FOSTER PEPPER PLLC

THE INTERMODAL LEAD

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

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FMC overhauls regs governing service contract and NSA filing.

By Steve Block

The evolution of ocean shipping requires periodic tune-ups to its management, and the U.S. Federal Maritime Commission (FMC) recently worked with industry (though its various trade associations) to adjust the cogs of regulatory machinery that facilitates the process. FMC regs at 49 CFR Parts 530-31 provide specifics as to what ocean carrier and non-vessel operating common carrier (NVOCC) documentation must be filed with the agency, when, and in coordination with what activity.

These regs in their current form were promulgated pursuant to deregulation legislation which moved us away from mandatory common carriage and opened the door to market-driven contract shipping. They have been revised periodically since the Ocean Shipping Reform Act changed that landscape in 1998 (can you believe it's been nearly 20 years?), and for NVOCCs in 2005 when FMC granted NVOCCs broader contract freedom through NVOCC Service Arrangements ("NSAs").

Primary aims of the new regs, which take effect May 5, 2017, are accommodation of the modification service providers make, sometimes fluidly, to service contracts and NSAs they file with FMC through the agency's electronic filing system; and correction of erroneously filed data.

The new regs recognize that the needs and circumstances of parties to ocean transportation relationships change, often pretty quickly, and getting new points documented and filed before operations may commence isn't always efficient or practical. The new provisions allow sequential amendments to ocean carrier service contracts, filed within 30 days of their effective date, thereby allowing parties to adjust their agreements based on business and operational circumstances without having to wait a 30-day period. Sequential filing works better within FMC's system than "batches" of amendments filed together. NVOCCs can now get underway with business up to 30 days before filing their NSAs. Most amendments and revisions NVOCCs and carriers present are minor and don't impact regulatory concerns.

Technical data transmission errors by service providers must be corrected within 30 days, up substantially from

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the 48 hours earlier allowed (errors frequently aren't caught that soon); and service contract correction requests can be submitted within 180 days, up from 45 days (more realistic in view of current volumes and practices). This latitude should avoid errors and administrative difficulties.

FMC and industry considered whether publication of "essential terms" within NSAs should be continued, but FMC deferred issuing a new rule.

Since 2006, FMC's SERVCON filing system has been accessible for web-based usage right from a service provider's contract management system, relieving the burden of manual processing. FMC appears interested in upgrading SERVCON to allow confirmation of a licensed entity's good standing, for example, when a carrier wants to be sure an NVOCC holds proper licensing before issuing it bills of lading.

By and large, industry and FMC seem to agree the new regs will benefit all concerned in the context of evolving practices and technology.

Ref: Amendments to Regulations Governing Service Contracts and NVOCC Service

Arrangements, available at http://www.fmc.gov/assets/1/Documents/16-05_Fnl_iss.pdf

Recent Developments in Motor Carrier Law

By Steve Block

A car dealership's signing a bill of lading renders it potentially a freight forwarder, and therefore liable under Carmack.

Edelbrock v. TT of Naples, Inc. and Gulf Coast Auto Services, LLC, 2016 WL 4157426 (M.D. Fla. 2016)

Here's one that should give pause to dealerships which handle the transport of cars for their customers. Mr. Edelbrock bought an Aston Martin at the Naples Florida dealership, called TT of Naples, that he wanted transported to his home in Michigan. A TT of Naples employee ordered up transportation with motor carrier Gulf Coast Auto Services for delivery to a dealership in Troy. The carrier named TT of Naples as the shipper in its bill of lading.

The trucker was involved in an accident en route, damaging Mr. Edelbrock's car to the tune of some 27 grand in repairs plus another 30 grand in diminished value. The car owner sued both TT of Naples and Gulf Coast in the U.S. District Court for the Middle District of Florida, alleging Carmack and state law liability against both.

TT of Naples sought to dismiss the Carmack claim on summary judgment. It argued it wasn't set up or licensed as any kind of transportation service provider, but if it might have been one here, a freight broker was most likely. As brokers aren't liable under Carmack, the dealership reasoned, Carmack wasn't a viable theory against it.

But TT of Naples had accepted a bill of lading by which Gulf Coast named it as its shipper of record. That sounds like what a freight forwarder would do. At a minimum, the court found questions of fact as to what the parties intended. Consequently, summary judgment was denied, and TT of Naples might very well find itself liable as a forwarder which operated without authority.

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Shipper owes no duty to consignee regarding placement of cargo on a load board with an imposter carrier.

Golub Corporation v. Sandell Transport, 2016 WL 4703734 (N.D. NY 2016)

Grocery store operator Golub ordered a load of nuts from supplier Wonderful Pistachios & Almonds. Golub's intermediary hired motor carrier Sandell Transport to run the load from California to New York, but Sandell turned around and posted it on a load board. Imposter thieves who claimed they were with "GM Express" accepted the haul on the board. Of course, the load disappeared.

Golub sued Sandell in the U.S. District Court for the Northern District of New York, and Sandell filed a third-party action against Wonderful, alleging the supplier's negligence, breach of contract and fraud caused the loss. Wonderful actually loaded the nuts into the imposters' truck, and apparently when checking the driver's license for identification purposes, didn't catch on to the fact that his address was stated as "Northdridge, California." There's no such municipality in the Golden State (presumably, the misspelled town was intended to be "Northridge," which is just a neighborhood in L.A., and wouldn't be listed on a real driver's license).

Wonderful moved to dismiss. While an argument could be made that the shipper had a duty not to load cargo into a truck whose driver hadn't been confirmed, the court refused to recognize as potential negligence a company's lack of familiarity with every California township's name. a shipper's duty when another entity arranges transportation goes only so far. The contract claim failed as well because, well, there was no identified contract between Sandell and Wonderful, at least not one that would impose duties on Wonderful to verify to a certainty a truck driver's identity. Even under a third-party beneficiary theory, Sandell could not assert a claim on behalf of Golub against Wonderful based on the Golub-Wonderful sales agreement. Lastly, the court didn't even consider the fraud claim because it was improperly pleaded.

The court did give Sandell an opportunity to amend its complaint to state a viable cause of action, but from facts in the record, it's hard to see where one might lie.

Seller of cargo to consignee which tendered cargo to carrier and signed bill of lading doesn't count as "shipper" for purposes of limitation of liability.

Schneider v. Fifth Wheel, LLC, et al., 2016 WL 4424944 (N. D. Ohio 2016)

The opinion isn't entirely clear on this one, but it appears the U.S. District Court for the Northern District of Ohio may have misinterpreted Carmack to conclude that a consignee plaintiff isn't bound by an apparent shipper's agreement to bill of lading terms which included limitation of liability.

Shipper Schneider bought an antique car from a dealer in Spokane, Washington, and through its broker, engaged motor carrier Fifth Wheel to transport the car to Ohio on the lower level of a dual-deck open trailer. Oil from the car overhead leaked onto Schneider's rod causing some twelve grand in damages.

Schneider sued Fifth Wheel, which promptly sought to deflect Carmack liability based on the inherent vice defense. The carrier's argument was that when you agree to ship a car with others in this type trailer, oil leakage is unavoidable. Thus, the theory went, cars shipped with others are inherently susceptible to oil leak damage. The court rejected that argument, correctly observing that Schneider's car itself must have some sort of propensity to suffer oil damage for the inherent vice defense to apply, and the circumstances of its shipment with other cargo can't "create" that propensity.

Fifth Wheel pointed to the limitation of liability clause in the bill of lading the seller signed, which would limit its liability to comparative peanuts. The court rejected the clause's applicability because Schneider, and not the seller, was the plaintiff; Schneider didn't see the bill of lading until delivery; and the evidence didn't establish that the seller was Schneider's agent. If the bill of lading showed the seller as the shipper of record, the analysis should have ended there. A carrier has a right to assume that terms it agrees to with its shipper of record will control the transportation transaction, and shouldn't have to worry about a consignee plaintiff having greater rights than the

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shipper. By the court's reasoning, in order to limit liability, a motor carrier would have to get both the shipper's and consignee's signatures on a bill of lading at the time of tender, which in most cases is impossible.

OOIDA challenges FMCSA guidance regarding exclusion of attenuator trucks for purposes of Crash Indicator analysis, but is thrown out of court for lack of standing.

Owner-Operator Independent Drivers Association v. U.S. Department of Transportation, et al., 2016 WL 4087235 (8th Cir. 2016)

The Federal Motor Carrier Safety Administration (FMCSA), as part of its complex program of evaluating and apprising the public about motor carrier safety, generates "Crash Indicator" measures for licensed carriers. The assessment is based on the number of accidents per a carrier's vehicles revised to reflect accident severity and miles driver per vehicle. FMCSA crunches the data to place registered carriers into a safety-event group of comparable carriers. Safety-event groups are based on two factors, (1) whether the carrier is a straight truck (all axles on a single frame), or a combination-truck; and (2) how many accidents the carrier has sustained over a 24-month period.

FMCSA then ranks the sorted carriers into percentiles of accidents as compared to the other carriers in the safety-event group. A ranking of 65 or higher subjects the carrier to FMCSA intervention, ranging from warning letters to investigations to removal from service.

In March 2015, FMCSA issued a "regulatory guidance" excluding attenuator trucks from the analysis. Attenuators are highway-safety vehicles equipped with an impact-absorbing crash cushion designed to protect workers in construction zones. In other words, they're meant specifically to be involved in crashes, rendering them, in FMCSA's eyes, improper for inclusion in the Crash Indicator assessment.

OOIDA member Kuehl Trucking thought that wasn't fair, and per established procedure, brought its gripe to the U.S. Court of Appeals for the Eighth Circuit. It claimed FMCSA's Crash Indicator assessment sans attenuator truck consideration was essentially an agency reg promulgated without an adequate public notice, or alternatively, was arbitrary and capricious.

While the court's opinion goes through a nice little summary of FMCSA's Crash Indicator program, the Eight Circuit dismissed OOIDA's claim for lack of standing on the part of Kuehl or the association as a whole. This is because a precept of an entitlement to court-ordered relief is standing to make a claim, and neither Kuehl nor OOIDA could show FMCSA's guidance caused any harm. OOIDA argued that Kuehl, like other motor carriers, was more likely to get hit with a higher percentile ranking within its safety-event groups when attenuators weren't added in, as there are fewer vehicles involved in crashes when that class is removed from the mix. The court didn't buy that argument, as Kuehl was a combo carrier, and attenuators, being straight trucks, don't affect its standing.

OOIDA scrambled and put in a declaration from several other of its carrier members, but the data the declaration contained was still insufficient to demonstrate they were harmed either. If a plaintiff, even an association representing a class of potentially affected entities, is unable to show harm, there is no standing to pursue a claim in court.

Insurer escapes coverage liability based on insured's noncooperation.

Forward Air Solutions v. C.R. Williams Transportation, et al., 2016 WL 4582186 (E.D. Tenn. 2016)

This case might be a handy cautionary tale to show insured players in the transportation industry when they are less than fully cooperative with their insurers. Most insurance policies contain clauses requiring insureds to give the insurer adequate notice of claim, and to cooperate in the insurer's investigation and defense of claims for covered

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losses. Progressive Southeastern Insurance Company's policies for motor truck cargo and vehicle insurance contain such clauses. When a truck owned by insured C.R. Williams Transportation, along with its cargo, disappeared from a lot in Tennessee, the motor carrier and its owner went radio silent in response to a lawsuit filed by Forward Air Solutions in the U.S. District Court for the Eastern District of Tennessee.

Apparently nervous about its potential exposure as the truck and cargo's insurer, Progressive intervened in the lawsuit, and promptly brought a motion for summary judgment seeking determination that its insured's violation of the cooperation clauses absolves the insurer of coverage liability. Progressive went through the host of cooperation provisions its insured violated, from failure to give the insurer timely notice, to failure to appear for an examination under oath, to failure to assist with mitigation of damages.

Applying North Carolina law (which is largely consistent with that of most states), the court ruled that alleged violation of policy cooperation clauses typically raises questions of fact not proper for summary judgment. But in response to Progressive's motion, the court found no challenge to the insurer's version of events. That wasn't hard to do given that the trucker defaulted in the lawsuit.

Specific written contract terms trump broker's online terms and conditions for purposes of arbitration clause.

Pittsburgh Logistics Systems, Inc. v. B. Keppel Trucking, LLC, 2016 WL 7212509 (Penn. 2016)

Broker Pittsburgh Logistics arranged its first transit with motor carrier B. Keppel Trucking for one of its shippers, and per practice, sent Keppel its standard Motor Carrier Service Contract (MSCS), which contained an arbitration clause. Keppel signed and returned the MCSC to Pittsburgh, but Pittsburgh apparently never signed it. Pittsburgh booked subsequent hauls with Keppel through the broker's online bidding website, and sent Keppel a link to its Carrier Terms of Use (Terms), which do not contain an arbitration clause. When a shipper failed to pay its bills, Pittsburgh didn't pay Keppel some fifty grand in freight charges, prompting the carrier to exercise the MSCS arbitration clause. Pittsburgh resisted arbitration in a couple lower Pennsylvania state courts, both of which found the arbitration clause enforceable. When an arbitrator awarded Keppel all fifty grand, Pittsburgh took the matter to the Keystone State's Superior Court, claiming the MCSC didn't constitute a binding contract whose terms could be enforced.

That court disagreed as well. The absence of all parties' signatures on a contract isn't controlling when they intended to be bound by a document's terms, which Pittsburgh must've been, given that its own document actually said as much, and Pittsburgh required Keppel to return the signed MCSC before issuing any payments. The absence of an arbitration clause in the Terms (given they were issued via hyperlink to Keppel after it had already run loads); the fact that the parties didn't negotiate the Terms; and the parties' consistent practices demonstrated the Terms weren't intended to supplant the MCSC.

Owner operator lease agreements' arbitration clauses are enforceable notwithstanding Federal Arbitration Act exemptions and motor carrier's early cancelation of leases.

Alvarado, et al. v. Pacific Motor Trucking, Inc., 2016 WL 7422711 (9th Cir. 2016)

Motor carrier Pacific Motor Trucking entered into owner operator lease agreements with a series of drivers under a program by which the drivers would purchase new trucks. Shortly into the leases, but after the drivers had made substantial financial commitments, Pacific canceled the leases in compliance with a 30-day termination clause. The drivers sued Pacific in the U.S. District Court for the Central District of California alleging fraud and breach of contract. The court dismissed the action in favor of Pacific's exercise of the leases' arbitration clause. The drivers went up the hill to the Ninth Circuit.

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The Court of Appeals affirmed. The drivers urged that the lease agreements, and therefore their arbitration clauses, resulted from fraud in the inducement, and therefore were unenforceable as unconscionable. They believed Pacific misrepresented the leases and collective bargaining agreement as long term, which should constitute fraud. However, as no evidence suggested Pacific knew at the time it entered into the lease that it would terminate the leases early (and, in fact, the unforeseen loss of Pacific's main customer prompted the termination), there could be no fraud. The drivers also pointed to the Federal Arbitration Act's preemption for "contracts of employment" for interstate transportation workers, but as owner operator leases aren't employment contracts, this theory failed as well. Yes, the owner operator business model imposes risks on drivers.

Owner operators must show actual damages to pursue a private right of action under the Truth in Leasing regs.

Hall, et al. v. B-H Transfer Company, 2016 WL 6747237 (Ct. Apps. Ga 2016)

A clause in the owner operator lease several drivers had with carrier B-H Transfer allowed B-H to withhold up to $200.00 when drivers failed to complete trips. This violates Truth in Leasing reg 49 CFR §376.12(d) because it lacks specificity as to how deductions would calculated. The actual cost to complete a trip for a delinquent driver was $36.00, and in fact, B-H only deducted $25.00.

Learning of this and other alleged regulatory violations, the drivers sued B-H in litigation that lasted over a decade in Georgia. The Peach State's high court got the last word when it dismissed the drivers' claims because, hey, they hadn't suffered any damages. The Motor Carrier Act allows a private right of action for violation of the Truth in Leasing regs, but not as a mechanism simply to enforce them, but rather when damages actually are sustained. Moreover, nothing suggested the drivers would have refused to lease to B-H had the deductions been properly disclosed.

Unclear relationships preclude summary judgment in Carmack claim.

Coyote Logistics v. All Way Transport v. GN Trucking, 2016 WL 7212487 (N.D. Ill. 2016)

Broker Coyote booked transit of a load of deli meats from Baltimore to Harmony, Pennsylvania with All Way Transport, which claimed it was another broker. All Way, in turn, booked the shipment with motor carrier GN Trucking. The cargo was destroyed in transit due to improper temperature maintenance to the tune of 88 grand. Subrogated Coyote sued All Way in the U.S. District Court for the Northern District of Illinois. All Way impleaded GN Trucking in a third-party action alleging breach of contract.

GN Trucking moved under FRCP 12(b)(6) to dismiss the breach of contract claim, asserting Carmack preemption. All Way responded arguing it was a broker which could seek indemnity from GN Trucking for its liability to Coyote. The Court found the record too incomplete to rule. If All Way is a broker, and is suing in its own name for its own damages (as opposed to an assignment-based claim), then its contract cause of action may not be preempted. All Way gets a chance to prove the role it played before the court can rule..

Arbitration clause in brokerage agreement is enforceable as to both breach of contract and tort claims.

Sayles v. Knight Transportation Co., 2016 WL 7053117 (E.D. Mo. 2016)

The monikers here are a bit confusing, but apparently, carrier Sayles entered into a "Transportation Brokerage Agreement" with motor carrier Knight Transportation whereby Sayles would provide contract carriage services to Knight, and Sayles was required to obtain its own insurance. The Transportation Brokerage Agreement contained an Arizona forum selection clause. Sayles later requested Knight's assistance obtaining insurance,

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so Knight referred Sayles to its insurance broker. The relationship didn't work out (details aren't in the opinion), Knight canceled the Transportation Brokerage Agreement, and Sayles sued Knight in the U.S. District Court for the Eastern District of Missouri alleging a variety of contract and tort claims.

Knight moved to transfer venue to Arizona under the forum selection clause. Finding the arbitration clause fully enforceable, the court granted the motion. Yes, the tort claims, too. When tort claims (1) depend on the relationship created by contract; (2) require interpretation of the contract to resolve; and (3) involve the same operative facts as a contract claim, they get tacked on for forum selection purposes. Apparently, the insurance coverage issue was at the heart of the parties' dispute, so the elements are all satisfied.

Carmack doesn't preempt cargo claims filed under 409 USC §14704(a)(2) of ICCTA.

Starr Indemnity & Liability Co. v. YRC, Inc., 2017 WL 168179 (N. D. Ill. 2017)

Shipper Cessna Aircraft Company booked for transit with motor carrier YRC a cargo of two jet engines from Florida to West Virginia. The cargo was damaged when YRC's truck rolled over under unclear circumstances. Cessna's subrogated insurer, Starr Indemnity & Liability, sued YRC in the U.S. District court for the Northern District of Illinois to recover its $1.9 million payout to Cessna.

Starr alleged the rollover resulted from TRC's failure, in violation of 49 CFR §398.4(g)(1), to properly block and brace the cargo within its trailer. The insurer claimed this violation is a basis for carrier liability under 49 USC §14704(a)(2) of ICCTA, and its complaint alleged liability under both Carmack and 49 USC §14704(a)(2). YRC moved to dismiss the latter statutory theory as preempted by Carmack.

The court denied the motion, although you can sense Judge Dow's furrowed brow reading the opinion. 49 USC §14704(a)(2) is indeed a liability statute separate and apart from Carmack and, especially as it's within the same Act, isn't preempted regardless of a claim's nature. Other courts have held so. But this statute's intention is to hold the feet of violators of any "order of the Secretary [of USDOT" to the fire of civil liability. Cargo damage resulting from an alleged reg violation wouldn't seem to fit that equation, but the court concluded Starr gets a chance to show otherwise before tossing out this liability theory.

Statutory employer concepts do not confer federal question jurisdiction in wrongful death action.

Moody v. Great West Casualty, et al., 2017 WL 77417 (S.D. Da. 2017)

Ocean carrier CMA-CGM issued a through bill of lading for cargo transported landside by motor carrier Georgia Freightways, whose truck was involved in an accident that, tragically, resulted in the death of Virgil Moody. Mr. Moody's estate representatives sued the carriers and their insurer in Georgia state court alleging wrongful death claims He felt CMA-CGM was liable based on principles of agency and respondeat superior pertinent to nondelegable duties under the Shipping Act and statutory employer concepts under 49 CFR §390.5 of the FMCSA regs.

Defendants removed the action to the U.S. District Court for the Southern District of Georgia claiming those liability theories presented federal questions creating federal jurisdiction. On the plaintiffs' motion to remand, the court disagreed and sent the case back to state court.

As a plaintiff is the "master of his complaint," he can craft his allegations so as to determine jurisdiction. Wrongful death is purely a state law issue. True, the plaintiff's liability theory wouldn't be available "but for federal law," but as the court put it, "there is a large difference between a federally based theory and a federal claim." Going through the federal question analysis, this claim failed the "substantiality" test, which depends not on the federal point being substantial to the claim, but on "the importance of the issue to the federal system as a whole." Given that carrier liability for traffic accidents under regulatory

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respondeat superior principles (1) wouldn't "control many other cases"; and (2) the federal government had "little interest in litigating in the federal forum," substantiality isn't present. Failure to satisfy those two prongs obviates the third, the question of law's "purity."

… and further regarding statutory employer liability, an owner-operator lease isn't necessary for it to arise.

Puga, et al. v. About Tyme Transport, Inc., et al., 2017 WL 25557 (S.D. Tex. 2017)

Motor carrier RCX accepted a brokered load, but its owner operator couldn't handle it because of an equipment failure. RCX went to another motor carrier, About Tyme, and had its driver Ronald Brown run the load. Brown was involved in an accident that injured Alexandro Puga and, tragically, killed Brown. Puga sued all concerned, including RCX and About Tyme. He settled with About Tyme out of court.

RCX claimed it wasn't liable as Brown's statutory employer, first because it was only a broker in the transport; second because Brown wasn't under lease to RCX; and third because it had been established in settlement discussions that About Tyme was Brown's employer. The U.S. District court for the Southern District of Texas wasn't impressed by any of these arguments, and denied RCX's motion for summary judgment.

Because RCX wasn't even licensed as a broker, and the bill of lading named RCX as the carrier of record, the oh-I'm-just-a-broker argument didn't cut it. Nice try. And while statutory employer concepts most typically apply to owner-operator leasing arrangements, the statutes don't actually require one. The operative word is "arrangement," which implies the nature of the carrier-driver relationship governs over its documentation. Statutory employer liability commences when a driver "responds to the carrier's direction," which clearly happened here. Lastly, motor carrier law has long held that a driver can have more than one employer (even if an out-of-court settlement could serve as res judicata on the issue). RCX is on the hook.

ICCTA's 18-month statute of limitations for freight charge collection actions doesn't preempt Indiana's 10-year statute of limitations.

Kennedy Tank & Mfg. Co., Inc., et al. v. Emmert Industrial Corporation, 2017 WL 24875 (Sup. Ct. Ind. 2017)

Shipper Kennedy Tank & Manufacturing hired motor carrier Emmert Industrial Corporation to haul an enormous process tower from Indiana to Tennessee. The cargo, which was some 280 feet long, was subject to various routing, permitting and loading requirements which Emmert documented in its contract as possible sources of higher freight charges. When a bridge closure resulted in additional charges of some half a million bucks, Kennedy refused to pay.

Apparently, the parties went back and forth trying to settle the dispute, and before Emmert filed suit in Indiana state court, ICCTA's 18-month statute of limitations for freight charge collection actions expired. Indiana's statute of limitations is ten years; the trial court found ICCTA doesn't preempt the state statute; Indiana's court of appeals reversed, finding preemption; and the parties made their way to the Hoosier State's Supreme Court for ultimate resolution.

The high court agreed with the trial court and found Emmert was not time barred. Going through a nice review of the two-ponged federal preemption analysis, the court concluded (1) the two statutes of limitation are not "physically impossible" to comply with, as Emmert could have filed suit within 18 months; and (2) that Indiana's longer statutory period wouldn't do "major damage to the federal scheme." The first prong being obvious, the court focused on the second in what was a matter of first impression in Indiana.

The court ruled that interstate trucking civil liability matters generally have been relinquished to court enforcement as opposed to USDOT regulation, such that federal uniformity isn't a priority. This is especially true for statutes of limitations. State collection actions are "unlikely candidates

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for federal regulation because there is no uniformity vital to national interests," and "Congress has actually removed its prior exclusive federal regulation from contract actions …" Just because interstate transportation is involved doesn't mean federal regulation should be exclusive given that the federal statutes contemplate a "coexisting system of state and federal regulations."

The court recognized that other states have gone the other way, and doesn't get into what happens when conflicting state statutes of limitation might be involved. That could lead to forum shopping, uncertainty and inconsistent results.

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