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Cargo Webinar: *The State of Freight*

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Overview

- Common Themes
- Caselaw Updates
- Q&A

Common Themes

- Brokers remain common target
- Broker or carrier? (dual authority)
- FAAAA and Carmack preemption
- Downstream carriers
- Sufficiency of claims
- Timeliness of claims
- Proof of damages

Broker Liability

- *Flexider USA Corp. v. Cindy Richmond d/b/a Reds Trucking*, No. 3:19-cv-00764 (M.D. Tenn. Mar. 13, 2020)
- Issue:
  - Carmack and FAAAA preemption for broker
- Holdings:
  - Carmack preemption does not apply to broker; applies to carrier only
  - Noting jurisdictional split, held safety exclusion to FAAAA preemption does not apply outside of personal injury context
  - Rejected negligent selection/brokering falls within "safety exclusion" because selection of carrier goes to heart of broker's services
  - State law causes of action for unjust enrichment, negligence against broker preempted

Broker Liability

- *Gillum v. High Standard, LLC*, 2020 U.S. Dist. LEXIS 14820 (S.D. Tex. Jan 27, 2020)
  - Personal injury case asserting state law negligence claim against broker including negligent selection theory
  - Broker filed motion to dismiss based upon FAAAA preemption
- Issue:
  - Does safety exclusion to FAAAA preemption permit state law causes of action?
- Holdings:
  - Safety exclusion to FAAAA preemption does not create a private right of action
  - Like with *Flexider* court, stressed the selection of carrier by a broker is the core of the services provided by broker and therefore FAAAA preemption applies
- Personal injury case but reasoning applies equally to cargo context

Broker Liability

- *Ross & Wallace Paper Products v. Team Logistics, Inc.*, 2020 La. App. LEXIS 1038 (La. Ct. App. July 8, 2020).
  - Broker brokered load to motor carrier that was damaged during interstate transit
- Issue:
  - Whether state law causes of action against broker were preempted?
- Holdings:
  - Broker could not be held liable under Carmack Amendment, therefore Carmack preemption did not bar claims
  - Broker found liable under Louisiana state contract law because Court held no Federal Preemption
- FAAAA preemption not raised as defense

Carmack Preemption

- *Gregory Shamoun*, 2020 U.S. Dist. LEXIS 18656 (N.D. Tex. February 4, 2020)
  - Interstate shipment of four "medallions" by motor carrier; freight lost in transit
  - Lawsuit against carrier alleged state law causes of action for negligence & conversion
- Issues:
  - Can a defendant remove to federal court based upon Carmack preemption and does Carmack preempt state law causes of action?
- Holdings:
  - Court held Carmack Amendment preempted both state law claims
  - Because exclusive remedy under federal law, removal to federal court appropriate

Carmack Waiver/Limitation of Liability

- *Central Transport, LLC v. Global Aeroleasing*, LLC 2020 U.S. Dist. LEXIS 90862 (S.D. Fla. May 25, 2020).
  - Shipper hired broker to coordinate transportation of landing gear
  - Broker hired second broker, who hired third broker, who hired final broker
  - Final broker engaged motor carrier to transport landing gear
  - Contract between final broker and motor carrier had limitation of liability and waiver of Carmack Amendment
  - Bill of Lading prepared by final broker and provided to upstream brokers and shipper stated transportation subject to agreement between motor carrier and final broker and limitation of liability may apply
  - Carrier repackaged freight that was subsequently damaged in transit
- Issue:
  - Was Carmack waiver in final broker/carrier contract enforceable?
- Holdings:
  - Final broker, as shipper's agent, stood in shipper's shoes when contracting with carrier and bound shipper to contractual terms in final broker/carrier agreement
  - Valid Carmack waiver (contract had provision expressly waiving Carmack liability)
  - Limitation of liability upheld

Downstream Carriers

- *Herod's Stone Design v. Mediterranean Shipping Company S.A.*, 2020 U.S. Dist. LEXIS 11591(S.D.N.Y. Jan. 22, 2020)
  - An international shipment of marble tile from China to New York involved transportation by sea and rail
  - Consignee/plaintiff contracted through series of intermediaries for shipment; intermediaries in turn contracted with ocean carrier
  - Ocean carrier subcontracted inland portion of transport with rail carrier
  - Ocean waybill had New York (not Port) as final destination, incorporated COGSA limitation of liability and 1 year SOL, and contained "exoneration provision" for any subcontractors
- Issues:
  - Was rail carrier afforded protection under terms of ocean waybill?
  - Was COGSA enforceable in favor of ocean carrier?
- Holdings:
  - Intermediaries accepted ocean waybill and on behalf of consignee and ocean waybill terms governed liability
  - Subcontractor exoneration clause enforceable and barred suit against rail carrier
  - One year statute of limitation in ocean waybill enforceable in favor of ocean carrier
  - Suit against ocean carrier was time-barred
  - Limitation of liability in favor of ocean carrier not reached in light of SOL decision

Downstream Carriers

- *Siemens Energy, Inc. v. CSX Transportation, Inc.*, 2020 WL 1161930 (E.D. Ky. Mar. 10, 2020)
  - Siemens arranged for delivery of two electrical transformers from Germany to Kentucky with Blue Anchor (ocean carrier)
  - Blue Anchor BOL reflecting Ghent, Kentucky as final destination, COGSA applied to entire journey, COGSA extended to subcontractors of ocean carrier, and containing exoneration clause in favor of subcontractors of Blue Anchor
  - Separate ocean carrier performed ocean transport and issued its own ocean waybill but that referenced Blue Anchor BOL
  - Rail carrier performed inland transport
  - Rail carrier issued own BOL that did not reference either ocean waybill
- Issue:
  - Was rail carrier protected by Blue Anchor BOL terms?
- Holdings:
  - Blue Anchor BOL was "through bill of lading" and extended to rail carrier
  - Issuance of subsequent BOL by rail carrier for domestic/inland segment of trip irrelevant because Blue Anchor BOL was through bill of lading
  - Exoneration clause enforceable and barred suit against rail carrier

Broker or Carrier?

- *Louis M. Marson Jr., Inc. v. Alliance Shippers, Inc.*, 2020 WL 618581 (E.D. Pa. Feb. 10, 2020)
  - Defendant held duel broker/carrier authority
  - Shipper contacted defendant about shipment and asked if defendant could handle shipment, to which defendant replied it could
  - Defendant had previously served as carrier for shipper
  - This time, defendant arranged for the shipment using another motor carrier
  - Truck broke down and delivery made two days late; consignee rejected goods
- Issue:
  - Was defendant carrier subject to Carmack liability or as a broker?
  - Did shipper prove damages?
- Holdings:
  - If an entity accepts responsibility for ensuring delivery of the goods, that entity qualifies as a carrier regardless of physical transportation; genuine issue of fact if defendant acted as carrier
  - Issue of fact on damages where consignee sent an email containing picture of the spoiled mushrooms to shipper as support for rejection
  - Since issue of fact as to broker or carrier, breach of contract claim not preempted

Proof of Damages

- *Underwriters at Interest v. All Logistics Grp.*, 2020 US. Dist. LEXIS 91810 (S.D. Fla. May 25, 2020)
  - International shipment of salmon that was exposed to elevated temperatures while in transport
- Issue:
  - Whether Cargo was damaged merely due to exposure to elevated temperatures?
- Holdings:
  - U.S. Food and Drug Administration guidance provides maximum cumulative time seafood can be exposed to certain temperatures to limit potential bacterial growth
  - Court held still genuine issue of material fact on whether Cargo damaged despite non-conformance with FDA guidance during transit

Claims Filing Deadline

- *JA Solar USA, Inc. v. EP Expedited Transport, LLC*, 2020 U.S. Dist. LEXIS 77638 (S.D. Tex. May 1, 2020)
  - Solar panels damaged in interstate transport
  - Written notice of claim provided to carrier within two days of accident
  - Five days after accident, the carrier's insurer sent a letter denying the claim as presented for lack of documentation
  - More than years later after the "denial letter," the shipper (solar company) filed a lawsuit against the motor carrier
- Issue:
  - Whether the "denial letter" was sufficient notice to commence the two-year statute of limitations period?
- Holdings:
  - A contingent denial does not start the statute of limitations clock
  - "[I]n order to effectively commence that period of limitations, a carrier's notice of disallowance must be clear, final, and unequivocal."
  - The letter only stated the carrier was unable to accept responsibility for the claim because it lacked documentation; treated as contingent denial

Sufficiency of Claim

- *Secura Insurance,* 2020 U.S. Dist. LEXIS 49737 (W.D. Ky. Mar. 20, 2020)
  - Consignee agreed to carrier's standard BOL that incorporated by reference its Rules Tariff, which contained a 9 month claim filing deadline
  - Windows arrived damaged; the same day the consignee sent email to carrier notifying that some windows were damaged and asking about process to file a claim
  - Carrier responded it was not liable for alleged damage because it was shipper "load and offload"
  - Consignee filed claim with its insurer, who paid claim, then subrogated insurer sent a demand letter to carrier more than nine months after date of delivery
- Issues:
  - Was the email from the shipper sufficient to meet the claim filing requirements under 49 CFR 370.3?
  - Did 9 month-claim filing deadline apply to consignee and its subrogated insurer, who were not shipper?
- Holdings:
  - Email was not sufficient because did not include specific or determinable amount of damage
  - Carrier's "denial" did not abrogate responsibility of claimant to file compliant claim
  - Bill of lading, and incorporated Tariff terms, applied equally to shipper and consignee (and consignee's subrogated insurer)

Sufficiency of Claim

- *Seinfeld v. Allied Van Lines, Inc.*, 2020 WL 1493662, 2020 U.S. Dist. LEXIS 54017 (N.D. Tex. Mar. 27, 2020)
  - Household goods shipment
  - Initial Statement of Claim was incomplete, listing several damaged items, but not itemizing their losses or setting forth damages figure
  - Subsequent mailings within 9 months further identified some of the damaged items with original invoice values provided for some, but not all, items
  - Claim ultimately denied by carrier, resulting in lawsuit
- Issue:
  - Was the Notice of Claim sufficient to meet minimum claim-filing requirements?
- Holdings:
  - Carmack Amendment claim requirements for loss of or damage to household goods: (1) contain facts sufficient to identify the shipment or goods; (2) assert liability for alleged loss, damage, injury, or delay; and (3) make a claim for payment of a specified or determinable amount of money
  - Plaintiff's Notice of Claim plus subsequent materials met the third requirement, because the original invoice value, when aggregated provided carrier with notice of specific and determinable amount of claim
  - Genuine issue of fact as to measure of damages (i.e. original invoice value could be submitted to jury)

Completion of Delivery

- *Total Quality Logistics, LLC v. Balance Transportation, LLC*, 2020 Ohio App. LEXIS 574 (Ohio Ct. App. Feb. 24, 2020)
  - Broker arranged for motor carrier to deliver granite to consignee
  - Motor carrier presented bill of lading/delivery receipt to consignee, who signed, dated, and returned to the motor carrier (presumably indicating no damage)
  - Consignee began to unload the granite and during unloading granite started falling off of truck
  - Consignee took signed bill of lading and tried to alter
  - Broker paid consignee, received assignment, and sued motor carrier under Carmack Amendment and broker/carrier agreement
- Issue:
  - When was delivery by carrier complete, thereby ending potential Carmack liability?
- Holdings:
  - Delivery was successful when consignee's agent signed BOL/delivery receipt
  - Upon signing of BOL/delivery receipt, risk of loss shifted to consignee
  - Question as to whether consignee unload was "key factor" in decision

Storage in Transit

- *Brunner v. Beltmann Group Incorporated*, 2020 WL 635905, 2020 U.S. Dist. LEXIS 23207 (N.D. Ill. Feb. 11, 2020)
  - Plaintiff hired interstate household goods carrier and its agent as part of interstate move in 2012
  - Moving company packed belongings and transported them to a facility within same state to hold pending further instructions
  - Bill of lading and moving estimate contemplated eventual move out of state
  - Goods remained in storage facility for six years and at no point did plaintiffs seek delivery
  - In 2018, plaintiffs moved to a different state and requested delivery
  - Goods moved under original 2012 BOL, with some goods damaged at delivery
  - In particular, the moving company "stored, shipped, handled, and packed Plaintiffs' goods."
- Issue:
  - Did Carmack apply?
- Holdings:
  - If the transportation is interstate in nature, the Carmack Amendment applies to the entire shipment, even as to a carrier that is only responsible for an intrastate leg of the shipment
  - Carmack applied because the 2018 was part and parcel of the 2012 shipment because all parties had the intent as of 2012 that the goods would be moved from warehouse to another final destination, in another state, and that the goods would not remain in storage for an indefinite period of time

Discovery Obligations of Assignee

- *Joe Whatley Jr. v. Canadian Pacific Railway*, 2019 U.S. Dist. LEXIS 218338 (D.N.D. December 19, 2019)
  - Carmack Amendment claim assigned from two entities to Plaintiff
  - Discovery requests served on plaintiff and plaintiff unable to produce much information as assignee of the claim
- Issue:
  - Could court compel discovery from assignee?
- Holdings:
  - Plaintiff only obligated to produce discovery within its control and there is no obligation for assignee to provide discovery from its assignor
- Utilize third-party discovery mechanisms where appropriate

Duty to Defend

- *Miss. Welders Supply Co. v. Crane*, 202 Minn. App. Unpub. LEXIS 389 (Minn. App. May 11, 2020)
  - Shipper filed suit against motor carrier
  - Motor carrier filed a third party complaint against its insurer claiming insurer had a duty to defend
  - Inland marine policy stated in the "defense costs" section that the insurer had the "option to defend any suit brought against you as a result of damage to covered property caused by a covered loss. We may investigate and settle a claim or suit" and that the insurer does not have to provide a defense after it has paid the insurance limits as a result of judgment or written settlement
- Issue:
  - Does the cited provision afford the insurer complete discretion as to whether provide a defense to its insured?
- Holdings:
  - Optional language in defense costs portion of policy is ambiguous
  - Any ambiguity interpreted against insurer
  - Insurer cannot simultaneously demand insured to obtain prior written consent before admitting liability, yet also have full discretion as to whether to provide a defense
  - Insurer required to provide a defense to insured up to the point it pays the limits of coverage under the policy via judgment or written settlement
- Common cargo policy provision

Questions

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