



How Many Hats Do You Wear?

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Slide 2

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Your Presenter



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DOMESTIC TRANSPORTATION ENTITIES

“Motor Carrier” - “a person providing motor vehicle transportation for compensation.”

“Property Broker” - “a person 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.

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4

TRANSPORTATION ENTITIES

“Freight Forwarder” - an intermediary which holds itself out to the general public to provide transportation of property for compensation 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 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 of a carrier subject to STB jurisdiction.

CARMACK AMENDMENT

- Since 1906, the Carmack Amendment to the Interstate Commerce Act has provided a federal scheme of carrier liability for goods lost or damaged in interstate transit. 49 U.S.C.A. § 14706.
- The Carmack Amendment creates a unity of responsibility in the transportation industry by requiring that the initial motor carrier of a shipment be responsible for the entire shipment despite the number of connecting carriers involved.

FIRST PRINCIPLES

- Each connecting carrier may still be sued for damages that occurred on its line. The Carmack Amendment, however, relieves the shipper of the burden of searching out such a carrier.
- The burden is transferred to the initial carrier which is in a better position to uncover the facts and litigate the liability of the connecting carriers.

CARMACK AMENDMENT

- Carmack applies only to surface transportation: “in the United States [interstate] or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.”
- Under these terms, Carmack clearly applies to a shipment originating within the U.S. under a through bill of lading and ending in Canada or Mexico.

CARRIER LIABILITY

- A prima facie case of carrier liability under the Carmack Amendment is established by proving that the goods were delivered to the carrier in good condition, that they arrived at the place of delivery in damaged condition, and that the amount of damages is measurable.

– *Case W. Reserve Univ. v. Yellow Freight Sys., Inc.*, 619 N.E.2d 42, 45 (Ohio Ct. App. 1993).

CARRIER LIABILITY

- The liability of the carrier is essentially strict liability.
- Once a plaintiff establishes a prima facie case, to avoid liability, the carrier must show that the damage was caused by an act of God; . . . the public enemy; . . . the act of the shipper himself; . . . public authority; . . . or the inherent vice or nature of goods.
 - *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964).

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10

LIMITATION OF LIABILITY

- A carrier may also limit its liability if it establishes rates for the transportation of property under which liability is limited to a value established by written declaration of the shipper, or by written agreement between the carrier and the shipper if it would be reasonable under the circumstances.

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**CARRIER, FORWARDER AND BROKER
LIABILITY**

- The distinction between a property broker and a freight forwarder is important with regard to the allocation of liability in the event of cargo loss or damage.
- Like motor carriers, freight forwarders issue bills of lading and are subject to liability for cargo loss and damage under, and are carriers for purposes of the Carmack Amendment.

CARRIER, FORWARDER AND BROKER LIABILITY

- However, Carmack does not apply to property brokers.
- Property brokers who merely arrange transportation of cargo with third-party motor carriers are generally not liable for cargo loss or damage.
 - *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 325 (D.N.J. 1997)

CARRIER V. BROKER STATUS

- The most frequently litigated issue in cargo litigation is broker v. motor carrier status.
- How does a property broker ensure that it will not be found liable for cargo loss and damage as a carrier under Carmack?
 - Publish and maintain Terms and Conditions of Service identifying itself as a “property broker,” stating that is merely arranging transpiration with third-party motor carriers, and disclaiming liability for cargo loss and damage.

TERMS & CONDITIONS OF SERVICE

- Require each customer to sign acknowledgment of receipt and acceptance of Terms and Conditions of Service when account is first created - Credit Application -
- Require sales force to reference Terms and Conditions in all booking communications or confirmation- “All services subject to Terms and Conditions of Service available upon request or on at www.wecanhandleyourfreight.com.”
- Invoices containing Terms and Conditions of Service on reverse side or incorporating them by reference.
 - *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 395 (7th Cir. 1992).

MAP 21 – WHAT IS THAT?

- Moving Ahead for Progress in the 21st Century Act, passed by Congress in 2012, commonly referred to as “MAP 21”
- Is the most recent legislation enacted by the federal government concerning the regulation of surface transportation.
- MAP 21, in part, affects property brokers and domestic freight forwarders involved in the business of surface transportation.

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MAP 21 - BACKGROUND

- MAP 21 left in place the previous statutory definition of “broker,” which expressly excludes motor carriers and their agents and employees.
- It separately prohibits motor carriers from brokering transportation services unless they are registered as a broker.
- The primary problem: motor carriers who were acting as brokers by subcontracting the entire transportation to another carrier (also called “double-brokering”).

MAP 21 - BACKGROUND

- This created confusion for shippers and their insurers with regard to responsibilities in the event of cargo loss or damage.
- There was also a belief that the surety bond amount of \$10,000 for brokers and freight forwarders was insufficient for current cargo values.
- Also concern there was no requirement regarding the experience or qualifications of a freight forwarder or property broker.

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21

MAP 21 – REQUIREMENTS

- Under MAP 21, all persons involved in freight forwarding or brokering activities as defined by the Act are required to register with the FMCSA, and have the required surety bond.
- Freight forwarders which perform both freight forwarding and motor carrier services must register both as freight forwarders and as motor carriers.
- Motor carriers that broker loads, even occasionally, **must** register as both motor carriers and brokers, and have the required bond in place.

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22

MAP 21 - BOND REQUIREMENTS

- MAP 21 raised the minimum level of financial security for brokers and freight forwarders from \$10,000 to \$75,000.
- They must obtain and file BMC-84 or BMC-85 forms with the FMCSA reflecting a surety bond or trust-fund agreement in this amount.

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24

MAP 21 - OTHER REQUIREMENTS

- MAP 21 also requires that each agreement to provide transportation or service for which registration as a broker, freight forwarder or motor carrier is required, the license entity **MUST**:
 - specify, in writing, the authority under which the person is providing such transportation or service.”
 - This is often deliberately avoided because the entity does not want the customer to realize that it is non-asset owning.

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25

MAP 21 - ADVICE

- This can be accomplished through disclosure of your role as a broker or freight forwarder on:
 - the shipper-broker agreement
 - load or rate confirmation
 - terms and conditions of service incorporated by reference on these documents from your website, and the like.

MAP 21 - PENALTIES FOR VIOLATIONS

- Any person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any person, a violation of MAP 21 [unauthorized interstate brokerage] is liable:
 - To the U.S. Government for a civil penalty up to \$10,000 for each violation;
 - To the injured party for all valid claims incurred without regard to amount. 49 U.S.C. § 14916(c).

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MAP 21 - EXCEPTIONS

- MAP 21 does not apply to:
 - An NVOCC or an ocean freight forwarder when arranging inland transportation as part of an international through movement involving ocean transportation between the U.S. and a foreign port.
 - A licensed customs broker to the extent that it is engaging in a movement under a customs bond or in a transaction involving customs business,

MAP 21 - EXCEPTIONS

- MAP 21 does not apply to:
 - An indirect air carrier holding a Standard Security Program (49 C.F.R. Part 1458) approved by the Transportation Security Administration, but only to the extent that the indirect air carrier is engaging in the activities as an air carrier

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OCEAN TRANSPORTATION ENTITIES

- Vessel Owning Common Carrier (“VOCC”)
- Freight Forwarder / Ocean Transportation Intermediary (“OTI”)
- Non-Vessel Owning Common Carrier (“NVOCC”)
 - All Licensed by Federal Maritime Commission

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OCEAN TRANSPORTATION ENTITIES

- OTI/Freight forwarder does not issue its own bill of lading.
- An NVOCC issues its own (house) bill of lading to the shipper identifying itself as the carrier on the house bill of lading and then arranges carriage with a VOCC, which issues its own (master) bill of lading to the NVOCC.
- An NVOCC is a common carrier with respect to shippers who employ its services, and shipper with respect to the VOCC.

BRIEF OVERVIEW OF COGSA

- As a common carrier, NVOCC is directly liable under COGSA for cargo loss or damage occurring during transit performed by VOCC
- Shipper may sue NVOCC or VOCC or both. NVOCC will then sue VOCC.
- COGSA is negligence based liability regime containing 17 enumerated defenses and limitations.
- Fire, act of the shipper, insufficiency of packaging, act of god, perils of the sea, and any other cause of loss occurring without fault or knowledge of the carrier

INTERPLAY OF COGSA | CARMACK

- *Regal-Beloit* involved an ocean “through” bill of lading into the U.S. which adopted COGSA. The cargo was damaged during interstate rail transportation, and the cargo owner sued the VOCC and inland rail carrier. The issue was enforcement of the Tokyo venue clause, which was valid under COGSA, but not Carmack.
- The holding of *Regal-Beloit* has been extended by several federal district courts to apply to both import and export shipments. *CNA Insurance Co. v. Hyundai Merchant Marine Co., Ltd.*, 747 F.3d 339, 366-370 (6th Cir. 2014).

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38

INTERPLAY OF COGSA | CARMACK

- In sum, when dealing with an international shipment transported under a through bill of lading, COGSA (adopted contractually) will trump Carmack.
- COGSA is more advantageous to the NVOCC, – negligence based liability and \$500 per package.

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