

# US LAW



pg4

**POWER TO THE PEOPLE**

Dodd-Frank Wall Street Reform and Consumer Protection Act



**AVOID BEING AN EASY TARGET**

pg6

Preventing Patent Marking Lawsuits



**THE DEPUTIES IN YOUR CUBICLES**

pg10

Federal Laws Create New Whistleblower Bounties and Protections



**TAX LAW CHANGES** pg36

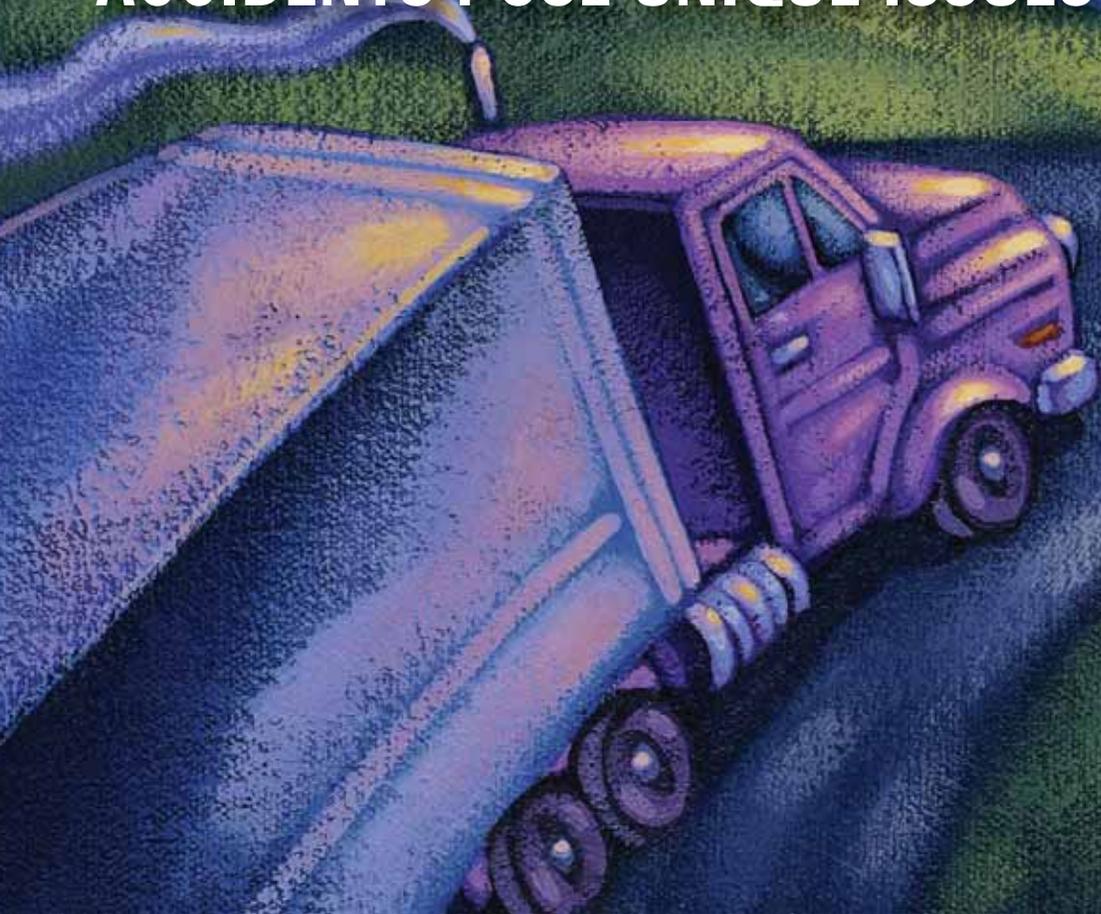
How Recent Changes in the Tax Law May Affect You, Your Family and Your Business



## THE TORT REFORM AGENDA

AFTER THE 2010 MIDTERM ELECTIONS

# INJURIES TO UNAUTHORIZED PASSENGERS IN TRUCKING ACCIDENTS POSE UNIQUE ISSUES



Kevin L. Fritz and Patrick E. Foppe Lashly & Baer, P.C.

Not so long ago, a good samaritan came upon the scene of a horrific tractor-trailer accident that occurred in the dark of night along an interstate highway. He immediately tried to determine if anyone was injured. As he ran up to the chaos, he could see that the front of the tractor was obliterated in the crash. Next to what remained of the front passenger door of the tractor, he found a woman struggling to open the passenger door crying in a panic, "I cannot get to my grandbaby Abby." He helped pry open the door. In the crushed passenger compartment of the tractor, he was stunned to find a lifeless three-year-old girl in the front seat.

In the days following the accident, the investigation determined that the driver of the tractor-trailer had been transporting her granddaughter without the trucking com-

pany's permission. Tragedies such as these should never happen, but every year trucking accidents occur that involve injuries to unauthorized passengers. Unfortunately, it is not uncommon to see trucking accidents when the truck driver was impermissibly transporting a spouse, family member, friend or even a hitchhiker. Personal injury claims brought by unauthorized passengers against trucking companies and their drivers invariably pose unique legal issues. This article highlights some of the issues that should be considered in handling these types of claims.

First, the Federal Motor Carrier Safety Regulations (49 C.F.R. § 392.60) generally prohibit drivers of commercial motor vehicles from transporting passengers without specific written authorization from the motor carrier. Accordingly, trucking com-

panies should effectively enforce a written policy barring their drivers from allowing passengers to ride in a commercial motor vehicle without the company's written permission. We recommend that all trucking companies have their drivers sign a form indicating they have received and understand the company's policy regarding unauthorized passengers. Ideally, fewer injuries to unauthorized passengers would occur if these policies were better enforced.

Nevertheless, when accidents do occur, the written policy regarding unauthorized passengers can be instrumental to the trucking company's defense of the personal injury claims brought by the unauthorized passenger. About half the states recognize some variation of the "unauthorized passenger doctrine," which can bar an unauthorized passenger from recovering directly

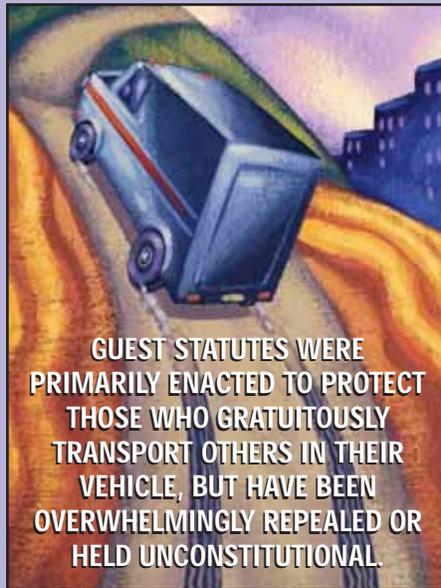
from the trucking company for the negligence of its driver, when the trucking company expressly prohibits the carrying of unauthorized passengers.<sup>1</sup> Today, most courts frame the issue in terms of the driver not having “actual” or “apparent authority” to invite others to ride with him or her. Trucking companies that have a written policy against unauthorized passengers may be able to defeat claims against the trucking company for the negligence of its driver. Only a couple of courts have found that the federal regulations making a motor carrier vicariously liable for injuries to the traveling public preempt the common law unauthorized passenger rule, and these cases may no longer be authoritative.<sup>2</sup> In any event, the “unauthorized passenger doctrine” can be an important tool to seek to preclude vicarious liability claims against the trucking company in certain situations.

In addition, a trucking company’s policy against unauthorized passengers can also assist in defeating claims that the trucking company negligently trained or supervised its drivers.<sup>3</sup> Also, claims that a trucking company is *per se* negligent by virtue of its driver failing to follow the Federal Motor Carrier Safety Regulations pertaining to unauthorized passengers should fail.<sup>4</sup>

Of course, the motor carrier’s insurer may nevertheless have to indemnify the driver for his or her negligence.<sup>5</sup> However, it is important to consider the special defenses the motor carrier’s driver may have against claims brought by unauthorized passengers. Generally, a driver has a responsibility not only to persons outside the vehicle, but also to passengers inside the vehicle. However, the laws of several states may provide the driver immunity, albeit in exceedingly rare instances.

In years past, a driver usually could not be held liable to guest passengers in most

states for injuries caused by the driver’s ordinary negligence because of special protective statutes called “guest statutes.” Guest statutes were primarily enacted to protect those who gratuitously transport others in their vehicle, but have been overwhelmingly repealed or held unconstitutional.<sup>6</sup> Today, only Alabama, Indiana, and Illinois have guest statutes. Alabama’s guest statute (Ala. Code § 32-1-2) precludes actions for injury



or death by any guest against an owner or operator absent “willful or wanton misconduct.” Indiana’s guest statute (IC 34-30-11-1) only precludes actions by a non-paying parent, spouse, child, step-child, or sibling of the driver, or by a hitchhiker, unless the driver’s conduct was wanton or willful. Further, the Illinois guest statute (625 ILCS 5/10-2010) applies only to hitchhikers.

Likewise, it was once widely recognized that no tort actions could be maintained

among household family members. In other words, passengers who were family members of the driver could traditionally not bring a personal injury claim against the driver. The so-called “parental immunity” rule generally barred claims brought on behalf of injured unemancipated children against their parents. Similarly, the “spousal immunity” rule generally barred actions between spouses. The traditional justifications for intra-family immunity were mainly to promote family harmony and to avoid fraudulent and collusive claims. Since the 1960s, however, most states have significantly qualified or repudiated the doctrines of parental immunity and spousal immunity. Nevertheless, states which still have a qualified version of the parental immunity doctrine in motor vehicle accident cases include: Alabama, Arkansas, Colorado, Georgia, Indiana, Louisiana, and Nebraska.<sup>7</sup> Similarly, the spousal immunity doctrine is still available in Georgia and Louisiana in cases involving motor vehicle accidents.<sup>8</sup>

In conclusion, when faced with a personal injury claim brought by a passenger in a trucking accident case, numerous issues should be considered. First, it is important to ascertain whether the passenger was an authorized or unauthorized passenger. Trucking companies should allow drivers to carry passengers only with special written authorization. If a trucking company does not provide the driver with permission to haul the passenger, then a company may be able to preclude the unauthorized passenger from suing the trucking company directly. Further, the truck driver may have immunity from claims brought by certain passengers under guest statutes and/or the parental or spousal immunity rules that still exist in some states. These considerations should assist in the successful resolution of these types of claims.

<sup>1</sup> See, e.g., *Beardsley v. Farmland Co-Op, Inc.*, 530 F.3d 1309 (10th Cir. 2008); *Mid-States Plastics, Inc. v. Estate of Bryant ex rel. Bryant*, 245 S.W.3d 728 (Ky. 2008); *Builders Transport, Inc. v. Grice-Smith*, 167 S.W.3d 1 (Tex. App. 2005). See also, 74 A.L.R. 163; Restatement (Second) Agency § 242. But see *Rahman v. State*, 208 P.3d 566 (Wash. App. 2009).

<sup>2</sup> *Smith v. Johnson*, 862 F. Supp. 1287 (M.D. Pa. 1994); *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984). But see *Bays v. Summitt Trucking, LLC*, 691 F.Supp.2d 725, 730 (W.D.Ky. 2010) (noting the 1992 amendments to the federal regulations may invalidate some prior decisions).

<sup>3</sup> See, e.g., *Builders Transport, Inc.*, 167 S.W.3d 1.

<sup>4</sup> See *Hill v. Western Door*, 2005 WL 2991589 (D.Colo. Nov. 08, 2005); *Santana v. Arpin America Moving System, LLC*, 2009 WL 2462500 (Tex. App. 2009).

<sup>5</sup> See, e.g., *Reisch v. M & D Terminals, Inc.*, 884 P.2d 242 (Ariz. App. 1994).

<sup>6</sup> E.g., Neb.Rev.St. § 25-21,237, repealed effective July 15, 2010; Tex. Civ. Prac. & Rem. Code Ann. § 72.001, declared unconstitutional by *Colvin v. Colvin*, 291 S.W.3d 508, 511 (Tex. App. 2009). See also 66 A.L.R.3d 532.

<sup>7</sup> See, e.g., *Smith v. Smith*, 922 So.2d 94 (Ala. 2005); *Greenwood v. Anderson*, 324 S.W.3d 324 (Ark. 2009) (except if injury arose in connection with parent’s business activity); *Schlessinger v. Schlessinger By and Through Schlessinger*, 796 P.2d 1385 (Colo. 1990) (except if parent engaged in willful and wanton or intentional misconduct or parent was pursuing a business or employment activity at time of accident); *Blake v. Blake*, 508 S.E.2d 443 (Ga. App. 1998); C.M.L. *ex rel. Brabant v. Republic Services, Inc.*, 800 N.E.2d 200 (Ind. Ct. App. 2003); LSA-R.S. 9:57; *Frey v. Blanket Corp.*, 582 N.W.2d 336 (Neb. 1998).

<sup>8</sup> *Larkin v. Larkin*, 601 S.E.2d 487 (Ga. 2004) (citing Ga. Ann. Code § 19-3-8 (2002)); *Cloud v. State Farm Mut. Auto. Ins. Co.*, 440 So.2d 961 (La. App. 1983) (citing LSA-R.S. 9:29).



Kevin L. Fritz and Patrick E. Foppe are attorneys at Lashly & Baer, P.C. in St. Louis, Missouri who specialize in transportation law and handle claims involving trucking accidents. Kevin is currently Chair of the USLAW NETWORK Transportation Practice Group. Patrick was selected for inclusion in the 2010 Missouri & Kansas Rising Stars.