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“Faces of Fraud and Theft: Effects on Transportation and Insurance”

I. Claims Perspective of the Problem

Statistics

Cargo theft is on the rise and thieves are becoming more sophisticated. Cargo theft in 2015 was up by 11% according to Cargo Net, a division of Verisk Crime Analytics. Cargo theft can happen at any time to just about any shipment. Freight Watch International reported that Mexico, Brazil, South Africa, the United States and Russia are the countries most at risk for cargo theft.

In the United States cargo is stolen several times a day with the most popular commodities to steal being foodstuffs, metals and electronics. The states with the highest number of thefts are California, Florida and Texas (Source Freight Watch).

One of the reasons theft and fraud is continually rising is its attraction; domestic cargo theft is low risk, with high rewards. Some of the main reasons thieves target FTL (Full Truck Load) carriers is that FLT carriers have clients with high value cargo that are usually in high demand, and high value cargo is easily resold on the black market. Cargo theft can happen at any time, any place and by many different people which could include employees, truckers, shippers, and/or organized groups. Organized groups are typically identified as ethnic gangs or the mafia. Currently, in the U.S., domestic cargo thieves target five main commodities: computer components and software, consumer electronics, cigarettes and pharmaceuticals, fashion apparel, as well as copper and metal. Just as in domestic thefts, international cargo thefts are usually committed while commodities are in transit which is when they are the most vulnerable. There can also be collusion between the consignee, shipper, trucker and or the criminals.

ECONOMIC CONSEQUENCES OF LOSS

Insurance fraud costs our country over \$80 billion per year. In fact, according to the National Insurance Crime Bureau (NICB), insurance fraud is the second most costly white-collar crime in the United States.

Cargo theft affects not only the cargo owners, but also shippers, carriers, manufacturers, and of course, the consumers. The by-products of cargo theft are higher insurance costs due to higher loss experience, additional freight charges for shippers who have to replace stolen cargo, added manufacturing costs for replacement cargo, lost revenues from cancelled deliveries, investigation costs, as well as potential legal fees.

ORGANIZED GROUPS

Currently, in the U.S. cargo theft is flourishing, and is performed by many different types of groups. In the south, principally in Florida and specifically the Miami area, the groups are made up of Cuban descent that focuses on FTL shipments from supply chain carriers who move high value loads. The Cuban gangs also commit burglaries of high value cargo stored in warehouses. There are also local gangs who concentrate on local distribution centers, truck stops and drop yards. In California, violent gangs such as MS-13 (a group coming out of El Salvador), have found cargo theft very lucrative and are known to finance their other illegal activities through their cargo theft activity. In Canada, the Chinese Triad crime organization has been linked to several reported cargo thefts in the country. In Mexico there is a very serious drug war going on which includes extensive violence as well as kidnapping for ransom. These warring drug lords and their cartels are commonly associated with the majority of that countries cargo theft.

Today more than ever an additional big concern regarding thefts is the money produced through theft and fraud by organized cargo theft rings. The concern is that this money is being directed back to terrorist organizations such as Al Qaeda and Hezbollah, which could be used to fund future attacks against American interests.

The typical method of operation for FTL thieves' involves them traveling from Florida to a distribution center location, where they sit and place the location under surveillance watching for a truck load to leave. They then follow the loaded tractor/trailer from the distribution center (DC) waiting for a chance to steal the unit. These thieves are patient and sometimes will follow the load for hundreds of miles before they have the chance to steal the load. Once the driver leaves the unit alone for whatever reason, the thieves will steal the entire unit by hot wiring the truck or they might even have the master keys. As soon as they have secured the unit they disable any GPS or tracking devices. The thieves then drive the stolen unit to a safe location where they can transfer the cargo and/or abandon the rig. The first 16 hours after the theft is the most critical in locating stolen cargo; after that time recovery is very slim.

In an article in the Claims Journal earlier last year, Tim Lynch, government affairs director for the National Insurance Crime Bureau, discussed anti-fraud legislation for 2015. He spoke of how illegally seized cargo, like baby formula and pharmaceutical equipment, are sold on the black market. He said, "Some states including Georgia, Kentucky and others over the past couple of years have passed legislation to make sure that cargo theft is specified as a crime and has strong penalties on the books to put the people that commit those crimes behind bars, or at least prosecuted. Texas is considering cargo theft legislation this year."

FRAUD OR FICTICIOUS PICKUP

Fictitious pick-up is becoming very popular among cargo thieves. Here is how it works: thieves assume the identity of a trucking company, often by reactivating a dormant Department of Transportation carrier number (DOT) from a government website; the cost is about \$300. That lets the crook operate as if they are long-established firm with an apparent good safety record. The fraud often includes paperwork such as insurance policies, fake driver's licenses and other documents to support the crooks new identity.

Then the con artists offer low bids to freight brokers who handle shipping for numerous companies. When the truckers show up at a company, everything seems legitimate to everyone to this point, but once the truck drives away, the goods are never seen again.

THEFT CLAIM EXAMPLE

In an article in the Claim Journal titled, "NICB Aids Bust in Midwestern Cargo Theft Scheme," the U.S. Attorney's Office for the Southern District of Indiana reported a cargo theft ring was busted as a result of a multiyear investigation. Per the article, a twenty-three count indictment was issued charging eight individuals in an organized scheme to steal tens of millions of dollars in merchandise from shipments of cargo moving through the state of Indiana and elsewhere. (*Claims Journal, Johnson, 9/4/2015*).

FICTICIOUS PICKUP CLAIM EXAMPLES

1. COPPER CLAIM

Copper theft has risen over the years and is now a \$1 billion dollar industry. Thieves are stealing copper from homes, businesses, and constructions sites alike. This crime appears to be happening more in Texas, Ohio, California, Georgia, and Illinois. Of all metal theft insurance claims between 2009 and 2012, 96% were copper related. Some of the reasons for the popularity of copper with thieves are that copper scrap is very difficult to track, there is a large demand for this metal and most of all, and copper provides big money, which is very appealing to thieves.

Here is an example from the Oak Lawn Patch November 22, 2012:

Marshall County Prosecuting Attorney Nelson Chipman announced today that an interstate investigation of the alleged theft of two copper wire shipments from a Bremen business valued at almost a third of a million dollars has resulted in the arrest and extradition of a 30 year old man. The man was charged with two counts of theft, both Level 5 Felonies, for allegedly stealing two semi-trucks filled with copper wire valued at \$320,000 on January 8 and January 9, 2015. He was arrested in Illinois as he appeared for a scheduled appointment on May 8, 2015 at the Office of Immigration and Naturalization Services; he was extradited and booked into the Marshall County Jail on May 22, 2015.

SECOND COPPER CLAIM

Another example from the Oak Lawn Patch:

Lemont Police, working in conjunction with the Tri County Auto Theft Task Force (TCAT), arrested two brothers in connection with a theft of \$500,000 worth of copper from a business in unincorporated Lemont. The brothers were booked into the Cook County Jail on charges of felony theft.

3. ALMOND CLAIM

Believe it or not nut claims have been escalating over the past few years. The price of walnuts and other nuts have dramatically increased in the past few years which makes a load of pecans or walnuts a high value load. Prices have increased 10% to 15% just in the past year. While these higher prices mean higher profits for nut growers, the cost is also an indication of increased theft.

In 2012, two truckloads of walnuts with a value of \$300,000 were stolen in Northern California. Soon another load, 140,000 pounds of walnuts with a value of \$400,000 was stolen in Los Angeles. In this case the thieves cut through and fence and hauled off the load. Another \$100,000 in almonds was stolen by a driver with a fake license. And \$100,000 in pistachios was taken by a big rig driver who left a farm without filling out any paperwork. Yet another claim for nuts involved a fictitious property broker a legitimate trucker, a legitimate drop warehouse and a fictitious final trucker.

SECOND ALMOND CLAIM

Capital Press October 14, 2015

Last year, Oregon-based snack manufacturer, Bridgetown Natural Foods, did not receive a shipment of almonds worth nearly \$184,000. However, the 42,000-pound shipment was picked up as scheduled on April 13 from SunnyGem LLC, an almond supplier in Wasco, Calif.

As it later turned out, the almonds were presumed stolen and police had no luck tracking down the truck. Bridgetown Natural Foods has now filed a lawsuit against SunnyGem and a freight management company, seeking a declaration that it owes nothing for the shipment.

II. LEGAL PERSPECTIVE

The trucking industry is especially vulnerable to theft by fraud because most shipments are booked on-line through a network of brokers. Motor carriers are routinely searching for shipments, especially “backhauls” (i.e., a load to carry back to their origin point, rather than pulling back an empty trailer). Carriers make their rates, rules and terms available on line, and much of their information is publicly available through the Federal Motor Carrier Safety Administration, including addresses, telephone numbers, fax numbers, registration numbers, and the name of their liability insurer and policy number. Carriers are solicited through on-line freight brokerage operations, known as “load boards,” that post available cargoes on which the carriers competitively bid. This very process makes information available which can be

exploited by theft networks to steal the identity of real carriers and information regarding real shipments to perpetrate fraudulent pickups. Loads are tendered by shippers to criminals posing with the stolen identities of real carriers, which usually have no idea their identity was stolen, and are never seen again.

Fraud is also perpetrated by imposter buyers of goods, who arrange what appear to be legitimate transactions for the purchase of goods, and involve legitimate sellers and transportation intermediaries and truckers, but who acquire delivery and possession without actual payment for the goods, often through the use of stolen credit cards (discovered too late).

When the theft occurs, the victimized consignee or shipper, and/or their subrogating cargo insurers, seek recovery for the loss wherever possible. They will often bring suit against the carrier whose identity was stolen, or who was duped with false information by a fraudulent buyer/consignee to deliver the cargo to a thief, or against the broker and warehousemen involved in the supply chain.

This is a developing area of the law, but the courts usually make a very close examination of the facts and apply the fundamental principles of cargo law in making a ruling on liability. Most trucking shipment involve interstate motor carriage, which is governed by the Carmack Amendment, 49 U.S.C §14706. Carmack controls and limits the liability of motor carriers for loss or damage to cargo, and preempts state law remedies that may increase a carrier's liability.

Under Carmack, the plaintiff must first establish a *prima facie* case for damage to cargo under Carmack. To meet this burden, the shipper must present evidence that the goods (1) were delivered to the carrier in good condition, (2) arrived in damaged condition, and (3) resulted in the specified amount of damage. *Independent Mach., Inc. v. Kuehne & Nagel, Inc.*, 867 F. Supp. 752, 758 (N.D. Ill. 1994). The burden then shifts to the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability: act of God, act of a public enemy, act or omission of the shipper, act of public authority or the inherent vice or nature of the goods. *American Nat'l Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 924 (7th Cir. 2003); *Fine Foliage of Florida., Inc. v. Bowman Transp., Inc.*, 901 F.2d 1034, 1039 (11th Cir. 1990).

In cases involving theft of a legitimate carrier's identity, and the real carrier is sued, the defense is to establish that the cargo was never actually tendered for carriage. In cases involving theft by an imposter consignee, the defense is usually to establish that the carrier delivered the cargo in accordance with the bill of lading terms or the shipper's instructions.

Examples from the Case Law where the Shipper Tendered to an Imposter Carrier.

The decision in *Fireman's Fund Insurance Company v. Reckart Logistics, Inc.*, 2011 WL 4062508 (E.D. Ill. 2011) shows how complicated the imposter schemes can be, and how a defrauded shipper can find a recovery. In *Fireman's Fund* the plaintiff's insured, Alliant, purchased a cargo of copper and zinc for delivery to Lewiston, Idaho from Olin Brass in East Alton, Illinois. Alliant hired the freight broker, Reckart, to arrange the transportation. Reckart,

using the websites “Internet Truck Stop” and “GetLoaded.com,” solicited carriers for the shipment and was contacted by a person who identified himself as “Sam” posing as an employee of “S&G Transportation,” a legitimate motor carrier. “Sam” faxed in a W-9, proof of insurance and DOT certificate for S&G Transportation, and obtained the booking.

“Sam,” in turn, contacted a legitimate motor carrier named Mr. Bult’s, Inc. (“MBI”), indicating he had a shipment of brass coils for transportation from East Alton to Chicago, Illinois for \$550 in cash. MBI agreed and sent a driver to pick up the shipment at Olin’s in East Alton, Illinois. The bill of lading stated the goods were to be transported to Idaho, but MBI instructed the driver to deliver the load to Chicago in accordance with the agreement with “Sam.” Once the goods were delivered to Chicago, the goods disappeared. Fireman’s Fund sued MBI and the legitimate S&G Transport for the loss.

Fireman’s Fund moved for summary judgment against MBI, which was granted. MBI argued that the theft was an act of a public enemy, but the court ruled that the public enemy exception applied to acts of war, and ruled MBI was liable for delivering the cargo to a destination not named in the bill of lading.

The real S&G also moved for summary judgment, which was also granted on its behalf. S&G argued that it had nothing to do with the shipment and had never agreed to carry the load, as its identity was stolen. The court found there was no credible evidence offered by Fireman’s Fund to counter this position.

On the other hand, there is the case of *Northern Indiana Metals v. Iowa Express, Inc.*, 2008 WL 2756330 (N.D. Ind. 2009), which is a cautionary tale of the pitfalls in a case involving an imposter which steals the identity of a motor carrier to obtain fraudulent possession of a cargo, but the real carrier whose identity was stolen was unable to get out of the case on summary judgment.

The shipper, Northern Indiana Metals, hired a broker, defendant Gateway Freightways, Inc., to arrange the transportation of a shipment of brass from Indiana to Illinois. Gateway posted the load on the “Internet Truck Stop” website. An individual posing as an employee of Iowa Express, a real motor carrier, made a bid for the load and faxed in a W-9, proof of insurance and used the Iowa Express’ FMCSA registration number. A truck with “Iowa Express” markings, and a driver posing as an Iowa Express driver named “John,” picked up the load at Northern Indiana’s facility, issuing a bill of lading. The shipment was then stolen. Northern Indiana sued the legitimate Iowa Express for the \$140,000 loss. Iowa Express defended on the basis that it had never received the shipment and that it was a victim of identity theft and offered evidence that it never employed anyone by the name “John,” or anyone matching his physical description.

However, the plaintiff established through discovery that Iowa Express maintained computers in its office without protecting its Internet Truck Stop username and passwords, and allowed drivers to take trucks home on occasion. Both sides moved for summary judgment. The court denied both motions, finding that as to Northern Indiana, there was a question of fact as to whether it was negligent in failing to verify the shipping documents and identity of the driver who picked

up the shipment (i.e., the defense of act of the shipper). It also found a question of fact as to whether Iowa Express was free from negligence. This is a startling result, as the real Iowa Express never took possession of the load, but it shows the courts are looking at how each party is verifying and/or safeguarding the information that is being presented or used in the ordinary course of shipping goods interstate.

Examples from the Cases of Delivery by the Carrier to an Imposter Buyer

The bill of lading determines the intent of the parties as to what is proper delivery, and compliance with its terms can discharge a carrier from liability. *Intech v. Consolidated Freightways, Inc.*, 836 F. 2d 672, 674 (1st Cir. 1978). A motor carrier can make delivery by depositing cargo at a consignee's place of business, or by tendering delivery, without formal acceptance or rejection by the consignee. *Id.* If the motor carrier has performed its obligations under the bill of lading and there is nothing further for the carrier to do, it will be deemed to have properly completed its delivery obligations under the bill of lading. *Id.*

Courts will consider the surrounding circumstances in the carrier's release of the cargo to an imposter in order to determine if the release was in compliance with the bill of lading terms and the shipper's express instructions. For instance, in *Fotokina of Florida Inc. v. Gold Coast Freightways, Inc.*, 596 So. 2d 524 (Fla. App. 1992), the plaintiff, Fotokina, an importer/exporter, sold merchandise to a company which represented itself to be "Concorde International" in New York. The terms of sale were C.O.D. Fotokina hired Gold Coast to carry the cargo and specifically instructed it to call a telephone number for further delivery instructions. The Gold Coast driver did call that phone number as instructed, and was directed to make the delivery at a warehouse address different from the address listed on the bill of lading. The driver made delivery and collected the C.O.D. payment, which later turned out to be fraudulent. The goods disappeared. It was later shown that Concorde was a fraudulent entity and had given a false address.

Fotokina sued Gold Coast for the loss, but the Florida Court of Appeal affirmed the decision of the trial court, which ruled that Gold Coast was not liable under the Federal Bills of Lading Act, 49 U.S.C. § 80111, because Gold Coast had delivered the cargo to the consignee named on the bill of lading, Concorde, which was the party to whom Gold Coast was contractually obligated to make the delivery. The court ruled: "Under the Act, no liability attaches where the carrier, acting reasonably, makes the delivery to the consignee at an address other than that given in the bill. In this case, the cause of the loss was the criminal conduct of the consignee, not the carrier's delivery to an address other than one specified in the bill of lading." *Id.* While the court did not elaborate further on the "acting reasonably" component, from its recitation of the facts, which included the instructions by Fotokina to call a certain phone number for further delivery instructions, we can assume that following the shippers express instructions on this point was "acting reasonably." We can also take this case for the proposition that courts will weigh in the balance which party is better able to assess whether there is a fraudulent transaction under way, and here, the court clearly viewed the shipper as being in the better position to make that assessment.

This type of assessment was also made in the case of *Lewis Brass and Copper Co. v. ABF Freight System, Inc.*, 2014 WL 991726 (E.D.N.Y. 2014). Lewis Brass and Copper (“Lewis”), hired ABF Freight to carry two shipments of copper from Glendale, New York to an address in Chicago for a roofing company represented as “S&C Roofing & Gutters.” Lewis issued bills of lading showing the S&C address in Chicago as the destination, with S&C as the consignee, and included the instruction to call “Scott” before delivery at a designated number. There was a dispute as to whether ABF called Scott or Scott called ABF. Ultimately, a phone conversation occurred between ABF and “Scott,” which resulted in a supposed employee of S&C coming to pick up the first shipment at ABF’s dock in Chicago, rather than having the cargo delivered to S&C. He signed his name illegibly and entered a driver’s license number. The second shipment was released in the same manner.

Lewis had received payment by credit card from “S&C,” but the payments never cleared because the card was stolen. It later determined that S&C was a sham corporation, and the original delivery address on the bill of lading was an empty lot. Lewis sued ABF.

The court granted ABF’s motion for summary judgment, on the basis of the “act or omission of the shipper” defense; specifically that Lewis had failed to obtain proper payment. The court ruled that this defense considers those risks which are more easily avoided by the shipper; that is, those risks which the shipper would know, but the carrier would not. The court rejected Lewis’ argument that ABF was negligent in not calling Scott’s phone number, because it was immaterial who called first. It only mattered that ABF did speak with “Scott” as instructed.

As to the delivery at its dock, the court found that ABF had no information that “Scott” or his designee was not the proper recipient. The court further found that each bill of lading indicated ‘S&C’ was the consignee. Therefore, the court ruled that under the relevant sections of the Federal Bill of Lading Act, ABF was permitted to deliver the goods to ‘the consignee named in a nonnegotiable bill.’ 49 U.S.C. §80110 (b)(2). In addition, ABF did not violate 49 U.S.C. §80110 (a)(1), governing liability on bills of lading, since it neither “delivered the goods to a person not entitled to their possession,” nor did it run afoul of Section 80111(a) (3) since it did not have information it was delivering the goods to a person not entitled to their possession.

The court expressly weighed which of the two parties was better able to assess the potential for a fraudulent transaction and guard against it, stating: “Told in the most obvious way, this is not a story of negligence on either [Lewis’] or ABF’s part; rather, it is the story of [Lewis’] victimization by unknown fraudsters. Nonetheless, in the context of this bilateral suit, one of the parties now before me has to bear the risk of the fraudulent orders. That party is [Lewis].” Because Lewis was in a better position to protect itself against the risk of a fraudulent credit card payment, the court effectively ruled that the loss was the fault of the shipper, and ABF was simply following instructions and was without negligence.

III. RISK MANAGEMENT PERSPECTIVE

Managing risks is essential in running any business. Risk management can be defined as “the forecasting and evaluation of financial risks together with the identification of procedures to avoid or minimize their impact.” There are both direct and indirect consequences to cargo thefts. Insurance premiums rise, costs of transporting cargo rises, price of manufacturing product rises, customer confidence can be lost, etc. Let’s look at ways to manage these risks through the eyes of a trucker, a truck broker and insurer.

A trucker is the most vulnerable and carries the most risk. After all, the trucker is carrying the cargo being transported. Creating an internal Best Practices for employees to following can greatly aid in minimizing thefts. Steps a trucker can take to minimize risks are:

1. Complete detailed background checks on employees (most policies exclude driver involvement in thefts). Continue to monitor employees and consider follow up background checks during the time of employment.
2. Invest in driver training.
3. Install tracking devices and consider using those that can remotely disable a stolen vehicle.
4. Apply appropriate locks such as king pin locks to prevent the tractor and trailer from being separated.
5. Do not leave cargo unattended in an unattended yard such as truck stops, driver homes, etc.
6. Do not travel in high crime areas. Look for alternate routes.
7. Be sure to have enough insurance to cover the value of the load being carried.
8. Report all suspicious activity and thefts to local police, FBI, task forces, etc.
9. Know who is hiring you to transport cargo. Due diligence is essential to ensure you are not picking up a fictitious load.
10. Limit access to shipment data such as value of load, shipper/consignee information, etc.

As a middle man, the truck broker poses different risks than a trucker. They essentially have two (2) clients; the party shipping the cargo and the party carrying the cargo. Properly vetting a trucker ensures confidence with their client that they have the ability to move their cargo without incident. It is essential to their business. A trucker broker should ALWAYS verify a trucker’s operating authority, safety ratings, websites and phone numbers. Other ways a truck broker can manage their risks are:

1. Do not co-broker loads if possible. You may not know the actual trucker and have less control over whether or not proper due diligence was done in the selection of that trucker.
2. Choose the right trucker for the right job. A trucker that specializes in carrying heavy equipment may not be the trucker you want to use for high value electronics.
3. If your customer asks you to sign a contract, you should pass along those same contract terms to the trucker you hire.
4. Ask a trucking company you consider hiring for their loss record.
5. As a trucking company for proof of insurance in the form of a Certificate of Insurance provided to you direct from their agent.

6. As a trucking company if they have internal Best Practices they follow.
7. Keep track of truckers you use and your success rates with them.
8. Ask if the trucking company employs drivers or hires owner/operators.

Insurance companies have seen a large increase in thefts over the past few years and are paying out more in claims for those thefts when they occur. Shippers often require a carrier to sign a contract in order for them to transport their cargo holding them fully liable for the cargo they are carrying. Consider excluding coverage where parties have entered into a contract unless specifically approved or consider sub-limits for those contracts as a way to manage the risk.

Other considerations:

1. Consider excluding thefts from unattended vehicles
2. Consider excluding contracts between parties unless specifically reviewed and endorsed onto the policy.
3. Consider excluding thefts that arise from traveling in high crime areas.
4. Consider excluding specific commodities.
5. Report thefts to task forces such as Freight Watch, CargoNet, FBI, police, etc.
6. Hire investigators for high value thefts or in situations where frequency of claims is a problem.
7. Inform clients that they need to report losses IMMEDIATELY to your office. The sooner a theft is reported and investigator assigned, the greater the possibility of locating the stolen cargo.

These lists are not intended to be exhaustive, but rather those that can aid in minimizing losses to goods in transit. Know your exposure. Cargo at rest is cargo at risk.

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