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Avoiding Carrier Liability Under Carmack – Act Like A Broker

If you want to be considered a broker and avoid liability under the Carmack Amendment, then act like a broker. If you agree to transport a shipment, have requested authorization to transport a shipment, or ultimately assume responsibility for transporting a shipment, you have likely performed transportation "services," and may be considered a "motor carrier" for purposes of the Carmack Amendment. Indeed, it makes no difference to a court of law that *you* consider *yourself* to be a broker.

The Carmack Amendment to the Interstate Commerce Commission Act, 49 U.S.C. § 14706, states in relevant part:

> A carrier providing transportation or service…shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service…are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States…. Failure to issue a receipt or bill of lading does not affect the liability of a carrier.

49 U.S.C. § 14706(a)(1).

The Supreme Court has held that the Carmack Amendment is a codification of the common-law rule that, "a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods." *Miss. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). To establish a prima facie case under the Carmack Amendment, a shipper must demonstrate (1) delivery of the shipment to the carrier in good condition; (2) loss or damage to the shipment; and (3) the amount of damages. Once a prima facie case is established, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *Allied Tube & Conduit Corp. v. S. Pac. Transp. Co.*, 211 F.3d 367 (7th Cir.2000).

Liability under the Carmack Amendment, however, extends beyond the carrier who actually provides the transportation. It extends to any carrier "providing transportation or service." 49 U.S.C. § 14706(a)(1). The ICA defines a "motor carrier" as "a person providing motor vehicle transportation for compensation," 49 U.S.C. § 13102(12). The ICA further specifies that the term "transportation" includes "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. § 13102(23)(B). Moreover, 49 C.F.R. § 371.2(a) states:

> 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.

The case law in this area has held steadfast to the statutes governing this issue. For example, in *Advantage Freight Network v. Sanchez*, the Eastern District of California treated the defendant as a motor carrier under Carmack, even though the defendant did not take possession of goods and arranged for another to transport the goods. 2008

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WL 4183987 (E.D. Cal. Sept. 10, 2008). In *Advantage*, the plaintiff hired the defendant to transport a shipment of DVD players. Because the defendant was having issues with his truck, he arranged for another to pick up the goods from the plaintiff and make the delivery. The plaintiff was unaware of the arrangement, and the defendant never actually took possession of the goods. During transportation, the goods were stolen. The court held that the defendant was a motor carrier and liable under the Carmack Amendment, stating: "Mr. Sanchez [defendant] was a 'motor carrier' within the meaning of the Interstate Commerce Act when he agreed to transport the goods."

"…the court held that ITG held itself out as providing "trucking services," and even though ITG did not have motor carrier authority, ITG had assumed responsibility for transporting the shipment of pajamas, and therefore, was a motor carrier for Carmack purposes."

Similarly, in *Land O'Lakes, Inc. v. Superior Service Transportation of Wisconsin, Inc.*, the Eastern District of Wisconsin held that the party who arranged for another party to broker the transport of a load was a motor carrier within the meaning of the Interstate Commerce Act. 500 F. Supp.2d 1150 (E.D. Wisc. 2007). In *Land O'Lakes*, the defendant, Superior, was assigned delivery of a shipment from another carrier. Superior did not take possession of the shipment, and arranged for a broker to broker out the shipment. During transportation, the shipment was partially ruined. Superior argued that it was not a motor carrier and not liable under the Carmack Amendment because it did not accept delivery, issue a bill of lading, or provide transport. However, the court held that Carmack liability extends to "any carrier providing transportation or service." The court further held:

> While Superior may not have directly transported the shipment, it did arrange for Town Center to broker the transport to Runabout. The ICA defines a "motor carrier" as "a person providing motor vehicle transportation for compensation," 49 U.S.C. § 13102(12). The ICA further specifies that the term "transportation" includes "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. § 13102(23)(B). And under the terms of its contract with LOL, Superior was entitled to payment for its services. Based on the undisputed facts of the case, the Court concludes that Superior was acting as a motor carrier for purposes of the Carmack Amendment.

Further, in *Mach Mold, Inc. v. Clover Assocs., Inc.*, the Northern District of Illinois held that a party who was authorized to transport goods, and accepted and legally bound itself to do so, was a motor carrier for purposes of the Interstate Commerce Act. 383 F.Supp.2d 1015 (N.D. Ill. 2005). In *Mach Mold*, the defendant, Clover, agreed to transport two large pieces of equipment for the plaintiff. The plaintiff later informed Clover that it would prefer to have a union carrier transport the larger piece of equipment. Clover then contacted Kingman, a union carrier, and Kingman agreed to act as carrier. During transport, issues arose with Kingman's portion of the transport, and the piece of equipment transported by Kingman was damaged. The plaintiff brought suit under Carmack alleging that Clover was liable as a motor carrier. Clover refuted this, arguing that it acted as a broker with regard to the transaction. The court held that Clover was a motor carrier, stating:

> Ownership of the vehicles used to transport the machine does not determine whether Clover was providing transportation or merely selling the transportation of another carrier. *See* 49 U.S.C. § 13102(12), (14), & (19) (1997). The mere fact that Clover did not use its own motor vehicles in transporting the machine does not preclude it from being a motor carrier for the purposes of the ICA. *See Keller Indus., Inc. v. U.S.*, 311 F.Supp. 384 (N.D.Fla.1970); *FDL Foods, Inc. v. Kokesch Trucking, Inc.*, 233 Ill.App.3d 245, 174 Ill.Dec. 474, 599 N.E.2d 20, 25-27 (1992) (interpreting the Carmack Amendment).

The court further noted that Clover had provided transport "services." In doing so, the *Mach Mold* court stated:

> Accordingly, if Clover had been authorized to transport the

machine and accepted and legally bound itself to do so, it would not be a broker. *Id.* Instead, Clover would be acting as a "motor carrier" for the purposes of the ICA. Indeed, the facts indicate that it is reasonable to conclude that Mach Mold authorized Clover to ship the machine from Chicago to Mach Mold's Benton Harbor facility, and that Clover did so by contracting with Kingman to help. More to the point, ***Clover has provided no evidence to demonstrate that it registered as a broker as required under the ICA.*** 49 U.S.C. §§ 13901, 13906(b) (1997). Thus, this Court finds that Clover has raised no genuine material issue of fact on the question of its status under the ICA.

Recently, in *Travelers Insurance v. Panalpina, Inc.*, 2010 WL 3894105 (N.D. Ill. 2010), the Northern District of Illinois came to a similar decision. In *Panalpina*, Vera Bradley retained Panalpina to coordinate transportation of a shipment of pajamas. Panalpina retained ITG to "transport" the pajamas to the destination. ITG then retained Buckley to transport the pajamas. While in Buckley's storage yard, the pajamas were set on fire. Vera Bradley and its insurer sought recovery against ITG and Buckley for the shipment under Carmack. ITG claimed it was a broker, and thus, had no liability under Carmack. However, the court held that ITG held itself out as providing "trucking services," and even though ITG did not have motor carrier authority, ITG had assumed responsibility for transporting the shipment of pajamas, and therefore, was a motor carrier for Carmack purposes.

As you can see from the cases above, it is not difficult to find yourself in a situation where the shipper is pointing its finger at you, claiming that you are a carrier. On the other hand, it is not difficult to avoid being painted with the carrier brush. For instance, make clear at the beginning of the relationship that you are providing brokerage services, and document your communications regarding the same. Do not say things like "we will transport" or "our trucks." Make sure your logo and signature block are clear in that your company provides brokerage services, not transportation services. Finally, make sure your company's name does not appear on the bill of lading as the carrier. These little things can go a long way in a court of law, and can save you time, resources and money by helping you avoid carrier liability under Carmack.

For more information, please contact Thomas Kern at tkern@beneschlaw.com or (614) 223-9369.

Transportation Contracting Tips Make Negotiations Less Worrisome

Contracts exist in many forms but, at their base, are legally enforceable agreements between two or more parties. The promises made in the agreement allow the parties to sort out the rights, responsibilities and risks each party will bear in the relationship. Negotiating an agreement, whether you are a motor carrier, shipper or an intermediary, can often be a nerve-wracking experience. However, by following some useful tips and guidelines, the process, and the ultimate outcome, can run much more smoothly for all parties involved.

Address All Issues: One surefire way to increase your chances of a contractual dispute down the road is to avoid addressing certain issues within a contract deliberately. Many times parties will avoid addressing a key issue because it is considered a controversial subject, where they ultimately fear both the confrontation and the eventual outcome of the negotiations. Addressing such a matter before signing the contract allows the parties to address the issue in a calm and rational manner, without the emotion surrounding a dispute during the contractual term. For example, remaining silent on key transportation issues such as the standard of liability, a maximum liability for loss or damage to freight, or the use of release values, believing that these terms can be "worked out" later, is a recipe for disaster.

Look at All Scenarios: Just because a situation is not probable does not make it impossible. Brainstorm to make sure that every possible scenario is addressed within the agreement. For example, many agreements neglect to address damages that could result beyond the direct damages associated with a loss or delay to freight. What if a key replacement part is lost during shipment, which results in the consignee's factory sitting idle for three additional days until another replacement part can arrive? The commercial loss could total in the millions of dollars. Is the motor carrier in any way responsible for this loss? Addressing these scenarios in the contract avoids questions and controversies should these exact situations arise.

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Transportation Contracting Tips Make Negotiations Less Worrisome

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Avoid Ambiguities: When the language in a contract is so ambiguous that no one is clear on its exact meaning, make sure you define any ambiguous terms. By human nature, each party will likely view the ambiguous term in the most self-favoring way. Defining these ambiguous terms eliminates all confusion so that each party knows the score up front.

Eliminate Vague Language: Similarly, if a clause is vague or difficult to understand, either clarify or remove it. Many motor carriers will utilize "form" agreements borrowed from another carrier or found on the Internet. Oftentimes, these borrowed agreements are multiple iterations removed from the agreement that was originally drafted, with special terms or clauses inserted by each user down the line. Terms inserted by other carriers are usually unique to their own circumstances. Although the next motor carrier user does not understand the term, he or she assumes that it must be important and so leaves it in the "form" agreement. While sometimes such a term is relatively harmless, other times a party may be agreeing to something that is either unacceptable or impossible to perform. As a general rule, make sure you understand each term to which you are agreeing in the contract to avoid any misunderstandings, disputes or possible litigation down the road.

"…remaining silent on key transportation issues such as the standard of liability, a maximum liability for loss or damage to freight, or the use of release values, believing that these terms can be 'worked out' later, is a recipe for disaster."

Consider Past Relationships: History tends to repeat itself, even in the context of a business relationship. If a motor carrier and shipper have done business together for several years and have worked out any differences fairly and respectfully, the parties should consider this positive relationship when negotiating any new terms. Taking on added risk or liability with a trusted partner can help further cement an ongoing relationship while often turning out to be less of a risk than the parties anticipated. On the other hand, parties may not necessarily want to throw caution to the wind if they are entering into an agreement with a new party for the first time.

Understand the Other Party's Business: Sometimes, due to the other party's business structure, the risk that one party is asked to assume is, in reality, much lower than anticipated. Understanding how a party operates and what other companies also partner with that party may be an integral part of understanding the liabilities under the agreement. For instance, if a shipper is subcontracting all or nearly all of its warehousing and distribution operations to third parties, aggressively providing indemnification for the shipper in instances associated with the freight movement may ultimately create minimal exposure for the motor carrier.

Evaluate Alternatives: Just because a term has been used in past agreements does not mean that viable alternatives should not be considered and used. Often, these alternatives provide as strong protection for the parties as the tried-and-true terms. For example, a non-solicitation clause is an alternative to a non-compete clause. Non-compete clauses are frequently under scrutiny by courts who believe they may unduly restrict an employee's ability to earn a living, particularly in light of our current harsh economic climate. Non-solicitation clauses, on the other hand, allow salespersons to move as an employee from one motor carrier to another. However, the salesperson typically is restricted from soliciting any of his or her old employer's current customers or customer prospects. This provides the employee the freedom to seek the best employment situation possible while also protecting the motor carrier employer from having its customer sales list cannibalized.

Finding a middle ground between acceptable risks and business considerations is often a tricky business. These tips, while certainly not comprehensive in scope, will go a long way to assist motor carriers, shippers and brokers in negotiations among themselves and with independent contractors and employees.

For more information, please contact Teresa Purtiman at tpurtiman@beneschlaw.com or (614) 223-9380.

Bankruptcy Logistics Part 2

On June 29, 2011 updated Article 7 of the Uniform Commercial Code went into effect in Ohio—bringing Ohio in line with the vast majority of all other States.

Now, electronic warehouse receipts and electronic bills of lading procedures are expressly recognized in Ohio. The terms and plain meaning of your storage agreement, and the amount and extent of the liens referenced therein, are the real focus for Courts to determine the extent of your lien rights.

In our Spring 2011 issue of *InterConnect*, you read about liens and other rights and benefits available for carriers, warehousemen and 3PLs when these logistic providers are creditors in a Chapter 7 or Chapter 11 case. These lien rights play an important role in bankruptcy cases and *the existence and extent of these rights are governed by state law*. Therefore, at least in Ohio, there has never been a better time to review your bills of lading, warehouse receipts, carrier and storage agreements, and practices to provide better predictability for all parties involved in the supply chain.

These rights and benefits are not only helpful in the front end of a bankruptcy case, they are very useful in the back end of the case as well. These liens and other rights are useful to defend against the ever-annoying Avoidance Action. The most common Avoidance Action, the Preference Action, is the easiest and cheapest method for a debtor or trustee to utilize in recovering funds that typically go to paying the costs of administration.

A preference is typically easy to prove by asking these questions: (1) Did you receive a transfer from the debtor or transfers of its broadly defined property rights?; (2) Were you a creditor of the debtor with some debt arising (or to arise)?; (3) Was the debtor insolvent (insolvency presumed!) and did you get paid within the 90 days prior to filing of the case?; and (4) Did you receive more than you would have received if, instead of getting paid, you took your lumps in a Chapter 7 case?

> ***"Bottom line:** If you provide storage and handling and got paid for storage and handling, and if your documents are in order, **you should not have any preference liability**!"*

This last element can be defeated by the important lien rights referenced above. With lien rights, you would have made out alright by asserting your rights in a Chapter 7 case—yet instead you got paid before the bankruptcy filing. Therefore, no harm in getting paid and thus no liability to send back any funds. Furthermore, (1) and (2) above can be challenged based upon interline or other trust fund relationships between you and the debtor. Finally, sections 545 and 546 of the Bankruptcy Code provide specific protections for warehousemen and general protections for carriers. **Bottom line:** If you provide storage and handling and got paid for storage and handling, and if your documents are in order, **you should not have any preference liability**!

If these elements can be proved, then the typical defenses are: (1) "Subsequent New Value," (2) "Ordinary Course," and (3) "Contemporaneous Exchange." Of course, for those with lien rights, specific defenses are available to those who receive security interests in inventory or a receivable within the 90 days prior to the filing. Defenses are also available for the fixing of statutory liens that are not avoidable under section 545. These specific defenses help many of those that have carrier liens, mechanics liens and security interests granted through carrier and storage agreements. Logistics community—these defenses are another line of defense for you!

In the Fall 2011 issue of *InterConnect*, I will review these typical defenses as they are applied to the very unique operations of logistics providers. In the meantime… know your rights.

For more information, please contact David Neumann at dneumann@beneschlaw.com or (216) 363-4584.

Recent Events

Marc Blubaugh presented the *Freight Loss and Damage Workshop* and **Martha Payne** served as a panelist for the *International Shipping – Air and Ocean Panel* at the **Transportation and Logistics Council/Transportation Loss Prevention & Security Association Annual Conference** in St. Louis, MO, on April 3–6, 2011. **Eric Zalud** also attended and presented in the *Freight Brokerage Workshop*. Additionally, Martha attended the Transportation Loss Prevention & Security Association Board of Directors meeting.

Martha Payne and **Eric Zalud** attended the **Transportation Intermediaries Association 33rd Annual Trade Show and Convention** in Orlando, FL, on April 6–9, 2011. **Eric Zalud** spoke on the *Legal Panel on Vicarious Liability Issues*.

Teresa Purtiman attended the **National Private Truck Council 2011 Education Management Conference & Exhibition** in Cincinnati, OH, on April 17–19, 2011.

Marc Blubaugh presented *Playing Your Aces: F4A Preemption – New Developments to Help You Use It As a Shield and Sword* at the **Transportation Lawyers Association Annual Conference** in Las Vegas, NV, on May 10–14, 2011. **David Neumann**, **Martha Payne** and **Eric Zalud** also attended. Marc and Eric also attended the TLA Executive Committee Meeting and Eric was the Co-Chair of the educational program. Marc was elected Second Vice President of the Association.

Teresa Purtiman and **Tom Washbush** attended the **Messenger Courier Association of America's Conference** in Las Vegas, NV, on May 11–14, 2011.

Rich Plewacki, Eric Zalud and **Steve Auvil** attended the **American Trucking Association Leadership Meeting** in White Sulphur, WV, on May 15–17, 2011. Eric and Steve presented on the *PJC Logistics Patent Litigation*.

Martha Payne attended the **Cargo News Northwest Intermodal Conference** in Portland, OR, on May 17–18, 2011.

Martha Payne attended the **SMC3 Connections 2011** in Coeur d'Alene, ID, on June 14–17, 2011.

Eric Zalud attended the **Terralex Conference** in Seattle, WA, on June 16–18, 2011.

Eric Zalud and **Teresa Purtiman** attended the **EyeForTransport Logistics Conference** in Atlanta, GA, on June 21–23, 2011.

Marc Blubaugh presented a *Transportation Law Update* at the **International Warehousing Logistics Association's Annual Legal Symposium** in Chicago, IL, on June 22, 2011.

Martha Payne and **Eric Zalud** attended the **Conference of Freight Counsel Meeting** in Chicago, IL, on June 26–27, 2011.

Marc Blubaugh attended the **2011 Defense Logistics Agency Industry Conference** in Columbus, OH, on June 28, 2011.

On the Horizon

Eric Zalud will be speaking on *CSA 2010 Casualty Litigation Implications* at the **American Trucking Association's Motor Carrier General Counsel Forum** in La Jolla, CA, on July 24–27, 2011. **Marc Blubaugh** will also be attending.

Eric Zalud will be presenting a webinar for the **Council on Litigation Management** entitled *Emergency Response and Crisis Management for Transportation Industries, Part 1*, on July 27, 2011.

Eric Zalud and **Rich Plewacki** will be attending the **National Tank Truck Carriers Board of Directors Meeting** in Colorado Springs, CO, on July 27–28, 2011.

Marc Blubaugh will be presenting *Freight Broker Liability: Can You Plug the Leak in the Dike?* at the **International Warehousing Logistics Association Insurance Company's Captive Insurance Board of Directors' Annual Meeting** in Lake Tahoe, CA, on July 28, 2011.

Marc Blubaugh will be attending the **Transportation Lawyers Association Executive Committee Meeting** in Boulder, CO, on July 30, 2011.

Marc Blubaugh will be presenting *Transportation Law: Navigating the Regulatory Landscape* at the **Annual International Warehousing Logistics Association's Safety & Risk Conference** in Memphis, TN, on September 15, 2011.

Eric Zalud will be speaking on *Cargo Insurance Issues* at the **Trucking Industry Defense Association Cargo Seminar: Back to Basics** in Cleveland, OH, on September 21, 2011.

For further information and registration, please contact Megan Pajakowski, Client Services Manager at mpajakowski@beneschlaw.com or (216) 363-4639.

Pass this copy of *InterConnect* on to a colleague, or e-mail Ellen Mellott at emellott@beneschlaw.com to add someone to the mailing list.

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