

Freight Brokers and Risk Management in the Post-Montgomery World

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The United States Supreme Court's decision in *Montgomery v. Caribe Transport II, LLC* ("Montgomery") in May of this year has confirmed that "state law" negligence claims may be brought against freight brokers for hiring unsafe motor carriers in connection with vehicle accidents in interstate commerce. As a result, freight brokers have lost what had been a key "preemption" defence and settlement leverage point.

The *Montgomery* ruling exposes freight brokers to increased litigation risk and potential liability for personal injury linked to carrier selection, which will drive up insurance costs and litigation settlement values.

The Transportation Intermediaries Association ("TIA") filed a petition on June 9, 2026 with the United States Federal Motor Carrier Safety Administration to address the resulting post-*Montgomery* fallout stating, *"the outcome in the Montgomery case has created a heightened and frankly, untenable expectation on brokers and shippers to independently determine the safety fitness of motor carriers – often without access to consistent, reliable or complete data. In far too many cases, a carrier's safety deficiencies are only revealed after a catastrophic incident has already occurred."*

Background

The outcome from *Montgomery* is not just a concern for freight brokers in the United States. Canadian based freight brokers and their insurers also must be "alive" to these developments. The liability of Canadian based freight brokers for injury or death to third parties arising from motor vehicles accidents occurring in the United States – as well as Canadian based motor carriers and shippers of goods – are determined by the laws of the jurisdiction where the negligent conduct occurred.

Accordingly, it follows that a freight broker who is based in Canada who hires a carrier to haul freight in the United States may be as much at risk as an American broker. The former may be sued in a United States court action, exposing it to risk of "nuclear verdict" and the application of state laws, if the applicable court finds ample "connecting factors" such that it rules that the Canadian broker has properly been included in that action as a defendant.

This litigation exposure risk is particularly acute in the United States, where (unlike Canada) monetary damage awards for plaintiffs are often meant to be punitive and to act as a deterrent to the rest of the public to not engage in the same reckless behavior as the defendant. In Canada, by contrast, damages for "pain and suffering" for plaintiffs are built on the intent to compensate the victim, rather than making a public example of the negligent party. This is, as a general proposition, why we do not have "nuclear verdicts" or verdicts of the same magnitude in Canada.

The search for big verdicts has evolved over time to the now prevalent practice in US motor carrier accident litigation in which plaintiffs and their attorneys "move up the supply chain" and not only sue the transport driver and the carrier in question, but also seek damages from the "upstream" freight brokers and even shippers who had some role in "putting the negligent carrier on the road".

Various legal theories have evolved whereby liability may be imposed against the freight broker or the shipper. This is despite their employees "not being at the wheel" or having managed the carrier fleet. The argument is essentially that there was a lack of due diligence or care exercised in the broker's or shipper's selection of the motor carrier that caused the accident.

As a general rule, freight brokers are more often pursued than shippers, no doubt on the basis that they tend to hold out a specific service in carrier selection, and they earn revenue (even if a little mark-up) in the process. Shippers also tend to be one further step removed when they engage freight brokers who in turn select carriers to haul freight.

The Loss of the State (Negligent Selection Claim) Preemption Defence

The *Federal Aviation Administration Authorization Act* ("FAAAA"), 49 U.S.C. § 14501 is a United States federal statute. Section (c)(1) ("Motor Carriers") provides a "preemption" provision which in certain cases precludes the application of state law to interstate motor truck carriage:

*(1) General rule.— Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier *** or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.*

This legislation however goes on to provide that the foregoing:

(2) Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(bold emphasis is added)

The foregoing "safety exception" frames this discussion. In *Montgomery*, the United States Supreme Court ruled that state laws giving effect to negligent selection of a motor carrier claims against freight brokers are matters of "safety with respect to motor vehicles". Accordingly, past arguments and defences asserted by freight brokers that negligent selection claims based on state law were preempted – so as to not be applicable in motor vehicle accident cases – are no longer valid.

Post-Montgomery Response by the Transportation Intermediaries Association

The TIA filed its aforementioned Petition (called "*Petition for Rulemaking*") with the Federal Motor Carrier Safety Administration (the "FMCSA"), calling for the establishment of a federal "*Motor Carrier Safety Selection Standard*" along with the publication of a "*High-Risk Motor Carrier List*".

In addition to citing the above-quoted concern, the TIA also noted, further compounding the challenge to freight brokers, was the fact that:

"more than 90% of authorized motor carriers currently operate without an FMCSA safety rating. This leaves brokers and shippers in the difficult position of effectively serving as the enforcement arm of the Agency – making critical safety determinations in the absence of clear federal standards or sufficient regulatory guidance...."

To further quote the language of the Petition:

"the TIA is urging the FMCSA to establish a clear, uniform federal standard outlining the reasonable steps brokers and shippers should take when selecting motor carriers. Such a standard would provide much needed guidance, improve safety outcomes, and create a more predictable legal and operating environment for all stakeholders. In addition, TIA is calling on the FMCSA to make public a High-Risk Motor Carrier List. This list would identify carriers that have exceeded intervention thresholds in three or more BASICS within the Safety Measurement System, or that exceed thresholds in any of the most critical categories, including Unsafe Driving, Crash Indicator, Hours-of-Service Compliance, or Vehicle Maintenance. Providing this information transparently would equip industry participants with actionable data to make more informed decisions and help prevent unsafe carriers from continuing to operate unchecked".

The Petition goes on to state that even where a carrier falls under the 10% that has a safety rating, that "FMCSA has acknowledged that the data generated by the Safety Measurement System (SMS) is used to prioritize potential interventions but is not intended to imply a federal safety rating and should not be used to draw conclusions about a motor carrier's overall safety condition".

The fallout from *Montgomery*, according to the Petition, is that "brokers and shippers continue to face an untenable burden in attempting to evaluate, develop and apply disparate methodologies and standards (using potentially suspect data) in an effort to discern whether a federally licensed motor carrier will nevertheless be deemed unsafe according to judges and juries in every state and federal jurisdiction across the country".

With the Petition, the TIA is asking the FMCSA to give a more in-depth stamp of approval for freight brokers to rely on. The Petition goes further:



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"This regulatory gap has had significant consequences... Unsafe motor carriers may continue to operate without adequate oversight, while small and independent carriers, many from diverse and underserved communities, are often excluded from opportunities due to risk-averse selection practices driven by litigation exposure.... If some sort of system is not put into place, it will lead to overcorrection across the industry, with increasingly restrictive carrier selection practices that exclude large numbers of otherwise complaint carriers having a disproportionate effect on small motor carriers, which are the lifeblood of the modern domestic supply chain".

The TIA requested that the FMCSA establish a federal motor carrier selection standard that informs brokers and shippers whether or not the use of a given motor carrier is reasonable based on objective criteria determined by the FMCSA to correlate demonstrably with safety performance and that the FMCSA immediately publish a list of motor carriers that it concludes to be "high risk".

In a LinkedIn statement, the President of the TIA, Chris Burroughs, stated the broad goals sought from the FMCSA were to:

"establish a clear, uniform federal standard outlining the reasonable steps brokers and shippers should take when selecting motor carriers. Such a standard would provide much needed guidance, improve safety outcomes and create a more predictable legal and operating environment for all stakeholders".

The Petition suggests that the proposed Safety Selection Standard would give a stamp of approval to a carrier that:

- i. is registered as a motor carrier or a household goods motor carrier under Title 49 under United States law, being the U.S. Code governing transportation;
- ii. meets the minimum insurance requirements of federal and state law, and
- iii. is not determined unfit to safely operate commercial motor vehicles, or otherwise ordered to discontinue operations by the FMCSA or a state.

Pending Further FMCSA or Other Legislative Developments, What Now for Freight Brokers?

Many freight brokers already implement good risk management practices. These practices are also important for other risk prevention purposes, such as the prevention of the theft of goods by rogue "carrier identity theft" carriers.

Going forward, at minimum, freight brokers should keep the following in mind, which is by no means intended to be an exhaustive list:

1. Broker-Carrier Agreements should be implemented whenever possible. With these templates, brokers obtain various carrier representations and warranties on safety compliance, instill that carriers are "independent contractors" and impose prohibitions on carrier "double-brokering" amongst other important provisions.
2. Brokers need to maintain diligence in carrier vetting:
 - i. does the carrier hold the required authorities?
 - ii. is the carrier adequately insured?
 - iii. where the carrier is subject to safety ratings laws, does the carrier have at least a "satisfactory" safety rating?
3. Brokers should consider purchasing or subscribing to various data sources and agencies offering carrier data and real time reporting on major carrier incidents i.e. RMIS (Registry Monitoring Insurance Services), Dat.com, Carrier 411, Highway.com being some examples. These products and services allow the broker to define relevant search and agency reporting parameters and data points for those platforms. With this in mind, brokers will need to balance thoroughness on one hand, and practicality on the other so as to avoid eliminating too many carriers from their carrier onboarding practices.
4. Brokers should revisit their insurance coverages. Do they have liability insurance for "negligent carrier selection"? The range of insurance products will no doubt evolve as time goes in light of the *Montgomery* decision. Brokers should consider securing Truck Broker Liability (TBL) coverage for protection from claims alleging that the broker itself was negligent (e.g., negligent selection of a carrier). This policy coverage may also include Contingent Auto (CA) coverage. Manuscript policies may also be applicable, the terms of which will vary from policy to policy.
5. Some commentators suggest that brokers should avoid issuing public policy statements in the wake of *Montgomery* to the effect that "they will be robust and careful in carrier selection" (or words to that effect), lest those words come back to haunt them in the context of a particular lawsuit in the future.
6. Brokers should continue to be deliberate with their business and risk management modelling. Brokers should avoid or prevent their names being featured on transportation documents and/or allowing the impression to be formed from a website suggesting that they are carriers of goods, when in fact they are not asset-based and do not haul freight.
7. If the broker happens to own or operate an asset based (carrier) division and/or have significant assets with land holdings, terminals and the like, they should consider corporate restructuring to make the "at risk" broker operation separate from the "assets". The broker should consider being as asset-free as possible, which is a legitimate way to protect assets elsewhere in broader corporate structure. A PDF version is available for download [here](#).

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