BROKER FOUND LIABLE FOR FREIGHT DAMAGE

In a recent Court of Appeals decision, State of Arkansas, Titan Transportation, Inc. v. Okay Foods, Inc., 2013 Ark. App. 33 (Opinion January 23, 2013), the broker was found liable. In this case, Titan is a freight brokerage company. It agreed to handle a shipment of frozen poultry for Okay Foods. Unbeknownst to Okay Foods, Titan contracted with Southwind Transportation, Inc. to handle the actual transportation. Southwind picked up the load and delivered it beyond the agreed temperature range, causing a loss of $29,566 in ruined poultry. The Complaint alleged Southwind was negligent and that Titan was negligent for failing to oversee Southwind, as well as selecting Southwind as the carrier since Southwind's corporate charter had been revoked eight months prior to the date of shipment.

Southwind defaulted in the matter and the broker was the only party left standing. Okay Foods contracted with Titan who advertised that it offered "carrier services". Titan did not disclose that it was a brokerage firm and not a carrier. Further, Titan did not disclose the name of the actual carrier, Southwind, to Okay Foods. In the confirmation agreement that Okay sent to Titan, the carrier was identified as Titan and apparently Titan did nothing to correct the error.

The Trial Court found that Titan did not disclose that it was a broker, and instead "held itself out" to be a carrier by confirming the load assignment with Titan listed as the carrier, and by various business materials highlighting its ability to provide "carrier services". The business materials are not identified by the Court. According to the Court of Appeals, because Titan controlled the risk, it could only avoid liability for contractual breach if it disclosed the principal's identity so that Okay Foods could confirm that it was willing to bail its property to a third party. The Trial Court found that the risk that was in Titan's control was ill-managed, that Titan failed to ensure that Southwind was an existing corporation and had authority to enter into a contract, and that it had the type of equipment required to deliver time- and temperature-sensitive loads. Since Titan had the right of control and was acting on behalf of an undisclosed principal, it is treated as an "agent" under Arkansas law, and therefore is liable for the damage to the freight. What is troubling about this case is that it is not unusual for a shipper to place the broker's name on a bill of lading or rate confirmation. There is plenty of case law that says such designations do not, by themselves, subject a broker to carrier liability. Furthermore, it is also common that a shipper may not be informed of the carrier name by the broker until shortly before arrival at the shipper's loading docks. A review of the Titan web pages shows on one page that it has broker authority. The other pages appear to show carrier services.

What is not disclosed in the opinion is whether Titan had any insurance to cover the risk of loss.

In case the moral of this story has not been made clear enough, it is wise to review all advertising and contractual materials that a broker uses to in fact identify as a broker, and that it acts as a broker and not as a carrier. The beat goes on with brokers being found liable for cargo damage when it is not careful how it "holds itself out" to the public. Need I say more?

Respectfully Submitted,

Ronald H. Usem, Esq.
Huffman, Usem, Crawford & Greenberg, PA
5101 Olson Memorial Highway, Suite 1000
Minneapolis, MN 55422
763-545-2720