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### Cleveland:

2300 BP Tower  
200 Public Square  
Cleveland, OH 44114-2378  
Phone: 216.363.4500  
Fax: 216.363.4588

### Columbus:

88 East Broad Street  
Suite 900  
Columbus, OH 43215-3506  
Phone: 614.223.9300  
Fax: 614.223.9330

## New Rules for Loading, Unloading and Storage of Hazardous Materials

By Robert Spira

DOT's Research and Special Programs Administration has adopted a Final Rule defining the circumstances under which loading, unloading and storage activities are covered by its Hazardous Materials Regulations. RSPA has been struggling with the issue for several years. It published a proposed rule (HM-223) in 1996 and followed with revised proposed rules in 1998 and 2001.

Almost five hundred comments were filed by the businesses and interest groups involved with hazardous materials and hazardous materials transportation.

The stakes are high. Persons performing loading, unloading and storage functions subject to the HMR will be responsible for assuring that their shipment is handled in compliance with the requirements of the HMR. The rules cover activities such as packaging, reporting, loading, unloading, recordkeeping and labeling of hazardous materials. RSPA enforcement activities can result in the assessment of heavy civil penalties and worse.

As indicated by the ongoing controversies triggered by the RSPA

proposals, the question of when loading, unloading and storage activities should be included within the framework of the HMR is not a simple matter. RSPA is hoping to answer the question by establishing definitions of specific terms. For example, according to a RSPA summary of the Rules,

"Pre-transportation functions are functions performed to prepare hazardous materials for transportation in commerce by persons who offer a hazardous material for transportation or cause a hazardous material to be transported. Transportation functions are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading, and storage of hazardous materials that is incidental to that movement."

Any person performing the activity that fits within the definition is covered by the HMR.

While all of this may sound simple enough to the regulators, the people handling the freight may have

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considerable difficulty applying the definitions to real world situations.

In addition to defining activities included under the HMR, the Final Rule adopts standards for circumstances under which certain functions related to hazardous materials transportation may be regulated by federal agencies other than RSPA (e.g., the Environmental Protection Agency and the Occupational Safety and Health Administration) and by state and local governments. The concern is that RSPA is ceding too much of its authority to other agencies. This is particularly true since Congress has given RSPA the authority to pre-empt any federal, state or local governmental agency regulation that might tend to conflict with the HMR. As a practical matter, those in the hazardous materials business have it tough enough keeping up with one agency, let alone with at least two other federal agencies and countless state and local governments.

Brokers and forwarders will be subjected to unusual challenges as a result of the new Rules. If, for example, a broker or a forwarder performs paperwork and other related services for a shipper, the broker or forwarder should be concerned whether he is an "offeror" of hazardous materials performing a "pre-transportation" function under the Rules.

RSPA is not unsympathetic to the problem. In its explanation of the new Rules, RSPA acknowledges that it would be unreasonable to hold an intermediary responsible for HMR compliance errors made by the shipper or the carrier unless the intermediary knew or should have known about the errors.

Unfortunately, sympathy from RSPA will not be of much help. What a person "should have known" is always clearer after a violation has occurred. In addition, an intermediary who prepares a shipping paper for a shipment of hazardous materials and signs the shipper certification is assuming responsibility for the shipping paper even if the shipping paper is based on information provided by the shipper. As

a practical matter, under the new Rule, intermediaries will be faced with new legal exposure for hazardous materials shipments including potential liability for personal injury and property damage claims arising from these shipments. If something goes wrong with the shipment, the intermediary will be part of the investigation and may be included as a defendant in a law suit.

What can be done? Exposures under the HMR need to be managed:

1. Review operations to determine if registration with RSPA is required under Form DOT F 5860.2. Registration fees are currently \$1,000 per year for most registrants.
2. Adopt new operating procedures and provide additional training for staff to be certain that shipments of hazardous materials comply with the HMR.
3. A broker or forwarder handling shipments of hazardous materials should require written contracts with shippers and with carriers that include indemnification provisions against exposures from the HMR.

RSPA has established October 1, 2004 as the Effective Date for the Final Rule. By adopting a Final Rule, RSPA may be hoping to avoid having to deal with further (and seemingly endless and repetitive) public comments. As we have seen with other recent DOT Rulemakings, adoption of a Final Rule will not necessarily prevent interested parties from appealing the Decision or from finding other ways to make their concerns known. Based on our recent experience with the DOT hours of service rules, RSPA may use the months until the Effective Date and after to work on interpretations, explanations and revisions.

*For additional information on this topic, please contact Robert Spira at 216.363.4413 or e-mail at [rspira@bfca.com](mailto:rspira@bfca.com).*

# How to Pay \$500 On a \$500,000 Freight Claim

By Marc Blubaugh

On November 5, 2003, the United States District Court for the Southern District of New York granted a victory to surface carriers in holding that a railroad could benefit from the \$500.00 per package limitation contained in an ocean carrier's intermodal, through bill of lading. In *Sompo Japan Insurance of America v. Union Pacific Railroad Company*, 2003 WL 22510361 (S.D. N.Y. 2003), Kubota Tractor Corporation ("Kubota"), a shipper, retained Misui OSK Line Ltd. ("MOL"), an ocean carrier, to transport 32 tractors, valued at nearly \$480,000.00, from Tokyo, Japan, to Swane, Georgia. MOL issued three intermodal, through bills of lading with respect to the goods. When the goods arrived in the United States, they were placed on railroad cars owned by Union Pacific ("UP"). However, while passing through Texas, the train derailed and damaged the tractors. The loss was apparently unsalvageable. Consequently, Sompo Japan Insurance of America ("Sompo"), Kubota's insurer, paid Kubota the full value of the goods. As subrogee, Sompo then sued UP.

## Limited Versus Unlimited Liability

UP moved for partial summary judgment to cap any possible recovery by Sompo at \$500.00 per package pursuant to the liability limitation contained in the Carriage of Goods by Sea Act ("COGSA"). At 46 U.S.C. § 1304(5), COGSA provides

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Neither MOL nor Kubota had declared a value of the tractors on the bill of lading. Sompo argued that UP was not an intended beneficiary of the COGSA limitation of

liability and, therefore, was subject to unlimited liability under the Carmack Amendment.

The Court granted UP's motion for partial summary judgment. While the Court agreed with Sompo that the Court had an obligation to strictly construe the limitation of liability in light of the fact that the limitation of liability purported to extend beyond COGSA's typical period of applicability, the Court found that the bill of lading's provisions "clearly express[ed]" that UP was an intended beneficiary of the \$500.00 per package limitation of liability.

First, the Court noted that the Himalaya clause on the bill of lading extended the benefits of the bill of lading to every servant, agent, and sub-contractor of the ocean carrier. Second, the bill of lading broadly defined "sub-contractor" as including, among other things, "inland carriers, road, rail and air transport operators, [and] any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage." Furthermore, the Court rejected Sompo's claim that the Carmack Amendment is a law that "cannot be departed from" by private contract. The Court noted that many courts recognize the well-settled principle that the Carmack Amendment may be departed from by contract and supplanted by COGSA to the detriment of the shipper.

## In summary

Carriers and shippers must remain cognizant of the fact that liability for freight loss and damage is fundamentally a function of contract. In particular, motor carriers and rail carriers should insist that, to the extent that they move goods pursuant to an intermodal, through bill of lading subject to COGSA, such bill of lading should contain a Himalaya clause and other language that provides the carrier with the benefit of the \$500.00 per package limitation of liability authorized under COGSA.

For additional information on this topic, please contact Marc Blubaugh at 614.223.9382 or e-mail at [mblubaugh@bfca.com](mailto:mblubaugh@bfca.com).



# RSPA Needs to Know When Something Goes Wrong

By Robert Spira

The Research and Special Programs Administration has adopted a Final Rule revising the incident reporting requirements of the Hazardous Materials Regulations and the Hazardous Materials Incident Report Form. (DOT Form F 5800.1) The Final Rule is the end product of a process first initiated by RSPA in 1999. Industry task forces have provided input. In addition, RSPA hired a third party layout design specialist to assist with the development of a revised Form.

RSPA relies on the Form for basic information on certain specified events (e.g., spills, fires, explosions and others) that may occur in hazardous materials transportation. Government and industry use the information to follow trends, identify problems and training inadequacies, evaluate packaging and assess ways to reduce the risk of releases of hazardous materials. RSPA received 17,500 reports in 2001.

From the revised Form, RSPA hopes to receive more and better information on the root cause of the incidents required to be reported, to offer better linkage between the Form and other data and to improve the structure of the Form to facilitate complete and accurate responses. RSPA anticipates that the new Form will take about ninety minutes to complete.

The scope of the Form has been expanded to include reporting of additional incidents such as undeclared shipments of hazardous materials and certain non-release incidents involving cargo tanks. In addition, the revised rules extend reporting requirements to persons other than carriers. RSPA believes that the revisions will assure an increase in the usefulness of data collected and under some circumstances provide relief from regulatory requirements.

In general, the regulated community has been supportive of RSPA's efforts with respect to the new Form. There is concern, however, that expanding the reporting requirements to include incidents where there has been no escape of hazardous substances could create a "compliance trap" for the tank truck carriers.

The Final Rule and Form will be effective July 1, 2004.

For additional information on this topic, please contact Robert Spira at 216.363.4413 or e-mail at [rspira@bfca.com](mailto:rspira@bfca.com).

## On the Horizon

**March 10, 2004** Columbus, OH

Benesch's Transportation and Logistics Seminar "Maximizing Opportunities and Minimizing Risks in Transportation and Logistics: How the Law Can Help." For additional information and to register for this seminar, log on to [www.bfca.com/events](http://www.bfca.com/events) or call Susan Avsec at 216.363.6129.

**March 15-19, 2004** Ft. Lauderdale, FL

Robert Spira will present a program at the American Trucking Associations Technology and Maintenance Council's Annual Meeting and Transportation Technology Exhibition.

**March 22, 2004** Orlando, FL

The Annual Joint Conference of the Transportation Consumer Protection Council and the Transportation Loss Prevention and Security Association. Eric Zalud will be speaking on "Manufacturing and Transporting Food Products; The Impact on Shippers and Carriers."

**June 1-5, 2004** Palm Beach, FL

TLA 2004 Annual Conference and CTLA Mid-Year Meeting. Jim Farmer will be speaking on a panel discussion entitled "Borders Not Barriers: Buying or Selling a Transportation Business Across Borders."

**June 26-30, 2004** Jackson Lake Lodge, WY

Association for Transportation Law, Logistics and Policy's Annual Meeting. Robert Spira will speak on new cases and regulatory developments affecting the motor carrier business.

**For more information, please contact our  
Transportation and Logistics Practice Group:**

**Eric Zalud (Cleveland)**  
216.363.4178 • E-mail: [ezalud@bfca.com](mailto:ezalud@bfca.com)

**Robert Spira (Cleveland)**  
216.363.4413 • E-mail: [rspira@bfca.com](mailto:rspira@bfca.com)

**Marc Blubaugh (Columbus)**  
614.223.9382 • E-mail: [mblubaugh@bfca.com](mailto:mblubaugh@bfca.com)