

*(Not so) Straight Forward and Freight Forward:  
Claims Handling Under Freight Forwarder  
Shipper's Interest and Legal Liability Policies –  
A Litigation Perspective*

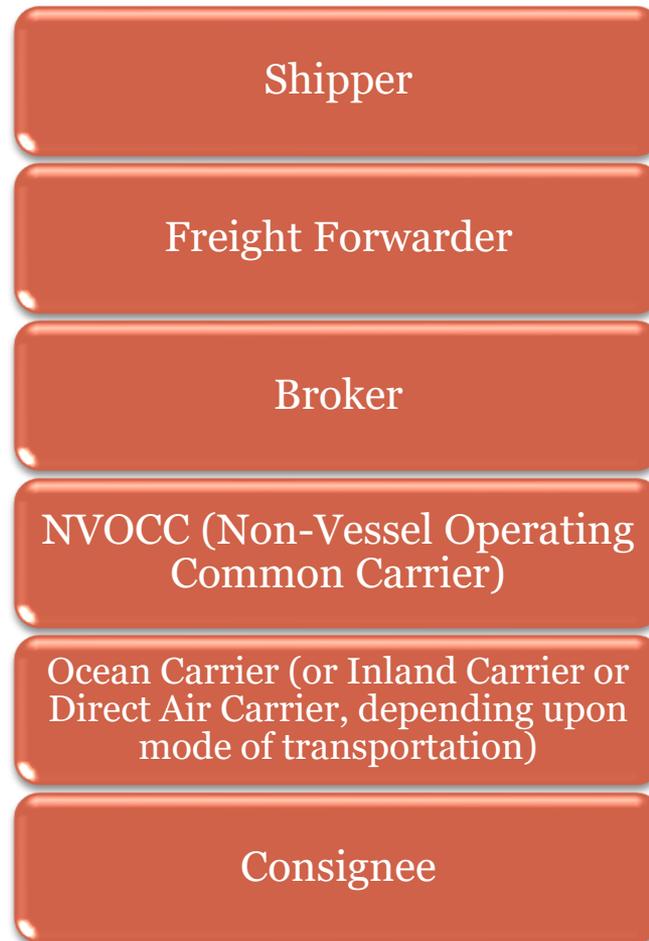
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# Primary Entities in the Cargo Transportation Chain

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# Cargo Documentation (generally)

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- Booking Request and Shipping Instructions
- Booking Confirmation
- NVOCC (House) Bill of Lading (or Indirect Air Carrier House Air Waybill, depending upon mode)
- Ocean (Master) Bill of Lading (or Direct Air Carrier Master Air Waybill, depending upon mode)
- Inland Waybills / Freight Bills
- Commercial Invoice

# Cargo Documentation (generally)

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- Packing List
- Loading Survey
- Discharge Survey
- Written exceptions taken at time of delivery, if any
- Correspondence between shipper, broker, forwarder, and/or carrier
- Repair invoices / salvage documentation
- Subrogation receipt

# Differences Between NVOCC and Freight Forwarder in Ocean Transportation

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Although both are considered Ocean Transportation Intermediaries (OTI) per the Federal Maritime Commission and appear to provide similar services, they are distinct entities providing different services

# Differences Between NVOCC and Freight Forwarder in Ocean Transportation

## Freight Forwarder

- Organizes/arranges cargo movement
- Books cargo shipments with carriers on behalf of shippers
- Prepares and processes shipping documentation
- Acts as agent to/for shipper
- Not directly involved in transporting cargo and generally does not issue a bill of lading
- Generally not liable for cargo claims if it limits its role to arranging for transportation

# Differences Between NVOCC and Freight Forwarder in Ocean Transportation

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- NVOCC
  - Provides ocean transportation services as carrier without operating vessels
  - Issues house bill of lading as carrier and assumes responsibility of carrier vis-à-vis cargo shipper
  - Acts as carrier to the shipper and shipper to the ocean carrier (VOCC)
  - Contractual defenses available to NVOCC per terms and conditions of its bill of lading, and COGSA defenses generally available by contractual incorporation or extension (representative sample below)
    - ✦ \$500 per package limitation
    - ✦ Act, neglect or fault of master / error in navigation
    - ✦ Perils of the sea
    - ✦ Inherent vice – insufficiency of packaging
    - ✦ Latent defects
    - ✦ Q clause – “Catch all” clause
    - ✦ Suit time – 1 year from date of delivery

# Carmack Amendment (generally) – 49 U.S.C. § 14706

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- Carmack – comprehensive law in the United States dealing with interstate cargo loss and damage claims
  - Subjects carriers and freight forwarders transporting cargo in interstate commerce to strict liability for actual loss or injury to the property
    - ✦ Exceptions to strict liability (which are very limited) are proof of freedom from negligence in addition to one of the following enumerated exceptions:
      - Act or default of shipper
      - Act of God
      - Public enemy
      - Public authority
      - Inherent vice of the commodity

# Limitation of Liability Under Carmack

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- Carriers and forwarders may limit their liability under Carmack by:
  - Maintaining a tariff or other documents (i.e. terms and conditions) and providing a written or electronic copy to the shipper on request;
  - Obtaining the shipper's agreement as to its choice of liability;
  - Giving the shipper a reasonable opportunity to choose between different levels of liability; and
  - Issuing a receipt or bill of lading prior to moving the shipment

# Differences Between Freight Forwarder and Broker Under Carmack Amendment

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- Freight Forwarder
  - Defined in 49 U.S.C. § 13102(8) as follows – “[F]reight forwarder” means a person holding itself out to the general public (other than as pipeline, rail, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business –
    - ✦ Assembles and consolidates, or provides for assembling and consolidating shipments and performs or provides for break-bulk and distribution operations of the shipments;
    - ✦ Assumes responsibility for the transportation from the place of receipt to the place of destination; and
    - ✦ Uses for any part of the transportation a carrier subject to the jurisdiction under this subtitle

# Differences Between Freight Forwarder and Broker Under Carmack Amendment

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- Surface freight forwarders (receiving or delivering carriers) are subject to Carmack liability
  - ✦ Receiving carrier - uses a motor carrier to receive property from a consignor and consents to the execution of the bill of lading or receipt by the motor carrier (See, 49 U.S.C. § 14706(a)(2))
  - ✦ Delivering carrier - consents to the motor carrier's delivery of property to the consignee (*Ibid.*)
- Carmack liability extends beyond those functions of a traditional carrier
- Like a NVOCC in ocean transportation, a freight forwarder under Carmack acts as a carrier vis-à-vis its shipper and acts as a shipper vis-à-vis the actual Carmack carrier
  - ✦ a freight forwarder has primary liability to the shipper under Carmack – first in line for cargo loss/damage claims (same as indirect air carriers in transportation by air and NVOCCs in ocean transportation, as a general matter)

# Differences Between Freight Forwarder and Broker Under Carmack Amendment

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- Broker
  - Defined as “a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation”
  - simply arranges for the transportation of goods
  - Transportation middleman
  - Not subject to Carmack liability, generally
    - ✦ However, if a broker holds itself out to the public as a carrier/freight forwarder, there may be an issue of fact regarding the broker’s status under Carmack

# Differences Between Freight Forwarder and Broker Under Carmack Amendment

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- Brokers' liability is governed by state law – tort or contract
  - ✦ Simply because a broker may not be strictly liable under Carmack, a broker is not shielded from liability
  - ✦ Carmack's general preemption of state law only applies to carriers/freight forwarders, not brokers
    - State law legal theories such as negligence, breach of contract, bailment, fraud, etc. are all preempted by Carmack as against carriers and freight forwarders
  - ✦ Brokers may be held liable for negligence or breach of contract, including negligent hiring / selection of a carrier and/or failure to properly convey shipper instructions to a carrier
    - Important to ascertain precisely what the claim is against the broker
      - What duty did the broker allegedly breach?
      - If a contract claim is asserted against a broker, what are the terms of the contract?
- These questions are addressed by Courts on a case-by-case basis, upon consideration of the totality of the circumstances – very fact-intensive

# Defending a Freight Forwarder and/or Broker under Carmack

- Carmack defenses potentially available as previously set forth
- Carmack notice of claim and suit-time requirements
  - Proper written notice of claim must contain facts sufficient to identify the shipment, assert liability for the alleged loss/damage, and make a claim for the payment of a specified amount of money
  - Written claim must be filed within 9 months (time runs from the day after the delivery of the goods)
  - Statutory period for filing suit is 2 years and 1 day (time runs from the date of written declination of the claim by the carrier and/or freight forwarder)
- Burden of Proof Under Carmack
  - Plaintiff has initial burden to establish: 1) the goods were in good condition when delivered to the carrier; 2) the goods did not arrive at destination or arrived damaged; and 3) the amount of money damages suffered by the loss or damaged condition of the goods
  - Burden then shifts to carrier to show that it was free from negligence and that damage to the cargo was due to one of the excepted causes relieving the carrier of liability

# Claims Handling (Litigation Perspective)

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- Know and understand the precise role each particular entity played in the transportation chain
  - From the plaintiff's (cargo interests) perspective, this information will dictate the nature/scope of the claim and causes of action to be presented
  - From the defense perspective, this information will dictate the nature/scope of the defenses to be presented
- Supporting claim documentation and correspondence is critical

# Claims Handling (Litigation Perspective)

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- Important questions (representative, but certainly not exhaustive)
  - Did the entity issue its own bill of lading?
  - How did the entity hold itself out to the public and to the shipper?
  - What do the documents say?
  - What does the entity's website say? How does the entity advertise itself on its website?
  - Is the entity licensed as a carrier?
  - What steps did the entity take to vet the carrier it selected?
  - Did the instructions provided to the carrier comport with the shipper's instructions?

# Claims Handling (Litigation Perspective)

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- Answers to those questions will dictate scope of claims to be presented against a particular entity, as well as the scope of defenses available to the entity, and overall scope of potential liability exposure
- Even if a broker and/or freight forwarder and/or NVOCC has liability in the first instance, can it then recover from the actual carrier?
  - Carrier limitation of liability?
  - Carrier insurance coverage?
    - ✦ Policy exclusions may apply
  - If no coverage, is the carrier solvent?

# Q&A

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## THANK YOU!

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