

Smooth Passage No More: The Risks of Hiring Third-Party Motor Carriers



Not long ago, outsourcing shipping and deliveries to a third party was sound risk management: a refuge from the widespread nuclear verdicts plaguing the trucking industry and a cost savings compared to doing the job in-house. A dramatic escalation in the frequency and severity of claims against hiring companies for the negligence of third-party carriers has shifted this paradigm.

Some recent cases that settled above the insured retention illustrate the point:

- A company hired a logistics company to transport its product. The driver was involved in an auto accident that resulted in severe injuries to a child and the death of a mother. The plaintiff sued the hiring company claiming negligent hiring of the logistics company.
- A company hired a third-party transporter, which sub-contracted the job to another driver who caused an auto accident that killed an elderly couple. The company was deemed to have granted "implicit" permission for the sub-contracting.
- A contract driver's medical condition resulted in an auto accident involving multiple fatalities and a severely injured child. The hiring company did not investigate the carrier's drivers and the court ruled that the allegations of negligent hiring should be decided by jury.

What's Driving Up Exposure?

When a 'named insured' hires a third-party carrier, that insured can face liability exposure when the carrier is involved in an auto accident. The rise in claims related to third-party haulers is fueled by both plaintiffs pursuing the perceived deep pockets (and insurance policies) of hiring companies and hiring companies leaving themselves vulnerable on several fronts ... four of which are discussed here.

1. Negligent Retention/Hiring.

Companies have an ongoing duty to investigate the qualifications and safety record of companies they hire to deliver their products. This obligation continues for the life of the contract. Confirming a carrier's DOT number and safety rating from the US DOT often isn't enough; requiring particular safety policies or procedures and independently investigating the third party's safety record are pivotal.

2. Agency.

An insured that hires an independent contractor is generally not liable to third parties for the contractor's negligence in the work performed. But when is an independent contractor not so independent? The parties' written contract normally governs this analysis but it is often not conclusive if other evidence can show a cozier relationship. For example, if it can be proven that work is done under the direction of the hiring company, using the hiring company's equipment, systems or uniforms, or otherwise giving the appearance of an employee-employer relationship, the hiring company may have greater exposure for the contractor's work.



3. “Double Broking”

While a company may contractually prohibit a third-party carrier from subcontracting its work, it still happens. If the subcontractor is at fault in an auto accident, the hiring company can be brought into the claim on the theory of agency or vicarious liability – even when it had no contractual or other direct business relationship with the at-fault carrier. Plaintiffs may assert that the company had knowledge of the subcontracting, either explicit or implicit. “If they didn’t know, they should have.”

4. Insufficient Insurance.

Contracts typically require a third-party hauler to carry minimal auto liability insurance, such as \$1 million per occurrence. This amount is typically insufficient for a catastrophic injury loss. These lower limits are a powerful motivator for plaintiffs to also pursue the hiring company and its insurance policy.

The Road to Solutions

Third-party hauling is no longer an emerging risk. It has become a clear and present danger for hiring companies. Open dialogue between insureds, brokers and insurers is critical to help evaluate and mitigate its exposure. Some questions to frame these discussions include:

- Do you purchase separate insurance to cover liability arising from intermediary or third-party carrier exposure?
- Do you use a freight broker?
- What percentage of your shipments go through common carriers, LTL carriers, large national carriers, or freight brokers?
- What characteristics (e.g., size, safety & accident record, DSA scores, rates, etc.) do you consider when hiring third-party carriers? Do you check and verify CSA scores?
- What contractual requirements do you have with third-party carriers (e.g., hold harmless, indemnification, primary/non-contributory, additional insured language)? What insurance limits do you require?
- What information do you receive on drivers employed by your third-party hauler? How do you vet their credentials and safety record?
- Do you lease equipment to third-party carriers or permit them to use your company-owned equipment?
- Do any third-party carriers’ vehicles, tractors, trailers, or uniforms bear your company logo or signage?
- Is the third party prohibited from further subcontracting or “double broking” your shipment to another carrier? What mechanisms are in place to prevent this?

In addition, companies should be aware of several approaches that can help to shield them from third-party exposure. These include outsourcing to large national shipping companies or freight brokers, which carry significant towers of liability insurance and deploy state-of-the-market safety practices and technology. Using common carriers or LTL (less than load) shippers can also help insulate a company from exposure, since these carriers transport loads for multiple customers on a single conveyance, making it less likely that one hiring company would be held responsible for shipper negligence.

The time is now for frank discussions between insureds, brokers and insurers to identify and evaluate third-party carrier exposure so steps can be taken to mitigate the exposure and liability coverage can be structured appropriately to address this potentially catastrophic exposure.

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