

## ***COMPLETE OPERATIONS--LOADING AND UNLOADING: WHEN IS THE BEGINNING THE BEGINNING?***

### ABOUT THE AUTHORS

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Analysis under the “complete operation” doctrine was envisioned to eliminate the ambiguities presented by the “coming to rest” doctrine. As two recent cases show the road traveled may not be as straight as envisioned by the complete operation proponents.

Any battle between the “complete operation” and “coming to rest” doctrines is long over. In determining whether loading or unloading a vehicle is the “use of a covered auto,” the “complete operation” doctrine has carried the day.<sup>1</sup> The “complete operation” doctrine’s basic principle is that it encompasses “the entire loading or unloading process,”<sup>2</sup> rather than focusing solely on the specific physical act of moving the goods onto or off of a vehicle, as in the now extinct “coming to rest” doctrine.<sup>3</sup> Thus, loading does not begin with moving the goods, but with preparation to move them; and unloading ends when the driver’s entire role in delivery is finished, and not simply when that driver has placed goods on the receiver’s property.

Typical descriptions of the “complete operation” doctrine involve phrases as to its “breadth,” and expansion beyond the “coming to rest” doctrine. The accuracy of these descriptions, however, depends upon context and perspective. From a commercial vehicle insurer’s perspective, where coverage is to be provided for injuries arising out of the “use” (including loading and unloading) of a covered vehicle, expanding the activities falling within the scope of loading or unloading processes also increases the scope of insurance coverage.

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<sup>1</sup> Jay Barry Harris, Lee Applebaum, & Jennifer Tatum Root, Truckers’ and Motor Carrier’s Commercial Vehicle Insurance, *New Appleman on Insurance* § 69.02[6][a][iii].

<sup>2</sup> *Id.* at § 69.02[6][a][ii].

<sup>3</sup> *Id.* at § 69.02[6][a][iii]. Despite its demise, the “coming to rest” rule is still frequently cited as either a means of contrast with the “complete operation” rule, or even to establish the acts involving the loading or unloading at issue would constitute use even under the “coming to rest” rule, and thus, *a fortiori*, must constitute use under the complete operation rule.

From the perspective of a commercial general liability carrier, with policies that typically exclude coverage for “use” of a motor vehicle, this very same rule functions to restrict the instances in which those insurers actually provide a defense or indemnification to an insured business shipping or receiving the goods.

Concomitantly the insured vehicle owner, whose driver is involved in an injury related to the loading process, may find this rule increasing the scope of its insurance coverage; while on the same facts the business owner shipping the goods may find its CGL carrier rejecting a defense tender. Another effect of increasing the activities constituting “use” is that the third party businesses, whose employees participate in the loading or unloading process, may become permissive users under the commercial vehicle policies through the very same definitions and analyses that exclude coverage under that same business’s CGL policy. In this article, we focus on the permissive use example to highlight the “complete operation” doctrine’s nuanced nature.

The “coming to rest” doctrine was more in the nature of a bright-line rule, eliminating the need for much analysis and nice distinctions. The “complete operation” rule lacks that bright-line definitiveness, and calls for something more subjective, though still analytic, at its periphery. Thus, with the “complete operation” doctrine, we are not looking at fixed borders on *terra firma*, but at the subtly shifting borders set by the banks of an ever flowing river (of facts).

We will discuss two cases in detail to give a sense of how the “complete operation” doctrine’s parameters may be malleable at the margins; and that its application calls for heightened attention and greater intellectual care and rigor from counsel for insureds and insurers than would be necessary in dealing with a true bright-line rule.

In *Colon v. Georgia-Pacific Corrugated, LLC*,<sup>4</sup> Roberto Colon worked for Temple Trucking. While working for Temple, Colon drove a tractor to Georgia-Pacific’s facility in New Jersey to pick up goods. Before Colon arrived at the facility, the goods had already been loaded onto a trailer, owned by yet another party, Kinard Trucking. Upon arrival, Colon connected the loaded Kinard trailer to the Temple tractor. Colon inspected the trailer, “complaining that it appeared to have been loaded improperly.” He still left Georgia-Pacific’s facility with the trailer as it had been loaded, and became involved in a motor vehicle accident with another truck.

Colon brought action against Georgia-Pacific, among others. Georgia-Pacific brought action against RLI Insurance Company, seeking defense and indemnification. RLI was Temple’s commercial automobile insurer. There was no question for purposes of the interpreting RLI’s policy that: (i) the tractor was scheduled for coverage and (ii) the attached trailer was a covered auto, even though owned by Kinard. The RLI policy provided coverage for bodily injury caused by an accident resulting from “use of a covered auto”; and the policy defined “insured” to include Temple as the named insured as well as “anyone else while using with [Temple’s] permission a covered “auto” owned, hired, or borrowed by Temple.” RLI argued that Georgia-Pacific was not using a covered auto because the allegedly negligent loading of the goods onto the trailer occurred before that trailer was attached to Temple’s tractor. Georgia-Pacific argued

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<sup>4</sup> 2012 U.S. Dist. LEXIS 102665 (D.N.J. July 24, 2012).

that the timing of the trailer's attachment was irrelevant; rather, the focus is on the relationship of the goods being loaded to use of the tractor-trailer.

The court observed that the definition of insured under the policy would include not only Temple, but permissive users of the covered auto, and that there was no dispute the tractor was scheduled and the trailer was attached at the time of the accident, placing them within the covered auto criteria. The court specifically rejected the insurer's argument that there was no coverage because the negligent loading took place before the trailer's attachment to the tractor. First, the court observed the policy language itself imposed no such limitation and "courts should interpret the policy as written."

Next, the court looked at the "complete operation" doctrine, observing the "broad interpretation of loading and unloading coverage under New Jersey law" which strongly supported Georgia-Pacific's position. Under New Jersey's application of that doctrine, "'loading and unloading' coverage 'covers the entire process involved in the movement of goods, from the moment they are given into the insured's possession until they are turned over at the place of destination to the party to whom delivery is to be made.'"<sup>5</sup> Further, "[a]ll that is required [to establish coverage] is that the act which resulted in the injury was necessary to carry out the loading and unloading." Thus, the time of attachment was not the measure of "use" at the time of the accident; rather, "coverage under the Policy was triggered because the accident took place during the 'entire process involved in the movement of goods,' and was allegedly caused by the improper loading of those goods onto the trailer involved in the accident." The court cited *Griffin v. Public Serv. Mutual Ins. Co.*,<sup>6</sup> for the proposition that the "insurer of [the] trailer portion of tractor-trailer involved in accident [was] required to provide coverage to foreign companies involved in alleged negligent loading of container contained in trailer because 'even though the container was loaded in China,' it was integral part of tractor-trailer at time of accident and therefore [the] foreign companies were 'users' under policy."

In *Safeco Ins. Co. of America v. Dale G. Kennedy Sons Warehouse*,<sup>7</sup> Jervis B. Webb Company was shipping conveyor parts it manufactured from Michigan to Delaware. In connection with this shipment, Webb used the services of Kennedy & Sons Warehouse, also located in Michigan. On August 9, 1996, Webb employees loaded the parts onto a flatbed trailer at its facility in New Hudson, Michigan, as the first step in preparing the shipment to a Chrysler assembly plant in Newark, Delaware. Kennedy had rented that trailer in the first instance, which Kennedy then rented in turn to Webb. Kennedy maintained such trailers in this way at the Webb facility so that Kennedy would have trailers readily available for site loading.

On that day, after the Webb employees "had completed the loading of the conveyor parts, Webb moved the trailer from its loading dock to a different location in the yard on [Webb's]

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<sup>5</sup> The court cited *Cenno v. West Virginia Paper & Pulp Co.*, 109 N.J. Super. 41, 46, 262 A.2d 223 (App. Div. 1970) for this interpretation of the "complete operation" doctrine that would encompass the movement of the loaded goods through delivery at the intended site; which appears to stand in contrast to the Florida and Washington state cases cited below.

<sup>6</sup> 327 N.J. Super. 501, 744 A.2d 204 (App. Div. 2000).

<sup>7</sup> 251 Mich. App. 692, 650 N.W.2d 722 (2002).

premises to await pickup by Kennedy....” Once picked up, Kennedy was to transport the parts on the way to their final destination. After Webb moved the trailer to another location in its yard, it had no further contact with the trailer.

Michael Beach was a truck driver employed by Kennedy. On the following day, August 10, 1996, Beach drove a Kennedy-owned tractor to Webb's facility to pick up the loaded trailer. On arriving at Webb's yard, Beach hooked the Kennedy tractor to the trailer loaded the previous day. Beach then drove the full rig to Kennedy's warehouse yard. Once at Kennedy's warehouse yard, the securing straps on the conveyor parts were to be taken off, and new straps were to be used to re-secure the conveyor parts. This removal and re-securing of the straps had to be done because Kennedy only shipped intra-state, within Michigan, and a separate interstate carrier was going to drive the parts to Delaware. This required the interstate carrier's employee re-securing the load for interstate transport. Unfortunately, before that re-securing occurred, “[w]hile Beach was removing the last strap on the trailer, a large conveyor piece loaded by Webb fell and fatally struck him.”

Beach's estate brought action against Webb. Webb and its insurers sought coverage from Everest National Insurance Company, Kennedy's commercial vehicle insurer. As in *Colon* above, the issue was whether Webb was a permissive user under the Kennedy's Everest policy, within the parameters of the “complete operation” rule. As set forth in Everest's policy defining insureds: “1. WHO IS AN INSURED: b. Anyone else while using with your permission a covered ‘auto’ you own, hire or borrow except....”

Webb argued that it was using a covered auto with Kennedy's permission because Kennedy had rented the trailer to fulfill its contractual obligations to Webb; Webb loaded the trailer; and the trailer was being used to transport Webb's products when the accident occurred. Everest argued, to the contrary, that Webb's loading activities no longer constituted a “use” at the time of the accident “because Webb had relinquished custody and control of the trailer” and that “once the conveyor parts were at rest on the trailer, the ‘loading’ was complete.” Everest asserted that the circumstances of the loading “were temporally and geographically” outside the policy's scope and removed from Webb, the accident having occurred “a full day after any Webb representative last touched the trailer” and that the accident occurred “on Kennedy's premises when Webb was not present.”

The trial and appellate courts agreed with Everest. The trial judge's oral ruling, quoted in the appellate opinion, provides insight on the judge's understanding on the “complete operation” doctrine's workings: “Okay. I don't think it's a close case. These things are supposed to be construed according to their ordinary English usage and understanding. No layman would think that Webb was using this vehicle. It's that simple. The idea of use generally connotes somebody getting in the vehicle and driving it.” The trial judge then added: “Now, I admit that sometimes that concept is expanded, but it's usually expanded in the law under phrases in automobile policies such as for an occurrence arising out of the ownership, use, loading or unloading of the vehicle. That's when it gets extended.”

The trial judge continued: “This doesn't have [that] language. And I have to disagree with [Webb's] counsel, it does have a temporal restriction. The restriction is the word ‘while.’”

While, during, as opposed to arising out of. They weren't using it any longer.” The trial judge then observed that any liability theoretically would come from the loading at Webb's yard. “But no employee of Webb was driving it at the time of the incident, which would be the characteristic example of use of the vehicle, or towing it or pushing it or doing anything else with it. They just weren't there.” He concluded: “I think you have to twist this language out of shape to say that they were using it at the time of this incident. And you'll excuse me if it seems that simple to me, but I think that the language is supposed to mean something, and the ordinary usage of this language indicates that it wasn't being used.”

The appellate court agreed with the trial judge's conclusion. It found that Michigan's courts had previously dealt with loading and unloading in the context of mandatory auto insurance statutes or policy provisions expressly using those words, but not the omnibus insurance provisions governing the definition of an insured via permissive use at issue in this case. The appellate panel found that even assuming that loading and unloading constituted “use” under the omnibus provision defining insureds, and applying the “complete operation” doctrine, “Webb's loading process was finished before the fatal accident and, therefore, Webb was no longer ‘using’ the trailer within the meaning of the omnibus insured provision of Everest's policy.” The appellate panel focused on the word “use” and the “complete operation” doctrine, moreso that than the word “while” focused upon by the trial judge; though it obviously thought the trial judge's analysis significant enough to quote at length. The panel favorably cited to a 1983 Florida case for the proposition that “*once the operation of either loading or unloading is completed and the vehicle is in motion (use) by the insured, a person claiming to be an omnibus insured is no longer covered by the vehicle policy.*”<sup>8</sup> (Emphasis in original).

The appellate panel concluded: “Webb's loading process was complete and [] the tractor-trailer was en route to its interstate destination when the fatal accident occurred. After the trailer had been loaded, a Webb employee moved the trailer into the yard and Webb had no further contact with the trailer. In fact, the trailer remained untouched by Webb personnel until Beach arrived the next day and took the load to Kennedy's premises. Because Webb's loading activities

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<sup>8</sup> *Florida Crushed Stone Co. v Commercial Standard Ins. Co.*, 432 So. 2d 690 (Fla. App. 2d Dist. 1983). The policy in that case included a permissive user provision (“Anyone else is an insured while using with your permission a covered auto”), and an exclusion for “Bodily injury or property damage resulting from the loading of property before it has been put in or on the covered auto or the unloading of property after it has been taken off or out of the covered auto.” Thus, the exclusion built something akin to the “coming to rest” doctrine into the insurance policy; which the court determined would include loading and unloading as “use” if not otherwise excluded. The trailer at issue was apparently loaded at the same time the injured driver was in the truck, having driven the whole rig to the site; but the issue was the fact that he had moved the vehicle by driving from the site with the load. That court looked to earlier case law which stated: “Both [the “complete operation” and “coming to rest”] theories agree, however, that ‘loading and unloading’ is used to cover liability while the vehicle is stationary ... and is used to cover liability arising during the ‘process’ or ‘operation’ of loading or unloading....” *McDonald Indus. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 631 P.2d 947, 950 (1981) (citations omitted).

were undisputedly completed the day before Kennedy's driver, Beach, picked up the trailer, we conclude that Webb stopped 'using' the trailer within the meaning of the omnibus 'insured' clause contained in the Everest policy long before the fatal accident. The fact that the trailer was not on Webb's premises at the time of the accident only serves to highlight Webb's lack of 'use' of the trailer. To conclude otherwise would unduly strain the intent of the parties to the insurance contract, Kennedy and Everest."

The omnibus language defining an insured via permissive use, and including the word "while" in that definition, is effectively the same in both *Colon* and *Beach*; thus, the *Beach* trial judge's focus on that word is not necessarily a point of distinction or explanation. Rather, these cases appear to be at loggerheads; and the earlier New Jersey opinion finding permissive use based on shipments loaded in China puts them at even greater extremes. Our point here, however, is not to opine on which court was correct or to find a means to reconcile these cases. Rather, our goal is to point out that the "coming to rest" doctrine's demise and the "complete operation" doctrine's ascension does not eliminate all ambiguity in determining when loading or unloading constitutes use of a covered vehicle; and, in fact, elimination of the "coming to rest" bright-line test makes the law more complex. Instead, lawyers still have to understand the "complete operation" case law in their own jurisdiction and, through close analysis, how that will apply to the unique facts of each case.