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## **DOWNSTREAM LIABILITY: MYTHS VERSUS REALITY**

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### **I. EXECUTIVE SUMMARY**

Some persons in corporate management believe that outsourcing the corporate transportation function will help to insulate the company from liability in the event of a motor carrier accident or a hazardous materials incident. This is not necessarily true -- outsourcing to third parties does not necessarily eliminate or mitigate this risk.

Outsourcing transportation to a for-hire motor carrier (or an intermediary such as a broker or freight forwarder) does change the target of due diligence from private fleet drivers to the third party transportation provider, but it does not eliminate the shipper's responsibility for investigating the person or company that will be transporting their goods, performing their pre- and post-transportation functions adequately, or even supervising their carrier's performance. But the aggressive exercise of management over carrier practices could also provide evidence that the shipper is responsible for the carrier's negligent acts or omissions.

It has become common for plaintiffs or their counsel to cast a wide net in selecting targets for filing claims or for initiating litigation following an incident or commercial motor vehicle collision. Moreover, courts have increasingly expanded the scope of responsibility for personal injuries resulting from such events. No shipper is completely shielded from potential harm--to bottom lines and/or public image--by contractual arrangements with outside providers.

Ultimately, shippers must balance the need to control their transportation service and the acceptance of a certain degree of liability for injuries caused by transportation operations.

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## II. SCOPE

This paper deals with civil liability for incidents or collisions that cause personal injuries or death and that occur in the stream of commercial motor vehicle transportation. This paper does not explore theories of liability for loss or damage to cargo or other property damage incidents, as that is a separate area of legal focus. Nor does this paper explore any criminal sanctions for acts or omissions by motor carriers or individuals.

Further, this paper is intended to provide a general discussion of the concepts of liability affecting shippers and carriers of goods by commercial motor vehicle—it is not designed to be a comprehensive treatise on all legal issues affecting such operations. Readers are encouraged to consult with competent legal counsel regarding questions that arise from consideration of this material.

## III. PRINCIPLES OF LIABILITY FOR TORT ACTIONS

A "tort" is an injury to another person or to property, which is compensable under civil (as opposed to criminal) law. Categories of torts include negligence, gross negligence, and intentional wrongdoing. Negligence is the most common type of tort. To give rise to a legal claim in negligence, an act (or inaction) must satisfy four elements:

1. there must be a legal duty of care to another person;
2. there must be a breach of that duty;
3. the claimant must have suffered damages, and
4. the damages must have been proximately caused by the breach of duty.<sup>1</sup>

In commercial transportation, whether a party owes a duty to someone else depends on that party's status as a carrier or a shipper. In the event of an incident or collision involving a commercial motor vehicle, for example, a court might find a duty of care was owed to third parties injured in the event, to the driver of one or more vehicles involved, or to warehousemen, "lumpers" (i.e., loaders or unloaders) or stevedores in the chain of transportation. In some cases courts might even find of duty of care to emergency responders for incidents involving certain types of hazardous materials.

The cases are highly fact-specific, and generally depend on state law (which varies in substance and procedure from state to state).<sup>2</sup> There are some legal principles that apply nationwide as well, however. Moreover, shippers and carriers that operate in multiple states are subject to the laws of each state in which they operate, and liability in tort litigation sometimes depends on which state's law is applied by the court.

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<sup>1</sup> The laws of a few states prohibit recovery by an injured party if that party was also negligent and his/her negligence contributed to the injury (known as "contributory negligence"). Most other states in such situations attempt to assign a percentage of liability for the plaintiff and defendant and allow the plaintiff only to recover that portion of the injuries attributable to the negligence of the defendant ("comparative negligence").

<sup>2</sup> The Federal Motor Carrier Safety Regulations apply to all motor carriage in interstate commerce nationwide and the Hazardous Materials Regulations apply to all transportation of hazardous materials in commerce nationwide, but tort law generally depends on substantive state law.

## A. Liability as a Motor Carrier

In general, a motor carrier (whether a private or for-hire carrier) operating a commercial motor vehicle is liable for the negligent actions or omissions of its drivers involved in an incident or collision. The carrier is vicariously liable for the negligence of the driver under the theory of *respondeat superior*, in which an employer is held liable for the negligence of its employees acting in the scope of their employment. See, e.g., *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004). To establish that the employee's conduct was within the scope of employment: (1) the conduct must have occurred substantially within the time and space limits authorized by the employment; (2) the employee must have been motivated, at least partially, by a purpose to serve the employer; and (3) the act must have been of a kind that the employee was hired to perform.

An example of this is if an employee driving a commercial truck struck a pedestrian during standard business hours. Whether the employer will be liable in this situation will depend on whether the employee was acting within the scope of his employment. For example, if the accident occurred while the employee was driving from his office to a customer's site, the employer will likely be liable. On the other hand, if the accident occurred while the employee was leaving a customer's site and heading across town in the opposite direction of his office to purchase football tickets for himself, the employer might not be held liable.

In the example above, the vicarious liability under the doctrine of *respondeat superior* relies upon a principal/agent or master/servant relationship between the carrier and the driver. An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement (Second) of Agency, § 1(1) (1958). An agency relationship may be established by written agreement or inference. To establish a principal-agent relationship by inference, the plaintiffs must show that: (1) the agent was subject to the principal's right of control; (2) the agent had a duty to primarily act for the benefit of the principal; and (3) the agent held the power to alter the legal relations of the principal. Restatement (Second) of Agency, § 12-14. (1958).

## B. Shipper Liability—Traditional Rule

The traditional rule is that a shipper (or broker/forwarder) who hires a for-hire carrier is not held vicariously liable for the negligence of the carrier that is an independent contractor. *Schramm v. Foster*, *supra*; see also, *McLaine v. McLeod*, 661 S.E. 2d 695 (Ga. App. 3d 2008); *Puckrein v. ATI Transport, Inc.*, 897 A.2d 1034 (N.J. 2006); *Clarendon National Insurance Co., v. Johnson*, 666 S.E.2d 567 (Ga. App. 2008).

To avoid this liability, the party hiring the motor carrier must not exercise so much control over the transportation function as to create a master/servant or principal/agent relationship with the carrier. An agent is one who consents to act on behalf of another and is subject to his control. Agency can be shown by the terms of a written contract or by inference from the actions of the parties.

Control is the touchstone for this legal analysis. The more control over the carrier, the more likely a court will find the carrier is an agent of the party hiring the motor carrier.

A servant is an agent whose methods of operation are controlled by the master.<sup>3</sup> Thus, the courts will generally not hold a shipper liable for the fault of an independent contractor carrier unless the shipper controlled the means as well as the results of the transportation service. Control over the result to be accomplished is not enough—the shipper must have some supervision over the manner in which the work is done. This could include providing driving, scheduling and routing directions, requiring the carrier to inspect the load and/or using load locks, and arranging for the shipment to be unloaded at destination.

Thus, the law places a shipper's need to control the transportation service, and thus its customer service, at odds with its liability concerns. The further measures that a shipper takes to ensure that a for-hire motor carrier is on time for pickups and deliveries, does not lose or damage the goods, and performs in a manner acceptable to the shipper, the more likely that a court will find that the shipper is liable for the negligence of the carrier under a master/servant relationship. As companies become more responsive to customers' needs through just-in-time delivery systems and integrated logistics software and communications, it seems likely that courts will be more willing to establish that the carrier's negligence is imputed to the shipper controlling the nature of the operations.

Moreover, the greater the involvement in a carrier's compliance with the Federal Motor Carrier Safety Regulations, the greater the evidence that the shipper is controlling not just the result but the transportation service. Shippers with outside carrier compliance programs are taking additional steps to ensure that their carriers follow driver qualification or hours of service requirements, but those very steps could be evidence that the shipper-carrier arrangement is something more than an independent contractor relationship.

A recent decision from the California courts has protected a shipper with a private truck fleet from the general rule that a motor carrier cannot avoid the responsibility for the negligence of an independent contractor driver, however. In *Hill Brothers Chemical Co. v. Superior Court of Los Angeles*, 123 Cal.App.4th 1001 (2004), Hill Brothers contracted with a for-hire motor carrier to provide transportation service, and the for-hire carrier used an owner-operator for the shipment in question. When the owner-operator was involved in a collision, the plaintiffs sued Hill Brothers as well as the for-hire carrier. Because Hill Brothers had a private truck fleet, the plaintiffs argued that California's non-delegable duty law<sup>4</sup> applied to Hill Brothers as a motor carrier.

The court of appeals distinguished between Hill Brothers' role as a shipper in this case and its use of its private fleet for other transportation. Because Hill Brothers was solely acting as a shipper in arranging for motor carrier transportation, the court declined to hold Hill Brothers liable for the negligence of the independent contractor driver under the non-delegable duty law, which applies only to for-hire carriers. See also, *Jallah v. Diverscape*, 2006 WL 2925377, following the *Hill Brothers* approach.

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<sup>3</sup> For example, under Maryland law, it is not enough to show a principal/agent relationship to hold the shipper vicariously liable for the carrier; the plaintiff must also prove a master/servant relationship existed. See *Schramm v. Foster, supra*.

<sup>4</sup> The California 1996 Motor Carriers of Property Permit Act (Veh. Code § 34600 et seq.), which provides that a motor carrier may not avoid tort liability based on the negligence of drivers by using independent contractors.

In *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E. 2d 463 (Ill. App. 3d 2011), the court upheld the jury's verdict that Robinson could be held liable for the negligence of an independent contractor who caused an accident which injured the plaintiffs. The court found that Robinson exercised a great deal of control over the driver's work performance and enforced special delivery instructions with a system of fines for nonconformance. It also distinguished the holdings in *Schramm* (above) and *Jones v. C.H. Robinson* (discussed below), by noting that in this case, Robinson was acting as a shipper (*i.e.*, not just a broker) because it owned the product being shipped and the product was being delivered to a Robinson warehouse. It also reiterated the control over the driver and fines system as factors distinguishing this case from *Schramm* and *Jones*.

### **C. Shipper Liability—Direct Negligence**

As an alternative to holding a shipper vicariously liable for the negligence of a motor carrier, courts have also found *direct theories of negligence* against the shipper itself when the carrier's actions or omissions have caused injury. Under these theories, the carrier's negligence is not imputed to the shipper, but the shipper itself may be found liable for its own negligent acts or omissions in arranging or supervising the transportation service.

#### **1. Negligent Hiring/Negligent Selection**

Courts have generally held companies liable directly in tort for negligent hiring of an employee for whom it was foreseeable that the employee would commit an act or omission leading to injury. For example, this theory has been used as the basis for damages for the failure to properly screen employees, resulting in the hiring of someone who has a history of violent or criminal acts who then commits such an act against another employee, a customer, or a member of the public. This theory has been extended to other duties of employers, including: (1) negligent retention: retaining an employee after the employer became aware of the employee's unsuitability, thereby failing to act on that knowledge; (2) negligent supervision: failing to provide the necessary monitoring to ensure that employees perform their duties properly; and (3) inadequate security: security measures that were provided to safeguard employees, customers and members of the public, that are not consistent with the potential threat.

In addition, courts have now extended this concept to the selection of independent contractors, such as motor carriers—this theory of liability is sometimes called negligent selection in addition to negligent hiring. In negligent hiring/selection, the shipper's basic duty is to ensure that the selected carrier is competent to transport the type of property the company is shipping. A shipper may be held liable for negligence in selecting, instructing, or supervising an independent contractor motor carrier. *Schramm v. Foster, supra*; see also, *Stander v. Dispoz-o-Products, Inc.*, 973 So. 2d 603 (Fla. 4<sup>th</sup> Ct. App. 2008); *McLaine v. McLeod, supra*; *Puckrein, supra*. Extending liability to the negligent hiring of an independent contractor stems from the Restatement (Second) of Torts § 411. To show liability under this theory, the plaintiff must show (1) the contractor was incompetent or unfit, (2) the employer knew or reasonably should have known of the incompetence or unfitness, and (3) the incompetence or unfitness was the proximate cause of the injury.

In June 2008, a federal court judge in Virginia ruled that a broker could be held liable for the negligent selection of a motor carrier to perform services under contract to the broker, when an inexperienced tractor-trailer truck driver crossed the median and struck another tractor-trailer truck head-on. *Jones v. C.H. Robinson Worldwide*, 558 F.Supp.2d 630 (W.D. Va. 2008). The

judge cited the online availability of trucking safety data and the broker's "active interjection of itself into the relationship between shipper and carrier," and held the plaintiff could show the broker had a duty to investigate the carrier's fitness prior to hiring it for the shipment. The courts would likely reach a similar conclusion for a shipper selecting an unsafe carrier under Virginia law.

Likewise, the New Jersey Supreme Court ruled that a shipper could be held liable for negligent selection of a motor carrier in *Puckrein v. ATI Transport, Inc., supra*. In order to prevail against the principal for hiring an independent contractor, the court held that a plaintiff must show that the contractor was, in fact, incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of that incompetence, and that the principal knew or should have known of the incompetence. *Mavrikidis v. Petullo*, 153 N.J. 117 (1998).

The court in *Puckrein* imposed a higher duty on the shipper because it was in the business of transporting hazardous materials on the highways, concluding that a company whose core purpose is the collection and transportation of hazmat by highways has a duty to use reasonable care in the hiring of an independent carrier, including a duty to make an inquiry whether its carriers had registered and insured vehicles. The opinion stated that basic competency included, at a minimum, a valid driver's license, a valid registration certificate, and a valid liability insurance identification card because, without those items, the carrier had no right to be on the road. N.J.S.A. 39:3-29.

The New Jersey Supreme Court also held that the shipper's duty did not end even if it could have been proven that the shipper made a reasonable inquiry as to the motor carrier's competence at the time of its hiring. The carrier's liability insurance coverage expired two months prior to the accident, and the court concluded that summary judgment for the shipper should not have been granted because the shipper continued to employ the carrier's services without evidence that they were competent to transport its products.

In particular, where the damages exceed the motor carrier's liability insurance (the FMCSA currently requires only \$750,000 in coverage for carriers in interstate commerce, or up to \$5 million for hazardous materials; see 49 CFR Part 387), plaintiff's counsel will make every effort to establish a direct theory of negligence against the shipper, especially a large corporation with deep pockets.

In selecting a carrier, a shipper or broker should take a number of steps to minimize the possibility of a negligent selection argument. The shipper must determine that the carrier has valid federal motor carrier authority. **GCU Int'l Insurance, PLC v. Keystone Lines Corp.**, 2004 WL 1047932 (N.D.Cal. 2004). Check the carrier's operating authority and confirm that it is in good standing.

The shipper should also determine that the carrier has cargo and liability insurance. **GCU Int'l Insurance, PLC v. Keystone Lines Corp.**, *supra*. The shipper should obtain a written certificate of insurance and confirm coverage with the carrier's insurance broker, preferably a written faxed confirmation from the insurance broker. The shipper may also require the carrier to hold additional liability coverage beyond what the federal minimum standards require--the more liability insurance covering the carrier, the less likely a personal injury plaintiff will pursue a case against the shipper.

Further, the shipper has a duty to check safety statistics of carriers. The shipper should "maintain internal records of the persons with whom it does business to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings."

**Schramm v. Foster**, *supra*. In **Schramm**, the broker hiring the carrier was denied summary judgment after the carrier was involved in a collision because the court decided that the broker should have known that the involved carrier was formed as a result of a safety performance problem with its predecessor.

The shipper must also avoid carriers that violate federal regulations. **Schramm v. Foster**, *supra*. Knowledge of facts suggesting that a carrier might violate the Federal Motor Carrier Safety Regulations, including failing to maintain brakes and tires in proper condition, ignoring driver qualifications, failing to conduct drug and/or alcohol testing, or ignoring (or even mandating) hours of service violations, as well as violating weight limits, could support liability claims for negligent selection or negligent supervision of the carrier in aiding the violation of federal regulations.

Finally, the contract of carriage should mandate carrier compliance with all applicable federal, state and local safety regulations. Yet once again, an aggressive program to audit carrier compliance could lead the shipper to vicarious liability if the court determines that the shipper had control over the transportation service itself.

## **2. Negligent Loading of Shipments**

Traditionally, the motor carrier has been held ultimately responsible for the safe loading of a shipment. *United States v. Savage Truck Line Inc.*, 209 F.2d 442 (4<sup>th</sup> Cir. 1953) (“The primary duty as to the safe loading of property is therefore upon the carrier.”). This duty arises from both common law and regulation (49 CFR § 392.9). *Franklin Stainless Corp. v. Marlo Transport Corp.*, 748 F.2d 865 (4<sup>th</sup> Cir. 1984).

The driver has an affirmative duty to ensure that a load is secure. In fact, where a driver has been injured in an incident resulting from shifting cargo, the driver’s contributory negligence can prevent him from recovering damages or limit his recovery. *Hardesty v. American Seating Co.*, 194 F. Supp. 2d 447 (D. Md. 2002). *Herring v. Coca-Cola Enters.*, 2008 Tenn. App. LEXIS 171 (Tenn. App. March 26, 2008).

But a shipper can also be held liable for incidents resulting from improperly secured cargo. Where the shipper loaded the goods onto the truck or trailer, and the defect in the load was latent or concealed, courts have held the shipper liable. *United States v. Savage Truck Line Inc.*, *supra* (“When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.”) *See also*, *Franklin Stainless, supra*; *Smart v. American Welding and Tank Co., Inc.*, 826 A.2d 570 (N.H. 2003).

Even if the shipper was negligent in loading, if the defect was open and obvious, the carrier will also be at fault. In the case of sealed loads, if driver does not observe loading, the shipper will be responsible for any injuries caused by the defective load. But courts have also held that the carrier may rely on the shipper’s assurances that the load is properly secured if the carrier acted reasonably under the circumstances. A decision on liability might depend on what was said between the shipper and the carrier’s driver, and the driver’s experience hauling that particular type of cargo.

### **C. Hazardous Materials Shipments**

Shippers might also face additional liability when arranging for the transportation of hazardous materials by for-hire motor carrier. The law imposes a broad duty to warn on hazmat shippers. *Hobart v. Sohio Petroleum Co.*, 255 F. Supp. 972, 974-75 (N.D. Miss. 1966) (“The Mississippi decisions are not inconsistent with the principles applicable in practically all other jurisdictions which impose a duty on distributors, shippers and other suppliers of inherently dangerous substances of conveying to users and other persons who may foreseeably be exposed to the hazard a fair and adequate warning of the dangerous potentialities.”). The shipper may not avoid this duty by hiring an independent contractor motor carrier to transport the shipment.

Additionally, the federal Hazardous Materials Regulations impose specific duties on “offerors” of hazardous materials for transportation in commerce, including pre-transportation and post-transportation functions. See, e.g., 49 CFR § 173.22, shipper’s responsibility for proper use of packagings and containers. A shipper may not avoid those regulatory requirements, and the effect that such violations might have on liability in subsequent litigation arising from such violations, merely by hiring a motor carrier. The shipper’s duty, as evidenced by the regulatory requirements, extends to the public despite the use of an independent contractor motor carrier for transportation.

### **IV. LIABILITY COSTS/INDEMNIFICATION AND CONTRIBUTION**

Even if a shipper is not ultimately held liable for the negligence of a carrier, not being held liable is not the same as not being sued. Whether a shipper is held liable or not, it will face substantial litigation costs just defending itself from claims of vicarious liability or negligence in the selection or management of carriers. To protect itself from such costs, a shipper should include provisions for contribution and/or indemnification in its motor carrier contracts.

Contribution is the right of one wrongdoer to recover proportional share of a judgment from another wrongdoer. Thus, if the shipper is held partially liable for an injury, as a matter of law it would have the right to seek contribution towards damages from the other negligent parties, including the carrier. Damages would be assigned by the court (or jury) with either an equal distribution of damages or by the relative percentage of fault for each party.

Indemnification is a contractual obligation to reimburse a party who has incurred a loss. Contractual indemnification may be required by the shipper under the Straight Bill of Lading. See *Detlefsen v. Deffenbaugh Indust., Inc.*, 2005 U.S. Dist. LEXIS 23075 (D. Kan. Sept. 22, 2005). Any waivers of liability by the shipper must be made with fair notice and conspicuous language, and merely getting the driver’s signature on the bill of lading might not by itself be sufficient to bind the carrier to indemnify the shipper. Furthermore, indemnity is not available from the carrier when the shipper is at fault. See also, *Caballero v. Stafford*, 202 S.W. 3d 683 (Mo. App. 2006).

### **V. USE OF CSA METRICS IN SELECTING MOTOR CARRIERS**

The Federal Motor Carrier Safety administration has a new enforcement program called Compliance, Safety, Accountability (“CSA”). CSA allows shippers and others hiring motor carriers to view additional safety performance statistics for these rated carriers. To the extent that additional information is available on carriers, the law will place an additional obligation on shippers to use that data reasonably in evaluating and selecting carriers.



Unlike the prior enforcement program, the CSA Safety Management System applies seven Behavior Analysis Safety Improvement Categories (“BASICS”). They are:

- (1) **Unsafe Driving**, *i.e.*, careless or dangerous operation of commercial motor vehicles (“CMVs”);
- (2) **Hours-Of-Service (HOS) Compliance**, *i.e.*, fatigued driving;
- (3) **Driver Fitness**, *i.e.*, judgment of whether a driver is unfit to operate a CMV due to a lack of training, experience or medical qualification;
- (4) **Controlled Substances and Alcohol**, *i.e.*, impaired CMV operation due to consumption of alcohol, use of illegal drugs, or misuse of prescription medication and/or over-the-counter medication;
- (5) **Vehicle Maintenance**, *i.e.*, improper maintenance of CMVs or failure to prevent shifting of loads transported thereon;
- (6) **Hazardous Materials Compliance**, *e.g.*, unsafe handling of hazardous materials due to improper placarding, or evidence of leakage from hazardous materials packaging; and
- (7) **Crash Indicator**, *i.e.*, patterns of frequency and severity of highway crashes.<sup>5</sup>

Prior to adoption of CSA, it was prudent practice for shippers negotiating for motor contract carriage services to commemorate in writing that they had selected safe carriers by including the following carrier representations, warranties and covenants in the transportation service contract:

- (1) The carrier has received and will continue to maintain throughout the term of the carriage agreement a Satisfactory safety rating issued by the FMCSA.
- (2) The interstate operating authority of the carrier awarded by the FMCSA or the former Interstate Commerce Commission, as well as any public utility commission (PUC)/public service commission (PSC)-issued intrastate operating authorities on which the carrier may rely to perform the required transportation of the shipper’s freight, remain active and in good standing.
- (3) The bodily injury and property damage liability insurance coverage the carrier has agreed to maintain in executing the Agreement remains in effect and meets federal and State-prescribed minimum levels of coverage, or that carrier has received FMCSA and PUC/PSC approval to self-insure at the levels of financial responsibility provided for in the transportation services agreement with the shipper and such self-insurance authorization remains effective.
- (4) All equipment carrier assigns to transport shipper’s freight will be in compliance with the vehicle inspection requirements of 49 C.F.R. Part 396, as well as satisfy the vehicle component specifications of 49 C.F.R. Part 393, and each of carrier’s drivers assigned to transport shipper’s freight are trained in the requirements of 49 C.F.R. 396 with respect to the mandatory performance of pre-trip and post-trip vehicle inspection reports (VIRs), as well as in the requirements of 49 C.F.R. Part 392 regarding prescribed conduct in operating CMVs.

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<sup>5</sup> At present, carrier data for the Hazardous Materials Compliance and Crash Indicator BASICS are not available for public view on the CSA website. But shippers may request to see that carrier data in the course of evaluating the carrier for shipments.

(5) Each of the drivers called upon by carrier to operate CMVs that will transport shipper's freight meet the driver qualification requirements contained in 49 C.F.R. Part 391 and, where applicable, Part 383, and carrier has in place a formal program of continually monitoring those driver qualifications.

(6) If carrier's vehicles will be required by shipper to haul hazardous materials in quantities requiring vehicle placarding, or if carrier will be transporting shipper's non-hazardous freight (i) in vehicles whose gross vehicle weight (GVW) or GVW rating is 26,001 pounds or more, whichever is greater, or (ii) in vehicles whose gross combination weight (GCW) or GCW rating is 26,001 pounds or more, whichever is greater, inclusive of a towed unit whose GVW or GVWR is more than 10,000 pounds, whichever is greater, then the drivers assigned thereto will each hold a commercial driver's license (CDL) with the appropriate CDL endorsement, as mandated by 49 C.F.R. Part 383, and such drivers will be subject to and satisfy the mandatory alcohol and controlled substances testing requirements set forth at 49 C.F.R. Part 382, in conformance with the carrier's written alcohol and controlled substances policies.

(7) To the extent that hazardous materials will be transported, each of the carrier's drivers assigned to those hauls will have received the five types of hazardous materials employee training specified under 49 C.F.R. § 172.704, i.e., (i) general awareness/familiarization training, (ii) function-specific training, (iii) safety training inclusive of emergency response, accident avoidance and hazmat exposure avoidance instruction, (iv) security awareness training and (v) in-depth security training, as well as training with respect to 49 C.F.R. Part 397's requirements as to driver vehicle attendance obligations with respect to CMVs carrying hazardous materials.

(8) Carrier has developed a motor carrier safety compliance program designed to comport with the requirements imposed by the Federal Motor Carrier Safety Regulations, as well as, where applicable, the U.S. Department of Transportation's Hazardous Materials Regulations contained in 49 C.F.R. §171-180, and regularly schedules its drivers and dispatchers for instruction with respect to compliance with those requirements.

(9) Carrier will assign to hauls of shipper's freight drivers who have sufficient hours remaining under the hours of service requirements of 49 C.F.R. Part 395 to safely and lawfully transport shipper's loads and who each properly maintain a daily record of their duty status that accompanies each driver at all times in the CMV he or she operates for that carrier.

(10) Carrier will not broker shipper's freight to another carrier.

(11) Carrier shall identify shipper as an additional insured under carrier's bodily injury and property damage liability insurance policy, specifically endorsing shipper onto that policy as an additional named insured and shall provide shipper with written evidence thereof.

(12) Carrier has established and applies a formal process of auditing its drivers' daily logs or their electronic onboard recording device time entries.

(13) Carrier has established a written set of disciplinary procedures that it applies in the event of deficiencies manifested by its drivers and/or dispatchers with respect to ensuring driver compliance with the hours of service requirements of 49 C.F.R. Part 395.

(14) Carrier has in place a formal program for investigating any DOT-defined accidents in which its personnel and CMVs may be involved.

With the implementation of the CSA program, however, inclusion in the transportation services contract of the above fourteen carrier representations, warranties and covenants may no longer prove sufficient to protect the shipper against suits by injured parties for negligent selection or entrustment. Instead, it now becomes vitally important for the shipper to further incorporate into the service agreement the following CSA program-related representations, warranties, and covenants as well.

- Carrier represents and warrants that its percentile ranking in each of the seven BASICS does not exceed the respective intervention threshold established by the FMCSA with respect to each of those BASICS. Carrier hereby covenants that it will immediately notify shipper in writing if it receives an FMCSA-issued "Alert" in any BASIC. Such notification shall apprise shipper of:
  - (1) Carrier's then current percentile ranking(s) in the negatively affected BASIC(s);
  - (2) The nature, i.e., level, of any intervention FMCSA has elected to invoke with respect to the issuance of such Alert(s); and
  - (3) The remedial corrective measures carrier is implementing to address the FMCSA's concerns as evidenced by the issuance of the Alert(s).
- With respect to any BASIC in which Carrier has received an Alert, carrier shall further apprise shipper monthly of any change in percentile ranking carrier has received with respect to any BASIC in which it has been issued an Alert until such time as the Alert no longer appears under that BASIC.

Incorporating these CSA-related provisions into the motor carrier service agreement gives the shipper the ability to monitor its selected carrier's CSA compliance profile in a timely manner. The shipper can then determine whether it should suspend its use of any carrier that has been issued one or more Alerts under CSA until the carrier's safety performance, when measured by CSA program standards, has improved sufficiently, as evidenced by a positive trend line in its BASIC percentile ranking(s). Or the shipper can decide that the carrier's remedial steps are adequate to support continued use by the shipper.

In either event, the shipper's election to then use or refrain from relying on the carrier's services will have been based on the shipper's exercise of appropriate due diligence, thus constructing a more effective buffer of protection against third party claims of shipper negligent selection or entrustment of freight to unsafe carriers.

## **VI. CONCLUSION**

Clearly, operating a private truck fleet exposes a company to more direct risk of liability. Hiring out your transportation service to a for-hire motor carrier shields you from at least some of that liability because the carrier usually has the ultimate responsibility for harm to third parties

during transportation. But operating a private fleet allows the shipper to control those activities that will determine whether collisions or incidents will occur.

Outsourcing transportation does not eliminate all risk for a shipper corporation. As a shipper, you still have a duty to third parties if you are loading vehicles. You have a duty to hire transportation providers responsibly, to ensure that they have liability insurance and otherwise comply with safety regulations, and to supervise their operations. You have a duty to warn others if there is anything dangerous about your product that may cause someone harm if they come in contact with it.

In sum, a shipper must engage in a delicate balance between liability exposure and control over the transportation service. The arguments in favor of operating a private fleet include complete control over your company's transportation operations, including the manner and quality of delivery, timing of dispatch, routing, quality and training of personnel, integration of transportation into the company's primary business function, and cargo and facility security. The downside is that these activities subject the shipper to vicarious liability through acts of your employees (drivers and loaders).

In contrast, outsourcing might limit the company's direct liability as a carrier, but the company could still face some liability exposure, as courts are increasingly allowing new theories of direct and vicarious liability on shippers of goods. The threshold question for shippers is whether this eroding protection from liability is worth the loss of complete control over the company's transportation function.

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