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Brokers, Motor Carriers and Shippers: Cargo Claim and Freight Charge Issues
An American College of Transportation Attorneys, Inc. White Paper

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The American College of Transportation Attorneys, Inc. (ACTA) is a Tennessee non-profit corporation consisting of a select group of experienced transportation defense lawyers who have joined together to serve as a confidential, reliable, and supplemental legal resource to the trucking industry. ACTA bylaws limit membership to 25 members, each with over 20 years of trucking industry service. A roster of current ACTA members is appended to this paper and is also published at: www.actalawgroup.org

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BROKERS, MOTOR CARRIERS AND SHIPPERS: CARGO CLAIM AND FREIGHT CHARGE ISSUES

Introduction

The current litigation trend against transportation brokers on theories such as negligent hiring, *respondeat superior*, negligent entrustment, and negligent supervision is no longer confined to catastrophic accidents and personal injury lawsuits.¹ The increase in various types of lawsuits against transportation brokers reflects their extensive involvement in the very fabric of today's transportation and logistics industry. Today, most shipments of goods by truck involve a broker transaction at one point or another. Thus, a majority of cargo claim and freight charge disputes now involve a transportation broker, freight forwarder or other intermediary. Indeed, the growing involvement of brokers in the transportation business has spun off an emerging body of case law that has travelled up to the reaches of the United States Supreme Court. These recent cases address whether and to what extent transportation brokers can be liable for cargo loss, damage, or freight charges and the effects brokers have on the shippers and motor carriers involved in any given transaction.

Although motor carriers and transportation brokers have co-existed almost since the dawn of regulated interstate transportation of goods by truck, today brokers, intermediaries and other third-party logistics providers ("brokers") play a far more significant role in interstate ground transportation than ever before. Historically, the function of a property transportation broker was to procure or arrange for the transportation of the shipper's goods via a properly certified motor carrier. That role evolved into the modern version of a "3PL," who provides warehousing, computer inventorying and associated supply chain functions which include the

¹ See *Broker Liability: Casualty Claims*, An American College Transportation Attorneys, Inc. White Paper, Spring 2010 for a comprehensive review of personal injury liability issues involving transportation brokers.

brokering of transportation as one component. The ICC Termination Act of 1995 (“ICCTA”)² defines a broker as “a person, other than a motor carrier or an employee or agent of a motor carrier, that as 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). A “motor carrier” means “a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation.” 49 U.S.C. §13102(14). Motor carriers are not brokers 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).

Since enactment of the original Motor Carrier Act of 1935,³ shippers were, and still are, liable to motor carriers for their freight charges,⁴ and motor carriers were and are strictly liable to shippers for cargo loss and damage claims (with certain exceptions and limitations not pertinent here). Originally, brokers were permitted to retain only “common carriers” to transport their customers’ shipments. *Copes Broker Application*, 27 M.C.C. 153, 167-168 (1940). However, since 1982, ground transportation brokers have been permitted to enter into contracts with motor carriers if, in fact, the broker exercises working control over the transportation. *Dixie Midwest Express, Inc., Extension – General Commodities*, 132 M.C.C. 794; 1982 M.C.C. LEXIS 29 at **49-53 (1982). With the enactment of the ICCTA and its elimination of the distinction between motor “common” and “contract” carriers, shippers can now effectively enter into common law transportation contracts with any motor carrier, 49 U.S.C. §14101(b), and with brokers under common law. This freedom to contract, together with the heightened competition following

² Pub. L. No. 104-88, 109 Stat. 803, effective January 1, 1996.

³ See n.1.

⁴ Under the former filed rate doctrine, shippers were liable for a carrier’s published tariff rate regardless of any equitable defenses. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 121, 110 S. Ct. 2759, 111 L. Ed.2d 3291 (1990).

enactment of the ICCTA and deregulation, as a practical matter, has resulted in fierce competition among motor carriers and brokers of all sizes, to the benefit of shippers seeking to cut their transportation budgets, reduce warehouse inventories, enjoy “just-in-time” trucking services, and possibly take advantage of low-cost and sometimes no-cost “rolling warehouses.” In this new shipping environment, brokers now play a prominent role.

The interstate transportation of goods now commonly involves brokers or other intermediaries seeking to get a slice of the transportation pie. As a result of brokers’ involvement in today’s transportation supply chain, they have become more frequently enmeshed - not just in the highly publicized tort cases⁵ - but also in disputes over the rights, duties and liabilities of motor carriers, brokers and shippers in cargo claim and freight charge controversies. The purpose of this paper is to identify some of the most commonly litigated issues and leading cases and precedents in this area to help motor carriers, shippers and brokers minimize risk and protect their bottom lines.

Cargo Claims and Brokers

A shipper’s common law right to recover against a motor carrier for interstate cargo damage has been codified in the Carmack Amendment, a strict liability statute originally applicable only to railroads since 1935. *See*, 49 U.S.C. §14706. Notably, the statute applies only to motor carriers and freight forwarders. Carmack does not govern (or even mention) brokers in the scheme of interstate cargo loss and damage liability. *Id.*; *see also Custom Cartage, Inc. v. Motorola, Inc.*, 1999 U.S. Dist. LEXIS 1684, *8 (N.D. Ill. 1999); *Professional Communications, Inc. v. Contract Freighters, Inc.*, 171 F. Supp.2d 546, 551 (D. Md. 2001). Brokers are not liable

⁵ Freight transportation brokers also now seem to be the new favorite target of plaintiffs in personal injury liability cases. *See, e.g., Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004); *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008); *Jones v. D’Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007). This is the subject of other ACTA papers, see n.1.

for cargo loss or damage under Carmack or elsewhere in the ICCTA. This makes sense because, after all, brokers do not take custody of the goods or handle the freight; they merely arrange for transportation.

Nonetheless, problems result because the role or function of a party in a given transportation transaction – “broker” vs. “carrier” – is often unclear or blurred. Although brokers are not liable under the Carmack Amendment, some courts have held they can be liable under state or common law theories, such as negligent entrustment or breach of contract, in matters involving cargo loss and damage. *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F. Supp. 2d 1064 (C.D. Cal. 2002). While there is ample precedent that the Carmack Amendment does not apply to cargo claims against brokers, *id.*, 1068-69; *Oliver Products Co. v. Foreway Management Services, Inc.*, 2006 U.S. Dist. LEXIS 32968 (W.D. Mich. 2005), brokers still may be liable on various causes of action outside of Carmack. *See e.g., Commercial Union Insurance Co. v. Forward Air, Inc.*, 50 F. Supp. 2d 255, 258 (S.D.N.Y. 1999); *KLS Air Express, Inc. v. Cheetah Transportation LLC*, 2007 U.S. Dist. LEXIS 62161 (E.D. Cal. 1007).⁶

Most cargo claims litigation against brokers turn on a fact-intensive inquiry concerning what services the broker agreed, represented or held itself out to perform for the shipper. This is very similar to the inquiry undertaken in personal injury liability cases wherein plaintiffs seek to clothe brokers with the duties and liabilities of motor carriers. *See, e.g., Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004); *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008); *Jones v. D’Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007).

⁶ See, however, discussion of preemption of all but breach of contract claims against brokers under the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), 49 U.S.C. §14501 (c), *infra*.

In many cases, brokers have successfully defeated cargo claims and associated state law claims. *Professional Communications, Inc. v. Contract Freighters, Inc.*, *supra* (broker deemed not to have agency relationship with motor carrier causing loss and damage to cargo nor was broker shown to have breached any duty in common law negligence in hiring motor carrier); *Chubb Group of Insurance Companies*, *supra* (broker not liable under Carmack Amendment and plaintiff failed to prove breach of contract and negligence claims against broker); *CGU International Insurance, PLC v. Keystone Lines Corp.*, 2004 U.S. Dist. LEXIS 8123 (N.D. Cal. 2004) (defendant broker ruled not liable as a motor carrier or negligent in its selection of the motor carrier under state law negligence principles); *Tokio Marine & Fire Insurance Co. Ltd. v. Megatrux, Inc.*, 2006 Cal. App. Unpub. LEXIS 6964 (Court of Appeal of California 2006) (broker not liable since plaintiff offered no evidence it provided motor vehicle transportation, nor was broker negligent in its selection of underlying motor carrier); *Fireman's Fund Insurance Company v. ATS Logistics Services, Inc.*, 2009 U.S. Dist. LEXIS 65870 (S.D. Tex. 2009) (broker not liable as a motor carrier or in common law bailment, negligence or breach of contract); *Multiflex Systems, Inc. v. Reed Transport Services, Inc.*, 2010 U.S. Dist. LEXIS 58749 (M.D. Fla. 2010) (broker not liable for negligent entrustment).

On the other hand, when faced with the quandary of deciding whether a defendant - broker was truly performing only “broker” vs. “motor carrier” functions, some courts have found the existence of questions of material fact and allowed such cases to proceed to trial. In these cases, the defendant-brokers are exposed to inconsistent results, reputation risks, and the mounting costs associated with defending a trial. *Consolidated Freightways Corporation of Delaware v. Travelers Insurance Company*, 2003 U.S. Dist. LEXIS 26984 (N.D. Cal. 2003) (broker's motion for summary judgment in defense of \$19 million damage claim denied due to

evidence it performed some transportation functions); *Oliver Products Company v. Foreway Management Services, Inc.*, *supra* (broker's motion to dismiss denied on the basis that Carmack Amendment and its related regulations "do not specifically limit or preempt the common law liability of a transportation broker for breach of contract."); *KLS Air Express, Inc. v. Cheetah Transportation LLC*, *supra* (defendant-broker's motion for summary judgment denied due to factual disputes over whether it played role of a broker or motor carrier in transportation of cargo); *AIOI Insurance Co. v. Timely Integrated, Inc.*, 2009 U.S. Dist. LEXIS 70822 (S.D.N.Y. 2009) (broker deemed liable where it was acting as motor carrier by agreeing to provide "transportation services" and holding itself out as a carrier and since it was authorized to transport the shipment itself and had legally bound itself to transport the shipment); *Peerless Importers, Inc. v. Cornerstone Systems, Inc.*, 2010 N.Y. Misc. LEXIS 1179 (2010) ("Whether a company is a broker or a carrier is not determined by what the company labels itself, but by how it represents itself to the world and its relationship to the shipper." Broker's motion for summary judgment denied because it appeared to be "in complete control at every juncture of the transportation.").

Where a broker, as is typical, holds itself out to do whatever is necessary to get the shipper's goods moved from point A to point B, as opposed to merely arranging for the transportation, courts will usually consider it a question of fact for the jury to determine the broker's legal status, and that will dictate the applicable legal standard to which it will be held. This is a risky proposition for the typical broker.

Motor Carrier Liability to Brokers

There are also instances in which motor carriers can be liable to brokers where the broker has paid its shipper for cargo damage and then seeks reimbursement from the motor carrier.⁷ *Edwards Bros., Inc. v. Overdrive Logistics, Inc.*, 581 S.E. 2d 570 (Ga. 2003) (broker successfully sued motor carrier to recover cargo damages it had paid its shipper client. “Because the Carmack Amendment was enacted to protect the rights of shippers suing under a receipt or bill of lading, not brokers, it does not preempt [the broker’s] breach of contract claim in this case.”); *REI Transport, Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F. 3d 693 (7th Cir. 2008) (in defending motor carrier’s suit for freight charges, broker, as assignee of its shipper customer, successfully counterclaimed for \$85,000 for goods lost in transit); *Intransit, Inc. v. Excel North American Road Transport, Inc.*, 426 F. Supp. 2d 1136 (D. Ore. 2006) (plaintiff broker’s claims against defendant motor carrier for direct contractual indemnity not preempted by Carmack Amendment); *Transcorr National Logistics LLC v. Chaler Corp.*, 2008 U.S. Dist. LEXIS 104472 (S.D. Ind. 2008) (since plaintiff broker’s claims against defendant motor carrier were deemed to be governed by the brokerage agreement rather than Carmack, defendant failed to prove Carmack preemption applied and case was remanded to state court).

Cargo claim disputes between and among motor carriers, brokers and shippers will continue to require a fact-intensive analysis. Motor carriers and brokers are cautioned to pay particular attention not only to the language in any governing transportation agreement, but also to their operational structure, representations to shippers, i.e. website information, and specific conduct in handling shipments of freight on a day-to-day basis. Today it is common for

⁷ Technically, brokers do not have legal standing, in the absence of an assignment from the shipper or a contractual obligation, to sue motor carriers because brokers are not shippers or owners of the goods and are thus not entitled to recover under the bill of lading. 49 U.S.C. § 14706(a) (1).

transportation entities to hold both motor carrier and broker authority from the FMCSA. In such cases, careful attention must be paid to the representations being made to shippers. If only brokerage services are to be provided, then that limited service should be clearly specified. Otherwise, the company will likely be charged with acting and holding itself out as a motor carrier, in which case it may be strictly liable under Carmack for any cargo loss or damage claim.

Preemption

Significantly, motor carriers, while strictly liable under the Carmack Amendment, enjoy the powerful defense of Carmack Amendment preemption of all state, common law and statutory claims. *See, e.g., Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hughes v. United Van Lines, Inc.*, 829 F. 2d 1407 (7th Cir. 1987); *Underwriters at Lloyds of London v. North American Van Lines, Inc.*, 890 F. 2d 1112 (10th Cir. 1989); *Moffit v. Bekins Van Lines Co.*, 6 F. 3d 305 (5th Cir. 1993); *Cleveland v. Beltman North American Co., Inc.*, 30 F. 3d 373 (2nd Cir. 1994); *Rini v. United Van Lines, Inc.*, 104 F.3d 502 (1st Cir. 1997); and *Gordon v. United Van Lines, Inc.*, 130 F. 3d 282 (7th Cir. 1997). Brokers, on the other hand, are not mentioned in the Carmack Amendment and do not enjoy the benefit of Carmack Amendment preemption. *Oliver Products, supra*; *TRG Holdings, LLC v. Leckner*, 2006 U.S. Dist. LEXIS 70781 (E.D. VA. 2006) (Carmack Amendment preemption inapplicable to brokers). Carmack preemption is a most valuable tool in avoiding gross negligence, conversion, unfair and deceptive trade practices and similar claims. Hence, there is good news and bad news for brokers. The good news is that brokers are not strictly liable on a cargo related claim and the plaintiff must meet his common law burdens of proof with evidence to prove, for example, breach of contract or negligence theories. The bad news is that brokers are exposed to numerous common law and state statutory claims, including punitive damages and unfair and deceptive trade practice claims.

However, all is not lost for freight brokers in terms of the preemption defense. This is because of express provisions in the ICCTA adopting the preemption language of the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”):

(c) Motor carriers of property. (1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, **broker**, or freight forwarder with respect to the transportation of property. (Emphasis added)⁸

This language is nearly identical to that in the Airline Deregulation Act (“ADA”), which has been construed as preempting all but breach of contract claims. *See, e.g., Morales v. TransWorld Airlines*, 504 U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-33 (1995); *Feldman v. United Parcel Service, Inc.*, 2008 U.S. Dist. LEXIS 30637, at *27 - *34 (S.D.N.Y. 2008); *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364; 128 S. Ct. 989; 169 L. Ed 2d. 933 (2008).

Many courts have followed the Supreme Court’s decisions in *Morales*, *Wolens* and *Rowe* and have adopted and applied the broad preemptive power of the ADA in the context of cargo loss and damage claims involving air freight. *Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392 (N.D. Tex. 1995), *Aff’d* 98 F. 3d 1338 (claims for misrepresentation under Texas deceptive trade practices and Consumer Protection Act and for negligence and gross negligence preempted); *Power Standards Lab, Inc. v. Federal Express Corp.*, 127 Cal. App. 4th 1039 (2005) (state law claim of breach of implied covenant of good faith and fair dealing preempted); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F. 3d 922 (5th Cir. 1997) (same); *Read-Rite Corp. v. Burlington Air Express Ltd.*, 186 F. 3d 1190 (9th Cir. 1999) (same).

⁸ 49 U.S.C. §14501(c) (1).

The preemption language of the FAAAA, which employs identical language to that contained in the ADA, is to be broadly construed. “[T]he House Conference Report on the preemption provisions of the FAAAA explains that the preemption provision [in 49 U.S.C. §14501 (c)] ‘is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects.’ H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 85 (1994). . . .” *Deerskin Trading Post, Inc. v. United Parcel Service of America, Inc.*, 972 F. Supp. 665, 669 (N.D. Ga. 1997) (claims for breach of contract, fraud and negligence related to motor carrier’s freight charges preempted).

The Supreme Court’s construction of the preemption provision of the ADA provides “an analogical template by which to interpret §14501(c) (1) of the ICCTA.” *Yellow Transportation, Inc. v. DM Transportation Management Services, Inc.*, 2006 U.S. Dist. LEXIS 51231 at *7 (E.D. Pa. 2006) (motor carrier lawsuit against freight broker over contract rates). FAAAA preemption under 49 U.S.C. §14501(c) has even been applied to preempt personal injury tort claims against motor carriers. *Rockwell v. United Parcel Service, Inc.*, 1999 U.S. Dist. LEXIS 22036 (D. Vt. 1999). In *Rockwell*, the plaintiff’s state law tort claims for serious personal injuries arose from defendant’s delivery of a package containing a pipe bomb which exploded and killed plaintiff’s son when he opened it. The claims were ruled preempted by the FAAAA.

In *Dynamic Movers, Inc. v. Paul Arpin Van Lines, Inc.*, 956 F. Supp. 836 (E.D. Wis. 1997), the plaintiff, a former interstate household goods agent and logistics provider for the defendant motor carrier, sued the defendant under the Wisconsin Fair Dealership Law (“WFDL”), alleging the defendant had improperly terminated their agency agreement and logistics relationship. The court ruled the WFDL claim was preempted by 49 U.S.C. §14501(c)

because it would affect the motor carrier's services in the state. "[T]he federal government, not the states, regulates the shipping of logistics." *Id.* at 839.

In *Rowe, supra*, the United States Supreme Court confirmed that a State of Maine statute regulating the delivery of tobacco products to minors in that state was preempted by the FAAAA and rejected the State of Maine's argument that its statute was exempt from the operation of the FAAAA because it protected its citizens' public health.

In *Huntington Operating Corp. v. Sybonney Express, Inc.*, 2010 U.S. Dist. LEXIS 55591 (S.D. Tex. 2010) the plaintiff sued a motor carrier and a broker for the loss of a shipment of perfume transported from Florida to Texas which was stolen in transit. The plaintiff sued the broker claiming it was responsible for insuring that the motor carrier had adequate insurance to cover the cargo, alleging claims for, *inter alia*, violations of the Texas Deceptive Trade Practices Act, negligence, negligent misrepresentation and breach of contract. The court granted the defendant/broker's motion for partial summary judgment dismissing all claims except for the breach of contract claim, ruling that 49 U.S.C. § 14501(c)(1) and the case law interpreting that statute provided the basis on which to dismiss all but the breach of contract claim. *See also, Chatelaine, Inc. v. Twin Modal, Inc.*, 2010 U.S. Dist. LEXIS 85894 (N.D. Tex. 2010), citing *Huntington* (broker's motion for summary judgment granted on the basis of §14501 preemption as to all state and common law claims, leaving only breach of contract claim).

Thus, brokers should know that FAAAA statutory preemption under 49 U.S.C. §14501(c) is available, in lieu of Carmack Amendment preemption, to defend garden-variety common law claims in negligence, fraud, misrepresentation, unfair or deceptive trade practices and punitive state law claims. That would leave brokers exposed only to breach of contract claims related to their freight brokering duties and obligations – something difficult for shippers to prove if the broker merely arranged for the transportation but did not hold itself out to do anything else.

Other Recent Notable Decisions Involving Freight Claims and Brokers

- *A&P Trucking, Inc. v. MKM Transportation Services, Inc.*, 2008 Conn. Super. LEXIS 506 (Conn. 2008).

Motor carrier who brokered shipment to freight broker but did not obtain an assignment of shipper's claim against underlying motor carrier denied recovery on its cargo damage claim against freight broker.

- *Electroplated Metal Solutions, Inc. v. American Services, Inc.*, 2008 U.S. Dist. LEXIS 8999 (N.D. Ill. 2008).

Carmack Amendment does not exempt brokers from paying for their own negligence; brokers have a duty to use reasonable care in brokering transportation.⁹

- *Land O'Lakes, Inc. v. Superior Service Transportation of Wisconsin, Inc.*, 500 F. Supp. 2d 1150 (E.D. Wis. 2007).

Motor carrier that brokered transportation acted as a motor carrier for purposes of Carmack Amendment liability.

- *Delta Research Corporation v. EMS, Inc.*, 2005 U.S. Dist. LEXIS 18353 (S.D. Mich. 2005).

Cross-motions for summary judgment denied because questions of fact remained as to defendant's status – carrier, freight forwarder or broker.

- *Roadmaster (USA) Corp. v. Calmodal Freight Systems, Inc.*, 153 Fed. Appx. 827 (3d Cir. 2005).

Local draymen's defense – that it was not liable as a carrier for plaintiff's claims because it merely procured brokers who arranged for interstate transportation – upheld on appeal.

- *Accu-Spec Electronic Services, Inc. v. Central Transport International*, 391 F. Supp. 2d 367 (W.D. Penn. 2005).

Court rejected defendant motor carrier's claim that where freight forwarder is used by shipper to transport cargo, shipper's only remedy for lost or damaged freight is against the forwarder.

⁹ 49 U.S.C. §14501(c) (1) preemption defense not mentioned.

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- *Nationwide Logistics, Inc. v. Condor Transport, Inc.*, 2004 Ga. App. LEXIS 1403 (2004).

Broker's failure to file timely claim with carrier, after broker paid shipper for its loss, barred broker's recovery against carrier; *and* carrier was entitled to recover its charges from broker.

- *Werner Enterprises, Inc. v. Westwind Maritime International, Inc.*, 554 F. 3d 1319 (11th Cir. 2009).

Motor carrier's released rate limit of liability, negotiated with broker, upheld in direct action by shipper against motor carrier.

- *NipponKoa Insurance Company, Ltd. v. C.H. Robinson Worldwide, Inc.*, 2011 U.S. Dist. LEXIS 17752 (S.D.N.Y. 2011)

Broker's motion for summary judgment denied where court ruled there was a question of fact as to whether it was a broker or carrier due to broker's representations to shipper that it was "a principal in the transaction."

Brokers, Motor Carriers, Shippers and Freight Charges

Disputes among brokers, motor carriers and shippers over responsibility for the payment of freight charges are common and escalating components of transportation litigation. Under the traditional shipper/broker/motor carrier model, (i) shipper pays broker, (ii) carrier invoices broker and (iii) broker then pays carrier, keeping its commission out of the shipper's payment. Of course, things do not always work out quite that simply. Historically, based in large part on the former filed rate doctrine, shippers could be liable directly to motor carriers for any unpaid published and filed tariff freight charges, regardless of its prior payments to the broker, extenuating circumstances, excuses, side deals or equitable defenses it may have had, because carriers were required to enforce their tariff provisions indiscriminately. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, *supra*. However, since Congress' passage of the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), which prospectively abolished the filed rate

doctrine (as to motor carriers of non-household goods) for individually determined rates,¹⁰ together with the explosion of broker/shipper transportation contracts and the much higher profile of brokers and other intermediaries in the supply chain, disputes among brokers, shippers and motor carriers over payment and collection of freight charges are now quite common.

The classic problem scenario involves the “double payment” dilemma which goes something like this: shipper hires broker to have its freight moved; broker hires motor carrier (or, in some instances, a second broker) who, in turn, hires a motor carrier to transport the shipment. Shipper pays broker for its quoted freight charges. Motor carrier invoices broker for its charges, but broker, for any one of several reasons (insolvency, bankruptcy or plain old-fashioned fraud) fails to pay motor carrier. Motor carrier then sues shipper and/or broker, if found, to collect its charges. In such cases, where the motor carrier sues the shipper directly, the courts are presented with the dilemma of deciding which of two innocent parties should be made to suffer a loss due to an absconding, insolvent or bankrupt broker: the shipper, who has already paid the broker, or the motor carrier, who has performed a service for which it has not been paid. While the Supreme Court, in *Southern Pacific*, came down hard in favor of enforcing the carrier’s bill of lading and tariff¹¹ in a direct action against the shipper and rejected the shipper’s equitable estoppel defense of “double payment,” courts have not taken the same approach in cases involving freight brokers or other intermediaries on ground shipments. The resulting inconsistent decisions are both fact- and equity-driven.

In *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F. 2d 295 (6th Cir. 1988), the court ruled the plaintiff motor carrier was equitably estopped from enforcing its bill of lading contract directly against a shipper where the shipper was able to prove it had previously

¹⁰ *Lalco, Inc. v. Exeter Energy Ltd. Partnership*, 989 F. Supp. 425, 428 (D. Conn. 1997); 49 U.S.C. §13710. However, the filed rate doctrine still applies to interstate motor carriers of household goods. 49 U.S.C. §13702.

¹¹ *Southern Pacific* involved enforcement of a railroad tariff.

paid the freight charges to an unlicensed freight forwarder. In affirming the lower court's ruling that the doctrine of equitable estoppel applied, the Sixth Circuit Court of Appeals held that actions on the carrier's part (where its delivery receipts instructed the shipper to mail payment of freight charges to the freight forwarder) had the effect of lulling the shipper into believing the motor carrier would get paid by the freight forwarder.

In *National Shipping Company of Saudi Arabia v. Omni Lines, Inc.*, 106 F. 3d 1544 (11th Cir. 1997), another "double payment" case, the Eleventh Circuit Court of Appeals reversed the district court's ruling that the shipper did not have to pay the carrier a second time, after it had already paid the freight forwarder, in spite of the fact that the bills of lading were marked "freight prepaid," because the "freight prepaid" language on the bill of lading did not release the shipper from its duty to pay the carrier. The Court warned shippers to take precautions to deal with reputable freight forwarders so as to avoid the duplicate payment problem.

In *Jackson Rapid Delivery Service, Inc. v. Thompson Consumer Electronics, Inc.*, 210 F. Supp. 2d 949 (N.D. Ill. 2001), another classic "double payment" case, the court rejected the plaintiff motor carrier's argument that the bills of lading constituted a shipper/carrier contract.¹² Recognizing that one of two innocent parties would lose, the court concluded that the plaintiff motor carrier created a risk by its credit practices and ruled that the bills of lading were not substantial enough for the motor carrier to reasonably believe the broker was the shipper's agent.

In *Oak Harbor, supra*, the plaintiff motor carrier, Oak Harbor, sued the shipper, Sears, directly to collect unpaid freight charges on shipments brokered by a freight broker, NLC. Oak Harbor's contract with NLC stated the shipper would pay the carrier regardless of whether the broker had been paid for the movement. Outbound bills of lading prepared by Sears were

¹² But compare *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F. 3d 949 (9th Cir. 2008), where the bills of lading were deemed to be binding shipping contracts between shipper and carrier. *Infra*.

marked “prepaid” and instructed Oak Harbor to send its freight bills to NLC. Oak Harbor later sued Sears to collect over \$227,000 in interstate freight charges which Sears had already paid to NLC but which NLC had not remitted to Oak Harbor. The Ninth Circuit Court of Appeals rejected Sears’ equitable estoppel defense and its argument that Oak Harbor’s rights under bill of lading contracts were trumped by its contract with NLC, ruling “that a shipper should bear the risk when it chooses to pay for freight charges through a broker rather than directly to the carrier.” Significantly, the Court in *Oak Harbor* relied on the bill of lading contracts naming Sears as the shipper and Oak Harbor as the carrier to hold Sears liable.

Marx Transport, Inc. v. Air Express International Corporation, 882 N.E. 2d 1281 (Ill. 2008) reached the opposite result. The Court in *Marx* permitted the defendant shipper to invoke the doctrine of equitable estoppel to bar the motor carrier’s collection action where the shipments moved pursuant to a “shipper’s letter of instruction” which authorized intermediaries to prepare and issue bills of lading for the shipments.

Southern Freight, Inc. v. L.G. Electronics, U.S.A., Inc., 2005-2007 Federal Carrier Cases, ¶84,500 (Superior Court, Gwinnett County, Georgia 2007) illustrates the classic example of a motor carrier’s attempt to collect freight charges directly from the shipper after the broker, USA Motor Express (“USAM”), whom the shipper already paid, filed for bankruptcy, leaving the motor carrier holding the proverbial bag. The court rejected the shipper’s argument that Southern Freight’s failure to have billed it within seven days of delivery as required by the FMCSA credit regulations barred its recovery and instead followed *Southern Pacific v. Commercial Metals* noting “there is a presumptive right of the carrier to collect directly from the shipper unless there is an express waiver (*sic*) by the shipper by execution of the Section 7 non-recourse provision, even if the result is double payment by the shipper,” the court concluded that

Southern Freight was entitled to recover its charges, plus prejudgment interest from the shipper.

Oddly, in another case involving the same bankrupt broker, USAM, the court in *J & P Trucking Company, Inc. v. USA Motor Express, Inc.*, 2007 U.S. Dist. LEXIS 79698 (N.D. Ala. 2007) ruled the defendant shipper should *not* be required to pay twice for transportation provided by the motor carriers. The court looked to the contracts entered into and noted that USAM had agreed that all obligations it assumed would apply to the same extent as if it actually had performed the transportation directly. The court noted the shipper had no knowledge of the fact that USAM had a completely separate contractual arrangement with the plaintiff motor carriers, found the contracts were unambiguous, clearly stated the intentions of the parties, and that the plaintiffs knew they were to be paid by USAM regardless of who the shipper was. It found “to allow plaintiffs to proceed directly against [shipper] renders not one, but two contracts meaningless.” While the court expressed its sympathy for the plaintiffs, it concluded nonetheless that they were bound by the contracts they entered into and granted the defendant’s motion for summary judgment.

Although transportation brokers must register with the FMCSA and file a bond to ensure that the transportation for which they arrange is provided, 49 U.S.C. §13906(b), there is nothing in the broker regulations¹³ or in the ICCTA imposing an obligation on the part of the broker to pay the motor carrier’s freight charges. Only common law is left to govern. As a result, there is some reported authority for the proposition that a constructive trust could be imposed on the broker (or the broker’s bank) for the benefit of motor carriers performing transportation services where the shipper has paid the broker and the broker has failed to remit the funds to the motor carrier. *Transportation Revenue Management v. Freight Peddlers, Inc.*, 2000 U.S. Dist. LEXIS

¹³ 49 C.F.R. §371.

22909 (D. S.C. 2000); *Summit Financial Resources L.P. v. Big Dog Enterprises Logistics, LLC*, 2009 U.S. Dist. LEXIS 28506 (S.D. Ill. 2009).

In *Transportation Revenue Management*, there was evidence that the defendant broker used money paid by shippers and intended to cover freight charges of the motor carriers to pay off its loan to the defendant bank. The court found the regulations “clearly contemplate that brokers...may act as a conduit by collecting freight charges owed to the motor carrier, and making appropriate payment to the carrier, less any brokerage charges.” 2000 U.S. Dist. LEXIS 22909, at *15. If the broker “simply forwarded the shippers’ payments to the carriers, then it would be acting as a conduit, and federal law would call for the court to impose a trust.” *Id.* After reviewing the facts and the broker regulations, the court analyzed the constructive trust argument under federal common law, and found it would be “most inequitable” to allow the money received by the defendant broker to be used to pay off its loan. *Id.* at *17. Consequently, the court denied the defendants’ motions for summary judgment.¹⁴

It is apparent that there is no uniform or consistent legal precedent to be gleaned from the above broker – carrier – shipper freight charge cases. Disputes among these parties over freight charge liability will likely be fact-intensive and the outcome will depend on the particular court’s application of transportation law principles colored by equitable considerations. Motor carriers and shippers would be wise to review carefully any transportation agreements involving traffic handled by or through brokers and the associated billing and collection practices. Similarly, brokers and shippers must examine their shipping practices and procedures to ensure that proper charges are remitted and the requisite payments credited promptly.

¹⁴ Obviously, careful examination of all relevant facts is needed in pursuing a constructive trust theory.

Conclusion

Just as freight brokers and intermediaries have become the latest favorite target defendant in personal injury cases under negligent hiring and similar theories, there is a parallel universe of litigation involving freight brokers in the area of cargo claims and freight charges. Many overlapping legal principles apply, but in the end, the underlying facts in each case will weigh heavily in the determination of broker and motor carrier status, rights, duties and liabilities. FAAAA preemption should not be overlooked in defending such claims. Ultimately, all parties in the transportation chain must be vigilant in their day-to-day operations and in how they document their agreements and relationships.

Key Points for Motor Carriers, Brokers and Shippers

In order to better protect against the legal, financial, and reputation risks that arise from cargo and freight related broker liability claims, please consider the following points:

- Parties should use extra caution in negotiating and documenting all transportation agreements and relationships.
- Motor carriers should maintain tariffs with released rate limitations, cargo claim rules and time limits consistent with 49 U.S.C. §14706 and 49 C.F.R. §370.
- Motor carriers and brokers should not execute transportation agreements that include a waiver of Title 49 provisions.
- Special vigilance is required in monitoring and collecting accounts receivables – from both shippers and brokers, as the case may be – in a brokered transaction.
- Watch out for the “mismatch” – where broker’s agreement with shipper has no limitation, but said agreement with motor carrier does contain a limitation of liability.
- Brokers have no standing to file or collect cargo claims with carriers unless the broker obtains an assignment of shipper’s claim against motor carrier or has some other contractual or common law right to do so.
- A broker who holds itself out as providing all the instrumentalities of transportation will likely be deemed to have the status of and the duties and liabilities of a motor carrier.