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The 3PL Dilemma: Trucking Broker/Logistic Provider Liability

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I. SUMMARY

Recent federal case law is largely favorable for shielding broker/logistics (3PL) companies from liability due to injuries caused by motor carriers and their drivers. Negligent hiring remains a concern where the motor carrier has a poor safety record or is poorly rated. The broker/logistics company must be careful to satisfy itself that the motor carrier is properly qualified, but not exercise the sort of control, which would destroy the independent contractor relationship. Finally, the unwary broker/logistics company could design a route where injuries become foreseeable and thereby result in civil liability.

II. INTRODUCTION

This article will address recent developments in federal case law where claimants injured in trucking-related traffic accidents attempted to place liability on trucking brokers/third party logistics (also known as 3PL) companies.

Brokers provide a variety of transportation services to shippers, eliminating the necessity for shippers to manage and contract for their own freight carrying needs. For motor carriers, especially small ones, brokers alleviate the need to solicit individual contracts from each shipper by providing a centralized clearinghouse allowing the motor carrier to serve many different shippers. Brokers may also offer logistics services, which would include designing routes. For the purposes of this paper, a broker offering logistic services will be referred to as a broker/logistics company or a 3PL company.

3PL companies bring shippers and carriers together. As independent intermediaries, acting for the benefit of both shippers and carriers (but as agents or employees of neither), they are vital conduits that have the expertise to provide for the efficient transportation of goods throughout the country as well as internationally.

III. TYPICAL CLAIMS

Claimants maintain that broker/logistics companies are in control of the motor carriers with whom they contract and thus are considered liable via *respondeat superior*. Claimants also state causes of action for poor route design, negligent hiring, and violation of Federal Motor Carrier Safety Regulations (FMCSR).

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IV. POTENTIAL CIVIL LIABILITY OF 3PL COMPANIES

While broker/logistics companies' services necessarily exist between shippers and carriers, one might suppose that the associated civil liability would be limited to actions between those entities (i.e., unpaid freight charges; untimely shipping of goods). However, recently broker/logistics companies have been exposed to civil liability through various legal theories for the tortious conduct of the motor carriers and drivers with whom they contract. Personal injury claims have not only been lodged against motor carriers and drivers for trucking-related accidents but against broker/logistics companies as well. To claimants, this is a creative way to increase recoveries by expanding the pool of defendants.

Recently, federal district courts have addressed just such cases and have rendered decisions mostly favorable for the 3PL companies.

A. *Smith v. Spring Hill Integrated Logistics Management, Inc.* - The Factual Synopsis of a Broker/Logistics Company Personal Injury Liability Case

This case was defended by the author and his law firm. Spring Hill Integrated Logistics Management, Inc. ("Spring Hill") was a broker/logistics company which contracted with Chieftain Transportation Services ("Chieftain") as a motor carrier, along with other motor carriers, to provide deliveries of automobile parts to Saturn. The automobile parts were being shipped from Cleveland, Ohio, to the main Saturn plant in Spring Hill, Tennessee, where they were used in assembling new cars. On behalf of Saturn, Spring Hill not only hired Chieftain to ship these automobile parts but designed the round-trip route schedule, specifically developing the pick-up and delivery times while accommodating driver breaks and allowing ample time for the route to be completed safely. This was a frequently run route and the evidence showed that it had an on-time success rate of over 97 percent.

On June 22, 2000, two Chieftain team drivers, Mr. Mobley and Mr. Ashford, started the route an hour late. Initially, Mr. Ashford was to sleep while Mr. Mobley drove. Unfortunately, Mr. Ashford had not been able to sleep and, instead, spent some time sitting in the passenger seat awake. After driving for five hours, Mr. Mobley switched positions with Mr. Ashford. Because Mr. Ashford had not been able get sufficient sleep, he began to drive while fatigued.

Mr. Ashford once meekly attempted to wake Mr. Mobley, but was unsuccessful and continued to drive while fatigued. Tragically, Mr. Ashford fell asleep at the wheel on north-bound Interstate 71 near Strongsville, Ohio. A resulting multiple vehicle collision included a car occupied by Mrs. Heidi Smith, her eight-month-old daughter Hailey, and her two-year-old son Austin. Mrs. Smith and Hailey were killed and Austin sustained life threatening injuries.

As a result of this tragic accident, Mr. Ashford was found guilty of vehicular homicide and was incarcerated. Additionally, a civil suit commenced. Plaintiffs settled with the motor carriers involved as well as the truck driver, the automobile parts manufacturer and the owner of the commercial motor vehicle. The suit was dismissed but then refiled against the broker/logistics company and was subsequently removed on diversity grounds to the United States District Court for the Northern District of Ohio, Case Number 1:04CV12, Judge Donald C. Nugent. The Court's October 6, 2005, Memorandum and Opinion granting defendant's motion for summary judgment is unreported, but can be obtained on Lexis at 2005 U.S. Dist. LEXIS 22765 or by contacting the author.

B. Plaintiff Claims and Defense Arguments

As mentioned above, plaintiffs claimed negligence and negligence per se based on negligent and reckless management of the drivers, motor carriers, the route itself, and negligent design and implementation of the delivery schedule, and violations of the FMCSR. Since tortious liability against broker/logistics companies is a relatively undeveloped area in trucking law, plaintiffs put forward numerous legal theories to attach civil liability to the 3PL company. In particular, plaintiffs alleged that defendant, as the hiring entity of the motor carrier as well as the designer of the trucking route, controlled, managed or otherwise supervised the motor carrier and its drivers and, therefore was liable under *respondeat superior* principles. In addition, plaintiffs alleged negligence in hiring the motor carrier. Plaintiffs contended as well that the broker/logistics company owed plaintiffs various legal duties of care arising from the terms of the contract between the broker/logistics company and the motor carrier. Further, plaintiffs alleged that the route schedule was unsafe and negligently designed as it forced drivers to drive while fatigued. As such, the plaintiffs claimed, the injuries sustained were foreseeable.

Plaintiffs also alleged the broker/logistics company was subject to liability under the FMCSR. Plaintiffs

argued that the broker/logistics company was a *de facto* motor carrier and, thus, subject to all liability as if it were the actual motor carrier. Similarly, plaintiffs claimed that the broker/logistic company aided and abetted the driver in violating the FMCSR and other laws. Punitive damages were also sought.

The defense countered these claims, and plaintiffs in essence conceded that defendant could not be found liable under the *respondeat superior* theory as originally advanced. The defense was able to defeat the claims that brokers/logistics companies owed any legal duties of care to plaintiffs. The defense also used the FMCSR to demonstrate the distinction between the broker/logistics company and a motor carrier, thereby precluding any liability for the tortious conduct of the motor carrier or its drivers.

V. THE LAW OF BROKER/LOGISTICS COMPANY CASES

A. Liability for the Conduct of Independent Contractors

The black letter law of *respondeat superior* principles is relatively simple. However, it is important to address this principle in order to demonstrate how plaintiffs attempted to argue that the broker/logistics company was liable.

1. *Respondeat Superior and Independent Contractors*

An employer is liable for the negligent acts of an employee.[1] However, an employer of an independent contractor is generally not liable for the negligent acts of the contractor or of his servants.[2] The key determination to establish whether one is an employee or an independent contractor is the right to control the manner or means of performing the work.[3]

In *Spring Hill*, the contract between a broker/logistics company and a motor carrier expressly stated that the motor carriers's role was strictly that of an independent contractor. The plaintiffs could not seriously deny that the broker/logistics company could not be found liable under the principles of *respondeat superior* because the broker, in actual practice, did not exercise control over the day-to-day operations of the motor carrier. Thus, the contract and its actual interpretation were relevant to the court's determination.

i. Negligent hiring

A broker must exercise reasonable care in the selection of a competent and careful independent contractor motor carrier.[4] An employer who engages an independent contractor with either actual or constructive knowledge that the contractor does not possess that measure of skill required for the proper performance of the work is liable for negligence in hiring the incompetent contractor.[5]

In *Smith v. Spring Hill*, plaintiff adduced no credible evidence that the broker/logistics company had negligently hired the motor carrier. In its defense, the broker/logistics company provided the following facts:

(1) testimony by plaintiffs' own expert that the broker/logistics company's hiring of the motor carrier was reasonable;

(2) the motor carrier was duly licensed, certified, and qualified to provide motor carrier services pursuant to the FMCSR;

(3) the motor carrier maintained the highest available "SAFER" safety rating from the U.S. Department of Transportation;

(4) the motor carrier met and exceeded its obligation under the FMCSR and the applicable contract to carry all necessary insurance coverage; and

(5) its driver hiring and training processes had been certified by ISO 9000, an independent organization.

Consequently, the court summarily disposed of that exception.

Spring Hill is not the only case to address broker liability for negligent hiring. In *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md 2004), a well-known and extensively discussed case, the plaintiffs brought suit against a broker/logistics company, the motor carrier and the truck driver for injuries sustained in a trucking-related traffic accident. The broker moved for summary judgment on all claims, including negligent hiring. The Court granted summary judgment on all issues except for the issue of negligent hiring. Critical to the court's decision was the fact that the motor carrier had a marginal to deficient SafeStat rating and was unrated by SAFER. The court reasoned that " . . . imposing a common law duty upon third party logistics company to use reasonable care in

1. Pusey v. Bator, 94 Ohio St.3d 275, 278-279, 2002-Ohio-795.
2. *Id*.
3. *Id*. at 278-279.
4. *Albain, supra* note14, at 258.
5. McGregor v. Heitzman, 98 Ohio App. 473, 476 (1953).

selecting carriers furthers the critical federal interest in protecting drivers and passengers on the nation's highways." This result occurred despite the broker's citation of the following disclaimer on the SafeStat website:

> "WARNING: Because of State data variations, FMCSA cautions those who seek to use the SafeStat data analysis system in ways not intended by FMCSA. Please be aware that use of SafeStat for purposes other than identifying and prioritizing carriers for FMCSA and state safety improvement and enforcement programs may produce unintended results and not be suitable for certain uses.

Comparing the outcome of *Spring Hill* with that of *Schramm*, it can be concluded that a broker/logistics company's liability for negligent hiring is dependant upon the motor carrier's overall ability to demonstrate to the broker that the motor carrier transports goods safely and operates competently. Brokers must scrupulously investigate and qualify motor carriers.

ii. Contracting non-delegable duties

The Plaintiffs in *Spring Hill* argued that the operation of a commercial motor vehicle is "inherently dangerous and therefore a 3PL cannot delegate to the independent contractor motor carrier the duty of reasonable care.

Because the determination of what constitutes an "inherently dangerous" activity necessarily requires subjective assessments of the likelihood of injury to others as well as the magnitude of the potential harm, one might naively assume that freight shipping using semi-tractor trailers traveling at high speeds along the crowded highways would comprise just such an "inherently dangerous" activity. However, the *Spring Hill* court properly recognized that ***as a matter of law*** the operation of commercial motor vehicles is not an "inherently dangerous" activity in and of itself.[6]

The court found that the use of team drivers, the buffer time built into the route, and the qualifications of the motor carrier were all argued as factors militating against a finding of "inherent danger."

B. 3PL Liability for Fatigue and Hours of Service Violations

Recall that in *Spring Hill* the broker also designed the route and timetable utilized by the motor carrier. The tortfeasor truck driver voluntarily continued to drive while he knew he was fatigued. Plaintiffs' initial contention was that the broker/logistics company owed a legal duty to plaintiffs because the injuries sustained by plaintiffs were a foreseeable consequence of the broker/logistics company's failure to communicate to the drivers the underlying timetable (and time buffers) for the route. Plaintiffs argued that the broker/logistics company should have realized that the driver, ignorant of the timetable upon which the route was designed, would feel pressured to continue driving while fatigued in order to quickly complete the route.

The test for foreseeability is whether a reasonable, prudent person would have anticipated that injury or damage was likely to result in the performance or nonperformance of an act.[7]

The court found that the broker/logistics company could not foresee that the truck driver would elect to continue driving while fatigued when there was no particular time pressure to complete the route, there was no adverse consequence for resting, the responsibility for communicating the route was in the control of the motor carrier, and the driver did not wake his team driver to operate the tractor trailer. Thus, the broker/logistics company did not owe a duty to plaintiffs.

1. *Confronting the Argument that the Contract between the Broker/logistics Company and the Motor Carrier Creates a Duty*

Plaintiffs also attempted to create a duty based upon provisions in the contract between the motor carrier and the broker/logistics company. More specifically, plaintiffs alleged that because various provisions in the contract were not implemented, the trucking accident occurred. The subject provisions mainly dealt with the performance of the route and quality control evaluations between the contracting parties.

However, in order for contract provisions to create a duty, contract law states that plaintiffs must be parties to or third party beneficiaries of the contract. Section 302 of the Restatement 2d, Contracts (1981) 439-440[8] states in pertinent part:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

6. George v. H. James Fry Trucking, Inc., (June 11, 1982), 6th Dist. No. L-82-074, 1982 Ohio App. Lexis 11552 at 6 (where the appellate court affirmed summary judgment in favor of the owner of a trucking company because the driver who caused injury to the plaintiffs was an independent contractor.

7. Thomas v. City of Parma, 88 Ohio App.3d, 523 (1993).

8. Cited in Hill v. Sonitrol of Southwestern Ohio, Inc., 36 Ohio St. 3d 36, 39 (1988).

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Further, Comment e to Section 302 states: "[p]erformance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created. * * *" Under this test, if the promisee, the broker/logistics company, intends that a third party (i.e. the motoring public) should benefit from the contract, then that third party is deemed an "intended beneficiary" who has enforceable rights under the contract. On the other hand, if the broker/logistics company had no intent to benefit a third party, then any third party to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.

The court adopted defendant's argument and clearly stated that there was no privity of contract between the broker/logistics company and plaintiffs. Further the court neither saw any evidence nor any legal theory under which to find that plaintiffs were a third party beneficiary to the contract between the motor carrier and the broker/logistics company.

Even if plaintiffs were third party beneficiaries, their attempt to recover under a tort theory by the provisions of the contract would fail. In reviewing these arguments, the court found that it is well settled Ohio law that a tort action cannot arise under the provisions of a contract.[9]

2. *No Duty Arises from Expert Testimony Attempting to Create a Duty*

While it is not unusual for experts to be instrumental in creating issues of fact to overcome summary judgment, they wrongly invade the province of the court when they provide opinions on matters of law such as the existence of a legal duty. Experts often opine that a legal duty exists and occasionally are of the opinion that a new legal duty should be created. Thus it bears discussion here for the simple fact that plaintiffs utilized expert testimony in hopes of overcoming summary judgment by arguing the broker/logistic company owed plaintiffs a new legal duty. However, "an expert's opinions cannot create a duty where no such duty exists."[10] Expert testimony regarding matters of law is not appropriate because the court may not abdicate its role as finder of law.[11]

The *Spring Hill* court addressed this issue. The Court found that plaintiffs' expert could not create a legal duty and that the expert's testimony would likely not have been admissible.

C. The Motor Carrier Violations of the FMCSR

As mentioned above, the *Spring Hill* court addressed plaintiff's arguments that one who acts in the capacity of a broker especially if it is also a motor carrier, is subject to the dictates of the FMCSR. Plaintiff attempted to argue that the broker was a "de facto" motor carrier due to its involvement in brokering the load. The court rejected this argument based on the definition of a broker and of a motor carrier, found in 49U.S.C. §13102(2) and (12):

> A "broker "means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."[12]
>
> A "motor carrier" means "a person providing motor vehicle transportation for compensation."[13]

This distinction is critical because the FMCSR attributes liability for violations of the pertinent regulations to motor carriers, not to brokers.

1. *Aiding and Abetting the Truck Driver's Criminal Conduct*

Plaintiff in *Spring Hill* (and to a lesser extent in *Schramm*) contended that the independent contractor rule was unavailable because the broker/logistics company had somehow "aided and abetted" the criminal conduct (driving while fatigued) of its independent contractor, the motor carrier, in violating local, state, and federal laws. Aiding and abetting is described in FMCSR Part 390.13.

9. Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App. 3d 137 (1996).
10. Dickerson v. Kirk, (Jan. 19, 1999) 12th Dist. No. CA98-09-186, 1999 Ohio App. Lexis 78, at 8.
11. Payne v. A.O. Smith Corp., 627 F. Supp. 226, 228-229 (S.D.Ohio 1985).
12. 49 U.S.C. § 13102(2).
13. 49 U.S.C. § 13102(12).

The gravamen of plaintiffs' argument was that the 3PL had not followed procedures in its contract with the motor carrier and had not communicated the timing components which were part of the underlying route design. Thus, the drivers were encouraged to drive while fatigued. As a result, plaintiffs alleged, the broker/logistics company facilitated the criminal act of driving while fatigued.

The court reiterated that no tort could arise from the contract. Additionally, the court found that no aiding and abetting can occur unless the 3PL company intended for or knew the driver was operating while he was fatigued. The driver decided on his own to operate while he was tired. The 3PL did not encourage the conduct.

VI. POSSIBLE PREVENTATIVE MEASURES

1. It is advisable to make the independent contractor relationship explicit in the contract. It is more advisable for the *actual practice* to be consistent with the earmarks of an independent contractor relationship.
2. The motor carrier should be able to provide evidence of compliance with driver and company safety and competency standards.
3. The broker/logistics company should periodically verify that its motor carriers are appropriately certified for compliance with safety and competency standards, including satisfactory SAFER and SafeStat ratings.
4. Because tort liability cannot be predicated upon a contract, the contract between the broker/logistics company is irrelevant to the case and a prudent practitioner should submit a motion *in limine* to prevent its introduction at trial. Case law may aid the defense during the dispositive motion stage.
5. Designing routes that would likely cause a driver to speed or drive while fatigued could result in a finding that the injuries occurring from a resulting truck-related traffic accident were, in fact, foreseeable and could render a broker/logistics company liable for negligence. For this reason, redesigning routes is warranted when communications with truck drivers indicates completion of the route is creating a time stress. Thus, the qualifications of the route designer are crucial. Consideration should be given to having routes reviewed by an outside logistics consultant and a fatigue expert.

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