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Shipper Liability (If Any) to Carriers' Drivers for Allegedly Improperly Loaded Freight

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Introduction

In most of the situations of injury and damage that are a result of allegedly improperly loaded freight, the damage is to third parties, who fall victim to freight careening

from trucks on public highways, or falling off, or out of, trucks in consignee unloading facilities or terminal yards. However, there *are* instances in which the drivers of the trucks *that actually pick up the loads* from the shippers, and who play some role in the actual loading process, are themselves injured. Often, these drivers are precluded by their respective state's workers' compensation statutes from filing any type of lawsuit against their carrier employers for their injuries. In many of these instances, the drivers then look to the shipper, and bring actions for alleged improper loading of freight.

In these situations, a compelling argument for the shippers is *the very existence* the Federal Motor Carrier Safety Regulations ("FMCSR's"), which place a statutory and regulatory duty upon the driver of the carrier (in these cases, the very person actually claiming injury or damage) to properly secure and inspect the freight. Generally, in these situations, the duties imposed by the FMCSR's upon the driver are likely to supersede any allegations of negligence on the part of the shipper. However, in these situations, it is nonetheless important that the shipper be *extremely careful* as to what degree it interjects itself into the loading process. An immersion in the loading process could lead to claims that the shipper has gratuitously assumed a duty to the driver (and, for that matter, to third parties) to properly secure and inspect the freight. Ancillary to that gratuitous assumption in these instances, would be an allegation that the shipper breached that gratuitous assumption of duty.

The Federal Motor Carrier Safety Regulations ("FMCSR's") And Their Dual Carrier Duties: Securement and Inspection

The FMCSR's apply to "all employers, employees and commercial vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). Thus, the regulations, on their face, apply to *motor carriers*, not shippers. The pertinent FMCSR's mandate that the driver has the ultimate obligation to secure and inspect cargo:

- (a) General. No person shall drive a commercial motor vehicle and a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless—
 - (1) The commercial vehicle's cargo is properly distributed *and adequately secured* as specified in §§ 393.100-393.106 of this subchapter.
 - (2) The commercial motor vehicle's tailgate, tailboard, doors, tarpaulins, its spare tire and other equipment used in its operation, and the means of fastening the commercial motor vehicle's cargo *are secured*....

49 C.F.R. at § 392.9(a) (emphasis added). This regulation creates the requirement, upon the driver of the commercial motor vehicle, *of actual physical securement itself*. This regulation concerns the *physical act* of securement, and *status* of securement, only. It does not mention inspection or assurance. It imposes a clear statutory duty on the driver *to actually secure the cargo*.

The Regulations *also* make clear that the driver of a tractor trailer *also* has the ultimate, responsibility of *inspecting and assuring* load securement. As 49 C.F.R. § 392.9(b) provides:

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(b) Drivers of trucks and truck tractors. Except as provided in paragraph (b)(4) of this section, *the driver of a truck or truck tractor must—*

- (1) *Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;*
- (2) *Examine the commercial motor vehicle's cargo and its load-securing devices within the first 25 miles after beginning a trip and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the commercial motor vehicle's load; and*
- (3) *Reexamine the commercial motor vehicle's cargo and its load-securing devices periodically during the course of transportation and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the commercial motor vehicle's load. . . .*
- (4) *The rules in this paragraph do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.*

Id. (emphasis added). Thus, there are two separate statutory requirements for the driver: Physically securing the load, and inspecting the load's securement. The driver is *obligated* to secure the freight. The driver is *then* obligated to inspect his load and his truck, to ensure that it is safe before taking it out on to the public highways. He is, essentially, the ultimate guarantor of the safety and securement of his load. See also, *Rector v. General Motors Corp.*, 953 F.2d 144, 147 (6th Cir. 1992) (§49 CFR §392.9(b), which states that the driver of a truck must assure himself that his vehicle's cargo is adequately secured, is indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods).

The Act of Loading And The Act Of Securement Are Separate Physical Actions, Which Create Separate Legal Obligations, For Separate Persons

The obligations of loading and securement, while sometimes coterminous, can be separated in instances, where the only reason that the shipper is actually placing the cargo on the trailer, is because it is so heavy that the truck driver cannot physically do so. Numerous courts have recognized this dichotomy and separated the duties of loading by the shipper, as opposed to securement by the carrier, in similar situations. See *Nichols v. International Paper Co.*, 278 Ark. 226, 644 S.W. 2d 583, 584 (1983) ("It is undisputed that it was the duty of International Paper Company [the shipper] to load the pallets on the trailer and then Nelson's [the carrier's driver] duty was to secure the load with a chain and deliver it"); *Gaber Co. v. Lawson*, 549 S.W. 2d 19, 22-23 (Tex. Civ. App. 1977) (owner of truck has duty to secure his cargo in a way that will prevent it from falling off truck and causing havoc on freeway); *Kasperski v. Patterson Services, Inc.*, 371, So. 2d 1254, 1258 (La. App. 1979) (recognizing separate cause of action against carrier for negligent securement of a load).

Thus, *Step One*—Loading, can be performed by the shipper. *Step Two*—Securement, is generally the motor carrier driver's obligation. *Step Three*—Final Inspection of Securement, is also the motor carrier driver's statutorily mandated obligation. Amalgamating loading and shipping together, while easy to do, essentially thrusts upon the shipper statutory duties that are not its own, but that are imposed upon the carrier and its driver.

A Plaintiff Driver's Statutory Duties Of Securement And Inspection Probably Supersede Any Alleged Similar Duties Of The Shipper

As noted, most of these cases involve a situation in which a third party, *not involved in the shipping and loading sequence*, brings an action against the shipper for injuries caused by cargo shifting. In the rare cases that address *driver* lawsuits against shippers, courts are *far more* reluctant to exonerate the driver from this mandatory obligation, of load securement and inspection, and commensurate negligence for ignoring it. For instance, in *General Electric*

Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), plaintiff Kelly Moretz brought an action against General Electric Company ("GE") for injuries that he sustained while driving a trailer truck hauling heavy crated electrical control panels. These panels had been allegedly loaded negligently by GE at its Salem, Virginia plant. Moretz was an employee of Mason & Dixon Lines, Inc. ("Mason & Dixon") an over-the-road interstate carrier. The parcels were loaded in such a manner that an open space was left in the center of the trailer without bracing, which allegedly allowed the parcels to shift in the course of the subsequent transit. GE initially turned the cargo over to a Mason & Dixon driver, who delivered it uneventfully to the nearest Mason & Dixon terminal, nine miles away. At the terminal, Mason & Dixon sealed the trailer, and turned it over to Moretz, to be driven to Alabama. During that trip, the load shifted as the vehicle rounded a turn near Roanoke. The trailer overturned and injured Moretz, who brought suit against GE.

GE then filed a third party complaint against Mason & Dixon. GE alleged that the *carrier* had the duty to inspect the shipment and to decline it if it was improperly loaded to transport. GE contended that the failure to perform these duties was the proximate cause of the accident. GE also contended that even if it had some degree of negligence, in some aspect of the loading, it was nevertheless entitled to indemnity from the carrier for any damages recovered by its driver, since the carrier's fault in transporting the goods, with notice of the alleged negligent stowage was: "so grave as to throw the whole loss upon it." *Id.* at 782.

At trial, the case was submitted to the jury on the question of the primary negligence of GE and its liability, if any, to the plaintiff driver Moretz. Any action by GE on its third-party complaint against Mason & Dixon would be determined by a special interrogatory to the jury, from which the court would determine the liability of Mason & Dixon, if any, to GE. The trial court thus confined the jury's verdict to the issue of the liability of GE to the plaintiff driver. The jury returned a verdict in favor of Moretz against GE in the amount of \$35,000. The jury then also found that Mason & Dixon was liable for negligence that proximately contributed to the accident, and the resulting injuries of Moretz.

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On appeal, GE contended that a motion for directed verdict in its favor should have been granted by the trial court. GE maintained that because under the undisputed facts, Moretz' injuries were not caused by any negligence on the part of GE, but by, *inter alia*, the contributory negligence of the plaintiff driver himself, it should be entitled to a directed verdict:

... General Electric contends that the plaintiff [driver] was guilty of contributory negligence because he did not inspect the fastening of the load and make sure that it was securely in place before he started on his drive to Alabama.

Id. at 784.

Noting the applicability of the Federal Motor Carrier Safety Regulations, the court explained that:

These regulations provide amongst other things that 'no motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place,' 49 C.F.R. 193.9(b) [prior version]. The gist of the contention is that the plaintiff [driver] did not make the inspection required by these regulations before starting out on the trip.

Id. at 784 (emphasis added). Later in its opinion, Moretz emphasized this duty by the carrier and its driver:

It should be borne in mind, in this connection, that *the transportation of the goods during which the loss occurred lay entirely in the hands of the carrier and that [any] initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties.*

Id. at 785 (emphasis added). And:

Clearly the carrier was not excused from carrying out *its primary obligation* to the shipper to make certain that the cargo delivered to it unharmed [by the shipper] was not sent out over the public roads in a dangerous condition.

Id. at 787 (emphasis added)

A Three Step, Sequential Analytical Process

The analytical process in these situations then, is a sequential one:

Step One is loading the cargo, often conducted by the shipper.

Step Two is securing the cargo, the carrier's driver's obligation.

Step Three is inspecting the load and making a *cognizant decision* that the load is safe and secure, and thus ready to be taken on to a public highway.

It is the carrier, not the shipper, that ultimately takes the load out on the open roads. Step Three then, is generally the driver's responsibility.

Cases Finding A Carrier Nondelegable Duty And Carrier "Last Clear Chance" To Avoid Injury

The duty of a motor carrier to ensure that before it takes a load out on to the public highways the load is secure and loaded properly, is a nondelegable duty. The carrier, as the entity with the last opportunity to decide whether the vehicle should be taken onto the public highways, is the entity with the *last clear chance* to ensure not only that the freight is loaded properly, but also that it is secured properly, so as to safely be transported over the public highways. This duty was addressed in *Jenkins v. E.L. Long Motor Lines, Inc.*, 103 S.E.2d 523 (S.C. 1958). In that case, Plaintiff Ruby Jenkins was injured when her car was hit by a tractor trailer rig of E.L. Long Motor Lines ("Long"). The jury awarded her \$30,000 in damages. Long appealed, presenting, *inter alia*, these questions to the appellate court:

Is a Motor Truck Carrier liable for damages sustained as a result of improper loading of the vehicle where the loading was done by the shipper, and the defective loading was latent and concealed?

Did the Trial Judge err in holding as a matter of law that defendant [carrier] had not made a reasonable inspection of the load when it picked up the trailer at the shipper's plant?

Id. at 523.

Noting a section of South Carolina Public Service Commission regulations similar to the subject Motor Carrier Safety Regulations, the Court used that section as a springboard, to conclude that the carrier's ultimate duty was paramount:

Subsection 2.092 thereof provides: 'Fastenings Secure.—No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place.'

It was the duty of Appellant [carrier] to make reasonable inspection to see that the load was properly distributed and if necessary secured in order to prevent unsafe shifting of the load; and *if it knew or in the exercise of ordinary care should have known that the load was not in condition to be safely hauled on the highway, it assumed the risk of such damage as might be occasioned thereby...* this question must therefore be resolved against appellant's [carrier's] contention [of negligent loading by the shipper].

Id. at 528 (emphasis added).

The court then concluded:

From the foregoing testimony, it is apparent that the driver made little or no effort to inspect his cargo with a view to seeing that it was properly loaded and fastened in order to prevent shifting or in anywise comply with the applicable statutes or rules of the Public Service Commission regarding same and that the Court committed no error in instructing the jury that there was a lack of evidence in this case that Appellant had made a reasonable inspection of the load to be transported.

Id. at 529 (emphasis added), see also, *Simmons v. Toumey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312, 318 (2000) ("A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured and remains vicariously liable for injury caused by an unsecured load."); *Thomson v. Chicago, M. & Jt. P.Ry.*, 217 N.W. 927, 929, 195 Wis. 78 (1928) (carrier may not claim that injury was caused by insufficient loading if this was

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discoverable by ordinary inspection when the goods were tendered).

In another recent case, *Decker v. New England Public Warehouse, Inc.*, 2000 Me. 76, 749 A.2d 762 (2000) plaintiff Decker had picked up a trailer loaded with paper pulp bales from defendant New England Public Warehouse's ("NEPW") facility. At trial, Decker presented evidence that the method of configuring the bales inside the trailer differed from previous trips. Decker inspected the load but did not step into the trailer to view the configuration of the bales. As Decker began to round a curve at an exit ramp, his tractor trailer rolled and crashed. The appellate court noted that:

The everyday practice and understanding in the trucking industry, as aptly reflected in the federal regulations on the subject, reflect that *carriers logically should have the final responsibility for the loads they haul. No shipper, such as NEPW, can force a driver to accept a load that the driver believes is unsafe.* See 49 C.F.R. § 392.9(b)(1) (2000). *By the same token, a driver must take responsibility for the safety of his or her cargo by inspecting and securing the load.* See § 392.9(b)(2).

Id. (emphasis added). Since the loading configuration was observable, the court found that the alleged defect was *not latent*, as a matter of law.

Summarizing the state of the nationwide jurisprudence in this regard after a careful survey, the court also *concluded* that:

Most courts now accept the rationale of *Savage* and require carriers to take responsibility for the loads they carry even if those loads have been improperly loaded by others.¹

Id. at 767 (emphasis added).

Decker also obliquely applied the last clear chance doctrine in cases where the plaintiff is the driver of a statutorily obligated carrier:

The reasoning in *Savage* comports with the established duty of care notion that an injury must be foreseeable before a duty attaches. . . . Here, *the carrier has the opportunity to intercept any problem through inspection. In fact, the carrier's driver is*

under the obligation to conduct such a safety inspection pursuant to federal law. See § 392.9(b)(2) Carriers, through their drivers, must ensure the safety of their own loads, *even when the cargo is loaded by shippers.* The *Savage* rule that imposes liability on carriers for the loading done by shippers, *even when negligent, has been accepted by the majority of modern courts and by federal regulators.* After considering both industry practice and traditional duty of care jurisprudence, we accept its reasoning as well. NEPW . . . may only be liable if Decker's tractor trailer was loaded negligently and that negligence was undiscoverable through a reasonable safety inspection.

Id. at 767 (emphasis added).

What Constitutes Reasonable Opportunity To Inspect?

Decker, 749, A.2d 762, *supra*, also made a detailed analysis of what constitutes a "reasonable opportunity to inspect" by the carrier's driver, so as to obviate any shipper liability:

The *Savage* rule does not demand abnormal scrutiny from carriers. It matters little if an extensive carrier inspection would have uncovered the shipper's negligent loading if a reasonable inspection by the carrier did not disclose the problem.

We must, therefore, determine whether the Deckers have presented enough evidence of latent negligent loading by the shipper to withstand a motion for summary judgment. . . . While Decker did look into his trailer before driving, the side-by-side placement of bales at the rear of the trailer obstructed his view into the rest of the cargo hold from ground level. Decker could have attempted to get a view of the interior of the trailer, but he did not do so because 'the load looked like it was safe.' . . . Decker's failure to carefully check his second load to confirm that it was exactly the same as the first load, not just that it looked the same, resulted in his failure to detect an otherwise patent defect. Decker's inspection should have revealed that the pulp bales were loaded in a contiguous configuration. *An inadequate inspection does not force liability onto the shippers.*

Id. at 767-68 (emphasis added).

Finally, the court concluded that Decker's failure to properly inspect the load rendered any alleged negligence by the shipper, moot:

Because the loading configuration was observable, although not observed, it matters not whether it was a defect. *Even if the contiguous configuration is a defect, Decker's failure to properly inspect the load rendered any such negligence moot.*

Id., at 768, n.4 (emphasis added).

Thus, the carrier's driver is not required to hyperscrutinize each load. However, in a closed van load, he is required to, at least enter the trailer, to examine as much of the load as he can see, to determine if it is secure. In an open trailer load, he or she is required to circumambulate the trailer, to ensure the load's proper securement. Drivers are not required to poke or prod at the freight, clamber up on top of it, or to actually move the freight to determine its securement. (Many times, the freight is of such weight that they would be physically unable to do so, in any event.) Finally, if a load is picked up already sealed, or "has been loaded [by the shipper] in a manner that makes inspection impracticable," the driver is not statutorily required to inspect its securement. See 49 C.F.R. §392.9(b)(4), *see also, Goodyear Tire & Rubber Co. v. Westover Cartage, Ltd*, 1997 U.S. Dist. LEXIS 1478 (N.D. Ill. 1997) (drivers of sealed vehicles exempted from CFR requirements of securement and inspection); *Miller v. Rollins Leasing Corp.*, 1999 Ohio App. LEXIS 4401 (Ohio App. 1999) (same holding).

Shipper Responsibility For Physical Loading/Heavy Loading Capability

Shippers can only be charged with the duty *for actions that they affirmatively took* with regard to the shipment, and the loading process. If the only such affirmative action that the shipper takes is to physically move, arrange, and load onto or into trailer, and the shipper conducts this loading process properly, there can be no negligence, and no liability upon the shipper for the "loading" of the cargo. As noted, the FMCSR's do not create a duty upon a shipper for securement of the freight, nor for inspection of that securement.

Industry standards bear out this conclusion of limited, focused duty upon the shipper of heavy cargo. The National Motor Freight Classification industry standards require that *the shipper* load cargo that weighs in excess of 500 pounds. That requirement exists because shippers will generally have the physical capabilities, such as fork lifts and other hydraulic equipment, to actually lift and place the cargo onto the bed of the trailer. Contrarily, the driver has no fork lift, but *does* have skills and knowledge that he has acquired through experience, training and education, regarding the FMCSR's, and load securement.

Wild Card: The Gratuitous Assumption Of Duty "Slippery Slope"

If a shipper *does* attempt to secure the cargo, or *does* instruct the driver on how to secure the cargo, or *does* assure him that it *is* secured, it *might be* argued that there was a duty upon the shipper to conduct these activities in non-negligent fashion. See generally, *Pierce v. Cook & Co., Inc.*, 437 F.2d 1119, 1126 (10th Cir. 1970) (where motor carrier was involved in collision, shipper who did not in any way aid or abet carrier in operation of defective truck or in negligently operating such truck, or in conspiring with carrier to avoid federal safety requirements, was not liable for the negligent and wrongful acts of the carrier).

This principle of law essentially results in a proverbial "slippery slope." While the shipper may be striving to ensure safe loading and securement, it may interject itself into the loading process to such a degree that a plaintiff *could* argue that the shipper "gratuitously assumed the duty" to secure the freight. The common law provides for such a cause of action. The next argument would that, not only did the shipper "gratuitously assume the duty" to the carrier driver—the shipper breached that duty. This author's research has located no court that has yet gone this far in this type of case, with a carrier's driver as plaintiff.

Judicial Clarification That The FMCSR'S Do Not Apply To Shippers, Neither Expressly, Nor By Implication

Pierce v. Cub Cadet Corp., 875 F.2d 866, 1989 WL 47446 (6th Cir. 1989), was another case in

which the *driver* of the truck became a plaintiff, suing a shipper. *Pierce* effectively debunked any implication that the FMCSR's, *in any manner* apply to shippers. In that case, John Henry Pierce, plaintiff's decedent, was employed by Decker Transportation, an over-the-road trucking company. He was carrying a truckload of approximately 41,000 pounds of metal parts manufactured by Cub Cadet Corp. ("CCC"). The cargo was loaded by CCC employees under the supervision of its traffic manager. The traffic manager, Oates, signed the loading manifest as shipper and consignor. Although Oates did not recall the specific load at issue, he testified as to CCC's standard loading procedure. Oates also testified with regard to inspection of the load by the driver, who in that case, picked up the trailer after it was loaded.

At trial, *Pierce* presented "industry experts" who sought to testify that the FMCSR's applied not only to carriers, *but also shippers* like CCC, *who undertake to load their own cargo*. After presentation of *Pierce's* case at trial, CCC moved for a directed verdict. The district court granted the directed verdict, on the grounds that there was no evidence that the cargo would not have come through the cab and killed *Pierce*, had it been properly anchored. Therefore, the trial court found that *Pierce* had failed to present *prima facie* evidence that any negligence on CCC's part caused *Pierce's* death. The trial court also found conclusively that the FMCSR's did not apply to shippers.

On appeal, *Pierce* contended that the district court erred in ruling that the FMCSR's, 49 C.F.R. parts 390-397, do not apply to shippers such as CCC. The Sixth Circuit then affirmed:

In this case, *Pierce* makes no argument that the district court misconstrued CCC's role in the transportation of the cargo in question, nor is there any evidence on this point but that CCC was a shipper and Decker was the carrier. *Pierce* relies on a misinterpretation of 49 C.F.R. §390.33 [in characterizing CCC as a 'private carrier']. We conclude, as did the district court, that 49 C.F.R. Parts 390 through 397 are inapplicable under these circumstances to CCC.

Id. at **1-2 (emphasis added).

The Carrier's Driver: A Plaintiff With His Own Statutory Duty, Not A Bystander

In the rare lawsuits brought by carrier's drivers against shippers in these situations, the courts agree that a driver's negligence is pertinent, and distinguishable from cases in which the plaintiff is a non-involved third party. *Decker, supra*, 749 A.2d 762, pointed out this important distinction, *i.e.*, a different negligence allocation when the plaintiff is a driver involved in the loading process, as opposed to a member of the general public, uninvolved in that process:

The situation would be markedly different in a case involving a party outside of the trucking industry. Pedestrians and non-commercial motorists, to name two possible third parties, injured in an accident caused by a shipper's negligent loading of cargo would still be able to sue the shipper for compensation despite the Savage rule. Shippers could not rely on Savage to bar claims from those not involved in the industry and who had no opportunity to remedy any negligence.

Id. at 767, n.3 (emphasis added). *Rector v. General Motors Corp.*, 953 F.2d 144 (6th Cir. 1992), also recognized that negligence allocations differ when the plaintiff is a carrier employee as opposed to a member of the general public:

A shipper may have a duty to inspect the loading of its wares by a common carrier to ensure against unreasonable risk of bodily harm *to those traveling on the highways...* *Such a rule is supportable on the ground that highway travelers have no power to inspect or ensure against faulty and dangerous loading. Here, by contrast, the injury incurred to an employee of the carrier itself,*

Id. at 147-148 (emphasis added). Thus, drivers are not plaintiffs who happened to be injured by unrelated freight, from an unrelated truck. They are plaintiffs with an integral, and required, involvement in the loading and securement process, with a commensurate federally mandated duty.

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What Actions By The Shipper Rise To The Level Of A "Policy" Of Load Securement?

Despite the nettlesome aspects of the slippery slope of gratuitous assumption of duty, the courts have found that in order to constitute an organizational "policy," practices must be organized, comprehensive and virtually habitual within the organization (and probably written). Consequently, isolated (or even not so isolated) instances of shippers interjecting themselves into the loading process, probably will not be found to constitute a "policy," which could springboard into a gratuitous assumption of duty claim.

For instance, in *Harvi v. United States of America*, 305 F.Supp 882 (E.D. Pa. 1969), plaintiff ship owners asserted that the government negligently caused the grounding of a ship because the government had failed to regularly survey and dredge a channel on the Delaware River. The evidence showed that, *on occasion*, the government had provided surveys of the channel. The court found that these isolated incidents of affirmative actions, did not create a "broad based policy" that would create a duty in all similar situations.

Thus, if there is at best, evidence of some isolated, happenstance, and coincidental involvement on the part of a shipper's employees in some aspect of the loading and securement process, on *some loads*, there is *not enough evidence* of a thoughtful well-conceived policy, by the shipper, to *ensure* the securement of *all* loads leaving its docks. *See also, Evans v. Liberty Mutual Insurance Co.*, 398 F.2d 665, 667 (3d Cir. 1968) (evidence of "spot inspections" at various times of industrial machinery, did not create broad based duty of full and complete inspection of plant); *Kirchoff v. Friedman*, 457 P.2d 760, 10 Ariz. App. 200 (1969) ("policy" in workplace implied projected program consisting of desired objective and means to achieve it); *Fabrizio v. Storey County*, 543 F. Supp. 573 (D. Nev. 1982) (instances of harassment or patterns of harassment of an individual by employees of county, did not constitute workplace "policy"); *Israel v. Gray Ins. Co.*, 720 So. 2d 803 (La. App. 1998) (employer's statement prohibiting use of drugs in workplace did not constitute "policy"; statement set forth no method of action for

testing and no clear circumstances under which testing would be required.)

A Fallback Position: Breach Of Internal Loading Guidelines Is Generally Not Negligence

Even if a court might find that a shipper had somehow either gratuitously assumed a duty, or formulated an internal policy of load securement and inspection, in all likelihood, there would still be another analytical fallback, before a shipper could be found liable. Generally, courts *do not* find that a company or organization's breach of *its own* internal guidelines, constitutes negligence for which a *third party* can bring a cause of action.

For instance, in *Kabo v. UAL, Inc.*, 762 F.Supp. 1190 (E.D. Pa. 1991), plaintiff Harry Kabo brought an action against United Airlines ("UAL") for, *inter alia*, negligently failing to comply with its own internal rules. Kabo went to the Philadelphia International Airport, to assist a group of senior citizens who had booked a tour through his travel agency, and were departing on a UAL flight. When the group arrived, Kabo was invited by UAL customer service representatives to come behind the counter and assist in checking in the group. At some point during that process, he suffered a non-fatal heart attack. Mr. Kabo subsequently brought suit against UAL on several theories, one of which is pertinent here:

[Kabo's] second theory of negligence is based on [UAL'S] violation of its internal rules governing baggage handling and acceptance... Plaintiff claims that liability may be imposed based on Restatement (Second) of Torts §323 (1965), which addresses the negligent performance of an undertaking to render services...

For purposes of this motion, [UAL] concedes that it violated its internal rules by permitting plaintiff to handle luggage, but maintains that §323 is inapposite. *Thus, [UAL] contends that, as a matter of law its violation of internal rules breached no duty to plaintiff.*

Section 323 is not applicable to this case. *By creating internal rules for baggage handling and check-in, [UAL] did not*

undertake to render services to [Kabo]. Rather, the rules established a series of administrative procedures for handling baggage and insuring the safety of defendant's passengers and employees and the protection of its passengers' property. *At most, the rules constitute an undertaking by [UAL] with respect to its employees and passengers.* There is simply no evidence of record from which to infer that the scope of any duty created by the rules extended to travel agents such as plaintiff; therefore, §323 does not provide a basis for plaintiff's negligence claim... Accordingly, *there is no triable issue of fact as to whether [UAL] breached a duty to [Kabo] by violating its internal rules.*

Id. at 1192-93 (emphasis added), *see also, Booker v. Lehigh University*, 800 F. Supp. 234, 040 (E.D. Pa. 1992) (university's alleged violation of internal campus "social policy" did not give rise to duty, allegedly owed to student injured at fraternity party).

Conclusion: Shippers Walk A Tightrope; Carriers-Train And Qualify Drivers

In these situations then, the shipper walks somewhat of a tightrope. Of course, it is in the shipper's, the carriers', the drivers' and the general public's best interest to ensure that *every load* that leaves *every shipper's* facility is loaded properly, secured properly and inspected. However, there is no federally mandated duty upon shippers to do so. Nonetheless, in the day to day realities on the loading docks, oftentimes shippers' employees *do* involve themselves in the loading process. On many occasions, shippers' employees are the ones with the most familiarity with the freight being loaded. In situations where the freight is heavy, such as steel coils, girders and heavy machinery, the shippers' employees are the ones with the physical capabilities, *i.e.*, tow motors and other vehicular and hydraulic machinery, to physically load the freight onto the trailer. They also may have knowledge as to how to properly secure, block and brace the freight.

If the shipper chooses to involve itself in the loading and securement process, it should have some loading dock documentation, to enable it to prove that prior to the load leaving its

yard, the load was inspected and approved by the carrier's driver. (Of course, this inspection could occur after a similar (documented) inspection by the shipper.) Paradoxically though, if a shipper—meaning well—involves itself integrally in the loading process, and usurps the statutorily mandated responsibilities from the driver, the shipper leaves itself open to a gratuitous assumption of duty claim, if that duty is breached. Thus, if a shipper *does* choose to insinuate itself into the loading process, there should be a routinized system for this integration, so that even if there *is* a gratuitous assumption of duty argument, the shipper can argue that if there *was* such a duty, it was not breached by the shipper. The best course of action is to have a thoughtfully articulated, written policy, that walks this fine line between excessive involvement in the process, and deference to the carrier's nondelegable duties under the FMCSR's.

Obviously, for carriers, it is critically important to have drivers who are well versed in the loading, securement and inspection aspects of the FMCSR's. Each driver should possess his or her own copy of the FMCSR's. (Of course, all driver training, and driver retention of the FMCSR's, should be well documented by the carrier.) It is also critically important that when dispatching drivers to shippers' docks for specialized loads, freight such steel coils, heavy machinery and construction materials, the specific driver dispatched for that load *does* have specific training and experience in securement and inspection of these types of heavy loads.²

Endnotes:

¹*United States v. Savage Truck Lines*, 209 F.2d 442 (4th Cir. 1953).

²The author also commends to the reader an excellent case summary by Robert Moseley in this issue of *The Transportation Lawyer* relating to similar issues recently addressed in *Smart v. American Welding & Tank Co.*, 2003 WL 2197324 (N.H. 2003).

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