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TRANSPORTATION ARCHIVES

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Over the past couple decades, the lawyers in Benesch's Transportation & Logistics Practice Group have spoken at countless industry conferences and authored hundreds of substantive articles dealing with a host of business and legal issues important to both the providers of, and the commercial users of, transportation and logistics services. With this new publication, which will be issued every other month, we look back on some of these seminal articles that remain critically relevant to the industry to this day. In advance of each issue, we carefully comb through the archives of our prior published work in the transportation and logistics arena and select a relevant article that we trust will be of continuing interest to our readers. Please let us know how we are doing!

Lien On Me – But Only If You Can

Carriers' Liens, Conversion and "Hostage Freight"

Eric L. Zalud

Introduction

In certain circumstances, carriers are authorized to exercise their common law and contractual rights to place a "carrier's lien" on freight. But what are those circumstances? If the carrier improperly asserts "dominion and control" over freight, in the form of a lien, and the carrier has no authority to do so, it may be liable for conversion. If a practitioner's client is holding the freight, the client must be advised as to whether it is properly doing so. If it is not properly holding the freight, the client must be advised promptly about other potential alternate modes of recourse. If the practitioner's client's freight is being held, the client must be expeditiously advised about how to either force the issue of return of the freight, effectuate a prompt overall resolution, or post appropriate security to have the freight returned in advance of final resolution. Often in these situations, the consequential damages in the marketplace to the shipper or consignee whose freight is being held mount rapidly. If a lien is alleged to be improperly asserted, many components of those damages could be passed on to the carrier if it is indeed improperly asserting the lien.

Creation and Extinguishment

The "life" of a carrier's lien is generally a short one. The carrier has a lien upon the goods for its lawful charges, arising when it picks up the freight. The lien is discharged when the carrier is paid for the goods. This discharge contemporaneously entitles the consignee to the goods. See *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 582, 40 S.Ct. 27 (1919); *Texas & Pacific Ry. Co. v. Mugg,* 202 U.S. 242, 26 S.Ct. 628 (1906). (A statutory credit arrangement may also authorize receipt of the goods before payment. 49 U.S.C. §10743(a)). A carrier loses its lien when it voluntarily delivers the goods or unjustifiably refuses to deliver. *Darby v. Baltimore & O.R. Co.*, 259 Md. 493, 270 A.2d 652 (1970). Thus, if the carrier retains the goods after it has been paid for the shipment that carries those goods, it is improperly converting the goods. A simple logical (and legal) equation generally is, that if the carrier actually possesses the freight, it has a right to a lien. If it does not, it has no such right, since there is nothing tangible upon which to lien. A corollary principle is that if the carrier has been paid for the load upon which it carries the goods, it has no lien. If it has not been paid, it usually does have a lien.

A Common Law Right; A Statutory Possibility

Thus, carriers have a lien, at common law, i.e. even in the absence of any statutory or contractual authorization, for the freight charges for the particular shipment, and also for any storage charges. *Navistar Fin. Corp. v. Allen's Corner Garage & Towing Serv., Inc.*, 153 Ill. App. 3d 574, 106 Ill. Dec. 530, 505 N.E.2d 1321, 1323-4 (1987). However, a contract carrier has no common law lien right upon goods in its possession, *Campbell v. ABC Storage & Van Co.,* 187 Mo. App. 565, 174 S.W. 140 (1915), see also, *Tucker v. Capital City Riggers*, 437 N.E.2d 1048, 1051 (Ind. App. 1982). This "contract carrier exception" could become a frequent litigation point, in light of the evolution of contract carriage and the more pervasive use of transportation contracts generally. Consequently, this is an exception that could one day swallow the rule. (Maritime carriers also obtain a lien upon cargo when it is loaded aboard the vessel, or delivered into the maritime carrier's custody.)

The Uniform Commercial Code, adopted by most states, also provides for a carrier's lien. See U.C.C. §7-307. However, state statutes regulating carrier liens are often preempted by federal law on the subject. *Rio Grande Motor Way, Inc. v. Resort Graphics, Inc.*, 740 P.2d 517, 520 (Colo. 1987) [See CCH FEDERAL CARRIERS CASES ¶83,323]. The UCC provisions of the various states vary both from federal

case law on the topic of carrier's liens, and from each other. Consequently, it is important in any lien situation to specifically research state commercial statutes dealing with carrier's liens. Also, the preemption doctrine varies from state to state and is not by any means universal. Consequently, preemption research should be a threshold task in any lien situation.

Getting Greedy: No Lien for Unrelated Debts

Importantly, a carrier does not have the right to lien and withhold delivery of cargo because of a shipper's failure to pay freight charges on separate, different and unrelated prior shipments. *See Car Transp. v. Garden Spot Distribs.*, 305 Ark. 82, 805 S.W.2d 632 (1991); *Clark v. Messer Indus., Inc.*, 222 Ga. App. 606, 475 S.E.2d 653 (1996); *Capital City Riggers, supra*, at 1052. Also, if the freight is prepaid, there is not a lien even on the goods being shipped. If a carrier exercises dominion and control over goods in an effort to obtain payment on prior shipments, then the carrier could be liable for tortious conversion of the goods. Consequently, an examination of the lading documents is essential, to determine who has the obligations to pay for the freight. With involvement of third-party intermediaries in shipping sequences being so prevalent, it is possible that payment may have already been made to an intermediary, thus spawning an argument that no lien should apply even if the carrier has not directly received payment. While the visceral reaction of many carrier clients may be to hold the freight on a present shipment for prior debts, they should be strongly advised against it, since this conversion could lead to recourse from a shipper/consignee which could include consequential damages, punitive damages and even attorneys' fees.

Getting Greedy, Part Two: No Lien on Goods Not Owned by Contracting Shipper

There is no statutory or contractual basis for a carrier to assert a lien upon goods owned by a third party when its contract is with a non-owner of the freight. *See BML Stage Lighting, Inc. v. Mayflower Transit, Inc.*, 14 S.W. 3d 395 (Tex. Civ. App. 2000). The mere fact of ownership of the goods does not impose liability upon the owner for the payment of freight charges on those goods. See also *Goodpasture v. M/V Pollux*, 602 F.2d 84, 86 (5th Cir. 1979) (when shipper failed to pay for freight, ship owner had no contractual lien against the cargo because the cargo's owner was not a party to the shipping contract); *Prozina Shipping Co. v. Thirty-Four Automobiles*, 179 F.R.D. 41, 44-45 (D. Mass. 1998) (same holding). As noted, a contract carrier has no common law lien rights. Thus, if a common carrier serves as a contract carrier for a particular load, it has no lien upon goods owned by others that it is transporting under a transportation contract. *In these situations, the carrier would be liable for conversion if it took unauthorized possession of the goods that it had hauled under a contract with one entity, which were owned by another.* Consequently, another initial examination by the practitioner in a carrier's lien situation is to clearly determine who is the titled owner of the goods. If the owner was not a party to the contract or carriage or bill of lading, the lien may be improper and damages may be accruing.

An Exception for Transportation or Finance Contracts

As noted, overall contractual relationships may create contractual liens upon goods in *present* shipments, for *prior* invoices. *See In Re Colortran, Inc.*, 218 B.R. 507 (Bankr. 9th Cir, 1997). (Freight forwarder found to have security interest based upon "security agreement" as defined in Uniform Commercial Code. The agreement was contained in a "credit application" signed by the shipper, and in each of the forwarder's invoices.) Consequently, peripheral transactional documents such as the invoice itself, credit agreements and, of course, an overall transportation contract, can obviate the "Separate Shipment Rule," and justify a lien upon unrelated freight. Also, just as contractual documents can create a lien on present goods for prior shipments, contractual documents between the parties can also negate a carrier's common law right to a lien. *See Esquire Carpet Mills, Inc. v. Kennesaw Transportation, Inc.,* 186 Ga. App. 367, 367 S.E.2d 569 (1988) (statutory and common law rights to carrier's lien were modified by a special contract between parties which provided that no payment was due until fifteen days after loading, despite the fact that goods had been delivered prior to that time. Unless payment was due under the particular contract, no lien attached). Inquiries should thus be made as to not only the *lading documents* for the particular shipment, but as to any document memorializing an overall contractual relationship between the shipper and the carrier, or a specific contractual relationship for the shipment at issue. The existence of either a general or specific transportation contract could impact, or negate, lien rights.

Acting Upon a Lien: The Uniform Bill of Lading

The Uniform Straight Bill of Lading (at §4(a)(2)) provides that if the property is not accepted by the consignee, the carrier may store the property subject to its lien for all freight and other lawful charges, including reasonable storage charges. The carrier may then sell the property at public auction in certain circumstances, and apply the proceeds of the sale to the payment of freight, demurrage, storage and other lawful charges. The carrier is then obligated to pay the remaining proceeds to the owner of the property. *Rio Grande Motor Way, Inc. v. Resort Graphics, Inc.,* 740 P.2d 517 (Colo. 1987) [See CCH FEDERAL CARRIERS CASES ¶83,323]. The practitioner should note that recently, the National Motor Freight Classification standard bill of lading on this point has been revised. These revisions eliminate the requirement of publication notice of a public sale. They also are more liberal in terms of notification to the consignee and shipper regarding public sale of the goods.

Other Charges Covered by Lien

The carrier's lien also attaches to custom duties to effect delivery, charges of a preceding carrier that a connecting carrier had to pay to obtain the cargo, even costs of feeding and preserving livestock, and all other reasonable, miscellaneous expenses associated with transport or storage of the freight (other than the carrier's own expenses of actually operating the means of transport). *See Wabash R.R. Co. v. Pearce,* 192 U.S. 179, 24 S.Ct. 231 (1904). Consequently, if the carrier's counsel has determined that the lien is a proper one, he or she should carefully catalogue any expenses that the carrier may have incurred, since they could very well be encompassed by the lien, and therefore compensable with proceeds from any public sale.

Releasing the Lien: Providing "Adequate Security"

The consignee or shipper may substitute "adequate security" in the form of a bond or cash escrow as a substitute for the cargo upon which the lien is claimed, and thereby recover the cargo. *See B.P. Exploration & Oil Co. v. 1146 Joints, etc.*, 1996 A.M.C. 1028 (E.D. La. 1995). Security, however, must be in an amount over and above the alleged value of the cargo to be considered adequate. An amount more than twice the amount of the disputed claim is presumptively reasonable. *Id., see also, World Wide Carrier, Ltd. v. Aris Steamship Co.*, 290 F.Supp. 860 (S.D.N.Y. 1968). *If adequate security has been posted and the carrier does not return the freight, it may be liable for conversion.* There is no absolute right to retention. Shipper's or consignee's counsel involved with shipments of time sensitive goods such as moving parts or workings for factory machinery, oil rigs, or physical plant, shut down of which will result in operational shutdowns, should be aware of this methodology to *immediately* recover the freight, and litigate the underlying dispute at a later date, after posting the bond.

Conversion: Measure of Damages

The measure of damages for carrier conversion in to these situations is generally the market value at the time and place of conversion, plus interest. *Knuth v. Erie-Crawford Cooperative Ass'n*, 463 F.2d 470 (3d Cir. 1972); *Universal Compute Systems, Inc. v. Allegheny Airlines, Inc.*, 479 F.Supp. 639, 645 (M.D. Pa. 1979). Consequential damages, including interest paid to borrow money to pay for converted cargo, travel expenses to placate customers whose goods were NOT delivered, carrying charges, dispatch charges and maritime shifting expenses have also been allowed as conversion damages. *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003 (5th Cir. 1982); *Esquire Carpet Mills, supra*, at 571. Lost profits are generally disallowed unless they are reasonably expected to follow from the conversion. *Fantis Foods, Inc. v. Standard Importing, Inc.*, 49 N.Y. 2d 317, 425 N.Y.S. 2d 783 (1980). Attorneys' fees incurred in *actually recovering possession* are recoverable. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729, 734 (1998). *Note that the return of converted property only impacts mitigation of damages. It is not a defense to a conversion claim. McQuillan, supra,* at 733; *Esquire Carpet Mills, supra,* at 571.

Conversion: Liability Limitations

Carriers' liability limitations generally apply to instances of conversion, unless the conversion is a "true conversion" where the carrier takes possession of the goods for its own use. *See Nippon Fire & Marine Ins. Co. v. Holmes Transportation, Inc.*, 616 F.Supp. 610, 611 (S.D.N.Y. 1985). The carrier may thus properly limit its liability where the conversion is by third parties, or even by its own employees. *Glickfeld v. Howard Van Lines*, 213 F.2d 723 (9th Cir. 1954); *Moore v. Duncan*, 237 F. 780 (6th Cir. 1916). A plaintiff shipper or consignee must prove that the carrier actually converted the property *to its own use and gain*.

In *Precious Gem Resources, Inc. v. Federal Express Corp.*, 88 Civ. 7576 (S.D.N.Y. Mar. 30, 1989), a carrier was accused of conversion, and presented evidence of its program of targeting employees suspected of pilferage and theft, subjecting them to polygraph tests, testing their honesty with dummy shipments, and then firing those who did not pass muster. There was also no specific evidence that the goods were stolen by the carrier. The court found that the carrier's liability was limited by its bill of lading and tariff. Indeed, even gross negligence or proof that an employee of the carrier actually stole the goods would generally not suffice to render tariff limitations inapplicable. *Tishman & Lipp, Inc. v. Delta Airlines*, 275 F.Supp. 471, 480 (S.D.N.Y. 1967), aff'd, 413 F.2d 1401 (2nd Cir. 1969). Similar principles apply in maritime freight situations and air carriage situations. *See United States Gold Corp. v. Federal Express Corp.*, 719 F.Supp. 1217, 1225 (S.D.N.Y. 1989), *appeal granted, mot. denied*, 1990 U.S. Dist. LEXIS 772 (S.D.N.Y. 1990).

Summary

The "carrier's lien" is a term that is used frequently and often cavalierly. However, improper assertion of such a lien can result in exorbitant damages to a carrier. Also, carriers and their counsel should be attuned to the array of potential damages and out-of-pocket costs that can be recoverable from lien proceeds, on a properly asserted carrier's lien. The practitioner should immediately delve into the factual and documentary background of any lien assertion situation, to ensure, as promptly as possible, that the lien is proper. Prompt action that minimizes the exacerbation of damages in these situations is essential.

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