



***Handshoe*—Stepping Squarely into Multiple Removal Issues**

BY LESESNE PHILLIPS

A case from the United States District Court for the Eastern District of Kentucky recently held removal to federal court based upon federal question jurisdiction under the Carmack Amendment was inappropriate and remanded the case for further proceedings in state court. The case, *Handshoe v. Day Brothers Auto & RV Sales, LLC, et al.*¹, involved two plaintiffs, a husband and wife, that purchased a motor home from one of the defendants, Day Brothers Auto & RV Sales, LLC, in Kentucky. After purchase, the plaintiffs contacted Day Brothers to arrange for warranty work on the motor home. Day Brothers took possession of the motor home but decided that it needed to be sent to Indiana for the manufacturer to complete the warranty work. Day Brothers did not inform the plaintiffs of its plan to send the motor home to Indiana. Day Brothers, itself, arranged for the transport of the motor home by hiring Star Fleet Trucking, Inc., which in turn hired a driver to drive the motor home to Indiana. During transportation from Kentucky to Indiana, the driver attempted pass under an overpass without sufficient height clearance causing damage to the motor home.

The plaintiffs filed a lawsuit in Kentucky state court alleging negligence and breach of contract against Day Brothers, Star Fleet, and the driver. Star Fleet and the driver removed the case to federal court, stating in the Notice of Removal that Day Brothers consented to removal. The plaintiffs in turn filed a motion to remand the case back to state court. The plaintiffs argued that the Carmack Amendment did not apply because the plaintiffs were not aware of the transport of the motor home from Kentucky to Indiana and were not parties to the bill of lading between Day Brothers and Star Fleet. Additionally, while Star Fleet and the driver indicated in the removal papers that Day Brothers consented to removal of the case to federal court, Day Brothers filed a brief stating it did not “consent” to remove the case to federal court but instead indicated only that it did not object to removal and took no official position on removal.

In addressing the motion to remand, the court found two issues with removal in this case. The first was that the consent to removal was not unanimous. In the context of removal from state court to federal court, all defendants must

[1] 2021 U.S. Dist. LEXIS 128227 (E.D.Ky. July 9, 2021).

unanimously consent to the removal. This rule of unanimity must be followed in order to remove the case to federal court even if there is clear subject matter jurisdiction before the federal court. While other defendants may vouch for the consent of another defendant in a notice of removal, Day Brothers' subsequent position in the case that it only offered "no objection" to removal undercut the unanimous consent requirement. Accordingly, the court raised serious concern whether the unanimous consent requirement for removal was met under the circumstances.

However, even assuming the consent aspect of approval was met, the court determined the Carmack Amendment did not preempt the plaintiffs' state law claims and therefore did not provide a basis for federal question jurisdiction. While the case involved damage to goods in interstate commerce caused by a motor carrier, the court emphasized the plaintiffs were not directly involved with or informed of the shipment. The plaintiffs were not listed on the bill of lading as any party, such as the consignor, consignee, or shipper. The Court noted the Carmack Amendment establishes a carrier is only liable to the person entitled to recover under the receipt or bill of lading. In this case, the court found Star Fleet was the carrier responsible for transport of the motor home and Day Brothers was the shipper. In the court's view, there was no indication the plaintiffs were a party to the bill of lading. Further supporting the court's view, it found the plaintiffs were not even aware of the interstate shipment of the motor home. The Court, acknowledging that there were many open questions as to whether a party not listed on the bill of lading can assert a Carmack Amendment claim, ultimately found any doubts must be resolved in favor of remand.

This case presents two important considerations for removal under the Carmack Amendment. First, if there are multiple defendants in the case, all defendants must unanimously agree to removal. While one party can, in the Notice of Removal, represent to the court that all defendants consent to removal, it is important to ensure all defendants do, in fact, consent.

The Handshoe Court, citing other decisions, held a "noncommittal, no-objection" does not suffice to constitute consent for purposes of the unanimity requirement. Accordingly, any attorney looking to remove a case would be well-advised to obtain written confirmation from counsel for all defendants that they affirmatively consent to the case being removed to federal court and should not simply rely upon a "no objection" response.

Next, this case raises important questions of who can recover under a bill of lading for purposes of a Carmack Amendment claim. *Handshoe* does not overturn prior authorities holding a party may nevertheless recover under a bill of lading where they are not listed on the bill of lading, but where the circumstances, as a whole, establish that party was involved in the shipping transaction as either the consignor, consignee, or shipper. Also, *Handshoe* does not suggest Star Fleet's liability to Day Brothers would not be pursuant to the Carmack Amendment. However, where, as here, a plaintiff had no knowledge whatsoever of the shipping transaction, is not listed on and is not in possession of the bill of lading, *Handshoe* suggests the Carmack Amendment does not govern the carrier's liability to said plaintiff. This means the plaintiff, in such circumstances, is not limited to recovery under Carmack and may sue the carrier under traditional tort and breach of contract theories. Additionally, the carrier may not have Carmack defenses available to those claims. Accordingly, it is imperative that a carrier fully understand the background of any given shipping transaction to ensure it understands the scope of its potential liability.