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Unique Preference Defenses Available to Freight Brokers

By Jennifer R. Hoover and Kevin M. Capuzzi

Freight brokers are well-accustomed to bankruptcy preference actions. Those actions, which are permitted under the Bankruptcy Code, allow a debtor, trustee or other bankruptcy estate representative to claw back payments made on account of antecedent debt in the 90 days prior to a bankruptcy filing. Trade creditors, especially those in the transportation industry, are often faced with significant preference claims because they provide service to debtors up until (and sometimes after) the debtor's bankruptcy filing. While many trade creditors are well-versed in the more standard defenses to a bankruptcy preference action, such as new value and ordinary course of business defenses, there also are unique defenses available to freight brokers that

are rarely exercised, but may be effective in certain circumstances.

In most cases, a freight broker contracts with a carrier to haul freight on behalf of a shipper. While a shipper often tenders payment directly to a freight broker, the freight broker then generally turns over that payment to the carrier, less any brokerage charges or commission. In situations where the debtor is the shipper, the effect of this scenario is that the alleged preferential payment from the debtor merely passes through the freight broker and ultimately ends up in the hands of the carrier. Since the shipper's relationship is with the freight broker, however, the freight broker is often the target of the preference claim, not the carrier.

An often overlooked preference defense is the "mere conduit" defense. To be a "mere conduit," a defendant must "establish that it lacked dominion and control over the transfer because the payment simply passed through its hands and it had no power to redirect the funds to its own use." [*Golden v. The Guardian Life Ins. Co. of Am. (In re Lenox Healthcare, Inc.)*, 343 B.R. 96, 103 (Bankr. D. Del. 2006)] With the exception of any brokerage charges or commission of the freight broker, it is generally the case that a shipper's payment only passes through the hands of the freight broker to the carrier. The mere conduit

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Playbook for Managing Risk of Driver Coercion and Harassment Claims

By Jonathon Todd

New Federal Motor Carrier Safety Administration (FMCSA) rules issued over winter allow drivers to file complaints for coercion and harassment. All parties to the transportation supply chain, including shippers, may find themselves subject to investigations and steep penalties. Your company can work to manage the risk associated with coercion or harassment claims by implementing operational best practices.

Driver Coercion Claims

Driver coercion claims carry risk for motor carriers, brokers, forwarders and shippers. The FMCSA's "Prohibiting Coercion" rule, effective on January 29, 2016, prohibits coercing drivers to operate in violation of the safety regulations, hazardous materials regulations or the motor carrier commercial regulations. [*Prohibiting Coercion of Commercial Motor Vehicle Drivers*, Final Rule, 80 Fed. Reg. 74695-74710 (November 30, 2015)]

Driver coercion occurs where threats or adverse actions, including withholding future opportunities, are taken against a driver in response to the driver's statements that transporting a load will violate the regulations. Merely withholding a particular load from a driver who raised regulatory concerns about that shipment is not considered coercion. However, any threats or adverse actions where a driver raises concerns or refuses to haul will be considered coercion—even if the driver's allegation of potential violations was incorrect.

Driver Harassment Claims

Carriers may also find themselves subject to driver harassment claims. The FMCSA's "Electronic Logging Device (ELD) Mandate," with a compliance date of December 18, 2017, in part prohibits harassing drivers to violate the Hours of Service (HOS) rules in connection with the use of ELDs. [*Electronic Logging Devices and Hours of Service Supporting Documents*, Final Rule, 80 Fed. Reg. 78292-78416 (December 16, 2015)] Driver harassment claims are a risk beginning the very moment ELDs are installed in power units, despite the mandatory compliance date.

Driver harassment occurs where the driver commits a violation of the Hours of Service (HOS) rules based on the carrier's actions in connection with an ELD. Unlike coercion, harassment requires that the carrier "knew or should have known" the driver

would engage in fatigued driving or violate the HOS rules and that the violation actually occurred. The flood of ELD data that carriers are now receiving, or will soon receive, dramatically increases the likelihood of possessing information about the driver's real-time performance and failing to consider that data when dispatching loads.

Your Risk Exposure

Coercion and harassment claims each carry civil penalties of up to \$16,000 for each offense. Claims can also result in revocation of operating authority in egregious cases. Civil penalties are in addition to any penalties associated with underlying regulatory violations and any lawsuits filed by drivers, such as for retaliation in response to refusals to haul.

Take action to avoid being blindsided by coercion or harassment claims and to help manage those claims if they should occur.

Driver complaints must be filed with the FMCSA local Division Office or the National Consumer Complaint Database within 90 days of the incident. The FMCSA will investigate all non-frivolous complaints that include adequate information regarding the alleged coercion or harassment. The investigation will include contacting both the driver and the company against whom the claim was filed for additional information. The FMCSA is also recommending that drivers consider filing whistleblower complaints with the Occupational Safety and Health Administration (OSHA).

Your Operations Playbook

Take action to avoid being blindsided by coercion or harassment claims and to help manage those claims if they should occur. The following are eight best practices to consider as you develop and implement your plan for managing the risk of coercion and harassment.

- **ENGAGE** each driver professionally and with respect, just as with an independent third-party