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Course of Conduct Rising! Prior Bills of Lading May Create Binding Liability Limitations

A surprising trend has arisen in freight loss and damage litigation. Several courts have taken into consideration the course of dealing between experienced transportation contracting entities to enforce liability limitations, even when there was not a limitation for a specific shipment. Recently, in *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 45 F.2d 85 (2nd Cir. 2007), plaintiff ABN was the subrogated insurer of Halm International Company. Halm, the shipper, had an ongoing business relationship with Geologistics as a freight forwarder. On June 13, 2000, Geologistics issued a "house airway bill" indicating that it would ship a printing press for Halm from Holland to Huntington Station, New York. When the press arrived at JFK Airport, Geologistics was contractually obligated to arrange for its delivery to Huntington Station. Halm had also instructed Geologistics to "rig" the unit.

Geologistics retained Art Messenger, a trucking company, to transport the press from JFK to Huntington Station. Geologistics had retained Art Messenger for literally thousands of prior shipments. They operated under a contract that limited Art Messenger's liability to \$50 per shipment, unless Geologistics made specific written arrangements indicating otherwise (and paid a higher rate). On June 20, an agent for Art Messenger picked up the press at JFK, failed to tie down the crates and the press was severely damaged.

One week later, Geologistics issued an invoice to Halm for the shipment. On the back of the invoice, in the terms and conditions, there was a liability limitation of \$50 per shipment, unless an additional amount was paid by the shipper. These *exact* terms and conditions appeared on the 25 prior Geologistics invoices to Halm, dating from 1997. Halm did not request additional coverage, nor pay extra compensation to increase the level of liability.

Geologistics moved for summary judgment based upon the liability limitation, and ABN sought to invalidate Art Messenger's \$50 liability limitation. The court found that Halm's contract with Geologistics authorized Geologistics to engage carriers on Halm's behalf and expressly authorized Geologistics to accept limitations of liability imposed by the retained carriers. Thus, a "downstream" carrier may be bound by a liability limitation of an "upstream" freight forwarder.

The court then noted that pursuant to this authority, Geologistics had contracted with Art Messenger, which had a \$50 per shipment liability limitation. ABN contended that since this liability limitation was not set forth in the bill of lading, it would not bind Halm and ABN. The court disagreed, finding Halm's contract with Geologistics authorized it to engage Art Messenger and to bind Halm to the terms of liability limitations set forth in *Geologistics'* contract with Art Messenger. It is notable that the court

recognized the *course of conduct* between the parties as a factor in enforcing liability limitations, including a liability limitation for the subject shipment (on the invoice) that the shipper received *one week after* the shipment. So, a regular course of conduct between experienced shippers, carriers and forwarders may now serve to, retrospectively, impose liability limitations upon otherwise non-limited shipments. These situations would occur in shipping schematics *not* governed by a transportation contract.

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U.S. Supreme Court Says State Law Carrier Regulations are Preempted by Federal Statute. *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 128 S. Ct. 989, 169 L.Ed.2d 933 (2008)

It is always exciting when the U.S. Supreme Court decides a case involving transportation issues. *Rowe v. New Hampshire Motor Carrier Transport Association* was decided in February of 2008. As with most Supreme Court decisions, the impact will be felt for some time to come.

In the *Rowe* decision, the Court determined how far a state can go to regulate motor carrier transportation. The State of Maine adopted a statute controlling the

distribution of tobacco. Two provisions of this statute restricted deliveries by motor carriers. The first provision forbids anyone other than a licensed tobacco retailer from receiving an order for tobacco. The second requires that retailers use a special kind of recipient verification service to be certain that the tobacco was not received by a person not authorized to receive it. As required, the carriers performing the tobacco deliveries must be certain that the

person who received the tobacco is the person to whom the package is addressed, is of legal age, has signed for the package and, if under the age of 27, has proper identification.

The New Hampshire Motor Transport Association, and others, challenged the Maine law based on provisions of the

Federal Aviation Administration Authorization Act of 1994 [49 U.S. 14501(c)(1)].

The Act prohibits states from adopting any law related to a motor carrier price, route or service with

respect to the transportation of property.

The First Circuit Court of Appeals agreed with the New Hampshire Motor Transport Association, and the Supreme Court agreed to hear the case. The Supreme Court affirmed the decision of the lower court.

According to the Supreme Court, state enforcement actions having a connection with, or reference to, a carrier's rates, routes or services are

preempted. Preemption may occur even if the effect of the law on rates, routes or services is only indirect. It makes no difference if the state law is consistent with other federal statutes. The goal of the federal law is to have rates, routes and services determined by competitive market forces. State statutes are preempted when the statute has a significant impact on the deregulatory and preemption-related objectives of the Congress.

The Court was not impressed with the arguments from the State of Maine that the burdens placed on the carriers with respect to the tobacco deliveries were only a minor inconvenience. The requirements affecting the trucking operations were not driven by the market, but by a state statute that mandated a specific behavior. If given a choice, the carriers would likely choose not to follow the state requirements regarding tobacco delivery.

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www.beneschlaw.com

Benesch is excited to launch our new Web site

Sellers Shipping Goods to Insolvent Buyers Now Stand Better Chance of Receiving Full Payment in Bankruptcies Pending in the Sixth Circuit



Kari Coniglio

Thanks to the Sixth Circuit, companies shipping goods to insolvent buyers, who subsequently file bankruptcy proceedings stand a better chance of

receiving full payment for their goods. In July, the Sixth Circuit held that creditors who (1) shipped goods (2) on credit (3) to insolvent buyers and (4) made timely demands to reclaim the goods must be paid in full before general unsecured creditors, even if the goods subject to reclamation were sold by the insolvent buyer or if the inventory was subject to a secured creditor.

The Court's decision will enhance a seller's reclamation rights under current Ohio law and the Bankruptcy Code.

Ohio law provides that when a seller has shipped goods on credit to an insolvent buyer, that seller must make a written demand to reclaim the goods within 10 days after delivery. If the buyer has declared bankruptcy, the Bankruptcy Code

now gives sellers the right to make a written demand to reclaim goods shipped within the 45-day period before the bankruptcy; however, the seller must make a written demand for reclamation within 20 days after the bankruptcy filing. Moreover, sellers must be aware that they have no right to reclaim goods the buyer has sold before the demand. Therefore, time is of the essence.

In bankruptcy cases, sellers with these reclamation rights are frequently given

administrative-expense priority – or a promise of full payment later in the case – in exchange for use of the goods. July's

Last week's opinion only strengthens a seller's rights because it will now retain the right to priority payment...

opinion only strengthens sellers' rights, because a seller will now retain the right to priority payment even if the goods at

issue were sold and used to pay a secured creditor who was secured by the same goods. It is unclear whether sellers now need to initiate a lawsuit to get that promise, but once you have it, it's a promise of full payments that must be kept!

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Eric Zalud Inaugurated as President of Transportation Lawyers Association



Eric Zalud

On May 9, 2008, **Eric Zalud** was inaugurated as President of the **Transportation Lawyers Association (TLA)**. Mr. Zalud's inauguration took

place at the group's Annual Conference, held in Fort Lauderdale, FL.

TLA is an independent, international bar association whose members assist providers and users of logistics and transportation services, regardless of mode. TLA is dedicated to keeping its members ahead of the constant changes in all aspects of the specialized legal environment affecting the transportation community, regardless of the particular legal discipline involved. With strong

academic ties, a commitment to excellence in continuing legal education and a long tradition of collegiality, TLA is a resource for lawyers seeking to maximize both the quality of the legal services they provide and the quality of their professional lives.

If you are interested in learning more about TLA or in becoming a member, please visit www.translaw.org.

Recent Events

Marc Blubaugh and Eric Zalud attended the **Transportation Law Association's Executive Committee Meeting** in Cleveland, OH, on July 25, 2008.

Benesch and National City Capital Markets co-hosted a transportation seminar, **Roadmap to Success: Critical Strategies for Buying, Selling and Financing Transportation and Logistics Businesses**, on June 4, 2008, at The City Club of Cleveland. The half-day event covered strategies on how to buy, sell and finance transportation businesses. More than 20 speakers from Benesch, National City and other companies participated as panelists and presenters. Topics covered included mergers and acquisitions of asset and non-asset based logistics businesses, purchase and sale of distressed companies, staging a company for a successful sale and understanding how private equity investors evaluate logistics companies.

Bob Spira presented a *Modal Update* at the **Annual Conference of the Association of Transportation Law Professionals** in Williamsburg, VA, on June 1, 2008.

Bob Spira led **SMC3's 2008 Contract Law Seminar** in Atlanta, GA, on May 21, 2008. The event is geared toward professionals who prepare, execute and manage transportation contracts.

Marc Blubaugh presented *Supply Chain Contracts and Potential Pitfalls* at **The Ohio State University's Fisher College of Business** in Columbus, OH, on May 19, 2008.

David Neumann, Frank Reed, and Eric Zalud attended the **National Tank Truck Carriers Annual Conference and Equipment Show** May 18–20, 2008, in New York, NY.

Eric Zalud was inaugurated as President of the **Transportation Lawyers Association** at the group's Annual Conference, held in Fort Lauderdale, FL, May 6–10, 2008. Bob Spira presented *China: Transportation To, From and Within* at the conference. Marc Blubaugh, who is an Executive Committee Member of TLA, and Martha Payne also attended.

On the Horizon

Marc Blubaugh and Eric Zalud will present *Warehousing & Transportation: Two Sides of the Same Coin* at the **International Warehousing Logistics Association's Legal Practices Symposium** in Chicago, IL, on August 7, 2008.

Eric Zalud and Frank Reed will be speaking at the **National Tank Truck Carriers Board of Directors Meeting** on August 8, 2008, in Bay City, MI. Mr. Zalud will be presenting *Protecting Your Assets—Who's Liable: Corporate Restructuring to Minimize Catastrophic Loss* and Mr. Reed will be presenting *Environmental Successor Liability in Corporate Transactions*.

Marc Blubaugh and Eric Zalud will be attending the **American Trucking Association's Motor Carriers General Counsels Forum** in Lake Tahoe, NV, on August 10–13, 2008.

Martha Payne will manage Benesch's exhibit booth at the **Oregon Trucking Association's Annual Convention** from August 14–16, 2008, in Redmond, OR.

Marc Blubaugh will attend the **Arkansas Trucking Seminar** in Fayetteville, AR, on September 17–18, 2008.

Eric Zalud will be attending the **Terralex Annual Meeting** in Capetown, South Africa, from September 17–20, 2008.

Eric Zalud will be attending the **Annual Conference of the Canadian Transportation Lawyers Association** in Quebec City, Quebec, from September 25–28, 2008.

Martha Payne will serve as chair of the *Claims Liability Workshop* at the **SMC3 Loss Prevention Conference** in Atlanta, GA, on October 12–13, 2008.

David Neumann will be presenting *Swords and Shields: How to Wield Transportation Contracts to Your Advantage in Shipper Chapter 11 Bankruptcies* at the **Transportation Law Institute** in New Orleans, LA, in November 2008. Eric Zalud will be moderating a panel titled *Hot Topics—Air, Motor, Sea and Rail Transportation* at this conference.

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

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