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E&O Review

ROANOKE TRADE
International Insurance Brokers Since 1935

Minor Routine Operating Procedures Minimize The Potential For Major Liability Exposure

Customs brokers and freight forwarders operate in an incredibly fast-paced environment, where the practice of proper documentation can easily lose priority. Thus, all too often when a dispute arises between a broker/forwarder and their client, we meet with the broker/forwarder and find that their file does not contain adequate confirmation letters or other forms of documented communications that would have shed light on the dispute and generally would have operated to absolve them of liability/responsibility.

To correct this problem, the following documentation procedures are recommended:

1. When opening a new file, be sure to have the customer complete a properly worded customer profile;

2. Periodically check to be certain that you have an up-to-date, properly executed power of attorney on file that specifically incorporates by reference, your NCBFAA Terms and Conditions of Service, as revised from time to time;

3. Check and make sure that the front side of your invoice prominently discloses the existence of your Terms and Conditions of Service on the reverse side and makes reference to your limitations of liability;

4. Establish a procedure wherein it is documented that each customer has been mailed your revised Terms and Conditions of Service and that you retain proof of mailing;

5. Be certain to have a shipper's letter of instructions on file;

6. Make sure that the importer or its representative receives copy(s) of the entry documents and/or classification, prior to filing. A simple acknowledgment should be signed by the customer that the entry classification, duty, etc. is correct, prior to filing same;

7. In the event of any uncertainty, write your customer/importer suggesting that they seek an informal or binding ruling or a legal opinion prior to classification and entry;

8. Take the time to e-mail or write letters confirming phone conversations wherein anything significant is discussed;

9. Keep on one side of the file a place where notes can be made in chronological order, as to what transpires;

10. When in doubt, seek legal advice before acting, rather than acting first, and afterward asking your lawyer if you did the right thing.

Andrew D. Kaplan, Senior Partner
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Roanoke Trade is represented by a worldwide network of agents in over 90 countries.

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Need To Make An Address Correction Or Want To Add A Co-Worker To Our Mailing List?

We invite you to join our readers in receiving future complimentary issues of the E&O Review!

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Complete the above information and fax back to 1-847-969-8200

Roanoke Trade Services, Inc., International Insurance Brokers

Contracts – Be Careful What You Agree To

At times, we are so excited at the prospect of obtaining a large client that we tend to agree to things when we shouldn't. Worse yet, we may sign a contract without really even knowing all of the possible ramifications and repercussions. Brokers and forwarders are often asked by importers and exporters to sign contracts, which if signed as presented, are in violation of their insurance policies… and such violations could serve to void liability coverage in the event of a claim or suit. Of equal concern is that many of these contracts are completely one-sided in favor of the client and/or force you to agree to levels of performance which are simply not doable on a consistent basis.

"It is essential that you enter into contracts that work for you as well as for your clients."

For example, a broker or forwarder may be asked to sign a contract where it must "hold harmless and indemnify" its client for virtually anything which may go wrong. Many times clients even go so far as to require that you pay for a lawyer of their choosing in the event of a dispute or problem. This presents a number of exposures to the broker/forwarder entering into such an agreement.

Most insurance policies (specifically Errors & Omissions, Bill of Lading Legal Liability, and Comprehensive General Liability) either (a) prevent an insured from holding harmless or indemnifying another without the insurance company's permission, and/or (b) prevent an insured from choosing its own counsel in the case of a legal action (let alone choosing counsel for one of its clients), and/or (c) completely exclude coverage for liability assumed under contract. Entering into these types of contracts, without first getting permission from your insurers (and without first getting the advice of legal counsel), may possibly place you in a position of having no insurance coverage in the event a client takes action against you.

It is also important to be cautious of entering into any contract that would require you to guarantee performance that is not within your company's control. For example, you may be asked to sign a contract that requires delivery of merchandise to occur within a specified time frame. Or, you may be asked to sign a contract requiring that any claim it brings for loss or damage to cargo will be resolved within a certain amount of time. Such time frames are often unrealistic and not even within the broker or forwarder's control. Clearly, you as a broker/forwarder cannot possibly guarantee when, or even if, an insurance company will pay a cargo claim. Nor can you guarantee when, or even if, a steamship company, airline or trucking company will ultimately deliver freight to a given consignee. You also cannot guarantee how Customs will treat a shipment, or how a third party or independent warehouseman will handle a shipment it receives during the course of transit.

Be careful if you are asked to sign a contract which contains phrases such as 'any and all', 'always', 'immediately', 'at all times' or other types of absolute wording. Similarly, be careful

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About Our New Look...

In the merging of operations between The Roanoke Companies and Trade Insurance Services, there were many individual elements of each company which needed to be combined to reflect that where there were once two separate entities, there is now one united organization. In that spirit, this new publication, E&O Review, is the successor to Roanoke's E&O Newsletter and Trade's publication of In-Transit. We hope to combine the best elements of both publications as we go forward into the new millennium.

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Suggestions?

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Did You Know?

You can access *Hot Topics,* Roanoke Trade's on-line monthly newsletter featuring industry issues of interest by visiting: **www.roanoketrade.com**

About the Writers

Bill Florio is a Senior Vice President at Roanoke Trade Services, with 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.

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Andrew D. Kaplan is a Senior Partner with Hyman & Kaplan, P.A., a law firm providing a variety of services to the international transportation community, including Customs representation, litigation, collection, contract drafting and review, negotiations, loss prevention, real estate and corporate representation.

Your Words
Can Be Used Against You

We often communicate with our employees, co-workers, and close business associates in an open and blunt fashion. "Get the cheapest rate," "use the cheapest route," "keep the costs down," "be careful using XYZ Trucking, they're cheap but careless at times." However, when such statements are exchanged by fax, e-mail or memo they can have a dire effect in the hands of a dishonest or dissatisfied customer.

Statements which are common in business, when written in a casual manner, can often be used after the fact to create the inference of negligent or intentional misconduct. In the eyes of a juror, whose only experience with shipping might be a package that got lost in the mail, these kinds of statements can appear outright irresponsible.

For example, a forwarder sends his agent in Amsterdam a fax that reads, "Due to our low bid, we need to keep costs to a minimum. Use XYZ to move the container from Amsterdam to New York, but stay on top of them, they misdelivered a container belonging to another client of ours last year." When the present shipment winds up getting lost or delivered late, the shipper sues claiming damages. The shipper claims that a copy of the 'warning' memo about XYZ from the forwarder to its agent, shows that the forwarder was concerned about XYZ's service, but used them anyway in an effort to increase its own profits. The judge agrees and decides to void protection for the forwarder under the liability limitations of its Terms & Conditions of Service and tells the jury they are free to access damages without the T & C constraints. To a jurist inexperienced in the realities of shipping, the "stay on top of them" fax is a smoking gun.

In another example, a freight forwarder's sales manager sends a fax to its overseas agent saying, "Please get the shipment underway as soon as possible. We committed to the client to deliver in 3 days." When he wrote those words, the sales manager was thinking about a verbal commitment he had made to "try" to have the goods to the delivery airport in three days. However, months later, in court the shipper relies on that same fax to prove that the sales manager had "guaranteed" a 3 day transit time. A jury agrees and the forwarder is held responsible for delay damages.

Always remember that once a lawsuit is brought, all your internal communications regarding the shipment or shipments which are the subject of the lawsuit can be subpoenaed by the claimant. Memos which you thought were just confidential communications within your own organization become evidence against you in a court of law.

You need to be conscious that a customer, for any reason (including avoiding payment of your bill) may decide to sue you. If they do, they will have the opportunity and the right to see your business communications during the course of the litigation.

Statements regarding the quality of carriers, or previous problems with carriers and firm commitments about transit time should never be put in writing. You can say "we will try to deliver by a certain date" or "please try to get this delivered as quickly as possible," but do not state a firm promise to deliver by a fixed date. Other types of statements are similarly guided by common sense. If you would not want to see a particular memo show up in a court case against you, then it is probably best that the communication not be written in the first place.

Jorge Espinosa, Senior Attorney
Sandler, Travis & Rosenberg, P.A.

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with contracts that attempt to hold your company completely responsible for the actions of your 'agents', 'servants', 'sub-contractors', 'carriers' or other third parties in general. These kinds of broad guarantees place an unfair or disproportionate amount of responsibility on your company, and you are probably better off walking away from any contract that attempts to take advantage in this manner. Instead, seek alternative language which will be satisfactory to you, to your prospective client and to your insurers.

Contracts between you and your clients are an important part of doing business, and most likely will become more important in the months and years to come. It is essential that you enter into contracts that work for you as well as for your clients. Carefully reviewing and challenging contracts both internally and with your attorneys and insurers, before you enter into them, is essential.

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

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 was the amount paid by the insurance company. Legal fees were paid by the insurance company as well.

The insured paid their deductible on the settlement amount.

CLAIM: Failure to Insure, Failure To Collect Shipping Charges

Freight Forwarder

The freight forwarder contracted an ocean carrier to transport a shipment of frozen fish. The fish arrived at destination spoiled, and the shipper refused to pay the ocean carrier's freight charges. The ocean carrier then brought suit against both the freight forwarder and the shipper. The ocean carrier alleged that the forwarder was negligent in not seeing to it that freight charges were collected for the contracted services. The ocean carrier further alleged that the forwarder was negligent in failing to procure 'proper' cargo insurance for the shipper, thus causing their spoilage claim to go unpaid, which in turn contributed to the shipper's failure to pay the ocean carrier. Note: The forwarder had placed cargo insurance which required, as a condition of coverage, a breakdown in the refrigeration machinery for a period in excess of 24 consecutive hours. As a 24-hour breakdown did not occur in this instance, the cargo claim was denied.

Damage Sought:	$5,240
Settlement:	$500
Legal Fees:	$3,500
Insured's Deductible Contribution:	$500

CLAIM: Failure To Follow Instructions

Freight Forwarder

The freight forwarder handling a shipment to Brazil was specifically instructed by the shipper that the terms were "cash against documents." The forwarder failed to advise the receiving agent of this fact and as a result, the goods were released without collecting payment. The consignee never paid the shipper for the merchandise. The forwarder was held responsible for the full value of the shipment.

Damage Sought:	$26,301
Settlement:	$26,301
Legal Fees:	$1,050
Insured's Deductible Contribution:	$10,000

CLAIM: Incorrect Classification & Failure To File Timely Protests

Customs Broker

The customs broker, over a 12-month period, entered merchandise on behalf of an importer as 'sewing thread'. The importer believed that the merchandise should have been classified as 'filament yarn', which would have been assessed a lower duty rate. The importer sought a binding ruling from U.S. Customs and obtained one in its favor. The importer was therefore entitled to refunds on a large number of entries and asked the broker to file protests accordingly. The broker filed some but missed approximately 100 entries. By the time those entries were discovered, protest time had expired. The importer held the broker responsible for the overpayment of duties that it was unable to recover.

Damage Sought:	$95,877
Settlement:	$42,000
Legal Fees:	$5,075
Insured's Deductible Contribution:	$10,000

CLAIM: Mistake In Classification Of Merchandise Entered Under A Tariff Rate Quota

Customs Broker

The customs broker mistakenly classified peanuts as 'raw' shelled, but should have entered them as 'blanched' shelled. Customs initially accepted the entry, but then caught the error and placed a hold on the 17 containers involved. A re-delivery notice was issued to the importer. The importer held the broker responsible for all damages.

Damage Sought:	$100,000+
Settlement:	$0
Legal Fees:	$5,425
Insured's Deductible Contribution:	$0

CLAIM: Improper Advice

Freight Forwarder

A shipper, exporting 'pepper spray' to Mexico, asked whether a special license was needed in order to ship this commodity. The forwarder's employee allegedly advised that no license was required. A license was in fact required and Customs seized the merchandise. The shipper held the forwarder responsible for any damage sustained to its merchandise, for consequential losses incurred as a result of the product being detained/delayed, and for any fines incurred as a result of the incorrect advice.

Damage Sought:	$365,000
Settlement:	$0
Legal Fees:	$1,225
Insured's Deductible Contribution:	$0