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Broker Liability: Casualty Claims

An American College of Transportation Attorneys White Paper

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The American College of Transportation Attorneys is a non-profit association consisting of a select group of experienced transportation defense lawyers who have joined together to serve as a confidential, reliable, and supplemental legal resource to the trucking industry. ACTA bylaws limit membership to 25 members, each with over 20 years of trucking industry service. A roster of current ACTA members is appended to this paper.

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INTRODUCTION

Brokers and third-party logistics companies have emerged in the wake of the deregulation of the trucking industry. Prior to deregulation, independent owner-operators typically associated themselves with large carriers who entered into contracts with shippers, either directly or through brokers. Because of the size of their internal networks, large carriers could provide integrated services to shippers. Shippers were able to rely on the large carriers' quality control and monitoring of independent owner- operators and their established processes of handling freight claims. While many carriers still utilize the traditional approach of directly soliciting freight from shippers, there has been a steady increase in the use of intermediaries, such as brokers, who among other things, play a role in matching carriers with the freight to be hauled. Typically, the relationship between brokers and shippers is governed by what is commonly referred to as a contract carrier agreement. This type of agreement, and related disagreements, historically focused upon who bore the risk of loss for damage to the freight.

However, over the last several years, settlements and verdicts in casualty claims have skyrocketed. Many of these verdicts have far exceeded the federally mandated minimum insurance limits for interstate motor carriers[1]. As a result, plaintiffs have sought alternative means of recovering awards that may exceed a defendant carriers' means. As part of this quest, plaintiffs have become increasingly creative in their efforts to find additional "deep pockets." Thus, brokers and their insurers have become target defendants in casualty cases.

While broker liability is a rapidly developing area of the law, theories of broker liability in casualty cases generally center around claimed violations of the Motor Carrier Act (MCA), Federal Motor Carrier Safety Regulations (FMCSR), common law negligence and *respondeat superior*, negligent hiring, negligent entrustment, and joint venture/alter ego. This paper examines how these theories have been applied by the courts in recent cases and suggests strategies for how to mitigate, if not avoid, broker liability in casualty cases.

[1] The federal minimum insurance limits are typically $750,000 or $1,000,000 per occurrence, depending upon the type of vehicle involved, nature of commodity carried, and other factors. (49 C.F.R. § 387.9)

DEFINITIONS

Broker liability involves the following key parties: (1) the broker or third-party logistics (3PL); (2) the motor carrier, and (3) the shipper/customer.

1. Brokers and 3PL's

Pursuant to 49 U.S.C.A § 13102 (2), the term "**broker**" means an entity, "*other than a motor carrier* or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation". Brokers and 3PL's are factually distinguishable. A **3PL** brokers goods by truck, rail, ocean and air. *Schramm v. Foster*, 341 F. Supp. 2d 536, 541 (D. Md. 2004). It provides time, loading locations, and loading information to coordinate the shipment of the load pursuant to the customer's particular needs. *Id.* at 550. Courts have held that if a 3PL voluntarily injects itself into the relationship between the Shipper and Motor Carrier, it may bear a greater responsibility and duty of care compared to that of an ordinary Broker. *Id.* at 553.

2. Motor Carrier

Section 49 U.S.C.A § 13102 (14) provides that a **Motor Carrier** is an entity that provides motor vehicle transportation for compensation. Furthermore, motor carriers are not brokers when they arrange, or offer to arrange, the transportation of shipments which *they* are authorized to transport, or when *they* have accepted and are legally bound to transport *themselves*. 49 C.F.R. § 371.2 9(a).

3. Shipper / Customer

Section 49 U.S.C.A 13102 § (13) states that an "**individual shipper**" is the shipper, consignor, or consignee of a household goods shipment; is identified as the shipper, consignor, or consignee on the face of the bill of lading; owns the goods being transported; *and* pays his own tariff transportation charges.

TRADITIONAL THEORIES OF LIABILITY

Historically, plaintiffs have sought to recover damages in casualty claims by alleging various forms of wrongdoing on the part of the **motor carriers**. They argued that the motor carrier breached certain regulatory or statutory duties. They argued negligent vehicle maintenance. They argued that the motor carrier was negligent in hiring or retaining allegedly unfit drivers. And, they argued that the motor carrier negligently entrusted the vehicle to someone that they knew or should have known was an unfit operator.

In recent years, plaintiffs have also sought to establish **broker** liability in casualty claims arising out of serious motor vehicle accidents. The theories of liability currently being asserted against brokers include the following:

1. Violations of the Motor Carrier Act (MCA) and Federal Motor Carrier Safety Regulations (FMCSR);
2. Common law negligence/*respondeat superior*;
3. Negligent retention;
4. Negligent entrustment; and
5. Joint venture/alter ego.

Plaintiffs attempt to apply these theories to hold brokers accountable for the acts or omissions of drivers and/or motor carriers. In such cases, Plaintiffs claim that the driver is an agent of the broker and that the broker retained control over the driver during the movement of the freight. In response, the brokers argue that the driver and motor carrier are independent contractors for whom the broker is not liable. They assert that the motor carrier agreement between the broker and the carrier documents the fact that the carrier is an independent contractor and that the driver is the employee of the carrier and not of the broker. Brokers further contend that participation in arranging the shipment does not afford them direct control over the driver and/or the carrier.

As shown below, recent reported cases dealing with broker liability in casualty claims turn heavily upon the terms of the broker-carrier agreement and the facts underlying the broker's hire of the motor carrier and its relationship and control over the driver.

RECENT CASE LAW ADDRESSING BROKER LIABILITY

1. ***Schramm v. Foster,*** 341 F. Supp. 2d 536 (D. Md. 2004)

a. Facts

In *Schramm,* C.H. Robinson (Robinson) was a 3PL specializing in brokering the shipment of goods. *Schramm,* 341 F. Supp. 2d at 541. As it did not maintain equipment, it matched shippers with motor carriers who did own and operate such equipment. *Id.* Robinson had brokerage contracts with motor carriers that agreed to haul loads for shippers. *Id.* Shippers could contact Robinson and have access to carriers who would haul loads to intended destinations. *Id.*

Robinson's promotional materials asserted that it provided "one point of contact" services to its shippers. *Id.* at 542. Significantly, Robinson's promotional materials asserted that it worked only with motor carriers that had sufficient insurance to cover personal injury actions and that it verified the carriers' insurance. *Id.* More importantly, Robinson's promotional materials asserted that it maintained excess liability insurance to pay for damages in the event of the carrier's limits were exhausted. *Id.*

In this case, Jasper Products requested that Robinson arrange for transportation of one of its products. *Id.* at 540. Robinson had a contract carrier agreement with Groff Brothers LLC (Groff), an authorized motor carrier, wherein Groff agreed to transport the product to the intended destination. *Id.* Subsequently, during the transportation of the cargo owned by Jasper Products, Groff's driver failed to yield at an intersection and collided with a truck operated by Schramm causing catastrophic injuries. *Id.* at 541. At the time of the collision, Groff's driver had been driving in excess of the maximum hours allowed by federal regulations. *Id.*

b. Theories of Liability

Seeking to find deep pockets beyond the confines of the motor carrier's insurance coverage, the *Schramm* plaintiffs' threw the proverbial kitchen sink at the broker, C.H. Robinson. As shown below, the broker prevailed at the summary judgment level on all theories except negligent hiring.

i. Statutory Liability Theories

In *Schramm,* Plaintiffs alleged violations under the Motor Carrier Act ("MCA") and the Federal Motor Carrier Safety Regulations ("FMCSR"). *Id.* at 547. Plaintiffs argued that Section 49 U.S.C. 14704(a) (2) created a federal private right of action for personal injuries. *Id.* The court disagreed.

In its opinion, the court notes that at first glance, the statute does appear to confer a right of action upon any person who has sustained damages as a result of a carrier's or broker's breach of its statutory duties:

> (2) *Damages for violations*. A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part. 49 U.S.C. § 14704 (a)(2).

However, it found that courts interpreting this statute have consistently held that the MCA does not create a private cause of action for personal injury. *Id.* at 547, citing *Stewart v. Mitchell Transport,* 241 F. Supp. 2d 1216, 1221 (D. Kan. 2002). These courts have held that while liability exists for "damages sustained by a person," this **does not** create a federal private right of action for ***personal injuries***. *Id.* The *Schramm* court further observed that the statute's legislative history supports this conclusion. It found this history illuminating in two key respects. First, the section was only intended to apply to commercial damages not personal injuries. *Id.* Second, the history contains no discussion about the impact that creation of a private right of action for personal injuries would have upon the work load of the federal courts. *Id.* The court concluded that as the impact would be substantial, it is reasonable to infer that Congress did not intend to create such a right of action. *Id*. at 16. Thus, the *Schramm* court held that the MCA creates a cause of action for damages in ***commercial disputes only***, and therefore plaintiffs could not maintain their personal injuries claim for damages under the Act. *Id.*

ii. Negligence and *Respondeat Superior Theories*

Asserting negligence and vicarious liability theories, the *Schramm* plaintiffs also alleged that Groff's driver was an agent of Robinson and therefore Robinson should be responsible for the driver's tortuous acts and omissions. *Schramm* at 543. A principal-agent

relationship results from the consent of one party to act under the control or on behalf of the other party. See *Restatement (Second) of Agency*, § 1.1 (1958). An "employer is vicariously liable for the tortious conduct of his employee or agent when that employee or agent is acting within the scope of the master-servant relationship." *Id.* citing *Schweizer v. Keating,* 150 F. Supp. 2d 830, 839 (D. Md. 2001); *Hunt v. Mercy Medical Center,* 710 A.2d 362, 376 (Md. App. 1998); *Kersten v. Van Grack, Axelson & Williamowsky P.C.*, 608 A.2d 1270, 1272 (Md. App. 1992). However, as the facts demonstrated, Groff's driver was not an agent of Robinson, and therefore the court concluded that Robinson was not vicariously liable for the driver's conduct.

a. No Principal – Agent Relationship By Written Agreement

First, there was no written agreement between the parties that would establish an agency relationship between Robinson and Groff's driver. *Schramm* at 543. Rather the written contract carrier agreement between Groff and Robinson stated that the "relationship of Carrier to Robinson hereunder is solely that of an independent contractor." *Id.* at 544. It clearly noted that the carrier employed all drivers, paid their salary, and provided the necessary equipment and fuel for the shipment. *Id.* The contract further stated that "such persons are not employees or agents of Robinson or its Customers." *Id.* Both Groff and Robinson understood that Groff maintained and controlled the overall transportation and performance of its drivers. *Id.* Therefore, evidence of a written agreement demonstrating a principal-agency relationship did not exist.

b. No Principal – Agent Relationship Inferred By Conduct

Moreover, in *Schramm* there was no evidence to demonstrate that a principal-agency relationship could be inferred from the parties' conduct. To establish an agency relationship by inference of conduct, courts have held that the following requirements must be satisfied: (1) the agent was subject to the principal's right of control; (2) the agent had a duty to act primarily for the benefit of the principal; and (3) the agent held the power to alter the legal relations of the principal. *Id*. at 543 (quoting *Schear v. Motel Management Corp.,* 487 A.2d 1240, 1243 (Md. App. 1985), quoting *Restatement (Second) of Agency* § 12-14 (1958).

Robinson required Groff's driver to call the broker to receive dispatch information. *Id*. at 544. Robinson provided directions and shipping instructions to Groff's driver but stated

they were for informational purposes only. *Id.* Robinson also provided Groff's driver with an emergency phone number if there was a problem with the shipment, and requested Groff's driver to check-in periodically during the trip. *Id.* at 545.

Despite the foregoing, the Court found that the only thing Robinson could control was "the ultimate result – the delivery of the load to its final destination…." *Id.* at 543. The mere fact that Robinson "instructed Foster on incidental details necessary to accomplish that goal" was insufficient to find Robinson responsible for the negligence of Groff's driver. *Id.* at 546. When viewing the evidence as a whole, the court held that Robinson's conduct did not create a principal agency relationship.

The court in *Schramm* found that there was no agency relationship by written agreement or conduct. Therefore, Groff remained an independent contractor at all times. An independent contractor is "one who contracts to perform a certain work for another according to his own means and methods, free from control of his employer in all details connected with the performance of the work except as to its product or result." *Id.* at 544, citing *Kersten* at 1272 (quoting *Gale v. Greater Washington Softball Umpires Ass'n,* 311 A.2d 817, 821 (Md. App. 1973)). Because Groff was an independent contractor, Robinson could not be held liable under the doctrine of *respondeat superior*.

iii. Negligent Hiring Theory

Courts have held that a broker has a duty to use reasonable care in selecting truckers whom it maintains in its stable of carriers. *Schramm* at 551. In *Schramm,* Groff did not have a "Satisfactory" SafeStat rating as required by the FMCSA when Robinson entered into a contract carrier agreement with it. Although Robinson's negligence appeared slight, it was sufficient to withstand a motion for summary judgment[2].

The Court in *Schramm* stated that the **broker's duty of reasonable care** requires it: (1) to check the safety statistics and evaluations of the carriers with whom it contracts on the

[2] Contrast *Smith v. Springhill Integrated Logistics Management, No. 1:04CV13,* 2005 U.S. Dist. Lexis 22765 (N.D. Ohio Oct. 6, 2005) where a review of the motor carrier's rating inured to the ***benefit*** of the broker. In *Smith*, Plaintiff asserted a negligent hiring claim against broker in a fatal collision. The broker moved for summary judgment on the negligent hiring claim. In support of its motion, broker provided evidence of the carrier's satisfactory Safer rating. Upon granting summary judgment, the Court considered the carrier's high rating as evidence that broker acted reasonably in retention of carrier.

SafeStat database maintained by FMSCA; and, (2) to maintain internal records of the persons with whom it contracts to ensure that they are not manipulating their business practices to avoid unsatisfactory SafeStat ratings. *Id.* at 551, citing *Cf*. *L.B. Foster Co., Inc. v. Hurnblad,* 418 F.2d 727 (9th Cir. 1969). The FMCSA provides information regarding carriers on various Internet websites. *Schramm* at 543. This documentation currently includes "SafeStat" information which rates carriers' safety performance. *Id.*[3]

The court appeared to concede that it was ***expanding*** **the obligations of the broker,** but suggested that the obligations were not "onerous," and that the imposition of such a common law duty was not incompatible with the FMCSR. *Id.* at 551. Rather, the court held that imposing such a common law duty served the interest of protecting the public:

> To the contrary, imposing a common law duty upon third party logistics companies to use reasonable care in selecting carriers furthers the critical federal interest in protecting drivers and passengers on the nation's highways.

Id. at 552.

While the court found that Robinson's negligence was "somewhat thin," it held that the nature of contract carrier agreements involved the public interest. *Id*. Significantly, the court observed that Robinson's actions increased the risk to the public, and that as a business owed a higher duty to the public than mere adherence to regulations:

> Finally, it cannot be ignored that Robinson increased the risk of harm to innocent third parties by its own actions. When seeking business, Robinson advertises to shipper customers that "[i]n the rare event that the damage [caused in an accident] goes beyond the carrier's insurance limits, CHRW maintains a liability insurance policy that pays the rest." Robinson contends that because shippers cannot be held liable for personal injuries caused by a

[3] The Federal Motor Carrier Safety Administration's SafeStat rating system is to be replaced by the **Comprehensive Safety Analysis 2010 (aka CSA 2010)** in the near future. FMCSA's current target date for posting CSA 2010 carrier scores online for carriers and the public simultaneously is November 30, 2010. Initially, the scores will be based on SafeStat data until CSA 2010 scoring data begin to accumulate, which FMCSA has recently predicted will be in the spring or summer of 2011. CSA 2010 is an entirely new approach to safety enforcement, and its requirements and ramifications will be the subject of another ACTA presentation. In the meantime, it is fair to expect that the plaintiff's bar will attempt to apply CSA 2010's carrier scoring, intervention and investigation processes and CSA 2010's new driver safety rating system against industry members, including brokers, in pursuit of negligent hiring, retention and entrustment claims even more vigorously than SafeStat data have been utilized in support of such claims.

> carrier's driver and thus would not care about the existence of excess insurance coverage for such injuries, this promotional statement and ones like it are of no practical effect. I am not willing to take such a cynical view. Responsible shippers are entitled to receive from firms with which they contract honest and accurate information about the insurance available to compensate victims of catastrophic accidents, such as the one involved in this case. It should not be assumed, as implicit in Robinson's argument, that American businessmen and businesswomen are concerned only about saving every nickel and dime and protecting themselves from liability. It is not only government regulators and others in the public sector who have a sense of public responsibility. Moreover, even if business executives engaged only in a cost/benefit analysis, they may very well conclude that the loss to their goodwill resulting from a source of adequate compensation for third parties suffering dreadful injuries in accidents caused by carriers shipping their products far outweighs the marginal increase in cost they must pay for excess insurance coverage to third party logistics companies through whom they arrange their shipments.

Id. at 552-53.

iv. Negligent Entrustment Theory

In order to be liable for negligent entrustment, one must be the supplier of chattel. A "supplier" of chattel is one who has the right to control the chattel. *Id.* at 547, citing *Broadwater v. Dorsey,* 688 A.2d 436, 439 (Md. 1997). The court in *Schramm* reasoned that Robinson could not be held liable for negligent entrustment because it did not provide the equipment to the driver (Foster), nor did it have control of it. Rather, Groff provided both the chattel and driver.

2. ***Jones v. D'Souza*****,** No. 7:06CV00547, 2007 WL 2688332 (W.D. Va., Sept. 11, 2007); ***Jones v. C.H. Robinson Worldwide, Inc.,*** 558 F. Supp. 2d 630 (W.D. Va. 2008)

A. Facts

Two vehicles were traveling in opposite directions on a divided highway. As they approached each other, the vehicle operated by AKJ Enterprises, Inc., d/b/a Unlimited Express ("AKJ"), crossed the median, striking Plaintiff's vehicle. *Id.* at 633. At the time of the accident, AKJ was transporting a load of cable reels manufactured by Coleman Cable Inc., pursuant to a contract carrier and/or broker agreement between AKJ Enterprises, Inc. d/b/a Unlimited Express ("AKJ") and C.H. Robinson (Robinson). Plaintiff alleged that AKJ and its driver were agents, servants or employees of Robinson. *Id.* at 635.

B. **Theories of Liability**

Plaintiff's claims against Robinson included violations of the MCA and FMCSR, negligence under the doctrine of *respondeat superior*, negligent hiring, and supervision and entrustment. *Id.* at 634.

Plaintiff claimed that pursuant to the contract carrier agreement, between Robinson and AKJ, Robinson would arrange the dates and times for pickup and delivery, obtain the pickup and delivery addresses, communicate any specific limitations or directions as to the loading or unloading of cargo, communicate any time-sensitivity issues for the load, and provide directions for transport of the load to AKJ and its driver. *Id.* at 637. Such communications were included on the Carrier Load Confirmation form that was sent from Robinson to AKJ. *Id.* at 635. Plaintiff contended that these requirements and communications indicated a high level of control by Robinson over AKJ and its driver. *Id.* at 637.

i. **Statutory Liability Theories**

Plaintiff first alleged that Robinson violated §14101(a) of the MCA. 49 U.S.C. §14101 (a) which requires a motor carrier to provide safe and adequate service, equipment and facilities. Plaintiff argued that Robinson violated this section because it knew that AKJ was unfit to operate as an interstate commercial carrier. *Jones v. D'Souza,* No. 7:06CV00547, 2007 WL 2688332*,* at *5. Plaintiff also alleged that Robinson violated §390.13 of the FMCSR, which provides that "no person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter." 49 CFR § 390.13. However, the Court concluded that the statute was enacted for ***commercial*** disputes only and granted Robinson's motion to dismiss on this issue. *Id*. at *7*.* (See also, *Schramm, supra*.)

ii. **Negligence and *Respondeat Superior Theories***

The court in *Jones* noted four factors in determining whether an individual or entity is an employee or an independent contractor: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power of control. *Id.* at 638, citing *Hadeed v. Medic-24, Ltd.,* 377 S.E.2d 589, 594-95 (Va. 1989). The fourth factor, **power of control, is determinative**. *Id.* However, the employer need not actually exercise this control; the test is whether the employer has the power to exercise such control. *Id.* at 638, citing *McDonald v. Hampton Training Sch. for Nurses,* 486 S.E.2d 299, 301 (Va.1997).

Plaintiff argued that under their contract carrier agreement, AKJ and Robinson controlled, managed and/or supervised the manner, method and/or procedure by which this load was to be transported, including but not limited to, the time the shipment was to be picked up and delivered, the route to be taken, payment restrictions, and extensive driver instructions. Plaintiff further alleged that under the agreement, Robinson had such a degree of control over AKJ's activities that AKJ and its driver were employees, not independent contractors, of Robinson. *Id.* at 638.

Defendant Robinson argued that it was not vicariously liable for the negligence of AKJ or its driver, because AKJ was an independent contractor. *Jones v. D'Souza,* 2007 WL 2688332, at *4. Robinson pointed to the contract carrier agreement, which stated that "the Parties understand and agree that the relationship of Carrier to Robinson hereunder is solely that of an independent contractor…" *Id.* at *3. The agreement further provided that "such persons are not employees or agents of Robinson or its Customers." *Id.* Most importantly, it provided that "persons employed…under this Contract are subject to the direction, control and supervision of the Carrier, and not of Robinson." *Id.*

The court found that AKJ was an independent contractor under the contract carrier agreement with Robinson. The court also found that Robinson did not exercise a sufficient degree of control over AKJ to "convert their contractual relationship to one of employer-employee." *Id.* at 638-39. While Robinson arranged "pickup dates and times, provided pickup and delivery addresses to the carrier, provided other directions regarding the transportation of the load including instructions from the shipper, and required drivers to call in to report the status of shipments," the court held that these activities were mere incidental details necessary to accomplish Robinson's ultimate goal of delivery. *Id.* at 639. The court also noted that Robinson could not terminate AKJ's driver or control the details of the driver's schedule or compensation. *Id.* Based on the foregoing, the Court concluded that Robinson could not be held liable under common law negligence and the doctrine of *respondeat superior.*

iii. **Negligent Hiring Theory**

The court observed that an employer is liable if it places an unfit individual in an employment situation that involves an unreasonable risk of harm to others. *Interim Personnel of Central Virginia, Inc. v. Messer,* 559 S.E. 2d 704, 709 (Va. 2002). Courts have held that

"knowledge" is a key element of a negligent hiring claim, as an employer fails to exercise reasonable care when he *knowingly* places an individual in an employment situation that is a threat to third parties. *Id.* The court held that in order to "succeed on a claim for negligent hiring of an independent contractor, the plaintiff must also be able to prove that the contractor was incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of the incompetence, and that the principal knew or should have known of the incompetence." *Jones v. C.H. Robinson* at 642-43.

Plaintiff alleged that Robinson specifically knew (or should have known) that AKJ did not have sufficient experience as a motor carrier. *Jones v. D'Souza,* 2007 WL 2688332, at *4. Further, it should have been aware that AKJ had a deficient safety rating by the FMCSA, was financially insecure, and unfit to operate. *Id.* In response, Robinson argued that it was not liable for negligent hiring because the contract carrier agreement specifically stated that AKJ was not its employee of Robinson. *Id.* However, the general rule is that "one who employs an independent contractor is not liable for injuries to third parties from the contractor's negligence." *MacCoy v. Colony House Builders, Inc.,* 387 S.E.2d 760, 762 (Va. 1990).

In their motions for summary judgment, the parties agreed that Robinson did not conduct any investigation into AKJ's safety and fitness as a carrier beyond ascertaining that it was insured, that it had a conditional safety rating, and that it had valid operating authority from the FMCSA. *Id.* at 643. Instead, the dispute between the parties focuses on the appropriate duty of inquiry required of Robinson. *Id.*

Plaintiff argued that Robinson should have conducted an investigation into AKJ's *safety* program and its safety ratings, and that those ratings would have disclosed that AKJ was an *at risk carrier* that was likely to be involved an accident. *Id.*[4]

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[4] The Federal Motor Carrier Safety Administration (FMCSA) maintains a database currently known as the Motor Carrier Safety Status Measurement System, or "SafeStat." SafeStat scores range between 0 to 100 (with 100 being the worst). The general Safety Ratings are: 0-49: Satisfactory; 50-74: Conditional; 75-100: Unsatisfactory. SafeStat combines current and historical carrier-based safety performance information to measure the relative (as compared to other carriers) safety fitness of interstate commercial motor carriers (and intrastate commercial motor carriers that transport hazardous materials). This information includes Federal and State data on crashes, roadside inspections, on-site compliance review results and enforcement history. While SafeStat is designed to enable FMCSA to quantify and monitor the safety status of individual motor carriers on a monthly basis, and thereby allowing FMCSA to focus enforcement resources on carriers posing the greatest potential safety risk, the information provided by SafeStat is also available to the general public on the Internet. The SafeStat database reports scores for carriers across different Safety Evaluation Areas, or SEAs.
***But see* footnote 3**.

Robinson argued that there is no evidence to demonstrate that it either knew or should have known that AKJ would be likely to be involved in a collision such as that involved in this case. *Id.* Instead, Robinson alleged that it made all appropriate inquiries prior to hiring AKJ to carry the subject load by determining that AKJ was properly insured and had valid operating authority from the FMCSA. In addition, the contract carrier agreement between Robinson and AKJ required AKJ to maintain a "conditional" rating from the FMCSA, and Robinson confirmed AKJ had a conditional rating prior to hiring it to transport the subject load.

The court noted that FMCSA maintains a public website which includes several different categories of safety information. *Id.* Carriers are scored on a bell curve such that there will always be carriers at either end of the curve regardless of their level of safety. *Id.* Information contained on the FMCSA website revealed AKJ was in the bottom 3% of the motor carriers in the country with regard to its Driver and vehicle SEA (Safety Evaluation Areas) *Id.* at 643-44. Studies published on the FMCSA website indicated that there is a correlation between deficient SEAs and crash rates. *Id.* at 644. The FMCSA website also indicated that AKJ's insurance coverage had been cancelled eight (8) times from 2001 to 2004 and that AKJ had previously been cited by the FMCSA for numerous violations of federal safety regulations. *Id.*

Based on the foregoing, the Court held that Robinson knew of AKJ's deficient safety rating and conducted no additional investigation to determine their professional reputation and experience. *Id.* at 648. The court noted that Robinson knew that AKJ's driver was inexperienced and had recently received her commercial driver's license. *Id.* The court found that Robinson should have known that all these factors contributed to the proximate cause of the accident. *Id.* It concluded that there is a "common law duty upon third party logistics companies to use reasonable care in selecting carriers" based on the "critical federal interest in protecting drivers and passengers on the nation's highways." *Id.* at 645, citing *Schramm,* 341 F. Supp. 2d at 552-53.

iv. **Negligent Entrustment Theory**

The Plaintiff also claimed that Robinson was liable under the theory of negligent entrustment. Citing to Section 308 of the *Restatement (Second) of Torts*, Plaintiff argued that Robinson negligently entrusted AKJ to transport the load. *Id.* Section 308 of the *Restatement* provides:

> It is negligent to permit a third person to use a thing or to **engage in an activity** which is under the control of an actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Robinson argued that in order to be liable for negligent entrustment, the employer must own the *instrument* which caused the accident. Robinson therefore argued that it was not liable for negligent entrustment because it did not own the *instrument* at issue. *Id.* However, Plaintiff argued that the asserted claim against Robinson was for the negligent entrustment of the *assignment to haul the cargo,* not the entrustment of the *instrument*. *Jones v. D'Souza,* 2007 WL 2688332, at *6. Therefore, Plaintiff argued in effect that the claim was really for negligent entrustment of an *activity*. *Id.*

The court had previously held that because Virginia law adopted Restatement (Second) of Torts § 308, it did recognize a claim for negligent entrustment of an *activity* but only when the activity would require the handling of a thing that was somehow *dangerous in and of itself*, *Id.* at 649. But this argument was subsequently rendered moot, as plaintiff conceded that the load (rolls of wire) was not inherently dangerous.

Thus once again, the broker succeeded in defeating at the summary judgment stage all claims of liability against it, except negligent hiring.

3. Sperl v. Henry et al., 04 IL 028, Will County, Illinois, (March 2009) *(Distinction: Driver Admits Agency Relationship With Broker)*

In *Sperl*, a Will County, Illinois court recently delivered a stunning $23.7 million verdict against C.H. Robinson (Robinson), highlighting the staggering significance of broker liability in casualty cases.

A. **Facts**

On April 1, 2004, DeAnn Henry (Henry) was driving a truck when she lost control and rear-ended multiple vehicles. The collision resulted in two deaths. Henry was driving on a suspended license and had falsified her logbooks. Robinson argued that Henry was an agent of Dragonfly, and was driving pursuant to Dragonfly's independent contractor agreement with Robinson. Thus, Robinson argued that it had no control over Henry. Plaintiffs argued, however, that the contract between Dragonfly and Robinson effectively made Henry *Robinson's* agent. The jury ultimately agreed.

B. **Distinctions At Trial**

This case can be distinguished from the cases analyzed above in that ***driver Henry believed she was acting as Robinson's agent***. A special interrogatory as to whether Henry was an agent of Robinson was answered in the affirmative. Henry testified that based on her subjective belief, she had her own "agreement" with Robinson, thus signifying an employer/employee relationship. Moreover, the Plaintiff's expert testified that Robinson controlled Henry during the course of transportation, and that Henry dealt directly with Robinson. Specifically, she received the load information and the assignment from Robinson, communicated directly with Robinson, made check calls through Robinson, was paid by Robinson, and identified herself as a representative of Robinson. The jury was persuaded by Plaintiff's arguments and concluded that a principal-agent relationship existed between Henry and Robinson.

C. **Post Trial – Battle Continues**

Upon post-trial motion practice, Robinson asserted that an independent contractor relationship, not an agency relationship, existed as a matter of Illinois and federal case law involving similar broker carrier agreements. The court denied the motions, and Robinson filed an appeal which is currently pending.

4. ***Puckrein v. ATI Transport, Inc.,*** 897 A.2d 1034 (N.J., 2006) (Direct Action against Shipper)

A. **Facts**

The Puckreins were killed in 1998 when their automobile was struck by an unregistered and uninsured tractor-trailer with defective brakes. The tractor-trailer was owned by ATI Transport, Inc. (ATI). BFI had contracted with World Carting Corporation to transport a load and World Carting then assigned its responsibilities to ATI. *Puckrein* at 1037. Pursuant to the contract, World Carting was to provide all necessary equipment complying with all federal, state and local laws, rules, regulations, permits and licenses. *Id.* It was to furnish BFI with proof of insurance and indemnify BFI for any and all injuries or death resulting from work preformed. *Id.* at 1039.

Testimony revealed that World Carting's liability insurance expired two months before the accident. Despite BFI's contract with World Carting, ATI vehicles began hauling the glass residue and waste in lieu of World Carting vehicles. This caused BFI to believe that World Carting and ATI were the same company. In fact, World Carting and ATI shared the same address and were both owned by John Stangle. No one at BFI inquired as to whether ATI's registration, insurance and other licenses were in order.

B. **Outcome**

The trial court granted a summary judgment in favor of BFI. This was affirmed on appeal, but reversed at the New Jersey Supreme Court level. There, the court held that the facts alleged in the complaint were sufficient to establish a claim against BFI for negligent hiring of an independent contractor. Moreover, the court found that there were issues of fact related to the joint venture/alter ego theory that should have defeated summary judgment.

i. Negligent Hiring Theory

The court first addressed the plaintiff's incompetent contractor claim. It observed that, as a general rule, when a person engages an independent contractor to do work that is not in and of itself a nuisance, he is not vicariously liable for the negligent acts of the contractor in the performance of the contract. *Id.* at 1041. But the court also noted that there are three exceptions to this rule: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent

contractor; or (3) where the activity constitutes a nuisance *per se*. *Id*. Only the second exception -the incompetent contractor exception - was at issue in this case. *Id.*

To prevail against a defendant on a claim of negligent hiring of an independent contractor, a plaintiff must show that the contractor was incompetent; that the harm that resulted arose out of the incompetence; and that the defendant knew or should have known of the incompetence. *Mavrikidis v. Petullo*, 707 A.2d 977 (N.J. 1998). The court ruled that the hauler's basic competency included, at a minimum, a valid driver's license, registration certificate, and a valid liability insurance identification card. The court reasoned that the question was not whether World Carting was competent to transport BFI's loads upon a public roadway – it was not. The question was whether it violated its duty to use reasonable care in selecting a trucker and whether it knew or should have known of World Carting's incompetence. The question was whether BFI knew or should have known of World Carting's incompetence. The court stated that a **company** (such as BFI) whose core purposes is the collection and transportation of materials on the highways **had a duty to use reasonable care in hiring an independent trucker** -- including a duty to make an inquiry into the trucker's ability to travel legally on the highways.

Mr. Stangle admitted that he knew that at least one of the drum brakes on the truck was completely missing. An automotive engineer retained by the State Police determined that a "maximum of only 54 % of the required breaking existed" on the truck. *Puckrein* at 1037. Stangle pled guilty to the motor vehicle offenses of a operating under a suspended registration, operating an unsafe vehicle, and operating an uninsured vehicle. *Id.* at 1038.

The extent of the inquiry depends on the status of the principal and the nature of the task that the contract covers. *Id.* at 1044. The court noted that a *casual* shipper of goods has a right to assume that the carrier is not conducting business in violation of the law. Conversely, a company whose core purpose is the collection and transportation of materials on the highway has a duty to use reasonable care in the hiring of an independent trucker -- including a duty to make an inquiry into the trucker's ability to travel legally on the highways. *Id.* Therefore, in effect the court held that the size, experience and expertise of a shipper are factors in ascertaining whether that shipper has a duty to exercise due care in the selection of independent contractors.

ii. Joint Venture/Alter Ego Theory

Finally, the court rejected the contention that even if the contractor (ATI) was incompetent, BFI-NY cannot be vicariously liable for its acts since it purportedly had “no relationship whatsoever with it”. Focusing upon the following facts, the court found that the evidence suggested that World Carting and ATI were one and the same and the BFI knew it and treated them as one entity.

- BFI-NY hired World Carting, through its president, Stangle, to transport its glass residue to New Jersey.
- World Carting sent ATI trucks to do the transporting and they were filled by BFI-NY with no questions asked.
- The BFI-NY employee responsible for health and safety issues (Van Woert) testified at his deposition that for ATI to have made pickups, it "would have to have some sort of agreement with BFI."
- As far as the transportation manager for BFI-NY could recall, although ATI was doing the transporting, the invoices for the loads said "World Carting" and all payments were issued to "World Carting."
- Employees of BFI-NY testified that they thought World Carting and ATI were the same company.
- Although World Carting agreed in its contract with BFI-NY that it would not subcontract the job to an "independent contractor" without BFI-NY's permission, according to the record, it neither sought nor obtained that permission to use the ATI truck, inferentially holding out ATI as its employee or alter-ego. Indeed, that seems to be the way BFI-NY's employees viewed those entities.
- World Carting and ATI have the same address.
- Stangle was president and owner of both World Carting and ATI, and his wife, Kristen Stangle, served as general manager for World Carting.

Based upon this perceived issue of material fact, the Supreme Court reversed the summary judgment and sent the matter back to the trial court level for further adjudication.

RISK MANAGING BROKER-CARRIER RELATIONSHIPS

The above cases demonstrate the Plaintiffs' bar's recent success in applying traditional theories of liability to brokers in serious casualty claims. Given the recent $23.7 million dollar verdict against the broker in *Sperl, supra.,* this risk is too serious to ignore. While broker liability exposure in casualty claims now exists, there are ways in which it may be minimized.

1. CAREFULLY CRAFT BROKER/MOTOR CARRIER AGREEMENTS

In light of Plaintiffs' recent successes in securing a pathway toward establishing broker liability, no contract can ensure a broker/shipper is completely insulated from liability for accidents occurring on U.S. highways. However, there are some steps that one may take to minimize this risk when contracting with motor carriers.

A. Pre-contract: Maintain Arms Length Relationships Between Brokers/Shippers and Motor Carriers. As shown in Puckrein, if the broker/shipper is an entity directly related to the motor carrier, this will increase the likelihood that a plaintiff may successfully establish an agency relationship between the shipper/broker and the carrier. If business practical, ensure that the entity dealing with the motor carrier is not a direct relative.

B. Seek Professional Help. The agreement should be prepared by an attorney.

C. Use ATA Model Contract Guidance. Subject to the immediately preceding subsection, the American Trucking Association's forms serve as a good "place to start" for motor carrier and other forms of transportation agreements. These may be tailored to fit specific needs.

D. Make Independent Contractor Status Explicit. The agreement should clearly assert that the motor carrier is an independent contractor and not an agent or employee of the broker or shipper.

E. Confirm *De Minimis* Role of Broker/Shipper with Actual Freight Movement. The agreement should document the fact that it is the motor carrier and not the broker/shipper that is responsible for the actual transport of the freight.

F. Verify Operating Authority. The agreement should make clear that the carrier must certify that it has valid operating authority.

G. Verify Insurance. The agreement should provide that the broker may demand proof of requisite insurance documentation.

H. Broker's Disclaimer for Bodily Injury and Property Damage. The agreement should provide that broker/shipper is not responsible for bodily injury or property damage arising during the transit of the cargo.

2. VETTING MOTOR CARRIERS BEFORE LOADS TENDERED: TWO VIEWS

The above cases particularly underscore the exposure a broker faces if it does not reasonably vet the background of a motor carrier before hiring them to carry a customer's load. There are two contrasting schools of thought in the proper approach for brokers/shippers to take when considering which motor carriers to engage in connection with particular shipments.

A. View 1: Proactive, Diligent Hiring Practices Required

The first view follows the reasoning of the some of the above courts and suggests that brokers have affirmative duties to actively vet prospective motor carriers' qualifications in order to avoid downstream liability. Such "due diligence" may include securing the following:

1. ***SafeStat Scores.*** A review and analysis of the carrier's current SafeStat scores[5];
2. ***Current MC Certificate of Registration with FMCSA.*** *Ensure carrier maintains a valid, current Motor Carrier registration with the FMSCA;*
3. ***USDOT Satisfactory Rating.*** *Check the carrier's safety rating before entering into the agreement to ensure the carrier's safety rating is sufficient. Ensure that carrier's drivers' SafeStat scores are sufficient. This work should be documented. Maintain a file for review.*

[5] But see footnote 3

4. ***Carrier to Advise Broker of any Safety Rating Change.*** *Agreement should require that the carrier immediately advise of any change in its safety rating;*
5. **Form MCS 90 Endorsement and Sufficient Limits**. Require that carrier provide documentation that its commercial/business auto liability policy incorporates Form MCS 90 and that the policy's limits satisfy with USDOT requirements. Ensure that the policy includes an omnibus clause that protects parties other than the insured against claimed vicarious liability arising out of the insured's acts;
6. ***Qualifications Checklist.*** *Keep a qualification checklist to incorporate these requirements in future contracts. Some who follow this line of reasoning suggest that a broker maintain a detailed checklist of carrier qualifications. The idea is that showing that the checklist was followed will be evidence of the broker's "due diligence" in defense of a negligent hiring or entrustment claim.*

B. **View 2: Reliance on DOT Evaluations Enough** (But is it enough?)

Others strongly disagree with the foregoing approach. Their view is that a broker should take the position that the Department of Transportation is charged with qualifying motor carriers for operation in interstate commerce and has far greater resources to perform that function than any broker or other individual entity. Accordingly, if the DOT has qualified the carrier, that should be satisfactory proof of qualification to the broker. Indeed, some courts have accepted this position.

Those taking the "good enough for DOT is good for me" approach are, however, generally not suggesting the broker perform no review. What they are suggesting, however, is that the broker perform a more holistic "smell test" review of the carrier, rather than apply a more formulaic checklist approach.

One of the problems with following a specific checklist of qualifications is premised upon the recognition of the reality of the freight movement business. Loads are often tendered "on the fly" and on very short notice. Accordingly, it is recognized that a broker may, as a practical matter, not have time to sufficiently vet the carrier to the "letter of the

list". Moreover, even if the broker previously vetted that particular carrier, its conditions may have changed and the broker may have no notice of the change (e.g. carrier being downgraded to "conditional" premised upon a safety fitness audit). Accordingly, if the broker tenders a load to a carrier who does not meet its own stated qualifications, the plaintiffs may use the argument that the broker violated the very minimum safety standards which it created. Further, if the agreement provides for retention of this type of documentation, but is not followed, a party may be deemed to have "violated its own standards," which may in turn serve as evidence of said party's own negligence. Such arguments might be persuasive to a jury, and in some venues, may even provide the basis for punitive damages.

3. AVOIDING JOINT VENTURE/ALTER EGO CLAIMS: CONSIDERATIONS FOR TRUCKING COMPANIES WITH LOGISTICS AND BROKERAGE COMPONENTS

Where a company operates both a brokerage component ("non-asset based") and a motor carrier component ("asset based") businesses, maintaining the brokerage's independent status *vis-a-vis* the motor carrier component is especially challenging. In order to minimize the likelihood of success of alter ego claims, the following considerations are important:

A. ***Different Name.*** The identity of the asset-based entity should be distinct from that of the non-asset based entity. Identical and/or similar names may draw the inference that the entities are related or even identical.

B. ***Separate Employees.*** If the two entities share employees in common, this may increase the likelihood that they are deemed the same.

C. ***Separate Addresses.*** Two businesses sharing the same office space and/or address may invite the inference that the two businesses are actually one and the same.

D. ***Separate Contact Numbers.*** Two businesses sharing the same telephone lines may also invite the inference that the two businesses are actually the same.

E. ***Separate Officers and Directors.*** Two businesses sharing the same key personnel may also invite the inference that the two businesses are actually one and the same.

F. **Separate Assets.** Vehicles and other assets should not be co-owned and the use of one component's assets by another should be contractually governed. For example, by lease.[6]

G. ***Separate Insurance.*** The two entities should have separate policies of insurance. Do not rely on "additional insured" endorsements to differentiate the two businesses.

H. ***Monitor Websites, Brochures and Advertisements Periodically.*** Monitor promotional materials to ensure that the two entities are not easily confused.

I. ***Avoid "One Point Of Contact" And "Total Transportation Solution" Types of References.*** Promotional materials that invite the customer to confuse brokerage services with motor carrier services also blur the line between the two businesses.

J. ***Avoid "Joint Venture" References.*** References to joint ventures may tend to invite the public to conclude that two entities are more closely affiliated than is intended.

CONCLUSION

With rising insurance costs and tight operating ratios for motor carriers and private fleet operators, many have limited excess insurance coverage or none at all. That trend, coupled with ever increasing settlements and jury verdicts, often results in insufficient insurance to satisfy escalating judgments. This scenario exposes the fleet operator's assets to risk if and when there is an excess judgment. Many operators, particularly smaller ones,

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[6] Motor vehicle rental and leasing defendants use the **Graves Amendment** 49 U.S.C. § 30106(a) as a tort defense to indirect or vicarious liability claims under state laws such as New York's *Vehicle & Traffic Law* Section 388. Applying preemption principles, the Graves Amendment provides vehicle renters and lessors with a federal statutory basis for dismissing vicarious liability claims in motor vehicle accident lawsuits. This amendment to the *Safe, Accountable, Flexible, Efficient Transportation Equity Act* of 2005: A Legacy for Users ("SAFETEA") provides in relevant part that:

> [a]n owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

would do well to take advantage of recent changes in the law, particularly the Graves Amendment which effectively precludes liability from being imputed simply by virtue of ownership of a vehicle which was involved in an accident. Having a separate corporate entity own the equipment, which in some cases is the owner's most valuable asset, and then lease it back to the operator entity, may effectively shield the vehicles from potential excess exposure as long as proper procedures are followed.

The lack of adequate coverage often prompts courts to be creative in allowing plaintiffs to maintain claims against other "deep pockets." The era of a brokers' blanket exemption from liability for their role in the shipping process appears to have come to an end. The cases discussed above demonstrate that brokers face liability for failing, in some courts' view, to adequately inquire into the safety record of the carrier and the driver. Therefore, every broker should carefully examine its policies and procedures with respect to investigating, hiring, and retaining motor carriers. While there will certainly be elevated costs associated with such investigation, the consequences of failing to conduct a sufficient investigation in the face of current risks, may prove to be far greater than any such associated costs.

Similarly, as illustrated by the *Puckrein* case, even shippers are faced with potential liability for acts of the motor carriers they retain. Accordingly, they must carefully examine their policies and procedures with regard to the selection of the motor carriers. At the very least, shippers and brokers should make reasonable efforts to confirm that their motor carriers meet minimum legal standards for authorized carriers and utilize drivers and equipment which comply with such standards.

Finally, it is prudent for brokers and shippers to maintain arms' length relationships with each other and their chosen motor carriers to avoid claims of vicarious liability based upon joint venture or other alter ego theories.

The industry knows from experience that in their quest for ever higher recoveries, plaintiffs will continue to push the proverbial envelope to find new and deeper pockets. Thus, fleet operators, brokers, and their insurers must be ever mindful of the various types of liability theories being forged against them so that they may respond accordingly. While one cannot anticipate every potential or factual scenario, careful planning and the implementation of "best practices" will help minimize broker liability exposure in the context of casualty claims. Ω

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