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Broker Subjected To Risk of Cargo Loss, When Carriers Insurance Fails—or Be Careful Of What You "Ensure"

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Prior case law has NOT imposed liability on brokers for cargo loss and damage claims where facts have disclosed that the obligation was not clearly assumed by the broker. This case for reasons discussed below puts the liability issue in the hands of a jury.

Huntington Operating Corp; Dba Texas International Import Export, Plaintiff, Vs. Sybonney Express, Inc; Dba J. P. Transports, Inc., Et Al, Defendants. *2009 U.S. Dist. Lexis 67561*

This case concerns the theft of a shipment of perfume in transit from Florida to Texas. Plaintiff Huntington Operating Corp. ("Huntington", the shipper) employed Custom, a transportation broker, to arrange the shipment. Custom in turn employed Sybonney Express, Inc., a motor carrier, to pick up the cargo in Miami, Florida, and deliver it to Huntington in Houston, Texas. On April 29, 2006, the shipment was stolen, along with the tractor-trailer, from a truck stop in Florida. The value of the shipment was $285,000.

Huntington brought suit against Custom alleging that Custom was responsible for *ensuring* that Sybonney Express had adequate insurance to cover the cargo loss. The tractor-trailer was not covered by the insurance policy, due to a clerical error. Huntington alleged (1) violations of the Texas Deceptive Trade Practices Act, (2) negligent misrepresentation, (3) common law fraud, (4) negligence, (5) negligent entrustment, (6) breach of fiduciary duty, and (7) breach of agreement.

Huntington alleged that, Custom failed to ensure insurance coverage for reasons that were discoverable prior to selecting Sybonney Express. Furthermore, Huntington alleged that Custom failed to disclose information regarding Sybonney Express licensure history that would have been "critical" in

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Huntington's decision to accept Custom's choice of Sybonney Express. *(The licensing problem is not disclosed in the opinion.)* Additionally, Huntington asserted that Custom assured Huntington that it was not necessary to procure additional insurance and, that the insurance coverage maintained by Sybonney Express was "more than sufficient" to cover the perfume shipment in the event of a loss.

Custom claimed that it followed standard operating procedures in ensuring that Sybonney Express had adequate insurance for the shipment. In his sworn affidavit, the Operations Manager for Custom stated that Custom received from Sybonney Express a Certificate of Liability Insurance and further confirmed the existence of the insurance policy on the Federal Motor Carrier Safety Administration (FMCSA) website.

High value shipments deserve some extra attention to determine where the risk of loss is and whether it is properly covered by insurance.

Lastly, Custom verbally confirmed the existence of cargo coverage as stated in the Certificate of Liability Insurance by contacting by phone the agent for KBS Insurance and Sybonney Express' insurance agent.

When Huntington made the claim for the stolen shipment from the insurance carrier, it was denied, stating that the vehicle that transported the perfume shipment was "not scheduled specifically in the cargo insurance policy."

Plaintiff Huntington alleged that Custom violated the Deceptive Trade Practices Act (DTPA) by representing that the carrier Sybonney Express was "properly and adequately insured" and "reliable, responsible, and did not have blemishes on its record. Custom is alleged by Huntington to have violated various sections of the DTPA including representing that goods or services have benefits they do not have; representing that goods or services are of a particular standard if they are of another; and representing that an agreement confers or involves rights, remedies or obligations which it does not have.

The main point of difference with the cases cited is that in this case Custom is not an insurance carrier but rather an intermediary. Yet Custom's acts were just as surely a "substantial factor" because they acted on behalf of Huntington in selecting a carrier. As their own recitation of facts compellingly reveals, the transportation broker bore the responsibility of ensuring that the carrier had insurance to cover the shipper's cargo. Custom cannot escape liability by claiming it relied on Sybonney Express' alleged misrepresentations regarding coverage. It must look instead to its own cause of action against Sybonney Express for indemnification. (Underlining is writer's emphasis.) Finding that the causation is no bar to recovery under the DTPA, the Court denied summary judgment to Custom as to the DTPA claim.

Negligence and Negligent Misrepresentation: Huntington alleged that: Custom breached its duty to Huntington when it "failed to confirm that the carrier selected by [Custom] was properly and adequately insured", and breached its duty when it "entrusted the perfume to the carrier when it possessed the knowledge that the carrier has had numerous licensing problems in the past."

A cause of action for negligence in Texas requires three elements. There must be a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach. D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 2002). There is scarce authority on what duty is owed by a broker to a shipper. *See* Chubb Group of Ins. Cos. v. H.A. Transp. Sys., 243 F. Supp. 2d 1064, 1071 (C.D. Cal. 2002). Custom argues, that it has no duty for the damage to the cargo while in transit, but the case it cites for this proposition, *H.A. Trans. Sys*, contemplates that a shipper may rely on a broker to ensure insurance coverage for the shipment and hold him liable for failure to do so if lack of coverage results in loss to the shipper. H.A Transp. Sys., 243 F. Supp. 2d at 1072. Custom represented to Huntington that as part of the ongoing business relationship between them, Custom would assume the duty to "ensure" insurance coverage up to $250,000 because Huntington had high-value shipments, and further represented that it assumed the duty to provide a reliable carrier. Although as a broker Custom did not have custody or control of this shipment at any time, Custom bears a duty to prevent loss by ensuring that the carrier had insurance and was a reliable carrier.

> In the fast moving world of freight brokerage, it is often a practical impossibility to examine the exclusion pages of a carriers insurance policy.

The duty Custom owed Huntington was to act as a reasonable prudent person would act under the same or similar circumstances regarding any reasonably foreseeable risk.

Custom took many measures to ensure that adequate insurance covered the shipment before transit, including obtaining a Certificate of Liability Insurance from Sybonney Express, checking the FMCSA website and contacting KBS Insurance directly. This makes it a close question whether Custom exercised such reasonable care that it could not have acted negligently despite the fact that coverage was ultimately found not to exist. The stated reason accepted by both parties for denial of the claim is that the specific tractor-trailer and its cargo were not listed on the policy. It appears to the Court that genuine issues of material fact remain as to whether Custom should have checked that the specific cargo was listed on the policy. Such a fact question is better reserved for the jury and summary judgment should not be granted for Custom on breach of duty.

Breach of Contract Claims Survive.

Custom raises two arguments in favor of striking the claim for breach of contract. First, that it exercised such "reasonable care" in selecting a carrier that it was not in breach. Second, that the lack of insurance was not a "substantial factor" in causing Plaintiff's damages. Finding no merit to either of these arguments, the Court sustained the action.

Custom argued that it did not breach the contract, which both parties assume to exist, because it was not aware of any fault and exercised reasonable care. Contract law, however, does not measure the 'fault' of either party but looks only to whether performance that was due was given. Assuming, as both parties do here, that providing an insured carrier was a contractual obligation that Custom bore to Huntington, then Custom may well have breached that obligation when it turned out that the carrier did not have adequate insurance.

Custom also seeks to repeat the same argument relating to causation: i.e., that because an unknown third party stole the shipment, Custom cannot be held liable. As discussed above this argument fails because the loss was preventable as far as Huntington is concerned by the provision of insurance.

The court denied plaintiffs motion for summary judgment based on theories of Negligent Misrepresentation, Common Law Fraud, Negligent Entrustment, and Breach of Fiduciary Duty due to lack of evidence.

The 'Morals" of this story are:

1. This decision does not make clear whether the broker assumed the obligation to "ensure" the carriers insurance coverage by written or verbal contract, although the opinion does not mention a written contract. If the lesson has not already been learned, a well drafted broker/carrier contract could have avoided the problems of this case. Caveat: I have seen many shipper contracts that seek to have the broker "ensure" the insurance coverage of the motor carrier. My recommendation always is to avoid such obligation

because to "ensure" is to "guarantee" and a broker cannot "guarantee" the coverage. A broker can agree to have the carrier contractually represent that it has the proper insurance coverage.

2. There is no mention in this opinion of contingent cargo, shippers interest, spike (Spike covers periodic increases in coverage for high value shipments), or possibly errors and omissions insurance to cover the loss. Proper insurance coverage may have avoided this all together. The opinion shows that the broker had advance knowledge of the high value shipment. In such instances it would have been wise to go the extra step to find out what the exclusions were in the carriers insurance coverage. High value shipments deserve some extra attention to determine where the risk of loss is and whether it is properly covered by insurance. As you can see that is exactly what the jury would have to decide in this case. Since there is no follow up opinion, it is assumed that no appeal was filed and that the case was settled.

3. The broker faces 3 different theories of liability which did not get dismissed. They are violation of the Texas Deceptive Practices Act; negligence; and breach of contract. Under the negligence theory the Texas court goes where no other court has gone by clearly stating that the broker had a duty to "ensure" the carrier had insurance coverage. Whether the broker breached that duty by failing to discover the particular truck was not covered is another critical jury question. The sticky question phrased another way is, "How much due diligence is enough?"

In the fast moving world of freight brokerage, it is often a practical impossibility to examine the exclusion pages of a carriers insurance policy (assuming you gain possession of them on time) to assure that all his trucks (including hired and non owned vehicles) as well as the particular commodities being transported are covered. In such instances contingent cargo insurance, with a "rider" or an endorsement for high value shipments may be the practical solution.

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