Different Roads to Deep Pockets: Preventing Alternative Routes of Liability Against 3PLS

By:

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Freight broker or third-party logistic provider (3PL) liability for personal injury and death arising out of collisions is on the rise driven by plaintiffs' attorneys' pursuit of deep pockets beyond those of motor carriers. Plaintiffs typically claim a 3PL that arranged transportation between a customer (shipper) and carrier is liable for injury or death caused by a carrier due to the 3PL's alleged control over the carrier or the 3PL's alleged negligent hiring of the carrier. Yet, plaintiffs' attorneys have shown creativity by asserting (although somewhat unsuccessfully) alternative theories of liability against 3PLs, namely "joint venture," "negligent entrustment" and "non-delegable duty." This article describes the alternative theories, their application to 3PLs and how 3PLs can avoid liability under those theories.

Joint Venture:
A joint venture is a combination of two or more entities to carry out a single enterprise for profit. Joint venturers are liable for wrongs committed within the scope of the venture. The existence of a joint venture is generally shown by the intent of the alleged joint venturers. To determine whether entities intended a joint venture, courts look for an express or implied agreement to carry on some business, a common interest shown by the contribution of property, financial resources, skill, effort or knowledge by each alleged joint venturer, some level of ownership or a shared right to exercise control over the business by each alleged joint venturer, and the sharing of profits or losses.

Under this theory, a plaintiff argues a motor carrier and 3PL are joint venturers and the 3PL is liable for the carrier's negligence in causing a collision. A carrier and 3PL need not have a long history of working together or any history at all. A joint venture can arise out of a single truck haul. The plaintiff may point to the transportation agreement between the 3PL and carrier (whether express or implied) as evidence the two intended to engage in an enterprise to deliver a load and both profited as a result. The plaintiff could claim the 3PL and carrier contributed resources, skill, effort and knowledge to the venture as the carrier provides a truck and driver and the 3PL brings together its network of customers and carriers. Control over the venture could be established by the 3PL's dictating of locations for pickup and delivery and monitoring of the load. The 3PL may advance funds to the carrier for fuel, collect the entire fee from the customer and then withdraw the 3PL's commission and pay the balance to the carrier representing a blending of the alleged venturers' funds. Facts like these could support a finding that a 3PL and carrier were acting in a joint venture and that the 3PL could be liable for the injuries and damages caused by the carrier in a collision.

Negligent Entrustment:
A truck may become dangerous if operated by someone who is unskilled in its use or who is reckless. A negligent entrustment claim may arise when an entity entrusts or loans a vehicle to a party and the entity knows or should know that the one to whom the vehicle is loaned or entrusted is unfit, inexperienced or reckless in its use, and it was that incompetence, inexperience or recklessness that caused a motor vehicle

collision. However, if the entity entrusting or loaning the vehicle does not have a sufficient right to control the vehicle (likely due to its lack of ownership of the vehicle), then there can be no claim under a negligent entrustment theory.

A plaintiff pursuing this theory of liability against a 3PL may claim a 3PL loans or entrusts a truck to a driver to haul a load. A 3PL may utilize a customer's truck and loan that truck to a driver. Otherwise, a 3PL may permit a driver to operate a truck the 3PL ordered from a trucking company. If the 3PL knows or should know the driver using the truck is an inexperienced, incompetent or reckless driver, then the 3PL may be liable for injuries caused by a collision involving the negligent driver. Proof of inexperience, incompetence, and recklessness can be established much like proof of a claim for the negligent hiring of a carrier, for instance, by evidence the 3PL knew or should have known a driver was fatigued or knowledge the driver or carrier had an insufficient USDOT rating or a poor SafeStat score.

Yet, the lack of necessary control a 3PL has over a truck may be problematic for a plaintiff bringing a lawsuit under a negligent entrustment theory. That is, a 3PL cannot loan or entrust to a driver that which the 3PL does not control. The carrier or driver—not the 3PL—will own the truck involved in a collision. Even if a 3PL allows a driver to operate a truck ordered from a trucking company, the truck is usually supplied by the driver's employer—the trucking company. Therefore, it will typically be the case that the 3PL did not play any part in assigning a load to a particular reckless or inexperienced driver, meaning adequate control over the truck will be lacking.

However, while a 3PL may not own a truck entrusted to a reckless or unfit driver, a 3PL could own or control certain permits or authorizations required for hauling certain goods. For example, a special permit may be provided by the 3PL so the carrier can haul alcohol. In that case, a plaintiff could argue the permit was loaned or entrusted to a reckless or unfit driver and, thereby, establish the plaintiff's allegations under a negligent entrustment theory.

Non-delegable Duty:
A non-delegable duty is just that: A duty that cannot be delegated. Under this doctrine, an entity cannot absolve itself of liability by contracting out the performance of certain responsibilities. If an entity contracts with another and attempts to delegate the performance of certain duties to another that is negligent in the performance of those duties, then the former will be liable for the negligence of the latter. The non-delegable duty doctrine is built on the belief that in some situations, certain duties of a party that hires another are of such significance that the hiring party may not escape liability by delegating performance to another. Some responsibilities are so important that they should not be considered discharged when one party hires another to perform them. A non-delegable duty may exist in various situations. For the purposes of 3PL liability, a non-delegable duty may arise out of the nature of commercial trucking which can be seen to create a danger to others.

Under this theory of liability, a plaintiff could argue that a 3PL who contracts with a customer to haul goods across the country cannot delegate to the carrier the responsibility of making sure the load is hauled in a safe manner. If the carrier is involved in an accident, the injured plaintiff could argue the 3PL owed a non-delegable duty to the plaintiff to make sure the carrier operated in a non-negligent manner. The plaintiff may claim commercial trucking is an activity that, by its very nature, creates a potential for danger to others on the road. Therefore, the 3PL's obligation to make sure a carrier is operating in a non-negligent manner is of such significance that the 3PL cannot escape liability by delegating that obligation to a carrier.

Avoiding Liability Under These Theories:
In order to limit exposure under these alternative theories of negligence liability, 3PLs should follow these recommendations when possible:

- A 3PL should weigh the potential risks of advancing funds to a driver and should determine whether collecting the entire fee from a customer, paying the carrier from those funds and keeping the remainder as the 3PL's commission makes sense as a payment construct in light of

the potential for liability exposure. Doing any of those acts potentially helps a plaintiff establish the 3PL and carrier are acting in a joint venture.

- A 3PL should beware of publically favoring certain carriers over others by describing carriers as “partners” or “preferred.” The claimed “partnerships” could be used as evidence of a joint venture.
- Beyond notifying a carrier of the location of pickup and delivery of a load, a 3PL’s monitoring of a carrier should, where possible to effect proper delivery, be limited so as to not indicate control over the carrier sufficient to establish a joint venture. Give as much control to the carrier as possible. The less indicia of control a 3PL has over the carrier, the less the 3PL and carrier can be said to have entered into a joint venture.
- A 3PL should always verify that a transportation agreement expressly places responsibility on the trucking company to provide the truck and the driver to deliver the load. The 3PL should not be the party finding a driver for a truck. Working with owner-operators may help avoid the later claim that a 3PL was the party entrusting or loaning a truck to a driver.
- Vetting drivers and carriers is vital to avoiding liability under negligent entrustment and non-delegable duty theories. Continually review a carrier’s safety record on the SAFER system.

Most importantly, get transportation agreements in writing. The contract should contain language requiring a carrier to indemnify the 3PL for losses whether due to the carrier’s fault or the fault of any other entity, including the 3PL, and specifically cover losses under these alternative negligence theories of joint venture, negligent entrustment and non-delegable duty. Ultimately, it is vital for 3PLs to work with their attorneys to confirm that they have limited their liability as to any individual truck haul and that their contract of indemnification language satisfies each jurisdiction’s requirements for validity.

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