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CARGO CLAIM LIABILITY OF DOMESTIC MOTOR CARRIERS AND FREIGHT FORWARDERS

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INTRODUCTION

In the United States, there exist three types of entities engaged in providing interstate or foreign transportation services by motor vehicle: carriers, freight forwarders and brokers. Liability for freight loss, damage and delay claims depends upon the type of entity providing the services. With many companies wearing more than one hat, knowingly or otherwise, and the influx of "logistics providers" in the industry in the last few decades, determining who is serving in what role and the

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corresponding standard of liability may pose a challenge for claimants, transportation providers and their counsel.

The law governing the liability of interstate motor carriers and freight forwarders for freight claims in the United States, in the absence of a contract to the contrary, is known as the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 14706)³. It is the exclusive remedy (state tort and contract theories are preempted) and carries a simple set of elements for a claimant to establish near strict liability. Brokers, on the other hand, providing that they are actually serving as brokers and not assuming carrier liability expressly or through their conduct, are not subject to Carmack Amendment liability for problems occurring with shipments transported at their request but may be subject to breach of contract liability based on commitments made to their customers.

RESPECTIVE ROLES OF TRANSPORTATION ENTITIES

A motor carrier is one that physically transports freight in trucks. In the U.S., for freight claim liability purposes, there is a single type of motor carrier on the domestic front. Though prior to the ICC Termination Act of 1995, the Interstate Commerce Act made a distinction between common and contract carriers with respect to licensing and operations requirements, among others, revisions to the Act resulted in application of the Carmack Amendment, which previously applied only to common carriers and freight forwarders, to contract carriers as well.

A broker is one that arranges for motor carrier services but does not physically handle the freight. 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 a motor carrier for compensation." (49 U.S.C. § 13102[2].) Similarly, the federal regulations define a broker as "a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier." (49 C.F.R. § 371.2[a].)

Motor carriers that do not hold broker authority are prohibited from brokering shipments. A carrier that nevertheless does delegate a shipment to another carrier after accepting responsibility for a shipment does not escape Carmack Amendment liability through the act of brokering the shipment.

A freight forwarder, while also an arranger of motor carrier services, is distinct from a broker for liability purposes. "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 -

20(11) before that, the name "Carmack Amendment" continues to be used.

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³ On December 29, 1995, Congress substantially reorganized and modified the Interstate Commerce Act through the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"). Though that Act amended and recodified the provisions of the Carmack Amendment, previously appearing at 49 U.S.C. § 11707 and §

- (a) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations 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." (49 U.S.C § 13102[8].)

A freight forwarder, in contrast to a broker, actually physically handles the freight, assembling, consolidating and distributing the goods. It serves as the carrier to its shipper, assuming full Carmack Amendment liability, and as a shipper to the carrier it retains to transport the freight. (*Tokio Marine & Fire Ins. Group v. J.J. Phoenix Exp.*, Ltd., 156 F.Supp.2d 889, 898 [N.D. Ill. 2001].)

LIABILITY OF CARRIERS AND FORWARDERS FOR CARGO CLAIMS

Questions of liability of a motor carrier or freight forwarder with respect to loss of, damage to or delay in delivery of a shipment of property transported in interstate commerce are matters of federal law, controlled exclusively by the Carmack Amendment. (Missouri Pacific R. R. Company v. Elmore & Stahl, 377 U.S. 135, 137, 12 L. Ed. 2d 194, 84 S. Ct. 1142 [1964].)

The Carmack Amendment provides, in relevant part, as follows:

"General liability:

Motor carriers and freight forwarders. A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 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 subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 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 or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading. . . . Failure to issue a receipt or bill of lading does not affect the liability of a carrier."

(49 U.S.C. § 14706[a]. See also § 11706 for a similar provision for rail carriers.)

The parties to a domestic transportation transaction, however, may waive application of the Carmack Amendment liability provisions through written contract:

"If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness."

(49 U.S.C. § 14101[b][1].)⁴

Where the parties expressly waive the Carmack Amendment rights and remedies, the exclusive remedy for any alleged breach of the contract is an action in the appropriate state or district court, unless the parties otherwise agree. (49 U.S.C. § 14101[b][2].)

Assuming no contractual exemption, the following aspects of the Carmack Amendment liability regime apply.

Elements of the Shipper's Case

To establish a case of liability against a carrier, the claimant/plaintiff must satisfy a three-pronged test by proving (1) delivery of the goods to the carrier in good condition; (2) delivery by the carrier to the consignee in damaged condition or non-delivery; and (3) damages. (*Missouri Pacific R.R Company*, 377 U.S. at 138.)

Hence, the burden is on the claimant to prove that the items allegedly damaged or missing were in fact all received by the carrier and in good condition; that all such items were delivered by the carrier in worsened condition or not delivered; and that the claimant suffered a measurable amount of damages as a result thereof.

This is a simple case for the plaintiff to make. It does not have to prove *how* the loss or damage happened; only that it *did* happen. However, without proof to establish all three prongs of the prima face case, a claimant's case against an interstate carrier or forwarder fails. At least one court has held that, even where loss in the hands of the carrier is established, if no clear proof of the amount of that loss is presented, a plaintiff cannot recover anything from the carrier. (*Cetek Technologies, Inc. v. North American Van Lines, Inc.*, 2005 WL 859299 [2d Cir. 2005].)

Common Law Defenses to Carmack Liability

Once the plaintiff has established the required elements, the carrier may rebut the presumption of liability by establishing that the loss or damage was caused by (1) the act or default of the shipper (improper packaging or loading); (2) an act of God; (3) the act of a public enemy; (4) the act of a public authority; or (5) the inherent vice or nature of the goods. (*Missouri Pacific*, 377 U.S. at 137.)

⁴ By its terms, this section does not apply to the movement of household goods.

Even if the motor carrier proves a defense, it must also show freedom from negligence. (*Ismert-Hincke Milling Co. v. Union Pac. R.R. Co.*, 238 F.2d 14, 16 [10th Cir. 1939] [If the carrier "failed to act as a reasonable prudent person would under the circumstances and failed to take reasonable available means to avoid or minimize the loss resulting therefrom," the carrier is liable]; *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1241 [S.D. Ala. 2001] ["The damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier . . ."].)

i. The Act or Default of the Shipper

The act or default of the shipper – along with the inherent vice or nature of the goods – is the most common defense raised by a motor carrier in a cargo damage claim. It arises in situations where the cargo loss or damage is caused solely by an act or fault of the shipper or owner of the goods, typically if packaging or loading is the responsibility of the shipper. As a general rule, when the shipper assumes the responsibility of loading, it becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier. (See, for example, Joe Schlitz Brewing Co. v. Transcon Lines, 571 F.Supp. 52, 57 [E.D. Wis. 1983], rev'd, 757 F.2d 171 [7th Cir. 1985]; U.S. v. Savage Truck Line, Inc., 209 F.2d 442, 445 [4th Cir. 1953].) However, if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. (Id.)

ii. An Act of God

The act of God defense is typically invoked when a natural disaster or other similar event occurs that the carrier is powerless to avoid or resist. While usually weather related, the carrier needs to prove that "the disturbance causing the damage, by whatever term it is described, is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it in the protection of property committed to its custody." (Compania de Vapores Insco, S.A. v. Missouri Pac. R.R. Co., 232 F.2d 657, 600 [5th Cir. 1956]). For the defense to succeed, the carrier must attempt to protect the goods from a disaster of which it has or should have had notice (American Sugar Refining Co. v. Illinois Cent. R.R. Co., 103 F. Supp. 280, 286 [E.D. La. 1952]) and must protect the goods to minimize the damages during the occurrence and after the catastrophe has taken place. (Ismert-Hincke Milling Co., 238 F.2d at 16.) In other words, even if the goods are damaged because of a hurricane or tornado, if the carrier has knowledge the weather event is occurring and knowingly drives into it, the Act of God defense will not apply.

iii. The Act of a Public Enemy

The Act of a Public Enemy (or "Act of War") defense typically is limited to situations where loss or damage is caused by hostile acts of military forces which are the enemies of the government.⁵ Given its narrow scope, this is a rarely used defense. Courts have held that "thieves, rioters and robbers, although at war with social order, are not to be classed as 'public enemies' in a legal sense, but are merely depredators for whose acts the carrier remains liable." (*Crystal, Inc. v. Ehrlich-Newmark Co.*, 64 Misc. 2d 325, 326 [N.Y. Civ. Ct. 1970]; see also *American Cigarette Cigar Co.* v. *Garner*, 47 S.E.2d 854 [N.C. 1948].) However, some courts have suggested that under appropriate circumstances, arson may be considered as an act of the public

⁵ Note that most cargo insurance policies exclude coverage for these acts.

enemy. (IBM Corp. v. Fernstrom Storage Van Co., 82 C 4089, 1985 WL 1111, at *3 n. 4 [N.D. Ill. 1985]; Brockway-Smith Co. v. Boston and Maine Corp., 497 F. Supp. 814, 820 n. 9 [D. Mass. 1980].)

iv. The Act of a Public Authority

The Act of a Public Authority defense is another rarely used defense. When proven, it relieves a motor carrier of liability if the loss or damage occurred because of an action or directive from a public authority, such as governmental orders that prevented delivery or required a route change. However, even in instances where the government seized a shipment of poultry to feed flood victims, the exception did not apply because the seizing authority relied on the carrier's false representation that the fowls were abandoned and dying and not subject to further consignment. (*Chicago & Eastern Illinois Railroad Company v. Collins Produce Co.*, 249 U.S. 186 [1919].) In cases of an embargo, motor carriers likely remain liable where they have accepted shipments knowing of the possibility of an embargo on a connecting carrier which would render it unable to fulfill contract. (*Boyd v. King*, 201 Mich. 436 [1918], *cert. denied*, 248 U.S. 572 [1918].)

v. <u>The Inherent Vice or Nature of the Goods</u>

The inherent vice or nature of the goods defense is one of the more common defenses raised by motor carriers. Courts have defined an inherent vice as "[a]ny existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with the lapse of time." (*Missouri Pac. R.R. Co*, 377 U.S. at 136.) These cases typically involve goods such as fruits, vegetables, dairy products, and frozen items. The carrier must prove the inherent vice or nature of the goods was the sole cause of the damage or loss and prove the portion of the shipment damaged. (*Harbert Int'l Establishment v. Power Shipping*, 635 F.2d 370, 375 [5th Cir. 1981].)

Time Limitations for Claims and Actions

Generally, a claim against a carrier must be filed within nine months of delivery or, in the case of non-delivery, within nine months of a reasonable time for delivery; and suits on a claim must be filed within two years of the carrier's written claim declination. These are the minimum periods prescribed by the Carmack Amendment. (49 U.S.C. § 14706[e][1].) However, to enforce such time limits, a carrier must establish such limits – shorter limits are not permitted - in a contract between the shipper and carrier, in the bill of lading or in the carrier's tariff⁶ or other document issued to its customer. The Uniform Domestic Straight Bill of Lading set forth in the

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⁶ The tariff-filing requirement for general commodities carriers is long in the past. Such carriers are simply required to maintain tariffs and to provide to their shipper customers, upon request, "a written or electronic copy of the rate, classification, rules, and practices, upon which any rate applicable to its shipment or agreed to between the shipper and carrier is based." (49 U.S.C. § 13710[a][1]; 49 U.S.C. § 14706[c][1][B].) Only household goods carriers and those engaged in domestic offshore trade are required to file tariffs with the Surface Transportation Board. (49 U.S.C. § 13702.)

National Motor Freight Classification and commonly used by shippers and carriers⁷ contains such a provision at Section 3:

- "(a) As a condition precedent to recovery, claims must be filed in writing with any participating carrier having sufficient information to identify the shipment.
- (b) Claims for loss or damage must be filed within nine months after the delivery of the property . . . except that claims for failure to make delivery must be filed within nine months after a reasonable time for delivery has elapsed.
- (c) Suits for loss, damage, injury or delay shall be instituted against any carrier no later than two years and one day from the day when written notice is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts of the claim specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Provided that the claim-filing and suit-filing limits are established by the carrier and connected to the particular shipment, such as through a bill of lading, credit application or contract expressly stating such time limits or incorporating such tariff provisions, if the filing requirements are not timely satisfied, a carrier may escape liability altogether. (Culver and Marine Office of America Corporation v. Boat Transit, Inc., 782 F.2d 1467 [9th Cir. 1986]; Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900 [2d Cir. 1980]; St. Paul Fire and Marine Insurance Co. v. Triad Installation & Moving Services, Inc., 157 F. Supp. 2d 223 [D. Conn. 2001]; and North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 234 [2d Cir. 1978].)

Measure of Damages for Loss or Damage

i. Actual Damages Only

The liability imposed under the Carmack Amendment is for "the actual loss or injury to the property caused by" the carrier. (49 U.S.C. § 14706[a][1].) That places the maximum liability of the carrier, according to the interpretive case law, for damaged goods as the 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 (Contempo Metal Furniture Company of California v. East Texas Motor Freight Lines, Inc., 661 F.2d 761, 764 [9th Cir. 1981]); and for lost goods as the destination value of the goods shipped (Meletio Sea Food Co. v. Gordons Transport, 191 S.W.2d 983 [Mo. App. 1946].) The plaintiff is not necessarily entitled to such damages, however, for the market value test, if not the most accurate measure of the actual loss, may be discarded where another rule better computes actual damages. (Illinois Central Railroad Co. v. Crail, 281 U.S. 57, 64-65, 74 L. Ed. 699, 50 S. Ct. 180 [1930].) For example, if the property was not a total loss and the cost of repair is not out of proportion to the value of the property, the reasonable cost of repair is

⁷ Note that the Uniform Domestic Straight Bill of Lading is a copyrighted document available exclusively for the use of participants in the National Motor Freight Classification.

considered the appropriate measure of damages. (Continental Can Company, Inc. v. Eazor Express, Inc., 354 F.2d 222 [2d Cir. 1965].)

The courts have generally held that if the goods were moving pursuant to a sale made prior to tendering the goods to the carrier, it is the sales price that constitutes the market value at origin. In the absence of a sales contract prior to transportation, though, for new, unused goods, market value at origin is determined by the claimant's purchase price or cost of manufacture. Speculative profits are not recoverable even with proof of prior sales of similar goods. (Camar Corporation v. Preston Trucking Company, 221 F.3d 271, 276-78 [1st Cir. 2000].) In Camar, for example, the shipper had not arranged for the sale of any of its goods prior to tendering the freight to the carrier, but, certainly, hoped to make sales following delivery. The court denied the plaintiff recovery of any potential profits, limiting the liability of the carrier to plaintiff's cost for the subject goods only. In the unusual situation that the shipper is the sole manufacturer of the goods and can prove that it sells everything it produces based on consistent market demand, a court may permit the shipper to recover the amount for which it would have sold the goods been delivered intact. (See, for example, Polaroid Corp. v. Schuster's Express, Inc., 484 F.2d 349 [1st Cir. 1973].)

For used goods, it is the shipper's cost that serves as the *starting* point in determining fair market value at origin. From there, it must be determined the extent of use and therefore reduction in value since their purchase. Stated another way, "fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell but is not compelled to do so, and a buyer who wishes to sell (sic) but is not compelled to do so." (*Zarn, Inc. v. Southern Railway Company*, 274 S.E.2d 251, 255 [Ct. App. N.C. 1981].)

Furthermore, damages must be measured in terms of the economic loss to the claimant, not by what may have been paid to the claimant under an insurance contract. (*Amstar Corp. v. M/VAlexandros T.*, 472 F. Supp. 1289, 1296 [D. Md. 1979], aff'd., 664 F.2d 904 [4th Cir. 1981].)

ii. No Special or Consequential Damages

Under the Carmack Amendment, nothing above the actual damages, including a claimant's anticipated profits, replacement value and incidental costs, among others, is recoverable. Such damages constitute special damages and are not recoverable unless they have been contemplated as between the shipper and carrier at the time the transportation agreement was made, i.e., that actual notice was given to the carrier at or prior to its receipt of the goods that such damages would result from loss, damage or delay. (Contempo Metal Furniture, 661 F.2d at 764; Main Road Bakery, Inc. v. Consolidated Freightways, 799 F. Supp. 26 [D.N.J. 1992]; Hycel, Inc. v. American Airlines, Inc., 328 F. Supp. 190 [S.D. Tx. 1971]; Scheppel v. Arkansas-Best Freight System, Inc., 254 N.E.2d 280 [D. Ill. 1970]; Meletio Sea Food Co. v. Gordons Transports, Inc., 191 S.W.2d 983 [Mo. App. 1946].)

iii. No Punitive Damages

Carriers subject to the Carmack Amendment are also exempt from liability for punitive damages. As such damages constitute a form of relief inconsistent with the Carmack Amendment, a request for such damages is deemed preempted, thereby precluding a shipper from recovering punitive damages in an action against a carrier for loss of or damage to freight transported in interstate commerce. (Charleston & Western Carolina Railway Company v. Varnville Furniture Company, 237 U.S. 597,

604, 59 L. Ed. 1137, 35 S. Ct. 715 [1915]; Cleveland v. Beltman North American Co., Inc., 30 F.3d 373, 379 [2d Cir. 1994], cert. denied, 513 U.S. 1110, 130 L. Ed.2d 785, 115 S. Ct. 901 [1995].)

iv. No Attorneys' Fees

Moreover, attorneys' fees are not recoverable under the Carmack Amendment. The rule consistently applied is that, in the absence of contractual or statutory liability therefor, attorneys' fees and related expenses are not recoverable as an element of damages. Neither the Uniform Straight Bill of Lading nor the Carmack Amendment contains such a provision; and courts have therefore continually held that plaintiffs are not entitled to such fees where the Carmack Amendment governs liability. (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 and Storage, 818 F. Supp. 178 [N.D. Tx. 1993], aff'd., 6 F.3d 305 [5th Cir. 1993].)

The only statutory bases for recovery of attorneys' fees from interstate carriers are 49 section 14704 (as a remedy available to one injured by a carrier who fails to obey an order of the Secretary of Transportation or the Surface Transportation Board); section 14707 (as a remedy available to a person injured by the transportation or service of a carrier who fails to comply with the registration requirements of the Interstate Commerce Act); and section 14708 (as a remedy available to COD household goods shippers only through a court action following submission of a loss or damage claim to the independent arbitration process made available by the carrier).

v. <u>Limitations of Liability</u>

Notwithstanding the foregoing, a carrier's liability for loss, damage or delay may be limited by contract or tariff. 49 U.S.C. section 14706(c)(1) permits carriers to limit their liability through written or electronic declaration of the shipper:

"[A] carrier . . . may . . . establish rates for the transportation of property . . . under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper . . ."

An interstate motor carrier or forwarder may, therefore, limit its liability for cargo claims through written agreement by the shipper in the form of a bill of lading or a separate transportation agreement between the parties or through a tariff provision. The burden of establishing an enforceable limitation of liability rests with the carrier. (*Schweitzer Aircraft Corp. v. Landstar Ranger, Inc.*, 114 F. Supp. 2d 199, 201 [W.D.N.Y. 2000].)

Where a limitation appears on the face of the bill of lading, one need look no further to determine the limits of the carrier's liability. (Siren, Inc. v. Estes Express Lines, 249 F.3d 1268, 1270-71 [11th Cir. 2001].) The bill of lading is the basic transportation contract between the shipper and carrier, its terms and conditions binding on the shipper, carrier and consignee. (Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 362, 72 L. Ed.2d 114, 102 S. Ct. 1815 [1982].)

Where the limitation appears in a written agreement between the shipper and carrier, the laws of contract interpretation govern, requiring the enforcement of the agreed-upon terms.

If no such provision appears in the bill of lading or in a stand-alone contract, a carrier may limit its liability through tariff if it: (1) makes its tariff available to the shipper upon request; (2) obtains the shipper's agreement as to its choice of liability; (3) gives the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issues a receipt or bill of lading prior to moving the shipment. (*Hughes v. United Van Lines*, 829 F.2d 1407, 1415 [7th Cir. 1987].)⁸ Courts have also shown an inclination to enforce a tariff limitation provision where it is shown simply that the shipper prepares the bill of lading incorporating the terms of the carrier's tariffs. Under such circumstances, the shipper is deemed to be familiar with and consent to such terms. (*EFS National Bank v. Averitt Express, Inc.*, 164 F. Supp. 2d 994, 1002 [W.D. Tenn. 2001].)

Household goods carriers, which are expressly excepted from the section 14706(c)(1) rules for limitation of liability by other motor carriers, are also permitted to set reduced liability levels. Section 14706(f) provides that a "carrier or group of carriers . . . may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of a carrier for that property is limited to a value established by written declaration of the shipper or by written agreement."

Jurisdiction for Carmack Cases (State or Federal Court)

An action against a carrier under section 14706 may be brought in either a state court or a federal court. (49 U.S.C. § 14706[d][1], [3].) That concurrent jurisdiction has long existed. (See, for example, *Missouri ex rel. St. Louis B. & M.R. Co. v. Taylor*, 266 U.S. 200, 69 L. Ed. 247, 45 S. Ct. 47 [1924].) However, when the plaintiff files an action in a state court involving over \$10,000.00, exclusive of interest and costs, for a single move (or, if multiple shipments involved, over \$10,000.00 per bill of lading), the defendant carrier may remove the case to federal court. 28 U.S.C. section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds \$10,000, exclusive of interest and costs."

in conjunction with 28 U.S.C. section 1441:

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⁸ This four-step test was established in the days of tariff filing. Accordingly, the first requirement was that the carrier file its tariff with the Interstate Commerce Commission. With tariff-filing for general commodities carriers a thing of the past, courts continue to cite *Hughes v. United Van Lines* as the seminal case but substitute the maintenance requirement for the filing requirement in the first step of the test. (See, for example, *Schweitzer v. Landstar Ranger*, 114 F. Supp. 2d at 201.)

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

provides the defendant carrier's right of removal.

Generally, interstate carriers prefer to remove freight claim cases to federal court and, assuming that the necessary monetary threshold is met and that the removal is timely, the plaintiff has no opportunity to return the case to state court.

Venue for Carmack Cases

The venue rules applicable to Carmack Amendment cases provide that an action must be tried against the delivering carrier in a judicial district or state through which the defendant carrier operates and an action against the carrier responsible for the loss or damage where the loss or damage is alleged to have occurred. (49 U.S.C. § 14706[d][1] and [2].)

With the vast majority of carriers operating on a nationwide basis, the provision that allows the plaintiff to sue the delivering carrier in a judicial district or state through which the defendant carrier operates, as a practical matter, prevents the carrier from limiting venue to the location in which the key witnesses are located (though a carrier defendant has the right to file a motion asserting inconvenient forum, the decision on which is purely within the discretion of the judge).

Several courts have held that forum selection clauses contained in contracts or other agreements are preempted by the Carmack Amendment. (See, for example, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 98 [2010] [stating in dicta that "if Carmack's terms appl[ied] . . . the [defendants] would have [had] a substantial argument that the . . . forum-selection clause . . . [was] pre-empted by Carmack's venue provisions"]; Smallwood v. Allied Van Lines, Inc., 660 F.3d 1115, 1121-22 [9th Cir. 2011] ["One of these inalienable requirements is that the shipper be permitted to sue in certain venues when a dispute arises. . . . These provisions assure the shipper a choice of forums as plaintiff."]; Icon Health v. NVC Logistics Grp., Inc., 2017 WL 2656112, *3 [D. Utah 2017] [finding that "[the defendant's] forum selection clause [was] preempted . . . [and] Carmack applie[d]"].)

Carmack Preemption (Exclusive Remedy)

The preemptive effect of the Carmack Amendment was first discussed by the United States Supreme Court in 1913 in *Adams Express Co. v. Croninger*, 226 U.S. 491, 57 L.Ed. 314, 33 S.Ct. 148 (1913), wherein it was held that the remedy provision exclusively governs questions of carrier liability and preempts all state and common law remedies inconsistent therewith. Adopting the preemptive effect of the Carmack Amendment, courts throughout the country have held causes of action for negligence, breach of contract, fraud, misrepresentation, bad faith, intentional or negligent infliction of emotional distress, interference with economic advantage and conversion,

among others, to be preempted and therefore dismissible, leaving only liability under the Carmack Amendment to be considered.

While some courts have "recognize[d] that carriers may be liable to shippers in tort for incidental harms associated with the loss or damage of cargo . . . as distinct from a loss of, or damage to, the goods," (North American Van Lines, Inc. v. Pinkerton Security Systems, Inc., 89 F.3d 452 [7th Cir. 1996]), the majority of courts, including the Pinkerton court just quoted, uphold the preemptive effect of the Carmack Amendment.

Preemption of non-Carmack claims was bolstered by the expansion of the term "transportation" through ICCTA to include pre- and post-shipment conduct. Such term now includes arranging for, packing and unpacking (49 U.S.C. § 13102[23][B]) in addition to the previous "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property" (former 49 U.S.C. § 10102[28][B], now 49 U.S.C. § 13102[23][B]).

CONCLUSION

The Carmack Amendment is broad in its scope and application with respect to interstate cargo claims. From considerations of removal, time limitations for making a claim, defenses, liability limitations, and damages, a thorough understanding of the Carmack Amendment is vital for all entities involved in the interstate carriage of goods.