



# Damage Control

The Carmack Amendment dictates how transportation insurance claims are settled.

by Michael A. Hamilton and Jennifer A. Coughlin

**A**s we enter the holiday season, we read about the gifts that every child wants. Parents begin frantically searching the stores to learn when the next shipment of that special toy will be arriving from the warehouse.

What if that shipment never arrives, and you learn that the entire truckload was stolen en route to the store after the driver for the trucking company left the rig unlocked and its engine running at a rest stop? What rights, if any, does the store have against the motor carrier to recover the value of the stolen merchandise?

The store's rights to recover for lost or damaged goods during interstate transportation are governed by a federal statute known as the

Carmack Amendment. Claims under the Carmack Amendment usually arise after the owner/shipper of the goods has recovered under its own insurance policy, and the insurer then asserts a subrogation claim against the party ultimately responsible for the loss.

What rights, if any, does the store have against a broker that was utilized to arrange transportation? Often, claims for Carmack-based breaches are asserted against not only the motor carrier but the broker as well. In some instances, even if the broker never had possession of the goods, a broker will be held to have acted as a motor carrier in the transportation process, exposing itself to liability under Carmack.

Such claims against a broker present complex coverage issues that require careful consideration, not only of the specific facts and circumstances of the claim, but also the precise language of insurance policies issued to the broker. Furthermore, a broker's increased exposure under Carmack may not be known, to either the insurer or the broker, when the insurance policy is purchased. Thus, the broker may be exposed to claims for which it may not have sufficient insurance.

Merchants and shippers often utilize brokers to arrange for a motor

## Key Points

- ▶ **The Situation:** Insuring transportation of goods is an intricate process in which brokers face myriad liabilities.
- ▶ **The Background:** The Carmack Amendment, part of the ICC's regulations, trumps all other legal remedies when goods are damaged or lost in transit.
- ▶ **The Road Ahead:** Inland marine insurers must grasp how to properly underwrite these transportation risks.

carrier's transportation of goods. The broker most likely has a list of potential motor carriers with whom the broker has pre-existing relationships and broker/motor carrier agreements.

These agreements contain the motor carrier's promise to maintain a certain amount of insurance coverage. They also contain a promise that the motor carrier will be liable to the shipper for any loss or damage to the goods during transportation, from the time the motor carrier retrieves the goods to the time it delivers them to their destination.

Typically, the broker informs the motor carrier of the goods' current location and final destination. The motor carrier, utilizing its own truck or cab, picks up the goods, issues a bill of lading to the owner/shipper and

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transports the goods to their destination. When cargo is damaged or lost during transportation, a shipper typically files a claim with its insurance carrier, which compensates the shipper for its loss and then looks to subrogate against the motor carrier and the broker, even though the broker did not have possession of the goods at any time during the transaction. Undoubtedly, one of the subrogation claims will be made under Carmack.

### Claims

A claim for violations of the Carmack Amendment is defensible only where the loss or damage was caused by acts of God, acts of a public enemy, acts of the shipper or by qualities inherent in the goods being shipped, such as perishable items.

The amendment specifically defines a motor carrier as a person providing motor vehicle transportation for compensation. It defines a broker as a person (other than a motor carrier) who, as a principal or agent, offers for sale, negotiates for, or holds itself out as arranging for transportation by motor carrier for compensation. However, a party's status as a broker in a shipping transaction is not determined by how the party labels itself or is licensed with agencies such as the Interstate Commerce Commission. A party's status is determined by way of the party's relationship to the shipper and participation in the shipping transaction.

Where a party's conduct is limited to agreeing to locate and hire a third party to transport goods for a shipper and acting as a middleman between the shipper and the carrier, a broker will not be considered a motor carrier for purposes of Carmack. However, some courts might impose liability under Carmack on a broker if it conducts itself outside of that scope. For instance, a party that labels itself a broker, but nevertheless exercises a substantial amount of contact and control during the transaction, may be found to be acting as a motor carrier under Carmack, and therefore may be exposed to liability for losses.

## Understanding Carmack

The Carmack Amendment governs the liability of motor carriers for loss or damage to goods in interstate commerce. The amendment is a shipper's exclusive remedy against a motor carrier for loss or damage to its goods, and pre-empts any common-law causes of action that a shipper may otherwise have against the motor carrier for the loss.

To recover under the amendment, a shipper must establish that:

- The goods in question had been delivered to the motor carrier in good condition.
- The goods were damaged or diminished by the carrier.
- The damages can be specified.

Thus, courts engage in a fact-specific analysis of the broker's involvement in the transaction when determining whether a broker is liable under Carmack. Conduct that some courts may find germane to determining whether an entity is a motor carrier includes:

- Directing how the shipment should be loaded and determining the size of the truck necessary for shipment.
- Drafting the bill of lading.
- Directing the manner and time of shipment.
- Serving as the only point of contact between the shipper and the carrier.
- Selecting the carrier with no input from the shipper.
- Neglecting to inform the shipper of the carrier's identity or selection.
- Representing to the shipper that the broker would pay for the cost of repair to damaged goods.
- Being directly retained by shipper to transport goods.
- Furnishing labor and equipment to load the goods.
- Invoicing the shipper directly for loading and transportation.

On the other hand, some argue that this involvement exhibits only a broker's commitment to customer satisfaction and does not change the nature of the customer/broker

relationship. In turn, insurers of brokers in the transportation industry face greater exposure than ever. Analysis of this exposure typically is required through claims asserted under inland marine insurance policies or commercial general liability policies.

### Inland Marine Coverage

Inland marine policies afford coverage for damage to property of others under certain scenarios.

The first scenario requires the property to have been on a vehicle specifically listed on the policy's declarations page and in the broker-insured's custody at the time of the loss. Since a typical transportation industry transaction does not include the broker coming into possession of the goods or utilizing its own vehicle for transportation, circumstances giving rise to liability under Carmack will be insufficient to trigger coverage under an inland marine policy.

The second scenario only requires that the broker be in the custody or control of the property at the time of the loss, and gives no regard to the vehicle upon which the goods are located. Under this scenario, the amount of control required for a broker to be a motor carrier under Carmack most likely will be sufficient to trigger liability coverage under the inland marine policy. In fact, some courts impose broker liability under this scenario with no regard to Carmack whatsoever. For example, in *H&H Brokerage Inc. v. Vanliner Insurance Co.*, the broker directed the motor carrier as to how, when and where the goods were to be delivered; negotiated the price that the owner of the goods was to be charged; handled all of the paperwork; instructed the truck driver to stay in contact with it; and had the power to make route changes during shipping. Both the trial court and the 8th U.S. Circuit Court of Appeals in St. Louis decided that H&H was "in control" of the goods during the shipping transaction. H&H's actions were sufficient to trigger coverage under its inland marine policy,

which did not require both custody and control of the goods or that the goods be located on a specific vehicle.

Coverage for a broker's liability under Carmack most often will be found in a broker's general liability policy, under an exception to the contractual liability exclusion.

A typical contractual liability exclusion bars coverage for liability that an insured assumed pursuant to an agreement. The exception to this exclusion affords coverage if the liability would have been imposed upon the insured, regardless of the agreement's existence.

For example, an insured's agreement to indemnify a contractor for negligence claims arising from a construction project generally will not bar coverage under the insured's commercial general liability policy if the insured would have been held liable for its own negligence, absent the agreement.

Here, it is this exception that brings Carmack Amendment liability under the scope of coverage.

In analyzing a claim for violations of Carmack under a commercial general liability policy, consider whether the policy excludes coverage for damage to the property of others while in the insureds' care, custody or control.

Many policies contain such an exclusion, which may sufficiently preclude coverage for liability because the liability was imposed due to the substantial amount of control the insured-broker exercised during the transaction.

Sometimes, though, this exclusion requires the damage to have occurred while the property was in the care, custody and control of the insured. Under this policy language, the exclusion may not apply, since the property was not in the possession of the broker at any time during the shipping transaction.

Other times, endorsements to the policy remove the exclusion altogether, thus placing liability under the Carmack Amendment back into the realm of coverage.

When presented with a claim for Carmack violations, broker-insurers are required to engage in both a complex and confusing coverage analysis. This analysis calls for a thorough grasp of the facts and circumstances giving rise to the claim, and of the policy under which coverage is sought. Insurers should take precautions to understand the nature and extent of the broker's services, both as offered and as provided, in both its relationship with the shipper and its relationship to the retained motor carrier. Insurers also should consider potential claims not only under the broker's inland marine policy, but other liability policies it has issued to the broker-insured.

An insurer can also take these steps during the underwriting process. Doing so will provide the insurer with an opportunity to ensure that it has properly considered all the risks associated with these transactions, and is charging premiums that are commensurate with these risks. **BR**

## U.S. Inland Marine – 2009 Top Writers

### Top 25 U.S. Inland Marine Direct Writers

Ranked by 2009 direct premiums written.  
(\$ Thousands)

Rank	Company/Group	AMB #	2009 Direct Premiums Written	% Change in Premiums	Market Share (%)			Adjusted Loss Ratios			% of Company Premiums
					2009	2008	2007	2009	2008	2007	
1	Liberty Mutual Ins Cos	000060	\$1,845,520	8.6	14.2	12.1	7.9	60.4	62.5	53.4	7.5
2	CNA Ins Cos	018313	1,161,332	1.9	9.0	8.1	9.0	71.3	60.8	39.0	15.1
3	FM Global Group	018502	750,223	23.2	5.8	4.3	4.7	45.0	76.5	33.7	27.3
4	Travelers Group	018674	745,211	-15.9	5.7	6.3	6.4	43.4	41.8	27.6	3.5
5	State Farm Group	000088	616,794	-2.0	4.8	4.5	4.3	42.9	43.1	40.3	1.3
6	Chubb Group of Ins Cos	000012	603,459	5.9	4.7	4.1	3.9	32.3	40.0	32.0	6.6
7	Amer Intl Group	018540	564,191	-41.4	4.4	6.9	8.0	44.8	60.1	24.9	2.6
8	Allianz of America	018429	535,814	-12.7	4.1	4.4	4.1	56.3	43.8	30.2	9.8
9	Zurich Finl Svcs NA Group	018549	438,959	-30.6	3.4	4.5	5.6	35.4	82.6	40.9	4.3
10	Old Republic Ins Group	000734	368,822	4.0	2.8	2.5	1.6	56.4	54.5	49.3	13.0
11	Assurant Ins Group	018523	330,497	-28.0	2.6	3.3	3.6	33.7	40.3	44.1	9.9
12	Ace INA Group	018498	263,676	2.3	2.0	1.8	1.9	9.8	47.7	-22.5	3.6
13	Hartford Ins Group	000048	234,451	-24.5	1.8	2.2	2.4	51.7	45.2	28.5	2.2
14	Allstate Ins Group	000008	224,216	-11.7	1.7	1.8	2.1	34.3	35.3	32.8	0.9
15	Great Amer P&C Ins Group	004835	222,062	-26.0	1.7	2.1	2.2	32.9	42.5	35.6	6.3
16	Progressive Ins Group	000780	209,648	4.9	1.6	1.4	1.3	47.0	59.8	43.0	1.5
17	QBE Americas Group	018713	182,264	-0.7	1.4	1.3	1.7	28.9	29.6	42.0	5.8
18	Nationwide Group	005987	180,883	1.6	1.4	1.3	1.2	29.6	38.6	31.7	1.2
19	USAA Group	004080	151,187	5.8	1.2	1.0	0.9	41.5	43.6	42.3	1.5
20	Markel Corp Group	018468	146,769	-3.0	1.1	1.1	1.0	56.8	48.1	31.7	12.4
21	The Hanover Ins Grp Prop & Cas Cos	004861	138,154	13.2	1.1	0.9	0.9	46.7	46.6	44.2	4.8
22	Farmers Ins Group	000032	125,974	-19.1	1.0	1.1	1.0	38.6	31.2	15.4	0.7
23	Munich-Amer Hldg Corp	018753	121,147	-1.7	0.9	0.9	1.1	41.0	31.0	42.7	6.0
24	Amex Assur Co	004298	117,228	-12.7	0.9	1.0	1.0	43.5	42.0	34.6	50.6
25	Auto-Owners Ins Group	004354	97,573	-6.2	0.8	0.7	0.7	40.2	43.2	44.1	2.2
<b>Top 25 Companies</b>			<b>\$10,376,054</b>	<b>-7.2</b>	<b>79.9</b>	<b>79.7</b>	<b>78.8</b>	<b>47.9</b>	<b>53.3</b>	<b>35.8</b>	<b>3.7</b>
<b>Total U.S. P/C Industry</b>			<b>\$12,979,703</b>	<b>-7.5</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>46.1</b>	<b>51.8</b>	<b>36.4</b>	<b>2.8</b>

Source:  BestLink State/Line (P/C Lines) – P/C, US Data as of: October 26, 2010