FOOD SAFETY – BROKEN OR MISSING SEALS

By George Carl Pezold

The Coronavirus pandemic has made us all very aware about the threat of possible exposure to contagious diseases. Viruses, bacteria, fungus, mold and other harmful substances can be anywhere and can travel around the world.

So what about food safety?

A controversial area of the law is the effect of broken or missing seals during the transportation of foods and food products. Virtually all shippers of foods and food products have strict requirements that carrier's trailers must be sealed at origin and that the seals may not be broken until the shipment is delivered to the consignee. Instructions may be noted on bills of lading and very often included in rate confirmations (by brokers) or in formal transportation contracts. Consignees likewise have such requirements and will often reject any food shipment that arrives with a missing or broken seal.

Often these shipments are rejected without any inspection or testing of the contents of the trailer, and sometimes not even after the trailer has been returned to the origin which could be a manufacturer, distributor or warehouse. And often the shipper or owner of the goods will demand that they be destroyed, so that they cannot enter the stream of commerce or be sold as distressed merchandise.

Clearly, contamination of food and food-related products intended for human consumption is a serious matter.

When loss and damage claims are filed the claimant will usually assert the full invoice value to its customer as the proper measure of damage on the grounds that it would was no way to conclusively determine if there was any contamination or adulteration of the product, that the goods were worthless because it would impossible or illegal to salvage or sell them.

On the other hand, carriers (and their insurers) will usually decline such claims arguing that there is no proof of any actual damage and that the claimant has failed to mitigate the loss, or will demand a "salvage allowance" even though there was no salvage.

So what are the laws and legal principles applicable to these disputes?

STATUTES AND REGULATIONS

The Federal Food, Drug and Cosmetic Act – Title 21 of the United States Code

21 U.S. Code § 321.Definitions; generally

For the purposes of this chapter—
(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

21 U.S.C. Section 331, Prohibited Acts

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.

21 U.S.C. Section 342. Adulterated food

A food shall be deemed to be adulterated—
(a)(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 rendered injurious to health
(i) If it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title.

Title 21 of the Code of Federal Regulations, Food and Drugs

There appears to be no reference to seals or any requirement to seal trailers or other vehicles that transport food or food-related products in the FDA regulations. This may seem strange in view of Congressional concerns voiced in enacting recent legislation such as the Sanitary Food Transportation Act of 2005 and the Food Safety Modernization Act of 2011.

COURT DECISIONS

Even though this situation does occur quite frequently, it is interesting to note that there are relatively few reported court decisions dealing with broken or missing seals and shipments of food or food products.

The first question is "can delivery with a broken or missing seal - ALONE - constitute "actual loss" or damage within the meaning of the Carmack amendment?"

One case directly on point is Seaboard Allied Milling Corp v. Consolidated Rail Corp., (unreported, D.C.D.C. Civ. No. 79-0828, July 22, 1980), Aff'd 656 F2d 900 (D.C. Cir. 1981). This involved a covered hopper car containing approximately 100,000 pounds of flour shipped from Seaboard Milling's plant in Buffalo, New York to the Downingtown, Pennsylvania Bakery of Pepperidge Farm. When the car was loaded all of the hatches were covered and sealed to ensure that the flour would not be exposed to contamination or adulteration during transport. Upon arrival at Downingtown it was discovered that a forward hatch had been opened and its seals removed, thus exposing the flour to possible contamination and Pepperidge Farm rejected the carload of flour.

Pepperidge Farm sued Conrail and the issues at trial were whether the plaintiff had establish its prima facie case by proving delivery in good condition, arrival at the destination in damaged condition, and the amount of damages incurred, as set forth in Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134 (1964). As to the first element, good condition at origin, the Court stated:

> . . . Plaintiff's strict and established program of quality control prior to and during the loading process in conjunction with periodic inspections and sampling of the flour affords adequate evidence establishing that the sealed flour was delivered to the carrier in good condition.

As to the second element, actual damage to the goods upon arrival, the Court found that the Plaintiff had successfully met its burden, stating:

> The actual damage to the flour occurred at the moment the hatch was opened by some unknown vandal, thereby destroying the commercial value of this shipment. Neither Plaintiff nor Pepperidge Farm could use this flour without violating strict Federal law. Under Section 331 of the Federal Food, Drug and Cosmetic Act, it is unlawful to introduce into interstate commerce any food which has been adulterated. 21 U.S.C. § 331(a). A food is deemed to be adulterated:

"if it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth or whereby *it may have been rendered injurious to health*." 21 U.S.C. § 342(a)(4). (Emphasis added.)

The prohibition extends to the use of adulterated components of food articles, 21 U.S.C. § 321(f)(3), and flour used for baking falls within the ambit of this Act. United States v. Cassaro, Inc., 443 F.2d 153 (1st Cir. 1971).

Therefore, because of the peculiar properties indigenous to flour, the only fail-safe method to test the flour for possible contamination would effectively destroy the entire shipment. The economic value of the flour contained in car GACX 42188 was irreparably destroyed at the moment of the unauthorized entry.

As to the third element, the amount of damage, the court awarded the contract (invoice) amount, stating:

. . . this Court finds Seaboard Milling incurred damages of $9, 448.11, and the price of the flour as set forth in the contract between Seaboard Milling and Pepperidge Farm. . .

Accordingly, judgment shall be entered for the Plaintiff for damages of $9, 448.11 from this date, plus interest and costs.

A more recent case is Oshkosh Storage Co. v. Kraze Trucking LLC, 65 F.Supp.3d 634 (E.D. Wis. 2014), recon. den., 2014 WL 7146405 (E.D. Wis. 2014. This involved a shipment of kosher cheddar cheese from Litchfield, Minnesota to Oshkosh Storage in Oskosh, Wisconsin. The shipment was custom made according to the specifications of a customer, Dairiconcepts, and was sealed at origin. The driver contended that when he arrived on the Oshkosh premises, the load was sealed. He was given instruction sheets, one of which indicated that Oshkosh Storage may reject a load of food products for various reasons, including "[n]o seal, broken seal, or seal does not match manifest" and was told to "pull up around the north side of the building at the third set of dock doors and pull up by the stairway and our warehouse guy will get [Daniels'] paperwork and break the seal." There were also signs in the check-in area which stated: "Please DO NOT break the seal on the trailer. Our warehouse staff will verify the seal number and break the seal prior to unloading." However, the driver prematurely broke the trailer seal, opened the trailer bay doors, and backed his trailer into an open loading dock. When the broken seal was discovered Oshkosh Storage immediately contacted the receiving customer, Dairiconcepts, which instructed it to reject the load. Thereafter, Great West Casualty, Kraze's insurer, ultimately sold the rejected load for $51,000, a sum $19,278 less than the original invoice price, which was $70,278.

The carrier did not question whether the cheese was in good condition when tendered to the it at origin, but argued that the plaintiff had not proven that there was any damage upon delivery. The court rejected this argument stating:

Kraze does not assert that Oshkosh Storage failed to deliver the cheese to Kraze in good condition. The central dispute between the parties is whether Kraze's premature removal of the seal caused "actual loss or injury" or "damage" to the delivered product. Oshkosh Storage asserts that the value of the cheese was $70,278.61 if it had arrived with a verified seal but that its value instantly decreased when the seal was broken. Oshkosh Storage President Carl Doemel testifies that his company's verification of an intact seal is part of the value of the load because customers demand this for assurance of product integrity. . . In Oshkosh Storage's view, the reduction in value constitutes damage under the plain meaning of the term. Kraze counters that a

broken seal is not prima facie evidence of damaged goods because it does not indicate whether the delivered goods were actually tampered with or harmed in any way. . .

The Court concludes that Oshkosh Storage has the better argument. Although the Carmack Amendment does not explicitly define "actual loss or injury," a decrease in product value is unquestionably a loss or injury. . . Here, it is undisputed that Dairiconcepts rejected the load solely because of the broken seal and that the cheese was later sold at a lower price. Kraze suggests that the broken seal did not cause the cheese to lose value and that Oshkosh Storage simply obtained a better price than Great West Casualty. Absent evidence that Great West sold the cheese at a discounted price for a particular reason, however, the Court presumes that Great West sold the cheese for its fair market value. Oshkosh Storage was therefore damaged in the amount of $19,278.61.

The Court awarded Oshkosh damages in amount of $19,278. (It should be noted that this was in addition to the $51,000 proceeds from the sale by Great West Casualty, Kraze's insurer, so that the total value of the cheese which was $70,278 was ultimately recovered.)

So, what can be learned from these two decisions? First, both judges recognized the legal principle that delivery with a missing or broken seal constitutes "actual loss or injury" within the meaning of the Carmack Amendment, 49 USC 14706. Second, the amount of the "actual loss" can be determined differently based on the specific facts of the case. In one case, salvage was not allowed and the claimant recovered its contract (invoice) price, and in the other the parties allowed the goods to be salvaged and the claimant received the salvage amount plus the diminution of value (for the same result).

CONTRACTUAL PROVISIONS

It has become quite common that food shippers to enter into formal transportation contacts with carriers that specifically address the use of seals and the consequences of delivery with a missing or broken seal. And, likewise, carriers usually will want to include contract language that say a broken or missing seal is insufficient and that there must be proof of actual physical damage to goods. Here are some examples of language in typical food shipper contracts:

Food Security. Carrier acknowledges that exposure of food and related products to possible contamination by foreign substances may render product worthless and/or unsuitable for its intended use. Shipments with missing or broken seals, or an unexplained break in the chain of custody, may be rejected by the consignee due to the possibility of adulteration or contamination.

OR

Sealed shipments. If any such shipment arrives at destination: 1) with a broken seal; 2) with evidence of tampering suggesting the shipment was accessed by unauthorized persons or otherwise subjected to contamination, infestation, or other sources with the potential to render the shipment injurious to health, the typical burden of proof imposed by Carmack shall not apply and instead Shipper, in its sole discretion, may determine that the shipment may have been rendered injurious to health and may reject the entire shipment or any portion thereof.

Carriers, on the other hand, will often want to add language such as this:

> Shipper must show actual damage or contamination to the cargo when filing a cargo claim, including with respect to loads refused or rejected by Shipper or the consignee because of a missing, broken, or unsatisfactory seal.
>
> OR
>
> Shipper will use all reasonable efforts to mitigate its loss by seeking to salvage any damaged, injured or expired shipments. If Shipper refuses to mitigate its loss by seeking to salvage, then Carrier will be entitled to a reasonable salvage allowance.

FOOD-RELATED GOODS

Just the other day we received an email from a broker who said that he "just got hit with claim on empty food cans that our manufacturer is refusing to receive because the when the warehouse they shipped them to refused them and returned without a seal." He explained, "Long and short, load went from Oakdale, CA to Kent, WA. Kent refused as a few cans had shifted. Upon return to Oakdale, trailer had no seal and manufacturer claiming a full loss as "potential contamination" and driver's insurance (Progressive) is declining "contamination" coverage. I'm trying to get our client, the can manufacturer, to physically inspect and they are refusing. Any suggestions?"

What about food-related items such as bottles, cans, plastic "clamshells" or other containers, wrapping materials, covers and caps, etc.? Manufacturers of these products and their customers also have strict rules and sanitary policies that require seal integrity.

While there do not appear that this situation has been the subject of any reported court decisions, the answer may lie in the wording of the definition of "food" in 21 U.S. Code § 321(f), which states: "The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article." Certainly it would seem that food-related items such as those described above would be considered as "articles" within the definition of the statute.

"THE LAW OF THE LAND AND THE LAW OF THE JUNGLE"

On the one hand we have the truck driver who says "There's nothing wrong with this stuff – I'll take it home and me and the kids will be happy to eat it!" On the other we have the supervisor on the dock who says "Can't you see that sign right there on the building! We don't accept any food shipments without a seal!"

Shippers and their customers believe that they have the right and the duty to enforce food security requirements out of legitimate concerns about exposure to violating the law, the possibility of adulterated or contaminated food entering the stream of commerce, and potential product liability. Carriers argue that in many cases there is no inspection, testing or evidence of the condition of the product, and that the shipper has to prove actual damage and to mitigate the loss.

It certainly would seem that in some cases there may be a middle ground for avoiding or resolving these disputes. For example, how is the product packaged and would it be reasonable to assume that the individual packages contained in a properly sealed carton should be adequately protected from any foreign substances? If the product is not permanently labeled with a brand or trademark, is there a secondary market?

In may be observed that, In view of the paucity of reported court decisions as noted above, it would appear many of these disputes are resolved by negotiation or settlement under the “Law of the Jungle”, thus avoiding costly and time-consuming litigation involving the “Law of the Land”.

Some final points:

1. Shippers (and consignees) must make it absolutely clear in advance of the consequences of delivery with a broken or missing seal.
2. Carriers have to respect shipper’s concerns and their food safety policies and procedures, and ensure that drivers are aware of the need to protect seal integrity.
3. Both parties should be willing to examine all of the facts in each case, and see if there can be some amicable solution.