REDEFINING THE SCOPE OF LIABILITY FOR CARRIER ACCIDENTS: CLAIMS AGAINST BROKERS AND SHIPPERS

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In the wake of deregulation, claims premised on trucking accidents have become increasingly tangential and, in turn, attorneys have become increasingly creative in application of theories to support these claims. The need to demonstrate liability of an entity with peripheral involvement and 'deep pockets' is paramount. This trend has manifested with an increasing number of claims against freight brokers for injuries sustained in accident with motor carriers to whom the broker tendered freight. See, e.g. Schramm v. Foster, 341 F.Supp.2d 536 (D. Md. 2004); Smith v. Spring Hill Integrated Logistics Mgmt., Inc., 2005 WL 2469689 (N.D. Ohio Oct. 6, 2005). To a lesser extent, the trend has also featured a proliferation of claims against shippers for injuries sustained in accident with motor carriers with whom they had contracted to haul freight. Puckrein v. ATI Transp., Inc. 897 A.2d 1034 (N.J. 2006).

The most likely theories to be utilized by those seeking to impose liability upon a party for the acts of an independent contractor with whom it contracts are 'negligent hiring' and 'negligent entrustment'. Both have traditionally been recognized in the trucking litigation context as viable bases for independent claims against a motor carrier above and beyond vicarious liability for negligent acts of its employees. Recent law has witnessed attempts to harness brokers and shippers with slightly modified versions of the same claims. Caselaw portrays a pecking order wherein negligent selection of an incompetent contractor seems to afford the most potential. Two cases, Schramm and Puckrein, collectively establish that, under certain circumstances, negligent selection claims will be sustainable with regard to both brokers and shippers. However, legal analysis suggests the need for different standards to reflect disparity between the functions of the broker and shipper.

An alternative theory, joint venture, is emerging as the runner-up but also has more limited application. Evidence that a shipper/3PL represented some association of identity with a contracted carrier

could, through application of the alter ego theory, establish a sufficient issue of fact to preclude summary judgment of claims for direct/vicarious liability. There is no precedent to directly support use of alter ego theory to sustain a direct/vicarious liability claim against a shipper for carrier's negligence. The analysis in Puckrein could be construed, via great inferential leap, as a sufficient basis to deny summary judgment on an alter ego claim. See also Walker v. Martin, 887 N.E.2d 125 (Ind. App. 2008)(affirming summary judgment for shipper on joint venture claim despite evidence that carrier had painted, without permission, shipper's logo on his truck).

ANALYSIS OF CASELAW ADDRESSING 3PL LIABIILITY

While claims against brokers have become increasingly common, the viability of broker directed claims remains in dispute. Traditionally, and even as recently as 2005, brokers confronted with these claims have secured dismissal via summary judgment. See Smith v. Springhill Logistics. However, attention continues to gravitate towards Schramm, wherein a federal court denied summary judgment for a claim against a freight broker holding that the broker could in fact be liable for injuries caused by the motor carrier with whom it contracted. Schramm, 341 F.Supp.2d at 551-52. Schramm has garnered momentum to sustain the movement to expand personal injury liability for carrier accidents to carriers, intermediaries, and brokers. Schramm serves as a powerful reminder that the judiciary is more inclined to search for/manufacture a basis to sustain a claim when it involves catastrophic damages and alleges liability of a financially robust/heavily insured defendant. Although the trend suggests inevitable erosion of the immunity traditionally afforded to shippers and brokers, there is no caselaw to support imposition of liability as a matter of law. Legal endorsement of claims against brokers remains limited to potential liability as evidenced by the fact that the most favorable caselaw merely indicates that the claim is sufficiently viable to survive summary judgment.

The crux of the Schramm decision was that "an employer may be held liable for negligence in selecting, instructing, or supervising [an independent] contractor." Schramm, 341 F.Supp.2d at 551

(Quoting Rowley v. Baltimore, 505 A.2d 494, 497). The opinion carefully carves a defined and specific duty of care for brokers. The duty of care is closely anchored to the characterization/status of the 3PL as evidenced in the following: "its self-proclaimed status as a 'third party logistics company' providing 'one point of contact' service to its shipper clients is sufficient under Maryland law to require it to use reasonable care when selecting a trucker who it maintains in a stable of carriers." Id. at 551. The analysis was tailored for an entity "that has actively interjected itself into the relationship" between shipper/carrier and "has chosen to conduct business in a context heavily tinged with public interest." Schramm, 341 F.Supp.2d at 553. The Schramm duty was crafted to govern the 3PL - an entity that represents itself as an expert in the business of selecting carriers. The opinion portrays a standard so specifically tailored that the 3PL is presumed to have gratuitously assumed the duty. Id. at 553. This notion -that 3PLs have volunteered to be governed by the Schramm duty -arises from careful evaluation of 3PL function, particularly its entanglement with public interest, and the necessary posturing, inasmuch as it disrupts the relationship between shipper/carrier. Id.

The standard, expressed as follows, reflects the 3PL's experience and expertise in the selection of motor carriers: "This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on SafeStat database maintained by FMCSA, and (2) to maintain internal records of the person with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings." Schramm, 341 F.Supp.2d at 552.

While some have heralded Schramm as a blanket endorsement of claims against any entity associated with the transportation process - broker, 3PL, or shipper - for negligent selection of a motor carrier, the language in the opinion suggests an intention to limit analysis to 3PLs. The following excerpt typifies expression of this inherent limitation: "To the contrary, *imposing a common law duty upon third*

party logistics companies to use reasonable care in selecting carriers furthers the critical federal interest in protecting drivers and passengers on the nation's highways." Id. at 552 (Emphasis added). On the other hand, it would not require a large analytical leap to declare, in similar fashion, that imposition of the same duty for shippers would be consistent with this interest as well. While the opinion sought, through careful use of limiting language to communicate a narrow scope of application, the analysis, in its entirety, is suited for generalized application.

In Jones v. C.H. Robinson Worldwide, Inc., often dubbed 'son of Schramm', a Virginia district court refused to dismiss, by summary judgment, a similar claim against a broker for negligent hiring of an independent contractor. 558 F.Supp.2d 630 (W.D. Va. 2008). From a general perspective, denial of the motion conveyed that the Virginia District Court would, under appropriate circumstances, extend the cause of action for negligent hiring of an independent contractor to a freight broker or 3PL for selection of a carrier. The precedential value of this opinion principally derives from its analysis of Safestat relevance. The opinion explores the reliability of SafeStat scores as an indicia of carrier risk as well as the relevance of these scores for defining 'reasonable inquiry'.

Plaintiff argued that the broker should have conducted an investigation into carrier's safety ratings and become aware that it was contracting with an 'at risk' carrier. Jones, 558 F.Supp.2d at 643. Plaintiff sought to support this contention with evidence that the carrier was in the bottom 3% of motor carriers for driver and vehicle SEA. Id. at 643-44. Plaintiff also produced evidence that readily available information, on the FMCSA website, revealed a history checkered with coverage cancellations and citations for violations of federal safety regulations. Id. The broker countered with evidence that the FMCSA has affixed a disclaimer to the safestat information. The disclaimer reads as follows:: "Because of State data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by the FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and may not be suitable for certain uses." Id. at 645-46. The plaintiff sought to substantiate the impact of the disclaimer with expert testimony that FMCSA intended for this disclaimer

to function as a warning against the very use for which plaintiffs sought in this case. Id.

Ultimately, the Court concluded that there was a duty to investigate carrier fitness but was unable to determine compliance therewith due to issues of fact surrounding the impact of the disclaimer and use of the SafeStat data in general. Id. at 646-47. Basically, the Court declined to recognize deficient SafeStat ratings as an indication of incompetence. Id. Similarly, the Court was not prepared to impose a legal duty on brokers to confirm the SafeStat rating of each carrier in its stable. Id. This reluctance was likely motivated by the inability of these ratings to convey sufficiently specific information about a risk as well as evidence that FMCSA represented, in the disclaimer and instructions, that the rating were not sufficiently reliable. The refusal to incorporate the SafeStat ratings is consistent with the emphasis that the Court placed on the necessary connection between the particular quality of the motor carrier that made it incompetent and the MVA in which that claimant was injured. SafeStat, in its current format, does not purport to convey sufficiently particular information to satisfy such a burden.

Nevertheless, the bottom line holding in Jones was that the plaintiff had developed such evidence that a jury issue was created as to whether C. H. Robinson, as the freight broker, had breached the appropriate duty of inquiry in selecting a competent carrier to haul this freight.

ANALYSIS OF CASELAW ADDRESSING SHIPPER LIABILITY

While the Courts have articulated the components of a broker's duty, there is minimal guidance for shippers confronted with negligent selection claims. Recent caselaw has merely acknowledged that shippers could face liability for failure to confirm that a carrier is legally authorized to haul freight. It is well established that a shipper, just like a broker, has a duty to exercise reasonable care in selecting a carrier. However, the law does not support application of the same standard to brokers and shippers.

The 9th Circuit, in an isolated opinion, established a foundation that enabled claims against shippers for negligent selection of an independent carrier. Foster v. Hurnblad, 418 F.2d 727 (9th Cir. 1969). The Court, affirming denial of motions for directed verdict, jnov, and new trial, concluded that it was appropriate for the jury to determine whether the shipper had failed to make a reasonable inquiry with regard to the carrier's competence. Foster, 418 F.2d at 732. The Court, having considered that the

shipper had extensive experience with similar loads, emphasized the failure of the shipper to inquire about carrier rates, federal licensure, equipment, and base location. Id. at 731. Evidence that an experienced shipper made such a limited inquiry prompted the following determination: "In light of Foster's experience in shipping similar loads, of the highway danger posed by the size of the load, and of the knowledge and action of Foster's employee in contracting with Transport Supply, we conclude that the evidence warranted a jury finding that Foster failed to make reasonable inquiry as to Transport Supply's competence..." Id.

This opinion prophetically contemplates a distinction between casual and experienced shippers. Citing Hurnblad, recent cases have acknowledged this relationship between the experience of the shipper and the scope of duty. Hurnblad was the first opinion to declare that a casual shipper has the right to assume that the carrier is not conducting business in violation of the law and thus probably has no duty to ascertain whether the carrier was properly authorized to haul freight. Id. at 731. Because this distinction has endured, it is critical to remain aware of characteristics that courts have associated with these designations. In Hurnblad, the shipper was considered experienced on account of its tendency to ship nearly 400 truck shipments per month. Id. [Note: McIlhenny has indicated that they ship approximately 175 truck loads of freight each month from their facility]. Because this case was adjudicated prior to the emergence of SafeStat, there is no discussion concerning whether a poor rating evidences incompetence or whether a shipper's duty entails verification of the carrier's rating.

Puckrein v. ATI Transport, Inc., is the seminal case for analysis of shipper liability on account of carrier negligence. 897 A.2d 1034 (N.J. 2006). The importance cannot be overstated so long as it remains the only recent case wherein a claim against a shipper for negligent selection of a carrier has survived summary judgment. In Puckrein, the Supreme Court of New Jersey reversed summary judgment holding that the shipper could be liable for the negligence of a motor carrier that was contracted to haul freight. In effect, this opinion has validated claims against the shipper for negligent selection and consequently the move to redistribute liability among peripheral parties with 'deep pockets'. However, the scope of a shippers duty, according to Puckrein, is significantly less involved than a broker's duty, as

outlined in Schramm.

On appeal, the issue was clearly identified as whether the shipper knew or should have known that the carrier was incompetent. Puckrein, 897 A.2d at 578. According to the evidence, the shipper was not apprised that the carrier's registration and liability insurance had expired prior to the accident. Id. at 580. The analysis generally sought to ascertain whether the shipper had a duty to ensure that its carrier was legally authorized to transport freight on the roadways. Id. The Court confirmed that a shipper, whose core purpose is the collection and transportation of materials on highways, has a duty to use reasonable care in hiring an independent contractor - including investigation into whether the carrier was legally authorized to haul the shipper's freight. Id. at 579-80. It is crucial to keep this opinion in perspective and to understand that it only confirms that a shipper is obligated to perform an initial inquiry into the carrier's insurance coverage and registration: " At a minimum, BFI-NY was required to inquire whether its haulers had proper insurance and registration because without those items the hauler had no right to be on the road." Id. at 580. The Court noted that the shipper was not free to utilize a carrier with unregistered and uninsured trucks. Id. Puckrein merely confirms that a shipper may be exposed to liability if the carrier is not legally authorized to haul at the time of the accident. Id. The Puckrein analysis expressly excludes casual shippers and provides no meaningful guidance with respect to the scope of a shipper's duty beyond confirmation of the carrier's legal authorization to haul freight.

The facts giving rise to this claim are extreme and as a result have spawned the creation of a very limited legal principal. This case is representative of the sentiment expressed in the adage "bad facts make bad law". Failure to verify that a carrier possess appropriate registration and insurance will give rise to a viable cause of action if an accident ensues. However, this opinion does not purport to address the viability of claims that are premised on poor safety ratings.

This opinion, in keeping with Hurnblad, also acknowledges a direct relationship between the shipper's status and the scope of the duty imputed to the shipper. Puckrein, 897 A.2d at 579-80. It was reiterated that "a casual shipper of goods has a right to assume that the carrier is not conducting business in violation of the law." Id. at 1044. The Court, distinguishing BFI-NY from the casual shipper,

specifically proclaimed that a company "whose core purpose is the collection and transportation of materials on highways" has a higher duty with regard to the motor carrier it engages than "a casual shipper of goods" including "a duty to make an inquiry into that trucker's ability to travel legally on the highways." Id. Certain factors including size, experience, and expertise were considered as the Court sought to ascertain whether the shipper could be charged with any duty to exercise reasonable care in the selection of carriers. Id

Essentially, a shipper will be entitled to rely upon its status as a casual shipper to defend against claims of liability. Clearly, the analysis is very limited in scope as it excludes the casual shipper and provides no guidance for 'reasonable inquiry' beyond an obligation to confirm that the carrier has authorization - with valid insurance and registration- to haul goods for the shipper. This opinion should not be considered persuasive for cases that do not involve the alleged failure of an experienced shipper to investigate the minimum qualifications of a carrier.

Finally, Puckrein suggests the potential application of alter ego/joint venture to complement a claim for vicarious liability. Id. at 1045. While the alter ego theory is referenced in Puckrein to demonstrate unification of identity between the carrier and subcontractor, the analysis foreshadows broader use of the theory to directly link the shipper with the carrier, particularly when shipper contends that it should be insulated because it was not aware or in control of the carrier. Id. Consideration of evidence that distracts from the perception of defendant autonomy will inevitably blur the distinctions that have enabled shippers to traditionally avoid liability for carrier accidents. See Id.

Although Puckrein's influence will likely fade as the limitations are acknowledged and confirmed, it is conceivable that certain jurisdictions will reference it as a foundation for the expansion of a shipper's duty to use reasonable care. It cannot be disputed, however, just as in recent cases holding brokers of goods potentially liable for accidents caused by a carrier, that plaintiff's attorneys, and the courts themselves, will creatively seek to impose liability on peripheral parties to ensure that judgment in favor of a seriously injured motorist does not go uncompensated.

ANALYSIS OF RELEVANT ALABAMA LAW

As was true in New Jersey before Puckrein, the current law in Alabama does not extend liability to shippers for 'negligent hiring' of trucking companies involved in motor vehicle accidents, barring a contractual provision otherwise. There is no reported Alabama decision holding a shipper, broker, or 3PL liable for the negligent hiring of an allegedly incompetent trucking company involved in an accident. Unless Alabama courts disregard clearly stated limitations on shipper liability, as stated in Puckrein, or extend the Schramm analysis to shipper, there is no persuasive authority to support expansion of liability in this context. However, with a rapidly evolving industry and catastrophic injuries, there is no certainty that the status quo will endure.

As a starting point, the Alabama Supreme court has held that a party employing an independent contractor is generally not liable for the torts of the independent contractor." Joseph Land Co. v. Gresham, 603 So.2d 923, 926 (Ala. 1992). Accordingly, the Alabama Supreme Court, in response to a certified question, has recently concluded that shippers do not owe a non-delegable duty to third party motorists injured on account of the carrier's negligence and as such are not generally liable for damages resulting therefrom. Fike v. Peace, 964 So.2d 651 (Ala. 2007)(holding that there was no basis to hold kiln manufacturer liable for injuries to third parties sustained in an accident caused by the negligence of a trucking company which contracted with manufacturer to transport a kiln).

Most significantly, the Northern District of Alabama recently disposed of claims against a shipper for negligent hiring of an independent contractor because there was no evidence that the shipper was on notice, actual or constructive, of carrier's incompetence. Fike v. Peace, 2007 U.S. Dist. LEXIS 81669 (N.D. Ala. 2007) *aff'd*, 2007 U.S. App. LEXIS 25240 (11th Cir. Ala., Oct. 25, 2007). Summary judgment was granted in spite of evidence that the carrier's safestat scores had declined into the bottom 20% nationally and that a federal safety inspection had deemed the carrier to be deficient in all areas 4 months prior to the accident. Id. The Court accepted the shipper's contentions reasoning that the shipper, unlike Schramm, was not consistently engaged in shipping and, unlike Hurnblad, was familiar with the reputation of the carrier through a long-standing business relationship. Id. This pivotal opinion officially endorses the viability of the casual shipper defense.

Because Fike involves consideration of a claim against a shipper for conduct analogous to that alleged in Schramm, the Court, by refusing to impose a duty regarding SafeStat, has necessarily declined to recognize the same standard for brokers and shippers. Alabama condones a 'sliding scale' approach to potential liability in this context to account for varying degrees of proximity to the actions of the carrier.

Alabama has expressly declined to impose a duty on shippers to investigate SafeStat ratings for each carrier to whom it entrusts freight. Pursuant to Fike, which is binding precedent, a poor safestat rating cannot be considered substantial evidence that a shipper was aware of a risk, particularly when there is evidence of a long-standing business relationship with its carrier. See Fike. Accordingly, Alabama law provides no basis for a claim against a shipper for negligent failure to investigate its carrier's SafeStat rating.

Finally, the Northern District of Alabama has also concluded, with regard to a slightly distinguishable claim, that a shipper has no duty to investigate the driving record of an individual operator hauling the freight of an independent contractor. See Wright v. Fields, 647 F.Supp.2d at 1293, 1298 at n.3 (N.D. Ala. 2009). In this claim it was alleged that a timber company had negligently hired and entrusted, through a trucking company, an unsafe driver. Wright, 647 F.Supp.2d at 1296-97. It was further alleged that the company negligently failed to investigate the contractor's driving history. Id. Unlike the preceding cases, this claim concerns evidence that the driving record of a individual, who was contracting with the carrier, was delinquent. The district court held, pursuant to federal regulations, that companies operating in the timber business have no duty to investigate the driving record of an independent contractor hired to haul freight. Id. In addition, the court refused to sustain the negligent hiring claim because there was no evidence that the company knew or should have known information contained in the driving record of an individual with whom they were not directly contracting. Wright, 647 F.Supp. at 1298.

SECONDARY ISSUES

A. Impact of carrier contract

In an effort to assess liability of involved parties, Courts are likely to defer to the monikers

ascribed to the contracting parties in contracts which have been executed to govern the shipping scenario. Traditionally, the Courts have attached great significance to the contractual relationships between entities, as memorialized by the contracts that clearly delineate their respective roles and obligations. See McLaine v. McLeod, 661 S.E.2d 695 (Ga. Ct. App. 2008). These designations may be critical for the defense of vicarious liability and respondeat superior claims, particularly when they contemplate minimal control over the carrier and specifically designate an independent contractor relationship.

At least one court has relied upon a contractual provision that required satisfactory SafeStat ratings to impute recognition of the importance of a sound safety record to the broker. See Schramm, 341 F.Supp.2d at 552-53. The Court, in Schramm, reasoned as follows: "Robinson itself recognizes the importance of a carrier's safety rating when it requires the carrier to have a 'Satisfactory' rating from the U.S. DOT in its contract carrier agreements." Id. at 552. Although, one of many, this factor was cited to support an enhanced duty for brokers. Id.

In accordance, it should be presumed that when a shipper/broker tenders a load to the carrier that does not meet the specifications noted in the contract, the specification may be introduced as evidence of the applicable duty. Plaintiffs will exploit this situation by arguing that the broker/shipper has violated the very minimum safety standards which it created. If the contract provides for retention of this type of documentation, but is not followed, a party may be deemed to have 'violated its own standards' which may in turn serve as evidence of that party's own negligence. These arguments, premised on provision in the carrier contracts, might be persuasive to a jury, and in some venues, may provide a basis for punitive damages.

B. Long standing relationship between shipper and carrier

Shippers confronting negligent selection/evaluation claims may be permitted to rely upon evidence of a long-standing relationship with the carrier, in addition to efforts to verify carrier's legal authorization, to demonstrate the exercise of reasonable care in the selection process. See Fike v. Peace, 2007 US Dist. LEXIS 81669 (N.D. Ala. 2007); contra Foster. If a carrier, after a period of retention, has demonstrated an impeccable record for safety while hauling for the shipper, there would be no notice that

further inquiry was warranted.

C. Access to reliable information

Several courts, acknowledging that brokers have limited access to information, have implied that a broker/shipper cannot be charged with constructive knowledge of information that is restricted from access. Because available information about carriers is more limited for shippers than brokers, the appropriate duty of inquiry should reflect this disparity.

Further, a process is currently underway to overhaul the current safety data compilation model. This process, culminating with effective implementation of the Safety Measurement System, will render SafeStat obsolete. It could be argued that the overwhelming need to overhaul SafeStat suggests that these scores provide insufficient information to reliably evaluate carrier risk. SafeStat scores have been criticized because they are not specific and do not factor in all relevant information. Official acknowledgment of these shortcomings is consistent with the stated intention of and reliance on the disclaimer discussed in both Schramm and Jones. If the information does not convey sufficiently specific information to establish a relationship with the cause of an MVA, then the ratings cannot be used as evidence of incompetence to support a claim for negligent hiring, entrustment, or selection of independent contractor.

CONCLUSION

Despite available legal analysis and precedent, lack of adequate insurance coverage coupled with catastrophic injury will inevitably prompt courts to find some argument that enables recovery from entities with 'deep pockets.' If nothing else, this memorandum should have confirmed that courts are becoming increasingly amenable, in the trucking litigation context, to previously untenable claims. Schramm effectively disrupted an era characterized by blanket exemption of brokers from liability related to their role in the arrangement of transportation between a shipper/carrier by demonstrating that a broker may face liability for failing to adequately inquire about the safety record of its carrier and driver. Puckrein, admonishes that, under certain circumstances, shippers may be held liable for conduct of motor carriers that they have engaged in contract. Overall, relevant law, in piecemeal fashion, has constructed a

continuum of liability exposure for entities that participate in the shipping process. Degree of exposure is commensurate with the amount of involvement that each entity has with the carrier and/or the actual transporting of freight.

Shippers, divided on the basis of their regular shipping volume, have the least exposure. While casual shippers have no legally recognized duty in the selection of independent carriers, experienced shippers must confirm that their carrier meets minimum legal standards - with respect to insurance, licensure, and registration - and must utilize only those carriers who are compliant. Although the scope of this established duty is limited, the potential for expansion has not been foreclosed. Shippers must make every effort to embrace the evolving involving industry and to make use of all available carrier related information. Inquiry should be established, thorough, and consistent for every carrier. For shippers, the costs associated with prevention will be more than offset by the value of minimizing liability risk.