Non-Trucking Liability Policies: Application and Exclusion

by Robert H. Griffin and Chip Campbell

Introduction

A policy of non-trucking liability coverage generally applies when a vehicle is being operated for a non-trucking use. If a driver is operating a vehicle in the business of a motor carrier then the motor carrier's commercial liability policy typically applies. If, on the other hand, the truck is being used for a purpose other than to transport the property of another for hire, then the non-trucking liability coverage usually covers the exposure.

This article does not reflect an exhaustive list of cases on the application and exclusion of non-trucking policy, but it presents various cases and fact patterns from different jurisdictions across the United States in both state and federal courts which have considered this issue.

Arkansas

Kenneth Thomas was killed in a head-on accident with a semi-trailer truck operated by Ralph Hogan. *The Connecticut Indemnity Company v. Harris Transport Company,* 909 F. Supp. 1212 (W.D. Ark. 1995). At the time of the accident, the semi-trailer truck was owned by Mitchel Hogan, brother of Ralph, and was leased to a motor carrier, Harris Transport Company ("Harris"). *Id*. at 1214. It was an exclusive lease agreement that provided that Harris "maintain exclusive possession, control and use of the tractor/trailer and to assume complete responsibility for the operation of the equipment for the duration of the lease." *Id*. at 1216.

There were two insurance policies in force for the semi-trailer truck at the time of the accident: a commercial liability policy issued to Harris, as lessee of the truck, and a non-trucking policy issued to Mitchell Hogan, as owner of the truck. *Id*. at 1214. The Court was faced with determining which policy provided coverage: Harris' commercial liability policy or Hogan's non-trucking policy. *Id.* The central issue for the Court's determination was whether the semi-trailer was being used "in the business of" Harris at the time of the accident. *Id*. at 1221. If so, then Harris' policy applied but if not then Hogan's non-trucking policy afforded primary coverage. *Id*.

The following facts were undisputed: at the time of the accident Ralph Hogan had completed his delivery for Harris, he was on his way home, empty, and under the dispatch of no one. *Id*. Nonetheless, the Court held that Harris' commercial policy applied, rather than the non-trucking liability policy, because Hogan was still furthering the business of Harris. *Id*. Applying Arkansas agency law and the "exclusive possession and control" provision of the lease in its determination, the Court stated that: "[t]here should be a strong presumption that a truck under an exclusive lease is in the business of the lessee in returning empty from a previous dispatch…that presumption could be refuted if there were clear evidence to the contrary." *Id.* at 1224.

Florida

In *Empire Fire & Marine Insurance Company v. Truck Insurance Exchange*, the Court addressed the issue of whether a non-trucking policy provided primary coverage for payment of personal injury damages that a passenger sustained when she fell out of a tractor operated by Berl Denslow. 462 So. 2d 76 (Fla. App. First DCA 1995). Denslow owned a tractor for which he obtained a non-trucking liability policy of insurance from Empire that provided coverage for the tractor except: "while the covered auto is used in the business of anyone to whom it is leased or rented if the lessee has liability insurance sufficient to pay for damages…" *Id*. at 77. Denslow entered into a "permanent lease" arrangement for the truck with Churchill Transportation, Inc. ("Churchill") such that Churchill had "exclusive possession, control, use and responsibility for the operation of the truck, including full responsibility to the public." *Id*.

Denslow was employed by Churchill to drive the leased tractor, with trailer attached, from Michigan to Jacksonville, Florida to deliver the trailer. Denslow delivered the trailer and checked into a Jacksonville hotel at 6:00 pm on the day of the accident. *Id*. at 78. At 7:00 pm, Churchill instructed Denslow to pick-up the trailer and deliver it to Macon, Georgia by 7:30 am the next day. *Id*. Denslow realized he would need to leave Jacksonville that night in order to make the deadline. *Id*. Before leaving Jacksonville, however, Denslow found a bar where he picked up Stacey Coates and another woman. *Id*. While driving in Denslow's tractor to another bar to play video games, Coates began operating the CB radio while sticking her head and arms out the window. *Id*. As Coates was waiving to a passing tractor-trailer, the door opened and she fell to the pavement sustaining injuries. *Id*.

The trial court found that Denslow was not "in the business" of Churchill so its commercial policy did not provide coverage for Coates' lawsuit. *Id*. at 77. The Florida Court of Appeals reversed holding that Denslow was still in the business of Churchill at the time of this accident, and therefore, the commercial policy applied. *Id*. at 80. In reversing the trial court, the Court of Appeals focused on the fact that the tractor was leased to Churchill and the Federal Motor Carrier Safety Regulations mandate that Churchill, the motor carrier, is deemed to be in control of leased equipment at all times. *Id*.

Georgia

In *AXA Global Risks v. Empire Fire & Marine Insurance Company*, the Court addressed the issue of whether a non-trucking policy or motor carrier provided primary coverage for a $1.5 million wrongful death settlement. *AXA Global Risks v. Empire*, 554 S.E.2d 755 (Ga. App. 2001). Clifford Conner owned a tractor and "permanently" leased it to JM Enterprises, Inc. ("JME"). *Id* at 756. JME employed Banzhoff as a driver. *Id.*

It was undisputed that the day before the fatal accident, a Friday, Banzhoff completed a run to Florida by returning to JME's yard in Winder, Georgia where he dropped off the empty trailer. *Id*. He was told that his next dispatch would be the following Tuesday. *Id*. After spending Friday night in his tractor in the Winder yard, he was driving off duty to his residence, bobtail (without a trailer) when the accident occurred. *Id*.

The Court noted that Conner's non-trucking policy provided primary coverage for Conner's tractor but excluded coverage while the tractor was "used in the business of" JME. *Id.* at 756. JME's policy provided primary coverage for the leased tractor while "used exclusively in [JME's] business as a 'truck'; otherwise, it provided excess coverage for the leased tractor." *Id* at 758. The Court held that since Banzhoff's personal use of the tractor did not fit the exclusion in the non-trucking policy then the non-trucking policy provided primary coverage and JME's policy provided excess coverage since the tractor was not being used exclusively in JME's business. *Id*. at 758.

Louisiana

In *LeBlanc v. Bailey*, the Court determined that a $1 Million non-trucking liability policy was primary for an $850,000 personal injury settlement. 700 So. 2d 1311 (La. Ct. App. 1997). Michael Bailey owned a tractor and it was under exclusive lease with Mill Transportation Company ("Mill"). *Id*. at 1312. There were two policies in force at the time of the accident: Mill's commercial liability policy for its leased vehicles and Bailey's non-trucking policy. *Id*.

On the day of the accident, Bailey made six deliveries at different locations throughout the New Orleans area with the final delivery at 5:00 pm. *Id*. at 1314. He began to drive home and he was involved in this accident at approximately 5:30 pm. *Id.* Bailey was not under dispatch at the time of the accident, was bobtail, and was not paid for his time or mileage for the trip to his home. *Id*. Based upon these facts, the Court held that the driver was not furthering the business of the motor carrier at the time of the accident, and the non-trucking liability policy applied. *Id*.

LeBlanc was distinguished in *Mahaffey v. General Security Insurance Company*, 543 F. 3d 738 (Fifth Cir. 2008). In *Mahaffey*, the driver, Wynn, delivered his load in the late afternoon, and was then advised by dispatch to take the night off and call back the next morning to see if there was an available load. *Id*. at 739. Wynn then drove bobtail to a truck stop, where he ate dinner, watched television, took a shower, and played slot machines. *Id*. Wynn was at the truck stop for a total of seven hours. *Id*. Although he usually slept in his tractor, his mattress was wet so he decided to go to a motel for the night. *Id*. On the way to the motel, the accident occurred. *Id*.

Under these facts and applying Louisiana law, the Court in *Mahaffey* held that Wynn was in the business of the motor carrier at the time of the accident so the commercial liability policy applied. *Id.* The Court stated that "unlike the driver in *LeBlanc,* who was heading home after completing his deliveries and was not under pre-dispatch for deliveries the following day, Wynn was not heading home, and he was on standby for further deliveries because the dispatcher told him "to take the rest of the night off and call him in the morning to see if they had a load." *Id*. 742.

Michigan

George Bogle leased his tractor to Wolverine Expediting, Inc. ("Wolverine"). *Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340 (6th Cir. 1996). Placards identifying Wolverine were placed on his tractor, and Bogle hired driver Gregory Freed to drive the tractor. *Id*. at 1344. During a time while business was slow for Wolverine, Bogle "borrowed back" the tractor, though the tractor still reflected Wolverine's identifying placards. *Id.* While Freed was driving the tractor on other business for Bogle, he was involved in the accident. *Id.*

Following an underlying lawsuit arising out the accident, Prestige Casualty Company (Bogle's insurer for bob-tailing purposes) filed a declaratory judgment action against Michigan Mutual Insurance Company (Wolverine's insurer), for a determination as to which policy provided primary coverage. *Id*. at 1345. The Court first noted that, because Wolverine is an interstate carrier operating pursuant to an ICC certificate and authority, the ICC endorsement "attached" to Michigan Mutual's policy. *Id*. Further, it noted that there are three views as to how this endorsement affects the allocation of risk between insurers:

1) it makes the policy to which it is attached primary (citing 1 case),
2) it negates limiting provisions in the policy to which it is attached, but does not necessarily establish primary liability over all others (citing 4 cases), or
3) it has no effect among insurers (citing 7 cases).*Id*. at 1347.

The Court followed the second approach, i.e. that any limiting clauses in the Michigan Mutual policy were negated. *Id*. at 1351. However, the Court found that both the Michigan Mutual and Prestige policies were primary. *Id*. Michigan Mutual's policy was primary upon finding that any limiting clauses were negated per the ICC endorsement. Prestige's policy was primary because its non-trucking liability endorsement simply provided that it applied to any uses other than "in the business of anyone to whom it is leased or rented." *Id*. Since the driver was not "in the business of" Wolverine at the time of the accident, coverage applied under the language of that policy as well. *Id*.

Minnesota

In *Occidental Fire & Casualty Company of North Carolina v. Soczynski*, the Court determined that the non-trucking liability afforded coverage for a fatal truck accident. 2013 WL 101877 (D. Minn. 2013). Thomas Hipp, a truck driver and sole shareholder of Hipp's Trucking, Inc., hauled freight exclusively for ATS, a motor carrier, under a continuous lease agreement. *Id*. at 1. On the day of the accident, Hipp ran two errands in his tractor-trailer. *Id*. at 4. He first drove to a facility to have software installed in the engine of the tractor. *Id*. He then drove to another facility to pick up some outriggers which he had purchased. *Id*. The outriggers were not ready, so he drove home, ate lunch, and then returned to the facility where he loaded the outriggers onto his trailer and returned home. *Id*. The fatal accident occurred during his trip home. *Id*.

At the time of the accident, the tractor displayed ATS' logo as well as its DOT number. *Id*. at 5. However, Hipp was not under dispatch at the time of the accident, the last directive that he received from ATS was fulfilled three days earlier. *Id*. at 5. Under these facts, the Court held that Hipp was not furthering the business of ATS at the time of the accident, but was rather on personal business, and therefore, the non-trucking liability policy applied. *Id* at 14.

North Carolina

In *McLean Trucking Co. v. Occidental Fire & Cas. Co. of North Carolina,* Wright, a truck driver, crashed into a bus when he was on his way home after he left McLean Trucking Company's terminal. 72 N.C. App. 285, 286, 324 S.E.2d 633, 634 (1985) *review denied*, 313 N.C. 603, 330 S.E.2d 611 (1985). McLean Trucking Company("McLean") leased Wright's tractor and the lease required Wright "to provide and maintain the tractor-trailer and to furnish a qualified driver subject to the approval of the lessee [McLean]." *Id*. at 633. Further, the lease provided that the "rented vehicle shall be and remain under the complete and exclusive control of [McLean] for the duration of this lease and the driver of said equipment shall be considered the employee of [McLean] for the duration of this lease." *Id*. at 634.

In accordance with the lease, a non-trucking liability policy was issued naming Wright as the insured and excluded coverage: (1) while the vehicle was being used "to carry property in any business" and (2) while the vehicle was being used "in the business of" anyone who rented the tractor. *Id*. at 635

After making deliveries in Florida, Wright followed protocol and called McLean to determine if other assignments in Florida were available. *Id*. at 636. Since no assignments were available he returned to McLean's freight terminal in North Carolina with an empty trailer to find an assignment. *Id*. 637. He was told that no assignments were available but to call Monday morning for an assignment. *Id*. Wright left the terminal and the accident occurred as he was on his way home. *Id*. at 637.

The Court framed the issue as follows: "[i]f Wright was in the business of McLean Trucking Company then defendant Occidental's [non-trucking] automobile policy excluded coverage; if he was not 'in the business of' McLean Trucking Company then defendant Occidental's [non-trucking] insurance policy afforded coverage.' *Id*. at 634. Occidental argued that its exclusion should apply because ICC regulations mandated a finding that Wright was "in the business of" the motor carrier, McClean, at the time of accident. *Id*. The Court rejected this, however, indicating that, while a carrier *may* be held liable to third parties, the ICC regulations did not prevent carriers from allocating risk through insurance or indemnification agreements. Therefore, the Court looked to the insurance contract language (i.e. "in the business of"), and found that the phrase "in the business of" was best defined in the common law doctrine of *respondeat superior*. *Id*. at 636. That is, in order to be "in the business of" the carrier, the driver would have to be in the scope of employment, furthering the business of the carrier at the time of the accident. Since Wright was returning home, under principles of *respondeat superior* he was not in the business of the carrier and exclusion in the non-trucking policy did not apply. *Id*. at 637.

Ohio

Roseberry, an owner-operator, leased his tractor to SSD Distribution ("SSD"). *Roseberry v. Balboa*, 627 N.E. 2d 1062 (Ohio Ct. App. 1993). As part of the lease, SSD was given exclusive possession, control and use of the truck for the duration of the lease. *Id.* The lease also imposed an obligation on SSD to furnish and pay the costs of public liability, property damage and cargo insurance. *Id*. at 1063. Roseberry, accompanied by a friend, Samuel Grewe, went on a run for SSD. *Id*. Roseberry picked up a loaded trailer at an Avon Products facility in Springdale, Ohio and then drove it to Perrysburg, Ohio. *Id*. Rosebury dropped the trailer off in Perrysburg and picked up an empty trailer that they then delivered back to the Avon plant. *Id*. Immediately after, Roseburry and Grewe stopped at a bar while heading home and "each consumed several beers over a short period of time." *Id*. Afterwards, Rosebury allowed Grewe to drive the tractor, and on the way home, the accident occurred. *Id*. Based upon these facts, the Court held that Grewe was not in the business of SSD at the time of the accident. *Id*.

In *Illinois National Insurance Company v. Ohio Security Insurance Company*, Terry Moon leased his tractor and trailer to O&I Transport. No. 10-3618 (6th Cir. Dec. 21, 2011). On the day of the accident, Moon made a delivery in West Virginia for O&I, and received another assignment from O&I for a load in Ohio. After Moon arrived in Ohio, he waited for his trailer to be loaded. Once loaded, however, instead of driving the trailer to his house in Ohio for the weekend, Moon decided to detach the trailer and leave it at the shipper's facility. Moon then headed home bobtail, and detoured slightly to have his tractor washed. During this trip, the accident occurred. Based upon these facts, the Court held that Moon was in the business of O&I at the time of the accident.

Pennsylvania

Gerald Nash "routinely" leased his tractor to Page Transportation ("Page") and operated it on Page's behalf. *Connecticut Indemnity Company v. Mary L. Stringfellow*, 956 F. Supp. 553 (M.D. Penn. 1997). After making deliveries he would typically call Page for instructions which varied, sometimes he was told to return for another delivery and sometimes he was told just to go home. *Id*. at 555. On the day of the accident Nash picked up and delivered a trailer of calcium chloride for Page without incident. *Id*. at 555. Afterwards, Nash stopped at a shopping plaza from 10:30 am until 3:15 pm and at 3:15 pm he drove to a truck stop to get his truck washed (and buy a Christmas present for his father). *Id*.

The accident occurred when Nash was leaving the truck stop. *Id*. At the time of the accident Nash was "logged on duty" and his tractor displayed the Page logo and the ICC placards were attached to his tractor. *Id*. at 555. However, he had not yet called Page for instruction before the accident but planned to do so before 5:00 pm. *Id*. The Court ruled that this was a personal errand, and that the driver was not in the business of Page at the time of the accident. Accordingly, the non-trucking liability policy applied. *Id.*

Conclusion

As illustrated by the cases discussed above, the determination of whether a non-trucking liability applies is very fact-dependent and can certainly differ from state to state. However, in most cases, the determination comes down to whether the driver is deemed to be under the dispatch of, or furthering the business of, the motor carrier under circumstances which exist at the time of an accident.

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