The Lessor of Two Evils: Presumption of Responsibility for Motor Carrier Lessees or Common Law *Respondeat Superior*

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Trucking accidents are common. Because of their size, trucks can cause extensive damage when involved in accidents. Those involved in accidents with trucks typically seek compensation from the truck's insurance company. However, unknown to the traveling public, many trucks are leased. This is significant because, in many instances, when confronted with the duty to compensate the injured party the owner of the truck and the lessee of the truck (and their corresponding insurers) deny financial responsibility for the accident. Or worse, there is no insurance for the truck. As a result, those injured in trucking accidents with leased vehicles often must wait years to identify the responsible party, or may never identify a financially accountable party at all.

I. INTRODUCTION

There is a division of authority among courts regarding the presumption of responsibility for motor carrier lessees. This split has caused confusion and delay for personal injury plaintiffs who have been injured as a result of accidents with motor carrier lessees.

Little known to the public, many commercial motor carriers (commercial motor freight operators, i.e. tractor-trailers or semis) lease their

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vehicles. Leasing has become increasingly favored over outright ownership of the truck in recent years.[1] Traditionally, the primary attraction of leasing was the minimization of liability.[2] Motor carrier companies leased trucks from individuals who owned the vehicles.[3] Subsequently, the companies would structure lease agreements whereby the leased vehicle and the driver would not be under the "control" of the lessee in any circumstance except while delivering freight for the lessee.[4] The lessee motor carrier would take maximum advantage of the shielding aspects the *respondeat superior* doctrine,[5] avoiding liability under master-servant principles.[6]

Either injured plaintiffs were left with the option of suing the owner of the truck or suing the driver, both of whom were unlikely to be financially able to satisfy a judgment.[7] Often the driver is "leased" along with the truck, compounding the incongruity of assuming control of the vehicle and the driver, yet contractually limiting the liability assumed along with them.[8] As a result of these contractual limitations on liability, motor carriers who leased their vehicles were able to escape liability in "virtually all" accidents.[9]

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1. *See* Cincinnati Ins. Co. v. Haack, 708 N.E.2d 214, 218-19 (Ohio Ct. App. 1997) (declaratory action where insurer for lessee motor carrier sued to avoid primary insurance responsibility in a case where the leased truck was involved in an accident while driving with an empty load on the return trip from a canceled pickup).

2. *Id.*

3. *Id.* at 219.

4. *Id.*

5. *Respondeat Superior*, Latin for "let the superior make answer." This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. BLACKS LAW DICTIONARY (8th ed. 2004). *See* RESTATEMENT (SECOND) OF AGENCY: NEGLIGENCE § 243 (1958) ("A master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment."). *See, e.g.*, Osborne v. Lyles, 587 N.E.2d 825 (Ohio 1992); Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988). *See generally* Christopher Vaeth, Annotation, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R. 5th 174 (1995) (discussing respondeat superior in cases where an employee is driving his or her own car, but arguably on the employer's business).

6. *Haack*, 708 N.E.2d at 219.

7. Of course accidents also occur while leased trucks are hauling freight for the motor carrier lessee—undoubtedly "within the service" of the lessee. The dichotomy of the majority-view and minority-view positions discussed in this article has little significance in such situations. Courts typically hold the lessee and their insurer responsible in that scenario because even common law *respondeat superior* "scope of employment" tests (*see infra* Section III) offer no real bases to avoid responsibility.

8. *Haack*, 708 N.E.2d at 218. A typical lease arrangement will read, "The carrier desires to lease the equipment from the contractor and to engage the contractor to provide certain services. . . ." Technically, the motor carrier is leasing the equipment and concurrently contracting for the service of driving. The practical effect is that the truck and the driver are "leased" together. *Id.*

9. *Id.* at 219.

The leases also enabled motor carrier companies to avoid compliance with federal and state motor carrier regulations.[10] Now defunct, the Interstate Commerce Commission ("ICC")[11] regulated the maintenance requirements, driver qualifications, driving time limits, and overall operation of motor carriers in interstate commerce.[12] By structuring lease agreements with favorable terms, the leasing motor carrier company was able to avoid compliance with the regulations by placing the regulatory burden on the owner of the vehicle or the independent driver.[13]

Recognizing this problem, the ICC issued regulations intending to make motor carrier lessees more accountable.[14] Unfortunately, the regulations caused confusion. From 1977 through 1986, the ICC regulated lessees as follows:

> *Exclusive Possession and Responsibilities.* [The lease] [s]hall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:
> *(i) Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.
> *(ii) Household goods, carrier; intermittent operations under long term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.[15]
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> *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing

10. *Id.* The court stated:

> Motor carriers were able to avoid compliance with these regulations by leasing motor vehicles from truck owners who were not regulated by the I.C.C. or P.U.C.O. [state counterpart to the ICC] and by structuring the lease arrangements so that the driver and truck could not be found to be under the "control" of the lessee under the master-servant test. This meant in many cases that lessee motor carriers were able to avoid safety standards imposed by the I.C.C. or the P.U.C.O. and the attendant necessary but inevitably more costly and cumbersome compliance with those regulations. *Id.*

11. The Interstate Commerce Commission was phased out of existence in 1996. *See ICC, Oldest Regulator, Is Phased Out,* CHI. SUN-TIMES, Jan. 3, 1996, at 42.

12. *Haack*, 708 N.E.2d at 219.

13. *Id.* Before the ICC regulations regarding motor carrier leases, the carefully-structured lease arrangements would make the lessor completely responsible for compliance with ICC regulations, leaving the lessees relatively unburdened by regulation. *Id.*

14. *See generally* H.R. DOC. NO. 2425, at 4304 (1956) for a record of the United States Congress's recognition that motor carriers leases created difficulty in fixing carrier responsibility and enforcing safety regulations.

15. 49 C.F.R. § 1057.4(a)(4) (1977).

possession of the equipment.[16]

The ostensible import of the regulation was to create a presumption that the existence of a lease established that the lessee was the exclusive operator of the vehicle, and therefore responsible for its operation.[17]

However, notwithstanding the "exclusive possession and responsibilities" language, motor carriers would structure leases narrowly defining when the vehicle would be considered "in the service" of the lease.[18] The result was that motor carrier lessees would divest themselves of all tort liability except when the leased truck was hauling the contracted payload to the point of delivery. Any other use of the truck was deemed outside the service of the lease, and therefore the motor carrier would not be liable. This included "deadheading"[19] and "bobtailing."[20]

Inevitably, the driver of a leased vehicle must drive the vehicle while "outside the service" of the lease (i.e., deadheading or bobtailing) after delivering the freight or on the way to pick up the next delivery. This is where the ICC regulations proved difficult. Did the regulations presume that the lessee, while displaying the ICC placards, was the responsible party for the vehicle? Or, did the regulations only create a rebuttable presumption that the leasing motor carrier was responsible, and the doctrine of *respondeat superior* determined whether the vehicle was under the control of the lessee at the time of the accident?

The majority of jurisdictions adopted the view that if the vehicle was operating under a valid lease and displaying the appropriate federal and state placards, the motor carrier would be presumed liable for the vehicle.[21] However, a minority of courts, notwithstanding the apparent presumption of responsibility within the ICC regulations, nonetheless applied the common law doctrine of *respondeat superior* in order to determine whether the vehicle was under the control of the motor carrier.[22]

This confusion over who is the responsible party has unfortunately caused further confusion regarding the insuring of motor carriers.[23] Because there remains a split in authority from state to state, motor carriers (by nature, often an interstate enterprise) continue to draft lease agreements cautiously, attempting to account for both views. Consequently, the lessee motor carrier and the lessor vehicle owner will not only agree

16. *Id.* § 1057.4(d)(1).

17. *Haack*, 708 N.E.2d at 219.

18. *Id.* at 218-19.

19. "Deadheading" means driving a tractor-trailer or truck with an empty load. *See* Prestige Cas. Co. v. Michigan Mut. Ins. Co., 99 F.3d 1340, 1343 n.3 (6th Cir. 1996).

20. "Bobtailing" means driving a tractor rig without an attached trailer. *See id.* at 1343.

21. *See infra* Section II.

22. *See infra* Section III.

23. *See infra* Section IV.

to establish liability for the lessee only while the vehicle is in its "service," but also will contractually shift the burden of who carries liability insurance—notwithstanding state law to the contrary.[24] Or worse, the lease will limit the liability of the motor carrier lessee only in instances where the vehicle is "in the service" of the lease, and, ironically, shift the duty to procure liability insurance onto the same motor carrier lessee—thereby leaving only a portion of potential accidents covered by any insurance.[25] As a result, injured parties often face uncertainty (even in cases of admitted liability) regarding which insurer will pay. Frequently, injured plaintiffs must wait while the two insurers sue one another for a declaratory judgment establishing which has the duty to defend.[26]

The remainder of this Article will explain and analyze both the majority view, that motor carrier lessees are irrebuttably presumed to be responsible for the vehicle, and the minority view, that the *respondeat superior* "scope of employment" test determines whether the vehicle was under the control of the lessee. Further, this Article will highlight cases where the insurer's duty to defend was at issue. Finally, after discussing these cases, this Article will advocate enacting a federal statute affirmatively fixing the responsibility for leased vehicles onto the lessee motor carrier.

II. Majority View: Presumption of Lessee Responsibility

The majority of jurisdictions have concluded that the ICC regulations established a presumption that when a vehicle is operating under a valid lease, the lessee is presumed to be responsible for any resulting accidents, no matter whether the truck is deadheading, bobtailing, or otherwise "not in the service" of the lessee.

Even before the 1977 regulations, *Mellon National Bank & Trust v. Sophie Lines*[27] established that the lessee in a motor carrier lease is presumed to be responsible at the time of an accident.[28] In *Mellon*, the

24. *Haack*, 708 N.E.2d at 227. One might wonder why lessors would be willing to accept the increased exposure to liability. The most likely answer is that the motor carrier companies typically have greater bargaining power because of their relative financial strength and size compared to the typical lessor, who often is a single truck owner leasing himself along with his truck. The lease agreements are frequently offered on a "take it or leave it" basis.

25. Canal Ins. v. Brogan, 639 N.E.2d 1219, 1223 (Ohio Ct. App. 1994).

26. *Haack*, 708 N.E.2d at 229.

27. 289 F.2d 473, 475 (3d Cir. 1961).

28. *Id.* at 477. *See also* Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131, 139 (8th Cir. 1974) ("It is true that the cases clearly hold that I.C.C. regulations require that the motor carrier operating leased equipment be held liable to the public for negligent operation of leased vehicles."); Simmons v. King, 478 F.2d 857, 867 (5th Cir. 1973) (driver of leased vehicle was "statutory employee" and therefore lessee was "vicariously liable as a matter of law for the negligence of [the driver]"); Alford v. Major, 470 F.2d 132, 135 (7th Cir. 1972) (leased truck operated under a "trip lease" caused fatal accident; court held the lessee to be responsible); Proctor v. Colonial

lessee, Turner Transfer, Inc., entered into a lease with Sophie Lines, Inc.[29] The lease contained a provision that the "leased equipment under this Agreement is in the exclusive possession, control, and use of the . . . Lessee . . . ."[30] Notwithstanding the agreement, Sophie Lines, who provided the driver and directed the driver, while under the lease to Turner Transfer and with Turner's knowledge, picked up a load for Sophie Lines during an empty (deadhead) portion of a delivery circuit in order to maximize the truck's utility.[31] Turner benefited by avoiding a 16-cent per mile assessment (a state use tax) for driving the vehicle with empty loads.[32] There was evidence that Turner had knowledge of such trips prior to the accident.[33] Sophie Lines was not authorized by the ICC to operate the vehicle; only Turner was the ICC authorized carrier.[34] During this delivery for Sophie, the truck collided with a freight train.[35] Despite the fact that the truck was undeniably on a trip for the benefit of Sophie (the lessor), the trial court held that Turner (the lessee) was liable for the accident.[36] The Third Circuit affirmed.[37] Despite the language in the lease agreement, the court concluded that Turner, and not Sophie, was liable for any accident occurring while under its lease.[38] The court stated:

> [P]ublic policy requires that the holder of a franchise or certificate from the Interstate Commerce Commission for the operation of freight vehicles in interstate commerce . . . be held responsible for the operation of such vehicles. . . . Otherwise, the public might be entirely deprived of the safeguards to the public . . . by means of certificate holders evading their responsibility by the employment of irresponsible persons as independent contractors.[39]

The court went on to note that the primary purpose of such regulations was for "the protection of the traveling public upon the

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Refrigerated Transp., Inc., 494 F.2d 89, 92 (4th Cir. 1974) (passenger in leased truck injured and sued the lessee motor carrier for his injuries; passenger was an employee of the lessor and claimed the injuries were caused by the negligence of the driver, who also was an employee of the lessor and had been leased to the lessee; the court held lessee responsible because "[plaintiff] was as much a stranger to [lessee] as . . . a member of the traveling public."); Cosmopolitan Mut. Ins. Co. v. White, 336 F. Supp. 92, 99 (D. Del. 1972) ("ICC carrier's liability . . . is not governed by the traditional common law doctrines of master-servant relationships and respondeat superior.").

29. *Mellon*, 289 F.2d at 475.
30. *Id.*
31. *Id.*
32. *Id.* at 476.
33. *Id.*
34. *Id.*
35. *Id.* at 474.
36. *Id.* at 476.
37. *Id.* at 478.
38. *Id.* at 477.
39. *Id.* (quoting Hodges v. Johnson, 52 F. Supp. 488, 490-91 (D. Va. 1943)).

highways."[40]

After the 1977 regulations, the Third Circuit continued to recognize the lessee as the responsible party, in keeping with its decision in *Mellon*. In *Carolina Casualty Insurance Company v. The Insurance Company of North America*,[41] the court held that the 1977 ICC regulations definitively placed responsibility on the lessee.[42] "[F]ederal law in effect creates an irrebuttable presumption of an employment relationship between a driver and the lessee whose placards identify the vehicle."[43]

The majority of federal courts have applied the same reasoning.[44] Likewise, the majority of state courts have also presumed motor carrier lessees to be liable.[45]

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40. *Id.* (quoting *Hodges*, 52 F. Supp. at 490).

41. 595 F.2d 128 (3d Cir. 1979).

42. *Id.* at 137.

43. *Id.* at 137 n.29.

44. *See* Rodriguez v. Ager, 705 F.2d 1229, 1230 (10th Cir. 1983) (accident occurred after termination of the lease, but lessee's insignia had not been removed from vehicle); Empire Indem. Ins. Co. v. Carolina Cas. Ins. Co., 838 F.2d 1428, 1430 (5th Cir. 1988) (leased truck involved in accident, and driver and lessee contracted to shift duty to procure insurance onto driver.) ("[W]hen a leased driver is making a trip during the term of but outside the scope of his employment and continues to display the required ICC insignia and permit number, that driver continues to be a statutory employee of the carrier . . . even though he is not actually operating under that authority at the time of the collision." *Id.* at 1433.); Grinnell Mut. Reinsurance. Co. v. Empire Fire & Marine Ins. Co., 722 F.2d 1400, 1402 (8th Cir. 1983) (leased truck involved in fatal accident with passenger car; truck was deadheading after completing a "trip lease"; court held the long term lessee liable to the plaintiff, but also held that the lessee was entitled to indemnity by the driver); Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co., 868 F.2d 357 (10th Cir. 1989) (leased truck involved in accident while deadheading to terminal in order to wait for a hauling job; court held lessee to be liable); Johnson v. S.O.S. Transp., Inc., 926 F.2d 516 (6th Cir. 1991) (leased truck caused fatal accident due to brake failure; court held that lessee was responsible for the maintenance of the truck even though under a "trip lease"); Gilstorff v. Top Line Express, Inc., 910 F. Supp. 355 (N.D. Ohio 1995) (accident involving permanently leased truck where the truck was under a "trip lease" by another carrier (creating two lessees) but failed to display ICC placard as was agreed to; court held that original lessee was primarily liable to injured parties because its placard was displayed at the time of the accident notwithstanding the second lessee's promise to display its placards).

45. *See* Wyckoff Trucking v. Marsh Bros. Trucking Serv., Inc., 569 N.E.2d 1049 (Ohio 1991) (abandoning Thornberry v. Oyler Bros., 131 N.E.2d 383 (Ohio 1955)) (leased truck involved in accident while deadheading in order to pick up a load of steel; court held lessee to be liable); Nat'l Trailer Convoy, Inc. v. Saul, 375 P.2d 922 (Okla. 1962) (leased truck involved in accident while bobtailing; lessee found liable); Cox v. Bond Transp., Inc., 249 A.2d 579 (N.J. 1969) (leased truck involved in accident while bobtailing in order to drive home from terminal; lessee held to be liable); Weeks v. Kelley, 377 A.2d 444 (Me. 1977) (leased truck involved in accident while in service of lessee; lessee held liable); Schedler v. Rowley Interstate Transp. Co., 368 N.E.2d 1287 (Ill. 1977) (leased truck involved in accident while bobtailing enroute to terminal and to await next load; lessee found liable); Wilkerson v. Allied Van Lines, Inc., 521 A.2d 25 (Pa. 1987) (suit by injured driver of a truck; leased truck had been subsequently re-leased to another motor carrier; court held that driver was entitled to ICC regulatory protection as a member of the "traveling public" and determine the subsequent lessee to be responsible); Williamson v. Steco Sales, Inc., 530 N.W.2d 412 (Wis. Ct. App. 1995) (holding that a lessee is presumed responsible,

III. Minority View: Respondeat Superior

A. Common Law Scope of Employment under Respondeat Superior

In traditional negligence actions involving employers and their employees or agents, courts do not presume the employer to be responsible. Rather, under common law *respondeat superior*, a plaintiff must satisfy a two-part test in order to hold an employer liable for the negligence of his employee or agent.[46] First, the plaintiff must establish that an employment or agency relationship exists.[47] Second, the plaintiff must show that the employee was under the "control" of the employer.[48]

The second part of the test is the most important because it is relatively easy to determine whether an employment or agency relationship exists in the realm of trucking leases. The plaintiff must establish that the negligent employee was acting "within the scope" of his employment at the time of the accident.[49] This test is explained in the following section.

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but remanding for trier of fact to determine the existence of a valid lease); Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006 (Ind. Ct. App. 1986) (leased truck involved in fatal accident while carrying a load for a subsequent sub-lessee under a "trip lease"; court held the long-term ICC-authorized lessee responsible for accidents occurring while under its lease).

46. *See* Babbitt v. Say, 165 N.E. 721, 725 (Ohio 1929).

47. *See* Restatement (Second) of Agency: Definition of Servant § 220 (1958).

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business. *See also Haack*, 708 N.E.2d at 218 (discussing *respondeat superior*).

48. *See Babbitt*, 165 N.E. at 725 (citing Densby v. Bartlett, 149 N.E. 571, 622 (1925)).

49. Retail Merchs. Ass'n v. Peterman, 99 P.2d 130, 131 (Okla. 1940).

[A]n act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was employed upon the master's business, and be done, although mistakenly or ill advisedly, with a view to further the master's business, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, or personal motive on the part of the servant to do the act upon his own account. *Id.*

B. Respondeat Superior and Motor Carrier Lessees

Both before and after the 1977 ICC regulations "clarifying" the status of motor carrier leases, a minority (albeit a small minority) of jurisdictions held that evidence of the tractor-trailer operating under a valid lease at the time of the accident does not, in and of itself, establish liability on the part of the lessee.[50] These courts held that aside from the lease, the plaintiff must establish the lessee's liability under the common law principle of *respondeat superior.*

In *Pace v. Southern Express Company*,[51] the driver of a leased tractor-trailer collided with an automobile, killing the automobile's passengers.[52] Peter Couture, the driver, was the owner of the truck.[53] He leased the truck and himself, as the driver, to the Southern Express Company.[54] The lease provided, "During the period of this lease, said vehicle and driver shall be solely and exclusively under the direction of the Lessee."[55] The lease continued, "In the event the Lessor [Peter Couture] is employed by the Lessee as driver of equipment owned or leased by the Lessee said Lessor shall be deemed an employee of the Lessee."[56] As part of the lease agreement, Couture was to procure insurance, which he failed to do.[57]

Couture collided with the plaintiff (killing him) while driving the tractor (bobtailing) from Southern Express's terminal to his home, after leaving the tractor and its freight at the company's terminal.[58] Despite the

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See also Restatement (Second) of Agency § 228 (1958).

> Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

See generally Restatement (Second) of Agency: Negligence § 243, Illustration 1 (1958). ("A, a messenger boy employed by the P telegraph company, on the way to receive a message to be delivered by A to P, carelessly runs into T, whom he knocks down. P is liable to T.").

50. *See generally* R.D. Hursh, Annotation, *Liability Under Respondeat Superior Doctrine for Acts of Operator Furnished With Leased Machine or Motor Vehicle*, 17 A.L.R.2d 1388 (1951) (discussing cases where *respondeat superior* doctrine holds employer's liable for instances where the employee commits a tort while using leased machines or motor vehicles).

51. 409 F.2d 331 (7th Cir. 1969).

52. *Id.* at 332.

53. *Id.*

54. *Id.*

55. *Id.* at 332-333.

56. *Id.* at 333.

57. *Id.*

58. *Id.*

language of the lease, the court determined that while driving the tractor to his home, he was not an "employee" of Southern Express, and could only be an employee when hauling loads for the company.[59] The court stated,

> Under Indiana law, which is controlling, it is well settled that where an employee, with or without the consent of the owner of the vehicle, uses the vehicle for purposes of his own, when not on regular duty, the owner is not liable for injury to another resulting from the driver's negligence (citations omitted). Here the uncontroverted facts show that Couture was off duty and performing no task for defendant at the time of the collision. He was neither engaging in defendant's business nor acting within the scope of his employment. Therefore, under Indiana law, defendant [Southern Express] was not responsible for Couture's negligence on this occasion, whether or not the relation of employer and employee existed at the time of the accident.[60]

Astonishingly, the court noted that the master-servant analysis was warranted notwithstanding an Indiana regulation (very similar to the 1977 ICC regulation) definitively establishing the lessee as responsible for the equipment. The Indiana regulation stated:

> *Lease of Equipment by and to Carriers.* The leasing of equipment to a common and/or contract carrier shall result in the complete control of the equipment by said carrier as lessee. The motor carrier to which the vehicle is leased *shall for the term of the lease be deemed the operator thereof* and the terms of the lease shall indicate that said lessee motor carrier shall be responsible for the operation of the vehicle, including equipment, physical condition, *insurance coverage*, registration thereof, markings, driver's qualifications, and all other related matters, to the same degree and extent *as if said lessee motor carrier were the regular owner thereof.*[61]

The court dismissed the regulation stating, "In our view, this rule only applies where the tractor is being operated on the lessee's business."[62] The court did not attempt to reconcile this with the plain language of the regulation stating that the lessee "shall for the term of the lease be deemed the operator thereof."[63]

In fact, the Seventh Circuit is the primary cause for the split of authority, having ruled similarly in *Gudgel v. Southern Shippers, Inc.*[64] In

59. *Id.* at 334.

60. *Id.* at 333.

61. *Id.* at 333-34 (emphasis added) (citing Rule 12(b) of the Public Service Commission of Indiana).

62. *Id.* at 334.

63. *Id. But see* St. Paul Fire & Marine Ins. Co. v. Frankart, 358 N.E.2d 720, 722-23 (Ill. 1976) (accepting *respondeat superior* as the appropriate test yet determining that returning home with an empty load is part of the "original activity on the behalf of the carrier." (referencing Am. Transit Lines v. Smith, 246 F.2d 86 (6th Cir. 1957)).

64. 387 F.2d 723 (7th Cir. 1967).

Gudgel, a leased truck was involved in an accident, and the court held that the doctrine of *respondeat superior* applied.[65] It is noteworthy, if not ironic, that in *Gudgel* the Seventh Circuit purported to apply Illinois law.[66] Yet Illinois applies the majority view presumption-of-responsibility rule.[67] Furthering the discontinuity, the Seventh Circuit applied the presumption of responsibility majority-view rule in *Alford v. Major*.[68] However, the court did not reverse, or even refer to *Gudgel*, which applied *respondeat superior* scope-of-employment analysis to a long-term lease—arguably worthy of the same treatment. Although these decisions predate the 1977 regulations, they remain valid.

The minority view continues in several state courts as well. In *Gackstetter v. Dart Transit Co.*,[69] the court held that the existence of a valid lease only satisfies the first element of the master-servant test, that an employer-employee relationship does exist, but does not establish that the employee was within the scope of employment at the time of the accident.[70]

Even after the 1977 regulations addressing lessees, some courts continued to apply *respondeat superior*, or at least would not presume the lessee to be responsible. In *Mensing v. Rochester Cheese Express, Inc.*,[71] the driver of a leased tractor-trailer unhitched the payload and proceeded to "bobtail" in order to get lunch while the terminal employees prepared to unload the trailer.[72] On the way to lunch, the driver collided with a car.[73]

The lease agreement excluded the lessee's liability "in any accident as concerns all Equipment hereunder when used not in performance of a trip under this Agreement . . . ."[74] Bobtailing, the lessee argued, was not in the performance of a trip according to the lease. The court agreed, stating "Cheese Express [lessee] [was] liable only when the tractor was pulling a *loaded* trailer. The trial court's interpretation is consistent with

65. *Id.* at 725.

66. *Id.*

67. Schedler v. Rowley Interstate Transp. Co., 368 N.E.2d 1287, 1288 (Ill. 1977) (applying the federal government's ICC regulations, making no reference to *Gudgel*).

68. 470 F.2d 132, 135 (7th Cir. 1972).

69. Gackstetter v. Dart Transit Co., 130 N.W.2d 326, 328 (Minn. 1964). *See also* Wilcox v. Transamerican Freight Lines, Inc., 371 F.2d 403 (6th Cir. 1967). Ostensibly, *Wilcox* has been abandoned in light of Johnson v. S.O.S. Transport, Inc., 926 F.2d. 516 (6th Cir. 1991) (applying the majority-view rule). *See also* Vance Trucking Co., v. Canal Ins. Co., 249 F. Supp. 33 (D.S.C. 1966) (holding that the driver of a leased truck had "abandoned" the service of the lessee; therefore, lessee not liable under the *respondeat superior* "scope of employment" test).

70. *Gackstetter*, 130 N.W.2d at 328-29.

71. 423 N.W.2d 92 (Minn. Ct. App. 1988).

72. *Id.* at 93.

73. *Id.*

74. *Id.*

federal and state statutes and regulations which require the carrier to maintain insurance coverage for the protection of the public."[75] But, the court continued on and applied the *Gackstetter v. Dart Transit Co.* pre-1977 ICC regulations, *respondeat superior* analysis.[76] In *Cheese Express*, the court determined that the driver was "within the scope of employment."[77] Bobtailing in order to attend lunch did not, by itself, destroy the employer-employee relationship.[78] "[A]n employee does not cease to be acting within the scope of employment because of an incidental personal act if the main purpose is still to carry on the business of the employer."[79] "We find the driver was acting primarily for the benefit of Cheese Express [lessee] while waiting for his trailer to be loaded."[80] While achieving the same result, lessee was liable, the court continued to apply *respondeat superior* analysis in light of the 1977 and the 1986 ICC regulations[81] and numerous cases holding that the lessee was irrebuttably presumed to be liable.[82] Other than stating that the decision was in line with current federal regulations,[83] the *Cheese Express* court did not explain how applying the scope-of-employment test conformed to the regulation's declaration that the authorized carrier, the lessee, shall assume complete responsibility for the duration of the lease.[84] Other courts have applied the same analysis, even after the 1977 and 1986 ICC regulations.[85]

In fact, there continues to be support for applying common law *re-*

75. *Id.* at 94.

76. *Cheese Express,* 423 N.W.2d at 94 (referring to *Gackstetter*, 130 N.W.2d at 329).

77. *Id.*

78. *Id.* at 94-95.

79. *Id.* at 95 (citing Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 16 (Minn. 1979) (quoting DeMirjian v. Ideal Heating Corp., 129 Cal. App. 2d 758, 765-66 (1955)).

80. *Id.* at 95. ("Such acts as are necessary to the life, comfort, and convenience of the [employee] while at work, though strictly personal . . . and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." *Id.*) (quoting Laurie v. Mueller, 78 N.W.2d 434, 438 (1956) (quoting Adams v. Am. President Lines, 23 Cal. 2d 681, 684 (1944)).

81. In light of the remaining confusion after the 1977 regulations, the ICC issued further clarification in 1986—

> (c) Exclusive possession and responsibilities — (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease. Written Lease Requirements, 49 C.F.R. § 1057.12 (c) (1986).

82. *See supra* Section II.

83. *Cheese Express*, 423 N.W.2d at 94.

84. *Id.*

85. *See* Penn v. Va. Int'l Terminals, Inc., 819 F. Supp. 514, 523 (E.D. Va. 1993) (holding that ICC regulations are not dispositive regarding employment relationship); Parker v. Erixon, 473 S.E.2d 421, 426 (N.C. Ct. App. 1996) (driver of leased truck became involved in an accident while on a purely personal undertaking; court absolved the carrier lessee of liability, holding that ICC regulations create only a rebuttable presumption of agency).

spondeat superior to motor carrier lessees. In his 1999 Note,[86] Patrick Phillips advocates that courts apply the common law test, rather than presume lessee responsibility—

> The better rule is to follow the interpretation taken by the minority of courts in this context, especially in light of the 1992 amendments.[87] The policy of full compensation has its limits. When courts assign liability to those not negligent for acts that do not confer any benefit on them, they carry this policy too far. A constant consideration to court construction should be the ultimate effects upon all parties involved.[88]

Put differently, Phillips believes that the minority view is the only method that prevents non-negligent actors from having to pay for the conduct of others.

While distinctly in the minority, the *respondeat superior* view persists in several jurisdictions. Notwithstanding the apparent presumption built into the ICC regulations, the long-standing principle of only attaching liability to a negligent actor overrides this presumption in the minority jurisdictions. The unfortunate side effect is that the continued adherence to this principle causes confusion for those injured by motor carriers.

IV. Insurers and Their Duty to Defend

Insurance companies are inextricable players in motor carrier liability cases. In practice, and as required by law, both lessors and lessees of tractor-trailers carry insurance. Indeed, it is often the insurers, recognizing the split of authority regarding motor carrier leases, which seek declaratory judgments, attempting to shift liability onto the opposing insurer (*i.e.*, a lessee insurer will sue the lessor's insurer).[89] The court in

86. Patrick Phillips, Note, *Common Law Respondeat Superior Versus Federal Regulation of Motor Carrier Leases: Court Interpretation of the Interstate Commerce Commission Regulations of Motor Carrier Lease Requirements*, 24 Okla. City U. L. Rev. 383, 411-12 (1999).

87. The 1992 Amendments to the ICC regulations provide:

> (c)(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 11107 and attendant administrative requirements. Written Lease Requirements, 49 C.F.R. § 1057.12(c) (1992).

This amendment largely was intended to address "trip leases" where the term of the lease exists only for the brief period where the driver and the truck are delivering the load. *See Grinnell Mut. Reinsurance Co.*, 722 F.2d at 1402 n.1, which defined the "trip lease" as follows:

> A "trip lease" involves the use by someone other than the lessee of a leased vehicle. Under a trip lease, the non-lessee uses the vehicle for a specific haul of its own. It is common for equipment leases to contain trip lease provisions. This prevents the equipment from standing idle and unproductive when it could otherwise be used.

88. Phillips, *supra* note 86, at 411-12.

89. *See* Occidental Fire & Cas. Co. of N.C. v. Int'l Ins. Co., 804 F.2d 983 (7th Cir. 1986); Am. Interinsurance Exch. v. Occidental Fire & Cas. Co. of N.C., 847 F.2d 1300 (7th Cir. 1988);

Carolina Casualty Insurance Company v. The Insurance Company of North America provided perhaps the most colorful and sarcastic description of the recurrent situation—

> The pattern of facts in this case is a common one. An ICC-certified motor carrier . . . leases a truck; the lessor of the vehicle . . . also provides the driver . . . . The truck, while carrying goods on the lessee's business and displaying the lessee's ICC placards, is involved in an accident. Members of the public . . . alleging injury in the accident, sue lessee, lessor and driver for damages. The insurers of the defendants in that case, meanwhile, stand anxiously by, each trying to bow the other through the courtroom door first. The result is a separate declaratory judgment action in which the lessor's insurer . . . and the lessee's insurer . . . seeks a determination as to which has the unwanted honor of first entering to defend and pay. . . .[90]

In spite of federal[91] and state[92] regulation and the majority line of decisions, motor carriers will nevertheless contractually shift the duty to carry liability insurance back to the lessor or the driver.[93] Ostensibly, motor carriers continue to do this because of the continuing split of authority, anticipating that the contractual shift will be upheld, at least in minority-view jurisdictions.[94] Nonetheless, this has not dissuaded the

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Occidental Fire & Cas. Co. of N.C. v. Bankers & Shippers Ins. Co. of N.Y., 564 F. Supp. 1501 (W.D. Va. 1983); Prestige Cas. Co. v. Mich. Mut. Ins. Co., 859 F. Supp. 1058 (E.D. Mich. 1994); Gilstorff v. Top Line Express, 910 F. Supp. 355 (N.D. Ohio 1995); Ohio Cas. Ins. Co. v. United S. Assurance Co., 620 N.E.2d 163 (Ohio Ct. App. 1993); Northland Ins. Co. v. Bennett, 533 N.W.2d 867 (Minn. Ct. App. 1995); Planet Ins. Co. v. Gunther, 608 N.Y.S.2d 763 (N.Y. Sup. Ct. 1993); Am. Motorist Ins. Co. v. King Shrimp Co., 406 S.E.2d 273 (Ga. Ct. App. 1991); Farmland Dairies v. N. J. Prop.-Liab. Ins. Guar. Assoc. & Integrity Ins. Co., 568 A.2d 579 (N.J. Super. App. Div. 1990); Crabtree v. Hertz Corp., 461 So.2d 981 (Fla. Dist. Ct. App. 1984); Riss Int'l Corp. v. Sullivan Lines, Inc., 684 S.W.2d 33 (Mo. Ct. App. 1984).

90. *Carolina Cas. Ins. Co.*, 595 F.2d at 129-30 (internal citations omitted).

91. Written Lease Requirements, 49 C.F.R. § 1057.12 (1986). The regulation provides: "(j) Insurance – (1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public. . . ."

See also Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131, 138 (8th Cir. 1974) (citing 49 C.F.R. § 1043.1 (1974)), which stated:

> No common or contract carrier . . . shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed and accepted by the Commission a surety bond, certificate of insurance, proof of qualifications as a self insurer, or other securities or agreements . . . conditioned 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 . . . .

92. *See, e.g.*, OHIO ADMIN. CODE § 4901:2-3-07 (2004) (requiring motor carrier lessees to carry liability insurance).

93. *See, e.g.*, *Haack*, 708 N.E.2d at 224-25; Canal Ins. Co. v. Brogan, 639 N.E.2d 1219, 1223 (Ohio Ct. App. 1994).

94. *See* DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGE TO PERSONS AND PROPERTY § 14-7(b) (2d ed. 1994) ("The seeds of confusion inherent in this situation are exacerbated by conflicting policy provisions and exclusions among the policies and the natu-

lessee's insurers from denying responsibility, effectively seeking application of the disfavored *respondeat superior* theory in majority-view jurisdictions.[95]

In *Haack*, an Ohio Court of Appeals held that not only was the motor carrier lessee irrebuttably presumed to be responsible under *Wyckoff Trucking v. Marsh Brothers Trucking Service*,[96] but also the lessor *is not to provide insurance* while the lease is effective.[97] Therefore, in effect, it is illegal in Ohio to contractually shift the duty to procure insurance. The court continued—

> [W]e are convinced that extending the statutory presumption of liability to the lessee's insurer prevents public confusion as to who is responsible for accidents caused by P.U.C.O. (Public Utilities Commission of Ohio)-licensed carriers and saves injured parties from lengthy court battles and interminable delays in receiving compensation. In addition, this approach avoids the inconsistent result of finding that the lessee is statutorily presumed to be responsible but not finding that the lessee's insurance is triggered.[98]

In spite of *Wyckoff* and *Haack*, and the stated goals of avoiding delays in compensating third parties, insurers continue to file declaratory actions in identical circumstances.[99]

V. The Merits of Presuming Lessee Liability and Insurer's Corresponding Duty to Defend

Having canvassed the majority view and the minority view, the rationale for both, as well as the concurrent problem of insurers, the majority view is the better approach. All courts should establish an irrebuttable presumption of responsibility for motor carrier lessees. This approach has greater public policy advantages than the strict application of *respondeat superior*, which is ill suited for the modern practice of leasing tractor-

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ral tendency of each insurer to claim that its coverage is excess only and that the others are primary.").

95. *See Haack*, 708 N.E.2d at 228.

96. 569 N.E.2d at 1054.

97. *Haack*, 708 N.E.2d at 224-27 (citing Ohio Admin. Code § 4901:2-3-07: The code prohibits "lessees from entering into lease agreements with lessors until the lessors have obtained insurance, but *expressly prohibits owner-lessors from obtaining insurance* covering periods while the vehicle is being operated under a lease." *Id.* at 227.) (emphasis added).

98. *Haack*, 708 N.E.2d at 230.

99. *See* Agric. Ins. Co. v. Scott, 2001 WL 253880 (E.D. Pa. 2001); AXA Global Risks v. Empire Fire & Marine Ins. Co., 554 S.E.2d 755 (Ga. Ct. App. 2001); Hot Shot Express, Inc. v. Assicurazioni Generali, S.P.A., 556 S.E.2d 475 (Ga. Ct. App. 2001); Reliance Nat. Ins. Co. v. Royal Indem. Co., 2001 WL 984737 (S.D.N.Y. 2001); Canal Ins. Co. v. Distrib. Serv., Inc., 176 F. Supp.2d 559 (E.D. Va. 2001).

trailers. The remainder of this Article will discuss the reasoning and advantages of uniformly applying the majority view.

More than the disadvantages of uniformly applying *respondeat superior,* the split of authority is the greatest problem. Regardless of prohibition by state law,[100] the fact that disparate treatment remains prompts motor carriers and their insurers to continue to contractually shift liability and insurance liability. Additionally, motor carriers will litigate the same hoping that a court will deem the accident beyond "the service of the lease." For this reason, Congress should amend the federal statute (not the regulations, as changes to the regulations seem not to be conclusive) to clearly establish that it is the motor carrier lessee who, while operating under a valid lease, is presumed to be responsible (not necessarily liable) for the accident. Furthermore, the lessee's insurer should bear the burden of defending and paying for the resulting accident.

A. Trucking as an "Inherently Dangerous Activity"

Modern tort law has recognized certain commercial activities to be "inherently dangerous."[101] Under the modern view, once an activity is determined to be "inherently" or "unreasonably" dangerous to the general public, the entity engaged in the activity will be held strictly liable for any resulting harm, as opposed to other activities where a showing of negligence is required in order to establish liability.[102]

Several courts have reasoned that trucking is an "inherently dangerous activity." *Hodges v. Johnson*[103] was the first to discuss trucking as "inherently dangerous."[104] The court in *Hodges* would have applied *respondeat superior* but for the fact that trucking is "inherently dangerous," and consequently held the owner of the truck liable:

> [T]his activity [trucking] involved an unreasonable risk of harm to others. It is a matter of common knowledge that the transportation of freight upon the

100. *See Haack*, 708 N.E.2d at 225.

101. *See, e.g.*, Dominick Vetri, Tort Law and Practice 715 (1998) (commercial blasting operations, storage of explosives, transporting of toxic chemicals, crop-dusting, the keeping of wild animals are examples of abnormally dangerous activities); Lowry Hill Prop., Inc. v. Ashbach Constr. Co., 194 N.W.2d 767 (Minn. 1971) (pile driving with abnormal risk to surroundings); Berry v. Shell Petroleum Co., 33 P.2d 953 (Kan. 1934) (oil well drilling near thickly settled communities); Brown v. L.S. Lunder Constr. Co., 2 N.W.2d 859 (Wis. 1942) (blasting in midst of city). *See also* William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 Colum. L. Rev. 1705 (1992).

102. *See* Restatement (Second) of Torts: Abnormally Dangerous Activities § 519 (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.").

103. 52 F. Supp. 488 (D.C. Va. 1943).

104. *Id.* at 492.

> highways, usually by means of huge trucks and trailers, if [sic] fraught with great danger to the traveling public.
>
> . . . .
>
> Therefore, it is my conclusion that public policy requires that the holder of a franchise or certificate from the Interstate Commerce Commission for the operation of freight vehicles in interstate commerce upon the public highways be held responsible for the operation of such vehicles . . . .[105]

The court continued:

> [W]here public authority grants to an individual or corporation authority to engage in certain activities involving danger to the public, which right is denied to the general public, the duty to safeguard the public, while performing such franchise activities, is legally nondelegable, and the franchise holder is therefore responsible for the conduct of those whom it permits to act under its franchise, even though such persons be independent contractors.[106]

It is noteworthy that the court did not first apply the majority-view's presumption of responsibility. Rather, the "inherent dangers" of trucking trump the "scope of employment" factors of *respondeat superior*, which the court would have otherwise applied, making the liability associated with trucking "nondelegable."

In *Haack*, the court relied on *Hodges*, in part, in presuming the motor carrier lessee and their insurer to be responsible.[107] Other courts, in majority-view jurisdictions, cite the hazards of commercial trucking as grounds for the presumption of responsibility.[108]

There would be little reason to apply strict liability to commercial trucking torts because many accidents with automobiles involve the negligence of the automobile driver. Nonetheless, trucks are more dangerous than other vehicles. They are much larger than other vehicles using the public roads; they often carry heavy loads; they are more difficult to maneuver; they are less able to react to emergencies; and when involved in accidents, they cause significantly more damage. For these reasons, rather than applying strict liability which is the traditional treatment for inherently dangerous activities, the "inherently dangers" of commercial trucking warrant a presumption of *responsibility*, not necessarily a presumption of *liability*, on behalf of the carrier. The carrier is free to

105. *Id.* at 490-91.

106. *Id.* at 491.

107. *Haack*, 708 N.E.2d at 219. ("Courts using this exception [to the general rule that employers are not liable for the torts of independent contractors] declared that commercial trucking is an inherently dangerous activity involving an unreasonable risk of harm to others.").

108. *See, e.g.*, Rodriguez v. Ager, 705 F.2d 1229, 1236 (10th Cir. 1983) ("To fail to uphold the ICC Regulations would result in injustice. Trucking equipment such as that here present has a capability for bringing about terrible injuries and damages to life.").

establish that they acted reasonably and avoid liability under negligence theory.

B. Compensation to Injured Parties

The most important reason to uniformly apply the majority approach is that it better ensures compensation and avoids confusion and delay regarding responsibility for those injured in tractor-trailer accidents. This is the most frequently mentioned basis for construing the ICC regulations to presume responsibility on behalf of the carrier lessee. In *Wyckoff Trucking v. Marsh Bros.*, the Ohio Supreme Court succinctly stated the compensatory rationale for fixing responsibility on the lessee—

> Above all, the majority view removes factual confusion attendant to determining which party is responsible for damages, thus relieving the innocent victim from the sometimes interminable delays that accompany multiple-party litigation, by focusing liability as it does, and forcing the trucking companies to allocate the various indemnification agreements among themselves. Once liability is fixed on the statutory employer, it is the statutory employer who must seek contribution or indemnification from other potentially responsible parties, not the innocent victim.[109]

The last sentence emphasizes the primary weakness in the minority view that presuming responsibility unjustly foists compensatory duties onto non-negligent actors.[110] The majority view allows the lessee to seek contribution and indemnification from the negligent party if the lessee was not the negligent party.[111] Consequently, the burden of paying for tortious conduct is not exclusively and conclusively placed upon the lessee if the lessee was not negligent and the innocent party receives compensation quickly and with less confusion.

Patrick Phillips criticizes the majority view, stating that it attaches liability onto parties "not negligent for acts that do not confer any benefit on them."[112] The problem with this assertion is that majority-view courts do not necessarily fix liability, only responsibility. As stated previously, side from indemnification the defending carrier, despite its responsibility,

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109. *Wyckoff Trucking*, 569 N.E.2d at 1053.

110. *See* Phillips, *supra* note 86, at 390. In support of the minority view, Phillips stated: The common law theory strikes a balance between the full compensation policy and the competing policy of assigning liability to those not responsible for the injuries. If the negligent actions were committed during the employment relationship, and the negligent actions conferred a benefit upon the motor carrier, then the motor carrier and its insurer will be liable for the actions of the owner/driver. However, if not, the owner/driver alone will face the liability. *Id.*

111. *See* Johnson v. S.O.S. Transp., Inc., 926 F.2d 516 (6th Cir. 1991) ("In *Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 39 (1975), the Court held that the 'control and responsibility' requirement does not prohibit an agreement by the lessor to indemnify the lessee for loss caused by the former's negligence. . . .").

112. *See* Phillips, *supra* note 86, at 412.

can establish that it acted reasonably and avoid liability under negligence theory (i.e., defeat the negligence claim).[113]

The court in *Rediehs Express, Inc. v. Maple*[114] provided perhaps the best response to the criticism that blame is unfairly imposed upon non-negligent carriers:

> The carrier must, at his peril, exert care in his leasing arrangements and avoid leasing from "gypsies" or fly-by-night, irresponsible truckers. *The regulations and cases make the carrier police its lessors as it is policed by the I.C.C.*
>
> Argument is made that these cases create an unfair burden upon the carrier who is held responsible for the frolic and detour of its lessor. . . . If the carrier has been derelict in employing an under-insured, financially irresponsible or incompetent lessor, *it has only itself to blame.*[115]

In fact, given this reasoning in *Rediehs*, one could argue that the lessee *is* negligent when it fails to properly certify its lessor, regardless of negligence for ensuing accidents. The motor carrier has a duty to ascertain the financial condition of the parties from whom it leases, and if the lessor is unable to provide indemnity or contribution for acts of its negligence, the lessee is negligent for failing to discover this before leasing the vehicle. The "inherent dangers" of trucking impose a duty upon those who partake in the business to insure that the risk, including financial risk, to the traveling public is minimized. As a matter of policy, it is pref-

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113. *See* DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING § 6-1 (2d ed. 1994) which states:

> The linchpin of the whole process of sorting out responsibility for injuries and property damage sustained in traffic accidents is to establish negligence on the part of the actors in the drama. Under the standard of exercising reasonable care to prevent injuries to persons and property within the vehicle's path, a truck driver risks liability to himself, his employer, and the truck's owner for the slightest deviation.

For an example where a truck did cause an accident but was not negligent, see Nichols v. Int'l Paper Co., 644 S.W.2d 583, 585 (Ark. 1983). In *Nichols,* a paper company had loaded logs onto a trailer and was subsequently sued by another motorist when the logs fell of the truck, striking the motorist's car. The court stated:

> It is true that the plaintiffs were apparently not guilty of any negligence and they did prove that an accident happened. But that is not enough. In WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 39 (4th ed. 1971), the burden of the plaintiff in such a case is explained.
>
> The mere fact that an accident or injury has occurred, with nothing more, is not evidence of negligence on the part of anyone. . . ."
>
> . . . .
>
> The evidence in this case was Nelson's [the driver] testimony that the load was properly loaded and bound, and that he was not negligent in driving. He knew of no cause of the accident. The yard foreman's testimony confirmed Nelson's testimony on loading. The plaintiffs simply did not offer one fact or any proof from which the jury could reasonably conclude International Paper Company was guilty of any negligence that was the cause of the accident.

114. 491 N.E.2d 1006 (Ind. Ct. App. 1986).

115. *Id.* at 1012 (emphasis added).

erable that the party most able to ascertain the risks of operation, in this case the motor carrier lessee, be the party to bear the compensatory risks if they neglect to ascertain those risks.

The key in reconciling the competing interests of compensating the injured and avoiding injustice to the motor carrier is the insurance.[116] Risk is shared in the trucking industry. Motor carriers are insured, the drivers are insured or at least are supposed to be insured, and the lessors are insured.[117] Assuming the injured plaintiff was not negligent in causing the accident, one of these parties will be defending and paying for the injuries.

Rather than constantly litigating to determine who must defend and pay,[118] it is better to clearly establish that it is the lessee's insurer who will defend and pay, if necessary.[119] Insurers of the lessee will adjust their premiums accordingly for the increased exposure and any increased risk for uninsured or underinsured drivers. In fact, this concept is well established in American tort jurisprudence.[120]

Theoretically, it is possible that insurers for lessees could avoid increasing the premiums by virtue of the money they would save from not having to continually litigate this scenario. Inevitably, the increased costs, if there are any, are passed on to customers. Given the fortunate rarity of accidents occurring "outside the service" of a motor carrier lessee, it is not likely that these costs will be significant.

C. The Inconsistency of Respondeat Superior

Another main weakness in applying *respondeat superior* is that there can be no certainty in determining when a driver "is in the service" of the

116. *See generally* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401, 436-43 (1959) (discussing the risk-spreading theory in tort liability and how insurance furthers the ability to spread risk).

117. *See supra* Section IV.

118. *See supra* Section IV.

119. *See Haack*, 708 N.E.2d at 230. ("Hence, the purpose of the presumption of statutory liability—to prevent public confusion as to who is responsible for accidents and to save injured parties from lengthy court battles and interminable delays in receiving compensation—are in effect defeated by the failure to extend the presumption of liability to the lessee's insurer.").

120. *See* Oliver Wendell Holmes, *The Path of the Law After One Hundred Years*, 110 Harv. L. Rev. 991, 999 (1997) (reprinting the address of Justice Oliver Wendell Holmes at the Boston University Law School on Jan. 8, 1897):

> Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of whose those work it uses.

lessee. In the minority-view jurisdictions, bobtailing has created disparate results. For instance, in *Mensing v. Rochester Cheese Express*, the court held that a driver bobtailing in order to get lunch was "within the scope of employment."[121] However, in *Pace v. Southern Express*, the court held that a driver bobtailing in order to go to his home was not "within the scope of employment."[122]

There seems to be little difference between driving to get lunch and driving to go home. Perhaps the driver in *Pace* had farther to travel than the driver in *Cheese Express*. How far is too far when determining whether the driver is "within the scope of employment?" What is the difference, as a matter of law, between going to lunch and going home? What if the driver were going home for lunch?

The scope-of-employment test is poorly suited for the trucking scenario—especially for trucks under lease. Trucking is different from other master-servant relationships. The nature of trucking dictates that the driver will eventually drop the cargo and travel while empty. Because of the long hours and long distances, drivers stop for lunch, stop to rest, use the tractor to go home, etc. It does not make sense to hinge liability of the lessee, who has effectively employed the driver, on whether the tractor was attached to the trailer or whether the trailer was hauling a load specifically for the lessee. Certainly, an injured party should not have to stake his recovery on the uncertain proposition of whether the driver was sufficiently "within the scope of employment" of the motor carrier lessee.

VI. Conclusion and Proposal

The ICC no longer exists.[123] There is little need to revive the large and mostly useless government bureaucracy in order to regulate motor carriers.[124] The companies can regulate themselves with federal statutes providing operating rules. However, the continued split in authority perpetuates the litigation regarding liability in motor carrier leases.

A short amendment to federal motor carrier statutes, codifying the majority view, would end the continuing confusion.[125] The following pro-

121. *Cheese Express*, 423 N.W.2d at 95.

122. *Pace*, 409 F.2d at 333.

123. The 3-member Surface Transportation Board has taken over any remaining functions of the ICC. *See* 49 U.S.C. § 701 (2001).

124. *See* I. C. C. v. Ala. Midland Ry. Co., 168 U.S. 144, 176 (1897) (Harlan, J., dissenting) ("[T]he present decision, it seems to me, goes far to make [the ICC] a useless body. . . ."). *See generally* Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution.*, 57 U. Chi. L. Rev. 521, 523 (1990) (noting that President Nixon's advisors argued for deregulation of the motor carrier industry, stating that ICC regulations "[appear] to have promoted high freight rates and numerous inefficiencies.").

125. Presumably, federal regulation is constitutional. The interstate nature of trucking indicates its penchant to be regulated via statute. In fact, there is a strong argument to be made that

posed statute would meet these goals:

Proposed Amendment to 49 U.S.C. § 14102(a):

(5) Exclusive possession and responsibilities.

Leases of motor vehicles, intended for the transporting of commercial freight, shall provide for the exclusive possession, control, and use of the equipment while operating under the lease. The lessee shall be irrebuttably presumed responsible for the equipment for the duration of the lease.

For the purpose of tort liability, the lessee and their corresponding insurer, insured in accordance with 49 U.S.C. § 13906 (1), shall have the duty to defend against and compensate those injured through the negligent operation or maintenance of the leased equipment.

The continued confusion regarding motor carrier lessee liability should be ended. Those injured through the negligence of leased tractor-trailers should be entitled to certainty in identifying a responsible party and to be compensated from that responsible party. The inherent hazards of trucking and the necessity of identifying solvent sources of compensation, which are market financed, necessitate an unambiguous federal statute establishing responsibility.

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state laws should not be the solution to this problem because of disparities among the states and the burden it may place upon interstate commerce. *See generally* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981) (holding that Iowa's restriction on the length of tractor-trailers using the state's highways was unconstitutional due to its burdensome effect on interstate commerce). However, to date no one has challenged the constitutionality of states' regulation of motor carrier insurance.