The (Damaged) Freight Stops Here. (But Now What Do We Do With It?)
The Pitfalls of Salvage and Damage Mitigation
INTRODUCTION: Damage Mitigation Obligations

• Defense often asserted in lawsuit for freight damage is that shipper or consignee has not appropriately “mitigated its damages” by salvaging and reselling damaged freight.

• Also, shipments may be refused by consignee on grounds of delay, or other bases.

• In those situations, obligations arise for carrier to take action to salvage and resell goods.
Perishable goods: Extremely problematic if arriving damaged upon delivery.

- FDA statutes, and commensurate regulations, that prohibit sale of adulterated food. See generally, 21 U.S.C. § 342.
- Applicable FDA standards may make it illegal or improper to sell damaged products which are intended for human use or consumption.
- Restrictions should be taken into consideration in determining damages sustained to contaminated cargo.

PERISHABLE GOODS: ACT FAST, BUT BE CAREFUL!
PERISHABLE GOODS: ACT FAST, BUT BE CAREFUL (cont.)

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 [of] 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.”

See also, Blasser Brothers v. Northern PanAmerican Line, 628 F.2d 376 (5th Cir. 1980).
PERISHABLE GOODS: ACT FAST, BUT BE CAREFUL (cont.)

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)

• Statute also contemplates storage in unsanitary conditions
• Also governs food products that “may have” become contaminated;
• Frequent litigation point.
Intermingling Contaminated Shipment with Unadulterated Prior Load May Result in Consequential Damages


• Liquid sugar had been contaminated with vegetable oil;
• Was delivered by carrier into connecting tanks of consignee.
• Pre-existing liquid sugar became contaminated and plant had to close down for cleaning.
• Carrier was found liable for damage to the sugar, and also for clean up.
Mere Possibility of Contamination May Preclude Any Salvage


- Upon arrival at destination, railroad cars had beetles in cars and on top of bags of Pillsbury flour.
- Bags had been held in railroad's yard for two days.
- Evidence indicated that cleaning of yard was infrequent.
- Court found that flour was commercially worthless.

Railroad had argued that although there were beetles in car at destination, there was no damage to flour itself.

Court rejected that argument on grounds that, as per statute, if unsanitary conditions “may have” subjected food to contamination, it is considered adulterated.

Consequently, Pillsbury recovered full value of potentially infested flour.

Railroad was also liable for fumigation costs.
Mere Possibility of Contamination May Preclude Any Salvage

*Seabound Allied Milling Corp. v. Consolidated Rail Corp.*, Civil Action No. 798828 (July 22, 1980)

- Mere breaking of railroad car seals, so that integrity of load of flour was in doubt, was sufficient to find “damage” to flour products themselves.
- Consignees and carriers should be *extremely* careful with perishable food products in salvage situations.
- Careless efforts *to salvage* food products may themselves result in contamination of products under the Act.
- Thus may increase claimant's damages.
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.


  “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.”
Specific Goods That Cause Salvage Difficulties

• Damaged goods that may create health hazards if used, such as medications;
• Goods that require license to resell, such as alcohol or tobacco products;
Trademarked Goods

- If manufacturer's trademark is affixed to product or to its packaging and is not removable, manufacturer may allege that entry of damaged product into 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).
Trademarked Goods (cont.)


- “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, carrier must show that goods could be sold without being traceable to shipper.

- Without such proof, salvage value of damaged goods is limited to their value, if any, in recycled form.
Trademarked Goods (cont.)

However, courts are mindful that this exception could swallow rule.

• Thus, not an automatic defense to 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 be destroyed just because of a small chance of minor harm to the shipper's reputation.”
Trademarked Goods (cont.)

*Tokio Marine* case involved damaged Honda automobiles.

- Court found that minor repairs would permit resale of some of cars without damage to Honda's trademark.
- These cases often turn upon severity of damage, in conjunction with *quantum* of consumer identification with product's brand name.
- No hard and fast rule.
Product Liability Concerns

Another reason to support failure to mitigate damages by reselling damaged freight, is the risk of product liability suit if product is resold. See, *Gerber Prods Co. v. Fisher Tank Co.*, 833 F.2d 505 (4th Cir. 1987).
Shipper/Consignee duty to Mitigate Damages: Taking an Adequate Survey

Consignee who receives damaged goods should conduct careful survey of entire load, so that undamaged goods will not be sold as salvage, with damaged merchandise.

- Failure to segregate damaged from undamaged goods caused delay in salvage sale.
- Thus, there was failure to mitigate damages.
- Consequently, salvage sale price was not considered in damage formula.
Shipper/Consignee duty to Mitigate Damages: Carrier Has Burden of Proof on Mitigation

In these situations, defendant, who will generally be carrier, has burden to prove that 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

Consinee must accept 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 damaged goods were worthless for their intended purpose, and that there is no secondary market in which 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).

- Consinee has general duty to accept goods because consinee is generally in better position to dispose of damaged goods than carrier.

Tender of delivery of cargo by carrier to consignee, and consignee's refusal to accept goods, generally terminates carriage, and terminates carrier's responsibility as a carrier.

• However, carrier then holds 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 carrier attempts delivery and 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 status of carrier or forwarder has changed in this manner, it is liable as 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).

- Important to note that since bill of lading provisions are still applicable even after carrier's liability has shifted to that of warehouseman, temporal limitations on claim filing, such as 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 shipper or consignee sells damaged goods at salvage sale, it has duty to make reasonable efforts to obtain “customary price” for goods. Similarly, if goods are damaged, shipper is obligated to sell goods at “customary discount” for sale of similarly damaged goods. *Jako Marketing Corp. v. M. V. Sea Fan*, 557 F. Supp. 1244, 1249 (S.D.N.Y. 1983).
Carrie Salvage Sale Methodology: Uniform Bill of Lading Carrier Sale Procedures

Section 4 of Uniform Domestic Bill of Lading provides that when consignee does not accept goods, carrier, under certain circumstances, may sell goods and apply proceeds to payment of freight, storage and other charges. Section 4 (b) provides specific procedures to be followed in connection with such a sale.
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, 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.”
Section Four (b) of 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.”

The Uniform Commercial Code, adopted by most states, sets forth similar procedures for sales to enforce carriers' liens. See U.C.C. § 7-308.
Carrier Salvage Sale Methodology: Solicitation of Bid Letters

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

Salvage expenses are subtracted from amount obtained in salvage sale, which is then credited against damages for which carrier would be liable to shipper or consignee as result of cargo damage. *Caterpillar Overseas S.A. v. Marine Transport, Inc.*, 900 F.2d 714 (4th Cir. 1990).
Use of Auctioneers

If carrier has followed procedure set forth in bill of lading, it is not precluded from using services of professional auctioneer.

• Auctioneer may adjourn sale date to obtain more bidders.

• Also not per se “unreasonable” for auctioneer to bid on goods itself, as long as process is fair and competitive. *Data Point Corp. v. Lee Way Motor Freight, Inc.*, 572 F.2d 1128 (5th Cit. 1978).
Newspaper Circulation

Sale's notice need *not* be published in local newspaper with greatest circulation. *Data Point, supra.*
Liability Limitations on Improper Salvage Sale by Carrier

If carrier's salvage sale is found to be improper, carrier's' liability still limited by amount of limitations set forth in its tariff, in same manner as if it had failed to deliver goods or lost the cargo. *Data Point, supra.*
Failure of Carrier to Follow Bill of Lading Procedures

If carrier fails to send an “on hand” notice to shipper and the consignee, indicating that consignee has refused to accept the goods, or fails to notify shipper that carrier intends to sell goods at salvage sale to recover its freight charges, and it then sells goods, carrier may be found liable to shipper. *Digital Equipment Corp. v. Salvage Discount, Inc.*, #C7442 (M.D.N.C. August 12, 1988).
Carrier Liability to Purchaser at Salvage Sale

Also, carrier may be liable to purchaser of salvaged goods if carrier represented that it had right to sell cargo as salvaged, but in actuality, it did not. *Data Point, supra.*
Reasonable Salvage Obviates Failure to Mitigate Defense

No Carrier Liability for Failure to Deliver after Proper Sale of Goods

If carrier has lawfully sold the goods, either to satisfy carrier's lien, because they have not been claimed, or because they are perishable or hazardous, carrier will not be liable thereafter for failure to deliver goods themselves to consignee. See 49 U.S.C. § 106.
Consignee Notice to Shipper of Rejection

To obviate liability, consignee who is intending to reject shipment may have duty to notify shipper. Also, if consignee notifies carrier of its rejection, carrier should protect itself by notifying shipper. *FrasierSmith, supra*, at 1402.
Agreement as to Salvage Price Does Not Constitute Accord and Satisfaction

If carrier and consignee/shipper agree to reasonable salvage price for goods, neither party can later claim that that agreement, in and of itself, constituted “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).

- Generally, however, salvager will not be held liable for negligent salvage, unless claimant can demonstrate gross negligence or willful misconduct.
QUESTIONS & ANSWERS