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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 60
FAILING TO FOLLOW THE GUIDANCE FROM THE "RECIPE BOOK" MAY BE VERY COSTLY: PART II

Two years ago in *Flash No. 45*[1], we wrote about the trial court decision in the Indiana case of *Celadon Trucking Services, Inc. v. Wilmoth, et al.*, highlighting the importance of close attention to the "ingredients" of agreements with owner-operators under the Federal Leasing Regulations (*i.e.*, the Recipe Book). The trial court awarded the Plaintiff class approximately $3.8 million, although that amount was subsequently reduced to just over $3.3 million, plus pre- and post-judgment interest. On February 7, 2017, the Indiana Court of Appeals affirmed the trial court's award.

Under the Celadon contract, the owner-operator was responsible for the purchase of fuel. To purchase fuel at truck stops, Celadon provided the owner-operators with fuel cards. When the owner-operator purchased fuel from Pilot Flying J using the fuel card, the receipt showed the fuel was purchased at the cash price displayed on the pump (the "Pump Price"). The Pump Price reportedly reflected a modest discount of approximately six cents a gallon. Celadon then charged back the Pump Price to the owner-operator's compensation. This fact pattern is very typical within the truckload segment of the industry, and more so with motor carriers that operate under a split board (*i.e.*, independent contractors and employee drivers).

However, Celadon did not actually pay Pilot Flying J the Pump Price. Instead, Celadon paid Pilot Flying J *cost less eight cents per gallon* (the "Discount Price"). The trial court focused on a provision in the contract that authorized Celadon to deduct from the owner-operator's compensation "advances or other extensions of credit" made by Celadon to an owner-operator. The Court decided that the section was unambiguous and construed the plain and ordinary meaning of the words without consideration of outside evidence. Under the plain and ordinary meaning of the words "advance" and "extension of credit," the Court determined that Celadon advanced or extended credit for fuel purchases in the amount that Celadon actually paid (the Discount Price), not for the higher Pump Price which Celadon never paid and was never obligated to pay.

On appeal, the Court considered the meaning of the word "advance," which Black's Law Dictionary defines as: "1. The furnishing of money or goods before any consideration is received in return. 2. The money or goods furnished." Based upon that definition, the Court wrote that Celadon did not transfer any money to Pilot Flying J (or the driver) at the time of a fuel purchase. Instead, Pilot Flying J issued a subsequent invoice to Celadon for the purchased fuel in the amount of the Discount Price. Celadon paid that amount to Pilot Flying J, not the Pump Price. As a result, Celadon "cannot be said to have ever

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'advanced' or 'furnished' a fuel purchase at the pump price." Actually, "what Celadon 'advanced' to truckers when they used a [fuel card] at Pilot Flying J was the actual fuel itself—not the specific pump price of the fuel."

Celadon argued that if a driver failed to pay for fuel at Pilot Flying J that Celadon could be charged with theft under Indiana law. The Court dispatched of this argument fairly quickly on the grounds that if such a prosecution of theft were to occur, Pilot Flying J's recovery would be limited to the Discount Price, not the Pump Price. In fact, "if a Celadon trucker did pay Pilot Flying J only the discounted price but not the displayed pump price, it is unclear that there would be any theft at all." Nevertheless, the Court ultimately concluded that no provision of agreement governing the relationship between the Plaintiff drivers and Celadon permitted Celadon to deduct or seek reimbursement for more than Celadon's costs for fuel purchases.

As we previously explained in *Flash No. 45*, Celadon's practice is far from unusual. There is no legal requirement that a motor carrier pass through all (or any) portion of a fuel discount that it may receive. However, the contract failed to clearly specify the chargeback for fuel in a manner consistent with Celadon's actual operational practice. Contracts with owner-operators must include that disclosure. Given the volume of fuel used in an owner-operator's business, clarity in disclosure, along with congruent operations, are extremely significant and require constant review and attention. The harsh result for Celadon may have been different if the contract simply stated that "the amount charged back to the owner-operator for the cost of fuel shall be the cash price at the pump as evidenced by the receipt the owner-operator receives at the time of purchase."

The bottom line action item for motor carriers that operate with owner-operators is to review their agreements and make certain that the ingredients called for by the Recipe Book are present, and that the motor carrier's operations are sync with the contract. A contract that contains all of the right ingredients can still fall flat if managers fail to act correctly and consistently with the contract's terms and provisions in dealings with owner-operators. The Benesch Transportation & Logistics Practice Group has the experience and capability to help your business review its independent contractor program, contractually and operationally, and would be happy to do so.

[1] *Flash No. 45* is available here.

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