

THE MULTI BUSINESS MODEL: EXAMINING ADVANTAGES AND PITFALLS

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I. INTRODUCTION

Shippers, brokers, forwarders, and other consumers of transportation services¹ face many challenges in selecting and contracting with motor carriers today's trucking environment. One of these challenges stems from liability that can be imposed on shippers under negligent selection legal theories when an unqualified² or uninsured carrier is contracted for a particular shipment. Another exposure arises when a shipper is forced to absorb a cargo loss—or to compensate its own customer for a cargo loss—where the motor carrier did not have adequate cargo insurance in place. Similarly, a broker may be forced to indemnify its shipper customer for third party liability or for the shipper's own loss if an uninsured or underinsured motor carrier is on the hook for the loss.

To minimize their exposure to these losses, shippers and brokers almost always impose insurance requirements on motor carriers with whom they contract, typically requiring, at minimum, auto liability insurance of \$1 million and cargo liability insurance of \$100,000. The liability insurance will require the insurer to defend and indemnify the shipper and broker where it is sued based on the act or omission of the carrier, and the cargo insurance will be payable to the shipper for a cargo loss that it covers. To ensure carriers comply with these insurance requirements, shippers usually obtain a certificate of insurance showing the insurance the carrier

¹ For ease of reference, we will refer to all of these collectively as shippers.

² The authors do not mean to suggest that there is merit to the theories of liability that suggest that shippers should look to anything further than confirming that the selected carrier is licensed and insured.

has in place, and, in conjunction, they are named as certificate holders, which entitles them³ to notice of cancellation to the carrier's insurance. Shippers may also request that the insurance company issue an endorsement naming the shipper as an additional insured.⁴

However, it would be impractical to expect a shipper to review the details of every carrier's insurance coverage, authorized drivers, or the lists of which units are scheduled at any given time. As a result, shippers and brokers have often taken refuge in the filing of the Form 91X by the carrier's insurer and the corresponding MCS-90 attached to the carrier's insurance policy. The 91X filing / MCS-90 establish that the carrier's insurer will pay any judgment against the carrier necessary to ensure that the carrier meets minimum federal financial responsibility requirements for bodily injury, property damage, or environmental cleanup.

In the multi model, though, the 91X/MCS-90—as well as the underlying insurance—may provide less protection than shippers and brokers realize. And for cargo losses, the multi model offers even less certainty. This article explores the potential pitfalls of the multi model and how shippers and brokers can avoid unforeseen exposures due to gaps in insurance in multi models of operation.

II. THE MULTI MODEL

Motor carriers transporting freight under their own authority (which they must do unless they meet certain narrow interlining exceptions or unless they have legal authority to operate as a broker) use either company owned or leased trucks operated by company employee drivers or leased trucks operated by independent contractors (or some combination of the two). However,

³ Maybe or maybe not. Insurance companies take great effort to avoid an absolute duty to provide notice. Historically, many certificates used language saying that the insurance company would “endeavor” to provide notice. The industry continues to wrestle with the issue.

⁴ This is one of the most misunderstood phrases in transportation. Most of the time, an insurer will issue an endorsement that reads that the shipper is an additional insured to the extent that the shipper is held legally responsible for the acts of an insured. Most shippers think the additional insured designation is much broader. In the words of Inigo Montoya from The Princess Bride, “I do not think it means what you think it means.”

regardless of which structure a motor carrier uses, the motor carrier itself is responsible to see that federal financial responsibility requirements are satisfied. 49 C.F.R. Part 387. While motor carriers can meet this responsibility by self-insuring or purchasing a bond, the vast majority of carriers satisfy financial responsibility requirements by purchasing insurance. When insurance is used to fulfil financial responsibility requirements, motor carriers traditionally purchase insurance to cover all owned and leased autos used in the carrier's business. However, most small carriers are not insured with an "Any Auto" symbol. Most commonly coverage is provided through a "scheduled auto" symbol, or occasionally through a "hired and non-owned" auto symbol. Normally, the carrier purchases this insurance entirely at its own expense, and as part of the arrangement, may require independent contractors to reimburse the carrier for their pro rata share of the premiums.

In the multi model, the motor carrier shifts its responsibility, in varying degrees, to a contractor or sub-hauler.⁵ At minimum, the motor carrier will typically require the contractor to purchase primary auto liability insurance to cover contractor's vehicle. The motor carrier may also ask the contractor to purchase its own cargo insurance. The multi model seems to have found much of its acceptance in the expedited model, where carriers like the flexibility it offers and where the need for smaller vehicles exists.

To verify this coverage is in place, the motor carrier requests the contractor provide a certificate of insurance showing auto coverage (and cargo coverage, if required) is in place. The

⁵ In some instances, the sub-hauler may have its own motor carrier authority, and it may be expected to operate under that authority. However, unless the motor carrier is taking possession of the freight itself at any point, this arrangement will qualify as freight brokerage, which could violate federal law unless the motor carrier has brokerage authority or which could result in a breach of contractual prohibitions on double brokering. In the expedited space, some of these contractors could actually be treated as carriers because their smaller vehicles may not necessitate any authority from the FMCSA.

motor carrier, in turn, usually buys its own auto liability coverage, which would normally include hired and non-owned auto coverages. Some of these insurance products provide excess coverage on the contractor's vehicle. Others provide excess/contingent coverage in the event the contractor's coverage is not available. This policy would also be expected to provide the BMC-91X filing/ MCS-90 endorsement to comply with the FMCSA requirements.

The motivation for the motor carrier is to take advantage of an independent contractor model while outsourcing some of the cost of insurance. Although the contractor operates under the motor carrier's authority, with the motor carrier's name and DOT number displayed on the vehicle, and with the motor carrier identified as the carrier on the bill of lading or other paperwork, a non-owned unit leased to the motor carrier transports the freight, with the contractor providing primary insurance coverage.

III. PITFALS OF THE MULTI MODEL

Because the multi model expands the number of parties responsible for obtaining insurance, it expands potential exposure for shippers and brokers.

1. Certificate and Insurance Verification Issues.

First, the multi model requires that the motor carrier's contractor have primary auto liability insurance coverage in place. Someone must verify this coverage is, in fact, in place, typically by obtaining a certificate of coverage. However, the same problems that arise from a certificate of coverage for the motor carrier arise from the contractor: has the coverage been cancelled? is the auto actually scheduled on the policy? is there a requirement for driver approval? has the driver been approved? The shipper or broker must rely on the motor carrier to verify these items, not all of which appear on a certificate of coverage. The motor carrier, in turn, has less control over the type of policy that is purchased, and the contractor has every

incentive to buy the cheapest coverage available.⁶ There is therefore the real potential that the required insurance may not be in place.

2. Significance of the MCS-90

Second, the usual backstop of the federal filing of the Form 91X and the attachment of the MCS-90 to the motor carrier's liability policy provide less protection in the multi model scenario. Although one can learn the identity of a carrier MCS-90 on line, a shipper should not rely on the filing as a shield. For one thing, these federal filings do not impose a duty to defend on the insurer, they do not require the insurer to pay anything until a judgment is in place, and they do not require the insurer to pay a judgment obtained against anyone other than the motor carrier. In addition, the 91X/MCS-90 are not required to be filed when the underlying insurance is written on a non-commercial motor vehicle, i.e. a vehicle that has a GVW/GVWR of less than 10,001 pounds. Although these small vehicles are required to have \$300,000 of coverage in place when crossing state lines, there is no filing made on them and thus not even the usual presence of the MCS-90 exists for them. Since many carriers who use the multi model rely on cargo vans and other small vehicles, this is a real concern in the multi model. Thus, the 91X/MCS-90 do not provide a failsafe guaranty of coverage for shippers and brokers. Instead, shippers and brokers need the underlying policy—and not merely the MCS-90—to respond to the loss because only the policy will, in most liability scenarios, provide a defense and indemnification to the shipper or broker as one being held liable for the conduct of the insured.

3. Cargo Issues

Third, for cargo losses, the coverage issues are even more acute. Because lower end cargo coverage is riddled with exclusions, there is no way to verify the adequacy of cargo

⁶ This relationship is also a fertile environment for fraud. Because the contractor's insurance is not issuing an MCS-90, it may be more lax in its underwriting and investigation of its contractor insured. Therefore, a contractor may run more vehicles than it insures, play the "float" on cancellations, etc.

coverage by viewing a certificate of insurance—unless one knows the details of the coverage forms used by the various insurers. For example, some cargo coverages exclude coverage for theft, non-delivery, mis-delivery, water or moisture damage, and unattended vehicle. Under these policies, the only common loss that is covered is physical damage resulting from a collision while the vehicle is underway. And, of course, cargo policies are often scheduled auto policies, and many of the same coverage issues that arise with liability policies arise on cargo policies as well. Because non-household good cargo policies are not subject to any federal (or most state) financial responsibility laws, there is no backup in place when the policy excludes coverage.⁷ The shipper or broker, then, is reliant on the motor carrier to verify the contractor's cargo coverage, and the motor carrier often has no certain way of making sure coverage that will respond to the loss is in place.

4. Service Issues

Fourth, insurance issues aside, shippers, brokers, and even carriers have less control over the movement of freight in the multi model. The contractors can generally move from carrier to carrier at will, and they can accept a load of freight to transport then refuse it several hours later if they find a better load.

5. Premium Cost

A motor carrier utilizing the multi model would not realize economies of scale in the purchase of insurance. One would normally expect a carrier with more trucks to pay lower premium than one with less. Once we pass the cost of the premium back up the chain to the motor carrier, the motor carrier would also purchase the excess or contingent policy, which would be added to the total cost. While the cost of the excess policy would certainly be at a

⁷ Readers with gray hair may recall the BMC-32 filing for cargo. While these filings are still on the FMCSA's licensing and insurance website, they have not been current for years and cannot be relied upon for accurate cargo insurance information.

lower premium rate, it would nevertheless be an expense. Therefore, a motor carrier would need to do some careful analysis to determine if a particular program would be in its interest.

IV. ADVANTAGES OF THE MULTI MODEL

All this being said, there are two potential upsides to the multi model.

1. Strong Independent Contractor Position

It is no secret that the independent contractor model is constantly under attack by government agencies hungry for revenue and by lawyers hungry for fees. Having the insurance purchased by the contractor, especially if the contractor has the choice of the insurer from whom it wishes to purchase the coverage, would strengthen the motor carrier's position that a true independent contractor model exists.⁸

2. Possibly More Coverage Available

If the contractor's insurance is in place and does respond to a loss, then the motor carrier's insurance could apply as excess coverage for a large loss, providing additional available insurance for the carrier, broker, and shipper beyond that provided by the contractor's primary policy. However, even in this scenario, there will be a question as to whether the motor carrier's insurance policy provides excess or replacement coverage. For example, in *Justin Time Transp., LLC v. Harco Nat. Ins. Co.*, 6 N.E.3d 794 (Ill. App. 5th 2014), a truck lessor had an auto liability policy that stated, "The insurance provided by this endorsement does not apply if any other insurance is collectible." *Id.* at 797-98. Because the lessee had liability insurance that applied and paid the loss, the lessor's policy was held to be contingent and not applicable to the loss by its terms. In the multi model scenario, the reverse could be true. If the lessor/contractor has

⁸ Of course, giving the contractor a choice in coverages creates more of an administrative hassle for the motor carrier in insuring that the contractor is compliant with the contract's insurance requirements and creates the very pitfalls discussed above.

liability coverage that applies, the lessee's coverage may not apply if it is written to be contingent or replacement only with respect to hired and non-owned autos.

IV. CONCLUSION

For these reasons, the multi model, while giving carriers greater flexibility in their operations, may widen the exposure that shippers and brokers have when a major loss occurs.

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