



HOW TO FILE A FREIGHT CLAIM FOR LOSS OR DAMAGE

A claim against a motor carrier is a legal demand for the payment of money arising from the breach of the "contract of carriage". Unless you have a formal transportation agreement, that contract will be the bill of lading, which probably will be some form of the "Uniform Straight Bill of Lading".

There are laws governing the filing of claims. For interstate shipments there is a federal statute known as the "Carmack Amendment," 49 U.S.C. § 14706, that governs most loss and damage claims against motor carriers and freight forwarders, and for intrastate shipments there are similar state laws. If an international movement is involved the claim may also be governed by international treaties, such as the Carriage of Goods by Sea Act (ocean shipments) or the Montreal Convention of 1999 (air shipments).

There are also federal regulations. The Federal Motor Carrier Safety Administration (formerly the ICC) has established "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage" that are published at 49 C.F.R. Part 370.

If a shipment is governed by a transportation contract, the terms of that agreement will govern the carrier's liability. Otherwise, the bill of lading and any applicable tariffs that are "incorporated by reference" in the bill of lading will apply.

What Constitutes a Claim?

No specific claim form is prescribed by law, but four elements are essential:

- (a) the shipment must be identified to enable the carrier to conduct an investigation;
- (b) the type of loss or damage must be stated;
- (c) the amount of the claim must be stated or estimated and
- (d) a demand for payment by the carrier must be made.

The shipment identification information should include the shipper's bill of lading number, the carrier's "Pro number", the name and address of the consignor (shipper) and the consignee (receiver), the shipping date and delivery date (or expected delivery date, if not delivered), and commodity description.

The claimant should ordinarily be the person that has risk of loss in transit, which is typically the shipper or consignee. Risk of loss is usually governed by the "terms of sale"; if the terms of sale are FOB Origin the risk of loss is on the buyer/consignee; if the terms of sale are FOB Destination the risk of loss is on the seller/shipper. These presumptions can be varied by agreement between the buyer and the seller. Other parties that may have the right to file a claim would include the beneficial owner of the goods, or an assignee of the claim.

The claim can be filed against either the receiving carrier, the delivering carrier, or the carrier in possession of the goods at the time of the loss. It is not recommended that claims be filed against intermediate connecting carriers, although it is permissible to do so if it is definitely known which carrier caused the loss or damage.

Claims must be filed in writing (or electronically, if both parties agree) - a phone call does not constitute a legal claim. The claim must be delivered to the carrier within the time period specified in the contract, bill of lading or tariff. For most interstate motor carrier shipments the minimum time prescribed by law (the "Carmack Amendment") is 9 months from the date of delivery, or in the case of a non-delivery 9 months from a reasonable time for delivery.

Since the date of receipt by the carrier determines whether or not the claim is timely filed, claims should be filed via delivery methods which give some type of confirmation of receipt and guarantee as to length of time for delivery, such as E-Mail (with a return receipt), Certified mail, Return Receipt Requested; Express Mail; or Express Courier Services.

Claims should be addressed to the carrier's claims manager at the carrier's home office, not to the carrier's insurance company. If a broker is involved, you must still file the claim with the carrier, but you should also send a copy to the broker.

Personal delivery to a carrier's representative may be effective if the claim is actually delivered in time, but an acknowledgment should be obtained in writing, and a copy sent to the carrier's claims manager. In the case of interline or connecting carrier movements, receipt by the receiving or delivering carrier is deemed to be notice to all connecting carriers as well.

Details of a Claim

A detailed factual description of the loss, damage or delay should be stated, setting forth the specific commodities, number of units of each type, extent of loss suffered, the value of each unit, the amount of salvage realized, the net loss, and a description of the events that caused the loss. For example:

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| <i>10 cartons clothing - water damaged @ \$100 ea.</i> | <i>\$1,000</i> |
| <i>2 cartons shoes - short @ \$500 ea.</i> | <i>1,000</i> |
| <i>3 cartons china - crushed @ \$100 ea.</i> | <i>300</i> |
| <i>Total damages:</i> | <i>2,300</i> |
| <i>Less Salvage:</i> | <i>(150)</i> |
| <i>Total Amount of Claim:</i> | <i><u>\$2,150</u></i> |

Include copies of any bills of lading or delivery receipts that show exception notations made at the time of delivery, as well as any inspection reports, photos, etc.

Amount of Claim

The amount of the claimant's loss must always be stated in the claim. When the extent of a loss is not known at the time of filing, it is not good practice to state that "this is a claim for \$100 more or less." When this is done, some carriers have been known to mail a check in the amount of \$100 in expectation that the check will be deposited, thus relieving the carrier of further liability. The better practice is to place the carrier on notice as to its maximum exposure to liability by stating the full potential loss. If a lesser amount is finally determined to be owed by the carrier, the claim can be amended to that amount.

Supporting Documentation

Claims should usually be supported by legible copies of the following:

- (a) The original bill of lading
- (b) The paid freight bill
- (c) Proof of the value of the commodities lost or damaged (an invoice)
- (d) Inspection or survey reports, if made
- (e) Copies of request for inspection
- (f) Notification of loss
- (g) Waiver of inspection by carrier
- (h) Other supporting documents when appropriate, such as photographs, temperature reports, shock or impact records, condemnation certificates, dumping certificates, laboratory analysis, quality control reports, loading diagrams, weight certificates, written statements or affidavits, loading and unloading tallies, etc.

Some carriers may require a "Bond of Indemnity" to be filed with the claim indemnifying the carrier for any loss it may suffer if it pays the wrong party.

Claims should be numbered (BOL number, etc.) by the claimant and recorded in a claim log or computer system. The carrier should also assign its claim number and acknowledge receipt of the claim within 30 days of receipt, pursuant to FMCSA regulations. Both claim numbers should be shown on all correspondence and checks.

A separate file should be kept on each claim. Important deadlines and dates should be recorded in the claim log and systematically reviewed.

Unless otherwise agreed upon in a contract, the FMCSA claim regulations require a carrier to acknowledge receipt of a claim within 30 days, the carrier must then pay, offer to compromise or disallow the claim within 120 days or provide status reports every 60 days thereafter. If the carrier fails to abide by these periods, it should be notified that it is violating the FMCSA claim regulations.

Lawsuit Deadlines

If a carrier denies liability for a loss for which the claimant has reason to believe the carrier is lawfully liable, the claimant has the right to institute a lawsuit. However, such suits must be instituted within strict time limits.

The most common time limit for bringing a lawsuit is two years and one day from the date the motor carrier disallowed the claim, based on the "Carmack Amendment" (49 U.S.C. § 14706) which prohibits the establishment of a shorter period. The date of mailing the carrier's disallowance letter usually governs, not the date of its receipt by the claimant.

It should be noted that some traffic is not subject to the Carmack Amendment minimum time limits. This would include "exempt" shipments such as fresh fruits and vegetables, intermodal shipments, etc. which could have shorter time limits. Exempt rail, international ocean and air freight shipments may also have shorter time limits.

A system should be implemented to periodically review the status of pending claims to prevent the expiration of the suit-filing deadlines. Don't wait until the last day to request your attorneys to institute a suit. Set your review schedule to allow at least 30 days' lead time.

Intermediaries

Many shippers use the services of intermediaries such as brokers or 3PL's to arrange with carriers for the transportation of their goods. Ordinarily a broker or 3PL does not have any liability for loss or damage since it is not a carrier and does not have physical possession or control over the shipments. Sometimes intermediaries will contractually agree to assume liability for loss or damage, but do not assume that a broker or 3PL will have any liability for transit losses unless they specifically agree to do so in a written contract.

Some brokers and 3PL's offer to handle the filing and/or collection of claims as an accommodation to their customers. This should not be confused with an assumption of liability. Furthermore, it is important to establish procedures to ensure that your claims are being properly filed and diligently pursued. Make sure that the claims are filed in your name (not that of the broker or 3PL) and request periodic status reports as to whether the claims have been acknowledged, whether additional supporting information has been requested, and whether the claims have been paid, compromised or disallowed, etc. If there is any question as to whether the intermediary is adequately representing your interests, consider handling claims directly with the responsible carriers.

Frequently Asked Questions

Q: *How do I find the time limits for filing claims against our carriers?*

A: In the absence of a contractual provision establishing time limits, the carrier's bill of lading or tariffs will usually specify the various time limits. They could be different depending on the mode of transportation, particularly on traffic that is "exempt" such as TOFC/COFC and most agricultural shipments. The best procedure is to draw-up a time limit chart listing these key periods for each carrier in your routing guide. This will also help you to select the carriers with the most favorable liability terms and conditions.

Q: *Must we notify our own insurance company of a claim against a carrier?*

A: Yes, if you have your own cargo ("inland marine") insurance, the insurer stipulates that it must be given notice of claims promptly, or within a reasonable time. If you are not able to recover from a carrier, you may be time barred from claiming against the insurer if you have not given it prompt notice of your claim against the carrier.

Q: *Must I use a specific claim form?*

A: No, any written notice containing the basic elements of a claim will suffice. (See listing above under "What Constitutes a Claim?")

Q: *May I include interest, administrative costs, freight charges, loss of profits, attorney's fees, etc. in my claim?*

A: As a general rule, a claim is limited to the value of product lost or damaged, which may include mitigation expenses associated with salvage. However, most other consequential damages are not recoverable. Attorney's fees, in particular, will not be recoverable unless a contractual provision allows it, see "Freight Claims in Plain English" (4th Ed. 2009) that discusses the case law on this issue as well as all other legal issues affecting claims.

Q: *Can I recover for damages if the carrier fails to make delivery on time?*

A: In the absence of an express agreement to deliver by a certain date or time, the carrier is only obligated to deliver with "reasonable dispatch", and is only liable for damages that are reasonably "foreseeable". Consequential damages resulting from delay such as interruption of an assembly line, cost of an extra unloading crew, air freight for a replacement shipment, loss of future sales or profits, etc. are usually considered "special damages" and are not recoverable unless the carrier was given notice at the time of shipment that a failure to make timely delivery will result in specified damages.

Q: *Can I recover a claim from a carrier after it files for bankruptcy?*

A: Maybe. You probably will have to file a claim in the Bankruptcy court.