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Guarding Your Property: Trade Secret Protection and Non-Compete Agreements

You have built your business from the ground up. Through countless early mornings, late evenings and sleepless nights, you have assembled the know-how to make your transportation and logistics company successful. Along the way, you have vested your key employees and independent contractors with critical and proprietary knowledge, information and data that gives you a leg up on your competition. Much like you may have a security system to protect your company's physical assets, you should also do what is necessary to protect its trade secrets.

A great deal of information, if released to the public (or, more specifically, your competition), would be detrimental to your business—from the intimate details of your customer relationships that reside with your sales force, to your managers' knowledge of the subtle operational nuances that set your transportation company apart from the competition (such as the identity of your drivers), to the sensitive data about your company that you entrust to independent contractors. While trade secret laws are in place to help you protect what is yours, you should also consider agreements with your employees, drivers and brokers to provide you an extra level of assurance.

All 50 states and the District of Columbia afford legal protections that guard against the misappropriation, dissemination or outright theft of your trade secrets. These laws are independent of any agreements you have in place. The overwhelming majority of states have adopted some variation of the Uniform Trade Secrets Act (UTSA). This model statute, adjusted slightly from jurisdiction to jurisdiction, vests an employer with the ability to prevent employees, contractors and brokers from misappropriating confidential information and to collect money damages for inappropriate activity.

Much of what you do on a daily basis may be considered a trade secret subject to legal protections in your state. Business owners and entrepreneurs often mistakenly believe that the term "trade secret" applies only to highly technical information or something akin to the formula needed to make Coca-Cola, but that is not the case. The UTSA broadly defines a trade secret as follows:

> 'Trade secret' means information, including a formula, pattern, compilation, program device, method, technique or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Unif. Trade Secrets Act § 1 (amended 1985), 14 U.L.A. 437 (1990)

When a business is seeking to protect its trade secrets in court, a number of factors are considered to determine whether the information is actually a trade secret:

1. The extent to which the information is known outside the business.
2. Precautions taken to guard the secrecy of the information.
3. The extent to which the information is known to those inside the business, i.e., by the employees.
4. The amount of effort or money expended in obtaining and developing confidential information.

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When it comes to confidential information, you should take steps to protect its secrecy. For example, customer lists, pricing data and the identity of drivers are often the lifeblood of transportation firms. In order to maximize trade secret protection, you should limit the access of this information to only those employees who need it to execute their job functions. The more readily available this information is within your company, the less likely it is to be deemed a trade secret. Should you have a wayward employee who wishes to disseminate confidential information, being able to show the efforts that you have taken to maintain its confidentiality is of paramount importance. As it relates to drivers who are owner-operators and brokers with whom you have relationships, it is wise to strictly limit access to your confidential information, as dissemination of this data will minimize your legal trade secret protection. You can work with your lawyer to implement strategies to maximize the legal trade secret protections available in your state.

"Properly drafted agreements containing trade secret and non-compete provisions can proactively defend against employee misconduct and can also allow you to legally enforce your rights."

To bolster the legal protections available to your business, you should also strongly consider agreements with your employees and contractors that define the ownership, value and proprietary nature of the information you share. You may also wish to consider having your employees sign non-compete agreements that will prevent your own information from being used competitively against you.

Non-compete agreements can have many forms. They can include strict prohibitions against former employees competing against you, soliciting your customers, soliciting customers within a specific geographic area or industry, breaking your confidences or even stealing your employees. You should work carefully with your counsel to narrowly construct any non-compete agreement to protect only those interests that are critical. Non-compete agreements that are overly broad in subject, time or geographic range are frequently stricken down.

There is no bright-line test that courts employ to determine whether or not a non-compete agreement is enforceable. Rather, the majority of courts in the U.S. attempt to determine whether or not such a provision is "reasonable" to protect legitimate business interests. Courts shy away from enforcing non-compete agreements that are overly broad.

Properly drafted agreements containing trade secret and non-compete provisions can proactively defend against employee misconduct and can also allow you to legally enforce your rights. Likewise, contracts with owner-operators and other independent contractors can bolster your protection. Form agreements and those not specifically molded to your business interests may not protect you adequately and are at risk of being disregarded by the courts, as the laws governing non-compete agreements vary widely from state-to-state. As such, you must take great care to make certain that your contracts are valid and enforceable. Consequently, having a proper agreement in place is worth the effort and time.

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

A Household Goods Agent for a Disclosed Principal is not Liable for Freight Loss or Damage Claims

In most lawsuits involving loss or damage to household goods resulting from an interstate move, the plaintiff's lawyer names as many defendants in the case as possible to better the plaintiff's chances of recovery. Many times, movers of household goods will contract with agent-movers to perform the actual transportation of the household goods. When something goes wrong and loss or damage occurs, the shipper's lawyer will inevitably name as defendants not only the mover the shipper originally contracted with, but also the agent-mover that actually performed the transportation of the household goods.

Once litigation ensues, the defendants' lawyers set forth a multitude of defenses, including the Carmack Amendment (49 U.S.C. § 14706). However, one often overlooked and extremely effective defense falls under 49 U.S.C. § 13907(a), which states:

> Carriers responsible for agents—Each motor carrier providing transportation of household goods shall be responsible for all acts or omissions of any of its agents which relate to the performance of household goods transportation services (including accessorial or terminal services) and which are within the actual or apparent authority of the agent from the carrier or which are ratified by the carrier.

In other words, federal law makes motor carriers liable for the acts and omissions of their agents. In cases involving the determination of liability for household goods agents, courts apply agency principles. In doing so, courts have uniformly held that a household goods agent for a disclosed principal is not liable for freight loss or damage claims. *Thornton v. Philpot Relocation Systems*, 2012 WL 174937 at * 3 (E.D. Tenn. 2012) (holding that household goods agent of disclosed principal was not liable for damages arising from damaged freight); *Moore v. La Habra Relocations, Inc.*, 501 F. Supp.2d 1278 at 1279 (C.D. Cal. 2007) (household goods agent of disclosed principal not liable for damages arising from loss or damage to freight); *Mallory v. Allied Van Lines, Inc.*, 2004 WL 870697 at * 2 (E.D. Pa. 2004) (relying upon Restatement [Second] of Agency, court held that household goods agent was not liable for freight loss and damage); *Nichols v. Mayflower Transit, LLC*, 368 F.Supp.2d 1104, 1109 (D. Nev. 2003) (household goods agent of disclosed principal not liable for damage to or loss of *freight); O'Donnell v. Earle W. Noyes & Sons*, 98 F.Supp.2d 60, 62-64 (D. Maine 2000) (under agency principles, household goods agent of disclosed principal should be dismissed from lawsuit for freight loss or damage).

"[C]ourts have uniformly held that a household goods agent for a disclosed principal is not liable for freight loss or damage claims."

In most cases, the plaintiff will either admit the existence of the agent-principal relationship, or it will be proven with relative ease by the bill of lading. Once the agency relationship is established, courts, as demonstrated above, will dismiss the agent-mover from the case. Not only does the dismissal of the agent-mover from the lawsuit save resources by eliminating the burden of duplicate litigation, but it also preserves the relationship between movers of household goods and their agents by eliminating any adverse positions between the parties. So, the next time you or your client is involved in this type of litigation, do not hesitate to utilize 49 U.S.C. § 13907(a).

For more information, please contact Thomas Kern at tkern@beneschlaw.com or (614) 223-9369

Due Diligence and Planning Ahead Can Grease the Skids at the Canadian Border

A few years ago, a friend called my office late on a Friday afternoon from the Canadian border near Detroit, Michigan. He and five friends were a few hours into a much anticipated week of fishing and fun in northern Ontario. Unfortunately, one member of the group had a drunken driving conviction from three years prior and was being denied admittance into Canada. "What should we do?" my friend asked. Under the circumstances, my reply was harsh but accurate: Put him in a hotel room, enjoy your fishing trip without him, and make sure he's better prepared next year. Canadian immigration considered him criminally inadmissible. To be fair, our Canadian friends face similar scrutiny when visiting the U.S.

Of course, a fishing trip with friends is one thing. The potential for delay of a shipment if your driver is deemed criminally inadmissible is another. It could be devastatingly costly for your company.

Benjamin Franklin said, "By failing to prepare, you are preparing to fail." The Free and Secure Trade (FAST) program joint initiative between the U.S. and Canada provides a commercially convenient way to complete cross-border shipments with fewer delays. Nevertheless, in order to be eligible, the driver, among other things, must not be criminally inadmissible.

Thankfully, Canadian authorities provide means to overcome criminal inadmissibility. Each, however, requires preparation in advance of a visit to Canada from the U.S.

"[I]n order to be eligible, the driver, among other things, must not be criminally inadmissible."

First, under Canadian law, a person may be granted admission to Canada if he or she is able to demonstrate to border officials that he or she meets the legal definition to be deemed rehabilitated. To be deemed rehabilitated, you must meet the requirements of the Canadian Immigration and Refugee Protection Act, and, depending on the offense, at least five years (and in some cases 10) must have passed from the completion of the sentence for the crime. In any event, if your offense is punishable in Canada by a maximum jail term of more than 10 years, you are ineligible for deemed rehabilitation.

Second, you may apply for criminal rehabilitation by satisfactorily completing the Application for Criminal Rehabilitation (IMM 1444E) and paying the appropriate processing fee if at least five years have passed since the completion of your criminal sentence. The Application is cumbersome. In addition to a complete employment and address history from age 18, the form requires detailed information regarding the offense resulting in your inadmissibility to Canada, including the specific statute number(s), a description of the events leading to your offense and conviction, and a statement explaining why you believe you are rehabilitated and not a danger to the public safety in Canada. The Application further requires copies of the following documents, among others, depending upon the nature of the criminal offense: passport, driver's license and birth certificate; court judgment(s); text of statute(s); police certificate; and documentation relating to the sentence, parole, probation, fine or pardon.

Third, if you are able to demonstrate to Canadian border agents that your conviction was pardoned or discharged under applicable law, you may be permitted to enter Canada.

Fourth, if less than five years has passed and, therefore, you are not yet eligible for criminal rehabilitation, you can seek a Temporary Resident Permit. However, there is no guarantee that you will be granted a Temporary Resident Permit and it can be revoked at any time.

Encouraging your drivers to provide full and complete background checks can help your company prepare for crossings at the Canadian-U.S. border. Avoid being left behind (or worse) by ensuring, in advance, that an otherwise inadmissible driver will be considered criminally rehabilitated at the border.

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

Recent Events

Marc Blubaugh and **Eric Zalud** attended the **Transportation Lawyers Association Executive Committee Meeting** in Toronto, Ontario, on July 28, 2012.

Rich Plewacki and **Allen Jones** attended the **National Tank Truck Carriers Summer Membership and Board of Directors Meeting** in La Malbaie, Quebec, Canada, August 1–3, 2012.

Rich Plewacki and **Chip Collier** co-presented at the **NEOTEC Logistics Conference & Golf Open**, at Firestone Country Club, Akron, OH, on August 13, 2012

Teresa Purtiman and **Rich Plewacki** attended the **TCA Independent Contractor & Open Deck Division Meetings** in Chicago, IL, September 6–7, 2012.

Marc Blubaugh presented on transportation law at the **International Warehouse Logistics Association's Safety Conference** in Memphis, TN, on September 13, 2012.

Eric Zalud spoke on *Cargo Liability for Cross Border Shipments* at the **TIDA Cargo Seminar** in Toronto, Canada, on September 13, 2012.

Teresa Purtiman, Thomas Kern and **Rich Plewacki** attended the **Ohio Trucking Association Annual Convention** in Cincinnati, OH, September 16–18, 2012.

Allen Jones attended the **Arkansas Trucking Seminar** in Springdale, AR, on September 19, 2012.

Eric Zalud attended and **Martha Payne** presented on *The Risks and Consideration for North American Companies Doing Business in Foreign Countries: FCPA* at the **Canadian Transport Lawyers Association Annual Conference** in Toronto, CA, on September 27, 2012.

Eric Zalud attended the **26th Annual Transportation Innovation & Cost Savings Conference** by Lande & Associate in Toronto, Canada on October 3, 2012.

Martha Payne presented on *Reducing Risks in Selection of Motor Carriers* at the **Northwest Global Freight Conference** in Portland, OR, on October 4, 2012.

Marc Blubaugh presented on *The Top Ten Legal Hurdles for 2012* and **Rich Plewacki** presented on *How to Deny Regulators and Trial Lawyers Seeking their Treasure by Re-Characterizing Your Independent Contractors as Employees* at the **American Trucking Associations' Management Conference & Exhibition** in Las Vegas, NV, October 6–9, 2012.

Martha Payne attended and **Eric Zalud** presented on *International Transportation Contracting, Collections and Credit* at the **FIATA World Congress** in Los Angeles, CA, October 8–11, 2012.

Matt Gurbach attended the **20th Annual TIDA Industry Seminar** in Dallas, TX, from October 10–12, 2012.

Eric Zalud attended the **TerraLex: 2012 Kansas City Global Meeting** in Kansas City, MO, from October 10–13, 2012.

Rich Plewacki presented on *Ohio HB522 Motor Carrier-Specific Independent Contractor Exception* at the **Cleveland Freight Association Meeting** in Cleveland, OH, on October 17, 2012.

Welcome
Stephanie S. Penninger

Stephanie S. Penninger is an associate in the firm's Litigation Practice Group. She focuses her practice on representing national and regional clients in a wide variety of complex commercial litigation matters. Stephanie has experience representing employers and employees in labor and employment matters, litigating disputes arising out of the employment relationship. This includes handling discrimination claims, covenants not to compete and trade secrets cases, duty of loyalty matters, and wage and contract disputes.

Stephanie's experience also includes representing corporations in transportation and logistics matters, e.g., prosecuting freight charge disputes and defending against cargo claims for loss, damage or delay.

Stephanie works out of the firm's Indianapolis office and regularly attends transportation conferences.

On the Horizon

Marc Blubaugh will be presenting *Fundamentals of Transportation Law: What Those New to Warehousing Need to Know about Transportation* at the **International Warehousing Logistics Association** in Memphis, TN, on October 23, 2012.

Jim Hill, Eric Zalud, Peter Shelton, Kevin Margolis and **Marc Blubaugh** will be attending the **Capital Roundtable on Private Equity Investing in Transportation & Logistics** in New York, NY, on October 25, 2012.

Marc Blubaugh and **Rich Plewacki** will be attending while **Eric Zalud** will be presenting on *Casualty Litigation and CSA Regulations* at the **Transportation Law Institute** in Nashville, TN, on November 9, 2012.

Marc Blubaugh will be attending the **Executive Committee Meeting of the Transportation Lawyers Association** in Nashville, TN, on November 10, 2012.

Marc Blubaugh will be presenting: *Extending Liability to Brokers: The Scope and Nuances of Recent Court Decisions on the Course of Trucking Litigation* at the **ACI National Forum on Defending and Managing Trucking Litigation** in Atlanta, GA, on November 29, 2012.

For further information and registration, please contact Megan Pajakowski, Client Services Manager at mpajakowski@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 email Sam Daher at sdaher@beneschlaw.com.

Pass this copy of *InterConnect* on to a colleague, or email Adriane DeFiore at adefiore@beneschlaw.com to add someone to the mailing list.

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