

**“PAY NO ATTENTION TO THE MAN BEHIND THE CURTAIN:” FINDING ADDITIONAL INSURANCE WITH THE LONE WOLF TRUCKING CARRIER**

There is a famous scene in the Wizard of Oz when Dorothy and her travel companions reach the Emerald City to see the Wizard of Oz. While talking to the Wizard, they are humorously instructed, “Pay no attention to the man behind the curtain!” This is exactly what brokers and large parent trucking companies want you to do the next time you have a client catastrophically injured by a one man/one truck operation. Too often in our practices we hear the same refrain, “I have a trucking case with serious/catastrophic injuries, but the carrier is a one man operation with one tractor-trailer that is operated out of the owner’s home, and the carrier only has the minimum insurance limits.” This is the classic “Lone Wolf” operation. However, it is essential to at least “look behind the curtain” to try and find additional insurance.

The purpose of this article is to provide a brief summary of a fantastic presentation on parent company liability and broker selection from Attorney Matthew Wright at the September 2017 Ohio Association of Justice Trucking Safety Seminar. This article will only scratch the surface of this issue, and practitioners with further interest should consider attending the OAJ quarterly Trucking Safety Section meetings and the OAJ Trucking Safety Seminars, where issues such as these are frequently discussed amongst practitioners in a “roundtable” forum.

Returning to our “Lone Wolf” operator, consider the following hypothetical: Joe Trucker owns XYZ Transport. XYZ Transport has one driver and one tractor trailer. XYZ Transport is headquartered in the trailer that Joe Trucker lives in. This is our classic “Lone Wolf” small operation.

Joe Trucker and XYZ Transport has a long and sordid history of receiving violations and being placed out of service by the Federal Motor Carrier Safety Administration (FMCSA). Trying to make a delivery deadline with a load, Joe Trucker has driven 15 hours straight on no sleep, and is using crystal meth to stay awake. He is driving 85 miles per hour, and is on his cell phone when he drifts onto the shoulder and plows into a disabled vehicle pulled off on the side of the highway. Joe Trucker causes devastating catastrophic injuries to a family of four.

You are retained to represent the family, and are quickly informed by Joe Trucker’s insurance carrier that Joe and XYZ Transport were only insured for the minimum limits of \$750,000.00. In your initial investigation, you learn that Joe was carrying an expensive load of brand new 60 inch flat screen televisions. How did seedy, unsafe, and drug using Joe Trucker and disreputable XYZ Transport land such a valuable load/job? Your eyebrows should be immediately raised.

Your attention should now be focused on the above question, “How did Joe Trucker get this load?” Many tiny carriers depend on “Load Boards” to find their work. In a “Load Board” situation, a larger motor carrier will essentially sell loads to the lowest bidding carrier. Basically, a large motor carrier will often have loads that have already been tendered by a shipper under a Master Carrier Service Agreement. Under these agreements, the large motor carrier agrees to transport a certain

amount of volume from a shipper. In this scenario, the shipper pays the large reputable motor carrier the big bucks for a set volume of loads, and then the large motor carrier turns around and sells the load to the lowest bidder, pocketing the difference.

One can begin to sense the problems that will arise when the “lowest bidder” Lone Wolf truck driver does the driving that the shipper thought the large, safe, reputable large motor carrier was doing. It is likely that the driver who is barely scraping by living “load to load” and who is willing to race to the bottom to obtain his next load, is not likely concerned with hours of service, driver fitness and safety, truck maintenance, or compliance with the Federal Motor Carrier Safety Regulations (FMCSR).

Returning to our example, “Hoodwinked Shipping Company” thought that they were hiring the large motor carrier “Respectable and Reliant Transport” to deliver the load of TV’s with safe drivers and safe trucks. Instead, R&R Transport turned around and farmed the load out to Joe Trucker/XYZ Transport because he was the lowest bid.

This is the classic, “You can’t have your cake and eat it too scenario.” R&R Transport wants to accept the big money premium rates for a time sensitive load from the shipper, while putting the risk and liability of the actual transportation of the load on Joe Trucker/XYZ. Your strategy here should be to argue that R&R Transport did not broker this load, but is instead vicariously liable as the statutory employer of Joe Trucker/XYZ, allowing you to tap into what should surely be much more robust insurance limits.

Your ammunition for this strategy is found in multiple regulations. R&R Transport will argue that they merely brokered the load to Joe/XYZ, who was an independent contractor. In defining “Broker,” 49 C.F.R. 371.2 provides that motor carriers are not brokers when they, “arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.” Once R&R Transport became legally bound to transport the load for Hoodwinked Shipping, R&R can no longer argue that they were merely a broker.

49 U.S.C. 13102(14) defines “motor carrier” as an entity “providing motor vehicle transportation for compensation.” 49 U.S.C. 13102(23)(B) defines “transportation” as “services related to that movement, including *arranging for*, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.”

R&R Transport will argue that Joe Trucker/XYZ was a mere independent contractor, and that under state law, they cannot be held liable for Joe Trucker’s negligence. However, FMCSR 390.5 defines employee to mean, “any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an ***independent contractor*** while in the course of operating a commercial motor vehicle)...” Case law has held that the FMCSR trumps/pre-empts traditional state law agency principles. This statutory definition of employee would appear to make Joe Trucker/XYZ a statutory employee of R&R Transport.

R&R Transport wants you to maintain your focus solely on seedy Joe Trucker and XYZ Transport's shoddy operation. But if R&R Transport accepted the load from Hoodwinked Shipping and agreed to be legally bound to transport the load, they can be found to be the statutory employer and vicariously liable for the actions of Joe Trucker/XYZ Transport, their statutorily defined employee. The next time you have a trucking case with a Lone Wolf operator, be sure to peer behind the curtain and see if there is another motor carrier lurking in the background trying to hide behind the Lone Wolf operator and evade responsibility. This additional research and investigation may lead to a "Yellow Brick Road" of much more robust insurance limits.