TAYLOR & ASSOC.
ATTORNEYS AT LAW

THE LOGISTICS LAWYER

FOURTH QUARTER 2012

ROUTES TO GETTING PAID

A Case Study in Motor Carrier Avoidance of Deadbeat Construction Contractors in Florida[1]

By J.W. Taylor, Esq.[2] and Bridgette M. Blitch, Esq.[3]

Contracts for the transportation of materials to construction projects come with at least some risk of not getting paid. This is nothing new and is not a problem isolated to the provision of motor carrier services to construction projects. However, under Florida law, motor carriers to construction projects have mechanisms available to them that improve the odds of getting paid that motor carriers involved in other types of hauling do not enjoy. These routes to getting paid are payment bonds and construction liens.

Payment Bonds

A payment bond is a surety bond posted by a general contractor to guaranty that his or her subcontractors and material suppliers on the project will be paid. Under Florida law, general

Continued on page 2

CAN YOU HEAR ME NOW?

Employers May Remain Exposed to Liability for Driver Cell Phone Use Despite Regulatory Compliance[1]

By Brian K. Mathis, Esq.[2]

In January 2012, the Federal Motor Carrier Safety Administration (the "FMCSA") amended its regulations to restrict the use of hand-held mobile telephones by drivers of commercial motor vehicles ("CMVs").[3] Specifically, the amendment bans the use of hand-held mobile telephones by drivers while driving a CMV and prohibits motor carriers from allowing or requiring its drivers to do so, except when necessary to communicate with law enforcement personnel or emergency services.[4]

The FMCSA amendment imposes civil penalties of

Continued on page 4

& LATEST NEWS

J.W. Taylor was featured as a speaker at the **CIC Truckers II Seminar** in Houston, Texas on September 2. He discussed Contractual Considerations and Industry Impact of the New $75k Property Broker Bond.

Continued from page 1

ROUTES TO GETTING PAID

contractors performing work on any county, city, or other government property (except, in most cases, federal property) are required to post a payment bond. Fla. Stat. § 255.05. Further, general contractors performing work on private property and owners of private property may also post a payment bond to avoid construction liens and foreclosures, but are not required to do so by law. Fla. Stat. § 713.23.[4] Payment bonds can provide a motor carrier an avenue to obtain payment from an uncooperative or potentially insolvent general contractor.

The right of a motor carrier to recover on a payment bond was confirmed in Weaver Aggregate Transport, Inc. v. WSD Site Development, Inc. et al., Case No.: 2008 CI 626 (Fla. 9th Cir. Ct. September 9, 2008) (a case handled by J.W. Taylor). In that matter, WSD (a subcontractor) provided construction site development services to a general contractor on a construction project on private property (the property being constructed in the Weaver case was a pharmacy). The general contractor had posted a payment bond on the property.

Weaver did not contract directly with the general contractor. Rather, Weaver was hired by the subcontractor, WSD, to haul aggregate (fill dirt and rock used to form foundations) directly to the construction project.[5] On the recommendation of counsel, Weaver filed a Notice to Owner, Notice to Contractor and Notice of Non-Payment in accordance with requirements of Section 713.23, Florida Statutes (which deals with payment bonds related to construction projects on private property).[6]

After Weaver complied with the Notice to Owner, Notice to Contractor and Notice of Non-Payment requirements for private property, and neither WSD nor the surety company paid the freight charges, Weaver filed suit against both entities seeking payment under the payment bond. WSD and the surety company argued that motor carriers cannot make claims under construction payment bonds under Florida law. Weaver argued they were a subsubcontractor because they performed hauling services directly to the construction project for a subcontractor to the project's general contractor, and therefore, were entitled to payment under the bond.

The Circuit Court for the Florida's Ninth Judicial Circuit agreed with Weaver, finding that it could collect under the payment bond because it made direct delivery to the construction project. The Court saw Weaver's direct delivery to the construction project as a central fact to its holding that Weaver was a subsubcontractor. The Court entered judgment in Weaver's favor under the payment bond, meaning that Weaver recovered all that it was owed for freight, including finance charges and attorney's fees. Before this case, no known Florida court had held that motor carriers can collect under construction payment bonds.

While the Weaver case did not address this issue, it is conceivable that a motor carrier who provides indirect transportation services for a subcontractor on a construction project may also be able to recover payment under a payment bond. Of course, any such determination

Continued on page 3

Continued from page 2

ROUTES TO GETTING PAID

will be fact intensive, and a motor carrier should carefully discuss this matter with qualified counsel before concluding that recovery under a payment bond is possible. Further, assuming it is possible, the Notice to Owner, Notice to Contractor and Notice of Non-Payment requirements of Florida law for recovery under payment bonds (summarized in the table below) would have to be met.

While payment bonds are typically filed in both public and private construction projects, we have found, through our practice, that this route to payment is not well known in the motor carrier industry. A motor carrier can determine if a payment bond exists by obtaining a copy of the Notice of Commencement from the general contractor. Do not rely on the subcontractor to determine if the payment bond exists, and do not rely on the subcontractor for proper mailing address for notices under the payment bond statutes. This information should be obtained directly from the payment bond on file for the project.

Construction Liens

Another route to payment is construction liens under Sections 713.06 and 713.08, Florida Statutes. A construction lien creates a foreclosure risk on property that is generally unacceptable to property owners and general contractors. Construction liens are asserted through Notices to Owner, Notices to Contract and Claims of Lien. The requirements are summarized in the table below.

Construction liens are a more indirect method of payment than a payment bond. Construction liens create leverage that can influence reasonably prompt payment from the property owner and general contractor. In the absence of payment, the lienholder may file an action in court to foreclose on the lien. Success in such an action permits the lienholder to force a sale of the property at auction. However, the lienholder would take secondarily to superior lienholders (e.g., the bank, if any, that financed the overall construction of the property).

Few things in life are certain. A motor carrier's ability to recover under payment bonds or constructions liens is not one them. However, under Florida law, motor carriers to construction projects have routes to payment that should not be overlooked. If you have any questions, please do not hesitate to contact us. &

BONDED PROPERTY

(County, City or Other Government)
Fla. Stat. § 255.05

Notice to Owner	Notice to Contractor	Notice of Non-Payment
Not required (government is statutorily exempt from claim for payment)	Must be served: 1. Before beginning work; OR 2. No later than 45 days after the last date of labor furnished.	May be served at any time during the progress of the work, or thereafter, but: 1. Not before 45 days after the first furnishing of labor, services, materials, AND 2. Not later than 90 days after the final furnishing of the labor. Must be served on the contractor and surety.

Continued on page 4

Continued from page 3

ROUTES TO GETTING PAID

BONDED PROPERTY

(Private)

Fla. Stat. § 713.23

Notice to Owner	Notice to Contractor	Notice of Non-Payment
Must be served: 1. Before beginning work OR 2. No later than 45 days after the last date of labor furnished.		Must be served no later than 90 days after the final furnishing of labor. Must be served on the contractor and surety.

PRIVATE PROPERTY – NOT BONDED

Fla. Stat. §§ 713.06, 713.08

Notice to Owner	Notice to Contractor	Claim of Lien
Must be served: 1. Before beginning work OR 2. No later than 45 days after last date of labor is furnished but, in any event, before the date of the owner's disbursement of the final payment after the contractor has furnished his/her notice of final payment affidavit.		No later than 90 days after final labor is performed. Must be served on the owner and contractor.[7]

[1] This article is intended for informational purposes only. It is not intended and should not be treated as legal advice or as a legal opinion. It is not possible to craft an article that applies uniformly to all situations and/or facts. Further, this article is not intended as legal advice or a legal opinion on the various requirements of Florida law for successful claims under payment bonds or successful efforts to recover through assertion of construction liens. For specific advice or for a specific opinion regarding your specific situation and/or facts, please contact us or other qualified counsel.

[2] Bridgette M. Blitch is an associate with Taylor & Associates, Attorneys at Law, P.L. Over the past four years, Mrs. Blitch has had the honor of practicing with J.W. Taylor, and focuses her practice on freight charge claims, cargo claims, household good claims, as well as counseling clients on regulatory compliance issues with the Federal Motor Carrier Safety Administration and safety provisions of the Department of Transportation. Mrs. Blitch has also successfully defeated claims brought by U.S. Customs, Florida Department of Revenue and other state and local agencies for code violations. In addition to these areas, Mrs. Blitch offers best practices and business development counsel to passenger and property carriers, household good carriers, brokers, shippers and entities up the supply chain. Prior to working for Mr. Taylor, Mrs. Blitch was the Editor in Chief of the Transportation Law Journal.

[3] Mr. Taylor is a business law / commercial litigation attorney focusing on transportation and logistics law. He represents transportation and logistics companies in matters of claims litigation, including personal injury litigation and ADR, cargo claims and contract disputes. Mr. Taylor represents these clients in corporate restructuring, insurance design, equipment financing and risk management matters as well. In addition to litigation, Mr. Taylor's practice includes restructuring corporate clients for compliance with Federal and State Regulation and statutes in order to meet underwriting requirements, as well as reducing risk exposure

Continued on page 5

Continued from page 4

ROUTES TO GETTING PAID

across the supply chain. He is a frequent lecturer at conferences throughout the nation.

[4] In order to protect the property from liens, payment bonds must be in at least the amount of the general contractor's contract price. Fla. Stat. § 713.23(1)(a).

[5] Like other subsubcontractors (a contractor to a subcontractor of a construction general contractor), motor carriers need not have a contract with the property owner or the general contractor in order to assert a claim under the payment bond. Fla. Stat. § 713.02.

[6] The Notice to Owner, Notice to Contractor and Notice of Non-Payment requirements are different under Florida law for government property. The requirements for making timely Notices to Owner, Notices to Contractor and Notices of Non-Payment regarding private and government property are strictly construed and are summarized in the table in this article.

[7] Failure to serve any Claim of Lien in the manner provided in section 713.18 (Manner of serving notices and other instruments) before recording or within 15 days after recording shall render the Claim of Lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service. Fla. Stat. § 713.08(4)(c).

Continued from page 1

CAN YOU HEAR ME NOW?

$2,750.00 on drivers and $11,000.00 on motor carriers for violations of the new regulations.[5] The amendment further implements new sanctions disqualifying drivers of CMVs for violations of the new regulations and disqualifying holders of commercial driver's licenses for multiple violations of state or local laws restricting the use of hand-held mobile telephones.[6]

The FMCSA amendment, which follows its 2010 ban on texting by drivers of CMVs while operating in interstate commerce,[7] is intended to further improve safety on national roadways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs.[8] As noted in its final ruling, the FMCSA in enacting the amendment recognized the recent trend in state and local traffic laws restricting the use of hand-held mobile telephones.[9]

A recent Texas case, however, raises concerns whether employer cell phone policies compliant with federal and state laws may still leave the employer exposed to liability for cell phone use by employees while driving.[10] In that case, a jury awarded a $21 million verdict against Coca-Cola Refreshments USA, Inc. ("Coca-Cola") for injuries to a woman whose automobile was struck by a Coca-Cola employee driving a company-owned vehicle while talking on a hands-free device.[11]

The lawsuit alleged that the Coca-Cola driver cell phone policy was vague, ambiguous, and more

importantly, unenforced.[12] During the case, the Coca-Cola employee testified that she was unaware of the risks involved in using a cell phone while driving, and that she would not have done so had she been made aware of the dangers.[13]

Continued on page 6

Continued from page 5

CAN YOU HEAR ME NOW?

Coca-Cola argued that its driver cell phone policy complied with Texas law, and that the employee driver was using a hands-free device in accordance with company policy.[14] The jury, however, sided with the plaintiff and handed down a verdict that included $10 million in punitive damages.[15]

The Texas case highlights a trend in distracted driving cases. While a large percentage of drivers admit to using cell phones while operating automobiles,[16] verdicts in distracted driving cases present a stark disconnect between behavior jurors may excuse from themselves and behavior jurors may find inexcusable from others, particularly where employers are involved.[17] As a result, "everybody does it" has shown to be ineffective as a defense.[18] Moreover, jurors appear eager to award large verdicts to push employers to adopt a complete ban on cell phone use.[19] Coca-Cola, in fact, asserts that its verdict was in response to a request by plaintiff's counsel to the jury to ban cell phone use while driving.

Given the possibility of exposure, what actions can an employer take to minimize its liability?

First, an employer must understand and appreciate the full extent of its exposure.[20] Under the legal doctrine of respondeat superior, an employer is generally liable for negligent employee actions if the employee was acting within the scope of his employment.[21] However, in today's business environment, the line between employment-related and personal activities is blurred. For example, employer liability for distracted driving has arisen in cases involving both employer-provided and employee-owned cell phones. Employer liability is also seen in cases involving an employer's owned or leased vehicles as well as an employee's personal vehicles.[22] Employer liability may also occur during non-work hours or even when the employee is using a cell phone for personal calls. As a result, it is imperative that employers understand the laws of the forums in which it will be operating and recognize the scope of potential liability beyond the traditional employer-employee relationship.[23]

Second, an employer must implement an effective cell phone policy. Effective policies will contain a clear policy statement and directives to employee drivers.[24] Policies drafted in language only other attorneys may understand will only confuse employees.[25] Additionally, an effective policy must be communicated within the company from the top down. The employer should distribute the policy through multiple media approaches, such as newsletters, personal meetings, and company intranet.[26] Employers should also consider using acknowledgments or certifications stating the employee is aware of the policy and will comply, or even require the employee to sign a policy statement each time the employee checks out a cell phone or vehicle. The key for employers is to focus on training and re-training employees as with any other safety policy or program.

Finally, it follows that an employer must actively enforce its policy. Changing individual behavior requires a sustained effort. An employer that does not enforce its

Continued on page 7

Continued from page 6

CAN YOU HEAR ME NOW?

cell phone policy may be worse off than having no policy in place. Enforcement actions, such as written warnings or revocation of company cell phones or vehicles, should be made known to employees beforehand and consistently applied. Employers may also consider technological enforcement, including usage and "trigger" software or secure management portals. Alternatively, an employer should consider reward and recognition programs to foster employee compliance with the employer policy.

Banning the use of cell phones while driving in accordance with federal and state regulation may not be sufficient to shield the employer from liability. When an accident occurs and your driver was using a cell phone, plaintiff's attorneys will scrutinize driver cell phone records as well as the implementation and enforcement of your cell phone policy. While you may be forced to defend your cell phone policy to an unsympathetic jury eager to send employers a message regarding employee cell phone use while driving, the price of remaining as free as possible from damaging verdicts may be little more than preventative measures with qualified counsel. Consequently, pre-accident implementation of best safety practices concerning cell phone use provides an employer its best defense to potential exposure for liability related to distracted driving by employees. &

[1] This article is intended for informational purposes only. It is not intended and should not be treated as legal advice or as a legal opinion. For legal advice or opinion regarding a specific issue or circumstance, please contact our office or other qualified counsel.

[2] Brian K. Mathis is an associate with Taylor & Associates, Attorneys At Law, P.L. Mr. Mathis focuses his practice upon transportation and logistics, commercial litigation, corporate structuring and business transactions, and regulatory compliance.

[3] "Commercial motor vehicle (CMV)" means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

(1) Has a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is greater; or

(2) Has a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 pounds or more), whichever is greater; or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of hazardous materials as defined in this section.

49 C.F.R. § 383.5 (2011).

[4] 49 C.F.R. § 392.82 (2011).

[5] 49 C.F.R. § Part 386, App. B (2011).

[6] 49 C.F.R. § 391.15(f) (2011); 49 C.F.R. 383.51, Table 1 (2011).

[7] 49 C.F.R. § 392.80 (2011).

[8] Drivers of CMVs: Restricting the Use of Cellular Phones, 76 Fed. Reg. 75,470 (Dec. 11, 2011) (to be codified at 49 C.F.R. Pts. 383, 384, 390, 391, 392).

[9] Id. Presently, ten states and the District of Columbia have traffic laws prohibiting the use of hand-held mobile telephones while driving. Governors Highway Safety Association, Cell Phone and Texting Laws, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html

[10] Megan O'Rourke, Coca-Cola Hit with a $21 Million distracted Driving Judgment, The National Law Review, May 20, 2012, http://www.natlawreview.com/article/coca-cola-hit-21-million-distracted-driving-judgment

[11] Id.

[12] Id.

[13] Insurance Journal, Jury Awards $24M to Woman Hit by Driver in Texas on Phone, May 27, 2012, http://www.insurancejournal.com/news/southcentral/2012/05/07/246574.htm.

[14] Id.

Continued on page 8

Continued from page 7

CAN YOU HEAR ME NOW?

[15] Id.

[16] A recent Harris Interactive poll shows that 59% of drivers polled admitted to using a cell phone without a hands-free device, while 43% of drivers admitted to using a hands-free cell phone. Harris Interactive, Most U.S. Drivers Engage in "Distracted" Behavior: Poll. http://www.harrisinteractive.com/NewsRoom/PressReleases/tabid/446/ctl/ReadCustom%20Default/mid/1506/ArticleId/924/Default.aspx.

[17] Ashley Halsey III, Employees Use of Cellphones While Driving Becomes a Liability for Companies, The Washington Post, May 20, 2012, http://www.washingtonpost.com/local/trafficandcommuting/employees-use-of-cellphones-while-driving-becomes-a-liability-for-companies/2012/05/20/gIQAFia2dU_story.html.

[18] Id.

[19] Id.

[20] The National Safety Council, Employer Liability and the Case for Comprehensive Cell Phone Policies 8, April 26, 2012, http://www.nsc.org/safety_road/Distracted_Driving/Documents/CorpLiability_wp.pdf.

[21] Id.

[22] Id. at App. B.

[23] Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance, or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with. [49] C.F.R. § 392.2.

[24] Cell Phone Policies Revisited After $21.6M Judgment, The Voice Report, August 20, 2007 at 5.

[25] Id.

[26] Id.