Rollin' On . . .®

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FULL LOSS AND DAMAGE?
NOT EXACTLY (NOT ALWAYS)

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The annual Transportation Law Institute was held last week in our nation's capitol. It was a good time to be in Washington, D.C. as the politicians were all out making their obligatory rounds in their congressional districts and states, in their biannual quest for money and votes, preferably both but either will do thank you. Instead of tripping over politicians, tourists faced the prospect of tripping over attorneys. Now I should of course come to the defense of the legal community and argue that this was a much better choice for the average tourist, but I was spared that task as the TLI was held outside the D.C. limits at a hotel on the southern beltway. I cannot bring myself to speculate as to the reason for keeping a group of attorneys out of sight.

One topic that received a lot of attention concerns the issue of carrier liability. As discussed in last month's issue of ***Rollin' On®,*** Congress meddled with the Carmack Amendment when it passed the ICC Termination Act of 1995. As most of you know, Carmack historically postulated that carriers were liable for "full actual loss, damage or injury". Carmack also provided that a carrier could limit its liability through the use of released rates, with varying degrees of liability, provided that the shipper had a choice of rates. The carriers limited their liability through filed tariffs and constructive notice. Carriers also frequenlty relied on automatic releases, or inadvertence clauses, which applied when a shipment moved without a specific agreement as to released valuation. Whose inadvertence depends on your interest: Was it the shipper's inadvertence in not declaring a value, or the carrier's inadvertence in accepting a shipment without a value declared by the shipper?

Carriers utilized these inadvertence clauses in their filed tariffs, even though the ICC specifically disapproved of their use prior to 1980. Carriers were able to use these clauses as they were allowed to file their tariffs without advance approval from the ICC. So disputes over these clauses ended up with the courts. Again, depending on one's view, the courts did or did not understand the impact of inadvertence clauses. In 1988 the ICC was asked to declare that these clauses were unlawful. The ICC refused to do so, in view of the court decisions that upheld the clauses. It should be noted that many judges have no idea as to the meaning of Carmack, which they may not know how to spell. I once had a judge refuse to provide a statutory or case law basis for his ruling in a Carmack case, stating only that he did not like the attitude of the party.

ICCTA provides that carriers can unilaterally limit their liability, provided only that they furnish a copy of their rates, classifications, rules and practices to their shippers on request. At the same time the parties are free to customize their bills of lading, which many shipping entities have in fact done. While it will take some time to sort out these changes, we must also keep in mind that Congress could change the laws again after it receives the DOT study that ICCTA requires to be completed within a year (fat chance). Throw into the mix a possible change in control of either or both the House or the Senate (few are expecting a change of White House occupants), and all are reminded that only death and taxes (and political commercials preceding election day) are certain.

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Meanwhile, shippers and carriers argue as to what full actual loss and damage really means. Carriers want

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The facts, although interesting, can be irrelevant.

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to pay only the manufacturing or equivalent costs, while shippers claim that even payment of the market cost does not fully reimburse the shipper for its expense, as the shipper still has other costs such as investigating and filing the claim and coping with unhappy consignees. Carriers claim that shippers are in the best position to insure against losses, while shippers claim that any deviation from full liability is likely to lead to a lower standard of care, and hence more loss and damage claims.

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

Short Bio
Admitted to the bars of the states of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 15 years and emphasizing transportation law, business law and related litigation.