

Analyzing Cargo Insurance Options for Freight Brokers

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Many shippers, particularly large shippers, include a provision in their shipper/broker contract that requires the contracting broker to assume the liability of a motor carrier for loss or damage to cargo. With large shippers, this provision – sometimes referred to as a “Carmack Cramdown” provision – is non-negotiable. When facing such a provision, brokers are left to make a business decision: (1) reject shipper/broker contracts containing a Carmack Cramdown; or (2) accept the Carmack Cramdown and hope a contingent cargo policy will cover. Spoiler alert: contingent cargo policies rarely cover this assumed risk.

Many brokers who reject Carmack Cramdowns lament the fact that they cannot service larger shipping accounts, which come with high volume benefits. Many brokers who accept Carmack Cramdowns and assume the liability of a motor carrier lament the fact that one large cargo claim can quickly wipe out months of earned profits. Traditionally, brokers have also been frustrated at the lack of insurance options to mitigate the assumption of liability for cargo claims. But the insurance landscape is changing, and several providers have made cargo insurance options available to freight brokers. With new insurance options come contract issues that transportation attorneys need to educate themselves on, so they can bring value to their broker clients’ annual insurance procurement deliberations. A quick refresher on cargo claim basics provides some background into the insurance issues.

Under the Carmack Amendment (found at 49 U.S.C. § 14706), motor carriers, not freight brokers, are liable for loss or damage to cargo. See e.g. *Delta Stone Products v. Xpertfreight*.¹ There are dozens

of cases that address this basic allocation of liability. Unless there is a contract stating otherwise, shippers cannot successfully pursue brokers for loss or damage to cargo because brokers have no legal liability for such loss.² Consequently, shippers include a Carmack Cramdown provision in the shipper/broker contract to shift liability for cargo loss to the broker. This has been an onerous shift to most brokers because prior to the last few years, no insurance company would underwrite a cargo policy for freight brokers. Insurers would not write such policies because brokers do not have custody or control of the goods during transit, and thus have no ability to prevent or cause loss or damage to the cargo. While brokers would pay tens of thousands of dollars annually for contingent cargo coverage, such coverage rarely covers cargo loss – especially when the motor carrier and their insurer are non-responsive, or the underlying cause of loss or damage is excluded under the motor carrier’s insurance policy.

Shippers do not sympathize with this predicament. They want to reallocate the liability for their loss onto their contracting party (the broker) so they do not have to pursue the cargo claim against a motor carrier with whom they have no contractual privity. Using the shipper/broker agreement as a platform, shippers draft Carmack Cramdown provisions into their contracts that vary in wording, but all achieve the same goal. All require that the contracting broker assume primary liability for loss or damage to the shipper’s cargo. Carmack Cramdown language might look something like this:

Upon SHIPPER providing BROKER with timely notice of a freight loss, damage or delay claim, BROKER

is responsible for filing any such claim for freight loss or damage against its selected motor carriers. In the event any claim is declined by the motor carrier for any reason, BROKER nonetheless shall remain liable for payment of such claim to SHIPPER [sometimes subject to specified terms and conditions in the agreement].

Sometimes the cramdown provision is more direct, i.e.: “Broker agrees to assume primary liability for loss or damage to cargo as set forth in the Carmack Amendment,” or “Broker assumes the liability of a motor carrier under the Carmack Amendment.” There are many variations on the theme, but as stated above, all cramdown provisions require the broker to assume liability for loss or damage to the cargo.

Brokers and their attorneys have long wondered if there was an insurer in the marketplace that would underwrite a broker policy that would provide cargo coverage to the broker, pay cargo claims asserted against the broker, then take an assignment of the shipper and broker’s rights against the motor carrier and pursue the carrier’s cargo policy? While such coverage previously did not exist, policies providing cargo coverage to freight brokers are now emerging.

Several insurers now address the problems outlined above by providing cargo coverage to brokers. Many freight brokers have only started to become aware that

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such policies exist. Many insurance brokers and agents – even those familiar with the transportation industry – are not well acquainted either with the problems freight brokers deal with associated with contingent cargo policies and are not aware these new first-party coverage policies exist for their freight broker clients.

Under new insurance policies for third-party logistics providers (“3PL”), a broker can now obtain first-party coverage for loss or damage to cargo it brokers to motor carriers. This coverage is not for every 3PL and may have drawbacks that require a corporate need/application analysis; however, it does provide a solution to many brokers who want to service large shipping accounts but have to assume carrier liability in order to do so.

Below are examples of policy language providing coverage for 3PLs from three different insurers. The reader should be advised that there are other existing policies and some in the works. This article is not meant to be all-inclusive or to advocate for one policy over another. The purpose is to work through some of the insurance and contract issues that arise with first-party cargo insurance for brokers that transportation attorneys need to be able to spot and advise on.

Policy 1: We will pay those sums you become legally obligated to pay as damages as a Motor Carrier, Warehouseman, Freight Forwarder, Logistics Service Provider or Other Bailee for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss.... **Covered Property**, as used in this Coverage Form, means lawful property of others that you have accepted for transportation, including while temporarily stored or subject to your transportation related logistics services, and for which a Limit of Insurance is shown in the Declarations.

Policy 2: We will pay the damages you become legally obligated to pay for loss to Covered Property caused by or resulting from a Covered Cause of Loss.... **Covered Property** means lawful property of others that you have accepted or arranged for transportation or storage as a Carrier for Hire, Freight Broker or Forwarder, Logistics

or Warehouse Operator or other Bailee and for which a Limit of Insurance is shown in the Declarations.

Policy 3: We insure you for: Your liability for physical loss/damage of cargo and consequential loss arising from this.... Cargo is defined as goods and property in respect of which you contract to provide services, or in which you have an insurable interest, including: carrying equipment unless supplied by you; anything used or intended to be used to pack or secure goods, carried from one place to another place.... Contract is defined as any contract related to your insured services...

These insuring provisions require some analysis from the attorney working through the shipper/broker agreement and assumption of liability for cargo claims with broker clients. First, note the language in all three insuring provisions: (1) We will pay those sums you become legally obligated for...; (2) We will pay the damages you become legally obligated for...; and (3) We insure you for...your liability for physical loss or damage...in respect of which you contract to provide services []. Since brokers have no legal liability for loss or damage to property, this language means there must be a contractual provision between the shipper and the freight broker under which the broker assumes legal liability for loss or damage to cargo. Absent such a provision, the broker has no legal liability and there is no coverage. Consequently, if a broker client wants primary cargo coverage, the attorney may need to advise the broker to ensure the shipper/broker contract contains an express assumption of liability for loss or damage to cargo. **Note:** It is a change to go from advising your broker clients that Carmack controls and only the motor carrier is responsible for loss or damage to goods in transit to advising them to enter into a contract in which they assume primary liability for cargo damage. Staunch believers in the Carmack Amendment really struggle with this shift, and for good reason, but they should be advised of the available insurance option.

When a broker makes a cargo claim on its first-party policy, the first thing some insurers review is whether there is a contract provision under which the broker assumes liability for loss or damage to cargo. Some

claims are immediately rejected if there is no contractual assumption of that liability. Once the assumption of liability is confirmed, the insurers pay the claim (either directly or through reimbursement) and then take an assignment of the broker's rights against the motor carrier and pursue the carrier. The assignment language in the insurance policy looks like the following:

Policy 1: If you have rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. You must do nothing after loss to impair them. At our request, you will bring “suit” or transfer those rights to us and help us enforce them.

Policy 2: If any person or organization to or for whom we make a payment under this Coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. If that person or organization does anything to impair our rights after a loss, we will not have to pay the loss....

Policy 3: This policy requires the insured to pay the claim and send it to the insurer for reimbursement after which reimbursement, the insurer subrogates against the motor carrier. [The actual policy language is too vague to draw this out, but what language existed in the policy was interpreted this way by the underwriter.]

What rights against the motor carrier must be preserved? Carmack rights and contract rights. If the primary cargo policy is a reimbursement-based policy, a broker that pays the cargo claim to the shipper and expects reimbursement from its insurer must obtain an assignment of the shipper's Carmack rights against the motor carrier. Brokers also have contract rights against the carrier that must be preserved. As the broker does not directly own any Carmack rights against the motor carrier, either the broker/shipper agreement must include language that will assign the shipper's Carmack rights against the motor carrier to the broker, so they can be transferred intact to the insurer or the broker must get a written assignment from the shipper to pass to its insurer. If the

former, shipper/broker agreement language might look like this:

SHIPPER agrees that in the event BROKER or its insurer pays any claim for loss or damage to property hereunder and SHIPPER has rights to recover from another, those rights are automatically transferred to BROKER or its insurer to the extent of its payment. SHIPPER also agrees that it will do everything necessary to secure BROKER'S rights and must do nothing after loss to impair them.

Such a provision ensures that any rights originating with the shipper effectively

transfer to the broker or its insurer upon payment of the claim to the shipper.

Additional issues to review and discuss with your client's insurer as you analyze primary coverage policies for 3PLs may include:

- Are claims paid by the insurer directly? Or are they paid by the broker and reimbursed by the insurer? If the latter, what notice requirements and deadlines apply?
- What are the timelines in the policy and how do they relate to preserving cargo claims under 49 CFR 370.3?
- What is the policy's recourse provision related to the motor carrier? In order

to preserve its claim against the policy, does the 3PL have to take any action against the motor carrier, i.e. file a lawsuit or submit a claim? Or does the insurer handle the cargo claim with the motor carrier from soup to nuts?

- Is the cost of the premium related to how much work the broker has to perform (i.e. managing the cargo claim with the motor carrier) as opposed to the insurer? Some brokers have systems in place that make certain policies with lower premiums (where more is required of the broker) more palatable than a higher premium associated with soup to nuts services provided by the insurer. 

Endnotes

1 "[Shipper's] claims against [Broker] for breach of contract and negligence [for damage to cargo] are preempted by the Carmack Amendment, 49 U.S.C. 14706, which provides the exclusive remedy for cargo claims. 'The Carmack Amendment so thoroughly regulates carrier liability that every circuit which has considered the matter...has either held or indicated that it would hold that the Carmack Amendment preempts state common law claims. This broad preemption covers not only common law negligence claims, but also claims for breach of contract.' (Internal citations omitted). Moreover, as conceded at the hearing by the parties, [Shipper's] negligence claim is also preempted by 49 U.S.C. 14501(c)(1) ("ICCTA"), which expressly preempts negligence claims arising out of services of a carrier or broker." 304 F.Supp.3d 1119 (D. Utah 2018)

2 *Id.*