



**Refrigerated
Meeting**

Legal Issues Facing Refrigerated Transport

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Although you face all the same issues as typical dry van carriers... you also face some unique issues because of the cargo and services you are asked to provide.

Most of these issues center around cargo claims and increased liability due to transporting food and sealed shipments.

The Sanitary Transportation Rule created more confusion – and shipper contract provisions are requesting more carrier liability.



Let's quickly explore

- How liability has played out under the Sanitary Transportation Rule
- Contract Provisions that can help or hurt you (Broker or Shipper Contracts)
- Additional Challenges like Seals
- Insurance Issues



Summary of FSMA/Sanitary Transportation Rule

Sanitary Transportation rule took effect in 2017-2018 depending on size.

Allowed the shipper to set requirements for keeping food safe while in transport.

Has some strange nuances:

- Broker is included in the definition of shipper.
- Applies to interstate and intrastate transportation.

Breath of the Rule – If Not Changed by Contract

The Rule only covers food that is not fully packaged or requires refrigeration for safety

- Oranges in a mesh bag are not fully packaged.
- Lunchmeat requires refrigeration for safety.
- Beer and Coke are refrigerated for convenience or to make them easier to sell, not for safety.

Comments to the rule

The comments to the rule explain that it does not apply to frozen food as the food would be unsellable before it became unsafe.

The comments to the rule also explain the FDA does not believe it alters existing law (i.e. the Carmack Amendment).

- The Rule requires food that may be unsafe be removed from commerce until a determination is made that the food is safe by a qualified individual (this does not happen in practice)
- May be unsafe is a big difference from the actual damages standard under Carmack.
- Not many cases yet... BUT
- Craig disagrees with the comments to the rule (they are changing the law).

Mecca & Sons Trucking Corp. v. White Arrow, LLC

- Our case law makes clear that carriers are “strictly liable for damages” under the Carmack Amendment, *Certain Underwriters at Interest at Lloyds of London v. United Parcel Serv. of Am., Inc.*, 762 F.3d 332, 335 (3d Cir. 2014), up to “the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) [certain intermediary carriers].” 49 U.S.C. § 14706(a)(1). Although carriers and shippers can agree to limit the carrier’s liability in accordance with certain conditions, 49 U.S.C. § 14706(c)(1)(A), no such limitations are at issue in this case.

Mecca & Sons Trucking Corp. v. White Arrow, LLC, 763 F. App'x 222, 226 (3d Cir. 2019)

- Here, Singletons—and, eventually, Mecca—suffered an actual loss of property when its cheese product was subject to conditions that violated the transportation requirements set out in its Master Vendor Agreement with Trader Joe’s and communicated to White Arrow via email. Whether experts could reasonably disagree as to the safety of the cheese, and whether Trader Joe’s could have kept the cheese under observation for spoilage, is beside the point. Trader Joe’s had contracted to accept the shipment only if it had been “shipped and received at 40°F or less,” with the packaging clean and intact, free of dents or tears, and seals intact. J.A. 384. For any party to show that the goods had been damaged before delivery, they needed only show by a preponderance of the evidence that one of Trader Joe’s requirements had been violated, as a violation would render the goods unsaleable. That evidence is clearly present in this case.

Mecca & Sons Trucking Corp. v. White Arrow, LLC, 763 F. App'x 222, 226 (3d Cir. 2019)



Contract Terms

- The rule doesn't have requirements in it, it leaves it up to the parties to set the rules by contract.
- When the rule was first enacted, we saw lots of food addendums - one or two pages that stood out and we could get to the right person.
- Now, these FSMA/Sanitary Transportation related terms are tucked in larger agreements (and the people reviewing these agreements may not be aware of the commitments they are making).

Contract May Expand the Definition of Food

Notwithstanding any other provisions this Agreement, with respect to any food intended for human or animal consumption, including articles used for components thereof (“Food”) with respect to which services are provided, the provisions of this section shall apply and supersede to the extent in conflict with any other terms and conditions maintained in this Agreement.

Not just food that is not fully packaged, or requires refrigeration for safety, but ALL food.



Seals

Many shippers act like seals and seal integrity are requirements of the FSMA/Sanitary Transportation Rule.

Without a contract term regarding seals and seal integrity, the Shippers don't have a leg to stand on here (other than commercial pressure). Carmack doesn't say a broken seal equals damages and neither does the FSMA/Sanitary Transportation Rule.

Watch your contracts for seal related provisions.

A close cousin to seal provisions is chain of custody...

Same as seals, not a requirement unless its in a contract.

Seal usage is expanding well past food - and rejections based on seal integrity are expanding also.



Contract Should Address Who is Responsible for What

CARRIER favored Shipper/CARRIER Agreement Sample:

If SHIPPER tenders or otherwise requests services with respect to any shipment consignment containing Food shall, at the time of the initial request for services with respect to the individual consignment in question is made, provide written notice to CARRIER that the consignment contains Food (hereinafter, the "Notice"), which Notice must also include any special instructions or handling requirements to be imposed on the Shipment, including, but not limited to, any requirements related to condition, design, maintenance or type of transportation equipment; sealing of trailers; cross-contaminant restrictions; segregation/isolation of Food consignments; records relating to equipment (such as prior use or cleaning); temperature range requirements; temperature records (including method of measuring, monitoring and documenting temperature); pre-cooling requirements; required transit-times, etc., (any such instructions, hereinafter the "Specialized Instructions") regardless of whether such requirements are imposed by private parties or by any applicable law, rule, regulation. Temperature requirements must be stated solely in degrees Fahrenheit. Any such Notice shall specifically identify the consignment to which it relates and in no event shall any Notice purporting to apply to multiple consignments (including any Notice purporting to apply to any specifically enumerated commodities, any category of commodities, or commodities moving to or from specified locations) be binding on CARRIER or otherwise apply to services provided by CARRIER, regardless of whether receipt of such general Notice has been confirmed by CARRIER.



Shipper Favored Provisions:

- Failure to comply with the provisions set forth herein or any SHIPPER instructions may result in a determination by the SHIPPER, in each entity's sole discretion, that the goods transported are no longer safe and if such a determination is made by either entity, CARRIER shall not sell or otherwise distribute the goods and shall dispose of the same at its expense. Any goods disposed of shall be considered a total loss and valueless for determining cargo loss and damage liability of CARRIER.
- CARRIER will comply with handling instructions provided by the SHIPPER, customer, consignor or consignee (including such instructions that may be passed through to CARRIER by SHIPPER) including, but not limited to, compliance with requirements related to transportation of temperature controlled shipments. Without in any way limiting the generality of the foregoing, CARRIER shall ensure that any shipments requiring controlled temperature transit are maintained at all times within required temperature ranges. If CARRIER is transporting cargo of a type that a reasonable person would understand to require controlled temperature transportation, but is not provided with instructions regarding such service, CARRIER shall request, such instructions prior to accepting the cargo in question and, if controlled temperature service is declined, shall use reasonable efforts to obtain such declination in writing.
- Unless a shipment is loaded and sealed prior to arrival of CARRIER personnel, the manner of loading and securing freight upon Equipment shall be the sole responsibility of CARRIER. With respect to unsealed loads loaded prior to CARRIER's arrival, CARRIER shall be obligated to inspect such loading prior to departing. CARRIER represents that each driver utilized by it shall be competent to manage the loading and transportation of the goods subject to this Agreement.



Shipper Favored Provisions (cont.):

- When required by SHIPPER, CARRIER shall secure shipments with a serialized seal. CARRIER shall ensure that the serialized seal number appears on the bill of lading or other form of manifest or receipt. CARRIER shall be solely responsible for maintaining seal integrity during transportation of the shipment. Except as is required by law enforcement personnel, under no circumstances shall CARRIER or any of its personnel break any seal without the express consent of SHIPPER. CARRIER shall immediately notify SHIPPER to report a missing or broken seal.
- In the event that law enforcement personnel require that CARRIER break any seal on any shipment, CARRIER shall document such fact on the bill of lading or other form of manifest or receipt by noting the law enforcement agency, time, location, and officer name and badge number. Upon completion of inspection by law enforcement personnel, CARRIER personnel shall immediately re-seal the shipment with a serialized seal and shall indicate the second seal number on the bill of lading or other form of manifest or receipt. Furthermore, CARRIER shall, as soon as reasonably possible after being required to break a seal by law enforcement personnel, communicate such fact to SHIPPER and, if not SHIPPER, the consignee of the shipment.
- CARRIER shall bear sole risk of rejection of cargo arising from or related to broken seals or failure to comply with load handling instructions.

Failure to Comply Doesn't Equal Damages

Brokers & Carriers need to include provisions in contracts that state:

Any failure or alleged failure by the underlying carrier to comply with specialized instructions provided and acknowledged in accordance with the provisions of these terms and conditions shall not, in and of itself, result in any presumption that the consignment is unsafe, contaminated, adulterated, or otherwise unfit for its intended purpose. Without limiting the generality of the foregoing, in no event will lack of the original seal at the time of delivery result in any presumption that the consignment is unsafe, contaminated, adulterated or otherwise unfit for its intended purpose. To the extent not otherwise prohibited by law, customer confirms its obligation to mitigate damages.



Watch for contract provisions you can't comply with or live with

Can you really ensure the equipment has never been used to transport garbage or HazMat. What about trailer pools, leased trailers, etc.

No salvage in the sole discretion of the shipper.

Broken seal equals unsafe.

Instructions given on one shipment shall apply to all shipments from that point forward of that commodity.

Strategies to use to mitigate risk

Make sure your team understands what contract provisions need to be rejected and have paragraphs to propose that are more fair.

Use limitations of liability to reduce risk.

When you decide to take on risk, make sure there is a profit margin and volume that justifies the risk.

New insurance products

- Coverage for contractual liability & FSMA/Sanitary Transportation Rule liability in addition to Cargo/Carmack liability.
- Broker all risk coverages can be much broader when compared to traditional contingent cargo.

Insurance Issues

- There are lots of exclusions everyone in this room is familiar with. Coverage for reefer breakdown only, requirements for maintenance history, etc. before coverage attaches...
- But watch out for a more simple problem – Sanitary Transportation Rule allows goods to be deemed unsafe without evidence of actual damages. Carmack (and insurance designed to address Carmack liability) typically requires actual damages.

Any Questions?

Feedback





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