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Review of Risk When Contracting with Motor Carriers

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Until Schramm v. Foster, the 2004 U.S. District Court Maryland case, property brokers were generally not liable for personal injuries or death caused by trucking companies hired by the broker to deliver freight. Six cases, including Schramm, have increased the risk of broker liability for personal injury and death.

Schramm v. Foster, 341 F. Sup 536 (US Dist.Ct.Md, 2004): In Schramm, a motor carrier was hired by C.H. Robinson to deliver a load of freight. While en route to make the delivery, the motor carrier coming off the freeway onto an exit ramp failed to yield or stop for oncoming traffic and ran into a pick-up truck, severely injuring two occupants. One was left in a vegetative state, and the other very seriously injured. The carrier had no safety rating.

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While there are many issues of liability raised in the case which were carefully analyzed by the Court, the essence of the case is that the Court ruled it was the broker's obligation to exercise reasonable care and due diligence, in the selection of the motor carrier. Robinson filed a Summary Judgment Motion in an attempt to be dismissed from the case. The Court carefully analyzed Robinson's operating procedures and found that none of the liabilities asserted, including vicarious liability - *(As used in the Schramm case it means the carrier was NOT determined to be Robinson's "agent". In order for vicarious liability to be imposed there must be authority to "control" the actions of an "agent". Thus a well drafted independent contractor clause helps avoid a finding of "control".)* fit the facts being presented. Ultimately the Court ruled that the question of whether Robinson had exercised reasonable care in selecting the motor carrier was a question to be decided by the jury. The case was settled out of Court.

Among the other "teachings" of the case are the following:

1. The Court observed that Robinson should have checked the Federal Motor Carrier Safety Administration's Safety Status Measurement System (SafeStat) system in order to check the

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carrier's safety scores. Robinson argued that the scores were inaccurate and that there was a disclaimer on the web site. The Court nonetheless sought to impose a further duty to evaluate the carrier's safety control measures.

2. The Court looked to the contract between Robinson and the motor carrier, finding that the language which made the carrier an "independent contractor" was controlling, and therefore Robinson was not liable under the theory of vicarious liability. Thus, it is important, from a contractual perspective, to include a good independent contractor clause included.
3. This case does *not* say Robinson, as broker, was liable. It said that the question of liability was for a jury to decide. As in any personal injury case, the facts will determine the outcome.

Puckrein v. ATI Transport, 2006 Lexis 656 (NJ Sup Ct 2006): In this case, a *shipper* was found liable for negligent selection of a motor carrier. The, a shipper hired a truck/carrier with full knowledge that the truck to be utilized had bad brakes. Additionally, the truck was unregistered and uninsured. The fully-loaded truck, while transporting the shipper's freight, ran a red light because of brake failure, hit another car, causing two deaths. This case was a blatant case of shipper negligence and it is no surprise that the shipper was found liable. Importantly, the Court states that there was an ongoing duty to check the safety ratings of the carrier.

McLaine, etc. v. McLeod, 661 SE 2d 695 (Ga. App. 2008): In this case, two principal theories of liability were asserted, one for vicarious liability and one for negligent hiring. The motor carrier's driver, while intoxicated, hit a pick-up truck killing two people and severely injuring a third person. It was undisputed that the driver was negligent. The Court, in reviewing the contract, between the broker and carrier, acknowledged that the contract provided that the carrier was an "independent contractor". It further provided a warranty that the carrier would furnish competent and properly licensed drivers. Evidence showed that the broker had used the carrier during the prior year, with no problems, and that the carrier passed the safety audit in 2003. The Court also found that there was no evidence of negligent hiring. The Court found there was no evidence that the broker could have or should have known that the carrier had hired an incompetent driver.

The case is significant in that it is the first one which cites a federal regulation, 49 CFR 391.23(k), which provides in substance that motor carriers hiring drivers must investigate the prospective driver's accident record, as well as conduct drug and alcohol tests. The regulation further provides that the employer "must take all precautions reasonably necessary to protect records from disclosure to anyone not involved in hiring". In short, specific information questions about drivers, by regulation, are not to be answered. The case is significant because the Court seemed to be saying that the broker had the right to rely on the contractual representations of the carrier, i.e. furnishing of competent drivers, as well as the law which says individual driver records cannot be disclosed. The broker was *not* found liable for either negligent hiring or vicarious liability.

The use of well-drafted Broker-Shipper and Broker-Carrier contracts, including load/rate confirmations, can help reduce the risk of liability.

Claredon National Insurance v. Johnson, 666 SE 2d 567, (Ga. App. 2008): In this case, the broker's independent sales agent hired the carrier. The driver admitted traveling too fast for conditions and rear-ended some cars that had stopped on the road. The plaintiff was severely injured and suffered permanent partial disabilities. The truck driver in this case was found to be legally blind in one eye, and had no commercial driver's license. In the contract between the motor carrier and the broker, an independent contractor clause was found. The clause also stated clearly that the day-to-day operations of the carrier were under the sole control of the carrier, and not the broker. While the broker was initially found liable by the jury, the case was reversed on appeal with the Court of Appeals stating that there was no evidence that the broker exercised any control over the day-to-day operations of the carrier, and thus the broker could not liable on the vicarious liability theory.

Jones v. D'Sousa, 2008 Lexis 45325 2008 (U.S. Dist. Ct. VA.): In this case, the truck hired by

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Robinson was involved in a head-on collision resulting in one death, and one person with serious multiple injuries. Claims were asserted against Robinson for negligent hiring, and vicarious liability. The contract between Robinson and the carrier provided that the relationship between them was that of independent contractors.

The Court ruled there was no vicarious liability. The remaining issue was negligent hiring. The contract between the parties provided that Robinson would only use carriers with "satisfactory" rating. However, the carrier Robinson hired had a "conditional" rating. Thus, Robinson violated its own contract.

The Court pointed out that Robinson in qualifying the carrier, checked the carrier's insurance, checked its safety rating (so it knew that it was conditional), and checked to make sure it had valid operating authority. However, the Court further stated that had Robinson investigated further into the Federal Motor Carriers Safety Administration's Safety Status System (Safestat) system, it would have found numerous safety violations. One of the most significant issues concerning the case involved the competing testimony about the validity and importance of the federal Safestat information.

Robinson called on Annette Sandberg, former head of the Federal Motor Carrier Safety Administration, who testified about the uncertainty of the information, as well as the fact that the web site showed a public disclaimer for commercial use of the information. The plaintiff's hired an "expert", an alleged transportation law expert, who testified that the public data should be validated. At the end of the competing evidence, the question of the validity and importance of the Safestat information was left up to the jury. Robinson was found liable for negligent hiring. The question of damages was left for subsequent hearings, and nothing has been reported. It is understood that a significant "settlement" was reached.

Sanders v. C.H. Robinson (Ill. Dist Ct. unreported) In this very recent case (March 2009), an Illinois state court found Robinson liable as an "agent" of the motor carrier. In this case, the carrier was involved in an accident resulting in two deaths, and another party severely injured. Initially, the legal theories asserted against Robinson were agency, joint venture, and partnership. According to Court documents, Robinson checked the carrier's operating authority, liability insurance, safety rating, and obtained a signed Broker-Carrier contract as a means of carrier qualification. Robinson attempted to be dismissed from the case under Summary Judgment Motion, arguing that the theories of liability asserted under Illinois law did not fit the facts. Robinson's Summary Judgment Motion was denied by the Court stating that there were material issues of fact which had to be decided by jury.

The plaintiff asserted that the driver and the sole proprietor motor carrier, who both admitted their negligence, were "agents" of Robinson under Illinois law. Jury instructions included definitions of "agents" and "agency" under state law which hinged on the question of whether Robinson exercised "control" so as to make the driver its "agent". The jury instructions apparently did *not* include anything about common practices in the transportation freight brokerage industry which could have distinguished information commonly given to carriers for instructional purposes, from "control" as that term is used in other industries.

Since the case has *not* yet been reported, we do not know the essential facts of the case, except that the jury found Robinson liable, as an "agent" of the carrier, and liable for $23-million in damages. Of

that amount, approximately $16-million was for loss of consortium for the surviving spouses of those who were killed. This case is far from completed. Post-trial motions will be filed and argued, and an appeal is possible. It is estimated that it will be at least a year before any final results can be determined.

As of this time, the "score board" for broker/intermediaries/shippers and Third-Party logistics companies is as follows:

- Two cases have been decided in *favor* of the broker (Georgia cases);
- One case has been decided against the broker and one was settled (both in US Federal District Courts where the broker in each case was C.H. Robinson);
- One case has been decided against a shipper.

What about the East Illinois case?

In summary, four courses of action should be considered in order to reduce the risk of personal injury/death liability for brokers/intermediaries:

1. A carefully written motor carrier selection process should be put in place with means for proving the application of the process for each carrier and each shipment. The qualification process should include use of a well-drafted Broker-Carrier contract. TIA offers to its members a carrier qualification framework for establishing such a process, as well as model contracts
2. A layer of insurance *specifically designed* to cover the risk of liability for wrongful death or personal injury arising out of actions of hired motor carriers should be obtained. It is urged that written acknowledgment be secured from the insurance underwriters acknowledging coverage of this *specific type of risk*. In general, general liability, auto liability, contingent cargo insurance, and E&O insurance do not cover those risks.
3. Establish an "on-call" relationship with a reputable personal injury defense lawyer who should be notified immediately in the event of a catastrophic loss involving a motor carrier whom you have hired. He or she should help you prepare a checklist of actions that you should take in the event of such a loss. In addition, having your own representation will assure that your insurance company defense counsel properly represent your company. Furthermore, in the event that a claim might exceed your insurance limits, you will need

your own counsel to defend you. This puts you in a "ready" position should that happen.

4. The use of well-drafted Broker-Shipper and Broker-Carrier contracts, including load/rate confirmations, can help reduce the risk of liability. TIA offers to its members model contracts that can be adopted to specific needs. Consult a qualified transportation attorney for assistance.

While some writers have stated these cases constitute a "trend" of liability for brokers, intermediaries, shippers, and third-party logistics companies, the reader should bear in mind the role of the media in sensationalizing large verdicts, in cases involving catastrophic injuries. At the end of the day, it is not too hard to predict that sloppy motor carrier selection procedures, exercise of excessive control over motor carriers, and poorly drafted transportation contracts (or no contracts at all) will increase risk of liability in cases involving catastrophic injuries.

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