



MITIGATING THE LOSS:

*Dealing with Damaged, Refused,
and Undeliverable Freight*

Marc S. Blubaugh

Benesch, Friedlander, Coplan & Aronoff LLP

Columbus, Ohio



The Duty to Mitigate

- Foundation: Common law of contracts
- Every party must use every reasonable means to lessen the damage caused by another
 - Restatement of Contracts / Treatises
 - The doctrine of “avoidable consequences”
- Carmack Amendment codifies principle in that the statute limits liability to actual loss or injury caused *by* a receiving *carrier*, delivering *carrier*, or other *carrier*.



Who Has The Burden of Proof?

- Shipper has the burden of proof to establish damages
- Carrier generally has the burden of proof to establish that shipper could have reasonably mitigated its damages
 - *Freedom Plastics, Inc. v. Schneider Tank Lines, Inc.*,
339 N.W.2d 365 (Wis. 1983).
- HOWEVER, the burden shifts back to the shipper to demonstrate that it mitigated if the facts are “peculiarly within the knowledge of his adversary.”



Novelty Textile Mills, Inc. v. C.T. Eastern Inc., 743 F.Supp. 212 (S.D. N.Y. 1990)

- Shipper hired carrier to transport specialty cloth for body armor from PA to NY
- While in custody of the carrier, liquid contaminant spilled on the cloth
- Carrier claimed that cloth was cleaned with hot water and was completely undamaged and, even if it was damaged, shipper did not mitigate its damages by selling it for \$4/yard



Carrier's Evidence

- Carrier hired expert who testified:
 - “We tried rinsing the material with various solvents, organic solvents, which was not successful. It did not--it was not affected at all. We then took a portion of the contaminant off the material, submitted it and ran an infrared analysis on that to determine what it was.... [T]he infrared analysis indicated it was some type of polymer... [G]iven that we tried probably one of the [best] polymer solvents which is simply water, and hot water took the [contaminant] off the base material with no apparent damage to the base material itself.”
 - But expert could not guarantee 100% removal



Shipper's Evidence

- Shipper testified that:
 - Unless 100% of the contaminant is removed, the base material would not be suitable for its intended purpose, i.e., as a fire retardant tank vest, especially when the contaminant may have been itself flammable. Because Nomex is used to manufacture products that protect the lives of army soldiers, the enormous potential liability in the form of products liability and personal injury actions would be too great to consider selling contaminated material to the Army.
 - Material could not be used for intended military purposes
 - Sent swatches to potential buyers but only received a bid of \$2/yard



Court's Holding

- Normally, the burden of showing that a shipper has unreasonably failed to minimize damages rests with the carrier
- However, "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."
- Shipper had burden of proving that it properly mitigated damages
- Where mitigation of damages is at issue, the test applied to shipper's conduct is whether the action taken in response to the defendant's breach was *reasonable*. If the course of conduct chosen by the shipper was reasonable, the shipper can recover despite the existence of another reasonable course of action that would have further lessened plaintiff's damages.
- Here, Shipper acted in a reasonably business-like manner



What Is The Duty of The Consignee?

- **Rule**: Consignee has a duty to accept damaged goods when delivered unless they are totally (or at least substantially) worthless
- **Policy**: 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. However, if goods are “worthless” such that they can only be sold for salvage value, then consignee is no better equipped than carrier to sell for salvage value.



FrasierSmith Co. v. Chicaa Rock Island & Pacific R. Co., 435 F.2d 1396 (8th Cir. 1971)

- Shipment of corn that had been “heated” and was “sour” due to delay in transit
- Court held:
 - The law is well settled that where goods are shipped by common carrier and become damaged in transit, the consignee nevertheless **has the duty to accept the shipment**. Under such circumstances the consignee's obligation is not affected by the fact that the goods have been injured or damaged during transit, unless they are considered to be 'totally worthless.'
- Issue of fact as to extent of damage to corn



What is the Duty of the Shipper?

- **Rule**: Shipper has a duty to mitigate (*i.e.*, salvage or otherwise)
- **Policy**: As with a consignee, Shipper is generally in a better position to dispose of the damaged goods than the carrier, particularly when the shipper is in the business of trading in the type of merchandise involved.



*The Paper Magic Group, Inc. v. J.B. Hunt
Transport, Inc.*, 318 F.3d 458 (3rd Cir. 2003)

- Shipper retained Carrier to transport Christmas cards to Target to be used in 1998
- Carrier temporarily lost cards until 1999
- Shipper and Consignee refused to take custody of the cards
- Contract stated that Carrier must pay Shipper the invoice prices “less reasonable salvage value.”
- Carrier sold goods at salvage for \$49,645.96 and offered to pay this amount to Shipper
- Shipper claimed \$130,080.46 (invoice price of sale to Target)



Holding

- Shipper is entitled to full \$130,080.49:
“The District Court's award left both parties in their rightful place. If Paper Magic had conducted a salvage sale, it presumably would have obtained \$49,645.96, and sued Hunt for the remaining \$80,434.52, netting the full invoice amount of \$130,080.48. Instead, Hunt retained the \$49,645.96 salvage value, and paid Paper Magic \$130,080.48. The bottom line remains the same: Hunt's net loss is \$80,434.52, and Paper Magic receives \$130,080.48 (plus interest).”



Judge Becker's "Advisory Opinion"

- Shipper had a contractual duty to sell the cards for salvage
- Shipper's refusal to salvage amounted to an abandonment of the cards
- Abandonment does not relieve Shipper of duty
- Giving Shipper the salvage value obtained by Carrier implicitly sanctions the shipper foisting its duty to salvage and mitigate upon the Carrier
 - Carrier had to bear cost of sale
 - Carrier likely didn't generate a higher salvage
 - Carrier should get to retain salvage value



What is the Carrier's Duty?

- Rule: Like the Consignee and Shipper, Carrier has a duty to mitigate if no one else does
- 49 C.F.R. 370.11 / 1005.6 governs salvage
- Bill of Lading / Contract Can Modify



49 CFR 370.11 / 1005.6:

Processing of Salvage

(a) Whenever baggage or material, goods, or other property transported by a carrier subject to the provisions herein contained 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.



Additional Duties

- The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests of 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 it to the shipment or transportation involved, and claim, if any, filed thereon.
- The carrier also shall assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.



Additional Duties

- The carrier shall record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same.
- The carrier's salvage records must disclose if salvage company is affiliated with carrier or directors/officers/managers.



Mitigation Is Very Fact-Specific

- What Type of Freight?
 - Food?
 - Pharmaceutical?
 - Customized?
 - Time Sensitive?
 - Commodity?
- What is Relevant Market?
- What is the Nature of the Damage?
- What other Laws / Regulations are Implicated?



Foods

- 21 U.S.C. § 342(a)(4) defines a food product as “adulterated” if, among other things:

... it has been ... held ... under unsanitary conditions whereby ... it **may** have been rendered injurious to health.

(emphasis added).



FDA's New Proposed Rules

- Requires vehicles / transportation equipment be suitable, sanitary, uncontaminated, etc.
- Requires that all transportation operations be conducted in a manner and under such conditions as are necessary to ensure food does not become filthy, putrid, decomposed, or otherwise unfit for food
- Training Requirements
- Recordkeeping requirements
- Effective 1 year after date of publication of final rule except that small businesses have 2 years



Examples

- Specify sanitary requirements in writing
- Segregate raw food from non-food in same load
- Segregate bulk food from food in container
- Temperature controls to prevent rapid growth of undesirable microorganisms
- Provide information about three previous bulk cargoes
- Written procedures for cleaning, sanitizing, compliance, etc.



Swift-Eckrich, Inc. v. Advantage Systems, Inc.,
55 F.Supp.2d 1280 (D. Kan. 1999)

- Shipper hires Broker and Broker Hires Carrier to transport refrigerated turkey, ham, bologna
- Meat was supposed to be at 22 degrees F
- Upon arrive, temperature was 52-65 degrees F
- Shipper claims meat is worthless for intended human consumption and entitled to \$22,032
- Carrier claims that shipper should have sold the meat for human consumption



Court's Holding

- “Because the meat was exposed to the effects of the sweltering heat for an undetermined but apparently lengthy time period, [the Shipper’s] subsequent decision to not sell the meat for human consumption was imminently reasonable.”
- “That four samples of the meat may have been deemed ‘fit for human consumption’ does not prove that the entire shipment was suitable for human consumption.”
- “The defendants offer no proof that such a small sample of 2260 cases is sufficient to demonstrate that all of the meat in the trailer was safe for human consumption. In contrast, Swift-Eckrich has demonstrated that selling the meat products for human consumption would not have been prudent or appropriate under the circumstances.”



Court's Holding

Court rejects carrier's argument that meat could have been sold to "less discriminating consumers" even if it couldn't be fed to school children:

"[The Shipper] 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 [the Shipper] could have taken any other reasonable steps under the circumstances of this case to mitigate its damages."



Orient Overseas Container Line Ltd. v. Crystal Cove Seafood Corp., 10 Civ. 3166 (S.D. N.Y. 2012)

- Shipper hires Ocean Carrier to transport 3,400 cartons of frozen tilapia from China to US
- B/L required temperature of -.04 degrees F
- Temperature recorder showed 50 degrees F
- Product thawed and refroze and smelled
- Surveyors checked 15-20 random cartons and declared a total loss with no salvage value
- Shipper instructed Carrier not to sell / salvage



Court's Holdings

- “[T]he cargo was in such a compromised condition that [the shipper] was within its rights to reject delivery.
- “Given [surveyor’s] description of the cargo's condition, it was reasonable for [the shipper] to conclude that the cargo was ‘practically valueless’ for its intended purpose, which was human consumption.
- “Given the expense of testing, storing and then attempting to sell the compromised fish, [the shipper] was within its right to reject the shipment under COGSA”
- Shipper was entitled to full value of shipment



Merchants Terminal Corp. v. L&O Transport, Inc.,
SAG-09-cv-2065 (D. My. 2012)

- Shipper hired motor carrier to transport truckload of frozen salmon interstate
- Driver dropped the trailer at destination at the middle of the night but trailer was stolen
- Shipper sues for and recovers \$57,559
- Motor Carrier appeals and argues that, among other things, Shipper failed to mitigate damages by failing to make insurance claim



Court's Holding

“[Shipper] did not file a claim with its insurance company for losses sustained as a result of the theft of the salmon. [Shipper's] ability to recover from [Motor Carrier], however, **does not depend upon whether [Shipper] did or could collect on an insurance claim related to the loss of the salmon.**”

“Under the collateral source rule, this Court may not consider evidence of whether [Shipper] has received or will receive insurance payments when considering the extent to which [Motor Carrier] is liable for damages. Using the principles underlying the collateral source rule as a guidepost, this Court will not consider [Shipper's] failure to submit an insurance claim to be a failure to mitigate damages.”

Land O'Lakes, Inc. v. Superior Service Transp. of Wisconsin, Inc.,
500 F.Supp.2d 1150 (E.D. Wis. 2007)

- Shipper enters into a contract with Motor Carrier that provides:
 - “If branded or labeled goods are damaged, [Shipper] may determine within its sole discretion, and not subject to a reasonableness standard, whether the goods may be salvaged, and if salvageable, the value of the salvage. Any salvage receipts will be credited against [Shipper’s] claim against Carrier.”
- Carrier “brokered” load of butter
- Highway accident occurred



Evidence Relating to Salvage

- Adjuster noted that, although dented, the trailer remained intact with the cooling unit operational.
- Upon inspecting the contents, the adjuster observed that the butter was still in its cardboard containers wrapped in plastic.
- Some of the boxes were dented or deformed; much of it appeared to be in its original condition.
- Since the packages were intact and the butter had not been exposed, owner-operator contacted Shipper and requested that it take back its product for re-sale.
- Shipper failed to respond to owner-operator's request, so he finally sold the butter as salvage for \$29,101.25 after three weeks.



Carrier's Position

- Shipper's failure to respond in a timely manner to its request that it take back the load and re-sell all or part of it constitutes a failure on Shipper's part to mitigate its damages.
- Shipper frequently reuses butter that is crushed or squashed in its own warehouses and, had it agreed to take the shipment back as requested, it could have resold it for all or most of its full value.
- The duty to accept and mitigate is based upon very practical considerations, namely the fact that a buyer/consignee (or, conversely, a seller/shipper/consignor) will often be a dealer or trader in the type of goods involved and thus may be in a much better position to dispose of those damaged goods than the carrier who is not in the business of buying and selling the type of goods involved.



Shipper's Position

- Its policy precludes it from accepting product that has been involved in an accident of this nature because of the risk of food contamination and damage to reputation
 - “We live in a time of biohazard when producers of food products must exercise remarkable care to ensure that products are not tampered with, contaminated with organisms, or otherwise become unsuitable for consumption.”
 - Testimony: “From my perspective, financial perspective, this product has been out of our control. It has been exposed to the elements, trailer was tipped over. The structural integrity of that trailer was compromised. I can't make guarantees that the product was secure, safe, free from infestation, free from individual contact. From a financial perspective, I can't compromise quality, reputation, with a potential product safety incident. “



Court's Holding

- “Based on this evidence, a jury could find that most of the butter was not damaged at all in the accident and the 20% that was deformed could have been resold at or near the market price.”
- “If despite this fact, [Shipper] elected for policy reasons or otherwise to reship a fresh load out of an overabundance of caution and in the absence of a genuine risk to either the public or its reputation, a factfinder could reasonably conclude that it failed to mitigate its damages. The record is not sufficiently clear to permit a determination of this issue as a matter of law. Accordingly, for this reason, as well, summary judgment is not warranted.”



Postscript

- First Jury Trial: Jury found that Shipper failed to mitigate its damages; awarded Shipper \$37,747,20 -- difference between invoice amount (\$66,348.45) and salvage amount (\$29,101.25)
- Judge *sua sponte* orders new trial for judge's own erroneous jury instruction:
 - The jury should have been instructed that it should find that Shipper failed to mitigate only if it found that Shipper, acting reasonably, could have sold the shipment for more than the amount carrier received. Only then should the jury then have been asked to determine what Shipper's loss would have been had it acted reasonably.
- Second Jury Trial: Jury found that Shipper failed to mitigate its damages; awarded Shipper \$46,724.35 – less than invoice value

Ameriswiss Technology, LLC v. Midway Line of Illinois, Inc.,

890 F.Supp.2d 189 (N.H. 2012)

- Ameriswiss (Shipper) retains C.H. Robinson (Broker) to arrange for transportation of machinery from IL to NH
- C.H. Robinson hires Midway Line to perform transport
- Traffic accident results in \$483,837 in damage to goods
- Court dismisses broker but default judgment taken against motor carrier
- Shipper introduced evidence to support only \$44,800 in damages (amount that Shipper paid for machinery)



Court's Holding

- Shipper is entitled to fair market value of machinery less salvage value since receiving the full market value of its damaged goods from a carrier, while retaining the goods, and thus their salvage value, would put it Shipper in better position through a partial double recovery
- Court invites shipper to submit evidence establishing the salvage value of the thirteen machines.
- “The court concludes by noting that in the event [Shipper] opts for a salvage value based on scrapping its machines, it would be well advised to produce competent evidence that it would not be able to make appreciably more money by engaging in some other form of salvage, such as selling undamaged components individually and selling as scrap only those pieces that are too badly damaged to be reused.”



THANK YOU!

Marc S. Blubaugh

Benesch, Friedlander, Coplan & Aronoff LLP

41 South High Street, Suite 2600

Columbus, Ohio 43215

Telephone: (614) 223-9382

Facsimile: (614) 223-9330

Email: mblubaugh@beneschlaw.com