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Cargo Liability and the Impact of the Food Safety Modernization Act

Section I – The Legal Liability of Motor Carriers and the Impact of Safe Transport Regulations on Liability

A. What Exactly Is A Motor Carrier In Interstate Commerce Liable For?

Liability is determined exclusively under federal law – Carmack Amendment, 49 USC 14706 which provides:

Motor carriers and freight forwarders.--..... That carrier and any other carrier that delivers the property and is providing transportation or service are liable to the person entitled to recover under the receipt or bill of lading. The **liability imposed under this paragraph is for the actual loss or injury** to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

The Carmack Amendment limits recovery to the actual loss or damage to the freight and all state law causes of action are preempted

B. Common Rules That Apply When Considering a Claim under the Carmack Amendment

Consequential Damages Are Generally Not Recoverable Absent Some Earlier Notice of the Potential for the Damages

Measure Of Damages For Actual Damages - Diminution Between Value In Which It Should Have Arrived And Value In Which It Did Arrive.

The Cargo Owner Has a Duty to Mitigate Its Damages

Carrier Bears Burden To Show That The Cargo Owner Did Not Exercise Reasonable Diligence In Mitigating Its Damages.

The Duty To Mitigate Only Requires That Reasonable Steps Be Taken Under The Circumstances To Mitigate.

Consignee Must Accept Damaged Goods When Delivered Unless They Are “Totally Worthless.”

“Totally worthless” Means Damaged Goods Are Worthless for Their Intended Purpose, And That There Is No Secondary Market.

The Requirement of Mitigation of Damages Is Changing With the New Rules

Is there a duty to mitigate when the customer’s brand will be impacted? Perhaps Not – But It Is A Balancing Act. Review of various case law that addresses that impact

Courts err toward not requiring a claimant to salvage unsafe food products if there is any doubt and the burden will rest on the motor carrier to establish that there is a salvage value

C. The New Safe Transport Regulations

21 USC §342 – Adulterated Food

A food shall be deemed to be adulterated—

- a.(4) ...if it has been prepared, packed, or held under insanitary conditions *whereby it may have become contaminated* with filth, or whereby it may have been rendered injurious to health
- i. Noncompliance with sanitary transportation practices if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food *under conditions that are not in compliance with regulations promulgated under section [350e](#) of this title.*

The Evaluation of When Product May Have Been Injured may be subjective and the FDA rules allow for an evaluation of the totality of circumstances.

Fear of loss is the latest issue in establishing a product being damaged. The absence of a seal during transport of food product may create a basis for actual loss or damage.

Good Manufacturing Practices – What Are They? The Practices Required In Order To Conform to the Guidelines Recommended By FDA or Other Regulatory Agencies

These Guidelines Provide Minimum Requirements That A Pharmaceutical or A Food Product Manufacturer Must Meet To Assure That the Products Are Of High Quality and Do Not Pose Any Risk to the Consumer or Public

21 C.F.R. §110.5 – Current Good Manufacturing Practice

- The criteria and definitions in this part shall apply in determining whether a food is adulterated (2) within the meaning of section 402(a)(4) of the act in that the food has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.
- Food covered by specific current good manufacturing practice regulations also is subject to the requirements of those regulations.

D. Are Carriers' Accepting Greater Liability

49 U.S.C. §14101(b)(1): Contract Carriage

If the shipper and the carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies.

In today's market more carriers are entering into contract carriage and changing the liabilities that they are accepting. The new regulations allow shippers to transfer the risk of compliance to the motor carrier

Sec. II Does A Motor Carrier Have Coverage for All This New Exposure?

- A. What is the exposure in terms of the standard Motor Truck Cargo Legal Liability Coverage?
- The typical Motor Truck Cargo LL policy provides coverage in part that covers the legal liability imposed on a trucker for loss to covered property, while the goods are under the care, custody and control; and that for which the trucker becomes legally obligated to pay as a common or contract carrier under a bill of lading, contract of carriage or shipping receipt.
 - The new regulations put additional obligations on the various parties in the logistics chain. These obligations are being contractually transferred down the various tier levels, ultimately landing at the trucker's door steps.
 - Transportation providers have new requirements to meet as regards training, equipment, safety and maintenance and the ability to provide supporting documentation.
 - Has the "definition" of physical loss and/or adulteration been changed or altered by the regulations? Maybe, maybe not... This will ultimately be answered by the courts and the product departments of various underwriting companies.

- B. What coverage generally exists today?
- Coverage for the “legal Liability” for “loss” to covered property...The new regulations are placing new obligations and perhaps greater obligations on motor carriers. The liability is generally governed by Carmack and/or contracts.
 - “Adulteration” is covered by some policies and not by others; Underwriters may want to consider providing a sub-limited coverage
- C. What questions of coverage do we anticipate as a result of the new regulations?
- It will be important to determine how “loss” is defined at the coverage form level
 - Many coverage forms require “physical loss” of or to property. In light of the new regulations there will be occasion where product will be deemed unusable where there is no apparent “loss”.
 - The new regulations may create opportunities for new products around warranty services, consequential damages, errors & omissions, and inability to satisfy obligations.

Sec III. The Steps for proper Adjustment of a Claim for Loss or Damage to Cargo

- a. Protocols for initial response to a claim that may be impacted by the new regulations?
- Day one response now requires a deeper due-diligence to protect liability
 - Should develop new claim/loss check-lists
 - Renders desk adjustment almost null and void
- b. Contractual obligations and managing mitigation...
- Both underwriters and claim personnel must have in-depth knowledge of contract language and obligations through-out the entire logistics chain
 - Claim adjusters must be aware of the new regulations and laws around disposing of adulterated product and potential legal and/or criminal implications
- c. How does one protect the liability of the motor carrier
- Must determine if Carmack or contractual language applies
 - Insured’s are going to be required to support and document protocols, SOP’s, training and equipment requirements
 - Claim investigations will need to be methodical and articulate