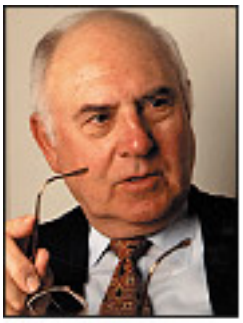
Viewpoint
PARCEL Shipping & Distribution

The Benefits of Discovery

FedEx denied claim "in bad faith"



By William J. Augello, Esquire

The value of discovery in law suits was graphically demonstrated in the recent jury award of $1.5 million plus $80,000 in attorney fees on a $17,450 claim for damage in transit against Federal Express for denying a claim in bad faith. Discovery is a pre-trial procedure under our administrative court procedures that provides access to both parties' records for the purpose of gathering evidence in connection with a law suit. The process is expensive and time-consuming, but it often leads to the discovery of damaging evidence of a party's internal policies and practices that the party would prefer not to be made public. Discovery also results in settlements before trial.

In Power Standards Laboratory versus Federal Express, the shipper used FedEx to overnight to a customer a unique piece of equipment valued at $17,450 and bought $20,000 worth of excess value coverage. It arrived severely damaged, but when a claim was filed, it was immediately denied on the grounds that "the original shipping carton, packing materials and contents were not available for our inspection, as required by FedEx Service Guide."

The shipper testified that he was told three times by a FedEx representative that no inspection was needed. FedEx's form instruction sheet also states that the "repair invoice or signed certified statement of non-repair from an authorized technician (if applicable)" must support the claim. The shipper had repairs made. FedEx then told the shipper that he would have to sue to collect the claim.

Discovery was conducted, producing copies of internal correspondence between FedEx personnel. The first was FedEx's Packaging Engineer's memorandum stating, "The photographs provided depict an adequately packaged shipment . . .The rationale for denying the claim was that the shipment was not mishandled. I disagree. This commodity had been tipped during shipment and was delivered on its side, not in the manner in which it was shipped. This would be considered 'improper handling.' Also, a

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shipment of this value should have been inspected immediately. Please reconsider your position on upholding the denial of this claim. For the reasons listed above, it appears FedEx was the cause of the damage."

The second memorandum was FedEx's reconsideration of the claim. It stated, "PSL produced pictures of the shipment being received at the destination location. The pictures indicate the electronic test system being delivered on a pallet; however, the unit was on its side and not standing up. We found no record of FedEx unbolting the unit from the pallet, then placing it on its side. We originally denied claim unable to inspect. Once pictures reviewed, we denied no evidence of mishandling."

At the trial, FedEx's claims manager is reported to have testified that it was the Claims Department's policy never to respond in writing to written inquiries from customers. Testimony was also given by the Claims Representative assigned to the claim that in the 20 years she had worked in the Claims Department, she had never seen FedEx overturn a denial of a claim in a customer's favor. The rest is history. The jury awarded $1.5 million in punitive damages, finding that FedEx acted in bad faith and with fraud or oppression in denying the claim. It also awarded $80,000 in attorney fees.

Note that the shipment in this case was an intrastate "overnight" shipment, which generally indicates movement by air. The liability of airlines is governed by common law. Motor carrier movements are governed by the Carmack Amendment if in interstate commerce or by state liability laws similar to the Carmack Amendment if intrastate in nature. Claimants are precluded from recovering damages in excess of those allowed by the Carmack Amendment under a doctrine known as a "preemption" of state law when a federal statute governs a shipment.

However, breach of contract actions are not preempted. The claimant's attorney cleverly argued that this was a breach of contract case, as every contract carries with it a "covenant of good faith and fair dealings." Thus the jury was not prevented from awarding punitive damages and attorney fees for the "bad faith" demonstrated by the evidence obtained through discovery.

This landmark award illustrates why our federal laws governing interstate carrier liability need to be modified to permit the application of state consumer protection laws such as Unfair Claim Settlement Practices Act, Unfair Insurance Practices Acts, Unfair Trade Practices Acts, etc. in loss and damage claims against interstate motor, rail and air carriers. The threat of being held liable for punitive damages and attorney fees for unfair, deceptive and irresponsible claim practices should be a sufficient deterrent to such practices where they exist. Responsible carriers should not be opposed to such legislation.

Congressman Thomas E. Petri (R-WI) appears to be on the right track having introduced a bill this year that would permit the use of state consumer protection laws when seeking damages from household goods carriers in light of the number of complaints received from customers of moving van companies annually. The National Association of State Attorneys General has gone on record as favoring similar legislation in the past few years.

However, this proposed legislation needs to be extended to other types of carriers that deal with consumers, such as parcel express carriers. The customers of both household goods movers and parcel express carriers are largely unsophisticated, casual shippers who are being victimized by firms that are experienced in evading liability for their negligence in handling goods in transit. Often, litigation is not practical due to the amount of the loss. Bad faith settlement legislation would help to balance the scales when negotiating loss and damage claims on interstate shipments.

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