



Broker liability in truck-accident cases

When a trucking company's insurance is inadequate, look to the broker for additional coverage

BY STEVEN R. CAVALLI

I was involved in a case a couple years ago where a big rig wiped out three cars near the California-Nevada border, killing one person and seriously injuring a number of others. I represented two Hispanic women that both received serious orthopedic injuries, one a brain injury. There was a total of \$1 million in liability coverage on the truck.

Together with the plaintiff's lawyer who had the death case (husband putting

on chains when the big rig struck him with his wife and two children watching), I set out to find additional coverage. Through the SAFER system, we discovered that this trucking company had a horrendous safety record. In the 18 months before our accident, various drivers working for the company had been cited for 238 safety violations and had been involved in three other accidents, one fatal.

We then discovered that transportation of the load of produce, which was

going from the Central Valley to Massachusetts, had been arranged through a property broker.¹ Property brokers act as the intermediary between a party that wants goods and a party that can supply them. The property broker engages the services of a trucking company to pick up and haul the load. It turned out that the property broker was one of the largest brokers in the country with plenty of insurance coverage.

The question that then had to be answered was the extent to which a property



broker can be held liable for the injuries and death that resulted from our accident, if at all. What follows is that portion of my mediation and trial brief which sets forth five separate legal theories which we advanced under the particular facts of our case. The Allen Lund Company (“Lund”) was the property broker, and Lund vigorously contended that it was acting exclusively as a property broker and was, therefore, not liable. However, it turned out that Lund also had motor carrier authority which did potentially expose it to liability.

Pertinent facts

Lund was a licensed motor carrier at the time it selected and hired Folsom Express (“Folsom”) to transport the load across the country. Over the course of the year and a half that Lund did business with Folsom prior to this wreck, Lund advanced to Folsom and its predecessor entity, Seven Stars Express (“Seven Stars”), more than \$420,000 to help finance Folsom’s business. Lund never reviewed the safety record of Folsom or Seven Stars although it could have done so on the SAFER system in less than five minutes. During this same time period, Folsom was cited for 238 safety violations, and involved in three other accidents, one fatal. Allen Lund, himself, testified that his company did not care about Folsom’s safety record because its safety record is “none of [Lund’s] business.”

The Allen Lund Company (ALC) is a huge company with its headquarters in La Canada, Cal. It has 28 branch offices throughout the US. It claims to be a property broker, contends that it owns no trucks and that it has not acted on its motor carrier authority for many years.

Ovchinikov and Vaysman were the owners of the trucking company for whom Razumovsky was working as an owner/operator at the time of the wreck. They are Russian immigrants who hired only Russians to drive for them.ⁱⁱ Ovchinikov originally began doing business with Lund in 1999, then doing business

as Seven Stars Express. He later formed a partnership with Vaysman in Folsom, Cal. and Seven Stars was incorporated. After A Seven Stars’ driver was involved in a fatal accident in Utah in 2000, Seven Stars’ authority to operate as a motor carrier was revoked. Undaunted, Vaysman simply obtained another motor carrier number from the DOT and they formed Folsom Express, Inc., whose name was on the tractor involved in this wreck. After this wreck, Folsom’s motor carrier authority was revoked after the DOT found more than **230 traffic violations** in the approximate seven months Folsom had been operating.

Razumovsky is a Russian immigrant who had been working for Folsom Express for only a few months before the wreck. It was long enough for him to incur numerous traffic violations, including log book irregularities, possession of radar and being cited for a cracked windshield twice (it was still cracked at the time of the wreck). He falsified his log book and was, in fact, out of hours at the time of the incident and should not even have been on the road.

That Lund was acting as more than a property broker in this transaction is evidenced by the facts that Lund set the price with the end user, TOPCO, and contractually assumed the legal obligation to transport the load to Massachusetts, even if it would lose money in the process. Lund accepted the load as acknowledged by Ovchinikov, who testified at deposition that it was “Lund’s load.” In the event something happened to the load during transport, Lund’s contract required that the carrier it hired place the load in a warehouse *in Lund’s name*, not the shipper’s.

Lund learned that the load was available and arranged for a truck to haul it. Lund did not check the authority of Folsom prior to the trip, dictated the locations for pickup and delivery, advanced money to the driver, and was to collect the full fee from the shipper, then pay Folsom and retain the balance. Lund set the delivery schedule and planned to

monitor the load by cell phone as it traveled across country.

The broker:

Lund was granted authority from the federal government to operate as a motor carrier. Lund was also authorized to operate as a property broker. Because the legal obligations and liability of a broker and motor carrier are different, Lund is trying to choose a label convenient to its defense. Unlike a broker, a motor carrier is vicariously liable for the negligence of any motor carrier (sub-hauler) it hires. Because they both perform many similar functions, the distinction between motor carriers and brokers is often blurred. However, under federal law, a common carrier is not a broker when “they arrange for transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.” (49 C.F.R. §371.2)

In this case, Lund claims it was acting as a property broker when it hired and continued to do business with one of the worst trucking companies in the United States, i.e., Folsom Express dba Seven Stars.

Theories of liability

However, the evidence and law are to the contrary. Lund is liable for the havoc wreaked by Razumovsky and Folsom under at least five separate legal theories. **(1) As a licensed motor carrier, Lund had a non-delegable duty to the public at large and may not use Folsom to shield itself from liability**

California Courts have long adopted the principles outlined in the Restatement of Torts (second) § 428:

An individual or corporation carrying on an activity which can be lawfully carried out only under a franchise granted by a public authority and which involves unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.



For a comprehensive history of the section 428 doctrine as applied to the trucking industry in California, see *Serna v. Pettey Leach Trucking Inc.* (2003) 110 Cal.App.4th 1475. The *Serna* court held that a trucking company that retains an independent contractor pursuant to a sub-hauler agreement owes a non-delegable duty to ensure that its sub-hauler operates in a non-negligent manner:

[T]he rule is that a carrier who undertakes an activity (1) which can be lawfully carried out only under a public franchise or authority and (2) which involves possible danger to the public is liable to a third person for harm caused by the negligence of the carrier's independent contractor. [Citations.] Were the rule otherwise, a carrier could escape liability for negligence of its independent contractors, thus reducing the incentive for careful supervision and depriving those who are injured of the financial responsibility of those to whom the privilege was granted. For these reasons, the carrier's duties are non-delegable, and it is only when the carrier is "not regulated" at all that the rule is otherwise. [Citations.]

(*Serna*, 110 Cal.App.4th at 1486.)

Lund meets both prongs of the *Serna* test. First, Lund was engaged in commercial trucking, an activity that can only be lawfully carried out under a public franchise or authority granted by the DOT. It is undisputed that Lund had motor carrier authority which was issued by the DOT in 1996.

In addition, California Courts have repeatedly held that the activity of commercial trucking is inherently dangerous as a matter of law. (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 434.) "[T]he operation of a tractor and semi trailer [is] an activity which (1) is attended with very considerable risk, and (2) is highly regulated in order to protect the public safety." (*Eli v. Murphy* (1952) 39 Cal.2d 598, 601.) Highway common carriers therefore may not insulate themselves from liability for negligence occurring in

the conduct of their business by engaging independent contractors to transport freight for them. (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d. 594; *Lehman v. Robertson Truck-A-Way* (1953) 122 Cal.App.2d 82; *Gamboia v. Conti Trucking Inc.* (1993) 19 Cal.App.4th 663.)

(2) Lund was a motor carrier and not a broker with respect to the April 21, 2001, shipment of goods.
Definition of a Broker

Under 49 U.S.C. § 13102(2) (the section of the federal statutes governing corporations operating in interstate shipping), a broker is defined as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by a motor carrier for compensation."

The definition of broker is further defined in 49 C.F.R. § 371.2(a) as:

...a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. **Motor carriers**, or persons who are employees or bona fide agents of carriers, **are not brokers** within the meaning of this section when they arrange or offer to arrange the transportation of shipments **which they are authorized to transport and which they have accepted and legally bound themselves to transport.**

(Emphasis added).

A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." (49 U.S.C. § 13102.)

Plaintiffs have produced three highly qualified experts in the broker/transportation industry who are each of the opinion that Lund was acting as a motor carrier in the subject transaction.^{iv} Lund set the price with its customer, TOPCO, and assumed the legal obligation to transport the load to Massachusetts, even if it would lose money in the process. Lund accepted the load as ac-

knowledged by Ovchinikov, who testified at deposition that it was "Lund's load." In the event something happened to the load during transport, Lund's contract required that the carrier it hired place the load in a warehouse *in Lund's name*, not the shipper's.

It is important to note that the fact that a Lund truck was not used, per se, to haul the load is not determinative.

One is not precluded from being a motor carrier by the mere fact that none of its own motor vehicles are used in transporting the goods. (See *Keller Industries, Inc. v. U.S.* (N.D. Fla. 1970) 311 F.Supp. 384.)

(3) Lund was engaged in a joint venture with Folsom Express.

Lund and Folsom were engaged in a joint venture when they arranged to deliver lettuce from California to Massachusetts. In addition, Lund and the predecessor corporation to Folsom, Seven Stars, had a longstanding joint business venture over the course of their one and a half year relationship, whereby Lund advanced more than \$400,000 to Seven Stars/Folsom Express for general business expenses, not specific to any load.

Ordinarily, a joint venture is created by contract or agreement between the parties, but there need not be any formal written agreement between the parties defining their respective rights and duties. Such a venture may be formed by parole agreement. Such a joint venture may be assumed as a reasonable deduction from the acts and declarations of the parties.

(*Rickless v. Temple* (1970) 4 Cal.App.3d 869, 893 [Citations omitted].)

It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control.

(*Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal.2d. 501, 506-507.)



No California case has been found which has decided whether, in the absence of a written agreement, a transportation broker and truck company are joint venturers.^v *Johnson v. Pacific Intermountain Exp. Co.* (Mo. 1983) 662 S.W.2d 237, however, is on all fours with the instant case. In *Johnson*, a broker arranged for a truck to deliver a load, dictated the locations for pickup and delivery, advanced money to the trucking company for gas and oil, and was going to collect the full fee from the shippers and then take out the broker's percentage and pay the balance to the trucking company. (*Id.* at 240.) The truck was involved in an accident that killed a motorist. (*Id.* at 238.) The Court held that the broker was instrumental in launching and directing the truck journey and therefore, the broker and trucking company were acting as a joint venture. (*Id.* at 241.) Significantly, the Court also held that no particular formalities are necessary for a joint venture and "[t]here may perfectly well be a joint venture for a single truck haul." [emphasis added] (*Id.* at 241.)

Lund's involvement with Folsom and the April 2001 shipment exceeded that of the broker in the *Johnson* case. Like the broker in *Johnson*, Lund learned that the load was available and arranged for a truck to haul it. Lund did not check the authority of Folsom prior to the trip, dictated the locations for pickup and delivery, advanced money to the driver, and was to collect the full fee from the shipper, then pay Folsom and retain the balance. Lund set the delivery schedule and planned to monitor the load by cell phone as it traveled cross-country. If the load was damaged, it was to be placed in a warehouse in Lund's name. Thus, Lund and Folsom were joint venturers and Lund must share Folsom's liability.

The law in California is similar to Missouri. A joint venture is created where two or more persons combine their money, property or time in the conduct of some particular line of trade, or for some particular business deal, and agree to share jointly in the profits and losses.

(*Martter v. Byers* (1946) 75 Cal.App.2d 375.) Facts showing the joining of funds, property or labor used in a common purpose to obtain a result for the benefit of all the parties, where each participant has a right in some measure to direct the conduct of others, will justify a finding that a joint venture exists. (*Ibid.*) While intent to form a joint venture is the most basic element of the relationship between two parties, as to third parties it is *actions* of the parties that govern whether joint venture liability exists, and the parties may be estopped in favor of third persons from denying that they are joint venturers, even if they never intended to become such. (*Shell Oil Co. v. Prestige* (9th Cir. Idaho 1957) 249 F.2d 413.)

(4) Lund was negligent in its selection of Folsom as Folsom and its predecessor corporation had a history of non-conformance with regulatory standards and major safety problems, including accidents resulting in death.

Lund is liable for negligently hiring Folsom.^{vi} Negligent selection of an independent contractor applies to the trucking industry. (*Risley v. Lenwell et al.* (1954) 129 Cal.App.2d 608, 622 (holding that where there is a foreseeable risk of harm to third parties, employer has a duty to select a competent contractor); *Swearingen v. Fall River Joint Un. Sch. Dist.* (1985) 166 Cal.App.3d 335 (negligent selection of student host drivers causing accident); *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (negligent hiring of truck driver hauling manure).)

[A]n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons. (Restatement Torts 2d, §411.)

Trucking is an activity that "involves a risk of physical harm unless it is skillfully and carefully done." (*L.B. Foster v. Hurnblad*, (9th Cir. Wash. 1969) 418 F.2d

727.) The *Hurnblad* Court held a shipper liable for not making a reasonable inquiry as to a motor carrier's competence in trucking a 40,000 pound load of steel. (*Id.* at 732.) The load Folsom was carrying weighed 35,000 (60,000 when the weight of the truck is added) pounds and thus it also involves a risk of physical harm unless skillfully and carefully transported.

Further, to the extent an employer gives directions to an independent contractor for dangerous work, the employer is required to exercise reasonable care for the protection of others.

Lund dictated a schedule that Folsom could not lawfully or safely perform without at least two drivers, yet it did not make any inquiry as to the number of drivers that would be used. Razumovsky's driving hours prior to this trip show that he should not have driven at all, let alone attempt to meet the schedule that Lund set.

Lund's CEO testified that Lund has a policy to dictate the number of drivers; however Lund's most knowledgeable person testified that Lund set the schedule for this trip but relied on Folsom to decide whether a team of drivers was needed, and that Lund has no such policy. Razumovsky, took the schedule very seriously as he testified that he would be fined if late for delivery. As a result he drove dangerously, he was out of hours prior to the trip, and falsified his log books.

Moreover, a business that routinely employs independent contractors has a duty to conduct a more extensive investigation of its contractors, and is expected to exercise better judgment in their selection, than an entity that does not routinely employ contractors. (*L.B. Foster v. Hurnblad*, (9th Cir. Wash. 1969) 418 F.2d 727 (Casual or infrequent employer of independent contractor may be entitled to presume that contractor is competent, and has no duty to make inquiry).) A competent contractor is one who possesses the knowledge, skill, experience, personal characteristics and available



equipment that a reasonable person would realize are required to safely perform the work contracted. (*Risley v. Lenwell, supra* 129 Cal.App.2d at 622-623.)

The *Hurnblad* Court, (9th Cir. Wash. 1969) 418 F.2d 727, examined several factors in determining that the hiring party was negligent in selecting a sub-hauler, including: the hired carrier had only been in existence for six months prior to the haul; the carrier had no office but merely a post office box and phone number; the carrier had engaged in illegal rate cutting in prior hauls; in general, carriers hauling at below market rates do not have well-maintained equipment and experienced drivers and often go out of business. (*Id.* at 730.)

Lund was negligent in hiring both Seven Stars and Folsom. Folsom had only been in existence for seven months prior to this accident. If Lund had looked at Folsom's and Seven Stars' driving records it would have immediately seen 258 traffic violations in a short two-year period, five prior crashes and a fatality six months earlier. Incredibly, when Lund's owner was asked whether it investigates motor carrier's prior accidents he stated: "It's none of our business."

Moreover, had Lund looked at its own documents it would have seen that Seven Stars gave three different addresses as its principal place of business: one in Massachusetts, one in Oklahoma and one in California. Lund never inquired as to whether Seven Stars even had an actual office. Listing multiple offices as a principal place of business is a red flag in and of itself.

Finally, beginning in December of 2000, the bills of lading that came to Lund's employees following trips completed by Folsom (51 trips with Folsom's name)^{vi}, listed Folsom Express as the motor carrier. Plaintiff's expert testified that, in his experience, 90 percent of the time that an individual changes the name of his trucking company, the company's license has been suspended or revoked, as it was in this case.

Had Lund made a simple five-minute inquiry on the SAFER system, it would have seen the previous accidents and abominable safety record, and this tragic accident would have been avoided.

(5) As a matter of public policy, The Allen Lund Company must be held accountable for the negligent actions of its sub-hauler, Folsom Express.

Lund may not escape liability for the injuries and death in this case simply because it elects to call itself a broker and not a motor carrier. Since the deregulation of the trucking industry, freight companies frequently attempt to use the "independent contractor" excuse to avoid liability for the torts of their sub-haulers. Congress specifically enacted the Motor Carrier Act (49 U.S.C. § 13906) to prevent freight haulers from escaping liability by delegating risky duties to independent contractors. Although the issue in some of the cases cited below involves truck leasing, the principle still applies in the present case:

"One purpose [of the Act] is to protect members of the public from motor carriers' attempts to escape liability for the negligence of drivers by claiming their drivers were independent contractors." (See e.g., *Prestige Casualty Co. v. Michigan Mutual Ins. Co.* (6th Cir. 1996) 99 F.3d 1340, 1342-43 (legislation designed to prevent motor carriers from escaping liability by promoting confusion through leasing arrangements); *C.C. v. Roadrunner Trucking, Inc.* (D.Utah 1993) 823 F.Supp. 913, 918 ("the purpose of the regulatory scheme governing truck leasing was to protect the public from irresponsible leasing arrangements"); *Perry v. Harco National Insurance Company* (9th Cir. 1997) 129 F.3d 1072, 1074.)

The Restatement of Torts also makes it clear that the idea that principals may escape liability for the torts of their contractors has steadily lost favor in the last thirty years. The exceptions to the rule that a principal is not liable for the torts of independent contractors "are so numerous, and they have so far eroded the 'general rule,' that it can now be said to

be 'general' only in the sense that it is applied where no good reason can be found for departing from it."

Accordingly, public policy, as well as federal and common law, demands that the Lund Company be held accountable for its negligent use of an unsafe and unscrupulous carrier such as Folsom Express.

Summary

Companies such as Lund that arrange for the shipment of goods, take legal responsibility for the shipment of those goods, profit directly from the shipment rather than taking a percentage fee as a broker, and that oversee every phase of the shipping, can not be allowed to escape liability simply by labeling their sub-haulers as "independent contractors." Hiring the cheapest, fly-by-night carrier, who will disappear or declare bankruptcy^{viii} as soon as they are sued for a tort, cannot for reasons of policy become the standard practice of the industry. The consequences to the public of such a state of affairs are quite obvious. It encourages unsafe behavior and allows no genuine recourse for injured parties. Both Congress and the Courts have made it clear that public policy requires those who



Cavalli

profit from the shipping of goods to also be held accountable when a tort occurs in the pursuit of those profits.

Steve Cavalli is a partner in the Oakland law firm, Gwilliam, Ivory, Chiosso, Cavalli & Brewer. He has been in practice for 28 years, handling a variety of serious personal injury cases.

Notes:

ⁱ During the course of the litigation, we learned that approximately 40% of the loads hauled throughout this country are arranged through property brokers.

ⁱⁱ Ovchinnikov denied this during deposition, but Vaysman admitted.

ⁱⁱⁱ Indeed, on many of the bills of lading produced in this case, Allen Lund appears as the



NOVEMBER 2009

“carrier”, which is further evidence that it was acting as a motor carrier.

^{iv} With all its resources, the best Lund could do is to come up with a fellow who runs a small brokerage company in New Jersey and who just happens to be an old crony and personal friend of Lund’s.

^v Lund argues that its contract defining Seven Stars as an independent contractor applies to Folsom. However, neither Lund nor Seven Stars assigned Seven Stars’ contract to Folsom. More-

over, Lund’s contract specifically requires written consent prior to any assignment. Thus, no written contract exists between Lund and Folsom.

^{vi} Lund is a premier member of the Transportation Intermediaries Association. His son sits on the board. That organization requires that brokers check the driving records of their sub-haulers. Lund’s expert surveyed twenty brokers in various areas throughout the country. Fifty percent responded that in 2001 they utilized the SAFER system to check the driving

records of their motor carriers before **every trip**. The Safer system is a DOT website that permits anyone to check the driving record of a trucking company for at least two years prior to the date of checking.

^{vii} Indeed, on many of the bills of lading produced in this case, Allen Lund appears as the “carrier,” which is further evidence that it was acting as a motor carrier.

^{viii} Shortly after this accident, both Folsom and its carrier filed for bankruptcy.