Between a Rock and a Hard Place: A Creative Claims Discussion

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- **Panelists:**
  - Grant Goldsmith, Vice President Business Development, Avalon Risk Management
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  - Cameron Roberts, Attorney, Roberts & Kehagiaras LLP
Between a Rock and a Hard Place:

A Creative Claims Discussion
This Panel addresses the claims not paid fully, properly or timely by a Carrier

• Intermediaries include freight brokers and forwarders, ocean transportation intermediaries, indirect air carriers, etc.

• Intermediaries typically have some liability for claims not paid by custodial carriers that are hired to move freight

• The liability can range from the low end of very limited liability to the high end of the full value of the cargo plus other expenses

• Intermediaries should clearly establish your liability

• Your insurance coverage should mirror your liability assumed in the contract or agreement unless you have decided to retain or self-insure the additional liabilities
What was the highest loss you paid not covered by the Motor Carrier’s Insurance?
What was the highest loss you paid not covered by the Motor Carrier’s Insurance?
What is the average size of the loss you have paid not covered by the Motor Carrier’s Insurance?
What is the average size of the loss you have paid not covered by the Motor Carrier’s Insurance?
What Establishes Your Liability -

• How do you hold yourself out to the shipping public?
  • Broker
  • Freight Forwarder
  • Motor Carrier

• Are you a common law carrier?

• Is your liability limited by contract?

• Who had care, custody and control at the time of loss?

• What was the mode of transportation at the time of loss?

• What is the Shipper’s Expectation of recovery?
Are you able to use your TIA standard contract or do you frequently agree to use the Shipper’s Contract?
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What Establishes Your Liability -

• What is the applicable law?
• What is the applicable forum and jurisdiction?
• Are you’re an intermediary with or without carrier liability?
• Are all parties on notice?
• Standing?
• Have the cargo owners rights been preserved?
• Does the cargo owner have 1st party cargo insurance?
• What viable sources of claim payment exist?
Do Shipper’s demand claims payment from you even if your contract limits your liability?
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What do you need to make a valid Claim -

• **Claim Demand from Shipper**
• **Loss Report**
• Bill of lading or air waybill
• Commercial invoice/Rate Quote
• Broker - Carrier Agreement or Contract with Carrier
• **Broker - Shipper Agreement or Contract with Shipper**
• All Correspondence
• Credit application
• POA
• Customs documents (if applicable)
• Survey (if required)
• Copy of Motor Carrier Certificate of Insurance
How many unpaid Motor Carrier Claims do you address, on average, each year?
How many unpaid Motor Carrier Claims do you address, on average, each year?
Four Complex Claims Scenarios
“The Silent Partner”

The hired Motor Carrier has a valid cargo damage claim (on behalf of the shipper) which they submit to their Motor Truck Cargo Insurer. This MTC insurer just sits on the claim – they don’t pay it but they also don’t deny it. When you ask them for a position on the claim they just ask for more and more information regarding the loss. *The shipper ultimately gets tired of these delay tactics and asks the Property Broker to pay the claim from their own coverage – but how can the Property Broker’s liability policy pay a claim that has yet to be either embraced or denied by the Motor Carrier’s policy?*
What is the typical amount of time you have to wait in order for the Motor Carrier’s Insurance to pay the Shipper?
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“Silent Partner” Claims Considerations

• You need to know your own Contingent Cargo Coverage and when you are able to submit a claim to your policy that is not being addressed by the MTC Policy – What is the timeline for this

• You need to consider enforcing your Broker – Carrier Indemnity rights

• You need to have a business partnership with the carrier and a strategy to pursue all available options for payment of the claim other than insurance

• If you pay the claim under your Contingent or Excess Coverage you need all rights of recovery subrogated to your insurer in order to allow them to pursue recovery for you
Current Certificate of Liability Wording

“...ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER.”

“...DOES NOT AFFIRMATIVELY OR NEGATIVELY AMMEND, EXTEND OR ALTER THE COVERAGE...”

“...DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURERS....AND THE CERTIFICATE HOLDER.”
Do you believe that the Certificate of Insurance is an adequate way to evaluate a Motor Carrier’s Insurance?
Do you believe that the Certificate of Insurance is an adequate way to evaluate a Motor Carrier’s Insurance?
“The Motor Carrier’s Certificate of Insurance shows a limit for Coverage – but after the loss there isn’t coverage”

The Property Broker follows their Carrier Selection Process fully and gets the required certificate of insurance showing the required limits for coverage however the Motor Carrier’s MTC policy also has high deductibles/retentions and limiting language in the exclusions resulting in no coverage being available at the time of the loss. The claim isn’t paid by the MTC insurance and now the Property Broker has to decide whether they will enforce their rights of Indemnity under the Broker – Carrier Agreement or push their own policy to pay the claim on contingency.
How do you pay for losses on behalf of the shipper that the Motor Carrier’s Insurance does not pay?
How do you pay for losses on behalf of the shipper that the Motor Carrier’s Insurance does not pay?
“Certificate but still no Coverage” Claims Considerations

• Will your Contingent Cargo Coverage provide coverage for a claim not coverage by the MTC Policy? If so at what limits?

• Can this claim turn into an E&O Claim under the concept of “Negligent Selection” of a carrier that did not have the proper insurance?

• Can you pursue this claim under your Indemnity provision or is the carrier too small (in terms of assets) to pay the claim?

• How does paying this claim impact your policy loss ratio and ultimately the increase to your annual insurance cost?
“I don’t care if it is covered in our contract or not – as long as I present a reasonable claim you must make me whole – (Shipper Statement)”

The *Shipper* decides to ignore the provisions of their *Shipper-Broker Agreement* and essentially demands full reimbursement of all claims made to a *Property Broker* within 30 days as long a “reasonable claim for loss was made” to the *Property Broker*. Perhaps the Shipper also leverages the business relationship or money owed to the Property Broker for other loads to ensure payment of a claim even though the Shipper – Broker Agreement does not require the PB to address the claim.
Do Shipper’s leverage your flow of business or threaten to stop using your services if you do not pay a claim?
Do Shipper’s leverage your flow of business or threaten to stop using your services if you do not pay a claim?
“Just pay me” Claim Considerations

• This happens – frequently
• Your liability policy requires a proper demand based on a contractual liability and negligence in order to pay – insurance policies don’t make payments just to make shipper’s happy
• “Other language” in Shipper – Broker contracts can supersede, amend the requirements in the “Insurance” section of the contract
• Have your legal counsel review all non standard contracts and agreements and send all non standard contracts and agreements to your insurers for review and approval
Does your legal counsel review all non standard contracts?
Does your legal counsel review all non standard contracts?
Does your insurance provider review all non standard contracts?
Does your insurance provider review all non standard contracts?
“Identity Theft”

Someone steals the Carrier’s Identity and picks up a valid load arranged by you for a Shipper that then never reaches the destination. The Shipper demands compensation by blaming the Property Broker for the data breach and identity theft resulting in the theft of the cargo. Typical “theft” coverage under a contingent cargo policy does not cover “theft due to identity theft” as normal theft coverage often requires a lock to be broken or a load to be physically stolen on the road or at a rest stop, etc. Insurance policies typically exclude “voluntary parting” of property as they want the property owner to take sufficient steps to safeguard their property. In this scenario there is no “motor carrier” to work with on the claim as the motor carrier was fictitious.
How often does the motor truck cargo insurance provided by the Motor Carrier fully pay the claim?
How often does the motor truck cargo insurance provided by the Motor Carrier fully pay the claim?
“Identity Theft” Claims Considerations

• This is one of the fastest growing causes of cargo loss
• Insurance coverage is either not available or possibly offered at lower limits than the normal cargo damage/theft limit
• Cyber Claims such as this are on the rise across all industries and law enforcement is very limited
• Proper Carrier Identification processes at the time of pick up can go a long way to preventing these kinds of losses
Summary

• Your contract establishes your liability – use a TIA model contract or your standard contract as frequently as possible – when you must use the Shipper’s contract ask your legal counsel and insurance representative to review in order to protect your interests

• An Indemnity Provision is only valuable if it is enforceable – make sure you are working with good partners that will cover their liability

• A Certificate of Insurance is only a tool to verify insurance exists – you really need to see the policy to verify the coverage

• Identity Theft and Cyber Crime are the fastest growing loss areas – you need to consider your business exposure to both of these risks

• No Claim gets better with Time – pursue all claims vigorously
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