

DHL 'breached because they could'

Carrier pulls out of U.S. delivery operations, causes Adrian reseller to fold

Verdicts & Settlements Plus

By Douglas J. Levy

The way the bottom was rapidly dropping on Wall Street in November 2008, businesses across the country were experiencing perpetual motion sickness.

It was particularly abrupt for an Adrian-based shipping reseller.

That month, DHL Express (USA), Inc. announced that, in 2½ months, it would cease domestic delivery operations, focusing only on international shipping.

For The Service Source, Inc., a 15-year-old, successful DHL service reseller for smaller businesses with domestic shipping needs, it meant eventually ceasing its operations altogether.

That's because DHL deemed its five-year, domestic-services-only contract with The Service Source void once those operations ceased. It resulted not only in lost revenue and profits, but also a lost opportunity to bring The Service Source, as a franchise, to other parts of the country.

"When DHL cut them off at the knees, they had nothing left to sell," said Keefe A. Brooks, of Birmingham-based Brooks Wilkins Sharkey & Turco, PLLC, who served as co-counsel for the plaintiffs.

On June 11, 2010, Lenawee County Circuit Court Judge Margaret M.S. Noe agreed, granting a \$4 million verdict in The Service Source's favor for damages.

"The Plaintiff had a right to expect the contract to continue," Noe wrote in her



LW photo by Douglas J. Levy

In representing an Adrian-based shipping-service reseller that went out of business, attorneys Keefe A. Brooks (left) and Courtney E. Morgan Jr. asserted that DHL Express (USA), Inc. was liable for breach of contract once it decided to end its domestic shipping operations.

ruling. "It seems it was just cheaper for Defendant to breach against Michigan Plaintiff than to abide by the terms of their contract. ... DHL breached because they could."

Intrastate damages

One hotly contested legal issue in the case was the choice-of-law provision in the contract, which stated that Florida law

would govern any legal matters arising from the contract, as DHL is based in that state.

Yet, Brooks said that on issue of breach, there wouldn't be a difference on either state's law.

There was another advantage when Noe granted the plaintiffs summary disposition on liability, and "As a plaintiff, that's not very often that you [get] that, even in a business context," said co-coun-

sel Courtney E. Morgan Jr. of Morgan & Meyers, PLC in Dearborn.

But Noe found the matter to be unequivocal breach of contract, so trial was limited to damages, as the effects of the breach were felt mostly in Michigan, instead of Florida.

“When it came to the proper measure of damages, there were some differences in case law — Michigan law being more favorable than Florida in that regard,” Brooks said. “And the trial judge quite properly ruled that when it came to the issue of remedy ... Michigan policy would override the choice-of-law provision in the contract and permit this Michigan plaintiff to recover damages in accordance with Michigan law.”

Morgan said that the defense’s theories as to why damages should be cut off sooner than the end of the contract’s term included DHL’s methods of placing its drop boxes in the U.S.

“They then built on that and said, ‘Which means we can essentially remove the drop boxes 100 percent. Therefore, it’s not a breach of the contract to have simply ceased the operations that we promised to give. ... It’s up to us to decide where in the United States we’re going to provide services, and therefore, we can decide where we provide services in the United States is *nowhere*.’”

Terse termination

Morgan said he didn’t understand why DHL, which had contracted with several hundred U.S. reseller businesses similar to The Service Source, couldn’t come to some kind of settlement for the remaining



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terms of the contract.

He said that DHL likely figured they were going to get sued, and they would see how bad the damage was in court.

“I don’t think they cared one way or the other, but I assume they were losing a lot of money running a domestic business, and if they had 15 or 20 resellers that would be put out in the cold, ‘Yeah, they’re going to sue us, but that’s cheaper than continuing to run a domestic operation that’s not making money.’”

Adding to that, however, was what Brooks called a terse termination of the

services, and the way it was handled. Alternate arrangements weren’t suggested, and other carriers who provided domestic service weren’t recommended (FedEx and UPS don’t do shipping-service reselling).

“Instead, [DHL] just issued a press release announcing to the entire world — including all of our client’s customers — ‘By the way, come Jan. 30, you’ll no longer have our service,’” Brooks said. “And that really exacerbated the problem and the damages, just unilaterally withdrawing in that fashion.”

Brooks said some other U.S. shipping resellers have “termination for convenience” clauses in their DHL contracts, meaning DHL could end the contract at any time. Others who are franchisees of resellers will have a tougher go because they don’t have a direct contract with DHL, and may end up suing the franchise that, in turn, is trying to sue DHL.

The latter example could have happened to The Service Source, as it was in the process of setting up a franchise before DHL ended domestic service. (A portion of the damages awarded include loss of investment in getting the franchise established.)

Counsel for the defendants did not respond to *Michigan Lawyers Weekly’s* requests for comment.

A Verdicts & Settlements report on *The Service Source, Inc., et al. v. DHL Express (USA), Inc.* can be found on page 23 and at www.milawyersweekly.com.

If you would like to comment on this story, please contact Douglas J. Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.



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