PURSUING THE UNINSURED EMPLOYER

by
J. William Snyder, Jr.
Kathleen Shannon Glancy, P.A.

Despite the fact that the Workers' Compensation Act mandates that the majority of employers who regularly employ three or more employees have workers' compensation coverage[1] and despite the fact that it is now a felony to fail willfully to maintain workers' compensation coverage when coverage is required,[2] it is surprising how many employers who are subject to the Act do not have the coverage required by law. Although an uninsured employer is still liable to her injured employees for workers' compensation benefits,[3] pursuing an uninsured employer for benefits for an injured employees entails many considerations not ordinarily encountered in the majority of workers' compensation claims. This article discusses many of these considerations and is intended to serve as a primer for workers' compensation attorneys who undertake the representation of the injured employees of uninsured employers.

THE REALITIES OF PURSUING A NON-INSURED ENTITY

The ordinary practice of workers' compensation and personal injury law is closely intertwined with insurance law and the insurance industry. Insurance companies specialize in managing risk and funds to cover the risks that they assume. Even self-insured employers have the resources and a degree of expertise in managing risk. Both insurance companies and self-insured employers are generally aware of what the law requires, and they generally have the liquidity to bear comfortably the risks that they undertake. Furthermore, an insurance company or self-insured employer usually pays what it is liable to pay when it acknowledges that it is liable or when it loses its denial of liability and has either decided not to appeal or has exhausted all of its appeals. Both classes also tend to be fairly deep pockets with more than adequate funds to pay most awards of benefits. Insurance companies stand to incur the wrath of the Commissioner of Insurance, who has the power to revoke their

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[1]N.C. Gen. Stat. § 97-2(1).

[2]N.C. Gen. Stat. § 97-94(d). An employer who merely "neglects" to maintain the required coverage remains only guilty of a misdemeanor. Id.

[3]N.C. Gen. Stat. § 97-95.

licenses to do business in North Carolina, for inappropriate conduct.

Unfortunately, these characteristics of ordinary workers' compensation practice are not present when dealing with an uninsured employer. More likely than not, the uninsured employer is unfamiliar with the workers' compensation process, either by choice or through shear ignorance. Unless there is a credible threat of criminal prosecution, she has few incentives to be forthcoming and cooperative when presented with a claim. If the employer is ultimately found liable for benefits by the Industrial Commission, the Commission's award has to be converted into a judgment in Superior Court, and the time-consuming and unpleasant task of judgment execution usually must ultimately be pursued to obtain recovery. If the uninsured employer is judgment proof, has been successful in shielding her assets from discovery, or declares bankruptcy, recovery may not be possible. Efforts to pursue other parties, such as insurance agents who failed to advise uninsured employers of the requirement to have workers' compensation insurance, have failed.[4]

In the past, prosecutions for failure to maintain the required coverage were exceedingly rare. However, the Commission is now actively prosecuting employers for failure to maintain the coverage required by law.[5] The Industrial

[4]In Bigger v. Vista Sales and Marketing, 131 N.C. App. 101, 102 505 S.E.2d 891, 892 (1998), the injured employee of an uninsured employer sued her employer's insurance agent for negligent failure to advise her employer to purchase workers' compensation insurance. Unfortunately, the court ruled that the agent did not have a duty to advise the employer to purchase workers' compensation insurance absent a specific inquiry from the employer. Id. at 103-06, 505 S.E.2d at 892-94. Furthermore, the court held that even if the agent did have such a duty, the plaintiff did not have standing to bring the claim because she did not show that her employer would have actually purchased coverage even if advised to do so. Id. at 106, 505 S.E.2d at 894. The court also dispensed with the injured employee's husband's claim for negligent infliction of emotional distress on the ground that mere existence of a family relationship is insufficient proof to satisfy the element of foreseeability, nor did they show that the defendants knew that he had any particular susceptibility to emotional distress. Id. at 106-07, 505 S.E.2d at 894-95.

[5]In a memo issued on January 23, 1998, the Industrial Commission stated its new procedure for handling claims against non-insured employers. In summary, the procedures require that the Fraud Investigations Section be given notice of all claims

Commission also has to power the assess civil penalties against uninsured employers, which has been frequently used in the past in some of the more egregious cases of willful and persistent failure to have workers' compensation insurance.[6] Still, assessing a judgment-proof employer with a civil penalty or putting that employer in jail does little to compensate a seriously injured employee whose earning capacity has been eviscerated by a serious on-the-job injury.

Accordingly, the first determination that must be made in deciding whether to pursue an uninsured employer is whether the employer has money or assets to pay benefits to your client. Pursuing a judgment proof employer does nothing to compensate your client and can give your client a false sense of hope. A visit to the county tax office will likely reveal whether the employer has large assets, such as real estate and vehicles, which might be sold to generate recovery for your client. However, tax listings can be misleading since such large assets are also likely to have mortgages or other security interests attached to them that may swallow-up the proceeds of any execution sale. Investment of several hundred dollars in an asset search of the employer can be especially helpful in ascertaining whether an uninsured employer has sufficient assets from which to pay an award for your client and also what large debts are owed by the employer. Your client may be personally familiar enough with the employer to know whether the employer has assets from which she you pay your client.

Willingness to pursue the execution of a judgment against an uninsured employer is required as well. As noted above, an insurance company or self-insured employer that loses will

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against uninsured employers and that all Opinions and Awards and settlement agreements are to be forwarded to the Section for review. An uninsured employer that fails to comply with the terms of an opinion and award or a settlement agreement is subject to contempt proceedings. The Deputy Commissioner that hears the claim is to give written notice to the parties concerning whether assessment of a civil penalty against the uninsured employer will be considered. Any penalty that is assessed is to commence as of the date of the injury until the date workers' compensation coverage is obtained or the employer demonstrates that it is no longer subject to the Act.

[6]N.C. Gen. Stat. § 97-94(b) mandates that uninsured employers be assessed a penalty of $1.00 per employee per day that coverage is not maintained with a minimum penalty of $50.00 per day and a maximum of $100.00 per day.

usually pay what it is liable to pay without much of a fight. The uninsured employer is usually not particularly willing to concede defeat and pay what it is liable to pay. Pursuing the uninsured employer requires a commitment from the outset to be willing to take the additional and time-consuming steps of converting an award of the Industrial Commission into a judgment and executing it against the employer, if necessary. Furthermore, uninsured employers are usually not large, faceless corporations. If executing a potentially large and punishing judgment against the proprietors of a Mom 'n Pop family enterprise upon whom several people depend for their livelihood makes you squeamish, you probably should decline to represent injured employees of uninsured employers.

Although these may be gross generalizations, I have found that uninsured employers tend to fall into two categories: the careless and uninformed, and the arrogant and brazen. Uninsured employers in the first category usually are not aware of their obligation to have workers' compensation insurance, either through shear ignorance or poor advising. If these employers denominate their "employees" as "independent contractors," they usually do so to avoid responsibility for withholding taxes. Little do these employers realize that who is responsible for withholding taxes from earnings is not a determinative factor when determining whether a worker is an employee or independent contractor.[7] The small family business is a good example of this type of employer.

Uninsured employers in the second category tend to view themselves as above the law. They are often aware of the obligation to have workers' coverage for employees, but they either callously disregard their obligation thinking that an employee will not try to seek benefits, or they aggressively construct their enterprise so that their employees are labeled as independent contractors. These employers usually are not only trying to evade their obligation to provide workers' compensation coverage, but they are also motivated to avoid vicarious liability for the acts of their putative employees and responsibility for withholding taxes. A taxicab company is a good example of this second type of employer.

TO FILE A REQUEST FOR HEARING OR TO FILE A COMPLAINT

Once you have made the determination that the uninsured employer is subject to and bound by the Workers' Compensation Act by having the requisite number of employees or by qualifying as statutory employer under N.C. Gen. Stat. § 97-19, counsel for

[7] Denton v. South Mountain Pulpwood Co., 69 N.C. App. 366, 317 S.E.2d 433, 438 (1984).

the employee of an uninsured employer has another decision to make: to pursue workers' compensation benefits or to sue the employer in tort.

Under a little known and rarely used provision of the Workers' Compensation Act, an uninsured employer who is required by the Act to have workers' compensation coverage but does not can be pursued for benefits under the Act or can be sued in tort for damages under the common law of employer liability at the election of the employee.[8] This section strips the uninsured employer who is subject to the Act but is in default of her obligation to have workers' compensation coverage of the protection of the exclusivity provision of the Act, which normally insulates employers from suit for on-the-job injuries.[9] An employer who has failed to keep her part of the workers' compensation bargain can thus be pursued by an injured employee for damages in tort and cannot raise the bar of the Act in defense to a common law action for an on-the-job injury.[10]

This provision of the Act offers the prospect of recovering not only medical expenses and partial wage compensation from an employer but also the prospect of recovering full wage loss, pain and suffering, and other consequential damages. However, this provision is a double-edged sword. By pursuing an employer for damages in tort, you must utilize the common law of employer liability with all of the shortcomings that led to the adoption of the Workers' Compensation Act. You must prove the employer negligently breached a duty of care to the injured employee, and you must run the gauntlet of the "unholy trinity" of common law defenses of contributory negligence, assumption of the risk, and the particularly nefarious fellow-servant rule.[11] With the exception of claims against railroads[12], all three common law

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[8]N.C. Gen. Stat. § 97-94(b).

[9]See N.C. Gen. Stat. § 97-10.1.

[10]See Seigel v. Patel, ___ N.C. App. ___, 513 S.E.2d 602 (1999).

[11]See Pleasant v. Johnson, 312 N.C. 710, 711-12, 325 S.E.2d 244, 246 (1985).

[12]N.C. Gen. Stat. § 62-242(d) abolished the fellow servant rule in claims by injured employees of railroads against their employers. Subsection (c) abolished application of contributory negligence in such claims and mandates the use of comparative negligence.

defenses are alive and well in actions outside the Workers" Compensation Act.[13]

It will be the rare case when it makes sense to pursue a common law action against an uninsured employer. In fact, if an uninsured employer is not subject to the Workers' Compensation Act, your client's only recourse against his employer may be the common law of employer liability with all of its shortcomings.[14] Nevertheless, counsel for the injured employee should at least evaluate the merits and risks of pursuing tort damages instead of workers' compensation benefits from an uninsured employer if the opportunity presents itself.

JOINDER

Under a memo issued by the Industrial Commission on January 23, 1998, all persons responsible for obtaining and maintaining workers' compensation coverage for an uninsured employer are to be added as named defendants. The memo directs the Deputy Commissioner that hears the case require the Plaintiff to identify the responsible individuals and to make sure that they have been added as defendants prior to the hearing. The Deputy Commissioner is to give notice to the added defendants of the hearing and that the assessment of civil penalties against them will be considered. Obtaining this information may be difficult from a recalcitrant or uncooperative employer may be difficult.

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[13]See Thornton v. Thornton, 45 N.C. App. 25, 27-28, 262 S.E.2d 326, 327-28 (1980) (discussing the continued application of the fellow-servant rule in common law actions against employers for on-the-job injuries).

In Seigel, the injured employee sued her uninsured employer outside with Workers' Compensation Act for fraud and unfair and deceptive trade practices (UDTP). Seigel, Id. at ___, 513 S.E.2d at 603-04. The court acknowledged that N.C. Gen. Stat. § 97-94 allows the injured employee of an uninsured employer to pursue an "action at law" for damages outside the Workers' Compensation Act and that the exclusivity provision of N.C. Gen. Stat. § 97-10.1 does not apply. Id. at ___, 513 S.E.2d at 604. However, the court ruled that employees may not maintain UDTP actions against their employers, that she failed to state a claim for fraud, and that she failed to file suit before the expiration of the three-year statute of limitations for fraud. Id. at ___, 513 S.E.2d at 605.

[14]Cf. Hoggard v. Umphlett, 48 N.C. App. 397, 401, 268 S.E.2d 882, 885 (1980) (stating that when the Workers' Compensation Act does not apply to an on-the-job injury that negligence of the employer must be proven for the employer to be liable for the injury).

However, you should make every effort to obtain this information from your client or from the uninsured employer either through interrogatories or by deposition.[15]

COMMON DEFENSES RAISED BY UNINSURED EMPLOYERS

When a putative employer who does not have workers' compensation insurance finds herself pursued by a putative employee for workers' compensation benefits, the employer often scrambles to avoid the teeth of the Act's imposition of strict liability for injuries by accident arising out of and in the course of employment. The first common defense asserted by the uninsured employer is that the injured worker is not an "employee" but is rather an independent contractor to whom she is not liable for benefits. This is often accompanied by an assertion that the worker's earnings were reported on IRS Form 1099 and not Form W-2 along with a document or documents signed by the worker purporting to acknowledge that she was an independent contractor and not an employee.

The first place to go when this defense is asserted is the case of Hayes v. Elon College[16] and its progeny in which the factors that must be considered in determining whether a worker is an employee or an independent contractor are articulated. In deciding whether a person is an employee or an independent contractor, the court must consider several factors: (1) is the person working for an hourly wage or for a contract price of a completed job, (2) does the employer have the right to direct how the work is to be performed, regardless of whether that power is actually exercised, (3) does the person maintain an independent business, (4) how long does the person work for the putative employer (full-time, part-time, other jobs), (5) does the putative employer have the right to discharge the person, (6) and does the person have the right to employ helpers without the putative employer's permission?[17] The most important of

[15]Rule 605(c) permits the use of discovery devices other than interrogatories and requests for production of documents if use of the device is ordered by the Industrial Commission. If an uninsured employer has refused to answer interrogatories or otherwise refused to cooperate, it may be worth while to ask the Commission for leave to depose someone with the uninsured employer to obtain this information.

[16]224 N.C. 11, 29 S.E.2d 137 (1944)

[17]Denton, 317 S.E.2d at 438; Lloyd v. Jenkins Context Co., 46 N.C. App. 817, 266 S.E.2d 35, 37 (1980); see also Hayes v. Elon College, 224 N.C. 11, 29 S.E.2d 137, 140 (1944).

these factors is the right to control the manner and method of the worker's work.[18] Fortunately, whom the IRS holds responsible for remitting of tax is not a determinative issue in the context of workers' compensation.[19] Accordingly, a worker might be an "independent contractor" for purposes of the Internal Revenue Code but an "employee" for purposes of the Workers' Compensation Act. Other non-determinative factors include (1) the person's own beliefs and assumptions with regard to the relationship, (2) the fact that the person did not work regular hours, and (3) the fact that the person is skilled and required very little supervision.[20]

Another avenue for establishing the employer-employee relationship for the purposes of the Workers' Compensation Act is to demonstrate that your client is a statutory employee of a higher-tier contractor pursuant to N.C. Gen. Stat. § 97-19. Under this section of the Act, if a general contractor or an intermediate subcontractor retains a lower-tier subcontractor, the higher-tier contractor is responsible for ensuring that the lower-tier contractor has workers' compensation insurance by obtaining from the lower-tier contractor, the Industrial Commission, or the Department of Insurance a certificate of compliance with the Act. If the higher-tier contractor fails to obtain the certificate of compliance, then that contractor is responsible for obtaining coverage for the employees of the lower-tier contractor and is liable for workers' compensation benefits due to injured employees of the lower-tier contractor. The purpose of this section is to a limited extent collapse the pyramid of contractual relationships that develop most commonly in the construction industry that may otherwise be used to evade the responsibility to obtain workers' compensation coverage. More specifically, our courts have said that this section was intended to protect the workers from financially irresponsible subcontractors.[21]

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[18]E.g., Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495, 500-01 (1970) (quoting Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950)).

[19]Denton, 317 S.E.2d at 438, Lloyd, 266 S.E.2d at 37.

[20]Denton, 317 S.E.2d at 438, Lloyd, 266 S.E.2d at 37.

[21]For a period of about 10 years, N.C. Gen. Stat. § 97-19 extended coverage to not only the employees of subcontractors but also to the subcontractors themselves. The General Assembly rescinded this extended coverage in 1995, but the version with the extended coverage still applies to injuries that occurred before the effective date of the rescission. See Boone v. Vinson, 127 N.C. App. 604, 607-09, 492 S.E.2d 456, 358-59 (1997).

This section has two characteristics pertaining to jurisdiction that deserve special attention. First of all, the lower-tier contractor does not have to have the normally required three employees for responsibility to attach to the higher-tier contractor. So, even if a lower-tier contractor has only one employee, the higher-tier contractor is still responsible for ensuring the lower-tier contractor has workers' compensation coverage or it is on-the-risk for injuries to that employee. More importantly, the higher-tier contractor need not have the normally-required jurisdictional three employees for its obligation to verify coverage or be on-the-risk for injuries of the employees of lower-tier contractors to attach. Accordingly, a general contractor with only one employee may still be liable for workers' compensation benefits for the injured employees of a subcontractor even though it has no obligation to provide coverage for its own employee.

If the putative employer is a trucking company and your client is a truck driver, the jurisdiction of the Interstate Commerce Commission (ICC) may afford you another theory under which to establish the employer-employee relationship. Several years ago, our office represented a truck driver who was blown off the back of his truck while securing a load, and he suffered severe injuries as a result of the fall. The trucking company denied that our client was its employee and claimed that he was an independent contractor. An investigation of the relationship between our client and the trucking company revealed the existence of a peculiar arrangement. Our client owned the truck he was operating at the time of his injury. However, he leased the truck to the trucking company. The company's plates were put on the truck as well as its ICC franchise sticker. Our client was then retained to drive the truck.

Because the trucking company operated in interstate commerce, it is subject to the Interstate Commerce Act. The Interstate Commerce Act requires that a carrier subject to the Act hold the appropriate certificate, permit, or license issued by the ICC.[22] The Act also requires the carrier to affix to its vehicles plates issued by the ICC.[23]

The leasing arrangement in our client's case is apparently very common in the trucking industry, so it is not surprising that the Interstate Commerce Act addresses the obligations of ICC franchise holders that use the arrangement. The Interstate Commerce Act requires that when a licensed carrier leases a

[22] 42 U.S.C. § 10921.

[23] Id. § 11106.

motor vehicle to be used in interstate commerce, the carrier is required to make arrangements in writing regarding the compensation, to have a copy of the arrangement in the vehicle, inspect the vehicle and **obtain liability insurance**, and **"have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier."**[24]

The Supreme Court held in Brown v. L.H. Bottoms Truck Lines[25] that when trucks owned by private persons are leased to ICC licensed carriers, in order for the carrier to comply with its safety obligations under the Interstate Commerce Act, the operators of the leased vehicles **must** be employees of the carrier; accordingly, such operators **are employees for purposes of the North Carolina Workers' Compensation Act**.[26] Issuance of an ICC franchise sticker to the operator establishes the employer/employee relationship under the Workers' Compensation Act.[27] Thus, we were able to assert convincingly that our client was an employee of the trucking company.

The employer maintained that an amendment to the ICC regulation in 1992, an amendment which purports to express the sense of the ICC that its "control regulation" is not intended to establish the existence of an employer-employee relationship, undermined this rule.[28] However, as recently as 1995, the Industrial Commission has adhered to the rule established by the

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[24]Id. § 11107.

[25]227 N.C. 307, 42 S.E.2d 71 (1947).

[26]Id. at 304-07, 42 S.E.2d at 75-77.

[27]Turner v. Epes Transp. Systems, 57 N.C. App. 197, 290 S.E.2d 714, 715, disc. rev. denied, 306 N.C. 564, 294 S.E.2d 229 (1982).

[28]49 C.F.R. § 376.12(c)(4) (1997) now provides that, "[n]othing in the provisions [pertaining to the requirement that the lease specify that the lessee assume `exclusive possession, control, and use of the equipment' and `complete responsibility for the operation of the equipment'] is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. [§] 14102 and attendant administrative requirement."

Supreme Court for this situation by citing a strong public policy that the lessees of trucks in arrangements like this be responsible for the truck's safe operation.[29] Furthermore, an amendment to a federal regulation does not automatically overrule Brown and its progeny, and moreover, Brown was based on an interpretation of the statute governing the lessor-driver and lessee-common carrier relationship and not just the regulation.[30] Our case eventually settled prior to a decision by the Deputy Commissioner on terms that were very favorable to our client.

Nevertheless, in a non-workers' compensation case decided in 1996, the Court of Appeals took notice of the amendment to the ICC regulations and held that the regulation creates only a rebuttable presumption of an agency relationship between the lessor-driver and lessee-common carrier.[31] This recent decision

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[29] "It has been the well established law of this jurisdiction -- and in virtually all of the States until abrogated by statute in recent years in some 19 of them -- that the ICC certificate holder is liable for compensating a driver injured while operating a vehicle under its certificate. Brown v. Bottoms Truck Lines, 227 N.C. 299, 42 S.E.2d 71 (1947). On public policy grounds, a franchise carrier enabling the operation of a truck with its ICC certificate is not allowed to contract away legal responsibility for damage it may do. The driver operating the vehicle, fulfilling the ICC carrier's contracts, and dealing with others as the ICC carrier's agent, is, for compensation law purposes, as well as transactions with third parties, the employee of the ICC carrier. Watkins v. Murrow, 253 N.C. 652, 658-59, 118 S.E.2d 5 (1961). ICC regulations currently provide that the certificate holder, with narrow exceptions, takes "exclusive control" of and "complete responsibility" for the operation of its leased vehicles. 49 CFR § 1057.12(c) [now codified at 49 C.F.R. § 376.12(c)]." Ashley v. Earl Brown et al., NCIC File No. 366205 (November 2, 1995).

[30] See Brown, 227 N.C. at 303-04, 42 S.E.2d at 74-75. The court refers to both the statute and the regulations. However, it only cites the applicable statutes.

[31] Parker v. Erixon, 123 N.C. App. 383, 391, 473 S.E.2d 421, 426 (1996). In Erixon, the lessor-driver of a truck caused a head-on collision while traveling to see his son after dropping off his load. Id. at 384, 473 S.E.2d at 422. Evidently seeing the problems with demonstrating that the lessor-driver was acting within the scope of employment at the time of the accident, the plaintiffs asserted that the lessor-driver that the ICC regulation created an irrebuttable presumption that he was an employee and agent of the lessee-common carrier. Id. at 385, 473 S.E.2d at 423. The court noted

of the Court of Appeals suggests that the Supreme Court may decide to reconsider Brown in light of the new regulation if the issue is presented to it in the future.

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that the ICC regulation had created two lines of jurisprudence: 1. that the regulation creates a rebuttable presumption of agency, and 2. that the regulation creates an irrebuttable presumption of agency. Id. at 385-86, 473 S.E.2d at 423. After examining the line of cases asserting that an irrebuttable presumption is created, the court noted that the ICC amended its regulation to include subsection (c)(4). Id. at 387, 473 S.E.2d at 424. Quoting the ICC regulatory history surrounding the amendment, the court acknowledged that the additional subsection was adopted because the ICC perceived that its rule was being held up incorrectly by state courts for the proposition that a lessor-owner is ipso facto an employee of a lessee-common carrier. Id. at 387-88, 473 S.E.2d at 424-25.

The court distinguished Brown by pointing out that in Brown, the lessor-driver died as a result of an injury by accident arising out of and in the course of his employment, whereas the lessor-driver in this case was acting outside his scope of employment at the time of his accident. Id. at 389, 473 S.E.2d at 425. After examining its own case law, the court held that North Carolina adheres to the rule that the regulation creates only a rebuttable presumption of agency, and it stated further that the ICC regulation was not intended to impose more liability on lessor-common carriers than the liability they would have for their own employees. Id. at 390-91, 473 S.E.2d at 426. The court concluded that based on stipulated facts that the lessor-driver was acting outside the scope of his employment at the time of the accident. Id. at 391, 473 S.E.2d at 426-27.

Although Erixon shows that North Carolina courts are taking notice of the 1992 amendment to the ICC regulation, it does not undermine, and in fact reaffirms, Brown's holding that a lessor-driver is an employee for purposes of the North Carolina Workers' Compensation Act. Erixon merely establishes that the fact that a lessor-driver is an "employee" of a common carrier during a trip does not make the common carrier liable for every act or omission of the lessor-driver, including those outside the scope of the employment. Extrapolating to workers' compensation law, Brown does not relieve the lessor-driver of the burden of proving that his injury arose out of and in the course of employment in order to receive benefits. Thus, the court appears to say that Brown's application of the regulation is in accordance with the ICC's intent. Nevertheless, the amendment to the regulation may cause the Supreme Court to reconsider Brown the next time it is faced with applying the decision.

The Act excludes "domestic services" from the definition of "employment," thus making employers of domestic servants not subject to the Act. However, as demonstrated recently, the mere facts that an employee performs services in a home does not necessarily make that employee a "domestic servant." In Kirkpatrick v. Ryburn,[32] the Commission found that a couple that utilized the services of three certified nursing assistants (CNAs) to care for them was an employer subject to the Act and that their CNAs were "employees" within the meaning of the Act. The Commission reasoned that the CNAs were not performing domestic services, but they were rather performing the services that would ordinarily be performed at a nursing home, thus removing them from the category of "domestic servants." Thus, if the uninsured employer is having your client perform services in a home that are outside the purview of "domestic services," you may be able to show that your client is an employee entitled to the protection of the Act.

If your client happens to have been working for someone other than the putative employer at the time of his injury, you should consider whether your client might be deemed to be the "borrowed servant" of the other entity. Our courts have recognized that it is possible for an individual simultaneously to be an employee of two different employers and that either or both of the employers may be liable to pay workers' compensation benefits.[33] Under the "borrowed servant" doctrine, an employee of one employer can also be the employee of another employer (the "special employer") when all of the following circumstances exist: 1. The employee entered into a separate employment with the special employer, express or implied. 2. The work the employee does is the work of the special employer. 3. The special employer is vested with the right to control the details of the employee's work.[34] An employee is an employee of both his primary employer and the special employer when all of these circumstances are present, and both employers are liable for workers' compensation benefits.[35] The "borrowed servant" doctrine is especially useful when recovery may not be possible against the primary employer but when recovery against the special employer is more likely.[36]

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[32]NCIC File No. 704974 (November 20, 1998).

[33]E.g. Henderson v. Manpower of Guilford County, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984).

[34]Id. at 414, 319 S.E.2d at 694.

[35]Id.

[36]Unfortunately, the "borrowed servant" doctrine can be

Another common defense asserted by uninsured employers is that they do not regularly employ the minimum number of employees to be required to have workers' compensation coverage, which for most employments is three.[37] **Because the plaintiff must prove the jurisdiction of the Industrial Commission[38], you MUST anticipate that this defense will be raised.** Unless the uninsured employer has stipulated in a pre-trial agreement or discovery responses that jurisdiction exists or has otherwise admitted in writing that it is subject to and bound by the Act, you must be prepared to offer evidence at the hearing that the uninsured employer had the required number of employees. Failure to be prepared to offer this evidence subjects you to a claim for attorney malpractice should there happen to be jurisdiction and your client's claim is otherwise meritorious.

If this defense is asserted, in addition to asking your client about other employees, speaking with other employees, and serving discovery on the uninsured employer asking about other employees, some provisions of the Act may assist you in proving jurisdiction.

First, find out of the uninsured employer is incorporated. The Act provides that officers of corporations are "employees" for purposes of the Act.[39] Use the Secretary of State's online corporation information database to run searches of the employer's name to see if it is incorporated.[40] If it is incorporated, find out through discovery whom were the corporation's officers at the time of your client's injury. If

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a double-edged sword in some circumstances. When an employee is injured as the result of negligence on the part of a special employer, the special employer is entitled to raise the bar of the exclusivity provision of the Workers' Compensation Act. Brown v. Friday Services, Inc., 119 N.C. App 753, 758-60, 460 S.E.2d 356, 360-61 (1995). When the employee recovers workers= compensation benefits from either one of the employers, the employee cannot proceed against either employee in a common law action for personal injuries. Id. (citing Pinkney v. United States, 671 F. Supp. 405, n.2 (E.D.N.C. 1987)).

[37]N.C. Gen. Stat. § 97-2(1).

[38]E.g., Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 382, 303 S.E.2d 184, 187 (1983), disc. rev. denied, 310 N.C. 476, 312 S.E.2d 883 (1984).

[39]N.C. Gen. Stat. § 97-2(2).

[40]http://www.secretary.state.nc.us/corporations/

you happen to be dealing with Mom 'n Pop, Inc. and you learn that Pop is the president and that Mom is the secretary/treasurer, you can use Mom, Pop, and your client (assuming that your client is an employee) as evidence that Mom 'n Pop, Inc. is subject to the Act.

If your client happens to be an employee of a subcontractor, you may be able to invoke N.C. Gen. Stat. § 97-19 to show that there is jurisdiction. As noted earlier, a general contractor or higher-tier subcontractor is liable for injuries sustained by the employees of a lower-tier subcontractor, regardless of whether the general contractor himself has the requisite number of employees and regardless of whether the subcontractor is itself subject to and bound by the Act.[41]

Even if the employer has less than the required number at the time of the injury, if she REGULARLY employed the minimum number of employees for a significant period of time about the time of your client's injury, then jurisdiction may still exist even though on the date of the injury the employer did not have the minimum number of employees.[42] According to the Court of Appeals, "regularly employed," a term not defined in the Act, "connotes employment of the same number of persons throughout the period."[43]

GETTING THE MONEY: UTILIZING CIVIL PROCESS TO ENFORCE AN AWARD OF COMPENSATION OR TO PRESERVE THE EMPLOYER'S ASSETS

Not only do uninsured employers tend to assert multiple threshold defenses to claims for compensation, they also may fail to pay up when an award of compensation is made, or worse, they may even try to take steps to shield their assets from eventual levy and execution. Accordingly, familiarity with the statutes governing the conversion of awards of the Commission

[41]See supra pp. 8-9.

[42]E.g., Grouse v. DRB Baseball Management, Inc., 121 N.C. App. 376, 378-80, 465 S.E.2d 568, 570-71 (1996); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 574-75 (1968). The Workers' Compensation Act originally required the presence of five (5) regularly employees to create jurisdiction. Over a period of years, the General Assembly reduced that number to four and eventually to the present three.

[43]Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575. The Court complained that the General Assembly's failure to define the term "regularly employed" caused much confusion, especially in businesses that use seasonal employment. Id. at 49-50, 162 S.E.2d at 575-56.

into executable judgments, the execution of judgments, and the pre-judgment attachment of assets is essential when pursuing uninsured employers.

N.C. Gen. Stat. § 97-95 permits injured employees of uninsured employers to commence a civil action to recover compensation awarded to them. More importantly, it allows suit to be filed BEFORE an order awarding compensation is obtained "for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation property which the defendant may own in this State."[44] This very powerful provision of the Act can be used to tie down an uninsured employer's assets to keep them from "walking off" prior to the Commission's entering of an award of compensation.

At first blush, § 97-95 would appear to permit the filing of a lawsuit and attachment of assets without any knowledge or showing that the uninsured employer is trying to shield his assets.[45] However, the Court of Appeals rejected such a reading of § 97-95 in Nelson v. Hayes.[46] The injured worker in Nelson filed, inter alia, a § 97-95 complaint and an affidavit for attachment of his uninsured employer's assets, and the clerk of Superior Court issued an order for attachment of the employer's assets.[47] The uninsured employer filed a verified answer and motion to dismiss the complaint.[48] At the hearing on the motion, the Superior Court found that the affidavit filed by the injured worker to obtain the order of attachment by the clerk was fatally defective because it "`failed to state in a definite and distinct manner the facts and circumstances supporting the plaintiff's allegations of acts committed by the defendants with intent to defraud creditors[.]'", and the court thereupon vacated the order for attachment which the injured workers had obtained from the clerk.[49]

The injured worker maintained that § 97-95 not only permitted the pre-judgment remedy of attachment to be used

[44]N.C. Gen. Stat. § 97-95.

[45]See N.C. Gen. Stat. § 97-95.

[46]116 N.C. App. 632, 448 S.E.2d 848, disc. rev. denied, 338 N.C. 519, 452 S.E.2d 848 (1994).

[47]Id. at 633-34, 448 S.E.2d at 849.

[48]Id. at 634, 448 S.E.2d at 849.

[49]Id. at 634-35, 448 S.E.2d at 849.

against uninsured employers, but he asserted further that § 97-95 allows attachment against uninsured employers simply because they are uninsured and did not require any further showing of intent to defraud.[50] The Court of Appeals agreed that § 97-95 permits attachment to be used against uninsured employers.[51] However, the court held that since § 97-95 refers to "ancillary remedies provided in civil actions of attachment," the injured worker still had to submit an affidavit alleging one or more of the grounds for attachment stated in N.C. Gen. Stat. § 1-440.2 in order to obtain an order for attachment.[52] The court observed that allegations warranting the issuance of an order for attachment must be stated with particularity and that general assertions of actions or abilities to shield assets are insufficient.[53] Accordingly, the Superior Court's dissolution and vacation of the order for attachment was proper.[54]

A question that the Nelson court did not address is whether an injured employee of an uninsured employer may file a § 97-95 lawsuit before obtaining an award of the Industrial Commission. The very fact that a lawsuit has been filed against an uninsured employer can serve to put others on notice that the employer is being pursued for workers' compensation benefits. A prudent title searcher is likely to check to see if the person selling the property is involved in any litigation that might create a judgment lien before closing. So the very existence of a § 97-95 lawsuit can serve to inhibit the uninsured employer's ability to dispose of his assets prior to an award by the Industrial Commission. It appears from the Nelson case that although the Superior Court revoked the writ of attachment, the Court did not dismiss the underlying lawsuit, and the Supreme Court did not disturb that aspect of the Superior Court's actions.[55]

The plaintiff in Nelson also filed notice of lis pendens with the Register of Deeds, presumably to put all title searchers on notice of the workers' compensation proceeding.[56]

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[50]Id. at 636, 448 S.E.2d at 850.

[51]Id.

[52]Id. at 637, 448 S.E.2d at 851.

[53]Id. (citing Connoly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980)).

[54]Id.

[55]Id. at 636-37, 448 S.E.2d at 850-51.

[56]Id. at 633, 448 S.E.2d at 849.

However, you should resist the urge to do this. Our courts have held that notice of lis pendens may only be filed when there is litigation over the property itself, not when only the claim is only for money damages.[57] Accordingly, if you file notice of lis pendens in connection with a workers' compensation proceeding when filing of lis pendens is not authorized, you put yourself and your client at risk for winding up on the business end of a lawsuit for slander of title.[58]

After you have obtained a favorable award of benefits from the Commission and the time for appeal has lapsed, you must still get the money from the uninsured employer who may still balk at paying the benefits awarded to your client. It is possible to file a § 97-95 if you have not already done so, but § 97-87 gives you another option. Under § 97-87, once you have a final award of the Commission with which there has been no compliance, you may file it with the Clerk of Superior Court.[59] Once it has been filed, the Court must hold a hearing at which judgment based on the award is entered against the defendants.[60] The defendants many only have the judgment removed by obtaining and filing with the Clerk a Certificate of Compliance from the Industrial Commission.[61] Notice of the hearing is not required to be given to the defendant(s), but notice of the judgment must be given to the defendant(s) after entry of the judgment.[62] This allows you a relatively quick way to obtain a judgment against an uninsured employer for the benefits the Industrial Commission

[57]E.g. Doby v. Lowder, 72 N.C. App. 22, 29, 324 S.E.2d 26, 31 (1984). According to N.C. Gen. Stat. § 1-116(1)-(3), there are only three types of actions in which notice of lis pendens may be filed: 1. actions affecting title to real property, 2. actions for foreclosure of a mortgage or deed of trust, and 3. actions in which an order for attachment has been issued and real property has been attached.

[58]Cf. Chatham Estates v. American National Bank, 171 N.C. 579, 88 S.E. 783, (1916) (holding that where a party initiates a suit and filed notice of lis pendens "for the purpose of injuring and destroying the credit and business of another≅ may be liable for damages caused by the cloud created on the property's title").

[59]N.C. Gen. Stat. § 97-87.

[60]Id.

[61]Id.

[62]Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, ___, 501 S.E.2d 346, 349 (1998).

awarded to your client. Section 97-87 also appears to be more geared to enforcement of awards for ongoing benefits than does § 97-95.

Even though you now have your judgment, the battle is not over, nor can you execute the judgment immediately. Familiarity with the statutes governing enforcement of judgments and fraudulent transfers is essential at this stage. For example, the judgment you obtain against an uninsured employer cannot be executed for thirty days after entry,[63] nor can the judgment generally be executed until the uninsured employer/judgment debtor has either declared his exemptions or waived them.[64] If the uninsured employer has property in more than one county, you must docket the judgment in each county where she has property before the clerk can issue a writ of execution in each such county.[65] The sheriff must first attempt to satisfy the judgment out of the uninsured employer's personal property before executing on real property of the employer.[66] The sheriff must return the writ of execution within ninety days.[67] If the writ is returned unsatisfied within three years after issuance of the execution, the employer can be compelled to appear in court for supplemental proceedings and be examined about her property.[68] The Uniform Fraudulent Transfers Act is available if you find that the employer has attempted to conceal her assets by transferring them to third parties for little or no consideration.[69]

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[63]N.C. Gen. Stat. § 1-305(a) directs the clerk to issue writs of execution for unsatisfied judgments, but this mandate is expressly made subject N.C. R. Civ. P. 62 and subsection (b). N.C. R. Civ. P. 62(a) provides that a judgment may not be enforced until the time period for filing notice of appeal has expired, and N.C. R. App. P. provides that, with certain exceptions, a party has thirty (30) days from the entry of judgment to file notice of appeal. N.C. Gen. Stat. § 1-310's provision that no execution can be issued until only ten days after entry of the judgment appears to be vestigial in light of § 1-305(a)'s mandate to the clerk.

[64]N.C. Gen. Stat. § 1-305(b)(1)-(2).

[65]N.C. Gen. Stat. § 1-308.

[66]N.C. Gen. Stat. § 1-313(1).

[67]N.C. Gen. Stat. § 1-310.

[68]N.C. Gen. Stat. § 1-352.

[69]N.C. Gen. Stat. §§ 39-23.1 to 39-23.12 (Cum. Supp. 1997).

ETHICAL CONSIDERATIONS IN PURSUING UNINSURED EMPLOYERS

The fact it is a crime not to have workers' compensation insurance when one is required by law to have it poses an ethical problem when pursuing uninsured employers. It is very tempting to tell an uninsured employer who does not want to pay benefits to your client that you will refer the matter to the District Attorney or the Industrial Commission's fraud section for prosecution if the employer persists in not paying benefits. As many "deadbeat dads" can tell you, the credible threat of criminal prosecution and incarceration can be very persuasive in obtaining money from a party whom otherwise does not want to pay.

Until recently, using this tactic against an uninsured employer could have led to allegations of unethical overreaching. Under the former N.C. Rule of Professional Conduct 7.5, it was unethical to threaten criminal prosecution in order to gain leverage in a civil matter. Since workers' compensation proceedings are essentially civil proceedings, this blanket rule appears to have barred making any threat of seeking criminal prosecution of an uninsured employer for not having workers' compensation insurance. While this rule was in effect, it was my practice not so much as refer to or suggest the criminality of not having workers' compensation insurance when dealing with uninsured employers, nor did I refer to the possibility of a fine by the Industrial Commission, out of fear of running afoul of this ethical rule.

In the recent rewrite of the Rules of Professional Conduct, the State Bar abolished former Rule 7.5.[70] The State Bar did this because it was felt that there were situations in which it was perfectly legitimate to threaten criminal prosecution to obtain leverage in a civil matter and that other ethical rules and common law crimes existed to deter and punish overzealous and inappropriate threats of criminal prosecution to obtain unfair leverage in a civil matter.[71]

Because of the omission of former Rule 7.5, attorneys now have more latitude to bring the possible criminal implications of failure to have workers' compensation insurance and the possibility of being fined by the Industrial Commission to the

[70]Alice Neece Mosely, When May A Lawyer Threaten the Other Party with Criminal Prosecution?, North Carolina State Bar Journal, Summer 1998, at 8.

[71]Id. at 8-9.

attention of an uninsured employer. However, it would be the exceptional case of egregious conduct when one should even consider making active threats to seek criminal prosecution of an uninsured employer. If your client's claim against an uninsured employer is less than meritorious, a threat to seek criminal prosecution of that uninsured employer may subject you to criminal liability for the crimes of extortion and compounding a felony and subject you to discipline for violating Rule of Professional Conduct 8.4(d) by engaging in conduct prejudicial to the administration of justice.[72] Above all, your primary concern should be obtaining recovery for your client if your client is entitled to recovery.

The proper way to make sure that the uninsured employer is made aware of the criminal implications of not having workers' compensation insurance is to involve the Commission's fraud section in your case as early as possible. Once made aware of the existence of a claim against an uninsured employer, the fraud section can issue a civil penalty petition to the uninsured employer stating that it either needs to show proof of having workers' compensation insurance or face a civil penalty. If an uninsured employer does not respond or provides a unsatisfactory response to the civil penalty petition, the fraud section can issue a criminal warrant for the arrest of the uninsured employer and/or the person responsible for obtaining and maintaining the workers' compensation coverage required by law.

CONCLUSION

As is apparent from this discussion, handling claims against uninsured employers entails many issues that do not normally arise in the ordinary practice of workers' compensation law. These cases can entail much more work than the typical workers' compensation case. Pursuing these claims requires a strong belief that uninsured employers are morally and legally responsible for paying for compensable injuries and for maintaining workers' compensation insurance. Nevertheless, the injured employees of uninsured employers desperately need your help to obtain compensation for their injuries. It is hoped that this primer will assist the practitioner in helping these injured employees.

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[72] See Mosely, supra, at 9. Mosely's article is an excellent discussion on the reasons behind the omission of former Rule 7.5 from the revised Rules of Professional Conduct and the possible criminal implications of threatening criminal prosecution in certain civil matters.