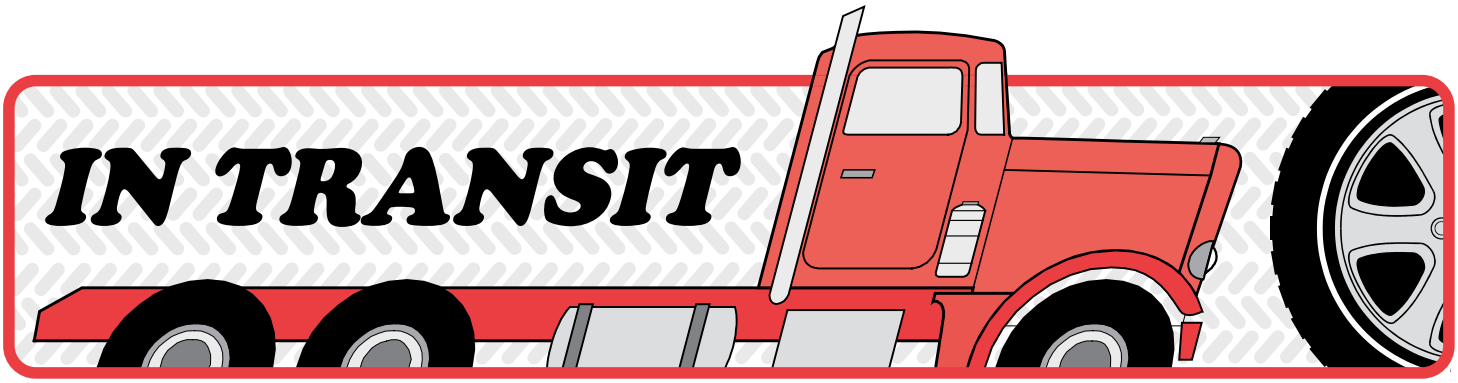
IN TRANSIT



News on industry developments and transportation projects from the Transportation and Logistics Law Group at Dean & Fulkerson

ROAD REPORT

(INDUSTRY LEGAL NEWS)

■ **Mine or Yours?** For purposes of a post-filing administrative expense claim under the Bankruptcy Code, the Court held that shipped goods are deemed received upon physical possession by the consignee (debtor) and not when the goods ship via common carrier "free on board."

World Imports Ltd. (3rd Cir 2017)

■ **Federal Law? So What?** Flying in the face of federal preemption, a state court held that a carrier's claim for recovery of freight charges relating to an interstate transportation of goods was deemed governed by the Indiana statute of limitations and not the 18-month federal rule.

Kennedy Tank & Mfg v. Emmert (Ind 2017)

■ **Right Church, Wrong Pew?** A state law negligence claim against a transportation property broker alleging errors in carrier vetting and selection process resulting in "imposter carrier" picking up and stealing the shipper's load was not preempted by the Interstate Commerce Commission Termination Act. The court observed property brokers are not carriers, and broker negligence liability would not result in regulation of carrier prices, routes or services.

Factory Mutual Ins v One Source Logistics (USDC Cal 2017)

■ **Motor Carrier Exemption - A Line Not Crossed.** Even though a driver never operated across state lines, the fact others did and plaintiff could have been called upon to do so was deemed sufficient to exempt the carrier-employer from payment of overtime under a state wage order construed in harmony with the

ON THE DOCK

(CURRENT D&F PROJECTS)

■ **STAA Retaliation Claim.** D&F is currently assisting a client before OSHA in defense of a driver termination claimed to have been undertaken in retaliation for refusal to participate in alleged violations of FMCSR hours of service requirements.

D&F Attorney: Neill Riddell

■ **Enforcement of Transportation Charges.** D&F successfully argued and the Michigan Court of Appeals affirmed a lower court's entry of a judgment following a grant of summary judgment for freight charges against a shipper who maintained that it had no involvement with the arrangements for transportation of goods.

D&F Attorney: Kevin Summers

■ **Detroit Water Challenge.** D&F has recently assisted several trucking companies with large Detroit facilities in identifying and implementing non-litigation solutions to significantly mitigate substantial Detroit water rate increases intended to recapture the cost of storm water sewer runoff from impervious (paved) properties.

D&F Attorney: Jim O'Brien

■ **Mergers and Acquisitions.** D&F has been active in assisting several trucking clients with matters relating to sales/purchases of business entities.

D&F Attorney: Jerry Byrd

FEATURE:

THERE'S A CHANCE NOVEL RELIEF IN CARGO CLAIMS

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FEATURE ARTICLE

So You're Saying There's A Chance – Court Recognizes Novel Relief in Cargo Claim

By Kevin Summers

If you're a truck company and you are defending cargo claims, you have pretty well figured out that the deck is stacked against you.

Add into the mix high value shipments, and the pressure only increases to identify some measure of relief from otherwise strict liability.

But history, and federal legislation, weigh heavily against you.

Aspects of the rules applying to motor carrier cargo claims trace back to English common law predating the advent of trucks and truck companies. Today, the dominant source of law on damage claims is the Carmack amendment, first adopted when rail was king.

Congress enacted the Carmack Amendment in 1906 to establish a national system of carrier liability for goods lost or damaged during interstate shipment under a valid bill of lading. The Act's purpose was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. To this end, the Carmack Amendment preempts state law claims brought against a carrier for loss or damage to goods that they transport, providing federal courts with exclusive jurisdiction over such claims.

The statute requires that a carrier issue a bill of lading for the property it transports which "records that a carrier has received goods from the party that wishes to ship them, states the terms of the carriage, and serves as evidence of the contract for carriage." The court further states that a bill of lading is a contract between the carrier and the shipper. While a carrier is liable to the person entitled to recover under the bill of lading for the actual loss or injury to the property, the liability of the carrier for such property may be limited to a value declared by the shipper or by written agreement between the carrier and shipper.

Ultimately, motor carriers are "virtual insurers" of the cargo they transport and will be held fully liable for loss or damage to the cargo unless they can show the damage or loss was caused by:

- an act of God;
- the public enemy;
- the act of the shipper himself;
- public authority; or
- the inherent vice or nature of the goods.

But, what if a party to the transportation somehow misrepresents the value of a shipment, understating its value at the time of tender, only to have the owner of the goods claim a much higher value when the shipment is stolen while in transit?

Recently, the U.S. District Court for the Middle District of North Carolina issued a ruling providing a motor carrier novel relief from the harsh reality of Carmack. The court held that a motor carrier could maintain a cause of action against a shipper for indemnification under an implied-in-law theory despite the fact that there was no express indemnification agreement between the shipper and carrier.

The rule likely has narrow application in limited fact situations. The case is nevertheless worth examining.

Western Express (carrier) and Macy's (consignee) entered into an agreement in which Western Express agreed to transport cargo owned by Macy's from a third-party, Coty (shipper), in North Carolina to Macy's facilities in Connecticut. The cargo was stolen in transit and was never recovered. Macy's filed suit against Western Express alleging a claim under the Carmack Amendment seeking recovery of the actual value of the cargo. According to Macy's, the value of the cargo exceeded $585,000.

After Macy's filed suit, Western Express filed a third-party action against Coty asserting a claim for indemnification. Western Express alleged Coty represented that the value of the cargo was only $93,145.00 and that it justifiably relied upon Coty's representations as to value in determining whether to implement additional safety measures. Western Express also alleged it had no opportunity to inspect the cargo so as to determine its true value. Thus, Western Express asserted that if it was found liable to Macy's, then Coty's actions in failing to disclose the "high-value nature" of the cargo entitled it to indemnity.

In reaching its conclusion, the court reasoned that an action under Carmack is more akin to a negligence action than it is to a contract action. Negligence rules regarding indemnification are, therefore, applicable.

Let the shipper beware!

ROAD REPORT

(CONTINUED)

Federal Motor Carrier Exemption.
Combs v Jaguar Energy Services (10th Cir 2017)

■ **Better Late Than Never.** The FMCSA upheld a carrier's safety rating challenge when agency personnel refused to consider evidence of the non-preventable character of two accidents. Although the evidence was not submitted within 10 days of the compliance review, as required by the Electronic Field Operations Training Manual, there is no 10-day requirement in the Federal Program Manual, which the presiding Administrator deemed controlling in excusing the late filing.
In re Marine Freight (FMCSA 2017)

ON THE DOCK

(CONTINUED)

■ **Handicapped Driver SPE.** D&F has recently provided guidance to a client seeking to assist a handicapped driver to contest a negative Skill Performance Evaluation preventing the driver from operating in interstate (but not intrastate) commerce.
D&F Attorney: Neill Riddell

■ **Withdrawal Liability.** D&F continues to advise clients on reducing risks associated with assessments for withdrawal liability from multi-employer pension plans. Recent projects include advising motor carrier employers on options to decrease owner exposure to potential liability for a possible future withdrawal.
D&F Attorney: Janet Lanyon

The information contained in this newsletter is not intended to be legal advice. Readers should not act or rely on this information without consulting an attorney.

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