The Evolving Trends of Supply Chain Liability

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McClaine v. McLeod
91 Ga. App. 335; 661 S.E.2d 695 (2008)

- Driver received all dispatches, and dispatch instructions from the broker.
- Driver's only contact with the motor carrier was to pick up his pay check at the end of the week.
- After the accident, the driver commented to law enforcement that he was driving for the broker.

McClaine v. McLeod

- Driver was primarily hauling containers to and from the Port of Savannah.
- Motor carrier was not a participant of the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) and did not have a SCAC number.
- The **Standard Carrier Alpha Code (SCAC)** is a unique two-to four-letter code assigned to transportation companies for identification purposes. The SCAC is required for Electronic Data Interchange (EDI), intermodal interchange agreements, and U.S. Customs entry.

McClaine v. McLeod

- Broker also had carrier authority.
- Broker's UIIA agreement and SCAC number were obtained under the carrier's authority.
- Those numbers were used by the driver to access the Port.

McClaine v. McLeod

- However: the court focused on the fact that:
- (1) broker merely conveyed to the driver pick-up and delivery instructions provided by the shippers;
- (2) the broker had no ability to hire, fire or discipline the driver; and
- (3) the broker never dictated to the driver the routes that he was required to take.

McClaine v. McLeod

- With regard to the fact that the broker was using its carrier authority to handle the equipment interchange, the Court of Appeals noted that the plaintiffs' contentions were not supported by the record.

- Big Issue: Court did not entertain a negligent selection theory and held that Kight Trucking met FMCSA's safety standards.

- Restatement (Second) of Torts § 411.

Clarendon National v. Johnson
293 Ga. App. 103, 666 S.E.2d 567 (2008)

- Has elements of a broker case:

- C&C had one contract with three related ATF companies to act as a freight agent. One ATF entity had brokerage authority, one had carrier authority.

- C&C's agreement allowed it to book shipments for carriers other than the ATF entity.

- If C&C used broker authority an assigned a load to another carrier, it had to make sure that carrier had adequate cargo insurance. No other requirements were cited.

Clarendon National v. Johnson

- C&C assigned load to son for local pickup.
- No evidence that ATF had oral or written leased for the truck.
- No evidence that son was paid by ATF or that ATF even knew he was handling local pickups.
- The fact that third-party wrote C&C/ATF on bill of lading is immaterial.

Clarendon National v. Johnson

- Court rejected negligent hiring claim against broker.
- OCGA § 51-2-5 sets forth the only recognized exceptions to the rule that principal is not liable for actions of independent contractor.
- (1) the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance; (2) based the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed (an inherently dangerous activity).

Clarendon National v. Johnson

- (3) the wrongful act is the violation of a duty imposed by express contract upon the employer; (4) the wrongful act is the violation of a duty imposed by statute; (5) the employer retains the right to direct or control the time and manner of executing he work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference; or (6) the employer ratifies the unauthorized wrong of the independent contractor.

Restatement (Second) of Torts § 411

- An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411

- Meaning of "competent and careful contractor." The words "competent and careful contractor" denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating an unreasonable risk of injury to others…

Restatement (Second) of Torts § 411

- Extent of rule. The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor, but only for such physical harm as his caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him.

Restatement (Second) of Torts § 411

- Factors determining amount of care required. The amount of care which should be exercised in selecting an independent contractor is that which a reasonable man would exercise under the circumstances, and therefore varies as the circumstances vary.

Restatement (Second) of Torts § 411

- Illustration:

- A, a builder, employees B, a teamster, to haul materials through the streets from a nearby railway station to the place where A is building a house. A knows that B's trucks are old and in bad condition and that B habitually employs inexperienced and inattentive drivers. C is run over by a truck carrying A's materials and driven by one of B's employees. A is subject to liability to C if the accident is due either to the bad condition of the truck, or the inexperienced or inattention of the driver.

Schramm v. Foster,
341 F. Supp. 2d 536 (D. Md. 2004).

- Court held that Maryland recognizes a claim against a principal for negligently selecting, instructing, or supervising an independent contractor.

- The court ruled that this duty included an obligation to: (1) check the safety valuations of carriers in the SafeStat database maintained by the Federal Motor Carrier Safety Administration (FMCSA); and (2) maintain internal records regarding carriers to ensure they were not manipulating their business practices to avoid an unsatisfactory SafeStat rating.

Jones v. C.H. Robinson Worldwide, Inc.
558 F. Supp. 2d 630 (W.D. Va. 2008)

- Virginia has adopted Restatement (Second) of Torts § 411

- C.H. Robinson was aware that the motor carrier had a conditional safety rating with the FMCSA. The evidence also showed that the carrier had an overall SEA score of 322.32 and was in the bottom three percent of all motor carriers in the country in vehicle, and driver SEA scores.

- The FMCSA's website further showed that the carrier's insurance coverage had been canceled eight times in the three years preceding the accident, and that the carrier had been cited for numerous FMCSR violations by the FMCSA.

Jones v. C.H. Robinson Worldwide, Inc.
558 F. Supp. 2d 630 (W.D. Va. 2008)

- Plaintiff presented an expert who testified that the FMCSA data is an accurate measure of driver and vehicle performance,

- Court noted the disclaimer on the FMCSA's website, and further recognized that the information may not be intended for commercial use. The court, therefore, found that a dispute existed regarding the use and reliability of FMCSA data, which presented fact question for trial.

McComb v. Bugarin Trucking, Inc., 2104 U.S. Dist. LEXIS 24157 (N.D. Ill. 2014)

- Intersection Accident.
- Post accident inspection shows out of adjustment brakes on trailer and loose brake chamber on tractor.
- Investigating officer cannot say if brake issues affected stopping.
- Plaintiff was not focused on brake issue as cause of accident.
- Restatement (Second) of Torts § 411 claim dismissed.

Safestat/CSA 2010 Scores

Almost all brokers/freight forwarders have literature/website or agree in contracts with shippers to employ safe motor carriers to transport shipments.

Almost all brokers/freight forwarders will agree that they at least review safestat/CSA 2010 data to some extent which is the beginning of the slippery slope.

What is impact of recent satisfactory safety rating?

Safestat/CSA 2010 Scores

Smith v. Spring Hill Integrated Logistics Mgmt., 2005 U.S. Dist. LEXIS 22765 (N.D. Ohio Oct. 6, 2005) – only published decision indicating that presence of satisfactory safety rating ended analysis of negligent hiring claim.

Satisfactory safety rating means that a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in §385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier. 49 C.F.R. 385.3.

Sperl v. CH Robinson
408 Ill. App. 3d 1051

Sperl is an agency case, not a negligent hiring case.

- CHR owned cargo and load going to CHR warehouse
- CHR had direct contact with driver discussing terms of load – driver allowed to use carrier's authority on her own keeping all profit
- Check calls required – "constant communication" required
- CHR had right to impose fines if schedule not met
- CHR scheduling required driver to violate FMCSRs

Scheinman v. Martin's Bulk Milk Service, Inc., 2013 U.S. Dist LEXIS 172599 (N.D. Ill. 2013)

- Contract required carrier/broker to provide tractors, drivers, and trailers on a daily or weekly basis, and further required carrier/broker provide qualified, licensed drivers who comply with applicable local, state, and federal laws and regulations.

- Contract required carrier/broker have the ability to communicate electronically with shipper regarding the acceptance of a load tender, the anticipated pick-up date/time, any unexpected delays, and other similar delivery events.

Scheinman v. Martin's Bulk Milk Service, Inc., 2013 U.S. Dist LEXIS 172599 (N.D. Ill. 2013)

- Agreement obligated carrier/broker to coordinate and establish delivery schedules for all services provided, meet a minimum on-time delivery requirement of 98%.

- Subsequent Carrier (1) dispatched the driver; (2) paid the driver; (3) deducted all payroll taxes; (4) owned and maintained the truck at issue; (5) qualified the driver; and (6) specified the routes taken by the driver.

- Court finds no agency.

Freight Forwarder/Broker Tort Liability Based Upon Language In Contract

Poorly worded contract language can be evidence in support of claim that driver was under direction and control of freight forwarder/broker. For example:

Contract defines forwarder/broker as CARRIER

Contract reads that:

CARRIER shall be an independent contractor and shall have exclusive control and direction of the persons operating vehicles or otherwise engaged in such transportation services.

Freight Forwarder/Broker Tort Liability Based Upon Language In Contract

Contract language regarding control coupled with other evidence may be enough to create a jury question as to agency. Examples of other evidence:

- Check Calls
- Broker/Freight Forwarder tracking shipment
- Driver advances
- Having Representative present at dock
- Right to fine or penalize driver in some way
- Instructions that cause motor carrier to violate FMCSRs

Freight Forwarder/Broker Tort Liability Based Upon Language In Contract

Overall, the primary evidence used against brokers and freight forwarders involves either contract language and direct communications/contact between the broker and the driver.

Fact that broker had no involvement with motor carrier's choice of driver, route chosen, selection of particular tractor-trailer, and had no direct contact with driver lead to summary judgment for broker in Kavulak v. Juodzevicius, AV, Inc., et. al., 2014 U.S. Dist. Lexis 4078 (W.D. N.Y. 2014).

Freight Forwarder Tort Liability Based Upon Assumption Of Responsibility For Shipment

"Freight forwarder" means:

a person holding itself out to … provide transportation of property for compensation and in the ordinary course of its business:

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs for break-bulk and distribution operations of the shipments;

(B) **assumes responsibility for the transportation** from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

49 U.S.C.A. § 13102 (8); *see also* 49 C.F.R. §386.2.

Freight Forwarder Tort Liability Based Upon Assumption Of Responsibility For Shipment

Definition of Freight Forwarder in 49 U.S.C.A. § 13102 (8) does not create liability since assumption of responsibility for shipment is a Carmack concept, not a tort liability concept. Holding that Carmack applies to property damage claims only.

Knoten v. Shippers Choice, et. al., Civ. Action No. 09-1028 (Orleans Parish Court, LA 2013).

Broker Tort Liability Due To Carmack?

Kavulak v. Juodzevicius, AV, Inc., et. al., 2014 U.S. Dist. Lexis 4078 (W.D. N.Y. 2014).

Plaintiff claims broker, TSG, bears liability as a motor carrier relying upon Carmack Amendment case law – presumably case law indicating that a broker holding itself out as a motor carrier subjects the broker to liability as a motor carrier **for the goods**.

Broker Tort Liability Due To Carmack?

Kavuluk court holds that Carmack applies to property only and has nothing to do with personal injury claims chastising the plaintiff's attorney by stating:

This Court will afford Plaintiff's counsel the benefit of the doubt and assume this and the prior Carmack Amendment arguments were simply poorly developed, and not a disingenuous attempt to use frivolous arguments to create the appearance of a question of fact. Counsel is reminded, however, that meritless arguments presented in bad faith for the sole purpose of harassing, delaying, or needlessly increasing the cost of litigation for the opposing party may form the basis for sanctions under the Federal Rules of Civil Procedure.

Broker Tort Liability Due To Carmack?

Kavuluk case is also remarkable for what is not included in the court's opinion:

TSG (broker) is named on bill of lading as carrier and arguably held itself out as a carrier on its website.

Schramm: See Chubb Group of Ins. Companies v. H.A. Tramp. Systems, Inc., 243 F. Supp.2d 1064, 1070 (C.D.Cal. 2002) (where transportation company did not prepare or assist in preparing bill of lading which listed company as "carrier", bill of lading could not be relied upon as basis for imposing carrier liability on company).

Broker Tort Liability Due To Carmack?

Kavuluk case is also remarkable for what is not included in the court's opinion:

Plaintiff's attorney tried to refer to an actual motor carrier as a "subhauler" thereby leaving "motor carrier liability" with TSG. This "subhauler" concept is something that Plaintiff's "expert" Lew Grill is trying to sell around the country. It is an extension of the statutory employer argument to be discussed.

Kavuluk court rejected such argument presumably based in part upon the fact that TSG did not have actual motor carrier authority.

Broker Tort Liability Due To Carmack?

Kavuluk case is also remarkable for what is not included in the court's opinion:

Plaintiff's attorney relied upon fact that TSG dictated time of pickup and time of deliver. Kavuluk court rejected saying:

Notably, the fact that a defendant "controlled the location where the cargo was picked up and delivered does not establish an agency relationship because such control involves only the result of the work and not the manner in which it is undertaken

Broker Tort Liability Based Upon Assumption Of Responsibility For Cargo

Many lawyers focus upon broker's agreement to bear responsibility for the freight as evidence of agency. Quote from Schramm:

"The fact that Robinson [the freight broker] takes responsibility for freight claims does not itself render it liable for personal injuries. It simply does not follow from an entity's voluntary assumption of liability for one type of claim that is accepting liability for all other claims." Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004).

Broker Violate Federal Regulations?

49 CFR 371.7 (b) – Misrepresentation

A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.

Will broker admit it violated federal regulations to avoid being deemed motor carrier?

MAP - 21

- Definitions of "Freight Forwarder" and "Broker" did not change
- MAP-21 Expressly allows a single entity to hold multiple authorities
- MAP-21 does not prohibit co-brokerage
- A regulated entity is not required to obtain a second MC number
- With the exception of the increase in the surety bond, most of MAP-21 took effect on October 1, 2012

MAP - 21

- Motor carriers must hold broker or freight forwarder authority unless :

  - The motor carrier transports property on equipment it owns or leases; or
  - As part of an interchange, the originating carrier "physically transports" the cargo at some point and "retains liability for the cargo and for payment of interchanged carriers"

MAP - 21

- It is illegal to provide “brokerage services” without a license or a bond.
  - “Brokerage service” is defined in relevant part as “the arranging of transportation of the physical movement of a motor vehicle or of property.”
- Exceptions:
  - Ocean Transportation Intermediaries licensed by the Federal Maritime Commission
  - Custom brokers
  - Indirect Air Carriers approved by the Transportation Security Administration

MAP - 21

- Any person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person, a violation” is liable for a penalty of $10,000, as well as to the injured party for all “valid claims” without regard to amount.
- Officers, directors and ‘’principals” are also personally liable.
- Does this create a private cause of action?

Joint Venture Between Motor Carrier And Broker/Shipper

Common Requirements of a joint venture:

(1) an association of persons to carry out a business enterprise;

(2) there must be a sharing of losses of the venture as well as profits; and

(3) each party must have some proprietary interest in, and be allowed to exercise some control over, the business.

Joint Venture Between Motor Carrier And Broker/Shipper

Beware of states with loose standard for joint venture. E.g., Kansas.

Kansas law does not define precisely the requirements of a joint venture. Instead, it merely lists various factors, none of which is singularly controlling, that are indicative of a joint venture. See Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 596 P.2d 816, 823 (Kan. 1979) These factors are: (1) the joint ownership and control of property; (2) the sharing of expenses, profits and losses, and having and exercising some voice in determining the division of the net earnings; (3) a community of control over and active participation in the management and direction of the business enterprise; (4) the intention of the parties, express or implied; and (5) the fixing of salaries by joint agreement.

Joint Venture Between Motor Carrier And Broker/Shipper

Johnson v. PIE, 662 S.W. 237 (Mo. 1983) is case many plaintiffs rely upon.

- 75/25 % split of revenue between broker and trucker
- Evidence established that broker knew trucker used had no valid authority (although court imposed logo liability on valid motor carrier that had insurance)
- Broker paid an advance to drivers before load shipped

Joint Venture Between Motor Carrier And Broker/Shipper

Court found joint venture holding that :

(1) the parties undertook a “particular project for mutual benefit and profit,”

and

(2) the broker was “instrumental in launching and directing the truck journey” and did business through “itinerant truckers with no semblance of operating authority.”

Bad facts make bad law. If plaintiff had asserted claims of negligent hiring, court may have more rigidly enforced requirements of joint venture.

Joint Venture Between Motor Carrier And Broker/Shipper

Motloch v. Albuquerue Tortilla, Case No. 11-12-00142-CV (11th Cir. DCA Texas 1/16/14).

Shipper allowed carrier (no motor carrier authority) to distribute tortillas in geographic region in exchange for $3k from carrier with carrier keeping 22% of sales.

Plaintiff's attorney argues that this is "very essence of a community interest" since neither party makes money if there are no sales and both parties make money upon sales."

Joint Venture Between Motor Carrier And Broker/Shipper

Motloch v. Albuquerue Tortilla, Case No. 11-12-00142-CV (11th Cir. DCA Texas 1/16/14).

Court correctly held that there is distinction between common business purpose and common pecuniary interest.

Distributor had different "pecuniary interests" since he bore costs of drivers and vehicles and was only entitled to 22% of sales in return – he could lose money when shipper was still making money

Non-Delegable Duty Claims

Plaintiffs frequently claim that original motor carrier has non-delegable duty to require driver observance of FMCSRs under 49 CFR 390.11 which provides:

> [w]henever … a duty is prescribed for a driver or
>
> a prohibition is imposed upon the driver, it shall
>
> be the duty of the motor carrier to require
>
> observance of such duty or prohibition.

Non-Delegable Duty Claims

Courts regularly reject the argument that a company having motor carrier authority is always acting as a motor carrier.

Harris v. Velichkov, 860 F.Supp.2d. 970 (D. Neb. 2012) (citing Schramm, stated that "court must focus on the specific transaction at issue, not whether Fedex acts as a motor carrier in other transactions.)

Non-Delegable Duty Claims

Harris v. Velichkov, 860 F.Supp.2d. 970 (D. Neb. 2012): Fedex's use of independent contractor did not put public at risk due to MCS 90.

Dangers of Dual Authority

Rest. 2d. Torts, § 428 – Contractor's Negligence in Doing Work Which Cannot Lawfully Be Done Except Under a Franchise Granted to His Employer

An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

Dangers of Dual Authority

Serna v. Petty Leach Trucking, 110 Cal. App. 4th 1475 (2003).

Serna Court held that, where entity with broker and motor carrier authority accepted load as motor carrier, it was strictly liable for negligence of motor carrier transporting the load under Rest. 2d. Torts, 428.

Dangers of Dual Authority

Serna Court possibly wrong on two fronts:

(1) Rest. 2nd of Torts, 428 only applies where the subcontractor is operating under the Defendant's authority. Phillips v. J.H. Transport, 565 So. 2d 66 (Ala. 1990); Clarendon v. Johnson, 293 Ga. App. 103 (2008).

Dangers of Dual Authority

Serna court possibly wrong on two fronts:

(2) Trucking does not involve an "unreasonable risk of harm to others." Cushman Motor Delivery Co. v. Bernick, 55 Ohio App. 31, 36 (1936); Burton-Lingo Co. v. Armstrong, 116 S.W.2d 791 (1938)

Tort Claims Against Brokers Preempted Under 49 USC § 14501 (c)(1)?

Under 14501(c)(1), aka FAAAA, state may not enact or enforce a law or regulation related to the price, route or service of any motor carrier…

Claims that Broker for negligent investigating, training, monitoring and retaining driver involve highway safety issues which are exception to rule. Owens v. C.H. Robinson, 2011 U.S. Dist. Lexis 139961 (M.D. Tenn. 2011).

Does Indemnitee Become An Insured Under Policy?

Majority position – No. See, e.g., Golden Eagle Ins. Co. v. Ins. Co. of West, 99 Cal. App. 4th. 837 (2002).

Minority position – Yes. See, e.g., Marlin v. Wetzel Board of Educ., 569 S.E. 2d. 462 (W.Va. 2002).

If indemnitee not an insured, there is technically no duty to defend.

Are Indemnitee's Defense Costs Covered As Part Of Insured Contract Coverage?

Split of Authority

Yes. Soo Line Railroad v. Brown's, 694 N.W. 2d 109 (Minn. Ct. App. 2005).

No. Progressive Casualty v. Brown's, 27 F. Supp. 2d 1288 (D. Wyo. 1998).

Do Indemnitee's Defense Costs Erode Policy Limits?

Yes. If part of "damages," then it must erode limits. Soo Line Railroad v. Brown's, 694 N.W. 2d 109 (Minn. Ct. App. 2005).

Question – make sense to voluntarily undertake indemnitee's defense and pay defense costs when policy limits case present?

Supply Chain Cases – Defense Costs

Subpart e: “Anyone liable for the conduct of an insured…” qualifies as Insured under ISO Truckers and Motor Carrier Form.

Lawyers always allege that driver is agent of all Defendants (motor carrier, broker, shipper, etc.).

How handle tender? Separate counsel required?