

Protecting Against Negligent Hiring of Carriers

Carrier411 Article

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Because of the [Schramm](#) case involving C.H. Robinson, brokers may be held liable for catastrophic personal injuries based on "**negligent hiring**" of carriers. A federal district court in Maryland ruled that brokers must exercise reasonable care (due diligence) when qualifying and hiring motor carriers.

Even the bare minimum of obtaining a copy of a carrier's operating authority, verifying insurance coverage for personal injury, property damage and cargo insurance, obtaining an insurance certificate and verifying the carrier does not have an "unsatisfactory" safety rating may not be enough to satisfy new requirements.

Using a service like Carrier411 to monitor trucking companies for authority, insurance and safety rating changes is beneficial, and it can also be used as a tool to qualify carriers with reasonable care and substantiate your due diligence efforts.

It is important to note the following suggested methods to qualify carriers are not all inclusive. They are intended to give you ideas about the carrier qualification process. Some suggestions have a more direct relationship to safety issues, while others deal more with risk issues and your ability to collect if there is a loss.

The most important step to help shield your brokerage from negligent hiring claims is to establish, implement and maintain a sound carrier qualification process that fits your business. Document the procedures and adhere to them consistently. In addition to maintaining insurance coverage for catastrophic losses, I suggest these due diligence considerations.

Things to Avoid in Your Promotional Materials:

- 1. Brokers should never be designated as an "agent" of the carrier or shipper for any reason. If the broker is truly an independent contractor, then the broker is not an agent of carriers or shippers.**
- 2. Carriers should never be a "subcontractor" of the broker.** It raises workers compensation and other potential liability issues. Claims have been made against brokers based on the analogy to the construction industry where contractors are sometimes liable for the actions of their subcontractors.
- 3. Brokers should not be a "partner" with carriers.** Representations should not be made to the public that state if the carrier's insurance limits are insufficient that the broker's insurance will cover the loss. That could be construed to mean the broker is assuming the carrier's liability. This representation was present in the Schramm case. This is different than telling a shipper that the broker has contingent cargo insurance to cover cargo loss and damage if for some reason the carrier's policy does not cover a cargo

loss.

- 4. Brokers should check their website, along with other marketing and advertising materials, to ensure they represent themselves only as a broker and not a carrier.** Courts look at all circumstances of the case, including how the broker "holds itself out to the public" and how it was acting in order to determine whether it will be treated as a broker or carrier for liability purposes. Courts will follow the "duck theory". If you look like a duck and act like a duck, the court will rule that you are a duck, regardless of what your contracts say.

Evaluate Carrier Safety and Other Documents:

- 1. Monitor the carrier's safety rating and SafeStat SEA values using Carrier411 or check the SafeStat website.** If the carrier has an "unsatisfactory" safety rating, do not use the carrier. Carriers with "conditional" safety ratings should be investigated further. Carriers with "satisfactory" safety ratings should be monitored for any changes in their rating. A decision to use a carrier should not be based solely on a "satisfactory" safety rating. **Safety evaluation area (SEA)** scores should be checked but are known to be unreliable. The SEA scores, if used at all, should be only one of many considerations made in carrier selection.
- 2. The toughest case to investigate is when a carrier has no carrier safety rating and no SafeStat scores.** New carriers may not get rated for a considerable amount of time. **If there is no safety information, ask the carrier to provide references and check them.** Regardless, this is a good practice to follow in any situation.
- 3. If there is no carrier safety rating:**
 - (a)** Ask the carrier how or what it does to comply with federal safety regulations? Specifically ask about loading and unloading, hours of service, controlled substance testing and use, driver training and compliance with equipment and maintenance regulations. Document the responses and keep them in your carrier file.
 - (b)** Determine whether the carrier performs its own maintenance or if it's subcontracted to another organization? If it is subcontracted, verify that the maintenance is in fact performed by that organization.
- 4. Review your rate confirmation sheet.** Insert a clause that states "delivery and pick-up dates and hours will not require the driver to violate hours of service regulations". Insert a statement that says "routing instructions are for informational purposes only".
- 5. Have a transportation attorney review your broker/carrier contract.** Ensure it contains all the necessary representations to protect your company as much as possible in the wake of the Schramm case.

More Due Diligence Considerations:

1. **Obtain a copy of the carrier's operating authority and check with Carrier411 or the FMCSA to ensure their authority is not inactive or pending revocation for any reason.** You may also want to obtain a copy of the carrier's articles of incorporation or other organizational charter documents. You can check the Secretary of State filing in the home state of the carrier on the internet. The name on the corporate charter should be the same as the one registered with Carrier411 or the FMCSA. If the corporate names are not the same, find out why there is a discrepancy.
2. **Check to see whether the carrier also has active broker authority.** Double brokering freight is an all-too-common event, and you need to ensure the carrier to which you tender your freight does not move the freight using another carrier. If that happens, you lose control of the carrier selection process. Carrier411 provides several helpful features, including its "Fraud Protection Search", designed to help you identify carriers with broker authority, as well as identifying the "provenance" of any carrier, including associated companies with other operating authority.
3. **Obtain an insurance certificate from the carrier's insurance agent.** If the carrier provides you with a copy, verify the policy information with their insurance agent. Make sure it covers cargo, public and auto liability - including non-owned, hired autos and property damage.

(a) The name of the insurance company listed with Carrier411 or the FMCSA should be the same as what is on the insurance certificate. Should the names differ, do not load the carrier until you learn why. There may or may not be a good reason for the difference.

(b) Even though a carrier's insurance may be cancelled for various reasons at any time prior to the policy expiration date - usually because of failure to pay the insurance premium - make sure the expiration date of the policy will allow the services to be completed before expiration occurs. If the services are to be provided close to the expiration date, use a carrier monitoring service like Carrier411 that will automatically notify you of changes, and insist on getting proof of renewal from the insurance agent.

(c) The motor carrier name on the insurance certificate should match exactly with the name on the FMCSA operating authority certificate. You can also verify the motor carrier name using Carrier411 or the FMCSA website. If the names do not exactly match, you should not load the truck. Find out why they do not match. Otherwise, if you are not careful, you could end up hiring a carrier with no insurance.

(d) Verify the insurance effective dates and monetary limits with the insurance agent.

(e) Ask the insurance agent if there is any action pending or threatened for suspension, termination or revocation of the policy for any reason. If the answer is "yes", you should not to load the truck pending further investigation.

- (f) Ask the insurance agent whether there are any exclusions in the insurance policy that would preclude coverage for the freight being tendered. For example, rust and corrosion are common exclusions for carriers hauling steel. In your broker/carrier contract, make sure there is a provision that the carrier represents there are no exclusions that would apply to the freight being transported.
4. **Evaluate as much available carrier information as you can, including historical records, and keep the information in your carrier file.** The more research you do, the better off your company will be from a due diligence standpoint. If your company is a member of the Transportation Intermediaries Association (TIA), also check the [TIA Watchdog](#) website for any information reported by TIA members about the carrier.
 5. **Determine whether the carrier is well established?** How long has the carrier been in business? Does it have a reputation? Does it use owner-operators? If it does, get something in writing from the carrier acknowledging that it maintains signed leases with all of its current owner-operators, and those leases must be compliant with current FMCSA regulations. If the carrier is unwilling to certify it does, you may not want to use that carrier.
 6. **Ask the carrier if it has ever been fined or subjected to disciplinary action by federal or state agencies for safety violations?** You can also run reports on Carrier411 and the SafeStat website to determine this yourself and verify information provided by the carrier. Keep this information in your file for the carrier.
 7. **Every carrier you use must sign and return your broker/carrier contract before tendering freight.** Make sure someone authorized to sign it on behalf of the carrier signs on the contract, including their job title. If the signature shows someone's title as "dispatcher", it would be wise to check and make sure that person has signing authority.
 8. **Document your questions and answers from carriers.** Always include the name of the person from whom you received information, including their title. Specify the dates that information was requested and received. It may be invaluable at a later date, if your hiring decisions are ever called into question.
 9. **Your dispatchers should only be authorized and instructed to use pre-qualified carriers.** Any violation of this corporate policy could subject them to immediate disciplinary action, which may include termination of employment.
 10. **Apply your carrier qualification process consistently.** Also be sure to keep records for carriers that are rejected, along with reasons why, to support the consistent application of your due diligence efforts.



About the Author

Ronald H. Usem is a graduate of the University of Minnesota and of Cornell Law School. He has been a partner and founding member with [Huffman, Usem, Saboe, Crawford & Greenberg](#) since 1995. Mr. Usem's practice emphasis is in transportation issues, employment issues, and a wide variety of corporate transactions. He can be reached at (763) 545-2720.

Mr. Usem is a member of the Transportation Intermediaries Association, Director's Circle, member of the Transportation Lawyers Association, Conference of Freight Counsel, and a member of the Transportation Club of Minneapolis and St. Paul.

Mr. Usem has 23 years extensive transportation experience, including:

- The representation of property brokers, freight forwarders, shippers, and carriers in a wide variety of transportation matters, including shipping contracts of all types.
- The negotiation of mergers, acquisitions and other corporate contract matters.
- Dealing with employment issues, including preparation and enforcement of non-compete/non-solicitation contracts.
- Litigating numerous freight charge and freight loss and damage claims, collection issues, safety compliance, authority and other transportation issues.
- Practices in state and federal courts, including U.S. District Court, Minnesota; U.S. Court of Appeals, 8th Circuit; and the U.S. Supreme Court.

Mr. Usem has conducted seminars at the Transportation Intermediaries Association annual meetings; is a former chairman of the Bylaws Committee of TIA; and is a regular contributing author of transportation law articles for TIA Logistics Journal. He has also conducted seminars at regional meetings of Transportation Credit Managers Association and has been a speaker at local traffic clubs.