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InterConnect

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An Important Victory for Motor Carriers!

On September 26, 2011, the U.S. Court of Appeals for the Ninth Circuit awarded the American Trucking Associations, Inc. (ATA) a major victory, invalidating an onerous and improper requirement applicable to motor carriers imposed by the Port of Los Angeles (the Port). *Am. Trucking Assoc. Inc. v. City of Los Angeles, et al.*, 2011 WL 4436256, No. 10-56465 (9th Cir. 2011). In the process, the Court ratified and affirmed the broad scope of a federal law that prohibits states and other regulatory bodies from enacting rules that subject motor carriers, transportation brokers, freight forwarders and private fleets to a hodgepodge of inconsistent and, in many cases, detrimental regulations.

Beginning in 2008, the Port required all motor carriers operating drayage trucks at the Port to assent to a Concession Agreement (the Agreement) under the auspices of its self-described environmental initiative, the Clean Truck Program. The Agreement contained 14 separate and varied requirements ranging from truck maintenance rules to parking restrictions. One portion of the Agreement, however, was of particular concern to motor carriers. The Port's Employer-Driver Provision—a provision vigorously supported by the Teamsters—requires all motor carriers operating within its boundaries to cease using independent owner-operators gradually over a five-year period in favor of motor carriers that directly employ their drivers. The Ninth Circuit invalidated this portion of the Agreement.

The ATA challenged the Agreement alleging that it violated the Federal Aviation Administration Authorization Act (FAAAA), 49 USC § 14501 *et seq.* The FAAAA is a federal statutory scheme that forbids states and their local municipalities (including the Port) from enacting or enforcing any "… law, regulation, or other provision having the force and effect of law relating to a price, route, or service of any motor carrier … or any motor carrier, broker or freight forwarder with respect to the transportation of property." The ATA sued the Port, claiming that the requirements of the Agreement violated the FAAAA.

At trial, the ATA challenged the following five provisions of the Agreement:

1. The Financial Capability Provision, which requires motor carriers to demonstrate, to the satisfaction of the Executive Director of the Port, that it has the requisite financial capability to discharge its obligations.
2. The Maintenance Provision, which requires that motor carriers "…ensure that the maintenance of all Permitted Trucks … is conducted in accordance with the manufacturer's instructions."
3. The Off-Street Parking Provision, which requires motor carriers to submit a plan for approval "…that includes off-street parking locations for all Permitted Trucks, and requires that carriers ensure that their trucks are "…in compliance with parking restrictions by local municipalities… "
4. The Placard Provision, which requires drivers to post placards on their trucks while on Port property.
5. The Employer-Driver Provision.

While it sought to attack the validity of all of these provisions, the Employer-Driver Provision was the ATA's prime target. If allowed to stand, this mandate would force motor carriers wishing to do business at the Port to hire their drivers directly as employees instead of entering into independent contractor agreements with owner-operators. Without court intervention, this rule could cascade across the country with states, cities, towns and other ports potentially enacting varying requirements subjecting motor carriers to multiple, conflicting rules across various jurisdictions.

The trial court ruled that none of these five provisions violate federal law. The Ninth Circuit disagreed as it relates to the Employer-Driver Provision. The court ruled that this requirement is preempted by the FAAAA and is invalid. While the other four provisions

continued on page 2

IN THIS ISSUE:

BENESCH
Attorneys at Law

An Important Victory for Motor Carriers!

continued from page 1

of the Agreement remained intact, the invalidation of this requirement stands as a victory for the ATA.

The Ninth Circuit ruled that, "While the port may impose conditions on licensed motor carriers seeking to operate on port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties." This is a direct recognition that the Port overstepped its bounds when it attempted to regulate the contractual relationships between motor carriers and their drivers. Notably, the court specifically held that the "…Port has an interest in continued provision of drayage services, but it may not obtain that stability by unilaterally inserting itself into the contractual relationship between motor carriers and driver."

> *"…the Port overstepped its bounds when it attempted to regulate the contractual relationships between motor carriers and their drivers."*

Motor carriers, transportation brokers, freight forwarders and private fleets should take notice of this ruling as it affirms the broad, preemptive scope of the FAAAA and provides encouragement to those interested in challenging burdensome regulations in any jurisdiction.

For more information, please contact Matt Gurbach at mgurbach@beneschlaw.com or (216) 363-4413.

A Winning Effort Begins With Preparation

"A winning effort begins with preparation." Good, practical advice from Joe Gibbs, winner of three Super Bowls as head coach of the Washington Redskins and three NASCAR championships as head of Joe Gibbs Racing. The importance of thorough preparation simply cannot be overstated, particularly in the increasingly complex multiparty world of cargo claims litigation.

Last year, in *Kawasaki Kisen Kaisha Ltd. V. Regal-Beloit Corp.*, 130 S.Ct. 2433 (2010), the United States Supreme Court held that the Carmack Amendment does not apply to a shipment originating overseas under a single through bill of lading. Kawasaki, or "K" Line as it is referred to by the Court, accepted goods for shipment from China to inland points in the U.S. "K" Line issued four through bills of lading, or bills of lading that covered in a single document the ocean and inland portions of the load. Importantly, "K" Line's bills of lading contained provisions: (1) extending defenses and limitations of liability to subcontractors; (2) permitting "K" Line to enter into subcontracts to complete transportation of the load; (3) mandating that transportation of the entire load was governed by the Carriage of Goods by Sea Act (COGSA); and (4) establishing venue for any disputes in Tokyo, Japan.

"K" Line handled the transportation from China to California, at which time it subcontracted with Union Pacific to transport the cargo by train to points within the continental U.S. Unfortunately, the train derailed, destroying the cargo. When the shippers sued to recover their losses, "K" Line and Union Pacific moved to dismiss on the grounds that, pursuant to the through bills of lading, proper venue for the suit was Tokyo, Japan. The District Court granted the motion, but the decision was reversed by the Ninth Circuit Court of Appeals, which held that the Carmack Amendment trumped the venue provision in the bills of lading. The Supreme Court reversed, concluding that "K" Line's bills of lading extended COGSA's terms to the entire shipment. Justice Kennedy, writing for the majority, concluded his opinion with very significant words: "The cargo owners must abide by the contracts they made."

Reinforcing the implication of the *Regal-Beloit* case, less than two months after it was decided, the Second Circuit Court of Appeals, in *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company*, 2010 WL 3044884 (2nd Cir. 2010), granted Union Pacific's motion for reconsideration on the grounds that the through bill of lading extended COGSA's $500 liability limitation to Union Pacific. Instead of being liable for the entire contents of a stolen container, Union Pacific's liability was capped at $500 per package.

What do *Regal-Beloit* and *Sompo* have to do with preparation? A great deal. Shipments rarely involve one or two carriers. To the contrary, there may be several carriers, brokers, freight forwarders or other logistics providers involved. As a best practice, maintain a file containing copies of *all* contracts and bills of lading for any international through shipment. When faced with cargo liability, applicable limitations of liability in those documents may be critical to the long-term viability of your business. Your diligence in preparing for a potential cargo claim may be the key to a winning effort for your business.

For more information, please contact Allen Jones at ajones@beneschlaw.com or (614) 223-9323.

Bankruptcy Logistics Part 3

There is a substantially lower frequency of demands for the return of funds received in the 90 days prior to a customer's bankruptcy filing. For this kind of Avoidance Action to arise (see Summer 2011 *InterConnect* for Part 2 of this series for a discussion of preferences), it is (i) required that there is a robust market that encourages the extension of unsecured commercial credit and (ii) dependent on a two-year statute of limitations for bringing the action. In 2011, the earliest date for a preference event to arise is the fall of 2009—a period of time in which very few companies extended credit with abandon.

"As the economy improves, the best way to avoid returning funds to your bankrupt customer is to understand the best defenses available to you and then structure your transactions to maximize these defenses."

As the economy improves, the best way to avoid returning funds to your bankrupt customer is to understand the best defenses available to you and then structure your transactions to maximize these defenses. These defenses and their application in the world of transportation can be described as follows:

1. The transfer was a contemporaneous exchange and was intended to be for contemporaneous exchange. This means C.O.D., C.I.A., a prepayment, or any other transaction that both was intended as and was in fact a non-credit relationship. This is the most effective protection against future liability, yet it most likely spoils the relationship with your customer. Once you switch to prepayment or a non-credit variant, you will need to stick with this decision for a while in order to create continuity.
2. The transfer was in payment of a debt incurred by the debtor in the ordinary course of business of you and your customer AND was made in the ordinary course of business OR was made according to ordinary business terms. This defense is called the ordinary course defense and requires factual proof, a fairly expensive proposition in most bankruptcy cases. To determine whether the payment was ordinary in your relationship with your customer, you will need to review your credit history with the customer and determine (a) did the customer pay the invoice when due? (b) if paid too early, was it a function of your pushing for payment? (c) if paid late, how far from the average or mean are your payments in the 90-day preference period compared to the historical relationship between you and your customer? In the transportation sector, oftentimes payments are made on batches of invoices, a unique issue that needs to be factored in to the mathematics of determining which payments are ordinary and which are not. It is the expense of this defense that typically leads parties to settle their cases prior to a trial. If you do not have a long-term relationship with the bankrupt customer, you will need to look to the industry standard, which is another expensive proposition to prove in court.
3. The transfer created a security interest secured by new value (a purchase money security interest) and was perfected within 30 days. This is a helpful tool when dealing with deposits or other collateral given during the 90-day period.
4. You provided new value to your customer subsequent to the transfer. This is your second best defense to a preference Avoidance Action. After receiving a payment (that otherwise would be a preference) you extended new credit. For purposes of simplicity, if that new credit (i.e., a new load) does not get paid for, it can be deducted from your liability. There are a number of mathematical rules that apply, and many courts accept the argument that even if the new credit was paid, it can still be deducted from your liability. However, the payment, once paid, is considered a preference. It can be reduced by subsequent credit extended.

Bottom line: Closely monitor your payments on invoices and make sure your accounts receivable desk is strong and on top of this. Being proactive will allow you to keep your money.

For more information, please contact David Neumann at dneumann@beneschlaw.com or (216) 363-4584.

Benesch/Ahern Transportation Conference

On September 23, 2011, Benesch and Ahern & Associates hosted a **Transportation & Logistics Conference** in Chicago, Illinois. Attendees obtained practical tips and recommendations regarding mergers, acquisitions, recapitalization and restructuring in the transportation and logistics industry; analyses and forecasts concerning regulatory changes; and the inside track on how to make their transportation and logistics operations more profitable and attractive for a sale, refinancing or just to grow organically and through acquisition. Benesch attorneys **Marc Blubaugh, Jim Hill, Rich Plewacki** and **Eric Zalud** participated in a variety of panels on various transportation topics. **Teresa Purtiman** also attended.

Recent Events

Marc Blubaugh spoke on CSA *2010 Casualty Litigation Implications* at the **American Trucking Association's Motor Carrier General Counsel Forum** in La Jolla, CA, on July 24–27, 2011. **Teresa Purtiman** also attended.

Eric Zalud presented a webinar for the **Council on Litigation Management** titled *Emergency Response and Crisis Management for Transportation Industries, Part 1*, on July 27, 2011.

Eric Zalud and **Rich Plewacki** attended the **National Tank Truck Carriers Board of Directors Meeting** in Colorado Springs, CO, on July 27–28, 2011.

Marc Blubaugh presented *Freight Broker Liability: Can You Plug the Leak in the Dike?* at the **International Warehousing Logistics Association Insurance Company's Captive Insurance Board of Directors Annual Meeting** in Lake Tahoe, CA, on July 28, 2011.

Marc Blubaugh attended the **Transportation Lawyers Association Executive Committee Meeting** in Boulder, CO, on July 30, 2011.

Rich Plewacki presented *Essential Concepts for Protecting Your Independent Contractor Status* at the **Truck Load Carriers Association Independent Contractor Division 16th Annual Independent Contractor Division Meeting** in Dallas, TX, on August 26–27, 2011. **Teresa Purtiman** also attended.

Rich Plewacki presented on *Contract Versus Company Drivers* at the **American Trucking Association's Safety Management Council's 2011 Safety & Human Resources National Conference and Exhibition** in Albuquerque, NM, on September 20–21, 2011.

Eric Zalud presented *Limiting Risk in the Cargo Arena Via Insurance and Liability Limitations* at the **Trucking Industry Defense Association Conference** in Cleveland, OH, on September 21, 2011.

Eric Zalud presented *The Expansion of Carrier Selection Personal Injury Liability in the CSA 2010 Era: What you don't know about whom you select, may hurt you* at the **Annual Conference on Transportation Innovation and Cost Savings** in Toronto, Canada, on September 22, 2011.

Martha Payne attended the **Canadian Transportation Lawyer's Association Annual Conference** in Winnipeg, Canada, on September 22–24, 2011.

Thomas Kern presented *Valuation v. Insurance, and Why You Should Care* at the **Ohio Trucking Association/Ohio Association of Movers Annual Convention** in Aurora, OH, on September 25–27, 2011. **Rich Plewacki** and **Teresa Purtiman** also attended.

Marc Blubaugh moderated a panel discussion titled, *Due Diligence, Deal Structuring, Pricing and Exits for Top Deal Professionals Explaining How They Identify and Navigate the Unique Issues of Transportation, Distribution and Logistics Deals* at the **Capital Roundtable** in New York City, NY, on October 9, 2011. **Eric Zalud** also attended.

Eric Zalud attended the **19th Annual Trucking Industry Defense Association Industry Seminar** in Las Vegas, NV, on October 12–14, 2011.

Marc Blubaugh, Rich Plewacki and **Teresa Purtiman** attended the **American Trucking Association's Annual Management Convention and Exhibition** in Grapevine, TX, on October 16–18, 2011.

Marc Blubaugh presented *Transportation Law: Navigating the Regulatory Landscape* as part of the **International Warehousing Logistics Association** webinar on October 27, 2011.

Eric Zalud presented *Don't Let Your "Friends" Become Your "Frenemies": Discovery Dilemmas and Privilege Paradoxes in the Age of Social Media* at the **Transportation Law Institute** in Washington, D.C., on November 4, 2011. **Marc Blubaugh** also attended.

Marc Blubaugh attended the **Transportation Lawyers Association Executive Committee Meeting** in Washington, D.C., on November 5, 2011.

On the Horizon

Marc Blubaugh will be presenting *Defending Against the Latest Claims From the Plaintiffs' Bar Against Brokers, Carriers and Manufacturers and Analyzing Fault Apportionment* at **ACI's 2nd National Forum on Defending and Managing Trucking Litigation** in Orlando, FL, on December 5, 2011.

Marc Blubaugh will be moderating a panel discussion on *Transportation and Logistics* for the **Columbus Roundtable of the Council of Supply Chain Management Professionals** in Columbus, OH, on January 13, 2012.

Marc Blubaugh and **Eric Zalud** will be attending the **Transportation Lawyers Association's Regional Conference** in Chicago, IL, on January 20, 2012.

Eric Zalud will be presenting *CSA 2010 in 2012: Practical Lessons from the Road* at the **Trucking Law Seminar** in Scottsdale, AZ, on February 16–17, 2012.

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

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

Eric Zalud, *Chair* | (216) 363-4178
ezalud@beneschlaw.com

Marc Blubaugh | (614) 223-9382
mblubaugh@beneschlaw.com

Matthew Gurbach | (216) 363-4413
mgurbach@beneschlaw.com

James Hill | (216) 363-4444
jhill@beneschlaw.com

J. Allen Jones III | (614) 223-9323
ajones@beneschlaw.com

Thomas Kern | (614) 223-9369
tkern@beneschlaw.com

Peter Kirsanow | (216) 363-4481
pkirsanow@beneschlaw.com

Andi Metzel | (317) 685-6159
ametzel@beneschlaw.com

David Neumann | (216) 363-4584
dneumann@beneschlaw.com

Lianzhong Pan | (011-8621) 3222-0388
lpan@beneschlaw.com

Martha Payne | (541) 764-2859
mpayne@beneschlaw.com

Rich Plewacki | (216) 363-4159
rplewacki@beneschlaw.com

Teresa Purtiman | (614) 223-9380
tpurtiman@beneschlaw.com

Nicole Schaefer | (216) 363-4593
nschaefer@beneschlaw.com

Clare Taft | (216) 363-4435
ctaft@beneschlaw.com

Yanping Wang | (216) 363-4664
ywang@beneschlaw.com

Thomas Washbush | (614) 223-9317
twashbush@beneschlaw.com

E. Mark Young | (216) 363-4518
myoung@beneschlaw.com

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