Collision of FDA Regulations and Carmack Can Cause Uninsured Cargo Losses

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Brokers engaged in the arrangement of foods by motor carrier are facing the dilemma of the collision between FDA (U.S. Food and Drug Administration) regulations and the Carmack Amendment. The FDA regulations are as follows:

21 USC Sec.331 titled "Prohibited Acts" states in relevant part:

"The following acts and the causing thereof are prohibited:

a. The introduction or delivery for introduction into interstate commerce of any food, drug device, tobacco product or cosmetic that is adulterated or misbranded.
b. The adulteration or misbranding of any food, drug, device, tobacco product or cosmetic in interstate commerce."

21 USC Sec. 342 titled, "Adulterated Food" states in relevant part:

"The food shall be deemed to be adulterated;

Sub.Par(.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 injurious to health."

Under the Carmack Amendment 49 USC Sec. 14706 a motor carrier is liable (for cargo damage) for the "actual loss or injury to the property caused by a Carrier."

Shippers commonly assert that under FDA regulations all they have to do is prove that the food product could have been, or may have been contaminated in order to establish a loss. However, under Carmack, as we know actual physical injury to the cargo must be proven. Thus the parties to the shipping transaction face the dilemma of product being rejected under FDA regulations but not physically damaged to meet the Carmack standard of loss.

The typical cargo insurance policy for motor carriers provides coverage for cargo proven to be physically damaged. The same is true for the typical contingent cargo policy for brokers which says the same thing that is, in order for the policy to cover the loss the cargo must be physically damaged. The end result is a substantial cargo loss with the shipper demanding payment and neither the motor carrier, nor the broker's contingent cargo insurance covering the loss. Brokers involved in arranging for transportation of food products can anticipate this dilemma and can provide for the allocation of risk in their contracts.

If this situation is not difficult enough we can add another layer of risk to be added to food delivery cases which involve the quality control requirements of the Shipper. Smart brokers will ask shippers for the shipper's quality control requirements in writing and convey them in writing to the hired carrier. If the quality control requirements include the shipper's right to demand no mitigation of damages and destruction of the cargo regardless of whether there is physical damage, the broker should provide these written instructions in writing to its carriers.

At this time, there is no known cargo insurance that will cover losses resulting from the application of FDA regulations, without at least some evidence of physical loss to the product.

A rejected food shipment may easily arise out of a violation of seal, and/or temperature requirements. At the very least, brokers can provide some protection for themselves by making sure their broker/carrier contracts contain refrigeration and seal terms and conditions. In any event, the violation of shipper seal and/or temperature terms and conditions can result in a rejection of the shipment under Section 342 because the shipment "could have been contaminated." At this time, there is no known cargo insurance that will cover losses resulting from the application of FDA regulations, without at least some evidence of physical loss to the product.

Case law on this thorny subject is diverse. Here are just a few examples:

In *Land of Lakes vs. Superior Service Transportation of Wisconsin* 500 Fed.Sup.2d,1150 (US District Court WI 2007) a case involving a truckload of butter that was involved in an accident, the Court applied Carmack damage standards and stated that while a seal that was intended to protect against tampering, the absence of the seal by itself does not mean the shipment was contaminated or otherwise damaged. The

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Court further indicated that a shipper should at least offer evidence of the general good condition of a product at the inception of the shipment. (This case was reviewed in more detail in the January 2009 issue of TIA's Logistics Journal)

Some cases applying the FDA regulations say that neither actual damages, nor actual contamination need be proven. *Pillsbury vs. Illinois Central Gulf R.R.* 687 Fed 2d, 241(8th Circuit 1982). In this case this Court acknowledges the shipper's right to protect its reputation.

Pillsbury provided proof that rail cars containing flour were clean at the inception of the shipment, and filled with beetle bugs at the end of the delivery point. Thus contamination could be inferred. Pillsbury was allowed to recover the total loss value of the shipment.

In *US vs. 157/137lb. Burlap Bags* 1993 WL 66701(E.D. VA 1993) the Court stated "in attempting to determine whether or not a substance has been adulterated within the meaning of 342 (a)(4) courts have uniformly adopted a "reasonable possibility" test. That is a food item may be considered adulterated if there exists a reasonable possibility that the unsanitary conditions under which the food is stored or processed may result in filth contamination. Under this standard it is not necessary that the food actually becomes contaminated although proof of contamination is certainly relevant toward an alleged violation of 342 (a)(4).

More recent cases have upheld the statement of law provided above see for example *US vs. Union Cheese Company* 902 FSupp,778, 786(N.D. OH 1995); *Atlantic Mutual Insurance Company vs. CSX Lines LLC* 432 F3d, 428 (Second Circuit 2005) where the Court suggested that the mere possibility that the food product had become adulterated pursuant to the FDA regulations was sufficient to deem the product unmarketable.

In *Penske Logistics vs. KLLM Inc.* 285F Supp.2d, 468 (D N. J.2003) Pepsi products were to be delivered under refrigeration. On delivery it was discovered that there was no refrigeration unit on the truck. Based on this, without a temperature reading or an inspection of the product for spoilage, the shipment was rejected and later destroyed. Penske tried to get out of the case on summary judgment but the Court noted that Penske had not provided any direct evidence such as actual testing of the product nor any circumstantial evidence that the product was outside the temperature range on the date of delivery. The Court denied the Motion.

Eastman Kodak vs. West Way Motor Freight 949F 2d, 317 (10th Circuit 1991). Kodak was allowed full recovery of damages to film shipped at an improper temperature. The claim was based on Kodak's protection of its reputation. The carrier argued that it was entitled to "salvage value" of the film but Kodak refused to allow the sale of its branded product in any secondary market. The carrier lost.

The critical take-away from the diverse cases instructs that brokers would be wise to obtain the shipper requirements (in writing) for transportation, and convey them in writing to the hired motor carriers, and contractually deal with them in their broker/carrier contracts. Rejections of shipments based on suspected contamination are common, and parties are smart to anticipate the issue. With no known cargo insurance to provide backup for the cost of such shipments, parties are at substantial risk of uninsured losses and resulting cargo liability disputes. As in all cases, the results are always very fact specific. The cases suggest, that as in any cargo damage claim, the parties would be wise to factually investigate all facts and circumstances as soon as possible. Facts have a major impact in determination of the outcome.

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