

Logistics on the Offensive: Using Contractual and Common Law Rights as a Sword

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We are now in the era of freedom of contract in the logistics arena. While contracts provide many protections to contracting parties, they can also be used offensively, to affirmatively protect legal rights. There are many common law and contractual causes of action available to transportation contracting parties (shippers, brokers, and carriers), including breach of contract, breach of covenant of good faith, and misappropriation of trade secrets. Also, in many instances, the attorneys' fees spent to prosecute the claim in litigation may be recoverable. The potential wrongs for which there may be recourse include: Double brokering (huge casualty/cargo exposure); back solicitation (your hard-earned customers!); confidentiality clauses (knowledge is an asset); trade secrets/noncompetition/customer lists (most important asset).

The Critical Clauses

Clauses that should be considered in virtually every transportation contract include:

Exclusivity Clauses: These are the gold standard and are worth enforcing. They keep those big customers locked in for a time-certain duration. They are also valuable for capacity and financial forecasting, and are particularly valuable in times of economic (or epidemiological) uncertainty.

Noncompetition Clauses: These clauses are typically contained in contracts with employees (and sometimes, independent contractors). Although, the FTC has attempted to ban them, that ban has been, essentially, judicially stayed, so they remain viable. These clauses protect the entity's customer lists and other technological/proprietary information, which often are the most important assets in a logistics enterprise. Common law rights are very narrow here, so it is imperative to infuse these protections into an actual, enforceable contract. Non-Solicitation clauses may be the most important here, and those will probably remain viable, regardless of the FTC outcome.

"No Double Brokering" Clauses: Logistics contracts (of shippers and brokers) should include provisions prohibiting double brokering, a scourge of a practice that can result in huge casualty/cargo exposure. Double brokering also often spawns freight charge issues, involving factorers and collection agencies. It may also have MAP 21 implications, which can subject individual officers and owners to liability.

"No Back Solicitation" Clauses: Logistics contracts of brokers should include provisions prohibiting back solicitation. These provisions help logistic companies protect their hard-earned customers and preserve the shipper/broker/carrier model. They are also potent weapons in contract litigation.

How to Make a Successful Claim - The Liability Prong

Various theories of liability in these actions include straightforward breach of contract actions (the strongest), or ancillary breach of covenant of good faith and fair dealing causes of action. There may also be tortious interference with existing or prospective business relationship claims, and misappropriation of trade secrets claims (although difficult without an actual contract). These actions apply particularly in noncompetition agreements. (It is imperative that a noncompetition clause have a reasonable duration and geographic scope, and restriction on dissemination of confidential information).

The Liability Prong/Damages

If there *is* liability, there also has to be damages. One challenge in these cases can be actually proving damages. That is because proving up damages involves discovery from potential or prior customers, which is often problematic from a business standpoint. Also, it is possible that the plaintiff did a very good job of *keeping* its customer's business, even *in spite of* the violative conduct, and thus has little out-of-pocket damage. So, in light of the frequent difficulty in proving up ascertainable damages, some of these contracts have a liquidated damages provision. However, those too must bear some reasonable relationship to the actual damages anticipated to be incurred. Importantly, many of these contracts also provide for attorney's fees to the prevailing party. The notion of who "prevails" can also be litigation point. One measure of damages which has been approved by several courts, is extrapolating prior revenue/earnings from the relationship, to the remaining years on the contract, after the breach occurred.

In cases of back solicitation, one critical fact is whether the defendant, either a competing broker or motor carrier, had previously conducted business with the shipper, prior to the initiation of the contract that contained the back solicitation clause. Pre-existing relationships *can* take the teeth out of these claims for back solicitation and exclusivity.

The Caselaw Supports Successful Contractual Lawsuits by Logistics Entities. For instance, in *All-Ways Logistics, Inc. v. USA Truck, Inc.*, 2007 U.S. Dist. LEXIS 48034 (E.D. Ark. Jul. 2, 2007), the Plaintiff/Broker/Agent, All-Ways, and motor carrier, USA Truck, entered into a brokerage commission agreement, by which All-Ways would receive a 5% commission for USA freight brokered by All-Ways. USA terminated the agreement and then contracted directly with Rheem, one of All-Ways' shipper customers. Consequently, All-Ways sued for (1) breach of contract; and (2) tortious interference. The court found that whether the commission agreement contained an implied prohibition against back solicitation was a question of fact for the jury (a good result for the plaintiff broker). Also, whether the back solicitation violated the implied covenant of good faith and fair dealing was also to be determined by the jury. There were also factual issues of actual reliance upon USA's promise not to engage in back solicitation, and whether that reliance was reasonable. The court also refused to grant summary judgment to USA on All-Way's tortious interference claim, because there was evidence of secret conversations with the customer and USA about contracting directly with USA. Also, the punitive damage claims stayed in case. So, all the plaintiff brokers' claims withstood summary judgment, and the case went to the jury-every plaintiff's dream!

Confidentiality Clauses Can Also be Judicially Enforced. For instance, in *Brown v. Rollett Bros. Trucking Co.*, 291 S.W. 3d 766 (Mo.Ct.App. 2009),

Brown had worked as a dispatcher for Rollett Logistics. He was responsible for finding loads by contacting established and prospective customers. Brown terminated his employment with Rollett and went to work for a competitor. Rollett then sent Brown's new employer a letter claiming that Brown had breached his noncompete provision. The court found that the Agreement was not enforceable because the noncompete provision did not operate to protect customer contacts or trade secrets. The court found that Brown's interaction with customers did not rise to the level of "customer contacts," because the customers ultimately made decisions based upon price-not upon a pre-existing relationship with a sales representative. Also, the defendants' customer list, rate sheets, and pricing process were not trade secrets because most of the information on customer lists was publicly available, the information contained on the rate sheets was not a "process" or device for continuous use in the business," and the plaintiff was never involved in the pricing process anyway. *Moral: It is tough to protect trade secrets without a specific contractual provision.*

Check those Contracts! So, if the transportation entity's contractual relationship ends, or is terminated by business exigencies, or a breach by the adverse contracting party, *do not walk away and do nothing* without conducting some due diligence on possible recourse in the courts, on valid breach of contract claims (or other contractual or common law claims). In other words, don't keep that contractual arrow in the quiver, because it may be right on target!

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