

# PUBLICATION

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## Brokers Beware! Your Carriers Have No Duty to Count the Goods.

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A Tennessee appellate court recently held that a carrier had no duty to count the goods delivered to it by a broker's customer, even when the goods were delivered to the carrier unsealed. As a result of this ruling, brokers must take care to ensure that goods are properly counted, when loaded and unloaded, or risk liability exposure when disputes arise as to delivery quantities.

### Background

It is well known to Tennessee practitioners that *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008) made it more difficult to obtain summary judgment. Under *Hannan*, "the moving party must either affirmatively negate an essential element of the nonmoving party's claim or establish an affirmative defense" in order to shift the burden of production to the nonmovant. *Id.* at 5. Applying *Hannan's* standard in *Mark VII Transportation Co., Inc. v. Responsive Trucking, Inc.*, No. W2009-001430-COA-R3-CV, 2009 WL 2986108 (Tenn. Ct. App. Sept. 18, 2009), the Court of Appeals of Tennessee denied summary judgment to a broker despite its contract with a shipper that invoked the Carmack Amendment standard of liability and expressly required the carrier to indemnify it for any cargo loss or damage. Significantly, as a basis for its holding, the Court concluded that a bill of lading does not establish delivery and, moreover, an incomplete or illegible bill of lading can actually create a material factual dispute as to the time a loss occurred.

### Summary

Mark VII, acting as a broker, made arrangements for Responsive Trucking (Responsive) to pick up toy shipments from Milton Bradley/Hasbro (Hasbro) and deliver them to retailers throughout the United States. Over the course of two years, Hasbro made claims for a number of short shipments to the retailers, ultimately requiring Mark VII to reimburse Hasbro in the amount of \$129,627.07. Mark VII sued Responsive for breach of contract based upon the Carmack Amendment standard of liability after the trucking company refused a claim for reimbursement pursuant to the parties' Contract Motor Carrier Agreement (the Agreement).

The Agreement between Mark VII and Responsive contained a "Loss or Damages to Cargo" provision that expressly required the carrier to accept the Carmack Amendment standard of liability. Additionally, the Agreement included an "Indemnification" provision that obligated Responsive to "defend, indemnify, and hold MARK VII harmless from and against any and all claims . . . for damage to the Goods of MARK VII's customer while under the care, custody, or control of CARRIER."

Evidence before the court demonstrated that Responsive, while at Hasbro to pick up shipments, would sign bills of lading, load toys and seal shipments without ever having counted the goods to be delivered. Consistently, a guard would check the seal before Responsive left Hasbro and the goods in each situation arrived with the seal intact. For unknown reasons, however, shortages regularly occurred. Incredibly, Responsive denied that any loss occurred under its care, custody or control.

In the lower court, Mark VII sought summary judgment under the Agreement, contending that Responsive was liability under the Carmack Amendment standard of liability as a matter of law. Liability exists under the Carmack Amendment for any damage or loss to property that is transported in the United States under a bill of

lading. To establish a prima facie case against a carrier under the Carmack Amendment, a plaintiff must prove (1) delivery of the goods to the carrier in good condition, (2) receipt by the consignees of a lesser quantity of goods at the destination, and (3) damages. The trial court denied summary judgment, finding that bills of lading did not establish the fact of delivery of all items to the shipper and that the shipper had no duty to count a shipment to ensure its quantity matched the bill of lading. Accordingly, the court found that Mark VII had not met its burden of production with respect to the first element, as required by *Hannan*.

On appeal, the parties disputed whether the two provisions in the Agreement were in conflict, whether the Indemnification provision should control as being more specific, and whether the Carmack Amendment was even applicable because Mark VII was technically a "broker" rather than a "shipper." The Court of Appeals found that the two provisions did not conflict and ruled that Mark VII could pursue claims under both provisions. However, it affirmed the trial court's holding that a material dispute of fact existed with respect to the timing of the shortage loss. Rejecting Mark VII's argument that the bills of lading were sufficient evidence of delivery to Responsive, the Court found that the preprinted bills of lading before it were incomplete and illegible, and thus did not clearly establish the quantity of contents received by Responsive at the time of loading. Effectively, Mark VII found itself both unable to prove the origin of a shortage and lacking a legal mechanism to shift the risk of loss to either its customer or shipper.

## Conclusion

The transactions in *Mark VII* involved four parties: a broker, a customer, a carrier and a shipper. The shortages at issue could have occurred while the goods were in the custody of three of those four parties: the customer (pre-loading shortages), the carrier (shortages during loading, transit or final delivery), and the shipper (shortages after final delivery). Yet, as *Mark VII* demonstrates, the broker, the only party to the transaction that never had custody of the shipments, may be the party that must ultimately bear an expensive shortage loss.

As always, but more so now after *Mark VII*, it is critical to have complete, accurate and legible bills of lading. To avoid the trap posed by *Mark VII*, brokers should consider implementing policies and using contracts that require more complete bills of lading consistent with those of the Federal Motor Carrier Safety Administration (FMCSA), coupled with provisions that shift legal responsibility to the extent bills of lading prove to be incomplete, inaccurate or illegible. Additionally, brokers should evaluate whether their contracts adequately address the duty on the part of carriers to ensure the actual quantity of a load matches the quantity set forth on a bill of lading.

Baker Donelson's Transportation Practice Group is well equipped to provide legal assistance in matters like those presented in the *Mark VII* case. Baker Donelson maintains a motor carrier emergency response team, handles all aspects of transportation litigation and has extensive experience with obtaining operating authority from the FMCSA and several States' regulators. For a complete list of our Transportation attorneys, please [click here](#).