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Last Mile Transportation Myths Debunked—and a Path Forward

In this issue:

Jonathan R. Todd

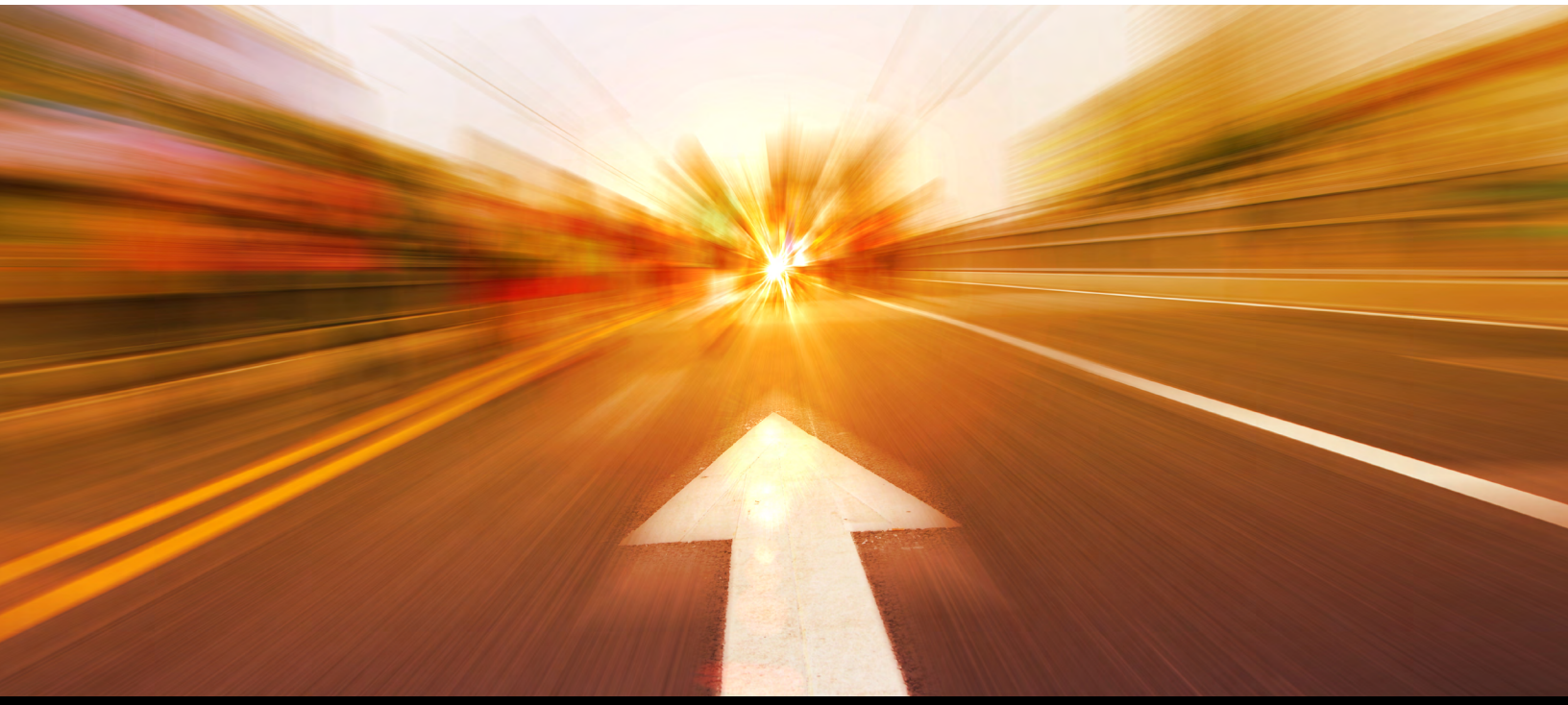
One of the most important stories in the transportation space over the last few years has been the explosive growth of last mile residential delivery. The global pandemic has only further fueled demand for this localized and often tech-driven service. New ventures have flooded this space previously occupied by traditional couriers, parcel carriers, and household goods movers.

A challenge that often exists for the strategic growth of new and novel service offerings is the archaic transportation regulatory environment. The current system has as its foundation the commerce clause of the U.S. Constitution and a regulatory understanding that transportation is a utility and should be regulated as such, with a turn-of-the-last-century view on that proposition. Even after deregulation, the resulting regulatory landscape remains largely constructed for application to the over-the-road motor carrier space. Simply put, it is no shock to anyone that the speed of business and the speed of government are often out of step with one another.

The last mile space, and the business strategies developing to meet that market, are often driven by certain myths that—while logical—don't align with the legal reality. The practical question that emerges then is how we may go about navigating the maze of government requirements while still advancing our businesses. This challenge is as confusing for sales and operations leads as it often appears to be for regulators themselves.

Our team works every day to bring clarity to the dizzying array of regulatory obligations by asking just a few targeted questions: (1) What is the Nature of Commerce?; (2) What is the Nature of Service?; and (3) What are the Operating Characteristics? In our experience the answers to these questions cut through the noise of whether and what requirements apply. They yield the clarity required for confident strategic growth, risk management, and preparation for challenge.

continued on page 2



Last Mile Transportation Myths Debunked—and a Path Forward

continued from page 1

Q1: What is the Nature of Commerce?

Arguably the single most misunderstood concept in the last mile space is the nature of commerce. The federal government holds exclusive jurisdiction over foreign and interstate commerce as granted by the Commerce Clause of the U.S. Constitution. State governments hold jurisdiction over intrastate commerce (transactions between points in a single state). Even at the local level, municipalities will have a narrow zone of control over certain aspects of commercial activities within their boundaries.

Determining which level of government has a "say" in the performance of a service is the challenge—and it is particularly challenging for transportation and logistics due to the geographic nature of the business. In its simplest form, we move things from one point to another or we provide service that contributes to those movements. Those activities may amount to the entire through transportation from origin to destination or it may be a leg between nodes in a complex supply chain.

The key for this threshold inquiry is the nature of commerce itself. Courts look to the shipper intent at the point of origin to determine the nature of commerce and thereby which level of government has authority. If the shipper's intent was to achieve throughput from one state to deliver at final destination in another state, then the movement is generally one in interstate commerce. This remains true even if multiple modes are deployed (such as air and motor carriage), if multiple carriers of the same mode are used (such as middle mile carriers between states and lightweight vehicle operations in the state of destination), if there is intervening storage that does not terminate transportation (such as short-term storage at a distribution center), and on the right set of facts even if the ultimate destination is not yet known (such as for positioning based upon forecasted near-term sales).

To summarize, it can be the case that last mile delivery is merely furtherance of interstate commerce. This defies the conventional wisdom that a particular vehicle must cross state lines to trigger federal jurisdiction, which is not true. Crossing state lines is a strong indicator of interstate commerce, but it is not necessary for that nature of commerce.

Q2: What is the Nature of Service?

Once we know what level of government applies, we can then determine which agency, administration, commission, or similar body holds jurisdiction over the service. At the federal level the dominant cast of characters is familiar to many in the business. The Federal Motor Carrier Safety Administration (FMCSA) has jurisdiction over motor carrier operations. The

Transportation Security Administration (TSA) has jurisdiction over air carriage, including indirect air carriage. The Federal Maritime Commission (FMC) has jurisdiction over international ocean carriage. The Surface Transportation Board (STB) has jurisdiction over water carriage in the non-contiguous domestic trades and other forms of motor carriage, including household goods service. If the appropriate governmental body is known, then the applicable set of laws, rules, regulations, and operating requirements can be swiftly determined.

Determining the state-level agencies with jurisdiction can be more of a challenge in the transportation and logistics space. One reason for complexity is that the states organize their governments in varying ways. For example, the state agency with authority over motor carrier transportation may be the Department of Transportation, or it could be the Public Utilities Commission, the Commerce Commission, or the Department of Motor Vehicles. Another reason for complexity is that not all states regulate the same services in the same way. For example, some states do not meaningfully regulate motor carriage by requiring intrastate operating authorities analogous to the FMCSA, including Delaware, Louisiana, and Alaska. Other states require holding intrastate operating authorities with varying insurance requirements and other compliance burdens. Carrying this example forward, it may be that an enterprise offers intrastate service in an array of states where some require licensure and others do not. Knowing which specific agency holds jurisdiction over each aspect of an operation, and whether or not that jurisdiction is exercised through regulation, cuts to the heart of the complexity.

To summarize, it can be the case that last mile delivery is regulated by the FMCSA, whose business is not merely focused on long haul carriers in commercial motor vehicles. If intrastate commerce is in scope, then the applicable agency in the state of jurisdiction will control, such as the Public Utilities Commission. For better or worse, not all states regulate operations equally, particularly when it comes to the commodity carried or the type of vehicle used. In general despite this variance, the nature of the employment relationship between the carrier and driver (employee or independent contractor) or the relationship with the vehicle (such as using the driver's vehicle) is not relevant to the question of whether regulated activity is conducted—similar to analysis under federal law.

Q3: What are the Operating Characteristics?

Finally, considering the operational characteristics can be determinative in understanding whether or not any governmental requirements are compulsory and their impact on operational performance as well as the cost of service delivery. A few common operational characteristics upon which operating requirements can turn are the types of commodities that are moved and the types of equipment that are used. Certain commodities are regulated differently than others due to particular safety and other public interest concerns of the federal and state governments under which service is performed. Classic examples are household goods, alcohol products, and dairy products. These commodities may require special licenses, permits, and operating procedures among various and overlapping government agencies. Most last mile services do not trigger these categories, but it is not without question.

Equipment types are the more common example of operating characteristics where there is often confusion when pioneering new services. For example, a great deal of attention is often paid to whether a commercial drivers license (CDL) is required to operate a vehicle. While this is certainly important, and key obligations attach, the fundamental question is often whether a commercial motor vehicle (CMV) is involved. CMVs may include seemingly light vehicles that break the 10,001 Gross Vehicle Weight Rating threshold, such as heavy sprinter vans or pickup trucks towing trailers. These vehicles trigger application of most Federal Motor Carrier Safety Regulations despite the absence of CDL requirements. Another area of frequent confusion involves passenger vehicles, such as those used for last mile delivery operations. Even if a movement is in intrastate commerce, certain states such as Illinois and Pennsylvania take interest in regulating those for-hire services, while others, including Colorado and Georgia, do not.

To summarize, the product delivered and the vehicle class are relevant to understanding the precise regulatory requirements, including the applicability of certain permits. It is not the case that single deliveries of consumer products, or that all lightweight vehicle operations, let alone operations in personally owned vehicles, are always unregulated. The opposite is very often true.

Meeting the Market with Confidence

The complexity of operating in the last mile space can be effectively attached with a strong game plan, as outlined here. Understanding the nature of commerce narrows scope to the level of government with which we should be most concerned. Identifying the relevant agency narrows scope further to the applicable body of regulations and policies. Then, considering whether the unique operating characteristics are addressed in that applicable body of requirements yields an actionable approach—with confidence. Even if an agency were to question compliance after launch of a new operation, the ability to clearly and concisely explain the answers to these questions assists in its persuasive or mitigating effect.

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Government Gone Wild! Part 2: New Deadlines are Approaching for California Warehouse Owners & Operators

Marc S. Blubaugh

Reed W. Sirak

On February 23, 2021, Benesch published an article titled *Government Gone Wild! Another First-Of-Its-Kind Regulation Targets the Logistics Industry*. The article examined California's South Coast Air Quality Management District (SCAQMD or District) Proposed Rule 2305—Warehouse Indirect Source Rule (the Indirect Source Rule). The Rule would collect fees (just under $1 billion annually) from warehouses in southern California that are over 100,000 square feet, unless these warehouses earn WAIRE points, or pay a mitigation fee, by taking certain actions to reduce nitrogen oxide emissions and diesel particulate matter from truck traffic at warehouses.

The Indirect Source Rule is considered first of its kind because, unlike traditional air regulations that target emissions directly from facilities, the rule targets trucks visiting warehouses that are not owned or controlled by the warehouse. Notably, air districts like SCAQMD cannot regulate vehicle tailpipe emissions. The Indirect Source Rule is different in that it purports to regulate warehouse facilities, as opposed to vehicle tailpipe emissions.

On May 7, 2021, the District formally adopted the Indirect Source Rule by a vote of 9 to 4. The basic structure of the Rule is the same as the Proposed Rule analyzed in the prior article.

What You Need to Know to Comply With the Indirect Source Rule

The Indirect Source Rules achieves compliance by targeting warehouses in three phases. Phase 1 applies to warehouse greater than or equal to 250,000 square feet. The first compliance period for Phase 1 warehouses runs from January 1, 2022, through December 31, 2022. Phase 2 targets warehouses between 150,000 square feet and 250,000 square feet. The first compliance period for Phase 2 warehouses begins on January 1, 2023, and ends on December 31, 2023. Phase 3 applies to warehouses that are between 100,000 square feet and 149,000 square feet. The first compliance period for Phase 3 begins on January 1, 2024, and ends on December 31, 2024. However, regardless of the size of a warehouse, warehouse owners and operators must take action now to comply with the initial reporting requirements.

a. Initial Warehouse Owner Requirements

All warehouse owners with a warehouse greater than or equal to 100,000 square feet must submit a Warehouse Operations Notification (WON) to the District by September 1, 2021. The WON must include the warehouse size and the area that may be used for warehouse activities, the warehouse lessee's name(s) and contact information, the lease start and end dates, the previous warehouse operator(s) information, and the square footage used by the warehouse owner for warehousing activities.

b. Initial Warehouse Operator Requirements

By July 1, 2022, operators of a warehouse greater than or equal to 250,000 square feet must submit an Initial Site Information Report (ISIR). The ISIR must include the warehouse size and area, the number of anticipated truck trips, anticipated actions necessary to meet the WAIRE Points Compliance Obligation (WPCO), provide details on potential onsite equipment, and, most importantly, include the number of truck trips in the previous 12-month period. This means that operators of a warehouse greater than or equal to 250,000 square feet need to start counting truck trips *immediately* in order to satisfy the ISIR's previous 12-month truck trip requirement, because the typical reporting period would be from the previous June 1 through May 31 period based on the July 1 deadline.

i. What is a Truck Trip?

A truck trip is the one-way trip a truck or tractor trailer makes to or from a site through the truck gate or driveway with at least one warehouse to deliver or pick up goods stored at that warehouse for later distribution to other locations. A truck for purposes of the Indirect Source Rule is classified as any Class 2b-7 and Class 8 trucks under any powertrain type. For purposes of the ISIR, a truck or tractor entering a warehouse and then leaving the same warehouse counts as two truck trips.

However, simply counting the number of trucks entering and leaving a warehouse is not enough to satisfy the ISIR. Operators must also record the date and time of the truck trip and whether the truck is a Class 2b-7 vehicle or a Class 8 vehicle. Additional information required by the ISIR includes fleet data if a warehouse operator owns or leases on-road trucks or tractors that serve the warehouse, fuel/charging data if the warehouse operator has an alternative fueling station or charging station, and truck yard data if the warehouse operator has yard trucks that are used at the warehouse.

The District does not endorse a particular method for counting truck trips as long as the method is verifiable and representative. Guidance issued by the SCAQMD provides examples of methods used for counting truck trips, which include: (1) electronic telematics systems that track truck activity via on-board GPS and fleet management software; (2) in-roadway or driveway sensors that count when a vehicle passes a certain point; (3) video monitoring; (4) guard shack monitoring; (5) reviewing documents like contracts or manifests that document load deliveries and pickups from a warehouse; or (6) any other method that is verifiable and representative.

In short, the District continues to press forward with its novel approach to environmental regulation. Moreover, to date, no party has commenced any litigation to challenge the Indirect Source Rule. Therefore, warehouse operators should take all of the foregoing into account and promptly develop plans to comply with the Indirect Source Rule. Benesch will continue to monitor guidance issued by the District on the Indirect Source Rule.

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Shutting Down the Texas Roadhouse Verdict Party (in part); The Texas Legislature Takes Aim at Nuclear Verdicts

Eric L. Zalud

Matthew Braich

As many are aware, the Nuclear Verdict phenomenon (a "nuclear verdict" is described as a verdict of $10 million or more)—by which plaintiffs' personal injury counsel, propagating a sophisticated yet simultaneously primordial strategy known as the Reptile Theory, seek to vilify the trucking company, as opposed to seeking recompense for actual damages—is an albatross around the proverbial neck of the motor carrier industry, and the transportation broker sector. Nuclear verdicts have jumped over 300% in the past decade. Also, the average verdict size for a lawsuit involving a truck collision has increased from $2.3 million to $22.3 million.

One of the hotbeds of the nuclear verdict battlefield has been the state of Texas. In fact, in Texas, they say that 10 million is the new one million! Recent cases in Texas include a verdict against a motor carrier in the $100 million range (including $75 million in punitive damages) in a case in which the plaintiff told the officers at the scene that he was not hurt. Similarly, there have been at least 20 other nuclear verdicts in Texas in the last several years. State legislatures across the country are taking notice of this phenomenon, and its deleterious effects upon the transportation sector, and legislating accordingly. One of the first and most comprehensive laws, Texas House Bill 19, was recently enacted by the Texas legislature on a broad, *bipartisan* basis. That law serves to compartmentalize the trial process, and interjects various other procedural thresholds, to slow the nuclear verdict freight train in these cases. The hope is to put the brakes on the Reptile Theory by excluding evidence of industry-wide trends likely to bias juries against motor carriers (and brokers).

Right out of the box, Texas House Bill 19 splits the trial into two phases. The first phase deals only with the motor carrier's driver's fault and liability (truck malfunctions will also be addressed in phase one). Notably, this phase excludes unrelated allegations of unsafe motor carrier safety practices. In fact, it is possible that during phase one the jury may not even know the *name* of the motor carrier! The second phase allows plaintiffs to sue the carrier itself, but only *after* the motor carrier's *driver's* liability has been determined (*if* it is determined). So, phase two concerns liability under *respondeat superior* and the amount of punitive damages, *if any*. Consequently, in trial proceedings under

continued on page 6

Shutting Down the Texas Roadhouse Verdict Party (in part); The Texas Legislature Takes Aim at Nuclear Verdicts

continued from page 5

this bifurcated process, the evidence, testimony, and, more importantly, arguments, intimations, and inuendo of plaintiffs' counsel are confined to actual facts of driver fault and liability and the common-law legal principles that relate to those facts. The bifurcation is not automatic though; it must be requested by a motion to the court, made within 120 days of the defendants answering the complaint—a *critical* docket date for motor carriers. This bifurcation mechanism thus effectively segregates that first phase from the more Reptilian second phase and should result in a dramatic decrease in vilification of the motor carrier itself for practices that are completely unrelated, to the underlying facts of the actual accident.

The statute also limits the admissibility of evidence of failure to comply with non-pertinent FMCSA regulations. Often in these cases, plaintiffs' counsel conduct exhaustive discovery into the smorgasbord of the motor carriers' policies and practices relating to FMCSA compliance, internal safety audits, maintenance programs, vehicle inspections, the company's "safety culture" as a whole, and a host of other overall operational facts, almost all of which typically have no direct bearing upon the facts underlying the accident at issue. They do this, with an aim toward demonizing the trucking company, by finding some fault in an unrelated policy or practice and attacking that, instead of the actual accident itself and its causation. Texas House Bill 19 should also serve to dramatically limit this inflammatory practice.

Under the Act, evidence of the defendant motor carriers' failure to comply with an FMCSA regulation must be directly relevant to the accident. There are two criteria that must be met in order for evidence of the carrier's failure to comply with FMCSA regulations to be admissible: First, the regulation must apply to the action or omission *that caused the accident*. Then, a reasonable jury must be able to find that the failure to comply was the proximate cause of the accident (another threshold point ripe for pretrial evidentiary motions). Also, the regulation must specifically govern the causative conduct and be an element of the duty of care applicable for the defendant in this phase. However, if the evidence of the carrier's failure to comply is admissible, other evidence of similar failures are admissible *only if they occurred within two years of the accident*. Also, per the direct statutory language, the plaintiff must obtain a court order allowing such historic (and archaic) discovery if the plaintiff seeks evidence of past failures to comply within the two-year period. Those court orders are subject to review for abuse of discretion. As noted, these procedural restrictions should limit, even before the trial stage, the broad-based "gotcha" type of discovery often sought by plaintiffs' counsel in these cases.

This action by the Texas legislature is a seminal one. It goes a long way to taking firm, concrete steps toward curbing abuses of the litigation and trial systems by plaintiffs' counsel. It helps to ensure that liability will be determined based upon the actual facts of the accident, actual proximate cause—and even comparative fault of the plaintiff—without inflammatory, Reptilian strategies that have nothing to do with the accident itself. Unfortunately, it appears that the Act does not apply retroactively. Section 6 of the Act makes clear that "[C]hanges in law made by this Act only apply to an action commenced on or after the effective date of this Act, which is September 1, 2021." Consequently, any motor vehicle accident lawsuit filed in Texas after that date—the Nuclear Disarmament Date (NDD)—will be governed by the very logical, rational, measured strictures of this statute. So, expect a tsunami of filings before the NDD. It looks like the Texas Roadhouse verdict party is still open—but last call will come a lot earlier going forward!

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Ready for What's Next

BENESCH CONTINUES TO ADD TO ITS ROSTER OF TOP-NOTCH LEGAL TALENT


Steven D. Lesser


J. Philip Nester


Christopher C. Razek

We are pleased to welcome **Steven D. Lesser, J. Philip Nester**, and **Christopher C. Razek** to the Transportation & Logistics Practice Group.

With more than 30 years in the public sector, **STEVE LESSER** advises clients regarding public utility, telecommunication, and energy industry matters. He has addressed legislative and regulatory issues in all aspects of energy, from regulated to the wholesale and retail markets.

Steve began his career in Transportation at the Public Utilities Commission of Ohio (PUCO), eventually becoming Chairman of the agency. He was extensively involved in drafting and implementing the regulatory programs for hazardous materials and household goods. More recently, he collaborated with the staff of the PUCO to draft the rules governing Transportation Network Companies and obtained approval for the first company permitted under those rules.

Steve has extensive experience working in the electric, natural gas, water, and telecommunication industries. He has been actively involved in initiatives advancing distributed energy resources, renewable energy, and grid modernization. He has represented industrial, commercial, trucking, rail, transportation network, and innovative technology businesses.

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PHIL NESTER is an associate attorney representing clients in transactional and regulatory transportation and logistics matters, with unique experience in insurance-related issues. Phil previously represented commercial motor carriers and their drivers in complex pre-suit claims and lawsuits involving wrongful death, personal injury, cargo, and property damage, handling all facets of risk management from accident scene investigation through litigation, mediation, and trial, and counseling insurers on coverage issues, pre-litigation issues, and he has served as lead counsel defending insurance carriers against claims alleging bad faith, unfair claims practices, and breach of contract.

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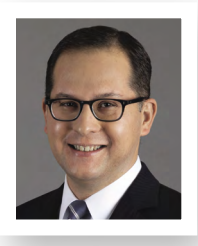
Technology and Data Privacy Implications for Driver Relationships



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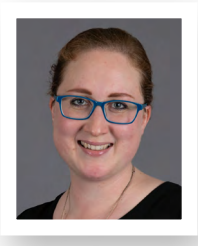

Helen M. Schweitz

It is no surprise that technology is driving change in the motor carrier industry. In fact, we are observing a perfect trifecta of challenges as technology and carrier business converge. The technological solutions that have driven efficiency and profitability are allowing for far greater visibility and access to data than ever before. The regulatory regimes that govern the use of technology and data are emerging as complex and aggressive tools for society that result in greater financial and reputational risks than ever before. Rounding out the trifecta, independent contractor issues remain increasingly under threat, with laser-focused scrutiny on the relationship between carrier and contractor in this brave new world where the carrier is electronically "in the cab" with the contractor.

The key takeaway developed in this article is a simple guiding principle that aligns with the interests of technology as well as transportation regulators—motor carriers should take care to disclose and gain consent for their deployment of technology and corresponding use and disclosure of collected information. The tactical deployment of this strategy will vary by circumstance, although the perspective may be new for some. In short, think of drivers as "users" when they engage in the entrepreneurial delivery of their services. This approach of principle and its tactical application will guide most carrier leaders through charting best practices in these new and uncertain times.

Technology as a Driver of Change in Industry

Today's motor carrier operations are far from the old days of booking drivers by chalkboard. The massive growth of transportation technology has gone from elementary means of managing business operations to EDI interfaces to highly complex TMS/WMS/OMS systems, and ultimately to the highly "sticky" world of shipper portals that contribute real value and visibility to accounts. Shippers will increasingly ask about safety technology, satellite and cellular tracking, integration into their ERP systems, and turnkey cloud-based solutions. The carrier value proposition has essentially exploded from one of hauling cargoes from Point A to Point B to one as a trusted supply chain solutions provider.

Indeed, carriers are, whether deliberately or not, quickly becoming technology providers and licensors, finding themselves not only on the receiving end of web-based platforms or other software tools but also as a provider of software and other technologies to their own personnel, to their drivers, and to shippers. This role brings with it not only the risks associated with allowing drivers and other parties to access third-party tools (over which the carrier has a low degree of control) but also new demands—both within and external to the legal agreement—by those to whom the tools are being provided. In short, if carriers are technology providers, that makes the shippers (among others) users and possibly licensees of technology.

The carrier-driver relationship is no less impacted and, in the foreseeable future, may in fact be more intimate than shipper relationships. Drivers and the services they offer are in many ways the practical point of implementation for technology. The expanding range of safety- and visibility-related technological solutions must be understood by drivers for correct use while, at the same time, seemingly relieving the burden on drivers and the strain on the driver population at large. Still, this leaves drivers in a position to serve as part technology expert during their day-to-day activities of running their businesses. Achieving this new and growing role requires disclosure, information, training, and acceptance. Drivers need to know what tools are available to them, what tools are required, how they use those tools, what data those tools collect, and how that data is used and disclosed.

Enter drivers as "users" or "consumers." Business-to-business personal information, such as personal information relating to drivers—as opposed to personal information about an individual who is consuming products or services (your typical "consumer")—can no longer be ignored (to the extent it ever could be), both as a legal matter and as a practical matter.

Change Impacting our Drivers, our Risk

The motor carrier industry has in many ways "been here before" despite the pace of change. During the run-up to the ELD mandate, the entire industry confronted a range of knowns and unknowns, risks and rewards, as it looked to respond to change. On the one hand, many carriers led the pack by early adoption, recognizing that earlier technology paved the way in certain regards and that the advance in systems would yield great operational and safety benefits. On the other hand, many carriers were reluctant to adopt the technology due to fear of the plaintiffs' bar, the sheer cost of adoption, and the negative impact on the available driver base. In the end, in our experience, carriers were able to navigate the path forward based upon certain guiding principles, such as the need to act upon data received (e.g., speeding or hard-braking data). The consternation that arose during rollout of the ELD mandate is practically ancient history.

The impact of increasingly business-critical technologies on carriers mirrors the ELD mandate in many ways, including by begging innumerable questions about the collection, use, and sharing of data: What data will be collected? How is it collected? Can certain types of collection be turned off? How much control is there over the collection, storage, and retention functionality? Is there any opportunity to customize that functionality? How is the collected data used and who will have access to it? While the competitive advantage of deploying these technologies is clear, the risk profile can be somewhat cloudy. With the increased and varied data protection frameworks being deployed across the nation and the globe comes a need for greater interdepartmental communication: There need to be open lines of communication among members of a carrier's legal, compliance, operations, human resources, information technology, marketing, and other teams, and those teams need to work together to ensure that the relevant stakeholders are involved in

decisions around the use of technology and the collection and use of information.

Data is the most valuable resource of our time. Regulators are increasingly taking interest precisely because it is so highly valuable, it can be manipulated, and it can impact disadvantaged parties. This interconnected world has brought many parties to the conversation around data generation and use. Shippers, carriers, third-party providers, and drivers all have an interest in the data-driven exercise. In large part, efficiency/productivity/visibility win the day. That win derives in large part from data generated at the precise point where drivers conduct their business—at the level of cargo. It is probably not unfair to view drivers as in many ways the precise point of generation for many of these systems, and yet, they are also human beings looking to conduct their own businesses profitably. Drivers are a key point of risk requiring focus.

The traditional mindset of only protecting personal information relating to traditional "consumers" of products and services now comes with much greater risk, as the types of personal information governed by the most recent data privacy legislation become broader and broader. Watch out for misleading defined terms in such legislation, for example, "consumer" in the California Consumer Privacy Act of 2018, the definition of which is broader than one may expect. With drivers as individuals whose personal information may be protected by increasingly complex data privacy and security frameworks at the state, national, and international levels, mitigation of the risk areas traditionally associated with such frameworks (such as data breaches) needs to take into consideration drivers as a source of data and, depending on the facts, as consumers with enumerated consumer rights.

Driver-Facing Technology Implementation

More and more traffic, and supply chain relationships generally, is supported by significant contracts rather than mere bills of lading, tariffs, and terms of service. This interconnected world requires carriers to consider technology provisions in their shipper relationships, warehousing relationships, certainly their technology provider relationships, and of course driver relationships. The carrier serves as a conceptual spoke in this contractual hub which in many ways directly or indirectly positions the carrier as a technology provider itself. While this is somewhat of a paradigm shift, viewing the motor carrier as a technology provider and the driver as a user will assist in appropriately framing technology implementation so that results are well conceived and actionable.

Refocusing our attention on drivers more as individual users of hardware, software, and other technology solutions and less as replaceable providers of services helps to put the associated risks—legal and otherwise—in perspective and to implement strategies—again, legal and otherwise—to help mitigate those risks. A driver-facing mobile app, for example, needs to incorporate the appropriate legal terms and privacy policy in an enforceable manner; but the user experience (UX) of that mobile app may also need to include additional on-screen explanations and disclaimers, especially with respect to the collection of information as a result of the driver's use of the mobile app. The role of the legal advisor does not, and should not, stop with the "Accept" button.

For most motor carriers, the most significant legal risks that come to mind with drivers generally are those associated with casualty litigation arising from vehicular accident. With respect to independent contractors, the second most significant risks are those associated with worker misclassification. Technology is unique because it can in principle assist in safer driving (provided that distraction is managed) while also creating challenging fact patterns for independent contractor analysis. Technology can conceivably allow a motor carrier to over-reach by providing tools of the trade, observing drivers in circumstances unrelated to safe operation, or other ways that may be construed as exerting control over the manner and means of work. These issues are not impossible to overcome, but it is critical to view technology as one part of the broader arms-length relationship with independent contractor owner-operators who must remain truly independent in their work.

Technology Contracting and Driver Implications

In case you have not yet heard, we have officially entered a world of "dynamic" contracting. Agreements that you have to print out (or at least save as a PDF) and have four corners still play an important role, of course, but, in practice, legal agreements—and how they are structured—are not as straightforward creatures as they once were.

More often than not, legal agreements have multiple moving pieces, incorporate third-party terms (that may or may not actually be attached to the agreement or available for your review), and may or may not be named in an informative manner (imagine a benign-looking set of online "Terms of Use" that is actually a comprehensive agreement contemplating the provision and development of software services, with some co-marketing obligations on top of that).

The "contract" (the loaded term it may now be), while perhaps "owned" by a particular department, truly requires the attention of the business stakeholders and the legal/compliance team. Especially key to a successful contracting process are the translation skills that each stakeholder brings to the table (or, more realistically, chain of emails), with the business team needing to appreciate the legal landscape and the legal team needing to understand exactly what is being provided and by whom.

The natural contractual setting to establish any required disclosures, consents, and other data-related mechanisms is in the independent contractor services agreement with drivers. The regulatory framework for those agreements is of course found in the Federal Leasing Regulations set out at 49 CFR 376.12. The regulations are similar to data privacy regulations in that they seek as their chief end the disclosure of conditions and gaining of consent.

The regulations require, among other express provisions, the statement that an independent contractor owner-operator is not required to purchase or rent any equipment from the carrier as a condition of entering into the relationship. Additionally, the regulations require establishing

continued on page 13

Recent Events

Truckload Carrier Association (TCA) Virtual Workshop
Helen M. Schweitz and **Jonathan R. Todd** presented *Transportation Technology Workshop: Technology, Data Privacy, and IC Relationships—Understanding the Impact*!
February 23, 2021 | Virtual

Transportation Intermediaries Association Webinar
Jonathan R. Todd and **Eric L. Zalud** presented *TIA Final Mile Legal Considerations.*
March 11, 2021 | Virtual

Air Forwarders Association General Meeting
Martha J. Payne attended.
March 17, 2021 | Virtual

AvatarFleet Webinar
Marc S. Blubaugh was a panelist during "How You Can Prevent a Nuclear Verdict."
March 25, 2021 | Virtual

IANA - Independent Contractor Update Webinar
Marc S. Blubaugh, Margo Wolf O'Donnell, and **Jordan J. Call** presented *Navigating Independent Contractors, Intricate Employment Laws, and Intermodal Markets: A Goal Without a Plan is Just a Wish!*
April 6, 2021 | Virtual

Truckload Carriers Association Webinar
Eric L. Zalud and **Helen M. Schweitz** presented *The Technological Tsunami Meets the Golden Hour—How New Technology Impacts Catastrophic MVA Litigation and Prevention.*
April 20, 2021 | Virtual

Institute for Supply Management - World | A 360° Perspective
Jonathan R. Todd presented *Future of Contracting Post Pandemic: Legal Tools to Mitigate Risk.*
April 20, 2021 | Virtual

Transportation Intermediaries Association (TIA)—Capital Ideas Conference and Exhibition
Marc S. Blubaugh, Martha J. Payne, and **Eric L. Zalud** attended.
May 11–13, 2021 | Virtual

Oregon Trucking Association Webinar
Bryna Dahlin participated in a virtual workshop called *Issues Regarding Cannabis and Their Effect on Trucking.* **Martha J. Payne** attended.
May 19, 2021 | Virtual

TerraLex Global Meeting 2021
Eric L. Zalud attended.
June | Virtual

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** attended.
June 5–7, 2021 | Annapolis, MD

National Tank Truch Carriers (NTTC) 2021 Annual Conference
Eric L. Zalud attended.
June 13–15, 2021 | Indianapolis, IN

Transportation Lawyers Association (TLA) Executive Committee Meeting
Marc S. Blubaugh attended as Voting Past President. **Eric L. Zalud** attended.
June 23, 2021 | Lake Tahoe, CA

Transportation Lawyers Association (TLA) Annual Conference
Eric L. Zalud presented *Plummeting Head First Down a Steep Track: When Cargo is Detained, Retained, or Abandoned.* **Marc S. Blubaugh, Martha J. Payne,, Kelly E. Mulrane**, and **Richard A. Plewacki** attended.
June 23–26, 2021 | Lake Tahoe, CA

International Warehouse Logistics Association's (IWLA) Essentials Course
Marc S. Blubaugh presented on transportation law.
July 14, 2021 | San Diego, CA

Truckstop.com - Webinar
Marc S. Blubaugh presented *Compliance: A Deep Dive into Risk Mitigation for Freight Brokers.*
July 15, 2021 | Virtual

Becker Logistics - Livestream
Marc S. Blubaugh presented on transportation and logistics.
July 19, 2021 | Virtual

American Trucking Association's (ATA) Trucking Legal Forum
Marc S. Blubaugh presented *Quick Hits: Practical Solutions to Routine Legal Dilemmas.* **Helen M. Schweitz** and **Jonathan R. Todd** presented *Technology and Data Privacy Implications for Independent Contractor Relationships.* **Martha J. Payne** and **Eric L. Zalud** attended.
July 25–28, 2021 | Washington, D.C.

70th Annual Oregon Trucking Association (OTA) Convention & Exhibition
Martha J. Payne attended.
August 9–11, 2021 | Bend, OR

Armstrong Transport Group Annual Agent Conference
Eric L. Zalud presented *Speed Bumps Ahead: Navigating Risks as a Broker/Agent to Maximize Opportunities: The Legal Perspective.*
August 12–13, 2021 | Raleigh, NC

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On the Horizon

IADC Annual Meeting
Eric L. Zalud is attending.
August 15–19, 2021 | Chicago, IL

American Trucking Association Webinar
Eric L. Zalud is presenting *Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers.*
August 31, 2021 | Virtual

International Warehouse Logistics Association (IWLA) Safety & Risk Conference
Marc S. Blubaugh is presenting on Reptile Theory and Nuclear Verdicts.
September 8, 2021 | Atlanta, GA

Intermodal Association of North America (IANA) Intermodal Expo 2021
Marc S. Blubaugh and **Eric L. Zalud** are attending.
September 12–14, 2021 | Long Beach, CA

Ohio Trucking Association (OTA) Annual Conference
Kelly E. Mulrane is attending.
September 13–14, 2021 | Columbus, OH

Freight Transportation Research (FTR) Transportation Conference
J. Philip Nester and **Christopher C. Razek** are attending.
September 13–16, 2021 | Indianapolis, IN

Truckload Carriers Association (TCA) Truckload 2021 Conference
Jonathan R. Todd and **Eric L. Zalud** are attending.
September 25–28, 2021 | Las Vegas, NV

Transportation Intermediaries Association (TIA) 3PL Policy Forum
Marc S. Blubaugh is attending.
September 28-29, 2021 | Washington D.C.

Trucking Industry Defense Association (TIDA) 2021 Annual Seminar
Eric L. Zalud is attending.
October 13–15, 2021 | Philadelphia, PA

Transportation Intermediaries Association (TIA) 3PLXtend
Marc S. Blubaugh and **Helen M. Schweitz** are participating in the *Playing Catch-Up: he Intersection of Technology and Law panel.* **Eric L. Zalud** is participating in the *Recruiting & Retaining Top/Talent panel.* **Martha J. Payne** is attending.
October 21–22, 2021 | San Antonio, TX

2021 American Trucking Association (ATA) Management Conference & Exhibition (MCE)
Jonathan R. Todd is attending.
October 23–26, 2021 | Nashville, TN

Association for Supply Chain Management (ASCM) Connect 2021
Jonathan R. Todd is presenting *Global Logistics Learnings and Enhancements Post-COVID.*
October 24–26, 2021 | San Antonio, TX / Hybrid

International Warehouse Logistics Association (IWLA) Convention & Expo 2021
Marc S. Blubaugh and **Eric L. Zalud** are attending.
November 1–3, 2021 | San Antonio, TX

2021 Transportation Law Institute
Eric L. Zalud is attending and is the Social Chairman for the event. **Marc S. Blubaugh, Martha J. Payne, Kelly E. Mulrane, J. Philip Nester, Cristopher C. Razek, Richard A. Plewacki,** and **Jonathan R. Todd** are attending.
November 12, 2021 | Cleveland, OH

Private Equity Forum on Recent Logistics Trends and events
Hosted by **Benesch's Transportation Group**
December 9, 2021 | Mid-Town Manhattan, NY

Please note that some of these events may be canceled or postponed due to the COVID-19 pandemic. Check with event representatives for more information.

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

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

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Technology and Data Privacy Implications for Driver Relationships

continued from page 9

with reasonable specificity the terms for any purchase or rental of equipment through the driver and the mechanism for deduction of associated amounts. Noncompliance with these provisions is subject to a private cause of action on the part of drivers by virtue of 49 USC 14704, and the availability of attorney's fees. It is imperative, therefore, that the incorporation of technology provisions allows for the sourcing of any required equipment from sources other than the motor carrier. If the technology is provided through the carrier upon the driver's election, then the terms of purchase, rental, or service must be disclosed.

The more narrow practicalities of contracting for technology use with drivers also require close attention when contracting. Disclosure of the existence or requirement of certain functionality—and in a manner that can be readily understood and will actually assist the driver—is essential. However, pragmatically outlining the entire life cycle for the technology will add to the user experience and lower the risk of confusion. Any elections and costs must be adequately memorialized, including possible installation fees, monthly use fees, de-install fees, re-install fees, and loss fees. The terms related to the end of the relationship, or the end of the technology life cycle, will also clarify expectations and avoid surprises for both parties.

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