Summer 2019

Best Lawyers BEST LAW FIRMS U.S.News & World Report TRANSPORTATION LAW TIER 1 NATIONAL 2019

InterConnect

Benesch has been ranked in the **First Tier** nationally in **Transportation Law** in the 2019 Edition of U.S. News & World Report/Best Lawyers® "Best Law Firms" ranking.

The U.S. News & World Report/Best Lawyers® "Best Law Firms" rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. For more information on Best Lawyers, please visit www.bestlawyers.com.

A publication of Benesch Friedlander Coplan & Aronoff LLP's Transportation & Logistics Group

Can Transportation Companies Continue to Provide Safe Drivers With All The New Laws Permitting Marijuana Use?

In this issue:

Joseph H. Gross

Margarita S. Krncevic

Employers around the country have a bumpy road to follow as they navigate the ever-changing marijuana laws and regulations. Pre-employment and post-accident drug testing have been challenged in courts in almost every state where medical marijuana has been legalized. These differing state laws create uncertainty for enforcing a drug-free workplace, even for safety-sensitive positions. In the transportation industry, these permissive state laws run directly afoul of federal requirements to keep the public highways and skies safe and drug-free. How can transportation companies manage drivers, pilots and other safety-sensitive workers while adapting to the increasingly legal use of cannabis—medical or recreational?

The Scales Have Tipped in Favor of Some Marijuana Legalization—at Least at the State Level

Thirty-three states have now legalized medical marijuana. Ten have legalized recreational marijuana. More are soon to come. Although employers certainly can continue to enforce their workplace drug-free policies when marijuana use is purely recreational, the road to enforcing their policies against *medical* marijuana use is much more challenging. Indeed, each state's particular law is unique to that state and the first cases decided by that state's courts.

Medical marijuana statutes, even those drafted to protect employers from liability for terminating or disciplining employees who test positive for marijuana, have been successfully challenged. Earlier this year in *Wild v. Carriage Funeral Holdings, Inc.*, a New Jersey court held that a former driver could contest his termination for a positive post-accident drug test under New Jersey's Law Against Discrimination. The court permitted the employee to proceed with his claim even though New Jersey's Compassionate Use Medical Marijuana Act expressly provides: "Nothing in this act shall be construed to require … *an employer to accommodate the medical use of marijuana in any workplace.*"

continued on page 10

Transportation Procurement Trends Toward Integrated Services, and Registration Requirements Abound

Jonathan Todd

Buy-side decisions for transportation and logistics services are increasingly driven by both internal subject matter experts and their corporate procurement teams. The traditional procurement perspective yields certain behaviors such as highly structured competitive bid processes and their timelines. The traditional logistics practice of procuring mode-specific service offerings is also, at least anecdotally, giving way to a trend toward going out to bid for wide-ranging integrated services with multimodal door-to-door results. One essential question when developing or reviewing RFQ responses is whether, in fact, the desired services may be lawfully offered and performed.

Risk to both the service provider and the enterprise shipper is palpable where the services under bid cannot be lawfully performed by the respective provider. Some service providers have built out wide-ranging portfolios of legacy operating authorities held either directly or across the corporate family. Other providers keenly recognize where holding one authority effectively extends available service offerings to other modes, such as the ability of Indirect Air Carriers and Non-Vessel Operating Common Carriers to perform what amounts to incidental transportation brokerage pursuant to 49 USC § 14916. Yet others may offer carefully constructed "shipper's agent" services where permitted by the respective legal structure and diligent observance of operating parameters. Nonetheless, failure to observe basic requirements places service providers at risk for regulatory enforcement and expanded damages along with simple allegations of contract breach and negligence. Shippers conversely risk failing to comply with internal corporate policies, supply chain interruption impacting performance and customer service, and unnecessary negative headlines.

Understanding the basic "ground rules" for offering a wide range of services, including those outside of core offerings, is key to customer satisfaction and risk management in this procurement environment. The following sections identify certain common transportation and logistics services that are often fundamental to integrated services and project logistics: (1) Motor Carrier Brokerage; (2) Ocean Freight Forwarder service; (3) Non-Vessel Operating Common Carrier service; (4) Indirect Air Carrier service; and (5) Customs House Brokerage. The regulated scope of offerings is identified for each as well as its basic registration requirement. Certain other common services where registration is less significant a consideration are also described, such as Intermodal Marketing Companies, Export Forwarding Agents and Warehousing.

Motor Carrier Brokerage

Service Scope - The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement or otherwise as selling, providing or arranging for transportation by motor carrier for compensation. 49 USC § 13102.

Registration Requirement - A person may provide interstate brokerage services as a broker only if that person (1) is registered under, and in compliance with, section 13904 and (2) has satisfied the financial security requirements under section 13906. 49 USC § 14916.

Ocean Freight Forwarder

Service Scope - The term "ocean freight forwarder" means a person that (1) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers and (2) processes the documentation or performs related activities incident to those shipments. Also, the term "ocean transportation intermediary" means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102.

Registration Requirement - A person in the United States may not advertise, hold oneself out or act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person

that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Non-Vessel Operating Common Carrier

Service Scope - The term "non-vessel-operating common carrier" means a common carrier that (1) does not operate the vessels by which the ocean transportation is provided and (2) is a shipper in its relationship with an ocean common carrier. Also, the term "ocean transportation intermediary" means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102.

Registration Requirement - A person in the United States may not advertise, hold oneself out or act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Indirect Air Carrier

Service Scope - The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. 49 USC § 40102. The term "indirect air carrier" (IAC) means any person or entity within the United States not in possession of an FAA air carrier operating certificate, that undertakes to engage indirectly in air transportation of property, and uses for all or any part of such transportation the services of an air carrier. 49 CFR § 1540.5.

Registration Requirement - No indirect air carrier may offer cargo to an aircraft operator operating under a full program or a full all-cargo program specified in part 1544 of this subchapter, or to a foreign air carrier operating under a program under § 1546.101(a), (b), or (e) of this subchapter, unless that indirect air carrier has and carries out an approved security program under this part. 49 CFR § 1548.5.

Customs House Broker

Service Scope - The term "customs broker" means a person who is licensed under this part to transact customs business on behalf of others. The term "customs business" means those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate or drawback of those duties, taxes or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with CBP in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, "customs business" does not include the mere electronic transmission of data received for transmission to CBP and does not include a corporate compliance activity. 19 CFR § 111.1.

Registration Requirement - Except as otherwise provided in paragraph (a)(2) of this section, a person must obtain the license provided for in this part in order to transact customs business as a broker. 19 CFR § 111.2.

Lesser Regulated Services

A broad range of core and ancillary integrated supply chain offerings do not carry any significant registration or operational requirements. Intermodal marketing, for example, may be generally conducted without any operating authority, although most in the space present FMCSA-issued broker permits as evidence of ability to perform. Export forwarding agents likewise have no operating authority-type requirements apart from registering to use services key to that function, such as the Census Bureau's AES Direct. Warehousing services are relatively speaking the least regulated of all. No federal authority is required, although those laws of the state and municipality having jurisdiction will govern together with published industry best practices.

Planning Ahead to the Pitch and Beyond

What is old is new again to some degree, as is often the case. Integrated service offerings and bids take on the character of project logistics where the goal is essentially to seek accomplishment of the desired traffic flows on time and under budget. Planning for responding to, or even developing, an RFQ and subsequent service delivery requires a common understanding of the goals and precisely what services are sought. Those services may take on a project manager character covering a wide range of modes. For service providers this role is consultative in nature and allows performance at its very best, but this role can also challenge the lawfulness of that available range of services and underlying relationships. Paying attention to those boundaries, and buttoning up any areas of weakness, can be essential to successful delivery in this environment.

JONATHAN TODD is a partner with Benesch's Transportation & Logistics Practice Group. He may be reached at jtodd@beneschlaw.com or (216) 363-4658.

What's Trending

Friend us on Facebook:
www.facebook.com/Benesch.Law

Follow us on Twitter:
www.twitter.com/BeneschLaw

Subscribe to our YouTube Channel:
www.youtube.com/user/BeneschVideos

Follow us on LinkedIn:
http://www.linkedin.com/company/benesch-friedlander-coplan-&-aronoff/

Federal Preemption: Whether 'Tis Better To Waive Or Not To Waive

Martha J. Payne

Contracts between shippers and motor carriers, shippers and 3PLs, and 3PLs and motor carriers typically include an "ICCTA waiver"—a statement that the parties expressly waive any and all rights and remedies that each may have under 49 U.S.C. §§ 13101 through 14914 that are contrary to specific provisions of the contract. This language is intended to make the contract enforceable pursuant to 49 U.S.C. § 14101(b)(1). But potential parties to transportation contracts must bear in mind the importance of keeping the ICCTA waiver narrow and in not losing federal preemption in the process.

Federal preemption over state causes of action in regard to cargo claims remains one of the most important principals of transportation law. Its history is rooted in the United States Constitution.

The Constitution provides that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[1] To the extent state laws conflict with federal law, they are preempted and without effect.[2]

In 1906, Congress enacted the Carmack Amendment to the Interstate Commerce Act of 1877.[3] The Carmack Amendment spells out rights, duties, and liabilities of shippers and carriers when it comes to cargo loss or damage. In *Adams Express Co. v. Croninger*,[4] the Supreme Court recognized that the purpose of the Carmack Amendment was to bring uniformity to a chaotic area of varying state law.

The Carmack Amendment, as federal law, preempts all state and common law claims and remedies for cargo damages in interstate commerce. A state or common law claim can survive this preemption only if it is a separate and independently actionable harm that is distinct from the loss of, or the damage to, the goods.[5]

The landmark case regarding federal preemption subsequent to the Interstate Commerce Termination Act of 1995 is *Rini v. United Van Lines, Inc.* After discussing the United States Supreme Court's decision in *Adams Express Co. v. Croninger*, the court of appeals in *Rini* went on to explain: "The preemptive effect of the Carmack Amendment over state law governing damages for the loss or damage of goods has been reiterated by the Supreme Court and is well stablished." … In other words, *Rini* stands for the proposition that the Carmack Amendment impliedly preempts state regulations related to damages for the loss or destruction of property during the course of interstate shipment.[6]

Maintaining federal preemption is critical to the protection of motor carriers in cases involving cargo loss or damage. Here are some recent cases preserving that right.

1. *Secura Insurance Mutual Co. v. Old Dominion Freight Line, Inc.*, 2019 WL 1114887, 2019 U.S. Dist LEXIS 38153 (W.D. Ky. Mar. 11, 2019)

Kiel Thomson purchased custom glass windows from Zeluck Architectural Windows & Doors in Brooklyn, NY. Thomson then contracted with Old Dominion to have those windows shipped to his construction site in Louisville, KY. Upon arrival, the windows were found to be broken and unusable. Thomson filed a claim with his insurer, Secura, who in turn sued Old Dominion as subrogee of Thomson, asserting claims under the Carmack Amendment, common law bailment and breach of contract. Old Dominion filed a motion to dismiss or alternatively for judgment on the pleadings to strike the bailment and breach of contract claims as preempted by the Carmack Amendment.

At issue was the question as to whether or not the bailment and breach of contract claims arose from "separate and independently actionable harms that are distinct from the loss of, or the damage to, the goods" and so as to avoid preemption under the Carmack Amendment.

The court concluded that the broad preemptive scope of the Carmack Amendment encompasses the bailment and breach of contract claims. Claims survive preemption only when they are based on "separate and independently actionable harms that are distinct from the loss of, or the damage to, the goods." Because the bailment and breach of contract claims arise from the same incident as the Carmack Amendment claim, that is, the alleged damage to the custom glass windows, the claims are preempted by the Carmack Amendment. Therefore, Old Dominion's motion for judgment on the pleadings was granted.

2. *Val's Auto Sales & Repair, LLC v. Garcia*, 367 F.Supp.3d 613 (E.D. Ky. Feb. 4, 2019)

Val's Auto Sales filed suit in state court against carrier Ezee Trans and its employee driver, Roberto Garcia, alleging negligence, vicarious liability and negligent entrustment for damage to a Mercedes-Benz Sprinter Van caused by a collision with a railroad bridge. Val's later added insurance company Progressive Northern Insurance Company as a defendant, asserting an Unfair Claims Settlement Practices Act (USCPA) violation. Defendants Garcia and Progressive removed the case to federal court under both diversity and federal question jurisdictions. Ezee Trans and Garcia then filed a motion to dismiss, arguing that plaintiff's claims against both the motor carrier and its employee driver were preempted by the Carmack Amendment.

Val's moved to remand, asserting that neither Progressive nor Garcia, the only removing parties, had a right to remove; that neither could establish the amount in controversy requirement for diversity jurisdiction; and that Ezee Trans missed its deadline to participate in removal.

At issue were two questions: (1) Does the Carmack Amendment preempt state law claims for cargo damage against both the motor carrier and its driver? Was removal by the driver and the motor carrier's insurer proper?

As for the first question, the court noted that, while Val's is correct that there exist state law claims that are not preempted by the Carmack Amendment (claims unrelated to the loss of, or damage to, goods in interstate commerce), Val's claims that Garcia negligently operated the vehicle carrying the van and that Ezee Trans negligently entrusted Garcia with the vehicle are not distinct from the damage to the van. Such claims are therefore preempted. Moreover, Garcia cannot be held liable because he is not a carrier, and the Carmack Amendment preempts claims against individual employees who are acting within the scope of their employment when the goods are lost or damaged. The driver was thus dismissed from the case, and Val's was granted leave to file an amended complaint to state a Carmack count only against Ezee Trans.

The court further ruled that plaintiff's objections to removal were misguided. The court explained that, upon a conclusion that one claim is completely preempted under a federal statute, there is no need for additional examination for other claims' removability. With plaintiff's state law causes of action against the driver and the motor carrier completely preempted by the Carmack Amendment, the court held that removal jurisdiction was established for the entire case and did not see any need to determine whether the USCPA claim against the insurance company also arose under federal law or whether the driver or the insurance company established diversity jurisdiction.

3. *Crypto Crane, LLC v. FedEx Ground Package Systems, Inc.*, 2018 WL 6816104 (E.D. Mich. Nov. 7, 2018)

Crypto Crane LLC sold $124,000 worth of cryptocurrency mining equipment to a customer in Canada and hired FedEx Ground Package Systems, Inc. (FedEx) to transport the shipment. The consignee signed as receiving the shipment, but alleged it was never delivered. In response, Crypto Crane contacted FedEx customer service, where a customer service representative allegedly instructed Crypto Crane to reimburse its customer the total purchase price of the order and to submit a claim to FedEx. Crypto Crane refunded its customer $124,000 and filed a claim with FedEx. FedEx, relying on its limitation of liability, offered Crypto Crane $1,985.

Crypto Crane sued FedEx, claiming that it was entitled to recover the full value of the order because the customer service representative had created an oral contract. FedEx filed a motion to dismiss under Rule 12(b)(6), asserting that the Carmack Amendment preempts breach of contract and promissory estoppel claims.

Citing *Rini v. United Van Lines, Inc.*,[7] the court held that the Carmack Amendment preempts state law claims including "all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims."

Because Crypto Crane's claims arouse out of delivery of goods by FedEx, they are preempted by the Carmack Amendment and FedEx's motion to dismiss was granted.

4. *Security USA Services, Inc. v. United Parcel Service, Inc.*, ___ F.Supp.3d ___, 2019 WL 1051017 (D. N.M. Mar. 5, 2019)

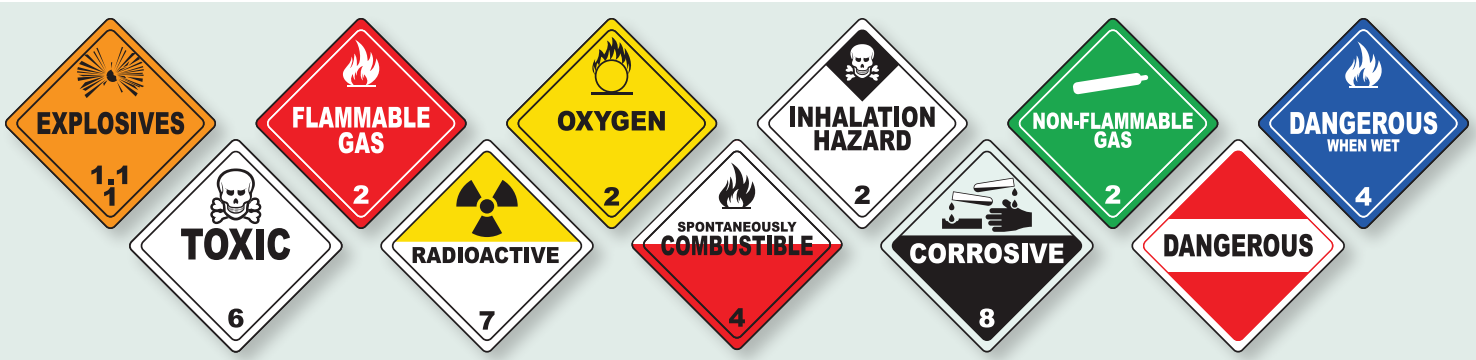
Security USA contracted with UPS to transport two boxes to a security convention in Dallas. Security USA selected the three-day delivery option on the shipping contract so that the packages would arrive in Dallas prior to the convention. The combined total value of the shipped items was $13,500. Only one of the packages arrived, and it was damaged. Security USA repurchased the contents of the missing package, rebuilt a missing computer server, and paid an employee to drive those items to Dallas, paying for that employee's travel and lodging costs over two days. When the missing package was found and delivered, it was open, mangled and vandalized.

Security USA sued UPS in New Mexico state court for breach of contract and bad faith claim denial. After UPS removed the case to federal court, Security USA amended its complaint to state a Carmack claim, but continued to maintain its common-law bad-faith claim, eventually seeking leave of court to add claims for violations of the New Mexico Unfair Practices statute. UPS moved to dismiss, arguing Carmack preemption, FAAAA[8] preemption and preemption under federal common law.

The court wrote a detailed analysis of Carmack preemption, holding that the broad sweep of Carmack preemption barred Security USA's claim for common-law bad faith. In denying Security USA's motion to add a claim under New Mexico's Unfair Practices Act, the court cited *Rini, Gordon*[9], and *Margetson v. United Van Lines*[10] in ruling that the state statutory claim was preempted.

These latest cases reaffirm the importance of federal preemption in regard to cargo claims. It is valuable for shippers, 3PLs and motor carriers. Everyone should be watchful to ensure ICCTA

continued on page 10



Hazardous Materials Regulations Compliance: Jail Time May Be Waiting

Jonathan Todd

Kristopher Chandler

The transportation of hazardous materials (hazmat) is an subject that holds significant safety implications for carriers, shippers, intermediaries and the general public. Compliance programs and their requirements vary widely across roles, modes and commodities, yet at the core of all responsible programs are those dedicated professionals charged with managing the hazardous materials supply chain. Today all professionals that influence hazardous materials compliance must remain ever vigilant to ensure that shipping documents are correctly produced and maintained, and hazmat shipments are labeled, packaged and transported in full compliance.

The cost of failure for compliance with the Hazardous Materials Regulations (HMR) has risen dramatically in recent years as regulatory enforcement agencies, and even courts, look to penalize those deemed to be in violation of applicable laws and regulations. The potential enforcement actions against a company can have a profound impact on business operations despite the cost of compliance. In addition to supply chain interruption, individuals that commit violations can be exposed to various criminal penalties that include lengthy jail time and millions of dollars in fines. This article explores those basic HMR compliance obligations and the steep cost of self-blinding to regulatory violations that impact hazardous materials safety.

The HMR are found at 49 CFR Parts 171 to 180. They are applicable to the transportation of hazardous materials in commerce and: (1) their offering to interstate, intrastate and foreign carriers by rail car, aircraft, motor vehicle and vessel; (2) the representation that hazmat is present in a package, container, rail car, aircraft, motor vehicle or vessel; (3) the manufacture, fabrication, marking, maintenance, reconditioning, repairing or testing of a package or container which is represented, marked, certified or sold for use in the transportation of hazardous materials. See 49 CFR 171.1(a).

HMR compliance activities range from registration with the DOT's Pipeline and Hazardous Materials Administration (PHMSA) to required training to ensuring that hazmats are "properly classed, described, packaged, marked, labeled, and in condition for shipment" 49 CFR 171.2(a). Responsibilities vary depending upon a party's role in the transportation transaction. Shipper obligations include: determining whether a material is a "hazardous material," determining the proper shipping name of the hazmat, properly classifying the hazmat, hazard warning labeling, packaging, marking, and employee training.[1] Carrier obligations include: hazmat shipping papers, placarding and marking vehicles, blocking and bracing hazmat, incident reporting, and employee training.[2] In essence, compliance through the supply chain requires both shippers and carriers bearing their fair share of load in the interest of public safety.

A number of hazardous materials incidents over recent years have resulted in truly outstanding consequences that should give pause to all those involved in HMR compliance. On November 9, 2018, the U.S. Attorney's Office announced that Donald E Wood, Jr., and his trucking company, Woody's Trucking LLC were sentenced to multiple charges related to violations of the HMR. According to the U.S. Attorney's Office, Woody's shipments were falsely identified as not containing hazardous materials when in fact they contained drip gas. These fraudulent activities directly resulted in an explosion at a processing facility. Mr. Wood received 12 months in prison and three years of supervised release in addition to $1.29 million in penalties. In another instance, an Ohio company was ordered to pay $1.5 million in fines to the U.S. EPA, and its CEO received jail time.[3] The violations occurred during transportation of several million pounds of hazardous waste between cities in Missouri. The transportation activities wantonly disregarded both state and federal laws.

Companies, their principals and employees can endure significant financial and reputational harm from both egregious violations of the HMR as well as those even slight violations that may contribute to serious injuries to persons and property. Compliance is the responsibility of all participants in the hazardous materials supply chain, because an error at tender may impact safe transportation and an error during transportation may impact safe receipt. Implementation of top-down compliance programs within enterprises, and awareness of risks during supplier and customer management, is essential to mitigating all forms of adverse consequence to which those in the hazardous materials supply chain are exposed.

Acceptance of one's responsibility for HMR compliance is a must, but an array of resources and outside advisors often contribute to ensuring the efficacy of those compliance programs. Assessments of hazardous-materials-related activities, extant training programs and materials, compliance organization structure, and violation or incident history are often the first steps to launching a new program or assessing gaps for further improvement. While those efforts are ultimately cost saving in their nature, it always remains the possibility that technical errors and accidents will happen causing investigations and regulatory enforcement action. Mitigation and strong corrective actions are often available in those instances to limit monetary exposure and escalation, and to appreciably reduce recurrence.

JONATHAN TODD is a partner with the Transportation & Logistics Practice Group at Benesch, Friedlander, Coplan & Aronoff. He is certified for surface transportation of hazardous materials and may be reached at (216) 363-4658 or jtodd@beneschlaw.com. **KRISTOPHER CHANDLER** is an associate with the firm and may be reached at (614) 223-9377 or kchandler@beneschlaw.com.

[1] https://www.fmcsa.dot.gov/regulations/hazardous-materials/how-comply-federal-hazardous-materials-regulations

[2] Id.

[3] https://www.justice.gov/usao-edmo/pr/several-individuals-and-corporation-plead-guilty-shipping-hazardous-waste; see also https://www.stltoday.com/news/local/crime-and-courts/ohio-company-stored-million-pounds-of-hazardous-waste-in-franklin/article_64dd9105-6411-557d-ad03-dfcae70dcfa8.html

Get to Know Megan Parsons

Megan Parsons Joins Benesch's Transportation & Logistics Practice Group

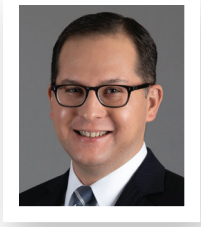
As Benesch continues to add to its roster of top-notch legal talent, the firm announces the hiring of attorney Megan Parsons, who joins the firm as Of Counsel.

Megan has broad experience in transportation and logistics, general corporate law, capital raising and commercial transactions. She has operated as general counsel for startup and growth stage businesses, including a nationally ranked, top North American 3PL, providing counsel on all aspects of business and transportation law, from employment and corporate governance to regulatory analysis, insurance, transportation-related service agreements and freight claims.

Megan received her J.D., *magna cum laude*, from the University of Tennessee College of Law in 2007 and her B.S. in Political Science, *magna cum laude*, from East Tennessee State University in 2003.

Pass this copy of *InterConnect* on to a colleague, or email **MEGAN THOMAS** at mthomas@beneschlaw.com to add someone to the mailing list.

Captive Insurance Companies for the Transportation Industry: A Quick Q&A With Those in the Know


Jonathan Todd


Matthew Selby


Philip Denny


Jeremy Speckman

Captive insurance companies are an elusive risk management strategy that, for many, is so poorly understood it is difficult to even begin consideration. Those who happen to fall into discussions of captives often bounce between painting quaint images of financial right-sizing and flexibility with antiquated jargon and reference to regulation. It is time to set the record straight by gaining actionable feedback from those who know.

The value and pitfalls of captive insurance companies look different from any angle. The legal perspective lends observations of global risk and administrative burden. The accounting perspective sheds light on financial advantages and models for structuring programs. The insurance market perspective indicates the relative benefit as compared to other risk management strategies and paths forward.

As the old joke goes, an attorney (Matt Selby), an accountant (Phil Denny), and an insurance broker (Jeremy Speckman) walk into a bar to discuss captive insurance in the transportation industry. What follows is the best summary of captive insurance strategies we have heard in quite some time.

It is often said that captive insurance programs are not for every motor carrier—what is the "sweet spot" for determining whether captives are a good fit?

Matt Selby: Captives are neither for everyone nor a suitable substitute for every type of insurance that a transportation company may need in its portfolio. However, a captive can be an attractive option for a company that is looking for more stability in rates or to maximize the lawful potential and creativity of tax planning. A key challenge when considering captives can be the on-hand cash and cash flow required to absorb the ongoing collateral requirements.

How is it that forming a captive insurance company is so financially attractive to some motor carriers?

Philip Denny: A captive insurance company can be an effective way to help motor carriers self-insure certain risk. Captives also offer a creative solution for addressing a range of risks for which coverage may not be available in the commercial insurance market. These risks may include items such as:

Deductible Reimbursement for **(1) Vehicle Liability**, **(2) Vehicle Physical Damage**, and **(3) Cargo** – Reimbursements for losses that are considered to be within the deductible or self-insured retention of the insured's commercially purchased insurance policies of these types.

(4) Collection Risk – Accounts receivable that are unable to be collected, including interest and expenses arising from the inability to collect after exhaustion of all remedies, such as use of a collection agency and litigation.

What are the key factors to consider when a motor carrier considers risk and reward based on total insurance spend and the availability of captive insurance programs?

Jeremy Speckman: The purchasing decision can turn on a wide range of factors including suitability of the captive model, total spend, and total potential recovery in the event of a claim. A member-owned group captive insurance company is particularly ideal for organizations that share such qualities as: (1) long-term financial strength and stability; (2) management teams committed to safety, with solid safety programs in place; (3) loss histories that are better than average for their respective industries; and (4) minimum casualty premiums in excess of $100,000.

Perhaps the most important threshold consideration, however, is that group captive members are often subject to premiums in a range that can be prohibitive for certain motor carriers. Annual premiums of at least $250,000 are the norm. It is not uncommon to see $1-$5 million in annual premiums, and those can even reach or exceed $25 million.

What types of captives are available and what are their basic characteristics?

Philip Denny: There are essentially two types of captives available, A and B. All property and casualty insurance companies are either taxed under IRC 831(a) or IRC 831(b). IRC 831(a) captives are taxed on taxable income after a deduction for reserves. Qualifying IRC 831(b) captives are taxed *only* on their taxable investment income.

We see a great deal of interest in "B" captives due their tax advantages. The basic requirements to qualify as an IRC 831(b) captive are: (1) the insurer must distribute risk among its policyholders; (2) the arrangement must involve insurable risk; (3) the arrangement must shift risk to the insurer; and (4) the arrangement must be insurance in the commonly accepted sense.

Technical requirements also apply when qualifying for "B" captive status: (1) premiums for the taxable year 2019 cannot exceed $2,300,000; (2) such company meets the applicable diversification requirements; and (3) such company elects the application for IRC 831(b) for the taxable year.

Is there any meaningful difference between captive insurance and traditional insurance in the event of high-exposure casualty incidents?

Matt Selby: One key difference in the event of a major catastrophic loss is that the captive will have reinsurance to cover a large of portion of the loss. These types of 'one-time' events do not usually 'count' against a member for the full amount of the loss and the amount that is covered by reinsurance (commonly an amount in excess of $250K) is not typically shared among the members. Just as with traditional insurance, the captive will still only cover the amount of the policy as decided by the members (for example, $2 million).

How does captive insurance perform differently compared to traditional insurance?

Jeremy Speckman: It is important to bear in mind that conventional insurance pricing rarely reflects the actual cost of the protection you are purchasing as the insured. This cost often includes markups to cover the insurer's acquisition costs, marketing expenses, high commissions, administration and overhead. This cost structure is specifically designed to deliver profit to the insurer's bottom line. In a captive, the goal is to minimize those costs and enhance your bottom line. It is possible to build or identify captive solutions that are closely tailored to your risk needs and thereby eliminate unnecessary cost.

What additional accounting and financial requirements are required to maintain a captive insurance company?

Philip Denny: The specific location of a company can have the greatest impact on other specific requirements for maintaining a captive insurance company. The location of domicile will dictate all applicable financial and tax filing requirements, which can differ by location. These variances can include financial filings for insurance regulations, tax returns, and potentially the frequency of a financial audit.

What creative options are available for those looking to enter the captive insurance market?

Jeremy Speckman: As a member of a group captive, you are far less susceptible to the ever-increasing and unpredictable costs imposed by conventional insurance providers year after year. Some of the other benefits enjoyed by group captive members include:

(1) Better services and better management. A captive can purchase strategic insurance products, such as specific and aggregate excess reinsurance coverage, that allow each captive member to manage predictable losses while transferring potential catastrophic losses. For captives supported by third-party service companies, such as Captive Resources, this leads to improved loss control and greater awareness of the factors that commonly give rise to losses, so that they may be reduced and often prevented in the future.

(2) Enhanced profit potential. As a member of a group captive, safety pays. You are rewarded for effective risk management by receiving dividends that are directly related to loss performance, while investment income accumulates to your benefit. That's more money in your pocket to invest in whatever way your business needs it most.

(3) Long-term control of your insurance outlook. Group captives overseen by third-party servicers afford their members the ability to customize insurance programs that meet their specific needs, so that you're not paying for coverage you don't require. Also, as a captive grows, so does its risk tolerance and ability to negotiate favorably with reinsurers.

What are the administrative burdens and other potential pain points associated with managing a captive insurance company?

Matt Selby: One of the major pitfalls of the captive structure is the potential for an unintended stranglehold on collateral (whether cash or a Letter of Credit). Most captives will require a certain percentage of a member's frequency fund for three rolling years. Although this helps to minimize the risk of nonpayment by another member, it can certainly strain a business where margins are already tight—as is often the case in the transportation and logistics sector. Sometimes the practical effect of this unintended consequence can offset the benefit of a lower rate than you would receive in the traditional insurance market.

JONATHAN TODD is a Partner with Benesch's Transportation and Logistics Practice. He may be reached at (216) 363-4658 or jtodd@beneschlaw.com.

MATT SELBY is Of Counsel with Benesch's Transportation and Logistics Practice. He may be reached at (216)363-4458 or mselby@beneschlaw.com.

PHILIP DENNY is a Principal with HBK CPAs & Consultants. He may be reached at (330) 758-8613 or pdenny@hbkcpa.com.

JEREMY SPECKMAN is a Risk Management Advisor with USI Insurance Services. He may be reached at (216) 777-2821 or Jeremy.Speckman@usi.com.

Can Transportation Companies Continue to Provide Safe Drivers With All The New Laws Permitting Marijuana Use?

continued from page 1

In another 2019 case, an Arizona court, in *Whitmire v. Walmart*, found in favor of a former employee who was terminated for a positive post-accident drug test resulting from her legal medical marijuana use. Ms. Whitmire's concentrations for marijuana metabolites were, in fact, at the highest level that a urine test could detect. Walmart contended that she was in a safety-sensitive position and had violated its policy prohibiting employees from reporting to work under the influence of medical marijuana. Ms. Whitmire had sued under several statues, including the Arizona Medical Marijuana Act, which prohibits employers from discriminating against a "patient" in hiring, termination, or other terms and conditions of employment based on the patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana at work during business hours.

These two cases continue the trend of other recent court decisions in states like Delaware (2018), Connecticut (2017), Massachusetts (2017) and Rhode Island (2017), where courts have expanded workplace protections for medical marijuana users. However, employers that are subject to DOT Drug and Alcohol Testing regulations must continue to comply with those regulations because marijuana is still listed in Schedule 1 of the Controlled Substances Act.

The DOT has made it clear that the regulations in 49 C.F.R. Part 40 do not authorize medical marijuana under a state law to be a valid explanation for a transportation employee's positive drug test result. Indeed, Medical Review Officers are prohibited from verifying a test as negative based on a physician's recommendation that the employee use a drug listed under Schedule 1. Commercial Drivers' License holders need to be aware that DOT drug tests require laboratory testing for marijuana, even if it is considered legal in their state of residence. The DOT's stance is based on its concern for providing a safe transportation system for the traveling public. According to the DOT's official blog, the number of drivers killed in crashes who tested positive for marijuana doubled from 2007 to 2015.

Under the Federal Motor Carrier Safety Regulations, a person is disqualified from physically driving a commercial motor vehicle if the person uses any Schedule 1 drug, including marijuana. Moreover, the Regulations prohibit a driver from possessing, or being under the influence of, any Schedule 1 drug while on duty. Similarly, motor carriers are prohibited from permitting drivers to be on duty if they possess, are under the influence of, or use marijuana, including a mixture or preparation containing marijuana. Keep in mind that DOT-regulated trucks and drivers are also legally barred from carrying marijuana and marijuana products.

Federal Aviation Administration regulations also prohibit persons from performing safety-sensitive functions for a certificate holder while having a prohibited drug, including marijuana and marijuana metabolites, in their system. Pilots who have a verified positive drug test for marijuana on a required DOT/FAA test will be disqualified from holding an FAA-issued medical certificate.

Are Employers In a Holding Pattern?

Until the federal government changes the classification for marijuana, employers, in general, will have to navigate both state and federal workplace laws when determining whether, and when, to drug test employees for marijuana. Transportation companies should likewise keep abreast of the changing views on the use of medical marijuana, but still abide by their federally mandated drug testing requirements. In states where medical marijuana is legal, they should reconsider whether their zero-tolerance policies should apply to non-safety-sensitive positions. They should also consider tailoring their post-accident testing to situations where there is reasonable suspicion of actual impairment. Their HR or safety managers should train their other managers and supervisors on how to determine when an employee or driver appears impaired. They should also ensure that their safety-sensitive positions are properly designated.

Keep in mind that proving actual marijuana impairment will continue to be a challenge given currently available testing methods. Medical marijuana users who ingest it at night, for example, may still have marijuana metabolites or components in their system the following morning when they report to work, but may not be impaired. Presently, there are no guidelines for private, non-DOT employers to follow in conclusively establishing impairment levels for medical marijuana.

JOSEPH N. GROSS and **MARGARITA S. KRNCEVIC** are attorneys in the firm's Labor & Employment Practice Group. Joe can be reached at jgross@beneschlaw.com or (216) 363-4163. Margarita can be reached at mkrncevic@beneschlaw.com or (216) 363-6285.

Federal Preemption: Whether 'Tis Better To Waive Or Not To Waive

continued from page 5

waiver language in contracts is narrow and does not forfeit the parties' critical protections under Carmack, FAAAA and federal common law.

For more information, please contact **MARTHA J. PAYNE** at mpayne@beneschlaw.com or (541) 764-2859.

[1] U.S. CONST. art. VI, cl. 2.

[2] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008)

[3] Carmack is currently codified at 49 U.S.C. §14706.

[4] Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913)

[5] Gordon v. United Van Lines, Inc., 130 F.3d 282, 289 &7th Cir. 1997).

[6] It is accepted … that the principal purpose of the Carmack Amendment was to achieve national uniformity in the liability assigned to carriers. *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 504 (1st Cir. 1997)

[7] *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 504 (1st Cir. 1997)

[8] Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 41713(b)(4)(A)

[9] *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997)

[10] *Margetson v. United Van Lines, Inc.*, 785 F.Supp 17 (D.N.M. 1991)

Recent Events

National Tank Truck Carriers' (NTTC's) 71st Annual Conference & Exhibits
Matthew J. Selby attended.
April 23–25, 2019 | Las Vegas, NV

Finance Association (ELFA)
Jonathan Todd presented *Emerging Asset Classes.*
April 28, 2019 | San Diego, CA

Intermodal Association of North America's Operations and Maintenance Business Meeting
Marc Blubaugh and **Verlyn Suderman** attended.
April 30–May 2 | Lombard, IL

2019 Transportation Lawyers Association's (TLA's) Annual Conference
Marc S. Blubaugh presented *Blockchain Unleashed.* **Eric L. Zalud** presented *2000 Miles: Through Multimodal.* **Martha J. Payne** and **Jonathan R. Todd** attended.
May 1–4, 2019 | Austin, TX

American Trucking Association (ATA) Management Meeting
Matthew J. Selby attended.
May 5, 2019 | Scottsdale, AZ

Customized Logistics and Delivery Association (CLDA) Final Mile Forum & Expo
Matthew J. Selby attended.
May 8–10, 2019 | Phoenix, AZ

Columbus Logistics Conference
Marc S. Blubaugh presented *Legal Update 2019: Key Transportation and Logistics Court Decisions and Regulatory Activity.*
May 16, 2019 | Columbus, OH

National Association of District Export Councils (NADEC) Annual Export Conference
Jonathan Todd attended.
May 21–22, 2019 | Arlington, VA

Transportation Lawyers Association (TLA) Webinar Series
Eric L. Zalud presented *The Sun Never Sets on Broker Liability (Unfortunately).*
May 30, 2019 | Webinar

Conference of Freight Counsel
Martha J. Payne and Eric L. Zalud attended.
June 9–10, 2019 | Greenville, SC

Eye for Transport's 3PL Summit
Marc S. Blubaugh and **Eric L. Zalud** attended.
June 10–12, 2019 | Atlanta, GA

Association of Transportation Law Professionals' 90th Annual Meeting
Jonathan Todd was a panelist in "B2C…And Back Again—Reverse Logistics."
June 11, 2019 | Washington, DC

Transportation Lawyers Association's (TLA's) Executive Committee and Summer Retreat
Marc S. Blubaugh and **Eric L. Zalud** attended.
June 12–13, 2019 | Scottsdale, AZ

American Trucking Association (ATA) Legal Forum
Martha J. Payne presented, *FREIGHT CLAIMS, LIABILITY AND RISK MANAGEMENT: The Importance of Federal Preemption Regarding Cargo Claims.* **Matthew J. Selby** presented *Fatigue: Science, Case Law and Compliance.* **Elizabeth R. Emanuel** and **Megan J. Parsons** attended.
July 14–17, 2019 | Rancho Bernardo, CA

National Tank Truck Carriers' (NTTC's) Summer Membership & Board Meeting
David A. Ferris attended.
July 23–26, 2019 | White Sulfur Springs, WV

On The Horizon

International Warehouse Logistics Association's (IWLA's) Annual Safety & Risk Program
Marc S. Blubaugh is presenting *Safety and Risk Management.*
September 12, 2019 | Columbus, OH

Intermodal Association of North America (IANA) Intermodal Expo 2019
Marc S. Blubaugh and **Martha J. Payne** are attending.
September 15–18, 2019 | Long Beach, CA

Council of Supply Chain Management Professionals EDGE Conference
Marc S. Blubaugh is presenting *Transportation Regulatory Developments: An Overview from FMCSA.* **Verlyn Suderman** is attending as Track Chair for this conference.
September 16, 2019 | Anaheim, CA

Ohio Trucking Association and Ohio Association of Movers—2019 Annual Conference
David A. Ferris and **Matthew J. Selby** are presenting *Art of Negotiating.*
September 16–17, 2019 | Cleveland, OH

2019 Association for Supply Chain Management (ASCM) Conference
Jonathan R. Todd is presenting *Keys to Effective Global Logistics Outsourcing in 2019.*
September 16–18, 2019 | Las Vegas, NV

Arkansas Trucking Seminar
Eric L. Zalud and **David A. Ferris** are attending.
September 18–19, 2019 | Rogers, AK

The 2019 Annual Conference on Transportation Innovation and Savings
Eric L. Zalud is attending.
September 19, 2019 | Toronto, Ontario

Canadian Transport Lawyers Association (CTLA) - AGM & Educational Conference 2019
Michael J. Mozes is presenting on M&A in the logistics space. **Jonathan R. Todd** is presenting on cabotage regulation. **Eric L. Zalud** and **Martha J. Payne** are attending.
September 19–21, 2019 | Winnipeg, Canada

Oregon Trucking Association Annual Conference
Martha J. Payne is attending.
September 25–27, 2019 | Gleneden Beach, OR

Women in Trucking Conference
Margo Wolf O'Donnell is presenting *Challenges in Employment Law and Gender Issues* and **Martha J. Payne** is also attending.
September 30, 2019 | Dallas, TX

International Warehousing Logistics Association's (IWLA's) Essentials Course
Marc S. Blubaugh is presenting *Fundamentals of Transportation Law.*
October 2, 2019 | Jacksonville, FL

American Trucking Association (ATA) Management Conference & Exhibition
Marc S. Blubaugh, Jonathan R. Todd and **Matthew J. Selby** are attending.
October 5–9, 2019 | San Diego, CA

The Truck Industry Defense Association (TIDA) 27th Annual Seminar
Eric L. Zalud is attending.
October 23-25, 2019 | Tampa, FL

The Logistics and Transportation National Association (LTNA) National Conference
Eric L. Zalud is attending.
October 23–25, 2019 | Nashville, TN

2019 Transportation Law Institute
Marc S. Blubaugh, Martha J. Payne, Jonathan R. Todd and **Eric L. Zalud** are attending.
November 8, 2019 | Minneapolis, MN

Transportation Intermediaries Association's (TIA's) 3PL Technovations Conference
Eric L. Zalud is presenting on M&A in the logistics sector. **Martha J. Payne** is attending.
November 12–13, 2019 | Amelia Island, Florida

Capital Roundtable: PE Investing in Transportation & Logistics Companies
Marc S. Blubaugh, Jonathan R. Todd, Peter K. Shelton and **Eric L. Zalud** are attending.
November 21, 2019 | New York, NY

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

Johnson and Moss Earn Certified Information Privacy Professional Credential

Whitney Johnson

Kate Watson Moss

Benesch is pleased to share that associates Whitney Johnson and Kate Watson Moss have earned the ANSI/ISO accredited Certified Information Privacy Professional/US (CIPP/US) credential through the International Association of Privacy Professionals (IAPP).

The CIPP is the global industry standard for professionals working in the field of privacy. Achieving a CIPP/US credential demonstrates a strong foundation in U.S. private-sector privacy laws and regulations and understanding of the legal requirements for the responsible transfer of sensitive personal data to and from the U.S., the EU and other jurisdictions.

As transportation and logistics businesses more frequently turn to technology when interacting with customers, connecting employees, and transmitting and storing sensitive information globally, Benesch acts as a valuable partner that enables businesses to address the legal aspects of data security and privacy to manage risk to their stakeholders.

"Rather than go out and try to hire CIPPs, we strategized that it would be better to internally develop people already at the firm," said Michael Stovsky, Chair of Benesch's Intellectual Property/3iP Practice Group. "Whitney and Kate have shown excellent initiative and aptitude in receiving this credential and we are very happy to add two more CIPPs to our roster."

Whitney centers her practice on commercial litigation, intellectual property disputes, transportation and logistics and white collar defense. Her commercial litigation practice is diverse—including breach of contract, product liability, trade secret, and business torts. Whitney has experience handling all aspects of the litigation process, including factual investigation, motion practice, written and oral discovery, and pre-trial preparations.

Kate focuses her practice on complex commercial litigation, class action litigation, transportation and logistics, securities litigation and corporate internal investigations. She has been involved in litigation in state and federal courts throughout the United States and has represented Fortune 500 companies in confidential internal investigations.

For more information about the Transportation & Logistics Group, please contact any of the following:

ERIC L. ZALUD, Co-Chair | (216) 363-4178
ezalud@beneschlaw.com

MARC S. BLUBAUGH, Co-Chair | (614) 223-9382
mblubaugh@beneschlaw.com

MICHAEL J. BARRIE | (302) 442-7068
mbarrie@beneschlaw.com

DAWN M. BEERY | (312) 212-4968
dbeery@beneschlaw.com

KEVIN M. CAPUZZI | (302) 442-7063
kcapuzzi@beneschlaw.com

KRISTOPHER J. CHANDLER | (614) 223-9377
kchandler@beneschlaw.com

DAVID A. FERRIS | (614) 223-9341
dferris@beneschlaw.com

JOHN C. GENTILE | (302) 442-7071
jgentile@beneschlaw.com

JOSEPH N. GROSS | (216) 363-4163
jgross@beneschlaw.com

MATTHEW D. GURBACH | (216) 363-4413
mgurbach@beneschlaw.com

JENNIFER R. HOOVER | (302) 442-7006
jhoover@beneschlaw.com

TREVOR J. ILLES | (312) 212-4945
tilles@beneschlaw.com

WHITNEY JOHNSON | (628) 600-2239
wjohnson@beneschlaw.com

THOMAS B. KERN | (614) 223-9369
tkern@beneschlaw.com

PETER N. KIRSANOW | (216) 363-4481
pkirsanow@beneschlaw.com

DAVID M. KRUEGER | (216) 363-4683
dkrueger@beneschlaw.com

CHARLES B. LEUIN | (312) 624-6344
cleuin@beneschlaw.com

JENNIFER A. MILLER | (628) 216-2241
jamiller@beneschlaw.com

MICHAEL J. MOZES | (614) 223-9376
mmozes@beneschlaw.com

KELLY E. MULRANE | (614) 223-9318
kmulrane@beneschlaw.com

MARGO WOLF O'DONNELL | (312) 212-4982
modonnell@beneschlaw.com

STEVEN A. OLDHAM | (614) 223-9374
soldham@beneschlaw.com

LIANZHONG PAN | (011-8621) 3222-0388
lpan@beneschlaw.com

MEGAN J. PARSONS | (216) 363-6177
mparsons@beneschlaw.com

MARTHA J. PAYNE | (541) 764-2859
mpayne@beneschlaw.com

JOEL R. PENTZ | (216) 363-4618
jpentz@beneschlaw.com

RICHARD A. PLEWACKI | (216) 363-4159
rplewacki@beneschlaw.com

JULIE M. PRICE | (216) 363-4689
jprice@beneschlaw.com

MATTHEW (Matt) J. SELBY | (216) 363-4458
mselby@beneschlaw.com

PETER K. SHELTON | (216) 363-4169
pshelton@beneschlaw.com

VERLYN SUDERMAN | (312) 212-4962
vsuderman@beneschlaw.com

CLARE TAFT | (216) 363-4435
ctaft@beneschlaw.com

JONATHAN TODD | (216) 363-4658
jtodd@beneschlaw.com