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BROKER LIABILITY UNDER CARMACK AND COMMON LAW

John W. Reis, Esq.
301 South College Street • Suite 2100 • Charlotte, NC 28202
P: 704.348.3416 • F: 704.334.3351 • *jreis@cozen.com*

Transportation middlemen—commonly referred to as "brokers"—are increasingly involved in cases of cargo loss or damage because shippers today regularly employ brokers who are able to provide lower freight rates that shippers could not negotiate if they dealt directly with carriers. As such, it is a regular occurrence that shippers have little, if any, direct contact with the inland carriers, i.e. truckers or railroads, who physically carry their cargo . . . whether it be across town or across the Continental United States.

In many instances, shippers have no means of determining in whose custody the cargo was lost or damaged. In other instances, a shipper can identify the carrier, but there is no insurance coverage and the carrier has no viable assets. In such cases, cargo shippers must look to the broker as the only viable party for recovery. The purpose of this article is to provide a brief analysis of broker liability for cargo loss and damage.

The so-called "Carmack Amendment" to the Interstate Commerce Act, 49 U.S.C. §11706. sought to provide an integrated statutory scheme in which carriers and shippers can easily evaluate their respective liabilities and exposures, and hopefully resolve their differences quickly. *See Mercer Transp. Co. v. Greentree Transp. Co.,* 341 F.3d 1192, (10th Cir. 2003).

However, courts have recently adopted a more expansive view of a broker such that a broker could theoretically be exposed to "carrier-like" strict liability. *See 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."). For example, in order to market themselves as a "one-stop" transportation expert, brokers can lead their shipper-clients to believe that the broker is responsible for carrying the cargo and be the sole point of contact for all transportation needs. If it can be shown that the broker, directly or indirectly, represented its operations as that of a carrier, it is likely that a court will find that there is an issue of fact which would preclude summary judgment on the broker's status pursuant to the Carmack Amendment. *See KLS Air Express, Inc. v. Cheetah Transp. LLC,* Slip Copy, 2007 WL 2428294 (E.D. Cal. 2007).

An argument can also be made that some changes in the definitions of "motor carrier" and "transportation" in the revised Interstate Commerce Act have effectively turned what would otherwise be considered brokers into carriers. Under the old Interstate Commerce Act, a "motor carrier" was either a motor common carrier (holding itself out to provide motor vehicle transportation), or a motor contract carrier (providing motor vehicle transportation to meet the distinct needs of a shipper). Under the current version of the Act, at 49 U.S.C. §13102(14), the concept of a "motor carrier" is broadened. It is now simply a "person"— which arguably would include a broker— "providing motor vehicle transportation for compensation."

The definition of "transportation" under the old Act included "services relating to that movement, including receipt, delivery, elevation, transfer." The definition was expanded under the revised Act, 49 U.S.C. §13102(23)(B), so that "transportation" now includes "services relating to that movement, including **arranging for**, receipt, delivery, elevation, transfer." (emphasis added). Thus, under the revised Act, one could argue that a motor carrier's responsibility is defined to include **arranging for** transportation, the precise function of the broker. *See Corbin v. Arkansas Best Corp.,* 2008 WL 631275 (E.D. Ark. 2008) (Carmack Amendment liability extends beyond those functions of a traditional carrier).

The analysis of the U.S. District Court for the Eastern District of Arkansas in Corbin is especially instructive in that it held "brokers may be held liable under state tort or contract law

in connection with shipments they have brokered." Accordingly, if a broker is found not to be a carrier and thus not strictly liable under the Carmack Amendment, that does not mean the broker is also immune from state law liability. While it is true the Carmack Amendment preempts state law claims against carriers, the Carmack Amendment does not preempt state law claims against brokers. *See Electroplated Metal Solutions, Inc. v. American Services, Inc.,* 2008 WL 345617 (N.D. Ill. Feb. 7, 2008) (there is no implicit grant of immunity under the Carmack Amendment directed towards brokers).

Therefore, brokers can be held responsible for their negligence or contractual duties arising from their brokerage activities, such as improper selection of a carrier or the failure to convey the proper instructions of the shipper. *Oliver Products Co. v. Foreway Management Services, Inc.,* 2006 WL 2711515 (W.D.Mich. 2006).

In conclusion, current case law analysis indicates a general trend of shippers, and their subrogated insurers, being more creative in seeking liability against brokers who were traditionally not seen as likely responsible parties for cargo loss or damage. Accordingly, shippers need not simply fold when a party claims "mere broker" status. Asking the right questions can increase a broker's exposure. 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 broker may have liability under either Carmack or state law causes of action.

For any questions, comments or suggestions regarding this or any future Maritime Alert, please contact:

David Y. Loh
212.908.1202 • dloh@cozen.com

Robert W. Phelan
212.908.1274 • rphelan@cozen.com

For additional information about Cozen O'Connor's subrogation practice areas, including maritime, please contact:

Elliott R. Feldman, Chair
National and International Subrogation & Recovery Department
215.665.2071 • efeldman@cozen.com

For additional information about Cozen O'Connor's Global Insurance Group, including maritime, please contact:

William P. Shelley, Chair
National Insurance Department
215.665.4142 • wshelley@cozen.com