Our transportation law expert provides shippers with a refresher course in the basic legal principles relating to claims for cargo loss and damage.

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I t’s been said that the one area that most shippers are the least knowledgeable in is that of claims for cargo loss and damage. However, this does not mean that an understanding of claims isn’t vital to running an efficient transportation and logistics department.

The late William J. Augello, co-author of *Freight Claims in Plain English*, had a passion about this topic. I believe that there are at least two reasons why Bill felt so strongly about the importance of understanding claims.

The first reason is financial. Unrecovered claims have a direct impact upon the bottom line of a company—the tougher the economic times and thinner the margins the greater the impact of an unrecovered claim. As depicted in the accompanying chart, if your company operates at a 5 percent profit margin, it would have to generate $20,000 in sales in order to recoup the net revenues that would be lost by failing to recover a $1,000 cargo claim.

Second, Bill believed that this knowledge is vital for shippers because they’re on their own when it comes to claims. For carriers, whose core business is transportation, the processing of claims is an integral part of their business, and all but the smallest of carriers are quite knowledgeable and very competent when it comes to defending against claims. For most retailers, manufacturers, and distributors, the transportation function is an unwanted headache—and claims represent a migraine.

However, just because something is difficult does not mean that it can be ignored. George Pezold, co-author with Bill on *Freight Claims in Plain English*, emphasizes that: “Knowledge of the basic legal distinctions and the applicable laws and regulations is critical in dealing with cargo claims.”
My goal over the next few pages is to provide transportation professionals with a refresher course in the basic legal principles relating to claims for cargo loss and damage.

**Basic legal principles**

The starting point in understanding cargo claims is to understand that a claim is based upon a breach of contract by the carrier, not whether the carrier was negligent. This arises out of the fact that the essence of a transportation contract is that the carrier agrees to move a piece of cargo from point A to point B. In return, the shipper agrees to pay the carrier.

Implicit in this arrangement is that the cargo will indeed arrive at destination in an undamaged condition. When the cargo is lost or damaged, the basic contract for carriage has been breached, giving rise to the shipper’s claim.

The contract for carriage can either be an individually negotiated contract between the shipper and the carrier; or, if none, the bill of lading, waybill, ocean bill, or other document issued by the carrier. These bills will typically incorporate, by reference, the terms of the carrier’s tariff or service guide or otherwise titled terms and conditions. The term “incorporate by reference” simply means that the contents of one document are incorporated into the document at hand, for example a bill of lading, simply by referring to the other document such as the carrier’s tariff.

Generally speaking, in order to prevail on a claim, the claimant has the initial burden of proving its claim. The claimant must prove good condition at origin, damaged condition at destination, and the amount of its damages. After establishing these three elements, the burden of defense shifts to the carrier.

**Different rules apply depending upon mode**

Another very basic principle must be kept in mind when dealing with a claim is that different legal principles and rules will apply depending upon the mode of transportation. Motor, rail, domestic water, international ocean, domestic air, or international air all have different time limits for filing claims and different deadlines for initiating lawsuits if a claim is denied.

At one time the majority of carriers only operated in one particular mode. Now, many entities operate in more than one mode. For instance, UPS is licensed as a motor carrier, air carrier, and a non-vessel operating common carrier (NVOCC).

Accordingly, an important initial step in analyzing any claim is to determine which mode the carrier was operating in at the time of the loss and thus which liability regime would apply. This can be very challenging for international movements involving multiple carriers and various modes.

**Basics of motor & rail carrier liability**

The starting point for rail and motor carriers are two federal statutes, one for rail and one for motor that are colloquially known as the Carmack Amendment. Under both of these statutes the liability imposed is “for the actual loss or injury to the property.” However, carriers are allowed to limit their liability in exchange for a lower rate, and most do so.

Carmack also sets minimum time standards for filing claims (nine months from the date of delivery) and for initiating lawsuits (two years from the date the claim is denied). It should be noted that the federal statutes do not themselves set these limits, but only prescribe the minimum. The significance of this is that if there is no tariff—as is often the case with small trucking companies—then there is no time limit to file a claim nor a two-year limitation on filing a lawsuit.

It should also be noted that Carmack only applies if the carrier is providing a regulated service subject to federal jurisdiction. When transporting an exempt commodity, like livestock, or operating in intrastate commerce (totally within one state), Carmack does not apply. For such shipments, the carrier could have tariff rules providing for shorter time limits than the minimum required by the Carmack Amendment.

The essence of Carmack is that the carriers are considered to be a virtual insurer and are strictly liable for cargo claims. There are, however, five recognized exceptions or defenses: (1) an act of God, (2) an act of the public enemy, (3) an act of a public authority, (4) an act of the shipper, or (5) an inherent vice of the product. And, even though one or more of these factors might be present, the carrier must also show that it was free of negligence.

**Ocean cargo liability**

Ocean shipments to and from the U.S. are by and large governed by the Carriage of Goods by Sea Act (COGSA). This, in turn, is based upon an international treaty known as the Hague Rules. Under COGSA, an ocean carrier has 17 defenses; however, as with Carmack, even when the facts establish such a defense the carrier must also show that its negligence did not contribute to the loss.

For ocean shipments, the timeline to file a claim is only three days from delivery—much shorter than the nine months allowed under Carmack. Similarly the timeline to file suit is one year from the date of delivery—as opposed to two years from the date of declination of a claim under Carmack.

Originally COGSA was understood to apply tackle-to-tackle, meaning from the time that loading the shipment began to the completion of unloading the shipment. However, over time, the ocean carriers have been allowed to extend the COGSA liability regime to its subcontractors. A 2010 decision of the United States Supreme Court (Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.) held that an ocean carrier can indeed, through its bill of lading or other contracts, extend COGSA to the inland portion of the movement by a motor or rail carrier.

Another significant difference between COGSA and Carmack is that whereas Carmack imposes liability for the actual loss, the liability of an ocean carrier under COGSA is limited to $500 per package or customary shipping unit. It’s for this reason that most shippers obtain shippers’ interest cargo insurance for ocean movements rather than rely on the liability of the carrier as is the general practice with motor carriers.

At some point in the future, COGSA will be superseded. In December 2008, the General Assembly of the United Nations adopted the final draft of the United Nations Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea colloquially known as “the Rotterdam Rules.” It is generally felt that the change will be of benefit to shippers, but the Rotterdam Rules will not go into effect until ratified by 25 countries, including the U.S. So far, only Spain has ratified the treaty.

**Air cargo liability**

Different rules apply for domestic air shipments or international air shipments. For domestic shipments, the air

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carrier’s tariff sets the time limits and limits of liability. These limits can be quite short—seven days or even less. The limit of liability can also be quite low—$50 a pound.

For international shipments, the Montreal Convention of 1999, an international treaty, sets the time limits and limits of liability. A claim must be filed within 14 days of delivery for damage and within 21 days for delay.

While the Convention does not provide a time limit for claims for non-delivery, the airlines typically set a limit of 120 days from the issuance of the air bill for notice of non-delivery. The statute of limitations for filing a lawsuit is two years; and under the Convention, the current limit of liability is 19 Standard Drawing Rights (SDRs) per kilo, which translates to approximately $12.95 per pound.

Insurance
I would be remiss in this article if I did not touch upon insurance. One very important distinction is that between "cargo insurance" and "cargo liability insurance."

The carrier purchases cargo liability insurance which only pays to the extent that the carrier is liable. Thus, while a high-value product such as a main-frame computer may have been totally destroyed in transit, if the carrier had in place a valid tariff limit of $.10 per pound for used equipment, the dollar amount of the carrier’s liability would be negligible compared to the value of the product.

Accordingly, shippers must always keep in mind the option of purchasing shippers’ interest cargo insurance to cover such situations. A shippers’ interest cargo insurance policy is not based upon fault. Thus, a carrier’s limit of liability, whether it be a motor carrier’s private tariff rule or an international treaty, is irrelevant. However, as with any insurance policy, it will have its own exclusions and deductions that must be carefully scrutinized by shippers to ensure that their freight is indeed insured.

Claims & claims filing
Whatever the mode, the first step to recover a loss and damage claim is the filing of a claim. The purpose of the claim is to put the carrier on notice of the facts relating to the damage or loss so that the carrier may investigate the claim and make a decision whether to pay it, decline it, or offer a compromise amount in settlement.

Although not at all in the nature of a lawsuit, the timely filing of a claim is a pre-requisite for any later litigation. If a claim with a motor carrier is not filed within nine months, the claim is extinguished.

The mechanics of claim filing are far beyond the scope of this article. Suffice it to say here that if not done correctly or within the applicable time limits, the result can be an unrecoverable claim.

When there is no individually negotiated contract in place between the shipper and the carrier, the claimant must look at the carrier’s tariff provisions very carefully to see if that carrier has specific filing requirements.

Also, it is very important that the claim be filed with the transportation carrier, as opposed to the insurance carrier. A claim filed with the insurance carrier, rather than the carrier providing the transportation service, is not considered a duly filed claim for purposes of meeting the claim filing time limit.

Shippers and intermediaries
This article is focused on the liability of carriers, however, shippers can also be liable for cargo damage if the shipper caused the damage. An example of this would be an LTL shipment when a poorly packaged liquid breaks open and stains or otherwise damages other cargo on the truck. When the shipper is responsible for damage to other cargo, the carrier would ordinarily pay the other party’s damage and then seek reimbursement from the shipper.

With respect to transportation intermediaries, as a general principle, they are not liable for cargo damage. However, intermediaries can be liable for cargo damage if they hold themselves out as a carrier, assume liability by contract, or the damage is caused by the intermediary’s negligence or breach of contract. It must also be kept in mind that some entities that shippers think of as intermediaries may, in a legal sense, actually be carriers—for example, surface freight forwarders or so-called indirect air carriers.

In summary
If you’re a transportation professional involved in filing claims, I recommend that you look into becoming a certified claims professional through the Certified Claims Professional Accreditation Council (CCPAC). CCPAC is comprised of transportation professionals representing shippers, intermediaries, and carriers all across the U.S. and around the world.

John O’Dell, the executive director of CCPAC, relates that: “Members have reported that after becoming a certified claims professional their confidence level in handling cargo claims has been elevated, and their career standing has advanced within their respective organizations.” Knowledge is still power.

Source: transportlawtexts, inc.