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Careening to the Future with 3PLS and 4PLS; THE LAW STRUGGLES TO KEEP PACE WITH THE INDUSTRY

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Introduction

THE BRAVE NEW WORLD AND THE CRYSTALLIZATION OF NEW FUNCTIONS AND RELATIONSHIPS

The growth of third-party logistic managers and, now, fourth-party logistic managers, has burgeoned in recent years. Shippers and consignees are striving for—and indeed—demanding, just-in-time inventory, "one stop shopping", electronic tracking of shipments, and any other innovations that will make their supply chains more efficient. While the traditional surface freight forwarders, transportation brokers, and air freight forwarders still do a regular and consistent business, logistics managers, 3PLs and 4PLs, are becoming ever more prevalent in the transportation industry. These entities are not easily pigeonholed. Often, they transcend statutorily defined transportation entity categories. On many occasions, they are involved in various aspects and links in the transportation continuum. Their activities also often cross international borders, in addition to transcending transportation modes.

Because of this metamorphosizing amalgamation of functions, new relationships in the transportation continuum are being formed that simply did not exist before. These relationships are often fluid and transitory. On other occasions, these relationships can be summarized, and can sometimes be captured and memorialized, in contractual documents. The case law involving freight loss and damage claims, freight charge issues and even personal injury liability has been well ensconced for many years, with numerous previously irrefutable principles. However, the fluid and instantaneously reactive expansion of logistic managers, 3PLs, and 4PLs is causing courts to recognize that they must adopt new legal principles, and legal analyses, to, in essence, catch up with the industry.

The Case Law

A SEMINAL, EXHAUSTIVE ANALYSIS OF 3PL FUNCTIONS AND LIABILITIES

This trend was recently exhaustively and cogently analyzed, in the context of a personal injury action against an over-the-road carrier, and a multinational transportational broker, also known as a 3PL. In *Schramm v. Foster*, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004), Plaintiffs John and Maria Schramm ("Plaintiffs") brought an action against Defendants Brian Foster ("Foster"), Groff Brothers Trucking, LLC ("Groff Brothers") and C.H. Robinson Worldwide, Inc. ("Robinson") for personal injuries suffered in a motor vehicle accident involving a tractor-trailer driven by Foster. Plaintiffs asserted state common law claims for negligence, negligent entrustment, negligent hiring and negligent supervision. They also sought recovery under the Motor Carrier Act, and the Federal Motor Carrier Safety Regulations.

The accident occurred in Maryland. Foster was transporting a load of soymilk from Maryland to Missouri and was employed by Groff Brothers at the time. The load was being transported from the warehouse of Jasper Products, LLC ("Jasper") in Joplin, Missouri. Jasper had requested that Robinson arrange for transportation of the soymilk. Robinson had made contact with Groff Brothers, with whom Robinson had a contract carrier agreement. At the time of the accident, Foster had been driving in excess of the maximum driving hours allowed by law for operators of property carrying vehicles.

The court first undertook a fairly extensive analysis of the operations of C.H. Robinson, which is instructive in partially summarizing the evolution of 3PLs in the industry:

> C.H. Robinson Worldwide, Inc., together with its subsidiaries and affiliates, is a third-party logistics '3PL' company that specializes in brokering the shipment of goods via truck, rail, ocean, and air. C.H. Robinson *does not own transportation equipment* (trucks, trains, ships or aircraft), but instead *matches shippers together with carriers that do own and operate such equipment so that commercial goods can be moved efficiently from origin to destination*. C.H. Robinson and its affiliates operate over 150

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> branch offices in the United States and abroad. They brokered approximately 2.8 million shipments in 2002 and 3.2 million shipments in 2003. As part of its motor carrier property brokerage operation, C.H. Robinson has brokerage contracts with more than 20,000 licensed motor carriers, whereby the carriers agree to haul loads for shippers through C.H. Robinson. At the same time, *C.H. Robinson markets itself to businesses and manufacturers with transportation needs.* With a simple phone call or fax to C.H. Robinson, shippers with transportation needs have ready access to available carriers to haul their loads, and carriers with available trucks can find shippers with goods requiring transportation.

Id. (*quoting* Robinson promotional material) (emphasis added). The court next summarized the evolution of 3PLs in the transportation industry:

> [T]hird-party logistics companies such as Robinson have emerged in the wake of deregulation of the trucking industry. Because of the size of their internal networks, the large carriers could provide integrated services to the shippers. Shippers were able to rely upon the large carriers' quality control, monitoring of the independent owner operators, (incentivized by the carriers' potential liability) and their established processes for handling freight claims. The carriers also provided excess liability insurance coverage, over and above the required regulatory minimum (presently $750,000) the independent owner-operators were required to carry.

Id. Continuing its dissection of Robinson's operations and promotional materials, the court noted that:

> Robinson proclaims that it provides such 'one point of contact' service to shippers. It maintains what apparently can fairly be described as a 'stable' of small carriers who can pick up loads from one of Robinson's shipping clients at a moment's notice. In the event that the cargo was damaged during transit, 'we [Robinson] are the ones to write them [the shipper] the check for the damage if we decide that it is a viable claim. They don't go to the trucking company directly. That's one of the points of being a 'one point of contract'.

Id. (*quoting* C.H. Robinson deposition.). The "one point of contact" reference can be a perilous one, which might cause expansion of liability. Also, taking responsibility for freight loss and damage can be an indicia that might transcend the categorization of a freight intermediary, to a different category. The court then also noted that Robinson addressed the issue of personal injury liability in its promotional materials:

> Just as [Robinson] takes responsibility for freight claims, we also step forward when liability issues arise. We insulate the shipper in three important ways:
>
> 1. We work only with carriers who carry full insurance coverage.
>
> 2. If an accident occurs, the carrier indemnifies the shipper and CHRW from liability.
>
> 3. In the rare event that the damage goes beyond the carrier's insurance limits, CHRW maintains a liability insurance policy that pays the rest.

Id. (*quoting* Robinson promotional materials). Voluntary providing insurance coverage, or notice of the availability of such coverage, is a business decision. However, from a legal standpoint, it can become a lynchpin in the court's analysis of a 3PLs liability.

Groff Brothers had entered into a contract carrier agreement with Robinson, which required the Groff Brothers have a "satisfactory" USDOT rating. However, Groff Brothers did not have such a rating at the time it entered into the agreement with Robinson, because it was a new company. Groff Brothers had an FMSCA "SafeStat" rating of 74. According to SafeStat, only SAE ratings of 75 or higher are deemed to be deficient.

The Plaintiffs contended that Robinson was liable for Foster's negligence under a *respondeat superior* theory, because Foster acted as an agent of Robinson in the transport of the load of soy. The court noted that there was no written agreement in which Robinson and Foster, or Groff Brothers, consented to have Foster act as Robinson's agent. Plaintiffs, however, argued that an agency relationship should be inferred from the circumstances:

> Robinson asserted its control over Foster under the terms of the contract carrier agreement it executed with Groff Brothers. The contract states that Robinson controls the transportation of freight on behalf of its customers. It further instructs the carrier to obtain instructions concerning the handling of the load, to inspect the goods before loading to ensure that they are in good condition, and to notify Robinson if they are not....Robinson exercised control when it dispatched Foster, directed him to pick up and deliver the load at specific times, and gave him directions from the Jasper warehouse to the warehouse in New Jersey. Robinson also gave Foster

specific instructions regarding the load, including requiring Foster to use load locks on the trailer. Finally, according to Plaintiffs, Robinson monitored Foster's performance by requiring him to call when he had successfully picked up the load and then periodically throughout the trip.

Id. The court, however, rejected these arguments by the Plaintiffs:

> The contract expressly provides that the 'relationship of Carrier to Robinson hereunder is solely that of an independent contractor'....The contract further states that the carrier shall employ all drivers transporting goods under the contract and that 'such persons are not employees or agents of Robinson or its Customers.'...Under the terms of the agreement, Groff Brothers was to pay Foster's salary and all expenses incurred....According to the contract, 'the Parties agree that Carrier shall be the party solely responsible for operating the equipment necessary to transport commodities under this Contract.'...Clearly, Groff Brothers and Robinson understood that Groff Brothers was to maintain control of the means and method of transportation, including the performance of the driver.
>
> Moreover, *there is no evidence that Robinson controlled Foster's actual performance through its coordination of the shipment....*
>
> *The mere fact that Robinson had Foster call Robinson directly to receive the dispatch information, rather than receive it from Groff Brothers does not demonstrate that Foster was under Robinson's control* in the performance of his work. Furthermore, *although Robinson provided Foster with directions* to and from the Jasper Warehouse, it *explicitly stated that the directions provided were simply for informational purposes....* The driving directions and special loading instructions provided by Robinson did not circumscribe Foster's performance to the extent that the details of his performance were precisely determined by Robinson's authority over the transaction.

Id. (emphasis added). The court rejected the fact that Robinson had provided Foster with a telephone number to call in the event of problems, and also rejected Plaintiffs' claim that Foster had altered the legal relationships involved when he signed the bill of lading that designated Robinson as a "carrier":

> Foster's signature on the bill of lading is insufficient to establish an agency relationship, however, because Foster was not authorized, either expressly or implicitly, to alter Robinson's legal relations in that manner....Although Foster was authorized to sign the bill of lading on behalf of Groff Brothers upon receiving the load, Robinson never expressly authorized Foster or held him out as authorized to legally bind Robinson by signing a bill of lading which, erroneously and without Robinson's knowledge, named Robinson as the carrier.

Id. The court next examined whether Robinson could be liable on a vicarious liability theory, for Foster's alleged negligent acts and for Foster's driving in a fatigued condition in excess of his statutorily mandated hours of service:

> To subject the principal to vicarious liability, 'the key element of control, or right of control must exist in respect to the very thing from which the injury arose.'...Thus, unless Robinson had control over Foster's driving time and the condition in which he drove, it will not be vicariously liable for Foster's negligence.
>
> There is no evidence that Robinson directed or authorized Foster to drive in excess of the maximum allowable hours or that Robinson had any control whatsoever of the manner in which Foster conducted his work...*The only thing Robinson had a right to control was the ultimate result – the delivery of the load to its final destination in New Jersey. The fact that Robinson instructed Foster on incidental details necessary to accomplish that goal is not enough to subject Robinson to liability for Foster's negligent acts during the course of the shipment when Robinson had no control over Foster's movements.*

Id. (emphasis added).

Plaintiffs next alleged that Robinson had negligently entrusted the tractor-trailer to Foster, when it was foreseeable that Foster might cause harm by driving in a fatigued condition. The court rejected this contention based upon the fact that a chattel was not supplied by Robinson to Foster:

The court next scrutinized the plaintiffs' claims under 49 U.S.C. § 14704(a)(2), to determine whether that code section created a private right of action for persons who have suffered personal injuries. That section states 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.

Id. Noting divisions of authority amongst the courts on this provision and finding the language enigmatic, the court referred to the legislative history to conclude that:

> *[The legislative history] indicates that the section was intended to apply only to commercial damages, not personal injuries*...Second, the history contains no discussion about the impact creation of a federal private right of action for personal injuries would have upon the workload of the federal courts. Because that impact would be substantial, it is reasonable to infer that Congress did not intend to create such a right of action.

Id. (emphasis added). The court also found that Robinson had no obligations to ensure Foster's compliance with the Federal Motor Carrier Safety Regulations pertaining to hours of service and driver safety, because Robinson was not Foster's "employer" as defined under 49 CFR § 390.3. The Plaintiffs then contended that Foster was a statutory employee of Robinson, because 49 CFR § 390.5 encompasses independent contractors hired by motor carriers to transport freight. The plaintiffs claimed that Robinson held itself out to Jasper as a carrier. Plaintiffs argued that Robinson was thus precluded from being considered a broker with respect to the Jasper load, because it offered to arrange the transportation of a shipment which it was authorized to transport and which it accepted and legally bound itself to transport. In support of that contention, plaintiffs identified several factors regarding Robinson's general methods of operation:

> (1) Robinson marketed itself as 'one-point of contact' which would handle all of its customers' shipping needs; (2) Robinson had FMCSA authority to operate as a carrier; (3) Robinson was listed as the carrier on the bill of lading; (4) Robinson takes responsibility for freight claims and maintains insurance coverage beyond that which is required of brokers.

Id. The court rejected these contentions finding, *inter alia*, that a transportation entity may have authority to operate as both a broker and a carrier, and that the Jasper's employees perceived Robinson to be a transportation broker. Also, the fact that Robinson was denoted as the "carrier" on the bill of lading *by Jasper, without any involvement in the notation by Robinson*, was a factor in finding that Robinson was not a carrier.

The court then addressed the critical issue of Robinson taking overall responsibility for the shipment. The court rejected that feature too as an inaccurate indication of Robinson's alleged "carrier status":

> *[T]he fact that Robinson takes responsibility for freight claims does not itself render it liable for personal injuries. It simply does not follow from an entity's voluntary assumption of liability for one type of claim that it is accepting liability for all other claims.* Moreover, the fact that Robinson had expanded insurance coverage for its operations conducted under its own motor carrier authority does not mean that it operated at all times under that authority.

Id. (emphasis added). The court also noted that in actuality, Robinson *did not* accept total responsibility for freight claims, but would pay the shipper on freight claims it deemed viable, and then pursue the carrier.

All was going well for C.H. Robinson until the court considered Plaintiffs' negligent hiring claim. This was the facet of Robinson's 3PL capacities which led the court to conclude that Robinson's 3PL status gave rise to at least a *cognizable* cause of action:

> Although, for the reasons I have stated, I do not believe that Robinson can be deemed to be a carrier under federal law, I believe that *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 in selecting the truckers whom it maintains in its stable of carriers.*

Id. (emphasis added). The court then expounded upon what this duty of reasonable care should be:

> This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics,...and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices...These obligations are not onerous, and I do not find the imposition of such a common law duty would be incompatible with the regulations promulgated by the FMCSA. *See* 49 CFR § 355.25 (prohibiting any state law or regulation pertaining to commercial motor vehicle safety which is incompatible with the provisions of the FMSCA).

Id. The court then delineated the "duty of inquiry" to which it was holding Robinson:

> While it is true, as Robinson asserts, that generally the breach of a contractual duty does not give rise to a tort claim by a third party..., by their very nature carrier contracts involve the public interest. Where, as here, one party (Robinson) knows from information provided to it by the other party (Groff Brothers) that the latter is

in breach of a contractual provisions whose very purpose is to protect the safety of innocent third parties, a duty of inquiry is necessarily implied. [Groff Brothers' Safe Stat rating] was a marginal one. This too implies a duty of further inquiry, and from the existing record, it can be inferred that Robinson should have been reasonably alerted to the fact that Groff Brothers' provenance was suspicious.

Id. The court then summarized its position on this area of law relating to 3PLs, and also recognized that the law needs to catch up with the industry:

> Finally, it cannot be ignored that Robinson increased the risk of harm to innocent third parties by its own actions. When seeking business, Robinson advertises to shipper customers that 'In the rare event that the damage [caused in an accident] goes beyond the carrier's insurance limits, CHRW maintains a liability insurance policy that pays the rest.' Robinson contends that because shippers cannot be held liable for personal injuries caused by a carrier's driver and thus would not care about the existence of excess insurance coverage for such injuries, this promotional statement and ones like it are of no practical effect. I am not willing to take such a cynical view. *Responsible shippers are entitled to receive from firms with which they contract honest and accurate information about the insurance available to compensate victims of catastrophic accidents, such as the one involved in this case....* In the last analysis, *this is a case in which the law may simply have to catch up with an obligation that Robinson has voluntarily assumed, presumably in response to the demands of the market.*
>
> Although strenuously contesting its liability in these proceedings, in conducting its everyday affairs, *Robinson apparently recognized the ambivalence of its position and purchased excess liability coverage, both to protect itself and to gain new customers. It has actively interjected itself into the relationship between shipper and carrier, and it has chosen to do business in the context heavily tinged with the public interest.* I find that *common law* imposes upon it a duty commensurate with *its undertakings.*

Id. (emphasis added).

The court here apparently seized upon a gratuitous assumption of duty theory (sometimes seen in the context of loading and unloading liability), to create a duty on behalf of Robinson to inquire as to the background of its carriers.

Nine Lessons from *Schramm v. Foster*

This exhaustive and cogently analyzed case provides several lessons for 3PLs and practitioners in this evolving area:

1. A 3PL *can* get involved to some extent in the day-to-day operations relating to shipments of freight under its contracts. However, if it gets too involved, to the extent of frequent operational contact with the driver, providing directions and directives on a daily or more regular basis, its status could be converted into a carrier for liability purposes.
2. Contracting can make a difference. Courts will refer to the monikers ascribed to the contracting parties in the various contracts involved in a 3PL shipping scenario, in an effort to assess liabilities amongst those parties.
3. Insurance coverage matters. Insurance coverage is often analyzed by the courts in these situations, not only for purposes of recompense, but in an effort by the courts to determine the status of the entities involved, and the liabilities as between those entities.
4. Some direct involvement with the actual drivers by a 3PL apparently is acceptable to the courts.
5. The acts of the driver and clerical mistakes on the bill of lading will generally not alter the contractual status and liabilities involved in these situations.
6. For non asset based 3PL, many states will find it difficult to endorse a cognizable negligent entrustment claim, since in those states, negligent entrustment necessarily involves an actual chattel, and 3PLs own no chattels.
7. 49 U.S.C. § 14704(A)(2) is muddled and enigmatic and spawns contradicting authority. Courts may find that it does give rise to a private right of action for commercial damages. There is ample authority that it does not give rise to a cause of action for personal injury.
8. Even voluntary acceptance of responsibility, in some form, for freight claims and the existence of insurance that may provide some coverage, is generally not enough for a 3PL to be found to be a carrier, for purposes of personal injury claims.
9. 3PLs, like brokers in some states, can be defendants and subject to claims for negligent selection of carrier actions. These actions are likely to survive and proliferate. However, the present state of the case law indicates that reasonable due diligence into the background of the carrier selected, would enable the 3PLs to fulfill that duty and not be liable for personal injury/freight damage.