

Defenses for Cargo Loss Claims Under the Carmack Amendment



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Cargo travels this nation by truck through hundreds of miles and through the hands of multiple parties before it reaches its destination. During the journey, the parties involved in the transport of the cargo face constant risks for legal liability for damage or loss to cargo. When such a loss occurs and the shipper asserts a claim, it is vital to a successful defense that the parties facing a claim understand their legal position and what defenses are available to them as a result. This article addresses the defenses available to a company that is either the motor carrier, broker, freight forwarder, or subcontractor and is intended to familiarize the company with the nuances of those defenses, particularly under the federal statute commonly known as the Carmack Amendment. As a general rule, the Carmack Amendment provides the “exclusive cause of action for loss or damage to goods arising from the interstate transportation of those goods by a common carrier.”¹ This article does not address the situation where the shipper and carrier have a contract in which they have agreed for the Carmack Amendment not to apply.²

Motor Carrier

A direct claim by a shipper against a motor carrier is usually governed by

the Carmack Amendment, 49 U.S.C. § 14706(d). Determining whether a trucking company is a “carrier” under the Carmack Amendment is straightforward: Did the company “provid[e] motor vehicle transportation for compensation”?³ If so, the company will be considered a carrier and can be sued for “the actual loss or injury to the property.”⁴ Translated, the phrase “actual loss or injury to the property” usually means the difference between the monetary value of the shipment before the damage or loss and the monetary value of the shipment after the damage or loss. To state a *prima facie* case of liability under the federal statute, the shipper must show delivery of the goods to the carrier in good condition, arrival of the goods in a damaged condition at the final destination, and the amount of damage.⁵

Often during the transport of cargo, multiple trucking companies may have carried the cargo on different portions of the journey. The Carmack Amendment takes into account this reality by imposing liability broadly on the “receiving carrier,” the “delivering carrier,” and the “carrier over whose line or route the property is transported.”⁶ However, a shipper can only bring a claim under the Carmack Amendment against the “receiving carrier,” who issues the bill of lading, and/or the “delivering carrier,” who delivers the cargo to its final destination, but cannot bring a Carmack Amendment claim against an “intermediate carrier,” who transports the cargo over a middle

leg of the journey.⁷ The receiving carrier or the delivering carrier can bring a claim against “the carrier over whose line or route the property is transported” or, in other words, the intermediate carrier, to recover what it paid under a shipper’s claim.⁸

Therefore, if a trucking company is a receiving or delivering carrier, it is probably in the cross-hairs of a cargo loss claim under the Carmack Amendment by a shipper. However, there are defenses available that can be employed. Vital to a trucking company’s defense is the bill of lading, which should limit a trucking company’s liability in the case of cargo loss or damage. The bill of lading is a contractual agreement between the shipper and the carrier that governs the obligations of both parties during the carriage of the cargo and can limit the liability for claims arising from the carriage. The Carmack Amendment specifically allows the bill of lading to reduce a carrier’s liability so long as the limitation is “reasonable under the circumstances surrounding the transportation.”⁹ Generally, a court will look at all the circumstances during the shipment of cargo in determining the reasonableness in a liability limitation.¹⁰ However, some courts have held that a limitation of liability provision will be upheld unless the carrier intentionally destroyed the cargo or absconded with

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it.¹¹ Therefore, it is vital that the trucking company, as an initial step in cargo loss litigation, understand the limits of its liability under the bill of lading, and if the published tariff of the motor carrier is incorporated by reference into the bill of lading, the carrier must similarly understand the liability limitation provisions in the tariff.

Another important tool in reducing a trucking company's liability is the preemption of state law claims by the Carmack Amendment. In other words, a shipper can only sue the company under the federal statute and cannot bring any other legal claims against the company to seek recovery for the damage or loss of the cargo.¹² The preemption of claims outside of the Carmack Amendment is very important to a motor carrier's defense because it narrows a carrier's liability to only the "actual loss or injury to the property" provided for by the federal statute, and nothing more.¹³ For example, the Carmack Amendment preempts the right to recover attorneys' fees.¹⁴

It is also important for a trucking company to understand its liability for special damages or consequential damages to the shipper. Special or consequential damages are damages resulting from the damage or loss to the cargo other than the "actual loss or injury to the property." A common example would be a shipper's loss of business or profits due to damaged or lost cargo. It is generally accepted that special or consequential damages are not recoverable under the Carmack Amendment if they were not in the contemplation of the shipper and carrier when entering into the contract for the shipment.¹⁵ However, if a carrier, at the time of contracting, knew that the shipper would suffer a specific type of damage other than actual loss if the cargo was lost or damaged, then the carrier could be held liable for such special damages. Accordingly, if a shipper includes special or consequential damages in

its lawsuit, a trucking company should consider whether those damages were contemplated by the trucking company at the time of the execution of the contract, and if not, the trucking company should have a good defense to the special damages.

In addition, motor carriers should consider whether the shipper timely submitted its claim. The bill of lading should provide the time limits for presenting a claim, but it cannot be less than nine months by statute.¹⁶ Additionally, a trucking company should consider whether the lawsuit was brought within time limits and, again, the bill of lading should provide for the time limit for filing claims, but it cannot be less than two years.¹⁷

Finally, a trucking company can avoid liability if it proves that it was free of negligence, and the damage or loss to the goods was caused by: 1) an act of God; 2) act of public enemy; 3) act of shipper, 4) act of public authorities or 5) by the inherent vice or nature of the goods.¹⁸ These defenses were enumerated by the U.S. Supreme Court in the 1964 case of *Elmore & Stahl*. They are relatively straightforward, self-explanatory and mean what they say (although the act of God defense may not be so self-explanatory to persons who may believe in a higher power other than God!!). Very little case law exists to further explain these defenses.¹⁹

Broker

If a company is a broker, it cannot be held liable to a shipper for cargo loss under the Carmack Amendment.²⁰ However, determining whether a company is a "broker" is not as straightforward as it appears and the distinction is blurry. A broker is a person or company that is not a "motor carrier," and instead "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."²¹ If a trucking company is legally authorized

to transport cargo, it may not be able to fit the definition of a "broker," and may instead be held liable as a motor carrier for cargo loss under the Carmack Amendment.²² Also, if a company is a broker, but has held itself out as a motor carrier, although not legally authorized as a carrier, it may be considered a carrier, and sued for cargo loss under the federal statute.²³ Brokers are registered with and regulated by the U.S. Department of Transportation.²⁴ The distinction between broker and carrier often turns on how the company represented itself to the outside world. For example, a holding company may have a subsidiary motor carrier business and a subsidiary broker business, all three with similar names, and the outside world may not understand the subtle distinctions between the three.

Even though a broker cannot be sued by a shipper under the Carmack Amendment, a broker still can be sued by a shipper on state law claims such as negligence or breach of contract.²⁵ Because the federal statute does not apply to claims brought by shippers against brokers, the statute does not preempt any other claims. Indeed, brokers may be found liable for not using reasonable care in the scheduling, arranging, preparing and brokering the transportation of cargo.²⁶ In some cases, it may be better for a trucking company to be considered a carrier and not a broker because of the protections given a carrier by the Carmack Amendment.

It may also be helpful to determine whether the party who assumed it acted as a broker was really acting as a freight forwarder.

Freight Forwarder

Related to a broker is the freight forwarder, but the freight forwarder is subject to liability for cargo loss under the Carmack Amendment. A freight forwarder is 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— (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.²⁷

Importantly, a freight forwarder is considered, in terms of liability to the shipper, to be both the receiving carrier and the delivering carrier, even if another carrier is receiving or delivering the cargo.²⁸ Accordingly, the freight forwarder should avail itself of the same defenses available to the carrier in defending against cargo loss claims brought by a shipper. Additionally, a party who considers itself a freight forwarder may be advised to take a second look to see if, in the particular transaction at issue, it in fact served as a broker. Perhaps the freight forwarder would want the Carmack Amendment not to apply to claims against it. For instance, in the *Custom Cartage, Inc.* case, the court stated that “Custom’s status in this transaction is the center of this litigation. If Custom was a carrier or freight forwarder, it would be liable under the Carmack Amendment, 49 U.S.C. § 14706, for the loss. If Custom was merely a broker and not a carrier or freight forwarder, then


Custom would not be liable under the Carmack Amendment.”²⁹

Subcontractor

While this player in the cargo shipment chain is not expressly set forth or defined in the Carmack Amendment and is often overlooked, the reality is that often the carrier who contracts with the shipper will subcontract the load to another carrier. This carrier is referred to herein as the subcontractor. A subcontractor who, in the broader sense, is a carrier under the Carmack Amendment can use the same defenses used by a carrier against a shipper. An especially important defense is using the liability limits in the initial carrier’s bill of lading to limit the liability of the subcontractor. Courts have held that limits on liability for an initial carrier may protect the subcontractors from claims by shippers. In a recent decision, a shipper’s potential recovery in a suit against a subcontractor was reduced by the limitation of liability in the bill of lading between the shipper and the initial carrier.³⁰ This defense is especially important for a subcontractor because it will likely have no direct contractual relationship with the shipper upon which it could contractually limit its liability. However, by taking advantage of the limitation of liability in the initial carrier’s contract with the shipper, a subcontractor may be able to protect itself.

It is also important for a subcontractor to be able to defend itself against claims by initial carriers. Often carriers will settle a claim brought by a shipper and then look to recover what it paid to the

shipper from its subcontractor who may be responsible for the loss. In defending a subcontractor, many of the same defenses an initial carrier would employ against a shipper are available to a subcontractor to employ against an initial carrier. Accordingly, one of the most important defenses is the potential contractual limit on a subcontractor’s liability in the contract between the initial carrier and the subcontractor. Another defense is the Carmack Amendment’s preemption of state law claims against a subcontractor. Also, one should defend against any special damages claimed by an initial carrier for, among other things, “handling the claim” such as for its damages due to increased insurance premiums or a fractured business relationship with the shipper. As discussed above, in the absence of these special damages being in the contemplation of the parties at the time of contracting, these damages should not be recoverable.

In conclusion, cargo damage or loss is oftentimes an evitable part of the shipping and trucking business. Trucking companies should know their defenses before the trailers are hitched to the tractors. If they are so informed, when a cargo loss claim is brought, the trucking company will have the optimum number of defenses available to limit its potential losses. While the Carmack Amendment provides many avenues for liability for a trucking company, it provides an array of defenses for that same trucking company that an attorney can use effectively to defend his or her client. 

Endnotes

1. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003).
2. However, it is noteworthy that where a contract is silent on a particular issue, the Carmack Amendment will supply the default rule of decision. See, *Transit Home of America v. Homes of Legend, Inc.*, 173 F. Supp.2d 1192, 1198 (N.D. Ala. 2001).
3. 49 U.S.C. § 13102(14)(2008).
4. 49 U.S.C. § 14706(a)(1)(2005).
5. See *Beautiful, Inc. v. Puerto Rico Marine Management, Inc.*, 611 F.Supp. 537, 542 (D.Md. 1985).

6. 49 U.S.C. § 14706(a)(1) (2005).
7. *Id.*; see *PNH Corp. v. Hullquist Corp.*, 843 F.2d 586, 588 (1st Cir. 1988) (“[A] shipper may recover the amount lost because of theft or damage of goods from either the initial carrier issuing the bill of lading or the carrier delivering the goods to their final destination, even if the goods were lost or damaged on those portions of the route handled by other carriers.”), and *Beautifax*, 611 F.Supp. at 543 (“intermediate connecting carrier [is] not amenable to suit under the Carmack Amendment”).
8. 49 U.S.C. § 14706(b)(2005) (“The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property.”)
9. 49 U.S.C. § 14706(c)(1)(2005).
10. See e.g., *National Semiconductor Corp. v. Commercial Lovelace Motor Freight, Inc.*, 560 F.Supp. 908, 910 (D.Ill.1983) (stating that “a court must determine the reasonableness of the value established in writing between the carrier and shipper under the circumstances surrounding the transportation”).
11. See e.g., *American Cyanamid Co. v. New Penn Motor Exp., Inc.*, 979 F.2d 310, 315-16 (3rd Cir. 1992) (“nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations in a released value provision.”).
12. Federal decisions hold that the Carmack Amendment preempts state law causes of action that seek redress for cargo loss or damage which are inconsistent with the Carmack Amendment. See e.g., *REI Transport, Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F.3d 693 (7th Cir. 2008) (finding that the “Carmack Amendment generally preempts separate state-law causes of action that a shipper might pursue against a carrier for lost or damaged goods”); *Usinor Steel Corp. v. Norfolk Southern Corp.*, 308 F.Supp.2d 510 (D. N.J. 2004) (stating that because Congress intended to occupy the field in this area, the Carmack Amendment preempts state law claims for cargo loss).
13. See *United Van Lines, L.L.C. v. Jackson*, 467 F.Supp. 2d 711 (S.D. Tex. 2006) (stating that the Carmack Amendment preempts any common law remedy other than “actual injury or loss”).
14. See *Accura Systems, Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874, 875 (5th Cir. 1996).
15. See *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir.) (“To recover special damages, the plaintiff must show that the carrier had notice of the special circumstances from which such damages would flow.”); *Main Road Bakery, Inc. v. Consolidated Freightways, Inc.*, 799 F.Supp. 26 (D. N.J. 1992) (“Even when the Carmack Amendment preempts state common law remedies, special damages are still recoverable under the [Carmack] Amendment if the carrier had notice of the special circumstances from which such damages would flow at [the] time [the] bill of lading contract was made.”).
16. 49 U.S.C. § 14706(e)(2005).
17. *Id.*
18. See *Missouri Pacific R.R. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964) (stating that the Carmack Amendment “codifies 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.”); *Tokio Marine and Fire Ins. Co., v. Amato Motors Inc.*, 871 F.Supp. 1010 (N.D. Ill. 1994); *RTC Transport, Inc. v. Walton*, 864 P.2d 969 (Wash.Ct.App. 1994) (finding that a carrier must prove it was not negligent, in addition to any one of the other enumerated defenses).
19. See e.g., *Plough, Inc. v. Mason & Dixon Lines*, 630 F.2d 468, 471 (6th Cir. 1980) (“inherent qualities of the goods” were at issue but the district court erred in applying the proper standard for burden of proof).
20. See *Chubb Group of Insurance Companies v. HA Transportation Systems, Inc.*, 243 F.Supp.2d 1064 (C.D.Cal. 2002) (stating that while it applies to “motor carriers” and “freight forwarders,” the Carmack Amendment does not apply to brokers).
21. 49 U.S.C. § 13102(2)(2008).
22. See e.g., *Delta Research Corp. v. EMS, Inc.*, No. 04-60046, 2005 WL 2090890 at *5, (E.D.Mich. Aug. 29, 2005) (citing the Code of Federal Regulations when it found that “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.” (citing 49 CFR § 371.2(a))).
23. *Id.*
24. 49 U.S.C. § 13904; *Gray Line National Tours Corp. v. United States*, 380 F.Supp. 263, 266 (S.D.N.Y. 1974) (regulating brokers is intended to protect carriers and shippers from dishonest and financially unstable middlemen in the transportation industry).
25. See *Chubb Group*, 243 F.Supp.2d at 1064 (“[M]ost courts hold that brokers may be held liable under state tort or contract law in connection with shipments.”); *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 89563, *3 (N.D.Ill. 1999) (stating that the Carmack Amendment “does not exempt brokers from paying for their own negligence or prevent them from entering into contracts with shippers”).
26. See *Electroplated Metal Solutions, Inc. v. American Services, Inc.*, No. 07C409, 2008 U.S. Dist. LEXIS 8999 (N.D. Ill. 2008).
27. 49 U.S.C. § 13102(8)(2008).
28. *Id.* at § 14706(a)(2); *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 89563 at *1 (N.D.Ill. 1999) (“If Custom was a carrier or freight forwarder, it would be liable under the Carmack Amendment.”).
29. *Id.*; see also *Delta Research Corp.*, No. 04-60046, 2005 WL 2090890 (considering claims by the plaintiff that defendant acted as a freight forwarder and the defendant’s claims that it was acting as a broker).
30. *Hyundai Corp. v. Contractor’s Cargo Co.*, No. H-07-2625, 2008 WL 4178188 at *7 (S.D. Tex 2008) (holding that “Hyundai [wa]s bound by the limited liability provision [in its claim against a subcontractor] because it gained the benefit of [the initial carrier’s] rates and decided not to opt out of the release value, but instead obtained separate insurance”).