§ 541(a)
interline trusts

Morrow v. A.C. Freight Systems et al., Adversary No. 00-3274
In re Silver Eagle Company, Case No. 300-34096
Appellate No. CV 01-1262-BR

10/3/2001 Dist. Ct. aff'g ELP Unpublished

The district court affirmed the bankruptcy court's entry of summary judgment for the trustee. The court adopted the bankruptcy court's letter ruling.

The debtor was a trucking company that had interline agreements with other trucking companies under which debtor would collect payments for services provided both by it and by other trucking companies. Debtor deposited the funds into its general account and periodically paid out settlements to the other carriers. The trustee sought a declaration that the funds received under these interline agreements were property of the estate. The trucking companies argued that the funds were held in trust under the interline trust doctrine.

The bankruptcy court rejected the interline trust argument. It concluded that federal common law does not apply and that, even if it did, it does not create such a doctrine. The court also concluded that state law does not create a trust for the interline carriers. Finally, the court held that, even if it were to conclude that there were a trust for the benefit of the interline carriers, defendants would have to trace the funds that are proceeds of interline accounts to establish that the funds are not property of the estate. Therefore, the court held that the funds were property of the estate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re SILVER EAGLE COMPANY, Debtor.	CV 01-1262-BR BR Case No. 00-34096-elp7 Adv. Proc. No. 00-03274-elp
A.C. FREIGHT SYSTEMS, INC., a California corporation, ART NORDANG TRUCKING, INC., a Washington corporation, B-D-R TRANSPORT, INC., a Vermont corporation, BEST OVERNITE EXPRESS, INC., a California corporation, CLIPPER EXPRESS COMPANY, an Illinois corporation, FOURIER TRUCK SERVICE, INC., an Oregon corporation, HOGLAND TRANSFER COMPANY, IDA-TRAN FREIGHT SYSTEMS, INC., an Idaho corporation, L.C. HALL TRUCKING LINE, INC., an Oregon corporation, MERGANTHALER TRANSFER & STORAGE CO., a Montana corporation, NPE, INC., an Oregon corporation, SPOKANE TRANSFER & STORAGE CO., a Washington corporation, TP FREIGHT LINES, INC., an Oregon corporation, Defendants-Appellants,	OPINION AND ORDER

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v.)
)
ROBERT K. MORROW, INC.,)
Trustee,)
)
Plaintiff-Appellee.)

JOHN A. ANDERSON
Anderson and Yamada, P.C.
1515 S.W. Fifth Avenue, Suite 1020
Portland, OR 97201-5445
(503) 227-4586

Attorneys for Defendants-Appellants

SANFORD R. LANDRESS
Greene & Markley, P.C.
1515 S.W. Fifth Avenue, Suite 600
Portland, OR 97201
(503) 295-2668

Attorneys for Plaintiff-Appellee

BROWN, Judge.

This matter comes before the Court on appeal from a Judgment of the Bankruptcy Court for the District of Oregon in a Chapter 7 proceeding. The Bankruptcy Court granted Plaintiff-Appellee Robert K. Morrow, Inc.'s Motion for Summary Judgment and found certain funds it received as bankruptcy trustee from Wells Fargo Bank constitute an asset of the estate. Defendants-Appellants objected to referral of this matter to the Bankruptcy Appellate Panel and elected to have the appeal reviewed by this Court. The Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700
PORTLAND, OREGON 97204
(503) 326 - 4173

LOZETTA B. DOLL, JUDICIAL ASSISTANT
DIANE K. BRIDGE, LAW CLERK
TONIA J. McCOMBS, LAW CLERK

March 20, 2001

Sanford R. Landress, Esq.
1515 S.W. Fifth, Suite 600
Portland, OR 97201

John A. Anderson, Esq.
1515 S.W. Fifth, Suite 1020
Portland, OR 97201

Lawrence R. Davidson, Esq.
1 S.W. Columbia, Suite 1850
Portland, OR 97258

David H. Williams, Esq.
121 S.W. Morrison, Suite 1300
Portland, OR 97204

Catherine S. Travis, Esq.
111 S.W. Fifth, Suite 2300
Portland, OR 97204

John T. Carr, Esq.
P. O. Box 955
Lake Oswego, OR 97034

James C. Frooman, Esq.
312 Walnut St., Suite 2300
Cincinnati, OH 45202

Thomas G. Waller, Esq.
2101 Fourth Ave., 24th Floor
Seattle, WA 98121

Jeffrey S. Theuer, Esq.
232 S. Capitol Ave., Suite 1000
Lansing, MI 48933

Re: Silver Eagle Company, #300-34096-elp7
Morrow v. A.C. Freight Systems, Inc., et al,
#00-3274-elp

Dear Counsel:

This matter came before the court on the chapter 7 trustee's motion and various defendants' cross-motions for summary judgment. After hearing argument at the March 5, 2001 hearing and considering the additional authorities provided, which I did not find added anything to the arguments already made, I conclude that I will adopt the tentative ruling that I outlined at the hearing. The purpose of this letter is to explain in more detail the reasons for my ruling.

The trustee filed a complaint for a declaratory judgment that certain funds turned over to the trustee by defendant Wells Fargo Bank (Wells Fargo) are property of the estate and are not

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held in trust for the trucking company defendants. The trustee moves for summary judgment on the legal question of whether the funds are held in trust. Some of the trucking company defendants have made cross-motions for summary judgment on the same issue. Wells Fargo filed a cross-motion for summary judgment on questions related to its alleged contingent claim secured by debtor Silver Eagle Company's (debtor) property.

I conclude that the funds are not held in trust and are property of the debtor's estate. Therefore, I will grant the trustee's motion for summary judgment and deny the trucking defendants' cross-motions for summary judgment. For the reasons set out below, I will deny Wells Fargo's cross-motion without prejudice.

FACTS

Debtor operated a regional trucking business. In order to facilitate shipment of goods that originates or terminates outside the region, debtor entered into agreements with other motor carriers. Under these "interline" agreements, the shipper pays a single unitary fee to either the originating or the destination carrier, which includes the fees charged by each of the carriers involved in the transportation of that shipper's goods. The carrier that receives the payment deposits the funds into its general account. Periodically, the interline accounts are balanced and the carrier pays the other shippers their share of the shipping cost, prorated based on the services provided by each carrier. Sometimes the carriers take offsets against amounts they owe to other carriers and write checks only for amounts owing after offsets.

In accordance with industry practice, debtor received payments from shippers for services provided by other carriers and deposited those funds in its general operating account. Funds in the general operating account were used to pay ordinary business expenses, including payroll, as well as to pay the interline carriers pursuant to their interline agreements.

As of the date debtor filed its bankruptcy petition, Wells Fargo held funds deposited by debtor totaling $617,937.93.[1] After the petition was filed, Wells Fargo turned over those funds to the trustee, who is currently holding them pending a ruling in this proceeding. The trucking company defendants[2] in this case all claim to be interline carriers who have interline agreements with debtor. Defendants assert that the funds received by debtor from shippers for interline shipping are held in trust for their benefit. The trustee asserts that the funds are not held in trust but are property of the bankruptcy estate.

DISCUSSION

1. Summary judgment standard

The court shall grant summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. There are no issues of fact with regard to whether these funds are property of the estate or are held in trust. The only issue is purely legal: whether the funds constitute an interline trust that are not property of the estate.

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[1] This amount includes $296,319 representing proceeds from the sale of equipment and $321,618.33 representing proceeds of debtor's accounts receivable. The proceeds of the accounts receivable include proceeds of both interline and non-interline accounts.

[2] I will refer to the trucking company defendants as "defendants" and Wells Fargo by its name.

2. Property of the estate

Upon the commencement of a bankruptcy case, "all legal or equitable interests of the debtor in property as of the commencement of the case" comprise property of the estate. 11 U.S.C. § 541(a)(1). Property held by the debtor as a trustee is not property of the estate available for distribution to creditors. 11 U.S.C. § 541(d); In re Unicom Computer Corp., 13 F.3d 321, 324 (9th Cir. 1994). "The nature and extent of a debtor's interest in property," including whether the property is held in trust, is determined under non-bankruptcy law. In re Coupon Clearing Service, Inc., 113 F.3d 1091, 1099 (9th Cir. 1997); In re Sale Guaranty Corp., 220 B.R. 660, 664 (9th Cir. BAP 1998). The party asserting a trust relationship has the burden of establishing the original trust relationship. 5 Lawrence P. King, Collier on Bankruptcy ¶ 541.11 (15th ed. Rev. 2000). See also Unicom Computer, 13 F.3d at 325.

3. The funds are property of the estate

a. Federal common law does not create a trust for interline carriers

Defendants argue that, in determining whether the funds at issue are held in trust for the interline carriers, I should apply federal common law rather than state law.[3] They rely primarily on In re Penn Central Transportation Co., 486 F.2d 519 (3d Cir. 1973), and Parker Motor Freight, Inc. v. Fifth Third Bank, 116 F.3d 1137 (6th Cir. 1997), which hold that funds collected by interline railroads and motor carriers for services provided by other interline carriers are held in trust.

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[3] Defendants do not claim that any federal statute or regulation or the agreements between the parties creates a trust.

(i) Federal common law does not apply

Federal courts should adopt a federal "common law" only in limited circumstances. In Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213 (1997), the Supreme Court said:

> This Court has recently discussed what one might call "federal common law" in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of federal statute or a properly promulgated administrative rule, but, rather, to the judicial "creation" of a special federal rule of decision. The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'" "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts . . . against the background of the total corpus juris of the states . . . .'" Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."

519 U.S. at 218 (citations omitted). The federal courts will apply federal common law in three general categories of cases: (1) cases that involve significant conflict between a uniquely federal interest and the use of state law; (2) cases that involve an area of law "so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law[;]" and (3) cases that involve substantive areas of law in which there is strong federal concern arising from the Constitution, from tradition, or from practical necessity, such as controversies between states, admiralty and maritime matters,

and foreign relations.[4] 19 Wright, Miller and Cooper, Federal Practice and Procedure § 4514 at 463-73 (1996).

Defendants argue that this case involves an area of significant national interest in which a uniform rule of law must apply, or that federal law has preempted the field.

(A) Significant national interest

There is no dispute that there is extensive federal regulation of motor carriers. For example, Congress has enacted legislation requiring that rates charged by motor carriers, including through rates, be reasonable, 49 U.S.C. § 13701(a), and providing for federal oversight of motor carriers. 49 U.S.C. § 13101. Congress has also prohibited state and local governments from enacting or enforcing laws or regulations relating to price, route, or service of motor carriers. 49 U.S.C. § 14501(c). This statutory regulation is intended to implement the stated federal transportation policy "[t]o ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense . . . ." 49 U.S.C. § 13101(a).

There can be no doubt about the importance of a nationwide system of shipping by motor carriers. However, the federal government's regulation of the industry and Congress's recognition of the need for a nationwide system of motor carriage do not, without more, establish a need for a uniform common law rule regarding whether funds collected for interline shipments constitute a trust. Indeed, there are many areas of commerce that are subject to extensive federal regulation, such as

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[4] The trustee focused only on this third category. These types of cases comprise but one category in which federal common law applies. See Mortgages, Inc. v. U. S. Dist. Court for the Dist. of Nev., 934 F.2d 209, 213 (9th Cir. 1991). Defendants argue that this case falls within the first or second category, not the third.

telecommunications and airline transportation, to name two. Neither extensive federal regulation nor industry importance requires a conclusion that federal law must govern all aspects of those industries.

Presumably, state contract law applies to agreements entered into by the motor carriers across the nation. Yet the lack of uniformity of state contract law apparently has not affected the ability of motor carriers to provide service. Defendants have not shown why applying state law to a determination of the ownership of funds collected under interline agreements would burden interstate commerce provided by motor carriers or subject that commerce to uncertainty. Nor have they shown any conflict between state law and the federal policy.

The Supreme Court's decision in Miree v. DeKalb County, Ga. 433 U.S. 25 (1977), is instructive. In that case, the Court held that federal common law does not apply to a breach of contract claim relating to contracts between a county and the Federal Aviation Administration. The Court acknowledged the federal interest in regulating aircraft travel and promoting air travel safety, but concluded that the federal interest was too remote to justify application of the federal common law to the action. The Court noted that, under Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966), "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." The conflict at issue in Miree was not sufficient to warrant application of a federal common law rule. 433 U.S. at 32.

Similarly here, defendants have shown no conflict between the federal interest in a nationwide system of motor carriers and use of state law with regard to the interline funds. I conclude that application of federal common law is not necessary to further a significant national interest.

(B) Federal law does not preempt state law

Some of the defendants argue that state law has been preempted by 49 U.S.C. § 14501. Section 14501(c) provides that, with exceptions not applicable here,

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

State law is preempted when:

> (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. When, however, Congress adopts a statute that provides a reliable indication of Congressional intent regarding preemption, the scope of federal preemption is determined by the statute.

Tocher v. City of Santa Ana, 219 F.3d 1040, 1045-46 (9th Cir. 2000)(citation omitted). Here, Congress has limited state and local governments' ability to regulate motor carriers where the law is "related to a price, route, or service of any motor carrier." Thus, the scope of federal preemption is determined by that provision.

Defendants argue that, if states cannot enact or enforce laws relating to the price, route or service of carriers, they also cannot enforce state law relating to "collection or division of prices, or carrier implementation of service." Memorandum in Support of KKW Trucking Inc. Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment at 14-15. I disagree. A state law "is related to the price, route, or service of a motor carrier if

the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." Tocher, 219 F.3d at 1047. Defendants have not shown that the characterization of payments received from shippers as property held in trust or property owned by the carrier outright has any effect at all on the carriers' prices or services. I conclude that § 14501(c) does not preempt application of state law to the characterization of the funds.

(ii) Even if federal common law applied, it does not create an interline trust

Even assuming that federal common law should apply,[5] the question remains whether there is an interline trust doctrine under federal common law. I conclude that there is not.

The interline trust doctrine was originally created in 1973 by the Third Circuit in the Penn Central case. The Sixth Circuit followed Penn Central in In re Ann Arbor Railroad Co., 623 F.2d 480 (6th Cir. 1980), and reached the same result. Later, the Sixth Circuit considered whether the answer would differ depending on the size of the railroad (because railroads are subject to differing regulations depending on size) and concluded that it would not. Missouri Pacific Railroad Co. v. Escanaba and Lake Superior Railroad Co., 897 F.2d 210 (6th Cir. 1990).

The Third Circuit extended the interline trust doctrine to customer refunds received by a natural gas company from upstream suppliers that the company was obligated to pass on to its customers. In re Columbia Gas Systems, Inc., 997 F.2d 1039 (3d Cir. 1993).

In 1997, the Sixth Circuit applied Penn Central and Ann Arbor to funds collected by interline motor carriers, concluding that there was not a sufficient distinction between the railroad

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[5] I am also assuming that the courts would not adopt the state law of the forum as federal common law. See Wright, Miller and Cooper, Federal Practice and Procedure § 4518 at 566.

industry and the motor carrier industry to justify applying the trust fund doctrine to one industry and not to the other. Parker Motor Freight, Inc., 116 F.3d at 1140. This is, according to the parties and to my own research, the only reported case that has extended the interline trust doctrine to the trucking industry.

The Seventh Circuit has rejected the interline trust doctrine. In re Iowa Railroad Co., 840 F.2d 535 (7th Cir. 1988).

I find the reasoning of Iowa Railroad more persuasive than the reasoning of the Penn Central case and its progeny. The Penn Central court essentially reasoned that, as a matter of equity, an entity that collects money from one source and forwards it to another[6] holds those funds in trust for the intended recipient regardless of what the entity does with the funds after it receives them. See Columbia Gas Systems, 997 F.2d at 1056. The reason for creating and applying this federal policy in the face of contrary state law is that railroads are a part of the national transportation system, governed by a national transportation policy to provide convenient transportation of goods throughout the nation.

I agree with the Seventh Circuit in Iowa Railroad that there are other equitable principles at stake, including the bankruptcy principle of ratable distribution. As that court said,

> The railroads that moved the freight are entitled to be paid - but so are the people who supplied it with diesel fuel,

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[6] The Penn Central court treated the collecting carriers as conduits. In fact, interline carriers are not conduits. A conduit takes funds intended for another party and turns them over to that party. In the interline carrier agreements, the carrier receives funds for interline shipping, then commingles those funds with its own general operating funds. It keeps a portion of the funds as payment for services it has provided, and pays the other interline carriers with money that has come not only from shipping customers but also from other sources. This is not a conduit; it is merely an agreement to pay.

> and its other creditors. All of these persons contributed essential ingredients of the movement of the freight and earned their right to payment. That the interline creditors have been short changed by the Iowa does not imply that the other creditors should get nothing. Justice in a bankruptcy case is decision according to law.
>
> . . . .
>
> The decision in this case turns on property rights, not notions of equity.

840 F.2d at 536. I am not convinced that there is anything about the interline carriers that justifies courts giving them special treatment to the detriment of other creditors.

Further, some of the reasoning of the court in Penn Central cannot withstand scrutiny. The court cited Restatement (Second) of Trusts § 12, comment h (1959), for the proposition that "the collection by Penn Central as an agent of money due and owing the other railroads suggests a trust." 486 F.2d at 524. Section 12 of the Restatement says, "A debt is not a trust." Comment h deals with agents: "A person who, as agent, receives money for his principal is an agent-trustee, if he receives title to the money, or bailee, if he has mere possession but not title." The comment continues:

> He is not a debtor to the principal, unless the principal manifested an intention that the agent should be entitled to use the money as his own.
>
> Where a stockbroker receives money from a customer or from the sale of the securities of a customer, he may be a trustee of the money so received or he may be a debtor to the customer. If there is an express or implied agreement between him and the customer that he shall not use the money as his own but shall apply it in accordance with the directions of the customer or shall immediately remit it to him, he holds the money as a trustee for the customer. On the other hand, it may be expressly or impliedly agreed that

> the broker may use the money as his own, in which case he is a debtor.

(Emphasis supplied.) Comment g carries the same theme:

> If one person pays money to another, it depends upon the manifested intention of the parties whether a trust or a debt is created. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created. If the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor or to a third person, a debt is created.

(Emphasis supplied.)

Thus, even under the authority that the court relied on in Penn Central, the relationship among the interline railroads was one of debtor-creditor, not trustee-beneficiary. I will not ignore the well-established law of trusts that provides that there is no trust but only a debt when the entity collecting the money has the right to unrestricted use of the funds and has agreed only to pay over to the third party a similar amount, whether with or without interest.

The court in Penn Central seemed concerned with the practicalities of the situation: each railroad makes numerous collections per day, and does not immediately know what portion of the collected funds is attributable to other carriers. 486 F.2d at 525. This practicality, along with the importance of a nationwide system of transportation and freight, led the court to conclude that the interline funds should be held in trust. In my view, neither the national significance of a particular industry nor the impracticality of segregating funds justifies ignoring principles of trust law.

If funds collected by interline shippers are to be held in trust as a matter of federal law, I think Congress should make that policy. Congress knows how to provide for trusts when it

feels that a national policy requires creation of a trust to protect payments made in a particular industry. For example, Congress has enacted the Perishable Agricultural Commodities Act (PACA), which provides in part for a nonsegregated statutory trust for proceeds from the sale of produce by a produce dealer. 7 U.S.C. § 499e(c); Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 156 (11th Cir. 1990). It has also provided for trusts with regard to the collection or withholding of taxes, 26 U.S.C. § 7501, and the collection of fees from owners or operators of aircraft for inspection services. 21 U.S.C. § 136a. That Congress has not done the same for interline funds collected by the transportation industry is some indication that the national interest in protecting interline payments is not substantial enough by itself to warrant creation of a trust.

In addition, when Congress enacted the Interstate Commerce Commission Termination Act, which was effective January 1, 1996, both Penn Central and Iowa Railroad had been decided, creating a conflict in the circuits about whether interline funds are held in trust. That Act extensively revised Title 49 with regard to both rail and motor carriers, including adding the prohibition on state regulation of price, routes and services of motor carriers. Revision Notes to 49 U.S.C. § 701; Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville, 78 F. Supp. 2d 725 (E.D. Tenn. 1999); Parker, 116 F.3d at 1138 n.1, 1139 n.2. Despite the circuit conflict, Congress amended 49 U.S.C. § 14501 to expand its preemption of state regulation of motor carriers without addressing the trust issue. If Congress had been concerned about the need for a uniform rule that interline funds be held in trust, it certainly could have added a provision to that effect.

I disagree with the comment in In the Matter of the Lehigh and New England Railway Co., 657 F.2d 570, 575 (3d Cir. 1981), that application of state law to interline freight accounts "would virtually assure . . . destruction" of the interline freight system. Until 1997, there was no published decision establishing interline trusts in the trucking industry. Both before and after 1997, the few circuits that have considered the issue with regard to national transportation systems have been split. Yet the system does not appear to have been endangered by

the lack of a uniform interline trust doctrine. If members of the industry believe application of trust principles is critical, they can enter into agreements providing that the collection of interline funds creates a trust. Or the carriers can devise ways to protect themselves from the risk of loss in the same way participants in other industries protect themselves. See Iowa Railroad Co., 840 F.2d at 541.

Finally, I agree with the trustee that the Ninth Circuit's decision in Coupon Clearing Service provides some indication that this circuit would be reluctant to adopt a rule that funds collected for services provided by other carriers are held in trust. The question in the case was whether certain coupon proceeds were held in trust for the retailers. The court rejected the Penn Central reasoning that, "because the collected funds were traceable and no provision of interest payments by carriers existed," the funds were held in trust. 113 F.3d at 1101. Although the court in Penn Central had held that commingling of funds was merely an indicator of a debtor-creditor relationship and was not necessarily conclusive, the Ninth Circuit was more convinced by the cases involving the relationship between freight forwarders or shipping brokers, which held that commingled funds were not held in trust. It was relevant that "payments to the carriers were not required to be made from the same funds received from the shippers." Id. I read Coupon Clearing Service as indicating a reluctance by the Ninth Circuit to adopt a rule that ignores the consensual commingling of funds when considering whether a trust exists.

Defendants rely on unpublished decisions from Pennsylvania, Washington and South Carolina in support of their trust theory. The trustee objects to my consideration of those decisions, citing the Ninth Circuit's rule against citation of unpublished decisions. See 9th Cir. Rule 36-3. That rule relates to unpublished decisions of the Ninth Circuit Court of Appeals, not to unpublished decisions of other courts. Thus, the rule does not preclude consideration of the unpublished decisions.

The unpublished decisions are not, of course, binding on this court. If they contained persuasive analysis, I would look

to them for guidance. I find no such helpful guidance in the cases cited. Norfolk & Western Railroad Co. v. Central Industries, Inc., 1989 WL 36958 (E.D. Pa. 1989), is a district court case out of the Third Circuit which, as it must, follows Penn Central. The Washington Bankruptcy Court order in In re Acme Inter-City Freight Lines, Inc., Bankr. No. 96-03571 (Overstreet, J., Dec. 22, 1998), is not helpful because it does not include the court's reasoning. Defendants provided the order and the motion; I cannot tell from those documents what reasoning the court used to reach its conclusion.

Finally, the order in Transportation Revenue Management v. Freight Peddlers, Inc., C.A. #2:99-2585-23 (Duffy, J., Sept. 7, 2000), does not assist defendants. In that case, the court concluded that there was a question of fact regarding whether funds collected by a freight broker for freight charges were held in trust for the carriers. The court pointed to federal regulations that required segregation of brokerage revenues and to the contracts between the broker and the motor carriers, which provided that the broker would perform all billing and collecting services from the party to whom the goods were delivered and that the broker would pay the carrier upon receipt of the bill of lading. The court said that, if the broker paid the motor carriers from its own general funds before it received the shippers' payments and therefore bore the risk of nonpayment,

> then the imposition of a trust might not be warranted. If, however, [the broker] simply forwarded the shippers' payments to the carriers, then it would be acting as a conduit, and federal law would call for the court to impose a trust.

Freight Peddlers actually supports the trustee's argument. In this case, there is no contractual or regulatory requirement of segregation, and the interline funds were commingled in the carriers' general accounts. The funds paid to the interline carriers are not required to be the same funds collected from the shippers; the carriers do not simply forward the payments to the interline carriers.

I conclude that, even if federal common law were to apply, that law would not include the interline trust doctrine.

b. State law does not create a trust for the interline carriers

Some of the defendants argue that I should hold that the funds are in a constructive trust.[7]

Under Oregon law, a constructive trust is an equitable device used "to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." Albino v. Albino, 279 Or. 537, 549 (1977)(quoting 6 Bogert, Trusts and Trustees 3-5, § 471 (2d ed. 1960)). It arises when a person in a fiduciary or confidential relationship acquires or retains property in violation of his duty to the grantor. Id. A constructive trust must be proved by "strong, clear and convincing evidence." Albino, 279 Or. at 550. Mere failure to

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[7] Not all defendants rely on state law for their argument that the funds are held in trust. All parties who discuss constructive trust rely on the law of the state of Oregon. Defendants do not argue that the funds are the subject of an express trust, an implied trust, or a resulting trust.

The KKW Trucking defendants mention a resulting trust in their memorandum, but argue only about whether the facts of this case fit the requirements for a constructive trust. Therefore I limit my consideration to constructive trust. In any event, I do not think that they have shown a resulting trust. Such a trust requires that, although the grantor did not expressly intend to create a trust, the grantor did not intend to give the beneficial interest in the property to the grantee. In this case, the evidence is that, consistent with industry practice and the parties' expectations, funds collected by debtor for interline services went into its general operating account to be used for general operating expenses as well as to pay interline charges. Those facts do not evidence an intention that debtor would not have a beneficial interest in the funds that it collected.

perform an agreement or carry out a promise cannot in itself give rise to a constructive trust, because the breach does not in itself constitute fraud or abuse of confidence or duty requisite to the existence of a constructive trust. 76 Am. Jur. 2d "Trusts" § 220 (1992).

Defendants argue that the constructive trust arose because debtor acquired the interline funds while in a fiduciary or confidential relationship. Defendants do not explain why the relationship between debtor and the other interline carriers was one of confidence. Confidential relationships are those in which "one party has reposed trust and confidence in another who thereby gains an influence and superiority over another," such as in a family or close personal relationship. 76 Am. Jur. 2d "Trusts" § 208 (1992); see also Albino, 279 Or. at 550 (confidential relationships include parent and child or husband and wife). There was no such relationship here.

Neither have defendants explained why debtor was in a fiduciary relationship with the other interline carriers. The carriers' agreement that each would collect payments for the others and pay over an amount representing the services provided by the other carriers does not make the carriers fiduciaries.[8] Defendants essentially argue that the funds were held in trust because debtor was a fiduciary, and debtor was a fiduciary because it held the funds in trust. That reasoning is circular.

Defendants might have a stronger argument for a constructive trust if debtor had agreed to pay over to the interline carriers the same funds it received for each carriers' services. However, the agreements and practice allowed debtor to commingle the interline payments with other funds in its general account, and to use those funds as it wished. Defendants have not shown

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[8] Compare this situation to that in In re Comcraft, Inc., 206 B.R. 551 (Bankr. D. Or. 1997), in which Judge Alley found a constructive trust where an Oregon statute required contractors entering into public contracts to pay subcontractors out of the proceeds of the contract.

strong, clear and convincing evidence that a constructive trust should be imposed in this case.

4. Trust res

Even if I were to conclude that there is a trust for the benefit of the interline carriers, I could not grant defendants' cross-motions for summary judgment because the fund that defendants assert is held in trust for them contains proceeds of the sale of equipment and of accounts receivable from non-interline carriers as well as proceeds from interline carriers. Defendants would have to trace the funds that are proceeds of interline accounts to establish that the funds are not property of the estate.[9]

5. Wells Fargo cross-motion for summary judgment

Wells Fargo filed a cross-motion for summary judgment seeking a declaration that it has a perfected security interest in certain listed assets and that the security interest secures payment of its contingent claim. The contingent claim is based on possible liability that would arise only if I found that the funds were held in trust. It also seeks summary judgment on other issues that it says are relevant only if I find that there is an interline trust. Because I have concluded that there is not an interline trust, the contingent claim will not arise and there is no controversy to decide. Therefore, Wells Fargo's cross-motion for summary judgment will be denied. However, if my decision regarding the interline trust is reversed on appeal, Wells Fargo may renew the cross-motion.

CONCLUSION

I conclude that federal common law does not apply in this case and that, if it did, it would not include the interline

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[9] At the hearing, defendants clarified that they are not seeking to impose a trust on all of the funds that came into debtor's hands, regardless of the source.

trust doctrine urged by defendants. I also conclude that defendants have not shown that the interline funds are subject to a constructive trust. Therefore, the trustee is entitled to summary judgment declaring that the funds are property of the estate. The trucking defendants' cross-motions for summary judgment are denied. Wells Fargo's cross-motion for summary judgment is denied without prejudice to renew the motion if my decision on the interline trust is reversed. Mr. Landress should submit the order and judgment within 14 days of the date of this letter.

Very truly yours,

ELIZABETH L. PERRIS
Bankruptcy Judge

ELP:lbd
cc: U. S. Trustee
Christine Coers-Mitchell
Red Ball Stage Line, Inc.
Lopez Auto Freight
The STS Group