

Hot Recent Cases in Motor Carrier Law

by Steve Block September 2002

Intermediaries and carriers hawking cargo insurance: is it kosher?

Evic Class Action Litigation Farina v. United Parcel Service, Inc., et al, 2002 WL 1766554 (SDNY 2002)

Have you ever wondered whether intermediaries and carriers who “sell” cargo insurance to their shipper customers should have to play by the same rules as any other insurance broker (including those addressing licensing)? Some – especially those in the insurance industry – say they should. Others – like the intermediaries and carriers themselves – roll their eyes at the suggestion claiming they’re not *really* insurance peddlers; they’re just providing a transportation service that happens to cross into the insurance industry a little bit. Most state insurance departments have looked the other way when asked about the issue, at least until now.

The law regarding sales of cargo insurance by transportation service providers recently received some serious attention from the U.S. District Court for the Southern District of New York. A number of shippers, insurers and transportation service providers (with UPS as a focus) got tangled in a dispute over cargo insurance sales. These culminated in cross motions for summary judgment addressing a smorgasbord of related issues, the most important of which led to the following determinations:

- 1) The filed-rate doctrine preempts state-law claims based on insurance regulation. However, that goes only for claims accrued between January 1, 1984 and August 26, 1994. UPS argued that the excess value insurance terms offered to its shippers were incorporated in UPS’s tariff, such that state law base claims were supplanted. While state regulation of insurance is a long-standing traditional principle of law, statutory and regulatory provisions of common carriage preempt that principle. True, the Interstate Commerce Commission and its successors weren’t in the business of regulating insurance, and tariffs didn’t have to offer insurance. But 49 CFR § 1312.28(a) (1993) specified that applicable and enforceable tariff provisions included “..other practices and privileges.” Thus, plaintiffs may proceed with their claims accrued before and after that reg and others were in effect.
- 2) The Federal Aviation Administration Authorization Act preempts plaintiffs’ state-law regulatory claims based on unfair competition and consumer protection statutes. Allowing private parties to bring actions for their own benefit against carriers would undermine the FAAAA’s prohibition of states promulgating laws regulating motor carriers. However, plaintiffs may proceed with their breach of contract and federal regulatory claims.

- 3) Plaintiffs' federal antitrust claims may proceed. All elements are supported by enough evidence to survive a dispositive motion. Plaintiffs need not be UPS's competitors to allege UPS failed to allow other insurers to sell coverage to shippers.

More to follow on this matter, which potentially could be highly precedential in determining whether and how carriers and intermediaries may sell cargo insurance. We'll keep you posted.

Notwithstanding ICCTA, states may force tow truck companies to pay costs
Henry's Wrecker Service Co. of Fairfax County, Inc. v. Prince George's County, 2002 WL 1953824 (D. Md. 2002)

A local ordinance in Maryland requires tow truck operators to pony up costs the state incurs advising vehicle owners that their cars have been snatched. One such operator, unhappy with having to fork over revenue just to let the their cargo owners know what's up, sued a county that enforces the ordinance. At issue was whether the ordinance impermissibly regulates the trucking industry in violation of 42 USC § 1983 of the Interstate Commerce Commission Termination Act.

Both parties moved for summary judgment. No one left the District of Maryland's courtroom happy, but everyone left, at least for the time being. Plaintiff's claim was dismissed without prejudice because the court lacked jurisdiction. The plaintiff had improperly crafted its complaint, basing its claim for monetary damages under § 1983, which doesn't grant a private right of action. However, the court granted plaintiff leave to amend its complaint to seek injunctive relief which would be available as a private cause of action under the Supremacy Clause. Reciprocally, the county's motion to dismiss was denied without prejudice pending submission of an amended complaint. The tow truck company may not recover money, but it may get an order towing the ordinance to the dump.

Purely intrastate hauls fall under Carmack: a court throws other considerations into the brew
Bilyou v. Dutchess Beer Distributors, 2002 WL 1806947 (2d Cir. 2002)

Driver Bilyou worked for beer distributor Dutchess, which operated solely in New York. After Dutchess canned him, Bilyou sued for overtime pay under the Fair Labor Standards Act (FLSA). Dutchess claimed exemption from the FLSA as an interstate motor carrier, as provided by the Motor Carrier Act, 49 USC § 31502 ("MCA"). The driver thought this was just hogshead, given the limited scope of Dutchess' in-state driving routes. The dispute went to the Second Circuit, which affirmed the district court in dismissing the Bilyou's claim.

True, Dutchess and its drivers operate only within the Empire State. But the beer it hauled originated in Pennsylvania and other places. Dutchess' role was but a continuation of an overall scheme to get Anheuser-Busch's sudsy treat to imbibing New Yorkers. The same goes for Dutchess' retrieval and delivery of empties for recycling; the containers ultimately found their way back to the breweries for refilling.

True also, Dutchess' primary business is wholesaling, and not transportation. Such distinctions are recognized in the MCA. But those distinctions are specific to MCA provisions which do not address the FLSA exemption. The court reviewed MCA's history to firm up its point. But couldn't the same argument be applied to many other spheres of business whose use of trucks intrastate indirectly touches on cargo originating out of state?

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Duck Head Footwear v. Mason & Dixon Lines, Inc., 2002 WL 1733778 (4th Cir. 2002)

This one involved a through haul of a cargo of shoes from Brazil to Lynchburg, Virginia. The first leg was accomplished by ocean carrier Zim; the second, from Norfolk to Lynchburg, by motor carrier Mason & Dixon ("M&D") under a separate bill of lading. When the sealed container was opened, it was some \$93,000 in shoes short. Duck Head brought both carriers to the mat, and the Fourth Circuit eventually heard an appeal.

M&D urged that Carmack should not apply (it wanted to assert liability defenses unavailable under the statute). After all, it only moved the cargo intrastate. Moreover, the Pomerene Bills of Lading Act, 49 USC § 80113(b), protects carriers from liability for damaged to cargo transported in a sealed container. The court rejected M&D's arguments. M&D's carriage of the subject cargo was pursuant to a haul originating in a foreign country, so it was not a purely intrastate deal. The Pomerene Act is only applicable to bills of lading issued for international transit; M&D's bill covered only the domestic leg of the haul. Accordingly, the Court of Appeals affirmed summary judgment in favor of Duck Head.

A shipper of household goods may get justice

Hall v. Aloha International Moving Services, et al, 2002 WL 1835469 (D. Minn 2002)

If you want to see how badly a household goods mover can botch things up, check out this one from the District of Minnesota. When shipper Hall tendered her worldly possessions to carrier Aloha, which falsely represented itself as Hawaii's sole Allied Van Lines authorized agent, she didn't realize she might as well be saying "Aloha" to her property. Not only did her stuff not arrive in Minnesota when promised, it was moved by a different carrier (not Allied) to Baltimore, where it was warehoused, damaged, repackaged, and sent on by rail. Aloha was lying to Hall all the while about her cargo's status, and charged her extra freight because Aloha underestimated the cargo's weight. Aloha never issued a bill of lading for the haul, but forged one for transit purposes.

Hall sued Aloha, alleging all sorts of theories including emotional distress, unfair and deceptive trade practices, fraud and forgery, lost wages, and others. At issue was whether Carmack's limited remedies should apply to poor Ms. Hall. Interestingly, the court referred issues to the Surface Transportation Board regarding Aloha's tariff. It turns out that Aloha improperly had no freight forwarder's tariff at all. This set the stage for the court circumventing Carmack, and leaving the door open for potentially huge liability.

In response to cross motions for summary judgment, the court ruled that Hall gets her cargo's damage value (which apparently was admitted), as well as her attorneys' fees related to the same. Her claims for fraud, forgery, and deceptive trade practices were denied because Carmack preempts them. But still at issue (pending resolution of factual issues) are Hall's claims for intentional infliction of emotional distress and lost wages, and other attorneys' fees. The court found that Aloha's alleged actions were outside the scope of the transportation process as contemplated by Carmack, such that the preemption might not apply.

More on the tolling task of record keeping: another trucker gets hit with a conditional rating

Darrell Andres Trucking Co. v. Federal Motor carrier Safety Administration, 296 F.3d 1120 (DDC 2002)

This one is very reminiscent of the *A.D. Transport Express, Inc. v. United States* case we reviewed in the May and March columns. The FMCSA must be on the rampage when it comes to truckers who toss their toll receipts in a paper bag!

This time carrier Darrel Andrews received a conditional safety rating (it originally was "unsatisfactory," which would have been a bigger headache) after failing to keep its drivers' toll receipts organized to prove operational hours of service complied with federally mandated maximums. Andrews pointed all kinds of fingers at the feds, only one of which succeeded in doing probably little more than delay the inevitable.

In issuing the conditional rating, an FMCSA auditor who investigated Andrews found maximum-hours violations and false records of duty status ("RODS"). Part of the charge was that Andrews bundled all of its drivers' toll receipts so that no one could cross reference them to the RODS. The court reviewed whether FMCSA's requirement of individually maintained toll records was an arbitrary and capricious application of regs that, at a minimum, should require a notice and comment period as part of new rulemaking. The court, by and large, found the FMCSA was well within its administrative purview in agreeing that the carrier's practices improper.

Andrews argued it doesn't use toll receipts to manage its drivers' time, so its poor organization of the documents is irrelevant. But that argument, if accepted, would empower any motor carrier to trash incriminating documents by just saying it doesn't use them to comply with federal regs. The court obviously didn't want to go down that path.

But, urged Andrews, nothing in the FMCSA's regs mandates that toll receipts be organized in any fashion. The carrier did have them in that paper bag. The court wasn't impressed. The applicable reg requires carriers to "maintain" records. If receipts and other documents are so haphazardly kept that they serve no purpose, the agency's goals in requiring them to be maintained would be frustrated.

Next, Andrews protested that it didn't know such a nasty repercussion would follow a simple mistake like badly organized receipts. Maybe, replied the court, but Andrews had received an earlier FMCSA citation for the same infraction. Moreover, the regs make clear that a conditional rating might result from bad record keeping.

After losing on Paper Reduction Act and lack of oral hearing arguments, the carrier did prevail, at least temporarily, on one point. Testimony suggests that toll receipts are inherently unreliable as evidence of a driver's work hours. This question must be answered before the court can bless any FMCSA order. When FMCSA issues a response, the court will issue a final decision.