The Transportation Lawyer

August 2010 • Volume 12, Number 1

A Joint Publication of

Transportation Lawyers Association

and

Canadian Transport Lawyers' Association

Association Canadienne des Avocats en Transport

September 23-25, 2010
2010 CTLA Annual Conference
Westin Bayshore Hotel
Vancouver, British Columbia, Canada

October 22, 2010
Transportation Law Institute
Intercontinental Hotel
Kansas City, Missouri

January 21, 2011
Chicago Regional Seminar
Chicago Fairmont Hotel
Chicago, Illinois

May 10-14, 2011
2011 TLA Annual Conference and
CTLA Mid-Year Meeting
JW Marriott Resort and Spa
Las Vegas, Nevada

A Comprehensive Journal of Developments in Transportation Law

TLA's Website: www.translaw.org CTLA's Website: www.ctla.ca

Allocating Responsibility for Defective Loading of Cargo: THE SAVAGE RULE

*Jason C. Palmer**

Carriers and shippers have historically argued over the legal responsibility regarding damaged cargo or personal injuries caused by cargo. The shippers have primarily won this battle because, in addition to the legalities of the Carmack Amendment, they had the ability to demand indemnification clauses in shipper/carrier contracts in which the carrier would fully and completely indemnify the shipper for any claims or damages arising from the carrier's transportation of the cargo. However, the advent of anti-indemnification statues throughout the United States have, and will continue to eliminate such provisions in contracts. Because the carriers will once again have the opportunity, in certain circumstances, to dispute claims relating to cargo loss or personal injuries arising from the cargo, the *Savage* rule could play an important role in apportioning liability of the carrier and shipper in such cases. This article discusses carrier and shipper liability in detail under the *Savage* rule and the necessary elements the carrier must show to shift liability to the shipper.

The Carmack Amendment codified the common law rule that a common carrier, though not an absolute insurer, is liable for damages to goods unless it can show that the damage was caused by (a) an act of God, (b) the public enemy, (c) the act of the shipper himself, (d) public authority, or (e) the inherent vice or nature of the goods. Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his *prima facie* case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. One of the exceptions relieving the carrier of liability is damage caused by the shipper itself.

In *United States v. Savage*, the United States Court of Appeals for the Fourth Circuit held that "when [a] shipper assumes the responsibility of loading, the general rule is that he becomes liable for defects in the manner of loading which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier ...." *Savage*, 209 F.2d 442, 445 (4th Cir. 1953). Consequently, if a shipper loads cargo onto a truck which is damaged, the court (or fact finder) determines whether a loading defect is latent and concealed from the carrier, which may absolve the carrier of liability for the damage.

The policy behind the *Savage* rule is well founded. The everyday practice and understanding in the trucking industry, aptly reflected in the federal regulations on the subject,[1] reflect that carriers logically should have the final responsibility for the loads they haul, and it must indemnify the shipper even though the shipper loaded the truck. *See General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959) (contract of carriage includes right to indemnify). No shipper can force a driver to accept a load that the driver believes is unsafe. *See* 49 C.F.R. § 392.9(B)(1). By the same token, a driver must take responsibility for the safety of his or her cargo by inspecting and securing the load. *See* 49 C.F.R. § 392.9(b)(2). The *Savage* rule brings some responsibility to the shipper as it bears the onus when cargo has been loaded improperly by it and that defect is latent. The *Savage* rule simply extends the industry's reasonable understanding to negligence suits involving carriers and shippers and allocates the responsibility between the shipper and the carrier for improper loading.

Initially, the *Savage* rule applied solely to damage caused to the cargo being shipped. *See generally* M.C. Dransfield, Annotation, *Liability of Carriers by Land or Air for Damaged Goods Shipped Resulting from Improper Loading*, 209 44 A.L.R. 2d 984 (1953). In subsequent years, courts extended the *Savage* reasoning to include personal injuries to employees of carriers caused by the negligent loading of goods. *See Decker v. New England Public Warehouse, Inc.* 749 A.2d 762, 767 (Maine 2000). The *Savage* Rule has been applied in a variety of scenarios involving shippers and carriers, for example:

*Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, Iowa

(1) Third-Party claims in personal injury suits; *See, e.g., Smith v. North Dewatering Inc.*, 2004 WL 326696 (D. Minn. 2004) (holding the shipper liable to the carrier's driver for injuries sustained while unloading the cargo because the carrier could not discover the defect in the shipper's loading of the cargo);

(2) Actions directly between the shipper and carrier for injuries sustained by the carrier's employee; *See, e.g., Grantham v. Nucor Corp.*, 2008 WL 3925211, at *3 (D. Utah Aug. 20, 2008) (unreported case) (determining that the *Savage* Rule applied in a case in which a truck driver was injured by improperly loaded cargo and that gaps between the loaded cargo may or may not have been a latent defect, precluding summary judgment);

(3) Suits between shippers and carriers for loss or damage to cargo; *See, e.g., Alitalia v. Arrow Trucking Co.*, 977 F.Supp. 973, 984 (D. Ariz. 1997) (holding the shipper liable for damage to an airplane engine that was damaged when it collided with an overpass); and

(4) Actions for damages to carriers' trucks. *See, e.g., Big G Express, Inc. v. Leviton Mfg. Co.*, 2009 WL 690814, at *2 (M.D. Tenn. Mar. 10, 2009) (utilizing the *Savage* Rule to determine who was responsible for ensuring adequate securement of a load when a truck was damaged due to the manner in which the cargo was loaded).

The reasoning in *Savage* comports with the established duty of care notion that an injury must be foreseable before a duty attaches. The carrier has the opportunity to intercept a problem through inspection. In fact, the carrier's driver is under the obligation to conduct such a safety inspection pursuant to federal law. *See* § 49 C.F.R. 392.9(b)(2). Carriers, through their drivers, must ensure the safety of their own loads, even when cargo is loaded by shippers. The *Savage* rules 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.[2]

An initial example of a case dealing with cargo losses and the *Savage* rule is *Thousand Springs Trout Farms, Inc. v. IML Freight, Inc.*, 558 F.2d 539 (9th Cir. 1977). *Thousand Springs* involved an action against a shipper for damage to a truckload of trout, but, in the end, the shipper was found to be not responsible for the damage to the cargo. Thousand Springs hired IML Freight to deliver the truckload of trout, and it issued a Bill of Lading specifying the temperature at which the fish needed to be refrigerated as well as when the fish were to be delivered. The bill of lading was signed by IML. Thousand Springs' employees, who loaded the trout onto the truck, did not know that the nitrogen refrigeration system on the truck was out of nitrogen when they loaded the fish. There was evidence indicating that the IML driver knew the tank was empty, but did not advise Thousand Springs of this fact. When Thousand Springs' employees observed that the temperature of the fish had risen, the truck was driven to another location to be filled with nitrogen. Once filled with nitrogen, the temperature of the fish went down, but not to the level it should have been. The IML driver assured the quality control biologist from Thousand Springs that the truck's temperature would be lowered during transport. Neither the biologist nor the driver understood that a nitrogen-refrigerated truck could only maintain the existing temperature of a load; it could not lower the temperature of the fish once it was loaded When the fish arrived and were distributed to various stores, the fish showed signs of decomposition and had to be destroyed.

IML appealed the district court finding that Thousand Springs "established a *prima facie* case by showing good delivery of the shipment to the carrier in good condition, the arrival of the shipment in damaged condition, and the resulting damages." IML argued that the damage to the fish was caused by Thousand Springs' employees because they were responsible for loading the fish. The Ninth Circuit Court of Appeals acknowledged that, when the shipper indicates in the bill of lading that the shipper is responsible for loading the goods into the truck, the carrier is not responsible for damages due to improper loading of the goods. *Id.* At 543 (citing 49 U.S.C. § 101). However, the Court declined to use this reasoning as a means of holding Thousand Springs responsible for the damage to the trout. The Court explained that "[t]he fallacy in IML's position is that Thousand Springs did not 'improperly load' the trailer. Rather, the damage stemmed from the defective nature of IML's truck." Thus, because "Thousand Springs had no control over the refrigeration of the truck," IML was liable due to its negligence in maintaining the temperature of the fish and its acceptance of the load with "complete knowledge of the condition of the fish." (citing *Savage*, 209 F.2d 442 (4th Cir. 1953).

This case illustrates that, where the shipper loads goods, but the deficiency in loading did not cause the loss or damage to cargo, the carrier is liable for the loss. The carrier's role in the cargo loss is relevant to the court (or fact finder) in determining whether the shipper should be liable for the loss due to shipper's loading of the goods. Because the carrier in *Thousand Springs* was aware that the fish were too warm and needed to be cooled, the carrier was liable for the

ultimate decomposition of the fish even though the shipper loaded it into the truck. Thus, the *Savage* rule can be applied to protect the carrier from liability only when: (1) the shipper assumed responsibility for the loading of the cargo; and (2) the defect was latent or undiscoverable through reasonable inspection by the carrier. These requirements will be discussed in turn.

A. Assuming Responsibility for Loading

Several cases lend insight to help determine when a shipper actually assumes the responsibility for loading cargo, thereby rendering itself liable for any latent defects in the loading that causes loss or damage. While the legal predicate of "assuming responsibility" is not explicitly discussed in the majority of cases, cases indicate that the shipper has assumed responsibility for the loading where the shipper either (1) participates in the loading of materials, or (2) does the loading itself. *See, e.g., Alitalia*, 977 F.Supp. at 984 (holding the shipper liable for defective loading when the shipper assured the carrier that the loading was properly executed and the carrier could not have discovered the defect based on his experience); *Thousand Springs Trout Farms, Inc., supra*, (because the shipper was responsible for loading the cargo in the "shippers load and count agreement" the shipper would have been liable for defectively loaded cargo had the defect not been discoverable, even known, to the carrier however as indicated above this was not a dispositive consideration); *Symington*, 688 F.Supp. 1278 (considering the fact that shipper exclusively loaded the carrier's trailer and submitted paperwork to the carrier that certified the shipment had been properly loaded persuasive in establishing responsibility on shipper); *Illinois v. Medlin*, 1995, WL 5875, *1 (N.D. Ill. Jan. 4, 1995) (unreported case) although the court indicated that the defect was not latent and therefore the shipper was not responsible for the defect, the court considered the shipper's role in loading the cargo).

B. "Defect" and "Latency"

Many cases define the defect and latency requirements employed by the *Savage* rule. These cases generally focus on the facts surrounding the issue of improper loading in order to determine whether the shipper should be held responsible for the damage that the improperly loaded material caused. The cases indicate that a shipper may only be held liable for defective loading when the defect could not have been discovered by a carrier's *reasonable* inspection of the loaded cargo. For instance, *Illinois v. Medlin* addressed a motion for summary judgment in a case in which forklifts being transported on a trailer were damaged because the manner in which they were loaded rendered the load taller than the height limit for hauling and too tall to fit under an overpass. *Medlin*, 1995 WL 5875 at *1. Consequently, the forklifts and overpass both sustained significant damage when the load hit the bridge. The court explained the general rule concerning actions between shippers and carriers:

> The most common shipper-carrier suits involve claims by either the shipper for damaged goods or the carrier for damaged equipment. In both these situations, when the shipper assumes responsibility for loading the goods, the general rule is that *the carrier is still liable for the loss or injury to goods resulting from defects in loading that are discoverable by ordinary inspection by the carrier.*

Id. At *2 (emphasis added). The court continued its analysis, citing *Southern Pacific Transportation Co. v. United States*, for its explanation of the *Savage* rule which indicates that "if improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper." *Id.* at *3 (citing *Southern Pacific Transp. Co.*, 456 F.Supp. 931, 941 (E.D. Cal. 1978)). The *Medlin* court treated the forklift height as a loading defect and proceeded to determine whether the defect was or should have been discoverable by the carrier. The court held that, while the shipper's employees loaded the forklifts onto the trucks, the height of the forklifts were not concealed and therefore there was no duty on the shipper to warn the carrier (truck driver) that the forklifts may be over the height limit for hauling. *Id.* at *4. The forklifts "were loaded on an open trailer and the height was never concealed." *Id.* at *3. The truck driver was the person who strapped the forklifts onto the trailer, and had access to the goods before he left the dock. The court emphasized that the fact that the truck driver "admitted that he thought the forklifts were either at or above the legal height limit" and that he intended to stop at a truck stop to measure the load. Thus, because the height of the forklift was discoverable by the carrier (who even indicated that he thought it might be a problem), the court determined that the *Savage* rule could not be utilized to render the shipper liable for a loading defect that could be seen by the carrier. The court granted summary judgment for the shipper, holding the carrier liable for damages due to the collision with the overpass.

While the *Medlin* court indicated that the carrier's questions regarding the height of the cargo rendered him liable for the damage to the cargo, other cases have used the carrier's lack of experience or inability to recognize defects as a means of determining that a defect was latent. A carrier's "duty with regard to a shipper, who has assumed the responsibility for loading, is to exercise reasonable care to see that the load is properly secured." *Franklin Stainless Corp. v. Marlo Transp. Corp.* 748 F.2d 865, 869 (4th Cir. 1984). In fact, "[w]hat is latent may depend in part on the

experience of the observer." *See, e.g., Alitalia*, 977 F.Supp. at 984. The particular facts of many cases indicate that courts should consider the carrier's experience to determine whether a defect is "readily discernable from [the carrier's] ordinary observation." *Smith v. North Dewatering Inc.*, 2004 WL 326696 (D. Minn. 2004); *see also Decker*, 749 A.2d at 768 (holding that because the carrier was aware of the proper manner in which the cargo should be loaded, his failure to inspect and observe the defectively loaded cargo could not result in responsibility to the shipper); *Symington*, 688 F.Supp. 1278 (finding it persuasive that, before leaving, the carrier received a shipping order and bill of lading from shipper's employees which contained language certifying that the shipment was "in proper condition for transportation"); *Alitalia*, 977 F.Supp. at 985 (holding that a carrier with three years of experience could not easily observe a difference in a few inches of height on the loaded cargo, especially when the carrier was assured by the shipper that there was no defect in the manner in which the cargo was loaded); *Franklin Stainless Corp., supra* at 868-70 (holding that where a carrier who had never before transported the type of cargo loaded on the truck was assured by the shipper's employees that the cargo had been loaded with no defect, the evident lack of strapping could not be considered open and obvious to the carrier).

In addition to the carrier's experience, the courts also consider the amount of scrutiny a carrier must employ to discover whether there is a latent defect. "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." *Decker*, 749 A.2d at 768 n.5 (however, this case indicates that where a potential defect is observable but not observed, the carrier is negligent for not taking the opportunity to properly inspect the manner in which the cargo was loaded). Thus, where a carrier's inspection was reasonable and did not uncover a defect, the *Savage* rule prevents the carrier from being held liable for damage or loss sustained due to the improperly loaded cargo. *See, e.g., Symington, supra*, (holding that, despite the fact he was responsible for visually inspecting the shipment and closing the trailer door, the carrier could not have been able to visually discover the defect in the loading of the shipment).

C. Applying the *Savage* Rule

As the discussion *supra* illustrates, the *Savage* rule can only be applied to render the shipper responsible for damage or loss of cargo when: (1) the shipper has assumed responsibility for the loading of the cargo; (2) the loading of the cargo was defective; and (3) the carrier could not have discovered the defect through reasonable inspection – this is often considered based upon the carrier's subjective experience. The varying outcomes of each of the *Savage* cases indicates that these cases are decided on a case-by-case, factual analysis. For example, where a driver with little experience is given assurances by the loading shipper that the cargo was properly loaded, it is unlikely that the carrier will be held liable for defectively loaded cargo. Conversely, where an experienced driver would have known the proper way to load certain cargo and did not reasonably inspect the load, which would have revealed it was defectively loaded, the carrier is responsible for the defect. The *Savage* rule thus "comports with the established duty of care notion that an injury [or damage] must be foreseeable before a duty attaches." *Decker, supra*, at 767. Therefore, the shipper will only be liable when the shipper was the last entity that could have reasonably discovered a defect in loading in order to prevent the resulting loss or damages.

Endnotes

1. For example, the United States of Transportation regulates commercial motor carriers through rules governing the safe loading of tractor trailers and other types of commercial trucks. See 49 C.F.R. § 392.9
2. There are approximately sixteen states that have considered the *Savage* Rule explicitly in their state courts:

California: *Albers v. Gehrke*, 4 Cal.App. 3d 463, 477-79 (Cal. Ct. App. 1970); *BBD Transp. Co. v. Buller*, 49 Cal.App. 3d 124, 132 (Cal. Ct. App. 1975); Connecticut: *Raytar v. Mason Fence Co.*, 1998 WL 27834 (Conn. Super. Ct. Jan. 16, 1998); Florida: *Akers Motor Lines v. Peaslee Metal Prods., Inc.*, 218 So.2d 498, 499 (Fla. Dist. Ct. App. 1969); Louisiana: *Illinois Cent. Gulf R. Co. v. City of New Orleans Through New Orleans Public Belt R.R.*, 426 So.2d 1385-89 (La. Ct. App. 1983); Maine: *Decker v. New England Pub. Warehouse, Inc.*, 749 A.2d 762, 768 (Me. 2000); *Castine Energy Const., Inc. v. T.T. Dunphy, Inc.*, 861 A.2d 671, 678 (Me. 2004); Michigan: *Neill v. Steer Master Transfer, Inc.*, 2008 WL 4649020 (Mich. Ct. App. Oct. 21 2008); Minnesota: *Powers v. Siats*, 70 N.W.2d 344, 349-50 (Minn. 1955); Montana: *Fletcher v. City of Helena*, 517 P.2d 365, 368 (Mont. 1973); New Hampshire: *Smart v. Am. Welding & Tank Co., Inc.*, 826 A.2d 570, 573-75 (N.H.2003); New Jersey: *W. J. Casey Trucking & Rigging Co., Inc. v. Gen. Elec. Co.*, 376 A.2d 603, 605-607 (N.J. Super Ct. L. Div. 1977); New York: *Instrument Sys. Corp. v. Assoc. Rigging and Hauling Corp.*, 70 A.D.2d 529, 530 (N.Y. App. Div. 1979); North Carolina: *Hensley v. Nat'l Freight Transp. Co., Inc.*, 668 S.E.2d 349, 352-53 (N.C. Ct. App. 2008); Ohio: *Brashear v. Liebert Corp*, 2007 WL 184888 (Ohio Ct. App. Jan 25, 2007); *Fernandez v. Anheuser-Busch, Inc.*, 2002 WL1396103 (Ohio Ct. App. Jun. 28 2002); South Carolina: *Mastropole v. Transit Homes, Inc.*, 175 S.E.2d 465, 470 (S.C. 1970); Tennessee: *Wayne Knitting Mills v. Delta Motor Lines*, 372 S.W.2d 419, 424-26 (Tenn. CT. App. 1962); *Herring v. Coca-Cola Enterprises*, 2008 WL 787871 *7-*9 (Tenn. Ct. App. Mar. 26, 2008); Texas: *Texas Specialty Trailers, Inc. v. Jackson & Simmen Drilling Co.*, 2009 WL 2462530, *7-*8 (Tex. App. Aug. 13, 2009).

In addition, the following Federal courts have considered the *Savage* Rule explicitly.

Second Circuit: *Ebasco Servs., Inc. v. Pac. Intermountain Express*, 398 F.Supp. 565, 569 (S.D.N.Y., 1975).

Third Circuit: *Helm's Exp. v. U.S.*, 186 F. Supp. 521, 522-42 (D.C. Del. 1960); *Spence v. ESAB Group, Inc.*, 2008 WL 450436, *3 (M.D. Pa. Feb. 15, 2008); *Spence v. ESAB Group, Inc.*, Civ., 2009 WL 3287389, *7-*8 (M.D. Pa. Feb. 15, 2009); *Hankinson v. Pennsylvania R. Co.*, 280 F. 2d 249, (3rd Cir. 1960).

Fourth Circuit: *Assoc. of Maryland Pilots v. Baltimore & O.R. Co.*, 304 F.Supp. 548, 551 (D. Md. 1969); *Dacotah Mktg. and Research, L.L.C. v. Versatility, Inc.*, 21 F.Supp.2d 570, 580 (E.D. Va. 1998); *Moretz v. Gen. Elec. Co.* 170 F. Supp. 698, 705 (W.D. Va. 1959); *Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865, 869 (4th Cir. 1984); *Masonite Corp. v. Norfolk & W. Ry. Co.*, 601 F.2d 724, 728-29 (4th Cir. 1979); *Gen. Elec. Co v. Moretz*, 270 F. 2d 780, 781 (4th Cir. 1959); *New Amsterdam Cas. Co. v. Novick Transfer Co.*, 274 F.2d 916, 924 (4th Cir. 1960).

Fifth Circuit: *White v. Dietrich Metal Framing*, 2007 WL 7049797, *5 (E.D. Tex. Jul. 05, 2007).

Sixth Circuit: *Syngenta Crop Prod., Inc. v. Doyle Brant, Inc.*, 2008 WL 167293, *2 (W.D. Ky. Jan. 16, 2008); *Crunk v. Dean Milk Co., Inc.*, 2008 WL 2473662 (W.D. Ky. Jun. 17, 2008); *Johnston v. Sappi Fine Paper N. Am.*, Civ., 2007 WL 1011914 (E.D. Mich. Mar. 29, 2007); *Lobdell v. MasterBrand Cabinets, Inc.*, 2008 WL 2224094 (E.D. Mich. May 29, 2008); *Johnston v. S.D. Warren Co.*, 2008 WL 183639 (E.D. Mich. Jan. 18, 2008); *Custom Rubber Corp. v. ATS Specialized, Inc.*, 633 F. Supp. 2d 495, 510 (N.D. Ohio, 2009); *Georgia Kraft Co. v. Terminal Transport Co.*, 343 F. Supp. 1240, 1246-48 (E.D. Tenn. 1972); *Big G Express, Inc. v. Leviton Mfg. Co.*, 2009 WL 690814, *2 (M.D. Tenn. Mar. 10, 2009); *Pierce v. Cub Cadet Corp.*, 1989 WL 47446 (6th Cir. May 09, 1989); *Lambert v. U.S.*, 438 F.2d 1249, 1250 (6th Cir. 1971).

Seventh Circuit: *Illinois v. Medlin*, 1995 WL 5875, *1 (N.D. Ill. Jan. 4, 1995); *Armour Research Found. of Ill. Inst. of Tech. v. Chicago R. I & P. R. Co.*, 297 F.2d 176, 178 (C.A.111 1961).

Eight Circuit: *Symington v. Great Western Trucking Co.*, 688 F.Supp. 1278 (S.D. Iowa 1987); *Vargo-Schaper v. Weyerhaeuser Co.*, Civ. 2009 WL 2424586 (D. Minn. Aug. 5, 2009); *Smith v. North Dewatering Inc.*, 2004 WL 326696 (D. Minn. Feb. 19, 2004); *Strong v. Nebraska Natural Gas Co.*, 476

F.Supp. 1170, 1175 (D.Neb. 1979); *Fulton v. Chicago, Rock Island, & P.R. Co.*, 481 F.2d 326, 339 (8th Cir. 1973).

Ninth Circuit: *S. Pac. Transp. Co. v. U.S.*, 456 F.Supp. 931, 940 (E.D. Cal. 1978); *Alitalia v. Arrow Trucking Co.*, 977 F.Supp. 973, 984 (D. Ariz. 1997); *Thousand Springs Trout Farms, Inc. v. IML Freight, Inc.*, 558 F.2d 539 (9th Cir. 1977).

Tenth Circuit: *Grantham v. Nucor Corp.*, 2008 WL 3925211, *2 (D. Utah Aug. 20, 2008).