

# An Ounce of Prevention is Worth a Pound of Cure

Understanding Direct and Derivative  
Claims Against Employers for Employee  
Negligence and How to Limit Exposure

# Introduction

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- Primary practice areas include civil defense, transportation, and contract drafting/negotiation with emphasis on risk management and allocation (i.e. Master Service Agreements)

# What are we going to talk about?

- Employer Liability for Employee Fault
  - Derivative claims
  - Employees v. Independent Contractors
- Employer Liability for Employer Negligence
  - Direct claims
    - Negligent Hiring
    - Negligent Selection
    - Negligent Retention
    - Negligent Supervision
    - Negligent Entrustment
- Policies and Procedures to Limit Exposure for derivative and direct claims
- Allocation of Risk Contractually

# DISCLAIMER

- By providing this slideshow, it is not creating an attorney-client relationship. It is offered for general informational purposes only. Its contents are not intended to be legal advice applicable to a given situation.

# Where is the risk heightened?

- Motor vehicles
  - Every time a vehicle leaves your yard, whether it's a tractor/trailer, pickup, etc., the operation of that vehicle is the employer's responsibility
- Oilfield-related operations
  - Drilling
  - Hydraulic fracturing
  - Roustabouts
  - Work-over rigs
  - Oilfield service companies

# Employer Liability for Employee Fault

- Vicarious liability, or “*respondeat superior*”
  - Based in principal-agency law
  - “[A]n employer is vicariously liable for the negligence of the an employee in the transaction of the employer’s business.” *Zimprich v. Broekel*, 519 N.W.2d 588, 590 (ND 1994)
  - Based on the employer’s “right” to control the employee’s conduct
  - Only extends to those acts done a) on the employer’s behalf, and b) with the scope of the employee’s duties
  - “Family car” doctrine: Owner of car is liable for acts of driver who is given express or implied consent to use the vehicle for business purposes

# Who is an “Employee”

- WSI Definition: [A] person who performs hazardous employments for another for remuneration unless the person is an independent contractor under the common-law test (N.D.C.C. § 65-01-02(16))
- Motor Carriers
  - Federal Motor Carrier Safety Act
    - 49 C.F.R. 390.5 *“Employee means any individual . . .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), a mechanic, and a freight handler. . . .”*

# More on the FMCSA

- FMCSA definition of “employee” creates a “fictional” employment relationship
  - North Dakota Supreme Court has specifically stated that liability for acts of an independent contractor will be determined under applicable state law. *Zimprich*, at 590.
  - There is no “strict liability” under FMCSA for all torts committed by drivers of motor carriers subject to FMCSA, even if the driver is a “statutory employee”
  - In ND, liability will be determined based on state law



# Who is An Independent Contractor?

- “Common-law” test
  - Found in Worker’s Compensation Bureau regulations
    - 20 factors
- Question of whether or not individual is an employee or IC is “question of fact”

# What difference does it make?

- For vicarious liability, employee v. independent contractor is important distinction
  - Employee: Employer is liable for negligent acts or omissions of employee if done on employer's behalf and in scope of employee's duties
  - IC: Generally, employer of IC is not liable for negligence of IC, unless the employer retains control over the IC's work; employer must retain control using reasonable care
    - How much control is "retained" control?
  - When injury caused by an independent contractor, Courts will focus on the specifics of the relationship between the employer and independent contractor

# What is the “scope of employment”?

- Vicarious liability only extends to acts done on employer’s behalf and within scope of employees duties
  - What are the employee’s duties?
    - Each position within organization should have a “job description” setting out the duties of the employee
  - Generally, intentional misconduct is not within scope of employment
  - What about employees who are on call 24 hours a day, and have an employer-provided vehicle?

# Employer Liability for Employer Negligence

- These are the “direct” liability claims
- Focus on what employer did or did not do, rather than on acts or omissions of employee or independent contractor
- North Dakota recognizes the following causes of action:
  - Negligent Supervision
  - Negligent Retention
  - Negligent Entrustment
  - Negligent Hiring/Selection

# Negligent Supervision

- Employer's have a duty to exercise reasonable care in supervision of employees to prevent "foreseeable misconduct of an employee" from causing harm to other employees or third persons
- What is "foreseeable" misconduct?
  - Conduct which, based on what the employer knows or should have known, is reasonably likely to occur
- Duty to use reasonable care in supervision includes within yard/office, employer's vehicles, areas where employer has access, etc.

# Negligent Retention

- Elements
  - Duty of care owed by an employer to a third person;
  - Breach of that duty; and
  - Injury to third person proximately caused by employer's breach
- Retention of an employee with known propensities to engage in conduct dangerous to others
  - Example: Employee gets a DUI; employer continues to allow employee to drive as part of job duties
- Employer Response
  - Discipline of employee (follow established procedures, if any, and document)
  - Remove employee from duty where known propensities are found
  - Set up a supervision plan
  - If necessary, terminate (i.e. CDL drivers who are no longer FMCSA compliant)

# Negligent Entrustment

- Occurs when employer, directly or through another, supplies a “chattel” to another that the employer knows, or has reason to know, will be likely to be used in a manner involving unreasonable risk of physical harm to himself and other
- Doctrine been applied to vehicles as well as other chattels

# Negligent Hiring/Selection

- Hiring applies to employee; Selection applies to an independent contractor
  - Negligent Hiring: Must utilize reasonable care in hiring employees
    - Focus on what employer should have known or learned during hiring process
  - Negligent selection: At the time of hiring, employer had actual or constructive knowledge that the independent contractor was incompetent
    - Employer must use “reasonable care” to employ a competent and careful contractor



# Significance of the “Direct” Claims

- In order to be liable under “vicarious liability”, the acts of employee must be within scope of employment
- With direct claims, acts of employee do not need to be in scope of employment to hold employer liable
  - Note: With a few exceptions, intentional misconduct (assault, battery, etc.) is never within the scope of employment

# Punitive Damages

- NDCC § 32-03.2-11 allows for a punitive damages in certain situations
- Exposure for exemplary (punitive) damages
  - At fault driver with DUI within five years who, at time of accident, was .08 or greater or under the influence of a controlled substance
    - Exemplary damages can be awarded against the “principal” (i.e. employer) if “agent” (employee) was unfit and the employer was reckless in employing or retaining the employee
- It is critical that employers exercise due diligence in hiring, retaining, and supervising employees, especially those who are authorized to drive motor vehicles

# “Prevention”

- Employers should take proactive steps to minimize risk of claims related to employee acts
  - If subject to FMCSA, follow ALL DOT regulations
    - Note: If you outsource DOT compliance to a third-party, make sure you carefully select DOT contractor and review work (compliance is responsibility of carrier, regardless of who does compliance work) 49 CFR 40.15 (related to drug-testing)
  - Ensure all employees are qualified to perform their job duties
  - Training should be on-going, in regular intervals, and always documented

# FMCSA Regulations on Hiring Process

- 49 CFR § 391.21 requires that every person who will drive a commercial motor vehicle provide the following information to the motor carrier:
  - Name, address, date of birth, SS#
  - Addresses where applicant resided for 3 years prior
  - Information on each unexpired CDL issued to applicant
  - Nature and extent of experience with operation of motor vehicles
  - List of all accidents within prior 3 years, including whether fatalities or personal injuries resulted
  - A list of all violations of motor vehicle laws or ordinances within prior 3 years

# Employment Application Cont.

- Circumstances surrounding any denial, revocation, or suspension of a license
- Identification of all employers for past 3 years
- If applying to operate a CMV over 26,000 lbs, must provide following:
  - List of employer's for 10 years preceding date of application, together with dates of employment and reasons for leaving

# A Quick Note on “Disqualification” Offenses

- A driver who is “disqualified” shall not operate a CMV; a motor carrier shall not permit a disqualified driver to operate a CMV
  - Disqualified during loss of CDL for any reason
  - Disqualification for criminal offenses occurring during on-duty time, including DUI with .04 or higher, DUI under state law, refusal to undergo testing
  - Driving CMV under influence of Schedule I substance
  - Violation of out-of-service orders
  - Violation of no-texting rule (49 CFR 392.80(a))
  - Violation of restriction on hand-held mobile phones

# FMCSA Driver Qualifications

- Must be at least 21 years old
- Can read and speak sufficient English to allow general conversation with public, to understand traffic signs, to respond to official inquiries, to make reports and records
- Can safely operate vehicle
- Is physically qualified
- Current valid commercial motor vehicle license
- Furnish violation certificate
- Not be disqualified under 49 CFR 391.15

# Motor Carrier Duty to Investigate

- Motor carrier, via application process, is required to investigate driving record for prior 3 years in any state where driver held a license or permit
- Investigate safety performance history with DOT regulated employers during preceding 3 years
- All records obtained must be in driver qualification file within 30 days of day driver's employment begins
- Must also investigate employment record for 3 years, and results must be in driver's qualification files



# Drug and Alcohol Testing

- For CDL Applicants
  - Pre-employment drug testing is mandatory (49 CFR 382.301)
  - Pre-employment alcohol testing: not advisable
- For CDL drivers (and other employees):
  - Reasonable suspicion
  - Post-accident
  - Random
  - Return to duty
  - Follow up

# Other FMCSA Requirements

- Required entry-level training
- Annual review of driving records
  - Document review and place in DQF
- Hours of Service
  - Require STRICT compliance with hours of service regulations, and ensure daily logs are kept
    - Precludes negligent supervision/entrustment claims (i.e. “You allowed a guy who hasn’t slept in 7 days to drive a tractor/trailer on public roadways”)
- Prohibition on Use of Cell Phones while driving
  - Should be in employer’s automobile policy
  - Do NOT require a CDL driver (or any driver) to have his/her phone on at all times and answer it

# Best Practices

- Employers should implement internal policies that satisfy or exceed the FMCSA and state law requirements for all drivers
- Regular legal review of all policies
- For all drivers, implement a training program that is required before authorized to drive
- Document all training in employee files
- Investigate all accidents (motor vehicle related or not)

# Allocation of Risk

- Master Service Agreements (“MSAs”)
  - Generally, every oil and gas company or drilling contractor will require a sub-contractor or vendor to sign these prior to doing work
  - All MSAs have “indemnity” clauses
    - What is an “indemnity” contract?
  - As a business, you should demand reciprocal indemnity from the companies you do business with
    - It is CRITICAL that you or your counsel carefully review every section of every contract you sign

# Common Types of Indemnity Clauses

- Fault-based
  - “Contractor will indemnify, defend, hold harmless Company for any claim caused by Contractor’s employees, agents, etc....”
    - Disadvantage of this type of indemnity agreement is that “causation” will be a question of fact, so parties will generally end up fighting over whose fault it is before they will accept indemnity
- Control-based
  - “Contractor will indemnify, defend, and hold harmless Company for any claim for personal injury or property arising in favor of Contractor’s employees. . . .”
    - Focus on who plaintiff is
    - Much greater certainty than fault-based
    - Fault is irrelevant (Company can be completely negligent, and if injured party is within your control, you are responsible)

# Definition of “Contractor”

- This is important nuance
- Definition of “Contractor” in MSA should include all your employees, independent contractors, etc.
- Definition of “Company” should include the Company, its employees, other contractors, etc.
- Often called the “Contractor Group” or “Company Group”

# Indemnity and Independent Contractors

- When utilizing contractors, ensure that there is a written contract, in place, with an indemnity clause
- Primary concern is injuries to third-parties caused by independent contractor
  - Won't necessarily be liable, but it is prudent to shift risk to contractor
- Depending on type of work independent contractor is doing, may want to use a fault-based indemnity clause
  - Due to possible injuries to third-parties who would not be within your "control", you want liability to lie with the at-fault party
- Independent Owners/Operators of CMVs
  - General Rule: Liability follows MC Number (and MCS 90 Endorsement)
    - 49 CFR 376.12 – Lease must state that MC assumes complete responsibility for operation of leased equipment during duration of lease
    - But that does not mean MC is precluded from requiring independent contractors from giving indemnity and obtaining insurance
      - 49 CFR 376.12(j) – Lease must state that it is MC's responsibility to obtain insurance required for protection of public; lease must also specify who is responsible for other insurance

# Insurance

- Most MSAs have insurance requirements
  - Important to have your insurance agent review to determine if additional coverage is necessary
  - Important to have counsel review to determine if required insurance is necessary based on your operations
- Insurance and Indemnity
  - While insurance is purchased to support indemnity obligations, it is a separate obligation



# Waivers of Subrogation

- MSA will require your insurer to “waive subrogation” against Company
  - Means that your insurer will not sue the Company to recover what it pays out on behalf of Company
    - Example: You have a control-based indemnity agreement with Company X. Company X employee is negligent, and injures your employee. Your employee cannot sue you (Worker’s Comp exclusivity), but he can sue Company X. Company X then “tenders” the claim to you. Your insurance kicks in and defends Company X and settles case with employee. If your insurer waived subrogation, it cannot then sue Company X to recoup what it expended

# Subrogation Cont.

- You should require that Company X waive subrogation against you as well
  - Why?
    - Because without the waiver, the indemnity obligation is fictitious
      - Example: Company X employee is injured by your employee's negligence. Company X insurer pays the settlement. However, Company X did not procure a waiver of subrogation in your favor. Company X can then sue you to recoup what it paid.

# Summary

- No way to completely prevent accidents; but you can minimize exposure related to accidents
- Be diligent in hiring and supervision
- Don't be afraid to take adverse action against an employee following misconduct (but talk to counsel first)
- Implement safety training programs
- If possible, shift the risk to other parties
- Ensure your insurance portfolio is sufficient for your business, including any risk contractually assumed

# Questions?