**The Carmack Amendment – Recent Legal Developments and Insurance Implications**

## I. The Carmack Amendment to the Interstate Commerce Act –

### A. Introduction

The Carmack Amendment to the Interstate Commerce Act ("Carmack")[1] is the United States statute that governs interstate transport of cargo by surface motor and rail carriers, as well as domestic freight forwarders.

### B. Carmack in a Nutshell

Carmack defines a "carrier" as both a motor carrier and a freight forwarder.[2] Further, Carmack deems a freight forwarder "both the receiving and delivering carrier."[3]

Under Carmack carrier providing transportation or service subject to the jurisdiction of applicable provisions of the Interstate Commerce Act is liable "for the actual loss or injury to the property."[4] Generally, this means, the actual value of the loss or damage. This would exclude attorney's fees, as well as consequential or punitive damages.

The liability extends to the receiving carrier, the delivering carrier or any other carrier over whose line or route the property was transported over in the U.S. or from a place in the U.S. to a place in an adjacent foreign country[5] when transported under a through bill of lading.[6]

To be compliant with Carmack the carrier is required to issue a receipt or bill of lading for the property it receives for transport.[7] However, "failure to issue a receipt or bill of lading does not affect the liability of a carrier."[8]

---

[1] 49 U.S.C. § 14706.
[2] 49 U.S.C. § 14706(a)(1).
[3] 49 U.S.C. § 14706(a)(2).
[4] 49 U.S.C. § 14706(a)(1).
[5] Principally Canada and Mexico.
[6] 49 U.S.C. § 14706(a)(1).
[7] 49 U.S.C. § 14706(a)(1).
[8] 49 U.S.C. § 14706(a)(1).

As a *quid pro quo* for the imposition of liability for the full value of the loss, Carmack allows a carrier to establish rates for its transport services which limit the carrier's liability. That limitation can be increased by declaration of value by the shipper, or in the terms of a written agreement between the carrier and the shipper.[9]

Carmack also addresses the time within which a claim for loss or damage may be filed. The time limit for filing a claim may not be less than nine (9) months from the date of delivery or when delivery should have taken place I the case of non-delivery.[10] Failure of the shipper to file a timely claim can result its denial and can act as a bar to the prosecution of a suit by the shipper to recover the value of the loss or damage.[11]

Should a claim be denied by the carrier, under Carmack the shipper may commence an action to recover the value of the claim provided it is filed within two (2) years and one day from the date "the carrier gives a person written notice that the carrier has disallowed any part of the claim."[12] "This is not a statute of limitations, but rather a condition precedent to recovery that the shipper must meet."[13] As in the case of the minimum nine (9) months within which a claim may be made, the time for commencement of an action is a "permissive statutory requirement which, unless incorporated into the contract of carriage, does not apply."[14]

A claimant can file a Carmack action in either a United States District Court or a State Court[15], provided that the minimal jurisdictional amount for filing in a United States District Court is $10,000.00.[16]

### C. Important Litigated Carmack Issues

Since enactment of Carmack in 1906, there have been numerous cases interpreting the intent of Congress in passing the statute and the meaning and application of its terms. This is not surprising since shippers have, and continue to, attempt to find a basis for avoiding carriers' limitations of liability, the strictures on the timing, and requirements, for filing claims and commencement of suit.

Although there many issues that can be raised in the context of a Carmack case, in one way or another almost all affect whether or not Carmack governs the claim and whether or not the carrier's limitation of liability is enforceable.

---

[9] 49 U.S.C. § 14706(c)(1)(A).
[10] 49 U.S.C. § 14706(e)(1)
[11] *See, e.g., Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980).
[12] 49 U.S.C. § 14706(e)(1); *see*, *Norpin Mfg. Co. v. CTS Con-Way Transp. Serv.*, 68 F. Supp. 2d 19, 23 (D. Mass. 1999).
[13] Wesley S. Chused, The Evolution of Motor Carrier Liability Under the Carmack Amendment into the 21st Century, 36 Transp. L.J. 177, 210 (2009).
[14] *Id.*
[15] 49 U.S.C. § 14706(d)(3).
[16] 28 U.S.C. § 1337(a).

1. Carmack Preemption -

The issue of whether Carmack governs a claim often arises at the outset of a suit when a shipper files a complaint seeking relief under a variety of state law causes of action. When this happens, the carrier will move to dismiss the complaint on the ground of Carmack preemption.

Carmack preemption refers to the concept that a claimant's sole remedy for seeking recovery for loss, damage or delay to goods in transit is Carmack. Preemption completely bars the ability of a claimant to commence an action on the basis of any state statute or any common law cause of action, such as breach of contract, negligence or fraud.

Congress enacted Carmack to provide, among other reasons, a uniform and unified statute governing interstate transportation of goods. In the interests of preserving that uniformity and the benefits that Carmack is intended to confer on both shippers and carriers, a long line of case law has upheld the concept that all state statutory and common law claims resulting from interstate transport of goods are preempted by Carmack.[17] This is the overwhelming prevailing view.

This is an important issue since a carrier's Carmack limitation of liability could be held to be void or voidable if the shipper's claim were prosecuted under a state common law cause of action or statute. However, if the carrier has taken the proper steps to establish its limitation of liability within the scope of Carmack, then preemption protects against the insinuation into the case of issues of law that might result in the limitation being found unenforceable.

Preemption not only applies to the period when goods are in transit but extends to the periods prior and subsequent to the actual transport of the goods.

By way of example, a suit against a domestic freight forwarder in California was filed seeking $7.6 million in damages for the theft of a shipment of cell phones. At the outset of the case plaintiff filed suit alleging a variety of state law causes of action, including breach of contract. A motion to dismiss was filed on the ground of Carmack preemption.

Among other arguments raised by plaintiff in opposition to the motion was the assertion that the contract, which the plaintiff claimed was breached, was formed well before the loss of the shipment and therefore was outside the scope of Carmack preemption.[18]

In granting our motion to dismiss the court stated:

---

[17] *See, for example*, Hughes v. United Van Lines, Inc., 829 F.2d 1407, 11412 (7th Cir. 1987).

[18] Unfortunately, there is no citation that can be referred to as the case was settled by execution of confidentiality agreement which would preclude providing more detailed information. It is worth noting, however, the settlement resulted from the plaintiff having developed litigation fatigue and recognized its efforts to overcome the forwarder's Carmack limitation of liability, a pittance compared to its claim, were not going to be successful. Consequently, a settlement, premised on the costs of continuing litigation and possible appeal was agreed for a very nominal premium above its limitation of liability.

> It is well settled that the Carmack Amendment is the exclusive cause of action for interstate-shipping contract claims…..[Plaintiff] contends that its state law claims are not preempted because they relate, at least in part, to [Defendant's] conduct before shipment…..The Court concludes that [Plaintiff's] 'before shipment' distinction cannot save its state law claims from dismissal. If Carmack did not preempt state law claims predicated on a carrier's conduct before shipment, then garden variety breach of contract claims would fall outside its reach.

With the exception of a very small number of cases, the foregoing represents the prevailing view of the majority of federal district courts when deciding a preemption issue. Those that have deviated from this view have not been given much currency by the majority of the district courts. Nonetheless, plaintiffs continue to argue for the wider application of these aberrant decisions.

State courts, however, have not necessarily been as consistent or uniform, as there seems to be an inclination on the part of state courts to try and find a means of affording their citizens relief from the protections provided big, bad carriers by Carmack. Therefore, there is a greater risk of an adverse ruling on preemption, as well as other Carmack issues, if a case is litigated in a state court. Consequently, one of the first things carrier defense counsel will do when taking up a case filed in state court is to remove it to a federal district court, provided the claim exceeds the minimum jurisdictional amount noted above.

2. Limitation of Liability -

A carrier limitation of liability can be, and most often is, established by the terms of its contract of carriage (generally the bill of lading) or tariff. As noted, however, the limitation can also be established by the terms of a written service agreement between the carrier and the shipper.

Shippers continually litigate the enforceability of carriers' limitations of liability, even in those instances where they elected to declare a higher value for carriage[19] or negotiated and signed a written agreement specifying the limitation.

As a consequence of cases contesting the enforceability of carriers' limitations of liability, a four-part test evolved as the accepted means in many jurisdictions of determining whether a carrier's limitation of liability is enforceable. As one of the criteria of the four-part

[19] In the cell phone case referred to above, the shipper had a long-standing course of dealing in which the shipper routinely declared the same value for carriage covering dozens of prior shipments handled by the forwarder, as well as the one that was the subject of the suit. Even though the amount of the declaration was determined by the shipper and the shipper was the one that placed the value declaration on the bill of lading, the shipper tried to claim it was unenforceable for a variety of reasons.

test was predicated on a no longer existing regulation which required carriers to file tariffs with the now defunct Interstate Commerce Commission, the test now requires three requirements be met.

Therefore, for a carrier to effectively limit its liability it must establish that: (1) it obtained a shipper's written declaration of the shipper's choice of liability; (2) it gave the shipper a reasonable opportunity to choose between two or more levels of liability; and (3) it issued a receipt or bill of lading prior to moving the shipment.

Each of the foregoing requirements is continually the subject of cases in which shippers attempt to avoid a carrier's limitation of liability. Often the arguments made are that the carrier did not provide proper notice of the existence of the limitation or to offer a choice of rates between two levels of liability.

What follows are case notes that focus primarily on determining the correct measure of damages in a Carmack cargo loss or damage case.

## II. Determination of Damages in a Carmack Case

### A. The General Rules

Generally, the amount of damages (subject to any limitation of liability) is the difference between the market value of the property in the condition in which it should have arrived at destination and its market value in the condition in which it did arrive. Other recoverable damages also include damages for delay, lost profits, and all reasonably foreseeable consequential damages. *Am. Natl Fire Ins. Co. v. Yellow Freight Sys.*, 325 F.3d 924, 931 (7th Cir. 2003). However, to recover special, or consequential, damages, the [shipper] must show that the carrier had notice of the special circumstances from which such damages would flow. Whether the goods have suffered an actual, physical loss is normally the measure as well. This is what is required by the standard form of motor truck cargo legal liability policies as well.
Is actual physical loss required? Maybe, Maybe not.

Actual physical loss has traditionally been a pre-requisite to finding liability under the Carmack Amendment. However, recent cases show a trend that mere loss in market value, or potential damage or adulteration, is sufficient to meet the damages element of the prima facie case under the Carmack Amendment.
Recent cases have held that damages under the Carmack Amendment can be demonstrated by a mere loss in market value. See, *Jessica Howard Ltd. v. Norfolk S. Ry. Co.*, 316 F.3d 165, 169 (2d Cir. 2003) and *Atlantic Mut. Ins. Co. v. Napa Transportation,* Inc., 201 Fed. Appx. 19 (2nd Cir. 2006). Even in these cases, there is generally some amount of physical loss or damage to the cargo container or packaging suggesting loss or contamination rendering the goods unmarketable.

We are seeing these cases increasingly in the area of food product and pharmaceutical transportation. Under the older case law, the mere fact that a cargo is delivered without the seal intact does not necessarily equate to damaged goods.

**B. Case Examples – Is a broken seal enough?**

For instance, in *Land O'Lakes, Inc. v. Superior Serv. Trans. of Wis., Inc*., 500 F.Supp.2d 1150, 1156 (W.D. Wis. 2007), the court stated, "a seal is intended to protect the shipment from tampering, but its absence does not mean that the shipment is contaminated or otherwise damaged."

Land O'Lakes involved a motor vehicle crash that resulted in minor physical damage to the cargo, which was butter. Most of the butter was still in the containers, wrapped in plastic, and not exposed to the elements. The refrigeration unit never stopped working. Land O' Lakes rejected shipment and sold the butter for salvage. The issue of the seal had more to do with the proof of good condition on loading, and not on proof of loss on delivery. LOL had failed to seal the trailer pursuant to its own policy. This was not proof of contamination or damage, but the court found LOL had failed to establish good condition on loading - no evidence of procedures used to prepare goods for inference of good condition (clean B/L not enough). Further, carrier claimed shipper had failed to mitigate damages in rejecting load.

The shipper argued its internal policy precluded it from accepting product that has been involved in an accident of this nature because of the risk of food contamination. *Id.* at 1157. The Court found fact issue regarding whether the shipper's rejection of the entire load was reasonable, as only 20% of load was deformed, the proper temperature maintained throughout, and most of the cargo remained unexposed, encased in packaging. There was enough factual evidence of failure to mitigate damages to preclude summary judgment. At trial, jury found shipper had failed to mitigate damages by refusing the load, but awarded the shipper the same amount it would have received if it had salvaged the goods itself (invoice value less the salvage award).

From the very same court issued *Oshkosh Storage Co. v. Kraze Trucking, LLC*, 65 F.Supp.3d 634 (E.D.Wis. 2014). That case involved a shipment of cheese from Minnesota to Wisconsin. There was an uneventful transportation, but as the driver pulled into the receiver's facility and checked in, he broke the seal before backing trailer into loading dock. Consignee rejected load, shipper sold for a loss. The court found that the mere breaking of seal was sufficient to meet proof of damage. The core of the dispute was "whether Kraze's premature removal of the seal caused 'actual loss or injury' or 'damage" to the delivered product". *Id.* at 637. In defining "actual loss or injury", court stated that a decrease in product value is "unquestionably" a loss or injury.

The court stated:

> Food distributors have a duty to ensure that the food they provide to the public is safe, and the requirement that shipments be unsealed only by authorized personnel is intended to provide assurance that the shipment has not been contaminated. Given the risk to customers and a distributor's own potential liability, it is not unreasonable for a company to adopt a policy of rejecting shipments of food products when the seal has been broken as long as that policy has been clearly announced."
> *Id.* at 638.

Court rejected the carrier's argument that its liability was extinguished once it arrived on facility property. It ruled that the cargo was not "delivered" until the cargo was made "accessible" for unloading. The court also rejected the argument that because the bill of lading did not require the seal to be broken by consignee, there was no evidence of negligence, ruling that the very purpose of seal is to provide consignee with a way to verify there has been no tampering with the goods. The court further disagreed that shipper's documents were an admission, because warehouse employee had accepted the load and checked a box noting no evidence of damage, ruling the clerk's notation a mistake, not a legal admission.

In *Atlantic Mut. Ins. Co. v. Napa Transp., Inc*., 201 Fed Appx. 19 (2nd Cir. 2006), a shipment of Johnson & Johnson pharmaceuticals was subjected to a fire inside the container, partially damaging some of the cargo. The entire load was rejected due to heavy smoke odor. The Carrier argued no damage to entire shipment, as goods were packaged in cardboard and shrink-wrapped. Court found sufficient evidence of damage to entire shipment, even though no item by item inspection.

## III. Carmack from an Insurance Claims Perspective

### A. Claim Handling Analysis

1. Does Carmack Cover the Claim? -

The Carmack Amendment has a significant effect on cargo claim handling. There are several questions as a claim handler we have to answer in order to handle, adjust and conclude a claim. The first question is the easiest; what really is the Carmack Amendment? I will try to simplify this as much as possible, but as Richard has explained earlier, the Carmack Amendment is a law that is applied to US motor carriers. This law was created by Congress in 1935 and was implemented to help bring consistency in the rules governing US interstate shipping. This law simply defines the rights, duties and liabilities of the shippers and carriers regarding cargo claims.

The next step is we need to know who the Amendment actually applies to. It applies to shippers and carriers who ship all types of cargo in and around the United States. There are a few exceptions like fisherman and farmers who this law is not applicable.

2. Who is Liable for the Claim? –

When we receive a claim our next question to ask; under the amendment, who would be liable for the cargo damages. The amendment holds the carrier liable for the damages, as long as there is no support of negligence, unless there are exceptions. There are five exceptions defined in the Carmack amendment by which a carrier can deny liability. They are:

Act of God – for example a wind storms that could blow over a rail car, or a tornados, floods etc.
Public enemy –
Act or Default of Shipper –
Public Authority –
Inherent Vice – the nature of the cargo

3. Shipper Responsibility in Connection with the Claim –

Now we also ask ourselves, what responsibility does the shipper have under Carmack. First, the shipper has to show support the cargo was in good condition when it was released to the carrier. Having the carrier sign at origination that he or she is picking up the freight in an undamaged condition is prima fascia evidence. The shipper also must support the damages or non-delivery of the cargo is noted at delivery. Lastly, the shipper must support the amount of the loss; what is the value of the damages.

4. Damages –

Once we know the amount of the damages, the claim handler has to determine how much of the claimed loss is the carrier liable for. Under Carmack, the carrier's liability is limited to the actual loss to the cargo. In addition, a motor carrier can limit their liability under Carmack by implementing a tariff they apply to the shipping rates which is based upon the weight of the cargo, transport miles, or the value of the cargo. A lower shipping rate can also limit the carrier's liability if both the shipper and the carrier agree prior to shipping.

**B. Disposition of the Claim**

When motor carriers receive a claim, they can either pay the claim in full to their customer, fall on one of the five exceptions listed earlier, offer their limitation of liability based upon their terms and conditions listed on their bill of lading; the contract of carriage. Oft times this is when the carrier turns to their insurer to handle the loss, for advice and for claims over their policy deductible.

There are requirements for filling claims as well as suits under Carmack. The limit to file claims under Carmack is 9 months from the date of delivery and suits can be filed two years and

a day from the date a claim is denied. These time limits should be listed in the bill of lading or contract of carriage from the carrier to the shipper.

Lastly, contracts shippers and carriers enter into can have an effect on a cargo claim as well. Today, more and more shippers and carriers are entering into formal contractual agreements spelling out the duties each will be responsible to perform. Contracts can extend or take precedence over the Carmack Amendment. The contract language can container Carmack as it applies to intrastate transit as well as commodity exclusions. Shippers and Carriers alike should be aware that contract terms can or may waive rights or responsibilities as spelled out in Carmack. Any waiver must be expressed and in writing, the signatories are then left to the state laws and the terms of the contract to decide who is to take responsibility for the cargo damages.

## IV. Carmack from a Company Risk Management Perspective

### A. The Roles of the 3PL.

In transportation today, 3PLs wear many hats. As a leading third-party logistics and supply chain management provider we offer a variety of strategic domestic and global freight transportation solutions. Depending on the level or type of service some transactions we may be the property broker, a freight forwarder, a carrier, a customs broker or even a shipper's Agent.

The Carmack Amendment applies to carriers and freight forwarders only, it does not apply to property brokers. It is therefore very important that not only do we understand what hat you are wearing in a transaction, but that our customers understand as well in order to determine liability in case of a loss.

Sometimes there can be confusion in whether a company is a broker or carrier. This could be a result of the how the company represents itself to the client, marketing brochures, website, etc. If a company accepts the responsibility of making sure a shipment is delivered from origination to destination, no matter who does the actual transport, the company is a carrier. If the company only agrees to coordinate on behalf of the shipper and secure a third party to transport the freight, the company is a broker.

### B. The Pressure from Shippers on 3PLs.

Although the bill of lading is the primary transportation contract between a shipper and a carrier, the broker is not liable under The Carmack Amendment for any loss or damage during the transit. However, the demands on 3PL's, especially brokers in the transportation industry today are huge because competition is fierce. Everyone is looking for contractual agreements because they know a broker is not liable under Carmack. In many cases brokers are compelled

to enter into contracts that hold them to all kinds of guarantees from ensuring freight charges are paid to paying claims in full regardless if their insurance company accept a claim or not.

Even though brokers have no liability under Carmack, shippers and cargo owners alike continue to file claims against property brokers. Their reasoning is anything from negligence to breach of contract. This is why it is important to know what hat the company is wearing for the shipment. The lines sometimes become blurred because the company may offer so many different services.