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The Law Office of Seaton & Husk, L.P. is a commercial litigation firm specializing in the collection of freight charges, cargo loss and damage claims, bankruptcy and related litigation. The firm also maintains a concentration in the formation and review of logistics contracts. Attention is placed on serving the trucking industry in both federal and state licensing and regulatory compliance.

This newsletter is provided free of charge to our clients and patrons. It will contain topical articles of interest, including reprints of ASound Law,@ a monthly column authored by Henry Seaton and appearing in *Commercial Carrier Journal* (previously *Trucking Co. Magazine).* Clients wishing to receive this newsletter should send their name and email address to us at HESeaton@aol.com.

FMCSA UPDATE

THE MEXICANS ARE COMING

The Agency has instituted rulemaking to permit Mexican carriers to extend transborder service. Under the proposed rules, Mexican carriers could apply to extend service beyond the border area into adjacent states or if they wish, to all points in the United States. Service would be limited to traffic moving to or from Mexico.

All U.S. safety regulations would apply and each Mexican carrier would be subject to a safety audit within 18 months of commencement of operations.

Although these proposed regulations were made necessary by NAFTA, substantial opposition from the teamsters and others is expected. Refer to FMCSA-98-3298.

FMCSA TACTICS CRITICIZED

A recent holding from the U.S. Court of Appeals for the D.C. Circuit, *Truckers United in Safety v. Meade*, questions the authority of the FMCSA and the IG office to seize motor carrier records in armed interventions whereby crippling the carrier=s ability to conduct operations.

DISCOVERY PERMITTED

Chief Safety Officer Cirillo dismissed a civil forfeiture proceedings against a carrier because the Midwest Service Center did not timely reply to requests for admissions. This decision confirms for the first time that motor carriers may utilize their rights of discovery as soon as a civil forfeiture letter is submitted. Carriers can now use the discovery rules (' 386) to develop their cases on appeal. Unfortunately, the rules of practice which apply to civil forfeitures have a limited effect in safety rating procedures. See *Baker Hiway Express,* FMCSA 2001-9155-5 (Cirillo 6/13/00).

TRUCK INSURANCE COSTS RISE

With the downturn in freight, continued shipper pressure for lower rates and increasing costs of fuel, most carriers thought life was as bad as it could get. Now a pullback in the insurance market has resulted in spiking liability and cargo premiums. Excess coverage or umbrella policies have become particularly expensive.

In an effort to cut costs, many carriers are tempted by policies which may have substandard

coverage. Cargo policies in particular are subject to exclusions which can leave you without coverage. Exclusions against theft from an unguarded lot, cargo upset without collision, temperature damage, electronic, etc., have become all too commonplace.

Often times, small carriers do not read or understand the fine print of their policy exclusions and a broker or shipper will never see the exclusions on the standard certificate of insurance generated by the insurer.

The carrier which can obtain a true Aall risk@ cargo policy protecting it to the extent of the regulatory requirements (the Carmack Amendment) is indeed fortunate but, by contract, shippers and brokers typically want even more.

Carriers must be wary of contract provisions which require them to name their customers as Aadditional insured@ and indemnity clauses which require them to indemnify the shippers against the shipper=s acts of negligence.

In one recent case, two pallets of dog food fell on a driver=s head. The shipment had been loaded, counted and sealed by the shipper, Ralston Purina, and the carrier=s workman=s compensation paid for the driver=s injury. The driver sued Ralston Purina for negligence and the shipper turned to the carrier for indemnity and insurance against loss which its shipper/carrier contract required the carrier to have.

At the end of the day, the carrier was adjudged liable to Ralston for $375,000 plus $90,000 in attorney=s fees for which it had no insurance. See *Ralston Purina v. Condor,* Civ. Act 98-V-62482 (Sup. Ct. Houston County, GA).

This case should serve as a lesson to all. Be careful not to warrant insurance coverage you don=t have and pay special attention to broadly worded indemnification clauses.

Contact us if you need help in reviewing insurance coverage issues, developing shipper/ carrier contracts or help in reviewing shipper prepared documents.

SOUND LAW: WHOSE MONEY IS IT, ANYWAY?

(Reprinted from *CCJ*-June 2001)

Q One of the brokers we have used extensively just filed for bankruptcy protection, owing us tens of thousands of dollars in freight charges. Do I have any hope of seeing that money?A Possibly. Shipments involving intermediaries typically are governed by multiple contracts that can -- and often do -- conflict, so you might have legal options in court. Bankruptcy proceedings, however, are traditionally unkind to motor carriers and other unsecured creditors. But if you are lucky, you might benefit from an emerging legal doctrine that can exclude freight charges from liens against the estates of bankrupt brokers.In a simple, two-party transaction, the bill of lading clearly defines rights and responsibilities. Carriers must deliver goods free and clear of damage, and consignors or consignees must pay for those services. This arrangement does not, however, address the obligations of an intermediary for either freight charges or cargo claims. Instead, those obligations usually appear in collateral agreements that often create confusion over the intermediary=s role.When acting as intermediaries, motor carriers and freight forwarders are liable for cargo loss and damage unless they obtain indemnity from the subcontracting party. But property brokers bear no liability for cargo loss and damage under federal law. Their duty is to arrange for transportation and to retain authorized and qualified carriers.That=s the law. In the real world, these legal distinctions often are blurred. Carriers Abroker@ freight, while brokers guarantee damage-free delivery and allow their names to be used as carriers of record. The result is uncertainty in the event of default. For example:

$$ **Must the intermediary pay the carrier even if it does not receive payment from the shipper?**

$$ **Does a shipper fulfill its bill of lading payment obligations to the carrier by paying the intermediary?**

$$ Can or should a shipper deduct a cargo claim from an intermediary=s invoice knowing it=s offsetting losses against freight charges for carriers that had nothing to do with the losses? There are no clear answers to any of these questions. But a legal doctrine emerging in several recent court decisions could alter the issues of freight charge collection and cargo liability drastically. Under the Aconduit theory,@ if freight charges are due to a subcontracting carrier, brokers and carriers hold those funds in what=s known as a constructive trust. In effect, the theory holds, funds received by intermediaries from shippers aren=t really the property of the intermediary; they belong to the carrier providing the service. The conduit theory is an old concept, but it gained new life about four years ago in the 6th Circuit=s decision in Parker Motor Freight vs. Fifth Third Bank. In that case, the appeals court ruled that Parker=s collection rights as the carrier providing the service trumped the rights of an intermediary carrier=s secured lender regarding the intermediary=s freight charge receivables. More recently, a federal district court in South Carolina extended the concept to freight charges held by property brokers. In TRM vs. Freight Peddlers, the judge treated freight charges differently than commissions on the grounds that federal regulations require brokers to segregate freight charge receivables from other funds and to maintain financial records on a shipment-by-shipment basis. Intermediaries can benefit from the conduit theory as well. In New Prime vs. Professional Logistics Management, a Missouri court reasoned that if a broker is merely a Aconduit@ for freight charges, it=s not obliged to pay the carrier unless it receives funds from the shipper. And the 2nd Circuit in Prima USA vs. Westinghouse used the conduit theory to pass cargo liability through an intermediary to the underlying carrier. The conduit theory is changing the legal framework for transactions involving intermediaries, and it may well help a carrier recover freight charges from a bankrupt broker. In general, however, shippers, carriers and intermediaries should assume that case law is unreliable and try to agree in advance to clearly defined roles.

HOW SOLID IS YOUR CONTRACT?

(Reprinted from *Trucking Co. Magazine,* July 1999)

Contracts with shippers and brokers typically cover at least 10 essential issues. Although signing bad contracts can bring high risk, simple and basic language should protect you fully while addressing shipper and broker concerns.

Identity of the parties. The contact should include the legal name and business address of the contracting party, which should be identified as the shipper, broker, freight forwarder, etc., along with its proper docket number, if applicable. Use this information to check credit references and confirm the party's authority, insurance and bonding.

Payment terms. The contract should tie the broker's or shipper's payment obligation to the rates and accessorial charges agreed to in writing. Carriers generally must submit proof of delivery with invoices to brokers for payment. Standard payment terms should be within 30 days of receipt, without offset.

Insurance. You usually must guarantee to the broker and its shipper/principal that you maintain all-risk cargo insurance in a specified amount per shipment, public liability insurance in a specified amount as required by federal regulations and workman's compensation insurance as required by state law. In addition, you often must provide certificates of insurance upon request, pledge to maintain a satisfactory Department of Transportation safety rating and promise to comply with applicable laws.

Governing rules. It's in your best interest to incorporate standard and accepted rules of commerce by reference into each contract. These rules include the terms and conditions of the uniform straight bill of lading, standard claims rules applicable to common carriers and the Carmack Amendment, which establishes claims standards and preempts other state-law causes of action. Use the destination market value as the standard for lost or damaged cargo. Exclude

special or consequential damages unless you specifically agree to them.

<u>Released rates</u>. Make sure that you and the broker or shipper agree on the maximum value of any truckload and that you are adequately insured. Then agree in writing to a maximum limit for your cargo exposure on any given shipment.

<u>Shipping document execution</u>. Specify that the terms and conditions of the uniform straight bill of lading applies so that you are not surprised by non-conforming terms you never agreed to accept. Be sure the contract provides that you are listed on the bill of lading as the "carrier of record" and that any broker or third party is shown as the payor of freight charges.

<u>Indemnification</u>. Avoid broadly worded indemnification provisions. It is appropriate, however, for you to hold brokers and shippers harmless from non-cargo claims or losses arising out of negligence or omissions on the part of the carrier, your employees or your agents.

<u>Law and integration</u>. The contract, together with any load confirmation, should contain the entire agreement between the parties. It should specify that signed, written agreement is needed for modifications. Incorporate general principles of federal transportation law, and select a forum state for other issues of law, venue and jurisdiction.

<u>Non-back solicitation agreement</u>. Many brokers and other intermediaries insist upon agreements not to back solicit their accounts. Ethically, you shouldn't circumvent a broker who first made possible your business with a particular shipper. But as a practical matter, you must be very careful with the scope and application of non-back solicitation agreements. A poorly worded agreement could bar you from any future direct service to a major account.

<u>Ground rules</u>. Finally, many issues, such as detention, C.O.D. salvage and so on, are seldom addressed in multi-page shipper prepared contracts. Review your rules tariffs to make sure these issues are covered. Where possible, incorporate your tariffs by reference.

These are the elements of a basic, one-time contract for the spot market. By adopting these concepts as standard, carriers, shippers and brokers could do business with unfamiliar parties without fear of nasty surprises. If you need help in preparing rules tariffs, constructing acceptable contracts, or in analyzing shipper prepared documents, please contact us at 800-338-8883.

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brokers and freight forwarders.

CONTRACTING PITFALLS

Owner-Operator Contracts which comply with 49 C.F.R. 376.

Insurance Contracts B Frequently used exclusions from coverage which can leave you uninsured.

Broker/Carrier and **Shipper/Carrier Contracts**

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