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# ENERGY, UTILITIES, TELECOMMUNICATIONS & TRANSPORTATION LAW

*The newsletter of the Illinois State Bar Association's Section on Energy, Utilities, Telecommunications & Transportation Law*

## Broker wins summary judgment in injury suit

*By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C.*

In *Brown v. Termain*, 2010 WL 539157 (N.D. IND. 2010), a broker won summary judgment in a personal injury lawsuit arising out of a truck crash. A shipper tendered a load to broker CDN Logistics and CDN then contracted with motor carrier Sunny Express to move the load. Sunny's driver's tractor/trailer then collided with another tractor/trailer operated by its driver Jason Brown. Brown was injured in the crash and brought suit in the U.S. District Court for the Northern District of Indiana against Sunny's driver, Sunny Express and CDN.

CDN moved for summary judgment and its motion was granted. While CDN owned the trailer hauled by Sunny in the crash, CDN's motion contended that CDN had no responsibility for Brown's injuries as CDN had no control over nor any connection with Sunny's driver Ionu Termain. Termain operated his power unit in the crash and there was no evidence that CDN's trailer was in any way the cause of the crash. Brown's negligence claim against CDN failed.

Brown's negligent entrustment claim against CDN also failed. No evidence demonstrated that driver Termain was either incapacitated or incapable of using due care at the time of the crash or that CDN had any knowledge of any Termain inability to operate a tractor/trailer combination safely when it tendered the load to Sunny. ■

## New York District Court holds broker not entitled to summary judgment on Carmack cargo claim

*By William D. Brejcha; Scopelitis, Garvin, Light, Hanson & Feary, P.C.*

In *Nipponka Insurance Company, Ltd. v. C.H. Robinson Worldwide, Inc.*, 2011 U.S. Dist. LEXIS 17752 (S.D.N.Y., 2/18/2011), the U.S. District Court for the Southern District of New York denied broker C.H. Robinson's ("Robinson") Motion for Summary Judgment in a cargo loss and damage Carmack Amendment lawsuit subject to 49 U.S.C. §14706. The Court found Robinson's conduct in the matter created a fact question for the jury as to whether Robinson had acted as a motor carrier, not a broker, and was thereby subject to Carmack Amendment liability. The action was brought by Nipponka as the subrogated insurer of the shipper Ricoh American Corporation against Robinson, alleging that Robinson should be held liable as a motor carrier or freight forwarder for cargo damage to two Ricoh shipments. Nipponka's Amended Complaint alleged a federal Carmack Amendment claim and state law causes of action for breach of contract, breach of bailment, negligence and tortious damage to property arising out of negligence or reckless and willful misconduct.

The case concerned two shipments of office equipment that were damaged in transit on moves from California to Pennsylvania and Florida respectively. Ricoh had hired Robinson to provide transportation services as to both ship-

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ments. Robinson in turn hired motor carrier CNR to make the Pennsylvania movement, but CNR's truck was involved in an in-transit crash with cargo damage valued at $600,000. Robinson had also hired Eduardo Perez to make the Florida move, but Perez's truck caught fire in transit with a resulting cargo loss of $295,000. After the crash, Perez filed for bankruptcy. There was no agreement between Robinson and Ricoh as to these moves governing their relationship or disclosing Robinson's status as to the moves. Robinson did not prepare either shipment for transportation and Ricoh issued bills of lading on both shipments, each of which identified Robinson as the carrier without Robinson's express knowledge or consent.

The District Court first noted that the Carmack Amendment governs the liability of motor carriers for loss or damage to good transported in interstate commerce. The Court next noted that Carmack gave a shipper the right of action against motor carriers under the same strict liability standards that maintained at common law and the Carmack cause of action preempted other common law cargo damage claims that shippers might otherwise hold against carriers. Robinson sought summary judgment on the Carmack claim, claiming it was a broker, not a carrier, and therefore not subject to Carmack liability and on the state claims, asserting they were pre-empted by Carmack.

The District Court next addressed the issue of whether Robinson had acted as a broker or a carrier as to the loads in issue, noting that only carriers were subject to claims under Carmack and that brokers had no Carmack liability to the extent they acted purely as brokers. After examining statutory definitions of motor carriers, freight forwarders and brokers, the Court first held that the mere fact an entity operated under an FMCSA broker license and not a motor carrier operating authority was not a dispositive fact as to the issue of carrier status, citing a series of decisions that reached that result. The Court went on to find further that the difference between a broker and a carrier "is often blurry" and that the inquiry as to how an entity would be characterized was "inherently fact-intensive and not subject to summary judgment." (Opinion, p. 4). The decision continued, stating that courts frequently have found that the determination of whether an entity was a broker or carrier created fact questions for a jury. Nipponka contended that Robinson presented itself to Ricoh as a motor carrier or freight forwarder (also a carrier under Carmack) while Robinson argued that it had acted strictly as a broker as to the two shipments in issue.

Robinson argued that it was a broker because it never exercised physical control over the goods comprising the shipments and that it never exercised control over the drivers on the shipments. Robinson claimed that it never represented itself to be a carrier to either Ricoh or the public in general. Robinson further asserted that at the time of each shipment, Robinson had contracted with subcontracting motor carriers in agreements that identified Robinson as a broker and the subcontractors as carriers. Robinson also asserted that its sole involvement with the physical transport of the goods was to issue load confirmations to the motor carriers such that they became authorized to pick up the shipments at their California origin points and deliver them to their respective destinations.

Ricoh only disputed Robinson's arguments that Robinson did not present itself to Ricoh as a motor carrier and that Robinson exercised no control over the drivers. Ricoh's Transportation Manager testified that Robinson presented itself to Ricoh as its single source transportation provider and contact relative to moves from origin to destination as to all transport activities such as billing, claims and communication, all of which were to be managed through Robinson. Robinson's Manager of Carrier Services admitted that Robinson's customers looked to it as the transportation provider on shipments tendered to Robinson.

Ricoh's Transportation Manager also testified that with respect to the more than 900 shipments that Robinson handled for Ricoh between January and June 2008, the truckers who picked up merchandise for movement from Ricoh "represented themselves as C.H. Robinson." On each of the more than 900 invoices that Robinson had sent to Ricoh for its services, Robinson charged Ricoh for "line haul services," not for brokerage commissions. And as to all 900 shipments, Ricoh had both identified Robinson as the motor carrier on its bills of lading with no objection from Robinson and record testimony from Robinson's management personnel to the effect that where Robinson noted errors in shipper prepared bills of lading, Robinson's practice was to notify the shipper as to the existence of the error. While the Court noted that shipper designation of the wrong party as a carrier on its bills of lading was not dispositive of the broker/carrier status issue, the Court found the 900 shipments to be important based on Robinson's admission that it would correct shipper bill of lading errors when the errors came to its attention. The Court further noted Robinson's position that the bill of lading carrier designation did not require correction because Robinson contended that Ricoh knew that Robinson acted only as a broker and that everyone understood the carrier name on the bills to be an error for that reason.

Nipponka also relied on a Robinson sales brochure to support its claim that Robinson was a carrier. The brochure represented that Robinson offered "complete transportation and mode management" without referring to itself as a mere broker. The brochure also listed "freight forwarding" as a service that Robinson provided to its customers. Nipponka also relied on Robinson's 10-K report to the SEC wherein Robinson identified itself as the principal in transport transactions wherein Robinson accepted certain responsibilities for transport of the shipments from origin to destination.

Based on all of the evidence, the District Court held that Robinson's status as a broker or a carrier could not be determined as a pure matter of law. The District Court found that the issue of Robinson's status raised a fact question and therefore denied Robinson's summary judgment motion due to the material factual dispute as to Robinson's status. And as the District Court could not determine whether Carmack applied to the action or not, the District Court also held that it could not grant Robinson summary judgment as to Nipponka's state law claims as state law claims would only be preempted by Carmack if Robinson was held to be a carrier and if Carmack applied to the action.

This decision is just one more of the recent Robinson decisions where its methods

of operation have left the broker exposed to carrier liabilities to which brokers are not ordinarily exposed. Brokers who offer one source transportation services to their customers such as Robinson expose themselves to claims that they are carriers, particularly where they are listed as the carrier on customer bills of lading, where their sales brochures offer complete transportation management, and where any publicly filed SEC reports identify the broker as principal on transportation transactions that the broker might arrange. While the market place may require the broker to offer more than a mere service arranging for transport for a shipper's movements of cargo via third-party motor carriers, brokers need to be aware that the more that they do and offer their customers and the public, the more likely it is that third parties will try to impose carrier liability on the broker if things go wrong on any of the shipments that brokers arrange. ■


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