

BROKER LIABILITY FOR CASUALTY CLAIMS

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I. *Why Is This an Issue at All?*

In a perfect world, a transportation broker (defined in 49 U.S.C. § 13102 (e)) makes transportation arrangements for its customer, retaining a motor carrier to handle the customer's load. In the event of an accident during that transport that produces personal injuries, the trucker has primary liability for its driver's negligence. If the trucker's insurance is sufficient to cover the injuries and damages, the broker's liability should be immaterial. If the broker is sued, it should be able to obtain common law or contractual indemnity from the trucker.

Therefore, broker liability for casualty claims comes into play if:

- The trucker has insufficient coverage, or none at all; or
- The trucker cannot be found; or
- A legal link cannot be made between an owner/operator (possibly inadequately insured) and a certificated (and insured) motor carrier.

The very contemporary case of *Schramm v. Foster*, 341 F.Supp.2d 536 (D.Md. 2004) arises from an accident causing neurological injuries to Tyler Schramm and leaving him in a semi-vegetative state. His fellow plaintiff, Mitchell Thompson, suffered severe head and body injuries. The court's opinion is silent on the issue of adequate insurance, but it seems clear that the trucker's insurance was not sufficient to cover the devastating injuries. Therefore, the plaintiffs looked to the broker on the load, C.H. Robinson Worldwide, Inc., to garner additional assets and insurance to cover the damages.

II. *The General Rule of Broker Liability*

In the cargo claim context, a broker, not itself negligent, "is generally not liable for the value of goods lost in interstate commerce." *Travelers Ind. Co. v. Alliance Shippers, Inc.*, 654 F.Supp. 840, 842 (N.D. Cal. 1986). (Cargo attorneys know that the Carmack Amendment does not apply to brokers.) In a typical case, the sole issue is whether the broker was negligent in selecting a particular motor carrier to carry the load. *CGU Int'l Insurance, PLC v. Keystone Lines Corp.*, 2004 WL 1047982 (N.D. Cal. 2004) (not officially reported).

In the cargo setting, broker liability can become an issue when the motor carrier or carriers handling the load do not have sufficient insurance, or if their contracts, bills of lading, or tariffs limit their liability so that the shipper or consignee, or subrogated insurer, seeks to maximize recovery.

The issue of whether the broker has been negligent in carrying out its duties is generally a question of fact in each case. Similarly, that issue was held to be a question of fact in the personal injury setting in *Schramm*, as we shall see.

III. What is a Broker?

49 U.S.C. § 13102(e) defines a broker as:

a person, *not a motor carrier*, . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. [Emphasis added].

The issue of whether a party who arranges transportation is acting as a broker or a motor carrier in a given instance will more likely arise in a cargo setting, although it does also arise in the *Schramm* case. In a cargo case, the emphasis will be upon the understanding of the contract from the shipper's standpoint, as well as the broker's conduct and the relationships between and among the parties. *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D. Ill., Oct. 15, 1999) (not officially reported) (denying summary judgment because, among other things, determination of Custom's status as a broker versus motor carrier was an issue of fact); *Phoenix Assur. Co. v. K-Mart Corp.*, 977 F.Supp. 319 (D.N.J. 1997) (referring determination of parties' status to Secretary of Transportation for resolution).

The analysis of issue of broker status in a cargo case is one thing; it may be different in a personal injury case. *Schramm* seems to stand alone as a reported personal injury case addressing that determination. And as to liability issues, we analyze a cargo claim on the basis of contract (bill of lading, tariffs, separate contract of carriage) and where applicable, the Carmack Amendment. In a personal injury case, we look for actual negligence or vicarious liability. The *Schramm* analysis addresses the latter, but with some overlapping into the traditional cargo claim approach.

IV. What is Schramm All About?

Tyler Schramm and Mitchell Taylor were very seriously injured – Schramm left in a semi-vegetative state – in a motor vehicle accident with a tractor-trailer driven by Brian Ashley Foster, an employee of Groff Brothers Trucking, LLC. Foster was hauling a load of soy milk from Jasper Products, LLC, from Joplin, Missouri, destined for Carteret, New Jersey. The accident occurred in Maryland. Foster, driving beyond his allowable hours, drove through a Stop sign at an intersection, without stopping.

C.H. Robinson Worldwide, Inc. is a licensed transportation broker (it also has motor carrier

authority) which advertises itself as a “one point-of-contact” transportation provider. Jasper to engaged Robinson to arrange the transport. Robinson brokered the load to Groff Brothers, who assigned the shipment to Foster, one of their drivers. Robinson apparently had a regular relationship with Jasper Products, whose witnesses testified that they knew that Robinson was acting as a third-party logistics provider, and not a motor carrier. They did not know at the time who the motor carrier would be. Robinson actually gave dispatch information, and cargo-handling instructions, to the Groff driver, Foster. Robinson did not inquire as to Foster’s available driving hours.

The injured plaintiffs sought to place liability upon Robinson, urging the following theories of liability:

- *Respondeat superior* liability, because of alleged exercise of control over Groff and Foster;
- Negligent Entrustment;
- Claims under the Motor Carrier Act, especially 49 U.S.C. § 14704(a)(2);
- Claims that Robinson acted as a motor carrier;
- Claims that Robinson aided and abetted Groff and Foster to violate Hours-of-Service Regulations; and
- Negligent Hiring

On motions and cross-motions for summary judgment, the district court dispensed with all of these theories except Negligent Hiring. The civil “aiding and abetting” theory was dismissed, as not proven. The Negligent Hiring claim, though weak, withstood summary judgment.

V. *Schramm: The Negligence/Respondent Superior Claims*

The district court found that these facts did not render Robinson liable for Foster’s negligence:

- That by contract Robinson could control the transportation and instructs the carrier to obtain instructions for handling the load, to inspect goods before loading, and to notify Robinson if they are not in good condition.
- That Foster was to call Robinson, not Foster, to receive dispatch information
- That Foster was to call Robinson periodically

These facts did not render Foster a servant of Robinson, or alter the clearly worded agreement between Robinson and Groff that Groff was to employ and pay its drivers, that

would be employees of Groff, and not Robinson, and that Groff would be solely responsible for operating the transportation equipment.

VI. Schramm: *The Negligent Entrustment Claim*

The district court dismissed this theory, under Maryland law, because Robinson did not supply the truck to Foster. Groff did.

VII. Schramm: *The Claim under 49 U.S.C. §14704(a)(2)*

This section provides that a “carrier or broker providing transportation or services is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.”

The district court joined those courts holding that this section applies to commercial damages only, and does not create a private right of action for personal injuries.

Even if a right of action were created, the district court held that the facts would not support that statutory action, as Robinson did not violate the Act or Regulations.

VIII. Schramm: *The Claim that Robinson acted as a Motor Carrier*

Robinson had federal authority as a motor carrier as well as a broker. 49 U.S.C. §131012(2) defines a broker as a “person, *other* than a motor carrier,” who arranges for transportation. Does that mean that Robinson cannot be deemed a broker? The district court said it does not. Rather, the focus must be on Robinson’s role in the specific transaction with the shipper, Jasper.

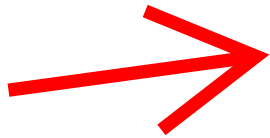
The court’s focus actually was on Robinson’s relationship – in this transaction – with Jasper, Groff Brothers and Foster. The court found that Robinson did not act as a motor carrier (“a person providing motor vehicle transportation for compensation,” 49 U.S.C. §13102(12), who has “accepted and legally bound” itself to transport shipments, 49 C.F.R. §371.2(a)).

In reaching that conclusion, the district court considered and rejected these arguments:

- That Robinson promoted itself as a comprehensive transportation company offering shippers “one point of contact.” This was relevant to its “common law duty to select carriers with reasonable care [but does not] convert Robinson into a [motor] carrier under federal law.” 341 F.Supp. 2d at 548. Further, Jasper’s president testified that he understood Robinson’s role to be that of an “intermediary.” The court relied upon *Chubb Group v. H.A. Transp. Systems, Inc.*, 243 F.Supp.2d 1064 (C.D. Cal. 2002).
- That Robinson had federal authority as a motor carrier. As noted, the district court held that the determination of status must be made on a case-by-case basis, but the fact that a broker also has motor carrier authority is not determinative, citing *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL

965686 (N.D. Ill. 1999) and *Phoenix Assur. Co. v. K-Mart Corp.*, 977 F. Supp. 319 (D.N.J. 1997). Also, there is no evidence that Robinson solicited the transportation for its own account. *Global Van Lines, Inc. v. I.C.C.*, 691 F.2d 773 (5th Cir. 1982).

- That Foster signed a bill of lading which erroneously identified Robinson as the “carrier.” The bill was actually prepared, automatically, by Jasper, who would not know at that point who the carrier would be. Jasper’s witness confirmed that she did not believe Robinson to be the carrier.
- That Robinson voluntarily maintained excess insurance coverage for freight loss and damage. The court held that the voluntary assumption of responsibility for unpaid freight claims does not render Robinson liable for personal injuries.
- That Robinson dispatched the driver as to pick-up and delivery places and times. This does not mean that Robinson controlled the carrier’s dispatcher. Groff assigned the load to Foster, its driver, and had the right to control his route, etc. Robinson’s providing of timing, locations, and special handling instructions was consistent with its role as a broker.



IX. Schramm: *The Claim that Robinson “aided and abetted” Groff and Foster to violate Hours-Of-Service Regulations*

This is disturbing. The district court dismissed this claim, not because it failed to state a cognizable cause of action, but because plaintiffs have “failed to proffer sufficient evidence that Robinson intended to assist Groff Brothers or Foster in violating the hours of service regulations.” *Schramm*, 341 F.Supp.2d at 551. The failure to inquire about Foster’s available driving hours, while setting pick-up and delivery times, does not show such an intent. *Id.*

That the district court saw this as a potential fact issue bears watching. A well-pleaded allegation of aiding and abetting the carrier or driver to violate federal regulations, such as failing to maintain brakes and tires in proper condition, or violating weight, or hours-of-service restrictions, could well survive a motion to dismiss at the pleading stage, at least with this judge.

The result is that, at least before the *Schramm* judge, a defendant broker could be required to defend itself against such a civil aiding-and-abetting claim.

X. Schramm: *The Negligent Hiring Claim*

This is the only claim that withstood Robinson’s motion for summary judgment, and it did so on the basis of Maryland common law. The district court held that under that State’s law Robinson had a duty to use reasonable care in selecting truckers “whom it maintains in its stable of carriers.” *Schramm*, 341 F.Supp.2d at 551. This includes a duty to check Safety

Statistics of carriers with whom it does business, and to “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.” *Id.*

Recognizing that the evidence of Robinson’s actual negligence was “somewhat thin,” the district court nonetheless denied summary judgment. As the court said, Groff’s SafeStat was not unsatisfactory, but it was marginal, which implies a duty of further inquiry:

. . . Robinson should have been reasonably alerted to the fact that Groff Brother’s [sic] provenance was suspicious. Its predecessor, RG Transportation, had experienced a safety performance problem which prompted the formation of Groff Brothers.

341 F.Supp.2d at522.

XI. Other Cases Defining Broker Liability - Recent Cargo Cases

CGU Int’l Insurance, PLC v. Keystone Lines Corp., 2004 WL 1047982 at *3 (N.D. Cal. 2004)

(The applicable standard is that of the ordinary and reasonable prudent person to hire a competent carrier; broker determined that carrier had a valid federal carrier’s authority and possessed cargo and liability insurance, which fact “reflects on its safety history and driving record.” Thus, there was no “need to separately inquire about the carrier’s drivers and accident history.”)

Chubb Group v. H.A. Transp. Sys., Inc., 243 F.Supp.2d 1064 (C.D. Cal. 2002)

(Finding that broker did not act as a motor carrier: the duty applicable to a broker is to exercise due care in selecting a carrier; also, broker has no duty, aside from contract, to ensure that the chosen motor carrier is adequately insured for cargo liability, especially where shipper fully insured the cargo.)

Quare: How would the *Schramm* court treat a broker who books a load with an *uninsured* motor carrier, who then severely injures an innocent motorist in a highway accident?

Phoenix Assur. Co. v. K-Mart Corp., 977 F.Supp. 319, 325 (D.N.J. 1997) (A broker, if not negligent, is generally not liable for the value of goods lost in interstate commerce.)

Custom Cartage, Inc. v. Motorola, Inc., 1999 WL 89563 at *3 (N.D. Ill. Feb. 16, 1999) (an earlier decision in this case) (Carmack does not exempt brokers from paying for their own negligence.)

Commercial Union Ins. Co. v. Forward Air, Inc., 50 F.Supp.2d 255 (S.D.N.Y. 1999) (Carmack Amendment does not provide immunity for brokers for liability from their own negligence, citing *Custom Cartage*, *Phoenix Assur.*, *supra*; this court favored a federal,

rather than state, common law approach to broker liability.)

Byrton Dairy Products, Inc. v. Harborside Refrigerated Services, Inc., 991 F.Supp. 977 (N.D. Ill. 1997) (a broker can be liable for common law contribution and indemnity claims and for indemnification obligations undertaken pursuant to contract, which claims will be enforced.)

XII. Is There a “Uniform National Rule” on Broker Liability?

These cases present some interesting choice-of-law approaches. All seem to agree that the determination of status – broker, carrier, or freight forwarder – is a matter of federal law. The courts diverge as to which law, federal or state, should govern the broker’s duty and analysis of alleged negligence. The *Commercial Union* court in New York favors a federal common law approach. The *Phoenix* court in New Jersey referred to federal law without mentioning the federal-state choice-of-law issue. *Byrton* would apply either federal or state law, depending upon whether the cause of action under analysis arises under federal or state law. The first *Custom Cartage* opinion (February 1999) refers to *Byrton* and *Phoenix* but is silent on the choice-of-law issue.

The court in *Chubb Group* paid notable respect, in a footnote, to the federal common-law concept put forth in *Commercial Union* (a uniform national rule would be better than competing decisions of each individual state), but then expressed a preference for California state common law on broker negligence. Nevertheless, finding “no California law that directly applies,” the court then referred to federal decisions from Alabama and Maryland.

And speaking of Maryland, the *Schramm* court applied Maryland state law, in what appears to be an expansive view of broker liability. We have come full circle, and there appears to be no uniform view on a “uniform national rule” for broker liability.

CONCLUSION

While brokers are substantially insulated from liability in cargo claims except for their own actual negligence, there appears to be an expansive attempt by plaintiffs’ attorneys, especially in the personal injury arena, to formulate theories of liability for actual negligence, or of vicarious liability, beyond the traditional views.

In *Schramm*, the district court placed a higher duty upon the broker, to delve more deeply into the motor carrier’s operational safety practices, and to maintain records concerning the carriers which it utilizes in its brokerage business. This seems to exceed the requirements in the recent cargo cases noted above.

Further, *Schramm* left open the possible cause of action of civil “aiding and abetting” the violation of federal motor carrier safety regulations. But for the insufficiency of proof, the district court would not have dismissed this theory of action.

All of this should caution brokers and their attorneys and insurers, that in a personal injury setting with injuries sufficient to exceed available trucker's insurance, aggressive personal injury plaintiffs' attorneys will attempt to pursue recovery against brokers who may have vicarious liability or who may have actually been negligent in the selection of the carrier, or who may have "aided and abetted" the carrier or its driver to violate safety regulations.

Finally, for an excellent and more expansive treatment of these issues, see Eric Zalud's excellent paper, presented to the TLI, October 2004, entitled *Careening to the Future with 3PL's and 4 PL's; The Law Struggles to Keep Pace with the Industry.*

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