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## **THE BASSETT BULLETIN™**

### **TANDEM DRIVERS: IS YOUR EMPLOYEE COVERED UNDER THE POLICY?**

In *Ooida Risk Retention Group, Inc. v. Williams*, 544 F.Supp.2d 540 (N.D. Tex. 2008), a Texas Federal Court recently addressed how an insurance policy's "Fellow Employee" exclusion applies to the insurance company's obligation to defend and indemnify an employee for the death of any fellow employee arising out of, and in the course of, the fellow employee's employment.

#### **Background Facts**

This case arises out of a single-vehicle accident that killed Tony Moses ("Moses"). Moses was the sole proprietor of Slim Shady Express, a commercial motor carrier. At the time of the accident, Moses' tractor-trailer was being driven by Derrick Williams. Moses and Williams operated the tractor-trailer as a tandem team.

At the time of the accident, Williams was driving the tractor-trailer rig in Florida, when he lost control of the rig, causing it to overturn, and roll down an embankment. Moses, who was occupying the rig's sleeper berth, was crushed and killed. Moses' family members subsequently filed a negligence suit in Texas against Williams.

Ooida Risk Retention Group, Inc. ("Ooida") issued a standard Commercial Motor Carrier Policy (the "Policy") to Slim Shady Express, a federally regulated interstate motor carrier under the Federal Motor Carrier Safety Act. The Policy provided \$1 million in liability coverage for tractor-trailer rigs owned and operated by Moses. When Williams was sued, Ooida provided a defense to Williams under a reservation of rights.

Ooida filed a declaratory action in Federal Court seeking to avoid a duty under the insurance policy to either defend or indemnify William in the underlying negligence suit.

#### **Duty to Defend and Indemnify**

The question of whether an insurer has a duty to defend and indemnify is a question of law for the courts. In Texas, the insurer's duty to defend is governed by the "eight corners rule," which holds that the duty to defend is determined solely from the terms of the policy and the pleadings of the third-party claimant.

If the underlying pleading alleges facts that may fall within the scope of coverage, the insurer has a duty to defend; if, on the other hand, the pleading only alleges facts excluded by the policy, there is no duty to defend. While the duty to defend depends on the allegations in the pleadings, the "duty to indemnify is triggered by the actual facts that establish liability in the underlying lawsuit."

## **Fellow Employee Exclusion and Duty to Defend**

The critical issue in Ooida's duty to defend turns on the policy's definition of an "insured." Because the "insured" is treated as the party against whom the claim is asserted, the Court found that Williams was the "insured" covered by the policy. Because Williams was the "insured" under the policy, Ooida argued that Williams was excluded from coverage under the policy's "Fellow Employee Exclusion;" thus, Ooida owed no duty to defend Williams in the underlying negligence lawsuit.

The "Fellow Employee Exclusion" of Ooida's policy excluded coverage for:

"Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

The Court found that Williams was, at a minimum, an independent contractor paid by Moses for the work on a load-by-load basis. Using the definitions of "employer" and "employee" found in the Federal Motor Carrier Safety Act, the Court found that Williams was an "employee." Furthermore, under the Federal Motor Carrier Safety Act, because Moses was a sole proprietor operating a motor vehicle, Moses was also an "employee."

Because Moses was driving in tandem with Williams on this trip, Moses and Williams were fellow employees as defined in the policy. As such, Ooida had no duty to defend Williams for the bodily injury to his fellow employee, Moses.

## **MCS-90 and Duty to Indemnify**

Because the duty to defend and the duty to indemnify are two completely separate duties, the Court then turned to the issue of whether Ooida owed Williams a duty to indemnify for any judgment.

An additional endorsement included in the Ooida policy was the "MCS-90" Endorsement, which is required by Federal law. The policy's MCS-90 Endorsement reads:

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere.

Such insurance is afforded for public liability; however, it does not apply to the injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. The "insured" under this policy exclusion is "the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation;" instead of Williams.

Because Williams was an “employee” of Moses, he did not fall within the statutory definition of the insured protected under the MCS-90 Exclusion. Thus, Ooida owed no duty to indemnify Williams for any judgment against Williams for the death of Moses.

## **What Does This Mean For You?**

First and foremost, this ruling applies directly to causes of action by one employee for the death of another employee. This case was special because the sole proprietor, Moses, was defined as both an employee and employer for the purposes of the insurer’s duty to defend and indemnify.

The danger of this opinion is the consequences if the roles were reversed, if Moses had caused the death of his employee, Williams. In that situation, Moses may not have been afforded a defense or indemnification under the insurance policy.

In order to protect your company, we have put together a few points that every trucking company must look at:

Review your insurance policy. If your policy contains a “Fellow Employee Exclusion,” consider negotiating with your agent out of this exclusion. While the premiums may be a bit more expensive, you will not be left high and dry when you are not provided a defense or indemnification.

This opinion makes it clear that both an owner-operator and an independent contractor can be “employees” of the company under the Federal Motor Carrier Regulations. It is important that you draft a clear contract with your owner-operators that establishes that they are not “employees” in other instances, such as under Workers’ Compensation insurance.

A sole proprietor operating as both the motor carrier and the driver should consider forming a business organization, such as a corporation or a limited liability company, to reduce liability and protect the individual for the company’s negligence.

If you have any questions on how to better protect your business in light of this ruling, contact The Bassett Firm, and we will guide you through the issues.

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