



Good deal gone bad

Is it worth suing when a provider breaks a promise?

The following story is based on real events between a real shipper and a real fourth-party logistics provider (4PL).

The shipper sought to outsource its logistics activities to a 4PL. The company wanted to share risk, increase flexibility, improve profitability and (most importantly) focus on its core business. So it hired a 4PL to manage all the third-party logistics providers (3PLs), carriers, forwarders, warehouse managers, Customs brokers and other providers in its global supply chain.

In its contract, the 4PL promised to manage contracts with multiple service providers, provide distinct services above and beyond those of a 3PL and add value on the technology side. What's more, it promised to do so in a cost-effective way.

The ink was barely dry on the contract before the 4PL started to violate it. It insisted on using its own in-house 3PL services instead of retaining an external service provider better in tune with the shipper's needs. By pushing business back into its parent company and affiliated corporations, it not only failed to maintain an arm's-length relationship with providers—it was also falling short of its cost and service promises. The shipper's costs increased, and many of its shipments were compromised.

When the shipper complained, the 4PL was unremorseful and hostile. The 4PL maintained it did nothing wrong and owed the shipper nothing. It was not willing to negotiate, mediate or arbitrate the dispute with the shipper.

Once the shock wore off and a sense of betrayal set in, the shipper became angry and decided to wage a legal battle with the 4PL.

To the courtroom

The shipper hired a lawyer and sued the 4PL. After two years of expensive and time-consuming litigation, the trial judge ruled that the 4PL violated the contract with the shipper, and held the 4PL liable for breach of contract, breach of fiduciary duty, negligence and negligent misrepresentation.

The trial judge concluded that the 4PL failed on two fronts: first, to complete the services in a professional and timely manner in accordance with the contract, and second, to exercise all reasonable care, skill and competence in the performance of the agreed-to professional services.

In the trial judge's view, the 4PL understood that professionalism and time were the essence of the contract, and had assured the shipper its services would be completed in a professional and timely manner. Furthermore, the judge ruled that the 4PL understood the shipper's objectives and needs, and that the shipper trusted it to meet those targets.

The trial judge also found that the 4PL knew its failure to complete services in a professional and expeditious manner would likely cause the shipper to suffer damages. The court found that the shipper relied on the assurances of the 4PL—without them, it never would have hired the 4PL.

Since the shipper was in a fiduciary relationship with the 4PL and was therefore required by law to avoid conflicts of interest, the court ruled that the 4PL was bound to act exclusively for the benefit of the shipper. The judge found the 4PL breached its fiduciary duty to the shipper, and ordered

the 4PL to pay damages known as equitable compensation. In addition, the judge held the 4PL concurrently liable to the shipper for the tort of negligent misrepresentation and ordered that the shipper be put back in the position occupied before the negligent misstatements of the 4PL.

The judge found that the shipper took all reasonable steps to mitigate its losses in the circumstances; the 4PL could not prove otherwise.

The court concluded that the shipper suffered direct and consequential economic damages, and that the 4PL was responsible. The 4PL launched an appeal and is currently awaiting a decision. Because of this, the shipper is still waiting to collect on the trial judgment.

Ask before you act

It's a frustrating story, one that most of us can relate to—some more than others. What should you do if a similar situation happens to you?

Before you rush to the courthouse (like the aforementioned shipper), you should take stock of—and prioritize—your needs, interests and objectives. Ask yourself about your options and weigh the costs and benefits of each.

What are your chances of succeeding at trial and of collecting on any judgment awarded against the opposing side? What would you consider to be an acceptable outcome?

Would a lawsuit really satisfy or advance your cause? Or would it expose you to further risks and costs—not to mention the emotional and psychological stresses of litigation?

Is it best for you to walk away from the dispute? Might you be better off negotiating, mediating or adjudicating a settlement?

Once you address these questions, you will be in a better position to make a wise decision as to what steps you, as a disputant, should take if your 4PL—or any other logistics service provider—fails to live up to expectations. Such precautions can better secure a happy ending. MM&D

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