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The Legal Mistakes that Trucking Companies and Brokers Make When Working Together

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Overview

Although cargo brokers have existed long before the ICC Termination Act of 1995, the “globalization of the supply chain” over the last decade has moved shippers to outsource their transportation needs to the point where the majority of traffic today is arranged by brokers.



Definition of Broker

49 U.S.C. 13102(2). 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.



Tripartite Relationship

The modern tripartite arrangement skews the traditional “shipper-carrier” relation which historically consisted of a standard straight bill of lading or formal written transportation agreement.



Risk Exposures

Regulatory?

Cargo Claims?

Negligent Hiring Claims?

Wrongful Death?



Risk Exposures

Regulatory: **MAP-21 - Moving Ahead for Progress in the 21st Century Act**

- Strong reform legislation
- Congress intent to bring clear focus to all previously “brokering” without being registered or bonded
- Stringent language in 49 U.S.C. 14916 enacted to close the “loopholes” that provided little accountability for brokers without clearly identifying their role;
- Prohibited activities:
 - A person may provide interstate brokerage services as a broker only if that person: (1) is registered as a broker and (2) has satisfied the financial security requirements.



Risk Exposures

What Types of Activities Constitute Brokering?

- Dispatch Services?
- Offer for sale the arrangement of motor carrier services?
- Negotiating... ?
- Advertising ... ?
 - Website
 - Other marketing materials



Risk Exposures

- Any person who knowingly authorizes, consents to or permits, directly or indirectly, either alone or in conjunction with any other person, is liable
 - To the United States for a civil penalty of \$10,000 for each violation
 - To the injured party for all valid claims incurred without regard to amount.
- Note: 49 U.S.C. 13901(c) requires that the transportation service specify in writing the authority by which the person is providing such transportation service.
 - Defense to aiding and abetting?



Risk Exposures

- The liability for civil penalties and for claims under this section for unauthorized brokering shall apply, jointly and severally
 - To any corporate entity or partnership involved; and
 - To the individual **officers, directors, and principals of such entities.**
- What happens when an authorized broker subcontracts with an unauthorized broker?



Cargo Claims

49 U.S.C. 14706

Carmack does not govern (or even mention) claims by or against brokers in the scheme of interstate cargo loss and damage liability. See *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 U.S. Dist. LEXIS 1684, *8 (N.D. Ill. 1999).



Cargo Claims

Nonetheless, problems result because the role or function of a party in a given transportation transaction – “broker” vs. “carrier” – is often unclear or blurred. Although brokers are not liable under the Carmack Amendment, some courts have held they can be liable under state or common law theories, such as negligent entrustment or breach of contract, in matters involving cargo loss and damage.



Cargo Claims

Case law discussion

Tryg Insurance v. C.H. Robinson
Worldwide, Inc. (April 19, 2019).



Cargo Claims

Case law discussion

AMG Resources Corp. v. Wooster
Motor Ways, Inc. (Jan. 14, 2019).



Cargo Claims

Where a broker holds itself out to do whatever is necessary to get the shipper's goods moved from point A to point B, as opposed to merely arranging for the transportation, courts will usually consider it a question of fact for the jury to determine the broker's legal status, and that will dictate the applicable legal standard to which it will be held.

This is a very risky proposition for brokers.



Contractual Issues



Waiver

49 U.S.C. 14101(b). Refers to contracts between shippers and motor carriers.



Waiver

A review of the legislative history of the ICCTA and 49 U.S.C. §14101(b) indicates Congress did not intend the express written waiver requirement would apply only to shipper carrier contracts, but that it intended the statute apply to “both parties” to a transportation contract.

The House Conference Report for §14101(b) shows two different versions of the proposed §14101(b) language. The House version would have provided, “shippers may, in writing, waive all rights and remedies under this part” The Senate version “would expressly allow carriers to enter into contracts ... under which both parties may waive their rights and remedies” H.R. Conf. Rep. 104-422, **214-215 (Dec. 18, 1995), 1995 WL 767862 (Legis. Hist.). Significantly, the Senate version does not refer to “shippers” but to “both parties,” a substantial difference.



F4A Act & Common Law Claims

Federal Aviation Administration
Authorization Act of 1994



F4A Act & Common Law Claims

Case Study

Enbridge Energy, LP v. Imperial
Freight, Inc. (April 25, 2019)



F4A Act & Common Law Claims

Jana Brands, Inc. v. C.H. Robinson,
Int'l Inc. (Dec. 20, 2018)



Legislative Update

Congress omits F4A, carrier selection from FAA bill

House version of the FAA bill that would have protected shippers and brokers in their selection of motor carriers as long as they verify carriers' operating authority and minimum insurance - rejected.



Wrongful Death and MVA claims



Who Are We Facing?







Motor Vehicle Accidents

Who are the Plaintiff's TARGETS?

- Motor carriers
- Vehicle owners
- Vehicle lessors
- Drivers
- Shippers
- Brokers
- Distributors / consolidators
- Freight-forwarders
- Warehouses





What Claims are Being Asserted?

- Negligent Hiring
- Negligent Entrustment
- Negligent Retention
- Negligence Per Se
- Negligent Inspection, Maintenance or Repair
- Wrongful Death
- Vicarious Liability





Risk Exposures for Brokers and Carriers?





Best Practices – Before the Accident Happens

- Structure/restructure your operations and/companies;
- Review and draft contracts (both internally and with third parties), to ensure duties are delegated to the company that is operating the motor vehicle;
- Review insurance coverages are in place to address risk exposures (i.e., does your policy cover punitive damages);
- Review DOT handbooks and internal policies and procedures (does your company policy align with your actual operations?).





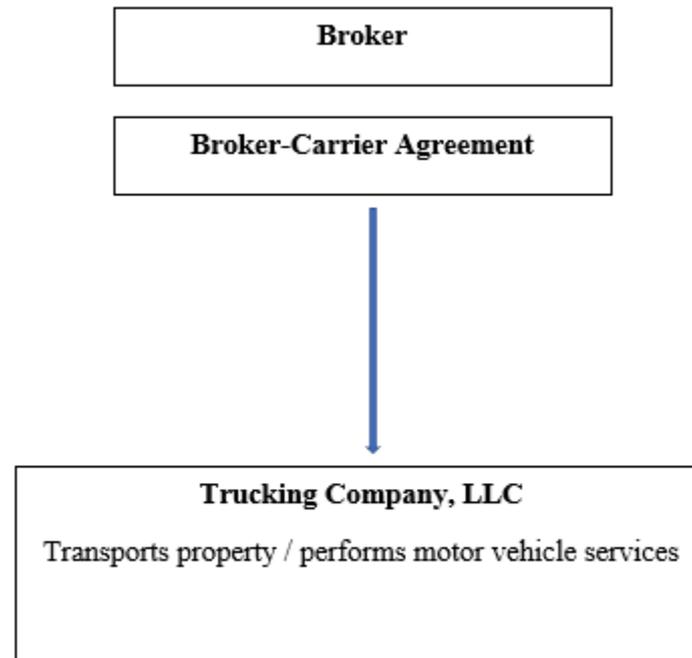
Best Practices – After the Accident Happens

- Retain independent transportation law counsel for your company.
- Work with defense counsel and independent counsel to ensure that all evidence is preserved.
- Review your contracts: understand whether the company has a right to defense and indemnification from a third party.



Corporate Structure

Separate shipping/production from trucking



Corporate Structure

Separate broker from trucking

Shipper / Manufacturer

Shipper-Motor Carrier Agreement



Trucking Company, LLC

Transports property / performs motor vehicle services



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