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Using Contractual Rights as a Sword to Protect Your Interests in Uncertain Times

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As many in the industry are aware, we are now in, and have been for over a decade, the era of the transportation contract. More and more shipments, shipment schematics, and overall transportation relationships are governed by transportation and logistics contracts. Those contracts are infused with provisions relating to technology, proprietary rights, confidential information, goodwill, and numerous other clauses--that are all put there-for a reason. That reason is that often commercial and contractual relationships in the logistics world deteriorate. They deteriorate for a variety of reasons, including shifting commercial, macroeconomic, societal, and (these days) epidemiological trends. They also deteriorate in light of specific, unique exigencies of one or both of the contracting parties. That risk of relationship deterioration, combined with the business reality that for many logistics entities, particularly those that are non-asset based, their principal assets are all intangible, make good contracting, and contract enforcement, imperative.

In this uncertain era then, it is more important than ever for logistics companies to realize that these contractual provisions, while they may slightly impede smooth commercial transactions, are viable legal instruments to protect the rights, proprietary interests, and customer bases of logistics companies. They are not just shields; they can also be swords.

The Critical Clauses: Consequently, there are several clauses that should be included in most transportation contracts. If these Critical Clauses are included and subsequently breached, they can and should be acted upon, often with favorable commercial results.

- **No Double Brokering**: Most logistics contracts should include provisions prohibiting double brokering, a practice that can result in huge casualty/cargo exposure. Double brokering also often spawns nettlesome freight charge issues, involving factorers and collection agencies, and may have MAP 21 implications.
- **No Back Solicitation**: Logistics contracts should include provisions prohibiting back solicitation. These provisions help logistic companies protect their hard-earned customers, and preserve the carefully calibrated dynamics of the shipper/broker/carrier model. When drafted carefully and properly, these clauses can be potent weapons in contract litigation.

- **Confidentiality Clauses**: In the logistics world, knowledge is an asset, including knowledge of processes, protocols, technology, and proprietary customer data. In most states, the definition of proprietary or confidential information is quite narrow, so common law causes of action are difficult to maintain. Consequently, without an underlying contract, these claims may be lost. With a contract, there is a much greater likelihood of success in a contractual enforcement lawsuit.
- **Exclusivity Clauses**: These are the gold standard, and are worth enforcing. They help keep those big customers locked in for a time-certain duration. They are also valuable for capacity and financial forecasting. They are particularly valuable in times of economic (or epidemiological) uncertainty.
- **Noncompetition Clauses**: These are for contracts with employees. They protect the entity's customer lists and other technological and proprietary information, some of the most important assets to any logistics enterprise. Again, common law rights are very narrow here, so it is imperative to infuse these protections into an actual, enforceable contract.

Two Prongs for Recovery Liability and Damages:

- **Liability:** There are various common law and contractual causes of action that can be brought for violations of these contract clauses. These include straightforward breach of contract actions (the strongest). In many states, there are ancillary breach of covenant of good faith and fair dealing causes of action. There also may be tortious interference with existing or prospective business relationships, and misappropriation of trade secrets claims (although different without an actual contract). However, it is much easier, and there is a much greater likelihood of prevailing, if there is an underlying contract between the parties, and there is clear contractual language that prohibits the conduct at issue. This applies particularly in noncompetition agreements. It is imperative that they have not only a noncompetition clause with a reasonable duration and geographic scope, but also a restriction on dissemination of confidential information.

Courts have supported the notion that logistics entities are entitled to protect intangible business interests such as those referenced above. [*See All-Way Logistics, Inc. v. U.S.A Truck, Inc.*, 2007 U.S. Dist. Lexis 48034 (E.D. Ark. 2007) (court found that brokerage commission agreement between broker and motor carrier could contain implied prohibition against back solicitation by the motor carrier; also permitted punitive damages claim to remain in the case).] 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 possibly take the teeth out of some of these claims for back solicitation and exclusivity, but not completely.

- **Damages:** Remember, if there is liability, there also has to be damages. So, in these cases, one challenge can be actually proving damages. Proving up damages involves discovery from potential or prior customers, which is often problematic from a business standpoint. Alternatively, it is possible that the plaintiff did a very good job of keeping the business, even in spite of the violative conduct, and thus has little out-of-pocket damage. 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. Many of these contracts also provide for attorney's fees to the prevailing party, but that notion of who "prevails" can also be a litigation point. One measure of damages in these situations, which has been approved by several courts, is extrapolating prior revenue/earnings from the relationship to the remaining years in the contract after the breach occurred.

So, if a 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. Don't keep that contractual arrow in the quiver, because it may be right on target!

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