

# **CARGO UPDATE NEWSLETTER**

## **ARE YOU A BROKER OR A CARRIER? – September 2012**

You are licensed as a broker and arrange transportation for your shipper clients with licensed motor carriers so you ask, why is he asking me this question? Well, the answer might not be as simple as that, since when it comes to a cargo loss or damage claim, the courts will look not at what you say you are, but rather, how you hold yourself out to the public and your relationship with the shipper. The difference for liability purposes can be substantial. Although brokers typically are liable only for their own negligence and are not subject to the Carmack Amendment, brokers who hold themselves out and act like carriers have been held to strict motor carrier liability under Carmack.

Several recent decisions have made clear that whether a company is a broker or a carrier is not determined by how it labels itself, but by how it holds itself out to the world and its relationship to the shipper. See, for example, *Peerless Importers, Inc. v. Cornerstone Systems, Inc.*, 2010 WL 549197 (NY 2010); *Custom Cartage, Inc. v. Motorola*, 1999 WL 965686 (N.D. IL 1999); *Travelers Insurance a/s/o Vera Bradley Designs v. Panalpina, Inc.*, 2010 WL 3894105 (N.D. IL 2010); *Hewlett-Packard Co. v. Brothers Trucking Enterprises, Inc., et al.*, 373 F. Supp.2d 1349 (S.D. FL 2005).

In *Vera Bradley*, the court found a licensed property broker, IGT Transportation Services, Inc., (“IGT”), to be a carrier notwithstanding that it was not licensed as a motor carrier. The case arose from the destruction by fire of a container of Vera Bradley pajamas being trucked from Illinois to Indiana. Vera Bradley had retained Panalpina to coordinate the transport. Panalpina issued a delivery order dispatching the load to IGT. IGT in turn directed a delivery order to trucker, Buckley Transportation, Inc., (“Buckley”). Buckley transported the load to its trucking facility in Indiana where it was severely damaged in a fire prior to delivery to Vera Bradley. Vera Bradley and its subrogated insurer sued Panalpina, IGT and Buckley under the Carmack Amendment. Vera Bradley and IGT filed cross-motions for summary judgment on the issue of whether IGT was a broker or a carrier. In considering this issue, the court made clear that the status of “broker” or “carrier” focuses on the relationship between IGT and Panalpina, not the label put on IGT’s services, which relationship included considerations of how IGT held itself out to the public and whether IGT assumed responsibility to deliver the container. There was conflicting testimony regarding what authority Panalpina believed IGT held and how IGT held itself out to Panalpina and the public, but the court found that neither this nor the fact that IGT held a broker’s license created a material issue of fact precluding summary judgment. Rather, the court found that the delivery order Panalpina sent to IGT established an obligation to transport the container, and held that under Carmack, IGT was not a broker because it assumed responsibility for the shipment and used another carrier, Buckley, to fulfill its obligation.

To summarize, courts will look at how a broker holds itself out to the public and its relationship to the shipper in determining the broker’s status as broker or carrier under Carmack, not at what it says it is or how it labels itself. Each State’s rules, decisions, and laws are different, so professional advice should be sought with regard to which rules, decisions and laws are applicable to your particular State and to your particular circumstances