

## Liability Insurance Coverage of Leased Trucks

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### SCOPE

The collision of a truck with another vehicle, person or object raises difficult issues of fact and liability. A lawyer who grapples with these issues must sift through such doctrines as negligence, contributory negligence, last clear chance, and failure to keep a proper lookout. This task is difficult enough. But when the truck is leased, a new dimension is added. The lawyer is no longer confronted with the sole issue of whether the truck driver is liable. It must now be determined whether there is another party upon whom the law will impose liability for the driver's negligence.

The rules of law that courts apply to determine which parties are liable are called the "rules of allocation." Although this article examines these rules of allocation, the primary focus is upon the conditions under which the parties' insurance companies assume the liability. The scope of the article is confined to liability losses arising from bodily injury and from damage to the property of third parties. Consequently, there is no analysis of loss allocation for damage to the leased vehicle itself. In addition, there is no attempt to analyze liability for damage to cargo carried by the leased vehicle. In other words, those losses normally covered by the cargo liability, fire, theft, comprehensive, combined additional coverage and collision coverages of an automobile insurance policy are not at issue.

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Finally, this article is confined to the lease of trucks to property carriers for hire, *i.e.*, motor carriers which transport the property of others for compensation.

#### I. INTRODUCTION

In the last three decades, truck leasing has grown to such an extent that by 1975, 800,000 trucks were leased or rented.<sup>1</sup> During this period, the nature of truck leasing has varied in accordance with the needs of the truck lessee. Today, the most common types of truck leases include:

- a) the lease of trucks (generally without drivers) from an equipment leasing firm by the day, week, month or longer;
- b) the long-term lease of one or more trucks with drivers from a contractor, (when the lessor-contractor is also the driver, such a contractor is called a "bobtail," "broker," "owner-operator," "driver-owner" or "lessor-driver");
- c) "trip leases," which include initial hauls, return or "back hauls" and round trips; and
- d) the most sophisticated leasing arrangement, the equipment interchange or "interline" agreement.

As businessmen, the lessor and lessee of a truck are interested in their costs of doing business. Of course, neither the occurrence of accidents nor the monetary liability for judgments arising therefrom can be foreseen with any degree of precision. Therefore, the truck lessor and lessee cannot estimate their future costs, and this inability hampers business planning.

The lessor and lessee can, however, take out insurance to protect them against liability claims. In so doing, their insurance premiums become a cost of their operations. Thus, they change an uncertain future cost of unknown amount into a present and known cost.

In order to arrange for appropriate insurance coverage, the lessor and lessee must know the rules for allocating liability losses. These rules of allocation allow the lessor and lessee to determine which of them may be liable for injury to the person or property of third parties. On the other hand, the insurance companies for the lessor and lessee must know the rules of

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1. AUTOMOTIVE FLEET, March, 1975, at 23.

For a general work covering all aspects of the trucking industry, see C. TAFF, *COMMERCIAL MOTOR TRANSPORTATION* (4th ed. 1969); and for a series of articles devoted to the business and financial aspects of equipment leasing, see 1 *ILL. L.F.* (1962).

See also Annot., 17 *A.L.R.* 2d 1388 (1951); Ahlers, *Lessor-Lessee Liability as Common Carriers by Motor Vehicle*, 22 *INS. COUNSEL J.* 162 (1955); Pause, *Legal Liability for the Operation of Leased Trucks*, 1951 *INS. L. J.* 333; Spangenberg, *Agency Problems in Motor Carrier Cases*, 6 *CLEV.-MAR. L. REV.* 130 (1951); Wes: & Jones, *What's in Favor of the Lessor*, 20 *INS. COUNSEL J.* 97 (1953); Sloan, *Liability of Carriers for Independent Contractors' Negligent Operation of Leased Motor Trucks*, 43 *IOWA L. REV.* 531 (1958).

allocation in order to charge a premium commensurate with the probability that the insurer may have to pay for such losses. And in a given case, where a prospective insured will bear all of the liability, the insurer may choose not to offer insurance at all.<sup>2</sup>

The common-law rules of such concepts as master-servant,<sup>3</sup> independent contractor,<sup>4</sup> and tort liability<sup>5</sup> are sources of these rules of allocation. Additional sources include the Interstate Commerce Commission's rules and regulations,<sup>6</sup> the insurance policies covering the lessee and lessor,<sup>7</sup> and the lease.<sup>8</sup>

In applying the rules of allocation, there are essentially five parties upon whom the courts may impose liability: the driver (whose negligence must be established if any of the parties is to be held liable), the lessor (who may be the driver if a bobtail lease is involved), the lessor's insurer, the lessee property carrier, and the lessee's insurer. Of course, the peculiar facts of a case may present additional parties for shouldering the liability such as sublessees, shippers, truck manufacturers, and retailers.

## II. THE STANDARD INSURING AGREEMENT

Unlike the fire insurance field, there is no statutorily-required liability insurance contract. Nevertheless, an insuring agreement similar to the following is found in every insurance policy providing automobile liability coverage:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of  
 Coverage C. bodily injury or  
 Coverage D. property damage  
 to which this insurance applies, caused by occurrence and arising out of the ownership, maintenance or use, including loading and unloading of any automobile . . . .<sup>9</sup>

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2. D. BICKELHAUPT, *GENERAL INSURANCE* 11-13 (9th ed. 1946). See generally, R. MEHR & E. CAMMACK, *PRINCIPLES OF INSURANCE* (5th ed. 1972).

3. *Transport Ins. Co. v. Mfrs. Cas. Ins. Co.*, 226 F. Supp. 251 (E.D. Ark. 1964).

4. *Costello v. Smith*, 179 F.2d 715 (2nd Cir. 1950).

5. *Louis v. Youngren*, 12 Ill. App. 2d 198, 138 N.E.2d 696 (1956).

6. 49 C.F.R. §§ 1057.1-1057.6. See *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3rd Cir. 1961). For a note bearing on the applicability of the ICC's rules, see Note, *Motor Transportation: Leasing of Drivers and Equipment—Private or For-hire Carriage?* 26 RUTGERS L. REV. 111 (1972).

7. *Travelers Ins. Co. v. Sindle*, 186 F. Supp. 8 (W.D. Ark. 1960).

8. *Brown v. Park Transp. Co.*, 382 S.W.2d 467 (Mo. App. 1964). See generally, Annot., 43 A.L.R.3d 1283 (1972).

9. Comprehensive Automobile Liability Insurance Coverage Part, GLA-A-1013 (Ed. 1-73). At the outset, it should be noted that many of the cases cited in this paper do not involve construction of liability insurance provisions. They are, nevertheless, relevant to the issues of liability insurance coverage. As the insuring agreement cited above indicates, a

### III. LIABILITY OF LESSOR

Given the framework provided by the insuring agreement just quoted, we turn to a brief survey of cases imposing liability upon the truck lessor. At common law, the lessor is liable when he is deemed an independent contractor<sup>10</sup> or when he is the master of the leased vehicle's operator.<sup>11</sup>

In practical terms, the right to control is determinative under both the independent contractor and respondeat superior concepts. If the lessor retains the right of control over the driver, the lessor is liable.

#### A. JOINT LIABILITY WITH THE LESSEE

The lessor and lessee may both be liable. For example, the lessor and lessee are liable when they have retained joint right of control over the negligent driver.<sup>12</sup> Moreover, when the lessee is liable under ICC regulations,<sup>13</sup> the lessor may be liable if he joins with the lessee in ignoring safety

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finding of legal liability on the part of the insured constitutes a precondition for application of a liability insurance policy. Hence, a case that merely imposes liability on the lessee or lessor, as opposed to construing a policy provision, is highly relevant to the liability insurance field. Once the insured lessee or lessor is found liable, then the question arises as to whether the lessor's or lessee's liability policy will cover the loss.

10. *Louis v. Youngren*, 12 Ill. App. 2d 198, 138 N.E.2d 696 (1956). The lessor is an independent contractor when it retains the right to control the details of the work to be performed.

11. *See generally* Annot., 17 A.L.R. 2d 1388 (1951).

The courts have regularly stated that the attributes of the master-servant relationship which must be present, either singly or in combination, if either the lessor or lessee of a motor vehicle or machine is to be held the master of, and liable, under the doctrine of respondeat superior, for the acts of, an operator furnished to the lessee in connection with the lease, include these: the right to select the operator; the right to discharge the operator (and this is given especially great weight); the right to supervise and direct, not merely the work to be done, but the method by which it should be done; and the manner in which the operator is paid, whether by the lessor directly, by the lessee indirectly through the lessor (the former compensating the latter for the operator's wages), or by the lessee directly. *Id.* at 1395.

For cases holding the lessor liable as the master of the leased vehicle's operator, see *Allstate Ins. Co. v. Liberty Mut. Ins. Co.*, 368 F.2d 121 (3rd Cir. 1966) (lessor ordered driver to return to terminal after completing delivery for lessee); *Transport Ins. Co. v. Manufacturers Cas. Ins. Co.*, 226 F. Supp. 251 (E.D. Ark. 1964) (lessor exercised supervisory control over the driver and paid his wages); *E.T. & W.N.C. Transp. Co. v. Virginia Sur. Co.*, 129 F. Supp. 305 (E.D. Tenn. 1955), *aff'd*, 219 F.2d 919 (6th Cir. 1955) (lessor exercised exclusive supervision of the vehicle's operation, hired and paid the driver, paid all expenses, and operated the truck himself most of the time); *Hodges v. Johnson*, 52 F. Supp. 488 (W.D. Va. 1943) (lessor paid, hired and fired drivers, and exercised exclusive right to supervise the methods, means, time and routes of hauls); *Smith v. Massachusetts Bonding and Ins. Co.*, 142 N.E.2d 307 (Ohio Comm. Pleas 1957) (lessor instructed driver to leave lessee's loaded trailer and reverse directions to effect repairs).

12. *Vance Trucking Co. v. Canal Ins. Co.*, 249 F. Supp. 33 (S.C. 1966), *aff'd*, 395 F.2d 391, *cert. denied* 393 U.S. 841 (1966); *Lindenmuty v. Steffy*, 173 Pa. Super. 509, 98 A.2d 242 (1953).

13. *See* 49 C.F.R. §1057 (1975).

regulations while appearing to comply with ICC requirements<sup>14</sup> or if he is found to have "practical control" over the truck's driver.<sup>15</sup> Liability may also be imposed on the lessor if he is found to be an independent contractor<sup>16</sup> or if the applicable state law contains an owner's liability statute.<sup>17</sup>

### B. 'BOBTAIL' LEASES

One variety of truck lease worth particular note is the one-man "bobtail" lease, where the lessor and driver are one and the same. The term "bobtail" refers to a tractor return from a haul without a trailer—"bobtailing" or "deadheading." Hence, the insurance policy that covers such a contractor under lease is referred to as "bobtail" or "deadhead" coverage, since it was originally intended to provide coverage for the bobtail operator when returning empty from a haul.<sup>17a</sup> The peculiarity of the owner and driver being the same person gave rise to the nomenclature of "driver-owner,"<sup>18</sup> "owner-operator,"<sup>19</sup> "lessor-operator,"<sup>20</sup> and "lessor-driver."<sup>21</sup>

The bobtail lease is generally long-term<sup>22</sup> and usually provides for the lessor's compensation in terms of a percentage of the gross freight revenues generated by the use of the tractor.<sup>23</sup> Although the nature of bobtail leasing may suggest a small-scale aspect of truck leasing, several of the largest truck lines procure all or almost all of their power equipment through this means. Whether or not subject to the ICC's regulations regarding identification,<sup>24</sup> a tractor under a long-term bobtail lease is usually marked with the same color scheme and decals as regular,

14. *Carriers Ins. Exch. v. Truck Ins. Exch.*, 310 F.2d 653 (4th Cir. 1962).

15. *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973).

16. *Continental Cas. Co. v. Am. Fidelity & Cas. Co.*, 159 F. Supp. 311 (S.D. Ill. 1958).

17. *Citizen's Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.*, 234 F. Supp. 931 (W.D. Mich. 1964). Such statutes are measures "adopted by the legislature to promote public safety by holding automobile owners accountable for certain negligent acts of the persons to whom they entrust their automobiles." *Id.* at 935. See also Annot., 61 A.L.R. 724 (1929); Sloan, *supra* note 1, at 550-51.

17a. *Ayers v. Kidney*, 333 F.2d 812, 813 (6th Cir. 1964).

18. *American Transit Lines v. Smith*, 246 F.2d 86 (6th Cir. 1957).

19. *Felbrant v. Able*, 80 N.J. Super. 587, 194 A.2d 491 (1963).

20. *Cox v. Bond Transp. Inc.*, 53 N.J. 186, 249 A.2d 579 (1969).

21. *Hartford Acc. & Indem. Co. v. Allstate Ins. Co.*, 50 Ohio App. 2d 287, 215 N.E.2d 416 (1966).

22. See, *Freed v. Travelers*, 300 F.2d 395 (7th Cir. 1962) (one year); *Carriers Ins. Co. v. Griffie*, 357 F. Supp. 441 (W.D. Penn. 1973) (3 years); *Alford v. Major*, 314 F. Supp. 979 (N.D. Ind. 1970) (one year); *Hartford Acc. & Indem. Co. v. Allstate Ins. Co.*, 50 Ohio App.2d 287, 215 N.E.2d 416 (1966) (one year).

23. *Wellman v. Liberty Mut. Ins. Co.*, 496 F.2d 131 (8th Cir. 1974) (75%); *Hodges v. Johnson*, 52 F. Supp. 488 (W.D. Va. 1943) (80%).

24. 49 C.F.R. §§ 1058.1-1058.6 (1975).

company-owned equipment. Furthermore, the lease frequently provides that the lessor is responsible for securing bobtail or deadhead liability coverage in addition to material damage coverages (collision, fire, theft, and combined additional coverage or comprehensive).<sup>25</sup>

With reference to the bobtail operator's liability, the lessor will be liable whenever the driver is negligent since the lessor and driver are one and the same. As the court indicated in *Hartford Accident & Indemnity Co. v. Allstate Insurance Co.*,<sup>26</sup> the lessor-driver of a tractor could be found personally liable to third persons for his own negligence whether he was the servant or agent of the lessee, or an independent contractor and regardless of whether the tractor was being used in the business of the lessee.

### C. SUMMARY

In general, the lessor is liable when he retains the right of control over the driver, when he violates ICC safety regulations, when the applicable state law contains an owner's liability statute, or when the lessor is also the driver. As might be expected, the most frequent reason for imposing liability upon the lessor is the finding that the lessor retained the right of control over the negligent driver. Given the need for predictability by the parties to a truck lease, as well as by the parties' insurers and the public, it seems unfortunate that so weighty an issue as public liability should turn on so artificial a concept as "control." By avoiding the attempt to squeeze a variety of factual situations into the artificial pigeonhole of "control," the statutory proposal outlined in the conclusion of this article would be more practical.

### IV. LIABILITY OF THE LESSOR'S INSURER

In the previously discussed standard insuring agreement, the insurer promises to respond when the insured is found legally liable. As a general rule the insurer is liable up to its policy limits for the liability of its insured.

The breadth of this insuring agreement is narrowed by several exclusions. One of these, the "lease exclusion," is primarily designed to exclude liability when the insured lessor has relinquished control of the insured vehicle to another party.<sup>27</sup>

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25. *American Fidelity and Cas. Co. v. Simmons*, 153 F. Supp. 658, 660 (M.D.N.C. 1957), *aff'd*, 253 F.2d 634 (4th Cir. 1958) (lessor responsible for material damage coverage).

26. 5 Ohio App.2d 287, 215 N.E.2d 416 (1966).

27. For specific formulations of this exclusion, see *American Indem. Co. v. Richland Oil Co.*, 273 F. Supp. 702 (D.S.C. 1967) (coverage excluded while vehicle is "subject to any lease, contract of hire, bailment, rental agreement or other similar contract or agreement either written or oral, express or implied. . . ."); *E.T. & W.N.C. Transp. Co. v. Virginia Sur. Co.*, 129 F. Supp. 305 (E.D. Tenn. 1955) (liability insurance "does not apply in the event that

Whether the use of the leased vehicle falls within the purview of an exclusion such as the lease exclusion depends upon the special facts of each case.<sup>28</sup> It has been held that the operation of the lease exclusion is confined to rentals that are "commercial in nature,"<sup>29</sup> e.g., if a lessor went on vacation, and left his truck with a friend for safekeeping and the friend's incidental use, for which the friend paid the lessor \$10 a week, the insurer of coverage would remain in effect.<sup>30</sup>

Of course, the lease exclusion relieves the insurer of liability whenever the insured is plainly operating under a lease. For example, the insurer is not liable when the leased tractor is pulling one of the lessee's trailers loaded with merchandise destined for one of the lessee's patrons.<sup>31</sup> Similarly, the lessor's insurance does not apply when the leased tractor is en route to pick up a load of cargo at the lessee's direction.<sup>32</sup>

#### A. MAINTENANCE OF THE LEASED VEHICLE

One of the recurring fact situations involves an accident occurring when the leased tractor is en route for servicing. In analyzing a mainte-

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the named insured shall rent, hire or lease any automobile, truck, or tractor and trailer described in or covered by the policy to any other person, firm or corporation. . . ."); *Protective Ins. Co. v. Dart Transit Co.*, 293 Minn. 402, 197 N.W.2d 668 (1972) ("No coverage is granted if the equipment is operating under orders of any trucking company."); *Brun v. George W. Brown, Inc.*, 289 N.Y.S.2d 722 (Sup. Ct. 1968) (coverage excluded "while the automobile is being used in the business of any person or organization to whom the automobile is rented. . . ."); *Overly v. American Fidelity & Cas. Co.*, 184 N.E.2d 925 (Ohio Ct. App. 1961) ("The insurance does not apply while the automobile is being used in the business of any person, or organization, to whom the automobile is rented.").

Employing the same kind of terminology developed in *E. PATTERSON, ESSENTIALS OF INSURANCE LAW* (1935), an early case construed a provision that the insured vehicle would not be rented to others as a "promissory warranty." *Neilson v. American Mut. Liab. Ins. Co.*, 111 N.J. 345, 168 A. 436 (Ct. Err. & App. 1933). Modern cases have treated the provision as simply an exclusion that narrows the insuring agreement. See e.g., *Protective Ins. Co. v. Dart Transit Co.*, *supra*. The result is the same under either approach. But a case could turn on the construction of the provision as a "warranty" or "exclusion" if a state were to enact a statute making warranties ineffective as an insurer's defense to direct actions by injured third parties who have secured a judgment against the insured.

28. *Ocean Accident & Guaranty Corp. v. Myers*, 22 F. Supp. 450 (M.D.N.C. 1938), *aff'd*, 99 F.2d 485 (4th Cir. 1938).

29. *Christensen v. State Farm Mut. Auto. Ins. Co.*, 52 Haw. 80, 470 P.2d 521 (1970) (construing an exclusion which read "while the owned automobile is rented or leased to others by the insured. . . .").

30. *Id.* 470 P.2d at 527. It should be noted that the *Christensen* case involved an automobile rather than a truck. But a case involving the hiring of a car may well serve as precedent for a case involving the hiring of a truck. Annot., 17 A.L.R.2d 1388, 1393 (1951).

31. *Travelers Ins. Co. v. Sindle*, 186 F. Supp. 8 (W.D. Ark. 1960); *Brun v. George W. Brown, Inc.*, 289 N.Y.S.2d 722 (Sup. Ct. 1968) (under the exclusion in both cases, the insurer was not liable while the vehicle was "being used in the business of any person or organization to whom the automobile is rented. . . .").

32. *Johnson v. Angerer*, 160 Ohio App.2d 16, 240 N.E.2d 891 (1968) ("insurance did not apply while vehicle was being used in the business of any person or organization to whom the vehicle was rented. . . .").

nance case, the courts consider the lease and the wording of the particular lease exclusion, but the cases turn on which party has control over the vehicle. If the lessor has control at the time of the loss, the lessor's insurer is generally liable.<sup>33</sup>

#### B. THE EQUIPMENT LESSOR

The case of *Keithan v. Massachusetts Bonding and Insurance Co.*<sup>34</sup> points up some basic distinctions between the contractor-type lessor and the equipment lessor. The equipment lessor's interest centers in the equipment itself rather than the service offered by the equipment and its operator. As was true in *Keithan*, the equipment lessor generally contracts to furnish a substitute unit to the lessee for any leased equipment temporarily out of service. Moreover, the equipment lessor usually services the leased vehicles in his own facility. The equipment lessor is geared to provide rentals on a daily, weekly or monthly basis without drivers. On the other hand, a lease contract is generally long-term with drivers furnished.

In *Keithan*, an accident occurred while one of the equipment lessor's mechanics was returning a crippled tractor to the garage for repairs. The

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33. In *Carriers Ins. Co. v. Griffie*, 357 F. Supp. 441 (W.D. Pa. 1973), a bobtail operator was directed by the lessee-carrier to proceed to a garage for inspection prior to picking up a load. While at the station, the bobtail operator injured the plaintiff. Since at the time of loss the bobtail, (1) was bearing the carrier's name and ICC number, (2) was at the garage selected by the carrier under the carrier's directions, and (3) was operating under a three-year lease which provided that during its continuance, "vehicles shall be in the exclusive possession, use and control" of the lessee carrier, the insurer of the bobtail operator was relieved of liability.

In a case where the lessor's driver left the lessee's prescribed route in order to effect repairs, the Ohio Court of Common Pleas held that as between the liability policies of the lessee carrier and the lessor, the lessor's policy must respond for damages. *Smith v. Massachusetts Bonding and Ins. Co.*, 142 N.E.2d 307 (Ohio Comm. Pleas 1957). The lessor had trip-leased to the carrier for a single load of steel. When the truck broke down, the lessor instructed his driver to leave the carrier's loaded trailer, reverse directions and effect repairs. The lessor was liable since his driver had made a clear and complete deviation from the scope of the lessee's business. The lessor's insurance policy in this case (as well as in *Griffie*, *supra*) excluded liability "while the automobile is being used in the business of any person or organization to whom automobile is rented."

The bobtail operator's policy in *Protective Ins. v. Dart Transit Co.*, 293 Minn. 402, 197 N.W.2d 668 (1972), on the other hand, contained the following exclusion: "No coverage is granted if the equipment is operating under orders of any trucking company." The insured bobtail operator had collided with another vehicle while en route to a garage for repairs. The Minnesota Supreme Court held that the bobtail operator's policy covered the loss. The bobtail operator's insurer argued that since the lease imposed a duty to maintain upon the lessee, the lessor was necessarily operating under the lessee's "orders." The court strictly construed the above-quoted exclusion and rejected the argument.

34. 159 Conn. 128, 267 A.2d 660 (1970).



court held that the lessor's policy, which did not apply while vehicles were rented or leased to others, covered the lessor's employee as an insured.

In a case applying Texas law,<sup>35</sup> the Tenth Circuit Court of Appeals faced an equipment lessor which had leased a truck to a firm named Sonoco Products Company. The policy covering the equipment lessor contained the common provision that insurance would not apply "while the automobile is used as a public or livery conveyance."<sup>36</sup> This clause has generally been construed to exclude the insurer's liability when the vehicle is used indiscriminately to haul members of the public for a consideration, but the Tenth Circuit construed the provision as excluding the insurer's liability while the vehicle was leased.<sup>37</sup> The court noted that under Texas law, "the car rental business was essentially the same as the old livery stable where horses and vehicles were kept for hire."<sup>38</sup>

### C. LESSOR HAULING FOR HIMSELF

*Ayers v. Kidney*<sup>39</sup> is a case construing the most restrictive of the lease exclusions. When the owner-operator in *Ayers* purchased his liability policy, he was engaged primarily in leasing his vehicle under contract. Accordingly, the lessor's insurer issued him a bobtail policy with liability excluded "while the automobile or any trailer attached thereto is used to carry property in any business."<sup>40</sup> At the time of the loss, the insured was hauling coal in conjunction with his own business. Under a rigid construction of a harsh exclusion, the Sixth Circuit Court of Appeals held that the above-quoted exclusion relieved the lessor's insurer of liability.

### D. TRIP LEASES

The trip lease situation raises a new element. In the contractor or equipment lease, the lessor is usually not a property carrier for hire. But in the trip lease situation, the lessor is often a motor carrier that has its own

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35. *Sonoco Products Co. v. Travelers Indem. Co.*, 315 F.2d 126 (10th Cir. 1963).

36. *Id.* at 128.

37. *Smith v. Stonewall Cas. Co.*, 212 Va. 765, 188 S.E.2d 82 (1972); *American Fidelity Fire Ins. Co. v. Pardo*, 32 App. Div.2d 536, 299 N.Y.S.2d 521 (1969).

38. *Sonoco Products Co. v. Travelers Indem. Co.*, 315 F.2d. 126,128 (10th Cir. 1963). This line of Texas authority belongs in the days of the horse and buggy and should be overruled. First, the plain language of the quoted policy provision does not exclude the normal lease and rental of vehicles. Consequently, the insured is misled as to the extent of coverage afforded by his policy. Second, the plight of the lessor who has been able to persuade his insurer to eliminate the lease exclusion from his policy should be considered. He quite reasonably assumes that he is now covered while leased. But in the event of an accident, he may find his insurer denying coverage on the strength of the above-quoted exclusion, which appears in virtually all automobile liability insurance policies. Thus, there is no reason to continue such a construction of the exclusion.

39. 333 F.2d 812 (6th Cir. 1964).

40. *Id.* at 813. Heretofore, the lease exclusions encountered did not relieve the insurer of liability while the lessor hauled on his own, as opposed to hauling "for hire."

state or ICC permit to operate as a property carrier for hire. If not subject to ICC regulation, the trip lease may be exactly that—a lease for a single trip. The utility of such a lease stems from the fact that “deadheading” or “dead hauls” are eliminated. A “dead haul,” of course, is the unprofitable situation where the property carrier has lined up a load for only one leg or a round trip and must return empty.<sup>41</sup>

Generally, the same rules of law that govern the contractor or equipment lease also govern the trip lease situation. But, the ICC has imposed a number of restrictions on the practice of trip leasing. Most importantly, the ICC requires leases to be of a minimum duration of thirty days<sup>42</sup> and requires lessees to assume complete responsibility for the equipment during the lease term.<sup>43</sup> Lessee-carriers have attempted to avoid the substance of this provision by executing a thirty-day lease whereby the lessee assumes responsibility for the leased vehicle only while cargo is actually being hauled. Such a lease is void, however, since in effect it contemplates the kind of one-way lease prohibited by the substantive requirements of the ICC regulations.<sup>44</sup>

The interaction of trip leasing with the lease exclusion was examined in *Prickett v. Hawkeye-Security Insurance Co.*<sup>45</sup> The issue presented by the case was whether a loss occurring while the tractor was trip-leased was covered by the lessor's liability policy. Although the precise wording of the exclusion is not set out in the opinion, “[t]he substance of the endorsement was that the insurance should not inure directly or indirectly to the benefit of any lessee or bailee, or his employees or agents. . . .”<sup>46</sup> The court held that the policy provision did not excuse the insurer from liability since it did not mention in express language a trip lease or trip lease arrangement.

#### E. SUMMARY

Generally, the lease exclusion in the lessor's insurance policy excludes coverage whenever the lessor relinquishes control of the insured vehicle by renting to another party. The reason for this is that insurers tend to exclude coverage of those aspects of a risk that are either

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41. For further information about trip leasing, see *American Trucking Ass'n. v. United States*, 344 U.S. 298 (1952), and HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, MOTOR CARRIERS-TRIPLEASING, H. R. REP. NO. 2425, 84th Cong., 2d Sess., reprinted in [1956] U.S. CODE CONG. & AD. NEWS 4304.

42. 49 C.F.R. §1057.4(a)(3)(1967).

43. 49 C.F.R. §1057.4(a)(4)(1967).

44. *Duke v. Thomas*, 343 S.W.2d 656 (St. Louis Ct. App. 1961) (consequently, the lessee motor carrier had control over the lessor-driver on the empty return trip and was liable for a loss occurring during the return trip).

45. 282 F.2d 294 (10th Cir. 1960).

46. *Id.* at 301.

unknown or that present too great an exposure to loss. As an example, consider a truck owner who hauls groceries fifty miles from a warehouse to the truck owner's grocery store. The truck owner's insurer knows the nature of its risk and can charge the truck owner a premium with some degree of confidence that the premium is commensurate with the exposure. But if the same truck owner also held his truck out for lease, then the insured vehicle could be used for hauling explosives one day, a flammable cargo the next day, and so on. Unless the insurer excludes such indiscriminate rental, thus forcing an insured to report variations from the originally reported usage of the vehicle, the insurer may end up underwriting exposures which it had no desire to cover.

#### V. THE LESSEE'S LIABILITY

Consistent with the common law principles governing liability of the lessor, the lessee is liable at common law when it has the right to control the driver of the leased vehicle.<sup>47</sup> Liability may be imposed upon the lessee because of provisions in the lease agreement.<sup>48</sup> Moreover, where a lessor motor carrier trip leases to a lessee carrier, both carriers may be jointly and severally liable under a joint enterprise theory.<sup>49</sup>

In an effort to insulate itself from liability, the lessee often asserts the defense that the lessor is an independent contractor.<sup>50</sup> Under the doctrine of respondeat superior, it is axiomatic that an employer is not liable for the negligence of an independent contractor.<sup>51</sup>

If however, the lessee is required to have a state or ICC permit, liability

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47. *Braden v. Turner*, 284 F. Supp. 379 (E.D. Tenn. 1968) (applying Tennessee law); *Iowa National Mut. Ins. Co. v. Coltrain*, 143 F. Supp. 87 (M.D.N.C. 1956); *American Fidelity & Cas. Co. v. Johnson*, 336 S.W.2d 351 (Ky. 1960) (lessee's agent gave instructions to driver and lease placed direction and control of truck under lessee); *Tindall v. Perry*, 283 S.W.2d 700 (Ky. 1955) (lessee had the actual and potential control of lessor's truck and driver).

48. *Beers v. Indianapolis Forwarding Co.*, 43 Ill. App. 2d 303, 193 N.E.2d 473 (1963) (lessee contracted to accept full responsibility. This provision made lessee liable even when its hired driver had swapped trailers so that lessee's driver was no longer pulling lessee's trailer); *American Fidelity & Cas. Co. v. Johnson*, 336 S.W.2d 351 (Ky. 1960) (lease placed direction and control of truck under lessee); *Brown v. Park Transp. Co.*, 382 S.W.2d 467 (Mo.App. 1964) (lessee solely liable since it had failed to purchase insurance in violation of lease agreement).

At first glance, it is surprising that there are not more cases holding the lessee liable because of its contractual obligations under the lease. Practical considerations explain this dearth of cases. In the typical truck lease, the lessee is in a position to proffer its own form lease on a "take-it-or-leave-it" basis. Consequently, few leases contain a provision under which the lessee agrees to assume liability. When the lease does play a determinative role in a case, it is usually a situation where the lessor has agreed to indemnify or hold the lessee harmless.

49. *Werner Transp. Co. v. Dealers Transport Co.*, 102 F. Supp. 670 (D. Minn. 1951), *aff'd*, 203 F.2d 549 (8th Cir. 1953), discussed in *Annot.*, 34 A.L.R.2d 1121 (1954).

50. *Venuto v. Robinson*, 118 F.2d 679 (3rd Cir. 1941).

51. *Costello v. Smith*, 179 F.2d 715 (2nd Cir. 1950); *Hodges v. Johnson*, 52 F. Supp. 488, 490 (W.D.Va. 1943).

is imposed upon a lessee even if the lessor is an independent contractor.<sup>52</sup> An individual or a corporation carrying on an activity for which the law requires a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused by the activity.<sup>53</sup> Naturally, the leased vehicle's driver must be operating within the scope of his employment.<sup>54</sup>

#### B. LESSEE'S LIABILITY UNDER THE ICC

Pursuant to 49 U.S.C. § 304 (1970), the ICC adopted a regulation requiring an ICC-authorized carrier and the leased unit's owner to execute a written contract<sup>55</sup> which "[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. . . ."<sup>56</sup> Of course, the regulation's requirement cannot be altered by the lease.<sup>57</sup>

In construing this regulation, the courts have stressed an intent to protect the public,<sup>58</sup> prevent accidents, and provide financially responsible defendants. Courts have also noted an intent to ensure that interstate operations would be supervised directly by persons familiar with federal safety regulations and amenable to the ICC's jurisdiction,<sup>59</sup> and put the use and operation of leased vehicles on a parity with equipment owned by the authorized carrier and operated by its own employees.<sup>60</sup> Furthermore, the regulation eliminates the independent contractor concept from lease arrangements<sup>61</sup> and, in effect, makes the leased unit's driver a statutory

52. RESTATEMENT (SECOND) OF TORTS §428 (1965).

53. *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967); *Kaplan Trucking Co. v. Lavine*, 253 F.2d 254 (6th Cir. 1958); *War Emergency Co-op. Ass'n. v. Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *Venuto v. Robinson*, 118 F.2d 679 (3rd Cir. 1941); *Griffith v. George Transfer and Rigging, Inc.*, 201 S.E.2d 281 (Sup.Ct.App. W.Va. 1973).

54. *Kaplan Trucking Company v. Lavine*, 253 F.2d 254 (6th Cir. 1958), *Griffith v. George Transfer and Rigging, Inc.*, 201 S.E.2d 281 (Sup.Ct.App. W.Va. 1973)(court sustained jury determination that lessor taking leased tractor home for repairs was within scope of employment); *Louis v. Youngren, Jr.*, 12 Ill.App.2d 198, 138 N.E.2d 696 (1956) (substantial deviation from scope of employment did not exist even though loss occurred away from most direct route suggested by lessee).

55. 49 C.F.R. § 1057.4(a)(2) (1975). For a history of the ICC's rules covering truck leasing, see *Christian v. United States*, 152 F. Supp. 561 (D.Md. 1957).

56. 49 C.F.R. § 1057.4(a)(4) (1975).

57. *Vance Trucking Co. v. Canal Ins. Co.*, 249 F. Supp. 33 (D. S.C.) *aff'd*, 395 F.2d 391, *cert. denied*, 393 U.S. 841 (1961) (omission of provision from lease does not excuse lessee of liability for the negligent driver); *Duke v. Thomas*, 343 S.W.2d 656 (St. Louis Ct. App. 1961)(lessee liable even though lease provides for the lessor's assumption of control after delivering the cargo).

58. *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969).

59. *Alford v. Major*, 314 F. Supp. 979 (N.D. Ind. 1970).

60. *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968).

61. *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974).

employee of the lessee.<sup>62</sup>

As Judge Francis of the New Jersey Supreme Court held in the leading case of *Cox v. Bond Transportation, Inc.*:

The statute, 49 U.S.C. § 304(e) and the regulations based thereon, when applicable, eliminate the common law distinction between an independent contractor and an employee. They create a type of statutory employment under which the franchised carrier becomes responsible for the negligence of the owner-operator at least when he is engaged in the activities of the carrier. In view of the public policy expressed by the regulations it can be argued persuasively that even when owner-operated equipment is leased by a carrier, the exclusive possession, control and use thereof, and "complete" assumption of responsibility imposed on the carrier for the "duration" of the lease, subjects it to liability for the lessor's negligent operation so long as the lessor is on the public highway with the permission of the carrier.<sup>63</sup>

Despite this seemingly cautious approach, Judge Francis and others have been liberal in imposing liability upon the lessee, even in cases where the leased vehicle was being operated for the personal use of the lessor's driver.<sup>64</sup> And some courts have gone so far as to hold that when an ICC lessee has relinquished control of the leased unit, the lessee is still liable until it has both removed its identifying markings and decals from the leased unit<sup>65</sup> and obtained a receipt for the equipment.<sup>66</sup>

### C. LIABILITY UNDER INTERLINE AND INTERCHANGE AGREEMENTS

In *Gilbertville Trucking Co. v. United States*,<sup>67</sup> the U.S. Supreme Court outlined the nature of and distinctions between "interlining" and "interchanging":

"Interlining" is the practice whereby a carrier, whose certificated routes do not reach the shipment destination, transfers the shipment to another carrier for delivery. "Interchanging" is a form of interlining whereby the two interlining carriers switch trailers at the point of transfer. An interchange is most common where the shipment involves a truckload quantity, and the

62. *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969), *cert. denied* 395 U.S. 935.

63. *Id.* 53 N.J. at \_\_, 249 A.2d at 589.

64. *Id.* See generally *Felbrant v. Able*, 80 N.J. Super. 587, 194 A.2d 491 (1963) (driver "off further service" to attend ailing wife). *But see* *Schmidbauer v. Baltimore & Pittsburgh Motor Exp. Co.*, 228 Md. 637, 181 A.2d 325 (1962) (lessee not liable where owner-operator, between interstate movements, was returning from movie to bunk room).

65. *Mellon Nat'l. Bank and Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961) (The lessee is liable even if it had instructed the driver to remove the decals.); *Leota v. Plessinger*, 8 N.Y.2d 449, 171 N.E. 2d 454, 209 N.Y.S.2d 304 (1960).

66. *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961). The receipt required is provided for in 49 C.F.R. § 1057.4(b) (1967).

67. 371 U.S. 115, 121 (1962). See also C. TAFF, *COMMERCIAL MOTOR TRANSPORTATION*, 219-221 (4th ed. 1969).

exchange of trailers obviates the necessity of unloading the shipment from the trailer of the transferor and loading it on the trailer of the transferee. The trailer taken in exchange for the shipment-trailer may be either empty or loaded with an interline shipment in the other direction. A further form of interlining involves the use of a trip-lease for the transferee's leg of the journey. There the shipment-trailer is taken by the transferee, but no trailer is given in exchange; instead the transferor will lease the shipment-trailer to the transferee for the completion of the trip.

Equipment interchanges are often difficult to distinguish from trip leases.<sup>68</sup> When the ICC regulations are applicable, the distinction is crucial. If a court finds the arrangement to be a trip lease, liability of the parties is governed by 49 C.F.R. §1057.4 and the lessee will probably be held liable.<sup>69</sup> But if the arrangement is viewed as an equipment interchange, the governing ICC regulation is 49 C.F.R. §1057.5.<sup>70</sup> Since 49 C.F.R. §1057.5 does not contain a provision making the lessee completely responsible, the case result is dictated under common law principles.<sup>71</sup>

#### D. SUMMARY

In considering the liability of the lessee, the rules of allocation applied by the courts seem needlessly complex. As an illustration, consider the following hypothetical case. First, an accident victim sues a lessee on the theory that the lessee had the right of control over the negligent contractor. The accident victim asserts that even so, the lessee is liable under Restatement of Torts §428. The lessee contends that §428 should not be applied because the case is governed by the ICC regulations. Further disputes could revolve around whether the lessee was subject to the ICC regulations and if so, whether he had relinquished control to the lessor, removed his decals or received a receipt for the leased vehicle. Such a convoluted framework for solving the simple problem of who should compensate the accident victim should be replaced by a rule of joint and several liability such as is proposed in the conclusion to this article.

#### VI. LIABILITY OF THE LESSEE'S INSURER

Insurance companies have, at various times, adopted conventions which are designed to simplify resolution of liability questions and thus

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68. Compare *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973)(trip lease) with *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill. 1974)(interchange).

69. *Simmons v. King*, 478 F.2d 827 (5th Cir. 1973).

70. *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill. 1974).

71. *Id.* (lessor liable by virtue of its lease agreement to indemnify the lessee). Accord, *Aetna Insurance Company v. Newton*, 456 F.2d 655 (3rd Cir. 1972) (the court referred to the lessor as the "initiating carrier" and the lessee as the "receiving carrier"); and *St. Louis Fire & Marine Ins. Co. v. Aetna Ins. Co.*, 283 F. Supp. 40 (S.D. W. Va. 1968) (lessor and lessee held jointly liable by the state trial court).

eliminate costly litigation. Rule 29 is such a convention. Under Rule 29 many insurance companies agreed that the lessee's insurer should have primary coverage. If one of the insurers is not a signatory to the convention, however, then resort to customary settlement methods is required.<sup>72</sup>

In contrast to truck lessors, many of which are individuals owning a few trucks, lessee motor carriers generally operate large fleets. Due in part to the premises liability hazards generated by the truck terminals necessary for dispatching, servicing and storing fleet vehicles, fleets have greater liability exposures. Accordingly, the lessee carriers usually purchase more inclusive policies such as the comprehensive general liability policy (with automobile liability coverage included or purchased separately), the gross receipts policy, or the retrospective rating policy.

Given the uncertainty and complexity of the law governing truck leasing, one wonders why the lessee doesn't resolve this problem by naming the lessor and its drivers as additional insureds under its liability policy. There are, however, practical considerations that militate against this solution. First, the lessee's insurer is reluctant to accept an additional exposure to loss over which it has little control. Assume, for example, that in addition to hauling for the lessee, the lessor makes hauls for another motor carrier or even hauls on its own. By naming the lessor as an additional insured, the insurer would be insuring an operation unrelated to the business of its own insured and possibly more hazardous.

But most important, such unrestricted coverage of the lessor would deprive the insurer of meaningful control of the exposure. With its own insured, the insurer knows its exposure, through the insurance application, the agent's report, investigations reports and its engineer's evaluation. Through these devices, the insurer can ascertain such task factors as the mileage radius in which the lessee operates, the commodities hauled and the routes traveled. Based on its evaluation of these risk factors, the insurer can charge a premium commensurate with the risk it is asked to underwrite. But unrestricted coverage of the lessor as an additional insured would allow the lessor to haul such things as explosives, without the insurer's knowledge and would obligate the insurer to respond for losses it had no intention of underwriting.

The lessee, however, is often a very large motor carrier, and hence a potentially desirable and profitable insured. Since an insurer often goes to great lengths to keep a desirable insured happy, one must wonder why the lessee cannot persuade its insurer to name the lessor as an additional insured. The answer perhaps lies in the fact that the additional exposure to loss caused by the unqualified addition of the lessor as an insured will

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72. Ahlers, *Lessor-Lessee Liability As Common Carriers by Motor Vehicle*, 22 INS. COUNS. J. 162 (1955).

lead, in theory, to higher losses. Higher losses, in turn, will cause the insurer to increase the premium of its insured lessee. Since the lessee doesn't want to see an increase in the costs of his already expensive insurance, he is usually sympathetic to his insurer's position.

#### A. INSURANCE PROVISIONS COVERING HIRED AUTOMOBILES

When a motor carrier leases trucks from another party, it must make certain that its liability for the leased trucks is insured. There are two commonly encountered endorsements regarding the extension of policy coverage to hired automobiles. An example of the first reads:

The insurance with respect to any person or organization other than the named insured does not apply:

(d) with respect to any hired automobile to the owner thereof or any employee of such owner; . . .<sup>73</sup>

The endorsement was construed by the District of Columbia Circuit Court of Appeals as follows:

The intent is clear: if an injured party sues the named insured . . . and recovers, the insurance company will be liable; but if he brings suit solely against the owner of a hired vehicle . . . the company assumes no responsibility either to the owner of the vehicle or to the injured party.<sup>74</sup>

In short, the lessee's insurer will incur liability only if the injured person prevails in an action against the lessee.<sup>75</sup>

The second commonly encountered endorsement reads:

The insurance with respect to any person or organization other than the named insured does not apply:

(d) With respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority, or (2) after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return of the automobile . . .<sup>76</sup>

As a corollary to the latter policy provision, a lessor and its driver are insured while the leased vehicle is being used exclusively in the business of the lessee carrier.

73. National Mut. Ins. Co. v. Liberty Mut. Ins. Co., 196 F.2d 597, 599 (D.C. Civ. 1952).

74. *Id.*; Annot., 32 A.L.R.2d 573 (1963).

75. *Chesher v. United States Cas. Co.*, 303 N.Y.S.2d 589, 105 N.E.2d 99 (1952).

76. *Cosmopolitan Mutual Ins. Co. v. White*, 336 F. Supp. 92, 100 (D. Del., 1972).



*B. EXCLUSIVE USE IN THE LESSEE'S BUSINESS*

Under the second endorsement, there is one overriding issue in determining whether the lessor and his driver are insureds under the lessee's policy. If the leased vehicle was in the "exclusive use" of the lessee's business at the time of the loss, then the lessee's insurer is required to defend a suit against the lessor and/or its driver. The leased vehicle is being used exclusively in the lessee's business if it is en route to pick up cargo for the lessee<sup>77</sup> or hauling freight for the lessee.<sup>78</sup> Similarly, the lessee's complete control over all aspects of a trip warrants a finding that the lessor-driver was operating exclusively in the lessee's business.<sup>79</sup> Exclusive use is found even when the use at the time of loss could only be characterized as beneficial to the lessee.<sup>80</sup>

The Court of Appeals for the Seventh Circuit decided a case where a loss occurred while the leased tractor was en route to a garage for repairs and while in between trips for the lessee.<sup>81</sup> In holding that the lessee's insurer must respond for damages, the court stressed: "1) the lease's prohibition of personal use by the lessor; 2) the lease's requirement that the lessor hold the tractor in readiness for the carrier's service; and 3) the duty imposed by the ICC upon the lessee to maintain the tractor 'in safe and proper operating condition'"<sup>82</sup> and to assume complete responsibility for the tractor.<sup>83</sup> The court stated that the lessee's duty to maintain the tractor "in safe and proper operating condition" could not be delegated so as to relieve the lessee of liability.<sup>84</sup>

The preceding cases show how courts and juries tend to extend the

77. Johnson v. Angerer, 16 Ohio App.2d 16, 240 N. E.2d 891 (1968).

78. Walter v. Dunlap, 368 F.2d 118 (3rd Cir. 1966).

79. Transit Cas. Co. v. Gator Systems, Inc., 445 F.2d 813 (5th Cir. 1971).

80. Hartford Accident & Indem. Co. v. Allstate Ins. Co., 5 Ohio App.2d 287, 215 N.E.2d 416 (1966)(Lessor was on Fourth of July layover at home when he struck another vehicle while en route to his cousin's to obtain grease for his "fifth wheel," the slotted disc at the rear of a tractor for coupling a tractor to a semi-trailer. The "fifth wheel" was not necessary for operating the tractor, but was necessary for coupling the tractor to one of the lessee's trailers. Since this item of maintenance was not part of the maintenance agreed to by the lessor, the lessee's insurer was ordered to defend against the lawsuit.); Annot., 31 A.L.R.2d 298 (Supp. 1975); Cosmopolitan Mut. Ins. Co. v. White, 336 F. Supp. 92 (D.Del. 1972) (Although loss occurred while lessor was hauling for another, the lessee was aware of, assisted, and encouraged its lessors to "hustle" loads on their own when the lessee was unable to provide work. By so doing, the lessee offered added inducement to its lessors to continue in the lessee's service.).

81. Freed v. Travelers, 300 F.2d 395 (7th Cir. 1962).

82. *Id.*, at 398 (citing GENERAL ORDER OF THE ICC, 49 C.F.R. § 1962) (1959).

83. *Id.*, (citing GENERAL ORDER OF THE ICC, *Ex Parte* No. MC43, 49 C.F.R. § 207 *et seq.*). The rule is now embodied in 49 C.F.R. § 1057.4(a)(4).

84. *Id.* For other cases holding generally that the lessee's insurer provided coverage, see Continental Casualty Co. v. American Fidelity & Cas. Co., 159 F. Supp. 311 (S.D. Ill. 1958), *modified*, 186 F. Supp. 173 (S.D. Ill. 1959); American Transit Lines v. Smith, 246 F.2d 86 (6th Cir. 1957).

protection afforded by the "deep pocket"—the lessee and its liability insurance policy. Nevertheless, there are cases that relieve the lessee's insurer from liability. The lessor will not be considered an additional insured under the lessee's policy, for example, when the lessor is hauling for another carrier at the time of loss.<sup>85</sup> Such use is not exclusive use in the business of the named insured, the lessee.

### C. AUTHORIZED ROUTE

In most cases a finding that the leased vehicle was used exclusively in the business of the named insured, will be decisive. However, many endorsements require that in order to be an additional insured, the lessor must also be operating "over a route the named insured is authorized to serve by federal or public authority."<sup>86</sup> The importance of this provision is illustrated by *St. Louis Fire & Marine Insurance Co. v. Aetna Insurance Co.*<sup>87</sup> In *St. Louis*, the lessor of "initiating carrier" gave the driver permission to bypass an interchange point provided for in an equipment interchange agreement. As a result of ignoring the interchange point, the trip exceeded the authority granted by the ICC both to the lessor ("initiating carrier") and the lessee ("receiving carrier"). Consequently, the initiating carrier and its driver were not additional insureds under the receiving carrier's policy.

### D. BACK HAULS

In (d)(2) of the second endorsement, set out above, the lessor and its drivers are not additional insureds under the lessee's policy "after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return of the automobile." In *Allstate Insurance Co. v. Liberty Mutual Insurance Co.*,<sup>88</sup> the court gave effect to the preceding policy provisions, thus relieving the lessee's insurer of liability. Although the lease in *Allstate* was for a term of one year, the lease provided that:

The terms of this lease as to any unit involved shall be considered effective when such vehicle is so delivered and shall be considered terminated when such vehicle is released.<sup>89</sup>

Thus, the one-year lease contemplated the making of one-way, single-trip contracts. Since the loss occurred while the lessor's driver was returning

85. Compare *Wellman v. Liberty Mut. Ins. Co.*, 496 F.2d 131 (8th Cir. 1974) with *Cosmopolitan Mut. Ins. Co. v. White*, 336 F. Supp. 92 (D. Del. 1972).

86. See, e.g., *Cosmopolitan Mut. Ins. Co. v. White*, 336 F. Supp. 92, 100 (D. Del. 1972).

87. 283 F. Supp. 40 (S.D.W. Va. 1968).

88. 368 F.2d 121 (3rd Cir. 1966).

89. *Id.*, at 123.

after completing a trip for the lessee, the lessee's insurer was not liable for a judgment against the lessor.<sup>90</sup>

## VII. INDEMNITY AGREEMENTS

An example of an indemnity or "hold harmless" agreement is found in *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*:

The Lessor agrees to reimburse the Lessee for any payment made on account of any accident, claim, or suit arising out of the operation of said equipment during the term of this lease.<sup>91</sup>

Because the lessee generally occupies a superior bargaining position, indemnity agreements usually run against the lessor and in favor of the lessee. Nevertheless, indemnity agreements are enforceable at common law.

For situations subject to the regulation of the ICC, there was a split in the circuit courts as to whether an indemnity agreement was enforceable.<sup>92</sup> In *Transamerican Freight Lines, Inc. v. Brada-Miller Freight Systems, Inc.*,<sup>93</sup> the Supreme Court resolved this split by holding that such indemnity agreements did not contravene the regulations of the ICC.

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90. Unless exempted, lease arrangements such as this could be voided as violations of the ICC's requirement that leases be of a minimum 30-day duration, stated in 49 C.F.R. § 1057.4(a)(3) (1967). However 49 C.F.R. § 1057.4(a)(3)(ii) (1975) exempts car carriers from this requirement and both lessor and lessee in this case were interstate car carriers. See also *Duke v. Thomas*, 343 S.W.2d 656 (St. Louis Ct. App. 1961).

For cases holding generally that the lessee's insurance policy afforded no coverage, see *Keithan v. Massachusetts Boarding and Ins. Co.*, 159 Conn. 128, 267 A.2d 660 (1970), Annot., 49 A.L.R. 2d 694 (Supp. 1975) and 50 A.L.R.2d 458 (Supp. 1975), and *Iowa Nat'l. Mut. Ins. Co. v. Coltrain*, 143 F. Supp. 87 (M.D.N.C. 1956). For a case holding that the lessor's and lessee's policies provided concurrent coverage, see *Security Ins. Co. v. Pioneer Cas. Co.*, 449 S.W. 2d 158 (Tex. Civ. App. 1969). Although the lessor was not named as a party defendant, the lessor's insurer was held liable since the lessee was an omnibus insured under the lessor's policy. The court further held that in a case where concurrent coverage existed, the pro rata clause applied instead of the excess coverage provisions. See also *Continental Cas. Co. v. American Fidelity & Cas. Co.*, 159 F. Supp. 311 (S.D. Ill. 1958), modified, 186 F. Supp. 173 (S.D. Ill. 1959).

91. 190 Neb. 231, 207 N.W.2d 368, 369 (1973).

92. Compare *Alford v. Major*, 470 F.2d 132, (7th Cir. 1972) (indemnity agreement unenforceable) with *Allstate Ins. Co. v. Alterman Transp. Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972) and *Carolina Freight Carriers Corp. v. Pitt County Transp. Co.* 492 F.2d 243 (4th Cir. 1974) (indemnity agreement enforceable). But c.f. *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100, 102 (6th Cir. 1974).

The Seventh Circuit later upheld an indemnity agreement, stating that *Alford* was "inapposite" and that an indemnity agreement "serves a useful purpose and must be upheld." *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill. 1974), *aff'd*, 525 F.2d 538, 540 (7th Cir. 1975).

93. 96 S.Ct. 229 (1975). The facts before the Court involved an indemnity agreement between two authorized motor carriers. Accordingly, the applicable ICC regulation was 49 C.F.R. § 1057.3(a) (1967), which required the lessee to assume "control and responsibility" for the equipment.

## VIII. SUBROGATION

An insurer that has paid its insured's liability may be able to shift its loss through subrogation. Where the lessee's insurer paid a judgment arising from the negligence of the lessor's driver, for example, subrogation may entitle the lessee's insurer to indemnification from the lessor's insurer.<sup>94</sup> Even when the lessee is liable because of 49 C.F.R. §1057.4, the lessee's insurer is entitled to reimbursement from a party otherwise liable by virtue of the common law or the lease agreement.<sup>95</sup> Moreover, the lessee's insurer is subrogated to the rights of its insured even when its policy contains the ICC endorsement providing for the insurer's liability for "final judgment" against its insured.<sup>96</sup>

However, an insurer's subrogation rights may be barred. If the lessee agreed in the lease to provide liability insurance, for example, neither the lessee nor its insurer has a right of indemnity against the lessor.<sup>97</sup> Furthermore, an initiating carrier's promise in an equipment interchange agreement to indemnify the receiving carrier deprives the initiating carrier's insurer of its right of subrogation.<sup>98</sup> Lastly, the lessee's insurer cannot recover by right of subrogation from the lessor or the lessor's driver where the lessor and driver were deemed additional insureds under the lessee's policy.<sup>99</sup>

## CONCLUSION

It should be thus apparent that the present state of the law is unsatisfactory to the lessor, the lessee, and their insurers. The confusion and uncertainty generated by the complicated rules of allocation preclude the parties from ascertaining the limits of their liability. As a result, the lessor and lessee can't be sure that they've adequately insured their liability risks. The insurers, moreover, are forced to spend far too much in litigating their rights against other insurers.

And from the standpoint of the accident victim, the present state of the law is also unsatisfactory. Since either the lessee, the lessor, or the driver may be solely liable, the victim encounters two barriers to recovery. First, the victim may sue the wrong defendant. For example, assume a

94. *Pacific Nat'l. Ins. Co. v. Transport Ins. Co.*, 341 F.2d 514 (8th Cir. 1965)(driver was covered by the lessor's policy as an omnibus insured) Annot., 39 A.L.R. 3d 1439 (1965).

95. *Aetna Casualty and Surety Co. v. Security Ins. Co.*, 267 A.2d 582 (Del. Sup. Ct. 1970).

96. *Kramer v. American Fidelity & Cas. Co.*, 165 A.2d 924 (D.C. Mun. Ct. App. 1960).

97. *War Emergency Co-op Ass'n. v. Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *American Fidelity and Cas. Co. v. Simmons*, 153 F. Supp. 658 (M.D.N.C. 1957), *aff'd*, 253 F.2d 634 (4th Cir. 1958).

98. *Aetna Ins. Co. v. Newton*, 456 F.2d 655 (3rd Cir. 1972). Consequently, the initiating carrier's insurer was not liable for loss assumed by its insured.

99. *Miller v. Kujak*, 4 Wis. 2d 80, 90 N.W.2d 137 (1958)(based on the principle that an insurer cannot recover from its own insured on either a theory of indemnity or subrogation).

situation where the lessee is solely liable. Suit against the lessor would be both unproductive and potentially disastrous in that the statute of limitations may bar a subsequent suit against the lessee. Proper joinder of parties, of course, eliminates the problem of suing the wrong defendant.

The second barrier to recovery is an unsatisfied judgment. The risk of an unsatisfied judgment is particularly great when the lessor or driver is solely liable, since the lessor (and driver) tend toward a weak financial position with few assets. The chances for recovery are slim when the owner-operator involved has as his only asset a heavily mortgaged tractor rig.

In addition, lessors (particularly owner-operators) are notorious for failure to have liability insurance in effect at the time of an accident. The reasons for this phenomenon include:

- a) poor finances;
- b) mistaken beliefs that they don't need their own liability insurance;
- c) the policy's renewal premium falling due while the lessor is on the road; or
- d) a general distaste for "paperwork" like paying insurance premiums on time.

As a result, the accident victim may face a defendant with no insurance and no assets from which to satisfy a judgment.

Even if insurance is in effect, the liability limits may be inadequate. Worse yet, the negligent party (particularly the owner-operator or the lessor's driver who is solely liable by virtue of being on a frolic) may disappear. If the negligent party is solely liable and has fled the jurisdiction, the victim cannot obtain a judgment and hence cannot reach the insurer. Of course, the preceding problems could also occur with the lessee who is solely liable.

As a solution to these problems, states should adopt a statute with the following provisions. First, the statute should make the driver, the lessor, and the lessee jointly and severally liable. Second, the statute should require lessees to carry insurance naming lessors and their drivers as additional insureds. The practical effect of such a statute is to shift liability losses to the lessee's insurer and to eliminate the need for the lessor to purchase insurance. The lessor would only need insurance when he hauled on his own in addition to hauling for the lessee.

In addition, the statute would largely eliminate the risk of an unsatisfied judgment. A judgment would remain unsatisfied only if the lessee's insurance was ineffective (lapsed or voided by some action by the insured) or if the assets of the driver, lessor, and lessee were inadequate to satisfy the judgment. Moreover, simplification of this area of the law is not the least of the advantages to be gained from the proposed statute.

There are, of course, a number of objections to such a statutory scheme. One of the first objections that comes to mind is the resultant disparity between the motor carrier's liability in the lease context and the regular master-servant context. If the proposed statute were adopted, the motor carrier would be liable when the lessor-driver was off on a frolic, whereas the same motor carrier would not be liable for its own employee when the employee is off on a frolic.

This disparity presents a logical inconsistency. But to the extent that this inconsistency is intolerable, it should be cured by adding an owner-consent or owner's liability provision to the statutory scheme. When a non-lease situation is involved, the owner-consent provision would make the vehicle's owner liable for the negligence of a person legally operating the car with the permission, express or implied, of the owner. Thus in both the lease and nonlease situations, the motor carrier would be liable for a driver off on a frolic.

Although the owner-consent provision cures one disparity, there remains a larger one. Motor carriers can and will object to the inequity of carving out the trucking industry as an exception to the respondeat superior doctrine. Why should a motor carrier be liable for a drunken driver en route to a red light district while a general contractor, for example, is not?

It can be answered that it is equitable to treat the trucking industry as an exception. The many sources available to the trucking industry for screening drivers make the industry chargeable for poor driver selection even when the cause of loss is a driver's drunken frolic.

First, the motor carrier can check the employment record of all drivers in its service through former employers. Such employment checks will often turn up a history of drinking on the job. If the former employer is also a trucker (which would usually be the case unless the driver is very young), there would be a record of the driver's accidents. Other trouble spots such as a lack of cooperation, a poor attitude toward safety, or a tendency to abuse the equipment should also turn up in an employment check.

Second, the motor carrier can obtain motor vehicle records on any drivers who might drive rigs in the motor carrier's service. Every state provides these records upon presentation of the driver's name, license number, date of birth, and a nominal service fee (generally from \$2 to \$6). Such records vary in quality from state to state, but generally a record of the driver's traffic citations and, in many cases, his traffic accidents are listed. Most automobile insurance companies base their rates and eligibility requirements on such records since there's an understandable correlation between the number of past accidents and citations and the probability of future accidents. And a driver who is prone to drinking on the

job will, more often than not, have a motor vehicle record that shows "drive-while-intoxicated" or "open-bottle" citations.

Third, the motor carrier can usually call upon the expertise of its insurer's engineering department. The insurer's engineer is only too happy to inspect the personnel files of the drivers in the carrier's service. A conscientious insurer will even order and evaluate motor vehicle records for the carrier. Moreover, the insurer's engineer will also inspect the logs and charts that are completed when the driver is on the road. Careful inspection of these materials will often expose a driver who is dishonest, loafing on the job, or who has a poor safety attitude. One of the most important safety contributions provided by the insurer is road reports of the motor carrier's vehicles while observed on the highway.

Lastly, when a motor carrier has accrued some experience with a driver, the carrier has the benefit of his own personal evaluation. The value of such observation varies in accordance with the degree of supervision exercised by the carrier. To the extent that the driver is inadequately supervised, the risk of loss caused by the driver should rest with the motor carrier.

As for the motor carrier's insurer, which will bear the brunt of the liability losses, the proposed statutory scheme would at least eliminate some of its mounting litigation expenses. More importantly, the additional losses could be absorbed through higher premiums charged against insured motor carriers. In turn, the motor carrier could shift some of its increased insurance expenses to the lessor by lowering the lessor's percentage of the freight revenue. The remaining expense would be shifted to the public through higher freight rates. And since lessors would no longer need liability insurance, the lessor's loss in revenue would be offset in part by its savings in liability insurance premiums.

