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Finding liability and insurance in cases involving motor carriers

Don't let truckers run you over

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Big money is made from the many trucks and truckers using our roadways to transport goods. When that truck slams into your client, the results will be catastrophic. While the trucker may be judgment-proof, do not assume that the trucker is your only potential defendant, or that there is no money available. Generally, there is a long chain of people between the trucker and the shipper. You must identify and investigate each link in the chain when looking for potential defendants. Find out how the load was brokered and how many subhaulers are involved. Determine who owns the truck, trailers and tires; if they were leased; and who maintained them. If any of the entities you have discovered are motor carriers, they are required to carry minimum levels of insurance ranging from $750,000 to $5 million.

When drafting a complaint, use inclusive language such as:

> Defendants, and each of them, negligently owned, leased, supplied, entrusted, contracted, directed, operated, controlled, and maintained the big rig, thereby causing the big rig to strike plaintiff's vehicle. Further, defendants, and each of them, negligently hired, provided, supplied, trained, and instructed big rig drivers in the safe use and operation of the big rig.

Consider pursuing claims for negligence that include vicarious liability, negligent entrustment or negligent selection.

Is my defendant a vicariously liable motor carrier?

• ***"For-Hire" Motor Carriers***

If any of your defendants are for-hire motor carriers, then non-delegable duties under Restatement (Second) of Torts, Section 428 may attach. The seminal California case on this issue is *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594. In *Taylor*, a garbage truck struck a high school student. The student sued the truck's driver, the truck's owner, and Oakland Scavenger Company, a garbage collector working under a contract with the City of Oakland. On appeal, Oakland Scavenger claimed it was not liable for the driver's negligence because the truck's owner was an independent contractor over whom Oakland Scavenger exercised little supervision or control.[1] The Supreme Court disagreed:

> If ... an individual or corporation undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority, **these liabilities may not be evaded by delegating performance to an independent contractor**. The original contractor remains subject to liability for harm caused by the negligence of the independent contractor employed to do the work.[2]

The cases supporting *Taylor* and expanding on the non-delegable duty rule are legion.[3]

The public policy behind Restatement 428's vicarious liability is simple:

> [w]ere the rule otherwise, a carrier could escape liability for the 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.

The inherent danger in operating heavy trucks on public highways has been repeatedly recognized by the courts of this state. Because of this recognized inherent risk, intrastate motor carriers are regulated in California by the California Highway Patrol and the Department of Motor Vehicles. On a national level, the Federal Motor Carrier Safety Administration (FMCSA) through the Department of Transportation oversees interstate transactions.

• ***My defendant claims no vicarious liability***

A defendant may claim: (1) it is not licensed as a motor carrier; (2) its motor carrier status is limited to private transactions; or (3) it was not acting as a motor carrier in your transaction. Do not be fooled. Putting on your detective hat and doing some digging will pay off.

California Vehicle Code section 34601 provides that anyone operating any commercial vehicle is classified as a "motor carrier of property." Motor carriers of property are then divided into two categories: "for-hire motor carriers" and "private carriers." A for-hire motor carrier is defined as a motor carrier who transports goods for compensation.[4] A private carrier is defined as a motor carrier who only transports its own goods.[5] The court in *Hill Bros Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, noted that "there is a critical difference between those who use the public highways as a business and those who use the highways only to transport their own products incidental to their business, and that the latter constitutes private carriage as a matter of right which is not subject to the same level of regulation as that of for-hire carriage."[6]

If your defendant is operating only as a private motor carrier, it cannot be vicariously liable under Restatement (Second) of Torts, Section 428.

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*Intra*state or *inter*state is important

• ***Who's in charge?***

The California Highway Patrol has exclusive jurisdiction over intrastate transactions while the FMCSA oversees interstate transactions. The FMCSA is a governmental entity created within the Department of Transportation pursuant to the Motor Carrier Safety Improvement Act of 1999. It is responsible for testing and licensing commercial motor vehicle drivers, and overseeing all aspects of motor carrier safety, from performing inspections to collecting and disseminating data to the public. To understand if the accident occurred during an intrastate or interstate haul, it is imperative to determine the details of the load being hauled.

• ***Look at the whole shipment, not just your leg***

An accident that happens in California, while a load is being hauled from point A to point B within the state, may be part of an interstate transaction if the load is ultimately leaving the state. Whether a haul is interstate or intrastate is "determined by essential character of the commerce, manifested by shipper's fixed and persisting transportation intent at the time of the shipment." When a product changes form (e.g. grapes to wine, soybeans to meal), the "essential character" of the load changes and a new haul begins. If a load will be "subjected to a manufacturing process that materially change[s] its character, utility, and value" before it leaves the state, it is not an interstate load.

Expertise without expert fees

• ***FMCSA's Web site***

Through the FMCSA's Web site you can access the same licensing and insurance information used by the trucking industry.[7] The FMCSA's Safety and Fitness Electronic Records (SAFER) center, available online, contains information about a motor carrier including: its permit number; whether it is actively performing work as a motor carrier for hire; its mileage for the year; what type of loads it is authorized to carry (e.g. general freight as compared to hazardous goods); and how many drivers, trucks, and trailers the company has on file.

The FMCSA's Web site also includes a wealth of applicable definitions. Most of these definitions have been adopted by California's regulations. Many definitions may be broader than you would assume. For example:

• A "for hire motor carrier" defines any person engaged in transport of people or goods for compensation;

• In some instances the term "motor vehicle" may include trailers or semitrailers; and

• An "employer" refers to any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle.[8]

Once you have spent time on the FMCSA's Web site, you will be armed with tools for written discovery and depositions.

• ***Be your own Internet investigator***

If it appears your defendant is a for-hire motor carrier, look to the Internet for support. Is the defendant listed as a member of a motor-carrier association? Identified as hauling for another company? If the entity has a Web site, review it to determine how it represents itself. In a recent case, a defendant claimed it was just a broker, rather than a for-hire motor carrier.[9] However the defendant's own Web site used statements like "our specialized equipment...allow[s] us to transport 51,000 lbs. over the road..."and "our integrated transportation solution gives customers a total solution from a single source provider." Statements like these, coupled with an active motor-carrier permit, made the claim of 'just a broker" just plain unbelievable.

Motor carriers must maintain at least $750,000 in insurance

Whether transporting interstate or intrastate, motor carriers are required to carry minimum levels of insurance based on the types of loads they haul and the corresponding risk. Insurance minimums range from $750,000 for most motor carriers, to $5 million for those transporting hazardous goods.[10] If the defendant is operating under the FMCSA's authority, demand the defendant's Form MCS-90 for proof of insurance. For a motor carrier licensed through the state, the required insurance forms are identified as a DMV 65 MCP, or DMV 131 MCP if the defendant is self-insured. Frequently this public liability insurance can be found attached to the motor carrier's insurance policy as a motor-carrier endorsement. Based on the language of the insurance policy, other motor carriers in the chain may be additional insureds.

A few negligent entrustment and selection hurdles

Our firm has been successful in establishing negligent selection and negligent entrustment liability for entities such as the owner of the shipment, trucks or trailers, or the entity who hired a subcontractor in the chain. However, the more removed a defendant is from the trucker, the more evidence you will need to meet your burden.

• ***Negligent entrustment***

Negligent entrustment of a motor vehicle under CACI 724 can be used for the owner or leasor of the trailers as well as the owner or leasor of the truck. Your defendant need not know of the driver's unfitness and/or incompetence as long as you can establish it should have known. Defendants like to cite *Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644 when trying to throw out your claim. In *Lindstrom,* a crash occurs while the driver is making an illegal U-turn. The court finds no liability for the rental car company because it verified the driver renting had a valid license. *Lindstrom* is distinguishable from any case involving a motor carrier because the public policy rationale governing commercial, for-hire carriers establishes higher levels of responsibility when entrusting motor vehicles as compared to those of a rental car company.

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• ***Negligent selection***

Negligent selection under Restatement (Second) Section 411 requires the plaintiff establish: (1) failure to exercise reasonable care to employ a competent and careful contractor; and (2) that this failure was a legal cause of the accident. In establishing the first factor, be prepared to distinguish your defendant's actions and inactions from *Henderson Bros. Stores, Inc. v. Smile* (1981) 120 Cal.App.3d 903. In *Henderson Bros.,* the court found no negligent selection where the defendant knew the contractor was licensed and had been in business for a number of years, regularly hired the contractor with satisfactory results, and had no information which reflected badly on the contractor's competence. When establishing factor (2) distinguish your case from *Davies, C&W Trucking v. Commercial Metals Co.,* 46 So. 3d 72 (Fla. Dist. Ct. App. 2010) and *Mooney v. Stainless, Inc.* (6th Cir. 1964) 338 F.2d 127. In *Davies, C&W Trucking*, the appellate court upheld summary judgment finding of no proximate cause against defendant that hired the negligent trucking company because plaintiff could not show defendant's negligent selection of the trucker caused the accident. The cause of the accident was not equipment failure, just driver negligence. In *Mooney,* the court found no proximate cause because the court determined that the accident appeared to be caused by lack of attention/diligence in operating the truck and allowing it to move forward and strike the plaintiff, rather than lack of experience or insufficient equipment. Review the FMCSA's Web site, DMV records, and driver's personnel file for information that was available at the time, had the defendant checked.

Do not let motor-carrier defendants run you over. Spend the time to investigate who is in the chain between trucker and shipper. You may find liability, and insurance, along the way.



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Veen

William Veen founded The Veen Firm, P.C. *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*

Endnotes

[1]*Taylor v. Oakland Scavenger Co.* 17 Cal.2d 594,603 (1941).
[2] Emphasis added, *Id.* at page 604.
[3]See *Snyder v. Southern Cal. Edison Co.* 44 Cal.2d 793, 798-799 (1955) [nondelegable liability also applies to activities carried out under public authority]; *Klein v. Leatherman* 270 Cal.App.2d 792, 796 (1969) ["A...carrier engaging another as a subhauler thus is under a practical compulsion to verify that the subhauler possesses an unrevoked permit and the required insurance coverage"]; *Gamboa v. Conti Trucking, Inc.* 19 Cal.App.4th 663, 666-668 (1993) [verifying liability insurance does not extinguish a nondelegable duty of care]; *Serna v. Pettey Leach Trucking, Inc.* 110 Cal.App.4th 1475, 1843-44 (2003) [It is only when the carrier is "not regulated" at all that the rule is otherwise.]; *Amerigas Propane LP v. Landstar Ranger, Inc.* 184 Cal.App.4th 981, 996(2010) [viable negligence claim established against the motor carrier for violating various Federal Motor Carrier Safety Regulations (FMCSRs)].
[4]*Serna v. Pettey Leach Trucking, Inc., supra.*
[5]*Serna v. Pettey Leach Trucking, Inc., supra,* 110 Cal.App.4th at 1481 (2003), *citing Eli v. Murphy* 39 Cal.2d 598, 599(1982).
[6]Cal.Veh.Code§ 34601, subd. (b).
[7]*Id.* at § 34601, subd. (d)
[8]*Hill Bros Chemical Co. v. Superior Court*123 Cal.App.4th 1001, 1010(2004).
[9]C.V.C. § 34623; 49 U.S.C §31501.
[10]49 U.S.C. §113.
[11]49 CFR§390.5
[12]*Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.,* 249 US 134, 151 (1919) [raw lumber to a mill for grinding before leaving state was not interstate]; *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U.S. 129 (1921) [separating seed from fiber of cotton at a mill was equivalent to the manufacturing standard in *Arkadelphia*]; *Roberts v. Levine*, 921 F.2d 804, 815 (8th Cit. 1990): intrastate transport of raw soybeans not interstate haul because soybeans processed into meal and oil before shipping out of state.
[13] www.fmcsa.dot.gov.
[14]http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=383.5.
[15]*Duncan v. Velazquez & Sons Trucking et al,* Superior Ct. Solano County, 2012, FCS034635.
[16]49 C.F.R.§ 387 et seq.; Cal.Veh.Code§ 34631.5(1)(1); C.C.R.§220.06.
[17]*Allen v. Toledo,* 109 Cal.App.3d 415, 419-420 (1980).
[18]*Lindstrom v. Hertz Corp,* 81 Cal.App.4th 644, 651 (2000).
[19]*Henderson Bros. Stores, Inc. v. Smiley,* 120 Cal.App.3d 903, 910 fn. 1 (1981).

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