

Logistics & the Law 2011: Unintended consequences

The elimination of required cargo liability insurance by the FMCSA now forces shippers to independently verify the existence of the policy and nature of the coverage held by their carriers. Sound time-consuming? Our transportation law expert offers some practical advice.

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In the 2009 installment of our ongoing series that we call “Logistics & the Law,” we explored two critical areas of law in an article entitled “Cargo Insurance & Vicarious Liability: Two cautionary tales.” (www.transportlawtexts.com/two-tales.php). This year we focus on cargo liability insurance and the fact that as of March 21, 2011, motor carriers and surface freight forwarders (other than household goods carriers and household goods freight forwarders) are no longer required to have any cargo liability insurance at all.

In particular we will examine the unintended consequences for shippers of these changes in the government’s regulatory scheme for motor carriers. As stated by Rob Norton, former economics editor of *Fortune* magazine: “The law of unintended consequences, often cited but rarely defined, is that actions of people—and especially of government—always have effects that are unanticipated or unintended. Economists and other social scientists have heeded its power for centuries; for just as long, politicians and

popular opinion have largely ignored it.”¹

In other words, while readers of *Logistics Management* may be generally aware that there is no longer a requirement for cargo liability insurance, they will overlook the unintended consequences at their economic peril. In this article we will explain these consequences and explore ways for shippers to minimize or avoid the resulting new perils.

ELIMINATION OF THE REQUIREMENT FOR CARGO LIABILITY INSURANCE

Since 1937, motor common carriers, but not contract carriers, have been required by federal law to maintain at least \$5,000 in cargo liability insurance and to file proof thereof with the Interstate Commerce Commission (ICC) and subsequently the Federal Motor Carrier Safety Administration (FMCSA). The requirement was extended to surface freight forwarders in 1944.

The purpose of cargo liability insurance is to provide insurance coverage to a trucking company to insure its obligations under another federal law—colloquially

known as the “Carmack Amendment”—for liability to the owner of property damaged or delayed while being transported by the trucking company.

To make sure that this coverage was not illusory, the federal regulation also required the policy to have something known as the BMC-32 endorsement. The purpose of this endorsement was to ensure that there would indeed be at least \$5,000 in coverage regardless of any otherwise applicable exclusion or deductible amount.

In June 2005, the FMCSA solicited comments to its proposal to eliminate the cargo liability insurance requirement. Thirty-two individuals and organizations submitted comments. Industry groups such as the Transportation and Logistics Council (T&LC), the Transportation Intermediaries Association (TIA), the Freight Transportation Consultants Association (FTCA), and The National Industrial Transportation League (NITL) opposed the repeal.

Of particular concern for these commentators was the collateral result of the end of the BMC-32 endorsement and



the termination of the requirement for filing proof of cargo liability insurance. With respect to the BMC-32 endorsement, the FMCSA summarized the position of these commentators as follows:

- The BMC-32 endorsement is the only protection against deductibles and other exclusions from liability found in cargo liability policies.
- In many cases the carriers' deductibles can be very high and the exclusions may eliminate most sources of loss or damage recovery.
- The BMC-32 endorsement permits the shipper to proceed directly against the insurer, providing relief to shippers in the event the carrier becomes insolvent or bankrupt.

Three groups supported the elimination of the requirement for cargo liability insurance—the American Trucking Associations (ATA), the Owner-Operator Independent Drivers Association (OOIDA), and the Property Casualty Insurers Association of America. The FMCSA agreed with the views of these three groups in its final decision issued in June 2010.

The full text of the decision makes for very interesting reading as it outlines the positions of all of the commentators and the FMCSA's views with regard to the comments. The decision may be found at <http://edocket.access.gpo.gov/2010/2010-14866.htm>.

Regardless of whether or not one agrees with the FMCSA or its reasoning, the fact of the matter is that its decision is final and has not been challenged in court. Thus, to use a phrase, the “new

normal” is that carriers do not have to have cargo liability insurance and shippers will have to adjust their practices and procedures accordingly.

WHAT'S A SHIPPER TO DO?

So, what should a shipper be doing after March 21, 2011, with respect to cargo liability insurance? To cut to the chase: A shipper must now independently verify the existence of the policy and nature of the coverage.

The position of the FMCSA, as stated in its decision, is that “Shippers are like any other party in a transaction where one party will be providing services to another party...Shippers should ask carriers for copies of their policies, including all endorsements, exclusions, and declarations, to see whether the shippers’ property

will often be 130 pages or more.”

This means that if a shipper is dealing with just a few carriers, it may be possible to review the policies. However, if a shipper is dealing with hundreds of carriers, this is going to be a very time consuming task. For truck brokers and other intermediaries who may be using literally thousands of carriers, it is an impossible task.

Keeping in mind that only by reviewing all of a policy will one know all of its terms and conditions, there are three possible alternatives. One is to obtain a certificate of insurance. This will let a shipper know that the insurance is in place as of the date of issuance of the certificate. However, certificates of insurance commonly do not disclose deductibles and will not show exclusions to coverage.

Another possibility is to ask the motor

call to the insurance agent will often lead, albeit informally, to a verification that there is, indeed, a policy and of the policy limits.

Yunker’s advice for shippers when making the call to the agent is to “ask about what you are shipping.” For example, if you are shipping only lumber, you probably don’t need to worry about an exclusion for damage from rust. Another area of inquiry is the policy definition of “covered property.” For example, coverage for cell phones may not appear in an exclusion, but if it is not included in the definition of “covered property” then indeed it will not be covered.

IN FORCE TODAY, GONE TOMORROW?

Let us now suppose that a shipper has been able to determine that a motor carrier’s cargo liability policy will provide a certain amount of coverage in the event of a loss; e.g., \$100,000 with a \$10,000 deductible amount. While it may be that a smaller trucker would have trouble paying the \$10,000 amount of the deductible, hopefully the shipper would get at least a \$90,000 recovery in the event of a loss.

However, the next unintended consequence of the FMCSA’s decision is that because motor carriers will no longer be required to file evidence of insurance with the FMCSA, a shipper or broker will no longer be able to determine if a policy is still in effect months or years after its initial inquiries by simply going to the FMCSA website.

Whether intended or unintended by the FMCSA, this result was not unanticipated. In its decision, the FMCSA stated, “The Agency recognized that elimination of the BMC-32 endorsement will make it less convenient for commercial shippers to confirm the existence of cargo insurance.”

According to Yunker, “It is now not only less convenient, but it eliminates any ability for one on their own to independently verify coverage being in place except for actually picking up the telephone and calling an agent to verify that the policy is still in force. It used to be one click, now it’s going to be a game of telephone tag.”

It must be kept in mind that while there have been various private companies who have provided this information

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—Mark Yunker, vice president, RJ Ahmann Co.

or interests will be served by a particular motor carrier.” Put another way: In the view of the FMCSA all a shipper needs to do now is to read the carrier’s policy.

As part of my law practice I represent many shippers and brokers. To help formulate a recommendation for these clients, as well as research for this article, I contacted Mark Yunker, vice president of RJ Ahmann Co., an independent insurance agency that provides insurance and risk management solutions to the transportation industry. On a daily basis Yunker deals with calls regarding, as he puts it, “problems that cannot be handled through normal channels or that have been mishandled through normal channels.”

When asked for his comments with regard to this observation of the FMCSA, Yunker simply says that the suggestion to read a carrier’s policy is highly impractical. “The shortest cargo liability policy I’ve seen is 57 pages long,” says Yunker. “If the cargo liability policy is combined with an automobile liability policy, then it

carrier to provide a copy of the declaration page of its policy. Setting aside the fact that many motor carriers are reluctant to, or won’t, provide a copy of their declaration page, the declaration page will show the deductibles, but will not show any exclusions to coverage.

To compound the problem, most cargo liability policies will have “endorsements”—the term the insurance industry uses for amendments or addenda to an insurance policy. As an example, “unattended vehicles” are typically covered by a cargo liability insurance policy, but often this coverage is then removed in an endorsement.

Conversely, cargo liability insurance policies do not typically cover losses resulting from a “change of temperature,” however an endorsement can add coverage for “breakdown or mechanical failure of a refrigeration unit.”

This leads to the third alternative: A telephone call to the agent who issued the policy for the trucker. The telephone

as part of the services offered to their customers, it's the author's understanding that for most—if not all—of these providers the source of their information was the FMCSA website. Thus, this resource is gone as well.

Another potential source of confusion is that the FMCSA has advised in its decision that it “will not remove the names of insurance companies and the appropriate policy numbers from FMCSA web sites and any other FMCSA distribution methods until March 18, 2013, the second anniversary of the effective date of this final rule, to facilitate identification of insurance coverage for claims arising from transportation occurring while the policies were in effect.”

In other words, the information on the FMCSA website will be historical and cannot and must not be relied upon to show the existence of coverage or the insurer, if any, from March 2011 forward.

And, by the way, the long-standing practice of being a “certificate holder” so you receive notice by the insurance company of a cancellation of a policy is no longer an available option. This is because that at the same time that the FMCSA was in the process of eliminating the cargo liability insurance requirement, another separate and unrelated process was taking place in the insurance industry that led to a change in the prescribed form for an insurance certificate in the fall of 2010.

In the past one could rely, at least to a certain extent, on a Certificate of Insurance to verify that a carrier had some form of cargo liability coverage in place as of a given date. The most common form of certificate is the “ACORD” form from the global, nonprofit insurance trade association of the same name. Prior to October 1, 2009, the ACORD Certifi-

cate contained this language:

“Cancellation: Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will endeavor to mail ___ days written notice to the below named certificate holder, but failure to mail such notice shall impose no obligation or liability of any kind upon the company.”

However, as of October 1, 2010, (after a one-year interim period), this language no longer appears on the ACORD form. It now reads as follows:

“Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.”

The catch is that if you read the policy provisions they will not provide for giving notice to a certificate holder.

MAKING SENSE

While this article may admittedly be a bit “alarmist” in tone, this was in part to get your attention. For shippers, all is not lost.

At least to date there has been no indication of an en masse cancellation of cargo liability insurance by the trucking industry. If for no other reason, this is because it is economically reasonable and prudent to have at least some form of cargo liability insurance in place, just as it is for any other business to have liability insurance in place to protect its economic interests.

Nevertheless, as time goes on, there will be carriers who will be limiting the extent of their coverage or raising the amount of the deductible to save premium dollars.

Further, while it may be that a trucker with just a few vehicles will stop carrying cargo liability insurance in order to “save money” in the short run, there will also be larger carriers who will conclude that in the long run it would be cheaper to pay

losses out of revenues rather than pay the cost of purchasing insurance.

As noted by the FMCSA in its decision, shippers who entered into contracts with their carriers in the past have required certain types of coverage and the level of coverage. To the extent that cargo liability insurance has not been the focus of these requirements, it should be in the future.

To sum up, here's what shippers need to know:

- the requirement for cargo liability insurance is gone;
- the BMC-32 endorsement is gone;
- certificates of insurance will not provide for notice of cancellation; and
- the FMCSA website cannot be relied upon with respect to a motor carrier's cargo liability insurance.

Accordingly, in the absence of these protections, a shipper must independently verify the existence of its carriers' cargo liability insurance policies and the terms and conditions of their coverage. And, as always, the best way for a shipper to protect its economic interests is to negotiate and have in place a contract with its carriers—including a provision requiring a cargo liability insurance policy and that specifies the required coverage. □

¹ Rob Norton, “Unintended Consequences.” The Concise Encyclopedia of Economics. 2008. Library of Economics and Liberty. 9 June 2011. www.econlib.org/library/Enc/UnintendedConsequences.html.

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