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BROKERS AND SHIPPERS AS ADDITIONAL INSURED: THE SUGAR PILL

When providing a load to a motor carrier, brokers and shippers must make sure the motor carrier has authority to haul the commodities. (The proof of insurance connected to the *authority is only to protect the public if there is no coverage in force at the time of a crash. It does not provide any protection to the shipper or broker if they are named in a suit caused by a motor carrier they allowed/arranged to haul a load.*) Brokers and shippers also need to know the motor carrier has the “right insurance”, so if a crash happens and the broker or shipper is named in a suit (*because of being held liable for the activities of the motor carrier*), they can rely on the motor carrier’s insurance company to address the suit, provide defense, and obtain a release if the case is resolved within the limits of the motor carrier’s policy. Motor carriers go to great lengths to make their broker and shipper customers happy. In fact, a major consideration for motor carriers when purchasing insurance is the various requirements demanded by their customers. These requirements, communicated to the retail insurance agents of the motor carrier, are satisfied as best they can be but sometimes do not make sense in the insurance world. While some of these requirements are valid and important to protect both parties, one requirement remains that can best be described as an insurance sugar pill (making the broker/shipper feel better without adding any benefit to the broker/shipper). This insurance sugar pill is the requirement that many brokers/shippers place on motor carriers

to provide a Certificate of Insurance (“COI”) showing an endorsement on their policy, that adds the broker/shipper as an “additional insured.” *(A COI is not insurance, it is evidence by a retail agent or insurance provider of the insurance in force at the time of request. A COI does not modify coverage. The policy language itself will determine coverage.)*

The following is a typical contract scenario between a broker/shipper and motor carrier. Before engaging in business, a broker/shipper will generally require the motor carrier to provide proof of auto liability insurance. The motor carrier will need to provide the broker/shipper with a COI meeting their requirements. *(In order to avoid a fraudulent COI, a broker/shipper will want to receive the actual COI from the retail agent reflecting the coverage.)* Typically, the policy derives from the Standard Insurance Services Office (“ISO”) policy or a policy based on ISO developed forms. *(ISO is an insurance advisory organization that creates new policy forms for insurers, among other things. These pre-printed ISO forms are used by insurers and are considered the industry standard.)* The policy contains a “Who Is An Insured” provision and, when requested, the “Designated Insured” endorsement. ISO forms’ “Who Is An Insured” read: “Anyone liable for the conduct of an ‘insured’ described above but only the extent of that liability.” This provides protection for the broker/shipper as an “insured” in the situation where a broker/shipper is named in a suit because of the actions of the motor carrier. In legal terms, this is being held vicariously liable for someone else’s actions.

First, any vicarious liability claim against the broker/shipper will be addressed under the ISO policy provision of the motor carrier described above as the “Who Is An Insured” with or without the “Designated Insured” endorsement. *(The “Designated Insured” endorsement is an ISO form and provides the broadest scope of any “Additional*

Insured” endorsement. If the Designated Insured endorsement is provided, it reflects that it is a standard ISO policy.) A “Designated Insured” endorsement states that: “Each person or organization shown in the Schedule is an ‘insured’ for Covered Autos Liability Coverage, but only to the extent that person or organization qualifies as an ‘Insured’ under the Who Is An Insured provision.” By referring to the “Who Is An Insured” provision above, the “Designated Insured” provision basically says that the broker/shipper is an “anyone” and is already an insured. Therefore, the request by the broker/shipper to be an additional insured on the COI is accomplished by the Designated Insured endorsement and provides what is being requested. By not accepting the “Designated Insured” endorsement and asking for an “Additional Insured” endorsement, the broker or shipper is asking for less coverage.

A review of wording by three major providers of insurance to motor carriers that have developed their own “Additional Insured” endorsements show that no other “Additional Insured” endorsements provide more protection than the standard ISO policy endorsement. The first example endorsement is as follows:

The person or organization is an insured with respect to such liability coverage as is afforded by the policy, but this insurance applies to said insured only as a person **liable for the conduct of another insured and then only to the extent of that liability.** We also agree with you that insurance provided by this endorsement will be primary for any power unit specifically described on the Declarations Page.

The next example provision suggests the same:

Who is an Insured is changed to include as an ‘insured’ the person or organization shown in the SCHEDULE on this endorsement **only if they are liable for the conduct of an ‘insured’ shown in the Who is an Insured provisions and only to the extent of that liability.**

Finally, the last example provides the following endorsement:

In consideration of payment of the additional premium listed below, LIABILITY COVERAGE is extended to include the additional insured named herein, provided that: 1) such insurance applies only to the ownership, maintenance or use of a covered auto; and 2) **such insurance applies only to acts or omissions by you, your agents or your 'employees' while covered auto is being used in your business;** and 3) such insurance does not apply to the acts or omissions of the additional insured or any of the additional insured's agents or 'employees' other than you; and 4) such inclusion of additional insured shall not increase our limit of liability under this policy.

Overall, compared with the ISO "Designated Insured" endorsement, there is no added protection found in these three "Additional Insured" endorsements. The endorsements' language provide no more protection than the standard ISO policy language as the additional insured is only protected to the extent that the additional insured is liable for the conduct of the motor carrier. The only differences between the above three endorsements are the titles, not the protection provided. In fact, these endorsements are slightly more limited than the unendorsed Standard ISO policy or the "Designated Insured" endorsement. For example, if the broker requires an endorsement and is named as an "additional insured" under any of the above three endorsements, then the broker will be protected but the shipper will not. In comparison, the ISO policy, with or without the "Designated Insured" endorsement, protects based on anyone held liable for the conduct of the insured, not based on whether the entity is listed in the "Additional Insured Schedule." So when the broker/shipper is named in a suit following a crash caused by a truck they provided a load to, the standard ISO policy with or without the "Designated Insured" endorsement or any other additional insured endorsement will provide the broker/shipper defense, and they will receive a release if the claim is settled within the limits of the policy. If the insurance carrier of the motor carrier cannot obtain a settlement

within the limits of the policy, then the broker/shipper's policy would be excess of the primary coverage provided by the insurance carrier of the motor carrier.

Multiple scenarios can arise where the question of coverage for the broker/shipper under the motor carrier's liability policy must be determined. However, these types of claims can be broken down between the broker/shipper being vicariously liable for the motor carrier and the broker/shipper being liable for its own negligence. The second scenario is where the request for insured status and additional insured status provides no benefit. An example where this request provides no benefit is in a drop and hook scenario. In this situation, the shipper provided for and oversaw all loading and gave the loaded trailer to the motor carrier. During movement, the truck turned over due to the shipper improperly loading it. If the shipper is sued for its own negligence, there is no protection for the shipper no matter how the request to be an insured or additional insured is met because the cause of the crash was not the actions of the motor carrier but the actions of the shipper. In other words, neither the standard ISO policy language nor the Designated or Additional Insured endorsements extend coverage to the shipper in this scenario.

Second, when the broker/shipper is accused of selecting an unqualified motor carrier (*which is a negligent selection claim*), this claim will not be covered under any circumstance regardless of whether the broker/shipper is an additional insured, a designated insured, or even where there is a hold harmless provision in the carrier's contract with the broker/shipper. This is because negligent selection would be considered the broker/shipper's own negligence. In forty-six states, it is against public policy for

parties to create a contractual obligation for the insured's policy to indemnify against the broker/shipper's own negligence.

Now let's discuss the motor carrier's cargo policy. It is a liability policy providing the motor carrier protection when the cargo they are hauling gets damaged or suffers a loss and provides payment to the owner of the property that was damaged while in the care of the motor carrier. The brokers/shippers often have a requirement to be added as an "additional insured" or loss payee on the cargo policy of the motor carrier. We focus on these requirements because with cargo liability the shipper or consignee (owner of the cargo being hauled and was damaged or suffered loss) would seek payment from the motor carrier for loss or damage to their owned cargo being hauled by the motor carrier and the motor carrier's cargo policy would respond. The broker could potentially be named in a suit. In this instance having a broker named as an "additional insured" does not provide the broker protection under the motor carrier's cargo policy. Their cargo insurance policy only covers when the cargo is in the "care, custody, and control" of an insured. By definition, the broker cannot have the shipper's cargo in its care, custody, or control. There would also be no benefit to the shipper to be an additional insured on the motor carrier's policy and in fact, might limit coverage. The motor carrier's policy is a liability policy, and an insured or additional insured cannot suffer a liability to themselves. The shipper (owner of the property being hauled by the motor carrier) requests to be named as a loss payee, but the shipper as owner already qualifies as a loss payee regardless of an endorsement. If their owned cargo is damaged then the motor carrier's cargo (which is a liability policy) will respond for the damage and must pay the shipper/owner of the property for the damage (*this is the definition of a loss payee*).

However, a broker cannot be a loss payee because the broker does not have an insurable interest. No broker should be paid or named on the check with the shipper because this would not satisfy the obligation of the contract to pay the owner of the goods, as there is no scenario where a broker could be the owner of the goods. If the broker wants to be named as a loss payee on a check or involved in payment of the claim, then the broker must obtain written permission or an assignment from the owner of the property and provide that permission or assignment to the insurance carrier.

As mentioned above, motor carriers go to great lengths to make the broker/shipper customer happy. However, it is important for brokers and shippers to refrain from putting unnecessary burdens on the motor carriers or their insurance providers. By making these requirements, brokers and shippers gain no additional benefit at the expense of limiting motor carriers they do business with. This insurance sugar pill does not benefit any party involved and can only provide unnecessary road blocks for the broker/shipper to use an otherwise well-qualified motor carrier. As we have shown, there are many legitimate concerns that brokers and shippers have when hiring a motor carrier. These can include potential exposure to liability based on the acts of the motor carrier. Because of the legitimacy of these concerns, we seek to show why these insurance sugar pills will not help but rather that the broker/shipper already has protection from such vicarious liability claims under the motor carrier's basic insurance policy. This article does not mean to deter the vetting of motor carriers, but it is important not to get hung up on titles or insurance requests which at the end of the day do not matter when a crash happens.

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