Shippers in the Crosshairs

Shipper Liability: The Reality of Current Liability Exposure and How to Reduce It for Your Company

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The OLD Rule

Shippers are *not* liable for the negligence of the independent contractors they hire, including motor carriers.
But the Rule is Eroding Quickly

• Courts are now treating Shippers who hire their own motor carrier more like **Brokers**.
  
  • **Brokers** may be responsible for a motor carrier’s negligence when they hire a motor carrier without researching the qualifications of the motor carrier.

  • **In same way, shippers** can be responsible for motor carrier accidents—*and usually the really, really catastrophic accidents.*
But why the Shipper?

- DEEP POCKETS & CREATIVE TRIAL LAWYERS!

- Usually, the accident is catastrophic and the motor carrier is “judgment proof” or:
  - Under-insured,
  - Or declares bankruptcy,
  - Or just closes up shop and disappears.

- When the motor carrier has no money, the shipper could be left to foot the bill for catastrophic accidents.
What’s the Shipper’s Risk Exposure

- A sloppy, fly-by-night motor carrier can make costly mistakes in areas that can directly hurt the Shipper:
  - **Cargo Securement & Placement**
    - *Loss of Cargo in transit can cause disastrous consequences*
  - **Freight Classification & Identification**
    - *Can cause mishandling & damaging important cargo*
  - **Accurate Freight Weight**
    - *Can lead to load shifting and loss of cargo or damage to cargo and overweight citations.*
What’s the Shipper’s Risk Exposure

- In these cases, when the motor carrier “disappears,” the shipper might have to foot the bill for:
  - Damage to its own cargo & other property
  - Damage to the property of third parties
  - Damage to the Government’s roadway
  - Injury & death to persons
Hypothetical Example 1

• Acme Co., a Houston manufacturer, hires Fly-By-Night Trucking, a little one-man motor carrier operation, to haul Acme’s widgets from Acme’s manufacturing factory to the distributor’s warehouse.

• Acme knows that Fly-By-Night’s trucks are old and in bad condition and that Fly-By-Night habitually employs inexperienced and inattentive drivers. But Fly-By-Night is cheap, and so Acme is saving $$$ with Fly-By-Night.

• Mrs. Jones is hit by a truck carrying Acme’s widgets and driven by one of Fly-By-Night’s employees. Acme may be liable for the injury to Mrs. Jones.
Hypothetical Example 2

- Acme Co. could also be liable if it simply fails to research and qualify Fly-By-Night as a competent motor carrier.
- Acme Co. might not even know about Fly-By-Night’s unsafe trucks and unqualified drivers!
- If one of Fly-By-Night’s drivers hits Mrs. Jones, Acme Co. can’t escape liability by claiming that it didn’t know that Fly-By-Night had a terrible safety record as a motor carrier!
Real Life Examples.

- **Stone v. Pinkerton Farms**
  - Motor Carrier slammed into a truck driven by Mr. Stone. Mr. Stone suffered severe, debilitating injuries.
  - Mr. Stone sued the Motor Carrier, but the Motor Carrier declared bankruptcy and all charges against him were dismissed.
  - So, Mr. Stone sued the Shipper, Pinkerton Farms.
  - Pinkerton Farms hired a Motor Carrier who was a bad apple:
    - 6 speeding tickets.
    - No liability insurance coverage
    - No motor carrier operating authority from the Feds or the State
  - Court held: No liability for the Shipper!
  - **BUT, the Law began changing after this decision.**

*Stone v. Pinkerton Farms, Inc., 741 F.2d 941, 942-943 (7th Cir. Ind. 1984)*
Real Life Examples.

**Puckrein v. ATI Transp.**

- BFI contracted with World Carting to pick up trash. World Carting assigned/brokered the loads to ATI Transport.
- ATI Transport was a bad apple.
- One of ATI’s trucks killed two people and seriously injured others.
- The ATI truck was:
  - Unregistered
  - Uninsured
  - And had “seriously defective brakes”

**Court’s Ruling:** BFI, the Shipper, was liable for the accident because it hired an “incompetent” motor carrier.
- BFI had a **duty to verify the minimum qualifications** for the motor carrier.

*Puckrein v. ATI Transp., Inc.,* 897 A.2d 1034 (N.J. 2006)
Real Life Examples.

- *Sperl v. Robinson*
  - CH Robinson hired DragonFly Express to haul a load of CHR’s potatoes to a CHR warehouse.
  - While en route, DragonFly’s Driver slammed into several vehicles—killing 2 and severely injuring others.
  - CHR controlled the method of payment and paid DragonFly’s Driver directly after a successful delivery.
    - Driver was dispatched by CHR, not by DragonFly.
    - CHR provided the materials for delivery.
  - Jury held that DragonFly’s driver was an *agent* of CHR and popped CHR with…
    - a $23.7 million verdict!
    - **UPHELD ON APPEAL.**
Real Life Examples.

- **Asphalt & Concrete, Inc. v. Perry**
  - ACS hired Higher Power to haul a load of stone to complete a construction job for a church playground.
  - While en route, driver stuck Perry crossing an intersection.
  - Court held driver was under control of ACS, because:
    - ACS contacted the driver directly;
    - ACS directed driver to go to quarry to pick up materials at specified time for project;
    - Driver was required to deliver materials directly to job site and was subject to docked pay or termination for untimely delivery;
    - ACS paid driver on an hourly basis, and driver was obligated to follow ACS’s directions about where to drop materials;
    - How much material to drop, and;
    - How many times he would need to return to quarry.

Protect your Company.

• Basic Best Practices to Avoid Liability Arise from Basics as to Broker Liability

Establish procedures to allow you to assert some “good faith” practices in the defense of your selection criteria of the motor carrier:

• Satisfactory Rating by the FMCSA
• Always keep a copy of MC’s Certificate of Insurance on file
  • make sure that it’s not expired!
• Don’t ignore your knowledge of specific “past bad acts” of the motor carrier
• Do not allow the motor carrier to sub-contract or broker the loads without express permission and then only to another pre-approved motor carrier!
Protect your Company.

- How far should you go to show your “Good Faith” in vetting the Motor Carrier?
  - Get a Copy of Motor Carrier’s Safety procedures/manual on file?
  - Use only a Motor Carrier been in business at least 3 years?
  - Ask the Motor Carrier for references and check them?
  - Do Credit Check on the Motor Carrier’s history of payment of obligations?
  - Access SAFESTAT- SEA(Safety Evaluation Area) Scores and set threshold on acceptance? (75 or higher is deficient by definition but on a scale of 0 is best and 100 is the best)
  - Access CSA (Compliance Safety and Accountability) Alerts?
    Should you set unacceptable percentage thresholds of your own?
The Paradigm Shift in the Use of Owner Operators
Who is Pacific 9 Transportation "Pac 9"?
Established in 2004 with two trucks, Pac9 has built a company that focuses on our core values of exceptional customer service, innovation, accountability, flexibility, successful execution, while maintaining a family business environment. Today our fleet of over 160 trucks dray over 100,000 containers and trailers to and from the ports of Los Angeles and Long Beach as well as the southern California BNSF, UP and ICTF rail ramps. In our 100,000 square feet of warehouse space we transload, store, pick and pack, and provide other customer directed services. Our local, regional, and national truckload fleet of over 50 trucks completes our end-to-end offering, giving our customers the flexibility they need to move their product from port to final destination.

We understand that our customer’s product is what sets them apart from their competition and, through our services; we provide the connection between the various links in our customers supply chain. Pac9 takes this responsibility very serious. We continuously work with our customers to ensure we are executing at the top of our game. We look for ways to streamline processes and develop innovative solutions to our customers supply chain needs. We believe in being accountable for our results, therefore, we work with our customers and give them an honest assessment of what we can and cannot handle. Finally, when the scope of work suddenly changes we remain flexible to handle the changes in stride ensuring that we meet an ever-dynamic supply chain head on.
Pac 9 Adverse NLRB Decision
March 21, 2014 – In an historic victory for American’s port truck drivers, illegally misclassified port truck drivers for California-based Pacific 9 Transportation, Inc. “Pac 9” have been recognized as legal employees in a recent settlement. After an extensive investigation into Unfair Labor Practice charges, Region 21 of the National Labor Relations Board “NLRB” determined there is sufficient evidence that Pac 9’s “Independent Contractor” drivers are employees and entitled to federal labor law protections under the National Labor Relations Act “NRLA”.
Pac 9’s illegal business practices caught the attention of California’s Employment Development Department insurance programs. The Tax Division audited Pac 9, determined drivers are employees and it prosecuting the company for illegally failing to pay unemployment and disability insurance payroll taxes. Pac 9 continues to appeal the government’s decisions.
Pac 9 drivers are also anxious for hearings to be scheduled by the California Division of Labor Standards Enforcement (DLSE) on the more than 50 wage and hour claims totaling more than $5 million in wage theft and illegal deductions drivers have filed with the agency. To date, the DLSE has ruled on 30 of the more than 400 wage and hour claims port drivers have filed in the Los Angeles area. All 30 rulings have determined drivers are employees and awarded over $3.5 million in back pay to drivers.
A report issued in February, 2014, “The Big Rig Overhaul,” exposed in stark detail how the port trucking industry is hurting the entire U.S. economy by using employee misclassification to pass business expenses on to workers, circumvent workers rights, and dodge employer taxes.
“From the United States Department of Labor to the IRS and the NLRB, agencies are telling trucking companies that the “independent contractor” scam is over,” said Rebecca Smith, Deputy Director of the National Employment Law Project and co-author of the “Big Rig Overhaul.”
“I work more than full time for Pac 9 and the company tells me where to go, what to do, and how much I will be paid” said Amador Rojas. “I do the exact same work – and in the same way – as employee drivers, but I earn a lot less because the company deducts their business expenses from my paycheck. Now the government has validated what I’ve always known – that I am misclassified as an independent contractor.”
This is a momentous step towards changing an industry that is reported to cheat drivers and local, state, and federal governments out of over $1 billion per year.
Hub Converting California’s 0-0s to Company Drivers Following Lawsuits
Hub Group Trucking, the drayage operation of the logistics provider The Hub Group, and formerly known as Comtrak Logistics, says it has converted over 350 owner operator truck drivers to company drivers since the Pac9 NLRB decision.
“It appears that the legal climate in California is becoming unfavorable to the common trucking industry practice of using independent truck drivers,” said Dan Burke, President of Hub Group Trucking, in his statement to Journal of Commerce.
“Because lawsuits are expensive, time-consuming and could interrupt our business, we have decided to make settlement offers to individual drivers with respect to the claims alleged in the lawsuits, without admitting liability.” Hub Group said in the filings with the Securities and Exchange Commission. “The company estimates that the total settlement amount, if all drivers accept the offers, is approximately $9.5 million. To date, a substantial number of the independent contractors have decided to accept the settlement offer.”
Hub Group Trucking has reportedly already met with drivers about the change in status, while Burke defended the company’s classification of its drivers as independent contractors, adding, “To avoid potential issues with the usage of owner/operators as the California legal environment changes and because we need to manage our business for the long-term, we decided to change our model and build around employee drivers.”
He acknowledged that it was possible the conversion of employee status could spread to other parts of the country.
Paradigm Shift.

Seattle Freight Service – Win for the Independent Contractors
Chief District Judge Marsha Pechman granted summary judgment in favor of drayage carrier Seattle Freight Service, thereby dismissing complaints on federal and state law wage-violation claims, unlawful workplace retaliation claims and negligence and emotional distress claims.

Pechman used a six-part test to decide whether Moba and his colleagues should be considered employees or contractors. That test is mandated by the Ninth U.S. Circuit Court of Appeals when there is a claim under the federal Fair Labor Standards Act. All points leaned toward the drivers being classified as owner-operators, she said.
The six parts of the test are:

- Control of manner and means in which work is performed;
- Opportunity for profit or loss based on managerial skill;
- Investment in equipment by the individual and his or her ability to employ others;
- Amount of skill or judgment required;
- Permanence of the working relationship; and
- Integral nature of the job performed relative to the total business.

Once classified as independent contractors, the 25 drivers could not sue based on the FLSA, which offers wage protections for employees.
Questions?

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