

CLIENT ADVISORY

How Can You Protect Your Truck Broker Clients from Damages Resulting from Vicarious Liability?

Superior Logistics, Inc. is a truck broker. Dangerous Dan owns his own tractor-trailer, which he leases to Peerless Carriers Co., a motor carrier. Superior Logistics hired Peerless Carriers, despite its marginal SafeStat score and having been issued a number of CSA alerts, to deliver a load of potatoes on behalf of one of Superior Logistics's customers. Peerless Carriers assigned the job to Dangerous Dan. Unknown to Superior Logistics, Dangerous Dan had previously been fined for falsifying hours of service log books and had a lapsed driver's license. While transporting the load Dangerous Dan caused a multiple-car accident, resulting in fatal injuries.

Pursuant to concepts of negligent hiring and vicarious liability, Superior Logistics may be liable for the deaths caused by Dangerous Dan even though the contract between Peerless Carriers and Superior Logistics describes Peerless Carriers' relationship with Superior Logistics as an independent contractor; Superior Logistics is a federally licensed freight broker, but not a licensed motor carrier like Peerless Carriers; and Dangerous Dan and Peerless Carriers admit liability.

Carrier Agreement. Pursuant to a standard carrier contract between Superior Logistics and Peerless Carriers, Peerless Carriers warranted that it would use competent drivers and that neither Superior Logistics nor its customers were responsible for the drivers' salaries, wages, charges, or workers' compensation expenses. The contract described Peerless Carriers' relationship with Superior Logistics as an "independent contractor."

The Load Confirmation Sheet. Superior Logistics sent Peerless Carriers a Load Confirmation Sheet confirming the shipment and setting forth its requirements for transportation of the load, mandating that Dangerous Dan be on time for pick-up and delivery, call after the pick-up to verify that he is loaded, stay in constant communication with Superior Logistics throughout entire load, and that he pulp all product being loaded to ensure it is properly refrigerated. Failure to comply with any of these conditions would result in a substantial fine levied against Dangerous Dan. Upon successful completion of the delivery Superior Logistics would pay Dangerous Dan's fee directly into his personal bank account. In order to ensure that this was a profitable job, Dangerous Dan did whatever was necessary to satisfy these requirements and avoid being fined by Superior Logistics, including violating federal regulations prohibiting Dangerous Dan from driving more than 10 hours each day.

Negligent Hiring. Superior Logistics may be liable for negligently hiring Peerless Carriers. Under the laws of certain states, a party may be held liable for negligence in the selection, instruction, or supervision of an independent contractor. This duty to use reasonable care in the selection of carriers requires a truck broker, at the very least, to check the safety statistics and evaluations of the carriers with whom it contracts and to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings. If the carrier is deemed to be a high risk, Superior Logistics may even be liable for negligently entrusting the load to Peerless Carriers.

Although Peerless Carriers' SafeStat score was "satisfactory," its rating was marginal and it had been issued several CSA alerts. In similar situations courts have imposed a duty of further inquiry to explore the safety history and records of its carriers and their drivers. A truck broker must perform true due diligence in order to protect itself from this liability.

Vicarious Liability. Even if Superior Logistics was not negligent in hiring Peerless Carriers, Superior Logistics may be vicariously liable for the damages caused by Dangerous Dan. A principal may be held liable for the negligent actions of an agent that caused a person's injury, even if the principal does not himself engage in any conduct in relation to the injured person. A principal is vicariously liable for the conduct of its agent, but not for the conduct of an independent contractor. In determining whether a person is an agent or an independent contractor, the primary consideration is the right to control the manner of the performance of the work. Little weight is given to contractual labels or provisions.

Under the laws of certain states Superior Logistics may very well be found vicariously liable for the deaths caused by Dangerous Dan. First, Superior Logistics controlled the manner of the performance of Dangerous Dan's work by requiring Dangerous Dan to stay in constant communication with Superior Logistics and to continuously measure the temperature of the load during his trip. Moreover,

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Superior Logistics enforced its instructions with a system of fines imposed as incentives to get the load delivered on time, compelling Dangerous Dan to violate federal regulations mandating that drivers only drive 10 hours each day. In addition, Superior Logistics controlled the method of payment by depositing Dangerous Dan's fee directly into his bank account. The combination of these factors can be construed as dictating Dangerous Dan's method of delivery and creating pressure on him to get to his destination and supporting an inference that Superior Logistics had the right to control the manner in which Dangerous Dan performed his job.

Best Practices. A truck broker, like any other entrepreneur, seeks to protect its business by dictating terms to those who it engages in its business. However, the more control a broker exerts over a driver, the more likely it is that the driver will be deemed to be an agent of the broker and found liable for the conduct of the driver. Conversely, too little involvement may result in the truck broker being found liable for negligent hiring or entrustment.

In order to avoid these types of liabilities, a truck broker should employ "Best Practices" including, but not limited to, the following:

- Carry the appropriate insurance, such as Truck Broker Liability, Contingent Auto Liability, and Contingent Cargo Liability.
- Utilize a strong Broker Carrier Contract in all transactions.
- Request a delivery timeframe, but do not mandate one, and state that delivery, pick-up dates and hours will not require violation of hours of service regulations and that routing instructions, if any, are for informational purposes only.
- Periodically review each carrier to obtain credit, proof of insurance, CSA scores, and an overall safety evaluation.

Insurance Coverage. Truck brokers have been traditionally understood to be mere booking agents who facilitate transportation and shipping transactions. However, this view has been diminished by the concept that truck brokers and other intermediaries are integral players in each transport's operational aspects. The above scenario is representative of the judiciary's trend toward holding truck brokers liable for the acts of its carriers and drivers.

Because the trucking industry is replete with small carriers which might not have sufficient insurance coverage or other assets to pay for a claimant's damages, deep-pocket truck brokers can be attractive targets for plaintiff attorneys. As such, some insurers have limited the coverage provided by their standard policies issued to truck brokers. Truck brokers and their brokers should be mindful of this development in their business arrangements and risk management and seek the appropriate coverage to protect them from damages resulting from negligent hiring and vicarious liability.

About the Author

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