A BUMP IN THE ROAD:
ASCERTAINING DAMAGES IN TRANSPORTATION CASES

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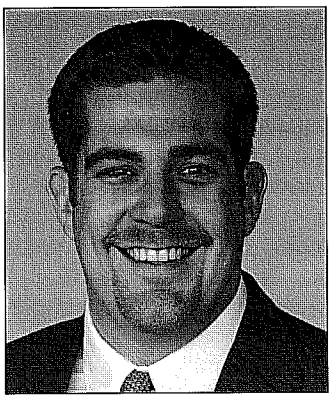

Although more goods are shipped through the air than ever before and shipment by sea or by train is still a viable alternative, the majority of this country's commercial transportation of goods is still accomplished over the road. The trucking industry in the United States is both highly important and highly regulated. These regulations often contain subtle differences based on the type of cargo and the shipment's destination. A cause of concern for most attorneys dealing with a cargo claim is determining the relevant rules, and regardless of whether their client is a shipper or a carrier, how those rules will be applied. This article will address some of the primary questions involved in handling such a case and focus on what rules are most likely to be applied by Minnesota Courts when dealing with the measure of damages in a cargo dispute.

In order to frame the issue, one must first consider the basic risks and potential damages which may be involved in any cargo claim. There are essentially two main risks which exist whenever a shipper places goods in the possession of a carrier: (1) the goods will be destroyed or damaged during shipment; or (2) the goods will not be delivered as instructed. Assuming the parties have not shifted the risk of loss to the buyer, either of these scenarios will likely cause the shipper to incur costs for either repair or replacement and may result in the loss of expected profits or other consequential damages. The goal for any attorney faced with a potential cargo claim is to prepare for these risks, and when something does go wrong, be able to protect the client as effectively as possible.

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I. LEGAL FRAMEWORK

Absent a specifically negotiated agreement, the basic contract for the carriage of cargo between a shipper and a carrier is a Bill of Lading. *Louisville and Nashville R.R. Co. v. Central Iron and Coal Co.*, 365 U.S. 59, 67-69, 44 S.Ct. 441,443 68 L. Ed. 900 (1924). Typically, the Bill of Lading lists the name of the shipper, carrier and consignee, the date of the shipment, describes the cargo, and provides for the carrier and consignee to acknowledge receipt. A Bill of Lading is important to the shipper because it is prima facie evidence of the carrier's receipt of the goods in the condition stated. *Cummins Sales and Service v. London and Overseas, Inc.*, 476 F. 2d 498, 500 (5th Cir. 1973).

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Minnesota Statute § 336.1-201, which codifies § 1-201(6) of the Uniform Commercial Code, defines "Bill of Lading" to mean: "a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and includes an airbill." Minn. Stat. § 336.1-201. Similar to the interpretation of any contract, when considering the effect and meaning of a Bill of Lading, courts will generally exclude parol evidence. *Beta Spawn, Inc. v. FFE Transportation Services, Inc.*, 250 F.3d 218, 226 (3rd Cir. 2001) (the terms and provisions of a Bill of Lading cannot be varied by extrinsic evidence, and all negotiations leading up to the written agreement are presumed to be merged therein).

Rights and responsibilities of the parties to a Bill of Lading for transportation of goods over the road are prescribed principally by three sources: Article 7 of the Uniform Commercial Code as enacted by the states (UCC), the Federal Bills of Lading Act (FBLA) and the Carmack Amendment to the Interstate Commerce Act (Carmack Amendment). Because of the federal jurisdictional issues involved in interstate commerce, the FBLA and the Carmack

Amendment are controlling in situations where they are applicable. Most courts have concluded that any claims against a carrier arising during the course of their provision of transportation services in interstate commerce are governed solely by federal law and, therefore, any state law remedies are pre-empted. *Underwriters at Lloyds of London v. North American Van Lines, Inc.*, 890 F.2d 1112 (10th Cir. 1989); *Adams Express v. Croninger*, 226 U.S. 491 (1913). In addition, many pieces of legislation, much smaller in scope and more specific in nature, may control a particular situation as well as rulings of regulatory bodies like the Interstate Commerce Commission (ICC).

As a result, Article 7 of the UCC, as adopted by the states, has limited application and only applies in primarily two situations: (1) where Bills of Lading are issued for the transportation of goods from a place within one state to another place in the same state, provided the goods are not to pass through another state or foreign country en route; and (2) where Bills of Lading are issued for transportation of goods from a foreign country, not in the United States. Because the Minnesota legislature has adopted the Uniform Commercial Code at Minn. Stat. § 336, Minnesota's intrastate transportation is controlled by UCC Article 7.

II. Liability Rules

A. Federal Law

At common law, a carrier's liability for all loss, damage or destruction was absolute. This rule of absolute liability was codified by the Carmack Amendment and governs all interstate transportation. *Missouri PAC. R. Co. v. Elmore and Stahl*, 377 U.S. 134, 138, 84 S.Ct. 1142, 1144-45, 198 (1964), reh'g denied, 377 U.S. 984, 84 S.Ct. 1880 (1964).

The rule of absolute liability in federal law does, however, contain exceptions for acts of God, acts of public enemies, acts of shippers, acts of public authorities, and the inherent vice or nature of the goods themselves. *Id.* at 137. The underlying rationale behind excusing liability in these situations is that "in the nature of things those causes of loss arise without fault of the carrier" and "he can in no case be responsible for their existence". *Hull v. Chicago, St. P., M. & O. Ry. Co.*, 41 Minn. 510, 513, 43 N.W. 391, 392 (1889).

The act of God exception applies to occurrences which are (1) abnormal or unusual, (2) strictly natural in origin with no human assistance or influence, and (3) inevitable, so that it could not have been reasonably prevented or provided against by the exercise of ordinary human foresight. 1 Am. Jur. 2d Act of God § 1 (2004).

The exception to absolute liability for an act of public enemy has fallen into relative disuse in recent years because it was based upon the acts of an organized military at war with the carrier's country of origin. This exception does not apply to instances of damage caused by thieves, rioters, robbers, or insurrectionists not part of an organized military. 14 Am. Jur. 2d Carriers § 546 (2004). It is possible that this exception would not apply to acts of terrorism. However, one of the other exceptions may apply to such a situation and prevent carrier liability.

The exception for acts of public authorities is for instances of damage or loss based on seizure or destruction by an authorized government agency. *Fehrenback Wine & Liquor Co. v. Atchison, T. & S. F. Ry. Co.*, 167 S.W. 631 (Mo. Ct. App. 1914). The exception for damage caused by the inherent nature of the goods is limited to loss or damage arising "solely from the nature of the property without intervention of human factors, such as loss from decay, fermentation, evaporation or natural shrinkage." *Secretary of Agriculture v. U.S., et al.*, 350 U.S. 162, 166 n.9, 76 S.Ct. 244, 247 (1956).

The final exception to the rule of absolute liability of the carrier is for acts of the shipper and exists to prevent a shipper from causing the loss and subsequently being able to recover for that loss. This exception comprehends every situation where a loss is caused by the shipper's act, whether it be an act of negligence, misconduct, or misfortune. 14 Am Jur. 2d Carriers § 549 (2004), *citing Tennessee Packers, Inc. v. Tennessee Cent. Ry. Co.*, 45 Tenn. App. 57, 319 S.W.2d 502 (1958). This exception is most applicable where a carrier seeks to avoid liability by introducing evidence that the loss or damage was based on improper instructions by the shipper or due to the shipper's failure to properly load the goods. The statutory support for this exception is found at FBLA § 80113(b). If a Bill of Lading contains the words "shipper's weight, load, and count" or similar words indicating that the shipper loaded the goods, the carrier will not be liable for damage caused by improper loading. 49 U.S.C. § 80113(b).

B. State Law

Article 7 of the Uniform Commercial Code requires only that the carrier exercise that degree of care in relation to the goods which a reasonably careful person would exercise

under like circumstances. U.C.C. § 7-309(1)(2003). At first glance, this standard appears very different than the federal standard of absolute liability, however, a further reading of 7-309(1) reveals otherwise: "this subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence." This language incorporates the common law rule of absolute liability and applies to Minnesota intrastate shipments. Also, the exceptions under the Carmack Amendment, which are outlined above, are generally applicable under UCC Article 7.

C. Proving Liability

The rule of absolute liability for carriers makes establishing a prima facie case to recover for damages to a shipment a relatively straightforward three-step process, in which the shipper must establish delivery to the carrier in good condition, arrival in damaged condition and amount of damages. *Missouri PAC. R. Co*, 377 U.S. at 138. To show delivery in good condition, a shipper may introduce a Bill of Lading issued by the carrier evidencing that that goods were "received in apparent good order" or other similar language. Such a representation amounts to prima facie evidence of delivery in good order. *Blue Bird Food Products Co. v. Baltimore & Ohio Railroad Co.*, 474 F.2d 102 (3rd Cir. 1973). However, the presumption of delivery in good order can be rebutted if the carrier can show that the damage was caused by a condition which was not apparent at the time it received the goods. *Id.* at 104. Therefore, the safest way to assure a finding of delivery in good order is to present the goods to the carrier in a manner that is "open and visible" and combine such presentation with the language "received in apparent good order" in the Bill of Lading.

Once a prima facie case has been established against a carrier, that carrier is absolutely liable for damages unless he can show that he was not negligent ***and*** that one of the exceptions outlined above applies. *See Missouri PAC. R. Co.*, 377 U.S. at 134.

D. Limiting Liability

UCC 7-309 authorizes a carrier to limit his liability for damages in certain circumstances and such limitation operates similarly to the liability limitations in the Carmack Amendment. 49 U.S.C. § 14706(a) and (f). This is a way for a carrier to circumvent the general rule of absolute liability and exists to allow carriers to assess and manage their risk. *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794 (Ind. Ct. App. 1999). This exception, however, is still counter to the public policy of the Carmack Amendment and UCC Article 7, and these liability limiting clauses will be strictly construed against the carrier. *Id.* at 799. A carrier must take four steps to limit its liability: (1) maintain a tariff according to ICC guidelines; (2) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to shipment. *Id.* The carrier bears the burden of establishing that it effectively limited its liability and a failure to do so will result in the shipper being entitled to her "actual loss or injury to property." *Id.*

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The complex web of regulations related to interstate and intrastate transportation place a heavy initial burden on carriers though absolute liability but makes it a difficult process for the shipper to obtain any damages in excess of actual cost to replace or repair the goods. It is also a tenuous position for a carrier to attempt to limit its liability and a failure to effectively do so will reinstate the presumption of absolute liability against a carrier.

III. Measure of Damages

Under the three-part process outlined above, once a shipper has established delivery in good condition and produced evidence of arrival in damaged condition, it must prove the amount of damages. While the measure of damages is an important question, neither Article 7 nor federal law set forth a way to measure damages against carriers for loss, damage, or destruction of goods. The most commonly cited rule from relevant case law is that a shipper is entitled to recover the difference between the fair market value of the goods in the condition they were supposed to have been in at the time of delivery and the fair market value of the goods as delivered. *The Ansalado San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494,

495, 55 S.Ct. 483, 484 (1935). This principle is generally referred to as "Arrived Sound Market Value less Arrived Damaged Market Value" (ASMV less ADMV). *Marine Office of America Corp., et al v. Lilac Marine Corp., et al*, 296 F.Supp.2d 91, 104 (D. Puerto Rico 2003), citing *The Ansaldo San Giorgio I*, 294 U.S. 494 (applying ASMV less ADMV theory to case involving Carriage of Goods by Sea Act).

This is, theoretically at least, an accurate measure of damages in a situation where the market value of the goods in sound condition can be determined, as is the case for certain commodities like grain. This principle is much harder to apply when there is no market available from which to obtain a value for the goods. *Id.* at 104. Thus, the most commonly applied principle is simply to measure damages in a way that will compensate the shipper for its loss. Courts are more than willing to depart from a market value measure of damages and use a different measure if it will result in an award of damages the court finds more appropriate. *See e.g. U.S. v. Northern Pac. Ry. Co.*, 116 F. Supp. 277 (D. Minn. 1953) (court valued potatoes at lower price than market value based on contract resale price in order to avoid overcompensating plaintiff). Courts also frequently look to the contract price the shipper was to receive from the buyer as an indicator of the fair market value the goods if they had been received as originally intended. *See e.g., Gore Products, Inc. v. Texas and N.O.R.R. Co.*, 34 So. 2d 418 (La. App. 1948) (Court used contract resale price to ascertain damages, noting that it was also the prevailing market value). A much more difficult question arises when determining what, if any, consequential damages the plaintiff is entitled to.

A. Consequential Damages

Statutory law regarding the question of consequential damages in a transportation setting is silent; however, the most frequently cited general principle of case law is a familiar one: the plaintiff may not recover special damages unless the possibility of their occurrence was fairly within the contemplation of the parties at the time of the contracting. *See Turners' Farms, Inc. v. Maine Central R. Co.*, 486 F. Supp. 694 (D. Me. 1980). This rule is derived from the case of *Hadley v. Baxendale*, a carrier case itself, which is often cited to explain how and when consequential damages will be awarded in a transportation contract. The opinion in *Hadley v. Baxendale* has evolved into a test in which recovery is dependent upon foreseeability, tested objectively under the first branch and subjectively under the second branch, with actual knowledge being the key. *Kleven v. Geigy Agriculture Chemicals*, 303 Minn. 320, 324-325, 227 N.W.2d 566, 569-570 (Minn. 1975). Under *Hadley v. Baxendale*, consequential damages are recoverable in situations where:

1 **Damages arise naturally** -- i.e. damages which arise naturally from the breach and which the carrier therefore must or ought to have foreseen as its likely consequence; or

2. **Damages arise from special circumstances** – i.e. damages which arise from special circumstances communicated to the carrier at the time of making the contract, which damages the carrier, so informed, could reasonably be expected to have foreseen as probable consequences of the breach.

In a situation of mis-delivery or non-delivery, the Eighth Circuit has developed stringent requirements for buyers seeking consequential damages in a situation where but-for the mis-delivery, they would have realized a sale. In these situations, the plaintiff is required to show:

1) At the time of making the contract of carriage, the plaintiff already had entered an existing contract of resale,

2) The goods in the hands of the carrier were purchased to fulfill the resale contract,

3) Such goods could not otherwise be procured in the market, and

4) The carrier was apprised of these facts at the time the contract was made.

Gardner v. Mid-Continent Grain Co., 168 F.2d 819 (8th Cir. 1948). These requirements, when compared with relevant case law, reveal a situation where a shipper must fully and specifically notify a carrier at the time the contract is made of precisely what will result from mis-delivery, non-delivery, or delivery of damaged goods. Otherwise, any claim for consequential damages will be an uphill battle.

Conclusion

Measuring liability and damages in a shipping contract can be a complicated and frustrating process for even the most patient attorney. This is especially true when considering the multitude of statutes which may apply to any given contract. However, with the correct planning and a relatively basic knowledge of relevant statutory authority, an attorney can help a client successfully navigate a transportation contract dispute, or better still, avoid the dispute all together. ▲