



# Who Pays for Shipping Damage?

by Perry Safran and Douglas McClanahan

Shipping is risky business. Every day millions of dollars' worth of goods are in transit to buyers or are being held in warehouses till buyers come to pick them up. If those goods are damaged in transit or in storage, who is legally responsible for the loss?

The answer is provided by the Uniform Commercial Code, a set of regulations concerning commercial transactions that has been adopted in whole or in part by every state. The code is premised on the idea that the parties to an agreement should be free to decide on all the terms of that agreement. But if the parties don't include terms — or don't provide complete terms — the code contains the rules for a judge to use to resolve a dispute.

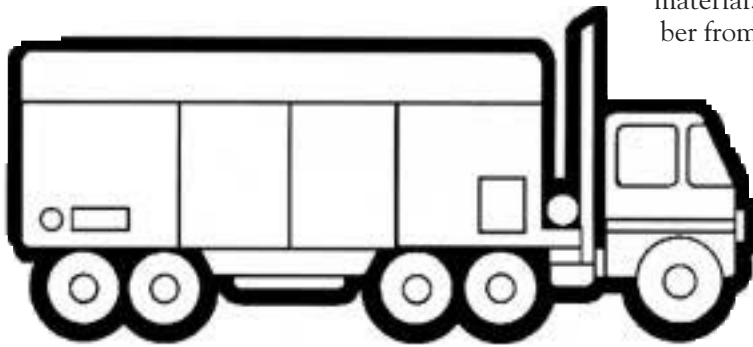
Most shipping agreements contain what is commonly called a "risk of loss" provision — a clause that establishes when the responsibility of ownership changes from the seller to the buyer. Both parties win if contractual duties are well defined.

But when this clause is ambiguous or is omitted, the code determines who bears the loss, depending upon what kind of contract is involved. The code lists three kinds of contracts: shipment, bailment, and so-called barrelhead transactions.

**Shipment contracts.** An agreement that requires the seller to ship the goods to the buyer by a common carrier is called a shipment contract. If the contract requires the seller to deliver the goods to a particular location, such as the buyer's place of business, the risk of loss passes when the goods are delivered to the buyer. On the other hand, if no specific delivery location is set at the time the order is placed or before it is shipped, the responsibility of ownership passes when the goods

are delivered to the *carrier*.

Builders are often involved in a shipment contract, sometimes without knowing it. A custom window order, for example, is governed by shipment contract when the shipping terms are "F.O.B." (freight on board). The F.O.B. location determines where risk of loss passes. F.O.B. "Sellersville"



means the risk of loss transfers upon shipment; F.O.B. "Buyersville" transfers the risk of loss at the destination. In the first case, the buyer of the windows is expected to have insurance coverage as of the shipping date. If the shipping date cannot be prearranged, the buyer's responsibility for insurance takes effect as soon as notice of shipment is received. The buyer can also ask the seller to secure insurance with the carrier, with the charges billed upon delivery.

**Bailment contract.** The second type of contract defined by the Uniform Commercial Code is a "bailment contract." A bailment contract requires the seller to deposit the goods with a third party, such as a warehouse, for the buyer to pick up. In this case, risk of loss passes when the buyer receives a document of title, such as a warehouse receipt, that entitles the buyer to possession.

**Barrelhead transactions.** Any case not involving a shipping or bailment contract is considered a barrelhead transaction. If the seller is a

"merchant" in the business of providing the product — in the language of the code, a merchant is "one who deals in goods of the kind" — the responsibility of ownership and risk of loss passes upon receipt of goods by the buyer.

If you buy lumber from a lumberyard, for example, risk of loss does not transfer to you until you pick up the material. However, if you buy lumber from a nonmerchant — such as another builder who took the lumber in trade — risk of loss transfers when you make the deal, not when you take possession.

The importance of a risk-of-loss term in a contract is obvious.

You can always buy insurance, but the trick is in knowing when you need it. In general, you can protect yourself from assuming risk of loss by following one of these steps:

- Always name a specific location for delivery. If you don't, risk of loss transfers to you upon shipment.
- On F.O.B. orders, stipulate the F.O.B. address at the place you want to take delivery. Otherwise, most F.O.B. orders stipulate the shipper's address.
- If you can't arrange F.O.B. delivery to your address, make separate arrangements with the carrier to cover risk of loss between the time the goods are at the F.O.B. location and when you take possession.
- Remember that payment does not determine transfer of risk of loss. You may still be liable for shipping damages even when you order goods C.O.D. ■

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