

Transport Topics

THE NATIONAL NEWSPAPER OF THE TRUCKING INDUSTRY

Week of November 24, 2003

Tips for a 'Hard' Insurance Market

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There is no shortage of evidence that the transportation industry is facing a "hard" insurance market where coverage is more costly and difficult to obtain vs. a "soft" market where policies are plentiful and affordable.

The core policies motor carriers must obtain include general, cargo and auto liability, as well as workers' compensation insurance. In addition, carriers using owner-operators continue to be concerned about non-trucking liability, physical damage and possibly occupational accident insurance. Although there are other coverages of concern, such as logistics liability, directors and officers liability, and employment practices liability, the core coverages just mentioned represent, in many instances, the third- or fourth-largest cost of operating a motor carrier behind labor, governmental fees and sometimes diesel fuel.

As a result, the hard-market portion of the insurance cycle has once again drawn great attention from all segments of trucking, regardless of the size or sophistication of the motor carrier.

Currently, there are fewer than 50 self-insured motor carriers authorized by the Federal Motor Carrier Safety Administration for the three main interstate liability coverages — general, cargo and auto. FMCSA has been inundated with new applications, and motor carriers trying to self-insure may experience a 6- to 9-month approval process. Collateral requirements related to the agency's approval seem to be trending upward. Self-insurance for intrastate operations continues to be slightly problematic, given the lack of coordination of requirements between some states' regulations and federal laws. However, some insurance companies have shown a willingness to accommodate self-insured motor carriers by issuing reasonably priced intrastate coverage for excess insurance.

Alternative risk vehicles such as captive companies, risk retention groups and risk purchasing groups are similarly attracting more attention. While domestic and offshore insurance regulators may be more accepting in their approval of such vehicles, the proper due diligence leading up to the submission of the regulatory application often results in a 6-month analysis.

Most motor carriers ask, "What's the first step?" Although there are concurrent initial steps, making certain that the motor carrier is dealing with a knowledgeable insurance broker who specializes in transportation and is familiar with alternative programs is the best preliminary step.

Often, the "feasibility study," which is an actuarial assessment of

loss history and a projection of the financial viability of a trucking company effectively insuring its own losses, is an important first step. Also, establishing a workable legal structure to properly shift and distribute risk away from the carrier to the new, regulated insurance entity is a key part of the preliminary analysis. The cost of such studies varies based on complexity, but can range from \$10,000 to \$50,000.

More carriers are becoming familiar with a direct-loss-sensitive environment through high-deductible insurance programs. It is now quite common for motor carriers to enter into programs that include deductibles ranging from \$100,000 to \$1 million or higher. Given this reality, more attention is being focused on contract negotiations with shippers.

Two common provisions that have a direct impact on insurance coverage are the "additional insured" and "indemnity" clauses. One key point is that these clauses have a direct correlation to each other. If a motor carrier agrees to indemnify a shipper for certain types of damages and losses, then the carrier should ensure that its policies and the manner in which they provide coverage to the "additional insured" directly correlate with the indemnification provided to the shipper. Otherwise, an uninsured coverage gap may exist.

There are also reemerging trends in workers' compensation that include exploring choice-of-jurisdiction agreements to contractually identify a single jurisdiction to which the employee driver and motor carrier can agree to isolate workers' compensation claims to a greater degree. Motor carriers once again are becoming concerned about premium assessments for independent contractor exposure to their workers' compensation policies. There are now fewer insurers providing occupational accident insurance with a workers' comp component, often a key to avoiding the assessment. In the meantime, regulators have become more sensitive to so-called "contingent workers' compensation" and/or "contingent liability" products.

Finally, trucking continues to struggle with health insurance for owner-operators. A pending congressional initiative, H.R. 660, would allow associations of owner-operators to self-insure without evoking burdensome state regulatory concerns. While the bill has substantial support, it might not be enough to pass this year. Yet, this may be the harbinger of good things to come.

Transportation insurance is currently a turbulent sea of creative alternatives. However, motor carriers must remember that turbulent waters can also hide sharks.

The author has served as counsel to American Trucking Associations on insurance matters, including work for the association's Task Force on Insurance and its National Accounting & Finance Council.



Opinion