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ROANOKE TRADE

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Review

Be Helpful, But Cautious

When the U.S. Customs Service launches an investigation against an importer suspected of violations of law, they routinely subpoena (or simply request) records from the customs brokers who have handled transactions for that importer. While your good intentions may lead you to cooperate and assist the Customs Service without first seeking legal counsel, keep a few things in mind should you find yourself in a similar situation.

Today's fraud case against an importer can very easily (and often does) become tomorrow's 'expanded' investigation against a customs broker—for collusion, cooperation, assistance or complicity. Anything you provide in the spirit of cooperation, can suddenly become evidence against you in future proceedings.

Furthermore, should you voluntarily share your records with investigators, without first obtaining your customer's approval, you may find yourself facing legal action from your client for disclosing confidential information. This is es-

pecially true, if your voluntary disclosure hinders their ability to defend themselves against the allegations brought against them.

Finally, an importer who is being investigated may be inclined to "blame" his customs broker, claiming that your poor or improper advice is what led them to unknowingly violate the law. In that eventuality, the very records you shared with Customs (or other governmental agencies) may be used as the basis of, or evidence for, an E&O claim against you by your client.

To be safe, contact your attorney if you find yourself involved, even on the fringes, of an investigation. While you understandably may wish to cooperate with requests from authorities, you certainly don't want to jeopardize your

own interests in the process.

*Bill Florio, Senior Vice President
Roanoke Trade Services, Inc.*

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Suggestions?

Would you prefer to receive the E&O Review via email? Want to add someone to our reader list or make a change of address? Are there topics you'd like addressed in our next issue? Please send your comments and inquiries to:

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About the Writers

Bill Florio is a Senior Vice President at Roanoke Trade Services, with over 25 years experience in providing insurance coverage for the international transportation industry. Among his responsibilities is the management of Roanoke Trade's Professional Liability (E&O) Insurance Program.

Francesca Russo-DiStaulo is a Senior Attorney at Sandler, Travis & Rosenberg, P.A., an international trade and Customs law firm concentrating in the movement of goods and personnel across international borders. Their attorneys possess extensive industry and government experience in the laws governing international trade.

Watching Your Weight

Ever get on the scale in the morning, look at the number, and hope that something is wrong with the scale? You step on and off the scale several times, only to be confronted with the same result. While understating your weight a pound or two (among friends) may not be a big deal, in the transportation industry, understating the weight of a shipment can be a very big deal.

Consider the following scenario: You are a surface freight forwarder and your customer requests that you arrange for the transportation of heavy machinery. After receiving the certificate of weights and measurements from the overseas shipper, you begin to prepare the documents. In your haste to move the shipment, you transpose a few numbers, or perhaps you mix up one shipment with another, or maybe you just make some erroneous assumptions. Whatever the reason, the net result is that you describe the weight of the container as 20,000 pounds, when in fact it actually weighs 30,000 pounds. The erroneous documents are transmitted to the trucking company who then picks up the cargo.

You may even discover the error after the cargo has already left, but you figure it is too late to correct it, so you do nothing. During transit, the truck, along with the 30,000-pound container, overturns on an exit ramp. The consignee sues you for loss of the cargo. The trucking company sues you for damages to the truck. And the driver sues you for the physical injuries he suffered as a result of the accident. All argue that the over-

weight container caused the accident and all hold you responsible for understating the weight. Are they right?

As a general rule, you could be held liable for understating the weight, if the error was in fact the proximate cause of the accident. As the initiating forwarder, you are responsible for providing the necessary documentation to the subsequent carrier. The subsequent carrier is entitled to rely upon the weight recorded on the bill of lading that you prepared. Accordingly, the carrier has no independent duty (unless the weight is close to the legal limit) to weigh the cargo.



Does this mean that *all* liability rests upon you as the initiating forwarder? The answer is, "not necessarily." Prior to departing with a load, the truck driver is responsible for conducting a routine pre-trip inspection to ensure that the truck and its contents are in

safe condition for transport. Should the driver fail to adequately conduct such an inspection, then the trucking company could be held liable for the resulting damages. This is especially true if, upon inspection of the vehicle *after* the accident, deficiencies are noted that could have been spotted and corrected during the pre-trip inspection. **Even so, this would not absolve you of your own negligence as the initiating forwarder.**

So, although it may be tempting to understate your own weight, when it comes to your clients' shipments...just the facts.

*Francesca Russo-DiStaulo, Senior Attorney
Sandler, Travis & Rosenberg, P.A.*

Errors & Omissions

CLAIMS REVIEW

Through a periodic review of actual claims that have occurred, we hope to illustrate how valuable an E&O Policy is in managing your business risks. In each of the following cases, the settlement and the legal fees were the amounts paid by the insurance company.

The insured paid their deductible on the settlement amount.

CLAIM: Delay in Delivery of Merchandise

Customs Broker

The customs broker cleared a shipment of shirts that was imported from Canada to the U.S. In its instructions to the customs broker, the Canadian shipper indicated that the shirts had to be delivered to the buyer no later than February 9. When the shirts were not delivered to the buyer until February 11, the buyer refused delivery and cancelled the order. The shipper then refused to pay the customs broker approximately \$50,000 for services rendered, so the customs broker sued the shipper for non-payment. The Canadian shipper responded by countersuing the broker for \$175,000 for loss of sale.

Damages Sought:	\$175,000
Settlement:	Case still open pending trial in Canada
Legal Fees:	\$12,500 to date
Insured's Deductible Contribution:	\$0

CLAIM: Food Products Spoiled

Freight Forwarder

The freight forwarder was asked to arrange transportation on a shipment of perishable food products from California to Malaysia. The shipper, which had tendered prior shipments to the forwarder, instructed that cargo be shipped "under the same conditions as the container you previously handled." When the merchandise arrived spoiled in Malaysia, it was discovered that the merchandise was different from the previous container and should have had a lower temperature setting. The shipper claimed that the freight forwarder should have known to lower the temperature and held them responsible for the full value of the merchandise.

Damages Sought:	\$27,729
Settlement:	\$0
Legal Fees:	\$1,500
Insured's Deductible Contribution:	\$0

CLAIM: Merchandise Damaged During Transit

Customs Broker

A piece of machinery imported from France was damaged during transit. The cargo insurer paid the importer for the loss and then sued all parties involved in the transaction in an attempt to recover their loss. The customs broker was also named in the lawsuit despite the fact that they never had custody of the machinery.

Damages Sought:	\$191,000
Settlement:	\$0
Legal Fees:	\$21,500
Insured's Deductible Contribution:	\$0

CLAIM: Merchandise Released to Wrong Party

Customs Broker

The shipper in Korea requested that the customs broker act as consignee on a large shipment of T-shirts. The customs broker obtained warehouse space for the shipment and the goods were delivered there. The customs broker later released the goods in accordance with instructions received from a person they *believed* was an agent of the Korean shipper. It was later discovered that the shipment should not have been released and that the individual who ordered the release was *not* an agent of the shipper. The shipper held the customs broker responsible for the full value of the lost merchandise.

Damages Sought:	\$259,000
Settlement:	\$0
Legal Fees:	\$29,500
Insured's Deductible Contribution:	\$0

CLAIM: Release of Goods Due to Fraudulent Documents

Freight Forwarder

The breakbulk agent handled an import shipment that was consigned "to order." The buyer of the goods obtained their release by presenting *copies* of fraudulent documents, which showed an endorsement by the shipper. The endorsement turned out to be forged and the shipper was never paid for the merchandise. The shipper claimed that the breakbulk agent was negligent in not demanding original documents and held the breakbulk agent responsible for the full value of the merchandise.

Damages Sought:	\$5,974
Settlement:	\$5,974
Legal Fees:	\$5,250
Insured's Deductible Contribution:	\$2,500

CLAIM: Goods Shipped to Wrong Consignee, Wrong Country

Freight Forwarder

The freight forwarder mistakenly directed a \$14,500 shipment to Indonesia that should have gone to Delhi, India. The party who erroneously received the merchandise in Indonesia, failed to release it so that it could be rerouted to the rightful owner. The shipper held the freight forwarder responsible for the full value of the shipment.

Damages Sought:	\$14,500
Settlement:	\$12,500
Legal Fees:	\$4,750
Insured's Deductible Contribution:	\$5,000

COGSA Package Liability Limits—Guidelines Defined in Court Ruling



Recently, the U.S. Court of Appeals for the 11th Circuit handed down what could become a landmark decision regarding the package limitation under the Carriage of Goods by Sea Act (COGSA) and in ocean bills of lading. In the case *Groupe Chegaray v. P&O Containers et al.*, the court over-

ruled a trial judge's opinion that the \$500 COGSA package limit applied to each of the 2,075 cartons that were packed in 42 pallets...for what would have totaled \$1,134,000 in damages. The decision to overrule the opinion was founded in the fact that the 42 pallets were listed as "packages" on a rider to the bill of lading that the carrier had issued to the shipper... *even though the shipper's pro-forma bill of lading had listed the contents as 42 "pallets," not packages.* To state the obvious, this final ruling of \$21,000 in damages (42 "packages" x \$500) significantly tipped the scales from the original perspective of the carrier's liability in the case.

In closing, the court that made the appeal provided some guidelines as to the principals it would follow to determine a COGSA package. Below is a summary of these guidelines:

- When a bill of lading discloses the number of packages in a container, the liability limit applies to that number.
- When a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of packages within the containers, the liability limitation applies to the containers themselves.

- The court should look to the parties' contractual agreement in order to ascertain whether the bill of lading correctly reflects the intent of the parties.
- A COGSA package is the result of some amount of preparation, such as packing and handling, for the purpose of transportation. For example, a COGSA package would be a pallet that holds cartons that have been shrink-wrapped and not the individual cartons on the pallet.
- A container can be considered a COGSA package only in light of a clear agreement to that effect; and
- When goods are placed in containers without being described as separately packaged, they are classified as goods not shipped in packages for COGSA purposes, absent an agreement to the contrary. Thus, the container would be the sole COGSA package.

For many years, importers, exporters and those in the transportation industry questioned how a package is defined under COGSA. With guidelines now reasonably established, shippers, forwarders and others in the transportation industry should pay careful attention to ensure that their bills of lading adequately describe the package count.

This article, edited by Sheila Skipper of Roanoke Trade Services, is a summary of a more detailed discussion of this case, which was printed in the NCBFAA Quarterly Bulletin, No. 101-03, Fall 2001, Pages 9-10, entitled "Court Tries to Clarify COGSA Package Limitation." We wish to thank the NCBFAA for allowing us to share the valuable information they print for the customs broker/freight forwarder community.



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