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Panel #3 – Freight Broker Liability

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Freight Broker Liability

Brief Overview

- What is a broker?
 - “**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.**” 49 U.S.C. § 13102(2).
 - If the motor carrier moves the cargo, the broker is the intermediary arranging for that movement
 - Differs from a freight forwarder—also liable under Carmack—because brokers do not deal with consolidating, do not assume responsibility or take possession for the movement of the cargo, typically do not do international shipping
 - DOT requires licensing for brokers, just like freight forwarders and motor carrier



Claims Against Brokers

- Carmack
- Negligence/Tort Claims
- Contract



Available Defenses - Carmack

- Brokers are NOT liable under the Carmack Amendment (only motor carriers and freight forwarders)
- Issues arise when Shippers/Plaintiffs claim that a broker acted as a motor carrier or freight forwarder
- Often this is an issue of fact and the Court considers:
 - Licensing of entity (not dispositive alone)
 - How it holds itself out, including advertisements
 - All services offered
 - Promises made/services offered to Shipper
 - Actual role in the shipment at issue
- Remedies to Prevent
 - Shipper/broker agreements clarifying the role of the broker
 - Clear communications between broker and shipping customers as to broker's role
 - Website language that does not imply broker owns trucks
 - Do not allow labeling as "carrier" on bill of lading
- If found to be motor carrier, can cross-claim against motor carrier for contribution



Negligence/Tort Claims

FAAAA Preemption

- U.S. Congress enacted a statute (now codified at 49 U.S.C. § 14501(c)(1)) that controls over state and local law:
 - **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.*
- Was aimed at creating uniformity for the transportation industry
- Exception: “safety regulatory authority of a State with respect to motor vehicles”
- Basic rule: non-contract, common law claims are preempted by FAAAA



Negligence/Tort Claims

Courts have three approaches to FAAAAA preemption

1. The FAAAAA does *not* preempt negligence claims
2. The FAAAAA does preempt negligence claims *but* the “safety exception” saves the claim
3. The FAAAAA does preempt negligence claims and the “safety exception” does *not* save the claim



Negligence/Tort Claims

1. The FAAAA does *not* preempt negligence claims
 - Growing minority; handful of district court cases
 - *Crawford v. Move Freight Trucking, LLC*, 2024 WL 762377 (W.D. Va. Feb. 20, 2024)
2. The FAAAA does preempt negligence claims *but* the “safety exception” saves the claim
 - *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020)
 - Claim “relates to” broker services, but safety exception applies
 - Personal injury claim



Negligence/Tort Claims

3. The FAAAA does preempt negligence claims and the “safety exception” does *not* save the claim
 - Gaining ground
 - *Aspen American Insurance Company v. Landstar Ranger, Inc.*, 65 F.4th1261 (11th Cir. 2023)
 - Stolen cargo claim
 - *Ying Ye v. Global Sunrise*, 74 F.4th 453 (7th Cir. 2023)
 - Wrongful death from truck crash
 - *Gauthier v. Hard to Stop LLC*, No. 22-10774, 2024 WL 3338944 (11th Cir. July 9, 2024)
 - Wrongful death from truck crash
 - TQL is seeking SCOTUS review, despite win in lower courts
 - SCOTUS has rejected cert on previous cases turning on FAAAA preemption (*C.H. Robinson* and *Ying Ye*)



Negligence/Tort Claims

- Defending on the Merits
 - Motor carrier provided certificate of insurance, had acceptable safety rating, was appropriately licensed
 - Standard of care expert to show did not deviate from broker's responsibilities



Contract Claims

- FAAAA does not preempt express contract claims
 - Case law is mixed on quasi-contract claims/unjust enrichment
 - *Mrs. Ressler's Food Products v. KZY Logistics, LLC*, 2017 WL 3868703 (D.N.J. Sept. 5, 2017) (finding preemption of implied contract)
 - In jurisdictions holding that FAAAA does not preempt negligence, quasi-contract and other state-law claims are likely to remain
- Will depend on what the broker actually agreed to
 - Often double brokering claims
 - Hiring motor carrier that does not meet contracted requirements
- Defending on the merits
 - No written agreement
 - Broker complied with all expectations
 - Can use FAAAA preemption when a contract claim attempts as a tort work-around



Strategies for Recovering Damages from Motor Carriers

Depends on Broker's contractual terms with its Customers

- Broker only facilitates claims for its Customers
 - When Customer acknowledges that its sole recourse is against motor carrier
- Broker accepts primary liability for cargo losses
 - When Broker agrees contractually to be responsible for cargo loss and damages



If Broker just facilitates the claim, then:

- Files claim with motor carrier and its insurer
- Insurer will accept or deny claim
- Common coverage exclusions include unattended vehicle, driver error, certain commodities (e.g., electronics, liquor, pharma), reefer breakdown, failure to cooperate by insured, etc.
- Carmack liability typically greater than carrier's insurance coverage
- If insurance denies claim, demand letter to motor carrier seeking payment under Carmack and indemnity obligations
- If policy doesn't pay, small carriers typically do not have the resources to pay claims
- Broker communicates with Customer that claim denied, Broker exhausted ability to recover from Carrier, and deferring to Customer for filing an action against Carrier to recover
- Shipper's Interest coverage?



What to do if Broker primarily liable for cargo claims:

- Broker files claim with its cargo insurer
- If covered, insurer will pay Customer claim in return for release and assignment of claim
- Insurer will likely seek subrogation against Carrier's insurance policy
- If no coverage or within deductible, Broker pays Customer's claim in return for release and assignment of claim
- Broker evaluates whether cost of litigation vs. likelihood of recovery justifies action against motor carrier
- Set-off payables to Carrier if not expressly disclaimed in Broker-Carrier Agreement
- Shipper's Interest Coverage?



Insurance Solutions

- Contingent Cargo Coverage
 - Responsive in event a motor carrier's policy becomes cancelled or insolvent
 - It is contingent or secondary coverage by default
 - Not the preferred policy to have if have primary liability by contract
- Cargo Legal Liability
 - Coverage where Customer designates Broker as legally liable for a cargo loss or damage regardless of motor carrier's fault or liability
- Shippers Interest Coverage
 - Provides All-Risk coverage insuring the goods for the Customer/Shipper or rightful owner at the time of loss regardless of the motor carrier's coverage or fault
 - Benefits include customer satisfaction (removing pain points with Customers over claims process), protecting Broker from "gap" liability, preserving relationships with Motor Carriers with "Swiss Cheese" policies, and increasing Carrier capacity



Canada: Freight Broker Liability

- What role is being undertaken? “**Arranger**” (agent) vs. “**Contracting Carrier**” (principal)
- Brokers as Agents are not protected by the terms of the Uniform Bill of Lading (\$2 per pound limit)
- It is not clear if Brokers acting as a Principal have this protection. (Uniform Bill of Lading applying to “Operators”)
- Brokers need to be deliberate and consistent in how structure their dealings to avoid inadvertent “holding out” of a carrier mandate: *“you don’t need to own or operator a truck to be a carrier....”*
- As a Broker, you can “choose your poison”: carrier presumptive liability for cargo loss or damage vs. moderated duty as an agent.... But what contractual defenses does the broker have as an agent?



Canada: (Very) Limited Regulation of Freight Brokers

- **Ontario:** *Highway Traffic Act* R.S.O. 1990 c.H-8, s. 191.0.1(3): trust fund obligation governing receipt of monies from shippers intended for payment to carriers
- **Quebec:** An Act Respecting Owners, Operators and Drivers of Heavy Vehicles CQLR cP-30.2 ss 15 and 16: freight brokers must be registered as such failing which contracts entered into are “null and void”
- This very limited regulation can be viewed as both opportunity and risk for brokers: freedom of contract and a low barrier to market entry versus no deemed contractual protections enjoyed by motor carriers under the Uniform Bill of Lading
- **Shipper** *[full value cargo recovery expectation]* → **Broker** → *[Double Broker?]* → **Carrier (\$2 per pound?)**



Canada: Smart Contracting for Freight Brokers

- Obligations and expectations: surprising lack of bright line case law authority
- Broker as agent: look to general agency principals. Consider carrier vetting best practices and expectations to be the same as in the United States (i.e. carrier authorities as applicable (US), safety rating(s), insurance, confirming carrier identity (preventing rogue carrier thefts).
- Avoiding reference or holding out to any joint venture or operational involvement with carriers i.e. “Broker will contractually require carrier to do “a, b and c” instead of “Broker warrants that carrier will do “a,b and c”
- Don’t sign “shipper-carrier: contracts
- Be deliberate in treatment of double brokering
- Be way of use of the word “subcontract” unless as broker you are deliberate in embracing a “principal” function
- *Risk Management through insurance: identical considerations to what Jeff Simmons has talked about*



Canada: Freight Bill Payment Liability

- **Shipper [A] pays Broker [B] → load is double brokered to “defaulting payor (notional carrier)” [C] → Broker pays double brokering carrier who engages third party performing carrier [D] but does not pay third party performing carrier**
- Who is liable? “Contract 101” says that the shipper who hired [D] has to pay. What if the immediate upstream party [C] goes out of business and does not pay?
- Can [D] sue [A] or [B] on agency principles, asserting that as may be the case [B] and [C] were acting as agent and sub-agent? In theory, yes, but Canadian case law recognizes the importance of industry expectations and practices



Canada: The “Shipper” may not have to pay if expected to pay a Third Party

- *C.P Ships v. Les Industries Lyon Corduroys Ltee* [1983] 1 FC 736

”Where a debtor, instead of paying his creditor, chooses to pay a third party, he does so at his peril. Where the money is not turned over to the creditor the onus is then on the debtor to establish either:

1. That the creditor actually authorized the third party to receive the money on his behalf, or
2. That the creditor held out the third party as being so authorized, or
3. That the creditor by his conduct or otherwise induced the debtor to come to that conclusion, or
4. **That a custom of the trade exists to the effect that in that particular trade and in those particular circumstances both the creditor and the debtor normally would expect the payment to be made to the third party.**



Canada: What about the Consignee Receiver though....?

The Bills of Lading Act R.S.C. 1985 c. B-5

Right of consignee or endorsee

2 Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

... shippers often seek the carrier's waiver of the above where brokers are involved or where for any reason

Note that there is interesting complication in respect of the application of the above for cross-border movement of goods.