

SHIPPER LIABILITY RISKS – WHAT LAWYERS KNOW AND YOU DON'T

A number of recent court rulings from around the country are increasing shipper liability. What are your chances of being sued if a carrier moving one of your loads is involved in an accident? How bad can it get if someone is killed? Just what can you, as a shipper, be held liable for? Can you be put out of business? Is there anything you can do to limit or even reduce your liability exposure? These issues and more will be addressed in this white paper.

Learn how to protect your company from these types of cases:

1999-Chapman v. Mutual Service Casualty Insurance Company. The federal court for the Eastern District of Wisconsin held that a broker can be held liable for a trucking company it hires stating, “one who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise control with reasonable care.” The court noted that when there is “retention of a right of supervision that the contractor is not entirely free to do the work his own way”. This opens the door for liability exposure to anyone retaining some control over carriers such as: pick-up and delivery deadlines or appointments, bill of lading and invoicing protocol, insurance requirements, specific trailer condition requirements and such other items as accessorial charges and fuel surcharges. This case concluded that liability can be imposed on anyone having “expertise in selecting trucking companies.” If you choose which carriers haul your loads, your company is exposed.

1984-Stone v. Pinkerton farms Inc. The Indiana Seventh Circuit Court of Appeals upheld a case applying liability for negligent hiring. The Court held that a shipper must exercise reasonable care when selecting a trucking company and that failure to do so could constitute negligence.

2004-Schramm v. Foster. In this case, the Federal District Court of Maryland ordered C.H. Robinson, to stand trial for negligent hiring of the carrier who allegedly caused the injury to Schramm. Defining “reasonable care” in selecting the carrier became the legal question. C. H. Robinson settled out of court for **\$4 million**. The crux of this case was that “an employer may be held liable for negligence in selecting, instructing or supervising (an independent) contractor.” It becomes obvious that the Schramm decision can be used by plaintiffs to try to hold any shipper, broker or third-party logistics provider that hires a carrier responsible for any damage or injuries resulting from that carrier’s operations.

2007-Fed. Insurance Co. v. Executive Coach Luxury Travel, Inc. The Bluffton University baseball team was traveling by chartered bus which crashed, killing 7 people. The Ohio Supreme Court found the University liable while transporting students in a vehicle the University “owned, hired or borrowed.” More lawsuits in progress will **far exceed the initial award of \$3 million**.

2010- Davies v. Commercial Metals Company. In this case, the Fifth District Court of Appeals of Florida recognized a cause of action for negligent selection of a trucking company who was hired as an independent contractor. The plaintiff was injured in a collision with the tractor-trailer hired by the scrap

metal company. The claim against the scrap metal company was for negligent hiring and retention, the Court recognizing the cause as viable by referencing section 411 of the Restatement of Torts, which provides, in part: “an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done.”

2011- Sperl v. Henry et al. An Illinois appeals court upheld a jury award of \$23.8 million against C.H. Robinson, after Robinson hired a motor carrier that was involved in a fatal truck crash. The driver of the truck killed 2 people and injured another when he rear-ended several cars. C.H. Robinson was considered “vicariously liable,” meaning they share liability for the actions of the carrier and driver.

Cases like these, from around the country, show what the climate is on the litigation scene. Plaintiffs are eager to sue and their lawyers are aggressively going after all parties involved. In fact, while researching for this paper, one corporate lawyer website stated, “The trial lawyer for the innocent victim of a tractor-trailer collision should not overlook the potential liability of the shipper, as well as that of the motor carrier and its driver”. These lawyers will go after the organization that has the “deeper pockets.” Very often, the shipper has more assets than a small carrier, so, you, the shipper, will end up in the crosshairs of the lawyers. Type in “filing truck accident lawsuit” on Google and you will get 96,400,000 results, with websites for 18 lawyers showing up on the first page. Shippers are fair game.

What else can the shipper be held liable for? Actually, for proper loading and securement of cargo. In October, 2010, the Third US Circuit Court of Appeals reversed the District Court’s decision and concluded that Pennsylvania law did impose a duty of due care to safely secure the goods the shipper has loaded into a third-party’s tractor-trailer. (Spence v. The EASB Group) This involved a rig that overturned when the load shifted, even though the experienced driver was on the trailer while ESAB loaded the pallets onto the trailer. Spence, the driver, secured the cargo with securement devices supplied by EASB.

Still another way an eager attorney may try to find liability on the shipper is found right in the Federal Motor Carrier Regulations (FMCSR). In section 390.13 of those regulations it states that “no person shall aid, abet, encourage or require a motor carrier or its employees to violate the rules of this chapter.” If a shipper regularly overloads trucks, or sets delivery schedules that require drivers to exceed the hours of service driving time, among other things, it may be argued that the shipper has violated FMCSR 390.13 and is therefore liable in the event of an accident.

Additionally, 34 states now have passed indemnification legislation that effectively makes it illegal to have a transportation contract between a motor carrier and a shipper that agrees to indemnify, defend or hold harmless the shipper from or against any liability for loss or damage that results from criminal acts, intentionally wrongful acts or omissions, wantonness or negligence of the shipper. It may be best to check your state’s individual indemnification laws. You can find a summary for each state that has these laws by going to the following website: http://www.ooida.com/Legislative_Watch/2012/Anit-Indemnification-Laws.shtml.

So, with awards of \$4 million, \$3 million and climbing, \$23 million and more almost every day how does a shipper protect themselves? Can you imagine trying to come up with \$4 million to settle a lawsuit? Can you figure out where you would even get the money to pay the premium for that kind of insurance protection? The courts have very definitely put the burden of due diligence square on the backs of shippers and brokers. This burden is compounded by the lack of necessary information to make informed choices. Cases like Schramm v. Foster open the door to liability for shippers who fail to use reasonable means to do background checks on motor carriers before they are retained.

What reasonable care can be taken by a shipper to reduce its liability exposure to for the negligent hiring claim? Some of these cases set a very high level of what is considered reasonable care which includes:

- 1) To consult the FMCSA Safestat database as to the carriers safety statistics and evaluations of any carriers it contracts with, and
- 2) To maintain internal records of the persons with whom it contracts to assure they are not manipulating their business practices in order to avoid unsatisfactory Safestat ratings.

In some cases a shipper may wish to hire a trucking company that has not been rated by the FMCSA. What can the shipper do in those cases and additionally to further reduce liability exposure?

- 1) Be sure that due diligence includes completely verifying full insurance coverage, federal operating authority and the FMCSA safety ratings Regularly re-verify this information, at least every six months, 3 would be better, or each time the carrier is used.
- 2) Be sure internal procedures are being followed by each staff member responsible for performing due diligence on carriers.
- 3) In the absence of FMCSA safety information, consider using a private service to obtain due diligence information. Or conduct an internal investigation of carriers that don't have the FMCSA rating.
- 4) Review contracts, bills of lading and other documents to be sure that current and future customers are well aware that your company is not a carrier or broker.
- 5) Maintain records of all due diligence and contacts.

Shippers are cautioned that in personal injury lawsuits, where damages exceed the motor carriers insurance, be assured that plaintiff's attorneys will try to recover against the shipper for negligence.

Further adding more burdens to this mix is the fact that recently, the FMCSA issued "guidance" that seemed to state that a shipper cannot rely upon the agency's own ratings to prove that the motor carrier operates safely. This reliance could clarify, to some degree, if the shipper did proper due diligence and mitigate liability. However, this "guidance" by the FMCSA has the effect of transferring liability to shippers in determining if a carrier is fit to operate.

SO WHERE DO I START?

Although a shipper may not rely on FMCSA ratings to prove a motor carrier operates safely, these ratings are an important starting point in showing due diligence in carrier selection. Set up internal carrier investigative procedures to be used for every carrier you use. For starters check the carrier information on the FMCSA website. Here's how:

- 1) Log on to www.fmcsa.dot.gov
- 2) Click on "safety & security"
- 3) Click on "safety fitness electronic records system"
- 4) Click on "company snapshot"
- 5) Enter carriers DOT, MC number or name
- 6) Click on "SMS Results". If scores are 65 or above, be alert, this is in the unsafe zone.
- 7) Click on "licensing & insurance", and get report. Print it out for your records. Check when authority granted. If under 1 year you may wish to not use or use with caution after doing further research on that carrier.

"SMS" stands for Safety Measurement System, part of the CSA 2010 safety initiative. It scores a carrier and driver's safety performance in 7 BASIC categories. Rankings are from 0 to 100 with 100 being the worst. Scoring reflects a carrier's BASIC score compared to other carriers. The categories are:

Unsafe Driving- includes speeding, reckless driving, not using seatbelt and others

Fatigued Driving- this includes hours of service violations, logbook violations and driving after being placed out of service.

Driver Fitness- includes drivers that don't meet medical qualifications, unqualified drivers, improper CDL endorsements and others.

Controlled Substances/Alcohol- includes violations for drivers who are under the influence or in possession of drugs or alcohol.

Vehicle Maintenance- Includes improper truck maintenance, defective brakes, tires, lights and so on.

Next, verify and document the carrier's insurance coverage. Contact their insurance company and get a certificate of insurance showing your company as an additional insured. Verify that they have commercial general liability, preferably for at least \$1 million in coverage. Verify at least the same for commercial auto liability. Make sure they have sufficient cargo coverage. This is especially important since, as of March 11, 2011, the Federal Motor Carrier Safety Administration no longer requires most motor carriers to carry cargo insurance. Imagine your horror to get a phone call telling you the truck hauling your load has overturned and the complete load has been destroyed and being told the carrier has no cargo insurance. Perhaps if it is scrap tires, no big deal. But, I have personally hauled loads of

electronics valued at over \$2 million dollars. One loss like that could potentially destroy your business. So, be sure to verify and record the carrier's insurance coverage.

Ask the carrier for references. Get names and phone numbers. Call them, record the responses and keep in the file. Ask the carrier about their background check policy for drivers. Top reputable carriers do background checks on all their drivers, often going back 10 years. Ask for an explanation of the carrier's oversight procedure. How will they determine the location of your load? Do they use GPS or satellite tracking? Discuss your particular requirements (temperature monitoring, tarping, 53' trailers, etc) with the carrier and be sure they can take care of your requirements. Record all this information in a file and set up a system that works for you. Make sure all your employees who choose carriers know and use this system.

Don't delay another minute! You do need to get started NOW! In case you are one of those who think that "this will never happen to me", consider the following large truck crash facts compiled by the FMCSA. I have taken the liberty to round the figures to the closest reasonable averages. The average number of fatal large truck crashes per year for years 1996 thru 2005 is 4500; the average number of deaths from those crashes is 775. Divide these figures by the number of days in a year and the result is approximately 12 crashes and 2 deaths **PER DAY**. The average number of injury large truck crashes for the same years, per year, is 90,000 with an average of 125,000 injuries per year from those crashes. Again, divide these numbers by days per year and the result is about 246 crashes and 342 injuries **PER DAY**. If you have a load of freight on the road, realize that your phone can ring any moment with the terrifying announcement that the truck has been in an accident. Then it is too late.

If your company doesn't have the expertise, time, personnel or financial resources to properly get started with all this, one solution is to use a highly skilled and experienced freight broker such as Integrity First Transportation, Inc. We can do all the pre-screening, verifying and investigation necessary to reduce your shipper liability significantly. We qualify every single carrier and verify that each carrier has active authority, cargo insurance necessary for your cargo, automotive liability insurance and is reasonable safe. We can make the phone calls for references and background research and forward the files on to you in a manner that fits your requirements. If you desire, we can go so far as to screen carriers with actual on-site inspections of the carrier facilities and maintenance procedures so you know all that is possible is done to protect your interests. We at Integrity First Transportation are transportation professionals that keep up with the latest industry developments, news and legislation. This is a great service to shippers who do not have the budget or do not want to do the carrier qualification process themselves. We also carry contingent truck cargo insurance of \$250,000, contingent auto liability insurance of \$1,000,000 and Errors and Omissions insurance coverage with a \$1,000,000 limit. Errors and omissions coverage protects our shippers from loss in the event Integrity First Transportation makes a mistake and fails to properly qualify the carrier. Less than 100 freight brokers out of 15,000 nationwide carry this insurance. We also carry a \$75000 TIA surety bond.

Our goal, here at Integrity First Transportation is to keep your company informed and as safe as possible from liability risks and lost or damaged freight while at the same time, providing seamless, safe, on-time

delivery of your precious cargo. So, pick up the phone, make the call now, fax or even email your requests for a consultation or help right now. There is no obligation.

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ABOUT THE AUTHOR:

Mr. Stender has well over 30 years experience in the transportation industry. He started as a driver, later an Owner/Operator. He has over 2,000,000 accident free miles and numerous safety awards from such organizations as The National Tank Truck Carriers Association, the American Trucking Association, Schneider Specialized and Shell Oil. His is most proud of his award from Shell Oil recognizing him for 2,000,000 safe miles.

He also served as the Transportation Director for a private, industrial manufacturer. He has served in various capacities in the industry such as driver trainer, operations manager and several years as the Safety Director for a 48 state refrigerated carrier. He has specialized training in FMCSA regulations and has served as a certified Hazmat trainer as well as having done FMCSA Drug & Alcohol training.

Since 2006, he has operated his own office as an independent freight broker agent along with transportation consulting. As a broker agent he has moved loads as large as 160,000 pounds requiring 13 axle rigs and has arranged complete shipping of freight and machinery into Mexico, Canada, Europe and Africa.

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