



RISBERG'S:

Shakedown in the Making

Several of you have received hate letters from South Dakota demanding payment for so-called undercharges. Some of you are now receiving drafts of complaints that name your company as a defendant in an adversary proceeding in bankruptcy court, which is a form of lawsuit. These various forms of correspondence all have a common theme, which is that they contain an offer to settle for 20% of the claim. These claims are a bunch of nonsense, for the following reasons.

First, the letters refer to the 1990 *Maislin* case which, it is true, did adversely affect shippers due to the ruling regarding the filed rate doctrine. However, the U.S. Supreme Court also noted in *Maislin* that claims can not be made to collect rates that are unreasonable. Risberg's was not the greatest thing since sliced bread, as there were other carriers offering the same service for the same price. So right out of the chute the undercharge cretins have an oar out of the water.

Second, Congress recently passed a law that legislatively overruled *Maislin*, by providing an unreasonable practices defense against the collection of freight charges in excess of those originally billed. The cretins don't bother to mention this fact. For that matter, they refer to sections of the old law and to the ICC as if that agency were still around.

Third, many of you qualify as small businesses, which gives you a

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complete pass on these claims.

Fourth, it is possible that claims are being made even when there were tariffs and/or agreements properly in place. Those factual issues can be dealt with if and when necessary.

Anyway, you get the picture. And the amount of the claim at times may make it impractical to defend. Our South Dakota friends not only know that; they rely on that fact. After all, they can lose and still win, as many disgusted shippers will just pay the claim instead of drawing a line in the sand.

However, it's frequently easier to start something than to finish it. One federal court recently stated the following in discussing its disgust with these collection tactics:

[The undercharge claimants] reply that litigants regularly compromise problematic claims when confronted with the reality of litigation costs.

This sophistry, of course, ignores the fact that the recipient of defendant's lawyer-authored demand for payment is not a "litigant" in any sense. The recipient is an unsuspecting business person/shipper who thought a shipping bill had been paid long ago. The shipper then gets his or her only "advice" from the lawyer for the party demanding payment. An argument that this is analogous to litigation is both uncharming and untenable.

Unfortunately, there are probably a lot of Oregon dollars headed east to South Dakota at this time. It is not

now known how aggressively the culprits will be when they come to Oregon to file their lawsuits. However, the welcoming party is forming, as I will be representing clients through a joint defense group. Please contact me if I can be of assistance. The more the merrier.

Incidentally, Interstate Audit retains 55% of the net receipts. Also, attorneys fees can amount to 30% of the total receipts, as well as payment of costs over and above the 30%. You can be the judge as to whether these claims are being made for the benefit of Risberg's creditors - and there are a slug of them - or for some other purpose.

NEW LEGISLATION SEMINAR

Including Bills of Lading

May 29 , 8:30 a.m. - 5:00 p.m.

As previously mentioned in last month's issue, the Transportation Claims and Prevention Council, Inc. (TCPC), of Huntington, New York, is holding a series of videotape seminars across the country on the ICC Termination Act of 1995. The seminar will address the new transportation laws, and will also include a discussion regarding bills of lading. The video-tape is of seminars conducted by its executive director, Bill Augello. I will be hosting the Portland seminar. Please call either TCPC at (516) 549-8984 or me for more information.

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

The Obligatory Disclaimer

This newsletter is distributed to shippers, carriers and third party intermediaries. It is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

Short Bio

Admitted to the bars of the states of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 15 years and emphasizing transportation law, business law and related litigation.