cover punitives?
2. If so, does some public policy of Texas as expressed either in statutes or by general public policy court decisions nevertheless prohibit coverage?

While the policy expressly prohibited coverage for punitive damages in some limited specified circumstances, those were not involved in the *Fairfield* facts. Accordingly, since the policy extended liability coverage for "all sums" that the insured becomes legally obligated to pay by reason of employer's liability, the court assumed that the policy language extended coverage for the punitive being sought.

The court then proceeded to the second step—did Texas statutes or general public policy prohibit coverage?

- The Legislature has passed a variety of statutes barring coverage of punitive in certain circumstances such as health care claims and the like but had not statutorily barred coverage in employer's liability cases.

- Workers compensation/employers liability policy forms can only be issued on forms that have been approved by the Texas Department of Insurance and purport to extend, in Coverage B, coverage for employer's liability cases even though, in Texas, the only type of claim that can be brought is a claim limited to gross negligence and death resulting there from and seeking an award of punitive damages.

- Accordingly, the court held that at least in the context of the *Fairfield* facts, involving as they did an employer's liability policy under the Texas workers compensation scheme, the legislature had by statute demonstrated that it was not against public policy for such policies to cover punitive damages.

But, the court, recognizing that the issue had wider implications beyond just the *Fairfield* facts and employers liability, went on, in dicta, to discuss more generally the considerations that courts should use in deciding

under different types of policies and facts whether public policy would be offended by coverage for punitives. The court majority made the following points that now govern the calculus in future cases:

- Texas has a strong public policy favoring freedom of contract and in enforcing contracts in a way that furthers the parties' reasonable expectations and certainty unless there are strong countervailing public policy interests that would be violated by the parties agreement;

- Texas statutes governing the imposition of punitive damages, however, have evolved over the decades to the point that currently, punitive damages, by statute, serve the paramount and primary purpose of punishment of the wrongdoer and not compensation or deterrence of others, as used to be the case under prior statutory schemes. Tex. Civ. Pract. & Rem. Code Sec. 41.001 et seq.

- Texas' statutory punitive damage scheme includes both objective and subjective factors concerning the level of conduct deserving punishment and governing the amount of punishment needed; the subjective factors are necessarily undermined if the wrongdoer can avoid, through insurance, bearing the pain of the punitive damage award.

- These considerations can weigh differently if the insured is a corporation facing punitive damages because of some action by its employees without management or executive involvement as opposed to conduct that involved management or CEO culpability or an award of punitive against the individual wrongdoer involved.

- "Extreme circumstances" may prompt a different analysis of the factors as well. (The court gave no example of what such "extreme circumstances" might be.)

Four justices concurred and wrote a separate opinion to give more explicit guidance:

- Where punitives are awarded against a corporation because of conduct of its employees but with no management or direct corporate policy culpability, a stronger argument can be made that the corporation should be able to insure against such an award so that an otherwise innocent entire company or its management or stockholders are not punished for the serious sins of just a few lower rung employees;

- Public policy counsels against allowing the actual wrongdoer himself to insure against punitive imposed on him, even if his conduct is only grossly negligent and not intentional; otherwise, the punishment purpose for punitive damages, as to him, is seriously impaired.

    - The concurrence gives as an example the truck owner who knows that his brakes are malfunctioning but does nothing to fix them thereby placing his employees and the public at serious risk of harm; even if his premiums go up as a result of a punitive award passed on to his insurer, that will be minor punishment compared to having to absorb the award himself.

### 3. Recent Post-Fairfield Cases Applying It

The *Fairfield* analysis has now been applied in only a couple of subsequent cases and in both the court held that coverage for a punitive damage award was against public policy on the facts involved. And as noted below, one of the recent cases was a trucking case.

- *Am. Int'l. Spec. Lines Ins. Co. v. Res-Care*, 529 F.3d 649 (5th Cir. 2008) (Tex. law), a case involving a group home for the mentally disabled, a resident with cerebral palsy and mental disabilities fell in the hallway and defecated. An employee then poured bleach onto the floor to clean it up but left the injured resident lying on the floor in the bleach for several hours while the employee ate a pizza outside. The injured resident pleaded for help to no avail. After finishing her pizza, the employee then came back inside, and put the resident in her bed but did not wash the bleach off of her and then left at the end of her shift. Two other staff members later found the resident on the floor in the bathroom and put clean clothes on her but also did not wash the bleach off and put her in bed. The resident then developed chemical burns from the bleach but received virtually no additional medical attention for about 17 hours. Eventually the facility's on site doctor

saw her, concluded the burns were only superficial and prescribed pain meds and whirlpool baths but those were not provided. The resident's skin then began peeling off and she began showing signs of dehydration. She eventually fell out of her bed, was taken to a hospital and eventually died from infections caused by the burns. The *Res-Care* court concluded that these facts amounted to the "extreme circumstances" alluded to by the *Fairfield* court so as preclude coverage for the punitive damages.

- *Minter v. Great American Ins. Co.*, 2010 WL 3377639 (5th Cir. 2010), (an appeal that followed the first round of appeals cited above in the preceding sections of this paper on the other coverage issues involving permissive use issues) no coverage for a punitive damage award against the truck driver individually where he had been twice convicted of DWI before the DWI-related accident in question.

### 4. Conclusions and Bottom Lines on Whether Punitive Damages are Covered in Texas

Thus, after *Fairfield*, the conclusions that can be drawn are:

- Unless the policy specifically addresses punitives or there is statutory scheme involved that does, coverage for punitives will be fact specific, defendant/insured specific, and depend on all of the facts and circumstances—no bright line test;

- Factors to be considered carefully are:

    a. Would coverage for the punitive damage award undermine the primary purpose of punishing the wrongdoer?
    b. Would not providing coverage for the punitive result in the punishment of otherwise largely blameless persons or corporations who themselves have little personal culpability?
    c. Is the award against the actual wrongdoer?
    d. Was corporate extreme malfeasance involved at a high level so that the wrongdoing can be ascribed to the corporation itself and not just to the individual actors below?
    e. Were upper level executives involved in the wrongdoing justifying the award?