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On the Horizon



Eric L. Zalud

The removal of CSA scores from public view may not eliminate the ability for an injured party to sue based on the negligent selection of a motor carrier, but it changes the analysis. The FMCSA still allows public access to certain safety information, and it further allows private access to the full statistics. Following the removal of the information to the public, the legal inquiry may revolve around what information was available and what kind of access to information a party had when selecting a motor carrier.

The CSA website still grants access to some data, and a motor carrier selector has various means to find all of a motor carrier's safety scores. For property carriers, the public can access inspection and crash data, investigation results, and measures for all public BASICS.¹ The public cannot access the Crash Indicator and Hazardous Material Compliance BASICS, but full results are available to enforcement users and motor carriers. While a motor carrier selector cannot independently access the entirety of a motor carrier's CSA scores, the carrier itself can, so the selector could require disclosure from the carrier before hiring.

Courts in states that recognize negligent hiring or selection of an independent contractor have been split as to what extent a selector needs to inquire into safety scores. The U.S. District Court for the Western District of Virginia, in *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630, 644-45 (W.D. Va. 2008), centered its reasonable care discussion on information publically available through the FMCSA. By contrast, the U.S. District Court for the Western District of Oklahoma, in *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1273 (W.D. Okla. 2014), stated that even though the selector checked the publicly available information through FMCSA, the fact that it did not request safety records (among other things) from the

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Industrial Real Estate is Breaking New Ground



Verlyn Suderman



Joel C. Pentz

Until recently, the organizing principles in the industrial real estate sector seemed well established and fairly stable. Specifically:

- Goods flow from a plant or a port into a manufacturer's or a third-party logistics provider's distribution center in one or more of the five core industrial markets (Atlanta, Chicago, Dallas/Fort Worth, Greater Los Angeles, and Eastern Pennsylvania), and then out to a customer's distribution center in that region and on to selling outlets. This flow results in the concentration of industrial development in and around major ports and those five geographic locations, and activity elsewhere is largely driven by company-specific considerations.

- Development activity is somewhat undisciplined and accelerates when current consumer demand and availability of investment funds are high. A bullwhip boom-bust cycle results as demand downturns create excess inventory, owners/developers become reluctant to trust resurgent demand, and supply becomes tight before new buildings are delivered.

These principles are becoming increasingly less operative as manufacturers overhaul their supply chains to enable their omnichannel strategies, and the development community continues to display discipline and caution in an environment where no one knows exactly where distribution center user demand is headed over the next 5–10 years as e-commerce growth, port capacity enhancements, changes in trade policy, and other factors further disrupt the status quo. The pace of change is increasing in every industry, but the rate of accelerated change in the supply chain space today is such that the implications of real estate-related decisions are becoming greatly magnified.

For landlords with buildings coming up for renewal, developers with product about to be delivered, and owners looking to sell, these are great times. Rents are at record highs, cap rates are near record lows, and tenant improvement packages and concessions are minimal. For lessees, leverage is modest, and the risk of making a suboptimal decision is substantial. However, growth and opportunity are everywhere in this industrial real estate market, and anyone having supply chain responsibilities or involvement should be prudently gathering as much information as possible about the landscape. To that end, here are some of the data points we are seeing:

- Consumer demand indicators remain positive (for example, the ISM Purchasing Managers' Index has been expansionary for each of the last 12 months).
- E-Commerce sales grew 16% in Q2 2017 compared with the same time last year and now represent 9% of total sales.
- Inbound container volumes are up 5–10% year-over-year at most U.S. ports.
- Q2 2017 represented the 29th consecutive quarter of net positive absorption at almost 60 million square feet.
- Vacancy nationwide is at a record low of 5.4% and asking rents are at or near all-time highs in most markets.
- LTL (less-than-truckload) leaders are building multiple new terminals and distribution centers.
- Lack of available space is making flex space offerings like Flexe and E*fill America more viable and providing 3PLs and manufacturers with the ability to more easily realize revenue from their pockets of excess space.
- Cap rates are in the 5s for credit tenant long-term leases in core markets and below 5 in Southern California.
- Credit is available for speculative development but generally requires 30% equity and sound fundamentals.

- Noncore markets like Seattle (\$7 asking rents), Kansas City (8 million square feet under construction), and Indianapolis (3 million square feet of absorption in H1 2017) continue to grow faster than the market average.
- Development activity in some core markets is concentrated in certain subregions (Joliet/I-80 in Chicago and Eastern Inland Empire in Southern California).

These and other data points lead us to a few observations:

1. **Supply and demand are not significantly misaligned, and the growth experienced in the last couple of years appears to be sustainable in the near- to mid-term.** Absorption and construction activity have been relatively consistent during the growth of the past couple of years, which along with continued low vacancy rates indicates a rough equilibrium between supply and demand. Credit is available, but not indiscriminately as in past boom cycles, and more rigorous equity requirements appear to be keeping developer exuberance in check.
2. **Lean distribution concepts and e-Commerce-driven thinking may produce a relative shift in demand to secondary and tertiary markets.** While the core markets are still growing at a healthy level, secondary and tertiary markets are growing faster, driven in part by the idea that distribution and fulfillment may be expedited by operating more warehouse locations closer to the end consumer. This type of thinking is increasing demand in these secondary and tertiary markets for product in the size range of 50,000–200,000 square feet.
3. **Lessees in the market for space in the near term are at risk of overpaying.** The cost of warehouse space is a significant cost input for any manufacturer or warehouse operator, and no one wants to pay substantially more for space than his or her competitor is paying for similar space. Nevertheless, the reality is that landlords

today are requiring longer terms at higher rents with fewer concessions than they were 2–3 years ago. It is of course possible that rents will continue to go up, but it seems very possible that we may be close to a top, especially in nonlandlocked areas where there is product in the pipeline. The flex space offerings mentioned above may in some situations provide an alternative space solution that allows the tenant to avoid making a long-term commitment until leasing conditions are more favorable.

4. **User/Owners may want to consider sale-leaseback transactions, given ultra-low cap rates and strong investor interest.**

Investor demand in industrial properties is strong and shows no signs of weakening at the moment. According to Lynn Reich, EVP in Colliers' Industrial Real Estate Group, "investment in industrial real estate continues to be a darling as an asset class because of its stability and low downside relative to other classes." With cap rates near historic lows, it may make sense for a user/owner to take advantage of this investor preference while it lasts and consider a sale-leaseback transaction.

It is critical that a supply chain participant properly document its rights and obligations in any real estate arrangement. Few things are worse than believing one has reached a shrewd business deal only to discover after the fact that a key provision is missing, an additional condition should have been added, or language that was thought to be clear is actually quite ambiguous. Benesch's Transportation & Logistics and Real Estate Practice Groups each have a number of attorneys with background and experience in supply chain-related real estate matters and can help you confidently navigate any given arrangement.

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Impact of CSA Scores Removed from Public View

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motor carrier contributed to a finding of a genuine issue of material fact. The U.S. Court of Appeals for the Fifth Circuit, in *Dragna v. KLLM Transp. Servs., L.L.C.*, 638 Fed. App'x 314, 319-20 (5th Cir. 2016), indicated that BASIC scores—even when negative—were not necessarily definitive of negligence, as one selector relied upon prior business dealings when deciding not to investigate further upon receiving the less-than-stellar BASIC scores of a motor carrier.

Signs indicate that the scores could at some point be available to the public again. After President Obama signed the FAST Act into law at the end of 2015, then-Transportation Secretary Anthony Foxx indicated that CSA scores would again be publicly available within two years.² While the FMCSA withdrew the Obama administration's proposed rule for safety standards and processes in March of 2017, this was most likely done in anticipation of the National Academy of Science's study on the methodology of the CSA scores.³

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¹ Safety Measurement System, Federal Motor Carrier Safety Administration, <https://ai.fmcsa.dot.gov/SMS/>.

² Eugene Mulero, *DOT's Anthony Foxx Says CSA Scores to Be Public Again in 2 Years*, TRANSPORT TOPICS, June 13, 2016, <http://www.ttnews.com/articles/basetemplate.aspx?storyid=42237&page=1>.

³ Aaron Marsh, *Trucking regs update: Coming and going in 2017*, AMERICAN TRUCKER, May 3, 2017, <http://trucker.com/regulations/trucking-regs-update-coming-and-going-2017>.

Mitigating Supply Chain Risk: Effective Transportation and Logistics Provider Diligence and Management Practices



Jonathan Todd

Every day, supply chain managers and logistics coordinators navigate a world of risk. Those risks include interruption due to delay, the damage, contamination, or loss of goods, customer service failures, and

even regulatory compliance violations. Perhaps the greatest example is the 2016 bankruptcy of ocean carrier Hanjin that stranded \$14 billion USD in freight and shocked supply chains. Fortunately, both commercial shippers and service providers can implement practices to help avoid or mitigate risk as goods circle the globe in the hands of others.

Supply chain risk is an acute vulnerability for transportation and logistics. In today's market, these services contribute not only operational efficiency but also serve as the face to end-users and in some cases play a significant part of the enterprise value proposition. Some global supply chains aggressively manage providers while others do not. Other supply chains in-source many of these services while others do not. In either case, third parties are likely handling material inputs, finished products, and returns, in all jurisdictions to which the supply chain extends.

Transportation and logistics services are high value and high impact because they are essentially outsourced operations. Each functional element of the global supply chain operates within its own regulatory framework, contractual requirements, and accepted business practices. The "rules of the road" differ when dealing with direct carriers, forwarders and brokers, transportation management providers, customs brokers, export agents, and warehousing and distribution companies. An effective plan to manage supply chain risk and resiliency will leverage each of these business realities during procurement and throughout operations management.

Service provider due diligence is a valuable part of any procurement and provider management strategy because it is both achievable and effective in the transportation and logistics sector. Most jurisdictions regulate transportation and logistics activities for public safety and convenience. Public records are often available from the respective regulatory agencies, which makes due diligence fast and inexpensive. Insurance and bonding information is also often available to the public due to the requirements imposed by law. Additionally, certifications and trade associations can serve as both badges of quality and evidence of market-standard practices and terms.

Taking brokers and third party logistics companies as an example, the range of services directly and indirectly offered will frame the impact of regulation and the areas for diligence. It is reasonable to inquire regarding a service provider's ability to perform, to require identification of its respective operating authorities and insurance, and to require representations and warranties to that effect under contract. The starting point for this analysis often begins with the nature of the services, such as:

- **Surface Transportation** – Does the provider hold a broker or freight forwarder permit from the Federal Motor Carrier Safety Administration?
- **Air Transportation** – Does the provider operate pursuant to a security program approved by the Transportation Security Administration and does it hold certification from the International Air Transport Association?
- **Ocean Transportation** – Does the provider hold an ocean forwarder or non-vessel operating common carrier (NVOCC) license from the Federal Maritime Commission?
- **Customs Brokerage** – Does the provider hold a customs broker license from U.S. Customs and Border Protection?

To further the review, many of these regulated services also require bonds, trust funds, or other evidence of financial responsibility. It is not uncommon to request evidence of additional insurance based upon an internal Risk Management team's tolerances. These requests often include commercial general liability coverage, workers compensation and employer's liability coverage, contingent cargo coverage, warehouseman's liability coverage, and even errors and omissions professional liability coverage. Sophisticated commercial shippers also require representations about the insurance requirements that the brokers and third party logistics providers impose on their portfolio of underlying carriers.

Certifications are another indicator of a provider's experience in a particular service or jurisdiction and in some cases offer independent third-party verification. For example, it is not uncommon to require Customs-Trade Partnership Against Terrorism (C-TPAT) certification in the United States where the desired activities include cross-border traffic or other forms of trade. Among the North American Free Trade Agreement (NAFTA) countries, Partners in Protection (PIP) certification is available as an analog in Canada and Nuevo Esquema de Empresas Certificadas (NEEC) certification is available in Mexico. Trade association membership may also be representative of a provider's commitment to professionalism. In the United States, many international forwarders are members of the National Customs Brokers and Forwarders Association of America (NCBFAA) and in the United Kingdom, as an example, British International Freight Association (BIFA) membership is available.

Active provider management strategies help to further manage supply chain risk and resiliency after qualified service providers are selected. As an initial matter, this involves negotiating appropriate contract terms and conditions applicable to the service, service provider, and country of operation. Developing agreement

Beyond Care, Custody, and Control: Data Security Best Practices for the Transportation and Logistics Sector

templates can facilitate the bidding process by comparing “apples to apples” while also gaining a view to which particular terms may be pain points for providers. Tailored agreement templates will also make contract administration and provider management easier following awards by clarifying expectations for renewals, updates to services and rates, and continuous improvement, and because similarly situated providers will be working from the same or nearly identical terms. Agreement templates will also help to manage the impact of incidents. For example, a transportation and logistics agreement can align with internal contingency plans by addressing: (1) required data feeds and event notices; (2) business continuity and disaster recovery; (3) termination rights and post-termination assistance; (4) escalation procedures; and (5) dispute resolution requirements.

Bear in mind service provider files age over time and require attention, such as updating operating authorities, insurance, and any other qualification that was raised during initial diligence. Operational characteristics and risk management tolerances may also change over time, and open and frequent communication offers an opportunity to problem-solve as well as to update any commercial or legal terms that may need adjusting. Contractual mechanisms are available to nurture these types of mutually beneficial relationship, including agreeing in advance to participate in periodic management meetings and continuous improvement discussions. The best-case scenario is, of course, to develop a long and fruitful relationship throughout the supply chain that yields few surprises.

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Jonathan Todd



Justin P. Clark

The receipt, storage, and handling of sensitive shipper data occurs, often frequently and in real-time, alongside the flow of goods. Commercial shippers are well aware of the supply chain security risk to the materials and finished products tendered for transportation. Service providers are keenly aware of the commercial and legal risk to their own enterprises inherent in the safe movement of shipper tender. However, the security risks associated with data flows is a very real threat for both shippers and service providers that likewise deserves due attention.

Shipper data may include a broad range of confidential and proprietary information, including strategic sourcing details (suppliers, inputs, and costs), account and sector details (customers, industries, and regions), and in today's e-commerce world the personal information of individuals (names, addresses, and contact information). It is easy to see how breaches in data security threaten to harm public relations, trading partner relationships, and competitive advantage with effects that will reverberate throughout the supply chain. Data security also carries the gravity of significant legal liability to those parties who disclosed or have an interest in the underlying data.

In the cybersecurity world it is often said that the risk of a security incident is “not an if, but when” question. Transportation and logistics companies collect, use, and maintain significant volumes of sensitive data just like the industries we often see in the headlines that encounter security breaches. Planning and preparation are the keys to weathering the storm. The very

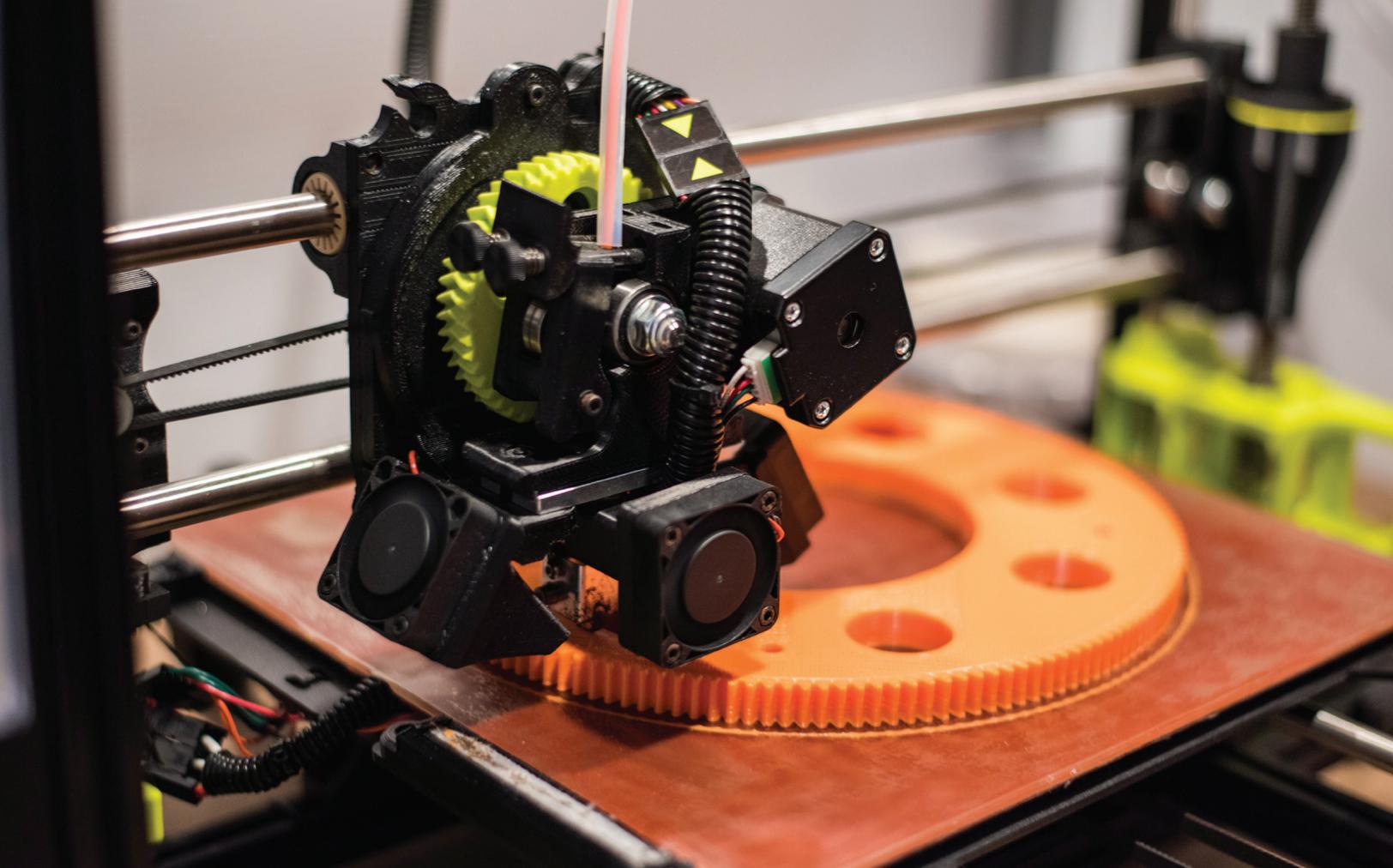
first source of information that government enforcement agencies or plaintiffs' attorneys will look to in the event of an incident are the corporate policies and procedures documenting data handling and security.

The best practice for transportation and logistics companies is to periodically review and update internal data handling policies and procedures to ensure compliance with the state of law and commercial standards. A comprehensive review will involve identifying and examining: (1) the receipt of critical data including any personal information; (2) the employees, personnel, and contractors who may have access to that critical data; (3) the owned and leased systems that process critical data including any cloud-based applications; (4) the technical and organizational controls that are in place to protect critical data from unauthorized access, loss, destruction or misuse; and (5) the legal, regulatory, and contractual requirements for handling critical data.

It is time to make informed decisions about how to mitigate identified risks of processing after arriving at a clear understating of internal practices. This step typically involves knowledgeable and pragmatic risk assessment including gap analysis. Even today, it is not uncommon to identify significant areas for improvement. Attorneys experienced in these technical areas draw from a toolbox of risk-prevention measures that may include:

- **Maintaining an Incident Response Plan.** Data breaches and security incidents to network systems maintained can occur at any time, whether by accident or by nefarious actors (including a disgruntled former employee). A documented incident response plan and procedure will prepare for these types of situations. The incident response plan should address incidents internal to the organization and incidents that occur involving third party service providers processing such information.

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3D Printing and Freight Companies: What Are You Doing About Additive?



Mark Avsec

Manufacturing industries sit on the precipice of a seismic shift because of 3D printing, also called additive manufacturing. Consumer manufacturing is shifting from mass production to production by the masses, with

a high level of customization. One day people may print their products at home, designed just for them. That may be a long way off for sophisticated products. But consumers may in the not-too-distant future begin using a local fabricator to print goods that Amazon or UPS now delivers to them.

3D printing has already begun in medical and aerospace industries. This is not about little plastic trinket items sold at carnivals or the sort your children now print in the school lab. Brackets and engine parts for airplanes, prosthetics and even electronics are now being

printed in a variety of metals, polymers and concrete, some with electrically conductive materials. Prognosticators predict that a fully-functioning smart phone could be printed in 10 years. Food is being printed (that market is expected to explode). Entire buildings are being printed in China and in Dubai. One of Twitter's co-founders, Biz Stone, predicts that Nike could be a pure software company in 10 years. Gartner analysts predict more than \$100 billion damages in intellectual property losses as a result of rogue 3D printing of patent-protected, copyright-protected and/or trademark-protected goods by next year, "away from the control" of IP owners. When you see companies like GE and Caterpillar focus on 3D printing, it is time for your transportation business to take note. A maxim is commonly bantered about in additive manufacturing circles: if you are not running in this space, then you are already falling behind.

The transportation industry is doing well. The economy has improved since 2008, traffic

volumes are robust, fuel prices are down. What will happen to your transportation business if the promise of 3D printing becomes fully actualized? Look what happened to the music industry's recorded music business sector as a result of the combination of the Internet, the unprotected CD, and MP3 compression technology. The business for recorded music today is vastly smaller than it was in 1999, pre-Napster. We are left today with an entirely new business model for consuming music, i.e., streaming. Many people lost their jobs during the music industry's evolutionary path though new companies such as iTunes, Spotify, Pandora, Beats and others were launched.

We have seen paradigm shifts in manufacturing economies in the past, of course, and that did not mean doom and gloom for them or for the transportation companies that transport the products they make. However, it does mean that things may be different. The person who shooed the horses lost his job when the automobile

replaced the horse, but many others grabbed jobs on Ford's new assembly line. The important thing is that if you are in the business of moving goods from one place to another, your annual strategic plan should have a bullet point: how are we planning for additive? How are we planning for printing-on-demand, planning for reductions in inventories, planning for more localized manufacturing closer to the point of disbursement? If you are not planning right now, you may already be falling behind.

3D printing is clearly a way for manufacturers to streamline operations, improve quality, and lower costs—and *they will leverage it*. Take as one example GE's 3D-printed LEAP fuel nozzle, which is 25% lighter than its conventionally assembled predecessor (thereby saving fuel costs for airplane owners): the number of GE engineers for the part was reduced because only one part is being designed; the number of prints was reduced because there is only one part; and the number of third-party suppliers for this part was dramatically reduced. It used to be that 20 suppliers supplied components for this fuel nozzle—but now there is only one supplier: GE. That means that transportation companies (perhaps many of them) have lost the business of moving component parts for the fuel nozzle.

Thus, the evolution of 3D printing has substantial implications for domestic and international freight firms. As more and more products are manufactured in finished form, like GE's fuel nozzle, and manufacturing occurs closer to the point of disbursement, the need to get parts from multiple parties around the world is correspondingly reduced, decreasing the need for global transportation. Ocean container shipments and air cargo will be reduced. That means that a significant portion of the domestic trucking business is at risk due to the decline in goods that once started as air cargo or containers on ships.

How are leading transportation and logistics companies dealing with this supply chain shift? UPS has opened several 3D printing kiosks and is partnering with SAP and Fast Radius: together they are not just designing for additive;

they are designing for the supply chain. UPS, SAP and Fast Radius are putting manufacturing capabilities inside a logistics network such as UPS. It is impressive and inspiring when a 150-year-old, successful logistics company like UPS realizes the need to retool itself to operate in a changing world.

Indeed, to really leverage 3D printing value, businesses will operate in a whole new way, changing both product design and supply chain configuration. Businesses will be seeking to manufacture in multiple, geographically dispersed sites closer to the point of use. The factories of the future will likely be huge warehouses full of 3D printing machines close to their customers with the ability to print "stuff."

Like UPS, Amazon is launching a 3D printing store, and has also recently filed a patent for a method of 3D printing on demand within mobile manufacturing hubs. Warehouse space is expensive for Amazon. Amazon wants to be able to send a digital file to a mobile unit that is closest to a customer, providing instructions to print out the ordered item. The mobile hubs would include a means to both additively and subtractively manufacture an item (which could include 3D printing technologies and other machining tools).

Many manufacturing companies needing to carry spare parts for the big machines they make will look to 3D printing to reduce inventories. The value of global inventories is approximately \$10 trillion. Reduce that amount by 5% and it would generate up to \$500 billion in working capital. Imagine a farmer who bought a tractor from John Deere in 1958. The tractor is a good machine and is still running. John Deere has to carry replacement parts for that farmer's machine. What if John Deere deleted its inventory and simply printed out a replacement part on demand when it was needed, if ever? The savings would be enormous. This is the "long tail" on steroids—and it is going to happen. Transportation companies must adjust.

Some believe that manufacturing industries, like the music industry, will transition to a licensing

model—when you buy a certain product you will be licensed a digital file with instructions for a fabricator to print it out. 3D printing will therefore spawn new cybersecurity issues, product liability issues, and intellectual property issues, as well as the transportation issues we have been discussing. To be sure, this paradigm shift in many industries is a long way off, but, as the example of GE's fuel nozzle proves, in some cases it is already happening.

Footwear, toys, plastic industries and ceramic products (easy to 3D print and relatively expensive to ship) may have the highest potential to disrupt transportation and logistics businesses. Freight companies that move pharmaceuticals and perishables are probably less threatened (though Aprexia Pharmaceuticals out of Blue Ash, Ohio, has recently begun 3D printing an oral tablet to treat epilepsy).

Your transportation business may or may not be at risk, depending on your unique set of circumstances. However, if your business is not well positioned now for the inevitable rise of localized production and transportation, perhaps your business should consider offering more localized moves. Or, like UPS, consider offering new logistics services. Remember, there will still be a great need to move the huge amounts of raw materials required for 3D printing (that is not going away).

The bottom line is that every transportation business should have a discussion item on its annual strategic planning meeting agenda: what are we doing about additive?

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Mirror, Mirror, You've Deceived Me Wrinkles in Drafting Indemnification Clauses



Martha J. Payne

For shippers, carriers and other service providers, careful contracting is fundamental to risk control. An axiom for third-party logistics companies¹ (3PLs) is that their contracts with

service providers, such as motor carriers, must mirror their contracts with customers. If a 3PL is required by its customer to assume a risk, that risk should be passed on to the service provider.

This is especially true with indemnification clauses. Indemnification clauses shift the responsibility to pay damages from one party to another, often without regard to who actually caused the loss. Too often, the indemnification clause in a contract is brushed over without careful review. Even when it is reviewed, the emphasis may be on creating in the service provider contract (e.g., Broker/Carrier Agreement) a mirror of the risk assumed in the customer contract (Shipper/Broker Agreement.)

Motor carriers are protected in most states by anti-indemnification statutes. Although the language and interpretation may vary between states, more than 40 states now have anti-indemnification statutes. If a motor carrier contracts to assume responsibility for the acts of its customer (the shipper), the motor carrier often has a good legal argument that the indemnification is void and unforeseeable.

BEWARE: The same is not true of 3PLs or other parties. The anti-indemnification statutes in most states refer specifically to motor carriers—and NOT to 3PLs. 3PLs thus cannot rely on the statutory language to void onerous indemnification provisions in their Shipper/3PL contracts, though the motor carrier may be able to void the same responsibilities set forth in 3PL/Carrier agreements.

Recently, the 8th Circuit U.S. Court of Appeals, in *Chapman v. Hiland Partners GP Holdings, LLC*,² upheld this inequality by affirming that

although a motor carrier may be protected by an anti-indemnification statute, the protection did not extend beyond the actual motor carrier. This has huge implications for 3PLs.

In *Chapman*, the court affirmed the decision of the lower court³ that a master services agreement indemnification clause did not fall under state anti-indemnification clauses applicable to motor carriers. The indemnification provision was therefore enforceable despite the statutory anti-indemnification clause

Hiland owns and operates a natural gas plant in Watford City, North Dakota. Hiland and Missouri Basin entered into a master service contract in July 2008, wherein Missouri Basin agreed to perform various services for Hiland, including hauling water from the gas plant. As part of the master service contract, Missouri Basin agreed to “indemnify, defend and save harmless Hiland Group . . . from and against any and all claims, demands, judgments, defense costs, or suits . . . in any way, directly or indirectly, arising out of or related to the performance of this Contract.”

Missouri Basin and B & B Heavy Haul, LLC (B & B) entered into a master service contract on May 24, 2011, in which B & B agreed to provide various services to Missouri Basin, including hauling water and other products from the gas plant. B&B, as “Carrier,” agreed “to provide the transportation services required by [Missouri Basin] and Customer.” In that master service contract, B&B agreed to “indemnify, defend, and save harmless [Missouri Basin] and the Customer from any and all claims, demands, judgments, defense costs, or suits . . . in any way, directly or indirectly, arising out of or related to the performance of this Contract.”

As you can see, the indemnification clauses mirror each other. Contractually, B&B is required to indemnify Missouri Basin to the same degree as Missouri Basin is required to indemnify Hiland.

In October 2011, Hiland requested Missouri Basin remove water from condensate tanks at the Watford plant. Missouri Basin contacted

B&B, which sent Lenny Chapman to the gas plant. Chapman arrived shortly after midnight. He and an employee of Hiland, James Olson, began connecting the tank to the B&B truck that Chapman was driving. After Chapman's truck was connected to the loading facility, but before any water was unloaded, condensate containing petroleum overflowed from the top of the condensate tank. Upon observing this, Olson notified the control room, told Chapman he better shut off his truck, and took off running. At that point, there was an explosion and flash fire that engulfed Chapman. He was seriously injured, but survived.⁴

Chapman and his wife, Tracy, filed an action against Hiland, alleging negligence and loss of consortium. Hiland filed a third-party complaint against Missouri Basin and B&B, contending they were contractually obligated to indemnify and defend Hiland. Missouri Basin cross-claimed against B&B, seeking a defense and indemnification if it was required to indemnify Hiland.

Hiland Missouri Basin Indemnification.

In the third-party complaint, Hiland sought indemnification from Missouri Basin, based on the indemnification clause in the master service contract between Hiland and Missouri Basin. Missouri Basin argued that the Hiland Missouri Basin master services contract was a motor carrier transportation contract and therefore the indemnification clause was void and unenforceable. The applicable anti-indemnification statute states:

Notwithstanding any provision of law to the contrary, any portion of a provision, clause, covenant, or agreement contained in, collateral to, or affecting a *motor carrier contract*, which purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee is void and unenforceable to the extent that the loss

“In the absence of specific identification as a transportation agreement, . . . you should anticipate that courts will find that the agreement is not a transportation contract and therefore is not protected by anti-indemnification laws applicable to motor carriers.”

or damage: a. Occurs during the motor carrier’s presence on the promisee’s premises and is caused by or results from the negligent or intentional acts or omissions of the promisee.⁵

Missouri Basin argued that the Hiland Missouri Basin master services contract was a motor carrier contract and therefore the indemnification clause was not enforceable. The court found, however, that nothing in the Hiland Missouri Basin master service contract identified it as a contract covering the transportation of property for hire. There was no reference to a motor carrier or to transportation services. The contract referred to Missouri Basin as a “Contractor” and stated that it will “from time to time... perform certain work or furnish certain services to Hiland.” Other portions of the Hiland Missouri Basin master service contract were generic and could have applied to carpenters, electricians, gate guards, surveyors or welders.

The trial court found, and the appeals court affirmed, that the Hiland Missouri Basin master services contract was not a motor carrier contract and that the anti-indemnification statute therefore did not apply. The indemnification clause in that contract was enforceable.

Missouri Basin B&B Indemnification. B&B filed a motion for partial summary judgment, contending the B&B master service contract with Missouri Basin did not require it to indemnify Missouri Basin or Hiland for Hiland’s negligence.

The district court granted B&B’s motion, dismissing Hiland’s third-party complaint against B&B and Missouri Basin’s cross-claim against B&B. As for Hiland’s third-party complaint, the court concluded as a matter of law that B&B had no legal duty under the B&B master service contract to indemnify Hiland for its own negligence. The court further found that even if the B&B master service contract could be construed to require B&B to indemnify Hiland for its own negligence, the contract was void and unenforceable under the state anti-indemnification statute. With regard to Missouri Basin’s cross-claim, the court concluded as a matter of law that B&B had no legal obligation to indemnify Missouri Basin for any indemnification obligations Missouri Basin might have to Hiland.

This case illustrates three basics of drafting contracts for 3PLs.

1. **Shipper/3PL agreements should be specifically drafted as transportation agreements.** Using a general contract carries risks beyond those usually anticipated. There is no guarantee that even a contract that is specifically identified as a transportation agreement will protect a 3PL from an indemnification clause in its contract with a shipper. In the absence of specific identification as a transportation agreement, however, you should anticipate that courts will find that the agreement is not a transportation contract and therefore is not protected by anti-indemnification laws applicable to motor carriers.

2. **Mirroring onerous provisions from a Shipper/3PL contract into a 3PL/carrier contract is not enough.** The motor carrier may be protected, as in the Hiland case, when the 3PL is not.

3. **3PLs should never agree to indemnify anyone for someone else’s acts.** A 3PL should not indemnify a shipper for the shipper’s own acts. Nor should a 3PL indemnify anyone for the acts of a motor carrier or other service provider, or for the acts of a shipper.

Careful drafting of contracts is essential. We are here to help.

¹Transportation brokers, freight forwarders, and other service providers

² *Chapman v. Hiland Partners GP Holdings, LLC*, United States Court of Appeals, Eighth Circuit, July 14, 2017

³ *Lenny M Chapman and Tracy M Chapman v. Hiland Partners GP Holdings, LLC v. Missouri Basin Well Service and B & B Heavy Haul, LLC* U.S.C., D. North Dakota, Southwestern Division, Sept. 10, 2014

⁴ *Lenny M Chapman and Tracy M Chapman v. Hiland Partners GP Holdings, LLC v. Missouri Basin Well Service and B & B Heavy Haul, LLC* U.S.C., D. North Dakota, Southwestern Division, Sept. 10, 2014

⁵ N.D. Cent. Code § 22-02-10(2)

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Beyond Care, Custody, and Control: Data Security Best Practices for the Transportation and Logistics Sector

continued from page 5

- **Ensuring Accuracy of the Privacy Policy.** A privacy policy is a company's explanation of how it collects, stores, and uses high-risk personal information. A review of the published privacy policy and website terms of use will help to ensure they are truthful and non-deceptive by accurately reflecting the collection and processing of personal information.
- **Restricting Access to Data.** No employees, personnel, or contractors should have access to critical data unless they need that data to perform their day-to-day jobs. A process to periodically review system access lists for appropriateness, including revoking the credentials of those no longer needing access, is a periodic security measure to responsibly control risk.
- **Encrypting Sensitive Data.** One of the best ways to secure information at rest or in motion is through adequate encryption. Not only may encryption properly protect sensitive information, it may also relieve the company of any notification obligations upon a security incident. Each company that possesses high-risk data will benefit from evaluating technical solutions to address the need for encryption. For example, developing a data classification policy may reduce the costs of encryption relative to encrypting all data. Encryption can also be tailored to contractual requirements, which increasingly include encryption requirements before data is sent to a third party—even before hosting by cloud service providers.

Commercial shippers and their service providers are continually adapting to emerging threats and changing expectations, as well as the ever-evolving landscape of international, domestic, and local privacy and data security laws. Company-wide data security and privacy compliance reviews are essential to remaining vigilant by improving upon internal data security and privacy compliance programs as well as the expectations for trading partners. Like the safe movement of goods, data security is a constant concern of all supply chain participants because the reputations, growth potential, and legal liability of each can easily suffer from outdated practices.

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RECENT EVENTS

Conference of Freight Counsel

Martha J. Payne and Eric L. Zalud attended.
June 11–12, 2017 | Jupiter, FL

The Truckload Carriers Association 22nd Annual Independent Contractor Division Meeting

Matthew J. Selby attended.
June 12, 2017 | Kansas City, MO

IANA's Intermodal Interchange Executive Committee Meeting

Marc S. Blubaugh attended.
June 13–14, 2017 | Ponte Vedra, FL

The Annual Workforce Builders Conference

Matthew J. Selby attended.
June 13–14, 2017 | Kansas City, MO

Eye for Transport 3PL & Supply Chain Summit

Eric L. Zalud presented *Risk Management Issues in the Transportation & Logistics Sector*. Stephanie S. Penninger and Verlyn Suderman attended.
June 14–16, 2017 | Chicago, IL

The Transportation Loss Prevention & Security Administration (TLP&SA) Supply Chain Cargo & Security Summit

Kevin M. Capuzzi attended.
June 29–30, 2017 | Jersey City, NJ

The Transportation Lawyers Association (TLA) Strategic Planning Task Force Meeting & Executive Committee Retreat

Marc S. Blubaugh attended.
June 30–July 1, 2017 | Pittsburgh, PA

International Association of Defense Counsel Annual Meeting

Eric L. Zalud attended.
July 9–12, 2017 | Québec City, Québec Canada

American Trucking Association General Counsel's Forum

Marc S. Blubaugh and Eric L. Zalud presented *Recent Developments in Freight Charge Collection*

Matters & Related Factoring Issues. Michael D. Stovsky and Kal K. Shah presented *Patent and Privacy Law: Updates Impacting Transportation and Logistics*. Matthew J. Selby and Martha J. Payne attended.

July 18, 2017 | Beaver Creek, CO

Women's Food Services Forum Executive Summit

Stephanie S. Penninger attended.
July 24–26, 2017 | Denver, CO

NTTC Summer Membership Meeting

Richard A. Plewacki attended.
July 26–28, 2017 | Bretton Woods, NH

Ohio Conference on Freight

Marc S. Blubaugh presented on "*The Road To Vehicle Automation - Where Are We, When is it Going to Happen and Is It a Good Idea?*"
August 3, 2017 | Columbus, OH

American Bar Association Admiralty and Maritime Law Committee Meeting

Stephanie S. Penninger moderated.
August 10–13, 2017 | New York, NY

2017 TerraLex Global Meeting

Eric L. Zalud attended.
September 6, 2017 | Salt Lake City, UT

Arkansas Trucking Seminar

Matthew J. Selby and Eric L. Zalud attended.
September 12–14, 2017 | Rogers, AR

The FTR Transportation Conference

Mark Avsec presented on 3D printing and transportation and Jonathan Todd presented *Trade in the Trump Era*.
September 12–14, 2017 | Indianapolis, IN

Oregon Trucking Association Management Meeting

Martha Payne attended.
September 13–15, 2017 | Gleneden Beach, OR

Transportation & Logistics Group

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ON THE HORIZON

Intermodal Association of North America Expo

Marc S. Blubaugh is moderating "Legislative and Regulatory Impacts on Intermodal Operations." Martha J. Payne and Stephanie S. Penninger are attending.
September 17–19, 2017 | Long Beach, CA

Ohio Trucking Association Annual Conference

Matthew J. Selby is attending.
September 18–19, 2017 | Dayton, OH

SC&RA Crane & Rigging Workshop

Martha J. Payne is attending.
September 20–22, 2017 | Kansas City, MO

The Council of Supply Chain Management Professionals Annual Conference

Verlyn Suderman is attending.
September 25–27, 2017 | Atlanta, GA

The Annual Conference on Transportation Innovation and Savings

Eric L. Zalud is attending.
September 26, 2017 | Burlington, ON

IWLA Essentials of Warehousing Course

Peter N. Kirsanow is presenting on Labor & Employment Law. Marc S. Blubaugh is presenting *Fundamentals of Transportation Law*.
October 4, 2017 | Minneapolis, MN

Canadian Transport Lawyers Association (CTLA) Annual Conference

Eric L. Zalud is presenting on cross border freight issues. Martha J. Payne is attending.
October 5–7, 2017 | Ottawa, CA

Truckload Carriers Association, Fall Board of Directors Meeting and Committee Meetings

Richard A. Plewacki is attending.
October 10–11, 2017 | National Harbor, MD

The Maritime Law Association of the United States 2017 Fall Meeting and Pacific Admiralty Seminar

Stephanie S. Penninger is presenting on a panel "Cargo Disputes and the Middle-Man: Brokers, Forwarders, and OTIs." Kelly E. Mulrane is attending.
October 18–21, 2017 | Napa Valley, CA

American Trucking Association (ATA) Management Conference & Exhibition (MCE)

Marc S. Blubaugh, Richard A. Plewacki, Matthew J. Selby and Jonathan Todd are attending.
October 21–24, 2017 | Orlando, FL

Logistics and Transportation National Association (LTNA) National Conference 2017

Jonathan Todd is attending.
October 24–26, 2017 | Las Vegas, NV

Capital Roundtable: PE Investing in Transportation, Distribution & Logistics Companies

Peter K. Shelton is moderating a panel. Marc S. Blubaugh, Richard A. Plewacki, Jonathan Todd and Eric L. Zalud are attending.
November 2, 2017 | New York City, NY

Women in Trucking Accelerate! Conference & Expo

Martha J. Payne is attending.
November 6–8, 2017 | Kansas City, MO

Transportation Intermediaries Association (TIA) Webinar

Stephanie S. Penninger is presenting on food safety in transporting food.
November 8, 2017 | Webinar

2017 IWLA Warehouse Legal Practice Symposium

Peter N. Kirsanow is presenting. Verlyn Suderman is attending.
November 9–10, 2017 | Chicago, IL

Transportation Lawyers Association (TLA) 50th Transportation Law Institute (TLI)

Eric L. Zalud is moderating and Marc S. Blubaugh is a panelist on *The Jubilee Panel: A Half-Century of Game Changers that Rocked the Transpo World! And How They Impact Our Practices Today*. Martha J. Payne, Stephanie S. Penninger, Richard A. Plewack and Jonathan Todd are attending.
November 10, 2017 | Norfolk, VA

BKD Transportation Webinar

Stephanie S. Penninger is presenting.
December 7, 2017 | Webinar

Transportation Lawyers Association (TLA) Chicago Regional Seminar

Marc S. Blubaugh, Stephanie S. Penninger, Kelly E. Mulrane, Kevin Capuzzi and Jonathan Todd are attending.
January 19, 2018 | Chicago, IL

SMC3 Jump Start 2018

Martha J. Payne is attending.
January 22–24, 2018 | Atlanta, GA

BG 2018 Strategic Advisors Supply Chain Conference

Marc S. Blubaugh, Peter K. Shelton and Eric L. Zalud are attending.
January 24–26, 2018 | Palm Beach, FL

ABA Midyear and TIPS Admiralty and Maritime Law Committee Meeting

Stephanie S. Penninger is attending.
January 31–February 6, 2018 | Vancouver

Cargo Logistics Canada

Martha J. Payne and Stephanie S. Penninger are attending.
February 6–8, 2018 | Vancouver

27th Biennial Tulane Admiralty Law Institute

Stephanie S. Penninger is attending.
February 28–March 2, 2018 | New Orleans, LA

International Warehouse Logistics Association (IWLA) Convention & Expo

Marc S. Blubaugh is presenting. Chris Lalak and Verlyn Suderman are attending.
March 11–13, 2018 | Tampa, FL

ABA TIPS Admiralty and Maritime Law Committee Meeting

Stephanie S. Penninger will be moderating a maritime law panel.
March 12–14, 2018 | Stamford, CT

Transportation & Logistics Council (TLC) 44th Annual Conference

Martha J. Payne and Eric L. Zalud are attending.
March 19–21, 2018 | Charleston, SC

Truckload Carriers Association 80th Annual Convention

Matthew D. Gurbach is presenting.
March 25–28, 2018 | Kissimmee, FL

Transportation Intermediaries Association (TIA) Capital Ideas Conference and Exhibition

Marc S. Blubaugh, Martha J. Payne, Stephanie S. Penninger and Eric L. Zalud are attending.
April 8–11, 2018 | Palm Desert, CA

Intermodal Operations & Maintenance Business Meeting

Marc S. Blubaugh is presenting.
May 2–4, 2018 | Lombard, IL

Transportation Lawyers Association (TLA) Annual Conference

Stephanie S. Penninger and Eric L. Zalud are presenting. Marc S. Blubaugh and Martha J. Payne are attending.
May 1–6, 2018 | Puerto Rico

ABA TIPS Section Conference and Admiralty and Maritime Law Committee Meeting

Kelly E. Mulrane and Stephanie S. Penninger are attending.
May 1–6, 2018 | Las Vegas, NV

For further information and registration, please contact **MEGAN PAJAKOWSKI**, Client Services Manager, at mpajakowski@beneschlaw.com or (216) 363-4639.