



Looney & Grossman LLP

*Attorneys at Law*

**TRANSPORTATION BROKERS AND CARGO CLAIMS**

**Presented by:  
Wesley S. Chused\***

TRUCKING INDUSTRY DEFENSE ASSOCIATION  
TEMPE, ARIZONA

MARCH 28, 2011

\*Partner, Looney & Grossman LLP, 101 Arch Street, Boston, MA 02110;  
[wchused@lgllp.com](mailto:wchused@lgllp.com); (617) 951-5800.

## DEFINITIONS

- **Shipper:** One who ships goods. Blacks Law Dictionary, Fourth Ed. Rev. (1968).

“Shipper” means the person who controls the transportation and refers to the actual shipper rather than an intermediary. Such shipper may be nominally either the consignor or the consignee, but must be one or the other. The payment of the charges for the transportation is evidence that the person who pays is the person who controls the transportation and such person will be presumed to be the Shipper. *Dixie Midwest Express, Inc., Extension - General Commodities*, 132 M.C.C. 794 (1982).

A shipper may also include a consignee who receives the benefit of the transportation and exercises control over the shipments. *United States v. Metropolitan Lumber Co.*, 254 F. 335 (D.N.J. 1918).

- **Consignee** means the person named in a bill of lading as the person to whom the goods are to be delivered. 49 U.S.C. §80101(1).
- **Consignor** means the person named in the bill of lading as the person from whom the goods have been received for shipment. 49 U.S.C. §80101(2).
- **Carrier** means a motor carrier, a water carrier and a freight forwarder. 49 U.S.C. §13102(3).

- **Broker** means: (i) 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); (ii) a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. “Motor carriers, or persons who are employees or bona fide agents of 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).

- ***Freight Forwarder.*** The term “freight forwarder” means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business:
  - Assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;
  - Assumes responsibility for the transportation from the place of receipt to the place of destination; and
  - Uses for any part of the transportation a carrier subject to jurisdiction under the ICC Termination Act of 1995, 49 U.S.C. §10101. 49 U.S.C. §13102(8).

- **Warehouseman** means a person engaged in the business of storing goods for hire. Uniform Commercial Code, §7-102(h).
- **Transportation** includes motor vehicle, vessel and warehouse services related to the movement of property. 49 U.S.C. §13102(23).

## SHIPPER/BROKER/CARRIER RELATIONSHIP

- Historically, the function of a property transportation broker was to procure or arrange for the transportation of the shipper's goods for compensation, usually paid by shipper.
- Shippers were liable to carriers for their freight charges and carriers were directly liable to shippers for cargo loss and damage claims.
- Brokers originally were permitted to retain only "common" carriers. *Copes Broker Application*, 27 M.C.C. 153, 167-168 (1940).
- However, since 1982, transportation brokers have been permitted to enter into contracts with any motor carrier if in fact the broker exercises working control over the transportation. *Dixie Midwest Express, Inc., Extension – General Commodities*, 132 M.C.C. 794 (1982).

- The ICC Termination Act of 1995 (“ICCTA”) eliminated the distinction between motor “common” carriers and motor “contract” carriers, notwithstanding the fact that the FMCSA’s registration application still makes that distinction. Now, any motor carrier can enter into a contract with a shipper.

## Sources of Problems

- Discrepancies between shipper/broker contract versus broker/carrier contract.
- Discrepancies as to cargo damage liability limitations and carrier rules.
- “Double brokering”
- Brokers or motor carriers who have insufficient or no applicable cargo insurance.

## BROKER-RELATED CARGO CLAIM PROBLEMS

- Shipper's common law right to recover against carrier is codified in the Carmack Amendment (to the ICCTA), a strict liability statute. 49 U.S.C. §14706(a).
- Motor carriers of property are no longer required to file tariffs. They are required only to provide the shipper, on request, with a written or electronic copy of their rates and rules. 49 U.S.C. §13710(a)(1).
- Carmack Amendment does not provide for the liability of brokers for interstate cargo loss and damage. *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 U.S. Dist. LEXIS 1684, \*8 (N.D. Ill. 1999).
- Where identities of "broker" and "carrier" are unclear, problems inevitably result.

- Traditionally, and legally, brokers were not liable for cargo loss or damage claims.
- More recently, however, courts have scrutinized the broker relationship to a freight shipment and ruled that brokers can be liable under state tort or contract law, such as negligent entrustment or breach of contract, though not under Carmack, for cargo claims. *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F. Supp. 2d 1064 (Cen. D. Cal. 2002).
- Brokers may still be liable on various causes of action outside of the Carmack Amendment. *Commercial Union Insurance Co. v. Forward Air, Inc.*, 50 F. Supp. 2d 255, 258 (S.D.N.Y. 1999).

## BROKERS WIN

- *Professional Communications, Inc. v. Contract Freighters, Inc.*, 171 F. Supp. 2d 546 (D. Md. 2001).
  - Shipper, PCI, hired Eagle USA Air Freight to transport a shipment of cell phones from Florida to Maryland.
  - Eagle hired defendant Covenant to coordinate the shipment of the crates. Covenant agreed to transport some shipments directly and for others it created a separate logistics company, Covenant Transport Logistics (“CTLI”), to broker the shipments.
  - CTLI arranged for Contract Freighters to transport the cell phone shipment, which arrived with lost and damaged goods.

- Plaintiff argued Contract Freighters was acting as Covenant’s agent.
- Covenant’s role as a broker did not establish a principal/agent relationship. “A mere contract to ship goods does not establish an agency relationship.”
- Covenant not shown to have breached any duty of common law negligence in hiring Contract Freighters.

- *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F. Supp. 2d 1064 (C.D. Cal. 2002).
  - Plaintiff's insured contracted with defendant H.A., a broker, for the inland transportation of an import shipment of cigarettes in California.
  - H.A. hired Orozco Transportation to transport the shipment, which was then stolen.
  - Plaintiff sued H.A. as a "common carrier," and H.A. moved for summary judgment because standards of liability for brokers differ from those that apply to carriers.
  - Plaintiff then tried to amend its complaint to substitute the term "common carrier" with "transportation broker" so as to allege broker liability based on a negligent entrustment (hiring) theory.

- Court ruled Carmack Amendment governs motor carriers and freight forwarders, but not brokers.
- “Most courts hold that brokers may be held liable under state tort or contract law in connection with shipments,” but not under the Carmack Amendment.
- No question of fact that H.A. did not act as a common carrier.
- Chubb failed to prove its breach of contract, negligence and state law claims against H.A.

- *CGU International Insurance, PLC v. Keystone Lines Corp.*, 2004 U.S. Dist. LEXIS 8123 (N.D. Cal. 2004).
  - Plaintiff's insured hired New Trans, a freight forwarder, to coordinate transportation of certain machinery. New Trans hired defendant Keystone to obtain a motor carrier to move the machines.
  - Keystone hired Europa Specialized Carriers, a motor carrier, to perform the transportation, during which two machines were damaged in the sum of nearly \$400,000. Plaintiff sued Keystone alleging it was negligent in selecting Europa to transport the machines.
  - Carmack governs carriers but not brokers.

- “The difference between a carrier and a broker is often blurry. The crucial distinction is whether the party legally binds itself to transport, in which case it is considered a carrier . . . . If, however, Keystone merely agreed to locate and hire a third party to transport the machines, then it was acting as a broker.”
- Court ruled Keystone merely acted as a broker, not a carrier, and therefore, plaintiff’s negligence claim was viable and not preempted.
- Under the “reasonably prudent person standard” plaintiff failed to show Keystone was negligent in its selection of Europa, having determined that Europa had valid state and federal carrier licenses and both cargo and liability insurance.

- *Tokio Marine & Fire Insurance Co. Ltd. v. Megatrux, Inc.*, 2006 Cal. App. Unpub. LEXIS 6964, Court of Appeal of California (2006).
  - Defendant Megatrux, a licensed broker, tendered a shipment of plaintiff's computer parts to a motor carrier, following which it was stolen.
  - Plaintiff sued Megatrux (among others) as “motor common carriers, freight forwarders and bailees” for the loss of the cargo worth over \$356,000.
  - Carmack Amendment preempts all state law claims against interstate motor carriers and freight forwarders (but not brokers).
  - Since plaintiff offered no evidence Megatrux provided *motor vehicle transportation*, Megatrux was found not to have motor carrier status or liability.

- No evidence Megatrux held itself out as a motor carrier, based solely on the manner in which it portrayed itself to the public in advertisements, without connecting the advertisements to its services actually provided.
- No evidence that shipper relied on Megatrux's advertising.
- Megatrux found not negligent as a matter of law in its selection of underlying motor carrier.

- *Esprit de Corp. v. Victory Express*, 2000 U.S. App. LEXIS 12063 (9th Cir. 2000).
  - Esprit, a shipper, sued Victory Express, a truckload carrier, for the loss of a shipment worth \$400,000. Esprit had hired Victory through the use of a broker, Farnesi. Multiple claims and cross-claims for contribution and indemnification were filed.
  - Pursuant to a contract between Victory and the broker, which incorporated Victory's tariff, Victory's liability was deemed limited to \$100,000.
  - Court rejected shipper's argument that since there were ten separate bills of lading, there were ten separate shipments with a \$100,000 limit per shipment and affirmed the trial court's conclusion that the truckload constituted one shipment with five stop offs for unloading.

## BROKERS LOSE

- *Consolidated Freightways Corporation of Delaware v. Travelers Insurance Company*, 2003 U.S. Dist. LEXIS 26984 (N.D. Cal. 2003).
  - Travelers and its insured shipper sought to recover over \$19 million in damages to a shipment of trade show equipment transported from Nevada to California.
  - Defendant CF moved to limit its liability to \$1,000 for damage based upon its Exhibition Transportation Agreement (“ETA”) with co-defendant GES, a broker.
  - GES also moved for summary judgment on the basis that its role was that of a “broker” only and not a “motor carrier.”

- CF’s tariff provided for an ultimate liability maximum of \$100,000 per shipment.
- Court ruled that since there was no persuasive evidence that the parties agreed to waive CF’s Carmack Amendment liability, the \$100,000 limitation and its tariff were applicable.
- GES’s motion for summary judgment that it was not liable under the Carmack Amendment because it was a “broker” was denied due to evidence that it performed some transportation functions, thus leaving GES exposed to extensive potential damages.

- *Oliver Products Company v. Foreway Management Services, Inc.*, 2006 U.S. Dist. LEXIS 32968 (W.D. Mich. 2006).
  - Plaintiff shipper hired defendant broker to transport a shipment of medical grade goods.
  - Broker brokered the load to co-defendant motor carrier whose trailer was filthy with printing toner.
  - Broker moved to dismiss lawsuit because the Carmack Amendment does not apply to brokers.
  - Court denied broker’s motion 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.”

## BROKER RECOVERIES AGAINST CARRIERS

- *Edwards Bros., Inc. v. Overdrive Logistics, Inc.*, 581 S.E. 2d 570 (Georgia, 2003).
  - Edwards, a motor carrier, and Overdrive, a transportation broker, were parties to a brokerage contract under which Overdrive agreed to tender a series of shipments to Edwards.
  - Shipper (Robinson) hired Overdrive to arrange for a shipment of chicken to be transported from Georgia to California.
  - Shipment was damaged and Robinson submitted a damage claim of \$21,552 to Edwards, who paid Robinson \$16,876 on the claim.
  - Because Robinson had not been fully compensated for its loss, it withheld the balance of the loss on its invoices owed to Overdrive, the broker.

- Overdrive then sued Edwards and Robinson for breach of contract and pursuant to the Carmack Amendment and sued Robinson for fraud and breach of contract.
- The Court of Appeals affirmed the lower court's grant of summary judgment for Overdrive on its breach of contract claim against Edwards.
- Court rejected Edwards' claim that Overdrive's breach of contract claim was preempted.
- "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 Overdrive's breach of contract claim in this case."

- *REI Transport, Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F. 3d 693 (7th Cir. 2008).
  - Shipper Circuit City hired defendant C.H. Robinson, a broker, to coordinate a shipment of DVD players from California to Illinois.
  - Robinson hired plaintiff REI, a motor carrier, to transport the shipment on the final leg of the trip, from St. Louis to Marian, Illinois, following prior rail transportation.
  - Through no fault of REI's, there was a shortage at destination of approximately \$85,000 worth of goods.
  - Robinson paid Circuit City \$85,429 on its claim in exchange for an assignment of Circuit City's rights against REI.

- Robinson then withheld freight charges due REI, setting the stage for REI's lawsuit against Robinson to recover \$81,232 in freight charges.
- Robinson counterclaimed for the \$85,429 cargo loss based upon the assignment it received from Circuit City.
- Seventh Circuit agreed with REI's argument that the district court erred in holding that the Carmack Amendment preempted REI's breach of contract claim against Robinson, but went on to rule that Robinson's exercise of self-help was justified based on its right under the contract to withhold payment to satisfy claims or shortages which would include claims arising under the Carmack Amendment.
- Since Robinson, as assignee of Circuit City, had adequately proven a *prima facie* case of carrier liability against REI on its counterclaim, the Court of Appeals affirmed the district court's finding that Robinson was entitled to recover an additional \$4,197 the difference between the amount of the loss and damage claim and the amount Robinson had withheld from REI.

## CLASSIC PROBLEM EXAMPLE:

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

- Case illustrates classic problem of “broker” versus “carrier” status.
- Subrogation action seeking \$295,000 in damages to two shipments of office equipment damaged in transit between California and Pennsylvania.
- Shipper (Ricoh) hired Defendant broker (CHRW) for transportation of shipment.

- Ricoh prepared bills of lading identifying CHRW as the “carrier” without broker’s permission.
- Court ruled CHRW’s status as broker or carrier is not determined by how it labels itself but by how it “holds itself out to the world and its relationship to the shipper.”
- Plaintiff produced evidence that CHRW held itself out to offer “complete transportation and mode management” service and “we are a principal in the transaction.” On that basis the court denied CHRW’s motion for summary judgment, ruling that its status as a broker or carrier cannot be determined as a matter of law but must go to trial.

*AIG Europe (Netherlands), N.V. v. UPS Supply Chain Solutions, Inc.*, 2011 U.S. Dist. LEXIS 14530 (S.D.N.Y.).

- Same Judge as in *NipponKoa v. C.H. Robinson Worldwide* denied defendant broker's motion for summary judgment, ruling it was a question of fact as to whether defendant acted as a carrier or merely arranged for delivery of the shipment as a broker.

*Unified Global Logistics, Inc. v. Nabers Solutions, LLC*, 2011 Cal. App. Unplb. LEXIS 437 (Court of Appeal of California 2011).

- Broker versus broker. Court ruled defendant broker did not hold itself out as a motor carrier and therefore was not liable.

*Peerless Importers, Inc. v. Cornerstone Systems, Inc.*, 2010 N.Y. Misc. LEXIS 1179 (Supreme Court of New York 2010).

- Defendant Broker's motion for summary judgment denied. Court ruled "whether a company is a broker or a carrier is not determined by what that company labels itself , but how it represents itself to the world and its relationship to the shipper."

*Multiflex Systems, Inc. v. Reed Transport Services, Inc.*,  
2010 U.S. Dist. LEXIS 58749 (M.D. Fla. 2010).

- Court incorrectly applied Carmack preemption to broker. Broker ruled not liable for negligent entrustment claim.

*Royal & Sun Alliance Insurance PLC v. Rogers  
Transportation Management Services, Inc.*, 2010 U.S. Dist.  
LEXIS 84880 (S.D.N.Y. 2010).

- Broker (UPS Supply Chain) held liable for its maximum contractual liability (\$250,000) for damage to a shipment of sutures totaling \$470,208.

## FAAAA PREEMPTION

The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) provides:

- **(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). 49 U.S.C. §14501(c) (1).

- 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. *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364; 128 S. Ct. 989; 169 L. Ed 2d. 933 (2008).
- In *Rowe* 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.

- The preemption language of the FAAAA 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).

- *Huntington Operating Corp. v. Sybonney Express, Inc.*, 2010 U.S. Dist. LEXIS 55591 (S.D. Tex. 2010). Plaintiff sued a motor carrier and a broker for loss of a shipment of perfume transported from Florida to Texas which was stolen in transit. Plaintiff claimed broker was responsible for insuring the motor carrier had adequate insurance to cover the cargo, and alleged many claims including violations of the Texas Deceptive Trade Practices Act, negligence, negligent misrepresentation and breach of contract.
- Court granted defendant/broker's motion for partial summary judgment dismissing all claims except 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.

- Thus, though brokers do not have the benefit of Carmack preemption, they can take advantage of FAAAA preemption under 49 U.S.C. §14501(c) to defend garden-variety common law claims in negligence, fraud, misrepresentation, unfair or deceptive trade practices and punitive state law claims.
- This 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.

- *Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F. Supp. 2d 638 (N.D. Tex. 2010). Citing *Huntington v. Sybonney*, court ruled all claims except breach of contract claim against broker were preempted by 49 U.S.C. §14501.
- *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. Note: 49 U.S.C. §14501(c) (1) preemption defense not raised.

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

- *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. Note: in absence of an assignment of claim from shipper, broker has no standing to sue motor carrier.
- *Werner Enterprises, Inc. v. Westwind Maritime International, Inc.*, 554 F. 3d 1319 (11<sup>th</sup> Cir. 2009). Motor carrier's released rate limit of liability, negotiated with broker, upheld in direct action by shipper against motor carrier.



**THANK YOU**