Perish the Thought: The Challenges of Moving Food

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Are you familiar with the FDA Sanitary Transportation of Food Rule?
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Overview

- Polling the Audience
- Food Cargo Claim Landscape
  - Different Regimes Governing Food Shipments
  - The Duty to Mitigate
  - Key Case Holdings and Lessons Learned
    - The Curse of the Broken Seal
    - Temperature Variance
- The Future of Food Transport
  - FSMA Rule on Sanitary Transportation of Human and Animal Food
- Questions
Polling Questions

• **Question 1:** Have you been involved in a cargo claim involving the rejection of a shipment at destination because of a broken or a missing seal?
  • Yes
  • No

• **Question 2:** Have you been involved in a case where a shipment was rejected at destination because there was a variation in the cargo temperature from the shipper’s instruction on a temperature setting?
  • Yes
  • No
Recent spike in cargo loss and damage litigation involving refrigerated food products due to broken seals and temperature control malfunction

Uncertainty as to when a shipment may be rejected and existing mitigation obligations

Need for compliance with new FDA regulations on sanitary food transportation published on March 31, 2016
• 49 U.S.C. §§ 11706 (rail) and 14706 (motor carrier)

• Shipper’s initial burden to show:
  • Delivery of the shipment to the carrier in good condition;
  • Loss or damage to the shipment; and
  • Damages amount

• Burden shift to carrier to show it was: (1) free from negligence and (2) loss or damage to the cargo was due to one of the excepted causes to avoid liability:
  • Act of God
  • Public enemy
  • Shipper’s act
  • Public authority or
  • Inherent vice or nature of the goods
March 13, 2014

Re: Shipper Claim No. ; Claim

Dear

I apologize for the delay in getting back to you with regard to this claim.

As we have advised in the past, lading shipped over Railroad Carrier moves subject to the requirements of the Carmack Amendment to the Interstate Commerce Act which requires the claimant to prove both good order at rail origin and bad order at rail destination. Our standard for liability for damage to the lading is the Interstate Commerce Act.


The fact that Shipper feels that its future use of the lading is governed by a different law does not serve to change or establish a different liability for the rail carrier than that standard of liability established by the contract of carriage.

In the absence of any evidence of actual damage to the lading, we see no basis to withdraw our declination of this claim.

Sincerely,

Railroad Carrier

- Prohibits distribution of “adulterated” food
- 21 U.S.C. § 342 (a)(4) defines food product as “adulterated” if, among other things:
  . . . It has been. . . Held. . . . under insanitary conditions whereby . . . It may have been rendered injurious to health.
- Regardless of whether filth is actually found in the food itself
- FDA can have the U.S. DOJ seize food product or stop its transport and criminally prosecute those who violate!
Do You Have to Destroy the Whole Load and Pay For It?
Mitigating Damages

• Defense asserted in freight claim litigation that shipper/consignee failed to mitigate its damages by salvaging and re-selling damaged freight.

• Each party must use reasonable means to lessen damage caused by the other under common law contract principles.

• Carmack codifies the principle by limiting liability to “actual loss or injury” caused by a carrier.

• Generally Carrier must show the Shipper could have reasonably mitigated its damages; then burden shifts to the Shipper to show it mitigated.

• Extremely fact-specific.
Key Case Holdings

• Can a shipper reject an entire food shipment because of a broken seal where there is no evidence that the goods are damaged?

• Can a shipper reject an entire food shipment without mitigating damages where the temperature is not maintained throughout the transport?

• Who is responsible for a rejected seafood load arriving at destination without a temperature control reader?
Oshkosh Storage Co. v. Kraze Trucking LLC, 65 F. Supp. 3d 634 (E.D. Wis. 2014)

• Oshkosh engaged Kraze to deliver a truckload of cheese from Minnesota to Wisconsin

• The cheese was shipped in a sealed refrigerated trailer which the driver claimed was sealed at pickup

• Although the B/L was silent, Oshkosh gave a lot number and written instructions to the driver indicating the shipment may be rejected if the shipment arrives without a seal, with a broken seal or if the seal does not match manifest. Oshkosh verbally instructed the driver that Oshkosh’s personnel would break the seal upon delivery. There was also signage in the check-in area stating “Please DO NOT break the seal on the trailer. Our warehouse staff will verify the seal number and break the seal prior to unloading”

• At delivery, Kraze's driver parked his truck, broke the seal and opened the trailer doors. Thus, Oshkosh rejected the entire load because of the broken seal
Oshkosh Storage Co. v. Kraze Trucking LLC

- Kraze’s insurer salvaged the load for $51,000 ($19,278.61 less than the invoice price)
- Oshkosh asserted a Carmack claim against Kraze arguing that the premature removal of the seal caused “actual loss or injury” or damaged the cheese and that its customers demanded an intact seal for product integrity assurance
- Kraze argued that the broken seal was not sufficient evidence that the cheese was damaged because it had no bearing on whether the goods were tampered with or harmed in any way
Lessons Learned

• Oshkosh suffered damages because of having to sell the cheese at a discounted price and, therefore, established its *prima facie* case under Carmack; Kraze was negligent in breaking the seal.

• Distinguished *Land O’ Lakes* which concerned whether goods were delivered in *good condition* and did not say a broken seal could *never* constitute damage to goods.

• Although Carmack does not expressly define “actual loss or injury” a *decrease in product value* can fall within the damages scope.

• If the carrier breaks the seal, the seal’s purpose is defeated because the consignee cannot verify that the food shipment has not been accessed or tampered with during delivery and contaminated.

• Food distributors have a duty to ensure that food is safe for the public, and policies requiring the rejection of food shipments when the seal has been broken may be reasonable, so long as they are announced.
Shipper engaged TQL (broker) who hired Macktoon (motor carrier) to haul a load of Pepperidge Farm frozen bread products from Pennsylvania to Utah.

The Rate Confirmation and the Broker Carrier Agreement for the load required that the shipment be maintained, continuously, at -10°F (industry and Pepperidge Farm standard).

The shipment was loaded in good condition; however, at destination, its temperature was too high; the consignee’s inventory control manager measured the temperatures between cases were between 42-44°F, inside the case was around 38°F and the trailer temperature was 50°F.

Pepperidge Farm directed that the cargo be destroyed as substandard and unsalable as the temperatures were outside of their specifications.

The consignee paid Pepperidge Farms’ $41,088.96 claim, broker paid the consignee’s claim, took an assignment of rights, and sued the carrier under Carmack.
Lessons Learned

- Plaintiff established the *prima facie* Carmack case because the shipment was delivered in good condition, the product temperature was not maintained during transport, and damages were the value the goods would have brought their owner had the shipment been delivered undamaged.

- Carrier could not show any action by the shipper that caused the damage or disprove its negligence when its driver did not replace a broken fan belt on the trailer’s refrigeration unit or contact anyone about it.

- Carrier’s not-so-credible expert testified that the shipment could have been salvaged at 25-35% its original value.

- Court finds that dumping cargo to protect against the risk that customers may obtain a product that is substandard or unfit is a legitimate reason to not mitigate damages.
Farmers (shipper) hired FFE (motor carrier) to transport a pallet of pasteurized, cooked claw crabmeat from its facility in Louisiana to Ipswich Shellfish Co. (consignee) in Massachusetts

Ipswich required a temp. control recorder (TCR) to be attached to the crabmeat pallet for data downloading at destination, and proof of temperature during transit

Farmers claimed its inventory clerk attached the TCR to the pallet in front of FFE’s driver, and told him that the TCR must stay attached until delivery or Ipswich would reject the shipment

Driver claimed he saw the device on the pallet, which he thought was a temp. recorder, but was not told anything about it or the possibility of rejection
Farmers Seafood Co. v. FFE Transportation Servs., Inc.

- The B/L contained TCR’s serial #: “Temp # 69041540,” and noted that the crabmeat had to be kept between 33-38°F during transport.
- The shipment was rejected at destination because the TCR was missing.
- FFE had a food laboratory test samples of the crabmeat and found they were in good condition and w/o any evidence of contamination.
- Farmers refused to accept return of the shipment when FFE could not prove the shipment was kept between 33-38°F during the entire transport, and brought a Carmack claim against FFE.
Lessons Learned

• A jury could find that the handwritten notation of the TCR’s serial number on the B/L made delivery of the TCR a condition of the B/L or required its use in connection with the temperature maintenance requirement also noted on the B/L

• A jury could find that the shipment was damaged at delivery because the TCR was missing
  • Impossible to verify crabmeat stored at requisite temp./safe
  • Selling the crabmeat w/o proof of temp. maintenance could expose Farmers and Ipswich to civil/criminal liability

• If delivery of TCR was required, its absence would make FFE liability for at least the TCR’s value and possibly the entire shipment
FDA’s Rule: Sanitary Food Transportation

• Required by Food Safety Modernization Act of 2011
• Proposed Rule published in the Federal Register on February 5, 2014 (21 C.F.R. § 1.900 et seq.)
• Final Rule published by: March 31, 2016
• Tiered compliance dates
Sanitary Transportation Rule

• Covers:
  • Shippers, carriers, and receivers.
  • Motor and Rail carriers expressly

• Definitions:
  • A 3PL or warehouseman who initiates a food shipment may be a “shipper”
    • Danger of placing responsibility on the wrong entity
  • Warehouseman and consignee may be considered “receivers” when they receive food after transportation
    • Do not have to represent the final point of receipt
  • Entities could fit into more than one definition depending upon functions performed
5 Exceptions

• Shippers, receivers, and carriers engaged in food transportation operations with less than $500,000 in total annual sales;

• The transportation of shelf stable food that is completely enclosed by a container;

• Live food animals and raw agricultural commodities when transported by farms;

• Food that is transshipped through the U.S. to another country; and

• Food that is imported for future export that is neither consumed nor distributed within the U.S.
Highlights

• Vehicles and transportation equipment:
  • To be maintained and stored in sanitary condition to prevent contamination

• Transportation Operations:
  • Must develop and document compliance protocol and temperature control requirements

• Training (must be documented)

• Recordkeeping requirements
Information Exchange:
• Carrier to provide shipper information about cargo previously hauled in vehicles and intervening cleanings; shipper to give written instructions on sanitary transportation of food

Burden Shift:
• Failure to adhere to shipper’s standards → adulteration and damages
• Unlike Carmack which requires proof of damages

Waivers:
• Only if in public’s interest and will not lead to unsafe food transportation
Sanitary Transportation Rule requirements apply to international shippers exporting food to the U.S. by ocean or air in a freight container if:

- Arranging for intact container’s transloading onto a motor or rail carrier;
- For transport in U.S. commerce; and
- Food will be consumed or distributed within the U.S.

Exporter is a “shipper” initiating shipment of food by motor or rail vehicle.
Timeline

• Effective 60 days after publication
  • Court-ordered to be published by March 31, 2016

• 2 Years to Comply:
  • Small businesses that are not also shippers or receivers with less than 500 employees
  • Motor carriers with less than $25.5 million in annual receipts

• 1 Year to Comply:
  • Any other business
Practical Considerations

- Identify shipments covered by the new legislation
- Do not agree to regulatory requirements for non-covered commodities
- No requirements that cannot be operationally met
- Motor carriers may treat food shipments like high value cargo (lower freight rate/limitation of liability)
- Agreed joint inspection of “adulterated” goods with a competent expert
- Address ambiguities in rules publications, T&C and rate confirmations
Food Shipment Contracts/Protocols - Examples

- **Broker/CARRIER Contract Addendum:**
  - The Carrier agrees that food that has been transported or offered for transport under conditions that are not in compliance with the shipper’s instructions, as provided to Carrier by the shipper, will be considered “adulterated” within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(i).
  - Carrier understands and agrees that adulterated shipments may be refused by the consignee or receiver, upon their delivery, at destination without diminishing or affecting Carrier’s liability in the event of a cargo claim.
Protocol or Broker/Shipper Contract:

- Shipper acknowledges and agrees that consignee has a duty to accept goods offered at delivery, unless an inspection by an expert is conducted, at no cost to Broker, and the shipment is found “adulterated”

- Broker will not be held liable for Carrier’s failure to adhere to a shipper’s instructions or the Food Safety Modernization Act, 21 U.S.C. § 2201, et seq., and its implementing regulations.
Produce Shipment Contracts/Protocols - Resources

• Broker-Shipper contract approved by TIA and UFPA

• Broker – Carrier Contract

• Broker – Carrier Contract California Edition

• Blue Book – DRC - Red Book - NAPTWG
Questions?
Thank You!

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