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Victims of Regulatory Experiments Unite!

In recent years, we have had clients come to us with novel regulatory issues that carried ominous implications. Several U.S. federal regulatory agencies have sought to expand their enforcement into areas previously untouched, making a select few licensed entities unwilling subjects of regulatory experimentation.

Five basic premises: 1) When you are stopped by the police on the interstate, it makes no difference how fast the *other* cars are speeding. 2) **YOU** don't get to decide whether your conduct was legal or illegal. 3) If you find yourself in a courtroom, you are in the wrong place. 4) The government has more money than you. 5) If you are a teenager, do not stay at a cabin near the lake in the woods where the ax-wielding maniac lives.

Regulatory experimentation is manifested when an officer of a regulatory agency informs you that what you have done or are doing is wrong, and you must pay a fine or penalty. Never mind that you had no idea what the officer is talking about OR that no one else has EVER been taken to task for the same conduct in a formal proceeding.

Two examples: The Environmental Protection Agency (EPA) sought to "double dip" by holding an importer AND its licensed Customs broker liable for the same "failure to report" the importation of a benign pesticide. The Federal Maritime Commission (FMC) selected a service contract to find fault with its language and the conduct of the Carrier and Shipper, whose one-to-one negotiation resulted in a mutually understood set of terms and conditions.

(As an aside, the concept of a **service contract** in this context is not what you have for maintenance and repairs for your washer or refrigerator--it is a statutorily permitted, bilateral agreement between and ocean common carrier and a shipper by which the carrier agrees to provide transportation services between specified ports, during an agreed upon period for agreed upon confidential prices, for which the shipper agrees to tender a specific volume of freight of a particular cargo description, accepting the carrier's volume requirements and pricing. In so contracting, the carrier can avoid using the published tariffs that would apply to cargo from non-contract shippers.)

In both the EPA and FMC instances, the history of the agency's enforcement of the alleged misconduct was limited to having tried the experiment on others who paid the fine/penalty rather than contest the validity of the charges. For any number of reasons, that may have been the best way to contain the damage. But it also may give the regulator the courage to try it again.

In the EPA case, the Customs broker risked the loss of its broker license IF it agreed with the EPA that it had violated a federal statute. The broker chose to fight the charge, AND won. There was a significant penalty at stake whether the broker folded at the outset or lost after a formal proceeding. That was money, but the implications to the broker's future livelihood was at risk for what CBP would do with the outcome at the EPA.

As for the FMC example, the shipper had no reason to believe that the carrier had not complied with all service contract filing requirements, as the carrier drafted the contract in issue and all other service contracts it had entered into with shippers. The electronic format of the contract filed with the FMC in SERVCON was not the format that the shipper signed and the shipper had no reason to believe that the SERVCON filing was anything but complete and correct.

In its own report on service contracts, the FMC said:

> **With contract rates and certain service terms no longer published, parties are free to privately structure their contracts in accordance with their individual business requirements. Service contracts are easier to obtain and amend. For the most part, the Ocean Shipping Reform Act of 1998 has enabled contracts to be fashioned and consummated in a more market-responsive environment as intended.**

Despite this statement of policy, the FMC sought substantial penalties from both carrier and shipper because the contract terms were purported to be vague and ambiguous, and the parties sought to amend the contract retroactively, and despite this possibly being a matter of "taste," at least four of the five premises listed above were present.

Not being an eccentric millionaire, and having an NVOCC license issued by the FMC that could have been put in jeopardy in a formal proceeding, the shipper sought to contain the damage by entering into a settlement with the FMC. The license was not affected, but a hefty payment was required, notwithstanding the shipper's qualification as a Small Business, the case being one without any hard precedent, its unlikelihood of being repeated, and the cooperation of the shipper with the FMC inquiry and in the shipper's efforts to correct the alleged misconduct.

While ignorance of the law is no defense, when the regulators don the white lab coats and delve into heretofore unexplored (and maybe unfounded) areas of enforcement, the regulated have no advance notice of what might befall them.

If nothing else, teenager or not, just do not stay at a cabin near the lake in the woods where the ax-wielding maniac lives.

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