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Plan Ahead – TLC's 45th Annual Conference

- **Still Time for Fall Seminars in Illinois!**
- **NAFTA Replaced With USMCA**
- **Federal Preemption and California Law**
- **Cost of Traffic Congestion**
- **Avoiding Costs of Double and Triple Orders**
- **USPS Proposes Rate Increases**
- **6th Circuit Ruling On Liability Limitations**
- **Precision Location Deliveries**
- **More Q&A's**

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RECENT COURT CASE

SIXTH CIRCUIT EXPANDS CARRIER REQUIREMENTS TO LIMIT LIABILITY

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The Sixth Circuit Court of Appeals recently issued a landmark decision potentially expanding the liability of future carriers under the Carmack Amendment.

The case is *Exel, Inc. v. Southern Refrigerated Transport, Inc.*, 2018 WL 4579690 (6th Cir. 2018) ("*Exel*"). *Exel* involved the loss by theft of a truckload of pharmaceuticals owned by Sandoz, with a value of $5.9 Million. The bill of lading for the shipment specified a liability limit of $2.40 per pound. *Id.* at 1-2. The limit of the carrier's liability thus calculated would be $56,766.36. The bill of lading was drafted by the shipper.

The Sixth Circuit decided that the liability limit in the bill of lading did not apply, on the basis of the "fair opportunity doctrine," which the court referred to as the "opportunity-to-choose requirement." *Id*. at 7. The Court disregarded the liability limit specified in the bill of lading on the basis that it would only be enforceable if the carrier had offered two different charges for the shipment – one for full liability and the other (at a reduced charge) for reduced carrier liability. The Court held that the actual choice between two actual freight charges offered by the carrier must be proven in order to a liability limit in a bill of lading to be enforced.

In this particular case, the Court issued rulings on the bill of lading language which significantly widens the potential to avoid liability limits in future claims. Significantly, the Court entered a ruling which in effect reverses the significance of a blank entry in the "declared value" section of the bill of lading at issue in the case. In *Exel*, the "declared value" section of the bill of lading was blank. The Court cited to language in the bill of lading's terms and conditions which state that "where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of property." The Court seized upon this language to rule that a blank declaration of value **indicates the freight rate being charged is not dependent on value**. If the freight rate isn't dependent on value, then per the Court's reasoning, there is no choice of freight rates dependent on value, and the carrier cannot limit its liability.

The District Court had determined earlier that SRT and Exel agreed on a flat rate for the shipment of the pharmaceuticals per the empty "'declared value' box" on the Bill of Lading. Exel had never explicitly declared to SRT the value of the shipment. The Court held that this made the freight-rate of the agreement a flat one. Since flat rates are independent of value, a per-pound limit of liability does not apply under these agreements. Indeed, even though the Bill of Lading stated in widely recognizable industry terms that the release value was not to exceed $2.40 per pound, the District Court refused to uphold this limit. Thus, if a shipper does not declare the value of its freight to the carrier, they cannot instate a per-pound limit of liability on the shipment.

In this instance, Exel informed SRT that their shipments are typically $1,000,000 or less, but the Sixth Circuit deemed this statement nonbinding, and that it did not constitute a declaration of value.

Additionally, in connection to the determination of a flat rate agreement and the "opportunity-to-choose" requirement of the Carmack Amendment, the Court held, again, that meeting this burden of proof requires the carrier to actually prove that it offered the shipper at least two levels of liability if it is to limit its liability below the full amount, i.e., to allow the shipper to have a degree of control over the amount of risk he incurs in a shipment.

In this case, the Sixth Circuit affirmed the District Court's finding that when a carrier offers a shipper a flat rate, they fail the above requirement and so forfeit their right to limit their liability under the Carmack Amendment. Further, if a carrier gives shippers the choice between agreeing to a single liability (and corresponding rate) and finding another carrier, the carrier "eviscerate[s] the Carmack Amendment's opportunity-to-choose requirement."

Notably, this requirement still applies when the shipper drafted the applicable bill of lading or other liability-limiting documents themselves. Prior rulings cited by SRT have indicated that under such a circumstance, the "opportunity-to-choose" clause of the Carmack Amendment had been satisfied. The District Court of New Jersey held thus:

> [W]here a shipper, rather than the carrier, drafts the bill of lading and chooses the release rate, the limitation of liability rate found on the bill of lading will be enforced against the shipper. *Penske Logistics, Inc. v. KLLM, Inc.*, 285 F. Supp. 2d 468 at 473.

Here, however, the Sixth Circuit distinguished those findings (excepting *Penske*) from the instant one, noting that the carriers in each prior case gave the shipper a discount for limiting liability. Southern Refrigerated Transport, in providing a single flat rate to Exel, failed to do this and therefore could not limit its liability under the Carmack Amendment.

The significance of the above is further emphasized because the bill of lading language that was at issue in the case is the Uniform Domestic Straight Bill of Lading. Thus, the same bill of lading language is likely to be encountered in many future Carmack losses. Indeed, the terms of this bill of lading are set by the Code of Federal Regulations at 49 C.F.R. § 1035. The CFR in fact requires that this form of bill of lading to be used. 49 C.F.R. § 1035.1. The Uniform Bill of Lading terms, and the language on the reverse side of the bill of lading (including the language upon which the *Exel* case hinges) is established by 49 C.F.R. § 1035, Appendix A and B.

An open question, following the recent *Exel* decision, is whether a carrier can alter their bill of lading terms to avoid the court's holding. The CFR states that the uniform bill of lading specified in 49 C.F.R. § 1035 cannot be changed "to alter any rights or obligations conferred by statute or regulation on either carriers or shippers with respect to the preparation or issuance of bills of lading." 49 C.F.R. § 1035.2. While not entirely clear, a strong argument can be made that this regulation would prevent a carrier from altering the terms of its bill of lading to avoid the *Exel* decision.

Carriers could also avoid full liability under the *Exel* decision by doing what the *Exel* Court required – exchanging and agreeing upon documentation with a shipper or broker beforehand which purports to set two rate structures (one limited with a reduced valuation, and the other for full carrier liability). It remains to be seen whether, commercially, carriers and shippers/brokers will undertake such a response.

In the meantime, open claims should be re-examined to determine if the holding of *Exel* could be cited to in support of a higher recovery or settlement. We do, however, note that the *Exel* decision is a decision of the Sixth Circuit. Other circuits are not bound to follow the holding in *Exel*, although given the simplicity of its holding, it would appear likely to be adopted by other circuits. Given the amounts at stake in the *Exel* litigation (which has thus far supported the parties to litigate two full appeals to the Sixth Circuit) it would appear likely that the *Exel* case will be appealed to the Supreme Court. We will continue to monitor the status of this case.

[Editor's note: Case citations were removed for easier reading.]

Please contact David T. Maloof if you have any questions about this landmark decision at (914) 921-1200 or dmaloof@maloofandbrowne.com.