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**Put the Brakes on**

# 4 CURBS!



By || **KATHERINE E. HARVEY-LEE**

# DEFENSE

Poor oversight and easily manipulated licensing laws make it simple for ‘curbside’ bus companies to hide from lawsuits. With careful discovery, attorneys can identify the corporate owners and obtain compensation for accident victims.

# Bus Abuse

**A** double-decker Megabus tour bus with 29 passengers took a wrong turn and hit a railway bridge in Salina, N.Y., killing four passengers and injuring dozens. The driver had missed multiple signs warning of the upcoming low bridge ahead.

A tour bus operated by World Side Tours crashed on an interstate in New York, killing 15 passengers and severely injuring at least 19 others; many suffered amputations and other similarly horrific injuries. The crash was found to have been the result of driver fatigue.

A commercial tour bus run by Sky Express with 58 passengers veered off an interstate and overturned on its roof near Carmel Church, Va., killing four and severely injuring dozens, many critically. Driver fatigue was cited as the cause of the accident.

The common denominator of these crashes is that the buses were operated by “curbside” carriers that offer cheap fares—but little in the way of safety—to their customers. Many budget curbside carriers conduct business in a shadowy and shifting manner, making it difficult for regulators to estimate how many are

actually in operation. The motor coach industry transports more than 700 million passengers a year in the United States, roughly the same as domestic airlines.<sup>1</sup> Some estimates show curbside carriers constituted perhaps as few as 71 of a total 4,172 interstate motor coach carriers in 2011,<sup>2</sup> but the budget curbside carrier business, like the entire motor coach industry, is expanding. Intercity motor coach service has been described as the fastest growing form of passenger transportation during the past few years.<sup>3</sup>

Despite the popularity of this mode of transport, investigators and regulators have found budget carriers pose significant dangers, including:

**Driver qualification.** Companies fail to ensure their drivers are qualified or fit for the job. Medical offices and commercial driving “schools” rubber-stamp and even cheat to provide Commercial Driving Licenses (CDLs) to drivers who often don’t speak English, have insufficient qualifications, and may be medically unfit.

**Driver fatigue.** Working too many hours is often demanded by the owners and operators of curbside carriers, who make a profit through volume. These

companies require drivers to handle routes without necessary rest periods, in violation of Department of Transportation (DOT) regulations.

**Lack of safety equipment and poor equipment.** Many buses are old, with poorly repaired and maintained seats and other interior hazards.

**Lack of adequate compensation available to injured victims.** The minimal amount of required insurance will likely fall far short of the actual damages in a crash, and few operators carry more insurance than is required.

Curbside carriers may comprise a relatively small percentage of the motor coach transport industry, but they have higher accident death rates and out-of-service rates resulting from driver fitness violations.<sup>4</sup> They are also overrepresented in driver logbook violations.<sup>5</sup> Nevertheless, the insurance and regulatory framework governing this industry allows these budget carriers to operate almost with impunity, given the lack of available inspectors to regulate them and their ability to reincarnate (shut down operations of one company, repaint the buses, and then reemerge as a “new” carrier). When catastrophe occurs, there

are substantial challenges in obtaining adequate compensation for the victims. Consequently, attorneys should consider a number of issues and practical steps when faced with the task of obtaining sufficient compensation for the victims of these carriers.

### Identify the Primary Operator

Finding the correct low-fare bus operator and holding it accountable can be, as federal regulators have found, a little like an unhappy game of “whack-a-mole.” Typically, these bus companies reorganize themselves multiple times to hide prior accidents or avoid federal investigations by simply reopening for business under a different name or in a different location. It costs only \$300 to obtain interstate operating authority, so many have multiple affiliated companies that share similar ownership and can transfer buses and assets at will. In fact, the buses belonging to such companies are known in the industry as “ghost” buses because they are typically painted almost entirely white with little decoration, making it easier to repaint them with a new company name.

The first step is to look at the photographs of the accident scene. Does the bus look like a ghost bus? The initial investigation must start with the search for the corporate entity responsible for the bus's operation, which may be no easy task. It is helpful to work with federal and state investigators. With these types of companies, time is of the essence. In a large accident, the National Transportation Safety Board (NTSB)

will likely conduct an investigation. Law enforcement may be able to access information concerning these companies and cut through the red tape faced by attorneys pursuing civil matters.

Obtaining this information does not end the search, however. Federal and state regulators report that data on the motor carriers' MCS-150 form is often inaccurate, especially among curbside carriers.<sup>6</sup> Investigators have found low-cost curbside operators with multiple DOT numbers, and the “owners” or “operators” of these businesses often meet regulators and investigators at outside locations, making it difficult for law enforcement to confirm the actual owner or operator involved.

The search for corporate records may require combing through numerous states as the carrier may be registered in a state different from the one in which it regularly operates. Motor coach operators can legally “shop” for state registrations and CDLs, and they typically register in states with less stringent oversight and weaker license laws. In 2011, the Federal Motor Carrier Safety Administration (FMCSA) issued a final rule to standardize CDLs among states, but the compliance date is in 2014.<sup>7</sup>

Nevertheless, a careful and thorough search of records can typically uncover the corporate entity responsible for the bus's operation at the time of the accident and, ultimately, an insurance policy for that company. However, the operator often carries only the minimum required insurance coverage of \$5 million. When deaths and critical injuries number in the

dozens, this minimal amount of insurance is inadequate, and the search must continue for other responsible parties.

### Cast a Wider Net

It is critical to determine the possible existence of less obvious culpable parties. Although this challenge is particularly important when dealing with a budget curbside carrier with insufficient insurance coverage, the following parties should always be considered in any bus-related accident.

**Leasing companies.** When a motor carrier needs additional drivers or vehicles, and at times when a carrier cannot obtain the necessary insurance or authorization to operate due to past violations, a carrier may partner with another motor carrier or company to lease its vehicles and drivers. Maintenance may or may not be included in the lease. These leases can be informal and unwritten agreements. Current FMCSA regulations apply only to leasing motor vehicles for for-hire interstate transportation of property, such as freight and other goods.<sup>8</sup> The FMCSA provides no oversight for leasing agreements among motor coach carriers.

For example, in 2008, motor coach company Capricorn Bus Lines, Inc., was unable to secure the mandatory insurance due to multiple safety violations and thus was unable to operate as an interstate passenger carrier. Capricorn “leased” its vehicles and drivers to another motor coach company, International Charter Services, Inc., which then permitted Capricorn to use the “leased”



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vehicles and drivers to conduct its own line runs under International Charter's insurance and operating authority.<sup>9</sup> After an accident involving a Capricorn driver, International Charter was a named defendant in the ensuing lawsuit.<sup>10</sup>

**Brokers.** Many budget curbside carriers use ticket brokers like GoTo Bus.com for ticket sales. In fact, they are far more likely than conventional bus services to use such agencies. "A review of online brokerage services showed that 72 percent of curbside carriers use such services to sell their tickets compared with 22 percent of conventional carriers."<sup>11</sup> The motor carrier industry does not require disclosure of the actual bus operator when the ticket is bought, which prevents passengers and others from evaluating the bus operator's safety record or characteristics.

It is unclear what responsibility if any these agencies have for ensuring the ticketed bus services are reasonably safe or even legally operated, although brokers have been implicated in certain circumstances.

A 2005 accident near Wilmer, Texas, involved nursing home patients being transported during Hurricane Rita on a bus provided through a charter operation set up by a bus broker, Global Charter Services, Ltd., doing business as the BusBank. The BusBank website indicated that the company had "a comprehensive bus operator qualification process," but the NTSB found that the BusBank did not perform due diligence to ensure the safety of its charter operators.<sup>12</sup> The plaintiffs settled with the broker for failing to investigate the bus operator's safety qualifications.<sup>13</sup> While not a broker per se, a casino, tour operator, senior care facility, or nursing home that hires the carrier for the trip, either directly or through a broker, may be liable for failing to carry out a reasonable inquiry to determine whether the carrier is safe.<sup>14</sup>

**Alter egos.** Most litigators are familiar with the headaches in establishing alter ego liability. The 20 factors considered in making the determination, including commingling funds or other assets, failure to maintain adequate corporate records and/or confusing the records of the separate entities, employing the same employees and/or attorney, failure to maintain arm's length relationships among related entities, and using a corporate entity to procure labor, services, or merchandise for another entity,<sup>15</sup> read as a blueprint for how these budget carriers operate to avoid responsibility. Pursuing the alter-ego theory can turn a tort case into a business litigation case, requiring further preparation and risks. Also, even if a lawyer can establish the alter ego theory, it does not necessarily follow that the insurance policies of the alter ego or shareholders will be implicated. However, a general liability policy covering the operators of these entities may apply, depending on the policy language.

**Medical and commercial driver licensing companies.** Medical "clinics" that profit by providing quick and easy DOT medical certificates to drivers often do so without any regard to the actual medical fitness of the drivers.<sup>16</sup> Despite the NTSB's recommendations to improve medical fitness exams for bus drivers, 826 fatal crashes involving medically unqualified drivers occurred from 2002 to 2008, many with current medical certificates.<sup>17</sup> Under new federal rules, these entities may be held responsible, even though many states have held physicians have no duty of care to plaintiff-motorists where they fail to report a patient's disqualifying condition to a governmental agency.<sup>18</sup>

However, physicians who affirmatively provide a commercial driver with medical certification necessary to drive, despite knowledge of a disqualifying condition, should now be held liable. The new federal requirements

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expressly state the doctor's careful certification is required "in the interest of public safety."<sup>19</sup> Consequently, the culpability of a physician who puts the public at risk by certifying a commercial driver despite having clear evidence of serious and disqualifying health conditions is worth pursuing.

**Products Liability**

Many deaths and injuries from cut-rate carrier accidents could be avoided or at least reduced if the safety features of the buses were improved. The NTSB has issued numerous recommendations to improve motor coach safety. While some involve better driver qualification and oversight, many recommend improvements to bus safety features, including crash avoidance technologies, such as forward collision warning systems and automatic braking; strengthened roofs; improved seat anchorages; revised window glazing requirements; developing performance standards for luggage racks to prevent injury; and improved fire protection.

In the Hurricane Rita litigation, the plaintiffs named the bus manufacturer, the designer of the axle and rear wheel assembly, and a component maker as defendants.<sup>20</sup> While counsel for the bus manufacturer disputed the claims that

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the bus was unsafe, the manufacturer agreed to contribute to the settlement.<sup>21</sup> In the past, an expansive reading of federal preemption under the Supreme Court decision in *Geier v. American Honda Motor Co.*<sup>22</sup> suggested claims based on the lack of seat belts or other design defects in buses would make a products liability case untenable.<sup>23</sup>

However, the *Geier* holding has come under fire in recent years, and cases now clearly suggest a product defect action can and should be considered in bus cases.<sup>24</sup> The New York Court of Appeals recently found neither express nor implied preemption of the plaintiff claims that the defendant bus manufacturer was liable for its failure to install bus passenger seat belts by federal regulations promulgated by the National Highway Traffic Safety Administration.<sup>25</sup> The court viewed the case as falling squarely within the rationale set forth by the Supreme Court in *Williamson v. Mazda Motor of America, Inc.*<sup>26</sup> Significantly, the Court in *Williamson* examined the passage and history of new Federal Motor Vehicle Safety Standards. The *Williamson* Court rejected *Geier* insofar as it determined there was no intent by the DOT to eliminate common law tort suits merely because the agency had considered cost-effectiveness in passing its regulations.<sup>27</sup>

With any large bus accident, the litigation will likely be complex and involve numerous attorneys representing multiple victims. The task of marshalling the information necessary for success is daunting, and it is important to utilize as many resources as possible to pursue these cases. Find the other claimants and work together with counsel to share discovery tasks and the substantial costs. A joint prosecution agreement is helpful, as are frequent teleconferences among plaintiff counsel to organize efforts and benefit from the larger pool of expertise. It is particularly helpful to use the NTSB's investigatory findings. Attend the NTSB hearing if there is one and speak with the investigators.

As people rely more on budget carriers for transportation, it is important that safety and justice do not take a back seat. Despite pleas for better regulation, funding, and oversight from regulators and investigators, it is often the battles in the courtroom that spur change. Although bus accident cases can be difficult and complex, these strategies and tools, along with tenacity and some thinking outside the box, can help win battles that are worth fighting. 

*Katherine E. Harvey-Lee is an associate with Baum, Hedlund, Aristei & Goldman in Los Angeles. She can be reached at kharvey-lee@baumhedlundlaw.com.*

### NOTES

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3. Joseph P. Schwieterman & Lauren Fischer, *The Intercity Bus: America's Fastest Growing Transportation Mode: 2010 Update on Scheduled Bus Service 4* (DePaul U. Chaddick

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4. See Natl. Transp. Safety Bd., *supra* n. 2, at 42 tbl. 13, 46 Fig. 10.
5. *Id.* at 51, 64.
6. *Id.* at 53.
7. 76 Fed. Reg. 26854 (May 9, 2011). The rule took effect in July 2011; the compliance date for states is July 2014.
8. See 49 C.F.R. §376 (2011).
9. See Natl. Transp. Safety Bd., *Motorcoach Rollover on U.S. Highway 59, Near Victoria, Texas, January 2, 2008, Highway Accident Summary Report 24* tbl. 2, NTSB/HAR-09/03/SUM (2009), [www.nts.gov/doclib/reports/2009/HAR0903.pdf](http://www.nts.gov/doclib/reports/2009/HAR0903.pdf).
10. *Mendez v. Capricorn Bus Lines, Inc.*, No. 2008-02193 (Tex., Harris Co. Dist. Aug. 20, 2012).
11. See Natl. Transp. Safety Bd., *supra* n. 2, at 15.
12. See Natl. Transp. Safety Bd., *Motorcoach Fire on Interstate 45 During Hurricane Rita Evacuation, Near Wilmer, Texas, September 23, 2005: Highway Accident Report 62-63 & 107*, NTSB/HAR-07/01 (2007), [www.nts.gov/doclib/reports/2007/HAR0701.pdf](http://www.nts.gov/doclib/reports/2007/HAR0701.pdf).
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19. 49 C.F.R. §391.43 (2012); see also *Restatement (Second) of Torts* §324A (1965).
20. Langford, *supra* n. 14.
21. *Id.*
22. 529 U.S. 861 (2000).
23. See e.g. *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424 (Ariz. App. 2001).
24. See e.g. *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475 (Tex. 2010), *cert. denied*, 131 S. Ct. 2903 (2011).
25. *Doomes v. Best Transit Corp.*, 958 N.E.2d 1183, 1192 (N.Y. 2011).
26. 131 S. Ct. 1131 (2011).
27. *Id.* at 1139–40.