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The (Damaged) Freight Stops Here. (But Now What Do We Do With It?) The Pitfalls Of Salvage And Damage Mitigation

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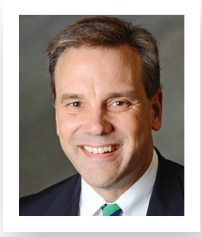

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Unfortunately, amongst the millions of freight shipments of all modes that occur on a daily basis, some freight *does* get damaged. These damages spawn freight claims, and some of *them* generate litigation. A defense often asserted in a lawsuit for freight damage is that the shipper or consignee has not appropriately "mitigated its damages" by salvaging and resellmg the damaged freight. Also, shipments may be refused by the consignee on the grounds of delay, or other bases. In those situations, obligations arise for the *carrier* to take action to salvage and resell the goods.

Perishable Goods: Act Fast, But Be Careful

Perishable goods are extremely problematic if they arrive damaged upon delivery. There are FDA statutes, and commensurate regulations, that prohibit sale of adulterated food. *See generally*, 21 U.S.C. § 342. Thus, applicable FDA standards may make it illegal or improper to sell damaged products which are intended for human use or consumption. These restrictions should be taken into consideration in determining damages sustained to contaminated cargo. *As Gerber Products Co. v. Fisher Tank Co.*, 833 F.2d 505 (4th Cir. 1987), explained:

> "At the very least, Gerber reasonably "believed that the law forbade its marketing its contaminated product. The defendants in this case have no standing to insist that Gerber should have undertaken to minimize its loss by the risky course of undertaking to market its contaminated foods when there was abundant reason to believe that such marketing activity would be unlawful."

Id. at 508, *see also, Blasser Brothers v. Northern PanAmerican Line*, 628 F.2d 376 (5th Cir. 1980).

The Federal Food, Drug and Cosmetic Act provides, in pertinent part, that:

> "A food shall be deemed to be adulterated…. if it has been prepared, packed or held under unsanitary conditions whereby it may have been contaminated in filth, or whereby it may have been rendered injurious to health."

Section 402, 21 U.S.C. § 342(a)(4) (emphasis added). Note that the statute contemplates storage in unsanitary conditions and also governs food products that *"may have"* become contaminated, a frequent litigation point. 1.

1. *Intermingling Contaminated* Shipment *with Unadulterated Prior Load May Result in Consequential Damages: In Amstar Corp. v. Transport Service Co.*, 7 111. Dec. 104, 48 111. App. 3d 1031, 364 N.E. 2d 91 (1977), liquid sugar had been contaminated with vegetable oil and was delivered by the carrier into the connecting tanks of the consignee. The pre-existing liquid sugar became contaminated and the plant had to close down for cleaning. The carrier was found liable for damage to the sugar, and also for clean up.

2. *Mere Possibility of Contamination May Preclude Any Salvage: In The Pillsbury Co. v. Illinois Central Gulf Railroad Corp.*, Civ. No. 479289 (D. Minn. October 15, 1981), *aff'd*, 687 F.2d 241 (8th Cir. 1982), upon arrival at destination, railroad cars had beetles in the cars and on top of the bags of Pillsbury flour. The bags had been held in the railroad's yard for two days. Evidence indicated that cleaning of the yard was infrequent. The court found that the flour was commercially worthless. The railroad had argued that although there were beetles in the car at the destination, there was no damage to the *flour itself*. The court rejected that argument on the grounds that, as per the statute, if unsanitary conditions "may have" subjected the food to contamination, it is considered adulterated. Consequently, Pillsbury recovered the full value of the potentially infested flour. The railroad was also liable for fumigation costs. *See also, Seabound Allied Milling Corp. v. Consolidated Rail Corp.*, Civil Action No. 7988!8 (July 22, 1980) (holding mere breaking of railroad car seals, so that integrity of load of flour was in doubt, was sufficient to find "damage" to the flour products themselves). Thus, consignees and carriers should be *extremely* careful with perishable food products in salvage situations. Careless efforts to salvage the food products may indeed result in contamination of the products under the Act, and thus may increase a claimant's damages.

3. *Courts Err Toward Not Salvaging Unsafe Food Products:* When in doubt, courts for public policy reasons, will err toward not permitting potentially contaminated food out into the stream of commerce as *Swift-Eckrich, Inc. v. Advantage Systems, Inc.*, 55 F. Supp. 2d 1280 (D. Kan. 1999), summarized:

   "Because Swift-Eckrich's determination that it was singularly unwise to sell the meat for human consumption stands insufficiently controverted, no genuine issues of fact preclude the court from granting summary judgment on the issue of damages. Swift-Eckrich could not in good conscience sell the warm meat for human consumption. Because the defendants present no other possibility for the sale of the meat, no reasonable factfinder could conclude that Swift-Eckrich could have taken any other reasonable steps under the circumstances of this case to mitigate its damages.

Id. at 1288-89 (emphasis added). A logical alternate sale plan by the defendant then, can assist in overall damage mitigation.

4. *Specific Goods That Cause Salvage Difficulties:*

   a. Damaged goods that may create health hazards if used, such as medications;

   b. Goods that require a license to resell, such as alcohol or tobacco products;

   c. *Trademarked Goods.* If the manufacturer's trademark is affixed to the product or to its wrapping and is not removable, the manufacturer may allege that the entry of the damaged product into the stream of commerce could damage its reputation and commercial goodwill. *See Perugina Chocolates & Confections, Inc. v. S/S Ro Ro Genova*, 649 F. Supp. 1235, 1240 (S.D.N.Y. 1986); *Sony Magnetic Products, Inc., of America v. Merivienti* O/Y, 863 F.2d 1537 (11th Cir. 1989); *Eastman Kodak Co. v. Westway Motor Freight*, 758 F. Supp. 641 (D. Colo. 1991), *aff'd* 949 F.2d 317 (10th Cir. 1991) ("as a matter of law, however, I conclude it is unreasonable to force Kodak to sell products the parties agree are commercially unacceptable....").

To surmount these trademark considerations, the carrier must show that the goods could be sold *without being traceable to the shipper.* Without such proof, the salvage value of the damaged goods is limited to their value, if any, *in recycled form*.

However, courts are mindful that this exception could swallow the rule. Thus, it is not an automatic defense to an attempt to salvage trademarked goods. As *Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry. Co.*, Civ. Action No. 6:94CV 535 (M.D.N.C. Sept. 6, 1996) explained:

> "Despite these cases, there is not a rule that a respectable manufacturer does not have to risk harm to its reputation by selling damaged goods. Such a gloss on the mitigation rule would threaten to swallow the rule itself. It is the nature of the mitigation doctrine to force shippers to sell damaged goods. Thus, in almost any circumstance, a shipper can claim that it would suffer a blow to its reputation if it had to release second quality goods on the market. Such a rule would be both wasteful and unfair to carriers because marketable and valuable goods could he destroyed just because of a small chance of minor harm to the shipper's reputation."
>
> *Id.* (emphasis added). That case involved damaged Honda automobiles. The court found that minor repairs would permit resale of some of the cars without damage to Honda's trademark. These cases often turn upon the severity of the damage, in conjunction with the quantum of consumer identification with the product's brand name. There is no hard and fast rule.

   d. *Product Liability Concerns:* Another reason to support a failure to mitigate damages by reselling damaged freight is the risk of a product liability suit if the product is resold. *Gerber Prods Co. v. Fisher Tank Co.*, 833 F.2d 505 (4th Cir. 1987).

Shipper/Consignee Duty to Mitigate Damages

1. *Taking an adequate survey.* The consignee who receives damaged goods should conduct a careful survey of the entire load, so that undamaged goods will not be sold as salvage with the damaged merchandise. *See Dixie Plywood Co. v. S. S. Federal Lakes*, 404 F. Supp. 461. (D. Ga. 1975). In that case, a failure to segregate damaged from undamaged goods caused delay in the salvage sale. Thus, there was a failure to mitigate damages. Consequently, the salvage sale price was not considered in the damage formula.

2. *Carrier has burden of proof on mitigation.* In these situations, the defendant, who will generally he the carrier, has the burden to prove that the plaintiff shipper/ consignee did not exercise reasonable diligence in mitigating its damages. The shipper or consignee need only take "reasonable steps under the circumstances of the particular case" to mitigate its damages. *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F 2d. 317, 320 (10th Cit. 1991).

Consignee's Duty to Accept the Goods

The consignee must accept the damaged goods when delivered unless they are "totally worthless." *See FrasierSmith Co. v. Chicaa Rock Island and Pacific R. Co.*, 435 F.2d 1396, 1399. "Totally worthless" has been defined to mean that the damaged goods were worthless for their intended purpose, and that there is no secondary market in which the damaged goods could be sold. *Oak Hall Cap and Gown Co. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 294 (4th Cir. 1990). The consignee has the general duty to accept the goods because the consignee is generally in a better position to dispose of the damaged goods than the carrier, particularly when the consignee is in the business of trading in the type of merchandise involved. *See Pilgrim Distrib. Corp. v. Terminal Transp. Co.*, 383 F. Supp. 204 (S.D. Ohio 1974).

Tender delivery of cargo by the carrier to the consignee, and the consignee's refusal to accept the goods, generally terminates the carriage, and terminates the carrier's responsibility as a carrier. However, the carrier then holds the goods as a bailee or warehouseman. *See Resort Graphics, Inc. v. Rio Grande Motor Way, Inc.*, 707 F.2d 1011, 1014 (Colo. Ct. App. 1985). (If the carrier attempts delivery and the consignee's business is closed, its obligations as carrier continue. *Keystone . Motor Freight Lines, Inc. v. Brannon-Signaigo Cigar Co.*, 115 F 2d 737 (5th Cir. 1940)). Once the status of the carrier or m forwarder has changed in this manner, it is liable as a warehouseman only for its own negligence. *See Independent Mach., Inc. v. Kuehne & Nagel, Inc.*, 867 F.2d 752 (N.D. Ill. 1994). Also, in its status as warehouseman liable only for negligence, the bill of lading's liability limitations still apply. *Cleveland, C.C. & St. L.R.R. Co. v. Dettlebach*, 239 U.S. 588, 36 S.Ct. 177 (1916). Finally, it is important to note that since the bill of lading provisions are still applicable even after the carrier's liability has shifted to that of a warehouseman, temporal limitations on claim filing, such as the nine month time period, still apply and can still bar claims made nine months after initial tender of delivery. *Rio Grande Motor Way, Inc. v. Resort Graphics, Inc.*, 740 F.2d 517 (Colo. 1987).

Shipper's Duty to Obtain "Customary Price"

If a shipper or consignee sells damaged goods at a salvage sale, it has a duty to make reasonable efforts to obtain a "customary price" for the goods. Similarly, if the goods are damaged, the shipper is obligated to sell the goods at a "customary discount" for the sale of similarly damaged goods. *Jako Marketing Corp. v. M. V. Sea Fan*, 557 F. Supp. 1244, 1249 (S.D.N.Y. 1983).

Carrier Salvage Sale Methodology

1. *Uniform Bill of Lading Carrier Sale Procedures.* Section 4 of the Uniform Domestic Bill of Lading provides that when a consignee does not accept the goods, the carrier, under certain circumstances, may sell the goods and apply the proceeds to payment of freight, storage and other charges. Section 4 (b) provides specific procedures to be followed in connection with such a sale, as do the ICC regulations. At 49 C.F.R. Part 1005, the Code of Federal Regulations also provides:

   "Whenever . . . property transported by a carrier . . . is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or., person entitled to receive such property, the carrier, after giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, shall undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests in all persons having an interest therein. The carrier shall make an itemized record sufficient to identify the property involved so as to be able to correlate to the shipment or transportation involved, and claim, if any, filed thereon."

   Id. at Section 1005.6(a). Section Four (b) of the Uniform Bill of Lading provides more specific procedures:

   "(b) If the carrier does not receive disposition instructions within 48 hours of the time of carrier's attempted first notification, carrier will attempt to issue a second and final confirmed notification. Such notice shall advise that if carrier does not receive disposition instructions within 10 days of that notification, carrier may offer the shipment for sale at a public auction and the carrier has the right to offer the shipment for sale. The amount of sale will be applied to the carrier's invoice for transportation, storage and other lawful charges. The owner will be responsible for the balance of charges not covered by the sale of the goods. If there is a balance remaining after all charges and expenses are paid, such balance will be paid to the owner of the property sold hereunder, upon claim and proof of ownership."

   Ibid. The Uniform Commercial Code, adopted by most states, sets forth similar procedures for sales to enforce carriers' liens. See U.C.C. § 7-308.

2. *Solicitation of Bid Letters.* Such solicitation is a reasonable and proper modus of advertising, even if only two responses are received, when the cargo is sold to the highest bidder. (It is helpful if wording of letter is approved by counsel). *Cargill, Inc. v. S/S Nasugbu*, 404 F. Supp. 342 (M.D. La 1975).

3. *Salvage Expenses Credited.* Salvage expenses are subtracted from the amount obtained in a salvage sale, which is then credited against the damages for which the carrier would be liable to a shipper or consignee as a result of cargo damage.

Caterpillar *Overseas S.A. v. Marine Transport, Inc.*, 900 F.2d 714 (4th Cir. 1990).

4. *Use of Auctioneers.* If a carrier has followed the procedure set forth in the bill of lading, it is not precluded from using the services of a professional auctioneer. Also, the auctioneer may adjourn the sale date to obtain more bidders. It is also not per se "unreasonable" for the auctioneer to bid on the goods itself, as long as the process is fair and competitive. *Data Point Corp. v. Lee Way Motor Freight, Inc.*, 572 F.2d 1128 (5th Cit. 1978).
5. *Newspaper Circulation.* The sale's notice need not be published in the local newspaper with the greatest circulation. *Data Point, supra*.
6. *Liability Limitations on Improper Salvage Sale by Carrier.* If the carrier's salvage sale is found to be improper, a carrier's' liability is still limited by the amount of the limitations set forth in its tariff, in the same manner as if it had failed to deliver the goods or lost the cargo. *Data Point, supra*.
7. *Failure of Carrier to Follow Bill of Lading Procedure.* If the carrier fails to send an "on hand" notice to the shipper and the consignee, indicating that the consignee has refused to accept the goods, or fails to notify the shipper that the carrier intends to sell the goods at a salvage sale to recover its freight charges, and it then sells the goods, the carrier may be found liable to the shipper. *Digital Equipment Corp. v. Salvage Discount, Inc.*, #C7442 (M.D.N.C. August 12, 1988).
8. *Carrier Liability to Purchaser at Salvage Sale.* Also, the carrier may be liable to the purchaser of the salvaged goods if the carrier represented that it had the right to sell the cargo as salvaged, but in actuality, it did not. *Data Point, supra*.
9. *Reasonable Salvage Obviates Failure to Mitigate Defense.* If method of disposal is reasonable, defense that plaintiff failed to mitigate its damages is invalid. *Cargill, Inc. v. S/S Nasugbu*, 404 F. Supp. 342 (M.D. La 1975).
10. *No Carrier Liability for Failure to Deliver after Proper Sale of Goods.* If the carrier has lawfully sold the goods, either to satisfy a carrier's lien, because they have not been claimed, or because they are perishable or hazardous, the carrier will not be liable thereafter for a failure to deliver the goods themselves to the consignee. *See* 49 U.S.C. § 106.

Consignee Notice to Shipper of Rejection

To obviate liability, a consignee who is intending to reject the shipment may have a duty to notify the shipper. Also, if the consignee notifies the carrier of its rejection, the carrier should protect itself by notifying the shipper. *FrasierSmith, supra*, at 1402.

Agreement as to Salvage Price Does Not Constitute Accord and Satisfaction

If the carrier and consignee/shipper agree to a reasonable salvage price for the goods, neither party can later claim that that agreement, in and of itself, constituted an "accord and satisfaction" of all claims between them, including freight charges and other aspects of freight damage. *See Masonite Corp. and Western Railway Co.*, 601 EZd 724 (4th Cir. 1979).

Cause of Action for Negligent Salvage

Admiralty law recognizes a cause of action for "negligent salvage." *See Continental Ins. Co. v. Garrison*, 54 F. Supp. 2d 874, 884 (E. D. Wis. 1999). Generally, however, a salvager will not be held liable for negligent salvage unless the claimant can demonstrate gross negligence or willful misconduct.

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