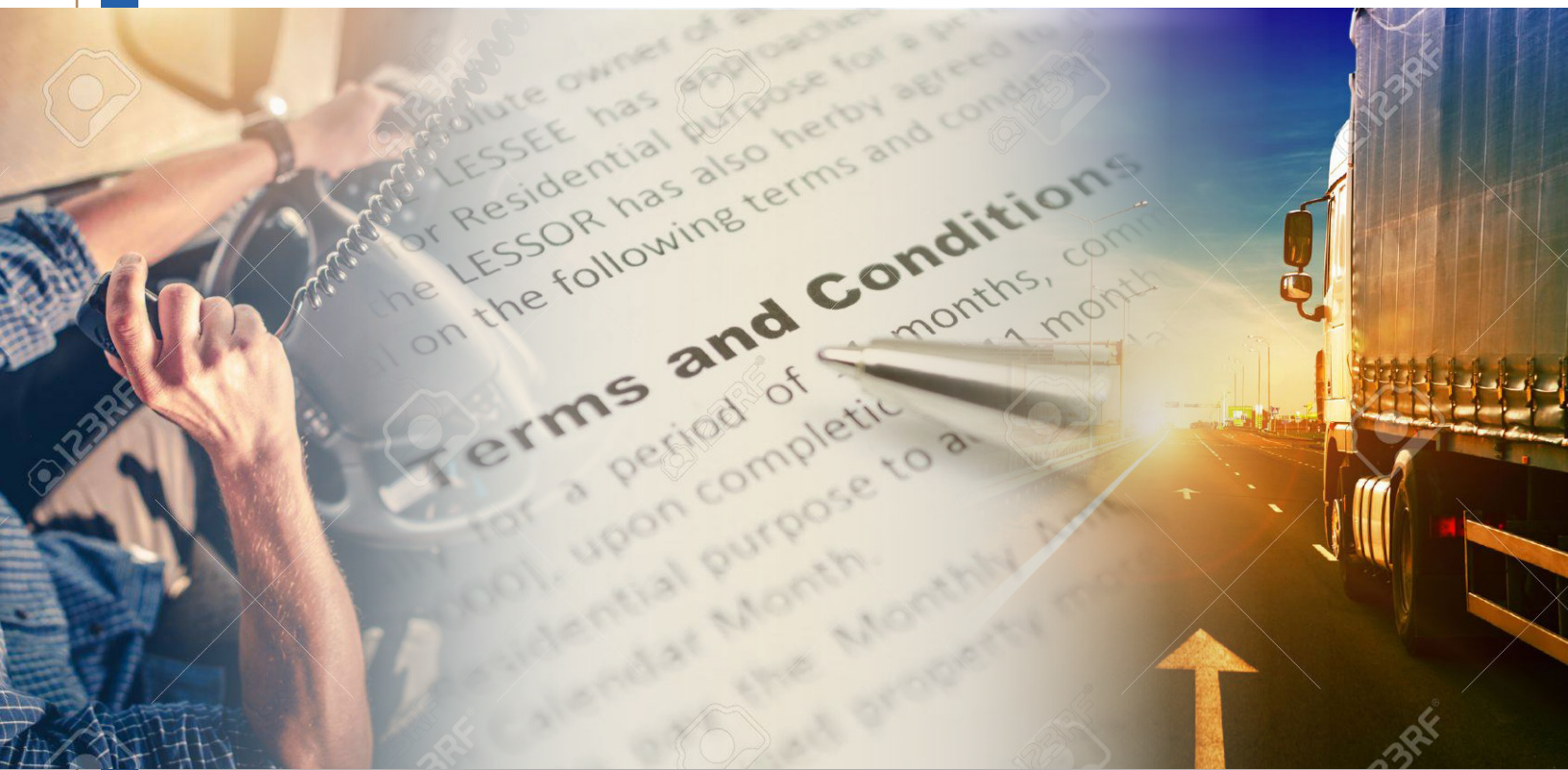


# Shipper 3PL Contracts Considerations



**TIA** Transportation  
Intermediaries  
Association

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## The Transportation Intermediaries Association (TIA) developed this resource in conjunction with our Shipper Committee and Council to provide guidance to 3PLs and shippers when developing contract considerations.

The purpose of this resource is to assist TIA Members and shipper professionals in contracting provisions. The ideas and information, and areas suggested for review contained in this resource, represent merely one set of tools among many others that TIA members and shippers may turn to as sources of information on contract development.

The resource is not designed, not intended, and not recommended to be a checklist or any type of industry “standard,” nor a characterization or summary of industry standards, nor a collection of “minimum” thresholds for contracts. Most of the areas

suggested for possible review in this resource are specific to certain scenarios which may present themselves from time to time during contract negotiations and/or during periodic contract review.

Nothing in this resource is intended to be nor should be used as legal advice or as a substitute for legal advice, which each member should obtain from qualified counsel familiar with the member’s business and laws applicable to it. The resource is not intended to define or prove compliance or non-compliance with any legal standard of care or diligence, and it should not be used or relied upon by anyone for any such purposes. This resource is understood by TIA to be a “working draft” and an evolving document.

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## Issues 3PLs should consider when presented with contracts

- Shippers often ask 3PLs to contractually assume the responsibilities of a motor carrier. This can range from application of Carmack liability or Canadian law on cross border shipments to things like verifying that equipment maintenance is performed, drug testing drivers, tracking hours of service, etc. Some contracts that 3PLs are presented with are literally shipper-carrier contracts where the word “carrier” has been replaced with the word “broker”. As a rule, 3PLs should never contractually agree to perform tasks that only the physical carrier is capable of.
- Some shippers will contractually require 3PLs to exercise an inordinate degree of control over the physical carrier. While this may be possible for the 3PL to do, caution should be exercised when directing the activities of the driver. Courts have found in the past that 3PLs that have done things like dictating a driver’s route or requiring the driver to check in hourly by phone have assumed the role of Motor Carrier rather than 3PL. In the context of personal injury suits, this has led to significant carrier liability for 3PLs with judgments against 3PLs reaching millions of dollars, even though they did not possess FMCSA Motor Carrier authority. As a rule, 3PLs should not exercise undue control over the carrier or the driver.
- Contracts will often include language that requires the carrier maintain specific insurance coverages and limits. These requests from time to time include requirements for coverage that is not appropriate for or available to motor carriers. Additionally, the limits of coverage requested, if too high, may prevent the 3PL from finding a compliant motor carrier. 3PLs should exercise caution when executing contracts such that they do not agree to terms they cannot comply with. Additionally, 3PLs should not agree to purchase insurance on behalf of the motor carrier, as it can be construed as exercising undue control, which could result in a 3PL assuming unanticipated liability. A good example of insurance requirements for carriers can be found in the TIA Model Broker-Carrier Agreement at [www.tianet.org](http://www.tianet.org).
- Some contracts contain indemnification language that is very broad. When reviewing clauses requiring you as the 3PL to indemnify the shipper, consider whether the shipper would have the right to settle a defensible third party claim without properly defending it and then seek indemnification from you. 3PLs and shippers often prevail when sued by third parties but those claims must be properly defended. Consider whether the contract that you are being asked to sign compromises your ability to defend yourself. It is also important to determine the insurability of the indemnification obligation you are assuming. If the indemnity risk is uninsurable you need to evaluate the cost/benefit feasibility of the contract in terms of realistic income versus the likely cost of the uninsured risk. A Risk Management and insurance professional may be consulted to assist you in making this evaluation.

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- Many contracts place unlimited liability on the 3PL. This presents an unbalanced cost/benefit scenario. As a 3PL, your upside is limited by the profit you will make by handling the shipper's business. The downside (liability of the 3PL) might be limitless. While some shippers will refuse to negotiate a cap on the 3PL's liability, we often see shippers (even very large ones) agree to liability caps. These can vary from stated dollar amounts to total charges paid by the shipper to the 3PL over the lifetime of the contract, such as multiples of the freight charges or shipment values, etc. 3PLs should perform a cost-benefit analysis, as well as endeavor to place a cap on liability.
- Some shippers will ask 3PLs to indemnify them for their own shipper negligence. You should never agree to this. You should never make yourself contractually responsible for the actions of your client. Beyond the issues of inequity, this will likely not be covered by the 3PL's insurance policies.

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- It is very common for shippers to ask to be added to the 3PL insurance policies as an Additional Insured. This raises several issues that 3PLs should

be aware of. When you and your insurer agree to add a shipper as an Additional Insured, this gives the shipper a right to make a claim against your policy. In effect, you are agreeing to share your limits with that shipper, both insofar as judgements/settlements and for legal defense costs. The latter can be significant because the insurance company will often need to hire separate attorneys to represent you and the shipper in order to avoid issues of conflict. Additionally, some shippers will ask to be named as additional insureds on cargo policies. As such, your insurance company may insist that they be added as a "Loss Payee" rather than an additional insured. Similarly, shippers may ask to be added as an additional insured on an automobile liability policy. It is important to note that not all insurance underwriters will agree to add additional insureds to their policies. Furthermore, depending on your policy form, the insurance company may not be able to grant additional insured status. This is often because the definition of an insured in the policy is so broad that it already includes coverage for shippers that become liable for the actions of the 3PL. In these situations, adding the shipper as an additional insured would be redundant so the insurer does not offer the option.

- Auto liability requirements – 3PLs should never agree to provide Automobile coverage that is simply excess of the primary coverage that the carrier has. That is to say, a 3PL would never want to provide coverage that simply steps in and pays, irrespective of 3PL liability, once the motor carrier's limits are exhausted. The 3PL's contingent auto cover can certainly be contingent upon other insurance being used up but should only be expected to pay when the 3PL is found liable, either directly or vicariously. Similarly, when a shipper asks to become an additional insured, they should be covered for the 3PL's negligence but not their own.
- If you will incur costs in order to sign a contract (implement special procedures, hire staff, pay additional insurance premiums, etc.) is there a guarantee of business from the shipper? Many contracts do result in the assumption of some degree of fixed costs on the part of the 3PL. Perhaps the shipper will agree to move at least several loads with you that would allow you to recover these.

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## **Remember that you should always review any contracts with your attorney and your insurer before signing them.**

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- Finally, remember that you should always review any contracts with your attorney and your insurer before signing them. Many insurance policies will not cover liability assumed in a contract unless agreed in advance by the insurance company and signing a contract without insurer approval can often negate your insurance coverage altogether. It is also important to realize that not all contract provisions can be insured. Agreeing to be responsible for things like consequential loss, delay, etc. can saddle you with significant liability that cannot be insured.

## **Issues shipper should consider when presenting 3PLs with contracts**

- Shippers sometimes ask 3PL to sign contracts that impose severe liability on the 3PL. Most businesses rely on insurance coverage to protect them and pay claims when they become liable for their actions. 3PLs are no different. A problem arises when contracts are written in a way that reduces or precludes coverage. Forcing 3PLs to sign these contracts can actually be counterproductive as it forces 3PLs to resort to paying claims out of pocket. In many cases, the shipper may have achieved a better result by keeping the 3PL's insurance coverage intact.
- Consider insuring your shipments on an "all-risks" basis. Relying on the carrier's liability in claims situations can result in unintended consequences. For example, a load may be destroyed by severe weather (an act of god). The shipper will not be compensated for this loss on a "liability" basis as no one is responsible for the severe weather. With shipper's interest cargo insurance, however, claims for things like heavy weather are covered.
- In some cases, asking to be added to a 3PL or carrier policy as an "additional insured" can actually hurt you. This is because many policies have provisions excluding coverage when one insured sues another. For this reason, while asking for additional insured status when you expect a 3PL's policy to defend you from a third party might make sense, doing so when you will potentially be claiming against the 3PL directly may not. Shippers should evaluate the use of Additional Insured status and adequate freight Broker insurance limits as an alternative to relying on suing the 3PL in the event of loss, damage or injuries arising from an accident event. Ensuring that the 3PL is properly insured and providing you with Additional Insured status may prove to be more effective and less expensive.
- Insurers do not have the ability to add additional insureds on certain types of policies. Many commercial auto policies fall into this category. These policies generally include a broad definition of an "insured" that states that anyone who becomes liable for the conduct of the primary insured is also an insured. There is simply no reason to add additional insureds to the policy as coverage already exists. For this reason, many insurers lack state insurance department permission to issue additional insured endorsements on these policies. Some shippers will insist on additional insured status which can cause regulatory issues for all involved.

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