Defending Against Attempts to Impose Liability THROUGH THE BROAD DEFINITIONS UNDER 49 C.F.R. § 390.5

*Patrick E. Foppe**

In catastrophic truck accident cases, plaintiffs are often not just suing truck drivers and motor carriers. Brokers, shippers, equipment owners and others are increasingly facing claims for agency (*respondeat superior*), joint enterprise, negligent selection of independent contractors, statutory employment, *etc.*[1] Holding parties vicariously liable for the acts of independent contractors remains a battleground issue in truck accident cases.

Plaintiffs often seek to utilize federal law, including the Federal Motor Carrier Safety Regulations (FMCSR), as a linchpin to establish vicarious liability in these cases. In the past, plaintiffs commonly sought to create a "statutory employment" relationship between the motor carrier-lessee and the owner-lessor under the leasing regulations, 49 C.F.R. Part 376. Plaintiffs, however, are now often using the broad definitions of "motor carrier," "employer" or "employee" under 49 C.F.R. § 390.5 to attempt to impose "statutory employment" liability upon brokers, shippers, equipment owners and others. Fortunately, most courts to date have been reluctant to embrace this innovative theory of liability.

A Brief History of Vicarious Liability Imposed under 49 C.F.R. Part 376

The FMCSR, 49 C.F.R. Part 376, formerly 49 C.F.R. Part 1057, requires motor carriers of property who lease vehicles from others to "have exclusive possession, control, and use of the equipment for the duration of the lease" and to "assume complete responsibility for the operation of the equipment for the duration of the lease."[2] Originally, 49 C.F.R. § 1057.11 also required a motor carrier-lessee to always obtain a receipt from the owner-lessor when the lessee surrendered possession of the equipment and the motor carrier-lessee was required to remove its name and DOT number from the equipment upon return of the equipment to the owner-lessor. Historically, courts found a motor carrier-lessee vicariously liable under these leasing regulations as a matter of law for the acts of the driver of the commercial vehicle, in what is sometimes referred as "lease liability" and "logo/placard liability." Cases decided under these leasing regulations vary among jurisdictions on the issues of whether the presumption of *respondeat superior* liability is rebuttable or irrebuttable and whether proof of conduct within the scope of employment is required.

Somewhat complicating matters, the placard requirements were changed under 49 C.F.R. §§ 376.11 and 376.12 to no longer require a receipt for return of the equipment and to allow the parties to the lease to designate which party was responsible for removing the identification devices from the equipment upon the termination of the lease. Importantly, § 376.12 was amended in 1992 to provide that the leasing regulations are not "intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee." Some courts have been slow to acknowledge how, if at all, the amended regulations impact "lease liability" or "logo/placard liability." *See e.g., Nat'l Am. Ins. Co. v. Progressive Corp.*, 2014 WL 1978470 (N.D. Ill. May 15, 2014); *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 447-48 (Ill. App. 2009). Other courts have found that the changes to 49 C.F.R. § 376.12 now require a rebuttable presumption, as opposed to an irrebuttable presumption, of *respondeat superior* liability upon the motor carrier-lessee. *See, e.g., UPS Ground Freight, Inc. v. Farran*, 2014 WL 60075 (S.D. Ohio Jan. 7, 2014); *Bays v. Summitt Trucking, LLC*, 691 F. Supp. 2d 725, 729 (W.D. Ky. 2010). *But see Delaney v. Rapid Response, Inc.*, 81 F. Supp. 3d 769, 776 (D.S.D. 2015) (motor carrier was liable for driver's negligence regardless of whether presumption of employment relationship was irrebuttable or rebuttable).

A New Battleground – Defending against Vicarious Liability Brought under the Broad Definitions of 49 C.F.R. § 390.5

More recently, plaintiffs have sought to establish "statutory

*Lashly & Baer, P.C. (St. Louis, Missouri)

employment" by merely applying the broad definitions of "motor carrier," "employer" and "employee" under § 390.5, aside from § 376.12. *See e.g.*, *Consumers Cnty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362, 366 (5th Cir. 2002) (noting that the definition of "employee" under § 390.5 eliminates "the common law employee/independent contractor distinction" and "serves to discourage motor carriers from using the independent contractor relationship to avoid liability exposure at the expense of the public."); *Amerigas Propane, LP v. Landstar Ranger, Inc.*, 184 Cal. App. 4th 981, 996-97 (Cal. App. 2010).

At issue, § 390.5 has broad definitions, in pertinent part, for the following:

- "Employee" means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic and a freight handler…
- "Employer" means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it…
- "Motor carrier" means a "for-hire motor carrier" or a "private motor carrier." The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning or dispatching of drivers and employees concerned with the installation, inspection and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms "employer" and exempt motor carrier…
- "For-hire motor carrier" means a person engaged in the transportation of goods or passengers for compensation…
- "Private motor carrier" means a person who provides transportation of property or passengers, by commercial motor vehicle and is not a for-hire motor carrier… "Person" means any individual, partnership, association, corporation, business trust or any other organized group of individuals.

Plaintiffs are increasingly trying to argue that many types of transportation companies can qualify as a "motor carrier" and "employer" under these definitions even though, for example, the transportation company may not own or lease the commercial motor vehicle involved in the accident, may not have exercised any motor carrier operating authority at the time of an accident or may not have been actually involved in the transportation of property or passengers at the time of an accident. Based on these broad definitions, entities like brokers, shippers, equipment owners and others face claims that they are liable for the actions of drivers as a statutory employee. To date, most courts have rejected this innovative liability theory when the following issues were raised.

Is the Statutory Employee Doctrine Applicable beyond Leasing Situations?

The Supreme Court of North Dakota recently refused, in part, to apply the statutory employee doctrine for situations where there is no lease contemplated by § 376.12 between the alleged "employer" and "employee." *Crocker v. Morales-Santana*, 854 N.W.2d 663 (N.D. 2014). The court found that Werner Enterprises was not a motor carrier at the time of the accident, in part, because Werner had no lease agreement with the driver. *Id.* at 667. Instead, Werner Enterprises merely owned the trailer and acted as a broker for the load at issue. *Id.* The court reasoned that "[a]lthough the definitions of employer and employee are broad [under § 390.5], the statutory employee doctrine applies to lease situations to impose liability on an authorized motor carrier-lessee for the negligence of the owner-lessor and its driver." *Id.* at 669.

Does the Statutory Employee Doctrine Only Apply to a Motor Carrier Exercising Its Motor Carrier Operating Authority at the Time of the Accident?

Numerous courts have found that a transportation company must have been exercising its motor carrier operating authority at the time of the accident to impose vicarious liability upon it under the broad definitions of § 390.5. In other words, vicarious liability is not possible under the broad definitions of § 390.5, if a transportation company is not using its motor carrier operating authority at the time of the accident.

In perhaps the leading case, *Schramm v. Foster*, 341 F.Supp.2d 536 (D.Md.2004), the federal district court considered plaintiffs' claims for personal injuries against a broker under the FMCSR. The court determined the broker who arranged for transportation of freight by a contract motor carrier was not an employer of the negligent driver under § 390.5 and had no obligation to ensure the driver's compliance with regulations pertaining to maximum driving hours because the broker did not own or lease a commercial motor vehicle. *Id.* at 547–48. The court also determined the negligent driver was not a statutory employee of the broker under the definition of "employee" in § 390.5, because the plaintiffs failed to establish the broker acted as a motor carrier in the specific transaction at issue, explaining:

> Motor carrier is defined in 49 U.S.C. § 13102(12) as "a person providing motor vehicle transportation for compensation." The term "broker" means a

> "person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). 49 C.F.R. § 371.2(a) further distinguishes motor carriers from brokers: "Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport." 341 F.Supp.2d at 548. The court recognized a transportation entity may have authority to operate as both a broker and a motor carrier.

Id. at 548–50. The court held that the critical inquiry must be the transportation company's role in the specific transaction, and not whether the entity simply had motor carrier operating authority. *Id.* at 549.

Following the *Schramm* case, the Seventh Circuit Court of Appeals further held that the fact that a logistics company had a "motor carrier" license is not enough to impose liability through the broad definition of "motor carrier" under § 390.5, but rather the company must have been "engaged in the actual movement" of property or passengers at the time of the accident, and not merely have provided "services related to the movement" to be held liable. *Camp v. TNT Logistics Corp.*, 553 F.3d 502, 507-10 (7th Cir. 2009) (noting the crucial inquiry is in what capacity was the defendant acting during the transaction).

Likewise, when recently faced with the broad definitions under § 390.5, the Eighth Circuit Court of Appeals noted that a transportation company may have authority to act as a shipper, broker or carrier, but the court must focus on the specific transaction at issue to impose vicarious liability, not whether defendant acts as a motor carrier in other transactions. *Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780, 784 (8th Cir. 2014) (citing *Schramm*, 341 F.Supp.2d at 549). The Eighth Circuit concluded that FedEx was acting as a shipper, not a motor carrier, in the transaction at issue and had no duty to require that driver observe his FMCSR duties by reason of § 390.11. *Id.* at 784. Moreover, FedEx was not a motor carrier in the transaction simply because "it was engaged in the primary business of transporting goods for compensation" as "this is an overly broad, impractical interpretation of regulations drafted for other purposes." *Id.* at 786.

Similarly, the Ninth Circuit Court of Appeals found that a shipper and equipment owner was not acting as a motor carrier as defined in § 390.5 when it hired a separate motor carrier to provide transportation services, which "controlled the execution of those services." *Alaubali v. Rite Aid Corp.*, 320 Fed. Appx. 765, 767 (9th Cir. 2009) (unpublished) (rejecting plaintiff's attempt to hold Rite Aid, a shipper and trailer owner, liable for negligently entrusting its trailers to a driver employed by Swift Transportation, Inc., a motor carrier hired by Rite Aid).

In *Caballero v. Archer*, 2007 WL 628755 (W.D. Tex. Feb. 1, 2007), the federal district court rejected plaintiff's attempt to hold Cargill, a shipper, liable under the definition of "private motor carrier." Again, the court found it "irrelevant" that Cargill had motor carrier operating authority, the critical inquiry was whether it was exercising that authority at the time of the accident. *Id.* at 4. The court noted:

> Cargill did not engage in conduct that would give rise to a finding that it assumed the responsibility of transporting the cargo. That was clearly the job of Archer Trucking. Cargill was obviously interested in the time of pick-up and delivery; it wanted to monitor its cargo to make sure it was in fact delivered; and, it wanted to maintain the quality of its product, which was accomplished by requesting that reefer be kept at a certain temperature throughout the trip. However, the facts do not suggest that Cargill was acting as a transporter or carrier of the goods. To hold otherwise would require the Court to exaggerate or stretch the facts beyond their logical meaning.

Id. at 5. *But see Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 174 (7th Cir. 1996) (concluding that defendant failed to cite any legal authority that "motor carrier" as defined under § 390.5 applies only to motor carriers exercising their operating authority).

Noteworthy, MAP-21 (officially the "Moving Ahead for Progress in the 21st Century Act), effective October 1 2012, will likely impact this issue looking forward. MAP-21 requires motor carriers, freight forwarders, freight brokers, and the shipper customers of each to use written contracts specifying "the authority under which the person is providing such transportation or service." 49 U.S.C. § 13901. The purpose of the law is to require each party to a transportation agreement to specify what hat they are wearing in the transaction. Theoretically, this should help clarify this issue in the future.

Can the Statutory Employee Doctrine Be Imposed when the Alleged "Employer" Neither Owns or Leases the Commercial Motor Vehicle Involved the Accident, Nor Assigns Employees to Operate It?

By its terms, § 390.5 defines "employer" to mean "any person engaged in a business affecting

interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it." 49 C.F.R. § 390.5. In *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1269-71 (W.D. Okla. 2014), the court found § 390.5 inapplicable to create a statutory employment relationship where the alleged employer neither owned or leased the commercial motor vehicle involved, nor assigned an employee to operate it.

Does the Statutory Employee Doctrine Apply when the Supposed "Employee" Is an Entity as Opposed to an Individual?

Several courts have adopted a "plain language" interpretation of § 390.5 to hold that a registered motor carrier that is an employer of an individual driver of a commercial motor vehicle cannot be a statutory employee of another registered motor carrier. *See, e.g., Brown v. Truck Connections Intern., Inc.*, 526 F. Supp. 2d 920, 925 (E.D. Ark. 2007); *Illinois Bulk Carrier, Inc. v. Jackson*, 908 N.E.2d 248, 255–56 (Ind.App.2009); *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1269-71 (W.D. Okla. 2014); *Crocker v. Morales-Santana*, 854 N.W.2d 663, 672 (N.D. 2014). The courts' analysis in these cases focuses largely on the term "individual" in holding that a corporation or other legal person cannot fit the definition of "employee" which is limited to "individuals." *Id.* In the *Brown* case, the district court explained:

> By using a different term to define employer, the language of the regulation itself indicates that in this instance, "individual" and "person" are not synonymous, which further indicates that here, "individual" does refer to human beings and not to corporations or other legal persons.

Brown, 526 F. Supp. 2d at 925. Thus, a corporate entity is not an "individual" and cannot be an "employee" under the plain meaning of "employee" in § 390.5. *Id.*

Conclusion

Undoubtedly, plaintiffs are always looking for new ways to impose liability. Utilizing the broad definitions under § 390.5 is seemingly becoming more popular among the plaintiffs' bar. A careful review of the cases to date, however, shows that this theory of liability can be defeated under the right set of facts. If you face a claim involving the broad definitions under § 390.5 and happen to represent an entity that is not a clear employer of the driver, then a careful review of recent cases involving the definitions under § 390.5 is probably warranted.

Endnotes

1. *See e.g., Dragna v. A & Z Transp., Inc.*, 2015 WL 729844 (M.D. La. Feb. 19, 2015), *appeal docketed*, No. 15-30216 (5th Cir. Mar. 13, 2015); *Hobbs v. Zhao*, 2015 WL 427819 (N.D. Okla. Feb. 2, 2015); *Crocker v. Morales-Santana*, 854 N.W.2d 663 (N.D. 2014); *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1269-71 (W.D. Okla. 2014); *Gonzalez v. J.W. Cheatham LLC*, 125 So. 3d 942 (Fla. App. 2013).
2. On May 27, 2015, the Federal Motor Carrier Safety Administration announced a final rule requiring passenger-carrying motor vehicles to have similar lease requirements as of January 1, 2017. *See* 49 CFR § 390.303.