



Date/Issue: **April 2009/Issue 64**

Title: ***Tips on how transportation brokers and other companies that hire motor carriers can reduce their liability exposure***

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Increasingly, shippers are holding transportation brokers liable for loss or damage to their freight. Third parties are also asserting that brokers are responsible for property damage and bodily injury when accidents occur. Claimants often allege that the broker breached its responsibility by failing to investigate a carrier's safety record, claims history and insurance status. Plaintiffs may also argue that the broker and carrier are either one and the same or have more than an agency relationship. The latter argument will likely center on the control that the broker exercised over the shipment contributed to the loss.

How, as a transportation broker, can you protect yourself?

What is negligent selection?

When a claim has occurred, typically the broker will not find itself to be directly negligent. They will not have operated the vehicle nor would they have had the federal authority to do so. If the actual motor carrier is found to be negligent, however, the question may arise as to whether the broker was negligent in selecting that particular motor carrier to transport the load. Central to this argument will be any potential lack of fitness on the part of the motor carrier (accident history, safety rating, experience, etc.) and whether the broker could have known this information during the carrier selection process. The *Schramm v. Foster* case involved this type of scenario and arose from an accident that left a plaintiff in a semi-vegetative state. The trucker's insurance was not sufficient to cover the devastating injuries and the plaintiffs looked to the broker (C.H. Robinson) for damages. While that case was settled out of court, it is important to note that the court was unwilling to dismiss the case against Robinson (summary judgment) on arguments regarding negligent hiring. In doing so, the court essentially took the position that brokers are responsible for the actions of carriers that they negligently select.

What can I do?

- Check the safety status (www.safersys.org) of all carriers that you engage.
- Require a satisfactory safety rating in broker contracts.
- Verify motor carrier insurance.
- Obtain the proper liability insurance coverage for your business.

What if I also own trucks and have authority as a motor carrier?

If a motor carrier is also licensed as a broker or freight forwarder, courts may impose carrier liabilities on the company even when loads are moved through the broker/forwarder channel. The fact that a broker also has motor carrier authority is not necessarily determinative but the *joint venture theory* holds that brokers and carriers are essentially the same entity if there is co-operation for profit and one exercises sufficient control over the other (see *Realty Development Co. v. Feit* and *Toledo v. Vanwater & Rogers*).

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It is also very possible that a plaintiff will argue that the company was actually acting as a motor carrier and not a broker when this was not the intention of the company. Confusion arises because a motor carrier hiring an owner operator (who has MC authority) and a broker hiring that same owner operator will appear to be very similar. Only the bill of lading will likely differ. From a liability standpoint, however, the implications can be significant. A motor carrier has primary responsibility for bodily injury or property damage even if an owner operator is working under the motor carrier's authority. Motor carriers that are also licensed as a broker or freight forwarder should discuss separating the companies with their attorney and tax accountant. It is also important that separated companies appear as separate to the shipping public.

What not to do:

- As a broker, do not identify yourself as the carrier on the bill of lading and don't allow the carrier to affix your name as the carrier on the bill of lading.
- Don't request that the carrier assign named drivers to your load.
- Don't refer to carriers as your "partners" in marketing materials or on your website. Avoid making claims about your "control over all aspects of the operation."
- Don't assign the carrier driver routes or otherwise route loads.
- Refrain from scheduling pickup and delivery times whenever possible.
- If an accident occurs in transit, don't instruct the driver to call the broker first.
- Don't sign shipper contracts wherein you assume carrier-like liability.

What types of insurance does a transportation broker need?

Several types of liability insurance policies are available to protect brokers from claims arising from cargo loss or damage and third-party liability. **Contingent Cargo Insurance** provides coverage when the motor carrier's insurance does not pay a claim and the motor carrier is unable to pay. Coverage is typically triggered only in situations where the motor carrier is negligent. **Errors & Omissions Insurance** protects the transportation broker if an error or oversight in the course of business causes a customer to suffer a financial loss. A transportation broker should ideally obtain a combined policy form with Errors & Omissions Insurance and Contingent Cargo coverage – this is not the same as purchasing separate policies. Doing so can create both gaps as well as overlaps in coverage.

Contingent Automobile Liability Insurance is also available to protect transportation brokers when they are held liable for death, bodily injury or third party property damage claims as a result of the motor carrier's negligence. Coverage may be purchased as a separate policy or, as an endorsement (add-on) to an Errors & Omissions insurance policy.

Avalon Risk Management specializes in understanding the complexity of liability issues for transportation brokers. We've designed a Combined Transit Liability (CTL) program to provide a comprehensive package for transportation brokers. Avalon's CTL policy is the only program of its kind endorsed by the Transportation Intermediaries Association (TIA).

For more information, please contact your local Avalon office or Andriana Davis, Product Manager at (847) 700-8087 or adavis@avalonrisk.com. To view a directory of Avalon's office locations, please visit our Web site at www.avalonrisk.com.

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