

**ANSWERS FOR FAULT DISTRIBUTION AND DAMAGE RECOVERY—
THE SYSTEM FOR RECOVERING FOR LOSS OR DAMAGE TO GOODS
IN INTERSTATE COMMERCE INCLUDING COMMENTS ON THE
HANDLING OF AN INLAND MARINE CLAIM (IS IT LAND OR SEA?)**



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ANSWERS FOR FAULT DISTRIBUTION AND DAMAGE RECOVERY—THE SYSTEM FOR RECOVERING FOR LOSS OR DAMAGE TO GOOD IN INTERSTATE COMMERCE INCLUDING COMMENTS ON THE HANDLING OF AN INLAND MARINE CLAIM (IS IT LAND OR SEA?)

I. INTRODUCTION:

Liability for the loss or damage of cargo being transported in interstate commerce is governed by the Carmack Amendment to the Interstate Commerce Act. 49 U.S.C. §14706. On January 1, 1996 the ICC Termination Act of 1995 (the ICCTA), Pub. L. No. 104-88, 109 Stat. 803, became effective. ICCTA abolished the ICC and transferred the remaining functions of the ICC to the Department of Transportation and the Surface Transportation Board. The ICCTA also recodified the Interstate Commerce Act (ICA) and renumbered many ICA sections. Among these is the Carmack Amendment which now has been recodified without substantive modification at 49 U.S.C. § 14706. This Act provides the statutory authority that carriers take on absolute liability to the shipper if the cargo is damaged. The benefit is that strict liability on carriers creates incentives for the protection of goods by the carrier, which further promotes safety on the roadways and encourages the transport of goods from state to state. For many interstate motor carriers, cargo claims and the general handling or defending against cargo claims creates confusion among all parties involved. The Carmack Amendment makes interstate carriers liable “for the full actual loss, loss, damage or injury to . . . property caused by” them to goods that they have under transport. 49 U.S.C. § 14706. The big picture is that carriers, when goods are put in their possession for carriage in interstate commerce, immediately take on absolute liability (with some exceptions as discussed below) which is derivative of the common law intent to protect shippers from collusion between carriers and thieves.

Because the presumption of liability is automatic as to the carrier, the carrier then has a financial motivation to protect what is put in its possession from point A to point B. Further complicating matters is the current complexity and nature of interstate commerce where often the situation arises that multiple carriers are involved from the time the goods are tendered from the shipper to the carrier until their arrival to the consignee. Because of this complicated

and sometimes multi-tasking process, who pays for and who is responsible for the damaged goods has often left not only lawyers, but transportation companies with a presumption they damaged the goods with no recourse.

The Carmack Amendment is a codification of the common law rule imposing strict liability upon the common carrier without proof of negligence. Carmack pre-empts state and common law in instances where goods are lost, damaged or ultimately delivered in interstate commerce. See *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964); *Hughes v. United Van Lines*, 829 F.2d 1407, 1415 (7th Cir. 1987), cert. denied, 485 U.S. 913 (1988). One of the main purposes behind Carmack was to create a standard of strict liability for carriers with the exception of a few situations. However, this does not leave the shipper without a duty to prove who, in fact, caused the damage; but it does relieve the shipper of having to figure out which carrier caused the damage. All carriers involved then have an indemnification right to each other in order to sort out who caused the damage. See e.g., *United States v. Savage Truck Line*, 209 F.2d 442 (4th Cir. 1953).

The Carmack Amendment was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887 and is now part of the Interstate Commerce Commission Termination Act of 1995. When enacted, Carmack established a uniform system of recovery by interstate shippers against motor carriers and freight forwarders and allowed a shipper to recover for actual loss or injury to the property. The purpose of this article is not only to inform, but to clarify some of the issues that many transportation companies are faced with every day.

II. APPLICABLE LAW ON GOODS TRANSPORTED IN INTERSTATE COMMERCE

The Carmack Amendment applies only to interstate transportation. 49 U.S.C. §13501. To the contrary, if the intended purpose of the transportation is intrastate, Carmack would not apply and common law and state law would rule.

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49 U.S.C. §23504. Carmack applies only to transportation by a motor carrier in the United States 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 United States to the extent the transportation is in the United States;
- 4) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
- 5) the United States and a place in a foreign country to the extent the transportation is in the United States. 49 U.S.C. §13501(1)(2005).

III. LIABILITY IMPOSED BY CARMACK IS STRICT LIABILITY

The Carmack Amendment subjects a motor carrier transporting cargo in interstate commerce to absolute or strict liability for actual loss or injury to the property. *See Missouri Pacific R.R. Co.*, 377 U.S. at 137. Limiting a carrier’s liability to the value of the goods enables all parties to evaluate or have realistic expectations about not only insurance, but liability that is at stake. As a benefit to the shipper, an avenue of recovery is always available. As a benefit to the carrier, if in fact the goods are damaged by the carrier, the actual loss or injury to the property subject to recovery by the shipper is that the damage is limited to the value of the goods, or the actual loss or injury to the property. §14706(1). This value is governed by the bill of lading used in the shipment of the goods, and the limits are based on the carrier’s rates or tariff. Section 14706(a) states that, “liability imposed...is for the actual or injury to the property...,” has been long interpreted by the courts to cover more than mere physical loss or damage to the goods. It includes any injury to or invasion of tangible or intangible property rights and economic loss not directly related to physical damage. In other words, a carrier knows the risk or worse case scenario before any goods are transported.

IV. SHIPPER’S BURDEN OF PROOF

In order to begin the process of filing a cargo claim, a shipper must first establish a prima facie case for damage to cargo. *See Independent Mach. Inc. v. Kuehne Nagel, Inc.*, 867 F.Supp. 752, 758 (N.D. Ill. 1994). Although the Carmack Amendment imposes strict liability on the carrier for loss of goods, this prima facie case must first be presented to the carrier through notice. A prima facie case must present evidence that (1) the goods were delivered to the carrier in good condition, (2) the goods arrived in damaged condition, and (3) the damage to the goods resulted in a specified amount of damage to the shipper. *See Chubb Group of Ins. Cos. v. H. A. Transp. Systems, Inc.*, 243 F.Supp.2d 1064 (C.D. Cal. 2002) (citing 49 U.S.C.A. §14706).

A. Notice Requirements

Before a lawsuit is ever filed, a shipper must give notice to the carrier. *See* Section 3 of the Uniform Straight Bill of Lading (a) and (b). Those who have standing to bring a claim are the holder of a bill of lading and persons beneficially interested in the shipment. *See id.* Insurance carriers subrogated to the rights of any of these individuals can also make a claim under Carmack. *See Ryder Truck Lines v. Consolidated Rail Corp.*, 588 F.Supp. 22 (N.D. Ill. 1984).

The bill of lading lays out the provisions of filing a notice for a cargo claim under Carmack. *See e.g., Portman Curson, Inc. v. Hartford Fire Ins. Co.*, 65 A.D.2d 712, 410 N.Y.S.2d 595 (1978)(example of sufficient notice include an attorney’s letter even though it never mentioned that a claim was being made); *Cooper Jarrett, Inc. v. Melody Stationery, Inc.*, 53 A.D.2d 146, 385 N.Y.S.2d 394 (1976)(inspection reports entitled “dangerous merchandise inspection” even though they stated they were not a claim). The bill of lading not only identifies how the claim is to be communicated to the carrier, but also the time within which the shipper must make a claim. The notice must contain facts sufficient for the carrier to identify the shipments, assert liability for the alleged loss, damage, injury or delay, and make a claim for the payment of a specified amount of money. 49 C.F.R. §370.3(a). When making a notice of

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claim, the shipper must provide an amount it is claiming for loss. *See id.* However, there is no statutory form or specific form required—only that the above mentioned requirements be met.

The Carmack Amendment allows the carrier to limit the amount of time the shipper has to file a claim as long as the time to file the claim is not less than nine months. §14706(e)(1). The minimum nine-month period is not a limitation period, but rather, it is a statutory determination of what is a reasonable period for the shipper. As such, a carrier may include in the bill of lading a requirement that a claim be brought within a set period of time that is greater than or equal to nine months. This time period begins to run the day after the delivery of the goods. *See* Section 3 of the Uniform Bill of Lading (a) & (b). The minimum nine-month claim filing deadline is enforceable against anyone having a claim against the carrier, including a subrogating insurance carrier. *See id.* A shipper who does not file a written claim of damage within the time specified in the bill of lading cannot recover its shipment damages. *See e.g., Imperial News Cov. P-I-E Nationwide, Inc.*, 727 F.Supp. 86 (E.D.N.Y. 1989). The claim will be considered filed when it has been delivered to and received by the carrier. Unlike Texas Rule of Civil Procedure 5, the Mailbox Rule does not apply. Three exceptions exist as to timely filing a notice of claim: (1) estoppel, (2) waiver, and (3) the inability of the shipper, despite the exercise of reasonable diligence to ascertain the extent of the loss within the filing period. *See Taylor v. Mayflower Transit, Inc.*, 161 F.Supp.2d 651, 660 (W.D.N.C. 2000).

B. Carrier’s burden of proof against another Carrier

In situations where the transporting of goods involves multiple carriers, different layers of liability are created in that as to the shipper, the goods are damaged, but as to the multiple carriers, one or more can be without fault but held to the strict liability standard. The courts have different opinions as to the proper standard. One school of thought is that liability between carriers can only be established by proof of negligence or fault. *See, e.g., Southern Express, Inc. v. TSC Motor Freight Lines*, 200 F.2d 797

(5th Cir. 1952). The other perspective is that a carrier has been held to be strictly liable for the damage or loss of goods while in its possession providing that “the [initial] carrier . . . is entitled to recover from the carrier over whose line or route the loss or injury occurred” which created a strict liability standard. § 14706(b).

C. The Carrier’s Defense

Once the shipper has established its prima facie case, the burden then shifts to the carrier to show both that it was free from negligence, and the damage to the cargo was due to one of the excepted causes, relieving the carrier of liability. Those excepted causes include that the damage was caused (1) by an Act of God, (2) the public enemy, (3) the shipper, (4) a public authority, or (5) that the damage resulted from the nature of the goods or an inherent vice in the goods. *See Missouri Pac. R.R. Co. at 137.* Further, the carrier has to show that the shipper did not exercise reasonable diligence in mitigating damages. *See Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991).

D. Duty of Consignee

A consignee has no right to reject damaged goods unless the goods are either totally destroyed, totally worthless, substantially destroyed, or where the value of the goods has been destroyed. *See Ferguson v. Red Arrow Freight Lines*, 580 S.W.2d 84 (Tex.Civ.App. 1979). As such without the absence of the complete destruction of the goods or their value, the consignee is under a duty to accept and then mitigate damages. *See Oak Hall Cap & Gown v. Old Dominion Freight Line*, 899 F.2d 291 (4th Cir. 1990)(shipment of academic gowns damaged by smoke caused by fire set in carrier’s trailer by vandals held to be worthless for their intended purpose and properly rejected by the consignee). A refusal by the consignee to accept delivery at the place named in the contract has been held to terminate the carrier’s liability as such and reduces it to that of a bailee or a warehouseman. *See Trans-Cold Express, Inc. v. Hardin*, 415 S.W.2d 431 (Tex.App. 1967).

V. LIMITATION OF LIABILITY

Although a carrier is faced with strict liability as to damage to the goods, there is a

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possibility that the parties can negotiate a limitation of liability under the bill of lading, or contract for goods. This bill of lading can set forth the limitations of the carrier's liability. For the limitation to be effective, the carrier must take four steps before transporting the goods:

- 1) Maintain a tariff, if required;
- 2) Obtain the shipper's agreement as to his or her choice of liability;
- 3) Give the shipper a reasonable opportunity to choose between two or more levels of liability; and
- 4) Issue a receipt or bill of lading prior to movement of the shipment. §13710(a)(1).

In other words, the contract or bill of lading must show to the court that there has been a fair agreement and that a shipper has the option to higher recovery if a higher rate is paid for the shipment.

VI. LIMITATIONS FOR FILING SUIT

Carmack does not specifically set forth a limitations period for filing a suit, but instead allows the shipper and carrier to set their own limitations for filing a civil suit so long as these limitations are within the minimum period set in Carmack. A claim must be filed within nine months from delivery or failure to make delivery. See Section 3 of the Uniform Straight Bill of Lading. Thereafter, the statutory period for filing a civil lawsuit is two years from the date the carrier has disallowed any part of a claim. § 14706(e)(1). The period to file suit begins to run on the date the carrier gives the shipper written notice that the carrier has disallowed all or any part of the shipper's claim specified in the notice of claim. §14706(e)(1). The filing date has been held to be the day that the claim is received by the carrier, not the date of mailing, which is unlike Texas Rule of Civil Procedure 5. See *Pathway Bellows, Inc .v. Blanchette*, 630 F.2d 900 (2d Cir. 1980), cert. denied, 450 U.S. 915, 101 S.Ct. 1357, 67 L.Ed. 2d 340 (1981) (claim received one day after nine-month period elapsed, but mailed within the nine-month period, held to be untimely filing and thus, claim was barred). If the shipper fails to file a civil action within this time, the suit is barred even if a timely notice of property

damage claim was filed. See e.g. *Consolidated Freightways Corp. v. Theodor Mfg. Corp.*, 516 F.Supp. 9 (C.D.Cal. 1981); *Imperial News Co. v. P.I.E. Nationwide, Inc.*, 727 F.Supp. 86 (E.D.N.Y. 1989). This requirement is also imposed on an initial or delivering carrier in its suit for indemnification against a connecting carrier.

VII. DAMAGES RECOVERABLE UNDER CARMACK

As mentioned earlier, the benefit of the Carmack Amendment is that it limits liability of the carrier to the value established by the written declaration of the shipper or by an agreement between the shipper and the carrier. §14706(c)(1)(a). Thus, the carrier is liable for "the actual loss or injury to the property caused by (a) the receiving carrier, (b) the delivering carrier, or (c) another carrier over whose line or route the property is transported..." *Id.* at §14706(1). Even more of a benefit to the carrier is that punitive damages are not allowed under the Carmack Amendment. See *Cleveland v. Beltman North American Co., Inc.*, 30 F.3d 373 (2nd Cir. 1994). Actual loss for goods that are destroyed or not delivered, is the market value of the goods at the point of destination or the cost of replacement, plus interest. For goods that are delivered but are damaged, the shipper can recover the difference between the market value of the property as shipped and the market or salvage value of the goods as damaged plus interest. See *Chicago, M. St. Paul Ry. Co. v. McCaull-Densmore Co.*, 253 U.S. 97 (1920). The market value rule, however, is not always the only recovery, in that if there is a contract to sell the damaged goods, the proper measure of damages is the price plaintiff would have received under the contract minus any money plaintiff received by selling the damaged goods.

A. So What If the Goods Are Delayed?

Carmack is also applicable to the liability of the interstate carrier for delay damages. §14706. A carrier's liability for delivery delay is calculated by the provisions of the carrier's operating tariffs and cannot exceed the released value of the shipment. See *Southeast Express Co. v. Pasttime Amusement Co.*, 299 U.S. 29 (1936). When there has been a delay in the

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delivery of goods, the question becomes what the definition of delay is for those goods. A carrier is only liable for an unreasonable delay. The courts have held that the damage for delay is the difference in the market value of the property on the day it should have been delivered and its market value on the date of actual delivery. See *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 29 (1936).

B. Attorney's Fees Under Carmack

As to attorney's fees, there is grumbling among the courts. The majority rule is that attorney's fees are not recoverable. See *Strickland Transp. Co. v. American Distrib. Co.*, 198 F.2d 546 (5th Cir. 1982). Attorney's fees have been allowed, but the issue if they were proper was never brought to the court's attention. See *First Nat'l Bank of Oirard v. Banker's Dispatch*, 221 Kan. 528, 562 P.2d 32 (1977).

VIII. WHAT IS "INLAND MARINE"—IS IT LAND OR SEA?

By its name alone it seems a contradiction of terms in and of itself, "inland marine". However, it is not exclusive to land or sea. "Inland marine" insurance coverage involves loss to moving or movable property and is an outgrowth of ocean marine insurance. Historically, ocean marine insurance held the transporter responsible for property loss before, during, and after the completion of the voyage. In the 1800s the non-ocean portion of the journey grew as cargoes were transferred to non-ocean vessels (such as barges) and the term "inland marine" was coined. *Wikipedia World WideWeb*, [http://en.wikipedia.org/wiki/Inland MarineInsurance](http://en.wikipedia.org/wiki/Inland_MarineInsurance). Inland marine policies became known as "floaters" since the property to which coverage was originally extended was essentially "floating". *Id.* The coverage has grown to include property that just involves an element of transportation. The property that is insured under inland marine coverage is typically one of the following: (1) actually in transit; (2) held by a bailee; (3) at a fixed location that is an instrument of transportation; (4) is a movable type of goods that is often at different locations. Examples of the some of the types of property at issue involve accounts

receivable, bailee customer's goods, builder's risk, communication towers and equipment, computer coverage, contractor's equipment, commercial floaters, dealers, exhibitions fine arts, furriers, jewelers, leased property, mobile medical equipment, motor truck cargo, just to name a few. TEXAS ADMIN. CODE § 5.5002.

Inland marine policies generally cover property with risk exposures that change regularly. Property covered by inland marine policies change from day to day and the risk they impose changes daily as well. For example, construction equipment used on sandy soil one day will be used in slippery muddy services the next day and on the third day be in transit on the back of a trailer headed to a new construction location. Each day new risks arise, and so the handling or forecasting of these types of claims becomes difficult.

The issue most prevalent today involving inland marine claims is theft of truck cargo. The American Association of Insurance Services, reported that in 2000 that from 1996 to 2000 theft in general, typically of construction equipment and truck cargo was the leading cause of loss in inland marine insurance. This amounted to 33.7% of all inland marine losses reported over that time to AAIS. Joseph S. Harrington, *Seeking Security*, BEST'S REVIEW, December 2002, at 3. These type of losses require stricter security and safety measures by companies.

Many trucking companies, especially those carrying freight that is a high risk for theft such as electronics, feel vulnerable and are having to take safety measures to protect the cargo being transported. Of course this includes not only training drivers to continually be watchful, but also insuring that the drivers hired are not only qualified but trustworthy. The rise in theft has set off all types of new company policies and procedures for safety from the time of delivery by the shipper to the time of delivery.

Many insurance underwriters struggled with the fact that these risks were of secondary concern to law enforcement because they involved only property. With the attacks on September 11, the connection between transportation safety and the public created heightened awareness, and in November 2001, the U.S. Customs Bureau formed the Customs-

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Trade Partnership Against Terrorism program which is designed to combat safety in not only importing but within interstate commerce in general. *See id.* at 4. This initiative along with the USA Patriot Act are all steps taken to promote safety not only in the ports but from state to state. All of this being said, theft of cargo is still a huge burden shouldered by inland marine insurance companies and carriers.

People in the transportation insurance industry are concerned that the efforts to enhance security are proceeding slowly at a time when motor carriers are being burdened with high fuel costs, rising insurance premiums, and falling revenues. *See id.* at 5. According to an ATA survey, rates for commercial auto coverage rose 32% on average in the months following the Sept. 11 attacks, with umbrella coverage increasing as much as 120%. *See id.* In 2001, Texas ranked second in the country for the number of direct premiums written for inland marine coverage. *See id.* at 8.

When handling claims that involve “inland marine” issues or property that “floats,” it is important to inform carriers not only to protect the cargo through safe driving, but also from theft due to the rising number of theft claims. Specific training by law enforcement should be called in to talk to drivers and warn them of potential hazards on the roadways. Carriers have a huge burden to overcome the number of cargo claims for the movable property known as “inland marine” coverage to prevent premiums from continuing to escalate. Not only are carriers subject to strict liability under Carmack, but now, they are faced with a high number of claims for cargo theft. Carriers have an overbearing duty to perform due diligence in the hiring and training of drivers and as such, this area of the law is ever changing and expanding new horizons for the future on interstate transportation of goods. The challenges ahead

are numerous. High fuel costs along with high insurance premiums should encourage preventative measures not only at the port, but also on the road.

One last issue to be addressed is the difference between “filed” and “nonfiled” classes of inland marine claims. This distinction was brought about by market conditions where marine insurers were expected to file inland marine forms and rating plans for classes that encompassed a large number of homogenous risks for which standardized forms and rating information could be developed. Joseph S. Harrington, *Seeking Security*, BEST’S REVIEW, December 2002, at 3. Examples of the filed classes include: accounts receivable, camera and musical instrument dealers, floor plan merchandise, implement dealers, jewelry dealers, musical instruments, negative film, photo equipment, physicians’ and dentists’ equipment, signs, and theatrical property. Examples of nonfiled classes include a range of cargo, construction, electronic data processing, farm and other risks. The push to have filing requirements for the nonfiled classes is unclear because there has been no apparent change in the nature of unfiled classes to make them any more suitable for the rate and form regulation than previously. *See id.* Nor has there been much of a change in legislative or insurance commissioners’ opinions on the topic. *See id.*

The speculative reason is that state budgets are under intense pressure, and as such, there is a financial incentive for insurance departments to require more filings which generate fee income. *See id.* Potentially, the growing specialization of insurance regulation has promoted this change which concerns many underwriters and adjusters in that complicating classes of “inland marine” only adds to the complexity of adjusting those claims. Defining “inland marine” and what is covered is a task in and of itself.