



# 2009 Factoring Conference Speaker Handout



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**2009 Transportation Factoring Update:**  
*A Rocky Road*

*(No, I'm not trying to scare you out of the business)*

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**Issue 1: Notification**

Nationwide Transport Finance vs. Cass Information Systems, Inc.  
523 F.3d 1051 (9<sup>th</sup> Cir. 2008)

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**THE WORST CASE EVER**

Does this case change how transportation factors notify?!



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### The Facts

- ▶ Nationwide Transport Finance is a Factor
- ▶ Cass operates a freight invoice payment system
- ▶ Cass paid Carriers that were under a Nationwide Transport Notification of Assignment
- ▶ Nationwide sued Cass to recover the payments to carrier claiming that the payments violated Section 9-406 of the UCC



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### The Court's Ruling

- ▶ The court refused to instruct the jury about 9-406 of the UCC because Cass was not the account debtor – the shippers were.
- ▶ The court also said that neither principles of agency nor industry practices made 9-406 applicable to Cass. WOW. Whatever.



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### WHAT THE?!

- ▶ Yep, that's what the court said. ..
- ▶ Never mind that Cass clearly assumed **ALL** payment responsibilities on behalf of the Shippers to Motor Carriers or their Assignees.



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### The Bad Lesson/Holding

- ▶ Cass is not bound by shippers' duties
  - ▶ i.e., paying the proper party



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### The Practical Effect and Lessons

1. Apparently you can't notify freight payment systems and effectively preserve your notification rights under 9-406 of the UCC (good to know...)
2. You have to Notify the underlying shippers (and Cass?) if Cass or similar entity is involved in the transportation equation



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### Take it a step further

- ▶ Could the same rationale be applied to brokers?
- ▶ What if the broker said its arrangement with the shipper didn't require the carrier to be paid until the shipper paid the broker?

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### Summary

- ▶ Terrible decision = defies precedent, black letter law, practicality, principles of agency, and simple logic
- ▶ Consider your current notification procedures when freight bill audit companies are involved
- ▶ Remember: future court's will look to precedent (this case)
- ▶ However, I don't expect this rational to extend to Brokers (whew...)
- ▶ I further doubt another court could get things this wrong

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### THE STATE OF TRANSPORTATION

(in particular, with respect to freight volume)

1. Where we are...
2. Where we are headed (and when)...



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### Poll of 10 Transportation Factors

- ▶ Are your total monthly purchases up or down from the period of August 08 to March of 09.
- ▶ Down: 10
- ▶ Up : 0
  
- ▶ How much?
- ▶ 1-10%: 1
- ▶ 11-20%: 5
- ▶ 21-40%: 4

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Poll Continued...

- ▶ What do you believe is the reason:
  1. Decreased availability of freight - 6
  2. Competition - 1
  3. Key Client Loss - 1
  4. Increased Client Costs/Out of Business- 1
  5. General State of the Economy - 1

Why are clients leaving? (2 most common)

1. No freight
2. Can't afford to keep running

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Short Term/Mid Range Freight Volume Forecast

- ▶ Surface Freight Forecast Growth Rates-Trend
- ▶ **US (Surface)Domestic**
  - ▶ 2008 through 2016: Increase 11%\*
  - ▶ An increase of roughly 1.375% per year
  - ▶ 53 million tons of freight moved a day in 2008
  - ▶ No current numbers for 2009 but I'm predicting it is/will end up 10 to 20% less than 2008.

▶ \* This is measured from a baseline of 12,896 million tons in 2007.

▶ Source: Federal Highway Administration

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Weight of Shipments by Transportation Mode: 2002, 2007, and 2035

(millions of tons)

	2002	2007	2035
▶ Truck	11,539	12,896	22,813

▶ So how about 2009? No concrete numbers that I can find. But if '07 and '08 are almost identical (13,000), you have to assume 10 to 20% less than that.

▶ The longer term picture, however, is apparently quite positive.

▶ Source: Federal Highway Administration - Freight Analysis Framework

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Immediate Thoughts

- ▶ Nothing will affect your purchase amounts more than freight tonnage levels.
- ▶ Large numbers of small motor carriers use factoring and asset based lending. I suggest that the percentage of carriers using factoring won't fluctuate much, but the amount of freight they can access to haul will.
- ▶ Your clients struggle to find regular, consistent, profitable lanes and your clients (1-40 trucks) use factoring in higher percentages. If they can't find consistent and profitable lanes, they are out of business quicker than larger operations.

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Issue 2: Michigan Statute

- ▶ What it says:
  - ▶ If the debtor believes a UCC financing statement has been made fraudulently/improperly, it can sign an affidavit to that effect and the SOS MUST remove the filing.
  - ▶ You, as the secured party, can then institute an action to compel the re-institution of your filing.




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WHAT THE?!! (Here we go again....)

- ▶ Yep, you get to file a lawsuit to try to re-institute your filing.
- ▶ How long will this take?
- ▶ How much money will this cost?
- ▶ Are you unperfected during the entire time the suit is pending?
- ▶ What if other secured creditors show up with filings during the suit?




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Why is this particularly bad for us?

- ▶ How often do you have a loss that makes litigation cost effective?
- ▶ Understand, your suit will be to try to perfect your interest.
- ▶ How many of your clients will really be scared and deterred from stating your filing is fraudulent if they believe you are "screwing them"?

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Potential Lessons

- ▶ You'll have to monitor the status of your filing.
- ▶ Does it make Michigan-based business less attractive?
- ▶ Would a separate document with the debtor waiving its right to contest UCC filings be helpful as presumptive evidence with the SOS?
- ▶ Build that provision into the contract?



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Beyond Basic Credit  
IT IS TOUGH OUT THERE

We all know that account debtor credit has deteriorated:

1. Slower pay trends
2. More bankruptcies
3. More disappearances

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### Intermediary Excuses

- ▶ Preface: Most Brokers are great people and run great businesses. We are talking about the bad 10% or less.
- ▶ They are working to slow pay, short pay or not pay, and they are working hard at it.



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### Common Stories

1. USDA inspection was not satisfactory
2. Carrier was late
3. Unspecified Damage/Freight Not Satisfactory to Receiver
4. Missing Freight
5. Missing Pallets
6. Driver didn't check in
7. Others you are hearing?

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### What to do when you hear this?

- ▶ Does the Bill of Lading indicate these issues?
- ▶ What does the USDA inspection report say?
- ▶ What are the specific itemized details on the Rate Confirmation Contract?
- ▶ Include the Shipper in these discussions and investigation
  - ▶ get underlying contracts?
- ▶ Mean letters
- ▶ What else?



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**ADDITIONAL NOTES/TOPICS**

- IFA sponsored lobbying effort to raise bond level?
- Action against Trust Funds for failure to pay?
- Other Issues?

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