

Are transportation intermediaries insurance brokers?

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Do freight forwarders, non-vessel operating common carriers, transportation brokers, intermodal marketing companies, shippers associations and other transportation intermediaries quack enough like “insurance brokers” to be subject to the state insurance regs and licensing requirements imposed on more typical insurance ducks?

Most outfits that peddle and administer transportation services provided by others also sell insurance coverage to their customers. This is done through a variety of mechanisms, such as procurement of coverage from the cargo insurance market, “open cargo” policies by which an intermediary brings its customers within blanket coverage provided by an insurer; and by the intermediary essentially acting as a full-blown insurer itself.

Indeed, transportation intermediaries must be knowledgeable enough about transit risks to properly advise their customers as to what insurance products they should buy. They usually score a profit off the premium paid for the coverage and, yes, a forwarder can find itself liable for failing to procure coverage it was supposed to. Do they sound pretty much like insurance brokers? If so, should states subject them to the same regulatory schemes other insurance brokers have to play by? Or is the insurance element of transportation intermediaries’ business so minor and removed from their primary function that states shouldn’t bother, especially now that “deregulation” is the battle cry?

These questions have come up in recent years. In 2002, United Parcel Service got in a row with some of its customers and competitors about antitrust implications in the insurance context. A class action lawsuit was launched in New York, and one of the issues was whether federal preemption of state laws which touch on interstate transit also trump any state regs that might subject forwarders and others to state insurance regulation. Exclusive federal dominion over interstate transportation is a sacred American legal doctrine, keeping any state from hindering uniform national policy in an inherently interstate arena.

The McCarran-Ferguson Act of 1945 carved out an exception for insurance regulation in otherwise federally regulated commerce, and proclaimed that the states keep most dibs on insurance regulation in the transportation industry. But in the UPS case, the fight was about UPS’s antitrust and monopolization in insurance sales. The concern was the impact on transportation relationships, and not what a forwarder might get away absent a state regulatory guard dog. The court found that the McCarran-Ferguson Act didn’t control because that case’s issues, while insurance related, weren’t of the variety that federal legislation reserved to the states. A fair inference from the decision is that the insurance services transportation intermediaries provide should also be exempted from state regulation because, hey, they’re essentially part of the interstate commerce process and not the stuff state commissions should bother with.

That same issue came up on the west coast in the context of the Carmack Amendment's preemption of state law in interstate surface transportation issues. The wrinkle in that case was that it involved the actions of a transportation broker, a species of intermediary specifically not subject to Carmack.

Texas dealt with a similar (and potentially precedential) issue involving car rental agencies which sell auto insurance to their customers. After a lawsuit that prompted legislation of a statute, the Lone Star State now requires its rental agencies to be licensed insurance brokers if they plan to sell their customers coverage.

An unscientific poll of state insurance authorities shows that most are not focused on, and some have never considered, whether transportation players who sell insurance should be regulated. There seems to be no vocalized objection from the insurance industry or consumer shippers. The issue just hasn't been on the radar screen.

Until, perhaps, a few weeks ago when news from Europe washed ashore about the European Union's plans to require forwarders to sign up with government authorities if their operations include cargo insurance sales. EU Directive 2002/92, effective January 2005, mandates that all EU member countries issue national legislation creating "a level playing field" for insurance brokers, including those whose primary activities are in other industries. The measure likely will include bonding (or the European equivalent) and education/certification requirements similar to those imposed on more typical insurance middlemen. A variety of penalties will be socked on violators.

The EU directive won't immediately impact U.S. transportation intermediaries, except to the extent they're transnational (which many larger ones are). However, policies like these have a way of spreading across hemispheres in the current era of international uniformity in ocean transportation. Especially with the attention already given to the issue stateside, it wouldn't be surprising if the European trend prompts a new look at this aspect of insurance regulation.

Ref: In Re Evic Class action Litigation Farina, et al v. United Parcel Service, Inc., 2002 WL 1766554 (SDNY 2002); Bormaster v. Express Shipping Centers, Inc., No. 01-16684 (9th Cir); Tex. Ins. Code Art. 21.07 § 21 and Urrutia, et al v. Decker, 992 S.W.2d 440 (1999); EU Directive 2002/92, available at http://www.fi.ee/failid/direktiiv2002_92.pdf.