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**SC Trucking Safety Mgmt Council
Truck Accident Litigation**

Myrtle Beach
November 9, 2018

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A New Alliance

 **Fox Rothschild** LLP
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Smith Moore Leatherwood to Merge with Fox Rothschild

- Combined firm will have 900+ attorneys in 27 offices coast-to-coast, under the Fox Rothschild banner

Effective Date: Nov. 1, 2018

High Points:

- Access to Fox Rothschild’s accomplished team of attorneys and national firm resources
- Availability of a broader range of services through Fox Rothschild’s 60+ practice areas
- Deeper bench in Litigation, Labor & Employment, Trusts & Estates, Health Law and Intellectual Property departments

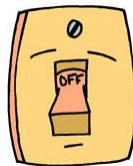

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Why did my insurance rates skyrocket

- On average, truck owners saw 30% increase in 2016-17

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How did all of this happen?



2011

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2011

- September - \$40M, ATL

2012

- March - \$13.2M , AZ
- May - \$21M, TX
- June – 36.5M, CA
- August - \$20M, CA
- August - \$117 LA
- December - \$18.5 IN

2013

- March - \$58.5M, NM
- March - \$15, CA
- April - \$ 15.7, CT
- July - \$19M, CA
- December - \$30M, CA
- December - \$178M, CA
- December- \$281, Tex

2014

- June - \$15M, FL
- October - \$42M, OH

2015

- January - \$35M LA
- January - \$165M, NM
- March - \$19M, AZ
- March - \$19M, AL
- March - \$16.5 M Sandersville, GA
- June - \$17M CA
- July - \$22M MI
- October - \$32 M IN

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2016

- May- \$10M Ohio
- September - \$35 M Dallas, TX
- November - \$37.5 MO
- Settlement of Nurse Cases - \$85M GA
- Broker Case \$11.3M San Antonio

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2017

- January - \$15 M GA (survivor of Nurse Case)
- April - \$18 M IL
- July - \$18M IN
- October - \$15.5 M PA
- November - \$85M IL
- December - \$115M IL

2018 ????

- March - \$15M IL
- April - \$53 M Los Angeles
- May - \$17 M Charleston
- May - \$90M Houston

Common Themes of Huge Truck Verdicts

- I. Better Plaintiff's Attorneys
 - a. Working Harder
 - b. More knowledgeable on trucks (gaps less)
 - c. Smarter
 - d. Not volume lawyers – time to work, prepare
 - e. Tech Savvy
 - f. Swing for the Fence

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Common Themes of Huge Truck Verdicts

2. Serious Injuries
 - a. TBI
 - b. Burns

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Common Themes of Huge Truck Verdicts

3. Public Data
 - a. CSA/FMCSA
 - b. Track Hiring Process by Subpoena
 - c. Failure to address red flags in data

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Common Themes of Huge Truck Verdicts

4. Management by Excess Carriers
 - a. Parachute lawyers
 - b. Hardball negotiations

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Common Themes of Huge Truck Verdicts

5. Recalibration of Verdict Values
 - a. Health Care Costs
 - b. Value of the dollar
 1. Professional athletes
 2. Lotteries

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Common Themes of Huge Truck Verdicts

6. Failure of Insurer to Escalate
 - a. Expense Minded
 - b. No focus groups/mock trials

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Common Themes of Huge Truck Verdicts

7. Defense Counsel Outlawyered and Overmatched
 - a. Case management like a \$5k wreck case
 - b. Not the right lawyer for the case

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Common Themes of Huge Truck Verdicts

8. Conduct from the Top of the MC
 - a. Safety expensive
 - b. Didn't Monitor Technology
 1. Hard brakes and speeding
 2. ELD data
 3. Collision Mitigation
 4. Event Recorders
 - c. Motor carrier hired the accident
 - d. No policies or policies not followed

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Specific Safety Issues

- Whistleblower Claims
- Didn't Monitor Technology
 1. Hard brakes and speeding
 2. ELD data
 3. Collision Mitigation
 4. Event Recorders
- Safety v. Employment
 - ADA and FMLA v. Safety
 - IC v. Company Drivers

Violations/Events

- Don't make best driver look like worst
- Show response to every event
 - Monitor
 - Coach
 - Delete
- Inconsistencies are "Red Flags"

Take Aways

- Manage claims as the insured
 - Ask questions
 - Insist on the plan
 - Are you comfortable with the lawyer
 - Who are the experts
 - Focus Groups

What can you do?

- Tort reform
- Judicial Elections

What is Next?

- Shippers and Brokers will want more than \$1M
 - Starting to see 2 types of brokers
- Freight rates have been steady
 - You only made a profit or broker even because low fuel offset high insurance.
 - Start projecting future rates
- Work on your retention
 - 6 Month Rule
- New CSA
- Drug and Alcohol

Broker/Shipper Liability

Why are we in a tight spot?

- Financial Responsibility \$IM
- HOS pushing efficiency
 - Dropped trailers
 - More brokering
- Power Only
- “Hidden Motor Carriers in the Supply Chain – The New Fraud,”

Brokers

- Travel Agent for Freight
- Regulatory history
- Not regulated under Carmack
- Not liable for freight claims

Generally unregulated

- 49 CFR 371
 - Record keeping
 - Not allow to represent itself as a carrier
 - Separate accounts from brokerage and motor carrier activities
 - Restricted ability to “rebate”
- Map 21
 - Only brokers can broker
 - Doesn’t apply to exempt, intrastate
 - Training
- DOT numbers

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Contract Issues

- 3 Part Process
 - Shipper-Broker Contract
 - Do with tariff of motor carrier
 - Specific Brokerage contract
 - 60% moves without contracts
 - Broker-Carrier Agreement
 - 100% in place
 - Load confirmations referencing terms and conditions
 - Agency agreement

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Broker Insurance Products

- Contingent Cargo
 - Protection for you in the event underlying carrier has no coverage or denies coverage
- Your cargo coverage for a carrier will not apply
- Errors and Omissions
- CGL
- Contingent Auto or Hired and Non-Owned Auto
- Broker Bond

Broker Liability

- Theories of Liability
 - Control
 - Dangerous Activities
 - Negligent Selection
 - Representation as Carrier
 - Brokerage industry in general

1. Control

- State law Control tests
- Driver Calls
- Penalties
- Sperl v. CHR
- Coverage?

2. Dangerous Activity

- Serna v. Petty Leach
- Restatement
- Not adopted widely
- Should not apply to brokers

3. Negligent Selection

- Reasons you should not have hired a carrier
 - Unrated
 - New Carrier
 - Conditional Rating
 - Had electronic devices that could be read while moving
 - Alert(s)
 - Serious violations during Comprehensive Review
 - Insufficient Driver hiring criteria
 - Didn't use PSP
 - Nonpublic Information (actual knowledge)
 - Quick Pay or Factoring

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3. Negligent Selection

- Reasons you should not have hired a carrier (cont)
 - No authority
 - Drug policy
 - Show the photos
 - TMS and Subscriptions
 - Comments in the TMS
 - Eliminate chameleons in your TMS
 - Multiple cancelations or revocations
- What other broker approved the carrier.

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4. De Facto Carrier

- 49 CFR 371 – broker does not include carrier with regard to a load MC was otherwise bound to transport
- Signed Carrier Contract
- Agreed to be liable as the motor carrier
- Subcontractor Issue
- No contract defining you as broker
 - 100% we thought they were a carrier
 - Must have a shipper-broker contract
 - At least refer to website on confirmation

Follow the Money

- Not only do the contracts have to be right
 - Contractual authority to broker (what did you tell the shipper you were doing?)
 - Brokerage Authority
- Follow the money
 - Does the money recognize the relationship?
 - Do you have the back office agreements in place to support the money flow?

5. Attack on the Broker Model in General

- Broker motivation is to find the cheapest carrier
 - Ignores economics and efficiencies
 - Ignores service issues
 - Might lose money on a shipment

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Broker Liability History

- Schramm (2004) – MD
 - Only denied SJ on Negligent Selection
- Jones (2008) - VA
 - Trial verdict on negligent selection
- Sperl (2011) – IL
 - Trial verdict on control
- Linhart (2012) WA
 - Trial verdict on negligent selection

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Broker Liability – Phase II

- Hayward (2012) IL
 - Win for broker
- Kavaluk (2013) NY
 - Win for broker
- McComb (2014) IL
 - Win for broker
 - Satisfactory safety rating
- Dockery (2014) NC
 - SJ in favor of broker

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Broker Liability Phase II

- Beavers v. Victorian, 2014 WL 1276374 (OK 2014)
 - Dismissed Vicarious Liability Claim
 - Denied SJ on Negligent Selection of Carriers
- Hobbs v. Zhao, 2015 US Dist. Lexis 11762 (ND OK 2015)
 - Amazon assigned to #1 but brokered four times to Zhao
 - SJ granted as to Negligent Entrustment of the load
 - Amazon gave a load, not a truck
 - Negligent hiring: shipper has a duty to use reasonable care in selecting a carrier
 - Amazon hired #1
 - Not direct contact with #4

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Broker Liability Phase II

- [McHale v. WD. Trucking](#), 2015 II App (1st) 132625)
- Broker was vicariously liable for the actions of the driver under \$8 M verdict
 - Control factors for Respondeat Superior
 - Provided route
 - Shipper-Broker Contract said Broker would have exclusive control over transportation) – probably carrier agreement
 - Carrier violation led to termination
- Motor carrier was obligated to fully indemnify the broker,
 - million dollars in auto coverage was not a limitation on the indemnity obligation

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Broker Liability Phase II

- [Dragna., v. KLLM Transport Services, LLC](#) 638 Fed. Appx. 314 (5th Cir. 2016).
- Trial level 2015 WL 729844 (MDLA 2015).
- (a)Defendant did not form joint venture with carrier;
- (b)carrier was A&Z's independent contractor and could therefore not be held vicariously liable because they did not assert any control over the driver; and
- (c) KLLM could not be held liable for negligent hiring as they had no knowledge of policies in place by A&Z around hiring. Carrier had 3 basics in alert threshold – not evidence carrier was irresponsible.

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Broker Liability – Phase II

- [Gonzalez v. Ramirez](#), 2015 WL 2148028 (Tex 2015).
 - Agricultural shipment
 - Shipper was sued
 - Shipper did not control what the carrier did and how it operated.
 - Simply gave pick up and delivery instructions

PHASE III Cases

Bowman v. Benouffas 2016 Tenn. App. LEXIS 668 (Tenn. Ct. App. Sept. 9, 2016)

- Claims were vicarious liability, joint venture, and implied partnership.
- Plaintiff argued factors: (1) motor carrier got over 50% of its freight from broker, (2) MC safety violations publicly available (not quantified); (3) instructions on loads, (4) determined type of equipment, (5) monitored progress of loads, (6) direct contact with drivers, (7) assembled freight loads.
- SJ to broker granted.

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Ramos-Becerra v. Hatfield (JB Hunt), 2016 Westlaw 5719801 (MD PA 2016).

- Power only carrier pulling JB Hunt trailer. Carrier had a bad history and involved in accident with a positive drug test and fleeing the scene.
- Negligence claim not preempted
- Court cites mostly carrier cases
- Mentions Schramm.
- Allows Negligent hiring under Restatement 411
- Still pending

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Puga v. About Thyme Transport, Inc., 2017 Westlaw 25557 (SD TX 2017).

- Broker (Sunset) retained RCX. RCX listed as carrier on Bill of Lading. RCX double brokered the load to About Thyme. RCX did not have broker authority. RCX SJ Motion.
- (1) Can be vicariously liable as a co-employer without a lease.
- (2) There may be 2 statutory employers.
- (3) Dismissed negligent hiring because no proof of proximate cause (that an accident was more likely to occur).
- (4) Punitives dismissed.

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Mann v. CH Robinson, 2017 Westlaw 3191516 (WD Va. 2017).

- CHR motion for Summary Judgment.
- Problems with Carrier:
 - 16 Negative comments in TMS (No Load)
 - Quick Pay
 - Unrated
 - CSA – court called alerts “high risk”- NOT ACCURATE
 - 3 inspections and 3 OOS
 - MC had not updated MCS-150 and was technically OOS
- Preemption Argument rejected.
- Defense expert excluded

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Turner v. Syfan Logistics, 2016 WL1559176 (WD VA 2017)

- Syfan hired DD
- DD driver bad guy and causes fatal accident
- Case on Motion to Dismiss
- There is jurisdiction over the broker
- Argued CSA Invalid after Fast Act
 - Court acknowledged that Fast Act casts doubt on reliability
 - But that goes to weight

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Amalu v. LSH Transport, 1:15-cv-01116- STA-egb (WD TN 2018)

- Motion on exclusion of experts
- CSA scores available when the accident happened
 - FMCSA “used” the scores
 - I find them “reliable”

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Le v. TQL, CA 116, 382 (OK Ct App 2018)

- TQL hired Arora to haul strawberries to Wal-Mart
- Arora driver (Singh) in accident
- Carmack cases do not apply to injury cases.
- TQL not a motor carrier
 - Did not commit to transport as a carrier
- TQL did not control
- TQL did not fail to check out Arora
 - 500 prior loads
 - Reject Schramm – unrated carrier
 - No duty to check driver (at least in this case)
- No joint enterprise

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Federal Preemption

- 4 cases rejected preemption
 - Mann v. CHR, 2017 WL 3191516 (WD VA 2017)
 - Montez de Oca v. El Paso-Los Angeles Limo Express, 2015 WL 1250139 (CD Cal. 2015)
 - Owens v. Anthony, 2011 WL 6056409 (MD TN 2011)
 - Syfan (see above)
- BUT THEN in 2018
- Kraus v. Iris USA, 2018 WL 2063839 (ED Pa 2018)
- Volkava v. CH Robinson, 2018 WL 741441 (ND IL 2018)

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Volkova v. CH Robinson, 2018 WL 741441 (ND IL 2018)

- CHR brokered to Antioch
- Antioch driver Nguyen in accident making U turn
- Plaintiff making injury claim
- Claim preempted.
 - Price Routes and Services
 - Services is broad
- Not without a remedy – can sue Carrier

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Kraus v. Iris USA, Inc., 2018 WL 2063839 (ED PA 2018)

- Shipment of Legos allegedly misloaded
- Volunteer injured when load shifted
- Iris – seller of Legos
- CH Robinson broker
- KV Load was carrier
- Carmack governed damage to Legos
- Injury claim preempted as to CHR
 - Selecting Carrier was a “core service” of CHR
 - Not as to shipper Iris
 - Maybe indemnity issues to shipper

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Power Only

- Liability Issues
 - Negligent Maintenance
 - Negligent Selection/Entrustment
- Insurance Issues
 - Policy Language

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