FOSTER PEPPER PLLC

THE INTERMODAL LEAD

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

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Hurricanes highlight the Jones Act's faults.

By Steve Block

In 1920, Congress passed the Merchant Marine Act, colloquially "the Jones Act," which governs transportation of cargo within the U.S. domestic (or "coastwise") trade, which includes all fifty states and U.S. territories like Guam and Puerto Rico. Under the Jones Act, only vessels flying the Stars & Stripes, and which are U.S. built, owned, financed and operated may operate in the coastwise trade. Numerous other statutory enactments called "cabotage laws" have added virtually every salty business – from fisheries and towing to transportation of government personnel and property – to the "U.S. boats only" list. If your trade is on this list, you can't move cargo on a foreign vessel between any two U.S. ports without making an intermediate stop elsewhere.

This politically-charged law has long found salvation and justification in the simple notion that, hey, we need American-flagged vessels. They serve economically and militarily crucial functions. If we want American vessels, we need shipyards to build and service them. And while we're at it, let's keep vessel financing, taxing, labor and safety close to home as well. These all promote essential American interests, while increasing tax revenues and keeping a labor force afloat to boot. We're not alone in this sentiment – other countries have similar laws.

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Legally restricting foreign vessels from playing in our backyard is the only way to combat a nasty reality of world economics: foreigners simply can build and operate boats cheaper than we can. Cabotage laws govern the other transportation modes as well, but the added requirement for domestic water carriage that only homebuilt boats be used in the coastwise trade can be onerous. Many a shipper has complained about the higher costs of domestic water carriage resulting from the limited supply of carriers able to run vessels made in the USA. And if you live in a state or territory isolated by water, costs of most all commodities, including food and building supplies, end up being way more expensive. It can be cheaper to fly goods typically sent by ship. Of course, the U.S. shipping industry, including shipyards and the suppliers of countless vessel construction parts, feel differently. Their lobby has been instrumental in keeping the Jones Act afloat.

While the debate has been ongoing and the subject of several organized movements over the last century toward revision, the recent hurricane onslaught in Texas, Florida

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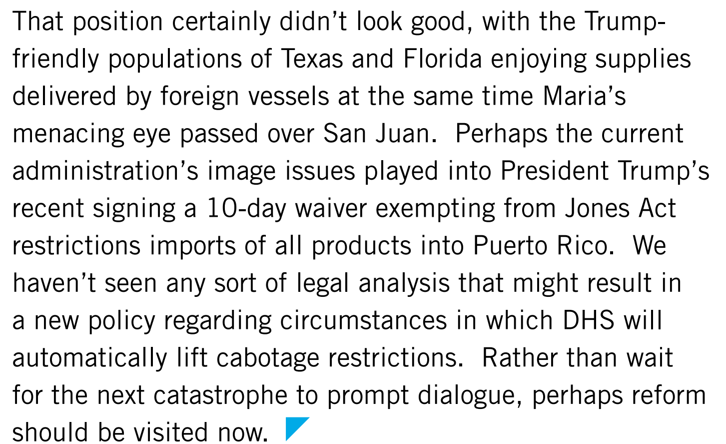
and Puerto Rico has generated more Jones Act controversy than recent memory recalls. Foreign ships originating transports out of U.S. ports with much-needed supplies were allowed to dock and offload in Texas and Florida in the aftermath of Hurricanes Harvey and Irma. President Trump and the U.S. Department of Homeland Security ("DHS"), which enforces the Jones Act, recognized the exigency, and perhaps political expediency, of getting life essentials to the residents of those (red) states.

But Puerto Rico in the wake of Hurricane Maria – not so fast. The Trump administration refused to lift Jones Act restrictions on our nearby territory for several days after the storm devastated the small island. Why? DHS opponents reportedly believed Puerto Rico's problem was primarily access to fuel, and U.S. barges are fully capable of delivering adequate supplies. As for food and other humanitarian necessities, opponents urged that Puerto Rico's problem wasn't receiving adequate stuff into its ports, but distributing it inland to needy consumers. Thus, they claimed that



enlisting foreign ships to run cargo across the Caribbean wouldn't add any benefit. President Trump agreed for a while, and proclaimed there was no need for a waiver.

That position certainly didn't look good, with the Trump-friendly populations of Texas and Florida enjoying supplies delivered by foreign vessels at the same time Maria's menacing eye passed over San Juan. Perhaps the current administration's image issues played into President Trump's recent signing a 10-day waiver exempting from Jones Act restrictions imports of all products into Puerto Rico. We haven't seen any sort of legal analysis that might result in a new policy regarding circumstances in which DHS will automatically lift cabotage restrictions. Rather than wait for the next catastrophe to prompt dialogue, perhaps reform should be visited now.

Ref: the Merchant Marine Act of 1920, 46 U.S.C. §55101, et seq, available at http://www.law.cornell.edu/uscode/text.

Recent Developments in Motor Carrier Law

By Steve Block

Another reason why brokerage and carrier operations should be kept separate and distinct…

Hall v. Kang, et al., 2017 WL 2414916 (W.D. Okla. 2017)

Truck driver Kang, running a load for motor carrier Skyview Farms, Inc., collided with motorist Hall, injuring her. Hall sued Kang, Skyview Farms and freight broker Skyview Transportation, Inc. in Sooner State court, and the defendants removed to the U.S. District Court for the Western District of Oklahoma. Skyview Transportation promptly moved to dismiss on the ground it had nothing to do with the accident. Skyview Farms conceded Kang had been working as its employee, and that it was liable under the doctrine of respondeat superior.

Hall argued that Skyview Transportation was Skyview Farms' alter ego, and therefore concurrently liable. The companies shared the same address, corporate officers and directors, and phone number. Building signage didn't distinguish the two, and a Skyview Farms employee had an email address ending in "@skyviewtrans.com." Apparently, Hall wanted to get her hands into Skyview Transportation's deeper pockets.

Under Oklahoma law, a corporation may be civilly liable as another's alter ego if its separate existence is "a design or scheme to perpetrate fraud or … so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another corporation." The question is control, which is largely a factual issue not often subject to summary judgment. Skyview Transportation had refused to answer Hall's discovery requests to develop a fact record.

In support of its motion, Skyview Transportation argued that Oklahoma law precludes arguments regarding employer liability when respondeat superior is conceded. Hall pointed to FMCSA regs governing motor carrier operations,

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and claimed these preempted that Oklahoma law. The court disagreed with Hall, as FMCSA regs and Oklahoma law aren't inconsistent. Nonetheless, the court denied Skyview Transportation's motion, finding questions of fact. The broker may come out on top here, but still has a legal battle to deal with, and pay for, all because of its close connection with a carrier.

Eradication of the Filed Rate Doctrine doesn't shield shipper from liability for freight charges.

Top Worldwide, LLC v. Midwest Molding, et al., 2017 WL 1422841 (Ct. Apps. Mich. 2017)

Midwest Molding sold its products over a period of years to G&B Global. Midwest would prepare bills of lading for transit by carriers booked by freight broker Top Worldwide, and G&B would pay the Top Worldwide's freight invoices on delivery. Then, G&B went out of business leaving invoices for 35 shipments unpaid. Top Worldwide, the carriers' assignee of unpaid freight charge claims, sued Midwest in Michigan state court, where it won a summary judgment motion holding Midwest liable. Midwest appealed to the Michigan Court of Appeals.

Some might call Midwest's argument a bit novel. It urged that eradication of the Filed Rate Doctrine, the deregulation step we took in the 1990s eliminating mandatory common carriage based on government-filed tariffs, nixed the concept that bills of lading are enforceable contracts. The shipper's theory was that carriers no longer are strictly mandated to collect freight charges from shippers under bills of lading. Thus, a broker seeking to collect freight charges shouldn't be able to look to bills of lading as the sole basis of their claim. And given the course of dealing whereby G&B had been paying Top Worldwide's bills, the broker didn't have a reasonable expectation Midwest would pay them if G&B didn't.

Affirming the summary judgment, the court disagreed. This was a state law contract action which federal law isn't concerned with. Bills of lading can and do establish contract rights between the parties that are separate and apart from earlier statutory obligations they might have created. The law (still) clearly provides that shippers designated in bills of lading are liable for freight charges. True, bills of lading are subject to common law freedom to contract, but Midwest's bill of lading didn't provide for "no recourse" against the shipper (it left the box unchecked), and nothing else supported the shipper's contention that the parties had agreed only G&B would pay Top Worldwide's freight bills. A course of conduct can overcome the terms of a contract, but to defeat the presumption that contract terms control, the course of conduct must "clearly" demonstrate an intended and understood deviation from them. That wasn't the case here.

Factual issues preclude summary judgment determination of whether driver gets FLSA overtime pay.

Garcia v. JIA Logistics, Inc., 2017 WL 2346149 (S.D. Fla 2017)

The federal Fair Labor Standards Act (FLSA) mandates that most categories of workers receive time-and-a-half pay for work they perform over 40 hours in a given week, but the statute includes an exemption for workers subject to the Motor Carrier Act (MCA), i.e., interstate truck drivers. A question often arises as to whether drivers qualify as "interstate" when they run loads both within a single state and cross-border.

When driver Garcia sued his former motor carrier employer, JIA Logistics, in the U.S. District Court for the Southern District of Florida seeking recovery of unpaid overtime, he encountered that uncertainty. In Garcia's case, he ran loads, often containing guns and ammo, only within Florida, but much of his cargo was to and from ports en route to out-of-state destinations. JIA moved for summary judgment, but the record wasn't clear enough for the court to sort out MCA's applicability.

Drivers are covered by FLSA if they work "in part" on vehicles weighing less than 10,000 pounds, unless the cargo is hazardous and require placarding (like ammo), in which case they're automatically exempt given MCA regulation of such cargo. Courts across are split as to what

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"in part" means, some saying even de minimus time in interstate commerce creates an FSLA exemption, while others hold that FLSA applies if a driver operates a smaller vehicle each week. A driver's work may be entirely within a state, but it's still considered interstate if the transport is a leg of an interstate move.

This court ruled it didn't need to decide that yet, because the record wasn't clear how much time Garcia ran what kinds of trucks for what periods of time running what kind of cargo. Because the court couldn't rule regardless of which test it applies, it denied JIA's motion and sent the matter back to the parties to further develop the record.

Carmack preempts state law cause of action and remedies even when motor carrier defaults.

Scotlynn USA Division, Inc. v. Z Top Logistics, Inc., 2017 WL 2560925 (M.D.) Fla 2017

We typically think of a defendant's failure to appear in an action in response to a properly served summons and complaint as a concession that everything alleged in the complaint is true and enforceable. Typically, the plaintiff gets judgment entered based on the theories of liability alleged in its complaint, along with the alleged damages so long as they're confirmed by a declaration filed with a motion for default.

Not so fast. When a knowledgeable court sees from the complaint itself that a plaintiff's causes of action are preempted, it can sua sponte enter a default judgment based only on what the law allows. In other words, even if a defaulting defendant motor carrier fails to raise Carmack preemption, a court can enforce it.

Just ask freight broker Scotlynn USA, the assignee of a shipper whose cargo was destroyed while being transported by motor carrier Z Top Logistics. Scotlynn sued Z Top in the U. S. District Court for the Middle District of Florida seeking recovery of some 39 grand it paid for a load of frozen chicken that went bad in transit, plus costs and attorneys' fees. The complaint alleged causes of action based on Carmack and breach of contract. Z Top didn't appear in the action. Scotlynn obtained a clerk's default, but when it moved for entry of judgment, the court took a closer look. It concluded that Carmack preempted the breach of contract claim. No big deal as far as the principal damages are concerned – Scotlynn was awarded them – but Carmack doesn't allow recovery of attorneys' fees. Scottlynn's award didn't include those.

Magistrate recommends that a pending Bar Order in bankruptcy case shuts down collection action against entity not a party to the bankruptcy.

Craft Brew Alliance, Inc. v. Baxter, Bailey & Associates, Inc., 2017 WL 3381715 (D. Or. 2017)

This is another one of those interesting scenarios that arises out of unique features of freight brokerages. Shipper Craft Brew booked cargo through freight broker Network F.O.B., which engaged factoring agent Capital Finance Corp. d.b.a "Bay View Funding" ("Bay View") to collect freight charges from its shippers like Craft Brew. Craft Brew paid all of its freight bills just fine, but Network ran into trouble, and apparently didn't pass along its freight charge collections to motor carriers which actually hauled the cargo.

Network was forced into Chapter 7 bankruptcy in the Middle District of Florida, where the trustee filed a motion to enter a "Bar Order" that would enjoin any claims against Network in any court. That motion was pending consideration when a collection agency the motor carriers had engaged, Baxter, Bailey & Associates ("BBA"), started taking steps to collect the unpaid freight charges from raft Brew. Yes, a shipper can be forced to pay freight twice under circumstances like this, but that's another article.

Craft Brew sued BBA in the U.S. District Court for the District of Oregon seeking to shut the collection efforts down on the basis of the pending bankruptcy. BBA moved to dismiss, pointing to the fact that Craft Brew and BBA weren't even parties in the bankruptcy. A federal magistrate disagreed, and recommended that the court deny BBA's motion.

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While no precise test guides courts in this situation, they enjoy a good deal of latitude when bankruptcy actions are pending. Because Network's bankruptcy was filed first chronologically, and could impact the rights of parties to this action, the magistrate concluded that BBA's collection efforts should be halted pending adjudication of the Bar Order motion. If adopted, the Bar Order would stay BBA's collection of freight charges related to those Bay View had already collected. This course would avoid one federal court reaching conclusions inconsistent with another. BBA could still ask the court to reject the magistrate's recommendation.

Widow has a wrongful death claim against an uninsured truck driver based on exclusions in owner-operator policy.

Creech v. OneBeacon America Ins. Co., 2017 WL 2805497 (S.D. Ga. 2017)

At a port facility in Garden City, Georgia, truck driver Creech was in his rig queued up in front of a truck operated by driver Watson, who may have tried to break in line. Creech initiated an altercation with Watson which tragically left Creech dead. Mrs. Creech sued OneBeacon America Ins. Co. seeking to establish its owner-operator and contract driver policy, issued to motor carrier Evans Delivery Company, provided coverage under its "occupational accidents" coverage.

Creech had no lease or other formalized agreement with Evans, and didn't own the truck he was in at the time. He merely had an agreement with the carrier that he was an "independent contractor," and as such, would receive a portion of freight charges paid for his runs. One Beacon moved to dismiss on the ground Creech didn't qualify for coverage under the policy.

The court granted the motion. While owner operators and contract drivers are independent contractors, the policy specified that coverage pertained only to drivers who leased a truck (for which he was required to provide maintenance and repairs) under a written agreement; or held a commercial driver's license. Creech could satisfy neither.

Mrs. Creech urged that OneBeacon had waived these arguments by not presenting them in its original letter declining coverage. That position sometimes has merit in certain states, but not here. OneBeacon hadn't had a chance to investigate the full circumstances of the loss before its letter became due, and it specifically reserved the right to base declination on other circumstances.

Household goods mover survives summary judgment on its declaratory judgment action seeking to establish limitation of liability.

United Van lines, LLC v. Deming, 2017 WL 3149301 (N.D. Cal. 2017)

Household good shipper Deming engaged freight broker Plus Relocation Services to arrange transportation of his stuff from Minnesota to California. Plus booked the shipment with United Van Lines ("UVL"), which issued a bill of lading to Deming. The bill provided that UVL's liability would be limited to five bucks a pound, but didn't give Deming an option for a different level of liability. Of course, the cargo arrived damaged by mold to the tune of 48 grand.

UVL sued Deming in the U.S. District Court for the Northern District of California seeking a declaratory judgment that its liability was limited to about five grand. Deming moved to dismiss the complaint on the ground he hadn't been given the option of higher carrier liability, one of the prerequisite hoops carriers must jump through to limit their liability. In that procedural posture, however, UVL need show only that it "plausibly" had given Deming an option of liability levels. In other words, if Deming's motion is denied, UVL doesn't win the case; rather, it merely gets a shot at proving its liability should be limited.

Perhaps bending a bit too far backwards, the court denied Deming's motion, concluding there were plausible circumstances in which UVL could demonstrate it had satisfied the criteria for limited liability. UVL had a transportation services agreement with Plus, one which was incorporated into the bill of lading. That agreement did include an option for Deming to select a higher level

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of carrier liability (in exchange for a higher freight charge). Deming urged that hadn't seen the UVL-Plus agreement, and wouldn't be expected to because he wasn't a party to it. Nonetheless, the court concluded UVL should have an opportunity to argue in later proceedings that Deming was on notice of the UVL-Plus agreement. If so, its terms might be extended to him. Hmm.

ICCTA and FAAAA preempt equity claims, too.

Mrs. Ressler's Food Products v. KZY Logistics, LLC v. Blue Grace Logistics, et al., 2017 WL 3868703 (D NJ 2017)

Shipper Mrs. Ressler's Food Products ("Ressler") hired broker Blue Grace to arrange transportation of a cargo of deli food products from Pennsylvania to California. Blue Grace booked the shipment with motor carrier Longitude Trucking, but in violation of a clause in its contract with Blue Grace, Longitude interlined the load to KZY Logistics. The load arrived spoiled and was rejected.

Ressler sued KZY and Longitude in the U.S. District Court for the District of New Jersey, alleging tort and contract theories and seeking recovery of the load's $69 thousand value. KZY counterclaimed, alleging that Ressler was unjustly enriched by the shipment, and brought a third-party action against Blue Grace and its insurer alleging the broker was unjustly enriched by KZY's uncompensated services. Blue Nile moved to dismiss KZY's third-party action claiming, among other things, that the Interstate Commerce Commission Termination Act and Federal Aviation Administration Authorization Act preempt KZY's equity-based unjust enrichment theories.

The court agreed, and dismissed the third-party action. ICCTA and FAAAA are not as broadly preemptive as is Carmack in their attempts to keep state regulation and adjudication out of interstate trucking. However, they are designed to keep state law from interfering with aspects of trucking agreements that parties undertake without concern that a common law concept might upset their intentions. As the court put it, "the parties must be allowed to contract around state-law based claims and, if not, then those claims are preempted."

Here, Ressler's agent Blue Grace contracted with Longitude not to interline. If KZL could thwart that obligation based on an unjust enrichment theory, then the shipper's ability to contract with carriers through its broker would be undermined. Thus, KZY's equity theory would allow an "enlargement or enhancement" of the Ressler-Blue Grace-Longistude contracts "based on state laws or policies external to the agreement." ICCTA and FAAAA don't allow that.

And while the court was on the subject – it sua sponte dismissed Ressler's tort and contract claims as preempted by Carmack. The shipper's claims presumably can be reasserted properly.

Even if interstate portion of a transit was by air, Carmack still governs load delivered by truck.

Sony Biotechnology, Inc. v. Chipman Logistics and Relocation, et al., 2017 WL 3605500 (S.D. Cal 2017)

Sony booked transit of a spectral analyzer from Seattle to San Diego through intermediary S&M Moving. Motor carrier Chipman Logistics and Relocation delivered the load damaged to the tune of some 125 grand. Apparently, Airways Freight Corp. undertook an unknown leg of the transport, which may have been from Seattle to California. In other words, it was unclear whether Chipman hauled the load interstate, or just from a California airport to destination.

Sony sued all three service providers in the U.S. District Court for the Southern District of California, alleging both Carmack liability and liability under common law bailment and negligence theories. Chipman moved to dismiss the latter based on Carmack preemption. Sony opposed the motion claiming, hey, we don't know whether the load crossed state borders on the road or in the air. It reasoned that Carmack would only apply only to a surface interstate move, and Chipman may never have crossed a state line. In that case, the alternatively pleaded state law causes of action should apply.

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The court granted the motion. The "intent of the parties" governs whether a move is interstate, and not which mode of transport executed the delivery. "Neither continuity of interstate movement nor isolated segments of the trip can be decisive" as to whether Carmack governs a haul as an interstate transaction. Thus, "[t]hat the analyzer was transported interstate at all renders the entire shipment subject to the Carmack Amendment, even if the transportation by truck occurred fully intrastate."

Local delivery services broker isn't liable for driver's accident just because it requires him to comply with customers' security policies.

Grange Indemnity Insurance Company v. BreavEx, Inc., 2017 WL 3497486 (Ct. Apps. Ga. 2017)

Beavex is a local delivery services broker in Atlanta. While driver Sarr was running a delivery to a Wells Fargo Bank in his Honda Civic, he collided with and injured motorists. The motorists' subrogated insurer sued BeavEx, claiming Sarr was its employee for master-servant liability purposes, and alternatively, that BeavEx was Sarr's "statutory employee" under Federal Motor Carrier Safety Regulations at 49 CFR §390.3(a)(1). The court granted BeavEx's motion to dismiss.

BeavEx required its drivers to wear a company logo badge, comply with customer delivery schedules, and comply with vehicle inspection and accident reporting requirements. However, these did not rise to the level of control a worker must be subject to in order to create master-servant liability. The broker-driver contract specified that drivers were independent contractors which operate their own cars, and the requirements were imposed not by BeavEx, but by its customers. Such general supervisory requirements aimed at safety are not evidence of control sufficient to "destroy the independence of the relation."

Nor do FMCSA regs convert Sarr into BeavEx's statutory employee, as he was not hauling interstate, operating a truck over 10,001 pounds, or driving a vehicle designed to transport more than eight passengers – all of which are addressed in 49 CFR §390.5 as threshold requirements for carriers to become liable as de facto employers of owner-operators.

Motor carrier's contract with broker, incorporated into carrier's bill of lading, might be enough for it to establish limitation of liability.

United Van Lines, LLC v. Deming, et al., 2017 WL 3149301 (N.D. Cal. 2017)

Shipper Scott Deming was employed by Capella Education Company, which had a contract with freight broker Plus Relocation Services to arrange its employees' household goods moves. When Deming was relocated from St. Paul to San Francisco, Plus arranged the transit with United Van Lines. United's Transportation Services Agreement with Plus provided that United's liability would be limited to five bucks a pound, and that the shipper could increase that liability level by declaring cargo value on bills of lading and paying a higher freight charge.

United issued to Deming its bill of lading which stated United's $5.00/pound limitation of liability, but didn't offer Deming an option to obtain a different level of liability. When Deming's stuff arrived with water and mold damage, he sought to recover its full $48,000 value. United beat him to the U.S. District Court for the Northern District of California's courthouse, seeking a declaratory judgment that its liability was limited. Deming moved to dismiss.

At issue was whether United had effectively given Deming an opportunity to obtain a level of liability other than $5.00/pound, one of the requirements motor carriers face to escape full liability. The court concluded that United's bill of lading didn't do the trick – a carrier's simply asserting that its liability is limited is insufficient. But the bill of lading's incorporation of United's Transportation Service Agreement with Plus might be sufficient – even though Deming wasn't a party to it or aware of its terms. Evidence might demonstrate that Plus acted as an intermediary not just for Capella, but for Deming as well. That's not to say United wins, but the court couldn't dismiss based on the current record. At issue might be whether Deming could have even seen United's contract with Plus had he wanted to.

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Recent Developments in Motor Carrier Law

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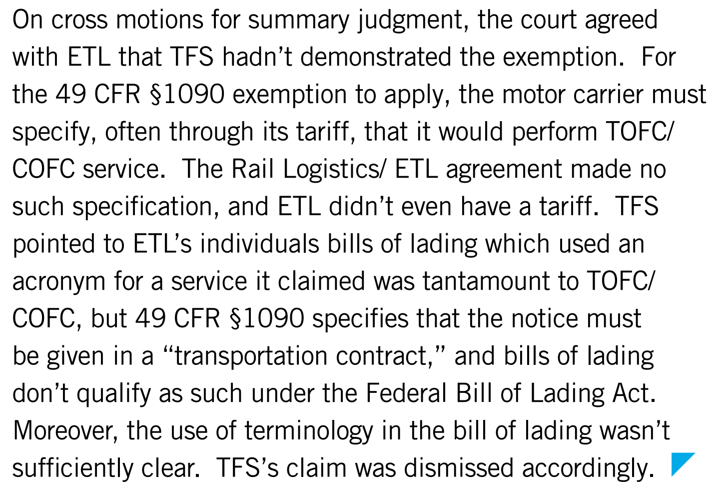
Broker trust fund administrator can't escape obligation under its BMC-85 to pay motor carrier freight charges based on alleged exemption for TOFC/COFC transportation.

Transportation Financial Services, LLC v. ETL, Inc., 2017 WL 4159363 (D. Or. 2017)

Transportation Financial Services ("TFS") is a trust fund administrator for freight brokers which hare required to post bonds or obtain financial security under 49 USC §13906(a) to a minimum of $75,000. As such, it files with FMCSA forms BMC-85 assuming financial responsibility for its broker clients against which claims for non-payment of freight charges (and others) are made. TFS filed a BMC-85 for broker Rail Logistics, LLC, which had a contract with motor carrier ETL. When Rail Logistics failed to pay ETL's freight charges, ETL made a claim to TFS, and TFS paid ETL about 22 grand.

By mistake, it later urged. TFS came to believe that the services ETL provided were exempt from trust fund coverage under 49 CFR §1090, which details "rail trailer-on-flatcar/ container-on-flatcar ("TOFC/COFC") service, and disqualifies trust fund liability for charges arising under it. TOFC/COFC service involves intermodal rail/truck transports. TFS sued ETL in the U.S. District Court for the District of Oregon, seeking to force ETL to reimburse the payment.



On cross motions for summary judgment, the court agreed with ETL that TFS hadn't demonstrated the exemption. For the 49 CFR §1090 exemption to apply, the motor carrier must specify, often through its tariff, that it would perform TOFC/ COFC service. The Rail Logistics/ ETL agreement made no such specification, and ETL didn't even have a tariff. TFS pointed to ETL's individuals bills of lading which used an acronym for a service it claimed was tantamount to TOFC/ COFC, but 49 CFR §1090 specifies that the notice must be given in a "transportation contract," and bills of lading don't qualify as such under the Federal Bill of Lading Act. Moreover, the use of terminology in the bill of lading wasn't sufficiently clear. TFS's claim was dismissed accordingly.

Upcoming Speaking Engagements

Transportation Law Institute

November 10, 2017 in Norfolk, Virginia

Steve Block will address deregulation of ocean shipping as the most significant event in ocean shipping law over the past fifty years.

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