Loss, Damage, and Delay Claims in the Logistics Chain

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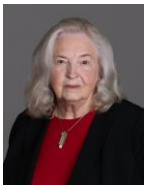

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YOU ARE contracting for surface motor carrier services in the United States and beginning to negotiate cargo liability terms—now what? Shippers, property brokers, and carriers begin by determining the appropriate legal regime that applies based on the mode of transportation and points of travel. The Carmack Amendment ("Carmack") generally governs the loss, damage, or delay that occurs while goods are transported in United States interstate highway system and international commerce via motor carriage.[1] This article outlines the legal principles under Carmack, and the impact of cargo claims on brokers.

I. Legal Principles of Carmack

A. Scope

Carmack applies to domestic transportation by a motor carrier in interstate commerce. Interstate commerce is not strictly defined by the route the motor carrier takes, which may appear to be within one state, but is rather defined by the intent of the shipper. If the shipper intends for the goods to travel in interstate commerce, the exact route of the carriage should not negate the interstate nature of transportation.

Carmack governs transportation by motor carrier between a place in (1) a state and a place in another state; (2) a state and another place in the same state through another state; (3) the United States and a place in a territory or possession of the U.S. to the extent the transportation is in

[1] 49 U.S.C. §14706.

the U.S.; (4) the U.S. and another place in the U.S. through a foreign country to the extent the transportation is in the U.S.; and (5) the U.S. and a place in a foreign country to the extent the transportation is in the U.S.

However, Carmack does *not* apply to transportation that occurs via intrastate travel—moving within one state, with the shipper's intent that it do so—; within commercial zones—large municipalities that may overlap state boundaries—;[2] or to exempt commodities—mostly agricultural goods.[3] Where it applies, Carmack is the exclusive remedy and preempts state claims for cargo loss, damage, or delay in interstate and international surface transportation by motor carriers.

B. Waiving out of Carmack

The point of utmost importance to remember in negotiating transportation contracts is that parties may contract to waive the application of Carmack.[4]

C. Insurance

The United States Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) does not require cargo liability insurance for general commodity motor carriers. It only requires cargo liability for household goods motor carriers and household goods freight forwarders. Brokers and non-household goods freight forwarders must only satisfy a $75,000 surety bond or trust fund requirement. The FMCSA's other insurance filing requirements are not related to cargo liability. Instead, the FMCSA requires that motor carriers and freight forwarders hold a $750,000 minimum insurance to cover bodily injury and property damage.

While the name "Bodily Injury and Property Damage" insurance might imply that its coverage extends to the cargo ("property") inside the commercial motor vehicle, it does not. Cargo insurance coverage is a separately maintained insurance policy that must be

[2] 49 C.F.R. §372.241.

[3] The list of exempt goods is available at 49 C.F.R. Part 1039.

[4] 49 U.S.C. §14101(b).

verified by the shipper or broker or risk having a lack of coverage.

D. Prima Facie Case

Carrier liability under Carmack for "actual loss or injury" is near-strict liability. Carrier liability begins when the carrier takes custody of the cargo and continues until the transportation process is completed. A person entitled to recover, which may be the shipper, consignor, or owner of the goods, establishes a prima facie case under Carmack by demonstrating that the motor carrier received the cargo in good condition and the carrier failed to deliver the cargo in the same good condition. The claimant also has the burden to prove that it sustained (or expects to sustain) a specified or determinable amount of money damage, and that the carrier must pay for the loss. Claimants may also collect reasonably expected or anticipated consequential damages pursuant to a Carmack claim.

Claims for delay or out-of-temperature of foodstuffs create additional issues. A prime example of delay liability occurs when a carrier's delayed delivery of a food product results in food safety issues. While some courts have determined that damaged food products do not need to be tested to establish a prima facie case under Carmack, other courts have found the opposite.

The United States District Court for the Central District of California held that a grocery store did not have to test individual packages of clam chowder or "inflict the chowder on its customers" to prove that it arrived in damaged condition.[5] In that case, the carrier's own logs evidenced that the chowder was out of temperature for over ten hours during a forty-hour trip.

Conversely, the Appellate Division of the Superior Court of New Jersey found that failure to adhere to a consignee's policy requiring an intact seal at delivery was insufficient to prove damaged condition where the packaging was not examined or determined to have been opened or compromised and the dietary fiber was not tested for damage or adulteration.[6]

Nationally, motor carriers (and practitioners defending or prosecuting motor carriers) should anticipate that a court will hold the motor carrier liable for food products that may have been damaged or deemed injurious to health even if the shipper or consignee did not test individual

[5] AGCS Marine Ins. Co. v. Kool Pak LLC, 669 F. Supp.3d 933 (C.D. Cal. 2023).

[6] Mecca & Sons Trucking Corp. v. J.B. Hunt Transp., Inc., No. A-0422-22 (N.J. Super. Ct. App. Div. May 30, 2024).

packages. If damage can be reasonably assumed from the conditions of the carriage, a court is likely to hold the motor carrier liable.

E. Defenses

Once claimants establish a prima facie case, motor carriers have limited defenses to liability. The carrier must prove that the damage, loss, or delay occurred because of one of the common law defenses to Carmack: (1) act of God; (2) act or default of the shipper; (3) inherent vice or nature of the goods; (4) public enemy; or (5) public authority.

F. Limitations of Liability

Under Carmack,[7] parties are free to contract to agree upon limitations of liability. To limit liability without an agreed upon contract, a motor carrier must maintain a tariff, obtain the shipper's written agreement as to the choice of liability, give the shipper a reasonable opportunity to choose between two or more levels of liability, and issue a receipt or bill of lading prior to the movement of the shipment. The limitations of liability established by the parties are closely adhered to by courts. In one instance, the Eastern District of New York determined that the partial loss of a shipment of cell phones was $153 under the carrier's tariff which limited liability to the lower of 50 cents per pound per package, or $10,000 per incident.[8] The court disagreed with the lower court's determination that the shipper was not apprised of the carrier's tariff.

G. Venue

A claimant may bring a civil action under Carmack in a United States district court or a state court.[9] A civil action may be brought against the delivering carrier in a U.S. district court or in a state court. If in a state court, a claimant may bring an action in any state through which the carrier operates. Claimants may bring suits against the carrier alleged to have caused the loss or damage in the judicial district in which such loss or damage is alleged to have occurred.

In one case, the United States District Court for the District of New Jersey denied a motion to dismiss for improper venue when it found that venue was proper in South Carolina, where the accident occurred, as well as New Jersey, where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of

[7] 49 U.S.C. §14706(c)(i).

[8] Cell Deal Inc. v. FedEx Freight, Inc., 21-CV-00788 (E.D.N.Y. July 12, 2024).

[9] 49 U.S.C. §14706(d).

the action is situated."[10] The transportation in that instance originated in New Jersey and was destined for Florida.

H. Claim Filing Instructions

Carmack outlines minimum requirements and time limits that shippers must follow when filing claims and lawsuits. A shipper must describe sufficient facts to identify the shipment, make an assertion of liability, and demand a specified or determinable amount of money.[11] A shipper has a minimum of nine months after a delivery to file a claim and two years after receipt of a claim denial to file a civil lawsuit.[12]

II. Impact of Cargo Claims on Brokers

Brokers are generally not liable for cargo claims. However, as the intermediary, brokers are often the first stop when a cargo claim arises. Courts typically will make determinations based on the contract between the parties. For example, an Ohio Court of Appeals held that a broker did not breach its agreement with the shipper by contracting with a motor carrier that did not maintain cargo loss and damage liability insurance when the obligation to do so was not included in the plain language of the contract.[13]

Many claimants try to hold brokers liable under tort theories for damages caused by the motor carriers they engage. Brokers defend such cases by citing the provisions of the Federal Aviation Authorization Act (FAAA)[14] that specify that a state may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier, broker, or freight forwarder with respect to the transportation of property. The exception to this rule is for safety regulations regarding motor vehicles. United States Courts of Appeal have ruled differently regarding FAAA preemption (and the applicability of the "safety exception" to brokers), creating a circuit split yet to be resolved by the Supreme Court.

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[10] AXA XL Ins. Co. UK Ltd. v. Exel Inc., No. 2:23-cv-21874 (D. N.J. Feb. 15, 2024), citing 28 U.S.C. §1391(b)(2).
[11] 49 C.F.R. §370.3(b).
[12] 49 U.S.C. §14706(e)(1).
[13] Certain Interested Underwriters at Lloyd's v. Total Quality Logistics, LLC, 2023-Ohio-4470 (Ohio Ct. App. Dec. 11, 2023).
[14] 49 U.S.C. §14501(c)(1).