Lawsuits: Learning From, and Avoiding Them

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## Tips, Suggestions, and Warnings on how to Avoid and Mitigate against 4 Types of Lawsuits

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How many attendees have been involved, directly or indirectly, in a lawsuit of any kind?
How many attendees have been involved directly or indirectly in a lawsuit of any kind?
Liability to the Public:

Risk

• Major Accident with Injuries or Death.

• Broker, along with every other party (Carrier, Customer, etc.) will be sued.

• Millions of Dollars at stake, thousands of Plaintiffs’ Lawyers ready to strike (Personal Injury), and victims who need to be made whole.
How many attendees believe that the FMCSA should be the SOLE entity responsible for qualifying and disqualifying motor carriers?
Poll: How many attendees believe that the FMCSA should be the SOLE entity responsible for qualifying and disqualifying motor carriers?
Liability to the Public:

Cases

• Carrier outsourced but had broker license. Young girl ran into back of hired truck with life long injuries.
  
  Fact: Carrier had brokerage license, but no contract between their brokerage company and the motor carrier.

• Broker and motor carrier sued on a 3 stop pick up and 3 stop delivery. Multiple deaths
  
  Fact: Carrier was deadheading home, had completed agreement with broker.

• Shipper, Freight Forwarder, Freight Forwarder 2, Broker, Motor Carrier sued. Multiple deaths
  
  Fact: Shipper agreement language ignored, several parties shared in a negotiated settlement
Liability to the Public:

Tips and Suggestions

- Carrier and employees are independent contractors & not employees of agents or broker.
- As freight broker disclaim responsibility for cargo, bodily injury and all other claims.
- Specify that broker has no control over load in transit.
- Re-brokering is not allowed.

- Carrier must notify broker if at any time the carrier (trucker) does not hold a valid operating authority, conditional or unsatisfactory safety rating, or the required liability insurance.
- Driver selection completely at discretion of carrier.

- Compliance with applicable laws and regulations.
Liability to the Public:

Tips and Suggestions

• Review contract language

• Make Carrier solely responsible for compliance and claims
• Don’t be micro managed

• Be flexible in your delivery times

• Directions should be for *Informational purposes only. We have it Shipper-provided as well.*
• Do not impose fines

• Never require that Carrier violate hours of service. Limit contact with Driver, do not talk to the driver while he/she is driving!

• Be flexible in your delivery times
• Use TIA Carrier Selection Framework/or tailored version
Liability to the Customers:

Risk - Cargo Loss

- Broker sued for Cargo Loss under various State Tort Claims such as negligence
- Broker needs to recover for Cargo Loss because it had to pay its Customer
Liability to the Customers:

Cases

  - State Law Claims are Pre-empted: (49 U.S.C. 14501(c)(1) and 14501 (b)
  - All non-contractual claims are preempted by FAAAA (49 U.S.C. 14501(c)(1))

  - Broker got Summary Judgement on claim of stolen cigarettes. Plaintiff failed to prove any duty in contract as a condition precedent to negligence
Liability to the Customers:

Cases

  • Copper theft. Many entities, but as to Broker, F4A pre-empted state torts.

  • Interesting case as Broker paid Shipper for claim and then in turn went after Carrier.
  • Carrier wanted Carmack to apply and prevent breach of contract and also wanted BOL limits to apply.
  • Court held Broker-Carrier contract controlled. Carrier liable to broker for millions.
Liability to the Customers:

Cases

• Mlinar v. United Parcel Service, No. SC14-54 (FL Sup Court 2016)
  • Painter sues UPS for state claims for taking her work during shipment and selling it. UPS states Carmack applies to cargo loss.

  • “Neither the Carmack Amendment nor Public Policy supports UPS’s attempts to evade liability arising not from the loss of property, but for its intentional misconduct. Accordingly, we conclude the Mlinar’s state law causes of action are not preempted.”
Liability to Customers:

Tips and Suggestions

• Carmack does not apply to Brokers, no liability to for Cargo loss unless you agree to it!
• Know Your Cargo
  • Drugs, Tobacco, Electronics
• Know your Carrier
• Know what your Contingent Cargo Policy covers and what it does not.
  • Add extra insurance (“Shipper’s Insurance”)
• If you DO agree to liability, makes sure to limit what you are giving!
• Have a good verification/identity program in place!
  • Check Phone Numbers
  • Check Public Information
  • Call Insurance Company
• Talk to Shipper and communication best practices of Security protocols on their dock.
• Get right of assignment from Customer, so you can recover any losses!
“Broker as Carrier”/Wearing Too Many Hats!

- Broker as “Carrier”
- Holding self out as carrier
- Authority
- Website
- Brochures (truck photos)
- Terminology
- The Very Worst Pronoun!

- *Travelers Ins. V. Panalpina, Inc.*, No. 08 C 5864, 2010 WL 3894105, at *5-6* (N.E. Ill. Sept. 30, 2010) (finding that company was motor carrier when delivery order established obligation to transport container and company fulfilled that obligation by contracting with another company to make delivery)

- *Alo Ins. Co. v. Timely Integrated, Inc.*, No. 08 Civ. 1479 (TPG), 2009 WL 2474072, at *3* (S.D.N.Y. Aug. 12, 2009) (finding that defendant qualified as “motor carrier” because it arranged for shipment of goods by contracting with third party to provide actual physical transportation, court being persuaded by fact that defendant held itself out to shipper as carrier of goods, that agreement between defendant and shipper authorized defendant to transport goods, and that defendant was legally bound to transport shipment).
Liability to the Carriers:

Cases


“Motor carrier” and “Transportation” are broadly defined, a broker or 3PL that intended to provide brokerage services, may be considered a “carrier” by the courts. (Statutory “Transportation” definition – includes “arranging”)

“[W]hether a company is a broker or a carrier/freight forwarder is not determined by how it labels itself, but by how it holds itself out to the world and its relationship to the shipper.” *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999). The court held that Clover was a motor carrier, stating that:

Ownership of the vehicles used to transport the machine does not determine whether Clover was providing transportation or merely selling the transportation of another carrier. The mere fact that Clover did not use its own motor vehicles in transporting the machine does not preclude it from being a motor carrier for the purposes of the ICA. *Id.* at 1029.
Liability to the Public:

**Tips and Suggestions**

- A Host of “Don’ts! from an actual Demand Letter from Shipper’s Attorney

We point out, for instance:

[Shipper] considered [Broker] as their carrier (and had a long standing relationship).

> The name of the company is [Broker] Transport.

> The bill of lading identifies [Broker] as the carrier (attached).

> [Broker]’s website (attached) holds itself out as being responsible for the transportation (not as a broker):

  > A truck photograph is the first item you see.
  > “[Broker] has gained a reputation for reliable service in the transportation of import and export freight, as well as domestically manufactured goods.”
  > “At [Broker] we pride ourselves in our ability to ensure every shipment is picked up and delivered on time.”
  > “Our services include, but are not limited to….. van truck loads”.
  > [Broker] does not identify itself as a broker, and in fact, never once uses the word “broker”.
Winning the Blame Game: Navigating Indemnification Clauses

- The hottest issue!
- Indemnification is guarantee against any loss that another might suffer
- Carriers and Brokers: be careful that you do not agree to indemnify shipper for the results of the shipper’s own negligence or willful misconduct (or third parties!)
- Many shippers have tried to shift risks in varying degrees, to motor carriers
  - 41 states have passed legislation prohibiting the complete shift (apply to carriers)
- Brokers: be especially careful about agreeing to indemnify shippers for the acts of others over whom you have no control
- Push back on this one!
  Avoid . . .
  “CARRIER’s indemnification for freight loss and damage claims, when determined, shall include legal fees . . . Which shall not be limited by any liability provisions of any other provision herein.”
- Backdooring freight claims and attorneys’ fees
The Lamson and Sessions Company v. ATS Logistics Services (N.D. Ohio 2005)

Shipper and transportation broker signed a shipper-“carrier” agreement (instead of a shipper-“broker” agreement) containing a broad indemnity provision:

INDEMNITY. CARRIER shall defend, indemnify, and hold SHIPPER harmless from and against any and all claims, liabilities, loss, cost, or expense (including court costs and reasonable attorneys’ fees) (collectively, the “Losses”) including, but not limited to Losses for injury to or death of persons or damage to property arising out of the performance of this Agreement and for any claims, costs and expense, including but not limited to court costs and reasonable attorneys’ fees incurred by SHIPPER as a result of the CARRIER’s breach of any of these terms of this Agreement and the services contemplated thereunder.
The Lamson and Sessions Company v. ATS Logistics Services (N.D. Ohio 2005)

- Shipper retains broker to arrange for transportation of polyethylene pipe.
- Broker hires motor carrier who is involved in accident that kills truck driver.
- The truck driver's wife brought a suit in Missouri against the shipper, claiming that shipper negligently loaded the truck.
- Shipper then sued the broker in Ohio, claiming that the indemnity provision required the broker to defend and indemnify the shipper even if shipper negligently loaded the truck.
- Federal court ultimately granted summary judgment in favor of shipper; and broker was obligated to defend and indemnify shipper pursuant to contract even if the shipper was negligent party.
In addition, on April 12, 2012, Plaintiff’s authorized representative signed a GTS Credit Application (ECF DKT #43-3). By executing the Application, Plaintiff designated GTS “as a provider of third-party freight transportation services.” *Id.* Further, a provision, typed in bold and in all caps, recites in part:

**THE COMPANY [NORTHRIC] FURTHER AGREES THAT GTS WILL NOT BE LIABLE TO THE COMPANY FOR ANY DAMAGES OF WHATEVER NATURE, INCLUDING BUT NOT LIMITED TO, CONSEQUENTIAL, SPECIAL OR PUNITIVE, WITH RESPECT TO GTS CARRYING OUT ITS OBLIGATIONS AND DUTIES AS SPECIFIED HEREIN AND/OR ANY OTHER MATTER RELATING THERETO. THE COMPANY AGREES TO LOOK TO THE FREIGHT CARRIER FOR DAMAGES IF THE COMPANY OR ITS VENDORS WERE TO SUFFER ANY DAMAGES IN THE DELIVERY OF ANY OF ITS PROPERTY.**

Thus, Plaintiff expressly waived any claim against GTS for damages to the heat exchangers (“coils”) transported by FedEx from Texas to Oberlin College in Ohio.

Therefore, the Motion (ECF DKT #43) of Defendant, Group Transportation Services, Inc. (“GTS”), for Summary Judgment is granted.
Liability to Customers:

Tips and Suggestions

• Put your contract on your credit application. Add a web link to your terms.

• A credit application is a Valid Contract:
  • Example: If, after consideration of the information provided herein and a review of the credit history of the applicant, KTI determines to extend credit to the applicant, such credit is subject to the Shipper terms and conditions listed at www.ktitrans.com/terms.


Liability to Customers:

Tips and Suggestions (2)

- If you have to sign a contract with some indemnification, put monetary limits in place!

- Get an insurance policy to limit any exposure to your customers or Plaintiffs:
  - Such as Contingent Auto or Truck Broker Policy
  - Read Policy!
  1. Exceptions
  2. Duty
  3. Carrier Selection
  4. Excessive or stand alone
Liability to the Customers:

Risk Rates and Assessorials

49 CFR § 371.3 - Records to be kept by brokers.

(a) A broker shall keep a record of each transaction. For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record shall show:

1. The name and address of the consignor;
2. The name, address, and registration number of the originating motor carrier;
3. The bill of lading or freight bill number;
4. The amount of compensation received by the broker for the brokerage service performed and the name of the payer;
5. A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of compensation received for the service, and the name of the payer; and
6. The amount of any freight charges collected by the broker and the date of payment to the carrier.

(b) Brokers shall keep the records required by this section for a period of three years.

(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.
Liability to Customers:

**Tips and Suggestions**

- Add disclaimers or quotes on email signatures to deal with rate disputes.

  - Example:
    ***Please note: All rates quotes given by KTI through email are only valid for 30 days from the date of the email. Any quote given does not ensure capacity or the arrangement of freight awarded. All services provided by KTI are subject to KTI terms and conditions found at http://www.ktitrans.com/terms. ***

- Many TMS systems will automate this function.
Within the last two years, how many attendees have had a load held “Hostage” or for “Ransom” by a carrier?
Within the last two years, how many attendees have had a load held “Hostage” or for “Ransom” by a carrier?
Liability of Carriers:

Risk - Carrier’s Lien/Hostage Freight

- In certain circumstances, carriers authorized to exercise common law and contractual rights to place “carrier’s lien” on freight.
- “Life” of carrier’s lien is short. Carrier has lien upon goods for its lawful charges, arising when it picks up the freight.
- Lien discharged when carrier paid for goods (or, possibly, when payment made to intermediary). Discharge contemporaneously entitles consignee to goods.
- Carrier does not have right to lien and withhold delivery of cargo because of shipper’s failure to pay freight charges on separate, different and unrelated prior shipments.
- Consignee or shipper or broker may substitute “adequate security” in form of bond or cash escrow as substitute for the cargo upon which the lien is claimed, and thereby recover the cargo (2X volume of cargo).
- If adequate security has been posted and carrier does not return the freight, it may be liable for conversion. There is no absolute right to retention.
Liability of Carriers:

Back Solicitation

*All-ways Logistics v. USA Truck, Inc.,*

Plaintiff/Broker/Agent, All-Ways, and motor carrier, USA Truck, entered into brokerage commission agreement.

All-Ways: 5% commission for USA freight brokered by All-Ways.

USA terminated agreement and contracted directly with Rheem, one of All-Ways’ shipper customers.

All-Ways sued for (1) breach of contract; and (2) tortious interference.

Court: whether commission agreement contained implied prohibition against back solicitation was question of fact for Jury.

Whether back solicitation violated implied covenant of good faith and fair dealing also for Jury.

Factual issues of actual reliance on USA’s promise not to engage in back solicitation and whether reliance was reasonable.

Also refused to grant summary judgment on All-Way’s tortious interference claim; evidence of secret conversations with the customer and USA about contracting directly with USA.

And, Punitive damage claims stayed in case!
Plaintiff/Broker Parisi and defendant, CRST, entered brokerage commission agreement. Agreement included back solicitation provision that prohibited CRST from approaching Parisi Shipper customers for term of agreement and 6 months after termination.

CRST terminated agreement but continued to haul freight for Shippers Reckitt, Verizon, and Hartz Mountain.

Parisi argued that these actions constituted breach of back solicitation agreement.

Court found: No evidence that CRST initiated contact with Verizon or Hartz Mountain.

Mere fact that CRST hauled freight for these customers did not mandate conclusion that CRST improperly contacted them (CRST had preexisting contacts with both).

Also: Some evidence of improper contact with Reckitt, but Court noted that Parisi must prove that CRST hauled Reckitt freight as result of improper contact.

Court awarded Broker Parisi Attorneys’ Fees!
Liability to the Carriers:

On the Offensive: Unauthorized Brokerage and Map 21

- More than just the $75,000 bond
- MAP21 specifically states that:
  “A motor carrier may not broker transportation services unless the motor carrier has registered as a broker under this chapter.”
- You must be registered as a freight forwarder or broker to “arrange” transportation. 49 U.S.C. §13902(i)

Severe Consequences for Unauthorized Brokerage, and Personal Liability

- $10,000 / violation civil fine (i.e., a government penalty) for unauthorized brokerage; Creates private cause of action against those engaged in unlawful brokerage (a weapon?); No express limitation on “type” of damage (cargo/personal injury); (FMCSA enforcement limited)

- “Officers, directors, and principals” of company engaged in unlawful brokerage will be “jointly and severally” liable for any civil penalties and civil damages imposed on company; need D&O insurance. 49 U.S.C. § 14916(d)
Defining Your Role and the Scope of Services to Customer under MAP-21 and Otherwise

Risks Arising from a Broker signing “Carrier” Contract; Extracting Reciprocal Commitments from Carriers

Example of Clarity in Role and Scope

“Broker agrees to arrange for transportation services as more fully set forth in Appendix A (‘Services’). Broker's responsibility under the Agreement is limited to arranging for, but not actually performing, transportation of the Goods.”

• Critical Statutory Buzz Word!
Liability to Carriers:

Tips and Suggestions

• Specify in each agreement or and rate confirmation which authority you are acting. Required under 49 U.S.C. §13901(c).

• Look at whether or not you should have separate entities. (i.e. Carrier company and Broker company)

• Group Bonds may be allowed in the future. 49 U.S.C. § 13906(b)(1)(B) allows the Secretary of DOT to “authorize the use of a group surety bond, trust fund, or other financial security, or combination thereof.”
Liability to other LSPs:

Risk

• Broker hires a great employee and then gets a letter from another Provider demanding that that employee be terminated immediately because they are under a non-compete.

• What if Broker has knowledge of such an agreement?

• What if Broker has no knowledge of such an Agreement?
J.B. Hunt Files Noncompete Lawsuits

by Mark Friedman on Monday, May 11, 2015 12:00 am

J.B. Hunt Transport Inc. recently filed two lawsuits against former employees who allegedly

#TransportTopics. Tell your followers.

XPO Logistics Sues Trucker YRC, Charging Rival ‘Poached’ Executives, Trade Secrets

Logistics company says trucking giant sought employees and confidential information after XPO acquired Con-way
Liability to other LSPs:

Cases


- Plaintiff Magic Valley brokerage entered into non-compete agreement with employee Meyer, which prohibited him from brokering within 300 miles of Boise and from disclosing records/information regarding Magic Valley’s operations, customers, and other specialized information.
- When Meyer began working for another brokerage, Magic Valley sued Meyer for breach of contract.
- Meyer argued that could not be liable for breach of contract because Magic Valley did not prove that he contacted its customers or used its confidential information.
- Court: Meyer breached contract on other grounds; his new job was within 300 miles of Boise.
- But, court did not award plaintiff any damages because: (1) no evidence that plaintiff’s actual damages stemmed from breach of contract, and (2) liquidated damages provision in agreement was unenforceable because fixed damages did not bear reasonable relationship to actual damages anticipated to be incurred.
- Dual equation: Liability plus damages; No attorneys fees/no “prevailing party”
**Liability to other LSPs:**

**Cases**


- Brown worked as a dispatcher for Rollett Logistics; was responsible for finding loads by contacting established and prospective customers.

- Brown terminated employment with Rollett and went to work for competitor.

- Rollett sent Brown’s new employer letter claiming that Brown breached non-compete provision.

- Court: Agreement not enforceable because non-compete provision did not operate to protect customer contacts or trade secrets.

- Brown’s interaction with customers did not rise to level of “customer contacts” because customers ultimately made decisions based on price – not on pre-existing relationship with sales representative.

- Also: Defendants’ customer list, rate sheets, and pricing process were not trade secrets because most of information on customer lists was publicly available, information contained on rate sheets was not “process” or device for continuous use in the business, and the plaintiff was never involved in pricing process anyway.

Tough to protect trade secrets without contract.
Liability to other LSPs:

**Tips and Suggestions**

- **Employment Offer Letters:** Title and Duties; Initial Compensation and Benefits; Acceptance Date; Starting Date; Post-offer conditions; “At-will” Disclaimer

- **Employment Agreements:** Title and Duties; Initial Compensation and Benefits; Effective Date; Term and Termination; Severance; Restrictive Covenants; Miscellaneous “Legal”; Signatures; Term: Typically One Year with Automatic Renewal; Termination: Typically Notice, Cause/Good Reason; Severance: Typically to Contract Expiration or **Period of Time**

- **Confidentiality Agreements:** Requirement to Use Confidential Information; Consideration; Definition of Confidential Information; Length of Restriction; Agreement to Return Confidential Information; Remedies; “At-will” Disclaimer; Miscellaneous “Legal”; Signature

- **Noncompetition Agreements:** Confidentiality Agreement, **Plus:** Need for Noncompetition; Duration; Geography or Scope; Specifics of Noncompetition requirement; Nonsolicitation requirements; Acknowledgement of No Undue Hardship
Liability to other LSPs:

Tips and Suggestions

- You must give a benefit to get a benefit
  - Job offer conditioned on a restrictive covenant.
  - Must sign and agree BEFORE first day
  - Every new restriction needs additional consideration
  - Part time to full time, a raise, a promotion
  - Add disclaimers to bonus plans

This Plan does not alter the at-will status of your employment with the Company.
You or the Company may terminate your employment at any time for any reason.
This is not a commission plan. You have no right to any compensation for any day which
you do not actually work. If your employment ends prior to the end of a month,
you will be entitled to a performance bonus pro-rated for the number of days that
you actually worked during that month, but You will not be entitled to a performance
bonus based on any loads covered or moved that take place after the date of your termination.
Liability to other LSPs:

**Tips and Suggestions**

- Court does not want to prevent someone from working. Must show actual harm. Usually loss of sales, proprietary information.

- I push for protection theories of Operations, training, Carrier relationships. Add carrier lists, rates, training materials, carrier relationships (“customers and vendors”).

- Treat employees well, especially if you terminate them: “*KTI loses an employee but gains a friend.*”

- *Get a release if you want to mitigate Risk.*
Liability to other LSPs:

Tips and Suggestions

Closing Tips

• Be Pro-Active

• Get a Lawyer

• Review your documents and procedures

• Transportation Lawyers Association

• Transportation Intermediaries Association

Questions?