Defense of Truth-in-Leasing Claims for Trucking Companies

By David H. Levitt

When the Seventh Circuit recently affirmed summary judgment for the defendants in *Mervyn v. Atlas Van Lines, Inc.*, 882 F.3d 680 (7th Cir. 2018) ("*Mervyn II*"), it affirmed compliance with the federal Truth-in-Leasing regulations that apply to owner-operator contracts that are often used in the trucking industry—and provided important lessons for participants in that industry.

Perhaps the most important lesson is this: a strong dispute resolution procedure, requiring that the owner-operator provide notice of a dispute about compensation within a specified period of time, can go a long way towards defeating both class certification and the claim on the merits. The owner-operator agreement at issue in *Mervyn II* included a provision that: "Financial entries made by [the trucking company] on payment documents shall be conclusively presumed correct and final if not disputed by Contractor within [a specified number] days after distribution." The provision was upheld as effective where there was no evidence that Mr. Mervyn had disputed any particular payment document within the specified time period.

In *Mervyn II*, this meant that Mr. Mervyn's individual claim was barred, which effectively ended his attempt to act as class representative.

There are other lessons for trucking companies facing such claims, as well as for trucking companies looking to firm up their compliance with the regulations so that such claims are never even brought.

The Statutory and Regulatory Background

Lawsuits like *Mervyn II* are brought under the federal Truth-in-Leasing Act and regulations promulgated under that Act. The statutory provisions, 49 U.S.C. §14704(a) and (e), create remedies for injunctive relief, damages, and attorney's fees arising from violations of the Act. The regulations, 49 C.F.R. §376.11 (requiring a written lease) and §376.12 (listing certain required terms in such leases), form the primary basis for these lawsuits. The remedies are specified in the Act, whereas the substantive bases of the claims are based in the regulations.

The primary meat of claims under the statute comes from the various subsections of §376.12. These subsections require, among other things:

- That the amount to be paid must be "clearly stated on the face of the lease or in an addendum which is attached to the lease." §376.12(d).
- That the lease clearly specify which party is responsible for certain costs and expenses, such as fuel, fuel taxes, empty mileage, permits, tolls, and the like, as well as who is responsible for loading and unloading the goods. §376.12(e).
- Where the revenue paid to the owner-operator (referred to in the regulations as the "lessor") is based on a percentage of the gross revenue for a shipment, the lessor is to receive a copy of the rated freight bill or a computer-generated document containing the same information, as well as the right to examine copies of the underlying tariff or contract provisions with the carrier's customer. §376.12(g).
- That the lease clearly specify all items that will be initially paid for by the carrier but will be deducted from the lessor's compensation, "together with a recitation as to how the amount of each item is to be calculated." §376.12(h)—a frequently asserted regulatory violation.
- That the lease specify that the lessor is not required to purchase or rent products, equipment, or services from the carrier as a condition of entering into the lease agreement. §376.12(i).
- That the lease clearly specify whether the carrier will charge back to the lessor any amounts for required insurance, as well as the conditions for any deductions for cargo or property damage. §376.12(j).
- That the lease specify any escrow requirements, and that any escrow amounts be refunded to the lessor within 45 days from the termination of the lease. §376.12(k).

Defense Strategies to Consider

Fight Class Action Allegations and Discovery

While there are any number of dangers arising from an individual claim—such as setting precedent that can be used by subsequent claimants—the largest part of the expense and exposure will most often arise from the class action allegations. Individual claims may or may not be relatively small, but facing claims from the entire fleet of owner-operators creates exponentially more at risk.

Therefore, the first effort should be to evaluate the merits of the putative class representative's individual claim. If that person does not have a valid claim, or if individual issues involving that person's own claim are significant even if the claim might otherwise have some merit, the defendant has legitimate and strong grounds for resisting or seeking to substantially limit class discovery and urging the court to consider the merits of the individual claim first.

The class action plaintiff will undoubtedly assert that Fed.R.Civ.Pro. 23(c)(1) requires that the court consider class certification as soon as practicable. But as noted by the Seventh Circuit in *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995):

> Class actions are expensive to defend. One way to try to knock one off at low cost is to seek summary judgment before the suit is certified as a class action. A decision that the claim of the named plaintiffs lacks merit ordinarily, but not invariably, [citations omitted] . . . disqualifies the named plaintiffs as proper class representatives. The effect is to moot the question whether to certify the suit as a class action unless the lawyers for the class manage to find another representative.

As to the merits of class certification, while there are cases going both ways in the district courts, Circuit Court opinions that have considered the issue have rejected class certification due to the predominance of individual issues. For example, the court in *OOIDA v. New Prime, Inc.*, 339 F.3d 1001, 1012 (8th Cir. 2003), affirmed denial of class certification because a court would have to examine each class member's operating account, including offsets, advances, and other items, so that individual issues predominated over class issues. Similarly, the court in *OOIDA v. Landstar System, Inc.*, 622 F.3d 1307, 1326–27 (11th Cir. 2010), affirmed class decertification because proof of actual damages required proof of detrimental reliance on an inaccurate or incomplete disclosure—a predominately individual issue.

Defeating class certification or, even better, convincing the court that the parties ought not even be required to brief or have discovery on the question of certification carries many benefits. Aside from the obvious issue of avoiding the expense of discovery and briefing certification—a potentially very substantial expense—success on this issue can also avoid roiling the waters of the fleet of owner-operators, most of whom will have no idea that a lawsuit is pending until they receive a class certification notice. Thus, if the defendant has a good case on the merits, successfully establishing that defense before class certification can have the laudatory effect of limiting the likelihood that other claims (equally defensible) will be asserted.

Have Good Contract Language—and Apply It Accurately and Equitably

As noted earlier, a well-written dispute resolution procedure can, by itself, result in victory on the merits as well as being a solid basis for arguing that individual issues predominate over class issues.

Even better—the defendants in *Mervyn II* provided substantial documentation to the owner-operators in connection with each shipment. This evidence supported the notion that the owner-operator had, in a timely fashion, the documentation needed to confirm whether his or her compensation had been properly determined.

Equally important, however, is to clearly spell out how compensation and charge-backs will be handled. Companies have gotten in trouble, for example, in cases such as *OOIDA v. Bulkmatic Transport Company*, 503 F.Supp.2d 961 (N.D. Ill. 2007). There, the lease provided that the owner-operator's compensation would be a specified percentage of "gross revenue." The term "gross revenue" was not defined in the lease, but the defendant calculated such revenue as only that part of the revenue attributable to the owner-operator's actual services—excluding from the calculation that part of the revenue that may have arisen from services performed by others in regard to the shipment. The court rejected the defendant's argument that such limitations were common knowledge; instead, the court accepted as reasonable the plaintiff's interpretation of the undefined term "gross revenue" as including *all* revenue on the shipment. As such, the court held that the lease violated §376.12(d) because the compensation was not "clearly stated"—at least if interpreted as suggested by the defendant.

Bulkmatic's problem could have been avoided if it had simply better defined "gross revenue" explicitly in the contract.

Moreover, once clear contract terms are in place, follow them. Failing to follow the contract strictly is a recipe for trouble. If something comes up that requires a change in the compensation structure, a new lease or addendum should be drafted and executed that makes those changes. Engaging in extra-contractual compensation structures is one of the surest ways to get sued—and to lose.

In the end, there is a reason that the Act and its regulations are called "Truth-in-Leasing." Clear *disclosure* of all the relevant terms is the goal. Where a lease is drafted with that in mind, and then the carrier actually pays or deducts as specified in the contract terms, the chances of an after-the-fact "gotcha" are substantially reduced.

Conclusion

There are many more possible issues likely to arise in Truth-in-Leasing compliance and litigation. The amounts potentially at stake, however, suggest that a comprehensive review of owner-operator agreements can be extremely beneficial to carriers.

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