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DC Court of Appeals Doesn't Like FMC's Rationale For Allowing Disparate Rates

By Steve Block

Marine terminal operators (MTOs) are subject to U.S. Federal Maritime Commission (FMC) regulation in ways similar to ocean carriers and ocean transportation intermediaries. A precept of MTO regulation is that services they offer under their tariffs be uniformly offered and provided to all consumers, much the same way ocean carriers and NVOCCs must adhere to the terms of their tariffs in common carriage. Subject to some qualifications, they also have to treat their customers evenly. The idea is that consumers of ocean transportation services should play on a level field.

APM-Maersk and Maher Terminals are tenants of the Port Authority of New York and New Jersey (the Port). APM-Maersk is an enormous, transnational ocean carrier which, along with its affiliated carriers, is capable of directing large cargo volumes to a port. Maher, on the other hand, is an independent MTO which services third-party carriers and shippers, and has minimal influence on port cargo volumes. Guess who the Port sees as its higher-valued customer.

Back in the late 1990s, the Port negotiated lease deals with both tenants which resulted in APM-Maersk paying substantially less rent per square foot than Maher, based largely on the APM-Maersk's cargo volume commitments to the Port. Fast forward a decade to 2008, and Maher's new parent company, Deutsche Bank, determines the unequal lease terms might violate provisions of the Shipping Act at 36 USC §41106(2) which prohibit MTOs from offering an "unreasonable preference" to one of its customers over another. If the Port gave APM-Maersk an unreasonable preference by way of lower rent, then Maher could demand a refund of sums it paid the Port in excess of what APM-Maersk paid.

Maher took its beef to FMC, first for adjudication in an administrative proceeding before an administrative law judge, and then to the FMC's panel of commissioners (yes, the Shipping Act has a three-year statute of limitations, so the most it could hope to recover is three years' worth of overpayments). Losing at both levels, it appealed FMC's dismissal of its claim to the District of Columbia Circuit Court of Appeals, asserting that FMC's rulings violated statutes and were arbitrary and capricious.

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For comments or additional information on the articles in this issue, please contact Steve Block | 206.447.7273 | steve.block@foster.com

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FMC's rulings state that the Port's disparate treatment of its two tenants was justified because APM-Maersk had credibly threatened to abandon the port if it didn't get a break in its lease terms, and was able to make revenue guarantees Maher couldn't. Also, Maher's terminal was higher quality than was APM-Maersk's, thereby justifying higher rent. The court wasn't satisfied with the explanation, and nixed FMC's ruling with a remand order directing it to at least explain its conclusions better.

An MTO may offer different pricing to its customers when doing so is justified by "transportation factors." This term, which predates the Shipping Act in earlier Interstate Commerce Act provisions, isn't well defined. FMC basically concluded that APM-Maersk's bargaining position and threat to leave the Port constitute "transportation factors." However, its logic as to how those points justify the lower rent was, as the court put it with furrowed brow, "hopelessly convoluted," resulting in "rather lame distinctions we find quite unpersuasive" when compared to earlier FMC rulings which basically say bargaining power doesn't justify divergent pricing. If FMC was trying to equate "transportation factor" with "reasonable," then where does it become unreasonable? The court further ruled:

> *We understand [FMC] to be saying that the reasons APM-Maersk were given [better] terms somehow necessarily implies that [Maher] should not be given the same terms. But that is a non sequitor. Whatever the reason the port determined to give lower rates to APM-Maersk, it doesn't at all follow that those same or similar rates should not be offered to [Maher].*

The court concluded by positing that "the underlying problem is competition between ports for a larger share of carrier traffic," for which "we wonder if there is not a regulatory solution to the problem." FMC may be able to clarify its rulings by defining terms and stating its underlying rationale as to why the Port was reasonable in offering different lease terms. In its ruling, FMC dismissed Maher's contention that transportation factors didn't justify the different rates as an unsupported "legal conclusion," but didn't tell us much more about how it included an analysis of any "transportation factors" in reaching its conclusions. Stay tuned. This case could create a significant precedent as to MTO responsibilities under the Shipping Act.

Ref: Maher Terminals, LLC v. Federal Maritime Commission, 2016 WL 1104774 (DC. Cir. 2016); and for additional detail about MTO regulation, see 2000 Legal Lookout article "Marine Terminal Operators: How Deregulation Impacts the Docks," available at http://www.forwarderlaw.com/library/view.php?article_id=679

Recent Developments in Motor Carrier Law

By Steve Block

Freight broker not exempt under FAAAA from liability based on trucker's accident.

Cruz Miguel Aguina Morales, et al. v. Redco Transport, Ltd., et al., 2015 WL 9274068 (S.D. Tex. 2015)

On a number of occasions, courts have held the Federal Aviation Administration Authorization Act (FAAAA) preempts state and common law tort claims against freight brokers given that motor carrier services would be affected. However, FAAAA specifically doesn't restrict a state's regulation of motor vehicle safety. In this case, freight broker Samsung SDS America (SDSA) booked a load with motor carrier JIT Automation, whose truck was involved in an accident which tragically resulted in personal injuries and a death of other motorists. The latter sued SDSA and JIT in the U.S. District Court for the Southern District of Texas, alleging SDSA negligently selected JIT. SDSA moved to dismiss the claims based on FAAAA preemption.

FAAAA's safety exemption sees little judicial attention, and apparently none as regards brokers. SDSA argued that safety regulation cases exempting motor carriers from FAAAA's preemption didn't apply to a broker because brokers never hold care, custody and control over cargo, and never operate motor vehicles. In other words, safety regulation, while remaining within state dominion, can't implicate a cargo middleman.

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The court disagreed. Possession of cargo and operation of trucks aren't essential elements of a safety negligence claim. Thus, FAAAA preemption doesn't apply to the plaintiffs' allegations relating to safety. SDSA's motion to dismiss was denied.

Motor vehicle accident claims against trucker and driver don't "relate back" to claims against logistics service providers so as to defeat statute of limitations defense.

Bracey, Jr., et al. v. McDonald, et al., 2016 WL 266059 (Ct.Apps. Tenn. 2016)

A motorist injured in an accident sued trucker Conrad Transportation and its driver Otis McDonald in Tennessee. A year or so later, after the statute of limitations had expired, he amended his complaint to name as defendants a series of logistics service providers, claiming they were "… engaged in a joint venture and an agreement among them to participate in a common enterprise for the purpose of commercially transporting freight …" The new defendants moved to dismiss the amended complaint as time barred. The trial court agreed, and the plaintiff took the matter to the Volunteer State's court of appeals.

He didn't fare better there, the court rejecting his argument that the new claims "relate back" to the old ones, and therefore should be deemed timely filed against the new defendants (as provided by state statute). To qualify, the plaintiff would have to demonstrate that the new claims arose out of the same occurrence originally alleged, and that the new parties had notice both of the timely claim and of a mere mistake in their not being named in the first place.

Despite notations on bills of lading, the court couldn't agree that the new defendants had notice of the lawsuit, or that it was intended to be against them. The original allegations were cast in terms of negligence and master servant liability, suggesting nothing about other entities' involvement. The new claims are time barred.

One stolen cargo, but different liability regimes.

AXA Corporate Solutions Assurance, et al. v. Great American Lines, Inc., et al., 2015 WL 9460558 (D. NJ 2015)

In circumstances involving multiple service providers which provide similar but differing roles, different liability parameters and analyses can apply to the players in the same cargo claim. That's what happened when shipper Sanofi-Aventis booked transit with motor carrier Great American Lines (GAL) of some $59 million worth of pharmaceuticals from its Georgia facility to its distributor, McKesson Corp., in Tennessee. Also involved were MVP Leasing, from which GAL had leased trucks, and Pilot Travel Centers, which operated the facility where the cargo was stolen. After paying up on a policy, McKesson's subrogated insurer, AXA, sued all concerned in the U.S. District Court for the District of New Jersey.

AXA alleged the defendants were liable based on Carmack; that GAL and MVP were liable based on breach of contract and breach of an implied contract of bailment theories; and Pilot was liable based on a negligence theory. All parties moved for summary judgment. GAL indisputably was a motor carrier subject to Carmack preemption of state and common law theories of liability. MVP urged it was not one, pointing out that it assigned its driver to work for GAL under GAL's authority. However, as MVP owned the truck and paid the driver, a question of fact precluding summary judgment remained as to its motor carrier status.

Sanofi had entered into a transportation contract with GAL which waived the plaintiff's rights under Carmack. MVP and Pilot argued that contract applied to them as well, pointing out that their services were part of GAL's, and the law doesn't require a separate contract from each one of several related service providers. But this contract specifically limited its applicability to the signatories, such that MVP and Pilot couldn't piggyback their way in. Carmack at least potentially could apply to them.

The court found questions of fact as to the substance of AXA's Carmack allegations, precluding summary judgment on that issue, although the court dismissed the common law claims against GAL as preempted. The court addressed

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those common law claims against MVP (which only would apply if it demonstrates it's not a motor carrier), and dismissed them as a matter of law. As the tractor and trailer were in GAL's exclusive possession as a matter of federal law, there could be no bailment. Apparently, AXA didn't oppose in its briefing MVP's motion to dismiss the contract claim, so it got thrown out as well. Similarly, AXA offered no evidence supporting the causation element of a negligence claim against Pilot, such that this theory was tossed as well.

"Connected" doesn't mean physically hitched for purposes of insurance coverage.

Great West Casualty Co. v. National Casualty Co., 807 F.3d 952 (8th Cir. 2015)

Owner operator Heinis was under lease to motor carrier Avery Enterprises. Both had their own insurance coverage, with Great West insuring Heinis and National Casualty insuring Avery. Heinis was responsible under his lease for repairs to his rig, and got them handled in Avery's garage. When he brought in his rig to have a leak fixed, it exploded, injuring a mechanic. The mechanic sued Heinis and Avery, and both tendered the claim to their respective insurers. The insurers duked it out in a coverage battle, first in the U.S. District Court for North Dakota, and then in the Eighth Circuit. Both courts agreed National had to provide coverage.

National's policy to Avery clearly made Heinis's truck a "covered vehicle," but did so only when "connected" to a trailer. National thought "connected" meant "hitched," i.e., physically connected and either in or ready for trucking operations. Great West, and ultimately the courts, disagreed. The term wasn't defined in the policy, and the Webster's definition, which applied in the absence of a policy definition, included "having the parts or elements logically related." In other words, because Heinis's rig was associated with a particular Avery trailer, a fair understanding of the term included a tractor that Avery had assigned a trailer. National's policy had some exclusions the courts found inapplicable, such as employer liability and "fellow employee," because Heinis, an owner operator, wasn't an Avery employee as a matter of FMCSA regs.

Great West's policy excluded coverage for a truck in the use, or business, of another entity. National argued that the rig, while being repaired, wasn't in its "use," such that the exclusion didn't apply. The courts rejected that argument as well, as Heinis's lease required him to maintain his vehicle, and he was only complying with that term at the time of the accident. A truck needn't be on a highway to be in "use." National gets to defend and potentially pay the mechanic's claim.

Expert testimony demonstrates cargo loading didn't cause trailer rollover.

Jackson v. International Paper Company, et al., 2015 WL 9274981 (N.D. Ind. 2015)

Driver Jackson fetched a sealed trailer containing paper rolls from International Paper. As he went around a ramp, the trailer rolled over causing him injuries. He sued International Paper pro se in Indiana state court, claiming the shipper improperly loaded the cargo without blocking and bracing in violation of state and federal law. International Paper removed the action to the U.S. District Court for the Northern District of Indiana, and retained a cargo loading expert. Apparently Jackson tried to get an expert to give counter-testimony, but procedural errors resulted in exclusion of his expert.

International Paper moved for summary judgment, and presented its expert's statements about cargo loading and movement dynamics. He concluded that the acceleration needed to move the cargo would only be achieved after the trailer had already begun to roll. The testimony summary presents an interesting glimpse at how an expert analyzes a rollover case, and how such expert testimony can be applied. Absent evidence to the contrary, Jackson's claims were dismissed, the court adding that Jackson's case would fail even without International Paper's expert statement because there was no evidence about how the cargo was loaded and secured. The mere fact of a rollover isn't sufficient to get a claim to a jury.

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Of Graves concern to plaintiffs: equipment lessors are not liable for accidents based solely on their ownership and lease of trailers.

Johnke, et al. v. Espinal-Quiroz, et al. v. Espinal Trucking, et al., 2016 WL 454333 (N.D. Ill. 2016)

Eagle Transport Group was the owner and lessor of a trailer driver Espinal-Quiroz was hauling when he was involved and a horrific accident that resulted in several fatalities. Eagle, also a motor carrier, was Mr. Espinal-Quiroz's former employer, and it maintained an employment file for him. The estates sued multiple defendants in the U.S. District Court for the Northern District of Illinois, asserting a variety of causes of action. The driver apparently was blind in one eye, a condition the plaintiffs claim rendered him unqualified to drive, and one Eagle was aware of based on its employment records.

Eagle moved to dismiss the plaintiffs' claims against it based on the Graves Amendment, 49 USC §30106; the absence of an employer-employee relationship for purposes of master-servant liability; and inadequate grounds to establish the driver was Eagle's agent at the time of his accident.

The Graves Act preemptively blocks claims against equipment lessors for accident liability when they're in the business of leasing, weren't negligent in that leasing, and just owned equipment involved in a mishap. Thus, plaintiffs' claims against Eagle based solely on its ownership of equipment were dismissed. But if Eagle were negligent in allowing a driver access to equipment when it knew he had a physical condition rendering him unqualified, a separate basis of potential liability not subject to the Graves Act would arise. The court denied plaintiffs' claims based on those allegations given remaining questions of fact.

Certain plaintiffs alleged Eagle was Mr. Espinal-Quiroz's statutory employer for purposes of vicarious master-servant liability. These assertions were based on misinterpretations of law designed for owner-operator relationships. Concluding Eagle was only an equipment owner and lessor, the court nixed claims based on an alleged statutory employer relationship. Similarly, as nothing in the complaint's alleged facts suggests Mr. Espinal-Quiroz was acting as Eagle's "agent" by leasing its trailer, the agency claims were tossed as well. Remaining at issue is the responsibility an equipment lessor has not to lease equipment to a driver it knows is unqualified.

Which trucker is the carrier of record determines which insurance coverage applies.

National Specialty Ins. Co. v. Martin-Vegue, 2016 WL 737780 (8th Cir. 2016)

Motor carriers ABS Transport and ABS Freight Transportation ("ABS Freight") were owned by a formerly married couple and operated in coordination with each other by sharing operations and through lease agreements. Apparently, freight broker ICCI brokered and documented a California-to-Florida load to ABS Freight, which then handed off the shipment to ABS Transport, whose driver, Andrii Plys hauled. ABS Freight had leased to ABS Transport the rig and trailer Plys was operating. He was involved in accident in Florida which, tragically, caused the death of Howard Martin-Vegue, whose estate made claims against both entities.

National Specialty Insurance Company ("National") insured ABS Freight and brought a declaratory judgment action to foreclose the estate's claim for coverage. It asserted that Plys wasn't insured under its policy, and the MCS-90 endorsement ABS Freight filed was inapplicable. Affirming the U.S. District Court for the Southern District of Florida, the Eighth Circuit Court of Appeals agreed, and ruled National's policy didn't apply.

The policy excluded coverage for drivers using equipment leased from ABS Freight, so coverage could obtain only by ABS Transport being the carrier of record. Just because a broker documents a booking with a trucker doesn't make that trucker a carrier of record. Indeed, ICCI confirmed it frequently allows double brokerage arrangements whereby loads it places with one carrier are hauled by another, in which case ICCI pays the actual trucker. More importantly, ABS Transport issued the shipment's bill of lading, and was properly in possession of all equipment at the time of the accident. That ABS Freight leased, and didn't own, the equipment is irrelevant.

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For these reasons as well, National's MCS-90 endorsement for ABS Freight is inapplicable, as it would guarantee coverage only for ABS Freight.

And similarly, a federal court rules that who owns the truck determines insurance coverage for owner-operator's accident …

Mendoza, et al. v. Hicks, et al., 2016 WL 815505 (E.D. La. 2016)

Driver Hicks was employed by owner operator BAC Trucking, which was under lease to C&R Transport. Hicks's truck broke down, forcing BAC to borrow a truck from Wyatt Trucking so that Hicks could make his runs for C&R. He was involved in an accident with another truck driver, who sued him in the U.S. District Court for the Eastern District of Louisiana.

Berkshire Hathaway Homestate Insurance Company insured C&R, and Canal Insurance Company insured Wyatt. At issue in cross motions for summary judgment was which insurer gets to pick up the accident tab.

The court first addressed a choice of law issue. Finding that all parties were located, and most activity transpired, in the Yellowhammer State, the court ruled that Alabama law governed insurance coverage issues. Louisiana was merely the accident's location. This was significant because a Louisiana statute extends insurance coverage to temporary substitute vehicles as a matter of law. Alabama has no such statute, and the Pelican State's interest in ensuring coverage exists for its public isn't enough to control an insurance policy issued in another state.

Berkshire prevailed in the cross motions because its policy only extends to vehicles "owned" by the insured. Canal argued that because BAC and its vehicles were under lease to C&R, and FMCSA regs define a vehicle "owner" as the entity which has exclusive use of it, C&R kind of was an owner. But Alabama law won't borrow from statutes aimed at different concerns to define a term that has a plain English meaning. "Own" means, well, "own" for insurance coverage purposes.

… and a week later, rules that while an owner-operator's driver is the motor carrier's statutory employee, questions of fact govern whether others employ him as well.

Mendoza, et al. v. Hicks, et al., 2016 WL 915297 (E.D. La. 2016)

So who's on the hook under master-servant vicarious liability principles for driver Hicks's accident? Plaintiff Mendoza wanted all three companies whose fingerprints were on Hicks and the truck to stay in the courtroom, and all three brought cross-motions for summary judgment on the issue.

Addressing first motor carrier C&R's standing as Hicks's employer, the Eastern District of Louisiana's opinion goes through a nice little review and summary of the concept that drivers employed by owner operators under lease to a motor carrier are deemed the motor carrier's "statutory employees" for purposes of accident liability. That's notwithstanding any disclaimers within leases. The Interstate Commerce Commission, promulgating regs that remain in force today as the Federal Motor Carrier Safety Regulations, 49 CFR §§350-399, made it clear years ago that an "authorized carrier" bear "complete responsibility" for a truck's operations whether or not a permitted driver is an actual carrier employee. C&R interpreted §376.12(c)(4) , which proclaims the regs don't define whether an owner operator is an independent contractor or employee, to mean that the regs shouldn't be construed to mean that a driver is employee, and that state law should govern. The court disagreed, ruling that the regs are designed to impose statutory employee status regardless of how state law would define the driver. Thus, Hicks is C&R's employee for master-servant vicarious liability purposes.

BAC and Wyatt aren't so clear. They exercised control over Hicks regarding such things as dispatch, fuel costs and hotel rooms; required that he undergo drug testing and pre-employment screening; and other activity typical of an employment relationship. But the regs don't govern the relationship of a non-motor carrier and its driver, leaving questions of fact as to Hicks's status that aren't appropriate for summary judgment. The court denied the motions regarding BAC's and Wyatt's employer status pending trial.

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Court's leniency in favor of pro se plaintiff avoids dismissal of action.

Soares v. Bekins Van Lines, Co., et al., 2016 WL 797046 (D. NJ 2016)

Just a little heads up here about how courts give benefits of doubts to pro se parties by bending the rules a little bit in their favor. Fola Soares claimed motor carrier Bekins Van Lines lost some of her household goods when transporting them interstate to New Jersey. She sued Bekins pro se in the U.S. District Court for the District of New Jersey, stating in her complaint that "[t]his action constitutes Breach of Contract, Negligent, Misrepresentation and Malicious contrary to United States Department of Transportation (USDOT) regulations on interstate commerce, Title 29 (49 U.S.C.) [sic]." Bekins promptly moved to dismiss the complaint based on Carmack preemption of state and common law claims.

The court noted that "Soares is proceeding pro se and the Court must construe the Complaint liberally in favor of her." Finding that her complaint's allegations sufficiently set forth a Carmack claim, the court ruled that the fact she "cites to Title 49, the title in which the Carmack Amendment is contained" is enough to dodge an FRCP 12(b)(6) motion to dismiss. References to state law claims were dismissed, but Ms. Soares gets to proceed with a Carmack claim despite the fact she probably has no idea what it is.

Upcoming Speaking Engagements

Association of Transportation Law Professionals 87th Annual Meeting

June 19-21, 2016, in New Orleans, LA

Steve Block will present:

- Modal Updates
- Motor Carrier Law and Regulation
- International Trade – Traffic Flows

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FOSTER PEPPER PLLC

1111 Third Avenue Suite 3000, Seattle, WA 98101

206.447.4400 foster.com