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THE BILL THAT *BROKE* THE BROKER BOOM 4

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$75,000 BROKER BOND REVISITED

On Dec. 1, 2013, after a 60-day cooling off period, the FMCSA canceled more than 9,000 broker authorities when the $75,000 bond requirement went live. Yet, amazingly, most existing brokers and forwarders as well as carriers who were required to obtain a broker's license or forwarder's permit, were able to comply with FFIT and obtain an increased bond for less than $2,000 annually, not an insurmountable financial burden.

A lawsuit is pending in the D.C. Court of Appeals and there is a petition before the agency to overturn the effect of the FFIT legislation — both brought by the Association of Independent Property Brokers & Agents (AIPBA). Yet the small carrier groups I work with report no great dislocation of freight. Apparently, small carriers which wish to continue outsourcing additional capacity either obtained a broker or forwarder's license or made the conscious decision to cease the practice.

If the limited goals of FFIT were to increase the amount of the bond to $75,000 and to eliminate some misrepresentations about whether an

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intermediary was acting as a carrier or a broker, then maybe the increased bond has met these limited objectives.

FFIT has not solved the problem of intermediary malfeasance or misfeasance, though, nor eliminated the confusion which has been spawned by too much rhetoric and too many pundits. The goal of FFIT was never to eliminate "double brokerage" any more than real estate statutes are intended to preclude the use of buyers' agents and sellers' agents in the same transaction. It was intended to eliminate fraud committed by rascals who could intentionally run up large payables to carriers, collect money from shippers and escape with the proceeds, leaving only $10,000 for the victims to fight over.

Unfortunately, the FFIT legislation doesn't solve the problem of carrier nonpayment or the possibility that shippers will be forced to pay twice. It only raises the ante. The very day this article was due to Internet Truckstop, and the day it was written, a good client in Texas called to enlist my help in collecting $279,000 due from a single broker. Its bondsman has already responded to its claim saying there are other claimants as well.

Nothing in FFIT will make my client whole for the excess after its portion of the $75,000 bond is pro rated out to it. Moreover, nothing in FFIT offers a solution to the old question, "Who ultimately bears the responsibility for broker default after the bond is exhausted?" Is it the carrier? Or is it the consignor, the consignee and the upstream broker, if any? The FFIT legislation says only that the funds are available to ensure that the broker's contractual financial obligations are met. The current broker regulations provide that a broker must segregate its broker receivables from any other business in which it is engaged and must be prepared to show any party to a broker transaction what it billed the customer, when it was paid, and when it paid the carrier. See 49 C.F.R. 371.7 and 49 C.F.R. 371.13.

These regulations sound like my obligations as a lawyer to keep funds collected for my clients in a separate account, holding the funds in trust under penalty of embezzlement. If brokers by contract accepted this kind of fiduciary obligation, both the carriers they hire and the broker would be well served. Carriers would know they did not need to be concerned about how deep the broker's pockets were — as long as the shipper paid its bills, the carrier would be paid. Brokers would be well served by following a constructive trust model rather than acting as a guarantor of all freight payments or, worse yet, trying to limit the carrier's recourse to its upstream customer in return for accepting sole non-contingent liability for paying all invoices on 30 days.

Last month a broker client who had served a Midwest shipper for more than 10 years called to report that the shipper had filed bankruptcy and owed more than $400,000. Under the new FFIT requirements, if the broker had contracted to pay all carriers on 30 day terms, regardless of whether the shipper paid it, the broker's license would have been quickly suspended and revoked.

Unfortunately the FFIT legislation is no panacea for freight charge payment problems which exceed the amount of the bond. It provides no sanctions against a broker or its principals who pledge or hypothecate carrier payables as long as a $75,000 bond is in place, and it does not solve the age old problem of who ultimately bears responsibility for broker default – the carrier or the shipper.

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One final issue needs to be raised. Left to be resolved are implementing regulations by the FMCSA. The FFIT legislation requires the agency to track the owners of brokers and freight forwarders, require proof of three years experience to get a license or permit, and provide for a renewed registration program every four years. Some advocates propose that to become a new broker in addition one must have 30 to 90 hours of training and pass a test! I would rather see a simple tweaking of the regulations to make clear that freight charges received by brokers and forwarders must be received in escrow and paid to the underlying carrier to the extent the carrier had not already been paid by the broker or forwarder from unrestricted funds.

Ultimately, so long as the shipper pays its bills, it and the carrier need the assurance the broker will not spend or pledge the money for some other purpose.

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