INTRODUCTION

The Carmack Amendment to the Interstate Commerce Act (Carmack)\(^1\) is the United States statute that governs interstate transport of property by motor and rail carriers and freight forwarders.

The scope of this article is limited to the application of Carmack to interstate transport of property. Carmack also governs the interstate transport of household goods, which is not addressed. In addition, a comparison with principal provisions of the CMR is offered as a hopefully useful reference in those locals where CMR governs surface transport.

It is hoped the reader will come away with a better understanding of the essential fundamentals of Carmack and the more common disputes regarding its application.

CARMACK IN A NUTSHELL

The principal purpose of Carmack is to govern liability of interstate carriers.

Carmack defines a “carrier” as both a motor carrier and a freight forwarder.\(^2\) Further, Carmack deems a freight forwarder “both the receiving and delivering carrier.”\(^3\)
Carmack provides that any carrier providing transportation or service subject to the jurisdiction of applicable provisions of the Interstate Commerce Act is liable “for the actual loss or injury to the property.”

Generally, this means, the actual value of the loss or damage or the cost of repairing the damaged goods. This would exclude attorney’s fees, as well as consequential or punitive damages.

This liability extends to the receiving carrier, the delivering carrier or any other carrier over whose line or route the property was transported in the US or from a place in the US to a place in an adjacent foreign country when transported under a through bill of lading.

To be compliant with Carmack the carrier is required to issue a receipt or bill of lading for the property it receives for transport. Failure to issue a receipt or bill of lading does not affect the liability of a carrier.

As a *quid pro quo* for the imposition of liability, Carmack allows a carrier to establish rates for its transport services which limit the carrier’s liability. That limitation can be increased by declaration of value by the shipper, or in the terms of a written agreement between the carrier and the shipper.

Carmack also addresses the time within which a claim for loss or damage may be filed. The time limit for filing a claim may not be less than nine (9) months from the date of delivery of a shipment. Failure of the shipper to file a timely claim can result in its denial and can act as a bar to the prosecution of a suit by the shipper to recover the value of the loss or damage.

Should a claim be denied by the carrier, under Carmack the shipper may commence an action to recover the value of the claim provided it is filed within two (2) years and one day from the date “the carrier gives a person written notice that the carrier has disallowed any part of the claim.” This is not a statute of limitations, but rather a condition precedent to recovery that the shipper must meet. As in the case of the minimum nine (9) months within which a claim may be made, the time for commencement of an action is a “permissive statutory requirement which, unless incorporated into the contract of carriage, does not apply.”

A claimant can file a Carmack action in either a United States District Court or a State Court. However, the minimal jurisdictional amount for filing a Carmack action in a United States District Court is US$10,000.

**IMPORTANT LITIGATED CARMACK ISSUES**

Since enactment of Carmack in 1906, there have been numerous cases interpreting the intent of Congress in passing the statute and the meaning and application of its terms. This is not surprising since shippers have, and continue to, attempt to find a basis for avoiding carriers’ limitations of liability and the strictures on the timing, and requirements, for filing claims and commencement of suit.

Although there are many issues that can be raised in the context of a Carmack case, in one way or another almost all affect whether or not Carmack governs the claim and whether or not the carrier’s limitation of liability is enforceable.

**Carmack preemption**

The issue of whether Carmack governs a claim often arises at the outset of a suit when a shipper files a complaint seeking relief under a variety of state law causes of action. When this happens, the carrier will move to dismiss the complaint on the ground of Carmack preemption.

Carmack preemption refers to the concept that a claimant’s sole remedy for seeking recovery for loss, damage or delay to goods in transit is Carmack. Preemption completely bars the ability of a claimant to commence an action on the basis of any state statute or any common law cause of action, such as breach of contract, negligence or fraud.

Congress enacted Carmack to provide, among other reasons, a uniform and unified statute governing interstate transportation of goods. In the interests of preserving that uniformity and the benefits that Carmack is intended to confer on both shippers and carriers, a long line of case law has upheld the concept that all state statutory and common law claims resulting from interstate transport of goods are preempted by Carmack. This is the overwhelming prevailing view, although a small minority of cases has held otherwise.

This is an important issue since a carrier’s Carmack limitation of liability could be held to be void or voidable if the shipper’s claim were prosecuted under a state common law cause of action or
However, if the carrier has taken the proper steps to establish its limitation of liability within the scope of Carmack, then preemption protects against the insinuation into the case of issues of law that might result in the limitation being found unenforceable.

Preemption not only applies to the period when goods are in transit, but extends well beyond to the period prior and subsequent to the actual transport of the goods.

By way of example, we successfully concluded the defense of a suit against a domestic freight forwarder in California seeking US$7.6 million in damages for the theft of a shipment of cell phones. At the outset of the case plaintiff filed suit alleging a variety of state law causes of action, including breach of contract. We moved to dismiss on the ground of Carmack preemption.

Among other arguments raised by plaintiff in opposition to our motion was the assertion that the contract, which the plaintiff claimed was breached, was formed well before the loss of the shipment and therefore was outside the scope of Carmack preemption.18

In granting our motion to dismiss the court stated:

“It is well settled that the Carmack Amendment is the exclusive cause of action for interstate-shipping contract claims....[plaintiff] contends that its state law claims are not preempted because they relate, at least in part, to [defendant's] conduct before shipment... The court concludes that [plaintiff's] 'before shipment' distinction cannot save its state law claims from dismissal. If Carmack did not preempt state law claims predicated on a carrier's conduct before shipment, then garden variety breach of contract claims would fall outside its reach.”

With the exception of a very small number of cases, the foregoing represents the prevailing view of the majority of federal district courts when deciding a preemption issue. Those that have deviated from this view have not been given much currency by the majority of the district courts. Nonetheless, shipper plaintiffs continue to argue for the wider application of these aberrant decisions.

State courts, however, have not necessarily been as consistent or uniform. There seems to be an inclination on the part of state courts to try and find a means of providing their citizens relief from the protections afforded big, bad carriers by Carmack. Therefore, there is a greater risk of an adverse ruling on preemption, as well as other Carmack issues, if a case is litigated in a state court. Consequently, one of the first things carrier defense counsel will do when taking up a case filed in state court is to remove it to a federal district court, provided the claim exceeds the minimum jurisdictional amount noted above.

**Limitation of liability**

A carrier limitation of liability can be, and most often is, established by the terms of its contract of carriage or tariff. As noted, however, the limitation can also be established by a shipper's declaration of value for carriage or by the terms of a written service agreement between the carrier and the shipper.

Shippers continually litigate the enforceability of carriers' limitations of liability, even in those instances where they elected to declare a higher value for carriage or negotiated and signed a written service agreement specifying the limitation.

As a consequence of cases contesting the enforceability of carriers' limitations of liability, a four part test evolved as the accepted means in many jurisdictions of determining whether a carrier's limitation of liability is enforceable. As one of the criteria of the four part test was predicated on no longer existing regulations which required carriers to file tariffs with the now defunct Interstate Commerce Commission, the test now requires three requirements be met.

Therefore, for a carrier to effectively limit its liability it must establish that:

- It obtained a shipper's written declaration of the shipper's choice of liability.
- It gave the shipper a reasonable opportunity to choose between two or more levels of liability.
- It issued a receipt or bill of lading prior to moving the shipment.

Each of the foregoing requirements is continually the subject of cases in which shippers attempt to avoid a carrier's limitation of liability. Space limitations do
not permit a full discussion of the scope of how courts decide such disputes.

Aside from the disputed facts specific to any particular case there is case law interpretation, as well as the terms of any contractual understandings that may have existed between the parties. Further, the case law varies as to whether it was decided in a strict or substantial compliance jurisdiction.

Suffice it to say, in the writer's experience a significant percentage, if not the majority, of Carmack cases often come down to a dispute as to whether the carrier's limitation of liability can be enforced against the shipper.

CARMACK V. CMR

There are similarities worth noting between the provisions of Carmack and the CMR. However, we shy away from any suggestion that those terms that are the same or substantially the same are interpreted and enforced in the same manner in the various jurisdictions where they are in effect. Therefore, what follows is offered for its interest value, rather than as a guide to the application of the respective regimes.

Space is short, so without preamble please note the following comparison of the two transport regimes:

- Unlike Carmack which applies to both road and rail transport, CMR only applies to carriage by road.
- Both CMR (subject to exceptions) and Carmack provide that the carrier is liable for any loss or damage during transport. However, while Carmack liability is statutorily absolute, under CMR there are a few limited exceptions in which the carrier has the burden of proving liability is barred.
- Both CMR and Carmack have provisions dealing with the period for filing of claims and filing of suit. However, CMR's provisions are mandatory and cannot be amended by agreement between the shipper and the carrier, while Carmack merely sets minimum standards that can be increased or waived by agreement.
- The CMR contains a number of provisions for notice of loss or damage to be provided to the carrier. The notice period will depend on the nature of the loss or damage and whether it is apparent. The substantive information filed is fairly basic and need not be as thorough as that required by Carmack. On the other hand the minimum time for filing a claim under Carmack is nine months.
- Under Carmack a shipper has two years within which to commence an action. The CMR provides a one year time limit for proceedings to be commenced against the carrier (or three years if willful misconduct can be established).
- CMR provides a fixed limit of liability based on 8.33 SDRs per kilogram, which can be broken in the event that willful misconduct can be proven by the claimant. However, freight charges and additional costs arising from the carriage can also be recovered. In some contracting states these additional charges can include customs duties, survey fees and other such charges. The parties can agree alternative limits but only in accordance with the formalities set out in Articles 24 and 26. Carmack, however, permits the limitation to be established by the carrier in its tariff or contract of carriage terms, or by express agreement with the shipper, subject to the three-part test outlined above. The amount of a Carmack limitation is not stipulated by the statute and can vary widely.
- Carmack requires the issuance of a bill of lading. The form of bill of lading is not specified by the statute and can vary widely. This lack of uniformity often contributes to problems in determining whether the shipper has been properly notified of the carrier's limitation of liability in satisfaction of the three part test. CMR stipulates that any consignment note issued must contain certain information. A standard format consignment note has developed. However, CMR will apply regardless of the absence or irregularity of such a document.
- Both CMR and Carmack allow a claimant to sue, at the same time, several carriers which were involved in the chain of custody while the shipment was in transit. Under the CMR the claimant may bring proceedings against the first contracting carrier, the last carrier or the carrier responsible for the loss or damage. The claimant may bring proceedings against several of these at the same time.
- Neither Carmack nor CMR expressly provide for legal fees. Because of Carmack preemption there would be no recourse to state law to obtain legal fees. However, in CMR cases there may be opportunities to obtain legal fees under the law of individual states.

FURTHER INFORMATION

To find out more about our services and expertise, and key contacts, go to: kennedyslaw.com
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5 Principally Canada and Mexico.
11 See, e.g., Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900 (2d Cir. 1980).
14 Id.
17 See, for example, Hughes v. United Van Lines, Inc., 829 F.2d 1407, 11412 (7th Cir. 1987).
18 Unfortunately, there is no citation that can be referred to, as the case was settled when the plaintiff developed litigation fatigue and recognized its efforts to overcome our client’s Carmack limitation of liability, a pittance compared to its claim, were not going to be successful. Consequently a settlement, premised on the costs of continuing litigation and possible appeal was agreed to by our client, for a very nominal premium above its limitation of liability.
19 In the cell phone case referred to above, the shipper had a long standing course of dealing in which the shipper routinely declared the same value for carriage covering dozens of prior shipments handled by the forwarder, as well as the one that was the subject of the suit. Even though the amount of the declaration was determined by the shipper and the shipper was the one that placed the value declaration on the bill of lading, the shipper tried to claim it was unenforceable for a variety of reasons.

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