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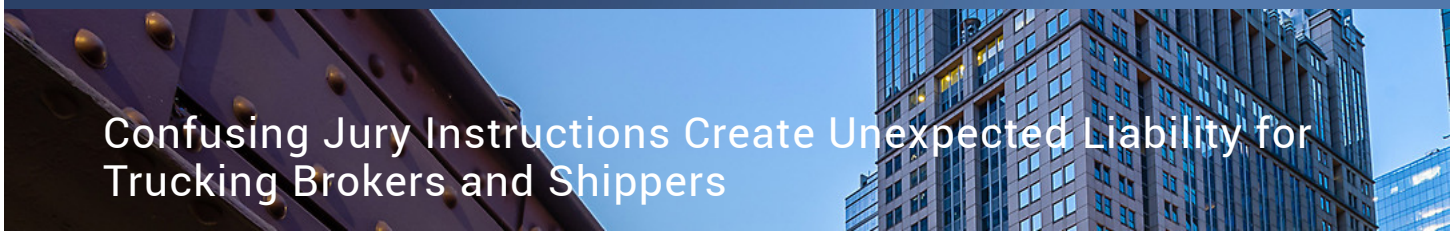

Confusing Jury Instructions Create Unexpected Liability for Trucking Brokers and Shippers

By Adam McGonigle on February 28, 2023
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Plaintiffs have long sued trucking brokers and shippers in search of deep pockets and additional insurance, but their theories of liability may be evolving. Because of vague, plaintiff-friendly jury instructions, plaintiffs are increasingly suing brokers and shippers under an agency theory, and many are winning big.

Traditional Theories of Liability Against Brokers and Shippers

Personal injury lawsuits against trucking brokers and shippers are not a new development, but plaintiffs are changing their theories of liability. Traditionally, plaintiffs would sue the broker or shipper alleging that it negligently selected the motor carrier.

Negligent selection cases are easy to allege and difficult to win. The plaintiff must not only prove the underlying negligence case (i.e., the negligence case against the trucking company or driver), they must also prove that the shipper or broker negligently selected the trucking company. It is, in effect, two cases in one. Relevant evidence includes a motor carrier's safety rating, its accident history, and the driver's licensure. Evidence may also include the company's or driver's history of traffic or moving violations, the operating condition of the tractor-trailer, and the historical relationship between the shipper/broker and the motor carrier. These are complex, evidence-heavy cases. And even when the trucking company's liability is clear, the broker or shipper's liability in a negligent selection case is usually far murkier.

Jury Instructions on Broker and Shipper Liability under "Agency" Theory

From a plaintiff's perspective, proving an agency claim against a broker or shipper is often much simpler. The plaintiff need not prove that the broker or shipper failed to investigate the carrier or driver before hiring it. They need not show that the carrier or driver was unsafe, had a history of accidents, or was operating an unsafe vehicle. Instead, to prove an agency claim, the plaintiff need only show that the carrier or driver was negligent and that the shipper or broker had the "right to control" the carrier.

The "right to control" is the linchpin of an agency claim against a trucking broker or shipper. Unfortunately, pattern jury instructions on agency claims are confusing and vague. The Illinois jury instruction, for example, provides that a trucking company or driver is an agent of the shipper/broker if there is an agreement between the two wherein the carrier or driver "transacts business, manages some affair, or does some service for the principal, with or without compensation." Illinois Pattern Jury

Instruction 50.05. The instruction further provides that the agreement may be "oral or written, express or implied." *Id.* Most critically, however, the instruction specifically advises the jury that if it "find[s] that one person has the right to control the actions of another at a given time, you may find that the relationship of principal and agent exists, *even though the right to control may not have been exercised*." *Id.* (emphasis added). In other words, a shipper or broker may be liable for the trucking company's actions even without a written agreement or actual control over the carrier if the jury finds merely that they had some nebulous "right" to control the carrier.

Missouri's jury instruction on agency is similarly confusing and representative of similar instructions nationwide. It provides that an agency relationship exists where there is an "express or implied agreement" between the alleged principal and agent and the principal "either controlled or had the right to control the physical conduct" of the agent. Missouri Approved Instruction 13.06. Neither Illinois' nor Missouri's instructions provide the jury any guidance into what constitutes a "right to control."

Case law in many states indicates that the "right to control" is not as nebulous a concept as the jury instructions would suggest. Courts have found that a "right to control" exists, for example, where the principal has the right to hire and fire the agent. The critical inquiry, courts say, is whether the alleged principal controls the manner or method in which the agent performs the actual work. *See, e.g., Shoemaker v. Elmhurst-Chicago Stone Company*, 273 Ill.App.3d 916, 921 (1st Dist. 1994); *Perkinson v. Manion*, 163 Ill.App.3d 262, 268 (1987)). Stated differently, a broker or shipper that controls who the carrier employs and how the carrier supervises and trains its drivers may be liable for the carrier's—and its driver's—negligence. So too may a broker or shipper that sets the carrier's routes and driver work schedules or dictates the driver's compensation.

Unfortunately, judges are ordinarily reluctant to modify pattern jury instructions to more accurately reflect their state's substantive law. Judges who do modify jury instructions face a real risk of reversal on appeal. Instead, the jury—composed of lay persons untrained in the law—is tasked with defining the "right to control."

Practice Tips

Brokers and shippers can take actions to protect against potential agency claims:

1. **Define the relationship with the carrier in a written contract.** The written contract between the carrier and the broker or shipper should set out in detail the relationship between the parties. It should specifically state that the driver is neither an employee nor an agent of the broker/shipper. It should state that the driver's compensation, schedule, and route are to be determined by the carrier, and that the carrier is responsible for providing the driver's tractor, trailer, and all equipment, along with all driver training, supervision, and discipline. Additionally, the contract should state that the carrier is responsible for all hiring and firing decisions. Though it may not be enough to defeat an agency claim before trial, such a written contract would be strong defense evidence for a jury to consider.
2. **Conduct due diligence before selecting the carrier.** In selecting a carrier, the broker or shipper must of course conduct its due diligence, lest it invite a negligent selection claim. It must review the

motor carrier's safety rating, safety record, and accident history. It must confirm that the carrier's drivers are all properly licensed and experienced truck drivers, and it should confirm that the carrier has an adequate safety program and operational equipment.

3. **In the event of a claim, obtain separate counsel.** Contracts between brokers and shippers and carriers often provide that one side agrees to defend and indemnify the other in the event of a lawsuit. Nevertheless, a clear conflict exists in these cases between the allegedly negligent carrier and the broker or shipper. At trial, it is critical for the broker or shipper's defense team to distinguish its clients from the allegedly negligent driver. They simply cannot do so if they represent both defendants.

Takeaway

As plaintiffs continue searching for deeper pockets in personal injury lawsuits, trucking brokers and shippers should be wary of agency claims – and take action now to prevent liability down the road.

Tags: Agency Claims, Illinois Pattern Jury Instructions, Jury Instructions, Missouri Pattern Jury Instructions