

DOES A BROKER HAVE A DUTY TO HIRE A CARRIER WITH ADEQUATE CARGO INSURANCE?

By George Carl Pezold

This question has come up a number of times on the Council's Q&A forum, so we thought that this short memorandum might be of interest. Two court decisions that address the question of whether a broker has a duty to hire a carrier with cargo insurance that adequately covers the commodity and/or value of the shipper's goods are discussed below.

Chubb Group of Ins. Companies v. H.A. Transp. Sys., 243 F. Supp.2d 1064 (C.D.Cal. 2002)

This case involved the theft of a shipment of 1200 cases of menthol cigarettes en route from Madrid, Spain to Benecia, California that was stolen in South Gate, California. Cigarettes Cheaper had contracted with a broker, HA to arrange for the inland leg of the shipment, and HA subcontracted the load to R & G Trucking. Chubb paid the claim, subrogated to the interests of Cigarettes Cheaper, and sued the broker, HA, alleging breach of contract, negligent entrustment (hiring), and negligence in hiring a carrier that had inadequate insurance to cover the cargo loss.

In dealing with the question of whether HA had a legal duty to hire a carrier with adequate insurance, the court stated:

Plaintiff cites no caselaw establishing or recognizing a duty on the part of a broker to ensure that its carrier has adequate insurance to cover potential losses or damage to the cargo. Moreover, this Court has been unable to locate any cases that are directly on point. For example, in *Government of the U.K. v. Northstar Services, Ltd*, the Court analyzed a broker's duty relating to its carrier's insurance coverage, but that duty arose from contract obligations, not tort. 1 F. Supp.2d 521, 527 (D.Md. 1998).

Moreover, where the shipper — Cigarettes Cheaper! in this case — is fully insured for the loss or theft of its cargo, it would appear to be most dubious for the law to impose a duty on its broker to ensure that the carrier has insurance to cover the same loss. Presumably, such a carrier would be more expensive. Here, Plaintiff Chubb is the shipper's insurance company. Chubb has already compensated Cigarettes Cheaper! for the loss of its shipment and now is suing as a subrogee. It seems unlikely that Cigarettes Cheaper! would have chosen to pay more for the shipment so that its insurance company would be compensated in the event of loss. In fact, the President of HA testified that HA offers an additional service whereby it buys insurance on behalf of a customer "if that customer is not in a position to get their (sic) own insurance." Huttman Deposition at 34-35. Presumably, Cigarettes Cheaper! never requested that service. It would be anomalous, therefore, to hold that HA had a duty to insure Cigarettes Cheaper!'s shipment anyway. *Cf. Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1999) (holding that a shipper who self-insures is not disadvantaged when it is denied the opportunity to "opt out" of an air carrier's limited liability provision by paying the carrier more money for redundant coverage).[fn8]

Therefore, the Court holds that because Chubb failed to establish that HA had a duty to ensure that the carrier it selected was insured against the same loss for which Cigarettes Cheaper! was itself insured, the Court GRANTS HA's Summary Judgment motion as to Chubb's negligence claims.

Huntington Operating Corp. v. Sybonney Express, Inc.(No. H-08-781 S.D.Tex. 8-3-2009)

A shipper of high-value perfumes, Huntington Operating Corp., sued a broker, Custom Direct Logistics, and the motor carrier, Sybonney Express, that had been in possession of the shipment when it was stolen en route from Miami to Houston. Huntington brought suit against Custom because, according to Huntington, Custom was responsible for ensuring that Sybonney Express had adequate insurance to cover the cargo.

This decision deals with the claims against the broker based on the Texas Deceptive Trade Practices Act, negligence, negligent misrepresentation, common law fraud, negligent entrustment, breach of fiduciary duty, and breach of contract.

The broker brought a motion for summary judgment in an attempt to dismiss the various causes of action. In discussing the factual background of the case the court found that there had been a course of dealing between Custom and Huntington, that Custom knew the value of the perfume and had represented to Huntington that it would only deal with properly licensed and insured carriers.

The court refused to grant Custom's motion as to five of the causes of action: the DTPA claim; the negligence claim; the negligent misrepresentation claim; and the breach of contract claim.

While normally a broker would not have been liable for failing to ascertain whether the carrier had adequate cargo insurance, and that it would cover its customer's specific commodities, because of the factual background and representations made by Custom, it could be liable for failure to do so.