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

Summer 2014

InterConnect

Counsel for the Road Ahead®

Benesch has been named **Law Firm of the Year** in **Transportation Law** in the 2014 Edition of U.S. News & World Report/Best Lawyers® "Best Law Firms" ranking.

Only one law firm per practice area in the U.S. is receiving this recognition, making this award a particularly significant achievement. This honor would not have been possible without the support of our clients, who both enable and challenge us every day, and the fine attorneys of our Transportation & Logistics Practice Group.

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

Don't Sail Too Close to the Wind: Enhancing Awareness of Intermodal Shipping Documents

Stephanie S. Penninger

In the wake of the surge in intermodal freight transportation, and the transportation industry's heightened reliance on subcontractors and intermediaries, pinpointing the responsible party when goods are lost, damaged or delayed has become convoluted. Multiple shipping documents often govern a particular shipment. Claims are brought by third parties, not even referenced in the bills of lading, against carriers, and carriers are asserting defenses contained in service contracts against nonparties. As illustrated in two recent court cases, it is imperative that intermodal freight transportation companies familiarize themselves with all of the shipping documents governing a particular shipment, and evaluate how the terms within those documents might affect their liability in the event of a cargo calamity.

In *Fubon Ins. Co. LTD. v. OHL Int'l*, 2014 AMC 1078 (S.D.N.Y. 2014), the Lite-On companies engaged OHL Taiwan, in coordination with OHL Xiamen, both agents, in some circumstances, to OHL International, to assist with booking the shipment of 802 boxes of Lite-On's optical devices from China to Buffalo, New York. The shipping order confirmation indicated that COSCO would perform the ocean carriage of the cargo. COSCO issued a bill of lading based on a pro forma bill of lading prepared and provided to COSCO by OHL Xiamen, identifying LET (HK) as "shipper" and COSCO as "carrier." COSCO then sub-contracted with Evans, a trucking company, for the inland transport of the cargo from the Port of New York to Buffalo. During the inland transport, the goods were stolen from a parking lot in New Jersey.

Although not themselves parties to any contract with Evans, cargo owner Lite-On and its subrogated underwriters sued OHL International and Evans, as COSCO's subcontractor,

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If you would like to receive future issues of the newsletter electronically, please email **SAM DAHER** at sdaher@beneschlaw.com.

Don't Sail Too Close to the Wind: Enhancing Awareness of Intermodal Shipping Documents

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for breach of contract, premised on OHL International's house bill and COSCO's bill of lading, respectively. Evans argued, and the court agreed, that Lite-On and its subrogated insurers were "merchants" under COSCO's bill of lading, a term defined to include the consignor, shipper, consignee, owner of the goods and "anyone authorized to act on behalf of any of the foregoing." Therefore, the covenant not to sue COSCO's subcontractors, also set forth in COSCO's bill of lading, barred Lite-On and its insurers from suing Evans. Indeed, the COSCO bill of lading stated that merchants agree to be bound by the bill of lading's terms and conditions as if they had actually signed the bill of lading. The court further reasoned that a party suing on a bill of lading consents to its terms, even if they did not sign or were not otherwise a party to it. Applying the same rationale, the court precluded OHL International, not a party to COSCO's bill of lading but also falling within the definition of "merchant" as an agent of the shipper and cargo owner, from asserting negligence, indemnity and contribution claims against Evans because of the covenant not to sue. Further, the court dismissed OHL International's negligence, indemnity and contribution claims against COSCO because the forum selection clause in the COSCO bill of lading, to which OHL International was bound, required the suit to be brought in the maritime courts in the People's Republic of China.

In *CNA Ins. Co. v. Hyundai Merch. Marine Co., Ltd.*, 747 F.3d 339, (6th Cir. 2014), glass used in LCD flat-screen televisions and computer monitors was damaged during the rail portion of its intermodal transport from Kentucky to Taiwan. CNA, the shipper's subrogated insurer, filed a breach of contract suit against two of the rail carriers involved in the inland portion of the transport: Norfolk Southern and BNSF. Both rail carriers were subcontractors of Hyundai, and neither had negotiated or signed the service contract between the shipper and Hyundai. The court found that the two rail carriers were third party beneficiaries of the service contract because transporting the glass involved substantial overland carriage, and CNA and Hyundai must have anticipated that their services would be required for performance of the contract. The court further found that, as intended beneficiaries and under the broadly written Himalaya clause (a provision extending protections available to carriers, under the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note (COGSA), to non-carriers, e.g., carriers' agents), they could invoke the benefit of the service contract's limitation of liability provisions. However, notwithstanding being an intended beneficiary, the court decided that the two rail carriers were not required to perform any of the obligations owed to CNA or Hyundai in the service contract. Thus, CNA and Hyundai could not maintain a breach of contract claim against the two rail carriers.

Whether or not they have issued their own shipping documents, cargo owners, subrogated insurers, transportation intermediaries, carriers and subcontractors involved in the intermodal transport of cargo should routinely review and analyze documents that have been issued for other portions of a shipment's transport. As in *Fubon* and *CNA*, limitation of liability provisions, covenants not to sue and forum selection clauses, in differing governing bills of lading and contracts, can be strategically enforced against contracting and non-contracting parties alike to minimize exposure or dispose of an opposing party's cargo claim.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or 317.685.6188.

CONGRATULATIONS!

Congratulations to **Stephanie S. Penninger**, an Indianapolis office associate in our Transportation & Logistics and Litigation Practice Groups, who was recently named to the Indiana Motor Truck Association's (IMTA) Future Leaders of Indiana (FLI) Council. The FLI Council's mission is to further the professional development of its membership through education, mentorship and leadership opportunities while continuing to grow and develop IMTA's membership.

NEMF Class Action Settlement Serves as a Reminder to Carriers to Ensure FCRA Compliance in Hiring

David M. Krueger

A New Jersey federal court recently approved an $870,500 settlement of a class action lawsuit against New England Motor Freight (NEMF) for alleged violations of the Fair Credit Reporting Act (FCRA) in connection with applications for employment. The FCRA imposes certain obligations on employers, and particularly motor carriers, before obtaining criminal background, credit or other consumer reports in connection with an application for employment. The FCRA also imposes additional conditions on motor carriers if a carrier denies a driver's application for employment based upon information in a consumer report.

According to the pleadings, the lead plaintiff was a driver whom NEMF had first obtained a criminal background report on without the individual's authorization. Then, NEMF denied the plaintiff's application for employment based upon information obtain in his criminal background report—information that was later discovered to be false. The driver filed suit against NEMF on behalf of a class of approximately 6,000 other truck drivers that had applied for positions with NEMF. Like the lead plaintiff, the drivers alleged that NEMF obtained criminal background checks, credit reports and driver history records without obtaining job applicants' authorization and/or that their applications for employment were denied without NEMF complying with the FCRA's disclosure obligations.

An employer that violates the FCRA may be liable as a matter of law up to $1,000 per violation. Notably, a carrier may be liable for violating the FCRA even if the information in a consumer report is accurate or if the job applicant suffers no actual injury. Lawsuits against motor carriers for alleged violations of the FCRA have been constant, if not slightly increasing, over recent years. There are also networks of plaintiff's law firms nationwide that actively recruit, market to and seek out drivers who are denied employment by carriers in order to identify potential new targets for lawsuits.

Given the number of applications many carriers receive annually, the penalties for failing to comply with the FCRA may quickly add up. Despite the steep potential penalties, however, the cost of compliance remains relatively low. Moreover, affirmative steps a carrier takes to ensure compliance with the FCRA may significantly decrease or eliminate potential penalties—even if it is later discovered the carrier is not in strict compliance. When it comes to a carrier becoming FCRA-compliant, up-front vigilance is much better than being penalized down the road.

For more information, please contact **DAVID M. KRUEGER** at dkrueger@beneschlaw.com or 216.363.4683.

Protect Your Brand! Apply for a Trademark

Thomas B. Kern

In the transportation industry, your reputation is everything. There are hundreds (maybe thousands) of companies doing what you do, and some of them are less expensive. So, you have to stand out for something in order to generate business. You stand out with your reputation. A good reputation is not built overnight—it takes years and sometimes decades to build. The goodwill associated with your name becomes your brand. Your brand is then communicated to the world through a logo or word.

So, sit back and think about all the blood, sweat and tears that went into that one little symbol that communicates to the world who you are and what you are about. Now, think about how easy it would be to skip all those years of hard work and client service, and piggyback on someone else's reputation. Scary isn't it? This type of parasitic behavior happens every single day in the transportation industry. Company "X" will spend years building its reputation only to have it tarnished by Company "x," a poser, using X's goodwill. And while FMCSA license numbers can provide protections and help avoid confusion, it won't keep posers from using your brand name. So, why not do something simple that provides you with brand protection via the force of federal law? That brand protection comes in the form of a registered trademark.

A trademark is a brand name. It can include any word, name, symbol or any combination thereof. A trademark's sole purpose is to provide you with brand protection by distinguishing your goods and services from that of another. A trademark puts the public on notice of your ownership of a brand, and allows you to prohibit others from profiting from your goodwill and reputation. Trademarks are absolutely underutilized by transportation companies. The nature of the transportation industry is interstate, and for a relatively modest amount of attorneys' fees and government fees, you receive nationwide brand protection. This is a no-brainer.

Still not convinced that you should file a trademark application? Run an Internet search using your company name. You will almost inevitably find a number of similarly named companies doing what you do. If you don't find these similarly named companies, then it is only a matter of time until you do. So, put a stop to these brand leeches. Protect your brand and file a trademark application. You will not regret it.

For more information, please contact **THOMAS B. KERN** at tkern@beneschlaw.com or 614.223.9369.

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An Ounce of Prevention: Employ an Effective Antitrust Compliance Policy to Safeguard Your Company's Precious Resources

J. Allen Jones, III

With the United States Department of Justice and State Attorneys General increasing or promising to increase antitrust enforcement efforts to achieve laudatory goals, earn political capital or manufacture other sources of revenue, trade associations are not beyond their reach. Most, if not all, businesses operating in the transportation and logistics industry are members of one or more industry-related associations. And, if a trade association is the target of an antitrust investigation, the trade association's members can be targets too.

In the United States, antitrust laws are designed to promote free and fair competition, prevent anti-competitive behavior, protect competition, and protect consumers and small businesses. Unlawful or anticompetitive activity can include, among other things, price fixing, bid rigging, customer allocation, product allocation, territorial allocation and group boycotts. In short, antitrust laws in the United States prohibit any agreements in restraint of trade, monopolizations or attempts to monopolize, unfair methods of competition, and price discrimination and discriminatory promotional allowances and services.

Trade associations are subject to antitrust laws [see *California Dental Association v. FTC*, 526 U.S. 756 (1999); *American Society of Mechanical Engineers v. Hyrdolevel Corp*, 456 U.S. 556 (1982)]. In addition, liability for antitrust violations can be imposed on a member of a trade association [see *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)].

Penalties for antitrust violations can be very severe, and may be imposed regardless of motive or intent. Thus, the risks involved in engaging in anticompetitive behavior, knowingly or unknowingly, can include imprisonment, substantial fines, additional civil liability (plaintiffs' class action lawyers are always lying in wait), litigation costs, business losses, and other tangible and intangible costs. The government's investigatory phase alone can cost your company or trade association hundreds of thousands of dollars. As a result, compliance is crucial.

Every company and trade association should have an antitrust compliance program. The program does not always need to be cumbersome and complex, but it should be easy to understand and simple to follow. Best practices should include the following, at minimum, among other important considerations:

- Always discuss with your attorney any documents that discuss or reference pricing, market allocations, and agreements or requests to refrain from dealing with a company, customer or supplier.
- While attending trade association meetings or other group meetings, do not discuss with fellow trade association members or attendees information about (1) your company's prices for products, assets or services, or prices charged by competitors, (2) costs, discounts, terms of sale, profit margins or anything that might affect your prices, or (3) any other competitively sensitive information concerning your company or a competitor's company.
- Never stay at any meeting or gathering if discussions are taking place regarding pricing, market allocations, and agreements or requests to refrain from dealing with a company, customer or supplier.
- Provide copies of your antitrust compliance guidelines to all participants at a trade association meeting, or all employees in your company.
- Use existing personnel and training opportunities to speak to and train your employees regarding antitrust compliance.
- Uniformly and consistently enforce violations of any antitrust compliance policy created and adopted by your company.

An antitrust compliance policy may not prevent an investigation or criminal or civil enforcement action, but it may prove to be the ounce of prevention that is worth a pound of cure.

For more information, please contact **J. ALLEN JONES, III** at jjones@beneschlaw.com or 614.223.9323

RECENT EVENTS

2014 TIA Great Ideas Conference & Exposition
Eric L. Zalud presented an overview of legal issues relating to transportation intermediaries. **Martha J. Payne** and **Stephanie S. Penninger** also attended.
April 9–12, 2014 | Tucson, AZ

Specialized Carriers & Rigging Association Annual Conference
Eric L. Zalud and **J. Allen Jones, III** attended.
April 22–27, 2014 | Boca Raton, FL

Maritime Law Association of the United States 2014 Spring Meeting
Stephanie S. Penninger attended.
April 29–May 2, 2014 | New York, NY

Transportation Lawyers Association Annual Conference
Marc S. Blubaugh was inaugurated as TLA President. **Eric L. Zalud** presented *Buy When Other People Are Selling! Are YOU Ready for the Pending Increase in Mergers, Acquisitions and Finance Activity in the Transportation Space?* **J. Allen Jones, III** and **Richard A. Plewacki** attended.
April 30–May 3, 2014 | St. Petersburg, FL

Transportation Lawyers Association Executive Committee Meeting
Marc S. Blubaugh and **Eric L. Zalud** attended.
April 30, 2014 | St. Petersburg, FL

Arkansas Trucking Association Annual Business Conference & Vendor Showcase
Eric L. Zalud presented *Negotiating Shippers Contracts: The Essentials Carriers Should Include; Phrases to Avoid/Look For; Indemnification Clause.*
May 21–23, 2014 | Branson, MO

Terralex 2014 Global Meeting
Eric L. Zalud attended.
June 4, 2014 | Indianapolis, IN

International Warehousing Logistics Association Legal Symposium
Marc S. Blubaugh presented *Big Wheels Keep on Turnin': Top Legal Issues in Transportation in 2014*
June 18, 2014 | Chicago, IL

DRI Trucking Law Seminar
Michael J. Barrie and **Trevor G. Covey** attended.
June 19–20, 2014 | Las Vegas, NV

Conference of Freight Counsel Summer 2014 Meeting
Stephanie S. Penninger attended.
June 21–23, 2014 | Avon, CO

2014 Forum for Motor Carrier General Counsel
Marc S. Blubaugh and **Eric L. Zalud** attended.
July 13–16 | Marina del Rey, CA

Transportation Lawyers Association Summer Executive Committee Meeting
Marc Blubaugh hosted this meeting while **J. Allen Jones** and **Eric L. Zalud** attended.
July 18–19 | Columbus, OH

ON THE HORIZON

Truckload Carriers Association Independent Contractor Division Annual Meeting
Richard A. Plewacki will be attending.
September 4, 2014 | Chicago, IL

The Knowledge Group – Webcast
Marc S. Blubaugh will be presenting during a webcast on *Understanding Transportation and Logistics Law: 2014 Perspective LIVE Webcast*
September 5, 2014

International Warehouse Logistics Association Annual Safety Conference
Marc S. Blubaugh will be presenting *Transportation Law Update*.
September 11–12, 2014 | Fort Worth, TX

2014 CTLA Annual Conference
Marc S. Blubaugh, **Martha J. Payne** and **Eric L. Zalud** will be attending.
September 24–27, 2014 | Halifax, Nova Scotia

FTR 2014 Annual Transportation Conference
Stephanie S. Penninger will be attending.
September 9–11, 2014 | Indianapolis, IN

Arkansas Trucking Seminar
Eric L. Zalud will be attending.
September 17–19, 2014 | Rogers, AR

Ohio Freight Conference
Marc S. Blubaugh will be attending.
September 18–19, 2014 | Columbus, OH

TIA Intermodal Expo 2014
Martha J. Payne and **Stephanie S. Penninger** will be attending. **Eric L. Zalud** will be presenting *Avoid Legal Sinkholes and Protect Your Business* on September 23.
September 21–23, 2014 | Long Beach, CA

CSCMP Annual Global Conference
Marc S. Blubaugh will be attending.
September 21–24, 2014 | San Antonio, TX

IMTA 83rd Annual Convention
Stephanie S. Penninger will be attending.
September 25–27, 2014 | French Lick, IN

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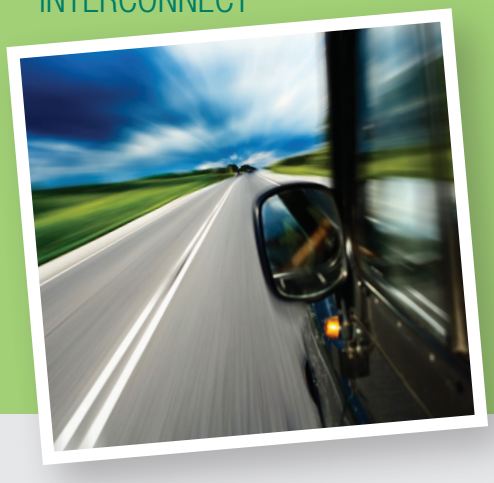

ON THE HORIZON

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ATA Management Conference & Exhibition
Marc S. Blubaugh, **Richard A. Plewacki** and **Teresa E. Purtiman** will be attending.
October 4–7, 2014 | San Diego, CA

International Warehousing Logistics Association "Essentials" Course
Marc S. Blubaugh will be presenting on Transportation Law.
October 7–10, 2014 | Adelphia, MD

Indiana Logistics Summit
Stephanie S. Penninger will be attending.
October 7–8, 2014 | Indianapolis, IN

Annual Conference on Transportation Innovation & Cost Savings
Eric L. Zalud will be attending.
October 8, 2014 | Toronto, Ontario

OTA/OAM Annual Convention
Richard A. Plewacki and **Teresa E. Purtiman** will be attending.
October 19–21, 2014 | Wheeling, WV

2014 TIDA 22nd Annual Industry Seminar
Eric L. Zalud will be attending.
October 22, 2014 | Caesars Palace, Las Vegas, NV

Transportation Lawyers Association Transportation Law Institute
Eric L. Zalud will be moderating a panel on Ethics in the Transportation Industry.
Marc S. Blubaugh, **Martha J. Payne** and **Stephanie S. Penninger** will be attending.
November 7, 2014 | St. Louis, MO

Transportation Lawyers Association Executive Committee Meeting
Marc S. Blubaugh and **Eric L. Zalud** will be attending.
November 8, 2014 | St. Louis, MO

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

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