

## **FedEx Enters Settlement with California District Attorneys to Partially Resolve Allegations of Mismanagement of Damaged Products, But Related Actions Still Pending in State and Federal Courts**

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On July 28, 2015, ***FedEx Ground Package System, Inc. (“FedEx”)*** entered into a settlement agreement (“Settlement”) with a group of California District Attorneys to partially resolve allegations that the company stored and transported packages of products that it found to be damaged or leaking, without complying with the applicable California requirements for hazardous and medical wastes. Under the terms of the (partial) Settlement, FedEx will pay a total of \$1,750,000, consisting of civil penalties, reimbursement for the costs of investigation and prosecution by the District Attorneys, and funding for supplemental environmental projects and a program of customer outreach for waste minimization and improved packaging. The company is also enjoined from future violations of the hazardous waste and medical waste regulations, as well as from failure to maintain the confidentiality of customer and employee records.

The Settlement does not resolve a related action brought by the California Department of Toxic Substance Control (“DTSC”), based on similar allegations, nor a pending case brought by FedEx in federal court seeking a declaratory judgment that the California rules for transport of hazardous and medical wastes are preempted by federal law, and thus cannot be enforced against the company.

### **Background and Related Actions**

On June 25, 2014, DTSC filed a complaint (“DTSC Complaint”) alleging that between November of 2008 and May 2014, FedEx violated California’s Hazardous Waste Control Law (“HWCL”) by failing to properly manage as hazardous wastes packages that were discovered at company terminals to be broken or leaking and that contained hazardous products such as acids, solvents, insecticides, batteries and other flammable, toxic, or corrosive materials. In some instances, FedEx allegedly either delivered the packages to the intended recipients or returned the packages to the original shipper (after repackaging, if necessary), without a hazardous waste transporter registration or a hazardous waste manifest. In other instances, the company allegedly stored the damaged packages at the terminals, placed them into salvage drums, and sent them to a hub facility for eventual recycling or disposal, without properly identifying and labeling the materials as hazardous waste, using a hazardous waste manifest, or shipping the material directly from the terminal to an authorized

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hazardous waste facility.

Shortly thereafter, on July 1, 2014, Sacramento District Attorney, Jan Scully, filed a related suit on behalf of the People of California (“DA Complaint”), which was amended on August 1, 2014. Nine District Attorneys from counties throughout California participated in the action. The allegations in the DA Complaint are similar in substance to those in the DTSC complaint, namely that FedEx violated California’s HWCL on 1,500 instances, by storing, transporting and disposing of hazardous materials without required permits, without using registered haulers and disposal facilities, and without using hazardous waste manifests. However, the allegations differ in several ways. First, the DA Complaint alleges violations of the Medical Waste Management Act (“MWMA”), as well as the HWCL. Second, the DA complaint alleges unspecified violations of the Business and Professions Code. Third, the DA Complaint encompasses a broader time period extending from May 1, 2007 through the filing of the Complaint.

In anticipation of the filing of the DTSC Complaint and the DA Complaint, FedEx on April 26, 2014, filed suit in federal court (“Federal Action”) against DTSC and the District Attorneys for the counties of Sacramento, San Diego, Los Angeles and San Bernardino. The complaint filed by FedEx seeks a declaratory judgment that the relevant HWCL provisions governing transport of hazardous wastes are preempted by the federal Hazardous Materials Transportation Act and the U.S. Department of Transportation (“DOT”) Hazardous Materials Regulations (“HMR”), such that the company could not be penalized for alleged violations of the state provisions. The District Attorneys filed a motion to dismiss, which the Northern District of California granted on January 22, 2015. The motion was granted pursuant to the Younger Abstention Doctrine, which requires that a federal court dismiss an action where (1) state judicial proceedings are pending; (2) the state proceedings implicate important state issues; and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. On February 23, 2015, FedEx timely appealed the District Court’s decision. [See here.](#)

## **The Settlement**

The Settlement resolves only the first cause of action alleged in the DA Complaint, but leaves the related DTSC Complaint and Federal Action unaffected. The remaining causes of action in the DA Complaint, concerning alleged violations of the HWCL and the MWMA, were dismissed with prejudice, in light of the pending DTSC case and the requirements of the Settlement, as discussed below.

Although the Settlement indicates that it does not resolve the alleged violations of the HWCL and MWMA, it explicitly enjoins noncompliance with numerous requirements for such wastes, such as:

- Unlawful transportation of hazardous and medical waste;
- Unlawful transportation of hazardous waste without use of a licensed hazardous waste hauler and a hazardous waste manifest;
- Unlawful storage of hazardous waste;
- Failure to train employees how to handle such wastes;
- Failure to properly manage hazardous wastes from the point of generation;
- Failure to obtain U.S. Environmental Protection Agency identification numbers for its facilities;

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and

- Failure to comply with California hazardous materials inventory and spill response programs.

The Settlement also enjoins the failure to maintain the confidentiality of customer and employee records, pursuant to an unrelated provision of the California Civil Code. The Settlement applies to all of FedEx's facilities throughout the State of California, and requires that FedEx notify the State within 45 days of the opening or relocation of any FedEx Ground facility.

Pursuant to the Settlement, FedEx agreed to dismiss its claims in the Federal Action for declaratory relief against District Attorneys for the counties of Sacramento, San Diego, Los Angeles, and San Bernardino. Importantly, however, FedEx was not required to dismiss the same claims against DTSC. Indeed, the District Attorneys explicitly agreed in the Settlement that FedEx was not waiving or forfeiting its preemption argument or any other claims or defenses in the Federal Action or the DTSC Complaint. Both of those cases survive the Settlement and still remain to be resolved.

## **Analysis and Implications**

The actions brought against FedEx by the California District Attorneys (now settled) and DTSC (still pending) represent a new front in the State's aggressive efforts to enforce the hazardous waste rules against non-industrial waste generators, such as retailers, telecommunications providers, and now ground transportation companies. Even though FedEx has entered into a partial settlement with significant penalties and compliance obligations, the company appears poised to continue fighting at least some of the allegations on the ground that State requirements for transport of hazardous and medical wastes are preempted by federal law. Somewhat similar preemption arguments have been addressed before by DOT and the courts, and they have had varying degrees of success depending upon the circumstances. The fate of FedEx's arguments in the DTSC Complaint and the Federal Action warrant close monitoring, because it may be of broader significance to other companies that initiate or transport shipments of products and/or wastes.

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