

HOW BROKERS' EXPANDING ROLES EXPAND THEIR LIABILITY

—Hillary Arrow Booth*



To borrow an old riddle, "When is a truck not a truck? When it turns into a garage." The same question applies, more seriously, to brokers. Thus, if the question is, "When is a broker not a broker," the answer turns out to be "when it turns into a carrier." The riddle is in figuring out when and how this happens. A second, and equally puzzling question, is when and how a broker's liability may expand beyond what has been traditionally imposed upon it.

If a company acts as a broker, its liability is generally determined by the negligence law of the State in which it is sued. See *Commercial Union Insurance Company v. Forward Air* (U.S.D.C., New York 1999) 50 F. Supp.2d 255. In contrast, if a company acts as an interstate motor carrier or a freight forwarder, its liability for damaged or lost freight is determined under 49 U.S.C. §14706. While this distinction in liability schemes sounds straightforward, the reality of the brokering business and a number of court decisions have created uncertainty, leaving a broker potentially at risk for liability even in the absence of negligence.

Traditionally, brokers arranged for the transportation of freight by acting as conduits between shippers and carriers. Under that scenario, their risk of liability for lost or damaged freight was generally limited to situations of negligent entrustment. Now, brokers have expanded their roles to provide value added services, such as assuring delivery schedules, maintaining their own freight insurance, and exerting expanded levels of control over shipments. While such services assist a

broker in competing for customers and in retaining customers, providing such services also enlarges its risk of liability. The provision of additional services will likely preclude a broker from asserting that its liability is limited to negligent entrustment. In several instances, courts have found that a broker's conduct opened it up to liability as a carrier and/or created duties far beyond the mere selection of a licensed carrier. Thus, if a broker stops acting narrowly as a broker, it may stop being treated as one too.

When is a Broker Not a Broker?

At least one court has confirmed what many transportation attorneys already know – the difference between a carrier and a broker is often blurry. *CGU International Insurance, PLC v. Keystone Lines Corp.* (N.D. Cal. 2004) 2004 U.S. Dist. Lexis §123. The factual determination of whether a company is a broker, freight forwarder, or motor carrier is not controlled by what the company labels itself, but rather by how it represents itself to the world and its relationships to the shipper. See *Hewlett-Packard Company v. Brother's Trucking Enterprises, Inc.*, (SD Florida 2005) 373 F. Supp.2d 1349; *Phoenix Assurance Company v. Kmart Corporation* (D. N.J. 1997) 977 F.Supp 319. Under this analysis, companies that consider themselves brokers may find themselves facing greater than expected risk as a result of their advertising and the additional services they provide.

Often, brokers advertise their services by assuring potential customers

that they have a good safety record, that they provide extra or added value, and that they assure on-time delivery. However, the provision of additional customer services, and the advertisement of those services, can create additional liability. In *Hewlett-Packard Company v. Brother's Trucking Enterprises, Inc.*, *supra*, the court determined that a reasonable fact finder could conclude that the broker served as a motor carrier because its actions were not strictly limited to arranging for the transport. Instead, it assured the shipper regarding its own contingent insurance coverage, presented the shipper's insurance claim after the loss occurred, advised the shipper that the freight would be driven by a team using a GPS tracking system, and advised the shipper that the freight would go directly to the destination. The broker's advertisements, claiming that it provided control, the very latest systems, and timely transit supported the court's decision.

Significantly, the fact that a company is licensed as a broker does not prohibit it from also being considered a carrier or freight forwarder for purposes of determining its liability for lost or damaged freight. See *Global Van Lines, Inc. v. I.C.C.* (5th Cir 1982) 691 F.2d 773, finding that a transportation entity may have authority to operate as both a broker and a carrier.

*Dongell Lawrence Finney, LLP, Los Angeles, California

More importantly, a broker that acts as a carrier or freight forwarder and that fails to properly register as a carrier may still be deemed a carrier for purposes of assessing liability for damaged or lost freight. See *Phoenix Assurance Company v. Kmart Corp.* (D.N.J. 1997) 977 F. Supp. 319.

The statutory definitions of the entities add to the uncertainty. The definition of a broker provided in 49 U.S.C. §13102(2) is “a person that offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, or arranging for, transportation by a motor carrier for compensation.” A motor carrier is defined as “a person providing motor vehicle transportation for compensation.” 49 U.S.C. § 13102(3). The definition of transportation includes “services related to that movement.” 49 USC §13102(2). These services may include arranging for the transportation along with the additional services offered by many brokers. One crucial difference between a broker and a motor carrier is whether the company legally binds itself to transport. If it does, it will likely be considered a carrier. See 49 C.F.R. 371.2; *CGU International Insurance, PLC v. Keystone Lines Corp.*, *supra*. The question as to whether a broker bound itself to transport is one of fact depending upon the communications, advertisements, relationships, and conduct surrounding the particular transportation.

Further, the definition of a freight forwarder found in 49 U.S.C. §13102(8) leaves room for interpretation. A company that provides for the transportation of property for compensation, advertises that it coordinates multiple loads, assumes responsibility for the freight from pick up to delivery, and utilizes a carrier subject to the Carmack Amendment may be found to be a freight forwarder, even though it considers itself a broker. In *Phoenix Assurance Company v. Kmart Corp.*, *supra*, the court ruled that a company may be considered a freight forwarder

even if it does not perform all of the authorized functions, as long as it offers freight forwarding services. Thus, once again, a broker's advertisement may create greater liability than it anticipates.

Duty is as Duty Does

A broker unquestionably has a duty to use reasonable care in selecting a carrier. See *Schramm v. Foster* (MA 2004) 341 F.Supp.2d 536. The law is equally clear that brokers are not granted immunity for breach of contract or tort actions arising out of the interstate shipment of goods. Instead, “the remedies provided under this subtitle [the Carmack Amendment] are in addition to remedies existing under another law or at common law” 49 U.S.C. §15103. There are no provisions expressly protecting or shielding brokers within the Carmack Amendment. See *Byrton v. Dairy Products, Inc. v. Harborside Refrigerated Services, Inc.* (N.D. Ill. 1997) 991 F. Supp. 977 (awarding breach of contract damages against defendant after determining the defendant merely arranged for the transportation of goods and was not a freight forwarder under the Carmack Amendment.)

While brokers may argue otherwise, their duty is not strictly limited to selecting a carrier that is licensed. In *Schramm v. Foster*, *supra*, the broker's duty included, at least, the duty to check safety statistics and evaluations of the carriers, and to maintain internal records to assure that the selected carriers were not manipulating their business practices. In that case, the court examined the potential liability of the broker for personal injuries resulting from an accident, and did not evaluate the broker's potential liability for damage to the freight. Brokers may attempt to shield themselves by arguing that their only duty is to select a licensed motor carrier. However, the authorities are not as definitive on that position as a broker may want, especially where

brokers go beyond the mere arranging of transportation.

For example, in *Chubb Group of Insurance Companies v. HA Trans. Systems, Inc.* (C.D. Cal 2002) 243 F. Supp.2d 1064, both parties agreed that the broker had a duty to exercise care in the selection of a motor carrier. The court did not rule that the proper selection of a motor carrier is a broker's only duty, and instead analyzed other potential duties in the context of that shipment. The *Chubb Group of Insurance Companies* court ultimately ruled in favor of the broker, in a narrowly phrased ruling, finding only that “Chubb failed to establish that HA [the broker] had a duty to ensure that the carrier it selected was insured against the same loss for which [the shipper] was itself insured.” *Id.* at 21. This case does not provide a blanket restriction on a broker's duty. Moreover, in *CGU International Insurance, PLC v. Keystone Lines Corp.* (N.D. Cal. 2004) 2004 U.S. Dist. Lexis 8123, the only negligence alleged was the selection of the carrier. The court analyzed that issue, but did not rule that the duty to select a licensed motor carrier is a broker's only duty.

In *Hewlett-Packard Company v. Brother's Trucking Enterprises, Inc.* (SD Florida 2005) 373 F. Supp.2d 1349, the court ruled that a broker could be held liable for the loss of freight stolen during transit as it was negligent in failing to follow the shipper's instructions, extending the legal duty of a broker well beyond the duty to select a licensed motor carrier. The broker in *Hewlett-Packard Company v. Brother's Trucking Enterprises, Inc.* did not limit its involvement to merely arranging for the transport, and instead represented that it would exert a greater measure of control in connection with the shipment. The court found that the broker had greater exposure to liability, but did not expressly condition the greater exposure to situations where the company takes on greater responsibility. In fact, a negligent failure to follow a shipper's instructions could

arise even where the broker merely arranges for the transportation.

Finally, in *Oliver Products Company v. Foreway Management Services, Inc.* (W.D. Mich. 2006) 2006 U.S. Dist. Lexis 312968, the court confirmed that common law claims against brokers are not preempted, and that examples of permissible suits against brokers include "breach of contract/negligence regarding the selection of the carrier or conveyance of instructions as to the delivery of goods." *Id.* at 4. A broker's acceptance of instruc-

tions from a shipper concerning the transit or delivery of freight may lead to a greater duty.

These judicial opinions create difficult choices for brokers. Brokers compete by advertising their value added services, yet the provision of those services can create duties previously avoided by brokers. If a broker is given specific instructions by the shipper, it must convey those instructions to the carrier. Absent compliance with the instructions, a broker will undoubtedly be sued, and

it may become a question of fact as to whether the instructions were adequately conveyed to the carrier. Courts may also question whether the broker had a duty to ensure compliance with the instructions. However, if a broker exerts control over the shipment by attempting to ensure such compliance, it creates a risk that it will be held liable as a carrier. In the end, brokers should be advised that their expanding roles expand their liability. 