Forwarders Face Lawsuits

For Highway Accidents Caused by Truckers They Select

By: Daniel R. Barney & Nathaniel G. Snyder,
Scopelitis, Garvin, Light, Hanson & Feary, P.C.

As an air freight forwarder, motor carrier safety may be the last thing on your mind. However, when you select motor carriers to handle pick-ups, deliveries, and long-haul ground moves, you're increasingly taking a risk that you'll be sued for the unsafe conduct of those carriers and possibly face millions of dollars in uninsured liabilities.

Plaintiffs Suing Forwarders for Conduct of Motor Carriers

In the past few years, we have seen a number of cases in which highway-accident injuries or deaths allegedly caused by a negligent motor carrier led to a lawsuit being filed against not only the motor carrier, but also the third-party logistics provider ("3PL") that selected the motor carrier. In such cases, the 3PL may be ruled directly liable to the plaintiff for the injuries caused by the motor carrier, based on the theory that the 3PL was itself negligent in selecting an unsafe motor carrier. Not surprisingly, damage awards in such a case can be extremely high and most 3PLs do not have insurance against such liabilities.

These suits are likely to multiply with the ongoing implementation of the Comprehensive Safety Accountability ("CSA") program by the Federal Motor Carrier Safety Administration ("FMCSA"). Under CSA, FMCSA issues publicly-available safety scores for motor carriers that operate vehicles with gross vehicle weight ratings of 10,000 lbs or higher in five different Behavioral Analysis and Safety Improvement Categories ("BASICs"), and also ranks motor carriers in two additional areas that are not publicly available.

A motor carrier is assigned a score in each of these areas from 1-100; as in golf, the higher the score, the worse the performance. FMCSA also publishes Intervention Thresholds. If a carrier exceeds any of these thresholds in any of the BASICS, the carrier is a candidate for intervention and possible enforcement action by the agency. Any shipper, competitor, or other member of the public can go to FMCSA's Safety Management System ("SMS") website, pull up a motor carrier's BASICs, and compare them to the Intervention Thresholds.

Prior to CSA, FMCSA used a different system of measuring motor carrier safety called SafeStat. Under SafeStat, carrier scores in three different Safety Evaluation Areas ("SEAs") were made publicly available and any score of 75 or higher was deemed to be "deficient." Under the prior system, motor carrier SEA scores were used against 3PLs to argue that 3PLs acted negligently in selecting motor carriers. In perhaps the most notorious case, Schramm v. Foster, a Maryland U.S. District Court held in 2004 that the 3PL had a duty to check safety statistics published by FMCSA, and a "duty of further inquiry" because the motor carrier's SEA scores in that case were "marginal." Importantly, the motor carrier's SEA scores were actually below (better than) the deficient threshold set by FMCSA, but that did not stop the court from deciding that there was sufficient evidence of negligence to allow the case to proceed to trial.

CSA Will Only Increase the Risks to Forwarders

There is even more information available to plaintiffs under CSA than under the old system. Mathematically, because there are so many BASICs and because a carrier can exceed the Intervention Threshold in any BASIC, CSA will result in more carriers with scores that exceed an FMCSA-published threshold (by some estimates, over 50% of registered carriers exceed at least one basic). Plaintiffs' attorneys are well aware of CSA and are already contemplating how SMS data can be used to their advantage. In fact, in February 2011, an association of trial attorneys published a detailed article in its monthly newsletter detailing how CSA information could be used to prove motor carrier negligence.

To promote expert, uniform safety enforcement throughout the country, the courts should be asked to recognize that solely FMCSA, not juries in personal injury cases, is empowered to determine which motor carriers are safe to operate on the nation's highways. Negligent selection should not be a valid claim if the freight forwarder or other 3PL selects a carrier that FMCSA has found not to exceed any of the BASICs thresholds or to be otherwise in compliance with federal safety regulations. These are arguments that should be aggressively pursued in defense of a 3PL sued for negligent selection. Unfortunately, however, the argument is not guaranteed to carry the day if past court decisions are any indication. There is no reason to think that this will change under the CSA regime.

Recently, three motor carrier trade associations sued FMCSA over CSA. In a settlement, FMCSA agreed to temper some of the inflammatory language on its website and to refrain from using the word "ALERT" to refer to carriers with BASICs in excess of Intervention Thresholds. Just how much protection the settlement truly offers freight forwarders and other 3PLs that hire motor carriers, however, is questionable because FMCSA simply does not have the authority to prohibit use of SMS (CSA) information against a 3PL in a negligent selection lawsuit for damages. That decision rests with the individual judge, who will determine whether or not to allow such evidence. Thus, while FMCSA has published a disclaimer that states that readers of SMS data "should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in [SMS]" (emphasis added), the plain fact is that FMCSA has no power to prohibit a judge from allowing SMS data into evidence in support of a negligent selection case. Indeed, FMCSA's quotation above basically admits as much; FMCSA does not say SMS data shall not be used at all to draw safety conclusions, only that it should not be used as the sole basis for such a conclusion. In fact, in Schramm v. Foster, the court specifically cited a disclaimer on the SafeStat page that cautioned against using SafeStat information for purposes not intended by FMCSA (for example, prioritizing carriers for safety improvement and enforcement), because doing so might lead to unintended results. The court effectively ignored the disclaimer by allowing the SafeStat information into evidence.

How Can You Protect Yourself?

Based on the foregoing, any air freight forwarder that is selecting a motor carrier to perform pick-ups, deliveries, or long-haul ground moves should strongly consider adopting motor carrier selection-criteria. Given the large number of carriers that exceed at least one Intervention Threshold, and the fact that carrier selection under CSA has yet to be challenged in court, establishing a carrier selection protocol that both protects the 3PL's legal interests without crippling the 3PL's ability to operate may be more art than science. However, even if a perfect balance is not struck, adoption and enforcement of even an imperfect selection protocol could go a long way towards protecting a 3PL from liability for negligently selecting an unsafe motor carrier.

When assisting air freight forwarder-clients in drafting a carrier-selection protocol, our focus is on implementing practical selection-criteria that balance administrative burden with the individual client's appetite for risk. If the selection protocol is too restrictive, for example, the forwarder may end up making numerous exceptions to it so as to prevent cargo from sitting idle. This practice, however, may inadvertently arm an injured plaintiff to argue in a negligent-selection lawsuit that the defendant-forwarder first acknowledged the importance of selecting safe carriers as evidenced by the selection protocol, only to actively choose to ignore the protocol in order to increase its profits. Thus, it is important to adopt selection-criteria that the forwarder can live with, minimizing the need for exceptions, and to include a procedure for considering and adopting defensible exceptions in the rare instances in which they are unavoidable.

[1]Daniel Barney is Managing Partner, DC Office (dbarney@scopelitis.com), and Nathaniel Saylor, Associate, Indianapolis Office (nsaylor@scopelitis.com), of the national transportation law firm of Scopelitis, Garvin, Light, Hanson & Feary, P.C. Both represent individual air freight forwarders and other transportation companies, and Mr. Barney also serves as outside Regulatory Counsel to the Airforwarders Association.