Expansion of the Common Carrier Exemption within the FTC Act

By: James P. Lamb
Published: October 8, 2017

There has been much written in recent years about the *"Common Carrier Exemption"* found within the Federal Trade Commission (FTC) Act. While some (http://www.heritage.org/technology/commentary/time-repeal-the-ftcs-common-carrier-jurisdictional-exemption-among-other) have argued for the outright elimination of this exemption, including the FTC itself, as per this undated document downloadable from the FTC.gov website (incidentally, that's how you know it's a government website site--by virtue of the top level domain extension ".gov," which is an abbreviation of the word "government," not to be confused by ".com" which stands for "commercial"), in which then-FTC Commissioner Thomas B. Leary, who served as a Commissioner from November 1999 to December 2005, asked Congress to remove the exemption from the law (https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-reauthorization/030611learyhr.pdf), Congress has chosen to leave the exemption in place for at least a dozen years since that FTC request.[1]

In fact, instead of scaling the exemption back, it would appear the Appellate Courts have actually expanded the application of the exemption-- from being narrowly construed as "activity-based" to being more broadly viewed as "status-based." See this August 2016 case (https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/29/15-16585.pdf) that was handed down in the 9th Circuit in which the Court held that FTC had no jurisdiction over AT&T because it enjoys status as a common carrier.

This article examines the *"Common Carrier Exemption"* in detail and advances two additional ways to further expand the exemption for businesses to stay out of the FTC's sometimes overreaching regulatory --and malicious civil prosecutorial-- clutches.

In recent years, FTC has been accused of abusive and unlawful tactics and its agents have been the targets of Bivens actions (https://www.pbwt.com/data-security-law-blog/the-ftc-and-labmds-legal-battle-gets-personal-first-amendment-claims-against-ftc-lawyers-survive) through which it has been alleged the agents of the FTC have violated the Constitutional rights of American citizens.

It should be noted here that in 1971, the U.S. Supreme Court created a private damage

[1] It is unclear whether FTC commissioners even have the legal right to request the removal of the Common Carrier Exemption as a matter of lobbying Congress. See: http://gai.georgetown.edu/changes-to-both-hatch-act-and-anti-lobbying-act-you-should-be-aware-of/

cause of action against federal agents if Plaintiffs suing the agents can demonstrate that the agents violated their constitutional rights. In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court ruled that the Fourth Amendment gives rise to a right of action against federal law enforcement officials personally for damages from an unlawful search and seizure. While the Federal government enjoys "sovereign immunity," employees of the government are not immune from litigation that names them as Defendants.

Disturbingly, there have even been public accusations on the Internet that FTC attorneys have used witness' families as pawns to coerce them to file false affidavits (https://www.youtube.com/watch?v=dsQ-wzcgTvE) to support charges the FTC has filed with the courts.

In fact, FTC's agents' actions have become so egregious, crossing the lines of law and ethics, that the FTC recently took action to indemnify their agents when their unlawful actions become the targets of Bivens actions designed to hold these people personally responsible when they infringe upon the Constitutional rights of American citizens; that is, so that the American taxpayer has to foot the bill when government actors are sued as individuals for their unlawful overreach (http://www.legaltechnews.com/latest-legal-tech-news/id=1202799836094/FTC-Lawyers-Accused-of-Retaliating-Against-LabMD-in-Data-Breach-Case-Seek-Immunity?mcode=1395244994797&curindex=3). It would appear FTC has no interest in scaling back their unlawful and immoral tactics that seem to follow a "by any means necessary" strategy to win cases they have commenced, no matter what justice requires; they prefer to simply make their employees immune from the consequences to insulate them from-- and frustrate-- Plaintiff's attempts to acquire economic justice.

This article is not intended as a guide to circumvent bona fide government actions to stop unscrupulous entities engaged in deceptive business practices. Rather, it is intended for businesses looking to set up shop and ethically operate their businesses without having to worry about becoming the target over an overzealous, overreaching, out-of-control rogue agency that abuses its Draconian authority granted by Congress with impunity; authority which includes the ability to freeze assets and seize and place businesses into receivership without a fair hearing in order to railroad business owners into having to settle because they then cannot afford a defense. This is the 21st Century FTC's MO.

It would appear Congress should conduct oversight hearings into FTC's abuse of this power, power that should be reserved for terrorist activity or organized crime rather than cases that revolve around whether good faith disclaimers are adequate to the satisfaction of anti-business socialist bureaucrats. However, as even the FTC has seen, getting Congress to do anything circa 2017 is a challenge in and of itself. In the meantime, this article seeks to help business fight back by pulling the rug out from under an agency that seeks to impose its over-the-top agenda on the business community under the guise of protecting American consumers.

I. CONGRESS HAS MADE COMMON CARRIERS EXEMPT FROM FTC JURISDICTION PURSUANT TO THE COMMON CARRIER EXEMPTION

15 USC 45(a)(2) contains an exemption from jurisdiction of the FTC for "common carriers subject to the acts to regulate commerce." Section 5 of the FTC Act, 15 USC 45(a)(2) states:

> "The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the acts to regulate commerce, air carriers and foreign air carriers subject to part a of subtitle VII of title 49, and persons, partnerships or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended (7 USCA §18 et seq.), except as provided in section 406(B) of said act [7 USCA §227 (b)], from using unfair methods of competition in affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

Pursuant to 15 USC 45(a)(2) common carriers are exempt from the jurisdiction of the FTC. The language pertaining to common carriers in section 45(a)(2) is known as the *"Common Carrier Exemption*".

Black's Law Dictionary suggests there are two types of common carriers that this would apply to:

1. *a company offering services to the public over wires or satelite (sic) systems; and*
2. *a transporter that serves all public, follows a schedule, carries specified cargo, and is the carrier of the contract or carriage. Refer to contract carrier.*

It appears that what Black's Law dictionary means by following a schedule is a published rates schedule. Historically, motor common carriers have been required to publish and at times in recent decades file their publicly offered rates and charges in documents called "tariffs." Under current Federal Law, the requirement to publish tariffs remains in place for common carriers of household goods. This requirement is enforced by both the United States Department of Transportation's (USDOT) Federal Motor Carrier Safety Administration (FMCSA) and the U.S. Surface Transportation Board (STB), an independent, bipartisan adjudicatory board, much like the Federal Trade Commission, administratively housed within the USDOT.

Typically, the first prong of the definition above has been made to apply to telecommunications companies; the second, to trucking, bus and moving companies regulated historically by the Interstate Commerce Commission (ICC) and more recently, the USDOT, through a grant of delegated authority from the Secretary of Transportation to FMCSA.

However, there is reason to conclude that depending on the nature of a business and the manner, in which, it operates its business, it may qualify as being classified as a "common carrier" if it meets certain conditions and falls under the definition of common carrier established by the Supreme Court of the United States (SCOTUS).

Companies that operate websites on the Internet are considered to be operating over the wire. In fact, criminal wire fraud charges can be brought when there is probable cause to believe a person or company has met these four elements: the defendant created or participated in a scheme to defraud another out of money; the defendant did so with intent to defraud; it was reasonably foreseeable that the defendant would use wire communications; and the defendant did in fact use interstate wire communications. See: http://criminal.findlaw.com/criminal-charges/wire-fraud.html. Prosecuting the crime of wire fraud falls under the jurisdiction of the U.S. Department of Justice. The FTC, in contrast, is a consumer protection agency that is confined to civil investigation and enforcement with respect to such matters as deceptive business practices, misleading advertising, and breaches in data security that harm consumers.

Under common law, a corporation can enjoy the status of common carrier whenever it provides services to any customer in the public (that is, by being "open" to anyone in the public and by being fit, willing and able to serve anyone in the public) at a standardized or fixed price. Once a company falls within these criteria, it is exempt from FTC's jurisdiction including any regulations or enforcement by FTC.

The *"Common Carrier Exemption"*, as provided in 15 USC 45(a)(2), is status-based rather than activity-based, and therefore the exemption from FTC regulation applies to side activities of common carriers that do differentiate services or rates between customers.

A corporation that has the status of a common carrier is exempt from all FTC regulation and enforcement, including but not limited to FTC lawsuits under the FTC Act alleging that service providers engaged in unfair or deceptive acts or practices. *FTC v. AT&T Mobility LLC*, 835 F3d 993 (9th Circ. 2016), reconsideration granted en banc, ___F3d___, 2017 WL 1856836 (9th Cir, 5/9/17).

SCOTUS has ruled that a common carrier is a corporation or individual operating a business that offers a service to all members of the public at a fixed rate or price, without differentiating between customers. The common carrier does not make individual decisions about whether and on what terms to provide the service to particular customers; rather, the common carrier offers the same service at the same price to all customers in the public, without negotiating the price or other conditions of the service with customers. United States v. State of California, 297 US 175, 182–183 (1936); Interstate Commerce Commission v. Goodrich Transit Co., 224 US 194, 208 (1912); Florida Power & Light Co. v. Federal Energy Regulatory Commission, 660 F2d 668, 674 (5th Cir. 1981).

The status of being a common carrier is an occupation selected by a business. The

controlling factor in determining whether a business has the status of common carrier is the public profession or holding out by the business. When a business holds itself out and offers to charge all potential customers the same service for a uniform price, the business is a common carrier. Railroad Co. v. Lockwood, 84 US 357, 376 (1873); Florida Power and Light Co. v. Federal Energy Regulatory Commission, supra, 660 F2d at 674. Common carriers have a quasi-public character because a common carrier offers a service open to all members of the public indifferently. Florida Power and Light Co. v. Federal Energy Regulatory Commission, supra, 660 F2d at 674.

Common carriers are engaged in a broad variety of businesses that provide different types of services to the public in general at a fixed rate. Railroad Co. v. Lockwood, supra, 84 US at 376 (railroad carrying passengers and freight is a common carrier); Terminal Taxicab Company v. Kutz, 241 US 252 (1916)(taxicab company is a common carrier); State of Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 US 207 (1927) (tugboat company towing logs are common carriers); Florida Power and Light Co. v. Federal Energy Regulatory Commission, supra, 660 F2d at 674 (5th Cir. 1981) (utility company offering transmission of energy is common carrier); Davis v. Southern Bell Telephone & Telegraph Co., 755 FSupp 1532, 1538 (SD Fla. 1991)(local telephone company is common carrier); FTC v. AT&T Mobility LLC, 835 F3rd 993, 995, 997 (9th Cir. 2016), reconsideration granted en banc, ___ F3d ___, 217 WL 1856836 (9th Cir. 5/9/17) (wireless data service provider on Internet is common carrier).

Therefore, under this logic, **any** individual or corporation that (1) sets up a commercial enterprise on the Internet that is open to the public, in which it serves the public in a non-preferential, non-discriminatory manner; and (2) offers its services through a standardized, published rate schedule without negotiating individual prices or other conditions with each customer is thereby a “common carrier” beyond the jurisdiction of the FTC.

This logic follows through to common motor carriers. Trucking companies engaged in carrying freight, household goods, and other goods who offer their services to the general public at a fixed price, are common carriers. American Trucking Association, Inc. v. Interstate Commerce Commission, 659 F2d 452, 457 (5th Cir. 1981).

II. CONGRESS HAS MADE AGENTS OF COMMON CARRIERS EXEMPT FROM FTC JURISDICTION PURSUANT TO THE COMMON CARRIER EXEMPTION

The second way the *“Common Carrier Exemption”* may be stretched under this elastic application is to declare during an FTC prosecution for violation of the FTC Act that an agent acting on behalf of its common carrier principal is also exempt from prosecution.

A common carrier may therefore intervene on behalf of its agent being targeted directly by FTC. So, not only would AT&T or a common motor carrier trucking company be exempt from FTC lawsuits, so too would their agents.

Or, using a more powerful industry-wide approach under the theory of "association standing," a trade group consisting of multiple common carriers may intervene on behalf of its membership as long as at least one member meets the definition of being a common carrier. Intervention on behalf of an industry as a representative trade group as opposed to one common carrier principal is an even more compelling argument.

The Federal Courts have further held that a common carrier may designate another corporation or entity as an agent of the said common carrier to carry out all or a portion of the common carrier' s contract with customers to transport or deliver goods or services. Union Stockyard & Transit Co. of Chicago v. United States, supra, 308 US at 220; United States v. Brooklyn Eastern District Terminal, 249 US 296 (1919); Bank of Kentucky v Adams Express Co., 93 US 174, 181–182, 185 (1876). FTC v. Verity International Ltd., 194 FSupp2d 270, 276-277 (SNDY 2002).

A common carrier does not cease to be a common carrier because in rendering its service to the public the common carrier acts as an agent of another common carrier. Union Stockyard & Transit Co. of Chicago v. United States, supra, 308 US at 220; United States v. Brooklyn Eastern District Terminal, supra, 249 US at 307;

Having funded in depth legal research on this topic, I can assert there is little case law in this area and a plethora of state laws on agency to navigate. So, this would be a novel argument to make. But, it is worth further exploring, if a Defendant in an FTC action cannot assert it is a common carrier itself. This is the type of argument that would likely come from a big corporation that is able to withstand the expense associated with such a precedent-setting defense. And it is the type of argument that could put hundreds if not thousands of would-be Defendants outside the evil clutches of the FTC.

III. Federal District Courts Lack Subject Matter Jurisdiction over Common Carrier Defendants in Lawsuits brought by FTC under the FTC Act

Federal district courts are courts of limited jurisdiction, and the subject matter jurisdiction of the district courts is defined by the statutes enacted by Congress. US Constitution, Article III, §1; Kontrick v. Ryan, 540 US 443, 453 (2004); Bender v. Williamsport Area School District, 475 US 534, 541 (1986); Smith v. GTE Corp., 236 F3d 1292, 1299 (11th Cir. 2001) (federal courts have power to decide only certain types of cases for which there has been a congressional grant of jurisdiction);

Statutes passed by Congress define the types of cases or subject matter that district courts may adjudicate or hear, and the district courts have power or authority to decide only those types of cases for which a statute passed by Congress gives power or authority to adjudicate. Smith v. GTE Corporation, supra, 236 F3d at 1299 ("….subject matter jurisdiction exists only where granted by statute…."); Morrison v. Allstate Indemnity Co., 228 F3d 1255, 1260 – 1261 (11th Cir. 2000); Jackson v. Seaboard Coastline R.R. Co., 678 F2d 992, 1000-1001 (11th Cir. 1982).

If a statute exempts a type of case or subject matter from the power or authority of the district courts to decide, the district court has no subject matter jurisdiction to hear that type of case. FTC v. AT&T Mobility, LLC., supra, 835 F3d at 996, 1003. Davis v. United States, 918 FSupp. 368, 370-371 (ND Fla.1996) (Federal tort claims act contains exception from United States' waiver of sovereign immunity for exercise of discretionary functions, and this exemption deprives district court of subject matter jurisdiction over case involving discretionary function);

If a district court does not have subject matter jurisdiction of a case, the court has no adjudicatory authority to determine any issue in the case. Kontrick v. Ryan, supra, 540 US at 454 – 455; Smith v. GTE Corporation, supra, 230 F3d at 1299 ("…. a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction….");

Subject matter jurisdiction is a threshold question, and, even when a motion to dismiss based on said ground is improperly raised, a district court must address the fundamental threshold question of jurisdiction even when neither party has raised the issue. North Carolina v. Rice, 404 US 244 (1971); Bender v. Williamsport Area School District, supra, 475 US at 546 – 547; Smith v. GTE Corporation, supra, 236 F3d at 1299.

A motion to dismiss based on lack of subject matter jurisdiction pursuant to FRCP 12(b)(1) can be made at any time while a case is pending, from the time the complaint was filed until final judgment or even on appeal for the first time. FRCP 12(h) (3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); Grupa Dataflux v. Atlas Global Group, 541 US 567, 571, 576 (2004); Kontrick v. Ryan, supra, 540 US at 456; Mansfield C & L. M. Ry. Co. v. Swan, 111 US 379, 382 (1884); Capron v. Van Noorden, 2 Cranch 126 (1804) (lack of diversity jurisdiction can be raised for the first time before Supreme Court); Smith v. GTE Corporation, supra, 236 F3d at 1299; Kluver v. United States Department of the Treasury -Internal Revenue Service, 2000 WL 1141610 (SD Fla. 2000).

When subject matter jurisdiction is challenged pursuant to FRCP 12(b)(1), the plaintiff or other party asserting subject matter jurisdiction of the case has the burden of proof to show that the court has jurisdiction by a preponderance of the evidence. If the plaintiff or proponent of the complaint does not carry their burden, the action must be dismissed. Lujan v. Defenders of Wildlife, 504 US 555, 561 (1992); McNutt v. General Motors Acceptance Corporation, 298 US 178, 182-183 (1936); DiMaio v. Democratic National Committee, 520 F3d 1299 (11th Cir. 2008); Lamb v. Charlotte County, 429 FSupp2d 1302, 1305-1306 (MD Fla. 2006); Anderson v. United States, 245 FSupp2d 1217, 1221 (MD Fla. 2002); Davis v. United States, 918 FSupp 368, 370 (ND Fla. 1996).

When the subject matter jurisdiction of a district court is challenged and it is determined the court did not have subject matter jurisdiction, all actions of the District Court in connection with the case are invalid and void since they were made without subject

matter jurisdiction. Ostroff v. State of Florida, Department of Health & Rehabilitative Services, 554 FSupp 346 (MD Fla. 1995).

Whenever the FTC has no jurisdiction over defendants because they are engaged in the business of common carriers, it logically follows that the FTC did not have lawful authority to investigate the defendants in the underlying FTC action. FTC v. Miller, 549 F2d 452 (7th Cir. 1977). (FTC had no jurisdiction to investigate common carrier engaged in the business of transporting mobile homes in order to write report to Congress).

When subject matter jurisdiction is challenged, a district court should consider the motion pursuant to FRCP 12(b)(1) first and promptly so as not to waste the resources of the court on a case over which it has no jurisdiction. Lamb v. Charlotte County, supra, 429 FSup2d at 1306 (where subject matter jurisdiction is challenged "….the Court must not proceed on the merits of the case.").

Since Congress has passed a statute at 15 USC 45(a)(2) exempting common carriers, whenever defendants in the FTC litigation fall within the *"Common Carrier Exemption"* in the FTC Act, the defendants cannot be liable for the violations alleged by the FTC in the underlying complaint. Ergo, the federal district court also does not have subject matter jurisdiction over the allegations in FTC's complaint against the defendants, and therefore the action must be dismissed pursuant to FRCP 12(b)(1).

In the interest of justice, I hope this article can be a tool to be added to unjustly accused Defendants' arsenals to fight back against government corruption, abuse, misrepresentation, and misconduct. And that Congressional committees with oversight authority over the rogue independent FTC will finally remove the wool over their eyes, investigate FTC's investigative tactics and legal maneuvering, and conclude that action is needed --not to scale back the *"Common Carrier Exemption"* as the FTC would purport, but to reel in an out-of-control rogue agency and reconsider the grant of Draconian authority currently being abused by power hungry zealots within the agency.