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HALLOWEEN SCARE: LARGE CLAIM, LIMITED INSURANCE, AND DAMAGES

I recently had the pleasure of traveling to the Salt Lake City area, where my client, a carrier, was facing a cargo claim of approximately $1,500,000, with policy limits of $500,000. If you're the carrier, that's pretty scary, since liability has thus far not been seriously contested.

Since the cargo was damaged while being moved in interstate commerce, the Carmack Amendment, well known to the transportation community, applies. In regard to damages, the shipper or consignee is entitled, as provided by Carmack, to the shipper's or consignee's actual loss or damage. Sounds fair enough. But the question arises, as to how that damage is determined.

To answer that question, we first roll the clock back to the Christmas holidays of last year, and even before to early December, when the damage occurred. At that time there was concern on the part of the carrier that the consignee was not taking the necessary action to mitigate its losses. Carmack, and for that matter many other laws, require the damaged party to do what it can to mitigate, or lessen, its damages. This is a common sense requirement, and is in the damaged party's best interest, especially if recovery from the party at fault is in question, or if liability is contested, as well as several other reasons.

The carrier's concern was strong enough that I found myself in my office on the Sunday am between the holidays, preparing a letter to the consignee, and others involved, in which we put those parties on notice that mitigation efforts, or lack thereof, would play a large part in regard to damages.

One type of damage is delay damage, with which many of you are familiar, where part or all of the damage suffered is not to the cargo itself, but instead pertains to the consequences of the cargo not being delivered on a timely basis. The easy example is the construction customer which has a big crane on site, and many employees who are brought to the job site to assist with unloading, and the carrier does a no-show or arrives several hours or a day or two late, with cargo in perfect conditon. The damage is thus all related to delay, and not to the cargo itself. Can the consignee recover the costs of having its employees and equipment made available, only to see everyone sitting around doing nothing, courtesy of the late arriving carrier?

As a general rule, and this applies to most facets of daily life, not just to transportation, the party at fault is not liable for delay damages unless that party has been informed in advance of the need to deliver at a particular time and place, and the consequences flowing from the failure to be on time. With proper notice, the party at fault will be liable for delay damages. But in real life, this is not a common occurrence, so delay damages in those instances are not recoverable.

As an aside, it should be noted that many insurance policies, especially marine policies, exclude delay damages from coverage. Of course, many insurance policies exclude exactly what you want to be insured, such as failure to tarp, so that should be no big surprise. It reminds one of Mark Twain's adage regarding banks, that you first have to prove to them that you don't need the money before they will lend any money to you.

Anyway, back to our predicament, the consignee, it seems to the carrier, is not at all concerned with mitigating its loss. In fact, the consignee appears to be prepared to "gold plate" its repairs, in a leisurely manner, with the apparent expectation that it will be reimbursed in full for its losses.

This raises another factor in the equation. The consignee's contract is with a construction company, not with the carrier, and thus there is no direct contractual relationship between the consignee and the carrier. It is therefore possible that the measure of damages, as provided by that contract, differs from the measure of damages provided by Carmack. If that is the case, then the construction company, sandwiched between the consigeee and carrier and with no written contract with the carrier, could get squeezed if it is obligated to pay the consignee more than it is entitled to recover from the carrier.

So back to the Christmas holidays. At that time I sent a letter to all concerned that they needed to undertake efforts to mitigate the damage. In this regard, there is another question, as to the reasonableness of the efforts that were made. For example, it appeared that far more hours were put into remedial action than was reasonably required. Also, equipment to accommodate the heavy cargo appeared to be around much longer than necessary.

Over the course of the next several months, the cast of characters grew, as some subs were thrown into the equation. Engineers offered different opinions as to proper remedial actions. A couple of insurance companies, through attorneys and adjusters, got involved.

The decision was made for everyone to meet and present their views, without any expectation of a resolution at that time. That expectation was completely fulfilled, so the saga continues.

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

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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.