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SUBROGATION WHITEPAPER

Navigating Cargo Claims

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INTRODUCTION

The term “cargo claim” is a broad one. Such claims are ancient with a long history of laws written and re-written to address them. Cargo claims can invoke “maritime law,” another broad and sometimes elusive term. Claims for cargo lost or damaged on land, never touching a drop of water, are often called marine cargo claims nonetheless. And cargo claims can also invoke “air law” – laws governing air travel.

Most cargo claims are covered by marine insurance. Marine insurance covers, among other things, the transportation of cargo on land, sea or air. Claims for loss and damage to cargo under a marine insurance policy, when paid, give rise to subrogation, by which the insurer gets an opportunity to try to collect back from the party(ies) responsible for the loss or damage. Through subrogation, the insurer gets to “stand in the shoes” of the insured, who is most often the owner of the cargo.

When the cargo owner (usually the insured) entrusts the goods to someone for storage or transportation, a bailment is created. If the goods move from or to the United States, internationally by ocean, that bailment relationship is controlled by the Carriage of Goods by Sea Act (COGSA), a statute of the United States. International shipments, not touching a U.S. port, may be controlled by other treaties, such as Hague-Visby or Hamburg Rules.

Interstate and transportation of cargo by rail, truck and barges are generally covered by the Pomerene Act and Carmack Amendment to the Interstate Commerce Act.

International air shipments are governed by the Montreal Convention, MP-4, or the Warsaw Convention.

Some personal injury claims are governed by the Jones Act and the Longshoremen and Harbor Workers’ Compensation Act (LHWCA), which are left for another day.

KEY TERMS TO CARGO CLAIMS

Cargo claims involve terms unfamiliar to the uninitiated, but which are key to understanding the claims under what is called the Carmack Amendment and COGSA. Such terms include:

- “BILL OF LADING”: This is a key document for cargo claims. A bill of lading generally serves three purposes: (1) document of title; (2) a contract of carriage and (3) a receipt for goods. Ocean bills can be negotiable instruments and control possession of the goods.
- “MANIFEST” is similar to a packing list. It identifes what was packed and/or stuffed into a container
- “SHIPPER” has been defined as “one who ships goods to another” and “one who tenders goods to a carrier for transportation.” Black’s Law Dictionary, 7th Ed. 1983.
- “CARRIER” has been defined as “an individual or organization (such as a railroad, ocean vessel or an airline) that transports passengers or goods for a fee.” *Id*.
- The term “PRIVATE CARRIER” refers to a carrier that transports or delivers goods or services for a single entity, often a corporation. Usually that entity's primary business is not transportation but rather something else. For example, a grocery store chain may own and operate its own private fleet to deliver produce and goods to their stores. That grocery store chain’s primary business is not transportation but grocery retail. Its fleet is a a private carrier.
- The term “COMMON CARRIER” refers to a carrier whose primary business is the transport of goods and which serve any customers that hire them, such as buses, railroads, trucking companies, airlines and taxis. Private carriers may refuse to sell their services at their own discretion, whereas common carriers must treat all customers equally. Examples of a common carrier are Federal Express and United Parcel Service.
- The term “INDEPENDENT CARRIER” refers to an individual owner-operator or trucker who may make deals with private carriers, common carriers, contract carriers, or others as he or she wishes.

- The term "CONSOLIDATOR" applies to a company that organizes and often loads into a single container, different cargoes, to obtain lower freight charges. Consolidators can be found to be carriers if they issue a bill of lading, such as Non Vessel Ower Common Carriers (NVOCC's) or Indirect Air Carriers.
- "BROKER": "The term 'broker' means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. §13102(2).

MARINE CLAIMS

THE ICC TERMINATION ACT (FORMERLY KNOWN AS THE CARMACK AMENDMENT)

What was traditionally known as the Carmack Amendment is codified at 49 U.S.C. Section 14706 *et seq*. It is now known as the ICC Termination Act. It provides the sole and exclusive remedy to shippers for loss or damage in interstate transit. *Hughes Aircraft v. North American Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992).

History

The Carmack Amendment was enacted by Congress in 1906 as an amendment to the Interstate Commerce Act of 1887 to provide for national consistency for goods damaged or lost during interstate shipment by a common carrier. *Ward v. Allied Van Line, Inc.*, 231 F.3d 135, 138 (4th Cir. 2000). The Interstate Commerce Commission was abolished by Congress in 1995 with the ICC Termination Act, "but the old ICC regulations remain in effect until the new regulations are promulgated." *John Deere Insurance Co. v. Nueva*, 229 F.3d 853, 855 n. 3 (9th Cir.2000). The ICC Termination Act also recodified the Carmack Amendment at 49 U.S.C. § 14706 from 49 U.S.C. § 11707 (1995). "This recodification worked no substantive change on the Carmack Amendment." *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 73 n.4 (2d Cir. 2001).

Application

The Carmack Amendment applies to transportation of goods between states, unless the shipment is within a commercial free trade zone, which is usually about a 50 mile radius from a specified point. Trucks delivering within such a zone are virtually unregulated and can set forth, for example, a $50 per shipment limitation of liability.

Purpose

The purpose of the Carmack Amendment was to provide "a uniform system of carrier liability that would provide certainty to both carrier and shipper by enabling the carrier to asses its risk and predict its potential liability for damages." *Pietro Culotta Grapes v. Southern Pacific Transportation*, 917 F.Supp. 713, 716 (E. Dist. Cal. 1996).

Effect

If applicable, Carmack "preempts a shipper's state and common law claims against a carrier for loss or damage to goods during shipment. *Ward v. Allied Van Lines, Inc.*, 231 F.3d 135, 138 (4th Cir.2000)(citing *Shao v. Link Cargo) (Taiwan) Ltd.,* 986 F.2d 700, 704 (4th Cir.1993)). It makes carriers liable "for the full actual loss, damage, or injury caused by them to property they transport, and declares unlawful and void any contract, regulation, tariff, or other attempted means of limiting this liability." *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 1144 (1964). The broad reach of Carmack preempts plaintiff's state law claims, which includes claims for: 1) the tort of outrage; 2) intentional and negligent infliction of emotional distress; 3) breach of contract; 4) breach of implied warranty; 5) breach of express warranty; 6) violation of the state's deceptive trade practices or consumer protection statutes; 7) slander; 8) misrepresentation; 9) fraud; 10) negligence and gross negligence; and 11) violation of the common carrier's statutory duties as a common carrier under state law. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 777 (5th Cir. 2003). Carmack also preempts federal common law that increases the carrier's liability.

The Elements

To make a prima facie case under the Carmack amendment, "a plaintiff must show 1) delivery to the carrier in good condition; 2) arrival in damaged condition; and 3) the amount of damages caused by the loss." *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 73 (2d Cir. 2001) "Once the prima facie case is established, liability attaches unless the carrier can establish one of several affirmative defenses." *Id.* These available affirmative defenses are that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; or (e) the inherent vice or nature of the goods." *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 1144 (1964). "The burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability." *Id.* at 138, 84 S.Ct. at 1145.

Recoverable Damages

What the Statute Provides

A plaintiff suing under the Carmack Amendment is entitled to the "actual loss or injury to the property caused by... the carrier." 49 U.S.C. § 14706(a)(1).

What the Case Law Says

"The Carmack amendment incorporates common law principles for damages." *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 76 (2d cir. 2001). Carmack makes carriers liable "for the full actual loss, damage, or injury caused by them to property they transport, and declares unlawful and void any contract, regulation, tariff, or other attempted means of limiting this liability." *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964). If the loss is a complete loss, the general measure of damages under Carmack is the fair market value at the place of destination. *Illinois Cent. R.R. Co. v. Caril*, 281 U.S. 57, 50 S.Ct. 180 (1930).

Market Value is Prevailing Measure of Damage

The goal in an action for cargo damage is to restore the innocent party to the position the party would have been in if the contract had been fully performed. *Hector Martinez & Co. v. Southern Pac. Transp. Co.*, 606 F.2d 106, 108 (5th Cir. 1979). Where goods are damaged, the general rule for damages is the difference between the market value of the shipment at its destination and the market value of the shipment as damaged. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 435 (2d cir. 2001). Where the damage is a total loss, the measure of damages is the fair market value at destination less salvage. *Encylcopaedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7, 19 (2d Cir. 1969). Market value is also an appropriate measure of damages under COGSA. *Van Der Salm Bulb Farms, Inc. v. Hapage Lloyd, A.G.*, 818 F.2d 699, 700 (9th Cir. 1987).

Time at Which Market Value is Established

The measure of damages where a carrier fails to deliver a shipment at a destination within a reasonable time is the difference between the market value of the goods at the time of delivery and the time when they should have been delivered. *Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 552 (5th Cir. 2005).

If goods which arrive at destination damaged are returned to the shipper for inspection, a court has held that it had no basis for determining that the damage was not caused, or at least aggravated, during the second part of the journey. *S.C. Johnson & Son, Inc., v. Louisville & Nashville R. Co.*, 695 F.2d 253 (7th Cir. 1982).

In *Neptune Orient Lines v. Burlington*, 211 F.3d 1118 (9th Cir. 2000), the court held that the measure of damages under the Carmack Amendment for the loss of a container load of Nike shoes on the inland portion of a carriage from Indonesia to Tennessee was the market value at destination, not the replacement cost. The Court stated, "Market value at destination" is the proper measure of the actual loss in a situation where, as here, the shipment is lost or destroyed." This was followed with the following string of citations:

> See The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 495-96 (1935) (affirming "damages [computed] on the basis of the market value of the goods at destination on the date of arrival."); Otis McAllister & Co. v. Skibs, 260 F.2d 181, 183 (9th Cir. 1958) (under COGSA and common law "basis of recovery for the usual carriage of goods [is] the value at the point of destination."); Polaroid Corp. v. Schuster's Express, Inc., 484 F.2d 349, 351 (1st Cir. 1973); see also Seguros Banvenez, S.A. v. S/S Oliver

Drescher, 761 F.2d 855, 861 (2d Cir.1985) (measure of damages under COGSA is typically the "market value of the goods at the time and place they were to have been delivered"); Armada Supply, Inc. v. S/T Agios Nikolas, 613 F. Supp. 1459, 1469 (S.D.N.Y. 1985); cf. New York Marine & Gen. Ins. Co. v. S/S "Ming Prosperity," 920 F. Supp. 416, 423 n.10 (S.D.N.Y. 1996) (finding injured party not entitled to "lost profits" where the bill of lading required carrier liability to be "adjusted and settled on the basis of the net invoice value").

Reasonableness

Where the measure of damages the shipper seeks is the market value of the goods less the salvage value, the shipper's salvage decision must be a reasonable one. *Bruzzone Consolidation, Inc., v. M/V Blue Eagle*, 713 F. Supp. 146, 151 (D. Md. 1989), *aff'd w/out opinion*, 900 F.2d 250 (4th Cir. 1990). In *Bruzzone*, the court stated that in determining the reasonableness of a settlement, factors to consider include the risk of further loss, the duty to mitigate damages, and the extent to which the settlement deviated from the actual loss. *Id*. The court decided that the plaintiff shipper's decision to sell damaged cargo at a 40% discount was a reasonable one, even though it "might well not have yielded a perfect result." *Id*.

Burden of Proving Market Value Damages

The plaintiff ordinarily has the burden of proof on the amount of damages, including when the plaintiff claims that the value of the lost or damaged property exceeds market value. *Association of Md. Pilots v. Baltimore & Ohio R.R. Co.*, 304 F. Supp. 548, 557 (D. Md. 1969). However, the burden of demonstrating that a rule other than market value will more closely approximate actual loss has been held to fall upon the carrier. *Morgan v. Norfolk and Western Ry. Co.*, 473 F.2d 1278, 1280 (7th Cir. 1973).

The amount of damage claimed must be determinable to a reasonable certainty. *First Nat'l Bank of Chicago v. Jefferson Mortg. Co.*, 576 F.2d 479, 494-495 (3d Cir. 1978). Purely speculative damages are not recoverable. *Ham's Express Inc. v. Joseph Land & Co.*, Inc., 506 F. Supp. 209, 213 (E.D. Pa. 1980).

Various methods have been used to determine market value, such as retail, wholesale, replacement, or even invoice value. *See Santiago v. Sea-Land Service Inc*., 366 F. Supp. 1309, 1315-1316 (D.P.R. 1973).

Rather than deny any recovery, a court should use the best indication of damages it can when a determination of damages is inexact without any fault of the consignee. *Bruzzone*, 713 F. Supp. at 151.

Partial Damage

Where machine parts are shipped in separate packages and one package is lost or damaged, a court has held that damages were limited to the value of the lost or damaged part only since the damaged portion of the machine was returned to the factory, repaired, and returned four days later. *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999).

Carrier Can Be Estopped from Challenging Damages

A carrier may be precluded from attacking a lack of precision in the measure of damages where the carrier has failed to give plaintiff advance notice of damage to the cargo, so that the plaintiff was unprepared to inspect, and where the plaintiff's surveyor was prevented from conducting a joint survey of the damage. *Amstar Corp. v. M/V Alexandros T.*, 472 F. Supp. 1289, 1298-1299 (D. Md. 1979), aff'd, 664 F.2d 904 (4th Cir. 1981).

Exceptions to Market Value as Measure of Damage

"[W]hile it is true that damages under the Carmack Amendment should generally be based on the fair market value, we have held that it need not be applied if 'circumstances suggest a more appropriate alternative.'" *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 77 (2d Cir. 2001)(citing *Oak Hall Cap & Gown Co. v. Old Dominion Freight Line, Inc.,* 899 F.2d 291, 296 (4th Cir. 1990)).

Special reasons may exist that render market value inapplicable, where the shipper can replace the shipment at cost and suffers no loss of profits. *Meletio Sea Food Co. v. Gordons Transports, Inc.*, 199 S.W.2d 983 (MO. App. 1946).

Where goods shipped from California to New York were intended for export to Venezuela but were damaged, a court has held that the fair measure of damages was the market value of the export goods at the place of shipment in California, plus the shipping costs to the point of export in New York. *F.J. McCarty Co., Inc. v. Southern Pac. Co.*, 428 F.2d 690 (9th Cir. 1970).

Lost Profits

Retail values, including lost profits, have been awarded where the profits have been shown with sufficient proof. *Goldenberg v. World Wide Shippers & Movers, Inc*., 236 F.2d 198, 202 (7th Cir. 1956). Loss of special profits resulting from loss of markets and loss of profits on other goods cannot usually be included in the measure of damages because they are too remote. *Id*. Lost profits must be proven with reasonable certainty. *Hale Container Line, Inc. v. Houston Sea Packing, Inc.*, 137 F.3d 1455, 1474 (11th Cir. 1998). Lost profits may be reasonable under COGSA. *Valerina Fashios, Inc. v. Hellman Int'l Forwarders, Inc*., 897 F. Supp. 138, 140 (S.D.N.Y. 1995).

To establish lost profits as an element of damages, a plaintiff must present evidence such as unfilled orders existing at the date of the loss. *Great Am. Trading Co. v. American President Lines, Ltd.*, 366 F. Supp. 396 (N.D. Cal. 1986). Profits will be disallowed as a measure of damages where insufficient evidence is produced and large inventories exist. *Id*. A jury may consider profits where a retail establishment has arranged for the shipment of goods that have a short sales life and where it is impossible to replace the goods in time for a market, providing that the retail establishment presents sufficient evidence that the goods would have sold had they arrived in good condition in time to meet consumer demand. *The Limited Stores, Inc., v. Pan Am. World Airways, Inc.* 600 N.E. 2d 1027, 1032 (Oh. 1992); *Valerina Fashions, Inc. v. Hellman Int'l Forwarders, Inc.*, 897 F. Supp. 138 (S.D.N.Y. 1995).

Wholesale Price v. Market Price v. Invoice Price

Where there has been a shortage in the delivery of a fungible good such as coal, the Supreme Court has said that the proper market price is to be the wholesale price, not the retail price. *Illinois C. R. Co. v. Crail*, 281 U.S. 57 (1930).The invoice price has been used as the value of undamaged goods where the fair market value is uncertain or not proven. *Marine Office of Am. Corp. v. Lilac Marine Corp.*, 296 F. Supp. 2d 91, 104 (D.P.R. 2003).

In determining damages, a court may limit the market price to the amount of the contract price, if the contract price is lower than the market price, but sufficient to make the plaintiff whole. *U.S. v. Northern Pacific Ry. Co.*, 116 F. Supp. 277 (D. Minn. 1953). However, if there is no evidence that the plaintiff could have replaced the purchases at the same bargain prices at the time the goods should have been delivered, a court has held that the measure of damages should be the wholesale price at destination, not the contract price. *R.R. Salvage of Conn., Inc. v. Eazor Express, Inc.*, 287 A.2d 745 (Conn. Super. Ct. 1971).

A discount given by a receiver to its customers as a result of damage to cargo during discharge may be a satisfactory basis for awarding damage to the receiver. *Bruzzone*, 713 F. Supp. at 151.

Proof of damages by statistical sampling of goods claimed to be damaged may be adequate to make a prima facie case for damage to the goods as a whole. *Imperial Veal & Lamb Co., Inc. v. Caravan Refrigerated Cargo, Ins.*, 554 F. Supp. 499, 501 (S.D. N.Y. 1982).

Cases Where Damages Sought Were Denied

A claim that a shipper was damaged because it lost its market, rather than market value, was rejected by the court because shipper was able to sell its goods once the goods were returned to the U.S., albeit at drastically lower prices than shipper would have received at the original destination of the cargo. *American Nat'l Fire Ins. Co. v. Mirasco, Inc.*, 249 F.Supp. 2d 303, 321 (S.D.N.Y. 2003).

Evidence of insurance proceeds, paid or received, is not evidence of damages. *Ferro Union, Inc. v. M/V Tamamonte*, 317 F. Supp. 2d 456, 459-460 (S.D.N.Y. 2004).

Under maritime law, U.C.C. § 2-715 which allows a purchaser consequential damages resulting from a seller's breach where the seller had reason to know of the buyer's requirements, is not applicable to the unique contractual relationship between a shipper and a carrier. *Affiliated Foods, Inc. v. Puerto Rico Marine Mgmt., Inc.*, 645 F. Supp. 838, 844 (D.P.R. 1986).

Prejudgment Interest
Compounded prejudgment interest is allowed on Carmack claims, running from the date of the loss as to the insured subrogor and from the date of payment as to the subrogated insurer. *American National Fire Insurance Co. v. Yellow Freight Systems Inc.*, 325 F.3d 924 (7th Cir. 2003). Courts typically look to the state law on prejudgment interest to determine the rate to apply.

Limits of Liability
The Carmack Amendment provides that a carrier may limit its liability "to a value established by written declaration of the shipper or by a written agreement." 49 U.S.C. §14706(f). In order to effectively limit its liability, the carrier must:

- Maintain a tariff in compliance with the requirements of the Interstate Commerce Commission;
- Give the shipper a reasonable opportunity to choose between two or more levels of liability;
- Obtain the shipper's agreement as to his choice of carrier liability limit; and
- Issue a bill of lading prior to moving the shipment that reflects any such agreement.

Hughes Aircraft v. North American Van Lines, 970 F.2d 609, 611-612 (9th Cir)

Litigation often centers around the "reasonable opportunity" requirement. The court in *Hughes* held that a "reasonable opportunity" means that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to make a deliberate and informed choice. A signature on the contract is sufficient proof of reasonable opportunity to select among liability limits. *Schultz v. Auld,* 848 F.Supp. 1497, 1505 (Idaho 1993). But even without an actual signature, reasonable opportunity can still be found if there is proof that the shipper accepted the terms of the contract. *Johnson v. Bekins Van Lines Company,* 808 F.Supp. 545, 548 (E.D. Tex. 1992).

Nine-Month Notice Requirement
There are two key deadlines for making and suing upon cargo claims. One is the nine-month notice requirement and the other is a two-year statute of limitations to sue. Under 49 U.S.C. §14706(e), the shipper has nine months from the date the shipment should have been delivered to send the carrier notice of the claim in writing setting forth the claimed amount. Once that notice letter is sent and the claim is denied, the shipper then has two years to file suit from the date of the denial. Sending the written notice of claim within the nine-month period is a condition precedent to bringing the lawsuit. *Consolidated Rail Corp. v. Primary Industries Corp.*, 868 F.Supp. 566, 577 (S. D. NY 1994). That case required strict compliance with the notice requirement and held that a cause of action simply does not accrue without it. *See also Taisho Marine & Fire Insurance Co. v. Vessel Gladiolus*, 762 F.2d 1364, 1369 (9th Cir. 1985) (granting summary judgment to carrier and holding that actual notice of the damage is insufficient if it did not come in the form of written notice within the nine-month period).

Specification of the Dollar Amount
Under 49 C.F.R. 370.3, the notice letter must set forth a "specified or determinable amount of money." Failure to do so can be deemed non-compliance with the Carmack Amendment notice requirements. The issue of what is a "specified or determinable amount of money" under 49 C.F.R. 370.3 was addressed in *Lewis v. Atlas Van Lines, Inc.*, 542 F.3d 403 (3rd Cir., Sept. 9, 2008). Richard and Patricia Lewis contracted with Atlas Van Lines, Inc. to move their household belongings from Pennsylvania to New York. The Lewises made it clear to Atlas that they were obligated to have their house empty by August 27th, 2004. Despite promising to move the belongings on August 26th, Atlas failed to do so until August 29th, causing the sale of the Lewises' house to fall through. On October 26, 2004, within the ninth-month requirement of 49 U.S.C. 14706(e)(1), the Lewises sent a letter to Atlas claiming losses stemming from Atlas' delay, including lost profits on the sale of their house, additional mortgage payments, and "other miscellaneous expenses." The letter explained that the Lewises could not provide an exact dollar amount of losses until they sold their house. The Lewises ultimately sold their house in June of 2005 for $35,000 less than the cancelled contract price. The following November, the Lewises sent a letter to Atlas detailing the dollar amount of their losses. When Atlas refused to reimburse them, the Lewises filed suit in Pennsylvania state court for breach of contract and negligence. Atlas removed the case to U.S. District Court (M.D. Penn.). The District Court held that the

state law claims were preempted by the Carmack Amendment, 49 U.S.C. 14706, and dismissed the Lewises' claims for noncompliance with the procedural steps of that Amendment in that the dollar amounts of claims were not set forth with sufficient specificity. On appeal, the Third Circuit agreed that the Carmack Amendment preempted state law claims against a carrier for "losses resulting from any failure to discharge a carrier's duty" regarding transportation. A claim under the Amendment must be filed with the carrier within the time specified in the bill of lading, but not less than nine months. 49 U.S.C. 14706(e)(1). The Lewises complied with the claim deadline in the Atlas bill of lading only if their letter of October 26 met the constituted a "claim" under the Amendment.

Among other requirements, a "claim" must include a "specified or determinable amount of money." *49 C.F.R. 370.3*. Atlas argued that the Lewises' October 26 letter failed to include a "determinable amount of money" because there was no dollar amount specified. The Court of Appeals disagreed, holding that the term "determinable," particularly in contrast to the term "specified," requires merely that the claim include sufficient details so that a dollar amount may be determined at some future time. Thus, stating that there would be damages of lost profits on the sale of the house and due to additional mortgage payments was sufficiently "determinable."

However, the Court held that referring to "miscellaneous" expenses was insufficient to indicate how a dollar amount would be determined in the future, and thus did not preserve damages which could be asserted under the Amendment.

The Court of Appeals reversed the holding of the District Court as to the Lewises' claim for reimbursement of mortgage payments and lost profits, and remanded the case for further proceedings.

Sample Notice Letter

The following is a template for a notice letter:

Re: **NOTICE OF CLAIM**

My Client:	Great Big Insurance Company (GBIC)
GBIC Insured:	Little Insured, Inc.
Loss Location:	In transit in West Virginia
Date of Loss:	June 1, 2008
GBIC Claim No.:	2008-1234
GBIC Policy No.:	OC-001234 (ocean marine cargo policy)
Bill of Lading No.:	ABC-954321
Damage Amount:	$275,000
Your Reference No.:	ABC9
Our File No.:	123456.000

Dear Mr. ____:

Although you are already aware of the above loss, please allow this to serve as a formal written notice of a cargo loss claim against your company in accordance with the ICC Termination Act, formerly known as the Carmack Amendment, codified under 49 U.S.C. Section 14706 *et seq*.

I have been retained as subrogation counsel to Great Big Insurance Company (GBIC), which provided ocean marine cargo insurance to Little Insured, Inc., which incurred damage of $275,000 to its large rock crusher shaft that was damaged on June 1, 2008 while in transit. GBIC has a subrogation interest in the $275,000 in damages as that is what GBIC anticipates paying on the claim. The carrier assigned to ship the shaft was Giant Cargo, which assigned the task to Cargo Carriers, Inc., which assigned the trucking task to XYZ Transportation, Inc. The transport waybill or bill of lading number is ABC-954321. I attach a copy of the Bill of Lading.

While the shaft was in transit in West Virginia by an XYZ Transportation trucker, the vehicle was the subject of a double tire blow-out. The crusher is a Smith brand gyratory crusher. It was intended for use in gold mining operations. The steel shaft is about 48 feet long and about 4 feet round at its largest part. It weights about 90,000 pounds. The shaft was designed by Jones Minerals which had the shaft machined at Gyro Grinders, Inc. This crusher shaft was one of a very limited number of crushers of this model that have been produced and there are no major parts/components stocked by the manufacturer.

This case meets the elements of the ICC Termination act in that: (1) the cargo was in good condition when it was placed on the truck, (2) the cargo did not arrive in good condition and indeed arrived in damaged condition; and (3) the amount of damages caused by the loss have been assessed at $275,000. Under *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 73 (2d Cir. 2001), "Once the prima facie case is established, liability attaches unless the carrier can establish one of several affirmative defenses." *Id.* These available affirmative defenses are that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; or (e) the inherent vice or nature of the goods." *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 1144 (1964). None of these affirmative defenses apply. "The burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability." *Id.* at 138, 84 S.Ct. at 1145.

Given that this case meets the elements of the ICC Termination Act and that none of defense are available, please consider this a formal claim and demand for full reimbursement of the $275,000. Please forward this letter on to all of your potential liability carriers and have someone contact me to discuss your position on this claim.

Statute of Limitations

Two years from the date that the party you put on notice has denied the claim.

Broker Liability Under Carmack and Common Law

The chain of command on a cargo loss claim can have many links. A shipper often contracts with a company that, in turn, subcontracts with trucking company that, in turn, contracts with another trucking company, and so on, until finally a particular trucker is hired that actually carries the cargo. It can be difficult to determine which of the middle carriers damaged or lost the cargo and difficult for the shipper to determine who actually carried the cargo. If the actual negligent party has limited assets or goes out of business, the shipper can be left without an effective claim against it.

The Carmack Amendment was intended to resolve this problem by relieving shippers of the burden of going after only the actual trucker that caused the loss and allowing the shipper to go up along the chain of those parties who agreed to serve as carriers. The problem and the solution are succinctly stated in *Mercer Transp. Co. v. Greentree Transp. Co.,* 341 F.3d 1192, (10th Cir. 2003), as follows:

> The purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." *Reider v. Thompson,* 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950). This court has stated that the "principal function" of the Carmack Amendment "is to permit a shipper in interstate commerce to bring an action against the initial carrier to recover for damages to the shipment whether such damages occurred while the goods were in the hands of the initial carrier or connecting carriers*." L.E. Whitlock Truck Serv., Inc. v. Regal Drilling Co.,* 333 F.2d 488, 490 (10th Cir. 1964), overruled on other grounds, *Underwriters at Lloyds of London v. N. Am. Van Lines,* 890 F.2d 1112, 1115 (10th Cir. 1989) (en banc). Thus, a carrier can be held liable to a shipper for *1197 damage to cargo without regard to fault. Because the Carmack Amendment permits a shipper whose property is diminished or destroyed to recover its actual damages from a carrier without demonstrating actual or proximate cause, there is no need to extend the logo liability rule to suits brought pursuant to 49 U.S.C. § 14706(a). The interests of shippers are adequately protected by the liability scheme set out in the statute itself.

However, if a party merely served as a "middleman" for the sole purpose of finding a carrier for the shipper but did not agree to serve as a carrier itself, that party will be deemed a "mere broker" and thus not liable under the Interstate Commerce Act. *Travelers Indemnity Co. v. Alliance Shippers, Inc.*, 654 F. Supp. at 842; *see also Travelers*

Indem. Co. v. SS "Hanjin Kwangyang," 1995 U.S. Dist. LEXIS 13020, (S.D.N.Y. 7, 1995); *Zima v. M/V Roman Pazinski*, 493 F. Supp. 268 (S.D.N.Y. 1980); *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D. Ill.).

What Is a Broker?

The definition of a "broker" under the Act is "a person other than a motor carrier ... that as a principal or agent sells ... or holds itself out ... as selling, providing, or arranging for, transportation by motor carrier." 49 U.S.C. §13102(2). Because of the "holds itself out" language, courts look not just at what the party labeled itself but at what the party "held itself out to be" in relation to the shipper, *i.e.*, what the shipper understood as the role of the other party. *Lumbermens Mut. Cas. Co. v. GES Exposition Services, Inc.,* 303 F.Supp.2d 920 (N.D.Ill. 2003) ("Whether a company is a broker or a carrier/freight forwarder is not determined by how it labels itself, but by how it holds itself out to the world and its relationship to the shipper."); *Custom Cartage, Inc. v. Motorola, Inc.,* No. 98-C5182, 1999 WL 965686, at 11-12 (N.D.Ill. Oct. 15, 1999).

Factual disputes on the purported brokers role can preclude summary judgment, as occurred in *KLS Air Express, Inc. v. Cheetah Transp. LLC*, Slip Copy, 2007 WL 2428294 (E.D. Cal. 2007). There, the court stated:

> In this case, the court finds there are factual disputes over whether Cheetah played the role of a broker or motor carrier in the shipment of the flat panel monitors. Such factual disputes preclude the granting of defendant's motion for summary judgment. [citations omitted].
>
> Contrary to defendant's protestations, a carrier is not automatically considered a broker because it requests another carrier to perform the transportation. Rather,
>
>> ... motor carriers ... are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
>
> 49 C.F.R. § 371.2(a). Furthermore, 49 C.F.R. § 371.7(b) states that "a broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation." Here, KLS offers evidence that Cheetah is licensed by the Federal Motor Carrier Safety Administration as a carrier (DF ¶ 7), and that Cheetah's advertising does not state that Cheetah is a broker (DF ¶ 9). Additionally, KLS offers evidence that it intended that Cheetah would be the carrier of the shipment; Cheetah agreed to act as such; KLS believed Cheetah was transporting the shipment; and Cheetah remained KLS's sole point of contact at all relevant times. (DF ¶ s 13, 14, 20, 24.) Viewing this evidence in the light most favorable to plaintiff, a reasonable fact finder could find that Cheetah served as a "carrier" rather than a "broker," pertaining to the subject shipment, despite the fact that Cheetah ultimately arranged for Sonko to actually transport the shipment.

The terms "carrier" and "transportation" are broad enough to cause a party that thought it had broker status to be considered a "carrier," the problem faced by the defendant in *Corbin v. Arkansas Best Corp., 2008 WL 631275* (E.D. Ark. 2008). There, the court stated:

> A "carrier," specifically a "motor carrier" in this case, is someone who provides commercial motor vehicle transportation for compensation. 49 U.S.C. § 13102(14). "Transportation" is defined broadly to include "services related to [the] movement [of passengers or property], including arranging for, receipt, delivery, elevation, transfer in transit ... handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. § 13102(23)(B). Thus, liability under the Carmack Amendment "extends beyond the carrier who actually provides the transportation." *Land O'Lakes v. Superior Service Transp. of Wisc.*, 500 F.Supp.2d 1150, 1155 (E.D. Wis. 2007); *see, e.g., Mach Mold, Inc. v. Clover Assocs., Inc.*, 383 F.Supp.2d 1015, 1030 (N.D. Ill. 2005) (Accordingly, if [the defendant] had been authorized to transport the machine and accepted and legally bound itself to do so ... [the defendant] would be acting as a motor carrier...."). Therefore, Arkansas Best could be a "carrier" under the Carmack Amendment.
>
> *3 Even if Arkansas Best were not considered a "carrier" under the Carmack Amendment, Corbin's claim against it should not be dismissed. Under the Carmack Amendment, only carriers and freight forwarders, not broker, are held liable. *Chubb Group of Ins. Cos. v. H.A. Transp. Sys.*, 243 F.Supp.2d 1064, 1069 (C.D. Cal. 2002). However, brokers may be held liable under state tort or contract law in

> connection with shipments they have brokered. *Id.; see also Electroplated Metal Solutions, inc. v. Am. Servs., Inc.*, No. 07-C-409, 2008 WL 345617, at *2 (N.D. Ill Feb. 7, 2008). Since Corbin has stated sufficient facts for a claim against Arkansas Best even if Arkansas Best is not a carrier, Arkansas Best should not be dismissed.

The last portion of the above quote brings us to another problem for brokers. If a party is not a carrier and thus not liable under the Act, that does not mean the party is immune from liability. Indeed, the party is now exposed to potential common law causes of action, such as negligence, breach of contract, and fraud.

Common Law Theories Against Brokers

The issue of whether a broker is protected merely because it is a broker was discussed, and rejected, in *Electroplated Metal Solutions, Inc. v. American Services, Inc.*, Slip Copy, 2008 WL 345617 (N.D. Ill. Feb. 7, 2008). There, the court held:

> Because of the pervasive regulation over the conduct and liability of motor carriers, the Carmack Amendment has been held to preempt state law actions against carriers. *See Adams Express Co. v. Croninger, 226 U.S. 491, 505-06, 33 S.Ct. 148, 57 L.Ed. 314 (1913); Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950). Contrary to the extensive regulation of motor carriers, however, the Interstate Commerce Act imposes relatively few duties upon brokers and makes no equivalent grant of liability. This silence as to liability should not be construed as an implicit grant of immunity to brokers. *See Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 89563 * 3 (N.D.Ill.1999) ("The Carmack Amendment streamlines and simplifies suits against carriers and freight forwarders. It does not exempt brokers from paying for their own negligence or prevent them from entering into contracts with shippers."). Rather, the relative scarcity of regulation over brokers counsels for the allowance of state law causes of action, rather than demonstrating that such claims should be preempted. *See DeHart v. Town of Austin, Inc.*, 39 F.3d 718, 721 (7th Cir.1994) (inferring preemption only when "a pervasive scheme of federal regulation makes it reasonable to conclude that Congress intended exclusive federal regulation of the area"). The Court, therefore, finds Two Brothers' claim of preemption to be unpersuasive and will not dismiss the amended complaint on this ground.

This was also addressed in *Oliver Products Co. v. Foreway Management Services, Inc.,* Slip Copy, 2006 WL 2711515 (W.D.Mich. 2006), as follows:

> Defendant's argument stripped of its flourishes, is that the Carmack Amendment preempts state common law claims against a transportation broker for damages to goods in transit. While federal courts, including the Supreme Court, have applied preemption to carrier cases because the Carmack Amendment intended uniform liability in such cases, they have not applied this doctrine to transportation brokers. Indeed, such an extension is at odds with the express language of the savings clause – 49 U.S.C. § 13103. It provides, "Except as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law." In other words, the default rule is that a common law claim against a broker (such as a claim for breach of contract or negligence) is not preempted absent specific statutory language to the contrary. Is there specific statutory language which precludes common law suit against a transportation broker? No. The statute and regulations give some definitions for the purpose of defining a carrier's mission and liabilities, but do not specifically limit or preempt the common law liability of a transportation broker for breach of contract. This is the holding of cases such as *Commercial Union Ins. Co. v. Forward Air, Inc.,* 50 F.Supp.2d 255, 257-59 (S.D.N.Y.1999), *Hewlett-Packard Co. v. Brother's Trucking Enterprises, Inc.,* 373 F.Supp.2d 1349, 1352-53 (S.D.Fla.2005) and the cases cited therein.
>
> *2 Thus, examples of common law liability for brokers include suits against brokers for breach of contract/negligence regarding the selection of the carrier or conveyance of instructions as to the delivery of goods*. See id.* The instant Complaint is a general one and is consistent with these possible theories of liability. *See Leatherman, supra.*

Conclusion

Shippers, or their subrogated insurers, need not fold when a party claims "mere broker" status. Asking the right questions can lead to a remedy. What did the purported broker hold itself out to be? What do the shipping documents say? How is the company described on www.safersys.org? Is it licensed by the Federal Motor Carrier Safety Administration as a carrier? What is in the company's website? Does it advertise as only a broker? Even if the company is a mere broker, did the broker run a search of the licensure, assets, and insurance of the ultimate trucker and those in between? Did it provide adequate instructions to the trucker? Depending on the answers, a recovery may be possible under Carmack or common law.

THE CARRIAGE OF GOODS BY SEA ACT (COGSA)

The Carriage of Goods by Sea Act (COGSA) governed shipments by sea and has different time limitations than the Carmack Amendment. This was replaced September 2009 by the Rotterdam Rules, per the below article:

> **Acceptance of Rotterdam Rules by 16 countries**
>
> 09-23-2009Today, 23 September, sixteen countries have officially expressed their support for the new UN convention ‘Rotterdam Rules’. The countries signed the convention that describes the rights and obligations involved in the maritime carriage of goods. Important seafaring nations such as the United States, Norway, Greece, France and the Netherlands are among the signatories. The Rotterdam Rules bring more clarity regarding who is responsible and liable for what, when, where and to what extent when it comes to transport by sea. The Rotterdam Rules will give world trade a boost, considering that 80% of world trade is conducted by sea. If the same law applies all over the world, this will promote international trade and make it more efficient and clearer.
>
> The signing took place in Rotterdam, the city after which the UN convention is named. The following countries have signed the convention: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherland, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America. In addition to this, delegations from all over the world will be attending the signing ceremony.
>
> The UN convention will not take immediate effect. Only one year after 20 countries have ratified it the Rotterdam Rules will officially come into force.
>
> The Rotterdam Rules are the first rules governing the carriage of goods by sea and connecting or previous transport by land. This used to require separate contracts. Also, responsibility and liability during the whole transport process are clearly demarcated. Furthermore, the convention puts in place the infrastructure for the development of e-commerce in maritime transport. This will mean less paperwork. The shorter turnaround times will reduce the chance of errors and lower costs.
>
> The Rotterdam Rules are the result of inter-governmental negotiations that took place between 2002 and 2009. These negotiations took place within the United Nations Commission for International Trade Law (UNCITRAL), after the Comité Maritime International (CMI) had prepared a basic draft for the convention. On 11th December 2008 the General Assembly of the United Nations adopted the Rotterdam Rules.
>
> http://www.portofrotterdam.com/en/news/pressreleases/2009/20090923_02.jsp

However, below is a summary of the provisions of COGSA.

History

COGSA followed the *Harter Act* of 1893 and the *Hague Rules*.

Purpose

The purpose of GOGSA was to encourage investment into the ocean transportation by balancing the interests of cargo owners, shippers, carriers, and ship owners. Ship owners had been attempting to contract out of the basic duty to make the vessel seaworthy or properly care for the goods during the travel. GOGSA imposed those duties by statute. Indeed, every bill of lading is deemed to incorporate the terms of the statute. A party is allowed to contract out of COGSA’s terms, but the shipowner can only increase, not decrease, its liability.

Scope

COGSA only applies to international shipments, not purely interstate shipments. The period of its application is also limited the period from the date the goods are loaded until the date the goods are discharged from the ship, i.e. "tackle to tackle."

Duties Imposed by COGSA

COGSA imposes upon the carrier the duty to use diligence to 1) make the vessel seaworthy; 2) properly equip, supply and man the vessel; 3) make the holds, cooling compartments and all other areas where the goods are to be stored, fit and safe for their reception, preservation and carriage.

Protections to the Shipper or Carrier

The shipper who follows those duties of due care is then protected by Section 4 (1) of COGSA, which states:

> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provision of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Limit of Liability to $500 per "package"

The Carriage of Goods by Sea Act permits shipowners to limit their liability to $500 per package. Section 5 states:

> **5. Amount of liability; Valuation of cargo.**
> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, that such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Most reasonable people would assume that the term "package" is the type of box or container that one person can lift or move with dolly. However, at least one case has held that a "package" can be an ocean shipping container having dimensions of 8 feet wide by 8 feet high and coming in lengths of 20 feet and 40 feet, so long as the number "1" was inserted in a column on the bill of lading entitled "Number of Packages." Such was the ruling in *Hayes-Leger, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 (11th Cir. 1985). The 11th Circuit would later make it even easier, eliminating the requirement that there be a "Number of Packages" column on the bill of lading at all. In *Groupe Chegaray v. De Chalus v. P&O Containers*, 251 F. 3d 1359 (11th Cir. 2001), the court gave leeway to carriers unilaterally re-wording the shipper's cargo description to its advantage, even after the vessel has already sailed away. The pro forma bill of lading in that case had an original entry made by the shipper's freight forwarder listing "42 pallets STC [said to contain] 2268 cartons + 2 cartons cosmetics." However, the ocean carrier issued its own bill of lading, changing the language on the original bill to read "42 *packages* STC 2268 Cartons + 2 Cartons." The Eleventh Circuit limited the carrier's liability to $500 times 44 packages (42 pallets + 2 cartons), which equals $22,000, rather than to $500 times 2270 cartons, which equals $505,190.40. The court faulted the cargo owner for not complaining about the carrier's unilateral change when it was made, even though the change was (a) made after the vessel left port, (b) in the carrier's self interest, and (c) without any change in the rate of the shipment.

The 17 other protections

Section 4(2) of COGSA enumerates 17 instances in which an ocean carrier is protected from liability. These are:

(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Two of the most common protections cited by carriers are the perils of the sea are and acts of God. *See* 46 U.S.C. app. §1304(2)(c),(d), respectively. To prevail on this defense, the carrier must show 1) the conditions rise to the level of an "Act of God" or "Peril of the Sea," 2) the damage or loss to the cargo was unforeseeable and 3) there was no contributing human negligence on the part of the Carrier. *See Freedman & Slater, Inc. v. M.V. Tofevo*, 222 F. Supp. 964 (S.D.N.Y. 1963). These defenses are discussed separately, even though there is some overlap in their analysis.

The Perils of the Sea Defense

"Peril of the sea" defense requires that there be an event at sea, usually a storm, of such force as to overcome the strength of well-found ships or the usual precautions of good seamanship. The defense has been defined as "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." See, *The GIULIA,* 218 F. 744, 746 (2d Cir. 1914).

The applicability of this defense depends heavily on the facts – the nature of the cargo and the nature of the conditions at sea. If the ocean carrier, however, committed acts of negligence even in the face of these conditions, the defense is voided. *Skandia Insurance Co. Ltd. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1242 (S.D. Ala. 2001); *see*, *Compania de Navigacion Porto Ronco, S.A. v. S.S. American Oriole*, 474 F. Supp. 22 (E.D. La. 1976), aff'd, 585 F.2d 1326 (5th Cir. 1978).

To determine whether the storm was sufficiently severe to be a peril, courts first evaluate the winds on a Beaufort scale. The Beaufort sale ranges from calm (force 0) to 71 knots (force 12) and above. Courts typically hold that winds up to force 11 (56 knots) are not perils of the sea.

Court will also look as such factors as: rolling and pitching of the vessel, damage to the vessel and other cargo on the vessel, damage to other vessels in the same area, damage to cargo on those other vessels, the forseeability of the storm when the ship set sail, the location of the storm, cross-sea conditions, the speed of the vessel, course changes.

The Act of God Defense

The "Act of God" defense is considered to be broader in scope than the "Peril of the Sea" defense. It has been defined as "…when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled and uninfluenced by the power of man, and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence …." See BLACK'S LAW DICTIONARY, 33 (6th ed. 1990).

Case law deems the "Act of God" defense to includes those occurrences that are "so extraordinary that that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Skandia*, 173 F. Supp. at 1239; citing *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir. 1989).

The courts have struggled with arriving at a general standard to apply for this defense. See, *Thyssen, Inc. v. S/S EUROUNITY*, 21 F.3d 533, 539, 2001 AMC 1527 (2d Cir. 1994). Each case is "wholly dependent on the facts of each case." *Id*.

Critical to the "Act of God" defense is that damage to the cargo due to the storm was unforeseeable. Where "a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane [or other Act of God] but fails to do so, then the defendant is responsible for the loss." See, *Skandia*, 173 F. Supp. at 1241. The carrier is at all times under a continuing duty to safeguard cargo as much as reasonably possible until delivery to a fit and customary wharf. *Id.* at 1237; citing *Caterpillar Overseas S.A. v. S.S. Expeditor,* 318 F.2d 720, 723 (2d Cir. 1963). Even in the face of difficult weather and other conditions, the carrier's duty is to get that cargo to a safe location where it may not be damaged further or stolen. *Id.*; citing *The Italia*, 187 F. 113 (2d Cir. 1911); see also *Standard Brands, Inc. v. Nippon Yusen Kaisha*, 42 F. Supp. 43 (D. Mass. 1941).

The event in question must also be from natural causes, not from an event that carrier was able to prevent through the exercise of reasonable care. Even in heavy weather, the carrier can choose not to travel or can alter course. The conditions must arise from an irresistible force or overwhelming power, which cannot be guarded against by human skill and prudence. As stated in the statute: *"[F]for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected of him."*

The "Q Clause" Defense

COGSA's last and 17th exception in Section 4(2) is enumerated in 4(2)(q) and thus known as "the Q Clause." The Q Clause protects ocean carriers from liability for cargo damage arising without the actual fault of the carrier or its agents. The exception is a catch-all defense for those situations not covered under the sixteen exceptions listed above it. The provision states:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from.......any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit

> of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

This defense, however, is particularly difficult for the carriers to prove. The burden of proving it rests on the carrier and requires the carrier to prove (a) it was free from any fault relating to the damage, and (b) what caused the cargo damage.

The *Calavan Foods* case (Appeal No. 4649), in the San Francisco Superior Court of Appeals demonstrates the perils of the Q Clause when relying on the perils of the sea defense. The case involved cargo damaged when a vessel unexpectedly encountered a typhoon on a voyage from Hong Kong to San Francisco. The trial court found that the wind speed of 47 knots were too low to validate the peril of the sea defense. On appeal, the court reversed the finding of liability against the carrier, not on the basis of the peril of sea defense but on the basis of the Q Clause. The court of appeals agreed with the trial court that the typhoon was not a peril of the sea. However, the court found that the shipowner had established the following Q Clause elements: (1) the vessel was free from fault in that the carrier took all reasonable steps to safeguard the cargo, and (2) the actual cause of the cargo damage was the storm, *i.e.*, the unpredicted change of the typhoon's course. Thus is it possible to defeat the perils of the sea defense but be caught with a viable Q clause defense.

Other Defenses

Other exceptions related to human force include: acts of war; acts of public enemies; arrest or restraint of princes; seizure under legal process; quarantine restrictions; riots and civil commotions; strikes; lockouts or stoppages of work; acts or omissions of the owner or shipper of the goods; losses arising from inherent defect of the goods or insufficiency of packing.

CONFLICTS BETWEEN COGSA AND CARMACK

As noted above, COGSA applies to international shipments only. However, most international shipments to the United States will involve transport between states. Interstate shipments are typically governed by COGSA. The question often arises whether COGSA applies or Carmack applies when the cargo is damaged while en route from one American state to another.

The issue was addressed in *Norfolk Southern Railway Co. v. James N. Kirby*, 543 U.S. 14 (2004), which considered whether COGSA's $500-per-package limitation of liability provision applied when the cargo was damaged in the United States. The $500 limitation applied to the bill of lading because the reverse side of the bill of lading referred to the Himalaya and Paramount Clauses. This was true of both the ocean carrier's bill of lading and the freight forwarder's bill of lading. There was no other bill of lading discussed in the decision. The *Kirby* decision held that this limitation applied to the inland portion of the travel as well as the ocean portion of the travel. The court thus took a "conceptual" approach to maritime law as opposed to a "spatial" approach to the jurisdictional analysis.

Since then, however, a split has occurred between the circuit courts as whether the impact of the Carmack Amendment alters the effect of a COGSA provision in a bill of lading. On the one hand, in *Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2nd Cir. 2006), the Second Circuit considered the $500 limit of liability as to the shipment of 32 tractors traveling from Tokyo, Japan to Swanee, Georgia via Los Angeles, California. The tractors were damaged in the course of a train derailment during the trip from California to Georgia. The rail carrier sought to impose the $500 limit of liability because the intermodal bill of lading included the Himalaya and Paramount Clauses, which under *Kirby* extend the reach of COGSA to the entire shipment throughout the cargo's movement. The Second Circuit took a turn from *Kirby*, however, and held that a contractual provision extending the reach of COGSA to also include the inland portion of an intermodal movement could not trump the application of the Carmack Amendment. The Second Circuit remanded to the district court for a determination of whether the rail carrier was entitled to a limitation of liability under the Carmack Amendment and the district court ultimately determined that the rail carrier was entitled to no limitation of liability because of the ambiguous nature of its transportation documentation.

On the other hand, the Eleventh Circuit in *Altadis USA, Inc. f/u/b/o Fireman's Fund Ins. Co. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), held the exact opposite way from *Sompo*. *Altadis* involved the intermodal transportation of a shipment of cigars from Puerto Rico to Tampa, Florida, via Jacksonville, Florida. The cigars were stolen during the inland truck movement from Jacksonville to Tampa. The question was whether the two-year time bar under Carmack or the one-year time bar under COGSA applied ot the inland movement. In ruling that the one-year time bar applied to the trucker, the Eleventh Circuit reasoned that since there was no separate bill of lading governing the inland portion of the intermodal movement, then the contractual provisions – including the Himalaya and Paramount Clauses – on the reverse side of the intermodal bill of lading would govern. Since the Paramount Clause incorporated by reference the terms and conditions of COGSA (including the one-year time bar) and the Himalaya Clauses extended the defenses under the bill of lading to the ocean carrier's subcontractors (including the trucker), the trucker was able to dismiss the complaint as being time barred. If a separate bill of lading or contract of carriage had been issued for the inland movement, the Eleventh Circuit would have found that Carmack and its two-year time bar would have applied.

What is known as a "Clause Paramount" is a statement in a bill of lading that such bill is subject to the provisions of the Carriage of Goods by Sea Act (46 U.S.C.A. § 1300 et seq. [1936]), the federal legislation that governs the rights, obligations, and liabilities arising out of the relation of issuer to holder of the ocean bill of lading, in regard to the loss or damage of goods.

What is known as a "Himalaya clause" is a clause benefiting a third party (usually a stevedore) in maritime matters. The term comes from the English case of *Adler v. Dickson (The Himalaya),* [1954] 2 Lloyd's Rep. 267, [1955] 1 Q.B. 158 (C.A.). Mrs. Adler was a passenger on the S.S. Himalaya. She was injured when a gangway fell, throwing her 16 feet to the quay below. The passenger ticket contained a clause exempting the carrier from responsibility. Mrs. Adler sued the master and the boatswain. The Court of Appeal upheld the clause, holding that the carrier can protect not only himself but also those whom he engaged to carry out the contract.

> The clause is usually added to bills of lading to protect third parties, including the stevedore, the terminal operator, and even a dry dock company from liability. Those third parties also get the benefit of the one-year limitation to file suit under the Hague Rules. A modern Himalaya clause may read as follows:
>
> It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions of this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

This particular clause was discussed in *The Cleveland (Eisen und Metall A.G. v. Ceres Stevedoring Co., Ltd. and Canadian Overseas Shipping Ltd.,* [1977] 1 Lloyd's Rep. 665 (1977) and *The Eurymedon (New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.,* [1974] 1 Lloyd's Rep. 534; [1975] A.C. 154 at p. 165 (P.C.).

The US Court of Appeals for the Ninth Circuit ruled in *Regal-Beloit v. Kawasaki Kisen Kaisha*, No. 06-56831 (9th Cir., February 4, 2009) that the Carmack Amendment, rather than COGSA, applies to goods damaged in the United States even though originallyshipped from overseas to an inland location in the United States. The shipment was under a through bill of lading covering both the oceanic and the rail portions of the transport. The goods were damaged on land when the train on which they were being carried derailed. When the shippers filed claims, defendants asserted that the dispute had to be litigated, if at all, in Tokyo as provided in the through bill of lading, which had incorporated the Carriage of Goods at Sea Act (COGSA). The shippers contended that the liberal forum selection provision of COGSA did not apply; rather, venue was restricted by the Carmack Amendment. The district court granted the carriers' motion to dismiss and the shippers appealed. Recognizing a split in the circuits, the appellate court reversed, holding that the Carmack Amendment applied in the case. The matter was remanded to the district court to determine whether there had been compliance with the applicable provisions of the Carmack Amendment. Note: This issue may now be ripe for the US Supreme Court.

AIR TRANSPORT CARGO CLAIMS

THE WARSAW CONVENTION

The **Warsaw Convention** is an international convention which regulates liability for international carriage of persons, luggage or goods performed by aircraft. Originally signed in 1929 in Warsaw, it was amended in 1955 at The Hague and in 1975 in Montreal. United States courts have held that, at least for some purposes, the Warsaw Convention is a different instrument from the Warsaw Convention as Amended by the Hague Protocol.

In particular, the Warsaw Convention:

- mandates carriers to issue passenger tickets;
- requires carriers to issue baggage checks for checked luggage;
- creates a limitation period of 2 years within which a claim must be brought (Article 29); and limits a carrier's liability to at most:
- 250,000 Francs or 16,600 Special Drawing Rights (SDR) for personal injury;
- 17 SDR per kilogram for checked luggage and cargo,
- 5,000 Francs or 332 SDR for the hand luggage of a traveller.

Freight Forwarders (Consolidators) can be considered Indirect Air Carriers if they issue an airwaywill. If not, they are generraly deemed to be simply freight forwarders, similar to travel agents.

The sums limiting liability were originally set in Francs (defined in terms of a particular quantity of gold). These sums were amended by the Montreal Additional Protocol No. 2 to substitute an expression given in terms of SDR's. These sums are valid in the absence of a differing agreement (on a higher sum) with the carrier. Agreements on *lower* sums are null and void.

The amount generally set is $20.00 per kilogram or $9.08 per pound. These limitations could avoided by showing that the air carrier was guilty of Wilful Misconduct. The French word "*dol*". This has never been shown for a cargo case.

Another way to avoid the limitation is by showing that the air carrier failed to identify and/include on the air waybill a stopping place. This called the "agreed stopping place doctrine". It has no viablity under the the Montreal Convention.

THE MONTREAL CONVENTION

The **Montreal Convention**, signed in 1999, will replace the Warsaw Convention system, once Montreal has been ratified by all states. Until then, however, there will be a patchwork of rules governing international carriage by air, as different states will be parties to different agreements (or no agreement at all).

The 'Montreal Convention', is a treaty adopted by member states in 1999. It amended important provisions of the Warsaw Convention regime concerning compensation for the victims of air disasters. The Convention re-establishes uniformity and predictability of rules relating to the international carriage of passengers, baggage and cargo. It protects the passengers by introducing a modern two-tier liability system and by facilitating the swift recovery of proven damages without the need for lengthy litigation.

Under the Montreal Convention, air carriers are strictly liable for proven damages up to 100,000 Special Drawing Rights (SDRs), a mix of currency values established by the International Monetary Fund (IMF), approximately $138,000 per passenger at the time of its ratification by the United States in 2003. (As of January 2007, the value has risen to roughly $149,000.) For damages above 100,000 SDR's, the airline must show the accident that caused injury or death was not due to their negligence or was attributable to the negligence of a third party. The Convention also amended the jurisdictional provisions of Warsaw and now allows the victim or their families to sue foreign carriers where they maintain their principal residence, and requires all air carriers to carry liability insurance.

The Montreal Convention also changes and generally increases the maximum liability of airlines for lost baggage to a fixed amount 1000 SDRs (the amount in the Warsaw Convention is based on weight of the baggage). For cargo, the limitation was increased from $20 per kg to about $23 per kg.

Montreal convention was brought about mainly to amend liabilities to be paid to families for death or injury while on board an aircraft.

CONCLUSION

Cargo claims require a heightened sensitivity to key documents, notice requirements, and deadlines. Phrases such as “dead in the water” or “lost at sea” or “rough waters” come to mind if these are missed. Cozen O’Connor stands ready to assist you in navigating those waters.

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