CLIENT ALERTS & INSIGHTS

What's Old Is New Again: Broker Liability Insulation from the Case Law in the Post-Montgomery Era

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The Supreme Court has spoken in its *Montgomery v. Caribe Transport* decision, and the brokerage sector, and even shipper and motor carriers, are working toward adapting to this "new liability regime." However, it is important to remember, as pointed out elsewhere in this issue, that the liability regime is *not really* a new one. Yes, *Montgomery* effectively eliminated the defense of federal preemption for brokers (and shippers) in negligent selection lawsuits. However, certain causes of action against brokers had always (going back several decades now) existed in many jurisdictions around the country, *regardless* of preemption status. Those causes of action typically fell, *and still do fall,* into three buckets: (1) negligent selection of a motor carrier (e.g., *Montgomery v. Caribe*); (2) Vicarious liability of the broker for the motor carrier's actions; (3) Joint Venture/Enterprise liability (broker and carrier allegedly act as a shared business with a common purpose, and shared financial interest); and (4) "Broker as Carrier" liability (primarily applicable in cargo loss and damage situations).

Prior to *Montgomery,* there was already a smorgasbord of case law from around the country with favorable and instructive holdings for brokers on reducing, minimizing or eliminating liability for motor vehicle casualty mishaps-by their brokered motor carriers. Most of these scenarios that were impacted by *Montgomery* (in select circuits) were negligent selection cases. However, there were several vicarious liability cases around the country to which the preemption argument was made. Shortly before the *Montgomery* litigation began, one of the most instructive cases for brokers to insulate themselves from liability, and a case with some of the most broad, comprehensive and helpful holdings for broker practices and procedures to insulate themselves from liability, was decided in Illinois. That case was unimpacted by any preemption holding by the Supreme Court (one way or the other). So, that case and its progeny remain unimpacted. It is a tremendously helpful one for brokers. In fact, it was a nuclear verdict reversal, so even better!

In *Cornejo v. Dakota Lines, Inc., 226 N.E.3d 9 (Ill. 2024)*, Gustavo Cornejo was severely injured when standing near his family vehicle shoulder of a highway. There, he was struck by an 18-wheel tractor-trailer. His mother subsequently brought a negligence suit on behalf of her son against defendants Lewis, the truck driver; his employer, the carrier Dakota Lines; and Alliance Shippers, the broker. A jury found that Lewis, Dakota and Alliance were liable to the plaintiff and awarded him $18,150,750. Alliance appealed on the issues of whether, as a matter of law, Dakota was an independent contractor and whether Lewis and/or Dakota were agents of Alliance.

Alliance alleged that the court erred when it denied Alliance's motion for judgment notwithstanding the verdict on these issues, because all the evidence overwhelmingly favored Alliance by showing, as matter of law, that Lewis and Dakota were not agents of Alliance. The evidence demonstrated that Alliance did not pay Dakota's drivers, nor withhold taxes from their pay. Alliance did not hire, train or fire the drivers. Alliance did not dispatch or even speak to the drivers. Alliance did not control the drivers' routes, or provide them with tools, equipment or materials. Alliance did not own the tractors or trailers that the drivers used. Dakota and Alliance had also adhered to 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 not solely be Alliance's carrier. Dakota hired, trained and fired its drivers; paid them; and withheld taxes from their paychecks.

Plaintiff Cornejo contended that vicarious liability for the broker Alliance was the proper legal conclusion for a variety of operational bases. First, Dakota was required to add Alliance as an additional insured on Dakota's insurance policy and to indemnify Alliance. Also, Alliance had requirements regarding seal integrity, freight bills and cargo security for loads transported by Dakota and brokered by Alliance. Alliance would designate if delivery had to be on a flatbed or in a container. Alliance also required Dakota to EDI, email and fax Alliance multiple times a day regarding pickup and delivery times. Dakota was also required to notify Alliance immediately regarding issues like crashes/problems that prohibited Dakota from moving the load. Then, Alliance would decide whether Dakota should send another driver to deliver the load. Alliance could also charge Dakota for damages if a delivery was late, damaged or lost. Alliance even kept a scorecard of timeliness of Dakota's deliveries. A decrease in Dakota's score could jeopardize future freight orders.

The court found that *none of these facts* showed the degree of control over the work performed (here, hauling loads) that courts have required when finding that an agency relationship exists. To wit,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 or use equipment bearing the name "Alliance" or otherwise hold himself out as an employee of Alliance. Alliance did not provide any of the equipment that Lewis used. The relationship between Alliance and Dakota was not an exclusive relationship. The Dakota-Alliance contract specified that Dakota was an independent contractor with sole responsibility for its employees. The court also reasoned that Alliance's specifying the result that it wanted Dakota to accomplish vis-à-vis tasks such as moving empty containers, or shipping cargo, was *different* from dictating the *manner* in which the work of hauling the containers would be performed. Instead, Alliance's requirements to Dakota were indicative of Alliance controlling the *result* to be performed.

The court found 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 it simply showed the parties' intent to keep the risk of loss with Dakota and its liability insurer. Similarly, the plaintiff's references to Alliance's marketing and advertising did not support an 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 plaintiff, overwhelmingly favored the conclusion that Lewis and Dakota were not Alliance's agents. No contrary verdict based upon the evidence could ever stand, so a nuclear verdict was reversed!

Broker Vicarious Liability Dos and Don'ts in the Post-*Montgomery* Era

As noted, this case is one of the most broad and detailed analyses of the nuts and bolts of a broker's operations and its interface with its motor carriers-and how those operations impact the broker's risk of vicarious liability. The case is tremendously instructive on a day-to-day operational basis and from a liability and risk prevention basis. Several paramount dos and don'ts for brokers (and also for shippers who deal directly with motor carriers) course through in the court's decision. Below are some of the most important ones:

1. ***It's the Result!*** Remember the emphatic thematic principle that the broker is entitled, under the law, to control the *result* of the shipment schematic as opposed to the *manner* of the shipment schematic.
2. ***Pox on Direct Driver Contact***. Direct relationships of any kind with the motor carrier's drivers should be minimized, if not eliminated completely, to the greatest extent possible. This includes compensation and other HR-related aspects, and also, importantly (but harder these days), avoiding direct contact between the broker's employees and the motor carrier driver himself/herself.
3. ***No Routing***. Brokers/Shippers should exercise minimal or no control over the driver's route to deliver the shipment.
4. ***Contracting Matters***. The underlying broker-carrier contract should make clear that the motor carrier has full control over its own employees and most notably the drivers and that it is an independent contractor. The contract should also make clear that the broker and the motor carrier do not have any type of exclusive relationship, i.e., the motor carrier can haul loads for other brokers and/or shippers. The contract should also forbid subcontracting of any brokered loads-for a variety of reasons.
5. ***Insurance Matters***. The goal of overall insurance coverage for any shipment is to prevent risk of loss and to have coverage for damage and injury. The courts will apply that goal predominantly over additional insured notations and aspects.
6. ***Some Contact Acceptable.*** Frequent operational contact regarding pickup and delivery times is acceptable.
7. ***MVA Notice.***Notification of motor vehicle accidents *does not* create vicarious liability and should be stressed and required in the underlying contract.
8. ***Performance Metrics Not Fatal***. Performance metrics and on-time tracking do not automatically create vicarious liability, but be careful of fines.

These operational mantras should be fairly easy to achieve-without sacrificing the result for the broker's customers, i.e., arranging transportation of the cargo from origin Point A to destination

Point B. They are also helpful operational practices to be combined with a carrier selection process that is carefully crafted in light of *Montgomery* and is-as importantly-adhered to by the broker or shipper. These practices could prevent an unwanted invitation to the litigationfest that may ensue in the wake of the *Montgomery* decision. We can only hope!

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