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Client Alert: Checklist for Booking Shipments via Brokers

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David H. Conaway

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

With the effects of the pandemic and recession being felt throughout the transportation industry, our firm has seen an increase in claims by unpaid motor carriers against shippers and consignees for nonpayment, where the shipper paid a third-party broker who then went out of business prior to remitting the shipper's payment to the carrier. Faced with the unfavorable prospect of recovering from the broker, carriers are turning to shippers and their customer-consignees for recovery.

The shipping documentation provides some guidance; however, courts have still wrestled with these claims over the years, which has led to inconsistent holdings among various jurisdictions.

Although these types of claims cannot be completely avoided, there are certain steps shippers can take to better position themselves to resolve these claims should they arise. Accordingly, we recommend the following protocols to our shipping clients to reduce the risk of liability for these claims:

A. Written Shipper/Broker Contract in Place: Never deal with any property broker with whom you do not have a written shipper/broker contract.

B. Investigate the Broker: Carefully investigate all brokers with whom you deal. This involves four steps:

1) Secretary of State: Check with the Secretary of State in the state in which they are incorporated to make certain that they are a valid, active corporation in that state. Never deal with an unincorporated broker. Limited liability companies are corporations if properly incorporated;

2) Financials, Insurance Certificates, Surety Bond: Demand current financials and insurance certificates from every broker to make sure that they are financially healthy and have up-to-date insurance. Also, demand a copy of their surety bond and make certain it is active and not drawn down below the statutorily required minimum of $75,000;

3) Ansonia Report: Run an Ansonia report on each broker. This requires an inexpensive subscription to Ansonia (see https://ansoniacreditdata.com/index.html) and it shows the payment history of every broker to motor carriers used by the broker. You are looking for a +90 percent rating or better;

4) Litigation Search: Run a LexisNexis/Westlaw/Pacer report on all litigation against the broker and watch out for cases that indicate financial threats to the broker or failure to pay motor carriers. Our office can do

these checks for you if you prefer. The cost usually runs about $200 per broker. We recommend that even with regard to established brokers, you re-do these checks at least annually, as things can change very fast if a broker starts to experience financial problems.

C. Specific Contract Provisions: Once your broker is vetted and chosen, make certain that your written contract with the broker provides specifically for the following:

1) They will only use motor carriers with valid, unconditional authority and sufficient currently valid insurance;

2) They will only use motor carriers with whom they have written broker/carrier contracts;

3) All carriers will look ONLY to the broker for payment of their charges;

4) All carriers will agree to not ever seek any payment of their charges from you, the shipper; and

5) Only your bill of lading will be used, and if the carrier's bill of lading is used, it will only be considered a receipt.

There are many other provisions that you will need to make certain are contained in broker contracts with motor carriers hired to haul your freight, but these are the most relevant provisions to this particular issue.

D. Maintain a File with all Relevant Documentation: Require copies of ALL contracts between the broker and ALL carriers used for you! We rarely can get these after a broker default. Also, make certain that each contract contains a waiver of claims against you as the shipper for freight charges and be sure that each contract waives the applicability of any tariffs (e.g., National Motor Freight Classification, NMFC) to your shipments.

E. Bill of Lading Section 7: Amend your bills of lading with respect to the Section 7 no recourse provision.

1) Make certain that you have a Section 7 no-recourse provision in your bill of lading in the first place and that it is signed by you (electronic or pre-printed signatures are acceptable).

2) Note: The no-recourse section must be separately signed by you—even though your signature might appear somewhere else on the bill of lading.

3) You also need to add the following language to your Section 7 no-recourse provision: *"In the case of brokered loads, Carrier agrees that Shipper will have no liability for freight charges and Carrier shall look only to the Broker for payment of its charges, regardless of whether the shipment is freight pre-paid or collect."*

F. Rate Confirmation Agreement: If your broker uses rate confirmation agreements (you should insist in the contract with the broker that they do), make certain that all rate confirmation agreements contain all of the Section 7 language, specifically also including the new language described above.

Even if you complete all of these steps, we cannot guarantee that you will not have any of these claims or that some sympathetic court will not still side with the "innocent" motor carrier. However, by taking these steps, you will substantially reduce your risk of having these claims, and you will substantially enhance our ability to successfully defend yourself against them.

Should you have any questions, or if you would like to discuss any of this, feel free to contact Shumaker for

additional guidance.

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