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Brokers, Warehousemen and Carriers Should Be Aware of Technical Legal Distinctions

Supply Chain companies will likely become surprised by significant, unexpected liability if they fail to consider recognized technical legal distinctions classifying the type of company they will be considered to be, for purposes of legal transactions and claims. Unexpected and costly legal liability exposure can be created if supply chain companies do not take steps to protect themselves, depending upon the intended status as either a transportation broker, a warehouseman, or a carrier. The classification distinctions must be considered when reviewing contracts, standard forms and procedures.

Regardless of what a supply chain company calls itself, or considers itself, depending upon the type of transaction, claim and the underlying facts and documents, courts can "deem" that a particular company acted in an unintended capacity, or as a different type of supply chain company than anticipated. At any point in time, a company could be found to be acting as either a broker, a freight forwarder, a carrier, a warehouseman or a shipper. There are important legal distinctions that can make a real difference in making classifications for purposes of determining liability. This article deals with the following four classification distinctions, in the listed order:

1. Warehouseman vs. Freight Forwarder
2. Transportation Broker vs. Transportation Freight Forwarder
3. Transportation Broker vs. Carrier
4. Consignee vs. Warehouseman

These classification distinctions make a real difference in determining liability for cargo claims, accident claims and demurrage and detention claims.

I will explain these distinctions below and discuss why it is important for supply chain companies of all types to be conscious of these distinctions. In order to avoid unexpected liability exposure they should make sure that the documents they issue or execute and the processes they follow, have been reviewed by competent legal counsel and that they are following established protocol.

A somewhat related subject that I will not be discussing in this article pertains to the legal issues raised by the recently passed H.R. 4348, signed by the President, which sets new requirements regarding distinctive registration numbers for each Federal transportation authority issued to an entity (i.e.—motor carrier, broker or freight forwarder), makes changes to requirements regarding authority license renewals, sets new bonding requirements and establishes mandates for regulation of these types of entities. This is known as the "Moving Ahead for Progress in the 21st Century Act." The related issues are beyond the scope of this article.

1. Warehouseman vs. Freight Forwarder

Warehouse companies receive most goods for storage under the terms of standard warehouse receipts, which are recognized under Article 7 the Uniform Commercial Code ("UCC") that has been adopted by the various states. Through warehouse receipt language, warehouse companies limit their liability for damage to goods given to them for storage to instances of negligence and then at a value as low as fifty cents per pound, pursuant to the authority of UCC Section 7-204. Normally, after a warehouseman arranges for a customer's transportation of goods outbound from the warehouse, and the goods *are damaged in transit*, the warehouseman is held to the limited, negligence based, duty of care accorded to a "shipper's agent" (who arranges for the hiring of transportation carriers for shippers). That legal duty of care dictates that the shipper's agent can be held liable only when the agent fails to exercise reasonable care in:

1. selecting a proper carrier,
2. arranging for proper equipment, or
3. otherwise fails to comply with the customer's shipping requirements.

This negligence based standard of liability is much more favorable for defending the issue of liability than is the nearly strict liability applicable to motor carriers causing damages to goods in transit under the Carmack Amendment[1]; and the warehouse receipt damages limitation is potentially less than what a motor carrier would pay under the Carmack Amendment, depending on whether a LTL or FTL load is involved and the applicable tariff or contract. (The issue of liability for "short" counts is beyond the scope of this article).

Nevertheless, there are circumstances under which a warehouseman can face the far stricter standard of care under the Carmack Amendment and at the same time be without the benefit of the warehouse receipt's limitation on damages. This happens if the warehouseman is deemed to be a "freight forwarder." A warehouseman can be found to be more than a warehouseman acting similar to a shipper's agent and be held liable under Carmack for damaging goods in transit if it holds itself out as a provider of transportation of property for compensation and in the ordinary course of business it:

1. assembles and consolidates, or provides for assembling and consolidating shipments and performs or provides for break-bulk and distribution operations of the shipments;
2. assumes responsibility for the transportation from the place of receipt to the place of destination; and
3. uses for any part of the transportation a carrier subject to (the regulation of the DOT's Federal Motor Carrier Safety Administration "FMCSA")[2].

It is common these days for warehouse companies to broker the transportation of LTL freight at near FTL prices, by operating cross docking operations whereby individual pieces of freight for individual customers are received and then consolidated with the individual pieces of freight from other customers, for shipment in one truckload, with several stops. Cross docking typically involves the warehouse operator's receipt of product delivered on one truck that is unloaded, held for a short time (often no more than 24 hours) and then loaded onto one or more other trucks for subsequent shipment to the ultimate consignee. Often the freight is never formally received into the warehouse and no warehouse receipt is issued. Therefore the warehouse receipt's damages limitations may not apply anyway, regardless of "freight forwarder" status.

So, freight forwarding status may apply to a typical cross docking operation where a warehouseman takes responsibility to receive, cross dock and arrange for the transportation of pieces of freight and in the process it "assembles and consolidates" freight, which may involve breaking down truckload shipments and reassembling individual pieces of freight to go to different destinations in consolidated loads. If it actively markets this service and there is damage to the freight in-transit, the warehouseman could be found to be a freight forwarder, rather than a shipper's agent and be held to the near strict liability of the Carmack Amendment.

When shifting from a warehouseman's status to a "freight forwarder", the "duty of care" (standard of liability) increases from the negligence based duty held by a shipper's agent, to the nearly "strict liability" standard of a transportation carrier under the Carmack Amendment, with potentially higher valuation of the cargo damages. This means that the warehouseman will be found liable for in-transit goods damages, unless a limited set of exceptions apply, as set forth below[3]:

1. act of God,
2. act of the shipper,
3. inherent vice of the goods,
4. act of the public authority or
5. act of the public enemy and they must also establish that they were not otherwise negligent.

Prudent warehouseman cover for this contingency by performing the cross docking operations only after issuing warehouse receipts whenever possible, or under written contracts limiting liability, and the valuation for damages. They also need to purchasing contingent insurance coverage by endorsement to standard warehouseman's legal liability insurance coverage, or to self-insure the exposure.

2. Transportation Broker vs. Transportation Freight Forwarder

Aside from the specific warehouseman's situation, a transportation broker (which obviously can include a warehousing company operating a transportation brokerage) generally has the limited liability of a shipper's agent, if there is a claim for in-transit cargo damages. Other than a cross docking operation, there are limited situations under which a transportation broker who is not holding itself as a freight forwarder, can be found liable as a freight forwarder. However, a cross docking operation can be run in a building with a cross dock and a warehouseman does not need to be involved for Carmack to apply. This is especially true if specialized services are offered in connection with a cross docking operation. With specialized services becoming more common, Carmack Liability is something that transportation brokers should be aware of. Such services should be offered only pursuant to written contracts limiting liability and the valuation of damages and when contingent insurance coverage is in place.

3. Transportation Broker vs. Transportation Carrier

Up to this point, we have been talking about the importance of transportation company type distinctions within the context of cargo damage claims. However, the distinction between a transportation broker and the carriers it hires to carry loads is an important one for protecting brokers from liability for the damages suffered by those involved in accidents with commercial trucks. Until very recently, this distinction "was golden" in the way it protected transportation brokers from liability for property damages and personal injuries suffered by those involved in traffic accidents caused by negligent motor carriers. With few exceptions, as long as the transportation broker did not exercise

significant control over the carrier, and the load was brokered to a carrier classified as "Satisfactory" by the FMCSA, the transportation broker was not responsible for the carrier's negligence in causing a truck accident. Unfortunately, the extent of the protection accorded by this distinction is eroding with the coming of Compliance, Safety, Accountability ("CSA"[4]).

This distinction has been important not only for companies whose sole business is transportation brokerage, but also to transportation carriers who choose to broker the carriage of individual loads, rather than taking each load themselves. Although the advent of CSA may have decreased the broker's protection from liability arising from the negligence of a carrier, this distinction is still, nevertheless, important. (For a summary of CSA, its latest developments and lawsuits challenging it, see my previous articles[5]).

Despite all the attention given CSA over the last few years, CSA implementation so far has not brought about changes to FMCSA regulations with regard to the making the ultimate safety rating called a "Safety Fitness Determination" ("SFD"), which determines the ultimate fitness of a particular carrier to be out on the road. Until such a change is made the SFD rating will remain directly unrelated to CSA's BASICs thresholds, which determine when the agency should intervene with a carrier. CSA's SMS data will be eventually used in the SFD process[6], but until then there will be dual FMCSA carrier safety measurement systems. So, for the time being, there could be a SFD determination that a carrier is "Satisfactory, while at the same time there could be insufficient data to determine whether the carrier meets the acceptable thresholds of the CSA BASICs categories. For other "Satisfactory" carriers there could be one or more BASICs categories falling into the threshold level of violations under which a carrier is subjected to monitoring under CSA.

These dual systems and the recent guidance given by the FMCSA concerning the dual systems is now being challenged in Court by an association representing small carriers and brokers ("ASECTT")[7]. The lawsuit was filed after the FMCSA released Power Point slides and notes, discouraging shippers and brokers from attempting to select a safe carrier by relying solely upon a Safety Fitness Determination classification that a carrier is "Satisfactory," and inviting shippers, brokers and insurers to review all data available from the FMCSA on a particular carrier (including CSA), before making a decision to use the carrier. Slide 4 specifically states the consistent themes of concerns the agency has heard from broker and shipper users of the system, which include concerns :

- (that) Information available in different FMCSA systems can be confusing (and)
- (that there is a) [p]reference for a simple label that protects from potential liability, though most understand FMCSA's mission does not include providing business direction to industry

The presentation notes for the slide state further that:

> FMCSA's mission is to reduce crashes, injuries, and fatalities involving large trucks and buses**. Its mission does not include providing business direction to private industry. Shippers, brokers, freight forwarders, and consumers are encouraged to exercise independent judgment about the companies with which they choose to do business**. Accordingly, FMCSA encourages the use of its public data to help make sound business judgments (Emphasis mine).

In the view of ASECTT and the Plaintiffs to the lawsuit, these statements amount to an abdication of the agency's duty to make safety fitness determinations of carriers and leaves shippers and brokers to make their own judgments based upon all the data provided by the FCMSA, without adequate guidance and

thus exposing shippers and brokers to potential liability for choosing carriers whose ultimate Safety Fitness Determinations are Satisfactory, but whose CSA BASICs scores may approach or exceed CSA BASICs categories threshold monitoring levels.

Accordingly, even if a carrier chosen by a broker has a "Satisfactory" FMCSA SFD rating, brokering a load to a carrier with one or more BASICs categories over FMCSA's thresholds could potentially make the broker liable for "negligently" selecting the carrier or "entrusting" the load to an unsafe carrier. However, as long as the carrier is both rated "Satisfactory" and does not have BASICs category violations above any of the thresholds, the broker is unlikely to be successfully sued by those injured in truck accidents. Nevertheless, this potentially limits the number of carriers to whom loads can be prudently brokered to.

So, the distinction between a transportation broker and a carrier is still an important protection for brokers, even if the protection has been somewhat diminished in its application by CSA developments. Therefore the process by which a transportation broker (including a carrier acting as a broker) follows in selecting carriers to which to broker loads is very important and should be reviewed by competent legal counsel.

4. Consignee vs. Warehouseman

When acting as a shipper's agent in receiving goods into the warehouse or in arranging for the shipment of outbound goods, warehouseman need to be diligent in protecting their legal status as "warehousemen" as opposed to "consignors" or "consignees." Sometimes bills of lading can create unintended liability for warehouseman as consignees. If the warehouseman, in accepting goods for storage, allows itself to be listed on bills as the "consignee" it could find itself liable for railroad car demurrage charges. A similar issue is involved with outbound goods and the "consignor" designation, but this should not be a significant issue, since the warehouse should be in control of the drafting of the bill of lading for outbound goods.

Demurrage charges are charges made by railroads for holding a railroad car for more than a designated period of free time for loading and unloading. Railroads establish their standards for free loading/unloading time and the conditions for making demurrage charges for exceeding the free time in their tariffs, or by contract with customers. Tariffs contain arbitrary rules for when the holding of railroad cars is subject to these late charges. However, navigating the application of these rules in the real world of warehouse operations can be a complicated task when railroads attempt to collect these charges from warehousemen, rather than from railroad customers. There is no agreement among the courts as to whether a warehouse operator is liable for such charges simply because it is identified on the bill of lading as the "consignee" rather than the "in care of" party, and Federal law provides methods to challenge the validity of such charges. However, one way of limiting this potential liability is to make sure that goods are accepted into the warehouse pursuant to properly drafted bills of lading which do not list the warehouseman as the consignee. Also, because transportation charges should be paid, in most cases, by the shipper, warehouse operators should be careful to promptly notify railroad carriers that it is the shipper's agent and will not be held responsible for the charges. The warehouse receipt should also specifically provide that the warehouse operator is not responsible for these charges, unless the charges resulted solely from the failure of the warehouse to diligently load or unload the railroad cars.

Detention charges are similar charges made by trucking companies to their customers or warehousemen for holding trailers for loading/unloading beyond specified time periods. The issues

involved and methods to avoid such liability are somewhat similar to that of demurrage charges. The warehouseman should have qualified legal counsel review its procedures and documents relevant to demurrage and detention charges.

CONCLUSION

For supply chain companies conducting business as transportation brokers, freight forwarders, warehouseman, or transportation carriers, technical legal distinctions can make a big difference in determining a transportation company's liability and exposure for unexpected cargo claims, demurrage and detention claims and truck accident injury claims. These companies should be diligent in having qualified legal counsel review their relevant documents and procedures and then to carefully follow procedures once established. By doing this, supply chain companies can reduce the amount of surprise liability they are exposed to.

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WALT METZ BIO

Walt's employment profile shows a transportation, warehousing and supply chain executive in-house legal counsel with an established track record of accomplishments achieved for large and medium sized public and private company employers in the trucking, warehousing, logistics and retail industries. Walt was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC, including a small trucking operation. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also completed a short tenure in the Legal Department of Old Dominion Freight Lines in 2011. Since January 1, 2012, Walt has sought a permanent, full time position as a house lawyer for a major transportation/supply chain company and during that time period has published several timely transportation law journal articles, has made himself available for consultation on related issues and has been remotely employed on a short term assignment for a substantial full truckload transportation company. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

Walt is available for a new in-house legal opportunity. Walt's complete professional profile can be accessed at: http://www.linkedin.com/in/waltmetz.

ENDNOTES:

[1] 49 U.S.C §14706

[2] 49 U.S.C . §13101(8)

[3] The Supreme Court has held that the Carmack Amendment is a codification of the common-law rule that, "a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods." *Miss. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

[4] "CSA" first came into being in 2008 as the CSA Op-Model Test in a small number of pilot test states. During the time the FMCSA was continuing the pilot tests in a small number of states and readying CSA for nationwide implementation, it became known as "CSA 2010" (Comprehensive Safety Analysis 2010). In 2011, CSA 2010 expanded from pilot states testing to nationwide implementation and became known simply as "CSA", which now stands for "Compliance Safety Accountability"

[5] "CSA and Motor Carrier Safety Ratings: The Past, Present and Future," *JD Supra*, February, 2012; "Recent Developments Show CSA Continues To Be a Work in Progress" as published in the July, 2012 edition of *The*

Transportation Lawyer, a prestigious quarterly legal journal by the Transportation Lawyers Association; "New Lawsuits and Interest Group Concerns Keep CSA Controversies Brewing", *JD Supra*, August, 2012.

[6] For more detail on the lawsuit, see my previous article, "New Lawsuits and Interest Group Concerns Keep CSA Controversies Brewing", *JD Supra*, August, 2012.

[7] For more details on the lawsuit, see my previous article, "New Lawsuits and Interest Group Concerns Keep CSA Controversies Brewing", *JD Supra*, August, 2012.