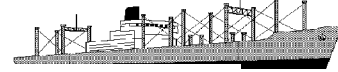




# Rollin' On



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## BROKERS AND FORWARDERS:

**L**ast week I made my annual trek to the national transportation law conference. We do an east coast/west coast rotation, so this year it was once again in San Francisco. This rotation is not without its detractors, some of whom want to have the conference in a Midwest city, like maybe Kansas City which is hard to get excited about. Then again, it's a conference of lawyers which means it's already bursting at the seams with excitement. It's so lively, there is a floor monitor who checks the meeting room occasionally for dead bodies, the ones who couldn't handle it, not that the dead ones are all that distinguishable from the live ones. (I know I shouldn't pick on my brethren, but we're such easy targets that it's hard to resist.)

The conference itself, which lasts two and one-half days (for some it's longer), is generally useful since old subjects get rehashed and new developments are discussed. Given the nature of the audience, there is frequent disagreement which provokes further discussion. Sometimes it's refreshing to know that you're not alone in your theories, doubts and general misgivings of pronouncements from people who are supposed to know what they're talking about.

In no particular order, and with a little Transportation Law 101 thrown in, the topics included the following.

**Brokers.** This fell in the old news revisited category. There were a few items that came up that I either had never known or had forgotten about.

### The Obligatory Disclaimer

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


  
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For example, a broker must keep its brokerage accounts separate from its other accounts. I haven't run across that one lately, especially since I don't broker legal services (now there's an idea; oops I almost forgot, that's what happens in the firms where the client talks to the senior partner who quietly has the associate do the real work). A broker of course does not hold itself out as a carrier and is not liable for cargo damage.

**Freight Forwarders.** Conversely, a (surface) freight forwarder holds itself out as a carrier, is a carrier vis-a-vis its shipper and a shipper vis-a-vis its carrier. By definition, this does not apply to entities using transportation of an air carrier. The forwarder assembles and consolidates and must be registered with the FHWA, making the required cargo and liability filings with FHWA in the same amounts as for motor carriers. Each freight forwarder that operates vehicles must register annually with a single registration state (there are 38, Oregon is not one of them). A forwarder has Carmack liability, with the same right as a carrier to limit that liability.

**Domestic AirFreight Forwarders.** Shifting gears, or flight patterns, this entity is not required to register, is an indirect cargo air carrier and may also act as agent of the shipper. If the shipper deals with the airfreight forwarder, the shipper must file its claim with the forwarder if the forwarder issued its own bill of lading.

**Int'l Airfreight Forwarder.** This entity is a common carrier subject to

common carrier liability, pursuant to DOT regulations. But where the forwarder acts as agent of the carrier, the forwarder can limit its liability just like the direct air carrier.

**Constructive Trusts.** We've heard it before: a broker (or forwarder) collects money from the shipper and fails to pay the carrier. There is recent case law that allows a "constructive trust" to be claimed against the bad apple, which is especially important in bankruptcy situations since the claimant wants the whole amount owed, untouched by the bankruptcy trustee, and not become an unsecured creditor where only cents on the dollar, or nothing, gets paid out.

### Sidebar: Maybe the Main Bar

In a recent drunk driving case, a judge accepted a novel defense. The police officer went on and on about how drunk the guy was and how he couldn't walk straight or talk without slurring his words. So the accused argues that if he was *that* drunk, then he was incapable of understanding his Miranda rights, you know, the ones where you have the right to remain silent, etc. Remarkably, in fact unbelievably, the judge bought the argument and dismissed the case. Think about it: he was too drunk to understand his rights, yet sober enough to be driving around? You can't have it both ways, although this guy did. Sometimes people lose their common sense, or else common sense isn't common enough.

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

### Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 20 years and emphasizing transportation law, business law and related litigation.