

Shippers Beware! You pay be paying freight forwarders at your own peril!

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Some areas of the law are just kind of wishy-washy. The whole point of maritime law being subject to federal jurisdiction is to ensure nationally uniform jurisprudence. But in some circumstances, there just isn't a guiding principle applied evenly throughout the land providing players a comfortable understanding of what their actions mean or don't mean. It's as if the rulebook is still being written, the goal posts are still being adjusted, and we're in the middle of the game. Pity should be extended not just to the players, but to the refs who have to sort the mess out.

A good example of this is the scenario when shipper hires freight forwarder, pays freight forwarder freight charges, enjoys the benefit of carrier transporting shipper's cargo, then gets sued by carrier when freight forwarder fails to pay carrier. Typically, the forwarder went belly up between the time it received shipper's payment and carrier's invoice came due.

Courts have gone in many different directions with this one. Some have analyzed it from an agency perspective, ruling that forwarders are shippers' agents. If a forwarder doesn't pay carrier, it's as if the shipper didn't pay, so it's the shipper's problem. Typically, the shipper gets to pay again.

Other courts look to Federal Maritime Commission (FMC) regs, interpreting them to mean that forwarders are no one's agent, and carriers are best able to determine which forwarders are teetering on the edge of bankruptcy, such that they should bear the brunt of accepting cargo booked by a busted intermediary.

Still others look at the players' relationships from a strictly contractual perspective. Bills of lading are enforceable contracts of affreightment. If those tiny words on the back say the shipper is liable for unpaid freight charges, some courts will make the consumer pay the piper.

Complicating the issue is a series of court decisions which simultaneously apply two or more of these analyses.

The U.S. Court of Appeals for the Sixth Circuit, sitting atop interior states that would be landlocked but for the Great Lakes, recently stepped its toe into the icy waters of shipper liability for freight charges unpaid by a forwarder. In this instance, the court took the unusual step of applying a contract law analysis to the shipper-carrier relationship after finding there was no contract. That's right, there was no service contract, and the carrier had failed to issue proper bills of lading. Nonetheless, the shipper was held liable to the carrier for breach of a contractual obligation to pay freight.

In this case, the shipper had gone the usual route of paying its freight forwarder in advance, then delivering its cargo dockside to the carrier. The carrier hauled the shipper's stuff to Syria, but the forwarder shrugged its shoulders contritely at the carrier's extended palm. The court found the shipper's cargo tender, coupled with the benefit the shipper received from the transport, enough to constitute a "contract implied in fact" (known in legal-ese as a "quasi contract").

The court's ruling doesn't address bill of lading requirements, or even mention other analyses courts have applied to this issue. Rather, it bought the carrier's argument that when the shipper delivered its cargo to the carrier's vessel, it "did so at its own peril." Thus, the shipper gets to pay twice for one transport.

So what's an innocent shipper to do when it just wants to get its ocean cargo moved without hazarding double freight charges? The most obvious, though not necessarily the easiest, precaution is to ensure the forwarder (or other intermediary) is stable and honest. Like any other business relationship, shippers are subject to *caveat emptor* when choosing whom to trust. In other words, do your homework.

With most cargo moving pursuant to negotiable service contracts these days, shippers, shippers associations and intermediaries may be able to negotiate ultimate freight charge liability with their carriers. Of course, smaller and occasional shippers will have far less leverage in this process than larger consumers. Take a look at this potential option.

Lastly, there may be some recourse against even bankrupt intermediaries by way of FMC-required bonds intermediaries post to cover their various imbroglios. Whether the intermediary's bond extends to freight charge claims is subject to a number of factors which an appropriate attorney should explore.

As long as the rules are still being written, we have to keep playing the game with at least a shade of uncertainty. Meanwhile, do the best you can with tools available to you.

Ref: Contship Containerlines, Inc. v. Howard Industries, 309 F.3d 910 (6th Cir. 2002)