OOIDA Class-Action Damages and Other Relief

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I. INTRODUCTION

The Owner-Operator Independent Drivers Association (OOIDA)[1] is comprised of truck drivers who own and operate their power units ("owner-operators"). OOIDA has aggressively filed lawsuits against carriers alleging violations of the so-called "Truth-in-Leasing" regulations.[2] In addition, at least five comparable lawsuits have been filed by other parties. OOIDA has claimed that motor carriers violated Federal Leasing & Interchange Regulations and has sought unique relief for recovery of unreturned maintenance account balances alleged due from motor carri-

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1. The Owner-Operator Independent Drivers Association is an international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect truckers. OOIDA represents more than 113,000 members in all 50 states and Canada who collectively own and/or operate more than 156,000 individual heavy-duty trucks and small truck fleets. *See* OOIDA.com, What is OOIDA, http://www.ooida.com/about_us/about_us.html (last visited Aug. 23, 2005).

2. *See generally* OOIDA.com, Legal Action, http://www.ooida.com/legal_action/court_cases2.html (last visited Aug. 23, 2005).

ers. The damages and equitable relief sought in these lawsuits pose substantial risks to all motor carriers, and potential liability for motor carrier lenders.

Owner-operators are independent contractors and often enter into lease agreements with motor carriers possessing authority from the U.S. Department of Transportation ("DOT") to transport property.[3] The leases are regulated by DOT through the Federal Highway Administration ("FHWA").[4]

In conjunction with the lease of the driver and power units, owner-operators frequently obtain their trucks by entering into equipment lease-purchase agreements with motor-carriers, in which the owner-operator is the lessee and the motor carrier is the lessor.[5] This article deals exclusively with the latter and related class-action lawsuits arising under DOT Regulations.

This article will analyze the damages and remedies that OOIDA may seek in class-action lawsuits against motor carriers and review strategies to limit motor carriers' exposure in such litigation. Section II discusses the legal basis for the claims made against motor carriers. Section III describes injunctive relief that has been sought against motor carriers and Section IV discusses the damages available under leasing laws. Section V provides strategies for minimizing such damages. Section VI discusses two lawsuits that OOIDA brought in the Chapter 11 bankruptcy cases of *Rocor International*[6] and *Arctic Express*.[7] Although OOIDA's claims were similar in both cases, the litigation arose in different procedural contexts and required the development and implementation of specialized strategies to reach favorable outcomes. In summary, Section VI suggests practical strategies to blunt OOIDA damage claims at each stage of litigation.

II. Claims Made Against Carriers

OOIDA and owner-operators base their claims for unreturned maintenance funds on the Truth-in-Leasing regulations promulgated under the Interstate Commerce Act, particularly 49 U.S.C. § 14102, which provides

3. *See* Opinion and Order at 2, Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., No. 97-CV00750 (S.D. Ohio 2001).

4. *See* 49 C.F.R. § 376 (2005); *see also* Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 339 F.3d 1001, 1006 (8th Cir. 2003) [hereinafter *New Prime IV*].

5. *See* 49 C.F.R § 376.2 (f), (g).

6. *In re* Rocor Int'l, Inc., Ch. 11 Case No. 02-17658-TRC (Bankr. W.D. OK Aug. 5, 2002); *see generally* OOIDA.com, Legal Action, http://www.ooida.com/legal_action/court_cases2.html (last visited Sept. 23, 2005).

7. *In re* Arctic Express, Inc., Ch. 11 Case No. 03-66797-DEC (Bankr. S.D. Ohio Oct. 31, 2003); *see generally* OOIDA.com, Legal Action, http://www.ooida.com/legal_action/Arctic/artic_index.html (last visited Sept. 23, 2005).

the Secretary of Transportation with authority to regulate vehicle leases.[8] The leasing regulations, title 49 sections 376.1 to 376.42,[9] specifically section 376.12(k), provide that "if escrow funds are required, the lease shall specify [that] . . . the carrier shall pay interest on the escrow fund[s] . . .. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of [lease] termination."[10] OOIDA asserts that maintenance funds may qualify as escrow funds and, accordingly, motor carriers must follow the requirements imposed on escrow funds. The regulations define an "escrow fund" as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee."[11]

Note that OOIDA lawsuits based on violations of these leasing regulations have the potential of being catastrophic to motor carriers. *Owner-Operator Independent Drivers Association v. Ledar Transport* illustrates how poorly litigation can go for motor carriers.[12] Section III discusses *Ledar Transport* as a case study of the legal and practical challenges confronting motor carriers.

III. Injunctive Relief Sought from Carriers

The OOIDA class-action lawsuits usually seek a permanent injunction against the motor carrier to restrain future violations of the leasing regulations, essentially by shutting down the carrier's operations.[13] Courts have found that a private right of action for injunctive relief exists under 49 U.S.C. § 14704(a)(1) only for those regulations promulgated under 49 U.S.C. § 14102.[14] In *New Prime II*, the court found that title 49, section 376.12 of the Code of Federal Regulations was enacted under 49 U.S.C. § 14102(a) authority, meaning that OOIDA may seek injunctive relief when claiming a violation of title 49, section 376.12 of the Code of Federal Regulations.[15]

The party seeking injunctive relief typically has the burden of showing it meets the "traditional equitable principles," which include: "[1]

8. 49 U.S.C. § 14102 (2000).

9. 49 C.F.R. §§ 376.1-376.42.

10. *See id.* § 376.12.

11. *Id.* § 376.2(l).

12. Owner-Operator Indep. Drivers Ass'n v. Ledar Transp., No. 00-0258-CV-W-2-ECF, 2000 WL 33711271, at *11 (W.D. Mo. Nov. 3, 2000).

13. *See, e.g,,* Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 250 F.2d 1151, 1153 (W.D. Mo. 2001) [hereinafter *New Prime II*].

14. *See id.* at 1160; Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 192 F.3d 778, 784 (8th Cir. 1999) [hereinafter *New Prime I*].

15. *New Prime II*, 250 F.2d at 1160.

threat of irreparable harm, [2] likelihood of success on the merits, [3] the balance of hardships [favors granting the injunction], and [4] public interest [favors the relief]."[16] The traditional test, however, has not always been applied. In *Ledar Transport*, the court applied the reasonable cause standard.[17]

A. Reasonable Cause Standard

In *Ledar Transport*, OOIDA argued that the reasonable cause standard is appropriate in litigation involving federal leasing regulations.[18] According to *Ledar Transport*, the reasonable cause standard is appropriate where (1) Congress has previously balanced the hardships, (2) the purpose of the regulations is served by an injunction, and (3) the regulations contain flat bans.[19] Based on the legislative history, the court found that Congress had balanced the equities when authorizing the promulgation of the Truth-in-Leasing regulations.[20] The court next analyzed whether the purpose of the leasing provisions would be served through issuance of a preliminary injunction.[21] The court quoted the old Interstate Commerce Commission ("ICC"), which stated that the purposes of the Truth-in-Leasing provisions are promoting truth-in-leasing, full disclosure between the carrier and the owner-operator regarding contracts, elimination of illegal practices, and promotion of economic welfare of the independent trucker segment of the industry.[22] The court found that these purposes would be served by issuing a preliminary injunction.[23]

The court then applied the third factor: "whether the statute places a flat ban on the prohibited conduct."[24] The court determined that the leasing regulations' mandated contents of a lease are effectively a flat ban on entering into noncompliant leases.[25] Under the reasonable cause standard, the court issued a preliminary injunction.[26]

B. Traditional Standard

Finding the *Ledar Transport* decision wrongly decided, the court in *Owner-Operator Independent Drivers Association, Inc. v. Swift Transportation Co., Inc.* found that the district court did not err in applying the

16. *Ledar Transp.*, 2000 WL 33711271, at *3.
17. *Id.* at *11.
18. *Id.* at *2.
19. *Id.* (citing Burlington N. R.R. Co. v. Bair, 957 F.2d 599 (8th Cir. 1992)).
20. *Id.*
21. *Id.* at *3.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *4.
26. *Id.* at *11.

"traditional equitable principles" test in granting or denying preliminary injunctions for federal leasing violations.[27] The *Swift Transportation* court reasoned that the traditional test is the appropriate test, unless Congress restricts the courts' equitable discretion.[28] In other words, the relevant inquiry is whether Congress expressed an intent to restrict judicial discretion through 49 U.S.C. §14704(a)(1).[29]

The *Swift Transportation* court found that "Congress has not clearly indicated an intent to restrict the courts' equitable discretion" in the text of the statute.[30] Further, the *Swift Transportation* court found that the factors applied by the *Ledar Transport* court do not relate to the question of ascertaining Congress's intent and, therefore, found that *Ledar Transport* was wrongly decided.[31] Applying the traditional test, the court denied OOIDA's request for preliminary injunctive relief.[32]

C. Court Approved Injunctive Relief

In *Ledar Transport*, the court entered a preliminary injunction requiring court-approved lease agreements.[33] This injunction, in essence, required the carrier to shut down business until it returned to court with new leases that complied with DOT regulations.[34] The *Ledar Transport* court also entered an injunction requiring the carrier to allow owner-operators to rescind their lease-purchase contracts with the motor carrier with no penalty.[35] Furthermore, the *Ledar Transport* court entered an injunction prohibiting retaliation against owner-operators.[36] Such injunc-

27. Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1115-16 (9th Cir. 2004).

28. *Id.* at 1111-12.

29. *Id.* at 1109-10.

30. *Id.* at 1114.

31. *Id.* at 1115.

32. *Id.* at 1115-16.

33. *Ledar Transp.*, 2000 WL 37711271, at *11. The court issued the following injunction:
Defendant Ledar Transport, Inc. is hereby enjoined, pursuant to 49 U.S.C. § 14704(a)(1) and 49 C.F.R. § 376.11(a), from performing any transportation requiring U.S. Department of Transportation authorization in equipment it does not own until it executes written lease agreements for such equipment, approved by this Court as conforming to the requirements contained in 49 C.F.R. § 376.12, with each person leasing such equipment to Defendant. *Id.*

34. *Id.*

35. *Id.* The court issued the following injunction:
For each equipment lessor to Defendant who is subject to any other lease, lease-purchase, or sales agreement between such lessor and Defendant, its officers, directors, shareholders, owners, employees, agents, corporate subsidiaries, corporate parents and/or corporate affiliates, such other agreement may be rescinded in its entirety at the option of such lessor, free of any penalty or further obligation upon such lessor. Defendant shall notify all such lessors of this provision in writing upon the issuance of this injunction. *Id.*

36. *Id.* The court prohibited retaliation with the following order:
Defendant is enjoined from all acts of retaliation, harassment, and intimidation against

tions can paralyze a motor carrier. OOIDA achieved its goal by claiming that the defendants in *Ledar Transport* retaliated against owner-operators by failing to repay them the outstanding lease escrow amounts after termination of their leases.[37] OOIDA argued that, by withholding compensation owed to lessors, the carrier erected an obstacle to lessors paying off their trucks and forfeiting drivers' rights under the lease-purchase agreements.[38]

IV. Statutory Trusts

OOIDA lawsuits have also sought to trump the priority of payment of secured lenders. OOIDA has aggressively sought to reorder payment priorities in bankruptcy proceedings. To recover ahead of other creditors in Chapter 11 bankruptcy cases, OOIDA has asserted that owner-operators benefit from a federal statutory trust for the amount of unreturned escrow accounts. OOIDA and the owner-operators would then have a superior claim to the subject assets because property subject to a statutory trust would not be part of a bankruptcy estate and would be outside the bankruptcy court's jurisdiction.[39] Such claims are superior even to the perfected and enforceable security interest held by asset-based lenders.

A. Trust Funds Excluded from Chapter 11 Bankruptcy

When a motor carrier enters bankruptcy, the debtor's estate broadly encompasses nearly every legal or equitable interest.[40] Nevertheless, property of others held by the debtor in trust is excluded from the bankruptcy estate.[41] An unsecured creditor can remove itself from an express bankruptcy statutory scheme by showing that the debtor is holding property in trust for the benefit of the unsecured creditor.[42]

Bankruptcy courts apply non-bankruptcy law to determine whether a

Plaintiffs, all other members of the potential class in this action, and others who may assist and/or participate in this action. *Id.*

37. Plaintiff's Suggestions in Support of their Motion for Supplemental Relief to Effect the Court's November 3, 2000 Order at 4, Owner-Operator Indep. Drivers Ass'n v. Ledar Transp., No. 00-0258-CV-W-2-ECF, 2000 WL 33711271 (W.D. Mo. Nov. 3, 2000).

38. *Id.*

39. *See generally* 11 U.S.C. § 541(d) (2000).

40. *See id.* § 541.

41. *Id.* § 541(b)(1) (providing that estate property does not include power held for the sole benefit of another); United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.10 (1983) ("Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition."); *see also* Daly v. Carrozzella & Richardson (*In re* Carrozzella & Richardson), 255 B.R. 267, 274 (Bankr. D. Conn. 2000) ("It is axiomatic that funds held in trust by one entity . . . do not constitute the beneficial property of the former.").

42. *See* 11 U.S.C. § 541(b)(1).

trust exists.[43] A statute may create a trust if the statute "'define[s] the trust res, spell[s] out trustee's fiduciary duties, and impose[s] a trust prior to and without reference to the wrong which created the debt.'"[44] Furthermore, under common law, strict tracing of the trust res is required.[45]

OOIDA has claimed that motor carriers, including those restructuring under Chapter 11 of the United States Bankruptcy Code, hold owner-operator funds in trust and, therefore, the funds are not subject to bankruptcy.[46] OOIDA has based its statutory trust argument on the use of the term "escrow" in the regulation and its reading of the Supreme Court's decision in *Begier v. IRS*.[47] OOIDA has succeeded with this argument in one case, *In re* Intrenet, Inc.,[48] despite the fact that the leasing regulations do not expressly establish a trust and that OOIDA can hardly be analogized to the U.S. Internal Revenue Service.

1. The Begier *Case*

At issue in *Begier* was whether tax payments made to the IRS could be avoided as preferential transfers.[49] Before the *Begier* decision, courts required the IRS to trace payments that debtors made to the IRS ninety days before filing for bankruptcy in order to claim the IRS payment from a trust account was not an avoidable transfer of bankruptcy estate property.[50] In *Begier*, the Court required only that there be some nexus between the alleged trust fund and the "trust fund taxes" withheld and paid by the debtor.[51] The Court held that the Internal Revenue Code, 26 U.S.C. § 7501, created a trust comprised of amounts withheld or collected as taxes, and those payments were, therefore, not avoidable transfers of property of the debtor's bankruptcy estate under the Bankruptcy Code,

43. *See* Butner v. United States, 440 U.S. 48, 54-55 (1979) (recognizing that state law generally determines contract rights absent a compelling federal interest).

44. Stephens v. Bigelow (*In re* Bigelow), 271 B.R. 178, 187 (B.A.P. 9th Cir. 2001) (citing Woodworking Enter., Inc. v. Baird (*In re* Baird), 114 B.R. 198, 202 (B.A.P. 9th Cir. 1990)); *see generally* 11 U.S.C. § 523(a)(4) ("(a) A discharge . . . does not discharge an individual debtor from any debt . . . (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.").

45. *See* Sender v. Nancy Elizabeth R. Heggland Family Trust (*In re* Hedged-Inv. Assocs.), 48 F.3d 470, 474 (10th Cir. 1995) (quoting 4 Collier on Bankruptcy, ¶541.13 at 541-76, 79 (15th ed. 1994)).

46. 11 U.S.C. §§ 101-1330.

47. Begier v. IRS, 496 U.S. 53 (1990).

48. *See* Owner-Operator Indep. Drivers Ass'n v. Huntington Nat'l Bank (*In re* Intrenet, Inc.), 273 B.R. 153, 157 (Bankr. S.D. Ohio 2002) (holding that "the funds are subject to a statutory trust created by the federal Truth-In-Leasing regulations for the benefit of the Owner-Operators.").

49. *Begier*, 496 U.S. at 55; *see also* 11 U.S.C. § 547 (providing for recovery of preferential payments).

50. *See id.* at 57 n.1.

51. *Id.* at 65-67.

11 U.S.C. § 547.[52]

Like *Begier*, the vast majority of statutory trusts are found in tax codes.[53] The Third Circuit has imposed trusts on natural gas customer refunds[54] and on interline freight payments between railroads,[55] but other circuits have not endorsed this expansion of the statutory trust doctrine to frustrate the fundamental bankruptcy policy of pro rata distribution on unsecured claims. However, extending *Begier* to truck lease-purchase agreements would radically expand that decision beyond the unique statutory tax scheme upon which it relies.[56] As such, the *Begier* holding should not be expanded more broadly than is "necessary to accomplish its purposes when doing so would undermine the policy of equality of distribution among creditors, a fundamental policy of the Bankruptcy Code, especially when the IRS would not be affected by a failure to expand the *Begier* holding."[57]

The Supreme Court based the trust in *Begier* on statutory language, which expressly provides that "the amount of tax so collected or withheld shall be held to be a special fund in *trust* for the United States."[58] There is no similar language in either the Interstate Commerce Act or regulations to create a statutory trust for owner-operators.[59] Moreover, relevant statutory and regulatory provisions never mention the word "trust."[60] Therefore, where Congress was previously explicit in its intention to create a statutory trust, the Interstate Commerce Commission Termination Act ("ICCTA")[61] was silent. The courts should not imply an intention that was not expressed. To decide otherwise would transform every regulated

52. *Id.* at 66-67.

53. *See* Tex. Comptroller v. Megafood Stores, Inc. (*In re* Megafood Stores, Inc.), 163 F.3d 1063, 1066 (9th Cir. 1998) (stating that a statutory tax trust arose by operation of the Texas Tax Code); City of Farrell v. Sharon Steel Corp., 41 F.3d 92, 93-94 (3d Cir. 1994) (involving a municipal income tax); *In re* Al Copeland Enter., Inc., 133 B.R. 837 (Bankr. W.D. Tex. 1991) (recognizing collected sales tax were trust funds pursuant to section 111.016 of the Texas Tax Code).

54. *See, e.g.,* Official Comm. of Unsecured Creditors v. Columbia Gas Sys., Inc. (*In re* Columbia Gas Sys., Inc.), 997 F.2d 1039 (3d Cir. 1993).

55. *See, e.g., In re* Penn Cent. Transp. Co., 486 F.2d 519 (3d Cir. 1973).

56. *See generally Begier*, 496 U.S. at 66 (holding that 26 U.S.C. § 7501 created a trust comprised of amounts withheld or collected as taxes, and those payments were, therefore, not avoidable transfers of property of the debtor's bankruptcy estate under 11 U.S.C. § 547).

57. Trustee of AAPEX v. CERES (*In re* AAPEX Sys., Inc.), 273 B.R. 35, 44 (Bankr. W.D.N.Y. 2002) (referencing Wyle v. S&S Credit Co. (*In re* Hamilton Taft & Co.), 53 F.3d 285 (9th Cir. 1995), *vacated* 68 F.3d 337 (9th Cir. 1995)).

58. 26 U.S.C. § 7501 (2000) (emphasis added).

59. *See, e.g.*, 49 U.S.C. § 14102.

60. *See, e.g.*, 49 C.F.R. §§ 376.1-376.42.

61. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (permitting individual Owner-Operators to bring defendants directly into court where prior to its enactment only the Interstate Commerce Commission ("ICC") could bring claims against motor carriers).

"fund" into a statutory trust that is not subject to *pro rata* distribution and undermine the strong public policy supporting the bankruptcy system.[62]

Owner-operators are not similarly situated to U.S. taxpayers and the OOIDA is not the IRS. Where a party has no specific obligation of his own for which he writes a check to an agent, then no trust exists over the funds.[63] The taxpayers in *Begier* were paying their own tax obligation. The owner-operators' payments to motor carriers are made based on lease agreements to fund the motor carriers' lease obligations, such as future maintenance expenses charged to the carrier and to be reimbursed by the driver.[64] If the lease obligations are not paid, the motor carriers, not the owner-operators, accumulate the debt.[65] The lease funds withheld from owner-operators are held by the carrier primarily for its own benefit (its future reimbursement owed by the driver), rather than for a third party or the driver.[66]

Furthermore, the policy in favor of payment of taxes is not implicated in OOIDA cases.[67] There is no strong public policy that favors owner-operators over fundamental bankruptcy principles. Nonetheless, in *Intrenet*, the bankruptcy court found a statutory trust created by the lease regulations.[68] Even in that instance, the funds were in a segregated bank account and the secured lender had been paid in full from its collateral.[69]

2. *Tracing Property Subject To the Statutory Trust*

Trust law generally requires the beneficiary to trace its trust property in order to recover it. As stated in *Hedged-Investments*:

> Once the trust relationship has been established, one claiming as a *cestui que trust* thereunder must identify the trust fund or property in the estate, and, if such fund or property has been mingled with the general property of the debtor, sufficiently trace the trust property. If the trust fund or property cannot be identified in its original or substituted form, the cestui becomes merely a general creditor of the estate . . ..[70]

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62. Although the regulations refer to holding funds in "escrow," the regulations allow the carrier to receive the payments and do not require segregation of the funds from the carrier's operating account. A true escrow requires the funds be held by a third party depositary under an express escrow agreement. *See* Mid-Island Hosp., Inc. v. Empire Blue Cross & Blue Shield (*In re* Mid-Island Hosp., Inc.), 276 F.3d 123, 130 (2d Cir. 2002) (applying New York state law).

63. *See* Morin v. Frontier Bus. Tech., 288 B.R. 663, 673 (W.D.N.Y. 2003) (finding that where a party has no tax obligation of its own, then no trust existed over its own funds).

64. *See In re Intrenet*, 273 B.R. at 155-56.

65. *See id.*

66. *See id.* at 157.

67. *Morin*, 288 B.R. at 673 (citing the implication of the public policy in favor of paying taxes as a reason not to apply the *Begier* holding).

68. *In re Intrenet*, 273 B.R. at 156-57.

69. *See id.*

70. *In re Hedged-Inv. Assocs.*, 48 F.3d at 474.

OOIDA argues, based on *Begier*, that tracing is not required for federal statutory trusts. *Begier* holds only that common law "rules are of limited utility in the context of the trust created by § 7501."[71] That is not to say that common law cannot answer questions pertaining to non-7501 trusts. If courts were to imply a statutory trust to lease funds, then common law rules logically should apply and OOIDA should be prepared to identify the trust property through tracing.

Moreover, the long period between an owner-operators' maintenance reserve contributions and litigation to collect those amounts, coupled with the fact that the regulation does not require those funds to be segregated, probably makes it impossible for OOIDA to trace the driver funds to specific, current assets of the debtor. If, however, OOIDA wins on this point, all of the carrier's property would belong to OOIDA members to the extent its reserve judgment on account escrows has been satisfied. OOIDA could liquidate the carrier for the benefit of owner-operators and itself, despite bargained-for secured credit facilities.

3. *The Creation of an OOIDA Statutory Trust Threatens All Carriers*

Statutory trust claims pose a substantial threat to the availability of credit and borrowing costs for all motor carriers because such claims threaten availability on existing lines of credit. New lenders may be unwilling to risk collateral which will be subject to a superior claim by the OOIDA. The cost of obtaining new financing in the trucking industry may be increased because potential lenders could require owner-operator audits to ensure compliance with the leasing regulations and to rule out possible trust claims by OOIDA. The higher cost of capital will compress already small operating margins and could push carriers with neutral or marginally positive cash flows into negative profitability.

Although to date OOIDA has only asserted the statutory trust argument in bankruptcy cases, nothing prevents it from making the same argument outside bankruptcy to satisfy claims ahead of a carrier's other creditors. Not only does the argument frustrate the legitimate expectations of a carrier's trade creditors, but also, on at least two occasions, OOIDA has used the argument seeking to recover payments made to a carrier's principal lender.[72]

As such, the risk to a carrier's survival is obvious if payments made to its lender must be disgorged to OOIDA as part of a statutory trust res. The lender would be forced to demand payment again from the carrier and may foreclose on assets (also subject to OOIDA's statutory trust) or seek payment directly from any guarantors. Statutory trusts violate the

71. *Begier*, 496 U.S. at 62.
72. *New Prime IV*, 339 F.3d at 1007.

expectations of lenders that believe they have an unassailable mortgage or security interest after checking real estate and UCC filings covering the motor carrier's collateral. The imposition of statutory trusts could destabilize established lending practices and even harm motor carriers who are not parties to an OOIDA lawsuit. As OOIDA's statutory trust theory faces fewer obstacles outside of bankruptcy , where equality of distribution among creditors is not a consideration, carriers can expect OOIDA to extend its statutory trust allegations more aggressively in non-bankruptcy litigation.

4. Damages Sought from Carriers

The hearing regulations do not contain an express private cause of action against motor carriers. Nevertheless, courts have implied a private right of action for damages arising under the Interstate Commerce Act.[73]

B. "Disgorgement" of Escrow Funds

Courts have interpreted OOIDA's requests for disgorgement of escrow funds as requests for money damages under 49 U.S.C. § 14704(a)(2).[74] OOIDA has claimed that it is entitled to recover damages of the full amount contributed into escrow funds.[75] OOIDA claimed that only deductions reported to drivers within 45 days of contract termination should be subtracted from the amounts contributed to the funds.[76] The courts have not adopted this harsh measure. Instead, the courts have looked to what damages are necessary to make the plaintiffs whole.[77] In *Arctic Express III*, the court found that, if the carrier had complied with the leasing regulations, the owner-operators would have recovered the net balance of the escrow accounts, not the total contributed funds.[78] Accordingly, the court found that the measure of damages is "the unrecovered amounts remaining in the maintenance escrows" at the time of each owner-operator's termination.[79]

73. *See* 49 U.S.C. § 14704(a)(2) (providing that "a carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier."); *see, e.g.,* Owner-Operator Indep. Drivers Ass'n v. Comerica, Inc., No. 2:05-CV-00056 (S.D. Ohio Jan. 19, 2005).

74. *See, e.g.,* Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 270 F. Supp. 2d 990, 995 (S.D. Ohio 2003) [hereinafter *Arctic Express III*] (recognizing that the court labeled remedy of damages as opposed to the remedy sought by the plaintiffs, the equitable remedy of the return of the escrow funds with interest are the same and do not alter the substantive rights of the parties), *recons. denied*, 288 F. Supp 2d 895 (S.D. Ohio 2003); *see generally* 49 U.S.C. § 14704(a)(2).

75. Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 288 F. Supp. 2d 895, 899, 905 (S.D. Ohio 2003) [hereinafter *Arctic Express IV*].

76. *Id.* at 905.

77. *Id.* at 906 (citing Dan B. Dobbs, Dobbs Law of Remedies § 3.1 (2d ed. 1993)).

78. *Id.*

79. *Id.*

C. Setoffs Against Escrow Balances

Determination of owner-operator damages does not end at the amount in the escrow accounts at the time of termination.[80] Pursuant to 49 C.F.R § 376.12(k)(6), all amounts due from the driver to the carrier are to be deducted from the escrow accounts if specified in the lease.[81] Under many owner-operator lease agreements, the escrow payments may pay such debts as the costs of "Qualcomm unit, maintenance and repairs, licenses, permits, taxes, insurance, loss or damage to the tractor, missing or damaged equipment, and costs associated with [recovering] possession of the tractor unit" after default.[82] Based on these countervailing lease provisions, some courts have not imposed liability on motor carriers that did not return funds if those funds were offset by amounts owed or if the escrow account did not have a positive balance.[83]

Notwithstanding this provision, OOIDA has persuaded some courts that the regulations prohibit any reduction in the amounts due to owner-operators or that permissible deductions are limited to the purpose of the escrow (*e.g.*, cost of tires deducted from tire reserve account). The effect of courts' acceptance of this argument is that carriers are required to return the full amount of the escrows to owner-operators, but are prevented from collecting amounts owed to the carrier by the owner-operator for items such as advances, past due lease payments and breach of lease damages. A carrier, therefore, faces a large damage claim from owner-operators and OOIDA, but is left with no effective way to recover amounts owed to it by those same owner-operators.

D. Attorney Fees

OOIDA routinely seeks attorneys fees under 49 U.S.C. §14704(e), which states that the "district court shall award a reasonable attorney's fee under this section."[84] As a result, defendants should include an estimate of OOIDA's attorney fees in calculating potential exposure.

E. Joinder of Company Owners, Directors, and Officers

OOIDA has joined motor carriers' presidents, agents, and employees for "engaging in a course of conduct, and in concert, whereby these parties have acted as part of a single common enterprise to violate federal

80. *See generally* 49 C.F.R. § 376.12(k)(6) (providing that "the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease.").

81. *Id.*

82. *New Prime IV*, 339 F.3d at 1011.

83. Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 213 F.R.D. 537, 547 (W.D. Mo. 2002) [hereinafter *New Prime III*].

84. 49 U.S.C. § 14704(e).

law."[85] OOIDA claimed in *Ledar Transport* that the facts justify piercing the corporate veil under Missouri law.[86] Piercing the corporate veil is an extraordinary form of relief that courts employ in very limited circumstances.[87] It is unlikely that OOIDA will be able to establish the extraordinary evidence required to prove such a claim. Nonetheless, OOIDA continues to make such claims as part of an aggressive litigation strategy.

V. Strategies for Reducing Risk of Damage Awards

According to its website, "OOIDA continues to file more lawsuits against motor carriers and several states in order to fight unfair and illegal treatment of drivers, violation of lumping laws, and private right of action, as well as double taxation."[88] Under this rubric, the OOIDA has filed class action lawsuits across the United States claiming to represent the interests of all owner-operators.

A. Setoffs and Counterclaims can Bar Class Certification

Carriers' claims against owner-operators for unpaid advances, lease breaches and other amounts due may provide a setoff against positive escrow balances that have not been refunded to a former owner-operator. If the carrier's claims exceed the amount of the escrow balance, the carrier has a counterclaim against the owner-operator in litigation. As such, these setoff and counterclaim rights may provide a basis to prevent class certification by OOIDA.[89]

Opposing class certification is crucial. OOIDA initiates litigation naming only a few owner-operators as plaintiffs with escrow claims, totaling only a few thousand dollars. But class certification could allow it to sue a carrier on behalf of all owner-operators owed escrow funds for a long period as well as recover attorney fees, increasing potential damage awards to millions of dollars.

However, OOIDA must establish several factors to obtain certifica-

85. *See, e.g., Ledar Transp.*, 2000 WL 33711271, at *11.

86. First Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages Demand for Jury Trial, Owner-Operator Indep. Drivers Ass'n v. Ledar Transp., No. 00-0258-CV-W-2-ECF (W.D. Mo. Nov. 3, 2000).

87. Union Pac. R.R. v. Midland Equities, Inc., 45 F. Supp. 2d 701, 707 (E.D. Mo. 1999).

88. OOIDA.com, What is OOIDA, http://www.ooida.com/about_us/about_us.html (last visited Aug. 28, 2005).

89. Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., No. 2:97-CV-750, 2001 WL 34366624, at *10 (S.D. Ohio Sept. 4, 2001) [hereinafter *Arctic Express II*] (determining that "the primary issue to be reached by this Court in deciding the Plaintiffs' Motion for Class Certification is whether, under Rule 24(b)(3), the Defendants' counterclaims can destroy an otherwise cognizable class.").

tion of a class.[90] The existence of setoffs and counterclaims is most relevant to the requirement that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[91]

The courts in *New Prime IV* recognized that, if New Prime had violated the leasing regulations, the escrow amount and the amount of New Prime's setoff and counterclaim rights would have to be determined separately for each class member.[92] Because "questions affecting individual class members would predominate over common questions of law or fact," the Eighth Circuit Court of Appeals upheld the denial of OOIDA's request for certification of a class.[93]

In contrast, the trial court in *Arctic Express II* decided that the question common to all defendants, whether the leasing regulations had been violated, warranted class certification.[94] By only asserting its counterclaims against the few named plaintiffs, Arctic Express left open the possibility of a simple alternative to denying class certification.[95] If counterclaims and setoffs became unwieldy, the court would create a subclass of owner-operators that were subject to those claims or sever those owner-operators from the action entirely.[96] When it later faced setoffs and counterclaims against virtually all of the thousands of class members,

90. FED. R. CIV. P. 23. The prerequisites to a Class Action pursuant to subsection (a) include:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Id. A court must also find pursuant to subsection (b) that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impeded their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . .. *Id.*

91. FED. R. CIV. P. 23(b)(3).

92. *New Prime IV*, 339 F.3d at 1012.

93. *Id.* at 1008, 1012.

94. *Arctic Express II*, 2001 WL 34366624, at *6. Oddly, the District Court had already decided that issue on summary judgment and, therefore, based class certification on an issue no longer before it.

95. *Id.* at *10.

96. *Id.* at *11.

the district court dismissed Arctic Express' counterclaims based on a lack of independent subject-matter jurisdiction instead of adjudicating Arctic Express' rights against the class members.[97] That dismissal left Arctic Express subject to liability for the full amount of the escrow balances without the ability to reduce that liability or otherwise collect the amounts it was owed by former owner-operators, except by bringing collection actions against thousands of former drivers, if they could be located.[98] The court's decision made a Chapter 11 bankruptcy case, in which setoffs are specifically preserved by the U.S. Bankruptcy Code, inevitable.[99]

Defeating class certification limits potential damages to those suffered by the named plaintiffs. Prevailing on the issue of commonality of claims would limit potential damages to a small fraction of that sought in a class action and removes OOIDA's motivations for pursuing the litigation.

B. Retroactive Application of the Regulation

The effective date of the ICCTA was January 1, 1996.[100] A federal statute that expands the class of plaintiffs that can bring an action cannot be applied retroactively.[101] Since no private right of action existed before the ICCTA,[102] most courts have held that the ICCTA expanded the class of plaintiffs and, therefore, cannot apply to owner-operators entering into leases before its January 1, 1996 effective date.[103] However, a minority of courts have held that the ICCTA and its regulations can be applied retroactively to allow pre-1996 owner-operators to sue carriers for alleged violations.[104]

C. Shortened Statute of Limitations

Courts recognizing a private right of action for owner-operators

97. *See, e.g.*, Owner-Operator Indep. Drivers Ass'n. v. Arctic Express, Inc., 238 F. Supp. 2d 963, 968-70 (S.D. Ohio 2003) [hereinafter *Arctic Express V*].

98. *See generally id.* at 965 (assuming it could find those former owner-operators, Arctic Express faced the impossible task of commencing thousands of individual lawsuits all around the country, obtaining service on each former owner-operator and then collecting the judgments it obtained).

99. *See generally* 11 U.S.C. § 553.

100. *New Prime IV*, 339 F.3d at 1006.

101. Hughes Aircraft Co. v. United States, 520 U.S. 939, 946-47 (1997).

102. *See New Prime IV*, 339 F.3d at 1007; *cf.* Renteria v. K & R Transp., Inc., No. CV 98-290 MRP, 1999 WL 33268638, at *6 (C.D. Cal. Feb. 23, 1999) (determining that the ICCTA did not create a private right of action for damages without first obtaining an agency order).

103. *See, e.g., New Prime IV*, 339 F.3d at 1007 (relying on Hughes Aircraft Co. v. United States, 520 U.S. 939, 950 (1997)).

104. *Arctic Express IV*, 288 F. Supp. 2d at 900-01 (distinguishing Hughes Aircraft Co. v. United States, 520 U.S. 939, 950 (1997)).

agree that it is based on 49 U.S.C. § 14704(a)(2).[105] However, that statute does not provide a statute of limitations for recovery of money damages.[106] Therefore, the general four-year statute of limitation would seem to apply.[107] Yet, at least one court has found that because of a drafting error, the private right of action for owner-operators was included in section 14704(a) instead of section 14705(c), which has a two-year statute of limitation.[108] Accordingly, the court held that owner-operators must bring their claims within a two-year period, significantly limiting the number of claims that could be asserted.[109]

D. OOIDA May Lack Standing To Act On Behalf Of Owner-Operators

Standing has been described as possibly the most important jurisdictional doctrine.[110] Because it raises a question of jurisdiction, the issue can be raised at any stage of the litigation or for the first time on appeal.[111] The party asserting standing, such as OOIDA, bears the burden of proof.[112]

Because OOIDA has not incurred damages, it usually asserts "associational standing" to represent its members in court.[113] "Associational standing," sometimes called organizational standing, was born from three decisions of the United States Supreme Court: *Warth v. Seldin*,[114] *Hunt v. Washington State Apple Advertising Comm'n.*[115] and *Automobile Workers v. Brock*.[116] An association can be granted standing to represent its members by satisfying a three-factor test: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim as-

105. 49 U.S.C. § 14704(a)(2).

106. *Id.*; *Renteria*, 1999 WL 33268638, at *5 (finding that no provision governs the filing of a civil action for any other types of damages and concluding that the lack of a limitations period provided persuasive evidence that no private right of action was intended by Congress).

107. 28 U.S.C. § 1658(a) (2000).

108. Fitzpatrick v. Morgan S., Inc., 261 F. Supp. 2d 978, 986 (W.D. Tenn. 2003).

109. *Id.* at 986.

110. Weinman v. Fid. Capital Apprec. Fund (*In re* Integra Realty Res., Inc.), 262 F.3d 1089, 1101 (10th Cir. 2001).

111. GMX Res. v. Kleban (*In re* Petroleum Prod. Mgmt.), 282 B.R. 9, 13 (B.A.P. 10th Cir. 2002).

112. *In re Integra Realty*, 262 F.3d at 1101-02.

113. *E.g.*, *Arctic Express II*, 2001 WL 34366624, at *7 (holding that OOIDA had associational standing without considering its preclusion when monetary damages are sought, even though the parties did not raise the issue directly).

114. Warth v. Seldin, 422 U.S. 490, 511 (1975).

115. Hunt v. Wash. State Apple Adver. Comm'n., 432 U.S. 333, 343 (1977) (citing Warth v. Seldin, 422 U.S. 490 (1975)).

116. Union v. Brock, 477 U.S. 274, 282 (1986) (citing Warth v. Seldin, 422 U.S. 490 (1975)).

serted nor the relief requested requires the participation of individual members in the lawsuit."[117]

OOIDA fails at least the third factor of the test for associational standing when monetary damages are sought. In *Warth*, the United States Supreme Court indicated that the participation of individual members would be required in an action for damages and the organization would consequently not have standing.[118] "These and later precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members."[119]

The denial of associational standing when monetary damages are sought promotes "adversarial intensity," protects against "the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity," and hedges "against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed."[120]

E. Defending Against Statutory Trust Claims

Statutory trusts are generally incompatible with federal bankruptcy law and should be used to extract property from the bankruptcy estate.[121] "[R]atable distribution among all creditors is one of the strongest policies behind the bankruptcy laws."[122]

Further, neither the ICCTA nor underlying regulations provide for the creation of a statutory trust. The regulation defining the terms of a lease between a carrier and owner-operator makes no reference to an "escrow."[123] However, even the escrow referred to in the regulation is optional and can be held by the carrier rather than the third-party trustee required by trust law.

VI. Case Studies: *Rocor Transportation* and *Arctic Express*

The two following examples of OOIDA litigation and their resolution through very different Chapter 11 strategies demonstrate the need for experienced advocacy and strategic planning in this type of litigation.

117. *Hunt*, 432 U.S. at 343.

118. *Warth*, 422 U.S. at 515-16.

119. United Food & Commercial Workers Union v. Brown Group, 517 U.S. 544, 554 (1996).

120. *Id.* at 556.

121. Wisconsin v. Reese (*In re* Kennedy & Cohen, Inc.), 612 F.2d 963, 966 (5th Cir. 1980).

122. Torres v. Eastlick (*In re* N. Am. Coin & Currency, Ltd.), 767 F.2d 1573, 1575 (9th Cir. 1985) (rejecting trust claim on segregated fund).

123. *See* 49 C.F.R. § 376.12(k).

A. THE *ROCOR TRANSPORTATION* CASE

OOIDA repeatedly failed to obtain class certification against Rocor International from the Oklahoma district court.[124] Other factors required the company to file its Chapter 11 case in August 2002.[125] Shortly after the Chapter 11 filing, OOIDA and the individual plaintiffs filed an adversary proceeding in the bankruptcy court seeking the imposition of a statutory or constructive trust on all of Rocor's assets on behalf of a putative class.[126] Although unsuccessful, OOIDA used its allegation of a trust to oppose every action by the debtor to spend money or transfer an asset, including a more than $17 million asset sale for the benefit of creditors, on the theory that all of Rocor's assets were held in trust for the former owner-operators.[127]

Spencer Fane Britt & Browne LLP ("Spencer Fane") represented Rocor International in its Chapter 11 case and obtained a dismissal of OOIDA's claim for a constructive trust. Confirmation of a plan of liquidation transferred Rocor International's assets into a liquidation trust (1) free and clear of liens and claims and (2) beyond the reach of OOIDA and the former owner-operators.[128] Although OOIDA appealed the confirmation and pursued its claims against the liquidation trust, Spencer Fane successfully opposed the two motions for stays pending appeal and a third motion for a preliminary injunction. It also obtained the dismissal of the individual owner-operators, leaving OOIDA as the only party to the appeal and putting its qualification for "associational standing" directly at issue.[129]

Following the denial of their motions, OOIDA and the other owner-operators agreed to dismiss the litigation and waive their claims against Rocor for a $100,000 administrative claim in the Chapter 11 case which is expected to receive only partial payment.

B. THE *ARCTIC EXPRESS* CASE

The district court certified a class of former owner-operators[130] and entered partial summary judgment against Arctic Express on liability for

124. *See* Order by Honorable Tim Leonard, Owner-Operator Indep. Drivers Ass'n v. Rocor Int'l, No. 00-CV-00640 (W.D. Okla. Sept. 25, 2001) (denying the plaintiff's motion for class certification because the proof offered by plaintiffs in support of their motion for class certification was deficient).

125. *In re* Rocor Int'l, Inc., No. 02-17658-TRC (Bankr. W.D. Okla. Aug. 5, 2002).

126. *Id.*

127. *Id.*

128. Order Confirming First Amended Plan of Liquidation at 5, *In re* Rocor Int'l, No. 02-17658-TRC (Bankr. W.D. Okla. Aug. 5, 2002).

129. *See supra* text accompanying notes 112-22.

130. *Arctic Express II*, 2001 WL 34366624, at *1.

violations of the leasing regulation.[131] OOIDA sought damages exceeding $16 million and the district court had dismissed all of Arctic Express' setoffs as well as counterclaims against class members, which would have significantly reduced that damage amount.[132] The potential liability and large legal fees required Arctic Express to file a Chapter 11 case and it retained Spencer Fane as its reorganization counsel.[133]

Most of the major battles, such as class certification, liability, and setoffs and counterclaims, have been fought and lost in the district court prior to the Chapter 11 case. Because of the potential size of the liability, OOIDA and the class most probably held a "veto" vote, which could stop any plan of reorganization proposed by the carrier. As in *Rocor*, OOIDA filed an adversary proceeding seeking a determination that Arctic Express' assets were held in statutory trust for the former owner-operators to secure repayment of the gross escrow amounts, which put the continued existence of Arctic Express in jeopardy.[134] Any reorganization strategy had to bring the damages to a manageable level by reducing the owner-operators' gross escrow amounts by the amounts those owner-operators owed Arctic Express. In many cases, matching the escrow amounts with the carrier's counterclaims and setoffs actually resulted in a net amount owed to Arctic Express.

The judgment OOIDA and the owner-operators received in the district court would be paid through the Chapter 11 case. OOIDA filed a $11.5 million proof of claim in the Chapter 11 case based on that expected judgment. However, the Bankruptcy Code requires parties to pay amounts they owe to the debtor and bars them from having a claim in bankruptcy until that debt is repaid.[135] Arctic Express used those provisions to obtain bankruptcy court approval of an alternative dispute resolution ("ADR") procedure that reduced the escrow amount owed to an owner-operator by the amount each owner-operator owed to Arctic Express, and informally resolved disputes regarding the accounts without further litigation.[136] The bankruptcy court's adoption of the ADR proce-

131. Owner Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 159 F. Supp. 2d 1067, 1080 (S.D. Ohio 2001) [hereinafter *Arctic Express I*] (granting plaintiff's motion for partial summary judgment as to count II with the only remaining issue being damages).

132. *See Arctic Express II*, 2001 WL 34366624 at *1; *Arctic Express V*, 238 F. Supp. 2d at 969-70.

133. *See In re* Arctic Express, Inc., Ch. 11 Case No. 03-66797-DEC (Bankr. S.D. Ohio Oct. 31, 2003).

134. Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc. (*In re* Arctic Express, Inc.), Ch. 11 Case No. 03-66797-DEC, Adv. No. 2:04-ap-02022 (Bankr. S.D. Ohio Jan. 16, 2004).

135. 11 U.S.C. §§ 502(d), 542(b).

136. Although the district court had ruled that it did not have subject matter jurisdiction over Arctic Express' setoffs and counterclaims against the former owner-operators, filing the Chapter 11 case gave the bankruptcy court original jurisdiction over those claims. *See* 28 U.S.C. § 1334(b).

dure had three important effects. First, it provided a mechanism to match the owner-operators' claims against Arctic Express with the carrier's claims against the owner-operators, and to net those claims against each other. This procedure, which the district court refused to allow, reduced Arctic Express' potential liability by millions of dollars. Second, by administering the claims between Arctic Express and the former owner-operators through an informal ADR procedure, Arctic Express would receive significant relief from the legal expenses that would be incurred in collecting its claims against owner-operators through traditional litigation. Finally, the ADR procedure would minimize OOIDA's role in the process and allow the adjustment of claims by Arctic Express and the owner-operators.

The approval of its ADR procedure and Arctic Express' opposition to certification of an owner-operator class in the bankruptcy court prompted OOIDA's settlement of its seven-year dispute with Arctic Express. OOIDA and the owner-operators have waived all claims against Arctic Express, including their allegation of a statutory trust on the carrier's assets, in return for a structured payment of $900,000 without interest over four years.[137]

VII. Conclusion: Practical Strategies for Reducing the Potential Damages

Carriers have options available to reduce the risk of an OOIDA claim based on the leasing regulations and the imposition of a statutory trust on the carrier's assets. A thorough review of owner-operator agreements and escrow management procedures by qualified counsel or the elimination of owner-operator lease programs can be preventative first steps, but will not cure past violations of the regulations. Carriers must also retain legal counsel with specific experience with owner-operator claims immediately upon receiving a demand or legal action from OOIDA or another owner-operator representative. OOIDA claims constitute complex litigation which requires special knowledge from the beginning in order to effectively defend against a large recovery. Trade group lobbying efforts to amend the statute and regulations so as to exclude a private right of action, reduce the term of the statute of limitations, prevent class actions, and to clarify the escrow provisions to exclude a statutory trust, could bring an end to this type of litigation. In the meantime, carriers finding themselves in OOIDA litigation should retain counsel experienced in these matters and solicit amicus curiae

137. The settlement was approved by the district court on July 16, 2004 and has been submitted for bankruptcy court approval as part of Arctic Express' plan of reorganization

("friend of the court") support from industry trade groups and other carriers.