

## NEWSLETTERS

### Can Shippers Or Brokers Legally Offset Freight Loss And Damage Claims Against Unpaid Motor Carrier Freight Charges?

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#### Logistically Speaking, May 2018

A lot of people in the transportation industry still believe there is a federal law prohibiting shippers or brokers from recovering amounts owed by motor carriers when freight loss or damage has occurred by offsetting those amounts against what the shipper or broker owes the carrier for delivery services.

This is not true – for the most part. While federal law used to prohibit offsets as a general matter, Congress eliminated most of these restrictions when it “found that motor carriage had become a ‘mature, highly competitive industry where competition disciplines rates far better than tariff filing and regulatory intervention,’” and passed the ICC Termination Act of 1995. *Con-Way Transp. Servs. v. Auto Sports Unlimited, Inc.*, 2007 U.S. Dist. LEXIS 75451 (W.D. Mich. Sept. 28, 2007) (quoting *Transit Homes of America v. Homes of Legend, Inc.*, 173 F. Supp. 2d 1185 (N.D. Ala. 2001) and S.Rep. No. 104-176, at 10 (1995)). Following that substantial deregulation, motor carriers were granted substantial freedom to set off a shipper’s cargo loss or damage claim against a carrier’s freight charge claim.

Offsets may remain prohibited, however, if your delivery involves carriage terms that remain subject to anti-discrimination regulation, such as (i) transportation of goods beyond the borders of the continental United States, or (ii) transportation of household goods.

#### Transportation Beyond the Continental United States

If the shipment includes noncontiguous domestic trade (i.e. goods shipped to or from Alaska, Hawaii, or U.S. territories) or international trade, other rate-setting requirements may prohibit the practice. This is primarily because rates (or “tariffs”) for noncontiguous domestic trade, and international trade, remain subject to rate-filing requirements under Title 49 of the U.S. Code, Section 13702. Because such rates remain subject to the jurisdiction of the Surface Transportation Board (the entity that replaced the Interstate Commerce Commission), a carrier is not at liberty to set off damage claims outside of the formal dispute resolution process, as this could be construed as prohibited “preferential treatment” by effectively charging a rate that varies from the published tariff.

#### Household Goods

Offsets also remain unavailable for most shipments of “household goods” under the law. “Household goods” for purposes of federal transportation

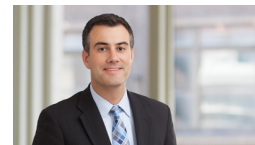
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## RELATED PRACTICE AREAS

Logistics and Transportation

regulations include: “personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property.” Property moving from a factory or store that might otherwise be considered “household goods” is exempt from the rule until it is purchased by a householder, according to federal law.

Although the household goods tariffs need not be published, they must be available for inspection upon request by the Surface Transportation Board or shippers, and they are still required to be reasonable. The regulations say a carrier may not enforce a rate against a shipper for shipment of household goods that varies from its maintained tariff, resulting in an effective prohibition against offsets and other forms of “preferential treatment.

If none of these circumstances exists, then federal law likely does not prohibit offsetting freight loss and damages claims against unpaid carrier freight charges – as long as the offset amount is legally owed and the carrier authorized offsets as a means of collection.

It is best practice for the contract with the carrier to have specific terms allowing offsets and establishing a reasonable procedure for investigating, adjusting, and applying the offset. The carrier contract also should supersede any contrary terms posted on relevant load boards. A broker or shipper may owe penalties, including interest and attorneys’ fees, if it improperly applies an offset.

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