CARGO CLAIMS
Basics and New Developments
• Federal Law governs liability of a motor carrier or freight forwarder for loss of or damage to goods transported in interstate commerce
  • 49 USC §14706
  • Exclusive remedy
  • Simple cause of action
  • Strict liability
  • Limited defenses

Carmack Amendment
Carmack applies to Cargo loss or damage during transportation:

- Between states
- In the US between the US and a US territory or possession
- In the US between the US and another country
Carmack Requirements

- The cargo was in good order and condition when it was delivered to the carrier;
- The cargo was damaged, or not delivered at destination; and
- The value of the goods, or cost of repair of the portion damaged.

- Missouri Pac. R. Co. v. Elmore and Stahl, 377 U.S. 134, (1964); Thousand Springs Trout Farms, Inc. v. IML Freight, Inc., 558 F.2d 539 (9th Cir. 1977)
Motor Carrier may assert as defenses that the cargo was damaged by:

- Act or default of the shipper;
- An act of God;
- An act of a public enemy;
- The "public authority;" or
- The inherent vice of the commodity.

Carmack Defenses
• Liability under Carmack Amendment is for “the actual loss or injury to the property caused by” the carrier

• General Rule: Difference between the market value of the property in the condition in which it should have arrived at destination and its market value in the condition in which it did arrive

• No special or consequential damages
• No punitive damages
• No attorneys fees

Measure of Damages
Limitation of Liability
49 U.S.C. § 14706(c)(1) permits carriers to limit their liability through written or electronic declaration of the shipper.

A carrier may limit its liability through a tariff if it:

• Makes its tariff available to the shipper upon request;
• Obtains the shipper’s agreement as to its choice of liability;
• Gives the shipper a reasonable opportunity to choose between two or more levels of liability; and
• Issues a receipt or bill of lading prior to moving the shipment.
CARGO CLAIMS AND BROKERS
Basics and New Developments
• “Broker” is “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).

• “Motor carrier” means “a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation.” 49 U.S.C. §13102(14).
• Current litigation trend against transportation brokers on theories such as:
  • negligent hiring,
  • *respondeat superior*,
  • negligent entrustment, and
  • negligent supervision
• No longer confined to catastrophic accidents and personal injury lawsuits.

Litigation Trends
• 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).

• Carmack Amendment to ICCTA codified shipper’s common law right to recover against railroads, 49 U.S.C. §11706, and motor carriers, 49 U.S.C. §14706, for interstate cargo.

• Notably, the statute applies only to motor carriers and freight forwarders.

• Brokers are not liable for cargo loss or damage under Carmack or elsewhere in the ICCTA, which makes sense because brokers do not take custody of the goods or handle the freight; they merely arrange for transportation.
The role or function of a party in a given transportation transaction – “broker” vs. “carrier” – is often unclear or blurred. Some courts have ruled brokers can be liable under state or common law theories, such as negligent entrustment or breach of contract, for cargo losses. *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F. Supp. 2d 1064 (C.D. Cal. 2002).

Brokers still may be liable on various causes of action outside 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. 2007).

Most cargo litigation against brokers turns on a fact-intensive inquiry: what services did broker agree, represent or hold itself out to perform?
• Similar to casualty cases, where plaintiffs seek to clothe brokers with the duties and liabilities of motor carriers, cargo plaintiffs typically allege a constellation of state and common law claims, including brokers liability for negligent selection of the underlying motor carrier, negligently failing to procure adequate “insurance coverage,” breach of contract and claims for punitive damages under state unfair and deceptive practices statutes.

• Brokers have successfully defeated cargo claims based on state law theories:
  
  • *Professional Communications, Inc. v. Contract Freighters, Inc.*, (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*, (broker not liable under Carmack Amendment; plaintiff also failed to prove breach of contract and negligence claims against broker)
  
• *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)

Where broker, as is typical, holds itself out to do whatever is necessary to get a shipment moved from point A to point B, its legal status – “broker” vs. “motor carrier” – often will be deemed a question of fact for 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.* 2006 U.S. Dist. LEXIS 32968 (W.D. MI 2006) (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, 2007 U.S. Dist. LEXIS 62161 (E.D. CA 2007)* (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.”)
• Carmack Amendment preemption, an invaluable tool for a motor carrier’s defense of state law negligence, conversion, unfair and deceptive trade practices, punitive damages and similar claims, is not available to cargo brokers.

• *Oliver Products, supra; TRG Holdings, LLC v. Leckner*, 2006 U.S. Dist. LEXIS 70781 (E.D. VA. 2006)
• However, the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") gives brokers a different kind of preemption shield:
  • (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.
  • 49 U.S.C. §14501(c) (1).
• FAAAA preemption language closely tracks that in the Airline Deregulation Act (“ADA”), which has been construed as preempting all but breach of contract claims.

• Many courts have followed *Morales*, *Wolens* and *Rowe* and adopted and applied the broad preemptive power of the ADA in 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);
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)

• *Read-Rite Corp. v. Burlington Air Express Ltd.*, 186 F. 3d 1190 (9th Cir. 1999)
• FAAAAA is to be broadly construed.

- Plaintiff sued motor carrier and broker for loss of a shipment stolen in transit.
- Claims against broker included that it was responsible for insuring the motor carrier had adequate insurance to cover the cargo; included claims for, inter alia, violations of the Texas Deceptive Trade Practices Act, negligence, negligent misrepresentation and breach of contract.
- Court granted broker’s motion for partial summary judgment, dismissing all claims except for breach of contract claim, ruling 49 U.S.C. § 14501(c)(1) and case law interpreting that statute preempted all but the breach of contract claim.
• *Chatelaine, Inc. v. Twin Modal, Inc.*, 2010 U.S. Dist. LEXIS 85894 (N.D. Tex. 2010), citing *Huntington*, (similarly granted broker’s motion for summary judgment on basis of §14501 preemption as to all state and common law claims, leaving only breach of contract claim).


- Negligence and breach of contract claims against broker based on “all-inclusive” freight quotation.
- Plaintiff also claimed broker breached agreement to procure insurance.
- Preemption of negligence claims against broker by both 49 U.S.C. §§ 14706 and 14501(c).
- “… [T]he claims...are all impliedly preempted by the Carmack Amendment, notwithstanding Robinson's role as a broker.”
• "However, even if those claims are not subject to implied preemption under the Carmack Amendment, they are expressly preempted by [49 U.S.C. §14501(c)]."

• "[T]here is no good basis for arguing that Congress did not intend that result . . ."

• "...[T]he two words ‘all-inclusive’ [in broker’s e-mail quote to shipper] do not establish a promise by Robinson to provide insurance coverage for Ameriswiss' cargo in any amount, much less whatever amount Ameriswiss might deem to be ‘appropriate.’"
• Thus, brokers can invoke FAAAAA preemption under 49 U.S.C. §14501(c) in lieu of Carmack preemption to defend negligence, fraud, misrepresentation, unfair or deceptive trade practices, punitive and other 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.
  • Plaintiff insurance company sought order that there was no coverage under its policy to motor carrier where its owner-operator was involved in fatality and policy did not cover “brokered” loads.
  • O/O had his own DOT number and liability insurance.
  • Cobra, the motor carrier, was under contract with shipper to transport shipments which it, in turn, contracted O/Os to handle.
• **Great West Casualty Co. v. Cobra Trucking, Inc.**:

  • Court denied plaintiff’s MSJ based on FMCSA’s definition of “broker” – “that a motor carrier is not a broker if [it arranges] transportation for shipments that the carrier is legally bound to transport.” 49 C.F.R. §371.2(a).

  • Court also could have reached the same conclusion that Cobra was acting as a motor carrier, not a broker because a motor carrier contract with an O/O under the FMCSA’s leasing regulations, 49 C.F.R. §376, is different from a bill of lading contract of transportation between a motor carrier and a shipper.
California Air Resources Board:

Anyone who operates or directs the operation of any vehicle subject to the Truck and Bus regulation needs to verify that each hired company is either in compliance with the regulation or has reported compliance to the Air Resources Board.

This requirement applies to any in-state or out-of-state motor carrier, California broker, or any California resident including but not limited to contractors, public agencies, and developers.
• CARB enforcement:
  • No penalties are stated for Brokers
  • Penalties to be assessed on a case by case basis
  • Health and Safety Code allows CARB to assess penalties on motor carriers of anywhere from $1,000 to $10,000 depending upon the nature of the violation and whether the violation is intentional, negligent, or the result of strict liability.
  • For brokered loads, CARB will evaluate the broker separately from the motor carrier, to see whether the broker acted diligently and responsibly.
  • CARB is looking to penalize whoever made the decision to dispatch a non-compliant vehicle.
• 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. (N.B. 49 U.S.C. §14501(c) (1) preemption not mentioned.)

• 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.)

• *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 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.)
• **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 due to question of fact as to whether it was a broker or carrier based on broker’s representations to shipper that it was “a principal in the transaction.”)
• Amended 49 U.S.C. §13902(a) (6):
  • Motor carrier may no longer broker transportation services unless it has registered separately as a broker.
• Motor carrier—
  • may provide transportation only using vehicles it owns or leases;
  • must physically transport the cargo at some point;
  • must retain liability for the cargo and for payment of interchange carrier; and may not arrange transportation, i.e., “convenience interline,” unless it has a “separate” registration as a freight forwarder or broker.
• Effectively ends “convenience interlining,” recognized and approved long ago, *Global Van Lines, Inc. v. Interstate Commerce Commission*, 691 F. 2d 773 (5th Cir. 1982); for years a routine practice in the trucking industry, now eliminated.

• Conflicts with statutory recognition of interlining; a carrier paying a claim may be indemnified by the carrier causing the loss. 49 U.S.C. § 14706(b).

• MAP-21 reclassified traditional convenience interlining as “brokerage.”
• MAP 21 Applies to freight forwarders and brokers.
  • A “distinctive registration number” is now required if motor carrier seeks to broker a shipment. 49 U.S.C. §13901(b) (1).
  • To avoid requirement for a separate broker registration under §13902, motor carrier must “physically transport [] the cargo *at some point*” and retain “liability for the cargo.”
• MAP-21 does not necessarily eliminate or cure the problem of motor carriers victimized by unscrupulous, fraudulent freight brokers; it merely creates additional regulatory red tape for legitimate motor carriers accustomed to traditional convenience interlining
• What “disclosures” must be given to shipper?
• What happens if a motor carrier, who originally intended to handle a shipment itself, ultimately “brokers” the load to another motor carrier? Must it revise all its paperwork?
• Whose name appears on bill of lading?
• Must the “originating” motor carrier, now a broker, communicate its different statuses to shipper? If so, how?
• Must it inform shipper an affiliate company may broker the shipment to another motor carrier if equipment is unavailable?

Cargo Issues Under MAP 21
• What effect will revised §13902 have on prosecution and defense of cargo claims against motor carriers under Carmack?
• Will amendment affect insurance coverage and liability issues?
• Can motor carrier’s failure to comply with § 13902 give shipper a new, separate (from Carmack) claim where shipment is lost due to an impostor “interline” carrier?
• Will motor carrier’s failure to comply with § 13902 prevent it from proving “freedom from negligence”?