



MOSELEY
MARCINAK
LAW GROUP

Broker Liability Cottingham & Butler Summit Chicago August 23, 2020

Rob Moseley
PO Box 26148
Greenville, SC 29616
Rob.moseley@momarlaw.com
864-380-5339 (cell)
864- 248-6026 (direct)

Current Broker Liability Environment



Why are we in a tight spot?

- ▶ Financial Responsibility \$1 M
 - ▶ HOS pushing efficiency
 - Dropped trailers
 - More brokering
 - ▶ Power Only
 - ▶ Plaintiff lawyer schools on brokers
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Somebody's gotta pay



Brokers

- ▶ Travel Agent for Freight
 - ▶ Regulatory history
 - ▶ Not regulated under Carmack
 - ▶ Not liable for freight claims
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Generally unregulated

- ▶ 49 CFR 371
 - Record keeping
 - Not allow to represent itself as a carrier
 - Separate accounts from brokerage and motor carrier activities
 - Restricted ability to “rebate”

Generally unregulated

- ▶ Map 21
 - Only brokers can broker
 - Doesn't apply to exempt, intrastate
 - Training

Contract Issues

- ▶ 3 Part Process
 - Shipper–Broker Contract
 - Broker–Carrier Agreement
 - Load confirmations

Shipper–Broker Agreement

- ▶ Most loads don't have a contract
 - ▶ Load Origin
 - ▶ Brokerage Addendum
 - ▶ Terms and Conditions
 - ▶ Email Links
 - ▶ Define yourself
- 

Know who you are





Broker-Carrier Agreement

- ▶ Less is More
- ▶ Pushed out in RMIS/On Highway/My Carrier Packets

Load Confirmation

- ▶ What is specific about this load
 - ▶ Supplements Contract
 - ▶ Control Language
 - ▶ Fines
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Bill of Lading

- ▶ Generally broker not in control
- ▶ Will name Broker as Carrier
- ▶ SCAC codes

Fraud/Double Broker/Imposters

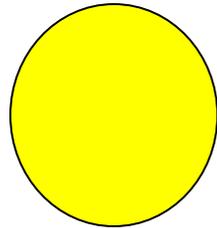
- ▶ Double Brokering
 - Co-brokering?
 - ▶ Imposters
 - ▶ Imposters Steal Loads
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Broker Insurance Products

- ▶ Underwriting tough
- ▶ Contingent Cargo
- ▶ Errors and Omissions
- ▶ CGL
- ▶ Contingent Auto or Hired and Non-Owned Auto/Truck Broker
 - Replacement v. Excess
 - Eroding
- ▶ Broker Bond

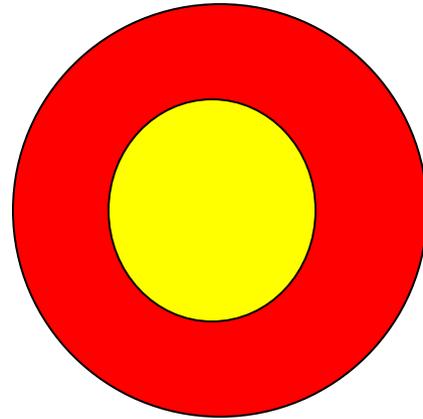
Current Environment

- ▶ Suit against the driver



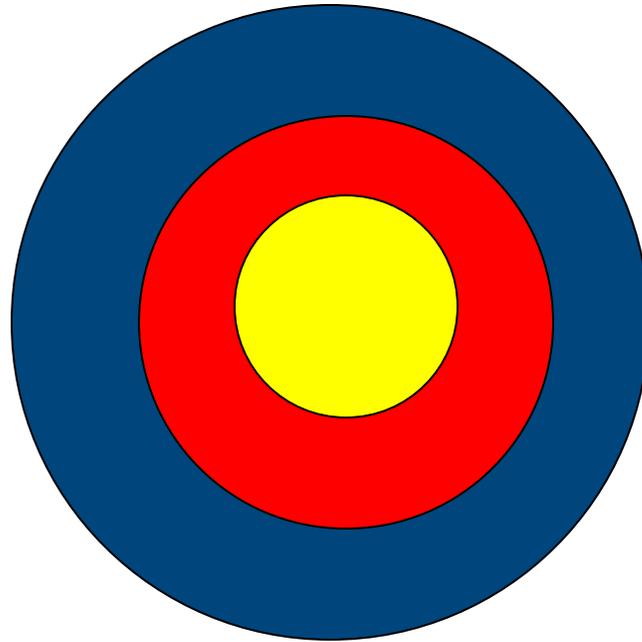
Current Environment

- ▶ Suit Against the Company



Current Environment

- ▶ Suit against Shipper/Broker



Things are serious



Broker Liability

- ▶ Theories of Liability
 - Control
 - Dangerous Activities
 - Negligent Selection
 - Representation as Carrier
 - Brokerage industry in general

1. Control

- ▶ State law Control tests
 - ▶ Driver Calls
 - ▶ Penalties
 - ▶ Sperl v. CHR
 - ▶ Coverage?
- 

2. Dangerous Activity

- ▶ Serna v. Petty Leach
 - ▶ Restatement
 - ▶ Not adopted widely
 - ▶ Should not apply to brokers
- 

3. Negligent Selection

- ▶ Reasons you should not have hired a carrier
 - Unrated
 - New Carrier
 - Conditional Rating
 - Had electronic devices that could be read while moving
 - Alert(s)
 - Serious violations during Comprehensive Review
 - Insufficient Driver hiring criteria
 - Didn't use PSP
 - Nonpublic Information (actual knowledge)
 - Quick Pay or Factoring

3. Negligent Selection

- ▶ Reasons you should not have hired a carrier (cont)
 - No authority
 - Drug policy
 - Show the photos
 - TMS and Subscriptions
 - Comments in the TMS
 - Eliminate chameleons in your TMS
 - Multiple cancelations or revocations
- ▶ What other broker approved the carrier.

Discovery to Get

- ▶ Prior loads with this MC
 - ▶ Prior loads with shipper to show they were brokered
 - ▶ What other brokers qualified this carrier
- 

Need a system



4. De Facto Carrier

- ▶ 49 CFR 371 – broker does not include carrier with regard to a load MC was otherwise bound to transport
- ▶ Signed Carrier Contract
- ▶ Agreed to be liable as the motor carrier
- ▶ Subcontractor Issue
- ▶ No contract defining you as broker
 - 100% we thought they were a carrier
 - Must have a shipper–broker contract
 - At least refer to website on confirmation

5. Attack on the Broker Model in General

- ▶ Broker motivation is to find the cheapest carrier
 - Ignores economics and efficiencies
 - Ignores service issues
 - Might lose money on a shipment

Follow the Money

- ▶ Not only do the contracts have to be right
 - Contractual authority to broker (what did you tell the shipper you were doing?)
 - Brokerage Authority
- ▶ Follow the money
 - Does the money recognize the relationship?
 - Do you have the back office agreements in place to support the money flow?

Power Only

- ▶ Liability Issues
 - Negligent Maintenance
 - Negligent Selection/Entrustment
- ▶ Insurance Issues
 - Policy Language
 - Tough to find trailer leasing coverage

But I am a carrier. . .

- ▶ Remember the broker is an AI on the MC policy
- ▶ Do not settle and leave broker hanging
- ▶ Release should include anyone vicariously liable for the acts of the released parties.

Worker's Comp Claims Against Brokers

- ▶ Collins v. Seko Charlotte, Op 27519 (April 29, 2015)
 - Seko assigned load to West Delivery
 - West's driver killed on way back to SC after dropping load in Wis.
 - West no worker's comp
 - Held a statutory employer
 - Interstate deliveries are important part of Seko's business
 - Necessary, essential, and integral to owner's business, OR
 - Identical work done by employer

Worker's Comp Claims Against Brokers

- ▶ Collins v. Seko Charlotte, Op 27519 (April 29, 2015) (cont.)
 - Arguments that did not work
 - Contract over after delivery
 - Contract had mileage for return built in
 - Seko admitted it would have paid the claim for one of its drivers
 - Seko only used contract carriers for long runs and did local themselves
 - Brokerage business does not seem to have been developed
 - Separate entity might have made a difference

Worker's Comp Claims Against Brokers

- ▶ *Atiappo v. Goree Logistics*, 2015 NC App Lexis 219 (NC Ct App. 2015) (Petition for Cert Pending)
 - Carrier's driver injured
 - NC 97.19.1 is bizarre statute
 - Court held carrier's driver to be broker's employee
 - On appeal (amicus filed)

We need a hero



The Hero

- ▶ Federal Preemption
- ▶ 49 USC 1450(c)
- ▶ “Price, Routes and Service”

The Big Three

- ▶ Miller
- ▶ Aspen
- ▶ Ye

It's all ball bearings now



Not only preemption Recent Cases Trending



- ▶ Hard to Stop (Ga)
- ▶ Werner (NE)
- ▶ Uni Trans (NM)
- ▶ Ruh (SC)





Rob Moseley
Moseley Marcinak Law Group, LLC
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