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A Broker Nuclear Verdict Reversal! (And a Very Good Year [In the Courts] for Brokers)

Client Bulletins

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Suffice it to say that the past year has been a very good year for brokers; in the courts, that is! While there have been several favorable preemption decisions across the country, the preemption doctrine is not universally applied to broker lawsuits in all jurisdictions. A recent Illinois case helped to fill those liability gaps in tectonic fashion.

In *Cornejo v. Dakota Lines Inc. et al.* 2023 IL App (1st) 220633, 229 N.E.3d 546, 471 (Ill. Dec. 795), Gustavo Cornejo was severely injured when standing near his family vehicle on the shoulder of a highway. He was struck by an 18-wheel tractor-trailer. His mother brought a negligence suit on behalf of her son against defendants Lewis, the truck driver; his employer, the motor carrier Dakota Lines; and Alliance Shippers, the broker. At trial, the jury found that Lewis, Dakota and Alliance were liable to the plaintiff and awarded the plaintiff $18,150,750, a nuclear verdict. Alliance appealed the court's judgment confirming the verdict, alleging that, as a matter of law, Dakota was an independent contractor of Alliance and that neither Lewis nor Dakota were the agents of Alliance.

The evidence showed that Alliance *did not* pay Dakota's drivers and withhold taxes from their pay; did hire, train or fire the drivers; did dispatch nor speak to the drivers; did not control the drivers' routes or provide them with tools, equipment or materials; and did not own the tractors or trailers the drivers used. The evidence also showed that Dakota and Alliance adhered to the terms of their contract, which provided that Dakota had full control over its personnel and would perform services as an independent contractor.

Also, Dakota and Alliance did not have an exclusive relationship; Dakota was free to haul freight for other brokers and was not solely Alliance's carrier. Dakota hired, trained and fired its own drivers, paid them and withheld taxes from their paychecks.

The plaintiff contended that, nonetheless, various other facts connoted an agency relationship. To wit, Alliance required Dakota to add Alliance as an additional insured on Dakota's insurance and indemnify Alliance. Alliance also had requirements regarding seal integrity, freight bills and cargo security. Alliance would designate if delivery had to be on a flatbed or via container and required Dakota to EDI, email and/or fax Alliance multiple times a day regarding pickup and delivery times. Alliance also required Dakota to notify Alliance immediately regarding issues like crashes or mechanical problems that would prohibit Dakota from moving the load. Then, Alliance would decide whether Dakota should send another driver to the load.

Alliance could charge Dakota for damages if a delivery was late, damaged or lost. Alliance kept a scorecard of Dakota's timeliness. A decrease in Dakota's score could jeopardize future freight orders from Alliance. The court found that none of these facts showed the degree of control over the work performed (here, hauling loads) that Illinois courts have required when finding that an agency relationship exists.

The court reasoned that there was no evidence that the driver, Lewis, was trained using materials that said he was part of Alliance's fleet or otherwise associated with Alliance. He did not wear clothing nor use equipment bearing the Alliance name or brand, nor did he otherwise hold himself out as an employee of Alliance. Alliance did not provide any of the equipment Lewis used. The Dakota-Alliance contract specified that Dakota was an independent contractor with sole responsibility for its employees. Thus, Alliance specified the result it wanted Dakota to accomplish, e.g., moving empty containers or shipping cargo. The court found that type of specifying to be different than dictating the *manner* in which the work of hauling the containers would be performed.

The court concluded that the "Seventh Circuit's treatment of Illinois law has also been consistent with the cases we have cited here concerning the lack of agency relationship." The fact that Dakota was required to insure Alliance as additional insured and indemnify Alliance showed the parties' intent to keep the risk of loss with Dakota and its liability insurer. The plaintiff's references to Alliance's marketing and advertising did not support the agency relationship between Alliance and Dakota. Alliance exercised little, if any, control over Dakota's and its drivers' performance of the transportation work, as opposed to control *over the result* of the assigned task or matters ancillary to the work to be performed. Dakota had no authority to bind Alliance contractually to a third party because the contract between Alliance and Dakota forbade Dakota from subcontracting any of Alliance's work. Thus, all the evidence, viewed in the light most favorable to the plaintiff, overwhelmingly favored the conclusion that Lewis and Dakota were not Alliance's agents. No contrary verdict based on the evidence could ever stand!

For broker liability cases that, for whatever reason, are not federally preempted, this case is a veritable mother lode of ammunition to defend against allegations of vicarious liability on behalf of the broker in either freight loss and damage or casualty scenarios. Many of the hallmarks of the business aspects of brokerages and the fundamental factors underlying the broker model are discussed in depth by the court. The court reviewed these facets carefully and concluded that the model works, i.e., that in a typical broker/carrier relationship, the carrier is *not* an agent and the broker will not be vicariously liable for the motor carrier's actions. As this court finds, the broker *can* exercise various contractual and insurance-related rights without those assertions being found to be indicia of control or liability. The principal theme of the decision is that the broker's actions vis-a-vis the motor carrier should relate to the *results* of the shipping schematic and not the details of how that result is accomplished. Albeit, the court *does* recognize that, in this just-in-time, fast-paced world, frequent contact between the broker and the motor carrier may be necessary but will not connote control nor vicarious liability. One watchword from previous case law to all brokers *is to avoid direct contact with the driver of the specific shipment*. All contact should be with the motor carrier dispatcher or other contact person. When brokers cross that line and begin to have direct contact with the actual driver, courts are more likely to find vicarious liability or liability invoking control.

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