Brokerage Victory: Claim for "Negligent Retention of Motor Carrier" Dismissed for Failure to State a Claim

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The transportation brokerage industry has received a much welcomed decision. The Southern District of Florida recently saw fit to dismiss, *at the pleading stage*, a "negligent selection of motor carrier" claim arising from a cargo theft. *Mega International Trade Group Inc. v. A-Link et al, Case* No. 14-24757 (M.D. Fla. June 19, 2015) Though unpublished and not appealable as an interlocutory ruling, the *Mega* decision's immediate impact is by application of the elevated federal pleading standards, under *Twombly* and *Ashcroft*, to *Schramm* oriented negligent motor carrier retention claims.[1] Those defending brokerage operations from the onslaught of negligent hiring claims now have further ammunition to successfully attack questionable pleadings, *ab initio*, instead of enduring years of costly discovery before (hopefully) prevailing at the summary judgment stage.

The Facts

The *Mega* decision arises from a stolen shipment of Sony camcorders in transit to the United Arab Emirates. The camcorders never made it out of the United States. The plaintiff/shipper sued no less than eight defendants involved in warehousing, brokering and transporting the freight. For purposes of this article, the focus is upon the brokerage or logistics component of the transaction. Mega International ("Mega") retained A-Link Freight to "coordinate the international transportation", with A-Link hiring Trade & Traffic ("T&T") as the NVOCC to consummate the inland portion of the delivery. T&T then retained TTSI as the drayage carrier to deliver the containerized freight from the shipper's Miami Port facility. Immediately after the carrier took possession, mysterious forces removed the freight from its containers. Presumably, and as the *Mega* decision suggests, TTSI driver complicity played a role in the theft.

The plaintiff, Mega (as the shipper/owner of the freight), brought a common law negligent retention of motor carrier claim against T&T. Specifically, alleging it negligently selected TTSI given T&T's *assumed suspicion and/or general knowledge* of the following: (1) that it was well known TTSI's owner had prior theft problems while working for another motor carrier; (2) the TTSI driver selected was "untrustworthy and dishonest"; (3) that TTSI's "safety ratings were below average, and its out of service rate was 41% higher than the national average of 20.7%"; *and* (4) that TTSI only carried cargo loss coverage of $100,000, despite knowing the freight's invoiced value exceeded $1 million. The plaintiff offered no specific facts supporting the otherwise general claim that the broker knew of industry rumors regarding the TTSI owner's prior theft problems, and of driver untrustworthiness and dishonesty.

Relying on the elevated notice pleading standards enunciated in *Bell* and *Ashcroft, supra,*, the *Mega* court granted T&T's Rule 12(b)(6) motion to dismiss the plaintiff's negligent hiring claim, concluding that "mere conclusions, speculation and formulaic legal recitations could not state a plausible claim for relief". The bases of the *Mega* court's ruling were as follows:

"The Untrustworthy Driver and Carrier"

In dismissing the shipper's negligent selection claim, the *Mega* court first riveted on the common law elements of such a claim under Florida law, elements that are replicated in nearly every other state. Foremost, requiring the plaintiff plead the transportation broker "knew or reasonably should have known of a *specific incompetence or unfitness that proximately caused the theft*." With this in mind, the *Mega* court brushed aside generalized allegations claiming T&T was aware of rumors and/or innuendo regarding prior bad acts, a bad reputation and of the driver and motor carrier owner's dishonesty. According to *Mega*, such allegations were patently deficient to state a claim, *even if the alleged rumors focused on prior cargo thefts.*

The *Mega* court concluded the sole issue was whether "... by diligent inquiry the broker could have discovered a carrier's *specific unfitness* precluded retention of that carrier."

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Hence, allegations the broker knew or was aware of bad rumors regarding the carrier, of unsavory industry character, or even of an untrustworthy driver propensity, were all patently deficient to support a negligent hiring claim. Per *Mega*, and consistent with the spirit of the *Twombly* and *Ashcroft* rulings, these are the exact type of speculative allegations not countenanced and which no longer survive dismissal at the pleading stage.

Finally, and by way of example, to sustain a negligent retention claim in a cargo theft case, the *Mega* court surmised a plaintiff may theoretically allege "the broker knew or could have known of a specific prior cargo theft related arrest or investigation", thus triggering a duty to further investigate. In *Mega*, however, the plaintiff apparently could not allege a single prior cargo theft or similar criminal act committed by the motor carrier or driver. The absence of this crucial nexus spelled the death knell for the plaintiff's negligent retention claim. In other words, simply knowing the motor carrier and/or driver are not up for "Citizens of the Year", is by itself not enough to sustain a negligent retention claim.

Deficient Safety Ratings

Next, the plaintiff claimed T&T should have known the carrier had "a questionable or less than commendable safety compliance record, and should not have arranged to transport these high value cargo shipments given concerns about carrier safety ratings." Interestingly, the *Mega* decision does not reference which particular "safety ratings, scores or records" were at issue. However, and from the briefs at the dismissal stage, is appears the plaintiff adduced CSA data showing the motor carrier had a smattering of prior maintenance and driver issues involving (for example) bad headlights, worn tire-treads and driver fitness related citations. No facts or CSA data pertaining to cargo securement, cargo damage or (certainly) cargo theft related incidents were alleged by the plaintiff as a predicate.

Per the *Mega* ruling, the selective use of CSA "drill down data," apparently culled from the CSA BASICS, could not impute a specific duty to foresee a future cargo theft with this particular carrier. The *Mega* court implied that if, for example, the CSA safety data merely showed the carrier had prior out of service orders, or that its drivers had a habit of speeding, *at the pleading stage* these types of general safety related facts are irrelevant to broker culpability arising from a cargo theft. With this in mind, the *Mega* court again focused on the allegations in the complaint, concluding the plaintiff failed to specifically allege the broker "knew of should have reasonably known *of* a *particular incompetency or unfitness that caused the (cargo theft) loss*".

Insufficient Cargo Insurance

As to the claim the broker retained an uninsured carrier, most of us know the courts, in various contexts, have already rejected this as the basis of a tort theory of recovery against brokers. The *Mega* court likewise batted away this claim, concluding there was no proof that T&T had knowledge of insufficient coverage, nor was there a causal nexus between insufficient insurance coverage and the cargo theft itself.

No Proximate Causation

Finally, not to be overlooked is the *Mega* court's "slam the door shut" ruling finding no proximate causation, as a matter of law. The *Mega* court concluded that even if a "dishonest, suspect and shady motor carrier and driver" were retained by the broker, as a matter of law this affords a legally deficient nexus with the ultimate cargo theft. In other words, T&T's alleged failure to investigate the motor carrier and driver's nefarious past was not a proximate cause of the subsequent cargo theft.

Conclusion

For practitioners representing transportation brokers in negligent retention claims, whether in a BI or cargo loss setting, the *Mega* decision affords ammunition to question "shot gun pleadings" bereft of facts specifically linking negligent carrier retention to the loss at issue. A Rule 12 motion (to dismiss, strike or for a judgment on the pleadings) challenging otherwise spurious broker "negligent hiring claims" should force the plaintiff to at least re-pled with the requisite foundational specificity.

In this regard, the *Mega* decision is particularly valuable in attacking claims based upon immaterial CSA data. Namely negligent retention and hiring claims founded upon the "selective use" of irrelevant fitness rankings, safety alerts and/or percentiles with no logical causation relationship with the underlying cargo loss or injury at issue.

It is this author's hope that the Eleventh Circuit is asked to take up this issue on appeal, and of course affirm the District Court's ruling in a published decision.

Endnotes

1. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), establishing the "plausibility pleading standard", and replacing the older "notice pleading standards" as established under *Conley v. Gibson*, 355 U.S. 41 (1957)