The Voice of the Defense Bar




In Transit

The Newsletter of the Trucking Law Committee

Volume 18 Issue 1

The Bridge to Broker Liability

by Michael Reda and Michael Harriss


Introduction

Illinois and Missouri recently celebrated the opening of the Stan Musial Veterans' Memorial Bridge, which now carries Interstate 70 traffic across the Mississippi River. One of the stated purposes in building the bridge was to relieve the volume of commercial motor vehicle traffic that passed through downtown St. Louis across the Poplar Street Bridge where Interstates 70, 55, and 64 converge. While there was some debate between the respective state legislatures over the naming of the bridge, the trucking industry generally, and brokers specifically, should be aware that when traveling from Missouri to Illinois they may be crossing, what is better known as, the bridge to broker liability.

***Sperl:* The Case That Started It All**

Because the root cause of the recent assertions of broker liability is *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E.2d 463 (Ill. App. Ct. 2011), it is important to understand exactly why the court found liability—that is, $23.8 million against the freight broker—appropriate in that case. In *Sperl*, the court's decision rested primarily upon the significant "indicia of control" asserted by the broker. The court concluded, for example, that the broker "directed [the driver's] conduct during the entire transportation process" by articulating "extensive requirements" as well as imposing a "system of fines" to enforce those requirements. 946 N.E.2d at 471-72. Specifically, the broker required that the driver (1) use a refrigerated trailer of a specific length; (2) pick up the load at a specified time; (3) make daily "check calls", as well as maintain "constant communication"; and (4) "continuously measure" the temperature of the product throughout the trip. *Id.* The court also considered facts indicating that the broker communicated directly with the driver to tender and dispatch the load, the broker paid the driver directly by depositing money in her bank account, and the broker owned the load being delivered to its own warehouse facility. *Id.* at 472. These facts, the court concluded, evidenced too much control; thus, the broker crossed the line from an independent contractor relationship to an employer-employee relationship warranting vicarious liability. Throughout the state and federal trial courts in southern Illinois, plaintiffs' counsels have increased their attempts to fit the facts of their case into a theory of broker liability, similar to *Sperl*. In federal court, for example, plaintiff's counsel asserted that a broker, in addition to the motor carrier, was vicariously liable under *respondeat superior* or agency and/or ostensible agency principles. Later, however, plaintiff's counsel voluntarily dismissed the broker, and the case eventually settled. But another case was filed in Madison County, Illinois, in which the deposition of the freight broker's representative provides a glimpse into plaintiff counsel's battle plan for asserting broker liability.

Lessons From a Deposition: Insight into Plaintiff Counsel's Battle Plan for Broker Liability

To reach the broker's deep pockets, plaintiff's counsel asserted a novel "joint venture" theory of liability based, in part, on *Sperl*'s "indicia of control" rationale. During the deposition of the freight broker's representative, plaintiff's counsel laid the foundation for his theory by securing testimony that allowed him to characterize the freight broker as acting as part of a venture with the shipper and motor carrier for the sole purpose of shipping the load for profit. This was accomplished during a long deposition, examining multiple documents, including most—if not all—contracts between the broker and both shipper and carriers.

Counsel first addressed the contract the broker had with the “customer”/”shipper” of the goods. The first target for plaintiff’s counsel was language in the contract stating: “Contractor—which in this instance refers to [broker]—will arrange to promptly and efficiently receive, transport, and deliver safely and with reasonable dispatch and without delay, the good entrusted to it hereunder, whether received from shipper or from third parties at the request of shipper.” Counsel used this language to attempt to establish that the freight broker had an “interest” in the goods when the broker “receive[d]” the goods under the contract. Of course, the broker’s representative denied that the company either received or ever took an interest in the goods. Counsel, however, was undeterred.

Then counsel addressed the contracts the broker had with various carriers, directly asking the representative whether the broker “directs the activities” of the carriers. Later in the deposition—after the representative admitted that “Yes”, the broker directs the activities of the carrier—counsel moved back to the contract between broker and shipper. Specifically, counsel pointed to language stating: “Contractor will arrange to provide, *supervise and control* competent, skilled, and properly licensed drivers . . . .” Based on that language, counsel asked the broker what they did to “supervise and control the driver”. While denying that the broker controls the driver, the representative went on to explain that the broker “monitors” the carrier to ensure that they have the proper safety rating, authority, and insurance—including, naming the broker as an additional insured on the carrier’s insurance policy—as well as monitoring the carrier’s safety statistics and out of service record. Counsel showed a glimpse of his future trial strategy by then asking whether the broker “ensures compliance” by taking the carrier out of the system—meaning they are unable to get loads from the broker—if they do not comply with safety standards. The broker’s representative agreed, seemingly unaware that such an admission could establish the sufficient “indicia of control” under *Sperl*.

Particularly detrimental to the broker’s position, counsel also relied on an “Addendum to Quality Partner Drayage Agreement” between the broker and the carrier, in which a recital stated that “Partner is a motor carrier and has entered into a Quality *Partner* Drayage Agreement with [broker] . . . .” Of course, counsel then asked who the “partner” was that was being referred to in the contract. Although the representative denied having partners, insisting that the carriers are “independent contractors”, the representative eventually conceded that “that’s what the document states, yes”—meaning the motor carrier was a partner for purposes of that agreement. Counsel then introduced the joint venture theory, reading another portion from the agreement: “Partner shall pay [broker] 5 percent of all revenues received from [broker] or derived from [broker] shipments.” Although the representative denied having personal knowledge regarding the payments, counsel had already laid the foundation for a future trial strategy of arguing that the broker and the carrier were in a joint venture for profit.

Finally, counsel turned to the bill of lading which, as the broker’s representative testified, defines the obligations of the parties to the transportation of freight. Specifically, the representative testified that the broker told the carrier where to pick up the load, where to deliver the load, and what time the load needed to be delivered. Still attempting to establish the broker’s control over the load, counsel also pointed to language in the agreement requiring the carriers to maintain a 98.5 percent on-time performance, as well as the broker’s agreement to pay the carriers within 30 days of delivery. Unfortunately for the broker, many of these admissions were also the bases for the significant “indicia of control” in *Sperl*.
By the end of the deposition, counsel laid his strategy out for all who had not already seen the writing on the wall, saying that his questions were getting at the broker’s “status as either a carrier or perhaps as a joint venture.” He then followed up, after comparing the invoice sent to the shipper to the receivables, by characterizing “an operation here which consisted of [broker and carriers] who collectively charged [shipper] $1,102 and those groups then divided that amount amongst themselves” with “the purpose of this venture” being “to take a load and transport it from one place to another.” Precisely the type of joint venture counsel would present to a judge and jury with the hopes of reaching the broker’s deep pockets.

Although this case eventually settled, the clear lesson is that plaintiffs’ counsel have demonstrated a willingness to push the envelope regarding broker liability to see how far courts are willing to expand the scope of liability and how close freight brokers are willing to skirt the cliff of *Sperl*-like liability.

A Potential Sigh of Relief for Brokers

There is good news for freight brokers, however. Although plaintiff’s counsels are pushing for more instances of broker liability, courts at both the state and federal level appear to be more conservative in their approach. Near the end of 2013, for example, the Northern District of Illinois granted summary judgment in favor of both the shipper as well as the freight broker in *Scheinman v. Martin's Bulk Milk Serv., Inc.*, 09 C 5340, 2013 WL 6467525 (N.D. Ill. Dec. 9, 2013).

According to the court, “Plaintiff relie[d] exclusively on *Sperl* to argue that a transportation broker can be held liable for a driver's negligence.” *Id.* at *13. In granting summary judgment for the broker, the court simply distinguished the case before it from *Sperl*. In doing so, the court recognized that broker liability may exist, under *Sperl*, if there are sufficient “indicia of control” as well as “other factors” the court in*Scheinman* found relevant, including: “the fact that the broker communicated directly with the driver to tender and dispatch the load, the broker paid the driver directly by depositing money in her bank account, and the broker owned the load being delivered to its own warehouse facility.” In *Scheinman*, however, the court found that *Sperl* was inapposite because “[n]one of these factors are present” in the case. *Id.* Specifically, the court found it was undisputed that the broker did *not*:

(1) pay the driver directly;

(2) withhold taxes from the driver’s earnings;

(3) insure either the driver or the truck he was driving;

(4) pay the driver’s expenses; or

(5) furnish tools, materials, or equipment for the driver to utilize when hauling loads pursuant to the broker’s agreement with the motor carrier.

Id. at *12. Because of these undisputed facts, “the most important factor”—the indicia of control—was not satisfied; therefore, the broker escaped liability by carefully avoiding the factual scenario of *Sperl*. Also, another Illinois appellate court—eight months after *Sperl* was decided—refused to hold a shipper of steel vicariously liable for the injuries caused by a driver’s negligence because the shipper did not assert too much control over the manner in which the work was performed. *Dowe v. Birmingham Steel Corp.*, 2011 IL App (1st) 091997, 963 N.E.2d 344 (Ill. App. Ct. 2011). Interestingly, the court did not rely on *Sperl*directly in its opinion. The court did, however, base its decision on the facts suggesting that the driver “chose his own route; controlled his own hours; provided and maintained his own equipment; . . . and performed his job pursuant to rules he received from [the motor carrier].” *Id.* at 351. While the court may not have relied on *Sperl* directly, the court’s focus suggests that the broker escaped liability by avoiding the same set of facts that led to liability in *Sperl*—those facts suggesting too much control.

Conclusion

Traditionally, a broker avoided liability for any injuries caused by the driver while transporting the load. Unlike the motor carrier, who might be vicariously liable as the employer of the driver, the broker typically remained outside the reach of such liability because the broker treated the motor carrier as an independent contractor. But this understanding was torpedoed in *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E.2d 463 (Ill. App. Ct. 2011) when the $23.8 million verdict against the freight broker was upheld. Of course, with eyes on similar verdicts reaching into the “deep pockets” of freight brokers, there has been an uptick in assertions of broker liability in trucking accident cases throughout Illinois trial courts, and specifically in Southern Illinois, as observed by the authors. The trend to bring claims against brokers will not be limited to Illinois courts as plaintiff’s counsel throughout the country push the envelope in an effort to expand the scope of liability in these cases. As a result, a broker arranging the transportation of loads that may cross the bridge between Missouri and Illinois—or any other state—must recognize that they may, in fact, be crossing a bridge to broker liability.

Michael Reda *is a partner in HeplerBroom, LLC's St. Louis, Missouri office. He has tried more than 100 civil jury trials in state and federal courts in Illinois and Missouri, including cases involving catastrophic trucking accidents. He can be contacted at mreda@heplerbroom.com.*

Michael Harriss *is an associate in HeplerBroom, LLC’s St. Louis, Missouri office. He is a litigation attorney with experience handling all phases of the litigation process, with particular experience handling the defense of cases involving trucking accidents. He can be contacted at meh@heplerbroom.com*