

THE “STATUTORY EMPLOYER” RULE
FOR COMMERCIAL MOTOR CARRIERS

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INTRODUCTION

The motor truck industry is regulated in many different ways. In order to obtain operating authority, a carrier must demonstrate adequate financial ability, insurance coverage, and ability to serve the public in compliance with stringent safety requirements, both as to equipment and competence of drivers. When a carrier utilizes non-owned trucks in its business operations, and permits an unregulated truck and driver to be on the road, it makes it possible for the owner of that unregulated equipment and the driver thereof to do what otherwise he could not do. As shown below, state and federal regulations make the carrier responsible for the owner/operator's conduct which includes financial ability, insurance coverage, safety of equipment and competence of drivers. Absent such a policy, when innocent people are hurt or killed, there will be a round-robin of finger pointing by carriers, lessors owners, drivers and insurers, raising issues of independent contractor, frolic and detour, what instructions the driver had, agency and the like, in the attempt to evade responsibility for the carnage wrecked upon innocent motorists. A Victim/Plaintiff encounters much difficulty in fixing responsibility, for only the carrier and the owner/operator really know their arrangements. In these circumstances, a Plaintiff should not be required to bear this burden, nor should he be required to settle for a financially irresponsible defendant fathered by the carrier. In short, the policy enunciated in both state and federal regulations and most of the cases thereunder make the carrier responsible to the injured Plaintiff as a matter of law for the negligence of the owner/operator and its drivers.

The lessee carrier must, at its peril, exert care in its business arrangements and avoid agreements with “fly-by-night” truckers. The regulations and cases demand that the commercial motor carrier police such business arrangements just as it is policed by the federal and state authorities. Indeed, this is the basis of the “statutory employer” rule in trucking cases.

A. The Federal Regulatory Scheme for Commercial Motor Carriers

During the first half of the twentieth century, motor carriers attempted to immunize themselves from liability for negligent drivers by leasing trucks and nominally classifying the drivers who operated the trucks as “independent contractors.” *See White v. Excalibur Ins. Co.*, 599 F. 2d 50, 52 (5th Cir. 1979), cert. denied, 444 U.S. 965, 100 S. Ct. 452, 62 L.Ed.2d 377 (1979); *see also Am. Trucking Ass ’ns v. United States*, 344 U.S. 298, 304-04, 73 S.Ct. 307, 311-12, 97 L.Ed. 337 (1953) (detailing pre-amendment problems and abuses that threatened public interest and vitality of trucking industry); *Empire Fire & Marine Ins. Co. v. Guaranty Nat’l Ins. Co.*, 868 F.2d 357, 362 (10th Cir. 1989) (*same*). In order to protect the public from the tortious conduct of the often judgement-proof truck-lessor operators, Congress in 1956 amended the Interstate Common Carrier Act to require motor carriers to assume full direction and control of the vehicles that they leased “as if they were the owners of such vehicles.” *Price v. Westmoreland*, 727 F.2d 494, 495-96 (5th Cir. 1984); *Simmons v. King*, 478 F.2d 857, 866-67 (5th Cir. 1973); *Wirtz v. Dependable Trucking Co.*, 260 F.Supp. 240, 243 (D.N.J. 1966). The purpose of the amendments to the Act was to ensure that motor carriers would be fully responsible for the maintenance and operation of

the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants. *See Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261(2nd Cir. 1991); *Empire Fire & Marine Ins. Co.*, 868 F. 2d at 362; *Alford v. Major*, 314 F.Supp. 979, 983 (N.D.Ind.1970), *aff'd*, 470 F.2d 132 (1972); *Wirtz*, 260 F.Supp at 243; *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124, 1132 (D.1996), clarified on reconsid., 43 F.Supp.2d 77, *aff'd*, 201 F.3d 427, 1999 WL 1338356; *see also Transam Freight Lines, Inc. v. Brada Miller Freight Sys. Inc.*, 423 U.S. 28, 36, 96 S. Ct. 229, 233, 46 L.Ed.2d 169 (1975) As a result of the regulatory authority granted in the Act, the Interstate Commerce Commission (ICC) issued regulations that require a carrier who leases equipment to enter into a lease agreement with the equipment owner providing that the carrier-lessee shall have exclusive possession, control, and use of the equipment, and shall assume complete responsibility for the operation of the equipment, for the duration of the lease. 49 C.F.R. ' 376-11-.12 (2000); *Price*, 727 F.2d at 496 & n. 2 (*applying predecessor to part 376*). The lessee must also insure any leased vehicles. 49 U.S.C. ' 11107(a)(3); 14102.

Because under the FMCSR motor carriers have both a legal right and duty to control leased vehicles operated for their benefit, the regulations create a statutory employee relationship between the employees of the owner-lessors and the lessee-carriers. *White*, 599 F.2d at 52-53; *Judy v Tri-State Motor Transit Co.*, 844 F.2d 1496, 1501 (11th Cir. 1988) (recognizing that ICC regulations create statutory employee relationship between ICC

carrier and drivers and equipment covered by lease agreement). Thus, a motor carrier's liability for equipment and drivers covered by leasing arrangements is not governed by the traditional common-law doctrines of the master-servant relationship and respondeat superior. Instead, an interstate commercial motor carrier is vicariously liable as a matter of law under the FMCSR for the negligence of its "statutory employee drivers." *See, e.g. Empire Indem. Ins. Co., v. Carolina Cas. Ins. Co.*, 838 F.2d 1428, 1433 (5th Cir.1988); *Planet Ins. Co.*, 823 F.2d at 288; *Price*, 727 F.2d at 496; *Grinnell Mut. Reinsurance Co. v. Empire Fire & Marine Ins. Co.*, 722 F.2d 1400, 1404 (8th Cir. 1983), cert. denied, 466 U.S. 951, 104 S.Ct. 2155, 80 L.Ed.2d 540 (1984); *Rodriguez v. Ager*, 705 F.2d 1229, 1233-36 (10th Cir.1983); *Simmons*, 478 F.2d at 867; *Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.* 289 F.2d 473, 476-77 (3rd Cir.1961).

Under Section 10927 of the Motor Carrier Act, the ICC can issue an operating permit to a motor carrier only if the motor carrier has filed an adequate "bond, insurance policy, or other type of security . . . in an amount not less than . . . the Secretary of Transportation prescribes." 49 U.S.C.A. ' 10927(a)(1) (West Supp.1994).¹ Moreover, ICC regulations require that a motor carrier's surety bond or insurance policy be sufficient "to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles subject" to ICC regulation. 49 C.F.R. ' 1043.1(a) (1993). Finally, in order to assure

¹The minimum amount of liability protection for personal injuries is \$750,000.00 See 49 C.F.R. 1043.2(b)(2) (1995); 49 C.F.R. 387 (1997).

compliance with section 10927(a)(1) and 49 C.F.R. ' 1043.1(a), the form ICC endorsement (an MCS-90) must be included in the insurance policies of all ICC registered carriers.² See *Canal Ins. Co. v. First Gen. Ins. Co.*, 899 F.2d 604, 611 (5th Cir.1989).

The endorsement MCS-90, as mandated by Sections 29 and 30 of the Motor Carrier Act of 1980 (49 C.F.R. ' 387.7(d)(1)) requires that vehicles owned or leased by interstate trucking companies provide insurance coverage, up to the required levels, 49 C.F.R. " 387.9 and 387.303, regardless of whether the vehicle is listed as a covered vehicle on the policy. 49 C.F.R. ' 387.15, adopted pursuant to 49 U.S.C. ' 13906 (a)(1) and (f). A "lease" is *defined under U.S.C.A. ' 13102 and 49 C.F.R. '376.2(e)* as "a contract or arrangement in which the owner grants the use of the equipment . . . to an authorized carrier for use in the regulated transportation of property."

The statutorily required MCS-90 endorsement for interstate carriers reads, in relevant part as follows:

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation,

²The regulations specify that the required insurance is to be provided by a Form MCS-90 endorsement, See 49 C.F.R. ' 1043(a)(4) (1995) and the proof of fulfilling this insurance requirement is to be satisfied by the filing of a Form BMC 91X. See 49 C.F.R. ' 1043(a)(3) (1995); See also 49 C.F.R. ' 387-15 (1997).

maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

Under the express terms of the MCS-90 (also referred to as “the ICC endorsement”), its scope supercedes any limitations, exclusions, exceptions, or conditions of the base policy.

The history and policy behind federal regulation of interstate carriers, specifically with respect to their use of leased tractor-trailers, has been set forth in many cases, both federal and state. *E.g.*, *T.H.E. Ins. Co. v. Larsen Intermodal*, 242 F.3d 667, 672 (5th Cir.2001); *Progressive Casualty Ins. Co. v. Hoover*, 570 Pa. 423, 809 A. 2d 353, 359 n. 9, n. 10 (2002). The Fifth Circuit in *T.H.E. Ins. Co.* summarized that history and the underlying public policy:

The MCS-90 was required under the regulations of the now-defunct Interstate Commerce Commission (“ICC”). When the ICC was abolished, its authority to regulate carriers was transferred to the Department of Transportation, but the old regulations remain in effect until new ones are promulgated. *John Deere Ins. Co. v. Nueva*, 229 F. 3d 853, 855 n. 3 (9th Cir. 2000). This Court has stated that ICC endorsements are governed by federal law. *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 610 (5th Cir. 1989), modified on other grounds, 901 F.2d 45 (5th Cir. 1990) (*citing Carter v. Vangilder*, 803 F.2d 189, 191 (5th Cir. 1986)). We also held that the policy embodied in the ICC regulations “was to assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers.” *Canal v. First Gen.*, 889 F.2d at 611. Thus, the

insurer's obligations under the MCS-90 are triggered when the policy to which it is attached provides no coverage to the insured. The First Circuit has aptly described the obligation placed upon the insurer by the MCS-90 as one of suretyship. “[W]e consider the ICC endorsement to be, in effect, suretyship by the insurance carrier to protect the publicBa safety net . . . [I]t simply covers the public when other coverage is lacking.” *Canal Ins. Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995). (Emphasis supplied).

It is noteworthy that the U. S. DOT regulations are even broader than those of the ICC. The ICC did not implement its own endorsement, but rather adopted the DOT's MCS-90 endorsement for those motor carriers subject to the ICC regulations. Notice of Final Rules, 132 M.C.C. 948, 1982 WL 600 28482 at 1. Thus, the MCS-90 endorsement is not limited to those carriers specifically subject to ICC jurisdiction. Rather, the MCS-90 endorsement required by the DOT explicitly applies in many situations (*e.g.*, transportation of hazardous commodities and intrastate for-hire carriers) even where the transportation arguably falls outside the jurisdiction of the ICC. (*See Century Indemnity Co. v. Carlson*, 133 F. 3d 591 (8th Cir. 1998)). The majority view, remains, however that the MCS-90 coverages only apply to motor carriers actually engaged in interstate commerce. (*See Century Indemnity v. Carlson*, 133 F.3d 591 (8th Cir. 1988)).

B. Georgia's Regulatory Scheme for Commercial Motor Carriers

A motor common or contract carrier engaged in both interstate and intrastate commerce is nonetheless subject to state statutory provisions governing motor common and contract carriers when the carrier's operations are performed in Georgia *O.C.G.A.*' 46-7-36. The term “carrier” is defined by statute to mean “a person who undertakes the transporting

of goods or passengers *for compensation*” *O.C.G.A.* ' 46-1-1(1) (emphasis added). The statutory definitions of motor common carrier and motor contract carrier both pertain to the business of transporting persons or property *for hire* over the public highways of *Georgia*. *National Union Fire Ins. Co. v. Sorrow*, 202 Ga. App. 517, 518, 414 S.E. 2d 731 (1992), citing former *O.C.G.A.* ' 46-1-1(7)(A) and (B), which are presently codified as *O.C.G.A.* '46-1-1(9)(A) and (B), Ga. Laws 1996, p. 950, effective April 15, 1996. “For hire” is defined by statute as “an activity wherein for compensation a motor vehicle and driver are furnished to a person by another person . . .” *O.C.G.A.* ' 46-1-1(6). This statutory definition is expressly adopted in Rule 3-1.5 of the Transportation Rules of the Georgia Public Service Commission. When a motor vehicle is used exclusively by an entity to transport its own products and is not held out for hire to the public or hired for the transportation of goods or passengers, such vehicle does not qualify as a motor common carrier or a motor contract carrier. *National Union Fire Ins. Co. v. Sorrow*, 202 Ga. App. 517, 518, 414 S. E. 2d 731 (1992).

By statute, in 1931, the Georgia Legislature authorized the Public Service Commission “to adopt such rules and orders as it may deem necessary in the enforcement of [the motor common carrier and motor contract carrier articles]” and “[s]uch rules and orders . . . shall have the same dignity and standing as if such rules and orders were specifically provided in [the motor common carrier and motor contract carrier article].” Pursuant to this enabling legislation, the Georgia Public Service Commission promulgated

rules and regulations governing the operation of motor common carriers and motor contract carriers in Georgia. Effective July 1, 2001, the responsibilities of enforcing and administering these rules and regulations were transferred to the Department of Motor Vehicle Safety. These rules and regulation are virtually identical to those previously promulgated by the Interstate Commerce Commission. (*See Ga. PSC, Rule 8-3.1 Re: Leasing of Motor Vehicles*). These rules establish that a lessee assumes complete legal responsibility for leased trucks, must inspect them for safety hazards and must insure them.

In Georgia, the independent contractor concept is eliminated from business arrangements between owner/operators and motor carriers regulated by the Department of Motor Vehicle Safety (formerly the Georgia Public Service Commission). *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 878(1) 311 S.E. 2d 193 (183) Thus, when examining vicarious liability issues regarding motor carriers for hire, ICC rules and regulations control in Georgia and under established case authority eliminate the concept of an “independent” owner operator. In such circumstances a lease agreement must be employed (regardless of the nature of the business arrangement) and the motor carrier lessee becomes fully responsible for the use of the leased trucks. *Nationwide Mutual Ins. Co. v. Holbrooks*, 187 Ga. App. 706, 710, 371 S.E. 2d 252 (1988); *Judy v. Tri-State Motors Transit Co., supra.* (interpreting Georgia law).

A motor common carrier may not operate in Georgia without obtaining from the PSC a certificate of public convenience and necessity (*OCGA '46-7-3*), and a certificate is not issued unless the applicant gives and maintains bond, with adequate security “for the

protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants, or its agents.” *OCGA ' 46-7-12 (a). (Emphasis Supplied)*³ In lieu of bond, the certificate holder may file a policy of indemnity insurance which is approved by the commission and substantially conforms to all the statutory provisions relating to bonds (‘ 46-7-12 (c)), or the commission may permit a motor common carrier to self-insure. *O.C.G.A. ' 46-7-12(d).* Whatever means the common carrier chooses to evidence its potential financial responsibility to the motoring public, the bond, insurance, or self-insured plan “is a direct and primary obligation” to any person who sustains actionable injury or loss as a result of the negligence of the common carrier or its agents. *Great American Indemnity Co. v. Vickers*, 183 Ga. 233, 236, 188 S.E. 24 (1936). Stated another way, the purpose of the insurance “is not for the benefit of the insured [motor common carrier] but for the sole benefit of those who may have a cause of action for damages for the negligence of the motor carrier, “making the insurance policy” in the nature of a substitute surety bond [which] creates liability in the insurer regardless of the insured’s breach of the conditions of the policy. [Cit.]” *Progressive Cas. Ins. Co. v. Bryant*, 205 Ga. App. 164, 165, 421 S.E. 2d 329 (1992).

³Georgia’s minimum statutory coverages are \$100,000.00 per person, \$300,000.00 per accident. *See Georgia PSC Rule 7-2.1.; Ross v. Stephens*, 269 Ga. 266, 496 S.E. 2d 705 (1998).