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"Sure! We Can Do That!"

An intermediary's sales force is naturally inclined to make any variety of commitments to a shipper in order to secure a business opportunity. Frequently, however, a salesperson not only fails to appreciate the distinction between the role of an intermediary and the role of an actual service provider, but also fails to distinguish between different types of intermediaries. For instance, the marketplace is filled with many parties who broadly market themselves as "transportation solution providers" or "logistics companies" or "third-party logistics providers" (i.e., 3PLs).

Surprisingly, many of those working for these companies have not necessarily considered the specific range of services that they are truly offering and have not engaged in proper compliance efforts because they are eager to be all things to all customers. Inevitably, however, when a high-dollar freight claim or a catastrophic personal injury (or other material) dispute arises, a customer maintains that the intermediary previously held itself out in negotiations—or in the contract itself—as an actual carrier rather than as an intermediary.

For instance, consider the case of *Trans-Pro Logistics, Inc. v. Coby Electronics Corp.* issued earlier this year. [2012 U.S. Dist. LEXIS 19899 (N.Y. 2012)] The dispute arose out of a situation where Coby Electronics Corp. (Coby) entered into a series of transactions with Trans-Pro Logistics, Inc. (Trans-Pro) in connection with the transportation of electronic equipment to various consignees around the country. However, the parties' relationship was not documented well. Instead of adopting a clear contract, the relationship was governed by a Credit Opening Form and, arguably, the invoices.

Ultimately, Coby did not pay Trans-Pro for the services, and Trans-Pro sued Coby to collect $228,913 in freight charges (plus $297,463.15 in interest!). Coby filed a counter-claim, alleging that Trans-Pro had lost a shipment of DVD players. More specifically, Coby alleged that Trans-Pro should bear the liability of a motor carrier rather than a transportation broker, because, among other things:

- Coby's warehouse manager was supposedly referred to Trans-Pro by a colleague who described Trans-Pro as providing a "carrier service."
- Trans-Pro's marketing materials supposedly suggested that Trans-Pro could provide both carrier and broker services.
- Trans-Pro had provided Coby with a reference letter from another shipper who described Trans-Pro as a "broker/carrier."
- Coby's warehouse manager maintained that he subjectively understood Trans-Pro to be a carrier.
- Coby testified that it had no practical reason to hire Trans-Pro as a broker, because it was already working with a transportation broker.

Trans-Pro countered this evidence with evidence of its own, among other things:

- Trans-Pro emphasized that it had provided Coby with a copy of Trans-Pro's broker's license in its promotional materials.
- Trans-Pro demonstrated that it had no carrier authority.
- Trans-Pro showed that it had provided Coby with a copy of its insurance policy, which was clearly for an intermediary.
- Trans-Pro testified that it never held itself out to Coby as a carrier.
- All bills of lading used in Coby's transactions listed third-party carriers as "carrier" rather than identifying Trans-Pro.

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- Trans-Pro's booking process involved Trans-Pro identifying the selected carrier and emailing that carrier's name to Coby for approval.

After a bench trial, the court found in favor of Trans-Pro and agreed that Trans-Pro was merely operating as a transportation broker. As a result, Coby was liable for all freight charges and interest, and Trans-Pro was absolved of any liability associated with the allegedly lost shipment of DVD players.

"While a good contract does not necessarily immunize an intermediary from claims that it acted as something other than an intermediary, a good contract can certainly go a long way toward achieving that goal."

However, these disputes do not always work out in favor of the intermediary, and, even when they do, they still involve parties bearing significant legal fees. For instance, in *Just Take Action, Inc. v. GST (Americas) Inc.* [2005 WL 1080597 (D. Minn. May 6, 2005)], a shipper retained a 3PL to arrange for the transportation of two steel tanks. The 3PL apparently provided assurances that the freight would be protected by full value coverage. The carrier selected by the 3PL ended up damaging the freight. The shipper brought a claim for liability under the Carmack Amendment, common law negligence and breach of contract. The court found that the 3PL could theoretically be liable as a carrier because of the degree of the 3PL's involvement in the transportation. The court also found that, even if the 3PL could not be deemed to be a carrier, the 3PL could nonetheless be found liable for breach of contract. More specifically, the court explained:

> In general, courts have held that a broker's duty to a shipper is limited to arranging for transportation with a reputable carrier. However, [the shipper] hired [the broker] to arrange for transportation of the tanks with the understanding that the tanks would be shipped with full coverage. In doing so, [the broker] **expanded its duty** beyond merely finding a reputable carrier to ensuring the tanks would be shipped with full coverage….

Id. (emphasis added). Other courts have reached similar conclusions. See, e.g., *Consolidated Freightways Corporation of Delaware v. Travelers Insurance Company* [2003 WL 22159468 (N.D. Cal. 2003)] (issues of fact existed as to whether a company was acting as a transportation broker or a shipper); *Custom Cartage, Inc. v. Motorola, Inc.* [1999 WL 965686 (N.D. Ill. 1999)] (transportation broker could be theoretically liable for freight loss under state law).

The foregoing cases make it all the more important that intermediaries memorialize their relationships with shippers accurately. While a good contract does not necessarily immunize an intermediary from claims that it acted as something other than an intermediary, a good contract can certainly go a long way toward achieving that goal. Moreover, certain statutes or regulations may also govern what an intermediary may say about the service that it is providing. For instance, 49 C.F.R. § 371.7(b), governing transportation brokers, expressly provides:

> A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.

In other words, a transportation broker who masquerades as a motor carrier violates federal law.

Indeed, in the course of negotiating with a shipper who is requesting that a transportation broker bear the liability of a motor carrier (or who presents a "motor carrier" agreement for the broker to sign), a transportation broker may use this regulation as justification for its reluctance to agree to such contractual provisions.

In short, intermediaries should strive for clarity in structuring their business relationships with their customers—as well as with the actual service providers they hire. An ounce of prevention is worth a pound of cure!

For more information, please contact Marc Blubaugh at mblubaugh@beneschlaw.com or (614) 223-9382.

Didn't Touch the Goods? The Carmack Amendment May Still Apply

If you think you avoid liability under the Carmack Amendment if you never touch the shipment of goods, think again. Thanks to the expansive definition of "transportation" under the Interstate Commerce Act, any "services related to that movement" are covered by the Carmack Amendment, even where a carrier never touched the shipment.

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.[1]

The Supreme Court has held 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.[2]

In short, transportation for Carmack Amendment purposes encompasses much more than the physical movement of goods. Liability under the Carmack Amendment extends to any carrier "providing transportation or service."[3] Transportation is broadly defined as including "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."[4]

"The issue is not when or where the property is damaged but whether the damage occurs during the performance of some service falling under the definition of 'transportation.'"

Courts have expansively interpreted this statutory definition of transportation. For example, courts have found that the Carmack Amendment applies where the claims relate to damage that occurred during storage of the shipped goods.[5] The issue is not *when* or *where* the property is damaged but whether the damage occurs during the performance of some service falling under the definition of transportation. For example, in *Thornton v. Philpot Relocation Systems*,[6] the Eastern District of Tennessee held that plaintiff's state law claims for damage to household goods while in storage were preempted by the Carmack Amendment. The court reasoned that "precisely when plaintiff's property was damaged is irrelevant to assessing the application of the Carmack Amendment" because "[t]he dispositive fact is that all of plaintiff's claims are based on allegations that defendants damaged and/or destroyed property whose transportation and storage was governed by an interstate bill of lading." In *Design X Manufacturing, Inc. v. ABF Freight Systems, Inc.*,[7] the District of Connecticut found that the plaintiff's state law claims were preempted by the Carmack Amendment where the damages were allegedly caused at the delivery site by the carrier's subcontractor.

Courts have also found that transportation includes services undertaken while "arranging for" carriage and delivery of goods.[8] Indeed, brokers or carriers who never touch the goods should take particular note that "arranging for" transportation services is specifically included in today's definition of transportation under the ICA.[9] For example, in *Land O'Lakes, Inc. v. Superior Service Transportation of Wisconsin, Inc.*,[10] defendant Superior was assigned delivery of a shipment from another carrier, never took possession of the shipment, then arranged for a broker to broker the shipment. The court held that, because "arranging for" transport is part of the definition of transportation under the ICA, Superior met the definition of motor carrier for purposes of Carmack Amendment liability despite never touching the shipment.

Even as a victim of a possible con artist scam, there may be liability under the Carmack Amendment. The Northern District of California recently held that even where the carrier never touched the shipment, the Carmack Amendment preempted state law claims for the carrier's failure to comply with its obligations under a broker/carrier agreement.[11] In *BNSF Logistics*, an individual holding himself out as working on behalf of the defendant carrier contacted the plaintiff broker on two separate occasions for a spot

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contract for the shipment of a load. The plaintiff sent confirmation emails to the defendant carrier, which did not respond and did not otherwise let the broker know it was no longer using the individual. Both shipments were picked up by the individual and never seen again. The court found that the Carmack Amendment applied to preempt plaintiff's state law claims because the "duty to inform the shipper of changes in important personnel and to promptly respond to communications regarding shipments is an important part of a carrier's services," and therefore, flowing from the broker/carrier agreement.

Remember…

Even without touching the shipment, you may still be liable under the Carmack Amendment, and state law claims for damages to goods occurring during storage or other services under the broad definition of transportation may be preempted by the Carmack Amendment. Thus, if you provide services to goods moving through interstate commerce—such as storage or "arranging for" or other handling—take care to ensure you have protected yourself with any appropriate limitation of liability available under the Carmack Amendment. If you find yourself prosecuting or defending claims for damages to goods that moved through interstate commerce, keep in mind the broad definition of transportation for Carmack Amendment preemption purposes to determine whether the parties have raised the proper claims and defenses.

[1] 49 U.S.C. § 14706(a)(1).

[2] *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137–38 (1964).

[3] 49 U.S.C. § 14706(a)(1).

[4] 49 U.S.C. § 13102(23)(B).

[5] *Schneider Electric USA, Inc. v. Landstar Inway, Inc.*, 2012 WL 1068170 (S.D. Ohio Mar. 29, 2012); *Hemsath v. J. Herschel Kendrick Moving & Storage*, 2006 WL 1000189 (S.D. Ohio April 14, 2006); *Marks v. Suddath Relocation Sys., Inc.*, 319 F. Supp. 2d 746 (S.D. Tex. 2004); *Margetson v. United Van Lines, Inc.*, 785 F. Supp. 917 (D. N.M. 1991).

[6] 2012 WL 174937, *4 (E.D. Tenn. Jan. 20, 2012).

[7] 584 F. Supp.2d 464 (D. Conn. 2008).

[8] *Emmert Indus. Corp. v. Artisan Assoc. Inc.*, 497 F.3d 982, 989 (9th Cir. 2007).

[9] 49 U.S.C. § 13102(23)(B).

[10] 500 F. Supp.2d 1150 (E.D. Wisc. 2007).

[11] *BNSF Logistics, LLC v. L&N Express, Inc.*, 2012 WL 525526 (N.D. Ca. Feb. 16, 2012).

For more information, please contact Sarah Stafford at sstafford@beneschlaw.com or (302) 442-7007.

Fighting Fraud in Transportation Act And Does it Apply to Me?

Yes if by Land

The long-term Federal transportation bill extension has been signed into law. It includes provisions from the Fighting Fraud in Transportation Act that increase to $75,000 the surety required of brokers that are subject to the jurisdiction of the Surface Transportation Board (STB).[1] But the increase in broker security requirements is not the only change that will affect brokers, freight forwarders and motor carriers that are subject to the STB.

One year from the date of enactment, surface freight forwarders that are subject to the STB, as well as brokers, would be required to post a $75,000 surety. The amount of the surety required would be reviewed after five years.

"[T]he increase in broker security requirements is not the only change that will affect brokers, freight forwarders and motor carriers that are subject to the STB."

Brokers and surface freight forwarders will be required to have an officer who meets a three year relevant experience or certified training requirement. Currently, there is no relevant experience or certified training requirement for entities subject to the STB.

The new law requires the Department of Transportation (DOT) to issue distinctive registration numbers for each authority issued. Each number would be required to include an indicator of the type of activity or service for which the registration number is issued. If an entity has motor carrier, broker and surface freight forwarding authority, each would have a separate number.

Motor carriers will not be allowed to broker freight unless they have separate broker authority. Motor carriers may still legally interline freight, but the originating carrier must physically transport the cargo at some point and retain liability for the cargo and payment of interline carriers. Freight forwarders are still authorized be to hire motor carriers to transport freight.

Severe penalties for brokering without a license include civil penalties up to $10,000 for each violation. The liability applies jointly and severally to any

corporate entity or partnership involved and to the individual officers, directors and principals of such entities.

No if by Air

Certain transportation by motor carrier is exempt from the current requirements regarding sureties and will continue to be exempt.

Transportation of property by motor vehicle *as part of a continuous movement* which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier is exempt from all provisions of 49 U.S.C. Subtitle IV Part B.[2]

The motor carriers who transport goods to or from the airport, and those who arrange for that transportation, apparently will continue to be exempt.

Transportation of property by motor vehicle *in lieu of transportation by aircraft* because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper are exempt from all provisions of 49 U.S.C. Subtitle IV Part B.[3]

But please note, unless the transportation in lieu of air meets one of the listed requirements, it is not exempt. Issuing an air waybill instead of a bill of lading does not make the transportation exempt.

The 1500-page legislation contains many more provisions that will affect transportation and logistics. The broker and freight forwarder surety requirements are a small part of the new law, but a part that is very important for shippers, motor carriers, brokers and surface freight forwarders. And their exclusion is a major issue for those involved in air transportation and its related ground transportation.

[1] The STB has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property or both are transported by motor carrier—

(1) between a place in—
  (A) a State and a place in another State;
  (B) a State and another place in the same State through another State;
  (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
  (D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
  (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

[2] 49 U.S.C. 13506 (a)(8)(B)

[3] 47 U.S.C. 13506 (a)(8)(C)

For more information, please contact Martha Payne at mpayne@beneschlaw.com or (541) 764-2859.

Welcome **Katie Tesner**

Katie Tesner is an associate in the firm's Labor and Employment Practice Group. Katie's practice focuses on representing public and private sector employers in all aspects of labor and employment law. Specifically, Katie has assisted clients with disputes involving wage and hour compliance, discipline and discharge, employment discrimination, employment contracts, non-competition agreements and other restrictive covenants, FMLA compliance, workers' compensation, and other employment-related claims. Katie has diverse experience in both federal and state court, as well as before administrative agencies such as the EEOC, SPBR, SERB and the Industrial Commission of Ohio.

Katie has specific experience representing clients in the transportation and logistics industry. For example, she has provided advice to transportation brokers in connection with non-competition agreements and trade secrets, has reviewed and consulted on employment contracts used in the logistics industry and has provided regulatory advice to a multistate trucking company. Katie works out of the firm's Columbus office.

Recent Events

Rich Plewacki attended the **American Trucking Associations' Leadership Meeting** in St. Petersburg, FL, from May 20–23, 2012.

Eric Zalud attended the **Terralex Conference** in Tokyo, Japan, from May 31–June 3, 2012.

Marc Blubaugh presented on the latest developments in transportation law at the **International Warehousing Logistics Association's Legal Symposium** in Chicago, IL, from June 20–21, 2012.

Eric Zalud attended the **Conference of Freight Counsel** in Baltimore, MD, from June 23–25, 2012.

Martha Payne attended the **SMC³ Conference** in Chicago, IL, from June 26–28, 2012.

Marc Blubaugh and **Teresa Purtiman** attended the **American Trucking Associations' Motor Carrier General Counsel Forum** in San Francisco, CA, from July 22–24, 2012.

Marc Blubaugh and **Eric Zalud** will be attending the **Transportation Lawyers Association Executive Committee Meeting** in Toronto, Ontario, on July 28, 2012.

Rich Plewacki and **Eric Zalud** will be attending the **National Tank Truck Carriers Summer Membership and Board of Directors Meeting** in La Malbaie, Quebec, Canada from August 1–3, 2012.

On the Horizon

Chip Collier and **Rich Plewacki** will be speaking on *Shale Oil Transport Issues* at the **Northeast Ohio Trade and Economic Consortium Conference** in Akron, OH, on August 13, 2012.

Marc Blubaugh will be presenting on transportation law at the **International Warehouse Logistics Association's Safety Conference** in Memphis, TN, on September 13, 2012.

Eric Zalud will be speaking on *Cross Border Transportation Issues* at the **Ontario Trucking Association Conference** Toronto, Ontario, on September 13, 2012.

Marc Blubaugh will be presenting on *The Top 10 Legal Hurdles for 2012* at the **American Trucking Associations' Annual Management Conference & Exhibition** in Las Vegas, NV, on October 8, 2012.

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

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please email Sam Daher at sdaher@beneschlaw.com.

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

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