



map-21 – the next new trap?

MSK Client Alert

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For years, companies and service providers have arranged transportation and not given a second thought to the relevant regulatory scheme for property brokers. While the obligation to qualify as a property broker has been on the books since at least 1988, in the absence of enforcement, many parties provide the service of arranging transportation for compensation, but are not property brokers. That is all about to change when the MAP-21 regulations become effective on October 1, 2013. If you are arranging the transportation of goods in interstate commerce (so across state lines or into or out of the U.S.), you would be wise to look carefully at how MAP-21 impacts your business. While customs brokers and freight forwarders are the ones most directly impacted, companies that arrange these services for sister entities must also be careful to navigate the new law and implementing regulations. While MAP-21 itself took effect on October 1, 2012, the final implementing regulations are not yet on the books, but are expected to be in place by the October 1, 2013, enforcement deadline. Derived from the Moving Ahead for Progress in the 21st Century Act, MAP-21, at 49 C.F.R. 371.2, defines the universe of those covered as: Broker means 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. 49 C.F.R. 371.2(c) goes on to say: "Brokerage or brokerage service is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee."

Enforcement will be through the Federal Motor Carrier Safety Administration (FMCSA). In its FAQs, FMCSA states: "Question 1: What is a broker? Answer: Generally speaking, a broker is a person or an entity other than a motor carrier that arranges for the transportation of property by a motor carrier for compensation. A broker does not transport the property and does not assume responsibility for the property."

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The most typical examples are the service provider who matches a customer with freight to move with a trucking company that will haul the freight; or the customer who pays the broker for moving the freight, the broker takes a cut from the payment, and then pays the trucking company after the run is complete. The first example clearly encompasses brokers and forwarders, but the second illustration more generally includes companies that import or export, depending on how they arrange their corporate structure and their compensation, plus, of course, what ends up in the final regulations.

Forwarders are defined at 49 C.F.R. 386.2:

Freight forwarder means a person holding itself out to the general public (other than as an express, pipeline, rail, sleeping car, motor, or water carrier) to provide transportation of property for compensation in interstate commerce, and in the ordinary course of its business:

- (1) Performs or provides for assembling, consolidating, break-bulk, and distribution of shipments;
- (2) Assumes responsibility for transportation from place of receipt to destination; and
- (3) Uses for any part of the transportation a carrier subject to FMCSA jurisdiction.

At the same time, there are a handful of notable exceptions:

- NVOCC/Ocean freight forwarder performing specific and limited functions
- Through ocean bill of lading covering inland movement
- Customs brokers performing specific and limited functions
- Arranging for in-bond moves, and
- A transaction involving "customs business"
- Air freight forwarders performing specific and limited functions
- Engaged in activities as an air carrier as defined in 49 U.S.C. §40102(2) or in activities defined in §40102(3).

If you are covered by the new law, you will need to register with the FMCSA and obtain a \$75,000 bond. Part of the registration process is having a qualified person on staff (in this case qualification is tied to "experience" and "fitness"). Given the discussion below about significant jury awards, you can bet the first line of inquiry by any plaintiff contemplating a lawsuit is whether or not the parties involved needed to be licensed as a property broker and the failure to be so licensed will be a prominent part of any litigation that follows. Keep in mind, too, that even if you are not subject to the property broker regulations, you may still end up liable for property damage, personal injury, or wrongful death arising from other facts and based on other theories of liability. After all, one of the first things any plaintiff is going to say is the service provider is an expert and knew or should have known x fact. Given the situation with the court system, i.e., the lack of funding, the lack of time, and the outright lack of knowledge about importing and exporting that is the norm in every court except the CIT, you can bet getting rid of the target painted on your back of being an expert will be a huge hurdle to overcome.



So, if you are a customs broker or a freight forwarder, you fall squarely within the definition of those who are considered to be property brokers. As noted, what is less clear is how companies will be covered. So, for example, if a company has a separate customs brokerage/freight forwarding operation, that entity is clearly encompassed by this new definition. What about if one part of the company arranges transportation for another party of the same company or a sister entity, and, in lieu of money actually being paid for those services, there are journal voucher entries or intercompany transfers made at year-end to compensate the arranging entity for the services rendered? Will a company that has an import-export operation (not a separate entity) where a portion of the staff's salary is reimbursed by other/sister entities be encompassed by the new law? Right now, that is not clear as we await the implementing regulations, and those are supposed to be out sometime before the October deadline as previously mentioned. For that reason, companies are wise to look at their operations and the literal language of the law and figure out what makes sense for them to do in order to be compliant.

Defining the roles of the parties has taken center stage as significant awards have been rendered when serious or fatal accidents occur. The one that captured everyone's attention involved C.H. Robinson and the \$23,775,000 judgment entered against it in 2004. When the news hit the press, everyone scratched their heads trying to understand how a customs broker/freight forwarder could be liable for the damages arising from a fatal accident caused by a trucker. In the end, it turned out C.H. Robinson (Robinson) took a far more active role with the goods and the shipment than does the typical customs broker or freight forwarder.

The legal theory is called negligent hiring, negligent entrustment, or negligent selection. To borrow part of a definition from our friends at GISTNet, "freight forwarders, customs brokers and other transportation intermediaries routinely act as agents of shippers and importers in hiring transportation carriers and other third party services. If such a party mishandles a shipment, charges excessive fees or rates, or cargo is lost or damaged in its custody, and the problem cannot be resolved to the satisfaction of the cargo owner, then the cargo owner may seek redress against its agent under a theory of negligent hiring."

Another legal theory that can be relied on is vicarious liability. *Black's Law Dictionary 1566* (6th ed. 1990) defines vicarious liability as "the 'imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or a principal for torts and contracts of an agent."

In summary, the *Robinson* case involved a shipment where the driver could not stop her vehicle and so ran over several vehicles, causing a multicar accident that led to two (2) deaths and one seriously injured person. The driver and the motor carrier admitted liability. The motor carrier's insurance company paid policy limits. Robinson fought the case through trial and on appeal and lost at both stages.

In 2002, Robinson and the trucker entered into a nonexclusive agreement for motor carrier services and made clear the parties were dealing with each other as independent contractors. So, where did things go wrong for Robinson? In short, Robinson controlled too many of the details about the load. It controlled the manner of the driver's work performance. The driver testified she contacted Robinson directly and asked for a load. Robinson required her to have a refrigerated trailer of a specified length. The driver accepted a load of potatoes that Robinson had purchased in Idaho for delivery to its warehouse in Bolingbrook. Additionally, Robinson testified it



impose fines as incentives to 16 drivers to get loads delivered on time. At the same time, federal regulations mandated that drivers drive only 10 hours each day. Further, the driver testified the schedule imposed by Robinson dictated her method of delivery and created pressure on her as a driver to get to her destination. She also stated that, if she followed federal regulations, she would be late delivering her load to the Bolingbrook warehouse; Robinson agreed with that assessment. In the end, the court held that Robinson had the right to control the manner in which the driver performed her job. As a result of these factors and others, Robinson was held vicariously liable for the actions of the driver and the motor carrier and so for the resulting damages.

After this case, many service providers thought that, by removing themselves or taking a step back, they could insulate themselves from liability, but changing the legal framework proved far more complicated.

The next significant case was *Heyl Logistics*. There, plaintiff was standing by the side of the road when the driver drove his rig into plaintiff's car. The driver was said to be coming off a crystal methamphetamine high and falling asleep at the wheel. When the load was given to Heyl Logistics, it was subcontracted. The claim by plaintiff was Heyl Logistics did not conduct sufficient due diligence. If it had, plaintiff asserted, Heyl Logistics would have discovered the subcontractor's operating authority had been suspended for lack of driver drug testing, plus there was no insurance. Heyl Logistics was held liable for \$5.2 million.

Heyl Logistics came on the heels of a \$27,672,152.15 judgment against 3PL Corporation, another logistics company, where the tractor-trailer hired to move a load of coils collided with plaintiff's vehicle, leaving her a paraplegic. The allegations in that case revolved around unsafe conditions regarding the container, tractor, trailer, chassis, and driver. In short, here again, the service provider was on the hook for lack of due diligence.

Taken together, what these cases tell us is you can no longer just pick up the telephone or send an email and assume the load is being properly handled and transported. Some degree of due diligence is now mandatory. So, what are some of the best practices to insulate your company from liability?

At a policy level:

1. Vet carriers, but do not exert control at the shipment level.
2. Hire or not based on information the carrier provides and your own due diligence.
3. Maintain a complete file for each carrier, including all documents and verifications (implicit in this recommendation is, if there is a red flag, you have to deal with it and document your efforts).
4. Regularly review and update information from your selected and approved carriers.

Here are some operational recommendations:

1. License yourself properly as a property broker.
2. House brokerage operations in different corporate entity to limit liability.



3. Do not act like a carrier.
4. Adopt good shipper-broker and broker-carrier contracts.
5. Adopt a carrier-selection protocol; prepare written procedures for carrier selection and use them.
6. Evaluate all carriers and brokers in all modes and regions on an ongoing basis.
7. Understand, at all levels in the organization, how current sourcing and contracting practices protect you or create the potential for liability.
8. Ensure you have valid contracts in place with all vendors, inbound and outbound.
9. Make roles and responsibilities clear.
10. Obtain signed/dated original contracts in all cases.
11. Verify you have the carrier name exactly right (check insurance).
12. Train all employees (keep records).
13. Maintain an approved vendor list and do not deviate from it.
14. List all limitations and exclusions (e.g., value, hazmat, types of goods).
15. Implement controls - no exceptions to approved vendors or processes to be used.
16. Check insurance, special licenses, safety rating, etc. periodically and keep records of findings.
17. Make certain insurance companies are notifying you of any coverage changes.
18. Obtain photos of the facility, yard, and equipment, if a site visit is impractical.
19. Ask carriers how they qualify drivers.
20. Do you have the right type of insurance and enough coverage for the difference between the jury award and the amount of the trucker's insurance coverage?

One of the bonding companies put forth this list: a) Verify carrier's authority; b) Verify carrier's safety rating; c) Verify insurance; d) Run a credit check/DUNS report; and e) Does information received from carrier match reliable sources?

To check out a company's safety records with the FMSCA, go to <http://www.safersys.org/> and/or <http://safer.fmcsa.dot.gov/companysnapshot.aspx>.

As with many other issues today facing companies doing business through international trade, MAP-21 is potentially troublesome, but bringing together the right resources to manage compliance will go a long way to making the issues manageable. In this case, in addition to a knowledgeable and empowered in-house staff, you



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want a good transportation attorney and an informed insurance broker to assist you. Where you want to end up is with an internal system that operates in as close to a checklist mode as you can, bearing in mind there are lots of factors to capture, especially when it comes to fully appreciating the insurance coverage and exclusions that any given trucker may have. While implementation will work best if you can approximate a checklist approach on a per-shipment basis, there is a good deal of upfront work needed to qualify service providers. How do you plan to implement those efforts? At the same time, if you are a user of these types of services, what steps do you plan to implement to evidence your company's due diligence in the selection of your service providers?