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EXPERT ANALYSIS

Theories of Recovery in Trucking Accident Cases Involving Insufficient Insurance

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Increasingly, major trucking corporations are hiring smaller carriers to haul goods. These "fly by night" carriers often employ bad drivers, use unsafe trucks and have no safety policies.

In addition, they typically carry minimum amounts of insurance. In trucking accidents that cause catastrophic injuries, the medical expenses victims incur far exceed the minimum coverage these small companies carry.

When a trucking accident victim sustains catastrophic injuries, it is critical to look beyond the negligent truck driver and the small motor carrier for sources of recovery. Analysis of liability must also include a close examination of the shipper of the load: the large trucking company that hired the small carrier or independent driver.

Many large corporations that hire small truck companies will hide behind an alleged independent contractor relationship and other predictable defenses. Several theories of liability can be asserted against the large corporation and other responsible parties to help you recover more than the meager policy limits held by the small carrier or individual driver.

These theories of recovery include:

- Negligent hiring of the alleged independent contractor.
- Agency/joint venture.
- Gratuitous undertaking.
- Improper cargo loading or securement.

Drafting pleadings and conducting discovery with these theories in mind will help you defeat summary judgment and maximize your client's recovery.

NEGLIGENT HIRING

A claim for negligent hiring of an independent contractor may enable you to recover against the larger corporation even if the fly-by-night carrier is deemed to be an independent contractor. Companies have a duty to select competent contractors.

In many cases, an adequate investigation of the contractor's competence is necessary to discover prior acts of negligence, quality of drivers, experience or lack thereof, financial condition, proper licensure and certification, and the ability to perform a job safely given the compensation.

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ARKANSAS CASE

A recent case our firm had in Arkansas illustrates the advantage of bringing a claim for negligent hiring of an independent contractor.[1] The case involved a large logging company that hired small, unqualified carriers to haul its logs and attempted to escape liability by using the carrier's independent contractor status as a defense.

We asserted a claim for negligent hiring of an independent contractor based on Section 411 of the Restatement Second of Torts, which provides:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which involves risk of bodily harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.[2]

The logging company's motion for summary judgment was denied based upon our Section 411 argument.

A recent favorable decision discussing Section 411 is *Ramos-Becerra v. Hatfield*, No. 14-cv-917, 2016 WL 5719801 (M.D. Pa. Oct. 3, 2016). In that ruling the court denied a motion for summary judgment filed by the defendant logistics company, J.B. Hunt.

In response to the claim that it had negligently hired an independent contractor, J.B. Hunt argued that it had no duty to review the driving records or criminal backgrounds of drivers employed by the fly-by-night carriers it hired as independent contractors.

The court noted that Pennsylvania follows Section 411. It held, in part:

> Plaintiffs allege that J.B. Hunt was negligent in failing to perform an appropriate background check before entering into a contract with Hatfield Trucking, and failing to perform an appropriate background check on Ricky L. Hatfield.
>
> The court agrees with plaintiffs that JB Hunt cannot shield itself from plaintiffs' negligent hiring claim by using the label of freight broker to hide behind the Federal Motor Carrier Safety Regulations, or FMCSRs. As discussed, the regulations do not preempt Pennsylvania common law claims such as negligent hiring. Regardless of JB Hunt's duties under the FMCSRs, it can still be liable under Pennsylvania law for its alleged failure to hire a careful and competent contractor.

A review of the state law in your jurisdiction regarding the negligent-hiring cause of action is essential at the outset of the case. These allegations must be pleaded correctly, and discovery should be tailored to develop facts that will enable you to prevail at the summary judgment stage.

Through discovery and depositions, you can determine whether the large company exercised due diligence prior to and after hiring the small carrier or individual driver. For example, did the large company:

- Check the carrier's safety record, policies and hiring standards to determine how the carrier vets the qualifications of its drivers and trains them for safety?
- Request other documents, such as insurance claims from prior accidents or maintenance records, to determine whether the carrier was reasonably safe and competent?
- Verify that the carrier had satisfied all Federal Motor Carrier Safety Administration requirements and had a satisfactory safety rating with the FMCSA?

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- Ignore red flags showing the carrier was not operating in compliance with federal safety regulations and industry standards of care (e.g., through invoices that detailed the number of drivers, mileage driven and hours of service in each trip)?

As registered motor carriers, these large companies are responsible for adhering to safety regulations and applicable industry standards when contracting with other carriers for transportation services.

AGENCY/JOINT VENTURE

Another tactic to consider is challenging independent contractor status to establish vicarious liability based upon an agency or joint venture theory.

The independent contractor agreement between the major corporation and the small carrier company often contains boilerplate language that purports to establish the carrier's status as an independent contractor.

However, these contracts routinely state that the large company retains substantial control over the carrier's conduct, thereby creating a principal-agent relationship that gives rise to respondeat superior liability.

State law varies widely on the question of agency and the facts necessary to rebut the independent contractor defense. To successfully argue the existence of a principal-agent relationship, you must develop the facts of your case to establish the principal's right or power to control and direct the conduct of the alleged agent.

Joint venture is a distinct but related concept. A joint venture is an association of two or more people for the pursuit of a single business enterprise, which may be as brief as a single truck haul.[3]

Joint ventures are a kind of partnership wherein all the partners share a common purpose, exercise a mutual right of control, and are jointly and severally liable for tortious conduct.

MISSOURI CASE

In a Missouri case our firm resolved, a large corporate farming entity, Premium Standard Farms (now Smithfield Foods) hired a small truck company in Kansas to do a major hauling job at various locations in northern Missouri.[4] The truck driver was unqualified; he was also impaired when he pulled out in front of our client's husband, who was killed in the crash.

The Kansas trucking company had minimal insurance. We alleged that Premium Standard was liable on theories of agency/joint venture, negligent hiring of an independent contractor and gratuitous undertaking under Section 324A of the Second Restatement of Torts.

The summary judgment arguments focused on agency and control of the driver by Premium Standard, which tried to shield itself from liability by asserting the carrier's alleged independent contractor status.

Like the law in many other states, Missouri law weighs various factors to determine whether the so-called independent contractor is actually an agent whose negligence can be imputed to the principal.[5]

To establish that the principal-agent relationship existed and respondeat superior liability attached, our response to the summary judgment motion demonstrated that Premium Standard had the right or power to control and direct the physical conduct of the driver in the operation of the tractor-trailer at the time he injured the plaintiff.

A review of the state law on the negligent-hiring cause of action is essential at the outset of the case.

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The determining factor in the agency versus independent contractor dispute is not that the principal actually exercised control over the driver's work, but that it had the right to do so.

At the summary judgment phase of this litigation, the trial court found that there was an agency relationship that gave rise to vicarious liability. That finding led to the ultimate resolution of the case.

GRATUITOUS UNDERTAKING

The gratuitous undertaking theory has been used in a wide variety of cases, and a substantial body of case law interprets and explains Section 324A. That section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> - his failure to exercise reasonable care increases the risk of such harm, or
> - he has undertaken to perform a duty owed by the other to the third person, or
> - the harm is suffered because of reliance of the other or the third person upon the undertaking.

Any company — whether an insurance company,[6] safety compliance company, shipper or cargo broker — that undertakes to direct, monitor, supervise and train drivers or an alleged "contractor" may be liable under the gratuitous undertaking theory.

Often, pre-suit investigation can lead to a lot of good information about the companies involved. Comprehensive early discovery is needed to enable your gratuitous undertaking claim to survive summary judgment.

IMPROPER CARGO LOADING OR SECUREMENT

There are many ways poor cargo loading or securement can cause accidents. For instance, if cargo is loaded improperly such that it shifts in transit, the driver may lose control of the truck. Also, when a load is not secured properly and falls from a trailer, stray objects may strike other vehicles or cause other drivers to wreck, resulting in serious and potentially fatal collisions.

Cargo loading and securement is governed by 49 C.F.R. Part 393, Subpart I, Protection Against Shifting and Falling Cargo. Who is responsible for compliance? Drivers, the trucking company, and potentially shippers and brokers.[7]

Federal Motor Carrier Safety Regulation Part 393, 49 C.F.R. § 393.100(b)-(c), provides in relevant part:

> Prevention against loss of load. Each commercial motor vehicle must, when transporting cargo on public roads, be loaded and equipped, and the cargo secured, in accordance with this subpart to prevent the cargo from leaking, spilling, blowing or falling from the motor vehicle.
>
> Prevention against shifting of load. Cargo must be contained, immobilized or secured in accordance with this subpart to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is adversely affected.

The standard applies to vehicles with a gross weight rating over 10,000 pounds and vehicles used in the transportation of hazardous materials. Basic rules include:

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- Cargo must be properly distributed and adequately secured.
- The vehicle's structure and equipment must be secured, including such things as doors, spare tires and cargo securing equipment.
- Cargo cannot be loaded such that it obscures a driver's view.
- Cargo must be inspected at regular intervals and adjusted as needed.
- Cargo that may roll must be restrained.

There are specific requirements for securing commodities such as logs, lumber, metal coils, paper rolls and pipe. For example, 49 C.F.R. § 393.116(c), Components of a Securement System, provides in relevant part:

> Logs must be transported on a vehicle designed and built, or adapted, for the transportation of logs. Any such vehicle must be fitted with bunks, bolsters, stakes or standards, or other equivalent means, that cradle the logs and prevent them from rolling.
>
> All vehicle components involved in securement of logs must be designed and built to withstand all anticipated operational forces without failure, accidental release or permanent deformation. Stakes or standards that are not permanently attached to the vehicle must be secured in a manner that prevents unintentional separation from the vehicle in transit.

CONCLUSION

There are many avenues for successfully litigating trucking accident claims to maximize recovery for your clients, even in cases against fly-by-night carriers and minimally insured drivers.

Do not settle for the small insurance limits of "contract" carriers without thoroughly exploring options to recover from the large corporation that hired them and other parties who may be responsible.

In trucking accident cases, investigate and identify all potential defendants and sources of recovery for your client. Explore the theories discussed in this article and consider claims for failing to maintain trucking equipment and products liability.

A detailed review of applicable state law at the outset of your case, coupled with a thorough pre-suit investigation of the potential defendants, will help you determine the strongest theories of liability.

Carefully pleading the applicable claims and conducting discovery and depositions that are tailored to your theories of liability will help you develop sufficient evidence to defeat the inevitable motion for summary judgment and ultimately maximize your client's recovery.

NOTES

[1] *McCoy v. Deltic Timber Corp.*, No. CV-2012-147 (Ark. Cir. Ct., Conway Cty.)

[2] The law in this regard is well-developed throughout the country, and there is substantial case law holding that a company is liable for hiring an unsafe, incompetent or unfit contractor. *See, e.g., L.B. Foster v. Hurnblad,* 418 F.2d 727 (9th Cir. 1969); *Ramos-Becerra v. Hatfield,* No. 14-cv-917, 2016 WL 5719801 (M.D. Pa. Oct. 3, 2016); *McComb v. Bugarin,* 20 F. Supp. 3d 676 (N.D. Ill. 2014); *Stallings v. Werner Enters.,* 598 F. Supp. 2d 1203 (D. Kan. 2009); *Jones v. C.H. Robinson Worldwide Inc.,* 558 F. Supp. 2d 630 (W.D. Va. 2008); *Schramm v. Foster,* 341 F. Supp. 2d 536 (D. Md. 2004); *Stoltze v. Ark. Valley Elec. Co-op. Corp.*, 127 S.W.3d 466 (Ark. 2003); *Jenkins v. Raleigh Trucking Servs.,* 468 N.W.2d 64 (Mich. Ct. App. 1991); *Talbott v. Roswell Hosp. Corp.*, 192 P.3d 267 (N.M. Ct. App. 2008); *Puckrein v. ATI Transp.,* 897 A.2d 1034 (N.J. 2006); *Hudgens v. Cook Indus.,* 521 P.2d 813 (Okla. 1974).

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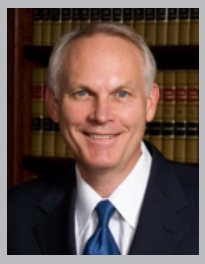
[3] *Johnson v. Pacific Intermountain Express Co.,* 662 S.W.2d 237, 241-42 (Mo. 1983) (en banc).

[4] *Roberts v. Hodges Farms & Dredging LLC,* No. 08DV-CV00079 (Mo. Cir. Ct., Livingston Cty.)

[5] *Bargfrede v. American Income Life Ins. Co.,* 21 S.W.3d 157, 161 (Mo. Ct. App. 2000), citing the Restatement (Second) of Agency § 220(2) (1958).

[6] *See, e.g., Hutcherson v. Progressive Corp.,* 984 F.2d 1152, 1157 (11th Cir. 1993) (reversing district court's entry of summary judgment on plaintiff's claim that the defendant carrier reduced its safety activities and relied upon its insurance company, defendant Progressive Corp., to provide services such as driver monitoring).

[7] *See, e.g., Fortner v. Tecchio,* 597 F. Supp. 2d 755, 757 (E.D. Tenn. 2009) (finding the defendant driver and carrier company negligent per se for improperly loading paper rolls, in violation of 49 C.F.R. § 393.122); *Johnston v. S.D. Warren Co.,* No. 06-cv-11617, 2008 WL 183639, *3-*4 (E.D. Mich. Jan. 18, 2008) (quoting *United States v. Savage Truck Line Inc.,* 209 F.2d 442, 445 (4th Cir. 1953) ("When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be observed by ordinary observation by the agents of the carrier.").



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