

*The Carmack Amendment*

# Where to Start with a Motor Carrier Cargo Claim

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Interstate cargo claims are governed by the Carmack Amendment (“Carmack”), 49 U.S.C §14706. Carmack controls and limits the liability of common carriers for in-transit cargo and preempts common or state law remedies that increase the carrier’s liability beyond the actual loss or injury to the property.

The purpose of this article is to provide a basic understanding of interstate cargo law, and a roadmap of the Carmack Amendment. This article does not address cargo claims against sea vessels, railroads or air carriers, all of which are based on other statutory sources or international treaties or conventions.

## Background of the Carmack Amendment for an Understanding of Its Purview

To understand the scope of the Carmack Amendment, one must generally know its background. Such knowledge is important given that the case law citing Carmack can

be confusing to those not familiar with its history.

Carmack was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887, and is now part of the Interstate Commerce Commission Termination Act of 1995 (“ICC Termination Act”). 49 U.S.C. §14706 (2005). When enacted, Carmack established a uniform regime of recovery by interstate shippers against motor carriers and freight forwarders, and allowed a shipper to recover for actual loss or injury to the property. Now, Carmack protects the carrier from causes of action that may expose it to damages beyond the value of the goods, if all of the required conditions have been met.

Carmack was, and continues to be under the ICC Termination Act, a codification of the common law rule imposing strict liability upon the common carrier without proof of negligence. Carmack preempts state and common law in instances where goods are lost, damaged or untimely delivered in interstate commerce. 1 Sorkin, *Goods in Transit* §5.02[1] at 5-16; see *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964), and *Ward v. Allied Van Lines, Inc.*, 231 F.3d 135, 138 (4th Cir. 2000). One purpose of Carmack is to relieve a shipper from searching for the particular carrier

at fault from the often numerous carriers handling the shipment. 1 Sorkin, *Goods in Transit* §5.02[1] at 5-18.

Carmack’s scope is determined by reference to 49 U.S.C. §13501, also a provision of the Interstate Commerce Act. In relevant part, §13501 extends the reach of Carmack to motor and rail transportation of property: 1) between a place in a state and a place in another state; or 2) between a place in the United States and a place in a foreign country “to the extent the transportation is in the United States...” 49 U.S.C. §13501(1)(A), (E) (2000).

The ICC Termination Act fixes liability upon rail carriers, motor carriers, freight forwarders, and pipeline carriers under receipts and bills of lading. The former Carmack provisions, which were all in one section in the Interstate Commerce Act, were recodified separately for rail carriers, motor carriers and freight forwarders. 1 Sorkin, *Goods in Transit* §1.04[1] at 1-28.3. Under the ICC Termination Act, the Secretary of Transportation and the Surface Transportation Board have jurisdiction over motor carrier transportation and the procurement of that transportation. 49 U.S.C. §13501(2005).

## Cargo Related Terminology

To better understand Carmack, one must be familiar with the definitions of certain terms related to the transportation of cargo. These terms are also important when determining Carmack’s applicability. Several of the most important ones are discussed below.

## Terms Relating to the Parties Involved in the Transportation of Cargo

### Broker

The federal transportation statutes define a “broker.”

The term “broker” means 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. 49 U.S.C. §13102(2) (2005). Brokers are not subject to Carmack liability. *Chubb Group of Ins. Cos. v. H.A. Transp. Sys.*, 243 F. Supp. 2d 1064, 1069 (C.D. Cal. 2002). Rather, state



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law governs their liability for loss or damage of cargo in transit. *Id.*

### **Carrier or Common Carrier**

A “carrier” is defined as a “. . . motor carrier, a water carrier, and a freight forwarder.” 49 U.S.C. §13102(3) (2005). The ICC Termination Act deleted all references to “common carrier,” which is one that holds itself out to public as ready to carry goods for anyone who requests its services, as distinguished from a private carrier, which reserves the right to accept or reject employment as a carrier. *J. Aron & Co. v. Cargill Marine Terminal, Inc.*, 998 F. Supp. 700, 704 (E.D. La. 1998). Under the Act, there is not a distinction between a “carrier” and “common carrier.” 1 Sorkin, *Goods in Transit* §1.02[2] at 1-27.

### **Motor Carrier**

A “motor carrier” is defined as “a person providing commercial motor vehicle (as defined in §31132) transportation for compensation.” 49 U.S.C. §13102(14).

### **Private Motor Carrier**

The term “private motor carrier” in the ICC Termination Act of 1995 is defined as a person, other than the motor carrier, transporting property by commercial motor vehicle in interstate or foreign commerce when the person is the owner, lessee, or bailee of the property being transported, and the property is being transported for sale, lease, rent or bailment or to further a commercial enterprise. 49 U.S.C. §13102(13).

A shipper cannot recover under Carmack against a private carrier because it is not a “motor carrier.” See 49 U.S.C. §13102(13); see also 1 Sorkin, *Goods in Transit* §1.03[2] at 1-28.1. A private carrier is liable as a bailee for negligence, and the plaintiff must prove that the damage or loss resulted from a cause for which the carrier is liable. *Erasco, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 928 (10th Cir. 1982).

### **Consignee**

A “consignee” is the person named in a bill of lading as the person to whom the goods are to be delivered. 49 U.S.C. §80101(1) (2005).

### **Consignor**

A “consignor” is the person named in a bill of lading as the person from whom the

goods have been received for shipment. 49 U.S.C. §80101(2) (2005).

### **Freight Forwarder**

A freight forwarder is defined in the Interstate Commerce Act as follows:

“[F]reight forwarder” means a person holding itself out to the general public (other than as pipeline, rail, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business—

(A) assembles and consolidates, or

**C**armack requires motor

carriers and freight forwarders

to issue a receipt or bill of

lading for the property received.

provides for assembling and consolidating shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to the jurisdiction under this subtitle.

49 U.S.C. §13101(8) (2005). Only surface freight forwarders are subject to Carmack liability requirements. 1 Sorkin, *Goods in Transit* §1.22[1] at 1-135. A surface “freight forwarder” can be either a receiving or a delivering carrier. 49 U.S.C. §14706(a)(2). A “freight forwarder” is considered a “receiving carrier” when the freight forwarder uses a motor carrier to receive property from a consignor and consents to the execution of the bill of lading or receipt by the motor carrier. *Id.* A “freight forwarder” is a “delivering carrier” when it consents to the motor carrier’s delivery of its property to a consignee. *Id.*

### **Holder**

A “holder” is the person who has possession of, and a property right in, a bill of lading. 49 U.S.C. §80101(4) (2005).

### **Shipper**

A shipper, also known as the “consignor,”

is the party who supplies the goods to be transported.

### **Terms Relating to the Type of Documents Used in Transporting Cargo by Motor Carrier**

#### **Bill of Lading**

Bills of lading are governed by the Bills of Lading Act. See 49 U.S.C. §§80101 to 80116 (2005). A bill of lading is basically a transportation contract between a shipper-consignor and the carrier, which terms and conditions bind the shipper and all connecting carriers. 1 Sorkin, *Goods in Transit* §2.01 at 2-10. The bill of lading represents the title of the goods and serves as evidence of the carrier’s receipt of goods, their condition at the time of receipt, and their nature and quantity. *Id.* Carmack requires motor carriers and freight forwarders to issue a receipt or bill of lading for the property received for transportation. 49 U.S.C. §14706(a)(1) (2005). However, the carrier’s “failure to issue a receipt or bill of lading does not affect the liability of the carrier.” *Id.*

There are several forms of bills of lading:

#### **A Straight Bill of Lading**

A “straight bill of lading” states that the goods are consigned or destined to a person whose name is specified in the bill of lading. 1 Sorkin, *Goods in Transit* §2.08 at 2-86. A “straight bill of lading” is not a negotiable bill. 49 U.S.C. §80103 (2005). This type of bill of lading obligates the carrier issuing it to transport or arrange for the transportation, and to be responsible for the shipment through its destination even though the shipment may require transportation over lines or routes beyond those of the receiving carrier and by means of connecting carriers or other modes of transportation. 1 Sorkin, *Goods in Transit* §2.01[3] at 2-16.2.

#### **A Way Bill**

A “way bill” or a “waybill” is another term to describe a “bill of lading.”

#### **A Non-Negotiable Bill of Lading**

A “non-negotiable bill of lading” is similar to a “straight bill of lading,” and is defined by statute as a bill that states in writing that the goods are to be delivered to a consignee and

that is “non-negotiable” or “not negotiable.” 49 U.S.C. §80103(b)(1)–(2) (2005).

### *A Negotiable Bill of Lading*

A bill of lading is negotiable if the bill states that the goods are to be delivered to the consignee and does not contain an agreement with the shipper that the bill is not negotiable. 49 U.S.C. §80103(a) (2005). If the bill of lading is negotiable, “it controls possession of the goods and is one of the indispensable documents in financing the movement of commodities and merchandise.” *Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14 (2004).

### *An Order Bill of Lading*

This type of bill of lading states that the goods are consigned to the order of any person named in the bill. 1 Sorkin, *Goods in Transit* §2.10[1] at 2-92.1. An order bill of lading is negotiable and cannot be made non-negotiable unless the shipper agrees in writing by endorsing the bill. *Id.*, at 2-93. The term “order” alone is defined as an “order by endorsement on a bill of lading.” 49 U.S.C. §80101(5) (2005). An “order bill of lading” is basically the equivalent to a “negotiable bill of lading.”

### *A Clean Bill of Lading*

A bill of lading that contains no language qualifying the acknowledgment of the apparent good order and condition of the cargo is known as a “clean bill of lading.” *Fox & Assoc., Inc. v. M/V Hanjin Yokohama*, 977 F. Supp. 1022 (C.D. Cal. 1997). A “clean bill of lading” creates a rebuttable presumption that all of the cargo listed in the document was loaded in the condition described in the bill. *Cummins Sales & Serv., Inc. v. London and Overseas Ins. Co.*, 476 F.2d 498, 500 (5th Cir. 1973), *cert. denied sub nom.*; *Dampfschiff Ges. “Hansa” v. Cummins Sales & Serv., Inc.*, 414 U.S. 1003 (1973).

### *A Through Bill of Lading*

A “through bill of lading” is an international bill between the United States and a foreign country. 1 Sorkin, *Goods in Transit* §3.3[2] at 3-19. It may be a bill issued in a foreign country that governs a shipment throughout its transportation from abroad to its final destination in the United States. *Id.* It can also govern its transportation

from an inland point in the United States to a location in a foreign country. *Id.*

### *A Multimodal or Intermodal through Bill of Lading*

A “multimodal or intermodal through bill of lading” is one that obligates the carrier to transport the cargo from origin to destination by more than one mode of transportation on a single freight charge by use of a single bill of lading. 1 Sorkin, *Goods in Transit* §§3.03[2], 3.15 at 3-109.

If a shipper wants to avoid Carmack’s limits on liability, the shipper can do so by using, for example, a multimodal ocean bill of lading to transport the inland portion of the delivery under that bill. *See Allianz CP Gen. Ins. Co. v. Blue Anchor Line*, 2004 WL 1048228 (S.D.N.Y. May 7, 2004) (citing *Commercial Union Ins. Co. v. Forward Air, Inc.*, 50 F. Supp. 2d 255 (S.D.N.Y. 1999)). The shipper, on the other hand, may likely not avoid Carmack with a multimodal bill if the motor carrier issues a second bill of lading. *American Road Serv. Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986).

### *Contract for Carriage*

A “Contract for Carriage” means either a bill of lading or transportation provided under written agreement. *See Metropolitan Sale Supply, Inc. v. M/V Royal Rainbow*, 12 F.3d 58 (5th Cir. 1994); *see also* 49 U.S.C. §13102(4) (2005).

### *Contract under 49 U.S.C. §14101(b)*

49 U.S.C. §14101(b) deals with the operations of carriers, and specifically with a carrier’s contract with a shipper. Pursuant to §14101(b), a DOT carrier and a shipper may contract to provide specified services, waiving the applicability of Carmack’s rights and remedies, and the carrier does not require a separate permit to do so. 49 U.S.C. §14101(b). 49 U.S.C. §14101(b) does not, however, apply to the movement of household goods. *See* §13102(10)(A).

### *Rates*

A carrier must establish rates for the transportation of goods, other than household goods, under which the liability of the carrier is limited to a value established in a written or electronic declaration. 49 U.S.C. §14706(c)(1)(A)

(2005). Rates have to be reasonable under the circumstances surrounding the transportation. *Id.*; §13710(A)(2) (2005).

### *Written or Electronic Copy of Rates, Classification, Rules and Practices*

A motor carrier not required to file a tariff with the Surface Transportation Board (see below), must provide to the shipper, upon request, “a written or electronic copy of the rate, classification, rules, and practices upon which any rate, applicable to a shipment, or agreed to between the shipper and carrier, is based.” 49 U.S.C. §§14706(c)(1)(B), 13710(a)(1) (2005).

### *Tariffs*

Tariffs are publications containing the actual rates, charges, classifications, rules, regulations and practices of carriers. *See* 46 C.F.R. §536.2. Prior to 1995, motor carriers were required to file their tariffs with the former Interstate Commerce Commission if they did not have a contract with a shipper. 1 Sorkin, *Goods in Transit* §2.05[2] at 2-38.1. As of 1995, tariffs, when required, are filed with the Surface Transportation Board. 49 U.S.C. §13702(e) (1995). After 1995, the only transportation performed pursuant to tariffs filed with the Surface Transportation Board is transportation of household goods and of property in non-contiguous domestic trade. 3 Sorkin, *Goods in Transit* §13.04 at 13-72.1. Registered motor carriers transporting any other type of goods can now enter into contracts and negotiate their tariffs. 1 Sorkin, *Goods in Transit* §2.05[2] at 2-38.2.

### *Liability Imposed by Carmack*

The Carmack Amendment subjects a motor carrier transporting cargo in interstate commerce to absolute or strict liability for “actual loss or injury to property.” *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964). By limiting a carrier’s liability to the actual loss or injury to the transported property, Congress intended to provide certainty to both shippers and carriers, and to enable carriers to assess their risks and predict their liability for damages. *Hughes v. United Van Lines*, 829 F.2d 1407, 1415 (7th Cir. 1987), *cert. denied*, 485 U.S. 913 (1988); *Counter v. United Van Lines, Inc.*, 935 F. Supp. 505, 507 (D.C. Vt. 1996). Accordingly, Carmack permits the shipper

a single method of recovery “directly from [the] interstate common carrier in whose care their goods are damaged.” *Windows, Inc. v. Jordan Panel Sys. Corp.*, 177 F.3d 114, 118 (2nd Cir. 1999).

The strict liability imposed by Carmack is for the actual loss or injury to the property, subject to the right of the motor carrier to limit its liability as provided by the statute. See 49 U.S.C. §14706(a) (2005). Section 14706(a)(1) provides, in part, that

[t]he liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading...

49 U.S.C. §14706(a)(1).

The carrier’s liability and duties under Carmack are determined pursuant to the bill of lading used in the shipment of the goods, and the limits are based on the carrier’s rates or tariffs. See, e.g., 49 U.S.C. §§14706, 13501 (2005). Recovery under Carmack, however, is not limited to damaged goods. The phrase in Section 14706(a), the “liability imposed... is for the actual loss or injury to the property...,” has been long interpreted by the courts to cover more than mere physical loss or damage to the goods. It includes any injury to or invasion of tangible or intangible property rights and economic loss not directly related to physical damage. *Wang Labs., Inc. v. Burts*, 612 F. Supp. 441, 444 (D. Md. 1984); *Reagan v. Commonwealth Theaters of P.R., Inc.*, 300 F. Supp. 676, 678 (D.P.R. 1969).

**Limitation of Liability under Carmack**

The bill of lading, the terms and conditions of which bind the shipper and all connecting carriers, sets forth the limitations of the carrier’s liability to which Carmack applies. For the bill of lading to, in effect, limit the carrier’s liability, the carrier must take four steps before transporting the goods: 1) maintain a tariff, if required; 2) obtain the shipper’s agreement as to his or her choice of liability; 3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and 4) issue a receipt or bill of lading prior to movement

of the shipment. *Allison-Erwin Co. v. Saturn Freight Sys.*, 106 F. Supp. 2d 1328, 1330 (N.D. Ga. 2000); see also *Cash Am. Pawn, L.P. v. Federal Express Corp.*, 109 F. Supp. 2d 513, 519 (N.D. Tex. 2000) (carrier limits liability if there is fair agreement and if shipper has option to a higher recovery if a higher rate paid).

**When Does Carmack Apply?**

In general, Carmack applies when motor carriers and surface freight forwarders are required to issue receipts and bills of lad-

**The strict liability imposed by Carmack is for the actual loss or injury to the property.**

ing when procuring interstate transportation or transportation services. 49 U.S.C. §§14706, 13501 (2005). When there is a written contract between the shipper and the carrier for the transportation of goods, which expressly waives any or all rights and remedies under §14101 *et seq.* for the transportation covered by the contract, Carmack does not apply even though a bill of lading exists. See 49 U.S.C. §14101(b) (2005).

When determining whether Carmack applies, the focus is on whether the transportation was intended to be interstate or intrastate, on the relationship between the shipper and the carrier and on the nature of the goods.

**Interstate or Intrastate**

Carmack applies only to transportation by a motor carrier in the United States between a place in:

- a state and a place in another state;
- a state and another place in the same state through another state;
- the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
- the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
- the United States and a place in a foreign country to the extent the transportation is in the United States.

49 U.S.C. §13501(1) (2005). Consequently,

Carmack does not apply to intrastate shipments. 49 U.S.C. §23504 (1995). Nor does it apply to, for example, a shipment from Mexico to England via the United States. *Sea-Land Serv. v. Lozen Int’l*, 285 F.3d 808, 817 (9th Cir. 2002). Likewise, Carmack does not apply to the imports of goods from an adjacent foreign country into the United States, because such imports are not regulated by the ICC. *Ingram Micro, Inc. v. Air-route Cargo Express, Inc.*, 154 F. Supp. 2d 834, 838 (S.D.N.Y. 2001).

**Relationship of the Shipper to the Carrier**

Generally, Carmack applies to all interstate shipments by DOT carriers, unless the carrier is providing the following services:

- Transportation in a terminal area when the transportation is a transfer, collection or delivery provided by the freight forwarder or if the transportation is incidental to the transportation or service provided. 49 U.S.C. §13503 (2005).
- Transportation of property by a non-transportation business when the transportation is within the scope of the primary business, which includes transportation by a “private motor carrier.” See 49 U.S.C. §10524(a)(1995); 49 U.S.C. §13102(13) (a motor private carrier is one other than a “motor carrier”).
- Transportation by a person who is a member of a corporate family for other members of the corporate family. 49 U.S.C. §10524(b)(2005).

When there is a carriage contract between the shipper and the carrier. See 49 U.S.C. 14101(b) (2005).

- When the motor carrier transports the goods pursuant to an intermodal bill of lading issued by a maritime vessel.

**Nature of Shipment**

Carmack applies to the interstate transportation by DOT carriers of all shipments except the following:

- Transportation by a farmer of his agricultural or horticultural products and supplies. 49 U.S.C. §13506(a)(4) (2005).
- Transportation of motor vehicles operated by an agricultural cooperative association. 49 U.S.C. §13506(a)(4) (2005).
- Transportation of livestock. 49 U.S.C. §13506(a)(6) (2005).

Commodities such as fish and shellfish, fish by-products, poultry and livestock

feed not intended for human consumption are also exempt from Carmack. 49 U.S.C. §13506(a)(6); *see also, Taiyo Americas, Inc. v. Honey Transport, Inc.*, 464 F. Supp. 1249 (S.D.N.Y. 1979). *See generally* 49 U.S.C. §13506.

### Carmack Preempts State Law

Remedies provided under Carmack preempt all causes of action seeking redress for loss or damage to goods transported through interstate commerce. Since the inception of Carmack, the Supreme Court has maintained Carmack's "preemptive" nature.

In *Missouri, K. & T.R. Co. of Tex. v. Harris*, 234 U.S. 412, 420 (1914), for example, the Supreme Court summarized its holdings from a series of cases as follows: "[T]he special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." *See also New York, N.H. & H.R. Co. v. Nothnagle*, 346 U.S.128, 131 (1953) ("With the enactment in 1906 of the Carmack Amendment, Congress superseded diverse state laws with a nationally uniform policy governing interstate carriers' liability for property loss."). This view was reiterated by the Supreme Court when it noted that state laws are pre-empted by the Carmack Amendment if they "in any way enlarge the responsibility of the carrier for loss or at all affect the ground of recovery, or the measure of recovery." *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597, 603 (1915) (internal quotation marks omitted).

The broad reach of Carmack preempts plaintiff's state law claims, which includes claims for: 1) the tort of outrage; 2) intentional and negligent infliction of emotional distress; 3) breach of contract; 4) breach of implied warranty; 5) breach of express warranty; 6) violation of the a state's deceptive trade practices or consumer protection statutes; 7) slander; 8) misrepresentation; 9) fraud; 10) negligence and gross negligence; and 11) violation of the common carrier's statutory duties as a common carrier under state law. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 777 (5th Cir. 2003). Carmack also preempts federal common law that increases the carrier's liability beyond the actual loss or injury to the

property, unless the shipper alleges injuries separate and apart from those resulting directly from the loss of shipped property. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 379 (5th Cir. 1998).

### Federal Jurisdiction

State and federal courts have concurrent jurisdiction to adjudicate claims governed under Carmack. 49 U.S.C. §14706(d)(1) (2005). If filed in state court, a Carmack claim is removable if the loss and/or damage exceeds \$10,000. 28 U.S.C. §§1337(a) and 1445(b). As long as the amount in controversy is met, the case is removable even though the plaintiff does not allege a cause of action under Carmack. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 777 (5th Cir. 2003).

A minority of courts have declined to allow removal when a plaintiff does not allege a Carmack cause of action. These courts reason that Carmack lacks complete preemption because of an absence of Congressional intent for the federal courts to exercise jurisdiction over state law claims based on Carmack. *Circle Redmont, Inc. v. Mercer Transp. Co.*, 78 F. Supp. 2d 1316, 1319 (M.D. Fla. 1999) ("[B]ecause the Carmack Amendment's language and history do not manifest an intent to make state law claims removable as Carmack claims, the complete preemption doctrine does not apply to give this Court jurisdiction."); *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315, 318 (D. Vt. 1999) ("Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court.").

The Supreme Court's holding in *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), however, expressly overruled the analysis followed by these courts. *See Hoskins*, 343 F.3d at 776. Under *Beneficial Nat'l Bank*, a case is removable when Congress provides an exclusive federal cause of action notwithstanding that Congress is silent on the issue of removal. *Id.* at 777. In the context of cargo claims, it is clear that Congress intended to make Carmack an exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier. *Id.* at 778. Therefore, the complete pre-emption doctrine applies and Carmack claims are removable under §1441. *Id.* (citing *Beneficial Nat'l Bank*, 123 S.Ct. at 2064).

### Carmack's Notice of Claim Requirements

Before a person can recover against the carrier for loss or damage, injury or delay of cargo under Carmack, that person must file a written notice of claim. 49 C.F.R. §370.3(a) (2005). The people who can file a claim are the holder of a bill of lading and persons beneficially interested in the shipment, although not in actual possession of the bill of lading, such as buyers, consignees or assignees. *Tallyho Plastics, Inc. v. Big M Constr. Co.*, 8 S.W.3d 789, 792 (Tex. App.1999, no writ); *Cohen v. Southern Ry. Co.*, 193 N.E. 480 (Ill. 1934). Insurance carriers subrogated to the rights of any of these individuals can also make a claim under Carmack. *State Farm Fire & Cas. v. United Van Lines*, 825 F. Supp. 1399 (D.S.C. 1992); *see also* 2 Sorkin, *Goods in Transit* §7.13 at 7-73.

Two issues associated with a "notice of claim" are: 1) what constitutes a proper notice of claim; and 2) the time limitations to file a notice of claim.

### What Constitutes a Proper Notice of Claim

The notice must be in compliance with the bill of lading, the contract of carriage and all tariff provisions that apply. 49 C.F.R. §370.3(a). If the carrier and shipper agree beforehand, the notice can be written or electronically communicated, and must be filed with the proper carrier within the time limits specified in the bill of lading or contract. *Id.* at (b). At a minimum, the notice must contain facts sufficient to identify the shipments, assert liability for alleged loss, damage, injury or delay and make a claim for the payment of a specified or determinable amount of money. *Id.*

However, when the shipper gives written notice of the damage, clearly communicating its intent to hold the carrier liable, and the carrier investigates the claim and agrees to pay the claim, the written notice of damage will likely constitute a "written claim." *Id.*; *see also Kvaerner E & C (Metals) v. Yellow Freight Systems, Inc.*, 266 F. Supp. 2d 1065 (N.D. Cal. 2003) (where carrier does not agree to make repairs or pay claims, a written notice is not a "written claim").

Likewise, a shipper's letter to the carrier stating the reasons to refuse a shipment rejected by a consignee is an adequate

statement to satisfy the written claim requirement of the bill of lading when the goods are identified by reference, the damages are included and the carrier has sufficient and timely information on the loss. *Wisconsin Packing Co., Inc. v. Indiana Refrigerator Lines, Inc.*, 618 F.2d 441 (7th Cir. 1980), cert. denied, 449 U.S. 837 (1980). On the other hand, an oral notice coupled with the carrier's knowledge of the damage is not sufficient to meet the "written claim" requirement. *Northern Pacific R.R. v. Mackie*, 195 F.2d 641, 642-43 (9th Cir. 1952).

With respect to the requirement that the claim include a "specified or determinable amount of money," 49 C.F.R. §370.3(d) provides, in part:

(d) Claims filed for uncertain amounts. Whenever a claim is presented against a proper carrier for an uncertain amount, such as "\$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall be filed in accordance to the provisions of paragraph (b) of this section.

If the shipper provides an uncertain amount in the notice of claim and within the nine-month period, the nine-month limit on filing a proper claim is not tolled. *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1190-91 (5th Cir. 1993). The burden is on the shipper to provide the carrier with the amount it is claiming for its loss. *Id.* (citing *R.T.A. Corp. v. Consolidated Rail Corp.*, 594 F. Supp. 205, 210 (S.D.N.Y. 1984)).

**Time Limitation to File a Notice of Claim**

Carmack allows the carrier to limit the amount of time a shipper has to file a claim, as long as the time to file the claim is not less than nine months. See 49 U.S.C. §14706(e)(1). The minimum nine-month period is not a limitation period, but rather,

it is a statutory determination of what is a reasonable period for the shipper. *State Farm Fire & Cas. Co. v. United Van Lines, Inc.*, 825 F. Supp. 896 (N.D. Cal. 1993). Accordingly, a carrier may include in a bill of lading a requirement that any claim of cargo damage be brought within a set time period greater than, or equal to, nine months. *Dan Barclay, Inc. v. Steward & Stevenson Services, Inc.*, 761 F. Supp. 194 (D. Mass. 1991). This time period begins to run the day after the delivery of the goods. *Inland Steel Corp. v. Consolidated Rail Corp.*, 714 F. Supp.

**Oral notice coupled with the carrier's knowledge of the damage is not sufficient to meet the "written claim" requirement.**

389 (D.C. Ind. 1989). The minimum nine-month claim filing deadline is enforceable against anyone having a claim against the carrier, including a subrogating insurance carrier. *State Farm Fire & Cas. Co. v. United Van Lines*, 825 F. Supp. 1399 (D.S.C. 1992).

A shipper who does not file a written claim of damage within the time specified in the bill of lading cannot recover its shipment damages. *Culver v. Boat Transit, Inc.*, 782 F.2d 1467, 1469 (9th Cir. 1986). The claim will be considered "filed" when it has been delivered to and received by the carrier. *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 902 (2nd Cir. 1980). Thus, if the shipper mails the claim on the last day he or she can make the claim, the claim will not be timely if the carrier receives the claim after the time specified in the bill of lading. *Id.* at 904-05. A claim that is received after the nine-month claim period expires does not qualify as a timely filed claim. *Id.* at 905.

There are three possible exceptions to timely filing a notice of claim: 1) estoppel, 2) waiver, and (3) the inability of the shipper, despite the exercise of reasonable diligence, to ascertain the extent of the loss within the filing period. *Taylor v. Mayflower Transit, Inc.*, 161 F. Supp. 2d 651, 660 (W.D.N.C. 2000) (citing *Nedloyd Lines v. Harris Transport Co., Inc.*, 922 F.2d 905 (1st

Cir. 1991)). The two last exceptions have been routinely rejected by the courts.

A carrier who informs the shipper that "he is aware of the pendency of the claim and that a formal filing is unnecessary" is estopped from invoking the ninth-month limitation period. *L&S Bearing Co., v. Randex Int'l*, 913 F. Supp. 1544, 1548 (S.D. Fla. 1995). On the other hand, a carrier's failure to reply to the shipper's repeated requests for proof of delivery has been held not to create an estoppel. *Consolidated Freightways Corp. of Del. v. Theodor Mfg. Corp.*, 516 F. Supp. 9 (C.D. Cal. 1981). However, where, in addition to failing to reply to the shipper's requests, the carrier repeatedly advises the shipper that delivery was made but it was unable to locate proof of delivery, the carrier is estopped from relying on the defense of late notice. *Action Drug Co. v. Overnite Transp. Co.*, 724 F. Supp. 269 (D. Del. 1989).

Waiver, although similar to estoppel, involves the voluntary or intentional surrender of a known right. *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1191 (5th Cir. 1992). This exception is not favored by the courts simply because the written notice requirement cannot be waived by the carrier. *Loveless v. Universal Carloading & Distributing Co.*, 225 F.2d 637, 639 (10th Cir. 1955). However, there is indication that if the carrier misleads the shipper that there is no need to file a claim, or that an otherwise insufficient notice is acceptable, then the carrier waives the notice of claim requirement. *Cf. Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 905 n.10 (2nd Cir. 1980).

The last exception, inability to ascertain loss within the filing period, requires the shipper to show that it could not have ascertained the extent of its loss within the nine-month filing period. *Id.* In *Taylor v. Mayflower Transit*, the court determined that this exception applied to a shipper who had to take more than nine months to determine what goods were missing because it took the carrier six months to unpack. *Taylor*, 161 F. Supp. 2d at 665. In that case, the carrier was also responsible for unpacking under the contract with the shipper. The court found that the shipper presented sufficient evidence to survive summary judgment as to the equitable exception of nine months being inadequate time to determine the extent of the loss. *Id.*

**Carmack's Limitations for Filing Suit**

Carmack does not set forth a limitations period for filing a suit. Rather, it allows the shipper and the carrier to set their own limitations for filing a civil suit so long as these limitations are within the minimum period set in Carmack. This statutory period for filing a civil action is "no less than two years to file a civil suit against [the carrier,]" or two years and one day. 49 U.S.C. §14706(e)(1) (2005).

The period to file suit begins to run on the date the carrier gives the shipper written notice that the carrier has disallowed all or any part of the shipper's claim specified in the notice of claim. 49 U.S.C. §14706(e)(1). This means that the shipper has two years and one day to file a civil action from the date notice was given in writing by the carrier that the shipper's claim was disallowed or denied. See *Kuehn v. United Van Lines, L.L.C.*, 367 F. Supp. 2d 1047, 1051-52 (S.D. Miss. 2005). If the shipper fails to file a civil action within this time, the suit is barred even if a timely notice of property damage claim was filed. *Id.* at 1051.

To trigger the two year and one day statute of limitations, the carrier's denial must "operate as a clear, final and unequivocal disallowance of the claim" and must not use words that are susceptible of more than one meaning. *Security Ins. Co. v. Old Dominion Freight Line*, 2003 WL 22004895 (S.D.N.Y. 2003) (citing *Combustion Eng'g, Inc. v. Consolidated Rail Corp.*, 741 F.2d 533, 537 (2nd Cir. 1984)). The disallowance does not have to be stated in so many words nor in the language contained in the bill of lading. 2 Sorkin, *Goods in Transit* §10.02[5] at 10-18. It is sufficient if it conveys the meaning that the claim is denied as made. *Id.* (citing *Tribby v. Chicago & N.W. Ry. Co.*, 264 N.W. 185 (S.D. 1935)).

**Burden of Proof in a Carmack Suit  
Plaintiff's Burden of Proof**

Although Carmack imposes strict liability on the carrier for loss of goods, a shipper must first establish a *prima facie* case for damage to cargo under Carmack. *Independent Mach., Inc. v. Kuehne & Nagel, Inc.*, 867 F. Supp. 752, 758 (N.D. Ill. 1994). To meet this burden, the shipper must present evidence that the goods (1) were delivered to the carrier in good condition, (2) arrived in damaged condition, and (3) resulted in the

specified amount of damage. *Chubb Group of Ins. Companies v. H.A. Transp. Systems, Inc.*, 243 F. Supp.2d 1064 (C.D. Cal. 2002) (citing 49 U.S.C.A. §14706); see 1 Sorkin, *Goods in Transit* §1.19 at 1-115 (citing *Independent Mach., Inc.*, 867 F. Supp. at 758).

**The Carrier's Burden of Proof**

The burden then shifts to the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *American Nat'l Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 924 (7th Cir. 2003).

The carrier must show that it is free from negligence and that the loss or damage was caused solely by an act of God, the public enemy, the shipper, a public authority, or that the damage resulted from the nature of the goods or an inherent vice in the goods. See *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964); *Fine Foliage of Florida, Inc. v. Bowman Transp., Inc.*, 901 F.2d 1034, 1039 (11th Cir. 1990); *Frosty Land foods v. Refrigerated Transp.*, 613 F.2d 1344, 1346-47 (5th Cir. 1980). Likewise, the carrier has to show that the shipper did not exercise reasonable diligence in mitigating damages. *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991); *Frosty Land Foods Intern, Inc. v. Refrigerated Transport Co., Inc.*, 613 F.2d 1344 (5th Cir. 1980). The following is an analysis of the most important defenses available to the carrier.

**The "Act of God" Defense**

The United States Supreme Court in *Missouri Pac. R.R. Co. v. Elmo & Stahl*, 377 U.S. 134 (1964), held that an "Act of God" defense may be raised under Carmack.

The "Act of God" defense is an affirmative defense, and is limited to occurrences produced by a physical cause or by natural phenomena such as lightning, storms, floods, hurricanes and earthquakes that the carrier is powerless to avoid or resist. See, e.g., *Gleason v. Virginia Midland R. Co.*, 140 U.S. 435 (1891) (landslides); *Western Millers Mut. Fire Ins. Co. v. Thompson*, 95 F. Supp. 933 (D. Mass. 1914) (tornadoes); *Little Rock Packing Co. v. Chicago, B&Q R.R. Co.*, 116 F. Supp. 213 (W.D. Mo. 1953) (floods); *American Sugar Refining Co. v.*

*Illinois Cent. R.R. Co.*, 103 F. Supp. 280 (E.D. La. 1952) (hurricane).

Hurricanes are very often described as an "Act of God." See *In the Matter of the Complaint and Petition of International Marine Develop. Corp.*, 328 F. Supp. 1316 (S.D. Miss. 1971), a case involving Hurricane Camille, and *Skandia Ins. Co., Ltd. v. Star Shipping*, 173 F. Supp. 2d 1228 (S.D. Ala. 2001), dealing with Hurricane Georges.

Not every weather condition will sustain this defense. The test is that

...the disturbance causing the damage, by whatever term it is described, is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it in the protection of property committed to its custody.

*Compañia deVapores Inscó, S.A. v. Missouri Pac. R.R. Co.*, 232 F.2d 657, 660 (5th Cir. 1956). The occurrence must be one that was not caused by the intervention of a human agency. *Gleeson v. Virginia Midland R.R. Co.*, 140 U.S. 435, 444 (1890). Moreover, the occurrence must be the immediate or proximate cause of the loss. *Memphis & Charleston Railroad Company v. Reeves*, 77 U.S. 176, 190-91 (1869).

The fact that the damage to or loss of goods while being transported by a carrier was proximately caused by an "Act of God" does not automatically relieve the carrier from liability. An essential element of the "Act of God" defense is that "the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier..." *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1241 (S.D. Ala. 2001) (citation omitted). The carrier cannot rely on the Act of God defense where the injury could have been avoided by the carrier's precaution. *Standard Brands, Inc. v. Nippon Yusen Kaisha*, 42 F. Supp. 43, 45 (D. Mass. 1941). If the carrier "failed to act as a reasonable prudent person would under the circumstances and failed to take reasonable available means to avoid or minimize the loss resulting therefrom," the carrier is liable. *Ismert-Hincke Milling Co. v. Union Pac. R.R. Co.*, 238 F.2d 14, 16 (10th Cir. 1939). Thus, a carrier's duty as a prudent person is twofold. First, the carrier must attempt to protect the goods from a disaster of which it has or should have had notice. *American Sugar Refining Co. v. Illi-*

*nois Cent. R.R. Co.*, 103 F. Supp. 280, 286 (E.D. La. 1952). Second, the carrier must protect the goods to minimize the damages during the occurrence and after the catastrophe has taken place. *Ismert-Hincke Milling Co.*, 238 F.2d at 16.

**The Public Enemy or Act of War Defense**

The defense of “Public Enemy” or “Act of War” is limited to loss or damage caused by the hostile acts of military forces which are the enemies of the Government. 1 Sorkin, *Goods in Transit* §5.08 at 5-86. This defense is also an affirmative defense that, if not asserted, is waived.

**The Act of the Shipper Defense**

The “Act of the Shipper” defense is available only when the loss is occasioned solely by the act or fault of the shipper or the owner of the goods. This defense includes such acts as an error in the description of the contents of the packages or containers by the shipper in the bill of lading. 1 Sorkin, *Goods in Transit* §5.10 at 5-94. It may also include improper loading or counting of the shipment unless the defect is latent and not discoverable through ordinary observation. *Minneapolis St. Paul and Sault Ste. Marie R.R. v. Metal-Matic, Inc.*, 323 F.2d 903, 906–07 (8th Cir. 1963). This defense is also an affirmative defense that, if not asserted, is waived.

**The “Inherent Vice” Defense**

The term “Inherent Vice” is defined as “any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with the lapse of time.” *Elmore & Stahl*, 377 U.S. at 136. Examples of goods which may be subject to an inherent vice are agricultural commodities such as fruits and vegetables, cheese, and tobacco. 1 Sorkin, *Goods in Transit* §5.07[1] at 5-64.

Once it is proven that the goods are in a damaged condition, then, as a general rule, the carrier has the burden of proving that the damage was caused solely by the inherent nature of the goods rather than by its own fault or negligence, such as not following the shipper’s instructions. *Id.* §5.07[4] at 5-76. If the carrier meets its burden, it is not liable for the damage to a shipment caused solely by an inherent vice. *Elmore & Stahl*, 377 U.S. at 138. However, if the car-

rier claims that only part of the shipment was damaged by an inherent vice, it must show what portion of the damage was so caused or the defense fails. *Harbert Int’l Establishment v. Power Shipping*, 635 F.2d 370, 375 (5th Cir. 1981).

**Damages Recoverable under Carmack**

**Actual Loss**

The liability of the carrier is limited to a value established by the written declaration of the shipper or by an agreement

**The shipper has two years and one day to file a civil action from the date notice was given.**

between the shipper and the carrier. 49 U.S.C. §14706(c)(1)(A) (2005). Thus, the carrier is liable for “the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported...” *Id.* §14706(1); see also *Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761, 764 (9th Cir. 1981).

Punitive damages are not allowed under the Carmack Amendment. *Cleveland v. Beltman North American Co., Inc.*, 30 F.3d 373 (2nd Cir. 1994). See also *Morris v. Corvan World Wide Moving, Inc.*, 144 F.3d 377, 382 (5th Cir. 1998).

**Market Value**

The general rule for determining the amount of damages is the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value in the condition in which it did arrive. *Chicago, M. St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97 (1920); *Mineral U.S. Inc., Exalmet Div. v. M/V Moslavina*, 46 F.3d 501 (5th Cir. 1995); *Camar Corp. v. Preston Trucking Co., Inc.*, 18 F. Supp. 2d 112 (D. Mass 1998), aff’d, 221 F.3d 271 (1st Cir. 2000).

The market value rule, however, is not a hard and fast one. 2 Sorkin, *Goods in Transit* §11.03[3] at 11-31. If there is a contract to sell the damaged goods, the proper measure of damages is the price plaintiff would have received under the contract, minus any

money plaintiff received by selling the damaged goods. *Hartford Fire Ins. Co. v. Novacargo USA, Inc.*, 257 F. Supp. 2d 665, 676 (S.D.N.Y. 2003); see also *Impact, Inc. v. International Freight Express (USA)*, 1997 WL 570580 (S.D. N.Y. Sept. 11 1997). In other instances, the courts have held that the proper measure of damages is the replacement value, especially when there was no market value at the port of destination and there was immediate need to replace the cargo. *Waterman S.S. Corp. v. United States S.R. & M. Co.*, 155 F.2d 687, 694 (5th Cir. 1946); see also *Fredette v. Allied Van Lines, Inc.*, 66 F.3d 363, 372 (1st Cir. 1995) (measure of damages can be by replacement or repair costs occasioned by the harm).

**Delay Damages**

Carmack is also the source for the determination of the liability of the interstate carrier for delay damages. 49 U.S.C. §14706. Federal courts, when considering delay claims, have rejected the application of the Uniform Commercial Code, state common law, and federal common law causes of action. A carrier’s liability for a delivery delay is calculated by the provisions of the carrier’s operating tariffs, and cannot exceed the released value of the shipment. *Southeast Express Co. v. Pastime Amusement Co.*, 299 U.S. 29 (1936)

When there has been a delay in the delivery of goods, the question turns on the definition of delay. A carrier is liable for an unreasonable delay. The United States Supreme Court in *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 213 (1931), defined a reasonable time for delivery as “such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in light of the circumstances and conditions surrounding the transaction.”

In measuring damages for a loss due to a delay, courts hold that if the carrier is liable, the liability, subject to any applicable limitations of liability, is for the difference in the market value of the property on the date it should have been delivered and its market value on the date of actual delivery.

**Cost of Transportation**

Under Carmack, freight, taxes, fees and insurance, in addition to the price paid for the commodity, can be recovered, or added

to the value, when the measure of damages is the cost to the shipper less the value of the damaged goods. *American Nat. Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 924 (7th Cir. 2003).

**Special and Consequential Damages**

“Special damages,” are those that the carrier did not have reason to foresee as ordinary, natural consequences of a breach of the contract of carriage when such contract was formed. *Burlington Air Express v. Truck Air*, 8 F. Supp. 508 (D.S.C. 1998). Carmack has not altered the common-law rule that special or consequential damages are usually not recoverable. *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir. 1981).

Special and consequential damages are recoverable if the carrier had notice of the special circumstances giving rise to such damages. *Reed v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302 (10th Cir. 1981). Thus, the carrier is liable to pay labor costs incurred by the consignee before it discovers that the shipment is defective when the carrier has implied notice that plaintiff could not use the goods in its manufacturing process if damaged. *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir. 1981). Conversely, where the carrier does not have notice that the consignee would disassemble its existing oven in preparation of the delivery of the new one, which was damaged in transit, special damages are not recoverable. *Main Road Bakery, Inc. v. Consolidated Freightways, Inc.*, 799 F. Supp. 26 (D.N.J. 1992).

**Attorney’s Fees**

As the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612, 1616 (1975), explained:

In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.

The Court referred to this precept as the “American Rule.”

The Court in *Key Tronic Corp. v. U.S.*, 511 U.S. 809 (1994), further commented on the “American Rule” and the recovery of attorney’s fees by noting an exception to the Rule:

(a) Under the longstanding “American Rule,” attorney’s fees generally are not a recoverable cost of litigation absent *explicit congressional authority*.

(Emphasis added.)

Carmack, 49 U.S.C. §14708(d), includes explicit congressional authority allowing an award of attorney’s fees to prevailing carriers and shippers in certain circumstances involving a shipment of household goods. In order to be awarded attorney’s fees, however, the prevailing shipper must meet these conditions:

- The claim is properly submitted;
- The shipper prevailed in the court action; and
- Either the decision resolving the dispute was not rendered through arbitration under 49 U.S.C. §14708 within 60 days of a request for arbitration or an extension of such period, or the court proceeding was to enforce a decision rendered through arbitration under 49 U.S.C. §14708 and was instituted after the period for performance under such decision had elapsed. 49 U.S.C. §14708(d).

*See Campbell v. Allied Van Lines, Inc.*, 410 F.3d 618 (9th Cir. June 7, 2005). The *Campbell* court also notes that:

Congress unambiguously authorized the awarding of attorney’s fees to shippers of household goods who meet three express conditions [see above]. None of those conditions require a shipper to first invoke arbitration.

*Campbell* at 623.

49 U.S.C. §14708(e) should also be considered in determining whether there is any benefit to a carrier in offering or accepting an offer to arbitrate. §14708(e) allows attorney’s fees in situations where a carrier of household goods has participated in arbitration. Accordingly, with respect to the issue of the awardance of attorney’s fees, there may be little incentive for a carrier of household goods to participate in arbitration, as attorney’s fees can be awarded in the court action or in arbitration.

**Duty to Mitigate by the Shipper or Consignee**

The plaintiff has a duty to mitigate its damages, and the carrier bears the burden to show that the plaintiff did not exer-

cise reasonable diligence in mitigating its damages. *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317, 320 (10th Cir. 1991). However, the plaintiff’s duty to mitigate only requires that reasonable steps be taken under the circumstances of the particular case to mitigate its damages. *Id.* When a plaintiff’s reputation will be harmed if the damaged goods are sold or used, the plaintiff does not have a duty to sell the damaged merchandise. *Id.* Likewise, when the owner of a car discovered that it was damaged and that experts indicated it could not be restored to its original condition, the owner did not have a duty to allow the carrier to repair the car so as to mitigate the damages. *Reed v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302 (10th Cir. 1981). On the other hand, a shipper and/or a consignee, as part of their duty to mitigate, may be obligated to make an adequate survey so that undamaged goods will not be sold as salvage with the damaged merchandise. *Dixie Plywood Co. v. S.S. Federal Lakes*, 404 F. Supp. 461 (D. Ga. 1975).

**Conclusions**

The roadmap presented in this article is meant to be a starting point when dealing with a motor carrier cargo claim. A Carmack Amendment claim can become very complicated, especially when dealing with fault, damage and defense issues. One needs to determine the relationships between the motor carrier and the shipper, broker, other carriers, freight forwarder, holder, consignor and consignee, in order to determine, the carrier’s rights and responsibilities. One must also determine the nature of the bill of lading and whether any contracts are applicable.

While Carmack subjects a motor carrier transporting cargo in interstate commerce to absolute or strict liability for actual loss or injury to property, there are several defenses available to the motor carrier. The written notice of claim must also be examined to determine if all of the requirements have been met. Given that total motor carrier revenue in 2002 was \$169,443,000,000, a transportation attorney can measure the likelihood of being involved in a Carmack Amendment claim. *See* Statistical Abstract of the United States: 2004–2005, No. 1105. Truck Transportation Summary: 2000 to 2002.

