

Third Party Contract Issues Concerning Motor Carriers, Brokers, and Shippers

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I. INTRODUCTION

The growth of third party participation in the movement of interstate freight by motor carriers¹ and the diminishing administrative oversight of

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1. The latest government figures indicate that approximately 16,930 active general commodities brokers are registered with the Federal Motor Carriers Safety Administration (FMCSA) as of April 17, 2006. The number of property broker applications has increased by thirty percent since 2003. Approximately 1,040 active general commodities freight forwarders are registered with the FMCSA and applications filed annually have increased by approximately

such movement² has increased the necessity to design contracts that will reflect the role of the various business interests involved. These changes in the industry require a well-founded understanding of liabilities involved in the movement of interstate freight and an awareness of the consequences that might flow from poorly drafted documents.

Significant contract litigation has arisen because parties have not understood or identified the specific roles they are undertaking in a freight movement. This is a particularly serious problem because the rights and liabilities of the multiple parties vary based on their relationship with the immediate contracting party. In most instances, rights and liabilities of parties also depend on the types of parties that will be involved in a three-party freight movement.

One very common issue that arises with regard to third party contracts involves the difference between an express classification of a transportation provider and the provider's actual activities. For instance, a 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.³

However, while holding a license as a broker, the provider might pursue contract or operations practices in a manner that exceeds the definitional scope of a "broker" and thereby effectively engage in the transportation as a motor carrier or shipper. Courts will take cognizance of the formal titles that parties adopt within contracts. However, courts will also look beyond such titles to determine what tasks parties are actually engaged in⁴ or performing⁵ in order to determine whether or not the authority that a party possesses is controlling.⁶

eighty percent since 2003. Registration of Brokers and Freight Forwarders of Non-Household Goods, 71 Fed. Reg. 50,115, 50,116 (Aug. 24, 2006).

2. In *Freight Transport Free-for-all*, William J. Augello addressed the problems arising from "Missing Monitors" and explained that "[e]xcept when it comes to motor carrier safety issues, transportation companies are not monitored," nor are intermediaries and third parties. William J. Augello, *Freight Transport Free-for-all*, INBOUND LOGISTICS, May 2006, at 32, available at <http://www.inboundlogistics.com/articles/fineprint/fineprint0506.shtml>; See also Mark J. Andrews, *The Old ICC Broker Regs, Alive and Well, or at Least Alive*, THE LOGISTIC J., Jan. 2003, at 5.

3. 49 U.S.C. § 13102(2) (2000); 49 C.F.R. § 371.2(d) (2006).

4. See *United States v. California*, 297 U.S. 175, 181-82 (1936); See also *EnSCO, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 925-26 (10th Cir. 1982).

5. See *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 326 (D.N.J. 1997).

6. *Id.*; See also *Tokio Marine & Fire Ins. Group v. J.J. Phoenix Express, Ltd.*, 104 F. Supp. 2d 946, 948 (N.D. Ill. 2000).