Sealing the Deal:
Ensuring a Shipper Has Agreed to Limit Liability

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When a carrier maintains a tariff or otherwise wishes to limit its liability under the Carmack Amendment for goods it transports, it must obtain the agreement of the shipper. Courts across the nation have interpreted 49 U.S.C. § 14706(c)(1)(A) to impose certain requirements on a carrier to obtain that agreement, including the requirement that a carrier must "issue a receipt or bill of lading prior to moving the shipment."[1] This seemingly plain requirement carries a big impact—arguably exposing a carrier to full liability if not met. This article explores this requirement, including its the origin and development by the courts and its application in modern shipping and logistics. A carrier may never encounter a shipper at the place of origin or "issue" a receipt or bill of lading to anyone at the time of shipment. This article also argues that the plain language of the Carmack Amendment and subsequent court interpretation does *not* require a carrier to have placed its agreement with the shipper on the receipt or bill of lading. All that is required is proof of an agreement, and that agreement may be made by the shipper and carrier far prior to shipment. Indeed, a prearranged written agreement limiting liability is preferred to any on-the-spot arrangement.

Consider the not uncommon situation where a carrier is directed to retrieve a shipment at a neutral site, a port for instance, and no representative of the shipper or consignor is present to be handed or "issued" a "receipt or bill of lading." In a hypothetical situation like this, it is certainly the case that the shipper and carrier have communicated beforehand (whether via broker or directly), and it is almost as certain that the shipper or broker has provided some form of writing, such as a dispatch notice or rate confirmation, that stated the terms of the carriage. The carrier often has a tariff on file available to the shipper or broker upon request containing details for choosing levels of liability the carrier will accept for a shipment. The exchange of information between the parties before the shipment can easily form an agreement on liability limits. Should that agreement be overlooked if the carrier does not "issue" the bill of lading or receipt immediately before moving the goods?[2] We doubt any reasoned decision maker would impose such a harsh and impractical rule. Parties to a shipping arrangement may agree to a limitation of liability in advance, such as by way of a tariff and rate confirmation, and the carrier does not have to specifically repeat or offer the limitation on the bill of lading or at the time of pickup. To mandate such a requirement would be draconian and halt the natural flow of business.

I. The Four-Part Test to Limit a Carrier's Liability Under the Carmack Amendment

The Carmack Amendment permits motor carriers to limit their liability to shippers by agreement. Frequently done through a tariff referenced by incorporation on a bill of lading, carriers may "establish rates for the transportation of property… under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation."[3] To effect such a limitation on liability, motor carriers must provide "to the shipper, on *request of the shipper*, 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 the carrier, is based."[4] To determine if a motor carrier has complied with these Carmack Amendment provisions, courts across the nation have applied a four-part test (now in all practicality a three-part test) popularized by the Seventh Circuit in 1986 in *Hughes v. United Van Lines, Inc.*[5] The test requires that to successfully limit its liability under the Carmack Amendment, a carrier must:

(1) maintain a tariff within the prescribed guidelines of the ICC (now obsolete),[6]

(2) obtain the shipper's written agreement as to its 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 a bill of lading prior to moving the shipment.

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While the third prong of the test–whether the shipper was provided a reasonable opportunity to choose between two or more levels of liability–is more frequently litigated (and consequently more frequently written about), we focus on two issues relating to the fourth prong of the test: (1) whether the carrier successfully issued a receipt or bill of lading prior to moving the shipment and (2) whether this prong of the test is necessary to complete an agreement between carrier and shipper on limitation of liability. We argue that the fourth prong is sometimes conflated with the prior two prongs, where a shipper erroneously argues the receipt or bill of lading must contain the limiting agreement.

As discussed below, the fourth prong follows the language of the Carmack Amendment to establish the relationship between carrier and shipper, but it should not be construed as a temporal or additional requirement for limitation of liability. The shipper may choose between two or more levels of liability and enter an agreement with the carrier at any time prior to shipment. It seems incongruous with the purpose of the Carmack Amendment and its legal interpretations that the shipper have a "reasonable opportunity to choose" between levels of liability to require such a choice to be contained in a bill of lading or receipt that is usually issued at the same time the freight is being moved, thus providing less opportunity for the consideration of liability limits. It is unnecessary, and in certain situations onerous or even impossible, to require a carrier, who negotiated a pre-shipment limitation of liability with a shipper, to further ensure it has issued a receipt or bill of lading (which may have nothing to do with the liability limitation) before moving the goods. This is especially true where the shipper or broker requires use of its bill of lading. In these situations, the carrier will not have incorporated the limitation of liability in the bill of lading because it is not the drafter. The practicalities of modern shipping create many questions and situations that call the continued utility of the final prong of the *Hughes* test into doubt.[7]

II. Development of the Requirement that a Carrier "Issue a Receipt or Bill of Lading Prior to Shipment"

Looking back to the origins of the Carmack Amendment, Congress at one time prohibited carriers from limiting their liability to shippers for lost or damaged goods.[8] This prohibition caused carriers to increase shipping rates, and Congress responded by enacting the Cummings Amendment,[9] allowing a carrier to limit liability if it complied with certain tariff requirements.[10] The Cummings Amendment was an exception to public policy against limitation of liability that Congress initially expressed in the original Carmack Amendment, and carriers were required to follow rules established by the Interstate Commerce Commission.[11] Those rules required "the filing of tariffs by the carrier and the use of a written agreement," often the bill of lading, which complied with the provisions of the tariff.[12] Judicial interpretation of the Carmack Amendment and subsequent amendments have culminated in the familiar four-part test for limiting a carrier's liability, which centers primarily on an agreement to limitation that is reduced writing between the parties to the contract of carriage.

Frequently, an "agreement as to the shipper's choice of liability" will be found on the bill of lading issued by the driver at the time of pickup because it will state the weight or value of the goods being shipped and provide written reference to the carrier's tariff rules, of which the shipper is presumed to have knowledge. The bill is signed by the shipper or consignor and often constitutes the required "reasonable opportunity to choose between two or more levels of liability." If the shipper does not follow the tariff requirements to select a higher limit of liability and signs the bill of lading at the time of shipment, the elements of the *Hughes* test are met and the carrier has successfully activated this exception to full carrier liability under the Carmack Amendment. Although this is a frequent method of entering a written agreement to limit liability, it is not an exclusive method.

The judicial test requiring that bill of lading be "issued" as part of the process to limit liability is obviously derived from the language in 49 U.S.C. 14706(a)(1), which sets forth the general requirement that a carrier issue a receipt or bill of lading for property it receives. That receipt or bill of lading is what gives shippers standing to bring lawsuits against carriers, and what exposes carriers to full liability unless otherwise limited. Distinct from the language in the Carmack Amendment regarding issuance of a bill of lading or receipt, the Carmack Amendment separately requires that the "carrier and the shipper must have a written agreement that is sufficiently specific to manifest that the shipper in fact agreed to a limitation of liability."[13] This is because a "carrier cannot limit liability by implication" and "[t]here must be an absolute, deliberate and well-informed choice by the shipper."[14]

The written agreement requirement is clear, but it is not part and parcel of the bill of lading requirement. The Eleventh Circuit elaborated on this point in a pair of cases that, by virtue of discussing the reasoning behind the relevant Carmack Amendment provision, opine on the utility of the final element of the *Hughes* test (but stop well short of calling the final element obsolete where all the other elements are met). In *Siren, Inc. v. Estes Express Lines*, the Eleventh Circuit explained that "…the concept of a carrier and shipper who agree in writing to limit the carrier's liability is not bounded by a requirement that the carrier's tariff somehow be incorporated into the bill of lading."[15] The court further noted that all the statute "requires [is] nothing more than a valid written contract between the parties establishing a reasonable value for the purpose of limiting the liability of the carrier."[16] Interestingly, during this discussion, the court in *Siren* looked directly to the statute and not prior court interpretation of the statute (*i.e.,* the *Hughes* multi-prong test) to make a very simple point – if two parties knowingly and reasonably agree to limit liability, then liability should be limited.[17] 49 U.S.C. § 14706 (c)(1)(A) and (B) confirm that the statute does *not* require that the carrier physically hand a bill of lading or receipt to the shipper to limit liability when an agreement on that issue has already been reached in good faith, and neither should the case law. Continuing with such a requirement would put form over substance in an area of law where formalities should not interrupt the speed at which business moves.[18]

In another decision, *Werner Enterprises, Inc. v. Westwind Mar. Int'l, Inc,* the Eleventh Circuit reaffirmed the concepts discussed in Siren, stating that the broker and carrier "…entered into a written contract providing the shipper with a reasonable opportunity to choose between two or more levels of liability…this is all that is required under the Carmack Amendment."[19] Explicitly rejecting the notion suggested in Hughes that the shipping manifest ("bill of lading or receipt") might be necessary to limit liability, the Werner court further explained that "[t]he manifest itself did not need to include the choice of levels of liability and rates; that choice was provided in a separate written contract…[t]hus, the requirements of the Carmack Amendment…are satisfied."[20]

III. The Carmack Amendment Does Not Require a "Receipt or Bill of Lading" that Contains the Limitation of Liability to Be Issued Prior to Shipment; An Agreement Must Only Be in Writing

While virtually all cases involving Carmack limitation of liability reference the multi-prong test from *Hughes*,[21] very few discuss the fourth prong, the issuance of a "receipt or bill of lading." One such case that delves into the final element is *Travelers Property Cas. Co. of America v. A.D. Transport Express, Inc.*, an unpublished federal district court case out of New Jersey.[22] In *Travelers,* the shipper and carrier had an ongoing business relationship and established business pattern, having conducted approximately 670 shipments during their relationship.[23] After each delivery, the shipper would send a freight bill and what it called a "Pro Bill," which specified liability limitation terms.[24] Given the "extensive course of dealing between" the parties, and notwithstanding that the carrier sent the document memorializing the liability limitation *after* the goods moved, the *Travelers* court was "satisfied that [the Pro Bills] constitute[d] a written agreement that properly limit[ed]…liability in this case."[25] The *Travelers* court focused on the parties' actions over timing. It found that the parties, which included a sophisticated shipper, effectively ratified the liability limitation and held that the *post-facto* delivered "Pro Bill" constituted a valid agreement between the parties to limit liability. The court rejected the rigid requirement of the four-part test that the carrier "issue a receipt or a bill of lading prior to moving the shipment," which the carrier inarguably did not do.[26]

The development of the law that surrounds the fourth prong is far from conclusive, but nonetheless supports the notion that when faced with determining whether a "receipt or bill of lading" was issued prior to shipment, an application of a rigid requirement will not overcome the parties' unambiguous agreement to limit a carrier's liability. This is especially true in situations where the parties have a well-established course of dealing that has established a common basis of understanding for interpreting their expressions and other conduct. Much like in *Travelers,* another federal district court in California explained that "[f]ailure to issue a bill of lading does not affect the liability of a carrier… so long as there is a 'course of dealing,' courts have only required that the bill of lading clearly state the [monetary] limitation and the method for avoiding it."[27] In that case the court observed that the carrier and shipper possessed significant and sufficient course of dealing to limit the carrier's liability under Carmack Amendment for the loss of a shipping container, notwithstanding the loss of applicable bill of lading, because the carrier and shipper had engaged in 101 transactions in the immediately preceding year and numerous additional transactions over the three-year period, all of which used the same bill of lading with written liability limits.

Other courts that have been called upon to apply the fourth prong requiring a carrier to issue a bill of lading or receipt before moving cargo have found that the requirement "may be satisfied by an agreement as to the salient terms of the contract of carriage before shipment."[28] The federal district court in Texas in *Hyundai Corp. v. Contractors Cargo* looked to the fact that the parties had *signed a contract* describing the salient terms limiting liability *before shipment,* and found this "constitute[ed] a receipt issued before shipment."[29] Similarly, in *Hoskins v. Bekins Van Lines,* the Fifth Circuit held that an interstate order for service containing the agreed upon terms of the contract for carriage was a receipt issued before shipment.[30] And in *Toppan Photomasks, Inc. v. North American Van Lines, Inc.,* the Southern District of Texas rejected the argument that the carrier was not entitled to limited liability because it did not "issue" a bill of lading before shipment.[31] The court found that all salient terms of the bill of lading were agreed to before shipment, stating that the "shipper's acceptance of the terms of the bill of lading controls, regardless of whether the carrier issued the actual bill of lading after transport."[32] It was not relevant that the carrier issued the bill of lading after transport because the shipper manifested assent to the terms of the bill prior to the shipment.

Surely there will be times where a shipper will have neglected to elect a higher limit on a carrier's liability, and following a loss that exceeds the carrier's limitation, the shipper might attempt to seize on a perfunctory application of the fourth prong if the carrier had not technically "issued a bill of lading" prior to shipment. In this instance, the plain language of the Carmack Amendment should control, and it requires nothing more than a valid written contract between the parties establishing an agreement to limit liability. The relevant portion of the statute itself does not use the phrase "bill of lading or receipt." It requires only an agreement be reached, which could be in the form of a written formal contract, a receipt,[34] or a bill of lading. In *Johnson v. Bekins Van Lines,* the Eastern District of Texas found the fourth prong satisfied and recognized that an agreement to limit liability had been reached where the "undisputed evidence further shows that the interstate order for service, which contained all the salient terms of the bill of lading, was signed by the Plaintiff, thus qualifying as a 'receipt.'"[35]

The discussions in *Siren, Werner, Hoskins, Toppan,* and *Travelers* are all supported by the subject provisions within the Carmack Amendment. These provisions contain no strict requirement that after the shipper and carrier agree in writing to a reasonable limitation on liability, the carrier must further seal the deal by providing a bill of lading immediately before moving the product. The requirement that a carrier issue a receipt or bill of lading hearkens back to both the contract of carriage that triggers the Carmack Amendment and the fundamental notion any agreement to limit liability be reduced to writing before a shipment takes place. The requirement should impose duplicative and impractical demands on a carrier at the moment a shipment is being retrieved. To avoid unnecessary disputes and providing fodder for argument over the fourth prong, ideally a carrier should ensure that all parts of the test are met—that the carrier obtained the shipper's written agreement of its choice of liability, offered the shipper a reasonable opportunity to choose between two or more levels of liability, and issued a receipt or bill of lading prior to shipment. If business or practicality dictates that a bill of lading or receipt cannot be issued prior to shipment, or the shipper is not available to agree to the terms in a bill of lading at the time of issue, best practice dictates that the agreement to limit liability should be reached far in advance of the shipment, with clear terms agreed in writing. Such practice should withstand the rigorous requirements of the Carmack Amendment.

Endnotes

1 Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir. 1987).

2 And is that even practical in situations, like our hypothetical, where the shipper is not present at the time of the loading? It has been suggested by advocates of the theory that the BOL or receipt must contain the liability limit that carriers should have no problems meeting this requirement due to advances of the digital age, such as iPads or other mobile devices. We find it implausible that a modern "fix" to some of the predicaments in issuing a BOL on the spot to a non-present shipper would be the answer to comply with a statute from the early 1900's.

3 49 U.S.C. § 14706 (c)(1)(A).

4 49 U.S.C. § 14706 (c)(1)(B) (emphasis supplied).

5 *Hughes,* 829 F.2d 1407 (7th Cir. 1987).

6 It is generally accepted that this prong was rendered obsolete by the passage of the ICC Termination Act of 1995, which, obviously, terminated the Interstate Commerce Commission. We include this in our statement of the test because the "parts" of the test are consistently referenced by number.

7 We are not advocating that a bill of lading or receipt is unnecessary; that would be contrary to the Carmack Amendment and fundamental tenants of shipping practice. However, it should not be necessary to issue a bill of lading or receipt prior to shipment in order to limit liability. Perhaps the test would have been better stated had it simply required that the agreement to limit liability be made in writing prior to shipment, and perhaps in time it will be re-stated that way. Until then, we rely on the history and meaning of the Carmack Amendment, case law, and basic shipping business logic to challenge whether the failure to issue a bill of lading or receipt at the time of shipment would result in unwinding of the liability limits to which the parties agreed.

8 *Rohner Gerig Co. v. Tri-State Motor Transit,* 950 F.2d 1079, 1083 (5th Cir.1992).

9 Former 49 U.S.C. § 10730.

10 *Rohner,* 950 F.2d at 1083.

11 *Rohner,* 950 F.2d. at 1084.

12 *Id.*

13 *ABB Inc. v. CSX Transp., Inc.,* 721 F.3d 135, 142 (4th Cir. 2013).

14 *Id.*

15 249 F.3d 1268, 1270-71 (11th Cir. 2001) (citing 49 U.S.C. § 14706(c)(1)(A)).

16 *Siren,* 249 F.3d at 1271.

17 *Siren* cites to the *Hughes* prongs only in a footnote. *See Siren,* 249 F.3d 1268 at FN 4 (citing to *Bio–Lab, Inc. v. Pony Express Courier Corp.,* 911 F.2d 1580 (11th Cir. 1990) which cites to *Hughes*).

18 Form and ceremony are fine for testamentary documents and the like which are executed by an individual once, maybe twice, in a lifetime, but not for shippers, brokers, and motor carriers who have to navigate many of these agreements on a daily basis.

19 554 F.3d 1319 (11th Cir. 2009)

20 *Id.* (citing *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.,* 331 F.3d 834 (11th Cir. 2003)).

21 Citing Hughes or its progeny.

22 *Travelers Prop. Cas. Co. of Am. v. A.D. Transp. Express, Inc.,* No. 04-CV-5830 JAP, 2007 WL 2571957 (D.N.J. Aug. 31, 2007).

23 *Id.* at *1; *4.

24 *Id.* at *1.

25 *Id.* at *4.

26 *Id.* at *4–*5. The carrier issued neither a bill of lading nor sent one prior to moving the shipment. It is possible that the Pro Bill could have been considered some form of receipt, but that was not discussed in *Travelers.*

27 *Atl. Mut. Ins. Co. v. Yasutomi Warehousing & Distribution, Inc.,* 326 F. Supp. 2d 1123, 1126 (C.D. Cal. 2004).

28 *Hyundai Corp. v. Contractors Cargo Co.,* No. 07-CV-2625, 2008 WL 4178188, at *4 (S.D. Tex. Sept. 5, 2008).

29 *Id.* at *5.

[30] *Hoskins v. Bekins Van Lines,* 343 F.3d 769, 778 (5th Cir.2003).
[31] *Toppan Photomasks, Inc. v. North American Van Lines, Inc.,* No. 05-CV- 3201, 2007 WL 173904 at *2 (S.D.Tex. Jan.19, 2007).
[32] *Id.*
[33] *Id.*
[34] *See, e.g., Johnson v. Bekins Van Lines Co.,* 808 F. Supp. 545, 548 (E.D. Tex. 1992), aff'd, 995 F.2d 221 (5th Cir. 1993).
[35] *Id.*