

Marc Blubaugh quoted extensively in Intermodal Insights | “Risk Management for 3PLs: Key Liability”

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Third-party logistics, like any other form of business, has its risks: there are many pitfalls that 3PL providers must avoid if they are going to remain solvent.

Among the chief pitfalls to avoid, industry experts tell Intermodal Insights, are not having appropriate licenses and compliance measures in place; proper carrier selection and vetting; and protection against hostile litigation. They also have advice regarding how to not fall victim to each of these pitfalls.

First of all, according to Marc S. Blubaugh, partner, Benesch, Friedlander, Coplan & Aronoff, a 3PL needs to know how it is viewed under the law so that it can better know what role it wants to play within the industry.

“No universal definition of ‘3PL’ exists under the law,” Blubaugh said “Rather the law recognizes different types of 3PLs - freight brokers, intermodal marketing companies, freight forwarders, non-vessel operating common carriers and warehouse operators.

“Each one of these types of 3PLs is subject to a distinct set of risks and regulations,” he continued. “In other words, you can’t even begin to evaluate risk unless you understand how the law will treat your given operations. If you don’t know where you are, you can’t get where you are going.”

A 3PL, he said, must understand the nature of the specific services it is offering and has to ensure that it has the correct licenses and compliance measures in place.

“For instance, a party providing freight brokerage services without having a freight broker’s license is subject under law to a \$10,000 civil penalty per load, and its officers, directors and principals are personally liable,” Blubaugh explained. “The barrier to entry is low, but the consequences for non-compliance can be severe.”

Carrier Selection, Vetting

Another key issue for 3PLs is carrier selection and vetting, said Keith Sanchez, a divisional vice president, Avalon Risk Management, an insurance and surety solutions company.

“This has been an issue for years and years and years; it’s obviously something that should be addressed,” he said. “It’s still a big area where - not the big guys but more medium-to-smaller entities - there’s a lack of care and concern with the whole process of vetting the carriers. They seem to lack concern of who they might be hiring and not having any policies and procedures in place to actually facilitate proper carrier selecting process and/or vetting. There’s a huge liability exposure and safety issue to the public and to the cargo itself.”

When carriers aren't vetted by 3PLs, and/or carriers don't have safety programs, or aren't conducting background checks on their drivers, it can result in more work-related injuries and fatalities, Sanchez said.

"Have a reasonable protocol in place to select the carriers with whom you will be working," Blubaugh added. "Focus on the fundamentals - ensuring that the carrier has an appropriate license or operating authority and insurance, but don't get too far down into the weeds evaluating or controlling the carrier's operations or a court may find that you voluntarily assumed certain duties that you want to avoid.

"Further, keep in mind that the only thing worse than having no policy at all is having a policy that you ignore," he said.

Legal Concerns

Chris Burroughs, vice president of government affairs with the Transportation Intermediaries Association, said another issue for 3PLs is nuisance litigation. 3PLs are increasingly being named as defendants in indirect liability and negligent selection lawsuits, he said.

"In the current state of play for 3PLs regarding risk management as it relates to liability and safety, 3PLs will often find themselves between the proverbial rock and a hard place," Burroughs said. "Depending on the situation of the case, a 3PL could be deemed to not have done enough - negligent selection - or did too much in their business practices - vicarious liability."

Such cases have only been exacerbated over recent years, Burroughs said, due in part to the public display of Compliance, Safety, Accountability scores used by the Federal Motor Carrier Safety Administration to identify high-risk motor carriers, and a plethora of raw data of violations posted on a public website.

In order to help reduce some of the risks associated with these legal concerns, Burroughs recommends that 3PLs develop their own internal carrier selection process and follow through on their internal procedures every time.

"This is by no means a silver bullet or get out of jail free card," he said, "but developing and following your own standard operating procedures is an excellent first step."

Dubious Claims

Two of the biggest risk issues that 3PLs face, Blubaugh said, involve liability for cargo loss, damage or delay - particularly if high value freight is involved; and liability arising from personal injuries or death related to transportation arranged by the 3PL.

"3PL liability in these areas typically arises from poor contracting practices, negligence in the selection of carriers, or excessive control and interference with the selected carriers," he said.

His advice for 3PLs to avoid such situations is to utilize a good contract.

"Like good fences make for good neighbors, good contracts make for good business partners and can chill dubious claims," he said. "A 3PL must be clear about the role that it is playing, what the scope of its services will be, what limitations of liability apply and whether consequential damages will be waived."

“3PLs are often tempted to ‘wing it’ in their contract negotiations and, as a result, can end up being penny wise and pound foolish,” he explained.

Sanchez said that contract negotiations are a time when 3PLs have to make sure that agreements are fair.

“We find that even existing customers will sign something before they run it past us and an attorney. That is a big issue with regards to civil liability that you’re picking up, whether you’re signing a contract that makes you liable for everything under the sun, and/or you don’t understand the contract and you’re outsourcing the transportation to someone who doesn’t have as much exposure as you do,” he explained.

Sanchez also said that it is very important for companies to have a blueprint in place regarding proper ways of running a business.

“Put in place certain practices and procedures that address all the issues,” he recommended. “Get a third party in or designate someone within the organization to be responsible for implementing best practices and procedures, so that when an issue does occur, you do your due diligence and hopefully have some practices in place that will mitigate exposures in the future.”

And looking into the future, Blubaugh predicts that an array of changes are ahead as the law struggles to catch up with technology and business.

“For instance, autonomous vehicles require consideration of cybersecurity, data privacy, performance testing and updating traffic laws. 3PLs will have to adapt along the way, too,” he said. “Among other things, they will need to continue to become very tech savvy. They will also need to keep their eyes on federal agencies that they have not typically had to monitor - like the [Federal Communications Commission], which gets involved in regulating the wireless components of automated vehicle technology.”

Certain technologies, however, will help reduce commercial risk, he predicted, such as predictive pricing, which allows a 3PL to provide greater cost certainty at a more rapid pace.