The Death of the Baga Serpent – Non-HHG Carrier Exposure for Attorney Fees Extinguished

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I. Introduction

Suppose a household goods carrier ("HHG Carrier") agrees to transport a household good and the good is subsequently damaged in transit. If the carrier does not provide a dispute resolution option to the shipper, the carrier would be liable for attorney's fees if the shipper successfully sues for the damage. This is unlikely to surprise—or even be news to—many transportation attorneys. But, suppose the carrier wasn't a HHG Carrier but merely a motor carrier who happened to be shipping an item that qualifies as a "household good?" Same result? No. Such a non-HHG Carrier would not be liable for attorney's fees. Again, this is unlikely to be a grand revelation, but it may surprise many to learn that this "no" could be given confidently only as recently as early 2011. In fact, before a recent Sixth Circuit case held otherwise, a nearly decade-old case established the opposite proposition: *any* motor carrier who transported "household goods" was subject to this statutory attorney's fee liability.

II. The Household Goods Transportation Act

In 1980, Congress enacted the Household Goods Transportation Act ("Act")[1] to remedy problems in the interstate shipping industry.[2] One such problem faced by shippers of household goods was the practice of common carriers to refuse to recognize shippers' claims because carriers knew few shippers would pursue expensive lawsuits to recover for damage to items of relatively little value.[3] To curb this practice, the Act mandated common carriers to provide a dispute resolution program so customers could recover damages without having to go to court.[4] To incentivize compliance with this new requirement, the Act stipulated that common carriers who did not make available some type of dispute resolution program would be liable for attorney's fees in the event a household good shipper prevailed on a claim.[5]

III. *Trepel v. Roadway Express, Inc.*: Liability Established

In *Trepel v. Roadway Express, Inc.*,[6] plaintiff purchased an African tribal carving—known as the "Baga serpent"—in New York for $15,000.[7] Trepel arranged to have Roadway Express transport the object to Phoenix, Arizona, where it was to serve as a decoration in plaintiff's private residence.[8] The serpent was broken while in transit, and Trepel filed a claim against Roadway for the damages.[9] Plaintiff called as witnesses a man who owned an African art gallery, and an appraiser of African art, who estimated the fair market value of the Baga serpent at $1.5 million and $2.5 million, respectively.[10] The jury found in favor of Trepel, setting damages at $80,000.[11] Trepel then moved for $12,716.35 in attorney's fees under the Act.[12]

Roadway contended Trepel was not entitled to attorney's fees under the Act because Congress intended the fee-shifting provision to apply solely to the household moving industry, of which Roadway was not a member.[13] In support of this argument, Roadway pointed to legislative history indicating various factors which prompted the Committee on Public Works and Transportation to "consider . . . the household goods moving industry apart from the rest of the trucking industry."[14] However, stating the language did not "take any position on the ultimate scope of the Household Goods Transportation Act," the court found the legislative history did not clearly indicate Congressional intent that the fee-shifting provision apply only to members of the household goods moving industry.[15]

Instead, the court found the fee-shifting provision applied to all motor carriers by virtue of the statute's "plain language."[16] By its own terms, the fee-shifting provision applies to any "motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of . . . title [49]."[17] Under the relevant statutes, "motor carriers" were subject to the Commission, and the term "motor carrier" included "motor common carrier."[18] The court reasoned because Roadway did not dispute its status as a "motor common carrier"—persons holding themselves out to the general

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public to provide motor vehicle transportation for compensation over regular or irregular routes, or both—it followed that Roadway was necessarily a "motor carrier" and, thus, expressly subject to the fee-shifting provision.[19]

IV. Congress Speaks

In 2005, Congress enacted the Household Goods Mover Oversight Enforcement and Reform Act ("Reform Act").[20] The Reform Act included a specific definition of "HHG Carrier" and imposed new registration requirements on such carriers.[21] Most significantly, however, Congress included the following provision in the statute as a legislative note:

> Application of certain provisions of law. The provisions of title 49, United States Code, and this subtitle (including any amendments made by this subtitle), *that relate to the transportation of household goods apply only to a household goods motor carrier* (as defined in section 13102 of title 49, United States Code).[22]

This provision, though deemed a "legislative note" by its codifiers, was enacted by Congress and is, thus, entitled to the same weight as any other law.[23] The legislative note, in combination with the new definition, seemed certain to mandate a contrary result in any future *Trepel* scenario. Confirmation came six years later in the case of *Osman v. Int'l Freight Logistics, Ltd.*

V. *Osman v. Int'l Freight Logistics, Ltd. – Trepel* Abrogated

In *Osman v. Int'l Freight Logistics, Ltd.*,[24] plaintiff purchased a decorative ceiling lamp for $12,000 at a design show in Miami, Florida.[25] Osman arranged to have International Freight Logistics ("IFL") pack, ship and deliver the lamp to Mt. Pleasant, Michigan.[26] IFL transported the lamp to its warehouse in New York, then arranged for Towne Air Freight ("TAF") to transport the lamp from New York to Michigan.[27] TAF delivered the lamp and Osman discovered it had been destroyed at some point during transport.[28] Osman filed state law claims against IFL for destruction of the lamp.[29] The case proceeded to trial, where the jury found IFL liable and rendered a verdict in favor of Osman.[30] Relying on *Trepel*, Osman then moved for an award of attorney fees pursuant to the attorney fee provision of the Act.[31] This was no small matter. By the conclusion of the trial the case was upside down, plaintiff having accrued some $75,000[32] in attorney's fees—more than six times the amount sought and recovered in the underlying claim.

Like Roadway, IFL argued it could not be liable for fees under the Act because the relevant provision authorizes fee awards only against HHG Carriers.[33] Having otherwise satisfied all statutory requirements for an award of attorney fees, the decision to grant or deny fees hinged on whether the fee-shifting provision applies to any carrier that transports household goods, as the plaintiff contended and *Trepel* supported, or is limited to claims against HHG Carriers as defined in the Reform Act, as IFL contended.[34]

Guided by the legislative note's "unambiguous directive," the court abrogated *Trepel*, holding the note precludes attorney fees awards under 49 U.S.C. § 14708(d) against motor carriers that do not qualify as HHG Carriers.[35]

VI. Conclusion

Trepel v. Roadway Express, Inc., decided in 2001, held the attorney fee provision of the Household Goods Transportation Act applied to non-HHG Carriers and HHG Carriers alike. However, no court ever cited the case for that proposition. In 2005, Congress authored a legislative note to make the point that Roadway tried, unsuccessfully, to make four years prior: the fee-shifting provision of the Act applies only to HHG Carriers. *Osman v. Int'l Freight Logistics, Ltd.* subsequently affirmed Congress' intent by abrogating *Trepel*. Thus, as of January 2011, attorney fee liability under the Act does not apply to common motor carriers. Only those carriers that bind themselves as HHG Carriers are subject to potential attorney fee liability under 49 U.S.C. § 14708(d).

Endnotes

1. 49 U.S.C. § 10100, *et seq.*
2. *Trepel v. Roadway Express, Inc.*, 266 F.3d 418, 421 (6th Cir. 2001).
3. *Id.*
4. *Id.*
5. *Id.*; 49 U.S.C. § 14708(d).
6. 266 F.3d 418 (6th Cir. 2001).
7. *Trepel*, 266 F.3d at 419.
8. *Id.*
9. *Id.*
10. *Id.* at 419-20.
11. *Id.* at 420.
12. *Id.*

13. Roadway was not certified to carry household goods; it did not go to any shipper's home and transport the shipper's household contents to a new residential location; it did not have specialized equipment with personnel trained to use it; and it did not hold itself out as a HHG Carrier. *Id.* at 422.
14. *Id.*
15. *Id.*
16. *Id.* at 423.
17. 49 U.S.C. § 11711(d). When *Trepel* was decided, the attorney's fee provision was located at § 11711(d). *See Osman v. Int'l Freight Logistics, Ltd.*, 2011 U.S. App. LEXIS 56, at *4-9 (6th Cir. Jan. 4, 2011). Section 11711(d) was later recodified as § 14708(d) as part of the Interstate Commerce Commission Termination Act of 1995. *Id.* at *7-8. The text of Section 11711(d) was "materially indistinguishable" from that of Section 14708(d), the provision analyzed in *Osman*. *Id.* at *6.
18. *Trepel*, 266 F.3d at 423.
19. *Id.*
20. *Osman*, 2011 U.S. App. LEXIS 56, at *8.
21. *Id.* at *8-9.
22. Pub. L. No. 109-59 § 4202(c).
23. *Osman*, 2011 U.S. App. LEXIS 56, at *9-10.
24. *Id.*
25. *Id.* at *2.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at *2-3; 49 U.S.C. § 14708(d).
32. $75,000 represents an estimate of the plaintiff's final request for attorney's fees. The plaintiff's demands for attorney's fees escalated as follows: $12,000, a few months after removal of the case to federal court; $27,500, after document discovery (no depositions) and the filing of summary judgment motions; $54,270, post trial; and finally an estimated $75,000 by the time of oral argument before the Sixth Circuit.
33. *See Osman*, 2011 U.S. App. LEXIS 56, at *7.
34. *Id.* at *5.
35. *Id.* at *10-11.