TAKE A LOAD OFF: THE LIABILITY FOR IMPROPER LOAD SECUREMENT

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Over 164,000 miles of highways in the National Highway System make up just a part of the over 4 million miles of public roads in America.[1] On these roads, truck drivers move roughly 72.5% of the nation's freight by weight.[2] With all of the loading and unloading of goods in the American trucking matrix, who is liable when a person is injured by falling cargo? Where does a broker's potential liability for injury from improperly secured cargo fit in?

RELEVANT STATUTES AND REGULATIONS – THE FEDERAL MOTOR CARRIER ACT

The Federal Motor Carrier Safety Administration ("FMCSA") was established as a separate administration within the United States Department of Transportation on January 1, 2000. The FMCSA publishes the set of regulations that govern the trucking industry, known as the Federal Motor Carrier Safety Regulations, 49 C.F.R. Parts 300-399 ("FMCSR").

To determine liability, it is first necessary to define the parties in play. To start, there are usually two major parties in a trucking transaction, the motor carrier and the shipper. Pursuant to FMCSR § 390.5, Motor carriers are entities responsible for hiring, supervising, training, assigning, or dispatching drivers and employees concerned with the installation, inspection, and maintenance of motor vehicles. On the other hand, a shipper is the party who tenders the cargo to the motor carrier for transport in interstate commerce. There is also a third potential player in a trucking transaction, the third-party broker, who, for compensation, arranges or offers to arrange property transportation by an authorized motor carrier. FMCSR § 371.2(a).

To determine potential liability, it must be determined who has the responsibility to ensure that the cargo is secured at all times. The driver of a truck *who is able to inspect the cargo prior to departure* must assure himself that the cargo is properly distributed and adequately secured. FMCSR § 392.9(b)(1). Specifically, that the cargo is immobilized either with securement devices or loaded in such a way so that it cannot shift or tip in a way that will affect stability or maneuverability. FMCSR § 393.102(c). After the vehicle departs, the driver is responsible for inspecting the cargo within the first 50 miles after the beginning of a trip to ensure that the cargo is not shifting or falling, even if this requires additional securement devices. FMSCR § 392.9(b)(2). The driver must reexamine the cargo any time that he (1) makes a change of his duty status; (2) has been driving for three hours; or (3) the vehicle has been driven for 150 miles, whichever occurs first. FMSCR § 392.9(b)(3)(i) – (iii)

However, the rules above only apply to unsealed loads where the cargo is able to be inspected. The driver is not responsible for these reexaminations if the cargo being transported is a sealed load or where the cargo is loaded so that it that makes the inspection of the cargo impossible. FMSCR § 392.9(b)(4). Courts have incorporated the gist of these regulations in crafting their own common law rules for liability between carriers and shippers.

THE *SAVAGE* RULE AND ITS APPLICABILITY – THE TRADITIONAL DUTIES OF CARGO LOADING

The seminal case relating to issues of cargo securement is *U.S. v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953). Decided in the United States Court of Appeals for the Fourth Circuit, *Savage* dealt with a collision in Virginia between a truck owned by Brooks Transportation Company,

Inc., and a truck owned by Savage Truck Line, Inc ("Savage"). *Id.* at 443. Savage's truck was carrying airplane engines in cylindrical containers. One of these cylinders fell off the Savage truck and onto the Brooks Transportation Company, Inc., truck, killing its driver instantly. The United States, the shipper, appealed the trial court's verdict against it on the ground that it was entitled to indemnity from Savage Truck Lines because the driver knew that the cargo was not properly secured. The Fourth Circuit noted that it is the responsibility of the carrier to "see that the packing of goods received by it for transportation is such as to secure their safety." *Id.* at 445. The Court then articulated the responsibilities of the shipper and the motor carrier as:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

Therefore, as the "principal fault" of the matter lay with the carrier, Savage, which was required to indemnify the United States. *Id.* at 447. This "*Savage* Rule" has been adopted or followed by a majority of jurisdictions. The Savage Rule also falls in line with the regulations outlined above, which are traditionally used by Courts to determine the duties of parties involved in trucking transactions.

THE BROKER'S ROLE IN CARGO SECUREMENT

While a traditional trucking arrangement involves only the carrier and the shipper, there are arrangements where a third-party broker acts at an arm's length between both parties to broker a trucking arrangement. A broker does not have any responsibility in the cargo securement process *per se*. However, liability can be asserted against a broker for improper cargo securement under two theories.

First, that the broker acted similarly to an employer in a "negligent hiring" case. To defend against this, the broker must show that it used reasonable care in selecting the carrier. The plaintiffs pursued this theory in *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004), which involved a catastrophic collision in Maryland between minor motorists and a truck driven by Goff Brothers Trucking, LLC. *Id.* at 540. The load was brokered between Goff and the shipper by C.H. Robinson Worldwide, Inc. ("Robinson"). The plaintiffs' brought claims against Robinson, in part, for "negligently hiring" the trucking company to transport the load. *Id.* at 551. The United States District Court for the District of Maryland found that Robinson, as the broker, had a duty to exercise reasonable care, including checking safety statistics for carriers that it is considering contracting with and maintaining internal records of carriers. *Id.* at 552. While the Court noted that evidence of Robinson's negligence was "very thin," the record showed Robinson failed to inquire further into the trucking company's qualifications after noting that the trucking company had a "marginal" SafeState safety rating when Robinson's contract called for a "satisfactory" safety rating.

The second theory of liability is that a broker asserted a "heightened" level of control over the carrier or the shipper that would allow the broker to assume the responsibility in cargo securement. In *Jones v. C.H. Robinson Worldwide, Inc.*, F.Supp.2d 630, 633 (W.D. Va. 2008), the plaintiff was struck by a truck that was contracted by Robinson in Virginia. The plaintiff sued Robinson, in part, on the theory that it was acting as a "motor carrier" in the trucking transaction by exercising undue control over the transporting trucking company. *Id.* at 635. After reviewing the record, the United States District Court for the Western District of Virginia held that Robinson did not exercise any "heightened level of control" over the trucking company's operations. *Id.* at 639. While Robinson did arrange pickup dates and times, provided pickup and delivery addresses to the carrier, and communicated information from the shipper regarding the loading and unloading of cargo, it did not control the details of the carrier's operations, such as drivers' schedules during a trip, particular routes, or compensation plans. This level of control was "incidental" to the cargo transportation process and did not go beyond the control typically exercised by the broker to determine where the load was going as requested by the shipper.

CONCLUSION - LIABILITY DEPENDS ON ROLE AND CONTROL

Liability for insufficient cargo securement depends first on what role the party is playing. The motor carrier is potentially liable for cargo securement issues that are discoverable when given the ability to inspect the cargo pre-trip. The shipper is potentially liable for latent cargo securement issues when there is no such opportunity for inspection by the motor carrier. Finally, the broker is typically not liable for cargo securement issues unless it can be shown that the broker was negligent in selecting the motor carrier or exercised a heightened level of control beyond that of a normal broker. When defending brokers, it is key to have accurate records of how the carrier was selected and the investigation done as to the carrier's safety record. Further, it is important that the broker not exercise control over anything more than pick up and delivery times, dates and addresses and potential special unloading instructions as communicated to it by the shipper. The broker must not control driver scheduling, such as choosing the driver, routing as to how the driver is to get there, or compensation plans as to the drivers.

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[1] https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter1.cfm#:~:text=Since%20the%20early%2020th%20century,million%2Dmile%20public%20road%20network

[2] https://www.trucking.org/economics-and-industry-data