c. Duty to Accept Goods on Delivery and Mitigate Loss

Consignees have a duty to accept damaged goods unless the shipment is "practically worthless" or totally worthless.[638] A wrongful rejection by the consignee, such as for non-conforming goods, may subject the rejecting party to liability for any damages that result from the wrongful rejection.[639]

This subject is becoming more important, due to increased government concern for terrorists' attempts to contaminate the food chain while goods are in transit. In an abundance of caution, some firms are reported to be rejecting shipments when a seal is missing from the delivering vehicle, for fear the product may have been contaminated. When this occurs, the consignee may be compromising its burden of proving damaged condition on delivery. At the same time, it is exposing itself to liability for any damage that may flow from its rejection, if a court rules that it was wrongful. Firms that are shipping food products, or products subject to the Food and Drug Administration's regulations, would be well advised to use high-tensile strength cable seals that cannot be readily broken or cut, and to make provisions in their contracts with carriers as to how broken or missing seal shipments will be handled. Shippers should also determine whether their carriers are introducing new rules for sealed shipments, such as the rule published by the BNSF railroad, as discussed in Section D.2. herein.

Once a shipment is refused by a consignee, the carrier's liability generally changes to that of a warehouseman.[640] Claimants also have the duty to mitigate the loss, and may recover expenses therefore.[641]

When carriers damage freight, they often assert that the shipper or consignee failed to mitigate damages. Generally, parties to a contract have a duty to mitigate damages when they become aware of a breach by the other party. In transportation situations, a shipper or consignee must take "reasonable steps under the circumstances of the particular case" to mitigate.[642] If goods are sold at a salvage sale, efforts must be made to obtain a "customary price" for the goods, and if the goods are damaged, there is an obligation to sell at a "customary discount."[643]

The extent of a shipper or consignee's duty to mitigate will often hinge on the type of product involved. For example, it may not be possible to resell certain perishable goods due to FDA regulations, which prohibit the sale of adulterated food.[644] FDA regulations state that food should not be salvaged if it "may have" been contaminated or rendered injurious to health.[645] Courts usually err on the side of caution and rule that potentially contaminated food should not have been put into the stream of commerce, finding no duty to mitigate damages in that situation.[646]

Trademarked goods may also present problems for those that might want to sell in the salvage market. In an 11th Circuit case[647] a shipment of Sony's videocassettes was damaged by an ocean carrier. The ocean carrier claimed Sony was unreasonable in failing to mitigate damages by refusing to allow the damaged videocassettes to be marketed unless embossed trademark identification markings were removed. The District Court stated it was "convinced that as a matter of public policy a manufacturer which has spent years and millions of dollars developing a reputation in the marketplace

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[638] See Section 10.9 in *Freight Claims in Plain English, Third Edition*.
[639] *M. Gododetz Export Corp. v. S/S Lake Anja*, 751 F. 2d 1103 (2nd Cir. 1985).
[640] *Chicago & N.W. Ry. Co. v Union Packing*, 373 F. Supp. 734 (D. Neb. 1974), *aff'd*, 514 F. 2d 30 (8th Cir. 1975).
[641] *Pillsbury Co. v. Illinois Central Gulf R.R.*, 687 F.2d 241, 245 (8th Cir. 1982).
[642] *Eastman Kodak v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991).
[643] See *Jako Marketing Corp. v. M.V. Sea Fan*, 557 F.Supp. 1244 (S.D.N.Y. 1983).
[644] 21 U.S.C. § 342 (2004).
[645] 21 U.S.C. § 342(a)(4) (2004).
[646] See, e.g., *Pillsbury Co. v. Illinois Central Gulf R.R. Corp.*, 687 F.2d 241 (8th Cir. 1982); *Swift-Eckrich, Inc. v. Advantage Systems, Inc.*, 55 F.Supp. 2d 1280 (D.Kan. 1999).
[647] *Sony Magnetic Products, Inc. of America v. Merivienti O/Y, Corp.*, 863 F.2d 1537 (11th Cir. 1989).