FedEx Settlement with California Department of Toxic Substances Control Contains Important Lessons/Reminders for Product and Waste Shippers

Friday, July 8, 2016

On June 14, 2016, FedEx Ground Package System, Inc. (“FedEx”) entered into a settlement with the California Department of Toxic Substances Control (“DTSC”) to resolve allegations that FedEx improperly handled, transported, stored, recycled and disposed of damaged packages of hazardous materials (“DTSC Settlement”). Under the terms of the DTSC Settlement, FedEx will pay a total of $3.4 million in civil penalties and is enjoined from further violations of California’s Hazardous Waste Control Law (“HWCL”). See Stipulation for Entry of Final Judgment and Order on Consent, People v. FedEx Ground Package System, Inc., Case No.34-2014-00165454 (Sacramento County Superior Court) (filed June 14, 2016). The DTSC Settlement also resolves a related case FedEx brought in federal court in April 2014 (“Federal Action”).

Resolution of the DTSC allegations and the Federal Action comes nearly one year after FedEx reached a $1.75 million settlement with a group of California District Attorneys (“DA Settlement”) who made allegations similar to those included in DTSC’s June 2014 complaint. The DA Settlement only partially resolved the allegations brought by the California District Attorneys, and dismissed with prejudice those allegations regarding noncompliance with the HWCL, based on the pending DTSC case. (For a full discussion of the DA Settlement see FedEx Enters Settlement with California District Attorneys to Partially Resolve Allegations of Mismanagement of Damaged Products, But Related Actions Still Pending in State and Federal Courts).

The DTSC Settlement with FedEx and the earlier DA Settlement with the company represent a new front in California’s aggressive efforts to enforce the hazardous waste rules against non-industrial waste generators, such as retailers, telecommunications providers, and now ground transport companies. Companies should continue to monitor these developments and ensure that they have strong internal processes and procedures in place to ensure compliance with California’s HWCL, corresponding laws in other states, and the federal Hazardous Materials Transport Act (“HMTA”).

Background

DTSC’s June 2014 complaint alleged that from 2008 through 2014, FedEx improperly handled, transported, stored, recycled and disposed of at least 1,500 defective, broken, damaged and/or leaking packages containing hazardous material in violation of California’s HWCL. The materials DTSC alleged were mishandled included acids, solvents, paints, aerosols, cleaners, automotive fluids, insecticides, electronics, batteries, and other toxic, flammable, and/or corrosive materials. DTSC further alleged that FedEx was required, but failed to obtain either a federal or state hazardous waste generator identification number, and that FedEx failed to make “timely” determinations as to whether or not the materials were in fact hazardous waste.

In anticipation of the DTSC state court action, in April 2014, FedEx filed a complaint requesting declaratory relief in the U.S. District Court for the Eastern District of California (“Federal Action”). In its complaint, FedEx claimed that packages containing hazardous materials that are found to be damaged, defective or leaking during transport...
are still in transit (at least in some cases) and remain subject to federal hazardous materials transport law, such
that the relevant provisions of the California HWCL are preempted and cannot be enforced against the company.
(For a full discussion of the Federal Action see FedEx Asks Federal Appeals Court to Block California Enforcement
Case Alleging Mismanagement of Damaged Products). On January 22, 2015, the District Court dismissed the
FedEx case on the ground that the preemption issue could properly be litigated in the state court actions, but
FedEx appealed the Court’s decision to the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) on February
23, 2015.

Settlement Terms

The DTSC Settlement not only resolves the allegations brought by DTSC in California state court, but also
resolves the related Federal Action. According to the settlement, DTSC and FedEx participated in the Ninth
Circuit’s mediation program to negotiate settlement of both matters. The DTSC Settlement resolves all claims
and causes of action alleged in the DTSC Complaint, as well as those claims that could have been brought by
DTSC based on the facts it alleged.

Pursuant to the injunctive provisions of the DTSC Settlement, FedEx is required to comply with all applicable
requirements of the HWCL and its implementing regulations. In doing so, FedEx must:

- Make a hazardous waste determination upon initially discovering a damaged hazardous material package
  at a facility;
- Obtain a state or federal hazardous waste generator identification number for each of its 39 California
  facilities;
- Properly label and mark containers of 119 gallons or less of hazardous waste, as required by the HWCL;
- Properly complete California Uniform Hazardous Waste Manifests prior to transporting hazardous waste or
  offering such waste for transport;
- Only treat, store or cause the treatment or storage of hazardous waste at points authorized under the
  HWCL; and
- Pay $3,357,975.00 in penalties.

The settlement further enjoins FedEx from shipping hazardous waste to locations that do not have either a valid
hazardous waste facility permit or other required authorization, and from transporting or causing hazardous
waste to be transported by a hauler who does not hold a valid registration.

Somewhat confusingly, the settlement states that, “[c]onsistent with this [settlement],” FedEx may use salvage
drums to move damaged or leaking hazardous materials packages to their original intended destination or back
to the shipper, in accordance with instructions from the shipper. However, it is unclear how such movements
could be consistent with the settlement, unless the damaged/leaking packages are not deemed to be hazardous
wastes (e.g., because the materials contained in the salvage drum can still be used beneficially), or unless (a) the
shipper or original intended destination are permitted/authorized facilities, (b) FedEx is registered as a
hazardous waste transporter, and (c) the salvage drum is properly labeled, marked, and manifested as
hazardous waste (which seems unlikely to be the case in most situations).

Analysis and Implications

The DTSC Settlement with FedEx and the earlier DA Settlement with the company represent a new front in
California’s aggressive efforts to enforce the hazardous waste rules against non-industrial waste generators,
such as retailers, telecommunications providers, and now ground transport companies. The two cases resulting
in these settlements, and the related Federal Action brought by FedEx, raised important issues related to the
potential preemption of state hazardous waste rules by the federal hazardous materials transport regulations.
Under the HMTA, states are preempted from issuing or enforcing requirements that are not substantively the
same as the federal requirements on certain subjects (e.g., packaging, labeling, shipping documents, and incident
reporting) or that otherwise are an obstacle to the goals of the statute. See 49 U.S.C. §§ 5125(a)-(b). Thus, as
long as the damaged packages were handled in accordance with the requirements of the HMTA and its
implementing regulations, there arguably should have been no basis for a state hazardous waste enforcement
action. However, these cases have now been resolved in a way that side-steps the preemption issue. The
preemption issue may, nevertheless, be important in future cases involving alleged violations of state regulations
for transport of hazardous materials and wastes.

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