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The Teamsters Target The FAAAA

On May 18, 2009, the *Journal of Commerce* reported that the Teamsters and its supporters are working to amend the Federal Aviation Administration Authorization Act ("FAAAA"). The apparent goal of the proposed amendment is to establish a special 50 mile zone around seaports where federal preemption of motor carrier rates, routes, and services would not apply. The Teamsters' efforts are aimed at undermining a recent court decision in the United States Court of Appeals for the Ninth Circuit. However, the proposed amendment would have detrimental consequences reaching far beyond the current dispute with the Port of Los Angeles and the Port of Long Beach (the "Ports").

The Ports Litigation

In the case that has energized the Teamsters, the American Trucking Association challenged the Ports in their efforts to impose certain Concession Agreements upon motor carriers who performed drayage service at the Ports. The Concession Agreements contain a wide variety of obligations, ranging from the phase-out of the use of independent owner-operators, to the institution of RFID technology, to certain parking bans. While the trial court refused to enjoin the implementation of the Concession Agreements, the Court of Appeals reversed the trial court, finding that the Concession Agreements, or parts thereof, were more likely than not to be preempted under the FAAAA. The Court of Appeals specifically noted that the phase-out of independent owner-operators was highly likely to be preempted. This result has frustrated the Teamsters, who have been hoping to organize employee drivers once the phase-out was underway.

FAAAA Fundamentals

By way of background, on August 23, 1994, the U.S. Congress enacted the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"). Among other things, the FAAAA expressly preempted a wide variety of state and local regulations and state law claims affecting trucking companies. On December 29, 1995, the U.S. Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA"), effective January 1, 1996. Section 103 of ICCTA recodified former 49 U.S.C. § 11501(h) as 49 U.S.C. § 14501(c). 49 U.S.C. § 14501(c)(1) now provides:

General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States *may not* enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service* of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(emphasis added). In other words, the statute preempts certain state laws and regulations relating to prices charged by trucking companies and others involved in the transportation of goods. This statute was modeled upon a virtually identical provision in the Airline Deregulation Act of 1978 (the "ADA"), presently codified at 49 U.S.C. § 41713(b)(4)(A). Therefore, courts have universally recognized that, in order to understand the preemptive scope of the FAAAA, courts must first look to the ADA. Indeed, last year, the United States Supreme Court itself construed the FAAAA as having a broad preemptive scope *identical* with that of the ADA. *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. 989, 994 (2008) (preempting a Maine statute regulating delivery companies).

Significantly, the FAAAA not only preempts certain state laws and regulations but also state law *claims* other than breach

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of contract. In other words, the FAAAA provides parties with powerful defenses in a wide variety of disputes. For example, the FAAAA preempts certain freight claims and certain freight charge controversies as described below.

Freight Claims

The FAAAA preempts many types of claims brought for freight loss, damage, or delay. For instance, *In Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 (N.D.Cal. 1996), a plaintiff shipper sued a carrier for negligence, conversion, and breach of contract arising out of the carrier's loss in transit of two gold rings. The carrier argued that the plaintiff's claims were all preempted by 49 U.S.C. § 14501(c)(1). After noting that the courts have given the "broadest possible scope" to preemption under 49 U.S.C. § 14501(c), the court concluded that the plaintiff's non-contractual claims necessarily "relate to" the carrier's services and, therefore, were preempted in total. As a result, the court entered judgment in favor of the carrier as a matter of law.

Rockwell v. United Parcel Service, Inc., 1999 WL 33100089 (D.Vt. 1999) provides yet another example of the preemptive effect of 49 U.S.C. § 14501(c)(1). In *Rockwell*, a plaintiff shipper sued a carrier under various state law tort claims for injuries arising out of a pipe bomb that the motor carrier unwittingly delivered. The carrier defended the action by seeking dismissal of the state law claims due to preemption under 49 U.S.C. § 14501(c). The court agreed that the shipper's claims were not cognizable under Vermont law:

> In the context of delivering packages, Ms. Rockwell's complaint regarding UPS' package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted…. *Tort claims regarding a carrier's shipment of packages 'would affect [its] provision of air shipment services' and are thus preempted.*

Id. at *2 (emphasis added) (internal citations omitted). In short, tort claims for freight loss and damage are, by definition, tort claims "regarding a carrier's shipment of packages" and are, therefore, plainly preempted.

Freight Charges

Just last year, in *Data Manufacturing, Inc. v. United Parcel Service, Inc.*, 2008 WL 648483 (E.D. Mo. 2008), a plaintiff brought a suit against a motor carrier seeking damages for allegedly wrongful "re-billing charges" assessed by the motor carrier. The defendant carrier successfully argued that all of the plaintiff's claims were preempted by 49 U.S.C. § 14501(c)(1). The court explained:

> The determination of whether such charges are unlawful or against public policy depends not on any term of the parties' contract, but instead on the laws and public policies of the state of Missouri. The remainder of plaintiff's claims are also derived from the enactment or enforcement of state law. Count II states a claim for fraudulent misrepresentation while Count III and Count IV state claims for money had and received and fraudulent misrepresentation, respectively. Finally, Count V of the amended complaint seeks contractual declaratory relief. *All of plaintiff's claims derive from the enactment or enforcement of state law.*

Id. at *3-4 (emphasis added). As a result, the court dismissed the plaintiff's complaint for failure to state a claim.

A similarly sound decision was issued in *Barber Auto Sales, Inc. v. United Parcel Services, Inc.*, 494 F.Supp.2d 1290 (N.D. Ala. 2007). In that case, a shipper brought a putative class action against a motor carrier for allegedly manipulating audit procedures in order to charge artificially high transportation charges. The plaintiff's claim sounded in contract and sought both monetary and equitable relief. Among other things, the trucking company argued that 49 U.S.C. § 14501(c)(1) preempted the plaintiff' s claims for equitable relief. The court agreed. Likewise, in *Mastercraft Interiors, Ltd. v. ABF Freight Systems, Inc.*, 283 F.Supp.2d 284 (D. Md. 2003), a plaintiff sued a trucking company for allegedly charging fees other than those agreed upon. The plaintiff 's claims included a claim for unjust enrichment. The trucking company defended on the basis of preemption under the FAAAA. Once again, the court agreed that plaintiff's claim for unjust enrichment (along with other claims) was preempted as such a claim requires reference to state law:

> The subject matter of the other three claims—misrepresentation, negligent misrepresentation, and unjust enrichment—seek to impose additional state law standards, which may vary from state to state. It is exactly this type of variance which Congress seeks to preclude by means of the preemption provisions of the ICCTA.

Id. at 288. Other, similar freight charge and billing disputes have been preempted by courts around the country.

Conclusion

Motor carriers, transportation brokers, freight forwarders, and private fleets should take immediate notice of the Teamsters' current efforts to limit the preemptive scope of the FAAAA. To enact an amendment that reduces the preemptive power of the FAAAA is to take a step backward to a time when parties could only speculate about the outcome of a given case based on the idiosyncrasies of any given state's caselaw and statutory framework. Parties interested in stable supply chains must carefully watch—and advocate against—any organized efforts to amend the FAAAA in order to reduce its preemptive scope.

For more information, please contact Marc Blubaugh at mblubaugh@beneschlaw.com or (614) 223-9382.

Deemed Export Licensing Requirements (Or How to Export Your Technology Without Leaving the United States)

It is incorrect to assume that just because your company does not export products to a foreign country that you may not be an "exporter" that is subject to the licensing requirements propounded by the Department of State in the International Traffic in Arms Regulations (ITAR) or Bureau of Industry and Security (BIS).

A "Deemed Export" is an export of technology or source code (except encryption source code) that is "deemed" to take place when it is released to a foreign national within the United States. (Export Administration Regulations ("EAR") § 734.2(b)(2)(ii)). Technology is "released" for export when it is available to foreign nationals for visual inspection; when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3) of the Export Administration Regulations (EAR).

EAR requires U.S. entities to apply for an export license when both of the following exist:

1. the entity intends to transfer or expose foreign nationals within their employment or otherwise to controlled technologies even if the exposure occurs within the United States; and
2. the transfer of the same technology to the foreign national's home country would require an export license.

The penalties for unwittingly engaging in deemed exporting can be quite severe. The potential penalties include both civil and criminal liability depending on the circumstances. Statistics provided by BIS show that Deemed Export violations that have been investigated and resolved since 2004 have resulted 19 final orders and fines totaling $2.4 million dollars. The fines can be very costly when the circumstances indicate certain levels of knowledge on the party of the company prior to the investigation. Strikingly, however, when the violation involved only technology and the company voluntarily disclosed the violation, the fines were significantly lower than when self-reporting was not the case. Since 2004, 120 investigations that involved a Deemed Export have been resolved with merely a warning letter.

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One case that highlights the danger of deemed exports is the settlement by Ingersoll Machine Tools ("Ingersoll") in August of 2008 in the amount of $126,000. Ingersoll was charged with having committed eight unlicensed Deemed Exports of production and development technology for vertical fiber and placement machines. This controlled technology was seen by Italian and Indian national employees while working in the United States. As a result, there were Deemed Exports to India and Italy. Ingersoll had an export compliance program in place, it simply did not consider or address preventing Deemed Exports.

What can you do to make sure that your organization is not a deemed exporter? There are several basic rules that if followed can identify and minimize the risk of exporting technology by accident.

1. Determine If Your Company Has Controlled Technology

Even if your company does not normally export goods, you must evaluate whether or not your company possesses technology that if "exported" would be subject to licensing requirements or other controls.

2. Determine Who Has Access To Your Technology

The first question to answer is where is your technology stored and who is exposed to it on a routine basis. Do you employ foreign nationals and routinely expose them to regulated technology?

The next question that must be answered is whether the regulated technology is stored in a manner that could allow for visitors, vendors or clients to be exposed to the technology. A Deemed Export can occur accidentally if a visitor, vendor or client happens to be exposed and is a foreign national.

3. Review Or Institute An Export Compliance Program

In short, if you have regulated technology, you must institute and monitor the protections that your company currently has in place. This will require determining and tracking the day to day activities of foreign national employees and visitors. It will require instituting efforts to ensure that such foreign nationals are barred from having any access to regulated technology. These efforts will then need to be documented into a Compliance Plan that is published and monitored by a designated individual in the corporation.

For further guidance on Deemed Exports, setting up a compliance program or other exporting issues, please contact Mariann Butch at mbutch@beneschlaw.com or (216) 363-4198 or E. Mark Young at myoung@beneschlaw.com or (216) 363-4518.

Charge-backs for Sale

Owner-Operator Independent Drivers Association, Inc. v. Landstar System, Inc., 541 F.3d 1278 (11th. Cir. 2008)

Since the trucking business was invented, independent truckers and motor carriers have had difficulty agreeing on the terms and conditions under which they do business. Several years ago, the ICC, and, more recently, the Federal Motor Carrier Safety Administration have tried to level the playing field through the "Truth in Leasing" rules (49 CFR Part 376). As a result, there has been a steady stream of litigation against motor carriers led by the independent trucker's trade association, the Owner-Operator Independent Driver's Association ("OOIDA"). These cases have dealt with a series of issues related to alleged violations of the Truth in Leasing rules.

In one recent decision, the 11th Circuit Court of Appeals addressed the question of charge-backs to the drivers to reimburse Landstar for purchases of insurance by Landstar for the benefit of the drivers. The Court of Appeals was concerned with the amount of detail regarding costs that may be required in the written contract to satisfy the Truth in Leasing requirements. The rule provides that the lease must clearly specify all charge-back items including an explanation of how the amount of each item is to be computed.

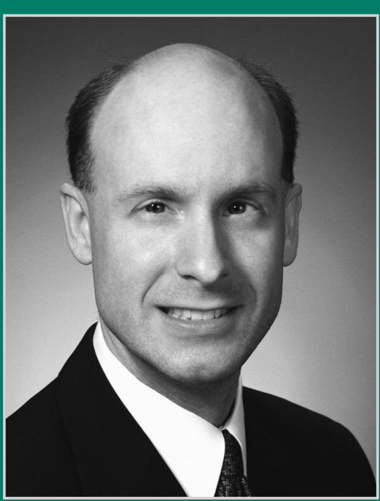
The Court of Appeals held that the Landstar leases violated the Truth in Leasing rules. Specifically, the Leases failed to state owner operator compensation clearly, failed to disclose charge-back items properly, and failed to disclose pricing lists of vendors of certain charge-backs items.

Fortunately for the carriers, the news was not all bad. The Court of Appeals also found that the rules did not prohibit a carrier from making a profit from charge-back items. In addition, the court made it difficult for a plaintiff to collect substantial damages because of the non-complying agreement. Any recovery by OOIDA or an owner-operator would have to be based on actual damages and not on any theory of restitution or disgorgement of profits. Also, claims would have to be proven individually since the court found that class certification was not appropriate under facts of this case. Actual damages arising from the charge-back items in question are likely to be a relatively small amount and will be hard to prove.

The bad news for the carriers is that the decision is telling them that they will have to be more careful with respect to providing information to the driver regarding charge-back items. The driver is entitled to know the carrier's cost with respect to any charge-back item. However, Truth in Leasing does not prohibit a carrier from charging the driver a price that is different from the price paid by the carrier to make the item available. Presumably, the driver would have the opportunity to decide that the carrier is offering a bad deal and go elsewhere.

Drafting and administering a lease offering insurance that qualifies under Truth in Leasing is a difficult task. The carrier may be providing different types of policies (e.g., physical damage, occupational accident, non-trucking liability and others). A rate or rates may change several times a year. The carrier will have to keep up with the changes in costs and with required disclosures to the drivers.

For more information, please contact Robert Spira at rspira@beneschlaw.com or (216) 363-4413.



Blubaugh Elected President of the Columbus Roundtable of the Council of Supply Chain Management Professionals

Marc Blubaugh was recently elected President of the Columbus Roundtable of the Council of Supply Chain Management Professionals (CSCMP) for 2009–2010. His term began on July 1, 2009.

Founded in 1963, CSCMP is the preeminent worldwide professional association dedicated to the advancement and dissemination of research and knowledge on supply chain management. With over 8,500 members representing nearly all industry sectors, government, and academia from 67 countries, CSCMP members are the leading practitioners and authorities in the fields of logistics and supply chain management.

U.S. Supreme Court Holds Transporter Not Liable For Environmental Clean Up

On May 4, 2009, the United States Supreme Court issued its decision in the case of *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. ____ (2009). An agricultural chemical distributor (Brown & Bryan, Inc. or "B & B") began operations on a parcel of land located in Arvin, California beginning in 1960. B & B purchased certain pesticides (including a pesticide known as D-D) from the Shell Oil Company. Eventually, B & B expanded its operations to an adjacent parcel of land which had suffered some environmental contamination by the prior owners, the Burlington Northern and Santa Fe Railway Company and the Union Pacific Railroad Company.

In 1989, the U.S. EPA and California Department of Toxic Substances Control discovered extensive soil and ground water contamination on the site. The Arvin site was placed on the National Priorities List ("NPL") and the U.S. EPA designated the site a "CERCLA" site, pursuant to the Comprehensive Environmental Response Compensation Liability Act of 1980, 42 U.S.C. §9601, *et seq.* Pursuant to the terms of CERCLA, U.S. EPA conducted clean up activities. In the meantime, B & B became insolvent and ceased all operations. In 1991, U.S. EPA issued an Administrative Order naming the railroads as "potentially responsible parties (PRPs)" and required the railroads to pay for the clean up. In 1992, the railroads filed suit in United States District Court in an effort to recoup their costs. That lawsuit was consolidated with a second lawsuit initiated by U.S. EPA which had been filed against all the PRPs, including Shell. By 1998, U.S. EPA had incurred clean up costs in excess of $8 million dollars.

The United States District Court conducted a six week bench trial and decided that Shell was liable for 6% of the total clean up because it had *"arranged"* for disposal of a hazardous substance. Further, the Court decided that the railroads were 9% responsible because they owned the land upon which hazardous spills had occurred. 42 USC §9607(a) imposes strict liability for environmental contamination on four broad categories of potentially responsible parties: (1) owners, (2) operators, (3) transporters, or (4) generators of hazardous waste. A "transporter" is "any person, who by contract, agreement, or otherwise *arrange* for disposal or treatment." Pursuant to CERCLA, persons identified under one of these categories may be compelled to clean up or reimburse the U.S. government for past and future response costs.

The United States Supreme Court analyzed whether Shell had "arranged" for the disposal of pesticide. The Court concluded that if a company were to enter a transaction solely for the purpose of discarding a used and no longer useful hazardous substance, this would meet the definition, but that if a company had sold a new and useful product, which later and unbeknownst to the seller, had been disposed of in a manner that led to contamination, such activity would not meet the definition. Importantly, the Court held that this question is fact intensive and case specific, but that "such liability may not extend the limits of the statute itself." *Id.* at 10. Under this analysis, the Court concluded, Shell's mere knowledge that spill and leaks sometimes occurred was not sufficient to conclude that Shell had "arranged" for the disposal of this substance. Therefore, the U.S. Supreme Court held under the facts developed, there was insufficient evidence to conclude that Shell was liable for the clean up.

The Court then examined the evidence and apportionment of liability as it relates to the Railroads. The Court cited *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (1983) issued by then-Chief Judge Carl Rubin of the United States Court for the Southern District of Ohio which held that CERCLA did not mandate "joint and several liability" in every case, but rather each defendant is "subject to liability only for the portion of the total harm that he has himself caused." *Id.* at 810.

The trial court had calculated that (1) the Railroad parcel constituted 19% of the surface area of the Arvin site, (2) that the railroad had leased their parcel to B & B for 13 years (which was 45% of time B & B had operated the site), (3) that the volume of hazardous-substance releasing activities on the B & B property was 10 times greater than the amount of substance released on the Railroad parcel, and (4) that two chemicals (Nemagon and dinoseb, not D-D) contributed to over two thirds of the contamination which required remediation. As such, the Court multiplied the total cost by .19, by .45, and by .66, which resulted in the railroads being responsible for approximately 6% of the total remediation costs. The U.S. Supreme Court concluded the facts in the record reasonably supported the apportionment of liability.

One lone Justice (Justice Ruth Bader Ginsburg) issued a dissenting opinion. She observed that the facts indicate that Shell began shipping its product in 55-gallon drums, but then found it "economically advantageous" to deliver in bulk tank truckloads, and that B & B maintained "bulk storage facilities" which led to numerous tank failures and spills as the chemical rusted tanks and eroded valves." As such, she wrote that she would have returned the cases to the trial court to "give all parties a fair opportunity to address the Court's endeavor to allocate costs."

For more information, please contact Frank Reed, Jr. at freed@beneschlaw.com or (614) 223-9304.

Recent Events

Mariann Butch presented *Electronic Discovery and Records Retention as Applied to Transportation Entities* and **Peter Kirsanow** spoke on diversity at the **Transportation Lawyers' Association Annual Conference** in Carlsbad, California, from April 28–May 2, 2009. **Eric Zalud** and **Marc Blubaugh** attended both the **Executive Committee Meeting** of the **Transportation Lawyers Association** as well as the Annual Conference, and **Bob Spira** attended the Annual Conference and Chairing the Motor Carriers Committee meeting.

Bob Spira served as Chair of a full-day seminar titled *Going Global Today* in Cleveland, OH, on May 12, 2009. The seminar was sponsored by the **International Law Section of Cleveland Bar Association** in partnership with the **International Trade Assistance Center**.

Marc Blubaugh presented *Crossing the Line: How the California Ports Went Too Far In Regulating Trucking* and **Marc Blubaugh** and **Eric Zalud** presented *Outsourcing Your Transport Services: Pushing the Envelope* at the **International Warehouse Logistics Association's Legal Practices Symposium** in Chicago, IL, on June 24, 2009

Eric Zalud attended the **Conference of Freight Counsel Meeting** in Philadelphia, PA, on June 28–29, 2009.

Bob Spira presented a *Motor Update* at the Denver, Colorado **80th Annual Meeting of the Association of Transportation Professionals** on June 30, 2009 in Denver, CO.

Eric Zalud attended the **Transportation Lawyers Association Executive Committee Meeting** in San Francisco, CA, on July 18, 2009.

Peter Kirsanow presented "Edsy for Individuals, Tough for Employers" regarding the ADA Amendments at the **American Trucking Association's General Counsel's Forum** in Vancouver, Canada, July 26–28. **Eric Zalud** and **Marc Blubaugh** also attended this forum.

Eric Zalud, Gregg Eisenberg and **Jeff Zimon** will be presenting on corporate succession issues, M&A issues and exit strategies (including benefits issues) at the **National Tank Truck Carriers Summer Board Meeting** in Jackson Hole, WY, on August 5–7, 2009.

On the Horizon

Eric Zalud and **Marc Blubaugh** will be presenting *Legal Smorgasbord: Hot Topics in Transportation and Logistics* at the **Ohio Trucking Association's Annual Convention** on in Oglebay, WV, on September 1, 2009.

Marc Blubaugh will be presenting *Due Diligence in the Selection of Carriers and Drivers* at the **Canadian Transportation Lawyers Association's Annual Conference** in Niagara-on-the-Lake, Ontario, on October 2, 2009.

Martha Payne will be speaking at the **SMC3 Loss Prevention Conference** in Atlanta, GA, on October 19. She will present the carrier's position during the *Claims Liability Workshop*.

Jason Blake will be attending the **National Private Truck Carriers Maintenance Conference** in Herndon, VA, on September 10 and 11, 2009.

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

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please e-mail Sam Daher at sdaher@beneschlaw.com.

Pass this copy of *InterConnect* on to a colleague, or e-mail Liz Highley at ehighley@beneschlaw.com to add someone to the mailing list.

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