

***Ocean transportation intermediary liability: baseless finger pointing  
costs a shipper big bucks***

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Shipping regulatory law may have lumped together non-vessel operating common carriers (NVOCCs) and freight forwarders for administrative purposes, but the distinction is alive and well when it comes to intermediary liability. The U.S. District Court for the Southern District of New York recently decided a dispute between an ocean shipper and its intermediary which focused on a number of issues significant in today's ocean carriage environment.

In March 2001, shipper General Carbon hired Navtrans to arrange transit of a cargo of impregnated activated carbon from New York to some point overseas (the court's opinion doesn't say where). Navtrans, typical of many players in the business, wears both freight forwarder and NVOCC hats through different legal entities under its umbrella, several of which apparently were involved here. Navtrans apparently co-brokered the freight to NVOCC Rose Containerline which, in turn, supplied a container and booked transit with steamship line Hapag-Lloyd.

No, impregnated activated carbon isn't mineral in a big-bellied, family way. Rather, it's a processed product used industrially for moisture removal. The problem is that introduction of moisture at certain points in the manufacturing process renders this commodity flammable. Apparently, this shipment's carbon hadn't stabilized before it was stowed on a vessel. Yes, the cargo went up in flames, damaging other freight and Hapag-Lloyd's vessel.

General Carbon settled a number of claims (to the tune of seven figures), and sought from Navtrans reimbursement, known as "indemnification" in the legal world. Navtrans counterclaimed against General Carbon to recover its attorneys' fees, pointing to a clause in its bill of lading to General Carbon which gave it the right to do so.

In ruling on this mess, the court first struggled with the Navtrans role at issue: was the intermediary a freight forwarder, an NVOCC, or both? To be sure the issue was covered, the court analyzed both, and decided that regardless of the hat Navtrans was wearing, it wasn't liable here.

Freight forwarders essentially are travel agents for freight. They're no more liable to their customers for other providers' no-no's than are vacation-planner intermediaries who book space for tourists in hotels or on cruise lines that later provide disappointing service. U.S. freight forwarders are liable only for their own negligence or breach of contract – the typical scenarios involving placement of freight with incompetent carriers or failure to pass along shipper instructions accurately.

NVOCCs, on the other hand, take on much greater responsibility. They issue bills of lading to their shippers (thereby becoming carriers of record), and then receive bills of lading from actual carriers (becoming steamship lines' shippers of record). If something goes wrong in the voyage, innocent NVOCCs can be liable to the same extent as the carrier that caused a loss.

Navtrans had no way of knowing the carbon was volatile, and prevailing law saddles shippers with complete responsibility for advising all concerned that their freight is hazardous (regs dealing with this now are even more rigorous, and General Carbon probably would've been in some serious hot water with the Department of Homeland Security had this incident taken place post 9-11). Hazmat shippers are "strictly liable" for mishaps resulting from their failure to alert transportation providers about their stuff's potential menace, meaning there are some pretty daunting legal presumptions against them when something goes wrong.

The court flat-out rejected General Carbon didn't know its product was dangerous. General Carbon pointed to a product information sheet it had given Navtrans that said something about impregnated activated carbon potentially causing skin burns. The court snubbed that argument with an almost audible "come on!" Warning about epidermal abrasions is a "far cry" from adequate notice about a compound that could blast a vessel, its crew and freight to smithereens.

General Carbon tried to argue that Navtrans the NVOCC was Hapag Lloyd's shipper of record, such that the intermediary bore primary responsibility for the mishap. That theory was novel, if not interesting, but it ignored the fact that Navtrans' bill of lading provided that General Carbon must indemnify Navtrans for losses brought on by the shipper's fault.

Even though freight forwarder liability is far rarer and more difficult to prove, General Carbon crafted an argument that Navtrans the travel agent should pay for this loss. The shipper urged that its freight forwarder had failed to fulfill its affirmative obligation to identify hazardous freight; failed to "process" the product information sheet, whatever that means; and was negligent in failing to secure an appropriate (moisture proof) container. The problem with those arguments is that freight forwarders aren't charged by law or industry practice with any such obligations, and the court refused General Carbon's invitation to expand freight forwarder liability. Thus, Navtrans, whether NVOCC, freight forwarder or both, isn't liable here. On the contrary, General Carbon gets to pay its intermediary's costs and attorneys' fees for causing the fiasco in the first place.

Shippers, you have to know your freight, and advise intermediaries and carriers if it's hazardous. The roles and liability of ocean transportation intermediaries, while sometimes subject to unusual circumstances which require detailed analysis, have become fairly well defined in current law. Absent particularized contractual arrangements, courts are not likely to pass off shipper wrongdoing onto intermediaries' shoulders.

***Ref: Scholastic, Inc. v. M/V Kitano, 2005 WL 742839 (SDNY 2005)***