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Getting beyond the small, underinsured delivery contractor

HOW TO ESTABLISH AGENCY IN CASES AGAINST AMAZON, FEDEX AND OTHER LAST-MILE LOGISTICS COMPANIES

Large corporations are increasingly using independent contractors for last-mile delivery to shield themselves from liability. In many instances, these companies require individual drivers to form corporate entities. Then, when an incident occurs, the company attempts to leave both the injured individual and their typically underinsured delivery drivers holding the proverbial bag. A recent case, *Bradfield v. Amazon Logistics*, Georgia State Court (Gwinnett County), Case No. 22-C-07003-S7, provides a roadmap on how to challenge this dynamic.

In *Bradfield*, plaintiff's counsel obtained a $16.2 million verdict for a 2022 collision that resulted in a degloving injury to an eight-year-old child's leg. The case is believed to be one of the first in the nation to go to trial on the issue of whether Amazon can be held liable for the negligence of its delivery service partners ("DSP"). *Bradfield* is instructive on how to try cases against Amazon, FedEx and other last-mile logistics companies and how to hold them accountable for the actions of their agents.

Bradfield v. Amazon Logistics

Bradfield involved an eight-year-old boy who was crossing a residential street on a small electric bike when he was run over and dragged 21 feet by a DSP delivery van. He suffered a broken pelvis and severe degloving injury to his leg, which required multiple surgeries and skin grafts and will require future care. Amazon denied liability for the actions of the DSP driver, arguing that he was employed by a separate company (a small business called Fly Fellas Logistics). Through its DSP program, Amazon provides guidance and training to individuals (like the owner of Fly Fellas Logistics), who set up small delivery companies that directly employ drivers to deliver Amazon's packages.

Despite this separate legal relationship, Plaintiff argued that Amazon was both directly and vicariously liable for the young boy's injuries. In proving direct liability, Plaintiff demonstrated how Amazon's lack of safety training regarding residential neighborhoods where children were likely to be present, and unreasonable expectations regarding delivery volumes and times contributed to driver negligence.

To establish vicarious liability, Plaintiff made an agency argument – showing how Amazon's exercise of extensive control over drivers blurred the line between independent contractor and employee. Critically, the contract Amazon had with the DSP contained pages of policies, procedures, and guidelines that the DSP was required to follow if it wanted to continue to deliver for

Amazon. And through testimony, Plaintiff was able to establish Amazon's extensive control over onboarding, training, monitoring, and discipling of DSP drivers.

After a short four-day trial, the jury awarded Plaintiff $16 million in past and future pain and suffering and $206,000 for past medical expenses. Liability was apportioned 85% to Amazon, 10% to the DSP and its driver, and 5% to a neighbor who was supposed to be supervising the child.

Our agency case

Recently, using a similar strategy, our firm was able to obtain a large-figure settlement against a set of healthcare logistics companies. The case, *Estate of Sara Correa-Ojeda v. BeavEx, Inc. et al.*, Case No. RG18931535 (Alameda County), was a hard-fought multi-year battle where – as you might expect – we had to fight for every scrap of paper we received, including refusal by one of the defendants to produce records or knowledgeable PMQs until the court compelled them to.

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The case involved a 47-year-old woman who was struck and killed in a crosswalk as she walked to work. The driver had just left a CVS location in Fremont. When we took the case, it wasn't immediately clear who the target defendants should be. We knew we had to look beyond the small independent contractor who employed the driver, but the larger contractor (BeavEx, Inc.) who had hired the independent contractor had gone bankrupt. We also named a company whose drugs were in the delivery van. But it was only through discovery that we learned about the healthcare logistics companies involved.

These logistics companies, who perform last-mile delivery for pharmaceutical and medical supply companies, primarily use small independent contractors (often drivers who are instructed to form companies) to perform their deliveries. Independent contractors are a way to not only avoid paying benefits and overtime, but also to reduce liability exposure. The liability for driver negligence, they argue, rests exclusively with the small independent contractor – a "we get all the benefits, while being exposed to none of the liabilities" scheme. Through discovery and depositions, we chipped away at this shell game to establish that sufficient control was retained and exercised by them to make the driver their agent.

Agency under California law

Under California law, whether an agency relationship exists is a matter of the "right to control." Or as the California Supreme Court in *Malloy v. Fong* (1951) 37 Cal.2d 356, 370 (cited in CACI 3705 ("Existence of 'Agency' Relationship Disputed")) held:

> Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.

Under the "right to control" standard, an agency relationship exists when the principal can control the "manner and means" by which a job is performed. (See *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 492-493 ["an agency relationship exists where the principal dictates, not just the desired result of the enterprise, but also 'the manner and means' by which such result is achieved"].) This is consistent with the standard that exists in Georgia and what was proven in *Bradfield* – that Amazon controlled the time, manner and method of how deliveries were performed by independent contractors. (See, e.g., *Canjus Contrs. v. Peachtree Prop. Sub, LLC* (2021) 360 Ga.App. 390, 394 ["Under longstanding Georgia law, the true test to be applied in determining whether the relationship of the parties under a contract for the performance of labor is that of employer and employee, or employer and independent contractor, lies in whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract"].)

How agency was established

Using CACI 3705 and the "right to control" standard as our guide, we drafted targeted discovery and fought through layer upon layer of corporate- speak to developed strong evidence of the elaborate control exerted over the delivery process by these companies. As in *Bradfield*, there were extensive policies and procedures and guidelines that drivers were required to follow. Failure to follow these rules resulted in discipline or termination of the relationship. And these companies could control driver's schedules, routes, route sequencing, and the vehicles used; they could insist on the firing of drivers; they could communicate directly and daily with drivers to change or prioritize routes; and they conducted regular safety audits and required strict compliance with federal regulations around "chain of custody" and "proof of delivery" for scheduled drugs.

In many ways, agency is stronger against healthcare logistics companies than it is against Amazon. Amazon chooses to provide guidance on driver training and insists on protocols as a matter of business preference. But given that there are strict federal and state regulations related to the transport of scheduled drugs that healthcare logistics companies must follow, they must retain control and supervise drivers, conduct audits, ensure proper driver hiring and training – not as a matter of preference, but as a matter of federal and state law.

And under California's regulated-hirer exception, these regulations cannot be circumvented by hiring an independent contractor. (See *Secci v. United Independant Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 860-861 ["[Defendant] argues that when public regulations require a company to exert control over its independent contractors, evidence of that government-mandated control cannot support a finding of vicarious liability based on agency. This argument conflicts with the policy behind the regulated hirer exception, which emphasizes that the effectiveness of public regulations 'would be impaired if the carrier could circumvent them by having the regulated operations conducted by an independent contractor'"].)

The more pressure we put on these companies and the more we shook the tree, the better our case got. After moving to compel, we obtained a manual that one defendant gave to all independent contractors. The manual included a significant set of driver guidelines and requirements. And through taking numerous PMQ depositions, we learned the name of a former employee for that same defendant (not disclosed in discovery) who was not under their control and provided the most candid testimony about the extensive control exerted over drivers. In the face of this

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mounting evidence of control, we were able to reach an eight-figure settlement of the case a month before trial was set to begin.

Developing your case

So, what did we learn from this case that may help you in yours? Here are some lessons we took from the *Estate of Sara Correa-Ojeda* that may help you develop your own case against a last-mile logistics company:

Look for additional targets

If you have a case involving last-mile delivery, look beyond the small independent contractor for other potential targets. Who is the driver delivering for even if the vehicle is unmarked? What types and whose products are in the vehicle? For example, are there pharmaceuticals involved and if so, is the pharmaceutical company using a healthcare logistics company? Are there intermediaries or subcontractors involved?

In our case, there was a middleman between one of the pharmaceutical companies and a larger contractor (BeavEx, Inc.), who hired the small independent contractor. Pay close attention to details in the police report. Research the entity listed as the registered owner of the vehicle. A recently registered corporation, or a corporation whose registered agent is the same as the driver may indicate a sham independent contractor situation. Figure out who might have responded to the scene: Often Amazon and other logistics companies will send representatives to the scene, even if they later deny association.

Go beyond the contract

The contract will insist on the independence of the small independent contractor (in our case a company run by two brothers and a handful of drivers) and their driver, but reality is likely far different. Fight the necessary discovery battles to obtain policies and procedures, guidelines and any rules or requirements that the independent contractor and their driver must follow. There will be some, especially if your case involves scheduled drugs. The key is to establish significant and everyday control over the driver. You can do this by showing, for example, that the logistics company controls:

- Routes and route sequences;
- Delivery windows and schedules;
- What vehicles can be used, vehicle maintenance schedules and vehicle branding requirements;
- What drivers can wear and how they must interact with customers;
- Requirements regarding driver safety training and providing training materials;
- The pace at which deliveries must occur (e.g., performance metrics and quotas);
- The protocols drivers must follow regarding delivery, customer signatures and what paperwork must be filled out and returned;
- Whether the logistics company can discipline the independent contractor and driver and terminate the relationship by failure to follow rules and guidelines; and
- Whether any equipment such as hand-held devices with company specific apps are used.

Look for indemnity obligations

Obtain the policy, not just the declarations page, so you can determine if the company who contracted with the independent contractor (e.g., Amazon) is an additional named insured. Also, look at the contracts between the logistics company and any intermediaries for indemnity clauses and conduct insurance PMQ depositions if necessary to determine the amount of coverage.

The independent contractor may be on your side

The small independent contractor may be on your side and may be your best source of records. They were in our case. The independent contractor produced some of the best testimony and records to establish agency. Remember, the independent contractor may recognize the unfairness of attempts to hold them solely responsible. As part of the closing argument in *Bradfield*, Plaintiff argued the independent contractor was also a victim and that it wasn't fair for Amazon to try to force a small-business owner to be held exclusively liable.

Fight through corporate-speak

In PMQ (person most qualified) depositions we had to fight through layers of non-responsive corporate-speak. Corporations speak their own language, have their own acronyms, and it is often difficult to wrestle a clear answer from their PMQs. Documents help cut through this, and so can identifying former employees. Use depositions to obtain admissions, but also get the name and title of every supervisor, manager, and employee who worked on a regional logistics team.

Consider direct liability

In our case there wasn't much evidence of direct negligence by the healthcare logistics companies. Unlike in *Bradfield*, the companies did not directly train the drivers and there wasn't strong evidence that the driver was under significant time pressure when making deliveries that day. However, it is worth exploring in discovery – especially with the driver and independent contractor – what training and training requirements there are, and whether there are delivery quotas or other time pressures that contributed directly to driver negligence.

The award in *Bradfield* and the settlement we were able to obtain in our case demonstrate that it is possible to hold logistics companies accountable for the actions of independent contractors. Cases against these large public companies are never easy, so be prepared for difficult discovery battles and dispositive motions on the agency issue. But it's a fight worth having. The sun is beginning to set on this liability-avoidance scheme and it's up to us to develop local precedent against last-mile logistics companies.

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