

Regulation of Third Party Surface Transportation: Who is a Third Party Provider and What Regulations Cover Third Party Operations in the United States?

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I. INTRODUCTION

Regulation of third party surface transportation intermediaries was historically an issue that states addressed through local licensing and registration requirements.¹ Federal legislation did not arise until approximately 1887 when Congress enacted the Interstate Commerce Act² and established the Interstate Commerce Commission.³ Through the Motor Carrier Act of 1935,⁴ the ICC eventually became the first regulatory body with the power to supervise carrier and broker surface transportation operations.⁵ Under the ICC and its successor agencies, including the Surface Transportation Board and the Federal Motor Carrier Safety Administration,⁶ government oversight of third party surface transportation has blossomed and withered.⁷ While the Motor Carrier Act of 1980,⁸ the ICC Termination Act of 1995,⁹ and, most recently, SAFETEA-LU¹⁰ in 2005 significantly deregulated the transportation industry, several important regulatory regimes still affect third party surface operations. Counsel to shippers, carriers, and intermediaries will want to become familiar with these regulations in order to correctly understand the risks involved in maintaining third party surface transportation relationships.

The first section of this article following the introduction provides an overview of the history of third party regulation and briefly explains the reasons that underlie the regulation of transportation intermediaries. This section also highlights contemporary legislation that gives rise to current regulatory issues. The second section outlines the regulatory provisions in Title 49 of the U.S. Code that determine the classification and registration of third party providers. Classification is particularly important because statutory liability standards do not apply evenhandedly to all

1. Charles E. Nadeau, *Carriers: Federal Regulation of Motor Transportation Brokers*, 36 MICH. L. REV. 963, 963 (1938).

2. Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887) (codified in relevant part as 49 U.S.C. § 10101 (2005)).

3. Thomas W. Gilligan, et al., *The Economic Incidence of the Interstate Commerce Act of 1887: A Theoretical and Empirical Analysis of the Short-Haul Pricing Constraint*, 21 RAND J. ECON. 189, 189 (1990).

4. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935).

5. *Id.* at 546.

6. William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 260 (1997).

7. Joe Pappalardo & Anna Fister, *Trucking Broker/Logistics Provider Liability Presentation at the Transportation Lawyers Association's 2006 Annual Conference (2006)*, http://www.gsfn.com/useful_tools/TLA.pdf.

8. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

9. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

10. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005).

types of third party providers. The last section in this article discusses current regulatory problems that transportation attorneys frequently encounter. In particular, this section discusses legislative oversight of shipping agents, the effect of SAFETEA-LU on the registration of intermediaries, basic regulatory requirements set forth in the Carmack Amendment, and possible regulatory and common law foundations for requiring brokers to hold freight charges in trust for carriers.

II. A BRIEF HISTORY OF THIRD PARTY SURFACE REGULATIONS

Regulatory efforts to supervise and guide third party surface transportation over time look like a bell curve and are closely related to the history of regulating motor carriers.¹¹ Until the early twentieth century motor carriers enjoyed broad independence from any permanent federal or state regulations.¹² While several states had implemented certain registration and licensing requirements to encourage competition and improve the quality of transportation services, the United States Supreme Court ended state regulation abruptly in 1925.¹³ In its holding in *Buck v. Kuykendall*,¹⁴ the Court decided that state measures to regulate motor carriers significantly affected interstate commerce – a power properly vested in the federal government.¹⁵ In response to the *Buck* decision and “almost overnight,” independent operators and individuals began overflowing the transportation market with transportation services.¹⁶ Undoubtedly, many of these transportation providers entered into the business with the intention of offering honest services.¹⁷ The depressions in the early 1900s attracted hardworking individuals who were able to start their own business on a “shoe string” budget of a few hundred dollars.¹⁸ Unfortunately, the growing abundance of trucks led to an oversupply of transportation services that depressed prices and profit margins.¹⁹ Overzealous salesmen aimed to take advantage of opportunities made possible in the absence of regulation – often to the disadvantage of customers and the industry overall.²⁰ Unscrupulous operators skipped maintenance of their equipment; operators discontinued freight services midway between load and unload points to pick up more profitable freight; carriers avoided insurance coverage; freight was stolen; driv-

11. See generally Nadeau, *supra* note 1.

12. *Id.* at 963.

13. *Id.*

14. *Buck v. Kuykendall*, 267 U.S. 307 (1925).

15. *Id.* at 316.

16. Nadeau, *supra* note 1, at 963.

17. See *id.* at 964.

18. *Id.*

19. *Id.* at 965.

20. *Id.* at 964-65.

ers were pressured to work unreasonable and dangerous hours.²¹

During this period of lax regulation and fierce competition among carriers, the need for brokers and freight forwarders grew substantially particularly because these intermediaries offered carriers a method to streamline their transportation services by facilitating communications between shippers and carriers.²² Unfortunately, “because there were no prerequisites to entering the business, these agents were often shiftless and irresponsible.”²³ Third party intermediaries often profited heavily by contracting carriage services with dishonest and irresponsible operators who would offer low rates in return for the broker’s blind eye towards lacking business practices.²⁴ In addition, because brokers tended to focus heavily on lowering shipping rates by engaging in numerous shady scams and tricks, “merchants could not tell what allowances to make for transportation.”²⁵

Racketeering among brokers and between brokers and carriers to the disadvantage of the public grew out of proportion and harmed the reputation of the intermediary industry to such an extent that in 1935, Congress finally felt compelled to provide for broad relief.²⁶ The solution appeared in the form of the Federal Motor Carrier Act of 1935 which gave the Interstate Commerce Commission the power to promulgate regulations for reigning in transportation intermediaries.²⁷ Specifically, the policy underlying the Act was to “protect carriers and the traveling and the shipping public against dishonest and financially unstable middlemen in the transportation industry.”²⁸

Rigid regulation until 1980 met with only partial success.²⁹ While the 1935 Act and the ICC appeared to succeed in relieving shippers from dealing with dishonest and corrupt transportation intermediaries, the regulations imposed extreme regulatory burdens “that, among other impositions, required anyone applying to become a broker demonstrate [that] their services would be consistent with the public interest”³⁰ and that its services would not “unnecessarily duplicate existing brokerage services.”³¹ At the height of this regulatory “bell curve,” federal oversight created virtual monopolies for select intermediaries and consequently in-

21. *Id.* at 964.

22. *See id.* at 963.

23. *Id.* at 966.

24. *Id.*

25. *Id.*

26. *Id.* at 969.

27. Pappalardo, *supra* note 7, at 3.

28. Gray Line Nat'l Tours Corp. v. United States, 380 F.Supp. 263, 266 (S.D.N.Y. 1974).

29. Pappalardo, *supra* note 7, at 3.

30. *Id.*

31. *Id.*

creased the cost to shippers for transporting goods.³²

It was not until 1980 that Congress decided to reconsider the effect that federal regulation had on brokers. The legislature's Motor Carrier Act of 1980³³ "ushered in an era of virtual deregulation"³⁴ of the motor carrier industry. While the Act did not go as far as to remove all restrictions on the operations of intermediaries, Congress did decide to make it easier for intermediaries to register and do business.³⁵ Current registration requirements for brokers and freight forwarders are outlined in section III of this article. Unlike the rather one-sided policy of the 1935 Act towards permitting monopolies,³⁶ today's federal legislation does a better job of balancing the competing needs of shippers and brokers.³⁷ For instance, United States Code Title 49 after the 1980 Act specifically aims to:

(A) encourage fair competition, and reasonable rates for transportation by motor carriers of property;

...

(D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;

...

(F) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions.³⁸

Since the Motor Carrier Act was implemented in 1980, the federal government has amended the U.S. Code in many other respects that affect transportation brokers and freight forwarders. The most relevant amendments to the Code include the following:

ICC Termination Act of 1995: Efforts to deregulate the transportation industry necessarily took away powers that the ICC had managed.³⁹ By 1995, the agency was left with only remnants of the economic control it once wielded.⁴⁰ The ICC Termination Act terminated the ICC effective December 31, 1995 and transferred the few remaining functions, such as

32. *Id.*

33. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

34. Pappalardo, *supra* note 7, at 3.

35. *See id.*

36. *Id.*

37. *See id.*

38. 49 U.S.C. § 13101(2) (2007). An example of the more liberal approach that current federal regulations take can be found in Section 14 of the Motor Carrier Act of 1980, which prohibits rate bureaus (and their members) from interfering with any carrier's right to publish its own rates and from voting on rate proposals in which they did not participate. *See* Pub. L. No. 96-296, 94 Stat. 793 at § 14 (1980). *See also* Paul S. Dempsey, *The Interstate Commerce Commission – The Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1, 41-43 (1984).

39. *See* Jennifer Mullenbach, *Third Party Logistics Companies and Legal Liability for Personal Injuries: Where Does the Injured Motorists' Road to Recovery Lead?* 33 TRANSP. L.J. 145, 153-54 (2005-2006).

40. *See id.* at 154.

licensing of motor carriers and economic regulation to the Federal Highway Administration and the Surface Transportation Board.⁴¹ Oversight of brokers and freight forwarders was henceforth managed by these two agencies until the Federal Motor Carrier Safety Administration was established in 2000.⁴²

*Carmack Amendment:*⁴³ In 1906, Congress enacted the Carmack Amendment to the Interstate Commerce Act of 1887 to address liability claims against railroads for damaged or lost goods in interstate commerce.⁴⁴ The Motor Carrier Act of 1935 eventually extended the Amendment's reach to motor carriers and freight forwarders.⁴⁵ After the termination of the ICC in 1995, Congress reenacted the Carmack Amendment in U.S. Code section 14706.⁴⁶

*Motor Carrier Safety Improvement Act of 1999:*⁴⁷ Congress decided that a separate agency, called the Federal Motor Carrier Safety Administration, was needed to improve the safety of motor carrier operations.⁴⁸ The FMCSA, which began its work on January 1, 2000, has since been the principal government agency to issue regulations that cover the operations of brokers and freight forwarders.⁴⁹

Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU): On August 10, 2005, Congress enacted SAFETEA-LU with the main purpose of authorizing federal surface transportation programs through 2009 and enhancing highway transportation safety.⁵⁰ The Act is particularly relevant to third party transportation because its provisions appear to weaken the licensing and bonding requirements for surface transportation brokers and freight forwarders.⁵¹

41. ICC Termination Act of 1995, Pub. L. No. 104-88 §§ 408, 701, 109 Stat. 803 (1995); see Phillip DeCaro, *The Impact of Trusts and Escrow Funds on Interstate Commerce*, 31 *TRANSP. L.J.* 249, 253 (2004).

42. Mullenbach, *supra* note 39, at 154.

43. 49 U.S.C. § 14706 (2005).

44. See *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 57-59 (2d Cir. 2006); see also Kelly A. Fisher, *The Carmack Amendment and the American Rule: Is Arbitration a Necessary Prerequisite to an Award of Attorney's Fees?* 33 *TRANSP. L.J.* 163, 164 (2005-2006).

45. See Paul S. Dempsey, *The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be*, 27 *TRANSP. L.J.* 367, 372 (2000).

46. 49 U.S.C. § 14706 (2005).

47. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1749 (1999).

48. *Id.*

49. See, e.g., *id.* § 205. Current rules and regulations established by the Federal Motor Carrier Safety Administration can be accessed at <http://www.fmcsa.dot.gov/>.

50. See Kevin M. McDonald, *Recall the Recall*, 33 *TRANSP. L.J.* 253, 277 (2006).

51. See, e.g., *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)*, Pub. L. No. 109-59, § 4142, 119 Stat. 1144, 1747 (2005).

Section IV of this article discusses the issues and rumors surrounding SAFETEA-LU with respect to brokers and freight forwarders.

III. CLASSIFICATION AND REGISTRATION REQUIREMENTS

The classification of a third party surface transportation provider often determines whether the provider can be held liable under tort or contract to a shipper or a carrier for a delay in delivery, the loss of goods, or the damage to goods. The U.S. Code and the Federal Motor Carrier Safety Regulations distinguish between general freight and household goods forwarders, property brokers, and shipper and carrier agents to impose a varying degree of governmental oversight of third party services. Unless the services of a third party provider are exempt from federal or state regulation, the provider may not engage in intermediary services without proper registration.⁵²

The regulations covering each type of provider give effect to the legislative policy set forth in Title 49 Section 13101 and aim to protect the public and shippers from unfair collusion among and between carriers and intermediaries.⁵³ However, the degree of protection that these regulations currently offer depends on the type of goods transported, the general characteristics of the provider, and the services offered by the intermediary in specific situations. Regulatory definitions of the different classifications of intermediaries and relevant registration requirements are described below.

A. FREIGHT FORWARDERS

1. *Regulatory Definition*

The transportation attorney may encounter a number of terms variously used to describe freight forwarders including the terms “freight agent” and “freight merchant.”⁵⁴ For the purpose of this section, these terms are taken to be synonymous with respect to the definition of forwarders in federal regulations.

Under the general definitions section in Title 49 Part B of the U.S. Code, a freight forwarder is defined as a company or individual that provides transportation of cargo belonging to others, and in the course of its business:

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

52. 49 U.S.C. § 13901 (2007).

53. 49 U.S.C. § 13101(a) (2007); 49 U.S.C. § 13904(c) (2007).

54. A. M. Swarthout, *Status, Rights, and Obligations of Freight Forwarders*, 141 A.L.R. 919, ¶ 2 (1942).

- (B) assumes responsibility for the transportation from the place of receipt to the place of destination; and
- (C) uses for any part of the transportation a carrier subject to [the] jurisdiction under [the Code].⁵⁵

The freight forwarder assumes responsibility for the transportation and assembles the loads but often does not conduct the actual transportation.⁵⁶ Rather, the forwarder generally uses for-hire carriers to conduct the line-haul movement from origin to destination.⁵⁷ The freight forwarder may provide transportation as the carrier itself “only if the freight forwarder also has registered to provide transportation as a carrier.”⁵⁸ The regulations that define freight forwarders might seem straightforward. As with many aspects of the law, however, special fact patterns and numerous differing court interpretations over the years have clouded the issue and have forced attorneys to rely heavily on case law to establish whether a party in a dispute is truly a freight forwarder or merely a broker or agent.⁵⁹ Discussion of relevant case law is outside the scope of this note. The apt transportation lawyer may, however, want to reference cases such as *Koninklijke Nedlloyd BV v. Uniroyal, Inc.*,⁶⁰ *Consolidated Freightways Corp. of Del. v. Admiral Corp.*,⁶¹ *Constructors Tecnicos v. Sea-Land Services, Inc.*⁶² and *Zenith Electronics Corporation v. Panalpina, Inc.*⁶³ to gain a broad understanding of current issues that affect the determination of whether a party should be classified a freight forwarder.

Despite partial deregulation of the transportation industry in the late twentieth century, the federal government through the Secretary of the Department of Transportation and the Surface Transportation Board has retained “jurisdiction . . . over service that a freight forwarder undertakes

55. 49 U.S.C. § 13102(8) (2007); see also 49 C.F.R. § 386.2 (2007).

56. 13 AM. JUR. 2D *Carriers* § 87 (2007).

57. See *id.*

58. 49 U.S.C. § 13903(b) (2007).

59. See 13 AM. JUR. 2D *Carriers* § 87 (2007).

60. 433 F.Supp. 121, 128-129 (S.D.N.Y. 1977) (holding that the usual agency principles such as control and oversight by the principal can be used to determine whether an intermediary was operating as a freight forwarder).

61. 442 F.2d 56, 63-64 (7th Cir. 1971) (holding that the lack of a freight forwarder license was irrelevant for determining whether an intermediary should be considered liable to the carrier for charges paid to the intermediary by the shipper).

62. 945 F.2d 841, 846 (5th Cir. 1991) (“[T]he question whether a freight forwarder acts as agent for either party to the contract of carriage tends to turn on the facts of the particular transaction under scrutiny”).

63. 68 F.3d 197, 198-199, 201-203 (7th Cir. 1995) (holding that the freight forwarder was not absolved from liability by virtue of carrier’s sole negligence where shipper and forwarder had a contractual relationship distinct from the relationship between forwarder and carrier).

to provide, or is authorized or required . . . to provide.”⁶⁴ Most importantly this means that the intermediary must adhere to specific registration provisions established in the U.S. Code and enforced by the Federal Motor Carrier Safety Administration.

2. *Regulatory Registration Requirements*

The application procedures to acquire a freight forwarding license are laid out in the Federal Motor Carrier Safety Regulations (FMCSR).⁶⁵ General registration requirements and definitions can be found in the U.S. Code. Under Title 49 Section 13903(a)(2), the Secretary of Transportation will register a freight forwarder if the forwarder is fit, willing, and able to provide the forwarding service.⁶⁶ The Secretary and Federal Motor Carrier Safety Administration must specifically determine that registration of the particular freight forwarder is “consistent with the public interest and the national transportation policy of 49 U.S.C. 13101”⁶⁷ and is necessary to protect shippers.⁶⁸

It is important to point out that after SAFETEA-LU, 49 U.S.C. Section 13903 and the FMCSR regulations at Section 365.107 distinguish general freight forwarders from household goods forwarders in their registration guidelines. Household goods are defined in the U.S. Code and in the FMCSR as:

personal effects or property used, or to be used, in a dwelling, when part of the equipment or supplies of the dwelling. Transportation of the household goods must be arranged and paid for by the individual shipper or by another individual on behalf of the shipper. Household goods includes property moving from a factory or store if purchased with the intent to use in a dwelling and transported at the request of the householder, who also pays the transportation charges.⁶⁹

Under the Federal Motor Carrier Safety Regulations, general freight and household goods freight forwarders submit the same application for registration.⁷⁰ The distinction between the two types of forwarders is significant, however, because the recent SAFETEA-LU amendment appears to remove legislative registration requirements for “mere” general freight forwarders as opposed to household goods forwarders.⁷¹ Section

64. 49 U.S.C. § 13531(a) (2007). Note, however, that neither the Secretary nor the Board has jurisdiction over service provided by a forwarder using air carriers. See 49 U.S.C. § 13531(b).

65. See, e.g., 49 C.F.R. § 365.105(a) (2007).

66. 49 U.S.C. § 13903(a) (2007).

67. 49 C.F.R. § 365.107(e)(2) (2007).

68. 49 U.S.C. § 13903(a)(2).

69. 49 C.F.R. § 375.103 (2007); see also 49 U.S.C. § 13102(10) (2007).

70. 49 C.F.R. § 365.105(a).

71. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 4142(b), 119 Stat. 1144, 1747 (2005).

IV of this comment addresses the impact of SAFETEA-LU in more detail.

This distinction is also important because 49 U.S.C. Section 14708 makes it a condition to registration that a forwarder of *household goods* provide shippers an opportunity to settle disputes via arbitration. Shippers may rely on this arbitration right to settle disputes concerning “damage or loss to the household goods transported and to determine whether carrier charges, in addition to those collected at delivery, must be paid by shippers for transportation and services related to transportation of household goods.”⁷²

A freight forwarder registered under 49 U.S.C. Section 13903 must acquire proper financial support to satisfy federal liability insurance requirements.⁷³ Specifically, the forwarder may not operate until it has filed a surety bond, insurance policy, or other type of security to cover potential loss or damage to property⁷⁴ and to satisfy potential public liability claims.⁷⁵ This “financial responsibility” document must be filed “within 20 days from the date an application notice is published in the FMCSA Register.”⁷⁶ The minimum amount of security that the forwarder must maintain is identical to the levels prescribed for motor carriers⁷⁷ and depends on the type of property transported and the size of the equipment used for the transportation.⁷⁸

Finally, before the application for the forwarding license is complete, the applicant must provide proof to the Secretary and any relevant state agencies that it has engaged process agents in each state in which the forwarder will operate.⁷⁹ These process agents are the forwarder’s representatives upon whom court papers can be served in proceedings that may be brought against the intermediary.⁸⁰ The freight forwarder must file FMCSA Form BOC-3, which designates these process agents, “within 20 days from the date an application notice is published in the FMCSA Register.”⁸¹

An application for registration or recertification may be opposed on at least two grounds: First, the party opposing the registration may claim that the carrier or forwarder is not fit to provide the regulated service.⁸²

72. 49 U.S.C. § 14708(a) (2007).

73. 49 U.S.C. § 13906(c)(2) (2007).

74. *Id.*

75. *Id.* at § 13906(c)(1); *see also* 49 C.F.R. § 387.403 (2007).

76. 49 C.F.R. § 365.109(a)(5)(i) and (iii) (2007).

77. 49 C.F.R. § 387.405 (2007).

78. 49 C.F.R. § 387.303(b) (2007).

79. 49 U.S.C. § 13303(a) and (b) (2007); *see also* 49 C.F.R. § 365.109(a)(6).

80. 49 U.S.C. § 13303(a).

81. 49 C.F.R. § 365.109(a)(6).

82. 49 C.F.R. § 365.107(a) (2007).

Under FMCSR Section 365.107(a), fitness might be measured by considering the service provider's compliance with financial registration requirements and the applicant's history of safe operations and adherence to safety rules.⁸³ Second, the Secretary or the federal agency may suspend or revoke an operating license once the freight forwarder ceases to satisfy the required security and insurance measures.⁸⁴

B. PROPERTY BROKERS

1. *Regulatory Definition*

The name "property broker" is generally considered the "correct terminology" to define the work that broker intermediaries do.⁸⁵ Other terms used synonymously include "truck broker," "freight broker," "freight agent," or "transportation broker."⁸⁶ A "freight broker agent," however, is merely an agent of the broker and is not covered directly by federal regulations concerning property brokers.⁸⁷ Under the U.S. Code, a property broker is defined as:

a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.⁸⁸

Brokers eliminate the need for motor carriers to solicit contracts from individual shippers by establishing "centralized clearinghouses" where carriers are able to service many shipping contracts at once.⁸⁹ Brokers are explicitly not included in the definition of carriers and, as this article will explain in subsequent sections, are not subject to a number of regulations that impose certain tort and contract liability on freight forwarders.⁹⁰

The lay reader of the federal regulations may wonder why the law distinguishes in the definition of carriers between freight forwarders and brokers when, in reality, both types of intermediaries engage in very similar transactions. After all, both parties negotiate among shippers with the aim of creating bulk break shipments to benefit from volume discounts. However, unlike freight forwarders, brokers do not actually play a role in

83. *Id.*

84. 49 U.S.C. § 13906(d) (2007).

85. *See, e.g.*, Transport Training International, Frequently Asked Questions About Trucking and Freight Brokering, <http://www.fbts.net/FAQS.htm> (Last visited Mar. 8, 2007).

86. *Id.*

87. *Id.*

88. 49 U.S.C. § 13102(2) (2007).

89. Pappalardo, *supra* note 7, at 2.

90. 49 U.S.C. § 13102(3).

the “assembly or carriage of the goods.”⁹¹ The property broker never acts as the carrier itself while the freight forwarder may become directly engaged in the assembly of shiploads, assumes responsibility for the shipment, and may even use its own resources to conduct the transportation.⁹² Therefore, the freight forwarder becomes liable exactly as the carrier would for the loss or damage of the freight while the property broker is largely shielded from claims of liability.⁹³

2. Regulatory Registration Requirements

The regulations for registering as a property broker are outlined in the FMCSR and Title 49 of the U.S. Code and do not differ substantively from the registration requirements for freight forwarders.⁹⁴ Under FMCSR Section 365.107(e), the applicant must prove that it is “fit, willing, and able to provide the involved transportation and to comply with all applicable statutory and regulatory provisions,”⁹⁵ and that the service will be consistent with public interests and the policy underlying Title 49.⁹⁶ After SAFETEA-LU, the code distinguishes between “mere” general freight brokers and brokers of household goods in the same manner as for freight forwarders.⁹⁷ As section IV of this article will discuss, counsel should not falsely believe that SAFETEA-LU amendments to Title 49 now dispense of the registration requirement for general freight intermediaries.⁹⁸

Like the freight forwarder, a broker must file form BOC-3 to designate a processing agent in compliance with 49 U.S.C. Section 13303 and must adhere to the FMCSA’s surety bond requirements.⁹⁹ These surety bond and insurance requirements, however, do differ from those required for operating a freight forwarding business. Specifically, Title 49 and the FMCSR demand merely that a broker maintain some type of policy or security approved by the Secretary to ensure that the transportation service arranged by the broker can be provided.¹⁰⁰ The Code does not demand that brokers maintain tort liability insurance of the sort required of

91. 14 AM. JUR. 2D *Carriers* § 651 (2007).

92. Notice of Determination, 71 Fed. Reg. 50,115, 50,115 (Aug. 24, 2006); *see also* 49 C.F.R. § 387.401 (2007).

93. Notice of Determination, 71 Fed. Reg. at 50,115.

94. *See* 49 U.S.C. § 13904 (2007). Step-by-step instructions for registering a brokerage or freight forwarding operation are currently provided at <http://www.fmcsa.dot.gov/registration-licensing/online-registration/onlineregdescription.htm>.

95. 49 C.F.R. § 365.107(e)(1) (2007).

96. 49 C.F.R. § 365.107(e)(2) (2007).

97. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005).

98. *Id.*

99. 49 U.S.C. § 13904(d); 49 C.F.R. § 387.307.

100. 49 U.S.C. §§ 13904(c)-(d); 49 C.F.R. § 387.307.

freight forwarders.¹⁰¹ The Federal Motor Carrier Safety Administration in FMCSR Section 387.307(a) currently requires that property brokers maintain surety bonds or trust funds of at least \$10,000. This “financial responsibility” document, as with freight forwarders, must be filed within twenty days after the application notice is published in the FMCSA Register.¹⁰² “The FMCSA will not issue a property broker license until a surety bond or trust fund for the full limits of liability prescribed [in the FMCSR] is in effect.”¹⁰³

The license to operate as a broker does not in itself allow the broker to provide the transportation itself.¹⁰⁴ Thus, the broker cannot, by virtue of its registration as a property broker decide to operate the carrier service and transport the goods.¹⁰⁵ Title 49 U.S.C. Section 13904(b)(1) instead demands that the broker “also has been registered to provide the transportation as a motor carrier.”¹⁰⁶

C. CARRIER AND SHIPPERS’ AGENTS

In most situations, carrier and shippers’ agents are not required to register with the FMCSA as a condition to providing transportation services.¹⁰⁷ Under the FMCSR, a carrier agent belongs to the “normal organization of a motor carrier” and performs transportation services under the carrier’s direction.¹⁰⁸ Unlike brokers or freight forwarders, who may at times also act as agents for carriers,¹⁰⁹ “mere” bona fide carrier agents are characterized particularly by a “preexisting agreement which provides for a continuing relationship [with the carrier], precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.”¹¹⁰ The actions of a bona fide carrier agent are governed by general rules of agency.¹¹¹ Of course, once the carrier agent engages in broker or freight forwarder services outside the scope of the agreement or relationship with the carrier, the bona fide agent exception to registration will not apply.¹¹² For instance, if the agent assists the carrier in ar-

101. 49 U.S.C. §§ 13906(c)(1)-(2).

102. 49 C.F.R. § 365.109(a)(5)(ii).

103. 49 C.F.R. § 387.307(a).

104. 49 U.S.C. § 13904(b)(1).

105. *Id.*

106. *Id.*

107. Mark J. Andrews, *The Old “ICC Broker Regs” Alive and Well, or at Least Alive*, THE LOGISTICS JOURNAL, Jan. 2003 at 5.

108. 49 C.F.R. § 371.2(b) (2007).

109. *See, e.g.*, 49 U.S.C. § 13102(2).

110. 49 C.F.R. § 371.2(b); *see also* Andrews, *supra* note 107, at 5.

111. 13 AM. JUR. 2D *Carriers* § 287 (2007); *see also* Dal-Tile Corp. & Red Arrow Freight Lines, Inc., 1990 WL 288088, *2 (S.T.B. May 15, 1990).

112. Andrews, *supra* note 107, at 5.

ranging transportation under a bill of lading issued by another carrier, FMCSR Section 371.2 suggests that the agent must register as a broker. Similarly, if the agent acts independently of the carrier to arrange for motor carrier transportation without any participation by the carrier, it does so subject to federal regulations.¹¹³

Unfortunately, the Federal Motor Carrier Safety Regulations do not clarify whether this “bona fide” agent exception to registration also applies to agents who work for shippers. The next section will address this issue and identify a few solutions for coming to terms with the apparent ambiguity in the regulations.

IV. CURRENT LEGISLATIVE AND REGULATORY ISSUES

A. REGISTRATION REQUIREMENTS FOR SHIPPERS’ AGENTS

Similar to the brokerage or freight forwarding services that a carrier agent may provide to carriers, a shippers’ agent may engage in intermediary services directly for the shipper.¹¹⁴ As broker or forwarder for the shipper, the shippers’ agent searches for carriers or forwarders that will transport the shipper’s goods.¹¹⁵ The shippers’ agent might also be called upon to search for other shippers who want to participate in a shipment to share shipping costs.¹¹⁶ Unlike a freight forwarder, however, the shippers’ agent does not hold itself out as a common carrier “vis-a-vis the shippers it serves” and does not accept full responsibility as a common carrier.¹¹⁷ Rather, the shippers’ agent “undertakes only to obtain the desired transportation services on behalf of and as agent for the shippers it represents.”¹¹⁸ Is this distinction between shippers’ agents and “mere” independent forwarders or brokers enough to qualify shippers’ agents for the “bona fide” agent exception to the regulatory registration requirements?

Unlike the “bona fide” registration exception that excludes motor carrier agents from the registration requirement,¹¹⁹ the federal regulations do not mention whether a similar exception applies to shippers’ agents. Fortunately, there are a handful of agency decisions that shed light on how the Department of Transportation might interpret this issue.

Early railroad and motor carrier cases suggest that “shippers’ agents were generally exempt from regulatory requirements.”¹²⁰ With respect to

113. *Dal-Tile*, 1990 WL 288088 at *2.

114. See generally *Andrews*, *supra* note 107.

115. See *Dal-Tile*, 1990 WL 288088 at *3.

116. See *id.*

117. *R&R Trucking, Inc.*, 13 M.C.C. 291, 294 (S.T.B. Nov. 4, 1983).

118. *Id.*

119. 49 C.F.R. § 371.2(b).

120. *Andrews*, *supra* note 107, at 6.

these agents, 49 U.S.C. Section 10562(4) specifically exempted from jurisdiction “the service of an agent of a shipper in consolidating or distributing pool cars when the service is provided for the shipper only in a terminal area in which the service is performed.”¹²¹ While Section 10562(4) was limited to railroad shippers’ agents, the ICC later sanctioned the same exception for motor carrier shippers’ agents.¹²² However, because the Surface Freight Forwarder Deregulation Act¹²³ repealed Section 10562 in 1986, the language of that section today merely evidences the historical distinction between freight forwarders and shippers’ agents.

Recent agency findings described below suggest that this early exemption of shippers’ agents still applies in the motor carrier context. In *R&R Trucking*, a transportation provider applied for an extension of authority to transport general commodities for a shipping agent.¹²⁴ The ICC denied the application on the basis that the applicant was attempting to transport goods for a mere shippers’ agent who “cannot assume responsibility [as a shipper] for . . . traffic from the point of origin to point of destination”¹²⁵ In its holding, the ICC explained that a shippers’ agent was therefore exempt from registration requirements but, as a result, could not engage in the same type of broad activities that registered intermediaries were able to operate in.¹²⁶

A more recent ICC hearing in 1990 concerning an unregistered motor carrier broker in a fee dispute case reiterated that a motor carrier “shippers’ agent [has] always . . . been exempt from Commission regulation.”¹²⁷ The hearing, which took place several years after the Section 10562 exemption was repealed, suggests that the Commission still accepted the regulatory exemption for shippers’ agents who consolidate and dispatch shipments for van load movements.¹²⁸

It would certainly be convenient to have clear regulatory guidance to understand whether the carrier agent exception may still be extended to shippers’ agents today. Yet, after the repeal of Section 10562, nothing exists to firmly anchor this exception for shippers’ agents. Surely, ambiguity in the law is often celebrated as an opportunity to engage in legal craftsmanship, and given case history described above, counsel to shippers’ agents might successfully wager the odds to advise clients that an

121. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337(1978).

122. Status of Carrier-Affiliated Shippers’ Agents, 365 I.C.C. 32, 39 (June 2, 1981).

123. Surface Freight Forwarder Deregulation Act “49 USC 10101 note” of 1986, Pub. L. No. 99-521, § 6(d) Stat. 2993 (1986).

124. *R & R Trucking, Inc.*, 133 M.C.C. at 291.

125. *Id.* at 292.

126. *Id.*

127. *Dal-Tile*, 1990 WL 288088 at *3.

128. *See id.*

exception will protect the agent's activities. In light of the rather insignificant registration burden, however, "the prudent course for a shippers' agent today is to pay the \$300 fee and obtain a broker's license if there exists even a possibility that the agent will arrange motor carrier shipments."¹²⁹

B. REGISTRATION REQUIREMENTS AFTER SAFETEA-LU

SAFETEA-LU could have filled the gap left by repealed Section 10562 to clarify registration requirements for third party intermediaries and agents. Indeed, while the Act, signed on August 10, 2005 by President George W. Bush, primarily reauthorizes funding of \$286 billion for federal transportation programs in fiscal years 2004 – 2009,¹³⁰ it also attempts to simplify regulatory oversight of third party intermediaries.¹³¹ Specifically, after SAFETEA-LU, Title 49 now distinguishes registration of *household goods* from registration of *general freight* intermediaries and substantively requires the following:

- (1) Household goods. The Secretary of the Department of Transportation *shall* register a person to be a broker or forwarder of household goods if the Secretary finds that the person is fit, willing, and able to be a broker or forwarder for transportation.¹³²
- (2) Others. The Secretary *may* register a person to provide service as a broker or forwarders (other than a broker or forwarder of household goods) if the Secretary finds that such registration is needed for the protection of shippers and that the person is fit, willing, and able to provide the service.¹³³

By making registration for non-household goods intermediaries optional, SAFETEA-LU provides the Secretary of the Department of Transportation (and the FMCSA) with the power to abolish registration requirements for general freight brokers and forwarders.¹³⁴ SAFETEA-LU also obviates the need for general freight intermediaries to file a bond or other type of security with the FMCSA as long as the FMCSA does not require registration of these intermediaries.¹³⁵ Indeed, 49 U.S.C. Section 13906(b) and (c) expressly condition *registration* of brokers and forwarders on proof of security (under Section 13903 for brokers) and liability insurance (under Section 13904 for forwarders).¹³⁶

129. Andrews, *supra* note 107, at 6.

130. McDonald, *supra* note 50, at 277.

131. See, e.g., SAFETEA-LU, Pub. L. No. 109-59, 4142, 119 Stat. 1144.

132. The household goods registration requirements for brokers and forwarders mirror one another in substance. See 49 U.S.C. §§ 13903, 13904.

133. See 49 U.S.C. §§ 13903, 13904.

134. See SAFETEA-LU § 4142.

135. See *id.*

136. 49 U.S.C. §§ 13906(b)-(c)(1).

That would mean that a “mere” general freight intermediary who might not be required to register would not need to maintain liability insurance or other security as a condition to operating.

These changes to the federal registration regulations clearly have the potential to impact the way intermediaries operate. Without strict registration requirements and assuming acquiescence by the FMCSA, an increasing number of brokers and freight forwarders will probably enter the business. Greater supply of intermediary transportation services thus increases competition in the third party transportation market and makes such services more affordable for shippers and carriers. Less regulatory oversight, however, may also increase the risk involved in doing business with intermediaries. For instance, shippers of non-household goods might not be able to recover for damaged shipments when an underfunded broker or forwarder has not voluntarily acquired liability insurance.

SAFETEA-LU, in effect, allows partial deregulation of the intermediary industry and thus continues the trend towards less government involvement. In many aspects, this deregulation and simplification of oversight is an excellent result that could benefit public consumers:

Recognizes changes in the industry: Modern technology has generally made business dealings more transparent.¹³⁷ Shippers and carriers now use the Internet and various other electronic means to compare and exchange information concerning the reputation and reliability of broker and freight forwarder services.¹³⁸ As a result of increased information exchange, market forces should play a far greater role in filtering out intermediaries that engage in dishonest business practices. SAFETEA-LU appears to recognize this shift towards market-regulation and aims to remove redundant government oversight.

Maintains protection for less sophisticated shippers: While SAFETEA-LU permits the Department of Transportation to relax oversight of general commodities intermediaries, the Act still maintains full oversight of household goods transactions.¹³⁹ SAFETEA-LU and the FMCSA recognize that continued regulation is needed in order to protect less-sophisticated parties that often engage in household goods transactions.¹⁴⁰

Improves efficiency of general freight services: The shift from regulatory

137. See, e.g., Dimitrios Fiதாகis, *The Impact of Information Technology Upon the Shipbroking Profession*, 29 TUL. MAR. L.J. 237, 252-53 (2005).

138. Popular online sources used by shippers and carriers include <http://www.uship.com> (last visited Apr. 8, 2007), <http://www.freightcenter.com> (last visited Apr. 8, 2007), and <http://www.freight101.com> (last visited Apr. 8, 2007).

139. SAFETEA-LU § 4142.

140. See *Brokers of Household Goods Transportation by Motor Vehicle*, 72 Fed. Reg. 5947-01 (proposed Feb. 8, 2007).

oversight to market regulation improves the efficiency with which the third party transportation industry functions. For instance, SAFETEA-LU enables individuals to enter the general freight intermediary industry without the financial burden of filing licensing applications and setting up trust funds or liability insurance. As a result of this lower regulatory overhead, a broker or freight forwarder can offer intermediary services at a lower cost.

SAFETEA-LU therefore finally implements changes that have been overdue for a long time. Unfortunately, however, the Act initially created significant confusion, precisely because it delegated power to the FMCSA to determine whether continued registration was needed.¹⁴¹ More than one year after the Act amended Title 49, there was still “no consensus as to whether the Secretary must initiate a rulemaking to determine whether continued regulation [was] needed to protect the public, or whether this change [had] been accomplished effective August 20, 2005.”¹⁴²

This confusion continued until late 2006 when the FMCSA eventually decided to make a public finding to clarify the gap created by SAFETEA-LU.¹⁴³ In its public “notice of determination” on August 24, 2006,¹⁴⁴ the agency, under Administrator John H. Hill, found that registration of general freight intermediaries is still needed in order to protect shippers from potentially dishonest and unstable intermediaries.¹⁴⁵ The agency based its decision on the continuing significance of freight forwarders and brokers with respect to shipments of general commodities.¹⁴⁶ According to the FMCSA’s Motor Carrier Management Information System, applications for non-household goods brokers increased by thirty percent since 2003 while the number of applications for freight forwarders grew by an astonishing eighty percent since 2003.¹⁴⁷ Considering this growth, associated revenues of over \$16 billion, and significant employment, the agency found that there could be a devastating impact on the national economy if general freight brokers and freight forwarders were to become unreliable “due to lack of confidence in their activities and financial responsibilities.”¹⁴⁸ Registration must therefore continue even for general freight intermediaries in order to ensure proper financial

141. William J. Augello, Esq., *Logistics and the Law Double Trouble*, LOGISTICS MANAGEMENT, Feb. 1, 2006.

142. *Id.*

143. Notice of Determination, 71 Fed. Reg. 50115-02 (Aug. 24, 2006).

144. *Id.*

145. *Id.* at 50,117.

146. *Id.* at 50,116.

147. *Id.*

148. *Id.*

backing and insurance.¹⁴⁹

C. LIABILITY FOR LOST OR DAMAGED GOODS

When shippers and their counsel sue to recover damages for lost or damaged goods as a result of the interstate transportation of the goods, they frequently raise state law claims such as breach of contract, negligence, and fraud.¹⁵⁰ The losses or damages probably implicate each of these areas of liability. What many attorneys might not be aware of, however, is that the Carmack Amendment, currently encoded at 40 U.S.C. Section 14706, preempts all such state law claims¹⁵¹ and is the “exclusive cause of action for contract claims alleging delay, loss, failure to deliver or damage to property.”¹⁵² The Amendment also preempts “claims of damage or loss relating to storage and other services rendered by interstate carriers.”¹⁵³

The Carmack Amendment was initially enacted in 1906 to cover claims for damages and losses that resulted from interstate transportation of goods by rail.¹⁵⁴ In 1935, particularly in response to the emergence of automobiles and trucks, Congress broadened the scope of the Carmack Amendment to create a uniform national liability scheme that extends to motor carriers.¹⁵⁵

Perhaps the most important aspect of Carmack that an attorney for motor carrier intermediaries should be aware of is that the Amendment applies not only to motor carriers but also to freight forwarders.¹⁵⁶ In other words, the freight forwarding company that handles goods which become damaged or lost in the course of interstate transportation will be liable to the shipper under federal law.¹⁵⁷ It does not matter that the freight forwarder itself did not actually transport the goods or cause the

149. See generally *id.*

150. Janet E. Humphrey, *The Carmack Amendment: A Uniform System of Liability For Interstate Transportation Carriers*, Law Offices of Songstad & Randall, <http://70.249.109.64/Pub/Carmack.htm> (last visited May 20, 2007).

151. *Hughes Aircraft v. North American Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992). In *Adams Express Co. v. Croninger*, the Supreme Court specifically held that the Carmack Amendment covers “[a]lmost every detail . . . so completely that there can be no rational doubt that Congress intended to take possession of the subject, and supercede all state regulation with reference to it.” 226 U.S. 491, 505-06 (1913).

152. *Hall v. N. Amer. Van Lines, Inc.*, 476 F.3d 683, 688 (9th Cir. 2007).

153. Humphrey, *supra* note 150 (citing *Margetson v. United Van Lines, Inc.*, 785 F.Supp. 917, 919 (D. N.M. 1991)).

154. See *Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 58-59 (2d Cir. 2006); see also Fisher, *supra* note 44, at 164.

155. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935).

156. 49 U.S.C. § 14706(a) (2005).

157. *Id.*

damage or loss.¹⁵⁸ The provisions added by the Carmack Amendment create strict liability as long as the plaintiff can set forth by a preponderance of the evidence the prima facie elements of the cause of action.¹⁵⁹ Thus, the plaintiff does not need to prove negligence.¹⁶⁰ The carrier or freight forwarder may limit this strict liability only by bargaining with the shipper for alternative contract terms.¹⁶¹ To establish the prima facie case, the plaintiff-shipper must specifically prove that:

- (1) the goods were delivered to the carrier in good condition, and
- (2) the goods arrived in damaged condition, and
- (3) there were specific, quantifiable damages.¹⁶²

Unlike a freight forwarder, a property broker is not considered a "carrier" within the meaning of the Carmack Amendment.¹⁶³ The freight forwarder is directly involved in the assembly and carriage of the shipper's goods.¹⁶⁴ In contrast, the broker merely facilitates communication and cooperation between shippers and carriers.¹⁶⁵ The broker generally does not take ownership of the freight or organize the transportation on its own behalf.¹⁶⁶ The broker therefore assumes the rights of a shipper in Carmack claims against carriers and is largely shielded from claims of liability that might arise when the carrier damages or loses the shipper's goods.¹⁶⁷

In a dispute involving damaged or lost goods, the Carmack Amendment gives the freight forwarder several procedural rights. For instance, the freight forwarder may require that the shipper state its claim within nine months of the shipment that resulted in the damage or loss of the shipper's goods.¹⁶⁸ In addition, the forwarder cannot be held liable for claims under the Carmack Amendment if the shipper does not initiate a civil action within two years after the shipper's claim for damages is de-

158. See Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Good by Sea: The Multimodal Problem*, 79 TUL. L. REV. 1461, 1464 (2005).

159. *Id.* at 1464-65.

160. See *id.*

161. *Hughes Aircraft v. North American Van Lines*, 970 F.2d 609, 611-12 (9th Cir. 1992).

162. *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

163. Richard A. Griggs & Andrew T. Stephenson, *Recent Developments in Commercial Transportation Litigation*, 41 TORT TRIAL & INS. PRAC. L.J. 295, 308 (2006).

164. 14 AM. JUR. 2D *Carriers* § 651 (2007).

165. Notice of Determination, 71 Fed. Reg. 50,115 (Aug. 24, 2006).

166. See *id.*

167. See, e.g., *B & D Appraisals v. Gaudette Machinery Movers, Inc.*, 733 F.Supp. 505, 509 (D. R.I. 1990) (broker who organized shipping was entitled to raise Carmack liability claims as shipper against the carrier); *Taft Equip. Sales Co. v. Ace Transp., Inc.*, 851 F.Supp. 1208, 1211 (N.D. Ill. 1994) (carrier, who acted as transportation broker for shipper and hired another carrier to conduct the actual transportation service, was entitled to enforce Carmack liability against the other carrier).

168. 49 U.S.C. § 14706(e)(1) (2005).

nied.¹⁶⁹ “The purpose of a claim period is to provide the carrier with knowledge that the shipper will be seeking reimbursement.”¹⁷⁰

Counsel for carriers and freight forwarders may be particularly interested in the limitation of liability provisions set forth in the Carmack Amendment. Generally, the Carmack Amendment subjects a motor carrier to absolute liability for “actual loss or . . . injury . . . to property.”¹⁷¹ However, according to the Amendment, a carrier may limit its liability for lost or damaged goods that were shipped in interstate commerce “to a value established by written declaration of the shipper or by a written agreement.”¹⁷² In an action concerning the enforceability of such a limited liability agreement, the carrier has the burden of proving that it has complied with the following requirements.¹⁷³ Specifically, the carrier must:

- (1) maintain a tariff that is within the prescribed guidelines of the Surface Transportation Board,¹⁷⁴
- (2) provide the shipper with an opportunity to “choose between two or more levels of liability,”¹⁷⁵
- (3) obtain the shipper’s agreement with respect to its choice of liability,¹⁷⁶ and
- (4) issue “a receipt or bill of lading prior to moving the shipment.”¹⁷⁷

The Carmack Amendment impliedly prescribes a number of common sense steps that counsel representing interstate common carriers and intermediaries should follow in order to steer clear of tort liability that might arise from damage to, or loss of, goods. First, an attorney should move to dismiss all state law claims that aggrieved shippers lodge against the carrier or freight forwarder.¹⁷⁸ “This will typically result in the reduction of a shipper’s available damages”¹⁷⁹ because the various and potentially costly state tort and contract claims are replaced by the likelihood of liability created by only one cause of action. The carrier’s attorney must then determine whether the claimant-shipper complied with the

169. *Id.*

170. Humphrey, *supra* note 150.

171. Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 137 (1964).

172. 49 U.S.C. § 14706(f).

173. Hughes Aircraft v. North American Van Lines, 970 F.2d 609, 611-12 (9th Cir. 1992).

174. *Id.* To effectively limit its liability in a filing with the Surface Transportation board, “a carrier must list with each rate listed in the tariffs a ‘released rate,’ which is the maximum dollar liability per unit of weight for which the carrier will be liable in the event of damage to the cargo.” *Id.* (citing Rohner Gehrig Co., Inc. v. Tri-State Motor Transit, 950 F.2d 1079, 1082 (5th Cir. 1992)).

175. *Hughes Aircraft*, 970 F.2d at 612.

176. *Id.*

177. *Id.*

178. *See* Humphrey, *supra* note 150.

179. *Id.*

maximum periods for filing claims and initiating civil actions. Obviously, a late claim or action will probably eliminate the potential for liability. Finally, the attorney should discuss with the carrier the possibility of creating limited liability riders to shipping contracts in order to circumscribe the possible liability that may result from damaged or lost goods.

D. HOLDING FREIGHT CHARGES IN TRUST FOR CARRIERS

An issue that often arises in the context of third party intermediary services involves non-payment of transportation charges where the intermediary receives payment for the transportation service from the shipper but does not properly disburse the payment to its carriers.¹⁸⁰ Should the intermediary be liable to come up with funds to satisfy the carriers' claims, or does ultimate responsibility always remain with the shipper? The answer depends on the type of relationship that the shipper has with the intermediary.¹⁸¹

Ordinarily, when a shipper deals with a freight forwarder, transportation charges billed by the carrier are enforceable only against the forwarder.¹⁸² The shipper is absolved from a carrier's claims by virtue of a lack of privity of contract between the parties. Indeed, the freight forwarder by definition takes charge of the shipment, issues a bill of lading to the shipper, and deals with the shipper as if the forwarder were the carrier.¹⁸³ On its own behalf, the forwarder then deals with actual carriers as the *de facto* shipper.¹⁸⁴ The carriers issue their bills of lading to the freight forwarder and might never be aware of who the original shippers are.¹⁸⁵ The freight forwarder becomes responsible to the carrier for all freight charges.¹⁸⁶

The result is different where a freight forwarder or broker deals with the shipper in the capacity of an agent or conduit for the shipper. The broker's activity, by definition, generally does not affect privity of contract between the shipper and the carrier because the broker does not interact with the carrier on its own behalf.¹⁸⁷ Instead, the broker merely

180. See Andrews, *supra* note 107, at 8.

181. See *Transp. Revenue Mgmt. v. Freight Peddlers, Inc.*, 2000 WL 33399885, 2002 Fed. Car. Cases ¶ 84,141, at *6 (D.S.C. 2000).

182. See 14 AM. JUR. 2D *Carriers* § 651 (2007) ("a freight forwarder . . . assumes responsibility for the shipment from receipt to the place of destination").

183. See *id.*; see also *Koninklijke Nedlloyd BV v. Uniroyal, Inc.*, 433 F.Supp. 121, 128 (S.D.N.Y. 1977).

184. 14 AM. JUR. 2D *Carriers* § 684 (2007).

185. *Id.*

186. *Id.*

187. See Notice of Determination, 71 Fed. Reg. 50,115 (Aug. 24, 2006) (explaining that brokers arrange transportation services on behalf of the shipper and generally do not issue bills of lading).

assists the shipper in identifying acceptable carriers and takes the role of a conduit for forwarding shipping charges from the shipper to the carrier.¹⁸⁸ The carrier therefore still issues its bill of lading directly to the original shipper or to the broker with the knowledge that the broker is acting on behalf of the identified shipper.¹⁸⁹ Of course, when a freight forwarder interacts with the shipper in a similar broker-shipper agency manner, the same relationship between shipper and carrier results whereby the shipper ultimately remains responsible for all freight charges.¹⁹⁰

In a “mere” conduit relationship with the intermediary, can a shipper satisfy its duty to pay the carrier by making a bulk payment to the intermediary with instructions to satisfy carrier charges? Does this payment to the intermediary establish a constructive trust where the intermediary retains only legal title while the carriers hold equitable title as beneficiaries of the trust?

1. *Using Intermediaries as Conduits to Satisfy Shipping Charges*

As described above, the property broker is by definition a conduit.¹⁹¹ Not only does the broker interact with shippers to facilitate communications between carriers and shippers, but the broker may also contract with shippers and carriers to collect and forward shipping charges.¹⁹² There is nothing inherently risky or wrong in this type of “collection” agreement. Indeed, federal regulations concerning record retention requirements implicitly allow brokers to act as payment conduits by specifically requiring brokers to record “[t]he amount of any freight charges collected by the broker and the date of payment to the carrier.”¹⁹³

2. *Satisfying Carrier Claims with Surety Agreements or Trust Funds*

What responsibilities does the intermediary-conduit have once it accepts the shipper’s payment? By merely collecting shipping charges, the intermediary-conduit does not automatically absolve the shipper from making sure that carriers are paid, because the intermediary does not destroy the privity of contract between shippers and carriers.¹⁹⁴ This is because conduits do not attempt to assume the liabilities and rights of

188. *Id.*

189. *Id.*

190. Brokers and freight forwarders are defined by the roles they assume. Thus, a freight forwarder who engages in brokerage activities only must be considered a broker. *See* 13 AM. JUR. 2D *Carriers* § 87 (2007) (outlining the roles that define brokers and freight forwarders).

191. *Id.*

192. *E.g.*, Freight Peddlers, Inc., 2000 WL 33399885, at *6 (intermediary contracted with carriers to collect and forward freight charges).

193. 49 C.F.R. § 371.3(a)(6) (2007).

194. *See* Registration of Brokers and Freight Forwarders of Non-Household Goods, Notice

shippers.¹⁹⁵ The risk therefore remains with the shipper to make sure that carriers are paid even when a dishonest intermediary-conduit does not correctly forward the shipper's payment.¹⁹⁶

The FMCSA has recognized this risk to shippers and carriers and therefore "will not issue a property broker license until a surety bond or trust fund for the full limits of liability" is in effect.¹⁹⁷ The purpose of the security is to "ensure the financial responsibility of the broker"¹⁹⁸ and arguably to protect shippers and carriers from nonpayment that might occur when the intermediary absconds with the collected payments. Theoretically, outstanding shipping claims can be paid from this security or trust fund. FMCSR Section 387.313 specifically prevents a broker from canceling or withdrawing a security agreement "until 30 days after written notice has been submitted to the FMCSA" in order to prevent the broker from frustrating a shipper's or carrier's claim to the security.¹⁹⁹

Unfortunately, many carriers and shippers are either unaware of the broker's surety requirement or have claims that surpass the \$10,000 minimum surety level.²⁰⁰ In response, on February 8, 2007, the FMCSA published an announcement inviting public comments concerning potential changes to the surety regulations – at least with regard to household goods brokers.²⁰¹ The FMCSA's proposals would modify FMCSR Section 387.307 to raise the minimum level of security to \$25,000 and to require brokers to notify consumers about the availability of sureties or trust funds.²⁰²

3. *Imposing Constructive Trusts Upon Freight Payments*

General freight carriers and shippers or those with higher shipping claims are not significantly benefited by the proposed changes and no regulations apart from the surety requirement exist that might directly protect shippers and carriers when transportation payments given to brokers become unavailable. As a result, injured parties have claimed that

of Determination, 71 Fed. Reg. 50115, 50115 (proposed Aug. 24, 2006) (noting that brokers do not generally assume liability for the loss of goods).

195. *E.g.*, Freight Peddlers, 2000 WL 33399885, at *6 (agreement between intermediary and carrier to collect shippers' payments did not thereby impose liability for non-payment upon intermediary).

196. *See id.*

197. 49 C.F.R. § 387.307(a) (2007).

198. *Id.*

199. 49 C.F.R. § 387.313(d) (2007). The thirty day limit does not apply where the broker is merely replacing one security with another. *Id.* at § 387.313(e). Termination in this situation can be effective immediately as long as a new security bond or surety becomes available. *Id.*

200. *See* Brokers of Household Goods Transportation by Motor Vehicle, Notice of Proposed Rule Making, Request for Comments, 72 Fed. Reg. 5947, 5950 (proposed February 8, 2007).

201. *Id.* at 5947 & 5951.

202. *Id.* at 5950 & 5953.

payments to intermediary-conduits are held in trust for the benefit of carriers.²⁰³ In some Canadian provinces, such as Québec, trust accounts are expressly required when certain brokers accept payments from shippers.²⁰⁴ While similar outright trust requirements do not exist in the United States, some Circuits, such as the Second Circuit in *Transportation Revenue Management v. Freight Peddlers*, have been willing to impose constructive trusts.²⁰⁵

Freight Peddlers provides a helpful analysis for understanding when a court might impose a constructive trust specifically on intermediaries. In *Freight Peddlers*, the carriers, represented by assignee Transportation Revenue Management (TRM), sued bankrupt broker Freight Peddlers for shipping charges that Freight Peddlers had collected but never forwarded to its carriers.²⁰⁶ Instead of forwarding the payment, Freight Peddlers transferred the collected charges to defendant bank pursuant to a security interest that the bank maintained in Freight Peddlers' accounts receivable.²⁰⁷ TRM claimed that the broker, as "mere" conduit, had received the shipping charges as trustee for the benefit of the carriers.²⁰⁸ As such, the bank as creditor of Freight Peddlers did not have a valid claim to the charges and could not acquire full equitable and legal title.²⁰⁹ The bank, therefore, should be obliged to transfer the charges to TRM.²¹⁰ In counterargument, the bank claimed that Freight Peddlers had received full legal and equitable title in the freight charges and became nothing more than a debtor to the carriers for the outstanding shipping payments.²¹¹

The court found that the language of the agreement between Freight Peddlers and the motor carriers did not create an *express* trust.²¹² However, according to the court, a *constructive* trust could be imposed because (1) the language and conduct of the parties proved that Freight Peddlers was a "mere" conduit, (2) the circumstances surrounding the transaction made this the only rational finding, and (3) a different holding would lead to inequity and potential fraud.²¹³

203. See *Freight Peddlers*, 2000 WL 33399885, at *1.

204. Transport Act, R.S.Q., ch. T-12, § 42.1 (2007) (Qué.), <http://www.canlii.org/qc/laws/stat-t-12/20070117/whole.html> (last visited May 18, 2007). The holder of a brokerage permit "shall deposit in a trust account the sums he receives . . . and administer them in accordance with the administrative and management standards prescribed by government regulation." *Id.*

205. *Freight Peddlers*, 2000 WL 33399885, at *5.

206. *Id.* at *1.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. See *id.* at *3.

212. *Id.*

213. See *id.* at *5.

The court specifically referenced the language of the parties' contract which required Freight Peddlers to perform "all billing and collecting services" and to "pay the carrier . . . upon receipt of the . . . bill of lading."²¹⁴ These requirements, the court determined, were consistent with the FMCSR Section 371.3(a)(4) definition of a "conduit" that held only legal title.²¹⁵ The conduct expected of a conduit would be to merely forward the shippers' payments to the carriers.²¹⁶ Freight Peddlers could contradict this presumption only by proving that the company paid carriers from its own general fund before receiving shippers' payments.²¹⁷ Ultimately, the defendant was unable to rebut this presumption because it failed to prove circumstances where it did pay carriers from its general fund.²¹⁸ Determining that "it would indeed be unjust and inequitable to allow Freight Peddlers to hold anything other than legal title to the freight charges,"²¹⁹ the court finally concluded that Freight Peddlers "was merely a collecting conduit" which could not "use the collected freight charges to pay off its loan from the bank."²²⁰

Earlier cases expand on several assertions underlying the decision in *Freight Peddlers*. In the 1973 case *In re Penn Central Transportation Company*²²¹ and the 1997 case *Columbia Gas Systems*,²²² the Third Circuit expressed the fundamental rule that "[f]ederal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient."²²³ *In re Penn Central* developed this rule by analyzing the basic common law requirements for establishing a trust. The court first looked towards the Restatement (Second) of Trusts Section 2, which requires that parties to a trust agreement manifest an intention to split the equitable and legal title to property.²²⁴ The court explained that this manifestation could be ascertained from "the facts and circumstances surrounding the transaction and the relationship of the parties."²²⁵ In particular, the fact that the parties were not demanding interest on conduit payments underscored the difference to the

214. *Id.* at *3.

215. *Id.* at *5; 49 C.F.R. § 371.3(a)(4).

216. *Freight Peddlers*, 2000 WL 33399885, at *5.

217. *Id.* The court also noted that "the commingling of trust funds with general revenues [typically] indicates a debtor-creditor relationship." *Id.* at *5 n.5 (quoting *In re Columbia Gas Sys. Inc.*, 997 F.2d 1039, 1060 (3d Cir. 1993)).

218. *Id.* at *5.

219. *Id.*

220. *Id.*

221. *In re Penn Cent. Transp. Co.*, 486 F.2d 519 (3d Cir. 1973).

222. *In re Columbia Gas Sys., Inc.*, 997 F.2d 1039 (3d Cir. 1993).

223. *Id.* at 1056.

224. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); *In re Penn Cent. Transp. Co.*, 486 F.2d at 524 (citing RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)).

225. *In re Penn Cent. Transp. Co.*, 486 F.2d at 524.

usual debtor-creditor relationship that “entails the right to use another’s money, the usual quid pro qui for which is the obligation to pay interest.”²²⁶

While *In re Penn Central* concerned trusts that arose from railroad interline contracts, the more recent 1997 Sixth Circuit case, *Parker Motor Freight v. Fifth Third Bank*,²²⁷ extends the same conduit trust analysis to motor carrier interline arrangements.²²⁸ Few cases beyond *Freight Peddlers* discuss the *In re Penn Central* analysis with respect to motor carrier intermediaries. The most current case on point is the 2006 federal bankruptcy case *In re Gulf Northern Transport*,²²⁹ which concluded that a payment made by the shipper directly to the carrier satisfied any service fee claims that a broker had against the shipper.²³⁰ In particular, the bankruptcy court maintained that the broker, as agent of the carrier, should have been able to retrieve the fee after the payment was made to the carrier.²³¹ The shipper was not required to submit the payment directly via the broker because the broker was a “mere” conduit.²³² *As a conduit, the broker would simply have held the money in trust for the carrier* and, absent consent by the carrier, would not have had any right to claim brokerage fees from the charges held in trust.²³³

While a basis for imposing constructive trusts is not explicitly mentioned within federal regulations, courts such as those involved in the cases discussed above have generously relied on the constructive trust theory to remedy fraud and inequity. Brokers might therefore prudently expect that courts will attempt to establish outcomes similar to *Freight Peddlers* in future cases that involve non-paying conduits and potential unjust enrichment.²³⁴

V. CONCLUSIONS

Federal regulations create a complex web of rules and procedures that attorneys for shippers, carriers, and intermediaries must master in order to provide adequate legal counseling. To correctly interpret these rules and procedures, an attorney must understand the public policy implications that give rise to government regulation. A history of fraud and collusion in the third party transportation industry was the main impetus

226. *Id.*

227. *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F.3d 1137 (6th Cir. 1997).

228. *Id.* at 1140.

229. *In re Gulf N. Transp., Inc.*, 340 B.R. 111, 111 (Bankr. M.D. Fla., 2006).

230. *Id.* at 122-23.

231. *Id.* at 122.

232. *See id.* at 122-23.

233. *See id.*

234. *See Andrews, supra* note 107, at 8.

for greater oversight and control.²³⁵ From these historical concerns arise the fairly strict registration and operating procedures that brokers and freight forwarders must still grapple with today.

Considering the current state of the transportation industry and the greater sophistication of commercial and household shippers thanks to technological innovation, the government's approach to heavy-handed regulation appears out of place. Instead of taking a skeptical view towards brokers and freight forwarders, the government should loosen its grip over the industry to allow for greater flexibility in the provision of services to carriers and shippers. Perhaps most obviously, shippers and carriers in today's technologically-savvy environment are able to compare and contrast intermediary services, reliability, and reputation. The shipping public is therefore less frequently prone to the often horrific ethical violations that ignited the government's regulatory quests at the end of the nineteenth century.

SAFETEA-LU provides for an opportunity to relax the non-HHG registration requirements that have, up until to now, increased the burden of providing intermediary services for non-consumer shippers. Unfortunately, any hope that the Act might simplify intermediary services by potentially eliminating registration requirements for general commodities intermediaries was extinguished in August 2006 when the Department of Transportation issued its finding that it would continue to impose its strict oversight.

Instead of maintaining regulations to restrict participation in the industry, the government should expand on its efforts to consolidate and streamline laws that affect third party transportation. The government should look towards the Carmack Amendment as the role model for future regulation, which provides fairly clear guidance with respect to claims for lost and damaged goods.²³⁶ In particular, the government should establish guidelines with respect to trust relationships between carriers, shippers, and conduits. Considering the outcome in cases such as *Freight Peddlers*, *Parker Motor Freight*, and *In re Penn Central*, an opportunity exists for creating a uniform rule that explains whether conduits hold payments in trust for the benefit of motor carriers.²³⁷ Unlike restrictive regulations that aim to reduce the supply of third party intermediaries, a comprehensive "trust" rule has the potential to avoid expensive litigation and ambiguity that raises the cost of providing transportation services.²³⁸

235. See Nadeau, *supra* note 1, at 964.

236. See, e.g., George W. Wright, *Slouching Toward a Morass: The Case for Preserving Complete Carmack Preemption*, 1 DEPAUL BUS. & COM. L.J. 177, 212-13 (2003).

237. See generally Andrews, *supra* note 107, at 8.

238. *Id.*