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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 63
EMPLOYEE v. IC: DUAL ROLE OF AGENT AND SMALL FLEET OWNER

The 'Agent Model' is commonly used by motor carriers operating with independent contractors ("ICs") to increase capacity in various markets. The model allows the motor carrier to align certain increased costs; e.g., sales, administrative, recruiting ICs, with a payment structure that is based upon the agent's productivity. A common misconception is that the model in itself distances the motor carrier from the ICs by virtue of the agent acting as an intermediary. Sometimes the 'agent' is just an 'agent' performing some or all of the functions mentioned above, while at other times the 'agent' may also be a small fleet owner that provides equipment/drivers to the motor carrier. Both scenarios require the motor carrier and the agent to carefully consider the elements of control between the parties to preserve the intended independent contractor, vendor/vendee type of relationship.

This type of relationship was recently reviewed by the Federal District Court for the Southern District of West Virginia in *Edwards v. McElliotts Trucking*,[1] whereby the court analyzed the power and the right of control a motor carrier possessed over an agent, as an agent, and as a small fleet owner operating with its equipment under the motor carrier's operating authority.

In *Edwards*, Defendant McGowan, entered into an Exclusive Sales Agency Agreement ("Agency Agreement") with a motor carrier, Defendant Cardinal Transport ("Cardinal"). McGowan, as the sole owner of McElliotts Trucking ("McElliotts"), also entered into an Independent Contractor Agreement ("IC Agreement") which provided him the ability to use his equipment and operate under Cardinal's operating authority under a typical IC/owner-operator arrangement.

Under the Agency Agreement, McGowan solicited business for Cardinal and arranged for the transportation of shipments with McElliotts' equipment. McGowan was paid an 8.5% commission based on revenue generated under the Agency Agreement, and received 76% of the "shipping fees" under the IC Agreement from which McElliotts was responsible to pay for a driver, fuel, maintenance and other operating expenses, as is typical in an IC/owner-operator arrangement.

On occasion, shippers would tender shipments to Cardinal that did not fill an entire trailer, and McGowan would arrange to have the partial load transported to his yard for offloading until he received another shipment which he could combine with the original shipment.

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The Plaintiff, Edwards, was injured while assisting McGowan load a trailer in his yard to make a full truckload shipment.[2] Edwards brought suit for his injuries in Federal Court against McGowan individually, McElliotts, Harold Midkiff, the driver of the McElliotts' truck, and Cardinal. Edwards alleged that McGowan's ultimate employer was Cardinal and thus Cardinal was vicariously liable to Edwards for the injuries caused by the accident in McGowan's truck yard.

Edwards asserted two theories to support his allegations of vicarious liability. The first was based on West Virginia common law, and the second on the Federal Regulations that impose certain requirements on Cardinal's relationship with McGowan and/or McElliotts pursuant to the Federal Leasing Regulations.[3] Cardinal filed a Motion for Summary Judgment requesting dismissal of all of Edwards' claims as a matter of law.

In reviewing Cardinal's Motion, the court (presumably) imputed that Edwards was an employee of McElliotts and proceeded to assess whether McGowan was a statutory employee of Cardinal subjecting Cardinal to Edward's claims for vicarious liability.

The court applied the 4-factor test utilized in West Virginia to determine common law vicarious liability claims.[4] Cardinal conceded that three of the four elements were present in its relationship with McGowan but argued that the fourth and determinative element, 'power of control', did not exist. The court indicated that when considering the existence of the fourth element, it is the power over the process, not just the outcome, that demonstrates the essential feature of control, such that a master-servant relationship exists.

The court began its analysis by reviewing the Agency Agreement and concluded that Cardinal exerted a significant amount of control over McGowan's operation. The Agency Agreement incorporated Cardinal's agent's policy manual which the court viewed as a "tomb-like" document that touched on every aspect of an agent's business. Essentially through the process described, Cardinal had "veto power" over the primary functions of the sales agent—soliciting customers and negotiating rates. Shipping contracts were not final until Cardinal approved them and all billing was handled by Cardinal. Additionally, the Agency Agreement included a non-compete clause and stated that money collected by the sales agent was the sole property of Cardinal.

Thereafter, Cardinal argued that it was only liable for McGowan's negligent acts done in the scope of his employment, which got little traction, and the court summarily determined that the evidence presented was either in conflict or susceptible to contrary but reasonable inferences, and therefore denied Cardinal's Motion for Summary Judgment.

Interestingly, the court, when addressing the argument related to the federal "statutory employee" liability arguments, found that such claims were moot given the court's earlier determination that summary judgment was not proper for Edwards' common law vicarious liability claim. Nonetheless, the court spent an inordinate, albeit interesting, amount of time addressing the implications of the "exclusive possession and responsibilities provision" that is found in the Federal Leasing Regulations,[5] concluding that the provision creates a rebuttable presumption of employment that can be rebutted by state common law principles.

Once again, this case highlights the need to maintain a pulse on the amount of control a motor carrier has when utilizing an agent model not only when the agent is merely an administrative/sales type of agent, but also when the agent is a small fleet owner. The two separate agreements must clearly outline the agent and the IC's ability/right to control certain aspects of their business (and the actions must align accordingly) as would be expected in any vendor/vendee relationship.

The agent model can provide tremendous benefits for all parties involved but by the nature of such an intertwined relationship, it also allows the courts to consider more facts when reviewing elements of control or right of control between such parties. There are ways to accomplish the business objectives desired through the agent model without leading to this type of result.

If you are currently operating under an agent model or are considering such an arrangement, carefully consider the control elements between the motor carrier and the agent/IC. As always, the Benesch Transportation team is available to answer any questions or concerns you may have about the agent model or the standard IC model. Please feel free to contact us for more information.

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[1] *Edwards v. McElliotts Trucking, 2017 U.S. Dist. LEXIS 121293.*

[2] Based on both the Complaint filed in the lawsuit, and the Court's decision, it is unclear what the relationship between Edwards and McGowan and/or McElliotts Trucking actually was: whether a mere "helper" or an employee of McElliotts.

[3] 49 CFR §376.12 et seq.

[4] The four factors are (1) selection and engagement of the servant; (2) payment of compensation; (3) power of dismissal; (4) power of control. *Cunningham v. Herbert J. Thomsas Mem'l Hosp. Ass'n., 737 S.E.2d 270, 277 (W.VA. 2012).*

[5] 49 CFR 376.12(c)(1).

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