

The Nuts & Bolts of Cargo Loading, Unloading and Securement Cases

Improper or unsafe loading, unloading and/or securing of cargo can lead to devastating consequences due to load shifting and cargo falling. Seven percent of serious trucking accidents nationwide are reported to have been caused, at least in part, by improper cargo securement shifting and falling.ⁱ Load shifting can cause a driver to lose control of the truck or cause a load to fall off the trailer during transport leading to serious danger to the motoring public and anyone involved in the unloading process. Behind most cargo securement cases there are many factors at play which complicate who may be at fault. This article covers the critical steps of evaluating these factors and successfully litigating cargo loading, unloading and securement cases. When first reviewing a cargo securement case, it is important to consider the following steps: (1) evaluate all the players involved and their possible negligence; (2) identify applicable regulations that apply to cargo securement; (3) familiarize with applicable case law; (4) conduct appropriate discovery; and (5) assemble the right team of experts.

1. Evaluate all the potential players and their possible negligence

Before proceeding with any cargo securement case, it is first crucial to consider all of the players involved in the loading, securing, and unloading process, including, but not limited to, the shipper and/or receiver of the load, the motor carrier, the truck driver and even the seller or manufacturer of the securing devices used.

Typically, different entities have different responsibilities. For example, if the shipper loaded trailer or determined how it was to be loaded, it may be responsible for properly and safely loading the cargo onto the trailer. The truck driver is generally responsible for properly inspecting and securing the cargo and inspecting it along the way to its destination. The receiver may be responsible for properly unloading and/or assisting in unloading the cargo. The trucking company is responsible for providing its drivers with proper training and securing devices and

how and when to use them. Further, the seller or manufacturer of the securing devices are responsible for the devices being free of defects and have the proper strength to withstand the forces of loads that they promise the device is to withstand. Finally, if the product causes a load issue due to not being packaged correctly, then the manufacturer may be responsible for not safely doing so. These duties are general, however, so it is important to understand each entity's actual procedures in the process with regard to the load at issue in your case. You may find that properly loading, unloading and/or securing the cargo was the duty of one entity or a combination of or all of the above named entities or individuals.

After identifying the possible entities involved, you must determine whether each player was negligent for unsafe or improper loading, unloading, and/or securement issues. The various players may have different responsibilities given the specific facts of the case. For example, when the shipper becomes involved in the loading process, it can be held liable for providing improper instructions to the carrier on the proper way to secure the load, by causing the loading of the cargo itself in a haphazard manner, or by having the truck loaded in such a manner that the loading defects are latent and not obvious to the carrier or driver upon reasonable inspection.

Additionally, the type of cargo being hauled by the driver may impact each entity's duties as to loading, unloading and securement. For example, while for some cargo a driver's duty is met when he/she uses the proper securement devices, in other cases a driver's duty may be met if he/she merely inspects the cargo and determines that it is secure given the method of loading.

2. Identify Applicable Regulations That Apply to Cargo Securement

Next, after identifying all of the players, look to the applicable state laws, the Federal Motor Carrier Safety Regulations (FMCSR), and OSHA Regulations that may govern your case. Also look your state's Commercial Driver's License (CDL) Manual and driver training manuals.

There are two FMCSRs that govern cargo loading and securement cases: Sections 392.9 and 393.100. The specific duties of the motor carrier and/or truck driver are defined in 49 C.F.R. § 392.9. Under this part, a motor carrier and its driver must ensure that the cargo is properly distributed and secured before the motor vehicle may be operated. Additionally, after beginning operations of the motor vehicle, drivers are required to inspect the cargo and devices used to secure the cargo within the first fifty miles of beginning the trip. The driver is to inspect the cargo again after changing his/her duty status or after driving the CMV for three hours or 150 miles, whichever occurs first.ⁱⁱ

According to 393.100(b), Commercial Motor Vehicles (CMVs) must be loaded and equipped to prevent cargo from leaking, spilling, blowing or falling from the motor vehicle. Second, cargo must be contained, immobilized or secured to prevent shifting to such an extent that the vehicle's stability or maneuverability is adversely affected pursuant to 49 C.F.R. § 393.100(c). Third, cargo must be firmly immobilized or secured on or within a vehicle by structures of adequate strength, dunnage or dunnage bags, shoring bars, tie downs or a combination of these under 49 C.F.R. § 393.106(b).

If a driver does not load the vehicle himself or herself, he or she is not always able to detect improperly loaded cargo. Therefore, under section 49 C.F.R. § 392.9(b)(4), the above rules 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.” This regulation is particularly applicable when the shipper and/or its employees load the trailer or when the shipper secures the freight and seals the trailer doors without the driver present. In either scenario, the trucking company and its driver are generally not liable for the injuries that occur from shifting

or falling cargo. Instead, liability for improper or unsafe loading shifts to the entity that improperly loaded the vehicle. The general rule to remember is if an entity takes responsibility for loading, unloading, or securing the cargo, it must do so safely.

There are also very defined rules for proper securement of specific cargo loads which are defined in 49 C.F.R. §§ 393.116-136. These parts regulate which vehicles are subject to cargo loading, unloading and securement standards, the types of securement devices required, and the standards for loading, unloading and securing irregular loads such as logs, metal coils, and paper rolls.ⁱⁱⁱ

Even though the shipper and receiver's conduct are not expressly governed by the FMCSRs, the regulations can serve as a standard for how cargo should be safely and properly loaded for transport by the shipper.^{iv} Further, there are other industry resources and standards which may determine a shipper or receiver's duty of care as to loading, unloading and/or securing cargo. For example, the Occupational Safety and Health Administration ("OSHA"), the Institute of Scrap Recycling Industries ("ISRI"), and the American Association of Railways ("AAR") are just a few which provide standards for loading, unloading and securing cargo. See also other Cargo Industry Related Resources.

OSHA regulations can be used to create a standard of care for shippers and/or receivers of cargo. In general, OSHA is preempted from enforcing its regulations if a working condition is regulated by another Federal Agency.^v Therefore, OSHA regulations typically do not apply to the trucking industry as it is regulated by the FMCSRs. However, as the FMCSRs are silent as to shippers and receivers loading and unloading requirements, OSHA regulations are then likely applicable. In this regard, OSHA provides specific guidance on Handling Materials under 29 C.F.R § 1910.176, which states:

(a) Use of mechanical equipment. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passageways may be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard...

(b) Secure Storage. “Storage of materials should not create a hazard. Bags, containers, bundles, etc. stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are able to stand and secure against sliding or collapse...”

In addition to OSHA, be mindful of 49 U.S.C. 80113 which states that a motor carrier issuing a bill of lading is *not* liable for damages caused by improper loading if (1) the shipper loads the goods; and (2) the bill contains the words, “shipper’s weight, load, and count” or words of the same meaning indicate the shipper loaded the goods.

Finally, you should familiarize yourself with your state’s CDL Manual which can serve as a great resource that outlines a driver’s duties on transporting cargo safely. For example, in Illinois, the CDL manual covers four major topics: (1) Inspecting Cargo; (2) Cargo Weight and Balance; (3) Securing Cargo; and (4) Cargo Needing Special Attention.

You will want to identify applicable FMCSRs, industry resources/standards, OSHA Regulations, and CDL manual requirements on cargo securement early on and use them to build your case through the discovery and expert process.

3. Be Familiar with the Applicable Case Law

Before filing your lawsuit and in evaluating the potential players and parties, review any and all applicable state and federal law that may apply to cargo and securement cases. It is important to know how courts have ruled on similar loading, unloading and securement cases in your jurisdiction and across the country. The applicable duty of care for any of the above entities can also be established using common law negligence principles.

For example, in *Smith v. Northern Dewatering, Inc.*, the Court held that shippers are not subject to the FMCSRs.^{vi} However, a shipper who assumes the responsibility for the loading process, without anyone observing the loading process, may be held liable under a common law negligence claim for damages resulting from shifting or falling freight.^{vii} In such cases, the FMCSRs can be used to establish the minimum standards setting the threshold for determining what constitutes the proper and safe securement of cargo and thereby determining the nature of the defendant's duty.^{viii}

There are two seminal cargo securement cases with which you should become familiar. The Fourth Circuit announced the prevailing common law loading duty for shippers in *United States v. Savage Truck Line, Inc.*^{ix} In that case, the following test was developed:

The primary duty as to the safe loading of property is therefore on 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.

Savage, 209 F.2d at 445.

Most recently, the *Savage* test was applied by the Third Circuit Appellate Court in *Spence v. ESAB Group, Inc.*^x In *Spence*, a driver was injured when a trailer overturned when he was rounding a corner. The accident occurred because the load shifted laterally causing the tractor-trailer to overturn and injuring the driver.

The *Spence* Court held that there was a duty of due care on the shipper to safely secure the goods. The *Spence* Court reasoned that the primary duty to assure that a load does not shift in transit generally rests with the carrier and its driver. However, where there is evidence that a

shipper undertook to load and secure the cargo being transported by a third party carrier, the shipper also bears an obligation to exercise reasonable care.

The *Spence* Court looked at five factors to determine whether the defendant owed a common law duty of care to the plaintiff including: (1) Relationship between the parties; (2) Social utility of the actor's conduct; (3) Nature of the risk imposed and foreseeability of the harm incurred; (4) Consequences of imposing a duty upon the actor; and (5) Overall public interest of the solution.

The *Spence* Court found that *those who undertake the task of loading, securing and hauling cargo on trailers have a duty to exercise due care to protect property and persons from the risk of harm.* In this case, if the jury was to find that the defendant participated in loading and securing then it would have to determine whether the defendant shipper exercised due care.

Spence has far reaching precedent as many jurisdictions have adopted Restatement (Second) of Torts § 323. Under this case, even though shippers are not regulated by the FMCSRs they can still be held liable for the negligent loading, unloading and securement of cargo. Spend time early on researching shipper duty of care cases in your jurisdiction before deciding to take on a case against a shipper.^{xi}

Courts have also allowed for punitive damage awards in cargo securement cases to act as a deterrent to other trucking companies which might use public highways to haul material without adequately securing the loads.^{xii}

4. Conduct Appropriate Discovery

The next step is to develop a discovery plan. Discovery in load securement cases should be tailored to understanding each entity's procedures and duties with regard to loading, unloading and securing the particular cargo at issue in your case. I recommend obtaining the

shipper, receiver and motor carrier's safety policies and instructions for loading, unloading and/or securing cargo. Also, request documentation of employee training programs and whether the employees involved in the incident took part in the training. If the entities involved in the case at issue have done business together in the past, request invoices for the past loads and any complaints that had been made regarding past loading, unloading and/or securement methods. These documents will establish how each entity was supposed to conduct loading, unloading and/or securing procedures and can help develop a line of questioning for depositions.

Depositions sequencing can also help establish your case. I recommend deposing the shipper's loading personnel such as the foremen, supervisors, and safety directors. I further recommend starting with the safety director or the record custodian of each entity and get them to commit to the written policies and protocols. Then depose the loading dock workers, foremen, supervisors, and the truck driver whose testimony will shed light on what was actually done and where things started to go wrong and how the policies and procedures were violated. Each of these individuals can help build your case against the entities at fault and minimize or eliminate defenses of contribution and/or contributory negligence.

5. Assemble the Right Team of Experts

Last, in any loading, unloading and/or securement case, assembling a team of experts to consult with and/or hire is critical. These individuals should be brought into the case early on to analyze the facts and assist in developing a theory of liability prior to conducting discovery. While not exhaustive, the following are mostly commonly used in load and securement cases. Reconstruction engineers, physicist, packaging/handling experts, and human factors experts can be very useful to understanding which regulations and standards were violated and how each link of the transportation chain contributed to the ultimate harm. Additionally, a truck driving/safety

expert is critical to show driver and motor carrier's responsibilities as to the loading, unloading and/or securement of cargo.

Each load securement case is unique and should be treated as such. It is not always easy to identify whether any load failure was a result of improper loading, securement, or unloading and who is at fault. Different entities may be involved in the transportation chain. It is important to make sure that you have all of the cargo-specific loading, unloading and securing requirements to determine liability.

ENDNOTES

ⁱ Federal Motor Carrier Safety Administration, National Highway Traffic Safety Administration, Large Truck Crash Causation Study – Summary Tables, Table 14, <http://ai.fmcsa.dot.gov/ltccs/default.asp?page=reports> (September 2010)

ⁱⁱ See 49 C.F.R. § 392.9(2) & (3).

- ⁱⁱⁱ § 393.116 Rules for securing logs
§ 393.118 Rules for securing dressed lumber or similar building products
§ 393.120 Rules for securing metal coils
§ 393.122 Rules for securing paper coils
§ 393.124 Rules for securing concrete pipe
§ 393.126 Rules for securing intermodal containers
§ 393.128 Rules for securing automobiles, light trucks and vans
§ 393.130 Rules for heavy vehicles, equipment and machinery
§ 393.132 Rules for securing flattened or crushed vehicles
§ 393.134 Rules for securing roll-on/roll-off or hook lift containers
§ 393.136 Rules for securing large boulders

^{iv} See 49 C.F.R. §§ 393.100-106

^v See 29 C.F.R. § 653(b)(1) and 29 C.F.R. § 1910.5(b).

^{vi} *Smith*, Civ. No. 01-1948, 2004 U.S. Dist. LEXIS 2648 at *5-6 (D. Minn. Feb. 19, 2004).

^{vii} *Camp v. TNT Logistics Corp. et al.*, 553 F.3d 502 (7th Cir. 2009).

^{viii} *Reed vs. Ace Doran Hauling & Rigging Co.*, 1997 WL 177849 (N. D. Ill. 1997) (not reported) (holding that the shipper had a common law duty to check that the driver had complied with the minimum securement requirements of the FMCSRs).

^{ix} *United States v. Savage Truck Lines, Inc.* 209 F.3d 442 (4th Cir. 1953).

^x *Spence*, 623 F.3d 212 (3rd Cir. 2010).

^{xi} For additional case law regarding loading, unloading and securing cargo please see: *Burke vs. JF Allen Company*, 182 F. 3rd 907 (West. Va. 1999); *Skeie vs. Mercer Trucking Co., Inc.* 61 P. 3rd 1207 (2003); *Symington vs. Great Western Trucking Company, Inc.*, 668 F. Supp. 1278 (S. D. Iowa 1987); *Locicero vs. Interpace Corp.*, 266 N. W. 2nd 423 (Wis. 1978) and *Miller vs. Rowlands Leasing Corp* 1999 WL 739539 (Ohio 1999). See also, [The Law of Commercial Trucking: Damages to Persons and Property](#) by David Nissenberg pages 566-74 for a more complete list of loading, unloading and securement cases.

^{xii} See, *Deaton, Inc. v. Burroughs*, 456 So. 2d 711 (Ala. 1984).

CARGO INDUSTRY RELATED RESOURCES

Driver's Handbook on Cargo Securement – A Guide to the North American Cargo Securement Standard

- <http://www.fmcsa.dot.gov/regulations/cargo-securement/drivers-handbook-cargo-securement-introduction>

Commercial Driver's License ("CDL") Manual Section 3: "Transporting Cargo Safely"

- http://www.cyberdriveillinois.com/publications/pdf_publications/dsd_cdl10.pdf

Occupational Safety and Health Administration

- https://www.osha.gov/SLTC_trucking_industry/loading_unloading.html

Canadian Council of Motor Transport Administrators (CCMTA)

- <http://ccmta.ca/en/publications/nsc-cargo-securement-standard>

Institute of Scrap Recycling Industries - Safe Shipping Guide for Baled Paper Products

- http://www.isrisafety.org/assets/files/trans_safety/safe-shipping-guide-for-baled-paper-products.pdf

Truck Trailer Manufacturers Association

- <http://www.ttmanet.org/>

Law of Commercial Trucking: Damages to Persons and Property – David Nissenberg

- <http://www.amazon.com/Law-Commercial-Trucking-Damages-Property/dp/0327003502>

Safe Shipping – The ISRI/AF&PA Shipping Guide for Baled Paper Products

- <http://www.isri.org>

Burlington Northern and Santa Fe (BSFN) Railway Loading and Securing Guide

- http://www.oocl.com/canada/eng/localinformation/operationalrestrictions/toronto/Documents/LA_RSIBUManual2005R2.pdf

Association of American Railroads (AAR) Intermodal Guide

- <http://www.aar.com/>

J.J. Keller Loading and Securement Handbooks and Videos

- <http://www.jjkeller.com/shop/Home>