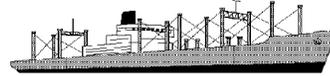




# Rollin' On



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## DEFENSES: CARMACK AND COSGA, & ETHICS

### *Defenses:*

***For carriers, nice to have around;  
For shippers, the other way around.***

For every claim or lawsuit that is filed, there are possible defenses. An extreme example that everyone knows about, in the criminal law area, concerns the right of self defense. You are allowed to use deadly force if someone is about to blow you away. In the civil area, if you are being sued by a lawyer who you don't like, you have the same right. OK, well not really but I had to make sure you're paying attention. Tempting though isn't it.

For surface transportation, the governing law is known as the Carmack Amendment. This law requires freight loss and damage claims to be filed within nine months of the loss, and then for a lawsuit to be filed within two years of denial of the claim. This is common knowledge for many people, and is printed on the back side of the uniform bill of lading.

If you are operating as a contract carrier and have a contract in place with your customer, usually the shipper or consignee, you have the right to modify, up or down, these time limits.

Motor carriers can also rely upon a limitation of liability, where the freight rate is dependent upon the value of the cargo. There are prerequisites, such as giving your customer the option of different rates based upon value. It gets into a gray area where the customer doesn't really know about the choice of rates, since it may not be brought to the customer's attention, or the customer doesn't bother to read all of the paperwork, or that sort of thing.

Anyway, if you're a shipper or

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consignee with a claim, you need to be mindful of these defenses. It is usually a moot point, since most people won't wait nine months to file a claim, or two more years if the claim is denied. Time is money, and there is no percentage in waiting, although in some instances the shipper or consignee may be awarded prejudgment interest, but don't count on it.

Ocean carriers have it even better. Through the law known as Carriage of Goods by Sea Act (COGSA), they have a one year limitation for filing a lawsuit. Also, they have a \$500 per package limitation. If a container is considered a package, that's a nice deal for the carrier.

Have you ever seen a ship on a flatbed? That would be a mighty a spicy a meatball, as they say. But that's the effect of some court rulings. If the ocean bill of lading is construed to govern the surface portion of the transportation, the courts have held that COGSA applies. That's a good deal if you are the motor (or rail) carrier. The one thing that motor carriers like more than Carmack is COGSA.

The courts have applied COGSA to inland transportation through what is known as the Himalaya clause, by virtue of a prior court case. This clause provides that both the ocean and inland transportation are governed by the ocean bill of lading.

So you've got a ship on a flatbed, courtesy of the tallest mountain in the world. In case you're wondering if this is stuff from a long time ago, that no court would go this route today, you've

in for a rude awakening, since the United States Supreme Court recently reaffirmed the doctrine in a case involving a railroad.

Contrary to the holding of some courts, the Supremes did not compare the length of of the water and land segments. The Court also said there was no need to strictly construe the bill of lading. The Court further held that there was no requirement of a direct contractual relationship between the railroad and the ocean carrier (or freight forwarder or NVOCC).

If you're a shipper or consignee, you need to make sure that you get your lawsuit filed timely. There is definitely more of a time issue involved for ocean carriage than for surface carriage.

### ***Ethics Food-Fight: Not so delicious.***

It is somewhat amusing to watch Congress fight over the ethics rules, as each party postures for the upper hand. As if any they'll do anything at the end of the day anyway.

While you're thinking of filing, you may not be able to get your local lawyer to run down to the your local courthouse to file the lawsuit. Many of these bills of ladings or contracts with ocean carriers provides that the lawsuits must be filed in Tokyo or London or some other faraway place. That means that you are required to find a lawyer who you may not even be able to talk to. While that may be true of your own local lawyer, since it seems that lawyers butcher the English language at times, it would still be especially troublesome if you have to deal with courts and judges and lawyers from such a long distance.

That's it for now. Until next time, keep the cargo *rollin'*!

#### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

#### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.