DEFENDING A CARGO CLAIM: PRELIMINARY CONSIDERATIONS

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Although it imposes strict liability upon carriers and freight forwarders for loss and damage to property in interstate commerce, the Carmack Amendment[1] provides motor carriers and freight forwarders the benefit of having a national uniform policy regarding liability for property loss and damage.[2]

Even with this national uniform policy in place, freight counsel and their respective clients face many issues in evaluating a claim for cargo loss and damage. This paper addresses three preliminary considerations that must be taken into account prior to litigating a properly pled Carmack Amendment cause of action. The initial focus is identifying what roles various entities play in the transportation of goods in interstate commerce and their liability under Carmack. The second section addresses venue issues and outlines removal procedures. Lastly, the third section sets forth the groundwork for preliminary motions if the underlying complaint seeks to expand the preemptive scope of Carmack.

Step One: Identify What Hat Your Client Was Wearing

Although it seems elemental, the first and most important step in defending a Carmack Amendment claim is to determine what role your client had in the transaction.

In the transportation industry today, the identity and the services provided by entities in the marketplace can sometimes become blurred. A popular moniker is for a transportation entity to identify itself as a "logistics company." The term "logistics" is often used to describe a multitude of services including distribution, warehousing, physical transportation of property, freight payment, and even brokerage services.

In regulated transportation of property, there still remains three types of federally licensed entities: the motor carrier, the freight forwarder, and the property broker. This seems simple enough, however, often entities obtain multiple authorities and do little to distinguish their separate operations in terms of corporate structure. It is imperative to know the statutory distinctions between the entities and apply them to your particular situation.

By statute, the term "carrier" means a motor carrier, water carrier, and a freight forwarder.[3]
A "motor carrier" means a person providing motor vehicle transportation for compensation.[4]

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[1] See 49 U.S.C. 14706.

[2] See *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128, 131, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Adams Express Co. v. Croninger*, 33 S.Ct. 148, 151-152 (1913).

[3] See U.S.C. 13102(3).

[4] See 49 U.S.C. 13102(12).

A "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:

(a) assembles and consolidates, provides for assembling and consolidating shipments and performs or provides for break bulk and distribution of the shipments;

(b) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(c) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle. The term does not include a person using transportation of an air carrier subject to Part (a) of subtitle VII.[1]

A freight forwarder acts like a carrier vis-a-vis its shipper and similarly, it acts as a shipper vis-a-vis the carrier it retains. Under the ordinary course of its business, a freight forwarder must proffer assembly, consolidation, break bulk and distribution services for any and all traffic tendered or transportation services provided. The four service elements are basic to the definition of a freight forwarder. They are neither optional nor alternative.

The service elements are required by the use of the conjunctive "and" in the statutory definition. Thus, in order to be a freight forwarder, a party must hold itself out to the public that it is prepared to provide the definitional services on all transactions. Moreover, if a party acting as an intermediary does not actually perform, but merely proffers such services, its activity is more akin to and may be deemed to be brokerage, for which a brokerage license is required. If the conduct evidences that the entity is merely arranging transportation rather than undertaking the transportation, such activity will not be considered freight forwarding.[2]

By statute, 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.[3]

Motor carriers, or persons who are employees or bona fide agents of 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.[4]

"Brokerage" or "brokerage service" is defined as the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor or consignee.[5]

A broker is generally not liable to the shipper for cargo loss or damage.[6] Brokers can limit their liability by contract. Neither the regulatory framework set forth in the Carmack Amendment nor the common law restrict a broker's ability to freely contract with shippers, freight forwarders and others.[7] A broker is free to establish by

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[1]See 49 U.S.C. 13102(8).

[2]See *Chemsource, Inc. v Hub Group, Inc.*, 106 F.3d 1358, 1361 (7th Cir. 1997); *Fireman's Fund Insurance v. USA Truck, Inc.*, 1992 Fed. Carr. Cases ¶83,698; See also *Travelers Indemnity Company v. Alliance Shippers, Inc.*, 654 F. Supp. 840 (N.D.Cal. 1986).

[3]49 U.S.C. 13102(2).

[4]See 49 C.F.R. 371.2(a).

[5]49 C.F.R. 371.2(c).

[6]See *Golden Triad Carriers, Inc. v. Paco American Corporation*, 1990 Fed. Carr. Cases, ¶83,515.

[7]See *Service Master Co., LP v. FTR Transport, Inc.*, 868 F. Supp. 90, 95 (E.D.Pa. 1994).

contract, the rates, services and terms and conditions of liability assumed.[8] In terms of liability, a crucial issue for property brokers is whether they hold themselves out to the public generally as the actual transporter of the goods.[9] If there is no evidence that a property broker held itself out as the actual transporter of the goods, it should not be found liable for cargo loss and damage, absent negligence on its part. Often, property brokers maintain contingent cargo insurance to protect their own business as well as the shipping public but acquiring same does not increase the broker's basic legal obligations in terms of liability for the goods transported.

In contrast, motor carriers and freight forwarders have primary liability to shippers or consignees for cargo loss and damage under the Carmack Amendment in the absence of a written contract.[10]

A carrier may waive the application of the Carmack Amendment through a written contact which expressly waives its applicability.[11] The remedy for a breach of the written contract is an action in state court or district court unless the parties otherwise agree.[12]

Under Carmack, a carrier may establish rates for transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by a written or electronic declaration of the shipper or by written agreement between the carrier and the shipper if that value would be reasonable under the circumstances surrounding the transportation.[13]

The carrier's right to limit its liability is subject to the requirement that it provide to the shipper, upon request, "... a written or electronic copy of the rate, classification, rules, and practices based upon which any rate applicable to a shipment, or agreed to between a shipper and the carrier is based."[14]

In the absence of a written contract or applicable tariff provisions limiting liability, the motor carrier and freight forwarder are subject to the Carmack Amendment. Clearly, it is important to identify what services your client was performing in order to properly defend them in a cargo loss and damage claim.

Step Two: Handling the Removal of a Carmack Case

A civil action for loss, damage, or delay may be brought against the delivering carrier or the carrier who is alleged to be responsible for the loss, damage or delay, in the United States district court or state court in which the carrier operates or the jurisdiction where such loss or damage is alleged to have occurred.[15] Although there is concurrent jurisdiction, most carriers and their freight counsel prefer to litigate Carmack claims in district court given the application of federal law.

In removing a case, freight counsel must be careful to follow the proper procedures. First and foremost, in order to remove a state court cause of action, the amount in controversy must exceed $10,000 exclusive of interest and costs.[16] A notice of removal must be filed within 30 days after service of the underlying complaint.[17]

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[8]See *General Electric Co. v. Harper Robinson & Co.*, 818 F. Supp. 31 (E.D.NY 1993).

[9]See *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983).

[10]See 49 U.S.C. 14706(a)(1).

[11]See 49 U.S.C. 14101(b)(1).

[12]See 49 U.S.C. 14101(b)(2).

[13]See 49 U.S.C. 14706(c)(1)(A).

[14]See 49 U.S.C. 14706(c)(1)(B).

[15]See 49 U.S.C. 14706(d)(1)(2) and (3).

[16]See 28 U.S.C. 1337 and 28 U.S.C. 1445(b).

The removal notice must be signed pursuant to Rule 11 and contain a short, plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon the defendant carrier.[18] It is helpful in removing a case to attach the underlying bill of lading contract(s) as an appendix to the removal notice as well. The notice should set forth that it is filed pursuant to the applicable removal statutes indicating to the district court that (1) the matter is one which the district court has original jurisdiction;[19] (2) the matter is founded on a claim or right under the Constitution, treaties or laws of the United States without regard to the citizenship or residence of the parties;[20] (3) the matter involves a federal question;[21] and (4) the matter is one which involves the Carmack Amendment and the amount in controversy exceeds $10,000 exclusive of interest and costs.[22]

Removing a state lawsuit poses no difficulty if the underlying Complaint sets forth in some respect a Carmack cause of action. Under Carmack, there is a longstanding three prong test. The plaintiff must establish its prima facie case liability against the carrier and/or freight forwarder by showing delivery of the goods to the carrier or freight forwarder in good order and condition; delivery by the carrier to the consignee in damaged condition or nondelivery; and a specified amount of damages.[23]

Difficulties arise when the underlying complaint drafted by clever and/or unknowing plaintiff's counsel, makes no reference to Carmack and instead asserts a litany of state law causes of action. Occasionally, plaintiff's counsel will file a motion to remand. In these situations it is imperative to know the difference between the "well pleaded complaint rule" versus the "artful pleading doctrine."

Federal question jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint.[24] Under the "well pleaded complaint rule" the plaintiff is the master of the claim and may avoid federal jurisdiction by exclusive reliance on state law.[25] A case may ordinarily not be removed to federal court on the basis of a federal defense even if its defensive preemption.[26] However, a plaintiff may not defeat removal by "artful pleading," omitting to plead necessary federal questions in a complaint, or framing an essentially federal case in terms of state law.[27] The “artful pleading doctrine” cannot be invoked, however, where defendants seek to justify removal on the basis of facts omitted from the complaint, which if alleged, would have constituted a federal claim.[28] The “artful pleading doctrine” does allow removal where federal law completely preempts an asserted state law claim.[29]

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[17]See 28 U.S.C. 1446(b); See also *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc*., 526 U.S. 344 (1999).

[18]See 28 U.S.C. 1446(a).

[19]See 28 U.S.C. 1441(a).

[20]See 28 U.S.C. 1441(b).

[21]See 28 U.S.C. 1331.

[22]See 28 U.S.C. 1337(a).

[23]See Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 12 L.Ed. 2d 194, 84 S.Ct. 1142 (1964).

[24]See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed. 2d 318 (1987).

[25]*Id.*

[26]*Id.* at 393, 107 S.Ct. 2425.

[27]*Rivet v. Regions Bank*, 522 U.S. 470, 118 S.Ct. 921, 925, 139 L.Ed. 2d 912 (1998) quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22, 103 S.Ct. 2841, 77 L.Ed. 2d 420 (1983).

[28]See *Caterpillar*, 482 U.S. at 397, 107 S.Ct. 2425.

[29]See *Rivet*, 118 S.Ct. at 925.

Under the "complete preemption doctrine," an "independent corollary" to the “well pleaded complaint rule,” the Supreme Court has concluded on rare occasions that the preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the “well pleaded complaint rule.”[30]

[30]See *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425.

The Supreme Court and the majority of circuits have interpreted the Carmack Amendment as broadly occupying the entire interstate shipment field of commerce.[31] In limited instances there have been some district courts that have tried to chip away at the "complete preemption doctrine" with respect to Carmack claims, however these decisions are still in the vast minority.[32]

Step Three: When in Doubt, Kick it Out

Regardless of the ultimate choice of venue of the litigation, one thing is for certain: The Carmack Amendment provides the exclusive remedy for an action for damages against a motor carrier or freight forwarder. Therefore, it is mandatory that any claims made in a complaint that seek to expand that liability, i.e., state law breach of contract, breach of bailment, negligence, misrepresentation, violations of state consumer protection acts, and claims for recovery of attorney's fees and interest should be dismissed since they fall squarely within the exclusive ambit of the Carmack Amendment.

The only claim that a Plaintiff may have is for actual damages they prove under the Carmack Amendment. The remaining claims are preempted. The Carmack Amendment does not permit a shipper to plead breach of contract however he or she wants, under a variety of theories that are in essence state common law claims.[33] Likewise, allowing a shipper to bring a common law negligence claim against the carrier for loss and damage conflicts with the national uniform policy regarding carrier liability under bill of lading contracts.[34]

Often plaintiffs allege that the carrier has violated a state law consumer protection and/or a deceptive trade practice act. These types of state statutes are preempted by Carmack if they in any way enlarge the responsibility of the motor carrier and/or freight forwarder effecting the grounds of recovery or the measure of recovery. The Carmack Amendment preempts all claims for loss or damage to goods moving through interstate commerce predicated on state deceptive trade or consumer protection statutes and statutory or common law theories of bad faith in the claims handling process.[35]

The Carmack Amendment's basic tenet is that any liability imposed is for "actual loss or injury to the property caused by the carrier."[36] The carrier is not responsible for special or consequential damages.[37]

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[31]See *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-506, 33 S.Ct. 148, 57 L.Ed. 314 (1913); See also *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir.), cert. denied, U.S., 118 S.Ct. 51, 139 L.Ed. 2d 16 (1997); *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 706-707 (4th Cir. 1993); *Moffitt v. Bekins Van Lines Co.*, 6 F.3d 305, 306 (5th Cir. 1993), *Hughes Aircraft Co. v. North American Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992).

[32]See *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315 (D.Vt. 1999); *Circle Redmont v. D&F Masons Co.*, Inc., 78 F. Supp. 2d 1316 (M.D.Fl. 1999) but see: *Reeves v. Mayflower Transit*, 87 F. Supp. 2d 1251 (M.D.Al. 1999).

[33]See *Margetson v. United Van Lines, Inc.*, 85 F. Supp. 917, 922, (D.NM 1991).

[34]See *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 706-707 (4th Cir. 1993); See also *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 505-506 (1st Cir.), cert. denied, U.S., 118 S.Ct. 51, 139 L.Ed. 2d 16 (1997).

[35]See *Werner v. Lawrence Transportation*, 52 F. Supp. 2d 567 (E.D.NC 1998). (North Carolina Deceptive Trade Act held preempted by Carmack Amendment.) *Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377 (5th Cir. 1998). (Claim for punitive damages held preempted by Carmack.) *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 505 (1st Cir. 1997), cert. denied, 522 U.S., 809 (1997). (Claims for violation of Chapter 93(a) of the Massachusetts Consumer Protection Act held preempted by Carmack.) *Pierre v. United Parcel Service, Inc.*, 774 F. Supp. 1149 (N.D.Ill. 1991). (Illinois Deceptive Trade Statute held preempted by Carmack.)

[36]See 49 U.S.C. 14706(a)(1).

[37]See *Contempo Metal Furniture of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761, 765 (9th Cir. 1981).

Furthermore, to the extent that a plaintiff seeks attorney's fees, these too are not recoverable under Carmack. The rule consistently applied is that in the absence of contractual or statutory liability therefor, attorney's fees and related expenses (i.e. costs) are not recoverable as an element of damages. Neither the uniform bill of lading nor the Carmack Amendment contains such a provision and the courts have continually held that such fees are not recoverable under the Carmack Amendment.[38]

Claims for anything other than actual damages undermine the national uniform policy in handling cargo claims, which is the intent of the Carmack Amendment.

Conclusion

With respect to cargo loss and damage claims, understanding the roles and liabilities of the various federally licensed transportation entities, understanding the available venue options for defending said claims, and understanding the preemptive effect of the Carmack Amendment can make a vital difference in successfully defending your client.

[38]See *Atlantic C.L.R. Co. v. Riverside Mills*, 219 U.S. 186, 55 L.Ed. 167, 31 S.Ct. 164 (1911); *Moffitt v. Bekins Moving & Storage*, 818 F. Supp. 178 (N.D.TX 1993); aff'd 6 F.3d 305 (5th Cir. 1993); see also *Acura Systems, Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874 (5th Cir. 1996).