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## Air Carrier Liability Regimes: Compare and Contrast of Warsaw and Montreal Provisions

In this issue:



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Air carrier liability has been governed by international convention nearly since the inception of the technology. In 1903, the Wright Brothers infamously conducted powered flight at Kitty Hawk. In 1919, the first reported scheduled international passenger air service occurred. Just a decade later by 1929, an international treaty known as the Warsaw Convention harmonized international law of air carrier liability. This foundational moment largely set the standard for traffic between member nation states until the Montreal Convention in 1999.

The intervening 70 years between Conventions saw the rise of globalization, consumerism, and technological connectivity. The utility of a harmonizing liability regime was clear in this wake of change—so clear that it became so ubiquitous its standards were (and are) often adopted for even domestic United States interstate and intrastate air traffic liability minimums, which remain largely unregulated to this day.

Tactical challenges remain in the intense, fast-paced, and complicated fact-specific transportation business. The granular legal questions that it yields often do not fit into neat boxes while, as time is ticking, business needs an actionable answer. For example, what are the balance of relative risks and liabilities when moving air cargo between countries where the older Warsaw Convention may apply in lieu of the more common Montreal Convention?

This article compares and contrasts key liability provisions of Warsaw and Montreal for just those occasions.

*continued on page 2*

# Air Carrier Liability Regimes: Compare and Contrast of Warsaw and Montreal Provisions

*continued from page 1*

## Warsaw and Montreal Convention Background

The Warsaw Convention was signed in 1929 as a response to insurers' concerns regarding the potentially unlimited damages air carriers may suffer when providing service. In 1933, the Convention went into effect, creating an international liability regime with limits for the burgeoning aviation industry. Since then, the Warsaw Convention has been amended to change the liability limits and protocol for air carriers, including the Hague Protocol of 1955, Guadalajara Convention of 1961, Montreal Agreement of 1966, Guatemala City Protocol of 1971, Montreal Protocols of 1975, and IATA Intercarrier Agreements of 1966.

The Montreal Convention was signed in 1999 as the United Nations' International Civil Aviation Organization sought to address the numerous amendments to the Warsaw Convention. This new consolidated agreement created a more cohesive system of air carrier liability. It became effective in the United States in 2003 and today is ratified in over 130 countries.

## Comparing and Contrasting the Conventions

Notably the Montreal Convention updated the Warsaw Convention to provide carriers and more predictability regarding their respective rights and obligations. For example, Montreal explicitly states that the rules are intended to include servants and agents of the carrier as well as contracting carriers. Plaintiffs cannot, however, aggregate damages to an amount that would exceed the highest amount that could be awarded against either party under the Convention. Montreal additionally created a two-tier liability system that shifted the burden put on plaintiffs to recover with a near strict-liability regime for claims up to a Special Drawing Rights (SDRs) threshold and a negligence standard for claims over that threshold.

Other key points of difference between the Warsaw and Montreal Conventions are explained here.

**Claims Periods.** As you would expect, both the Warsaw and Montreal Conventions lay out claims periods for damage, delay, and other legal claims. The Montreal Convention updated those periods in notable ways.

Articles 26 and 29 of the Warsaw Convention control the claims periods for claims of damaged and delayed cargo. According to Article 26, damage claims must be brought within seven days from the date of receipt of goods and delayed claims must be made within 14 days from the date of delivery. Legal claims, on the other hand, fall under Article 29 and must be brought "within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

The Montreal Convention addresses claims periods in Articles 31 and 35. Article 31 of the Montreal Convention extends the claims period for damaged goods to 14 days from the date of receipt, and likewise extends the claims period for delayed goods to 21 days from the date of delivery. Like the Warsaw Convention, the Montreal Convention has a two-year claim period under Article 35. Courts have found that this two-year statute of limitation

does not include claims for contribution and indemnification.

**Recovery Amount.** Limiting the liability amount for air carriers was a major component of the Warsaw Convention, since this was one of the primary concerns of insurers who were wary of issuing policies to air carriers in the case of potentially unlimited damages. Article 22 of the Warsaw Convention limits cargo liability of the carrier to a sum of 250 Francs per kilogram, which would amount to around $9.75 USD per kilogram of cargo. Various later amendments increased the recovery amount, with Article 22 of the Montreal Convention of 1999 increasing the amount to a sum of 17 SDRs per kilogram, or about $23.21 USD. This amount was updated to 19 SDRs in 2010 and, most recently, 22 SDRs per kilogram, making the current recovery amount per kilogram around $30.04 USD today. SDR value is set by the International Monetary Fund as a composite of five world currencies that, as a result, changes with some frequency.

**Defenses to Claims.** Defenses available to carriers for damage or delay claims differ between the two Conventions. Article 20 of the Warsaw Convention exempts liability if a carrier proves that it has "taken all the necessary measures to avoid the damages or that it was impossible for [it] to take such measures," or that the damage was caused by negligent pilotage or negligence in handling of the aircraft. Article 21 additionally provides air carriers a defense to liability if the damage was "caused by or contributed to by the negligence of the injured person."

The Montreal Convention created a more comprehensive set of defenses. Article 18 details a wide range of exemptions from air carrier liability: inherent defect, quality, or vice; defective packing by a third party; act of war or an armed conflict; and act of public authority carried out in connection with the entry, exit, or transit of the cargo. Article 20 also excludes liability analogous to Warsaw's Article 21 where the damage was "caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation."

**Inland and Combined Carriage.** The concept of "international carriage," defined in Article 1 of both Conventions, includes any carriage in which the nation states of departure and destination are parties to the Convention. If one country is not a party and the other is, the Convention will cover carriage to the extent there is an agreed-upon stopping place in another country regardless of whether that country is a party to the Convention. Combined carriage that has breaks or is performed by different carriers as a single operation is also included in the definition of "international carriage."

Article 31 of the Warsaw Convention, Article 38 of the Montreal Convention, and Article 18 of both limit applicability to carriage by air and do not extend to inland portions of travel, except for carriage "for the purpose of loading, delivery, or transshipment." Under that exception, both Conventions presume any damage, "subject to proof of the contrary, to have been the result of an event which took place during the carriage by air."

The Warsaw Convention is silent on remedy for instances in which a carrier agrees to provide a consignor with carriage by air and, without the consignor's consent, wholly or partially substitutes carriage by another mode of transport. In those instances, Article 18 of the Montreal Convention treats carriage by another mode of transport the same as carriage by air.

Both Conventions allow the parties the freedom to include terms relating to other modes of carriage in their contracts as long the provisions of the Convention are only observed to the carriage by air. While the Warsaw Convention explains this in Article 31, the Montreal Convention does so in Article 18.

**Force Majeure Provisions.** Neither the Warsaw nor the Montreal Convention contains an express force majeure or "Act of God" provision in those terms. Each Convention has language that does, however, exempt liability for carriers in circumstances beyond the control of the carrier.

Article 20 of the Warsaw Convention exempts a carrier's liability if it has "taken all the necessary measures to avoid the damage or that it was impossible for [it] to take such measures." Article 34 of the Convention additionally notes that it does not apply to "carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business." Warsaw does not define "impossible" and "extraordinary circumstances," but the terms can generally be construed to include weather conditions or political unrest as defenses for carriers in the case of delayed or damaged cargo.

Article 19 of the Montreal Convention contains a similar provision regarding the impossibility for the carrier to take measures to prevent damage. Article 18 of the Montreal Convention includes an explicit defense for damage caused by an act of war or armed conflict. Additionally, Article 51 notes that documentary requirements for air waybills, cargo receipts, and other records of the carriage found in Articles 4,5,7, and 8 do not apply in the case of carriage performed in "extraordinary circumstances outside the normal scope of a carrier's business."

## Freedom to Contract Unique Terms

Finally, a key point to remember with all air transportation transactions is that the parties enjoy a freedom to contract under either the Warsaw or the Montreal Convention. Article 33 in the case of Warsaw and Article 27 in the case of Montreal stand for the proposition that commercial and even legal terms can be negotiated provided that no party is deprived of the fundamental minimums established under the respective Convention. This gives flexibility to business teams when negotiating the particular details of service, but it does provide a limit to those terms. For example, the terms of an Air Transportation Services Agreement or an Air Waybill issued by an air carrier or indirect air carrier may establish a lengthier claims period or a recovery amount in excess of the then-current SDR measure. Attempting to establish terms lesser than the respective Convention, however, risks a court reinstating those terms to the extent that the Convention applies.

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# Carmack Amendment Liability: Reminder of the Basic Legal Principles

Jonathan R. Todd

Robert Naumoff

We regularly receive questions about motor carrier liability under the Carmack Amendment. This standard has been ubiquitous with interstate motor carriage since its enactment in 1906. Still, misunderstandings abound and can lead to road bumps in both contract negotiation and resolution of cargo claims.

Here is a reminder of the basic legal principles.

**No Carrier Negligence Standard.** At a high-level, a motor carrier providing interstate transportation services assumes liability for loss, damage, or delay to cargo pursuant to 49 USC 14706 (the Carmack Amendment). The Carmack Amendment places a near strict liability standard on motor carriers for the "actual loss or injury" to cargo that occurs while under the motor carrier's care, custody, and control (Carmack Liability). A carrier's negligence, or lack of negligence, is purposefully absent from a Carmack Liability analysis.

**Limitations of Liability.** The "actual loss or injury" standard generally includes loss, damage, or delay and extends to loss, damage, or delay that is reasonably foreseeable. The quintessential examples for delay liability (i.e., a failure to use reasonable dispatch) may constitute "actual loss or injury" when a food product that is delayed in delivery such that it expires and is no longer saleable or when dated materials such as greeting cards stating "Merry Christmas 2022" arrive January 2023. In practice, the rates offered for service are typically based upon an agreed limitation of liability, such as $100,000 per truckload. Liability options, or the opportunity to declare a higher value for commensurate rates, are common to provide a meaningful choice in agreeing to the limitation.

**Claim Filing Period.** The Carmack Amendment provides a clear and express minimum claims filing period at 49 USC 14706(e)(1) requiring at least 9 months following delivery for claims filing and 2 years from written claim denial for filing a civil lawsuit.

**Shipper's Burden of Proof.** Shippers have a three-part burden of proof under case law applying the Carmack Amendment. A prima facie case of Carmack Liability is established if the shipper can show: (i) the motor carrier accepted the cargo in good condition without exception (i.e., no notation of loss or damage on the bill of lading at origin); (ii) the cargo was delivered in damaged condition relative to receipt; and (iii) substantiation for the value of loss. Once a shipper establishes its prima facie case, the burden shifts to the motor carrier to prove a defense to Carmack Liability.

**Carrier's Common Law Defenses.** A motor carrier may nonetheless avoid liability in situations where the motor carrier establishes one of the following common law defenses: (i) act of God; (ii) act or default of the Shipper; (iii) act of public enemy (i.e., act of war or terrorism); (iv) act of public authority (i.e., governmental action); or (iv) inherent vice or nature of the goods.

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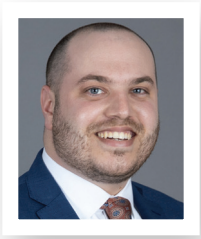
# GSA/DoD Transportation Law Primer

Jonathan R. Todd



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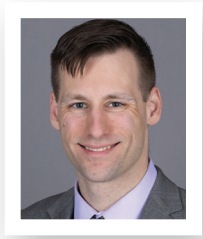

Robert Pleines, Jr.

Many government agencies accomplish their critical missions by using private transportation and logistics services. The General Services Administration (GSA) is often the key federal agency for managing private procurement of these services. Its Freight Management Branch serves the broader federal agency community's procurement needs including the U.S. Department of Defense (DoD). As one would expect, the DoD regularly awards a considerable number of contracts to transportation providers. Unlike contracting with another business for transportation-related services, however, contracting with DoD requires the understanding and acceptance of the federal government's contractual terms and conditions along with other nuances and rules of the road.

This simple primer provides a playbook for the regulations applicable to contracting with the DoD and background on how many transportation providers establish their ability to bid on contracts offered by the DoD and its subagencies.

## Why do I keep hearing reference to the "FARs"?

The Federal Acquisition Regulations (FARs) and the Defense Federal Acquisition Regulations (DFARs) are the primary regulations used by all executive agencies, including the DoD, in their acquisition of supplies and services with appropriated funds. Generally, FARs and DFARs apply to vendors and contractors who are seeking awards of government contracts with the DoD. These regulations outline the bid solicitation process and certain performance requirements. The FARs are found in Title 48 of the Code of Federal Regulations.

While the FARs are extensive and cover the requirements of both contractors and government agencies alike, FAR Part 52 is the most impactful for purposes of government contracting. FAR Part 52 contains the standard solicitation provisions and mandatory contract clauses directed at contractors interested in competing for specific contracts.

## Are there FARs that pertain specifically to transportation and logistics providers?

The breadth of the FARs generally allows for regulations covering specific areas of contracting. FAR Part 247 contains various requirements and recommendations for government agencies pertaining to contracts for transportation or for transportation-related services. For example, this Part 247 recommends to government procurement officers that in addition to the general evaluation factors and subfactors expressed in the FARs, generally procurement officers should also consider records of claims involving loss or damage and the commitment of transportation assets to readiness support when reviewing bids. In other words, the government, as a sophisticated shipper in this case, is instructed to conduct its due diligence on potential transportation providers during the bid process. FAR Part 247 also expressly acknowledges that there are certain additional required contract clauses for solicitations and contracts for motor carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services.

## Will I need to obtain a new or different type of operating authority to comply with the FAR?

Generally, there is no additional operating authority (i.e., motor carrier authority or a broker permit) required to perform services for the government beyond what is required in private business. While the FARs do not contain a requirement of certain operating authority, the GSA tends to be particular regarding a contractor's capabilities, such as potentially requiring a prospective contractor to obtain additional authority as part of the solicitation process. Further, government contractors should remain keenly aware of the purview of the False Claims Act (FCA), found at 31 USC §§ 3729-3777, when representing the capabilities of their services to government agencies. In short, the FCA was expressly enacted to punish defense contractors for fraudulent representations, and the FCA's generous establishment of rights for private citizens broadens its scope.

## What are some key considerations for compliance with government contracts?

Prospective government contractors should understand that contracting with the federal government brings additional employment legal requirements. For example, both the FARs and applicable Executive Orders prohibit federal contractors and subcontractors who exceed a monetary threshold of business in a given year from discriminating in employment decisions on the basis of race, color, religion, sexual orientation, gender identity, or national origin. Certain Executive Orders also require government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment, including upgrading, demotion, transfer, termination, rates of pay, etc.

Another particularly important consideration in complying with government contracts, particularly for prime government contractors, is the manner in which the contractors "flow down" mandatory or discretionary contractual provisions to their subcontractors performing services pursuant to a government contractor. In short, the FARs require that contracts with government subcontractors contain mandatory flow-down clauses—that is, clauses that must appear or be expressly incorporated into the contractor's agreements with subcontractors.

*continued on page 6*

## GSA/DoD Transportation Law Primer

*continued from page 5*

In our experience, "subcontractor" is broadly defined and so, for brokers, flow-down is a necessary part of performance of services for the government. Approaches vary in the marketplace, but we see a range of flow-down provisions to subcontractors from only the required clauses, on one hand, to a full range of optional flow-down provisions on the other. Our team is ready to assist in determining the proper strategy for best practices in compliance with FAR flow-down requirements.

### How do transportation providers contract with the Department of Defense?

The DoD and its subagencies award contracts to transportation providers who bid on the services requested. Identifying and, if necessary, establishing the business entity to submit bids to the DoD's subagencies is the first step in soliciting and receiving a contract. Since government agencies are required to award a percentage of their contracts to small, veteran-owned, and minority-owned businesses, many transportation providers launch businesses that satisfy these categories to increase the chance of winning a bid. Determining the range of services to be offered is another early step. For example, transportation providers often produce Capability Statements to advertise the transportation services they wish to offer the DoD. These Capability Statements are typically displayed on the transportation provider's website and can be a required submission when the transportation provider bids.

Once the business entity and capability is determined, the transportation provider must register in the System for Award Management (SAM), located at SAM.gov. Registration in SAM will include several questions about the FARs and DFARs, as discussed above, to ensure the transportation provider is knowledgeable regarding the regulations applicable to government contracting. Following registration, the federal government will activate the transportation provider's SAM.gov account in seven (7) to ten (10) days, and allow the transportation provider to bid on contracts.

Bidding on a DoD transportation or logistics contract takes place in four stages:

**Sources Sought.** During the first stage, Sources Sought, the applicable agency will publish the details of a potential contract to solicit information from and the capabilities of interested transportation providers.

**Pre-Solicitation.** The second stage, Pre-Solicitation, involves the agency alerting transportation providers that a contract will be coming for bid and affords the transportation providers the ability to begin preparation of a bid.

**Solicitation.** Solicitation is the third stage and involves the agency officially requesting bids from transportation providers through the forms requested by the agency.

**Award.** The fourth stage, Award, involves the agency's contracting officer contacting the transportation provider with the winning bid.

Submitting a winning bid involves a detailed review and response to the agency's instructions and requirements. Close attention to the solicitations and agency instructions on SAM.gov is required, as the agency may fail to consider bids for even the minimal discrepancies (i.e., font and page limit).

### What other federal compliance activities may apply when performing as a prime or subcontractor for the Department of Defense?

One of the most frequent topics of conversation when looking to perform DoD-related work is the possible need for registration to handle arms. The federal agency with jurisdiction over the export and temporary import of arms is the Department of State's Defense Directorate of Trade Controls (DDTC), which enforces the International Traffic in Arms Regulations (ITAR) found at 22 CFR Parts 120 to 130.

The ITAR applies to any items designated on the United States Munitions List (USML) found at 22 CFR § 121.1, including firearms, ammunition, missiles, explosives, training equipment, military electronics, optics, and spacecraft systems. The DDTC requires registration and licensing of certain actors and actions involved in the trade of arms.

Transportation and logistics providers involved in the international movement of USML items must in some circumstances maintain registrations as either an "exporter" or a "broker" with the DDTC. The exporter capacity arises for service providers most frequently in the case of participation in the Foreign Military Sales (FMS) Program. On the other hand, the broker capacity arises where a transportation or logistics provider performs certain other services amounting to the facilitation of international arms sales. Determining whether broker registration is required involves close review since it is entirely different than the "property broker" permit that many transportation intermediaries already hold from the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) or from certain state agencies for intrastate brokerage. Unlawful brokering and participation and transactions with knowledge of violations can be a serious area of exposure that in some cases may trigger voluntary disclosure.

### Does Department of Defense contracting make sense for my transportation or logistics service portfolio?

There are shared functions across most aspects of the transportation and logistics business, and from that perspective DoD work is no different. Certain of our clients have successfully delivered DoD work, and other GSA work for federal agencies, for many years. For some this is a fundamental part of the business legacy that brings a great source of pride to the organization. Doing so involves recognition that the federal government is not a customer similar to other private enterprise shipper accounts. There will be less flexibility in many ways, including around pricing and the terms of the relationship as a Transportation Service Provider. It also requires a heightened care to process and regulatory compliance that can necessitate launching new divisions, or even new entities, so that core competencies in government contracting and compliance are developed and maintained. As a result, early-stage planning and a robust commitment to day-to-day performance is just as important as strong regulatory compliance. This may not be for all providers, but for some it can develop into a long and fulfilling business segment.

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# Far From Home: Supreme Court Expands General Jurisdiction for Out-of-State Defendants in *Mallory v. Norfolk Southern Railway Co.*

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When served with a summons and complaint for an out-of-state lawsuit, one of the first things a defendant is likely to ask is—can this court compel me to appear? Given that most transportation and logistics-related disputes involve parties of multiple states, the question of whether a litigant will have to chase a defendant to its home state court is an important one, and often a way to get a lawsuit dismissed early. The law on personal jurisdiction, which determines whether a defendant can be compelled to litigate in a particular state, has been extensively developed over the past several decades, and notably refined in the last 15 years to give defendants a sense of predictability in answering this question. Following decisions in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), *and Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), the rules of personal jurisdiction essentially allowed a corporation only to be sued in the state where it was considered "at home"—which the Supreme Court has generally defined as its state of incorporation or principal place of business (general jurisdiction)—or in the state where the corporation engaged in the conduct giving rise to the claims asserted in the lawsuit (specific jurisdiction). As a result, plaintiffs have faced increasing difficulties in suing corporations doing business across the U.S. outside of their home base, and such corporations have enjoyed some level of predictability when sued out of state. However, the Supreme Court's recent decision in *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, slip op. at 2 (U.S. June 27, 2023), has now changed that predictable landscape, making companies susceptible to jurisdiction in foreign states wherein the state requires the company agree to jurisdiction as a condition of doing business there.

### Overview of the Facts of the Case

Mallory was a freight-car mechanic in Ohio and Virginia. After leaving his job as a mechanic, Mallory moved to Pennsylvania before returning to Virginia. Along the way, Mallory was diagnosed with cancer, which he attributed to his time at Norfolk Southern. Mallory filed suit against Norfolk Southern under the Federal Employer's Liability Act in Pennsylvania state court. Since Mallory resided in Virginia, was exposed to carcinogens in Ohio and Virginia,

*continued on page 8*

# Far From Home: Supreme Court Expands General Jurisdiction for Out-of-State Defendants in *Mallory v. Norfolk Southern Railway Co.*

*continued from page 7*

and Norfolk Southern is headquartered and incorporated in Virginia, Norfolk Southern argued that the Pennsylvania state court lacked personal jurisdiction over it. However, Norfolk conducts extensive operations in Pennsylvania, including managing over 2,000 miles of track, operating 11 rail yards, and running three locomotive repair shops in the state. But under the previous predictable landscape, none of that might have mattered were it not for the fact that Pennsylvania requires all out-of-state companies that register to do business in the state (including Norfolk Southern) to agree to appear in its courts on "any cause of action" against them.

## Divided Court Finds Norfolk Consented to Jurisdiction By Registering to Do Business in Pennsylvania

In a divided opinion, the Supreme Court ultimately held that Pennsylvania's requirement that out-of-state businesses consent to being sued in Pennsylvania when they register to do business in Pennsylvania was enough to convey personal jurisdiction in this case and did not offend due process. In reaching its decision, the Court's plurality opinion relied heavily on a case that was over 100 years old, *Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), which involved a finding of personal jurisdiction over a Pennsylvania insurance company by a Missouri court in a case concerning a Colorado gold smelter, because Missouri had a law similar to the Pennsylvania one here. There, Missouri law required out-of-state insurance companies seeking to do business in-state to file paperwork agreeing to appoint a state agent for service of process and to accept such service in Missouri, which was the basis for jurisdiction. The Court found this case analogous to the Pennsylvania law at issue, and pointed out that there were no due process concerns with this outcome because Norfolk Southern had been registered to do business in Pennsylvania for many years, had an office to receive service of process in Pennsylvania, and reaped the benefits of the state of Pennsylvania through its extensive business activities. By consenting to service of process in Pennsylvania as a condition of doing business in Pennsylvania, Norfolk Southern was required to defend the lawsuit in Pennsylvania, regardless of its place of incorporation or headquarters.

However, the Court was still divided on the rationale for this outcome. In a concurring opinion, Justice Jackson warned that personal jurisdiction is always something that can be waived, and under the circumstances, Norfolk waived the right to contest personal jurisdiction by choosing to register as a foreign corporation, which expressly required that it consent to accept service of process in Pennsylvania. Justice Alito, on the other hand, focused on the Dormant Commerce Clause, which prohibits state laws that discriminate against or unduly burden interstate commerce, absent a legitimate local public interest. Justice Alito posited whether the Pennsylvania law would be susceptible to a challenge that it violated the Dormant Commerce Clause, finding a lack of any local interest advanced by this law.

In her dissenting opinion, joined by three other Justices, Justice Barrett criticized reliance on *Pennsylvania Fire*, opining that this case had long-been overruled by other cases, and offering a warning that any state could construct a long-arm statute to elicit consent from a corporation solely for registering to do business in that state, which would upend 75 years of personal jurisdiction jurisprudence.

## The Long Way Home or Brave New World? The Effect on Jurisdictional Analysis and Future Considerations for Corporations

Following the decision in *Mallory*, the analysis for personal jurisdiction has now shifted with respect to corporations, although it remains unchanged as to individual defendants. Courts will now first assess whether the forum state has a statute granting state courts the authority to exercise personal jurisdiction over registered foreign corporations. If it does not, then the longstanding analyses will apply and nothing changes, with a corporation only being subject to jurisdiction if the lawsuit arises out of the corporation's activities in the forum state or in the state(s) of its incorporation or principal place of business. However, if there is a statute like that in Pennsylvania, it would appear that the

foreign corporation will likely be deemed to have impliedly consented to personal jurisdiction, without even considering the corporation's actual relationship with the forum state. But perhaps, as Justice Alito hinted at, such state laws could still be challenged under the Dormant Commerce Clause, and *Mallory* could prove to be a short-lived detour back to the status quo of "at home" jurisdiction. But as of now, the once predictable general jurisdiction analysis is now in flux.

One potential consequence of the *Mallory* decision is that more states may enact similar laws, essentially expanding jurisdiction to most, if not all, foreign corporations by requiring them to consent to jurisdiction as a condition of registering to do business there. As of print, only Pennsylvania and Georgia have enacted such laws, but that number could grow, depending on whether more states have an interest in their courts hearing disputes against foreign companies. Because of this possibility, companies doing business across multiple U.S. states—specifically motor carriers, freight forwarders, and freight brokerage and logistics companies—should monitor legislative action in all states in which they are registered to do business. But, if any company is already registered to do business in either Pennsylvania or Georgia, then it should be aware that it may be subject to personal jurisdiction in those states' courts following *Mallory*.

For plaintiffs, *Mallory* may invite the return to broad general jurisdiction and widely available domestic forum shopping. While the Court may limit its holding to the facts of *Mallory*, mandated fictional-consent statutes still create an opportunity for nationwide jurisdiction, so long as a company is registered to do business in a state with a statute similar to that of Pennsylvania. Nonetheless, Justice Alito's Dormant Commerce Clause concerns may result in the effective death of statutes like that of *Mallory*. As the case was remanded with an opportunity for Norfolk Southern to raise this issue, the question is still open as to how the lower court ultimately resolves this issue on the path to its final destination.[1]

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With thanks to Benesch summer associates **VALENTINA WOLF, SAM FUJIKAWA**, and **ANDREW KLEMM**.

[1] So far, one District Court has used *Mallory* to expand general jurisdiction against a foreign corporation registering to do business in the forum state. *See In Re: Abbott Laboratories et al., Preterm Infant Nutrition Products v. Mead Johnson & Company, LLC*, No. 22 C 02011, 2023 WL 4976182 (N.D. Ill. August 3, 2023)

# *Diagnosis: Whiplash!* The FMCSA's Meal and Rest Break Waiver Proposal

Marc S. Blubaugh

Thomas O'Donnell

Providers and commercial users of transportation services necessarily rely upon the predictability and uniformity afforded by national laws and regulations to support the efficient and reliable supply chains that are so essential to a thriving economy. However, this public policy interest in is sometimes victim to external forces.

On August 14, 2023, the Federal Motor Carrier Safety Administration (FMCSA) signaled a policy turnabout that may leave many in the industry a bit disoriented. In short, FMCSA announced that it will now accept petitions for waivers from its very recent decisions to preempt truck driver meal and rest break laws in the states of California and Washington for certain drivers of CMVs subject to federal hours-of-service regulations. Any petitions for such a waiver must be submitted by November 13, 2023, after which any such petitions will be posted and open for public comment before the FMCSA decides whether or not to grant any specific petition.

## General Background

In 2018 and 2020, the FMCSA ruled that both the California and Washington meal and rest break rules would create an unreasonable burden on interstate commerce. Further, in 2021, the U.S. Court of Appeals for the Ninth Circuit affirmed the FMCSA's preemption determination. Likewise, the State of Washington originally pursued a challenge to the FMCSA's preemption determination but ultimately abandoned that effort by voluntarily dismissing its case in August 2022. Notably, in 2008, the FMCSA had conversely found that California's meal and rest break law was *not* preempted by federal law.

However, the winds of change have shifted yet again at the FMCSA. With a more labor-friendly Administration in Washington, D.C., the FMCSA appears to be adopting the same perspective. Thus, the stance that the FMCSA staked out on these issues under the previous Administration is now under attack. In the industry itself, sides have already been drawn. The Truckload Carriers Association (TCA) and the American Trucking Associations (ATA) naturally oppose enforcement of the state rules. ATA President and CEO Chris Spear has stated the ATA will use all its resources to stop any change in the rules. On the other side of the issue, the International Brotherhood of Teamsters very much supports the FMCSA's solicitation of petitions for waivers from its previous decisions to preempt meal and rest break rules in California and Washington.

*continued on page 10*


# *Diagnosis: Whiplash!* The FMCSA's Meal and Rest Break Waiver Proposal

*continued from page 9*

## The California and Washington Meal and Rest Break Rules

The applicable California and Washington state laws would require commercial drivers to take breaks more often than required under federal hours of service rules. Under the California law, employers must provide non-exempt employees a 30-minute meal break if they work more than 5 hours in a day, and employees who work a shift of 10 hours or more are entitled to a second 30-minute meal break. In addition, employees are entitled to a 10-minute rest period for each 4 hours, or a substantial fraction thereof, that they work in a day. To the extent possible, these breaks are to be taken in the middle of each 4-hour period.

Under the Washington law, employers must provide employees with a meal period of at least 30 minutes that commences after the second hour and before the fifth hour after the shift commences. In addition, Washington's meal and rest break rules provide for a 10-minute rest period for each 4 hours of working time and must occur no later than the end of the third working hour. The rest period must be scheduled as near as possible to the midpoint of the 4 hours of working time, and no employee may be required to work more than 3 consecutive hours without a rest period.

In contrast to both states' laws, the federal hours of service rules require only that drivers take a 30-minute break after 8 hours of driving time and allow an on-duty/not driving period to satisfy this break.

## The Newly Created Waiver Process

The FMCSA indicates that that any request for a waiver from the FMCSA's preemption decision should address the following issues:

1. Whether and to what extent enforcement of a state's meal and rest break laws with respect to intrastate property-carrying and passenger-carrying CMV drivers has impacted the health and safety of drivers.
2. Whether enforcement of state meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will exacerbate the existing truck parking shortages and result in more trucks parking on the side of the road, whether any such effect will burden interstate commerce or create additional dangers to drivers and the public, and whether the applicant intends to take any actions to mitigate or address any such effect; and
3. Whether enforcement of a state's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will dissuade carriers from operating in that state, whether any such effect will weaken the resiliency of the national supply chain, and whether the applicant intends to take any actions to mitigate or address any such effect.

Because the FMCSA is actively soliciting waivers from preemption of meal and rest breaks rules, the agency is likely predisposed to grant such requests. The states of California and Washington are themselves naturally the two states most likely to request such a waiver, but the FMCSA's announcement invites "any person" to submit a request for a waiver.

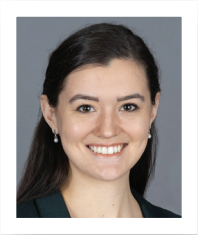
If granted, motor carriers operating in California and Washington can expect their drivers to operate under a more onerous set of rules than most other states. Of course, this change in applicable law will necessarily disrupt shippers' procurement models and their overall cost of service. In granting any such waivers, the FMCSA will vexingly allow enforcement of rules that it just recently determined were too burdensome upon interstate commerce to stand. In short, motor carriers, brokers, and shippers are understandably experiencing what amounts to regulatory whiplash.

**MARC S. BLUBAUGH** is a partner and Co-Chair of Benesch's Transportation & Logistics Group. He may be reached at (614) 223-9382 and mblubaugh@beneschlaw.com.

**THOMAS O'DONNELL** is Of Counsel in Benesch's Transportation & Logistics Group. He may be reached at (302) 442-7007 and todonnell@beneschlaw.com.

# Anti-Boycott Restrictions Remain Relevant Today

Jonathan R. Todd



Megan K. MacCallum

Anti-boycott rules are one of the lesser raised issues across clients involved in international trade or in servicing those movements, but the issue does arise. The rules originated in the Export Administration Act of 1979 (the Act) as a means to protect U.S. business practices and foreign policy, but the U.S. Department of Commerce (Commerce) enhanced the act as recently as 2022. Three new "enhancements" to the rules reprioritize categories of violations with enhanced penalties, revise the settlement process, and renew focus on foreign subsidiaries of U.S. companies. Here is a quick summary.

**Recategorization of Violations.** Commerce through its Bureau of Industry and Security (BIS) now categorizes violations based on perceived harm. Category A violations are only the most serious offenses and now include furnishing information about association with charitable organizations that support a boycotted country [87 FR 60890]. Category A penalties are unchanged and reflect maximum penalties available under the Anti-Boycott Act of 2018. These penalties include imprisonment for twenty (20) years and a fine of $1 million USD [50 USC 4843; 87 FR 60890]. BIS additionally revised Category B violations to include those that most commonly arise in commercial transactions, including some violations that were removed from Category A such as refusal to do business, violations involving letters of credit, and furnishing information about business relationships with boycotted countries or blacklisted persons [87 FR 60809]. BIS also enhanced penalties for the same. [87 FR 60890] Category C violations have not been revised.

**Settlement Process.** BIS also implemented changes to its settlement procedures to ensure harmony in its practice and promote visibility about compliant practices. In the past, BIS resolved violations by permitting companies to pay a reduced penalty without admitting misconduct through "no admit/no deny" settlements. BIS noted that these settlements lacked public statement of facts, which made compliance practices unclear for companies reviewing precedent. The lack of public fact statements was misaligned with BIS practices, such as the requirement that administrative export cases under its jurisdiction require a public admittance of conduct in order to obtain resolution. Now, BIS requires admittance to a statement of facts outlining violative conduct in the settlement agreement in order to obtain a reduced penalty in settlement.

**New Focus on Subsidiaries.** Finally, BIS stated that its past enforcement efforts have largely targeted U.S. parties that complied with, or failed to report receipt of, boycott requests rather than the parties making the requests. BIS stated that its future efforts will be more aggressive and include methods to deter foreign parties from issuing or making such boycott requests. BIS stated that it will have a particular focus on controlled foreign subsidiaries of U.S. parent companies.

The subject of anti-boycott rules has long been the practice of certain states or organizations seeking to boycott Israel. In the last ten (10) years over fifty (50) enforcement actions have been brought against U.S. companies, banks, and other entities for furthering illegal boycotts of Israel. While Israel is the "principal" unsanctioned foreign boycott with which U.S. persons should be concerned, BIS intends that the new enhancement will apply to all unsanctioned foreign boycotts.

**JONATHAN R. TODD** is a partner in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com. **MEGAN K. MACCALLUM** is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.


## BENESCH CONTINUES TO ADD TO ITS TOP-NOTCH LEGAL TALENT.

We are pleased to welcome **Brian Cullen** and **Thomas O'Donnell** to the Transportation & Logistics Practice Group.

### Brian Cullen

Of Counsel

bcullen@beneschlaw.com | (312) 488-3297

Brian joins the group as Of Counsel and has a decade of experience counseling clients, focusing on supply chain & distribution management, transportation, and logistics technology, among other topics. Brian joins from Schneider National, Inc., one of North America's largest providers of surface transportation and logistics solutions, where he was in-house counsel. During his 8-year tenure at Schneider National Inc., Brian had, among other things, overall legal responsibility for the intermodal rail, supply chain management, warehouse distribution, port drayage, and Mexican service offerings. More generally, he drafted, reviewed, and negotiated hundreds of contracts (including with several Fortune 500 companies and Class I railroads) and provided advice on a wide range of regulatory matters, including CARB, import/export, and key issues in international transactions.

Brian earned his J.D. from Mitchell Hamline School of Law, his M.B.A from the University of Southern Indiana, and his B.A. in Management from St. John's University (Minnesota).

### Thomas O'Donnell

Of Counsel

todonnell@beneschlaw.com | (302) 442-7007

Thomas joins the firm as Of Counsel. He has over 20 years of experience in transportation law, including 15+ years as the sole in-house counsel and Director of Legal Affairs for two large motor carriers. During that time, he handled legal and compliance issues for the two companies and their subsidiaries, overseeing numerous employees. He developed entire safety programs to ensure DOT compliance, including training, policies, procedures, and disciplinary actions. As a Senior Level Manager in these companies, Thomas has gained valuable knowledge of how transportation companies work and what they need to be successful. In addition, Thomas has 7 years of experience in a law firm practicing transportation law. He has conducted mock DOT audits for clients to assess regulatory compliance and Safety Rating Upgrade requests. As both in-house and outside counsel, Thomas has led clients to successful defense in DOT audits, which allowed them to continue their operations. His areas of expertise include regulatory compliance, transportation contracts, negotiations and agreements, policy and procedures, handbooks and manuals, and risk assessment.

Thomas earned his J.D. from Widener School of Law and his M.B.A. in Management from Widener University School of Business. He graduated from Rutgers University with a B.S. in Business Management.

# Regulatory Update for Marine Terminal Operators

J. Philip Nester

Laura E. Kogan

Nicholas P. Lacey

*"…[T]he contours of OSRA will continue to develop and have a significant impact on MTO practices and compliance obligations within the ocean transportation system."*

Marine terminal operators (MTOs) and ocean common carriers became easy targets upon which to cast blame for the port congestion issues and supply chain weaknesses arising out of the COVID-19 pandemic. The U.S. Congress responded to certain of these issues by passing the Ocean Shipping Reform Act of 2022 (OSRA), which gave the Federal Maritime Commission (FMC) authority to further regulate and enforce the ocean transportation system, which seeks to increase supply chain transparency and refine certain detention, demurrage, dwell fees, and per diem (D&D) practices. In March of 2023, the FMC announced it is taking a hard look at MTO dwell fees and per diem charges to ensure these practices comply with OSRA and the FMC's "Incentive Principle" under the "Interpretive Rule on Demurrage and Detention Under the Shipping Act" at 46 C.F.R. Part 545 (Interpretive Rule). Prior to OSRA, MTOs had broad discretion to operate under their "schedules," which made the regulation of MTOs largely predictable. However, until the FMC's finalizes its post-OSRA rulemaking that it proposed in October 2022, the MTOs' forward-looking regulatory landscape and the use of their schedules will remain unsettled.

**MTOs.** MTOs are persons engaged in business in the U.S. providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier that is subject to the Surface Transportation Board. [49 U.S.C. § 40102(15)] MTOs include terminals owned or operated by governmental entities, railroads who perform port terminal services not covered by their line haul rates, ocean common carriers who perform port terminal services, and even warehousemen who operate port terminal facilities. [46 C.F.R. § 525.1(c)(13)]

**MTO Schedules.** MTOs can have actual contracts with their counterparties, but it has traditionally been the case that MTOs perform services in accordance with their "schedules," whereby they set forth rates, regulations, and practices for their services. [46 C.F.R. § 525.2(a)] MTOs establish their schedules by mere publication, such that those parties receiving MTO services are bound by "implied contract" even "without proof that such party has actual knowledge of the provisions." [46 C.F.R. § 525.2(a)(2)] Rates of general applicability published online consistent with the standards at 46 C.F.R. § 525.3 are deemed accepted by a party using the MTOs' services.

**Historical Regulation.** The Shipping Act grants authority to the FMC to regulate MTOs and their facilities that involve international ocean transportation. MTOs must establish, observe, and enforce their own regulations and practices related to receiving, handling, storing, or delivering property, which is generally accomplished through publication of the MTO's schedule. [46 U.S.C. § 41102] MTOs are prohibited from engaging in certain conduct, including: (1) unreasonable discrimination against persons in providing terminal services; (2) giving undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refusing to deal or negotiate. [46 U.S.C. § 41106] The FMC oversees MTO compliance with their schedules to identify and prevent unreasonable preference or prejudice and unjust discrimination that violate the Shipping Act and related regulations. [46 C.F.R. §§ 525.1(a)-(b)] Claims arising out of MTO practices and standards of conduct are fact specific, but the FMC tends to apply general principles to test whether an MTO's conduct violated the terms of its schedule or the Shipping Act.

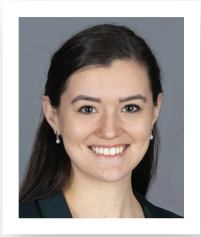
**Post-OSRA Regulation.** Since the enactment of OSRA, the FMC's efforts have focused largely on steamship lines and their D&D practices. However, following the FMC's decision in the matter of *TWC, Inc. v. Evergreen Shipping Agency* (Docket No. 1996(I)) in December 2022, the Agency has turned its attention to MTO compliance with the Interpretive Rule, where the "Incentive Principle" is used to determine whether D&D practices and charges are serving their intended primary purposes as financial incentives to promote freight fluidity. Further, under the FMC's proposed rulemaking issued in October 2022, MTOs would be required to include specific minimum information on D&D invoices as set forth in 46 U.S.C. § 41104(d)(2). This means MTOs would have the same D&D invoicing compliance obligations that OSRA requires of ocean common carriers. Practically, MTOs would need to issue invoices for D&D to the billed party with whom they have a direct contractual relationship, which generally is not the case, as MTOs almost always operate and perform services under their schedules. The enactment of the FMC's proposed rulemaking would impact not only MTO contracting and invoicing practices, but other MTO operations,

*continued on page 17*

# Informal FMC Charge Complaint Process Available


Jonathan R. Todd


J. Philip Nester


Megan K. MacCallum

A number of developments in international ocean shipping have emerged following the enactment of the Ocean Shipping Reform Act of 2022 (OSRA) last year. The U.S. Congress sought to arm the Federal Maritime Commission (FMC) with the authority that it needed to address certain ocean transportation vulnerabilities acutely experienced by beneficial cargo owners during the height of the COVID-19 pandemic. One of the tools that has emerged and is now being used by enterprise shippers is the right to submit a Charge Complaint to the FMC pursuant to 46 U.S.C. § 41310. The FMC implemented its Interim Procedure for Processing Charge Complaints in December 2022. This article provides a quick summary of the informal Charge Complaint process.

**Charge Complaints.** A Charge Complaint must be based on OSRA violations, which may include claims against a carrier for false billing, a failure to provide services in accordance with tariff or service contract rates, technical invoice noncompliance for D&D charges, or practices that are retaliatory, unfair, or discriminatory. [46 U.S.C. §§ 41102 and 41104(a)] Charge Complaints must include the following minimum information: (i) identification of the carrier; (ii) a description of how the charge or fee violated 46 U.S.C. §§ 41102 or 41104(a); and (iii) supporting documentation such as bills of lading, invoices, proof of payment, and the like. Once a Charge Complaint is filed pursuant to 46 U.S.C. § 41310(a), the FMC will begin an initial investigation in accordance with its Charge Complaint Interim Procedure (CCIP). Under the CCIP, the carrier can at any time prior to a final decision voluntarily elect to refund or waive any payment that forms the basis of a Charge Complaint, which will result in the matter being closed.

**Initial Investigation.** Charge Complaints must be submitted to the FMC via email. Initial review of the submission involves a determination of whether there is sufficient evidence of a carrier violation under OSRA. If there is not, the FMC will close the matter without prejudice and provide the shipper with its rationale in support of the finding (the shipper can resubmit a Charge Complaint and a new matter will

be opened if additional information becomes available). If the FMC finds the carrier failed to comply with OSRA then the matter will proceed similar to an enforcement action, and the carrier has the burden of proof to establish the reasonableness of its charges in accordance with 46 C.F.R. § 545.5. Upon completion of its initial investigation, the FMC will notify both the shipper and carrier that the matter will be: (i) closed if the carrier is found to have complied with OSRA; or (ii) referred to the Office of Enforcement for further adjudication if the carrier failed to comply with OSRA.

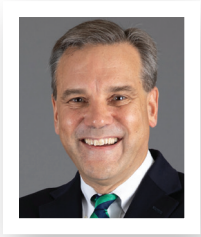
**Office of Enforcement.** If a Charge Complaint is referred to the Office of Enforcement, it may recommend the FMC to issue an Order to Show Cause under 46 C.F.R. § 502.91. The matter will then be adjudicated in an administrative proceeding before an Administrative Law Judge (ALJ). The carrier will be required to "show cause" as to reasonableness of the charges and why it should not be required to refund or waive those charges. During this process, the shipper may provide any additional information it has in support of its Charge Complaint, although the shipper is not expected or required to testify or otherwise participate in the administrative proceeding. Upon completion of the administrative proceeding, the ALJ may dismiss the matter or order the carrier to issue a refund to the shipper in addition to any civil penalties that are enforced pursuant to a separate proceeding under 46 U.S.C. §§ 41104(a), 41102, or 41107.

**Changes to Charge Complaint Procedures.** In its notice of proposed rulemaking issued in October 2022 (NPRM), the FMC proposed several items that may become required practice when invoicing for D&D charges, including: (i) the formal adoption of a list of minimum information carriers must include in D&D invoices pursuant to OSRA; (ii) additional information to be included in or with a D&D invoice; (iii) defining prohibited practices and clarifying which parties may be billed for D&D charges; and (iv) establishing practices that the billing parties must follow when invoicing for D&D charges.

The team at Benesch knows from experience that many shippers continue to struggle with ocean shipping charges that arose during the pandemic while at the same time trying to determine a strategic path forward for ocean shipping procurement. We are available to assist in developing pragmatic approaches to address D&D charges and other OSRA-related issues as well as negotiating ocean shipping service contracts and resolving disputes.

**JONATHAN R. TODD** is a partner in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com. **J. PHILIP NESTER** is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-6240 and jpnester@beneschlaw.com. **MEGAN K. MACCALLUM** is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

# Sunshine On My Shoulder: Reptile Smiting in the Sunshine State



Eric L. Zalud

Reptile theory litigation tactics and commensurate nuclear verdicts have become a recurring problem for motor carriers, transportation brokers, and now, even shippers in high-stakes, catastrophic casualty litigation. There are many effective ways to counter Reptile theory tactics before litigation and in the heat of litigation itself. These have been touched on in my prior article. However, defense counsel can be aided in litigation by legislatively enacted state laws that codify more rationale decision-making processes for these cases. Such legislation can serve to curb the inflammatory and non-proximate causally related aspects of that type of litigation. That helps smite Reptile tactics—at least in part. Several states have already enacted legislative reforms that will assist transportation industry defendants in litigation to achieve results that are not tainted by prejudice. The most noteworthy of these is Texas, but efforts have also been made in states such as Missouri, Iowa, West Virginia, Louisiana, and Montana. Now, the Sunshine State has also weighed in.

The Florida state legislature recently enacted H.B. 837. (§768.0427 Fla. Stat: the "Act"). That Florida statute is chock-full of helpful codifications for motor carriers, brokers, and others in Reptile theory, high-value casualty litigation. First, the Act reduces the statute of limitations for general negligence cases (which would encompass all MVA casualty litigation) from four years to two years (this change applies to claims that have occurred after the effective date of the legislation, which is March 24, 2023). Clearly, this temporal ambit reduction compresses the time within which plaintiffs can file their lawsuits. It thus commensurately reduces the exposure period for motor carrier and broker defendants. This reduction also helps with exposure/risk minimization and analysis, and projections—and of course, reduces actual risk.

*continued on page 16*


## Sunshine On My Shoulder: Reptile Smiting in the Sunshine State!

*continued from page 15*

The Act next also changed Florida's comparative negligence system from a *pure* comparative negligence system to a *modified* comparative negligence system. By that comparative system, a plaintiff who is found to be more than 50% at fault for his/her own harm is barred from recovering any damages. Often in these cases, there is significant comparative fault attributable to the noncommercial driver plaintiff. The statute recognizes that that *quantum* of fault should be a factor. Because of the risk that a plaintiff's comparative fault may entirely bar the claim, plaintiffs' counsel thus have a stronger motivation to settle, and settle earlier, to recover at least some portion of damages. Obviously, this scenario leads to more leverage for defendants during settlement negotiations and would lower overall settlement amounts because of the increased litigation risk to plaintiffs. Jury research shows though, that in comparative negligence jurisdictions, jurors are sometimes less likely to take the extra step and find the plaintiff 51% liable if they know that the plaintiff would not recover at all. So, this is a bit of a wild card at trial. However, it still is nonetheless an *excellent* settlement tool.

The Act also modifies what evidence that is admissible at trial to prove medical treatment and expenses. The Act limits the amount of damages for past or future medical expenses to evidence of the amounts actually paid, regardless of the source of payment. Under the Act, if the claimant has healthcare coverage, he or she may offer evidence of the amount necessary to satisfy unpaid charges of the amount that such healthcare coverage is obligated to pay the healthcare provider, to satisfy the charges for the healthcare itself. If the claimant does not have healthcare coverage, evidence of the Medicare reimbursement rate effective at the time of trial for claimant's incurred medical treatment or services will be

the evaluation tool. If there is no applicable Medicare rate for service, 140% of the applicable state Medicare rate will be applied. These measures, among others related to medical payments, should dramatically reduce actual and future medical expense recovery under the Act. Similar proof parameters apply to future medical treatment and services. Consequently, to evaluate the cost of past and future medical expenses in these cases, defendants will need to know and understand reimbursement rates and carefully assess the medical bills in each case for admissible dollar value versus face value. This undertaking may require retention of expert witnesses to determine the actual value of the medical bills. Importantly though, it is the plaintiff's burden to prove their medical damages.

The Act also makes a good attempt to curtail the cottage industry of plaintiff's counsel referring plaintiff/"patients" to particular doctors to create inflated injuries and commensurate medical expenses. The Act deems that referrals by plaintiff's counsel to treating physicians are no longer privileged and may be explored in depositions. Consequently, defense counsel is now permitted to inquire as to who recommended particular courses of treatment and why that treatment was recommended. Defense counsel will also be permitted to explore the doctor's relationship with plaintiff's counsel on a financial, professional, and personal level. These discovery topics, and their availability, should help decrease that particular cost-spiraling cottage industry. This provision of the Act further serves to level the playing field in Reptile theory litigation.

The plaintiff's bar in Florida recognized the dramatic impact the Act would have on plaintiff's recovery on claims in Florida. To that effect, the Floria state court system was deluged with eleventh-hour filings prior to the statute's effective date. To wit, there were 90,593 civil cases filed in the five days between March 17 and March 22, 2023. This statistic is obviously a very clear signal that plaintiffs' counsel realized the dramatic limitations on their recovery that are propagated by the Act. It also might mean slower docket times in Florida state courts for a while. Either way, the sun is shining a little brighter in the Sunshine State for motor carrier, broker, and shipper casualty defendants!

**For more information on these topics, contact a member of the firm's Transportation & Logistics Practice Group.**

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## Regulatory Update for Marine Terminal Operators

*continued from page 13*

such as their ability to exercise possessory liens to withhold the release of cargoes on which scheduled rates remain due and owing. Until the FMC's finalizes and implements its post-OSRA rulemaking, the prospective regulatory landscape and historical MTO practices will remain unsettled.

**The Path Forward.** The FMC has yet to promulgate additional regulations or step up enforcement using its new authority under OSRA, but the contours of OSRA will continue to develop and have a significant impact on MTO practices and compliance obligations within the ocean transportation system. The evolution of OSRA has global public policy implications, and as such, forthcoming developments from the FMC will come with a continued focus on supply chain transparency and concerns about the impact that D&D charges will have on end consumers in light of economic instability and inflation.

The team at Benesch is well versed in all aspects of the ocean transportation market and global supply chains and is available to assist in developing pragmatic approaches to address the impact that the FMC's proposed rulemaking may have on OSRA-related issues across the spectrum of ocean market participants.

**J. PHILIP NESTER** is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-6240 and jpnester@beneschlaw.com. **LAURA E. KOGAN** is a partner in Benesch's Litigation Group and may be reached at (216) 363-4518 and lkogan@beneschlaw.com. **NICHOLAS P. LACEY** is an associate in the Litigation Group and may be reached at (614) 223-9384 and nlacey@beneschlaw.com.

## What's Trending

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# Recent Events

### Trucking Industry Defense Association's Cargo Claims Seminar
**Marc S. Blubaugh** presented *Dealing with Cross-Border Food Product Claims*.
March 21, 2023 | Tempe, AZ

### Rose Rocket Podcast
**Eric L. Zalud** discussed *The Top 5 Trends in U.S. Casualty Litigation for Brokers and Motor Carriers*.
April 13, 2023 | Toronto, Canada

### Transportation Intermediaries Association (TIA) Capital Ideas Conference & Exhibition
**Marc S. Blubaugh** presented *The Shot Heard 'Round the Logistics World: Miller, the Future of Preemption, and a Path Forward*. **Eric L. Zalud** presented *Consolidating in the Logistics Space And Top 10 Hints for Buying or Selling a Logistics Enterprise*.
April 19–22, 2023 | Orlando, FL

### Transportation Lawyers Association (TLA) Executive Committee Meeting
**Marc S. Blubaugh** attended as Voting Past President.
April 26, 2023 | San Diego, CA

### Transportation Lawyers Association (TLA) Annual Conference
**Eric L. Zalud** presented *Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers*. **Marc S. Blubaugh, Martha J. Payne, Robert Pleines, Jr.**, and **Richard A. Plewacki** attended.
April 26–29, 2023 | San Diego, CA

### Commercial Litigation Committee of the Transportation Lawyers Association (TLA)
**Eric L. Zalud** presented *A Smorgasbord of Current Pertinent Cases in Commercial Litigation*.
April 27, 2023 | San Diego, CA

### Transportation and Logistics Council 49th Annual Conference
**Eric L. Zalud** presented *Legal Issues Relating to Freight Loss and Damage*. **Martha J. Payne** moderated the panels "Preventing and Mitigating Loss" and "Tariffs and Carrier Liability."
May 1–3, 2023 | San Diego, CA

### Jeffries Transportation Conference
**Marc S. Blubaugh, Peter K. Shelton**, and **Eric L. Zalud** attended.
May 3–4, 2023 | Coral Gables, FL

### 2023 TerraLex Global Meeting
**Eric L. Zalud** attended.
May 3–6, 2023 | Mexico City, Mexico

### Intermodal Association of North America (IANA) Operations, Safety & Maintenance Business Meeting
**Marc S. Blubaugh** attended.
May 10, 2023 | Oak Brook, IL

### Columbus Logistics Conference 2023
**Marc S. Blubaugh** presented *International and Domestic Transportation Legal Update*.
May 17, 2023 | Columbus, OH

### Leadership in Logistics
**Marc S. Blubaugh** presented *Hot Topics in Transportation*.
May 19, 2023 | Marysville, OH

### Conference of Freight Counsel
**Martha J. Payne** and **Eric L. Zalud** attended.
June 9–12, 2023 | Pittsburgh, PA

### Freight Waves Live—The Future of Supply Chain
**Marc S. Blubaugh, Peter K. Shelton, Eric L. Zalud, Megan K. MacCallum, Christopher C. Razek, J. Philip Nester**, and **Jonathan R. Todd** attended.
June 21–22, 2023 | Cleveland, OH

### Association of Transportation Law Professionals – 94th Annual Meeting
**Jonathan R. Todd** and **Margarita Krncevic** presented *Friend Shoring to Mexico*. **Eric L. Zalud** attended.
June 26, 2023 | Virtual

### International Association of Defense Counsel (IADC) 2023 Annual Meeting
**Martha J. Payne** attended.
July 9–14, 2023 | Waimea, HI

### American Trucking Associations (ATA) Trucking Legal Forum 2023
**Jonathan R. Todd** and **Margarita S. Krncevic** presented *Shoring Up: Preparing for Near-Shoring Impact on Cross-border Traffic*. **Eric L. Zalud** presented *The International Air Freight Liability Regime, and its Surface Transport Implications*. **Marc S. Blubaugh** presented *The Multiverse of Multimodal Transportation*!
July 16–19, 2023 | La Jolla, CA

### National Home Delivery Association Annual Forum
**Marc S. Blubaugh** presented *Responding to the Regulatory Environment*.
August 1, 2023 | Boston, MA

### National Star Route Mail Contractors Association (NSRMCA) National Convention
**Jonathan R. Todd** presented *Motor Carrier Operations Legal Update for 2023*.
August 4–9, 2023 | Washington, D.C.

### Intermodal Association of North America (IANA) Intermodal Expo
**Marc S. Blubaugh** attended.
September 10–12, 2023 | Los Angeles, CA

# On the Horizon

**Wisconsin Motor Carriers Association Annual Meeting**
**Brian Cullen** is attending.
September 18–19, 2023 | Green Bay, WI

**Trucking Defense Advocates Council Annual Conference (TDAC)**
**Eric L. Zalud** is attending.
September 20–21, 2023 | Fayetteville, AR

**Journal of Commerce: Inland Distribution Conference 2023**
**J. Philip Nester** is attending.
September 25–27, 2023 | Chicago, IL

**Transportation Intermediaries Association (TIA) 2023 3PL Policy Forum**
**Marc S. Blubaugh** is attending.
September 25–27, 2023 | Washington, D.C.

**The National Industrial Transportation League (NITL) Engage Conference—The Shipper's Voice: Resilience in Turbulent Supply Chains**
**Eric L. Zalud** is attending.
October 9–11, 2023 | Columbus, OH

**Transportation Lawyers Association (TLA) Webinar**
**Eric L. Zalud** is presenting *Reprise: The Sun Never Sets on Broker Liability (Unfortunately) Surveying the Panorama of Broker Liability Issues (Cargo and Casualty) and the State of the Law in 2023—and What to do about it!*
October 10, 2023 | Virtual

**Ohio Trucking Association (OTA) Safety Director Bootcamp**
**Vincent J. Michalec** and **Kelly E. Mulrane** are presenting.
October 11, 2023 | Westerville, OH

**Trucking Industry Defense Association (TIDA)**
**Eric L. Zalud** is attending.
October 11–13, 2023 | Las Vegas, NV

**American Trucking Associations (ATA) Management Conference & Exhibition**
**Marc S. Blubaugh** is attending.
October 14–17, 2023

**TerraLex Annual Global Conference**
**Eric L. Zalud** is attending.
October 16–19, 2023 | Melbourne, Australia

**3PL Valuation Creation Summit 2023**
**Marc S. Blubaugh** is presenting on *Mitigating Risks: Transportation and Logistics Law in 2023*.
**Eric L. Zalud** is attending.
October 18–19, 2023 | Chicago, IL

**Transportation Intermediaries Association (TIA) Technovations Conference**
**Eric L. Zalud** is attending.
October 18–20, 2023 | San Diego, CA

**Canadian Transport Lawyers Association (CTLA) 2023 Annual General Meeting and Educational Conference**
**Martha J. Payne** is attending.
October 19–21, 2023 | Montreal, Canada

**2023 Transportation Law Institute**
**Marc S. Blubaugh, Martha J. Payne**, and **Eric L. Zalud** are attending.
October 27, 2023 | Salt Lake City, UT

**NDTA-USTRANSCOM Fall Meeting**
**Christopher C. Razek** and **Robert Pleines, Jr.** are attending.
October 31–November 3, 2023 | Orlando, FL

**Women in Trucking – Accelerate! Conference & Expo**
**Martha J. Payne, Vanessa Gomez**, and **Megan MacCallum** are attending.
November 4–8, 2023 | Dallas, TX

**The Traffic Club of Chicago Transportation & Logistics Customer Forum**
**Brian Cullen** is attending.
November 9, 2023 | Chicago, IL

**Conference of Freight Counsel**
**Martha J. Payne** and **Eric L. Zalud** are attending.
January 6–8, 2024 | Sedona, AZ

**Columbus Roundtable of the Council of Supply Chain Management Professionals**
**Marc S. Blubaugh** will be moderating the "Annual Transportation Panel."
January 12, 2024 | Columbus, OH

**Transportation & Logistics Council (TLC) 50th Annual Convention**
**Martha J. Payne** and **Eric L. Zalud** are attending.
March 18, 2024 | Charleston, SC

**Transportation Intermediaries Association (TIA) Capital Ideas Conference**
**Marc S. Blubaugh** is presenting *Catch Me if You Can: The Definitive Toolkit for Preventing and Mitigating Fraud in the Supply Chain.* **Eric L. Zalud** is also presenting. **Martha J. Payne** is attending.
April 10–13, 2024 | Phoenix, AZ

**Transportation Lawyers Association (TLA) 2024 Annual Conference**
**Eric L. Zalud** is presenting. **Marc S. Blubaugh** and **Martha J. Payne** are attending.
May 1–4, 2024 | Rio Grande, Puerto Rico

**International Association of Defense Counsel (IADC) 2024 Annual Meeting**
**Martha J. Payne** is attending.
July 6–11, 2024 | Vancouver, Canada

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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