A HARD ROAD TO TOLL

Imposing vicarious liability against non-motor carriers under the Federal Motor Carrier Safety Regulations

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Holding other parties liable for the acts of truck drivers remains a battleground issue in truck accident cases. Particularly in catastrophic truck accident cases, plaintiffs often just do not sue the truck driver and the motor carrier. Instead, brokers, shippers, third-party logistics providers, equipment owners and others often face claims for agency (*respondeat superior*), joint enterprise, negligent selection of independent contractors, statutory employment, etc. The sometimes enmeshed business relationships between these types of parties in truck accident case opens the door for plaintiffs to pursue these types of claims.

Plaintiffs often utilize federal law, including the Federal Motor Carrier Safety Regulations (FMCSR), as a linchpin to establish vicarious liability in these cases. It is well recognized that plaintiffs can try to establish a "statutory employment" relationship between the motor carrier and independent contractor drivers under Part 376 of the FMCSR. A more recent trend, however, is plaintiffs attempts to use 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. To date, courts have correctly rejected this wrong-headed theory of liability.

DEFENDING AGAINST VICARIOUS LIABILITY BROUGHT UNDER THE BROAD DEFINITIONS OF 49 C.F.R. § 390.5

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

> • "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 . . . .
> • "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 . . . .
> • "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.
> • "Person" means any individual, partnership, association, corporation, business trust, or any other organized group of individuals.

Plaintiffs try 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 a driver as a statutory employee.

Nevertheless, where there is no lease between the alleged "employer" and "employee", courts have been reluctant to find a statutory employment relationship under the broad definitions of § 390.5. For instance, in *Crocker v. Morales-Santana*[1], the Supreme Court of North Dakota 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 and, instead, merely owned the trailer and acted as a broker for the load at issue. 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. As such, courts have generally found §390.5 to be inapplicable where the alleged "employer" neither owned or leased the commercial motor vehicle involved, nor assigned a driver to operate it.

Several courts have also 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. 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." In *Brown v. Truck Connections Intern., Inc.*[2], the Arkansas 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.

Thus, a corporate entity is not an "individual" and cannot be an "employee" under the plain meaning of "employee" in § 390.5.

Further, numerous courts have found that it is not enough that an alleged "employer" might meet the definition of "motor carrier" under § 390.5, holding that there must be something more to establish the statutory employment relationship. Specifically, courts have looked at whether the transportation company was "exercising" its motor carrier operating authority at the time of the accident. If not, then vicarious liability is not possible under § 390.5.

In S*chramm v. Foster*[3], a 2004 decision from the United States District Court for the District of Maryland, the court determined that the negligent driver did not meet the § 390.5 definition of "employee" because the plaintiffs had failed to establish the broker in fact acted as a "motor carrier" in the specific transaction at issue. 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.

Moreover, in *Camp v. TNT Logistics Corp.*[4], the Seventh Circuit Court of Appeals held that in order to satisfy the requirements of § 390.5, 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." In *Camp*, the defendant, TNT Logistics, had entered into a contract with a third-party, which provided that the third-party (and not TNT) was responsible for supplying the truck, driver and associated equipment for the movement of the cargo. In the court's eyes there was no question that the third-party provided the services that moved the cargo in question, preventing a finding of liability against TNT.

The Ninth Circuit Court of Appeals reached a similar result in *Alaubali v. Rite Aid Corp.*[5], rejecting plaintiff's attempt to hold Rite Aid, a shipper and trailer owner, liable for negligently entrusting its trailers to a driver employed by another motor carrier who was hired by Rite Aid because the third-party ultimately controlled the execution of the transportation services at issue in the case.

The Supreme Court of Nebraska recently considered this issue in *Sparks v. M&D Trucking*[6], and found the fact that the supposed statutory employer did not have "exclusive control" over the driver and his equipment central to its finding that the defendant was not a "motor carrier" of the load at issue.

Noteworthy, the Moving Ahead for Progress in the 21st Century Act passed by Congress in 2012, now 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. Ideally, this should help clarify what role each party to the transaction is playing thereby avoiding confusion and potential vicarious liability.

CONCLUSION

Undoubtedly, plaintiffs are always looking for new ways to impose liability. Utilizing the broad definitions under § 390.5 is a path that plaintiffs often try to use, but which 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 most certainly warranted.

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1 854 N.W.2d 663 (N.D. 2014)
2 526 F.Supp.2d 920 (E.D. Ark. 2007)
3 341 F.Supp.2d 536 (D. Md. 2004)
4 553 F.3d 502 (7th Cir. 2009)
5 320 Fed. Appx. 765 (9th Cir. 2009)
6 921 N.W.2d 110 (Neb. 2018)