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CTLA
ctla.ca

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The Transportation Lawyer

Publication Schedule Submission Deadlines
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February 2, 2024

PLEASE submit material by email in time to meet these deadlines to TLA Editor, Louis Amato-Gauci (see address above). You can also call or email either editor with questions.

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October

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President's Message

Fall is finally in the air or, so I am guessing. As I am writing this in August, there is not much in the air except heat and humidity, at least here in southeast Texas. "Summertime and the living is easy" from *Porgy and Bess* seemed to capture it best, and that was written before air conditioning. Fortunately, Houston is one of the most air-conditioned cities in the world. Selling that claim to fame, I was able to lure the Executive Committee to Houston for its summer retreat to tackle the business of the association and approve the budget for the following year. As we tackled then approved that budget, I was amazed how many exciting projects are underway within your Association.

Eric R. Benton

In addition to the Transportation Law Institute, the Chicago Regional Seminar and Bootcamp, and the Annual Conference in Puerto Rico, the various TLA Committees continue to be very busy with activities of their own. Budgets for conferences have always been difficult but following COVID-19 the hospitality industry has dramatically increased their charges for not only rooms, but also for food and beverage and audio-visual support to name just a few of the many items that cost drastically more. Along with the Executive Committee, I am working diligently to ensure that our conferences are of the quality that we have grown accustomed to, while still trying to keep the costs in check.

In addition to the budget, several exciting projects are underway. One that is particularly important to me is the strategic planning process and implementation. Executive Committee member **Marshall Pitchford** has graciously volunteered to lead this exercise and we are working on setting out measurable objectives so we can manage how we are doing. I see this as an ongoing process that will shape the Association for many years to come, allowing us to continue to provide the education, networking and quality programming that has worked so well in the past and, with a few tweaks, will continue to work well into the future.

The Technology and Social Media Committee has been very active with several important projects in the works. The Executive Committee has approved a budget expenditure from the Special Projects fund for a new website. The Committee has identified and is working with an approved provider to help with the planning, development, and deployment of the new website. Look for a roll-out in the coming months. TLA also is now on Facebook and make sure to check out the LinkedIn page and give us a "thumbs up." Finally, we were very pleased to launch our new series of online testimonial videos this past August. Watch out for more of these videos to be appearing soon. A total of 19 videos were shot at the last Annual Meeting in San Diego and they will help introduce TLA and the benefits of the organization.

In addition to the work of the Technology and Social Media Committee, other committees also presented the Executive Committee with some of their projects. For example, the ADR Committee is in the process of revising some of the rules to assist with the administration of arbitration proceedings. The Diversity, Equity, and Inclusion Committee, while limited to a set number of members, is going to rotate some of the current members off so new members can participate and bring their perspectives and talents to the important work of this committee. The Federal Regulations Committee will be educating our members on the developments of the federal organizations that are supposed to be overseeing the industry. Some of this education will be coming in the form of webinars, so please look for webinars of interest in the upcoming months. TLA is going to start charging a minimal amount for members to attend webinars. This step was taken reluctantly, but with the need to neutralize some of the expenses of getting CLE accreditation for the benefit of attendees. Even state bar associations are raising their rates.

The Transportation Law Institute is just around the corner when you receive this edition of *The Transportation Lawyer*. If you have not already done so, drop whatever you planned to do after reading this edition, book your flight, make your hotel reservations and join us in one of the most beautiful cities in the United States, Salt Lake City. I am hoping that the late October meeting will allow us a chance to see the fall foliage changing before the champagne powder starts falling. Program Chairs, **Paul Mello** and **Mark Thornton**, and their committee have prepared a tremendous program. Look at the line-up in the *Events* section of our website, and then make plans to join us for not only a great education and timely program but also a great networking opportunity, as we visit the best restaurants in Salt Lake with our friends and colleagues.

As we get ready to tackle the new year, rest assured that **Kathy Garber**, President-Elect; **Louis Amato-Gauci**, First Vice President; **Jeffrey Pincus**, Second Vice-President; and **Patrick Foppe**, Secretary/Treasurer have been working throughout the summer to make sure the Association is primed and ready for whatever issues may arise. We look forward to not only putting together a fantastic Chicago Regional and Bootcamp in January, an unmatched Annual Conference in Puerto Rico in addition to the Transportation Law Institute in Salt Lake City, but also to identifying and hosting webinars that are educational and current and committee activities that focus on your area of specialty. Coupled with some of the finest and friendliest attorneys, I am sure you will find the benefits of belonging to this Association are unparalleled.

TLA Executive Committee Meeting

Houston, Texas - July 29, 2023

To the Stars and Beyond!

TLA Mission Statement

The Transportation Lawyers Association ("TLA") is an independent bar association, comprised of in-house, government and private practice attorneys. Its members assist providers and commercial users of domestic and international logistics and transportation services, in all modes. TLA is dedicated to keeping its members ahead of the constant changes in the specialized legal environment governing all aspects of the supply chain and passenger travel. With commitment to excellence in continuing legal education, and a long tradition of collegiality and exchange of ideas, TLA is a collaborative resource for lawyers seeking to maximize the quality of the legal services they provide and enhance their professional lives.

President's Message

Dear members of the CTLA and the TLA:

It's hard to believe that my year as President is coming to an end. It flew by quickly. I began the year with the goals of having two member webinars, continuing to grow our membership alongside the efforts of the TLA to do the same, and plan an excellent CTLA conference in Montreal. We managed to hold one webinar, increase our membership slightly, and the conference (which hasn't happened as I write this) is well on its way to being a fun and educational event.

In the meantime, the supply chain industry in Canada and the United States continues to experience significant disruptions, not only from natural events like wildfires, drought, flooding, and other climate-related circumstances, but also due to labour disruptions and government interventions.

Robin Squires

Despite all of the unrest, Canada's supply chain landscape remains resilient and adaptable. Despite its vast geographical expanse, we have an efficient and interconnected supply chain network. We've seen trends related to automation and e commerce to meet increasing consumer demands. Companies are investing in automation and last-mile delivery solutions, along with adopting advanced technologies like artificial intelligence, blockchain, and Internet of Things to enhance visibility, traceability, and efficiency, and in order to remain competitive.

Sustainability is still a driving force in the Canadian supply chain. Consumers and businesses are increasingly concerned about environmental impacts. As a result, there is a growing emphasis on sustainable sourcing, packaging, and transportation options. It will be exciting to see how that all plays out over the next few years.

On both sides of the border, the disruptions caused by the COVID-19 pandemic and more recent events have exposed vulnerabilities in global supply chains. Companies are now focused on building resilient supply chains with diversified sourcing, stockpiling critical supplies, and risk management strategies.

Adopting digital technologies will undoubtedly allow companies to be better equipped to navigate uncertainties and meet evolving customer expectations. However, they carry with them risks of data and privacy breaches, along with theft of equipment and cargo.

Similarly, organizations that prioritize sustainability will eventually have a competitive advantage, but this is a long-term investment with significant cost. As such, the risk of investing in the wrong solution is a real concern. In addition, the evolution of associated regulations is crucial for smooth cross-border operations.

In short, the outlook for the industry we serve is extremely positive, and for the legal community, there are exciting new challenges and opportunities available. I'm personally excited about the future of transportation law and what it means for our members.

Just like the companies we serve, legal organizations that prioritize adaptability and embrace technological advancements will be best positioned to thrive in this ever-changing landscape. The CTLA allows companies to meet, share ideas, discuss and plan for new developments, and to stay on top of what's happening in the industry. As a result, I have enjoyed this past year immensely and look forward to continuing to be involved in the future.

Let me start my concluding paragraphs off with a few thank yous. Thanks to all of the board members that assisted me through my year as President: Your Executive Committee was Past President **Carole McAfee Wallace** (Gardiner Roberts LLP), Vice-President **Elizabeth Fashler** (BLG LLP), Treasurer **Jaclyne Reive** (Miller Thomson LLP), and Director of Communications **Pui Hong** (Trimac). The Directors were **Mathew Crowe** (Alexander Holburn), **Julia Loney** (McMillan), **Seamus Ryder** (Metcalf & Co.), **Lori Posluns** (Traffic Tech), **Andrea Fernandes** (Gardiner Roberts), **Orvel Currie** (DD West), and **John Wilcox** (Dysart Taylor). Over the year, we discussed membership, the webinars, the annual conference, and addressed some uncertainty with regard to the lifetime member category. Our meetings were pleasant, and every one of the board members contributed meaningfully to the success we had this year in implementing my plans.

The next few years are certain to be even better, with **Elizabeth Fashler**, **Jaclyne Reive**, and **Pui Hong** likely to be your next few Presidents. Their dedication, experience, and creativity are sure to make the CTLA an even more vibrant and thriving organization.

I cannot leave off without mentioning the committees of the board this year. There was, of course, the Executive Committee. There was also a conference planning committee that assisted me in making the upcoming conference in Montreal a resounding success. There was also a committee led by **Carole McAfee Wallace**, which was struck to plan the CTLA events that took place in San Diego during the TLA Annual Conference. By all accounts, there was a strong showing from Canadians, and a return to the previous format of a "Semi-Annual" meeting of the CTLA with educational content by and for the Canadian members of TLA.

Last on my list of thank yous is the Membership Committee, comprised of **Kim Stoll** and **Carole McAfee Wallace** from Gardiner Roberts and **Stéphane Lamarre** from Cain Lamarre. Their significant efforts to follow up with lapsed members, contact prospective members, and work with the TLA to increase membership in both organizations have shown results in the past few years. Our CTLA

membership ranks increased by 30%, and the committee ensured that lawyers involved in the transportation industry know about and consider joining the CTLA. Many thanks are owed to all of the committee members.

Finally, to those of you whose names I have forgotten to mention, please know that it is not for any reason except my own failure. It is certainly not a result of any measure of your involvement or efforts this year. I apologize for neglecting to mention you in my closing words – and I thank you for all that you have done to make the CTLA stronger.

It takes all of us in an organization like ours to be successful. I hope to be able to live up to my predecessor Past Presidents and to support the organization in the future in the manner it deserves.

Thanks again to all of you – until we meet again.

Robin Squires

TLA Website: www.translaw.org

Members Only area:

User Name: First initial + last name + the Zip code where you receive TLA mail, i.e., jbrown66061. (Canadian members–please note that your postal code may include a space which counts as a character.)

Password: translaw1

If you wish, you can personalize your user name and password using the ID & Password link in the members services area of the TLA website.

Are you receiving emails from TLA?

If not, your spam blocker may be preventing you from receiving important updates about TLA events and developments in transportation law. To ensure that you will receive updates, be sure that your system will accept emails from **TLA-info@kellencompany.com**.

CTLA Website: www.ctla.ca
User Name: Transport
Members Only Password: ship

Editor's Column

The Transportation Lawyers Association is well on its way to becoming a global organization. Our membership directory indicates that we now have members from across the United States, Puerto Rico, six Canadian provinces, México, Korea, Germany, the United Kingdom and Australia. The Damm Membership Committee is working hard to keep that momentum going, and you can help by looking for opportunities to talk about TLA with colleagues and clients in every corner of the world.

TLA's increasingly global outlook is well reflected in this issue of the *TTL*, with an excellent article by **Dr. Marco Remiorz** and **Julia Brennecke** regarding Germany's Supply Chain Due Diligence Act. This is a statute that requires businesses to audit their supply chains for possible human rights violations, and take steps to mitigate and avoid them. Many of our clients move freight across international borders. Some of them may be directly caught by the Act because they have a place of business in Germany and meet the applicable thresholds. Others may be compelled to comply with the Act as direct or indirect suppliers to German manufacturers, shippers, consignees and service providers. Take a few minutes to read this article. Your clients will thank you for it.

Louis Amato-Gauci

Next up: it's back to the future, *Jetsons*-style for a timely, thought-provoking article by **Latasha Johnson** on eVTOLs – passenger or cargo aircraft that use electric power to hover, take-off and land vertically. The Federal Aviation Authority recently released an operational blueprint, and is already issuing flight certifications for eVTOLs. The age of the flying taxi is upon us and, as Latasha notes in her article, its "expected time of arrival is now". Aside from providing a new, efficient and carbon-neutral form of passenger transportation in congested urban centers, eVTOLs are expected to revolutionize eCommerce deliveries, emergency medical transportation, cargo and freight delivery.

Bill Pentecost teams up with **Henry Sienkiewicz** and **David Olive** to provide us with an in-depth look at cyber security vulnerabilities in the trucking industry, and a detailed analysis of government agency guidance and industry best practices to defend against, mitigate and manage the risks presented by hackers, rogue actors, and cyber terrorists. **Hillary Arrow Booth** and **Madison Romine** walk us through the series of cases that resulted in a circuit split on whether state tort claims against brokers that are preempted by the Federal Aviation Administration Authorization Act of 1994 can be saved by the safety exception. Stay tuned for more on this topic, as an appeal to the Supreme Court of the United States appears likely.

The National Transportation Safety Board investigates aviation, railroad, highway, marine and pipeline accidents to determine their probable cause and issues safety recommendations to reduce the risk of future accidents. **Thomas Tobin** and **Daniel Braude** give us a peek behind the curtain, describing the nuts and bolts of NTSB investigations. They explain that although these proceedings follow a pre-determined pattern, they may be unfamiliar ground for most attorneys, and companies in all five modes of transportation are often unprepared for their broad scope and intense pace. This article is intended to serve as a reference tool for attorneys whose clients are active in these industries.

Also in this issue, **David Popowski** provides a case note on *Greatwide Transport II, LLC v. United States Department of Labor*, and its implications regarding whistleblower claims in the trucking industry. We close with a further case note by **Miles Kavaller**, who picks up where he left off in the February 2023 issue of *TTL*, with an update on the Ninth Circuit's reconsideration of *Carmona v. Domino's Pizza LLC*.

Thank you to all of these fine authors for their informative contributions to our journal, and to **Rachel Celentano** at Kellen, who keeps the editing and proofreading moving along at a swift pace.

Earlier this year, David and I went a road trip, with Larkin our Siberian Husky, through various parts of upstate New York, New Hampshire, Maine and Canada's Atlantic Provinces. While I had my reservations throughout the planning stages (and indeed all the way up to the midpoint on the southbound lane of the Thousand Islands Bridge), I came away from that experience with a new found appreciation for the beauty and majesty of these two countries that most of our members are fortunate enough to call home. I cannot recommend it enough. If you're planning time off anytime soon, why not make it a road-trip? A glance at the *Farmer's Almanac* suggests that the top three destinations for fall foliage this year will be Rangeley Lakes Region, Maine (October 1–17); Letchworth State Park, New York (September 28–October 28); and Kancamagus Scenic Highway, Lincoln, New Hampshire (September 28–October 9). Get out there, and enjoy!

I would like to take this opportunity to wish all of you a very Happy Thanksgiving. Whether your holiday feast includes roast turkey and stuffing (or dressing) made to a cherished family recipe, or a traditional Downeast Jigg's dinner with split-pea pudding, whether you plan to spend time with family and friends or take in the CFL Thanksgiving Day Classic in Montréal, I hope you will find time to rest up, recharge and reflect on the many things that have made 2023 a year to remember.

And if there is some downtime in your future, might I suggest that this could be the perfect opportunity to prepare an article or two on your favorite transport-related topics, for publication in an upcoming issue of *TTL*.

Editor's Column

The time has come for me to bid adieu to my role as the Director of Communications for the CTLA. I have gained a lot of knowledge from speaking with all of the members who have so graciously contributed to the TTL and those who have put forth ideas. I extend my heartfelt thanks to everyone who has made my role that much easier.

It wasn't until I stepped into the role of Director of Communications that I realized how small our practice area is and how much camaraderie there is within our community. It really is a community where everyone shares ideas and provides support when needed. It is a pleasure to be a member of this community.

Pui C. Hong

As I pass the torch to my successor, I am reminded of the importance of continuity and evolution. Just as the transport industry constantly adapts to new challenges, so must CTLA continue to keep up with the industry's growth and sharing innovations. It's not merely a changing of roles; it's a commitment to upholding the association's values and advancing its mission. To the incoming Director of Communications, I offer my best wishes. These times are exciting for the transportation industry and I look forward to the stories you will bring forth and the topics you will highlight.

The Canadian contributions this issue include discussions about: (i) drone regulation in Canada in a case note titled, **"Drone Regulation in Canada: Proposed Rules for BVLOS and Medium-Sized Drones"** by **Sairam Sanathkumar**; (ii) bilingualism and its application in Canadian airports in an article titled, **"Official Languages Up in the Air: The Status of Bilingualism in Canadian Airports"** by **Bennet Misskey**; and (iii) nuclear verdicts in the backdrop of Canada's judicial system in an article titled, **"The Half Life of *Andrews*: Shielding Against Nuclear Verdicts in Canadian Law"** by **Kieran Boyko** and **Pui Hong**.

TTL Call for Articles

We are looking for more featured articles and case notes for upcoming issues. This is an opportunity for TLA and CTLA members to write on timely issues which will allow greater exposure among our memberships. Publishing in the *TTL* will give you nationwide recognition and is a great way to expand your networking abilities as part of a well-respected and widely read industry publication.

The submission deadline for the next publication is November 14, 2023.

Please direct any questions and submissions to *TTL* Editor **Louis Amato-Gauci** at lamatogauci@millerthomson.com.

Secretary/Treasurer's Report

I am humbled and grateful beyond words to have been elected as the new Secretary/Treasurer of TLA. As I step into this role, I find myself reflecting on the path that brought me here and the remarkable individuals who have guided me along the way.

First and foremost, I want to extend my heartfelt appreciation to all of you, my fellow TLA members, for placing your trust in me. It is an honor to serve such a distinguished group of professionals who are at the forefront of transportation law. I look forward to contributing my skills and dedication to the continued growth and success of our organization.

I must express my deep gratitude to my esteemed fellow officers, **Eric Benton**, **Kathy Garber**, **Louis Amato-Gauci**, and **Jeff Pincus**. You brave souls will have to put up with me! I am eager to work alongside each of you, and I am confident that together, we will accomplish great things for TLA and its members.

Patrick E. Foppe

Next up, I'd like to give a heartfelt shout-out to **Fritz Damm**, the guru of TLA knowledge. Fritz, my friend, you are not just a Past-President and the long-time Chair of the Damm Membership Committee; you are the gatekeeper of TLA's history and traditions. When I first met you, I thought you were some kind of legal Yoda, knowing everyone and everything about TLA. As it turns out, you probably are a Jedi master in disguise. Your guidance and wisdom have been invaluable, even if I sometimes suspect you're playing "TLA Trivia" with me for your own amusement. In all seriousness, Fritz, you have been an irreplaceable mentor to me, imparting not only your knowledge of TLA's rich history and traditions but also your profound understanding of the value that our Association brings to each member's life. Your guidance has been instrumental in shaping my understanding of TLA's significance, and I am deeply grateful for your friendship.

I would be remiss if I didn't acknowledge the unwavering support of my family. To my wife, Kate, and my kids, your love and understanding have been my bedrock. Your patience during those days and nights when I was away attending meetings and events did not go unnoticed. Your support has given me the strength to take on this new responsibility, and I am truly blessed to have you by my side.

In the spirit of camaraderie and professional growth, I have come to understand that TLA is not merely an organization but a community of friends and peers. I've come to realize that being part of TLA is like being in a secret society of transportation law enthusiasts. It's not about slick marketing or business cards; it's about forging genuine friendships. The relationships forged here are beyond measure, and the collective knowledge and expertise of our members make TLA an unparalleled resource in the transportation law arena. And Fritz, you nailed it when you explained to me that this collegial organization is essentially a matchmaking service for lawyer-friends. Move over Yenta; TLA is where the real connections happen!

Therefore, I encourage each of you to continue your support of TLA by maintaining your membership, recruiting other attorneys to join and – if you haven't done so already – pay your annual dues! It's a small price for all the benefits to be had.

Having said that, I now direct your attention to the current state of TLA's finances. TLA's unaudited July 31, 2023 financials reflect cash assets of $414,921, of which $206,203 is in the Truist operating bank accounts, $55,728 in two money market accounts, and $124,705 in certificates of deposit. Included in this are restricted assets of ($132,467). Fiscal year-end revenue is $712,155 and total expenses are $749,544, which resulted in a loss of approximately ($37,390). There are some final revenues anticipated from the Annual Conference in San Diego, which will adjust the statement slightly once received.

In conclusion, thank you once again for this incredible opportunity. I am honored to be a part of this extraordinary Association, and I promise to do my utmost to uphold the principles and values that make TLA so exceptional. I want to reaffirm my commitment to serving each of you, the TLA members. I am excited about the journey ahead and the opportunities it presents for all of us. Let us embark on this path together to propel TLA to even greater heights. Here's to friendship, laughter, and many more fun adventures with all of you!

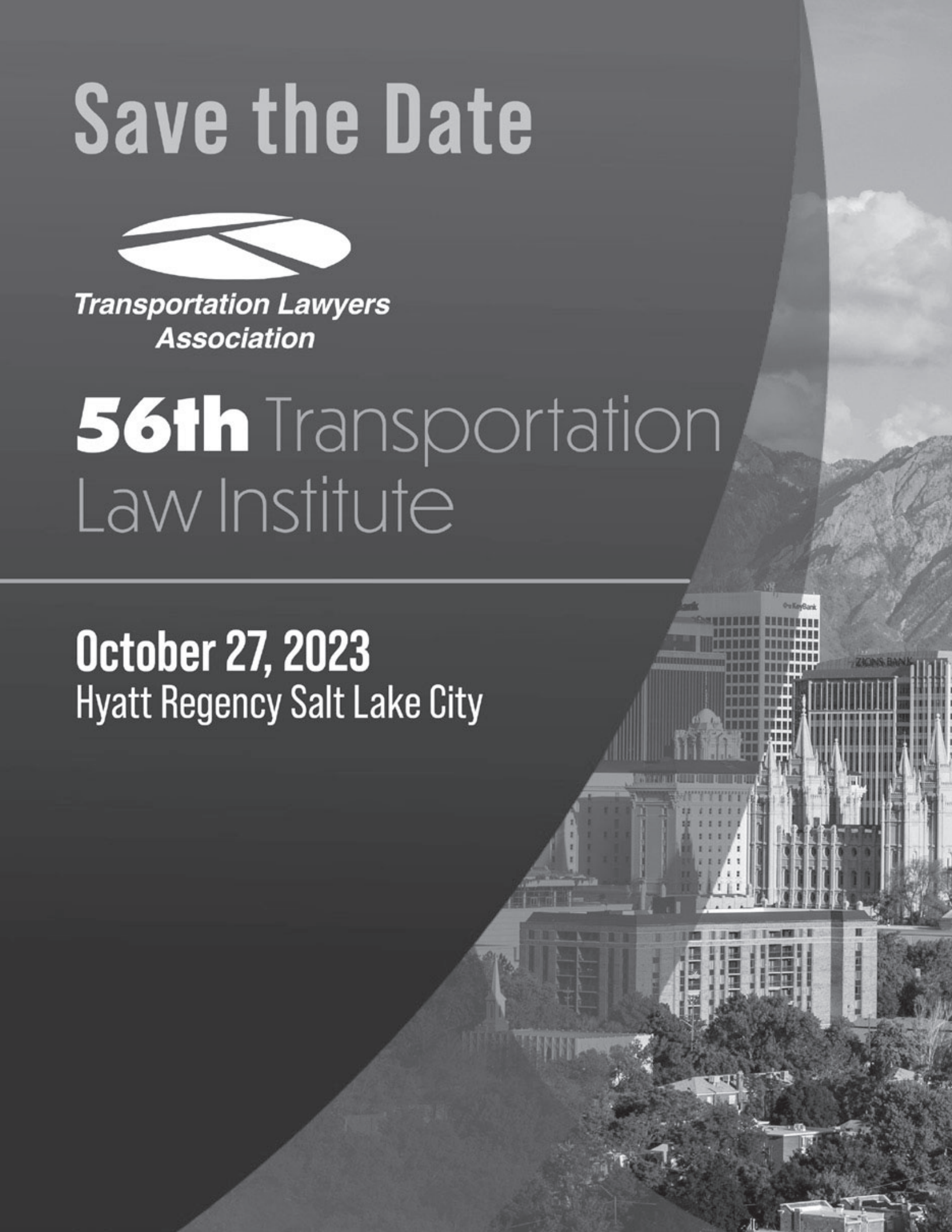
Save the Date

Transportation Lawyers Association

56th Transportation Law Institute

October 27, 2023

Hyatt Regency Salt Lake City



2024 Chicago Regional Seminar and Bootcamp

Radisson Blu Aqua Hotel – Chicago, IL
January 18–19, 2024

Frank C. Botta*

Joelle Nelson**

Carlos M. Sesma Jr.***

Alecia Walters-Hinds****

Next year, the first and one of the most emblematic and anticipated events of our organization is taking place again in the Radisson Blu Aqua Hotel in downtown Chicago.

Bootcamp

We will be kickstarting with our traditional Bootcamp lead by **Frank Botta** and **Alecia Walters-Hinds** who have been working hard to assemble a very interesting and profound discussion regarding Insurance within the Transportation and Logistics Industries. We will learn from insurance experts, private practice attorneys and in-house counsel from very different perspectives that include:

- Current insurance needs for brokers in a changing landscape where the number and size of brokers have proliferated. The "gold standard" for protecting a freight broker's operations and stakeholders will be discussed for freight brokers to be in the best position to defend and be protected.
- We will learn about ISO forms, what they are, how they work and how they seek to provide consistency and predictability in insurance coverages, to avoid having different jurisdictions interpreting the insurance contract in different ways.
- We will explore insurance coverage from the in-house perspective of a motor carrier, as well as insurance coverage expectations coming from brokers and other parties with whom motor carriers transact business.

We will hear from a very diverse group of experts, which in no particular order include: **Jeffrey Simmons**, **Patrick Bobo**, **Brett McGinnis**, **William Worthington**, **Timothy Groustra**, **Chase Carmichael**, **Blake Deitrich**, **David Brown**, **Sandra Hiller**, **Jason Orleans**, **Daniel Johnson**, among others.

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**** Partner, Lewis Brisbois (New York, NY)

Regional Seminar

"Transportation & Technology – Where We've Been & Where We Are Going"

We now move on to the Regional Seminar which will take place on Friday, January 19, 2024.

For 2024, we are focusing on the impact of technology in our industry. The speed and continued sophistication of technology keeps us constantly on our edge, trying to be informed and striving to keep up with all the news and developments. Electrification, automation, charging stations, sustainable fuels and digitalization are normal day to day matters that influence our work and our client's operations and risks. We will take a brief pause to do a deeper dive and analyze where we have been and where we are going with transportation and technology.

Joelle Nelson and **Carlos M. Sesma, Jr.** have joined efforts as Co-Chairs for the 2024 Chicago Regional Seminar and have structured a very interesting program that will examine the implications of technology from different perspectives, including:

- Accident Reconstruction and the Impact of New and Improved Technology (including a live demonstration)
- New Transportation Technology – From Network Companies and Brokers to Autonomous Vehicles
- New Technology and Impacts on Cargo Today and Tomorrow
- Industry leaders from Mexico and the US will discuss the legal, economic, and political impact of the very present and

growing nearshoring trends, and will discuss how 2024 is shaping up from a regional growth perspective.

- Our ethics panel will focus on the discussion of working at the office or working from home. There is now a growing push for workers to return to the office full time. The discussion has truly divided all work communities, but especially the legal community. The freedom to work from home (even on a hybrid basis) afforded parents, caregivers, minorities, and persons with disabilities the flexibility to be more productive as well as save money; on the other side, employees who are present at the office are "in line of sight" and continue to receive the better and more high-profile assignments, which affects job promotion. This panel is sure to generate a good and high-level debate.

A great team of industry experts, in-house counsel and private practitioners has been assembled to address the above themes in the most profound, engaging, and challenging way. The team includes: **William "Billy" Davis**, **Al Durrell**, **Joseph Goldberg**, **Matt Grimm**, **Eduardo Haros**, **Kristen Johnson**, **Matthew Koch**, **John Nunnally, Daniel Sbanotto**, **James Whelan**, **Ashley Winsky**, among others.

Networking Opportunities

Both our Bootcamp and the Chicago Regional Seminar are designed to continue to develop our relationships and the strong collegiality that characterizes the Transportation Lawyers Association. Networking opportunities are always available starting early in the morning in breakfast, to coffee and lunch breaks, evening cocktails and the pre-event dinner which gives attendees the opportunity to meet and greet our speakers.

Chicago

Chicago, the "Windy City", lies along the shores of Lake Michigan. Known for its vibrant arts scene, numerous cultural attractions, excellent shopping, and interesting architecture, this city attracts visitors from the US and around the globe.

Chicago enjoys a worldwide reputation as a focal point of 20th-century architecture and art, with architects such as Louis Sullivan and Frank Lloyd Wright, and artists like Picasso, Miró, Dubuffet, and Chagall leaving their mark.

The city also has much to offer in the sporting sphere, with the Chicago Bears in American football, the Chicago White Sox and Cubs in baseball, and the Chicago Bulls in basketball.

Out of its many attractions, below is a list of 10 suggestions for you to consider during your stay:

1. Visit the Art Institute of Chicago
2. Walk through Millennium Park
3. Stroll around Navy Pier
4. Reach for the Stars at Adler Planetarium
5. Museum of Science and Industry
6. See the View from the Willis Tower SkyDeck
8. 360 Chicago
9. Field Museum of Natural History
10. Michigan Avenue and the Magnificent Mile

Hotel Information

Radisson Blu Aqua Hotel, Chicago
221 North Columbus Drive, Chicago, IL, 60601, US
(312) 638-6686

Dive into the rich culture of downtown Chicago from the Radisson Blu Aqua Hotel, Chicago, which is within walking distance of Millennium Park, the Magnificent Mile, and Navy Pier. Designed by famed architect Jeanne Gang, our striking hotel places guests in the heart of the city with easy access to Financial District businesses and attractions like "The Bean" and the Chicago Riverwalk.

During your stay, take advantage of our indoor pool to swim laps. Our fitness center adds fun to your workout with a half-size basketball court, an outdoor running track, and a steam and sauna room. The hotel's lifestyle garden provides a welcome respite from the hustle and bustle of the day, and the on-site FireLake Grill House & Cocktail Bar offers Midwestern cuisine in an inviting atmosphere. The hotel also offers electric car-charging stations for your convenience.

2024 TLA Annual Conference & CTLA Midyear Meeting

Rio Grande, Puerto Rico

Eric R. Benton*

William M. Davis**

M. Gordon Hearn***

Excitement is building for the 2023 TLA Annual Conference and CTLA Midyear Meeting scheduled for May 1-4, 2024, at the Wyndham Grand Rio Mar Puerto Rico Golf & Beach Resort. The planning committee is working diligently to provide a first-class educational program combined with a variety of events that will make your visit a memorable experience. All you need to pack is your flip flops, your sunscreen, and your family. No passport is required for our U.S. attendees to join us in majestic, tropical, Puerto Rico.

Naturally, the planning committee has started identifying the topics and issues that are diverse yet important for all practitioners in the transportation arena to be aware of, in support of the advice we provide to our clients. Whether it is substantive, basic information or the latest hot topic, we are putting together panelists who are tops in their fields to present this important information to the attendees. Stay tuned and look for updates in future issues of *The Transportation Lawyer*, as we further refine the topics and the fun-filled events. Please review the brief description below of the resort and some of the items we are currently working on for your education and enjoyment.

The Resort

Nestled between the gold beaches of the Caribbean and the natural beauty of El Yunque National Forest – the only tropical rain forest in the U.S. National Forest System – lies the picturesque Wyndham Grand Rio Mar Golf & Beach Resort that will host the 2024 Annual Conference. With two miles of exclusive golden beaches, two 18-hole golf courses on site, a state-of-the-art tennis center, a 7,000 square foot spa, a lively casino, and three lagoon-style pools there is no limit on fun on *la Isla del Encanto* ("the Isle of Enchantment").

The resort offers a wide range of activities for your family while you are in the conference educational sessions or attending your committee meetings. Snorkeling, tennis, rainforest tours, horseback riding on the beach or offshore fishing are all available on or near the resort. In addition to the beach activities there is rum tasting and exploring Old San Juan and its unique history as the oldest European-founded city in the Americas.

Dining, both on and off the resort property, entice all to taste the culinary delights of the Caribbean. There are nine restaurants in the resort ranging from fine dining to fish tacos beachside at the Tiki Hut. Need a drink? Try the 5 O'Clock Somewhere Bar & Grill in Margaritaville located on the resort. Just down the highway from the resort is Luquillo Kiosks, a collection of restaurants and shops that the locals love to explore. We are in the process of creating a pamphlet with recommendations from Puerto Rican members on where to shop, eat and visit.

Networking and Social Events

In addition to a top-notch educational program, there will be plenty of time to get to know and relax with your colleagues from across North America and around the globe as we enjoy the beautiful island of Puerto Rico. After sticking your toes in the sand and enjoying the gentle breezes swaying the palm trees, you may want to enjoy a more rigorous activity such as: visiting Old San Juan, touring the Bacardi Rum distillery, sailing, kayaking, four-wheeling, deep sea or light tackle fishing, or exploring the rainforest by hiking trail or zip lining.

* Partner, Mayer (Houston, TX) - TLA President
** Partner, Bovis Kyle (Atlanta, GA) - Co-Chair, Planning Committee
*** Partner, Gardiner Roberts (Toronto, ON) - Co-Chair, Planning Committee

Wednesday, May 1 – After a day of travel or recreation, including the annual golf tournament, TLA will officially welcome you to the tropical get-away of Wyndham Grand Rio Mar. Join colleagues for drinks and heavy appetizers on the resort's grounds with island-inspired entertainment and ocean views. Keep an eye out during receptions for new members and corporate counsel: this is one of many ways to meet new friends and clients.

Thursday, May 2 – After a morning packed with exceptional CLE opportunities and an afternoon of committee meetings in your practice areas, attendees will board private shuttles to venture into Old San Juan for a night of fun, dining and exploring the cobblestone streets of this magnificent historic town. Be sure to sign up for the dine-around as we will explore the streets and smells of tantalizing dishes, coffee at its finest, and history unparalleled in the Americas.

Friday, May 3 – After a day of classes and committee meetings, the Annual Banquet will be held on the property. Attire is designated as "tropical black-tie" so bring your whites and palm prints for an evening of recognition and the passing of the President's gavel from current President Eric Benton to President-Elect Kathy Garber.

Saturday, May 4 – The Closing Celebration is held on Saturday night as a casual opportunity to say temporary good-byes to old friends and new acquaintances as we wind down an educational and fun week of learning the latest and greatest for those who represent the transportation industry. Attendees will be presented with local fair and island vibes beneath the stars. This resort casual event will close out the Annual Conference at this beautiful tropical location.

Educational Program

The educational program will cover a wide spectrum of current and critical topics of interest to lawyers in private practice or serving as in-house counsel. The education committee, comprised of **Elizabeth Bass**, **Marc Blubaugh**, **Kevin Brejcha**, R**ebecca Burroughs**, **Eliseo Roques-Arroyo**, **Soumit Roy**, **Shannon Wheeler** and co-chairs **Billy Davis** and **Gordon Hearn** are working an agenda that will include the following sessions:

- ***Technological Advancements in the Transportation Industry: How Technology is Reshaping the Transportation Industry***

Panelists will address a suite of cutting-edge truck and aviation technologies, from advanced dash-cam systems to radar technology. Attendees will gain an understanding of these technologies, their practical applications and their potential impact on the improvement of transportation safety and legal proceedings.

- ***Public Perception of the Transportation Industry and its Application to Rulemaking, Legislation and Litigation***

This presentation will offer an entertaining review of popular culture (movies, music, songs, shows, art, social media) of the transportation industry. How might this shape the perceptions and thought processes of the general public, insurers – or jurors for that matter? Is there a demonization of truck drivers requiring those representing truck drivers and trucking companies to break down stereotypes before we can best represent our clients? How might these social realities affect our clients, in turn placing the importance of awareness on us as effective counsel? This panel promises to be both entertaining and informative in presenting a new element of awareness.

- ***In House Counsel: Customer Focused and Business Driven Learn Their Challenges, Daily Demands, and How to Expand and Improve Customer Service***

Liability, profitability and timeliness are just a few of the different pressures in-house counsel face daily. External counsel can benefit significantly by learning how to prepare and deliver legal services in the most successful manner. A panel of in-house counsel will review the top legal issues facing their businesses today, from employment mobility, cybercrime and competition issues, to mergers and amalgamations and labor shutdowns, these key issues require external counsel's advice and services.

Defending Transportation Claims with a Focused and Coordinated

- ***Defending Transportation Claims with a Focused and Coordinated Defense from Day One***

This panel will offer an in-depth analysis of lessons learned from defending high exposure and catastrophic claims and what tools can be successfully implemented to coordinate discovery efforts and prepare transportation entities for a successful defense, including through to the time of trial. This evaluation will include the benefits of coordinated discovery efforts nation-wide (and the risks of failing to make such coordination efforts), consistent implementation of policies and procedures (and the dangers of policies and procedures which "advance" the standards of reasonableness and care unknowingly), the detailed preparation (and associated dangers) of both driver and 30(b)(6) depositions, and strategies to defeat claims for negligent hiring and retention.

- ***Recent Detention and Demurrage Disputes, Legislative Developments and Rulemaking: How They Affect the Carriage of Goods from Origin through to Final Destination***

Inter-modal delays, surprises and unintended costs in the transfer of transportation assets and equipment can compromise business relationships and lead to commercial to enhanced risk of cargo loss, damage or delay claims. This panel will explain the current issues and regulatory initiatives affecting shippers, transportation service providers from a broad supply chain perspective.

- ***Cybersecurity and Data Protection: A Ransomware Tale and the Need for a Plan***

What do you do when your IT director calls and tells you your network has been encrypted and there is a ransom note demanding $500,000? Did the threat actor exfiltrate data? Do you contact the threat actor, and how do you negotiate? What do you tell your customers and employees while you try to get your network running again? When do you call law enforcement? How long will your forensic investigation take? Will the attorney general knock on your door? This presentation will include an overview of the most common cyber-attacks seen in the transportation and logistics industry, an overview of the costs associated with a cyber-incident,

key terms and technologies, and real-world best practices that can be put in place immediately to help reduce cyber risk exposure to organizations.

- ***An Inside View of NTSB Investigations: Investigative Protocol and Strategy Considerations***

A former assistant general counsel will provide a case study concerning a major investigation into a catastrophic bridge collapse over an eight-lane highway in Miami, Florida and the valuable insights and information acquired regarding the National Transportation Safety board during a three-year long investigative process. The proposed presentation will offer an inside view into NTSB investigations, discussion of investigative protocol and agreements, exploration of matters of state and federal law, suggestions for litigating related issues and developing a strategy for the use of investigation protocols to a client's best advantage.

- ***From Puerto Rico to Ukraine: Jones Act Issues, and Economic Sanctions***

A panel of international practitioners will review developments and critical considerations in the cross border trade of goods – starting with our home base of Puerto Rico.

- ***Modal Updates: Air, Land & Sea***

Subject -matter experts will summarize the most recent and timely case law and regulatory developments in air transport, rail transport, and maritime transport from in various jurisdictions.

- ***Ethics and Professionalism: Preservation of Client Privilege***

This topic will feature discussion and analysis of In re Grand Jury and the professional obligation of preserving client privilege.

- ***A General Counsel's M&A and Transaction Survival Guide: Navigating Traditional Aspects of the Practice and the Legal Role in M&A Deals***

While much of an in-house counsel's and outside counsel's role involves litigation, claims, and disputes – an equal or larger portion involves corporate transactions, acquisitions, divestures and financings, public and private equity reporting, corporate structure and governance, due diligence for M&A transactions, and the legal aspects of integration thereafter. This panel will discuss all aspects - practical, strategic, legal, and economic - of those transactional components, of the practice.

- ***Employment Law Across North America: A Review of Classification and Other Key Regulatory and Litigious Issues***

A panel of United States, Canadian and Mexican attorneys will canvass the state of the union on the regulation of transportation sector employees and owner-operators, and other key issues.

TLA Membership Report

Fritz R. Damm* and Kristen M.J. Johnson**
TLA Membership Chair and Vice Chair

The Membership Committee's goal is to attract the world's best transportation lawyers from diverse practices. This is something that most distinguishes TLA from so many other legal organizations in the transportation industry. Our diversity in membership remains a top priority of our committee and we are always looking for innovative ways to recruit members from different backgrounds.

As of September 1, 2023, TLA has 921 active members. Since September 1, 2022, TLA has gained 87 new members.

We wish to welcome all new members who joined TLA in since April 2023.

New Members

- Gerardo (Jerry) Alcantara, Mayer LLP, Dallas, TX
- David G. Ballard, Law Office of David G. Ballard, Meridian, ID
- David Bayles, Allen Lund Company, La Cañada, CA
- Hailey Benton-Thomas, Bison Payments LLC, Oklahoma City, OK
- Sophia L. Bernard, Taylor Johnson PL, Winter Haven, FL
- Megan Bolt, Helmreich Law, LLC, Fishers, IN
- William Burgess, U.S. Multimodal Group, Orland Park, IL
- Shannon Butler, B.R. Williams Trucking, Inc., Oxford, AL
- Jessica Cappock, Mathis Law Group, Lakeland, FL
- Wendy Cassity, XPO Logistics, Boston MA
- Terry J. Coniglio, Terry J. Coniglio, Inc. P.C, Long Beach, CA
- Mathew Crowe, Alexander Holburn, Vancouver, BC
- Ryan Eckert, Arrive Logistics, Chicago, IL
- Nicolas Endre, Ryder System, Inc., Miami, FL
- Javier González, Royston Rayzor, Brownsville, TX
- Todd Gray, Lewis Brisbios Bisgaard and Smith, Cleveland, OH
- Ben S. Greenberg, North Carolina Trucking Association, Raleigh, NC
- Tyler R. Harkness, Curri, Inc., Ventura, CA
- Erick Harris, United Petroleum Transports, Oklahoma City, OK
- Caroline Healey, Railway Association of Canada, Ottawa, ON
- Tiffany Hutchens, Ascent Global Logistics & Roadrunner, Milwaukee, WI
- David Jackson, ODW Logistics, Columbus, OH
- Risa S. Katz-Albert, Old Dominion Freight Line, Inc., Thomasville, NC
- John P. Kellenberger, US 1 Industries, Inc., Valparaiso, IN
- Melissa L. Korfhage, Whitten Law Office, West Chester, OH
- Seung Woo Lee, LX Pantos Co., Ltd., Seoul, Republic of Korea
- Geoffrey Leskie, Segal McCambridge, Southfield, MI
- Eyck O. Lugo, EDGE Legal LLC, San Juan, PR
- Randall A. Mead, Drake, Narup & Mead, P.C., Springfield, IL
- Clayton J. Meder, Student, Lincoln, NE
- Jennifer L. Merritt, Taylor Johnson PL, Clearwater, FL
- Derek Myers, Chauvel & Glatt, LLP, San Mateo, CA
- Franck Ngandui, Andy Transport Inc., Saint- Laurent, QC
- Peter V. Nguyen, The Descartes Systems Group Inc., Waterloo, ON
- T. Christine Pham, Cowan Systems, LLC, Halethorpe, MD
- Emily Pitre, Borden Ladner Gervais LLP, Vancouver, BC
- Tamara Rodriguez, Vidaurri, Rodriquez & Reyna, LLP, Edinburg, TX
- Alina Schechner, Ryder System, Inc., Miami, FL
- Emma Schott, Mitchell - Handschuh Law Group, Atlanta, GA
- Kimesha Smith, Mathis Law Group, Plantation, FL
- Ryan Warden, White and Williams LLP, Philadelphia, PA
- Lauren West, McLane Company, Inc., Temple, TX

* Of Counsel, Scopelitis, Garvin, Light, Hanson & Feary (Detroit, MI)
** Cargomatic (Clearwater, FL)

TLA Committee Corner

Membership is a team effort! Our membership goal for this year is to have over 1,000 attorneys in TLA. We need your help! Helping also comes with the honor of becoming a *Line 8 Recipient*. New members are asked on Line 8 of their membership applications to identify the current TLA members who encouraged them to join our Association.

We are happy to report that 22 TLA members heard our call for help and invited new members since April 2023. We wish to thank and recognize each of them:

Line 8 Recipients

- Dirk H. Beckwith
- Patrick Bobo
- Frank Botta
- Madison Bulman
- Jeremy Handschuh
- Craig Helmreich
- Kristin Jackson
- Jieun Jang
- Kristen Johnson
- Michael Kroul
- Brain Mathis
- Peter Murphy
- Carrie Palmer
- Martha Payne
- Campbell Roper
- Beata Shapiro
- Jeffrey Simmons
- Chad Sizemore
- Robin Squires
- JW Taylor
- Shannon Wheeler
- Todd Wolfe

Our goal is to have 100 *Line 8 Recipients* this coming year.

Your membership renewal has been in your inbox for two months. If you haven't already done so, please make it a top priority to renew your TLA membership so you can continue to receive the many benefits of TLA and the organization can continue to be strong.

Please remember that as important as inviting new members may be, it is also important that members make an effort to get involved in committees, and take advantage of the many collegial and the professional opportunities of TLA by attending meetings, writing articles, or volunteering for the various ongoing projects, initiatives, and leadership roles.

Later this month we expect the TLI in Salt Lake City, Utah on October 26, 2023 to be another great event for our ongoing efforts to recruit and invite attorneys to join TLA.

As always, if you know someone who you think might enjoy becoming a member of our Association, please invite them or simply send the person's name and contact information to **Fritz Damm** (fdamm@scopelitis.com) or **Kristen Johnson** (kmjohnson@cargomatic.com). If you have any questions, call Fritz at 313.237.7401.

Thank you for being a TLA Member!

Membership Committee:

Stevan R. Baxter
Kevin T. Brejcha
Rebecca L. Burroughs
Fritz R. Damm
William "Billy" Davis
Whitney M. Eschenheimer
Patrick E. Foppe
Kristen Johnson
Peter A. Quinter
Daniel R. Sonneborn
Roger S. Watts

Motor Carrier Committee

William B. Pentecost, Jr.*

Melissa Thompson Richardson**

Jaclyne Reive***

Over the past year, the Motor Carrier Committee (the "MCC") has continued to roll along, gaining speed and traction with its members, as well as with the TLA membership as a whole. We have taken on a more international flavor with the addition of **Jaclyne Reive** as our new Co-Chair, and she has been contributing well toward our efforts on the MCC.

In order to keep our members engaged, the MCC has continued with its regular monthly Zoom calls on the "THIRD THURSDAY of every month at THREE P.M. Eastern Time," shortened to "TTT" meetings. While the alliteration and mnemonic helped to jump-start MCC's engine, we believe that the involvement of the membership continues to sustain the drive, keeping us all moving at deliberate, if not highway, speed.

The MCC continues to toggle its TTT meetings between webinars and business meetings. The webinars include speakers – typically experts or lawyers from other sections – to provide some informative information that would be useful to the Motor Carrier Committee members. So as to be inclusive, plenary invitations are sent to all TLA members. Most of the MCC webinars have provided CLE credit in the applicable jurisdictions.

Our business meetings focus on the twin objectives of: (i) service to TLA in the form of articles for *TTL* and speaking opportunities for webinars and conferences; and (ii) service to the MCC membership in the form of referrals and shared opportunities.

Some of the highlights include August of last year, when **Bridgette Blitch**, our former Co-Chair, who now chairs TLA's Alternative Dispute Resolution Committee, hosted a webinar discussing motor carriers that transport and arrange cargo for air transportation. The discussion included the ins and outs of the TSA certification and liability concerns when cargo leaves the motor carrier's care, custody and control. There was also an analysis of the issues that arise when working with both domestic and international freight forwarders or motor carriers, and what insurance the motor carrier should consider if the customer contractually requires the carrier to assume liability from origin to destination.

Last October, our friends at RIMKUS presented a webinar on Biomechanical Analysis of Brain Injuries. **Erin Potma**, Ph.D., P.Eng., ACTAR, gave an excellent overview of the mechanisms of brain injury and the injury consistency associated with different incident scenarios, such as vehicle accidents, fall incidents, and falling objects. The webinar provided some familiarity with human anatomy, basic biomechanical engineering principles, and examples in which claimed brain injuries were analyzed in light of the incident that reportedly caused them.

In February of this year, the MCC co-hosted a TTT webinar with TLA's Creditors' Rights Committee on the topic entitled: "Keep on Truckin' Even After A Catastrophic Accident: Subchapter V of Chapter 11 as the Last Line of Defense." That presentation, led by **Rick Steinberg**, **Dick Westley** and Dick's colleague (and potential future TLA member) **J. David Krekeler**, focused on Subchapter V of Chapter 11 of the U.S. Bankruptcy Code, which can be used by smaller motor carriers to avoid the consequences of a potential catastrophic outcome in litigation. Real world examples of dramatic outcomes were provided to illustrate how a "last resort" strategy can impact high stakes litigation.

At our Annual Conference in San Diego in April, we co-hosted a break-out session with the Casualty Committee, which we dubbed "Touch the Truck." We spent about 45 minutes in the classroom discussing what is involved in DOT roadside inspections and the majority of our time was then spent out in the parking lot, allowing the participants to see (and touch) an actual power unit provided courtesy of Lytx. Engineers from S-E-A provided most of the instruction in a round-robin format encircling the truck, followed by a final classroom session presented jointly by Lytx and S-E-A engineers. While our session was scheduled for the precarious time slot of

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** Partner, Walters Richardson, PLLC. (Lexington, KY)
*** Partner, Miller Thomson LLP (Toronto, ON)

"just after lunch," the participants seemed very engaged, and the feedback was extremely positive.

In May, we hosted a TTT webinar sponsored by RIMKUS in which **Tracie Jones**, BSME, ACTAR, CFEI, gave a detailed presentation on ECMs and Airbag Modules, focusing primarily on Electronic Data Recorders (EDRs). Ms. Jones began with a basic overview of EDRs and vehicles in which they can be found, including discussion of both passenger and commercial vehicles. She went on to speak about data recorded by EDRs and how it can be used or misused.

In June, we hosted another TTT webinar sponsored by RIMKUS on the topic of Human Biomechanics in Low-Speed Vehicle Collisions. **Dr. Erin Potma** spoke about how biomechanical engineers can help determine the cause of the injuries claimed or determine if there are inconsistencies between the accident or incident and the injuries being claimed. She addressed the function of vehicle occupant protection systems, such as seatbelts, airbags, pretensioners, and child safety seats, and explained their role in mitigating injuries in accidents.

In August, **J. Allen Jones III**, who co-chairs TLA's Corporate Counsel Committee, gave a very informative webinar as to what life is like behind the curtain for in-house attorneys, walking us through a typical day, if there is such a thing, in the life of an in-house lawyer. Allen described how he often runs from a meeting in one c-suite office to another, while managing a host of outside counsel handling myriad cases, and handling some legal matters himself, some of which present familiar areas of the law, with others falling beyond his comfort zone.

Without being pedantic, Allen summarized a few of the pet peeves he has about well-meaning outside counsel. In short, he would be pleased if outside counsel would quickly and succinctly respond to a question posed, so that without delay, the harried in-house lawyer can respond to whomever in the organization posed the question. Waiting days or weeks for a law-review quality dissertation on a matter is nowhere near as helpful to the in-house lawyer as a prompt, concise response, with an offer to supplement with further analysis and authority if needed. Such supplemental material is not needed as often as one would expect, so outside counsel should be more time-sensitive, without sacrificing accuracy. Allen completed his presentation with a request (some may say a challenge) for outside counsel to give a similar presentation to the Corporate Counsel Committee about what they don't like about in-house counsel. To date, there have not been any volunteers to preach to the corporate counsel. Perhaps some off the record conversation at the next happy hour might be the best way to share those concerns!

Since the Executive Committee meeting in Houston in July, we have gone to the drawing board to plan future webinar presentations, as well as our break-out presentation for the upcoming TLA Annual Conference in Puerto Rico. Please let us know if you have any suggestions for topics, and if you would like to co-present with us in any of our upcoming presentations.

Rail Committee

Jameson Rice*

While many TLA members have motor carriage as a component of their practice, you may not be aware that our Rail Committee includes approximately 90 members. Twenty-eight percent of U.S. freight by ton-mile moves by rail, and more long-distance freight moves in the U.S. by rail than by any other mode. Whether rail is a substantial part of your practice, or a small part, or even if you are just looking to learn more about the other major surface mode of transportation, we welcome you to join the Rail Committee.

Freight claims are one large source of crossover for TLA members whose practice involves both motor carriers and railroads. The Carmack Amendment for rail (49 USC § 11706) is very similar to its motor carrier analogue. Yet differences in the law, industry practices, and nature of cargo damage in the rail context present unique aspects for the rail practitioner.

Personal injury claims are another major source of rail and road practice synergies. Again, there are transferrable skills and knowledge from trucking personal injury claims to rail, yet the nature of injuries to third parties is often unique in the rail context. Notably, injury to rail employees is covered by the Federal Employers Liability Act rather than typical workers' compensation coverage, and given that this allows rail employees to recover full compensation for damages, it is a world unto itself.

Litigation in the rail context involves many federal statutes with preemption arguments that may seem familiar to the motor carrier lawyer. Primary sources of preemption include the ICC Termination Act (49 USC § 10501), which like the FAA Authorization Act, preempts rates and services, among other things, as well as the Federal Railroad Safety Act (49 USC § 20106).

In addition to the foregoing, the practices of Rail Committee members include these additional areas:

- Property
  - ROW issues
  - Eminent Domain
  - Rails to Trails
  - Infrastructure / Real Estate Development
- Government
  - Federal Funding
  - Eminent Domain
  - Transit
  - Safety / Operational (FRA)
  - Economic Regulation (STB)
- Canadian regulatory and commercial matters
- Commercial Agreements
  - M&A
  - Trackage Rights/Haulage
  - Terminals Services
  - Shipper Agreements
  - Runthough Locomotive Agreements

Because of the synergies with other practices, the Rail Committee has collaborated with other committees. Twice recently, this has included collaborations with the Freight Claims Committee. In June, TLA Past President (and so much more) **Greg Summy** presented to the Freight Claims and Rail Committees about the East Palestine Derailment. At the TLA Annual Conference in San Diego, **Andrew Steif** of Gunster in Jacksonville, Florida presented on rail issues at a joint meeting with the Freight Claims Committee.

Recent meetings have included a discussion of the Canadian Pacific and Kansas City Southern merger, as well as the literal intersection of rail and motor vehicles: crossing accidents.

Committee meetings include engaging and energizing dialogue, with TLA's trademark congeniality. Members are often invited to speak about a current topic or about their practice. New members are asked to introduce themselves. It's a great way to get to know a community within the TLA.

We welcome your attendance at our next meeting!

* Partner, Holland & Knight LLP (Jacksonville, FL)

Doing Business in Germany? Take Note of the Supply Chain Due Diligence Act!

Dr. Marco Remiorz * and Julia Brennecke**

On July 22, 2021, the Act on Corporate Due Diligence in Supply Chains (Supply Chain Due Diligence Act; in short: the "**Act**") was promulgated in Germany. The Act has been in force since January 1, 2023.

It is intended to oblige companies to check their supply chains for possible human rights violations and to avoid them. In this article, the obligations arising from the Act will be summarized and the effects for companies will be shown. At first glance, the Act mainly affects German companies; but at second glance, foreign companies will also be directly or indirectly affected. The Act provides for various fine frameworks in the event of breaches of obligations. The highest possible fine against individuals can be 800,000.00 euros. In certain cases, fines of more than 400 million euros and up to two percent of average annual sales are conceivable for companies. This should be avoided!

The Basics of the Supply Chain Due Diligence Act

The Act stipulates that companies above a certain size operating in Germany are obliged to take appropriate precautions to prevent human rights violations in their global supply chains. To this end, the Act lists a number of protected rights whose violation is to be prevented through extensive obligations. These include violations of labor rights, forced labor, child labor and environmental pollution.

Which Companies Does the Act Affect?

Companies are affected by the Act if they have their head office, administrative headquarters or a registered office in Germany. The Law initially applies only to companies with more than 3,000 employees; however from 2024 onwards, companies with more than 1,000 employees will also fall within the scope of the Act. Companies that do not have their head office, administrative headquarters or a registered office in Germany are currently affected by the Act if they have a branch office in Germany with more than 3,000 employees; however from 2024 onwards, a branch office with more than 1,000 employees will also fall within the scope of the Act. In determining whether these thresholds are met, within affiliated companies, the German-resident employees of all group companies are added to those of the domestic parent company.

Notwithstanding the thresholds and the scope of application limited to companies with their registered office in Germany, however, the Act will also have an indirect impact on small and medium-sized companies and companies with their registered office outside of Germany, insofar as they are suppliers of a company affected by the Act.[1] In fulfillment of their risk management obligations, companies at the top of the supply chain will contractually oblige their suppliers to comply with the statutory obligations.[2] This "trickle-down effect" is intended by the legislator. As a result, indirect suppliers to a company carrying on business in Germany may also be included in that company's risk management endeavors.[3]

What Rights Need to be Protected?

The rights protected by the Act can be divided into two components: (i) human rights; and (ii) environmental rights. All protected rights are based on international agreements ratified by the Federal Republic of Germany and listed in the Annex to the Act.

1. *Human Rights*

The human rights protected by the Act are found in Section 2 (2). This includes, first of all, the fundamental human rights, such as the prohibitions of child labor, torture, slavery and forced labor (Section 2 (2) Nos. 1, 2, 3, 4). The Act also protects employee-related, human rights:

- In this regard, companies are to ensure that the occupational health and safety obligations

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applicable under the Act of the place of employment, which are intended to prevent hazards due to accidents at work or other work-related health hazards, are not disregarded (Section 2 (2) No. 5).

- In addition, freedom of association is protected, according to which employees are free to form, join and participate in trade unions. Moreover, the formation or joining of a trade union may not be used as a reason for discrimination or retaliation (Section 2 (2) No. 6).
- Companies are also to ensure that the payment of an appropriate wage is guaranteed within their supply chains. The appropriate wage is determined in accordance with the applicable law of the location of the company or supplier concerned and amounts to the minimum wage (if any) in effect under that law (Section 2 (2) No. 8).
- The Act also contains a ban on discrimination: companies must ensure that there is no unequal treatment in employment (e.g. in the payment of wages) on the basis of national and ethnic origin, social origin, health status, disability, sexual orientation, age, gender, political opinion, religion or belief, unless this is justified by the requirements of the job. (Section 2 (2) No. 7).
- The Act also stipulates a number of additional social standards that must be complied with within the supply chain. These include the prohibition of the unlawful seizure of land (Section 2 (2) No. 10), the pollution of water, soil and air (Section 2 (2) No. 9) and the improper use of private or public security forces (Section 2 (2) No. 11).

2. *Environmental Rights*

Environmental protection is also taken into account by the Act:

- Companies are required to comply with various prohibitions arising from the *Minamata Convention on Mercury*[4] (Section 2 (3) Nos. 1, 2, 3).
- In addition, companies within the supply chain are prohibited from exporting hazardous waste, at least to the extent that the export is to or from a state party to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*[5] (Section 2 (3) Nos. 6, 7, 8).
- Furthermore, the Act prohibits, in accordance with the *Stockholm Convention on Persistent Organic Pollutants*[6]: (i) the production and use of persistent organic substances (Section 2 (3) No. 4); and (ii) the non-environmentally sound handling, collection, storage and disposal of waste (Section 2 (3) No. 5).

How Must the Obligations be Implemented?

In order to implement the aforementioned obligations, the Act requires that the companies concerned make reasonable efforts, in accordance with their own discretion, to ensure that there are no violations of the obligations in their own business operations and within their supply chains.

1. *Own business operations*

The concept of a company's own business operations covers all products and services of a company and includes all steps at home and abroad that are necessary to manufacture the product or provide the service.[7]

2. *Supply chain*

Within the framework of the supply chain, the Act differentiates between indirect and direct suppliers:

- Direct suppliers are direct contractual partners of the affected company, whose supply is necessary for the manufacture of the company's product or the provision of a service by the company. The company must ensure that its direct suppliers also comply with their obligations under the Act. This also includes the provision of logistics services.[8] Many companies in the transport industry that do not actually meet the thresholds of Section 1 of the Act are thus indirectly included in the scope of the Act as direct suppliers.
- Indirect suppliers are all suppliers with whom the company does not have a direct contractual relationship, but whose supply is nevertheless necessary for the manufacture of the company's product or the provision of a service by the company. In the case of indirect suppliers, the affected company is generally not required to comply with the rights set forth by the Act. However, the company must also take the measures required by the Act in the case of indirect suppliers if it receives substantiated knowledge of possible human or environmental rights violations.[9]

If the company attempts to circumvent the obligations by using a direct supplier as an intermediary between the company and an indirect supplier, that indirect supplier will be deemed to be a direct supplier. In effect this means that a company must also work towards ensuring compliance by its indirect suppliers to the best of its ability.

Implementation Requirements

1. *"Appropriate" implementation*

The obligations defined in the Act are not designed as performance obligations. This means that companies are obliged to work towards compliance with the obligations in their own business operations and with their direct suppliers to the best of their ability.[10] They do not have to guarantee compliance with these obligations, but they are required to implement them

in an *appropriate* manner. The Act does not define the concept of appropriateness. Although this gives companies a certain amount of leeway in implementing the obligations, this leeway also entails a considerable risk, as the question of whether an obligation has been implemented appropriately may be assessed differently by a court than by the company concerned.

It can be assumed that the concept of appropriateness will be fleshed out over time by case law. Until then, the companies are advised to follow the guidelines of the Federal Office of Economics and Export Control, the EU Commission, the OECD or other national authorities. The first guides on the concretization of the Act by the Federal Office of Economics and Export Control (BAFA) were published on August 17, 2022.[11]

2. *What measures need to be taken?*

The Act provides for a number of preventive and remedial measures by which companies must identify and minimize the risks of breach of the obligations and, if necessary, put an end to a breach of the obligations:

a. Risk management

First, a company that is subject to the Act must establish an appropriate and effective risk management system to ensure compliance with the due diligence obligations. Risk management must be embedded in all relevant business processes through appropriate measures (see the commentary above regarding the meaning of the term *appropriate*).

Effective measures are those that make it possible to identify and minimize human and environmental rights risks and to prevent, end or limit the extent of violations of human rights or environmental obligations if the company has caused or contributed to these risks or violations within the supply chain.

The company must also ensure that it is determined who within the company is responsible for monitoring risk management, for example by appointing a human rights officer. Company management shall regularly, at least once a year, inform itself about the work of the responsible person or persons.

Risk management can be implemented in the company's own business operations, for example, by training employees and carefully reviewing potential and existing contractual partners.

b. Risk analysis

A company that is subject to the Act must also evaluate the findings from risk management as part of a risk analysis. The identified human and environmental rights risks must be appropriately weighted and prioritized. In particular, the criteria set out in Section 3 (2) shall be decisive in this context:

- the nature and scope of the company's business activities;
- the company's ability to influence the direct perpetrator of a human rights or environment-related risk, or the violation of a human rights-related or environment-related obligation;
- the severity of the injury typically expected;
- the likelihood of a violation of a human rights-related duty or an environmental duty;
- the reversibility of the infringement; and
- the nature of the company's act or omission that is contributing to the human rights or environment rights-related risk, or to the violation of a human rights-related or an environment-related obligation.

Special country- or industry-specific risks must also be taken into account.

c. Prevention measures

If a company identifies a risk as part of the analysis, it must immediately take appropriate preventive measures. This includes issuing a policy statement on its human rights strategy. The policy statement must contain at least the following elements:

- a description of the procedure by which the company fulfills its obligations under the Act;
- the priority human rights and environmental risks identified for the company on the basis of the risk analysis; and
- the definition, based on the risk analysis, of the human rights-related and environmental expectations that the company has of its employees and suppliers.

Furthermore, the company must anchor appropriate prevention measures in its own business area, in particular:

- the implementation of the human rights strategy set out in the policy statement in the relevant business processes;
- the development and implementation of appropriate procurement strategies and purchasing practices that prevent or minimize identified risks;
- the implementation of training in the relevant business areas; and
- the implementation of risk-based control measures to verify compliance with the human rights strategy contained in the policy statement in its own business operations.

The company must also anchor appropriate prevention measures with respect to a direct supplier, specifically:

- giving due consideration to human rights and environmental expectations when selecting a direct supplier;
- securing contractual assurance from a direct supplier that it will comply with required human rights and environmental expectations and adequately address them along the supply chain;
- conducting training and education to enforce the direct supplier's contractual assurances; and
- agreeing on appropriate contractual control mechanisms and implementing them on a risk-based basis to verify the

direct supplier's compliance with the human rights strategy.

Companies are therefore required to obtain contractual assurances from their direct suppliers that they will comply with the obligations and address them appropriately along their supply chain. Thus, the obligations of the Act extend beyond the affected companies to the direct suppliers and, further, by requiring the direct suppliers to contractually commit and address the obligations along their suppliers as well, to the indirect suppliers of the affected company.

The effectiveness of the preventive measures must be reviewed once a year and on an ad hoc basis if the company anticipates significant changes or a significantly expanded risk profile within its own business area or with regard to a direct supplier, for example as a result of the introduction of new products, projects or a new business area. In these cases, the preventative measures are to be updated immediately if necessary.

d. Remedial action

If a breach of obligations occurs or is imminent in a company's own business operations, the Act requires the company to take appropriate remedial action to prevent, end or minimize the extent of the breach. In its own business operations, the remedial action must result in an end to the breach.

If the breach of an obligation under the Act has occurred or is imminent at a direct supplier, measures shall also be taken to prevent or stop the breach or to minimize the extent of the breach.

If the breach is such that the company cannot end it in the foreseeable future, it must immediately draw up and implement a plan for ending or minimizing it. The plan must include a concrete timetable. In addition, the Act already contains several proposals for measures to end the breach, including the temporary termination of the business relationship.

However, the termination of the business relationship with a direct supplier shall be *ultima ratio*, and is only required if the breach is very serious, for example, in the event of a violation of fundamental human rights. In addition, a very serious breach of obligation can also result from the fact that the breach has already lasted for a very long time, even if the violated right is not considered fundamental per se.

e. Complaints procedure

Companies must also set up a complaints procedure that enables people to point out human rights and environmental risks. The complaints procedure must be accessible to indirect suppliers so that they can point out risks involving direct suppliers.

f. Documentation and reporting requirements

The fulfillment of all obligations under the Act must be documented on an ongoing basis within the company. The documentation must be kept for at least seven years from the date of its creation. The company is also required to prepare an annual report on the fulfillment of its obligations in the previous financial year, and make it publicly available free of charge on the company's website for a period of seven years, no later than four months after the end of the financial year.

g. Litigation options

Section 11 also makes it possible to assert a violation of rights in a special capacity: anyone who claims to have suffered a violation of rights in a protected legal position of overriding importance under Section 2(1) may authorize a domestic trade union or nongovernmental organization to take legal action in order to assert those rights in court.

Not all legal positions mentioned in the annex referred to in Section 2(1) are to be classified as having overriding importance, but in any case this includes death and personal injury. In view of the purpose of the provision, which is to improve access to court for potential aggrieved parties, no overly high evidentiary standards or burdens of proof will apply during any legal proceedings under these provisions of the Act.

What are the Penalties for Violations?

The Act provides for various fine frameworks in the event of breaches of obligations. The highest possible fine against individuals can be 800,000.00 euros. In certain cases, fines of more than 400 million euros and up to two percent of average annual sales are conceivable for companies.

Impact on the Transport Industry

The transport industry is affected by the regulations of the Act, as it is an essential link in global supply chains. Very large transport companies are now required to ensure compliance with the Act in their own business operations and with their direct suppliers. Much more frequently, however, smaller and medium-sized transport companies as direct suppliers will be required to represent and warrant to any of their customers who are directly bound by the provisions of the Act, that they too are in compliance with the Act.

In particular, the transport industry will have to ensure human rights in the form of employee rights. Companies in the road transport sector that are either directly affected by the Act or provide services as direct suppliers to an affected company will have to increasingly monitor compliance with working hours and rest periods, as well as the payment of appropriate wages.

In the area of international shipping, recourse to flags of convenience is common. Shipping companies that are affected by the Act, as well as shipping companies that provide services as suppliers, will therefore have to ensure that the standards set by the Act are nevertheless met.

Conclusion

Regardless of the threshold of 3,000 German-resident employees (decreasing to 1,000 German-resident employees in 2024), the Act can in fact affect any company worldwide. On the one hand, if it is the direct supplier of a company affected and is contractually obligated by the latter to comply with the human rights and environmental expectations applicable to it. In this case, the company affected by the Act not only has a legal obligation to be selective in its choice of suppliers (Section 6(4), No. 1), but it is also under an implicit obligation to ensure compliance by those suppliers by

way of contractual terms and conditions.[12] As a result, indirect suppliers will also be affected, because the direct suppliers must adequately address the expectations of their contracting counterparty (Section 6 (4) No. 2), for example by including so-called pass-through, conduit, or flow-down clauses in agreements with their own upstream suppliers. These clauses oblige the indirect supplier to implement the same code of conduct that was imposed upon the direct supplier by the company that is directly subject to the Act.

Even if the transport industry does not appear at first glance to be directly subject to the Act, companies within the transport industry will nonetheless be affected by the Act. Of any company within the transport industry could reach the threshold values of Section 1, and will thus be directly affected by the scope of the Act. More often, however, logistics companies will come into contact with the obligations of the Act as direct or indirect suppliers of companies that are directly subject to the Act. For transport companies worldwide, this means that they must prepare to ensure compliance with the obligations set out in the Act ultimately in their own business operations in order to be able to attest to this compliance in the representations, warranties and covenants that will be required by their contracting counterparties.

Endnotes

1 Lutz-Bachmann/Vorbeck/Wengenroth BB 2021, 906 (907).
2 Nietsch/Wiedmann NJW 2022, 1 (3) marginal no. 10.
3 BeckOK LkSG/Rudkowski, 2nd ed. 1.2.2023, LkSG § 1 Rn. 3.
4 Agreed at the fifth session of the Intergovernmental Negotiating Committee on Mercury in Geneva, Switzerland on 19 January 2013 and adopted on 10 October 2013 at a Diplomatic Conference (Conference of Plenipotentiaries), held in Kumamoto, Japan. The *Minamata Convention* entered into force on 16 August 2017.
5 Adopted on 22 March 1989 by the Conference of Plenipotentiaries in Basel, Switzerland.
6 Signed on 22 May 2001 in Stockholm and in force internationally from 17 May 2004.
7 Hopt/Leyens, 42nd ed. 2023, LkSG § 2 marginal no. 11.
8 RegE, BT-Drs. 19/28649, 22.
9 Hopt/Leyens, 42nd ed. 2023, LkSG § 9 marginal no. 2.
10 Hopt/Leyens, 42nd ed. 2023, LkSG § 3 marginal no. 1
11 Federal Office for Economic Affairs and Export Control (Germany), *Identifying, Weighting and Prioritizing Risks - Handout for Implementing a Risk Analysis in Accordance with the Requirements of the Supply Chain Sourcing Obligations Act* (August 2022). Available online at: https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_risikoanalyse.pdf;jsessionid=B2615A3DC26BCCFCFBD3A2D8F5961306.2_cid387?__blob=publicationFile&v=6 [accessed 10 August 2023]
12 Nietsch/Wiedmann NJW 2022, 1 (3) marginal no. 10.

eVTOL: Transformative Mode of Air Transportation, Once on the Horizon, Has Finally Landed

Latasha Johnson*

I. Public awakening? Media abuzz with news of the "first" flying car

California-based aviation company, Alef Aeronautics, set the newswires abuzz in June of 2023 when it announced that its *Model A* flying car received a limited Special Airworthiness Certification from the U.S. Federal Aviation Administration.[1] The Model A is the first flying car to obtain legal approval to fly from the United States government.[2]

Billed as a "solution to modern congestion," the vehicle is designed to drive on the street but can, remarkably, "take off vertically when needed and fly overhead above traffic."[3] Vertical takeoff ability allows the Model A to reach altitude without the need for runways.

While the Model A is new and exciting for would-be consumer purchasers, the technology that permits its vertical liftoff – electric vertical takeoff and landing (eVTOL) – has been in development for years. Aside from its potential to be a game changer for consumer-driven vehicles, eVTOL is poised to infiltrate the commercial space and open life-changing opportunities beyond mere avoidance of highway traffic.

II. Research suggests eVTOL can do much more than enable cars to fly

The Model A is marketed to consumers. It's exciting to think that, for those who can afford it, spending long hours on congested highways will be a thing of the past. However, when the technology is applied to commercial uses, the possibilities to change traditional transit notions are endless.

While specific technology varies by manufacturer and design, the primary benefits of eVTOL aircraft include the ability to take off and land like a helicopter, fly like an airplane, emit minimal to zero noise pollution, and run on electric batteries to reduce its carbon footprint and operating costs.[4] Some estimates suggest the aircraft can fly up to 250 miles at 170 mph on a single charge. These aircraft embody various flight technologies, representing a fusion of helicopter operation, fixed-wing aircraft performance, and drone-like automation. It is not a plane, drone, or helicopter but encompasses comparable qualities to each. eVTOLs are a marvel, and their operations are generally discussed as a component of Advanced or Urban Air Mobility (AAM or UAM).

In addition to advancing cleaner and cheaper vehicle operations, an exciting benefit of the aircraft is that it has the potential to fulfill voids across multiple service sectors. Three primary areas where eVTOL technology is expected to have a major impact are delivery services, taxis and local transportation, and emergency services.

To prepare for these changes, states and territories across North America have commissioned studies to analyze the effects of AAM within their territory. In one study focusing on eVTOL impacts on the state of Ohio, researchers identified the following key AAM use cases:

i. on-demand air taxis,

ii. regional air mobility,

iii. airport shuttles,

iv. emergency medical services,

v. corporate and business aviation, and cargo and freight delivery.[5]

Such diverse uses are expected to have beneficial catalytic impacts, including improved labor market efficiencies, better suburban-rural connectivity, increased educational opportunities, and accelerated demand for alternative power sources such as hydrogen.[6]

A Greater Toronto Area study highlighted many of the same potential AAM uses identified in Ohio, listing emergency services, MedEvac and critical supply or equipment deliveries, passenger operations, inter-regional travel, airport shuttle services, on-demand air taxis, corporate and business aviation, tourism, services for underserved communities, and transport logistics and cargo as potential sectors AAM could serve.

According to the Toronto research, AAM will open up new forms of Regional Air Mobility in the Golden Horseshoe of Southern Ontario, and is forecast to provide convenient, carbon-free flights between city pairs whose distances are currently not commercially viable for airlines, permitting short flights from Pearson International and Billy Bishop Toronto City Airports to places like Kitchener, Peterborough, Barrie, Buffalo, Rochester, Detroit, Pittsburgh, Syracuse, and Cleveland.

In another study commissioned by the Commonwealth of Virginia, researchers noted various uses of these aircraft to transport people and cargo and perform varied functions for hospitals and emergency

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services, police, fire, forestry, agriculture, package delivery providers, and inspections.[7] The study's market analysis forecasts a global opportunity worth more than $1 trillion through 2045.[8]

The Virginia study concluded that it will require four value chains or supply chains for AAM to achieve operational status, and to bring this new transportation method into the mainstream. Each one of the supply chains identified by the study is expected to create jobs and revenues:

> aircraft developers and suppliers and the requisite ecosystem of manufacturers providing things such as composites, precision machining, electrical systems, batteries, interiors, flight computers, simulators, and testing and training equipment;
> vertiports, including landing and takeoff areas;
> ground infrastructure developers, including those providing construction, engineering, architectural services, lighting, beacon navigation nodes, and passenger amenities;
> air traffic management developers and operators, along with the ecosystem needed to provide high-density radar, network design, automation systems, weather information, computers, equipment, and flight decision support tools; and
> Air Service Operators, which oversee aircraft operation.[9]

The supply chains identified by Virginia are effectively mirrored in a study released by the Florida Department of Transportation. A June 2022 Florida Air Advanced Mobility report identified several factors as essential for the success of a fully scaled AAM industry in the United States. It lists highly safe and efficient aircraft, advanced air traffic control with aircraft self-deconfliction, low noise exposure, scaled manufacturing and maintenance, and physical infrastructure as prerequisites for success.[10]

Regardless of the study, the commonality in findings – and the logically flowing consequence of AAM – suggests an undeniable and unavoidable seismic shift in the types of services that will be available to the average person and an enormous global economic impact from the integration of eVTOLs into various service sectors. While there is no one-size-fits-all approach to preparation, research from various locales suggests that states are ushering in AAM by focusing on infrastructure and the supply chains that support eVTOL manufacturing and operations.

III. What does eVTOL mean for logistics and transportation-based industries?

The studies make clear that the economic and cultural impact of eVTOL technology extends beyond the world's first flying car. Though less spectacular than the flying car concepts, autonomous eVTOL cargo aircraft have been quietly gaining momentum and making strides in design, technology and industry acceptance as a viable cargo delivery option in recent years.

Warehouses

Cargo-only eVTOL aircraft are set to play a significant role in package delivery, retail, and eCommerce. The eVTOL ripple effect touches on every logistical component of the supply chain before ultimately impacting delivery to the consumer. Take, for example, warehousing. By itself, a warehouse is just a storage facility. To someone unfamiliar with how a supply chain works, eVTOL might not have an obvious connection to a warehouse. As packages move through the delivery system at a quicker pace, however, the impact on warehouses stands to be a significant one. With anticipated speed and flexibility from eVTOLs, shippers can restructure inventory to lower levels, allowing one warehouse to cover more area. The end result? Reduced warehouse inventory and quicker warehouse goods acceptance turnarounds. For warehouses, the eVTOL impact will be apparent through more transactions, increased operations, and greater revenue potential.

Delivery to Rural Service Areas

Likewise, eVTOLs are expected to expedite delivery to more remote places where delivery services are typically slower to reach the consumer. Rural and less-populated areas represent an oft-noted gap in the consumer-loved and lightning-fast next-day and two-day delivery eCommerce offerings. eVTOL aircraft are poised to fill the void by enabling quick deliveries to hard-to-reach locations. The benefit of expediently reaching consumers at home, regardless of whether they reside in rural or metropolitan areas, is profound – providing cost savings for just-in-time manufacturing lines, timely deliveries of crucial medical shipments, and speedy replacements for fast-moving consumer goods.[11]

With eVTOL, retailers and businesses reliant on consumer delivery services can increase sales and cut costs around ground delivery intermediaries.

Moving Goods in Congested Metropolitan Areas

It is no surprise that areas known for their heavy congestion and difficulty in efficient highway transport are looking forward to eVTOL aircraft reducing the number of trucks on the roads. Indeed, a Toronto-based study found that congestion is a key factor in determining whether a metropolitan area becomes an early user of AAM.[12]

Toronto is notorious for its traffic. According to the TomTom Traffic Index, which ranks urban congestion in 416 cities around the world, it takes Toronto drivers 33 percent longer to arrive at their destination than it would without congestion.[13] Delays increase to 56 percent during the morning rush and 68 percent during the evening rush. The Toronto Board of Trade estimates that over $3 billion worth of goods are trucked through the region daily, adding to the congestion and straining the capacity of existing highway infrastructure. On average, congestion is believed to increase the price each household pays for its goods by $125 a year, or as much as $650 million to residents in Greater Toronto, as trucking companies pay more for gas, insurance, salaries, tolls, fines, and parking tickets. The increasing shipment of goods is a positive sign of economic prosperity, but the downside is that delivery vehicles play a prominent role in traffic congestion.[14]

Obviously, Toronto is not alone in battling congestion-related problems that affect residents' quality of life. The opportunity the AAM presents to congested metropolitan areas is immense. This fact has not escaped ground delivery services. Not surprisingly, forward-thinking delivery services are investing in and *embracing* the implementation of eVTOL aircraft into their operations.

One major player, United Parcel Service (UPS), is reportedly purchasing at least 10 all-electric eVTOLs from Beta Technologies (BETA), a Vermont-based aerospace manufacturer. UPS will operate the eVTOLs as part of its Flight Forward division: the same division that operates its drone delivery solutions. The connection is a natural given that drone delivery is arguably the precursor and foundation for widely establishing eVTOL implementation, having paved the way for a more innovative approach to commercial urban air mobility.[15]

UPS plans to implement eVTOLs to augment its air service in select small- and mid-size markets. Echoing the cleaner, greener and cheaper messaging generally associated with eVTOLs, UPS notes that the aircraft will take off and land at UPS facilities "in a whisper-quiet fashion, reducing time-in-transit, vehicle emissions, and operating cost."[16] The BETA aircraft's 1,400-pound cargo capacity can quickly and sustainably transport time-sensitive deliveries that would otherwise fly on UPS's small fixed-wing aircraft. UPS touts the aircraft as benefiting "healthcare providers, thousands of small and medium-sized businesses, and other companies in smaller communities."[17]

Not surprisingly, UPS's competitors are following suit. FedEx Express, a subsidiary of FedEx Corp., teamed up with California-based Elroy Air. FedEx Express will develop plans to test Elroy Air's Chaparral autonomous air cargo system within the company's middle-mile logistics operations, moving shipments between sortation locations.[18] FedEx describes the partnership as "the latest initiative from FedEx in its effort to explore and adopt emerging technologies across its networks" with the ultimate goal of meeting eCommerce demand for reliable, efficient transportation and logistics solutions throughout all stages of the supply chain.[19]

Those who have not followed the expansions and modernization of the United States Postal Service (USPS) in recent years may be surprised to find that even USPS is poised to embrace electric and autonomous vehicles. Due in large part to $3 billion in congressional funding through the Inflation Reduction Act, USPS is making major moves to transform its operations. In December 2022, USPS announced that it intends to purchase at least 66,000 battery-electric delivery vehicles between now and 2028 as part of its 106,000 vehicle acquisition plan.[20]

In the same vein, Mail Management Services (MMS), a provider of surface transportation services for USPS, signed an agreement with Airspace Experience Technologies (ASX) to acquire eVTOL aircraft to transport USPS loads between cities, airports and suburbs. With its wholly-electric model, ASX can move up to 1,000 pounds over 150 miles and 2,000 pounds over 75 miles. The hybrid model, ASX Sigma-6, can transport up to 1,000 pounds for 760 miles and 2,000 pounds for 380 miles. Notably, the ASX Sigma-6 eVTOL is believed to be the most flexible platform on the market that minimizes failure modes and reduces development and manufacturing costs.[21] The design is reportedly the only multi-modal vehicle in development.[22]

Air Taxis and Rideshares

eVTOL flying cars are currently being developed as part of on-demand transportation services, with ride-sharing leader Uber signing a partnership in 2020 with Joby Aviation to integrate future air and land travel for its customers.[23] "This is real," FAA Administrator Steve Dickson confirmed.[24] "We anticipate that there's a good possibility – I would say a high likelihood – that we will have the first designs certified in 2023 and could see the first Advanced and Urban Air Mobility (AAM/UAM) operations as early as 2024."

Uber is not alone in its plans to integrate air taxis. JetBlue Airways is helping finance Joby Aviation's development of an all-electric aircraft through its JetBlue Technology Ventures Fund.[25] Similarly, United Airlines, with its regional partner Mesa Airlines, has preordered 200 of Archer Aviation's Maker electric air taxis.[26] Not to be outdone, American Airlines ordered up to 250 VA-X4 vehicles being developed by Vertical Aerospace.[27]

IV. The FAA and NASA have prepared for eVTOL's arrival

A month before giving the green light to Alef's Model A in June 2023, the FAA released an updated blueprint for airspace and procedure changes to accommodate future air taxis and other AAM operations.[28] NASA defines the term "Advanced Air Mobility" as the development and deployment of aviation in transformative and innovative manners to provide aerial mobility in ways not typically seen today.[29] The FAA developed the blueprint with input from NASA and industry stakeholders.[30]

According to the FAA's blueprint, AAM operations will begin at a low rate, with air taxis flying much as helicopters, using existing routes and infrastructure such as helipads and early vertiports.[31] As eVTOL transport becomes more widely used, operations will increase, with air taxis expected to fly in corridors between major airports and vertiports in city centers.

Many planned air taxis are set to be unmanned, so there must be a degree of autonomy and corresponding coordination with ground infrastructure regarding air traffic management. However, in this domain, air traffic management is not the same as for fixed-wing aircraft. The majority of eVTOLS are meant to fly in relatively small, confined city spaces. The expected use will require novel systems to ensure air taxis avoid colliding with buildings or other vehicles.

Accordingly, the complexity of the corridors is likely to increase over time, evolving from single one-way paths to routes serving multiple flows of aircraft flying in multiple directions. The system must keep pace with these changes.[32] Looking ahead, these corridors could link an increasing number of routes between vertiports. The operational blueprint is a critical step – along with certifying the aircraft and pilots – in the FAA's aim to encourage and safely usher in the next era of aviation.

A key aspect of the FAA's regulation involves certification, or the approval process an aircraft undergoes to demonstrate its compliance with safety regulations. In many ways, FAA certification is the litmus test of aeronautical engineering, as certification ensures that the aircraft meets the stringent safety requirements for commercial operation.

For commercialization to occur, eVTOLs, like other types of aircraft, require three basic aviation regulatory approvals: type certification, production certification, and operational authorities.

Type Certification

The first hurdle, type certification, requires regulatory approval of the airworthiness of a particular manufacturing design (type design).[33] To obtain type certification, eVTOLS must pass one of two existing certification processes in 14 C.F.R. 21.17(a) and (b). Section (a) applies when the aircraft under review closely matches the characteristics of an already certified airplane or rotorcraft class. Section (b), on the other hand, is used for special classes of aircraft reflecting a novel design, for which the FAA looks to airworthiness requirements derived from other regulations as appropriate, along with other airworthiness criteria to ensure the novel aircraft has an equivalent level of safety to existing airworthiness requirements.

Production Certification

Once a type certificate is issued, eVTOL manufacturers will need to obtain a production certificate. A production certificate is an approval to manufacture duplicate products to the same standard of the type design.[34] The holder of a production certificate may obtain an airworthiness certificate for aircraft produced under the production certificate without further showing to the FAA.

Operational Certification

The final step is obtaining operational certification under 14 C.F.R. 135. The two basic types of certificates are based on the type of services the applicant will provide and where they want to conduct operations.[35] Air Carrier certificates are issued to conduct interstate, foreign, or overseas transportation, or to carry mail. By contrast, operating certificates are issued to conduct intrastate transportation, i.e., transportation conducted wholly within the same state.

eVTOL-specific Regulation Changes

The FAA is currently working on draft policy and guidance for eVTOL type certification. A new class of eVTOL vehicles, capable of flying in different modes of flight (vertical, transitory, and forward), is new to the Part 23 fleet. In its Small Airplanes Issue List (SAIL), Q2 FY 2023 Release, the FAA acknowledged that there are many eVTOL considerations not currently addressed in current requirements, including new pilot vehicle interfaces, new displays for energy and thrust management, handling qualities, and unique malfunction scenarios. To address the gap, the FAA is actively working on draft policy and guidance for the use of eVTOL's new and novel technology and currently deciding whether certification will be under 14 CFR 21.17(b) (special class) or 14 CFR 23 with special conditions.[36] The FAA has also updated the airworthiness standards of 14 CFR 23 to integrate a performance-based approach, which offers flexibility in the special conditions applied to eVTOLs under the Part 21.17(a) process.

Once an aircraft is certified, the potential impact on aviation-related services is considerable. The many new uses and routes of AAM aircraft would add hundreds, perhaps thousands, of movements to each Air Traffic Control (ATC) regional system daily, overloading the FAA's air traffic management capabilities. NASA and the FAA are aware of this challenge and have been working for several years to define new ATC systems and capabilities to augment airspace management at low and medium altitudes, which are expected to be overwhelmed with drone and eVTOL traffic.[37]

With considerable direct AAM industry support from NASA and billions of dollars currently committed by the aerospace sector, the stage is being set for AAM at the local and state levels across the US.[38] The NASA Advanced Air Mobility National Campaign, announced in 2020, is going strong today. To the extent the campaign is designed to promote public confidence and accelerate the realization of emerging aviation markets for passenger and cargo transportation in urban, suburban, rural, and regional environments, it appears to be a bona fide success.

V. Success requires a "system of systems" along with a comprehensive legal and statutory framework

In 2021, BETA and other eVTOL original equipment manufacturers (OEMs) were slated to produce commercial-ready aircraft within four to five years. Estimates at that time were that the industry would scale by 2027 or 2028 and shake up supply chains.[39]

The 10 eVTOLs, representing the first batch from BETA purchased by UPS, are scheduled to become fully operational by 2024.[40] FedEx and Elroy Air are working on launching test flights aimed at middle-mile delivery in 2023.[41] Likewise, MMS will introduce electric delivery vehicles in the latter part of 2023 and continue to add to the fleet with current plans through 2025.[42]

In sum, eVTOLs are here. The expected time of arrival is now. If the generally accepted "schedule" touted by industry analysis and OEMs holds, we are currently in the scaling phase of eVTOL integration, awaiting manufacturing volume to catch up and widespread industry implementation to begin. With the FAA providing an operational blueprint and issuing flight certifications, eVTOLs are not a future concept so much as a present one.

As the skies get busier, an obvious challenge will be managing an increasingly diverse airspace while keeping all air traffic moving safely and efficiently. As contemplated by the FAA's operational blueprint, a key component of the future of eVTOLs will include uncrewed aircraft system traffic management, which would have to work in conjunction with existing air traffic management systems.[43] The study posited that eventually, AAM will need supplemental air traffic management services working in conjunction with the current FAA ATC system.[44] Human staff and operators may become airspace managers, focused on supervising automated systems and aircraft operations, ensuring safety and security. A

single operator could supervise many more aircraft movements than working in an airport ATC tower. A simple explanation is that aircraft will operate in layers of altitude with UAS at the lowest level, eVTOL aircraft in the middle, and traditional aircraft at the highest. However, they must also be safely guided through layers during take-off and landing.[45]

A significant aspect of regulation involves certification, which is the approval process an aircraft undergoes to demonstrate its compliance with safety regulations. In many ways, certification is the litmus test of aeronautical engineering, ensuring that any aircraft, eVTOL or otherwise, meets the stringent safety requirements for commercial operation.

Called a "system of systems," the network of services required to make eVTOL integration successful includes eVTOL operators, communication system service providers, data service providers, and regulatory authorities.[46] Further underscoring the multi-pronged system, the importance of cybersecurity for the aircraft implicates not only the FAA but also the Departments of Homeland Security, Justice, and Defense.

Cybersecurity has a heightened importance in AAM. The level of risk is not necessarily clear-cut. On the one hand, operators will increasingly rely on electronic control systems on the ground and in the air, yet, on the other, automated systems in AAM might minimize cybersecurity threats because autonomous vehicles rely on fewer external resources and data.[47]

Among the most insidious risks to cybersecurity in uncrewed aircraft are corporate espionage, or state-sponsored actors could all potentially exploit vulnerabilities in the system to cause harm or steal valuable information. Cybersecurity is thus essential not just in eVTOLs operation but also in the design, operation, and maintenance of these aircraft.

Ultimately, and regardless of whether cyber threats increase or diminish in operating eVTOLs, the issues impacting their integration are interagency in nature and demand effective coordination and governance to be successful. Indeed, the system's success will depend on reliable and available communication, predictable and consistent navigation, and accessible, trusted surveillance.[48] Ultimately, these new elements must merge with the old tried-and-true procedures, coordinated teams, redundancy, and continuous training of the current system for eVTOLS to integrate and operate reliably and safely.[49] Endless opportunities for collaboration exist between public agencies and the private sector. Indeed, developing groundbreaking public-private partnerships to fulfill each service area within the system will also be important to its overall success.

In sum, the current messaging from NASA and the FAA suggests a regulatory environment in which the key actors are mutually incentivized to cooperate to build a new aviation ecosystem to support and integrate AAM.

Novel Legal Considerations

With both consumer- and commercial-facing elements, eVTOL's impact on the legal field is also expected to usher in novel legal issues. Real estate (including ground-based issues, such as zoning and tenancy, and also above-ground issues, such as trespass and airspace usage rights), insurance, environmental, intellectual property, and personal injury laws also may need to adapt to UAM operations and concepts to consider how to apportion risk and liability for accidents arising from eVTOL operation.

One might also expect initial uncertainty regarding preemption. In many, if not most, instances, AAM operations are expected to be regional and local, occurring mainly within a single city or a single state's boundaries. Nonetheless, the federal government, via the FAA, is authorized to exert its jurisdiction in the national airspace, which is generally defined as 500 feet above ground level, and within the zone of AAM operation.[50] For the aforementioned system of systems to be successful, federal, state and local authorities must coexist. AAM operations will not merely require existing laws to change but may also require lawmakers at all levels of government to imagine new regulatory frameworks to accommodate what are undeniably novel aviation operations.[51]

The legal profession, for its part, will have limitless opportunities to shape the new landscape. With many questions and few answers, the legal changes from eVTOLs are *up in the air*. What is certain, however, is that lawyers, in their roles as advisors, litigators, negotiators, and decision-makers shaping policy, will invariably play a key role in defining this emerging and exciting area.

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A Collision From Afar: Cybersecurity Meets The Trucking Industry

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It wasn't so long ago that the trucking industry security was focused on physical security and mechanical security. Companies wanted to prevent unauthorized vehicle use and to avoid a mechanical failure. The days of being simply focused on physical and mechanical security are long gone. Truck safety is now much more expansive.

Striving to be more effective and efficient, the trucking industry has embraced myriad digital technologies, from integrated fleet management systems that encompass maintenance management, GPS enablement, profit per mile calculations and fleet set-up, to "smart devices," which allow for GPS enablement, driver tracking and profiling, fuel consumption.

Cybersecurity is the industry's next waystation. The embrace of digital technologies makes it crucial to prioritize cybersecurity measures to protect the industry from the ever-evolving cyber threats and vulnerabilities. Through the adoption of robust cybersecurity strategies, the trucking industry can ensure the integrity, availability and confidentiality of critical data and systems, paving the way for a secure and efficient future.

The United States Department of Transportation (DOT) provides a great deal of guidance to the industry, subjecting the industry to its comprehensive Federal Motor Carrier Safety Regulations[1] that aim to ensure safety, efficiency, and compliance. These regulations and frameworks govern safety, environmental impact, and driver qualifications; but they do not fully address cyber security.

There has been significant research in this area. Earlier this year, the European Union Agency for Cybersecurity (ENISA) published its first cyber threat landscape report dedicated to the transport sector.[2] It found that ransomware attacks had become the most prominent threat against the transportation industry in 2022, with attacks having almost doubled from the previous year. Ransomware attacks were followed by data-related threats, as cybercriminals targeted credentials, employee and customer data, as well as intellectual property, for profit. More than half of the incidents observed in the past year were linked to cybercriminals, most of whom appeared to employ "follow the money" as their *modus operandi*. Attacks by hackers were also on the rise, with a focus on the geopolitical environment and the goal of operational disruption. The threats in the European trucking sector were predominantly ransomware attacks, followed by data-related threats and malware. The automotive industry, especially OEM and tier-X suppliers, has been targeted by ransomware, which has led to production disruptions. Data-related threats primarily target IT systems to acquire customer and employee data as well as proprietary information.[3]

Last year, the transportation and trucking industry was the ninth most targeted for cyberattacks.[4] It is not unusual for a trucking company's dispatching software to be hacked, so as to disrupt driver communications and reducing the company's ability to invoice for its services.[5] Cyber criminals have also set up fake loads of items to be transported and have diverted funds away from legitimate transactions. More mundane attacks include exploiting the diagnostics ports found in truck engines that are used to access telematics and diagnostic information for routine maintenance and repairs. Cyber criminals have become adept at using that connection to bring about a "denial of service attack," *i.e.,* preventing legitimate users from accessing information systems, devices, or other network resources.[6] A single cybersecurity

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disruption has the potential to cripple even the largest trucking companies while having a detrimental impact on the supply chain as a whole.

The efficiency of a trucking company's operations often presents the greatest opportunity for a cyber breach. Motor carriers ranging from the smallest to the largest in the industry typically have integrated their communications, billing, and logistics operations into a single database.[7] While advancements in GPS navigation and automated systems further enhance a company's operations, maintaining such varied applications in one place gives cybercriminals the chance to disrupt the business's supply chain in one targeted attack.[8]

Such attacks aimed at a trucking company may manifest in many forms. Phishing targets employees directly by falsely posing as a customer, public official, or even someone within the organization. Depending on the company's preparedness, ransomware and malware can bypass the firewalls and access confidential company and employee data. Even the rise of autonomous vehicles poses cybersecurity risks as their software can be hacked, leading to a loss of control over the vehicle and potentially damaging property and employees. Data theft was the most common outcome of these attacks, followed by extortion and impacts on brand reputation.[9]

In 2017, FedEx suffered a significant malware attack that limited its operations for months. More recently, Expeditors International of Washington, Seattle-based logistics giant, suffered a cyberattack that shut down most of its operating systems, diminishing its ability to conduct its operations, which was significant, given that it manages freight movements by air, sea and ground transportation in over three hundred locations around the world. Smaller fleets are likewise vulnerable, as cybercriminals accomplish their goal of causing panic by halting operations. [10]

Last year, Bay & Bay Transportation, a Minnesota trucking and logistics company, fell victim to a ransomware attack. The company was targeted by a ransomware gang known as "Conti," a so-called ransomware as a service provider, as it provides malware, an extortion platform and support to affiliates, who get a percentage of the payments made by victims. Conti has been linked to hundreds of attacks, including multiple transportation and logistics companies throughout the United States. While the attack impacted some of Bay & Bay's systems, including a small minority of its desktop computers, the company shut down all operations as a precaution. Unfortunately, this was the second cyberattack leveled against Bay & Bay in three years, but the prior experience led to the company employing measures, including network segmentation, to minimize the impacts of this attack, allowing the company to return to "90% functionality" within about a day and a half of the incident. The company credited quick action, training and cloud-based backups with enabling a rapid recovery.[11]

Bay & Bay, which has a fleet of over four hundred power units, disclosed the attack after Conti began posting data stolen from the company to the dark web. Groups like Conti typically do this after victims refuse to pay their ransom demands. The carrier was attacked through a known vulnerability in a Microsoft Exchange server. While Microsoft released an update a month earlier, which would have fixed multiple security issues, Bay & Bay had not run the update prior to the attack.[12]

The government and industry have not idly stood by. The US Department of Homeland Security (DHS), DOT, and industry organizations have done a great deal of research on these topics and have published guidance, which should be the industry's best practices.

There has been protracted debate as to what aspect of the infrastructure is the most critical.[13] While that debate continues to rage, the Department of Homeland Security has determined that the transportation and logistics industry is among the most critical to the infrastructure of the United States.[14] The government has determined that the protection of our logistical assets against cybersecurity attacks is of paramount importance, reasoning that transportation disruptions, such as an attack on logistical assets, can prevent the delivery of fuel, food, pharmaceuticals and raw materials, the interruption of the supply of any of which would be disastrous to our security and economy.[15]

The National Infrastructure Protection Plan (NIPP)[16] is a framework developed by the Department of Homeland Security to enhance the security and resilience of critical infrastructure sectors in the United States. Within the scope of the NIPP is a 2015 Transportation Sector Specific Plan (SSP)[17] focused on securing and ensuring the reliability of the transportation systems. Key components of the SSP include:

1. **Risk Management:** Highlights the need for risk assessment and management practices.
2. **Information Sharing:** Emphasizing the importance of information sharing and coordination among stakeholders and establishing information sharing networks and partnerships.
3. **Physical Security:** Addresses physical security measures to protect from threats such as terrorism, sabotage, and other malicious activities, to include security enhancements for critical assets, access control measures, surveillance systems, and the implementation of security protocols and procedures.
4. **Resilience and Continuity of Operations:** Emphasizes the importance of building resilience within the transportation sector, including strategies for maintaining essential operations, continuity planning, and the integration of resilience principles into infrastructure design and development.
5. **Cybersecurity:** Acknowledges the need for robust cybersecurity measures, to include the development of cybersecurity strategies, incident response plans, and the adoption of best practices to protect transportation.[18]

More recently, DOT published a draft

2020 draft update entitled, "Cybersecurity Best Practices for the Safety of Modern Vehicles."[19] An update to the 2016 document, the draft "is intended to cover cybersecurity issues for all motor vehicles and motor vehicle equipment (including software).[20] While not prescriptive, it does recommend that "(t)he automotive industry should follow the National Institute of Standards and Technology's (NIST) document Cybersecurity Framework,"[21] and, further, that the approach should:

- be built on risk-based prioritized identification and protection of safety-critical vehicle control systems;
- eliminate sources of risk to safety-critical vehicle control systems were possible and feasible;
- provide for timely detection and rapid response to potential vehicle cybersecurity incidents in the field;
- design-in methods and processes to facilitate rapid recovery from incidents when they occur; and
- institutionalize methods for accelerated adoption of lessons learned.[22]

Finally, at a very high level, the DOT document outlines a specific vehicle development process with explicit cybersecurity considerations. This includes:

- process;
- risk assessment;
- sensor vulnerability risks;
- protections;
- inventory and management of software assets on vehicles;
- penetration testing and documentation;
- monitoring, containment and remediation;
- data, documentation and information sharing;
- continuous risk monitoring and assessment; and
- industry best practices.[23]

Established in 2015, the Automotive Information Sharing and Analysis Center (Auto-ISAC, Inc.) is an industry organization focused on enhancing cyber security in the automotive sector.[24] Recognizing that as vehicles become increasingly connected and, eventually autonomous, the manufacturers and suppliers recognized the need to provide safeguards from potential cyber threats that could compromise safety, privacy, and data integrity. It has developed a comprehensive set of best practices: incident response; collaboration and engagement; governance; risk assessment and management; awareness and training; threat detection; monitoring and analysis; and security development lifecycle.[25]

The regulations and guidance promulgated by DHS, DOT, and Auto-ISAC, Inc. are leading the industry to a cyber standard of care. *Standard of care* refers to the level of care, diligence, and responsibility that individuals and organizations are expected to exercise in the execution of their duties or protecting their assets. The notion of a cyber standard of care applies this concept to the principle of level of care, diligence, and responsibility to digital assets, information systems, and data from cyber threats and vulnerabilities.[26]

With the initial parameters set by the governmental agencies, then, this is the opportune time to establish a standard framework and benchmarks for a *cyber standard of care*, to consider the reasonable and prudent actions to prevent, detect, and respond to cyber-attacks and data breaches. This framework and benchmark should be grounded in current industry best practices, although reinforced by regulatory guidance and other providers, such as the insurance industry. Further, a *cyber standard of care* needs to be reasonable and prudent. The cybersecurity landscape is constantly changing and evolving, and organizations only have limited resources that they can devote to cybersecurity. The standard of care acknowledges that there is no one-size-fits-all solution and that measures must be tailored to the specific circumstance and organizational risk profile. There are several key principles that should be included in an evolving *cyber standard of care:*

1. **Risk assessment:** Organizations should conduct regular risk assessments to identify and evaluate potential cyber risks and vulnerabilities. This includes assessing the value of assets, likelihood of threats, and potential impacts.
2. **Security controls:** The implementation of appropriate security controls and safeguards is essential. This includes measures such as firewalls, intrusion detection systems, encryptions, strong authentication mechanisms, and regular software updates.
3. **Employee Training and Awareness:** Organizations must invest in educating and training employees about cybersecurity best practices, to include awareness about common threats like phishing, social engineering, and malware, strong password management, data handling practices, and reporting suspicious activities.
4. **Incident Response and Recovery:** A well-defined incident response plan, including procedures, is essential. The plan should have protocols for detecting, containing, and mitigating the impact of cyber incidents, post-incident analysis, and implementing measures to prevent future occurrences.
5. **Supply-chain Risk Management:** Organizations often rely on third-party vendors, suppliers, and partners for various services and solutions. A cyber standard of care requires that organizations assess and manage the cybersecurity practices of these third parties.
6. **Compliance with laws and regulations:** While the trucking industry is well-versed in compliance, the cyber security standard of care includes compliance with industry-specific standards, data protection

requirements, industry compliance frameworks, and contractual obligations.

7. **Continuous Monitoring and Improvement:** Cyber security is not a one-time checklist activity; it requires continuous monitoring, assessment and improvement of cybersecurity measures.

The industry's implementation of a cyber standard of care should include, at a minimum, current industry best practices, which include the use of a threat modeling, supply chain risk management. The adoption of a verified-trust approach should be the starting point.[27]

Threat modelling is the systematic identification of organizational assets, generally the assets believed to have value, *e.g.*, value to the attacker, value to the organization, or value as a stepping stone to something else. The model then identifies what the organization has, or is building, what can go wrong, and what should be done about it.[28] The threat model should be used in conjunction with the MITRE[29] Adversarial Tactics, Techniques, and Common Knowledge (ATT&CK) framework (MITRE ATT&CK Framework) and DHS's Cyber Security Evaluation Tool (CSET)[30] in order to provide a comprehensive view of the organization's entirety.[31]

A comprehensive understanding of the supply chain will also help identify and mitigate risk. The United States Department of Defense (DOD) defines Supply Chain Risk Management (SCRM) as the "systematic process for managing supply chain risk by identifying susceptibilities, vulnerabilities and threats throughout DOD's 'supply chain' and developing mitigation strategies to combat those threats whether presented by the supplier, the supplied product and its subcomponents, or the supply chain (*e.g.*, initial production, packaging, handling, storage, transport, mission operation, and disposal)." SCRM has four aspects: security, integrity, resiliency, and quality of information.[32]

Finally, the use of verified-trust principles during the implementation and operation phases. The idea of verified-trust is modification of NIST's Zero-Trust approach, and uses the principles of "verify, least privilege, micro-segmentation, assume breach, continuous monitoring, encryption, comprehensive access controls and automation."[33]

Like the situation with so many other industries, the vast majority of transportation companies will have great difficulty preventing all cyberattacks, particularly when those attacks are initiated or sanctioned by nation-state actors.[34] Cyber attackers will look for the weakest link into networked systems. Some of the most destructive attacks have started with an unprotected entry into a small business' computer system that is connected to a larger system. (*e.g.*, a targeted breach via a truck's diagnostic port). For that reason, many companies mitigate that risk by purchasing cyber security insurance. Cyber insurance policies may have significant differences in the language of what is covered, so transportation company risk managers should pay close attention to what risks they are retaining and what will be covered by their policies.

Moreover, recent decisions by major re-insurer companies to limit, if not outright exclude, coverage for ransomware attacks, as but one example, have created a level of uncertainty into mitigation strategies. The current situation is akin, although not identical, to the situation property and casualty insurance companies faced in the aftermath of the September 11, 2001, terrorists' attacks. Most private insurers took steps to exclude coverage for damages caused by terrorist attacks, leading Congress to create a federal Terrorist Risk Insurance as a backstop to shore up the private sector's willingness to cover terrorist-inflicted damages. The day before the Terrorist Risk Insurance Act received approval, Congress passed the Homeland Security Act of 2002, creating the Department of Homeland Security and, within it, a risk-mitigation program called the Support Antiterrorism by Fostering Effective Technologies Act of 2002, commonly known as the "SAFETY Act," to be administered by the DHS Science & Technology Directorate.[35]

The SAFETY Act[36] provides important legal liability protections for providers of Qualified Anti-Terrorism Technologies – whether they are products or services. The program's goal is to encourage the development and deployment of effective anti-terrorism products and services. Liability protections over the past 20 years have been extended to "sellers" of physical products and cyber protection systems. The SAFETY Act is specifically intended to provide liability protection to private sector entities where there is a terrorist caused act, and the determination of what constitutes an "act of terrorism" is made by the Secretary of Homeland Security. The definition of "terrorism" for purposes of the federal Terrorist Risk Insurance program is made by a group of three federal cabinet officials. Risk managers therefore should be aware of what their cyber security and terrorism risk insurance policies cover and, to the extent that there may be gaps in coverage, seeking SAFETY Act protections might be advisable.[37]

The SAFETY Act liability protections apply to a wide range of anti-terrorism products, systems, and services. A private sector entity must apply for protections for the Department of Homeland Security to determine if their offering is a Qualified Anti-Terrorism Technology.[38]

As a critical part of America's infrastructure, the trucking industry has been and will continue to be a target of cyber-attacks. Beginning well before, but accelerated greatly by the 9/11 attacks, the government has promulgated guidance and regulations to guard against such malicious attacks. These evolving standards serve as the baseline for the industry itself to develop and cyber standard of care, born of the industry's best practices, which have been and must continue to be ahead of governmental regulation and supervision. No cyber standard of care can be, nor should be expected to be, completely successful in preventing or repelling such attacks, so additional safeguards in the form of insurance are essential. The government encourages such pragmatism, as exemplified by the protections afforded by the SAFETY Act. Cyber attacks have become, and unfortunately will remain a frequent occurrence in the trucking industry.

Endnotes

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The Circuit Split We've All Been Waiting For:
The Seventh, Ninth, and Eleventh Circuits Conflict on the Application of the Safety Exception to Negligence Claims Against Brokers

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I. Introduction

The continued uptick in tort claims asserted against freight brokers in connection with motor vehicle accidents has resulted in three noteworthy federal appellate decisions interpreting the preemption of state tort law claims under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). In the July 2023 issue of *The Transportation Lawyer*, Sophia M. Rago discussed the Eleventh Circuit's decision in *Aspen American Insurance Company v. Landstar Ranger, Inc. ("Aspen"),* in which the Court found FAAAA preemption but disagreed with the Ninth Circuit's decision in *Miller v. C.H. Robinson Worldwide, Inc. ("Miller")* concerning the applicability of the safety exception. While those cases differed in their findings, the safety exception opinions expressed in *Aspen* are arguably dicta as *Aspen* was a cargo loss case that did not raise safety issues. Thus, the transportation industry has been awaiting the Seventh Circuit's decision in *Ying Ye v. Globaltranz Enterprises, Inc.* The Seventh Circuit released its decision on July 18, 2023, which solidified the circuit split by siding with the Eleventh Circuit's decision in *Aspen* and rejecting the Ninth Circuit's decision in *Miller.*

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All three of these cases–*Ye, Aspen, and Miller*–draw from the source for federal preemption over interstate transportation in 49 U.S.C. § 14501. The "general rule" is:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.[1]

The test for whether or not FAAAA preemption applies is the "related to" test, which comes from the phrase "related to" in 49 U.S.C. 14501(c)(1). This test has been applied by the Supreme Court of the United States, which determined that the phrase "related to" in the FAAAA "embraces state laws 'having a connection with or reference to' ... 'rates, routes, or services,' whether directly or indirectly."[2] Further, the Supreme Court has determined:

> (1) that "[s]tate enforcement actions having a connection with, or reference to," carrier " 'rates, routes, or services' are pre-empted;" (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect;" (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.[3]

The Supreme Court has also held that state laws affecting rates, routes, or services "only in a tenuous, remote, or peripheral… manner, with no significant impact on Congress's deregulatory authority" are not preempted by the FAAAA.[4]

The safety exception as outlined in the FAAAA provides in relevant part that the general rule "shall not restrict the safety and regulatory authority of a State with respect to motor vehicles."[5] The Supreme Court has not offered an abundance of guidance on the safety exception thus far. In *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, the Supreme Court held that "Section 14501(c)(2)(A) seeks to save from preemption state power 'in a field which the States have traditionally occupied.'"[6] The Supreme Court also held that "Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting and traditional state police power over safety."[7]

II. *Ye v. GlobalTranz Enterprises, Inc.*

In *Ye v. GlobalTranz Enterprises, Inc.*, – F.4th –, 2023 WL 4567097, the widow of a man who was killed in a motorcycle accident brought suit against GlobalTranz Enterprises, Inc. ("GlobalTranz"), which was the broker, and Global Sunrise, Inc., which was the unrelated motor carrier selected by GlobalTranz.[8] The suit alleged negligent hiring and vicarious liability against GlobalTranz.[9] Ye alleged that GlobalTranz "knew, or should have known, that Global Sunrise Inc. was an unsafe company with a history of hours of service and unsafe driving violations," and that GlobalTranz "exercised sufficient control over Global Sunrise."[10] Ye was awarded $10 million in survival damages against Global Sunrise in a default judgment.[11] GlobalTranz moved to dismiss the claims against it.[12] The district court dismissed the negligent hiring claim against GlobalTranz, concluding that the claim was barred by the FAAAA's preemption provision and not saved by any of the exceptions, including the safety exception, which Ye appealed.[13] The district court also entered summary judgment in GlobalTranz's favor on the vicarious liability claim, which Ye did not appeal.[14]

The Seventh Circuit reviewed Ye's claims for negligent hiring de novo, with "no deference to the district court's legal determination that the [FAAAA] preempts [Ye's] claim."[15] The Seventh Circuit stated that express preemption is at issue in this case and said that its "task is one of statutory construction–to determine whether Ye's state law claim falls within the [FAAAA]'s express prohibition in § 14501(c)(1) and, if so, whether any of the [FAAAA]'s exceptions save her claim from preemption."[16]

The Seventh Circuit agreed with the district court's conclusion that the negligent hiring claim against GlobalTranz was expressly preempted by the FAAAA.[17] They first looked at the text of the preemption clause, noting that the Supreme Court interprets "'related to' or "'relating to' as having a 'broad preemptive purpose.'"[18] While this may be interpreted so broadly that a state law need only to have an indirect "connection with, or reference to" "a price, route, or service of any motor carrier…broker, or freight forwarder with respect to the transportation of property,"[19] a state law that only impacts broker services in a "tenuous, remote, or peripheral" manner will not be preempted.[20]

The Seventh Circuit then used a two-part test: a "party seeking to establish preemption…must show both that a state 'enacted or attempted to enforce a law' and that the state law relates to broker 'rates, routes, or services "either by expressly referring to them, or by having a significant economic impact on them."'"[21] They found the first prong easily satisfied, stating that "common law tort claims 'fall comfortably within the language of the [ ] preemption provision' that, by its terms, 'applies to state "law[s], regulation[s], or other provision[s] having the force and effect of law."' "[22] To determine whether GlobalTranz established the second prong, the Seventh Circuit focused "on whether Ye's proposed enforcement of Illinois's common law of negligence would have a significant economic effect on broker services," which the Court determined it would:[23] "By its terms, Ye's claim strikes at the core of GlobalTranz's broker services by challenging the adequacy of care the company took–or failed to take–in hiring Global Sunrise to provide shipping services."[24]

The Seventh Circuit outlined just how much of an economic impact common law negligence claims against brokers would have on the industry:

> By recognizing common-law negligence claims, courts would impose in the name of state law a new and clear duty of care on brokers, the breach of which would result in a monetary judgment. This is exactly what Ye seeks here against GlobalTranz. To avoid these costly damages payouts, GlobalTranz and other brokers would change how they conduct their services–for instance, by incurring new costs to evaluate motor carriers. Then, by changing their hiring processes, brokers would likely hire different motor carriers than they would have otherwise hired without the state negligence standards.[25]

The Seventh Circuit agreed with both the Ninth and Eleventh Circuits in the handling of the preemption analysis in the context of a negligent hiring claim.[26]

As for Ye's argument that the safety exception saved the negligent hiring claim from preemption, unlike the Ninth Circuit in *Miller*, the Seventh Circuit was not persuaded. In fact, the Seventh Circuit did not even consider whether state tort law is part of a state's safety regulatory authority because it determined that "a common law negligence claim enforced against a broker is not a law that is 'with respect to motor vehicles.'"[27] Starting with the statutory text, the Seventh Circuit determined that there is "no mention of brokers in the safety exception itself or in Congress's definition of motor vehicles, which suggests that such claims may be outside the scope of the exception's plain text."[28] Further, the Seventh Circuit noted that there is no "reference to brokers or broker services" in 49 U.S.C. § 14501(c)(2)(A), and that there was no reference to any kind of safety exception in 49 U.S.C. § 14501(b), which is titled "Freight Forwarders and Brokers."[29] Congress recognized the distinction between motor carriers and brokers, and intentionally did not apply the safety exception to brokers. Looking even more broadly, Congress regulated motor vehicle safety in Title 49 by addressing ownership, operation, and maintenance, but never by addressing brokers.[30] Where Congress regulates freight brokers, it focuses on the economic aspects of brokers such as ensuring that brokers file a "'surety bond, proof of trust fund, or other financial security'…to secure against any 'claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation.'"[31] Congress and the Seventh Circuit understand that brokers are not in the business of transporting goods themselves, and that brokers have no control over the safety practices of the motor carriers they select.

The Seventh Circuit concluded definitively that a negligent hiring claim against a broker is preempted by the FAAAA and

not saved by the safety exception because it would have a significant economic effect on brokers and is not a law that is "with respect to motor vehicles."

III. *Ye* directly contradicts *Miller*

The Seventh Circuit's decision in *Ye* directly contradicts the Ninth Circuit's decision in *Miller*. While both courts determined that negligent hiring claims are expressly preempted by the FAAAA, the Ninth Circuit held in *Miller* that the safety exception saved the negligent hiring claim from preemption, which the Seventh Circuit disagreed with.[32] The Seventh Circuit points to three major analytical differences in the two courts' analysis of the safety exception: (1) the Ninth Circuit's focus on Congress's deregulatory purpose for the FAAAA; (2) the Ninth Circuit's presumption against preemption to determine ambiguity in the scope of the safety exception; and (3) the Ninth Circuit's determination that "with respect to" is the same as "relating to."[33]

First, the Ninth Circuit focused on the deregulatory purpose of the FAAAA. Using the Airline Deregulation Act of 1978, the predecessor of the FAAAA, as a guide, the Court determined that the focus of the FAAAA was the economic deregulation of the trucking industry.[34] The *Ye* court believed this emphasis to be misplaced because "given the plain meaning and import of the text, both in § 14501(c) itself and throughout the rest of Title 49, we do not see how Congress's deregulatory goals can overcome the clear statutory mandate that the exception in § 14501(c)(2)(A) saves only those safety regulations directly concerning motor vehicles."[35] Judge Fernandez reached the same conclusion in his concurrence in part and dissent in part in *Miller*, stating:

> C.H. Robinson is a broker, which is "a principal or agent [that] sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." [citation] A motor carrier, in turn, is "a person providing motor vehicle transportation for compensation." [citation] And, a broker cannot be a motor carrier. [citation] Those definitions make clear that as a broker, C.H. Robinson and the services it provides have no direct connection to motor vehicles or their drivers. Any connection is merely indirect–for example, via an intermediary motor carrier.[36]

The *Ye* court concluded that Congress's deregulatory purpose was not enough for the *Miller* court to hold that the safety exception in the FAAAA applies to brokers.

Second, the Ninth Circuit focused on a presumption against preemption. The *Miller* court operated under "the presumption that Congress does not intend to supplant state law" and the presumption that "Congress has not preempted the 'historic police powers of the States…unless that was the clear and manifest purpose of Congress."[37] The Ninth Circuit further relied on Supreme Court guidance that states "'when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."'"[38] The Seventh Circuit points out that the Ninth Circuit seemingly admitted its error in a subsequent decision in which the Ninth Circuit stated that a presumption against preemption "stood in direct conflict with the Supreme Court's instruction to 'focus on the plain wording of the clause' instead of 'invok[ing] any presumption against pre-emption.'"[39]

Finally, the most significant contrast is between the Seventh and Ninth Circuits' interpretation of the phrase "with respect to" in 49 U.S.C. 14501(c)(1). The Ninth Circuit, using "with respect to" as synonymous with "relating to," determined that "negligence claims against brokers that stem from motor vehicle accidents are 'with respect to motor vehicles.'"[40] The Ninth Circuit relied on Supreme Court precedent that states "[c]onsequently, the FAAAA's safety exception exempts from preemption safety regulations that 'hav[e] a "connection with" motor vehicles,' whether directly or indirectly."[41] The Ninth Circuit's final holding was "negligence claims against brokers, to the extent that they arise out of motor vehicle accidents, have the requisite 'connection with' motor vehicles. Therefore, the safety exception applies to Miller's claim against C.H. Robinson."[42] The Ninth Circuit relied on *California Tow Truck Ass'n v. City & Cnty. of San Francisco*, 807 F.3d 1008, 1021 (9th Cir. 2015), while the Seventh Circuit relied on *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260, 133 S.Ct. 1769, 185 L.Ed.2d 909 (2013). The Seventh Circuit interpreted "with respect to" to mean "concerns," and therefore found a much narrower safety exception, which did not apply to brokers. [43]

IV. *Aspen American Insurance Co. v. Landstar Ranger, Inc.* supports the *Ye* decision

The Seventh and Ninth Circuits are not the only circuit courts to consider whether the safety exception saves a state common law negligence claim from being preempted under the FAAA; the Eleventh Circuit weighed in with its decision in *Aspen American Insurance Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023) (*"Aspen"*). In *Aspen*, the Eleventh Circuit dealt with whether a negligence claim could be brought against a freight broker under a different set of facts that did not involve personal injury.[44] Landstar, the broker, hired L&P Transportation LLC ("L&P") to transport its customer's goods, but gave the shipment to a motor carrier posing as L&P.[45] The shipper filed a claim with Aspen American Insurance Company ("Aspen"), its insurer, which paid the claim and then filed suit against Landstar for negligence.[46] The Eleventh Circuit held that a negligent hiring claim against a broker is expressly preempted by the FAAAA,[47] which is in line with both the Seventh and Ninth Circuits.

In what appears to be an intent to create a Circuit split, the *Aspen* Court evaluated the safety exception under the FAAAA, and determined that the safety exception does not save a negligent hiring claim against a broker because brokers actions are not "with respect to motor vehicles."[48] The Eleventh Circuit held that the "phrase 'with respect to motor vehicles' limits the safety exception's application to state laws that have a *direct* relationship to motor

vehicles."[49] The Eleventh Circuit stated that "a mere indirect connection between state regulations and motor vehicles will not invoke the FAAAA's safety exception."[50] The Eleventh Circuit further supports its conclusion that a negligent hiring claim is not "with respect to motor vehicles" by stating that the complaint does not say anything about motor vehicles or their ownership, maintenance, or operation, and does not even allege that a motor vehicle was involved in the fact pattern giving rise to the claim.[51] Surely, a claim in which there are no motor vehicles alleged to be involved is not "with respect to motor vehicles" in a way that would allow for the claim to fall under the safety exception.

While *Aspen* was a cargo case, not a casualty case like *Ye* and *Miller*, the Eleventh Circuit was very clear in its interpretation of the safety exception: "it makes little sense for the safety exception to turn on whether a plaintiff seeks damages for property loss or bodily injury–the common law negligence standard is the same no matter the damages a breach has caused."[52] Thus, when read with *Miller* and *Ye*, it is clear that *Aspen* aligns with *Ye* in that the safety exception does not save a negligence claim against a broker from preemption no matter what damages are sought.

V. Conclusion

The Seventh Circuit's decision in *Ye* has cemented the circuit split on whether state tort claims against brokers preempted by the FAAAA can be saved by the safety exception. *Ye* is almost certainly going to appeal to the Supreme Court of the United States. With this circuit split in place–the Ninth Circuit holding that the safety exception applies to state tort claims against brokers, while the Seventh and Eleventh Circuits hold that the safety exception does not apply to state tort claims against brokers–the Supreme Court has a ripe opportunity to settle this issue once and for all.

Endnotes

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3 *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008))[internal citations omitted].
4 *Id.* at 371.
5 49 U.S.C. § 14501(c)(2)(A).
6 *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438, 122 S. Ct. 2226, 2235, 153 L. Ed. 2d 430 (2002) (*"Ours Garage"*) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)).
7 *Ours Garage, supra*, 536 U.S. at 439.
8 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *1 (7th Cir. July 18, 2023).
9 *Id.*
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11 *Id.*
12 *Id.*
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14 *Id.*
15 *Id.*, at *2.
16 *Id.*
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18 *Id.*; see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (interpreting an identical provision in the Airline Deregulation Act); see also *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370-371, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) (explaining that interpretations of the Airline Deregulation Act directly apply to the Federal Aviation Administration Authorization Act).
19 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *2-3 (7th Cir. July 18, 2023) (citing *Rowe, supra,* 552 U.S. at 370, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008), quoting *Morales, supra*, 504 U.S. at 384-386, 112 S.Ct. 2031 and 49 U.S.C. § 14501(c)).
20 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *3 (7th Cir. July 18, 2023) (citing *Rowe, supra*, 552 U.S. at 371, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008), quoting *Morales, supra*, 504 U.S. at 390, 112 S.Ct. 2031).
21 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *3 (7th Cir. July 18, 2023) (quoting *Nationwide Freight Sys., Inc. v. Illinois Com. Comm'n*, 784 F.3d 367 (7th Cir. 2015) (quoting *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996)).
22 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *4 (7th Cir. July 18, 2023) (quoting *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 281–82, 134 S.Ct. 1422, 188 L.Ed.2d 538 (2014) (alterations in original) (citation omitted)).
23 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *4 (7th Cir. July 18, 2023).
24 *Id.*
25 *Id.*
26 *Id.*; see *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1024 (9th Cir. 2020) ("[A] claim that imposes an obligation on brokers at the point at which they arrange for transportation by motor carrier has a 'connection with' broker services."); *Aspen Am. Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261, 1267 (11th Cir. 2023) ("[T]he [Act] makes plain that [the plaintiff's] negligence claims relate to a broker's services.").
27 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *5 (7th Cir. July 18, 2023).
28 *Id.; see Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261–62, 133 S.Ct. 1769 (concluding that a state's law was not "with respect to transportation of property" under § 14501(c)(1) where it concerned post-towing storage, which does not constitute "transportation" as defined in § 13102(23)(B)).
29 *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *6 (7th Cir. July 18, 2023).

[30] *Id.* at *7.
[31] *Id.* at *8, quoting 49 U.S.C. 13906(b)(1)(A), (2)(A).
[32] *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *9 (7th Cir. July 18, 2023); see *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1030-31 (9th Cir. 2020).
[33] *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *9-10 (7th Cir. July 18, 2023).
[34] *Id.* at 1022.
[35] *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *9 (7th Cir. July 18, 2023); see Miller, supra, 976 F.3d at 1031 (Fernandez, J., concurring in part and dissenting in part) ("[A broker] and the services it provides have no direct connection to motor vehicles or their drivers .... That attenuated connection is simply too remote for the safety exception to encompass [the] negligence claim.").
[36] *Miller, supra*, 976 F.3d at 1031 (internal citations omitted).
[37] *Miller, supra*, 976 F.3d at 1021.
[38] *Miller, supra*, 976 F.3d at 1027 at 1027-28, (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 19, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (quoting *1028 *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008)).
[39] *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *9 (7th Cir. July 18, 2023) (quoting *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 553 n.6 (9th Cir. 2022) (quoting *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 125, 136 S.Ct. 1938, 195 L.Ed.2d 298 (2016)).
[40] *Miller, supra*, 976 F.3d at 1030.
[41] *Id.* (quoting *California Tow Truck Ass'n v. City & Cnty. of San Francisco*, 807 F.3d 1008, 1021 (9th Cir. 2015) (quoting Dan's City Used Cars, supra, 569 U.S. at 260, 133 S.Ct. 1769).
[42] *Miller, supra*, 976 F.3d at 1031.
[43] *Ye v. GlobalTranz Enterprises, Inc.*, No. 22-1805, 2023 WL 4567097, at *10 (7th Cir. July 18, 2023).
[44] *Aspen American Insurance Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261, 1265 (11th Cir. 2023).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 1268.
[48] *Id.* at 1272.
[49] *Id.* at 1271 (emphasis in original).
[50] *Aspen, supra*, 65 F.4th at 1272.
[51] *Id.*
[52] *Id.* at 1269.

A Guide to NTSB Investigations

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Any transportation provider, manufacturer or pipeline operator (**"Company"**) that is faced with a National Transportation Safety Board investigation must carefully navigate its activities in the days following a catastrophic incident. There is simply no time during those first 24 to 48 hours to learn about how the NTSB operates, and what is expected of the company.

This article is intended to serve as a reference tool for attorneys whose clients are active in these industries. We begin with a general overview regarding NTSB investigations: how they unfold, who is involved, and the role your clients may play in the process. We then describe the fact-gathering and analysis phases of NTSB investigations.

Overview

The NTSB investigates aviation, railroad, highway, marine, pipeline and commercial space accidents to determine their probable cause and issues safety recommendations to reduce the risk of future accidents. The NTSB also studies transportation safety issues and evaluates the safety effectiveness of related government agencies, including the United States Coast Guard and those within the Department of Transportation (the Federal Aviation Administration, National Highway Traffic Safety Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Federal Transit Administration, and Pipeline and Hazardous Materials Safety Administration).

The NTSB has five *Members* who are each appointed by the President and confirmed by the Senate for five-year terms. It has approximately 420 employees and annually investigates about 2,000 aviation accidents and about 500 major accidents or incidents involving other modes of transportation including pipelines transporting hazardous materials.

The NTSB proudly notes that more than 80 percent of its accident-related safety recommendations are acted upon favorably.

The NTSB has priority over other federal investigative agencies in accident investigations, but that does not preclude other federal and state agencies, or members of Congress, from mounting their own investigations.

Which Accidents does the NTSB Investigate?

The NTSB is mandated to investigate all aviation accidents and significant marine, rail, highway, pipeline and commercial space accidents. In non-aviation accidents, the NTSB considers the scope of the incident (the number of fatalities and injuries and the amount of property damage) and whether or not an NTSB investigation is likely to generate meaningful recommendations.

The NTSB Investigative Team

When a decision is made to launch a major investigation, the investigative "go team" strives to launch within two hours of the decision to investigate. This team is led by an Investigator-in-Charge **("IIC"**). Other participants include investigators assigned to each NTSB Working Group, one of the five Members, a press/media staff member and occasionally, an attorney from the NTSB Office of the General Counsel and a family-assistance staff member.

The Goal: Preventing Similar Accidents

While the NTSB conducts vigorous investigations and issues factual findings and opinions as to probable cause, their focus is less on the specific incident that triggered the accident than how to prevent future accidents from occurring. Attention is frequently placed on how to reduce the likelihood of future accidents by assessing organizational issues, risk management and changes in overall safety culture. With that in mind, the scope of an NTSB investigation is typically much broader than any litigation concerning a specific accident.

The "Party" System: Selfless Cooperation or Fox in the Henhouse?

The NTSB invites any Company involved in the accident that appears to be able to provide first- hand technical assistance to be Parties to the investigation. The same investigative process is used by the NTSB for aviation, rail, marine, highway, pipeline and commercial space accidents. It allows the NTSB to leverage its small staff while obtaining unfettered cooperation and resources of those most closely involved in the calamity. This is a routine part of the NTSB investigation process and has served the NTSB well for over 50 years. There is no other way such a small agency could investigate so many accidents. Also, the cooperation demanded, and almost universally received, from Parties provides

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the NTSB with broad, up-to-date technical assistance that would be very difficult to duplicate regardless of agency size or budget.

But the process is not without controversy. Those injured and the families of those killed may perceive the Parties (some of whom may be future defendants) as being in a position to influence NTSB findings. This can become a cause of frustration because the NTSB will not allow the involved individuals to participate as Parties either directly or via their own paid outside experts.

For this and other reasons, NTSB investigators are trained to trust but verify. They work hard to make sure that any information provided by a Party is substantiated through documentation or multi-source testimony. If this cannot be done to their satisfaction, references to such information is often predicated in any reports by "According to [Party]..." caveats.

The Burdens and Advantages of Being a "Party to the Investigation"

Historically, transportation providers, manufacturers and pipeline operators have almost always decided that the advantages of becoming a Party outweigh the burdens. But each matter ought to be individually evaluated, even if only to provide solace when the burdens present themselves.

Active Party-to-the-Investigation participation will provide an opportunity to keep the factual foundation, upon which the NTSB will predicate its findings, purely factual. This is important. No one knows as much about your system and operations as you do. Active participation is also the quickest way to enact corrective measures.

Additional benefits include the ability to:

- announce to the public that "We are assisting the NTSB with its investigation and for that reason cannot comment further";
- vet draft NTSB Working Group factual reports to ensure that they are purely factual;
- make a Party Submission of Proposed Findings & Recommendations to the NTSB investigation staff and the five Presidentially-appointed "Members"; and
- meet with individual NTSB Members to discuss Proposed Findings and Recommendations while they are in the process of considering the draft staff report on your accident.

There are, however, significant disadvantages. A Party must:

- supply technical staff to assist;
- assist with preservation of perishable evidence;
- limit its accident-related public statements (particularly as to cause);
- advise of relevant information;
- maintain strict confidentiality of "Investigative Information;
- limit on internal investigations and communications; and
- not disclose NTSB "investigative information" or opinions as to causation in litigation pleadings, and discovery response.

Communications with the Many Stakeholders

Parties are prohibited from disclosing NTSB Investigative Information without the NTSB's permission until the NTSB opens its public docket for the investigation. But, unfortunately, NTSB investigations never take place in a vacuum. There are always stakeholders clamoring for information. These may include:

- the press;
- company employees and management;
- federal and state politicians;
- those injured, and the families of those killed, in the accident (and their attorneys);
- judges presiding over related litigation;
- FAA, FMVSS, FMCSA, FRA, FTA, PHMSA or USCG;
- state regulatory agencies;
- Department of Justice and state Attorneys General;
- federal and state law enforcement agencies; and
- federal and state legislative committees.

The longer an investigation takes, the more likely these stakeholders will find themselves wrestling with the NTSB or Parties to NTSB investigations about the scope and duration of the prohibition on the release of Investigative Information.

It is important to remember that because the focus of the investigation is not so much on what happened, but why, the scope of the prohibition depends very much on what is being investigated. It is also important to understand that, from the NTSB's point of view, confidential Investigative Information is typically not limited to information and documents from the time of the accident or explosion forward. If the NTSB is examining a number of complex safety issues as potential causes of the accident, Investigative Information could include documents and data leading up to the accident. Employee training records and maintenance records may be critical, even though they pre-date the accident or incident.

Determining the probable cause of an accident, in lieu of simply describing what happened, expands what the NTSB considers Investigative Information.

As investigations approach completion of the factual phase, the need for a prohibition on disclosures of 100 percent of the Investigative Information is frequently diminished. Also, many months into an investigation, information often finds its way into the public domain through channels other than Party disclosures, arguably making the confidentiality of that information moot.

Sharing Information Internally on a Safety-Need-To-Know Basis

Often there is an urgent need for a Party to understand how and why an accident happened so it can take corrective measures without waiting 12 or more months for the NTSB to issue its Accident Report. This urgent need gives rise to a "safety-need-to-know" exception that allows a Party Coordinator to share some information

internally (but very carefully). Those with whom NTSB accident information is shared must understand the Party obligations and ought not disclose the information further except on a safety-need-to- know basis, with the understanding of the Party Coordinator, and a further pledge to maintain Party confidentiality.

In the event that a transportation provider, manufacturer or pipeline operator decides to change a policy or procedure as a result of the accident, NTSB regulations require that the NTSB IIC be advised.

What is the General Timeline?

The NTSB strives to complete its major investigations within 12 months. Historically it has done fairly well adhering to this goal for major aviation investigations. NTSB regional aviation investigations and investigations of rail, marine and highway accidents often take 24 months or more.

What to Expect and When to Expect It – Substantively and Procedurally

The NTSB will be on scene for five to 10 days during which time it will focus its investigation efforts on preserving perishable evidence. This will involve examining the site, harvesting pictures, documents and information and interviewing those directly involved along with other possible witnesses. This activity culminates with the Parties vetting and signing off on the NTSB Field Notes.

Factual efforts over the following six to 18 months will include requests for more documents and information, and laboratory testing in Washington DC, plus interviews concerning training, professional development, risk management, safety management systems and safety culture in general.

The factual phase of the investigation concludes with vetting of draft Factual Reports of the several NTSB Working Groups and ultimate sign-offs of the reports by the Parties. The analytic phase of the investigation then commences and may last anywhere from six to 12 months.

While there are often sporadic requests for more documents and information, Party participation with the investigative team radically diminishes during this phase. Parties are typically given a window of 30 days or so after the last Factual Report has been finalized to submit Proposed Findings and Recommendations. This is a Party's opportunity to marshal and characterize the facts and to propose factual findings, a probable cause, and recommendations. Parties then have the opportunity to individually meet separately with each of the five NTSB Members to discuss their Proposed Findings and Recommendations.

The conclusion of the NTSB investigation is a public "sunshine meeting" (webcast live) in an auditorium at NTSB headquarters in DC at which the NTSB staff presents to the Members their findings, probable cause and recommendations. The Members question the staff and vote on the findings, probable cause, and recommendations. An executive summary of the findings, probable cause and recommendations is typically published the same day. The Accident Report is typically published within two weeks.

A Party may file a Petition for Reconsideration if or when new material evidence is found or if a showing can be made that a finding, probable cause, or recommendation is based upon clear error. There is no deadline to file such a petition.

The Most Critical Events – When Your Client can Make a Difference

The most critical events at which a Company can make a difference as a Party are:

- factually vetting the Field Notes;
- factually vetting the Working Group Factual Reports;
- submitting detailed, well-constructed Proposed Findings and Recommendations; and
- making maximum use of their meetings with the NTSB Members.

At the same time, it is critically important to be an active Party participant throughout the process:

- provide accurate and timely responses to NTSB inquiries;
- offer ideas to the NTSB: your client's team may have more experience and equally good ideas;
- be diplomatic, but don't sit back and watch;
- if a sensitive issue develops, respond affirmatively;
- strive for a thorough investigation and a thorough analysis; and
- insist on balanced and fair statements and characterizations.

Anticipating an NTSB Investigation: How Best to Prepare

Select a Party Coordinator and an Alternate

Your client's NTSB Party Coordinator is a critically important person, serving as the face of the Company in all NTSB interactions. All communications and documents will flow through the Party Coordinator. In many ways, the success of the process from a Party point of view is very much dependent upon the selection of an appropriate Party Coordinator.

Ideally, a Party Coordinator must be technical enough to fully understand the technical issues and senior enough to make things happen. Party Coordinators must be more than just a senior technical company interface. They must be well-spoken and confident in addition to collegial and collaborative.

Your client's Party Coordinator will also need help on scene. At least one senior technical staff member should accompany the Party Coordinator at all times in order to take and memorialize, and sometimes act upon requests for information, documents and assistance. Keep in mind that the NTSB will arrive on scene with no equipment and only a skeleton staff. They will rely upon the Company to assist with evidence preservation. These efforts are often conducted simultaneously with efforts to get the rail, highway or pipeline system up and running for the public.

Logistics must also be addressed. Your client's Party Coordinator and team will

need a place to work. This should be a large centrally-located conference room (or two), preferably within an operations facility at which information and documents will be easily within reach. This room should be staffed from 7:00 AM until midnight with qualified assistants, and possibly one or more paralegals from the Legal Department, each day the NTSB is on scene. It will be a very busy day every day, coordinating and responding to requests for information, documents and witness interviews.

Your client's Party Coordinator must be well-briefed on the NTSB process (preferably well before any incident) and understand that the first 15 days will be fully-occupied by the NTSB investigation. For the following six months the investigation will require about 25 percent of the Party Coordinator's workload, dropping to around 10 percent thereafter. The Party Coordinator will also experience bursts of intense activity when draft group Factual Reports require vetting and when the company's Proposed Findings and Recommendations are being prepared.

NTSB investigations always seem to happen at inconvenient times. For that reason, every company ought to select and train both a primary and an alternate Party Coordinator, potentially for separate regions. Additionally, the Party Coordinator must be an employee of the company and cannot be an attorney.

Select an In-House Attorney and an Alternate

The need to keep NTSB Investigative Information confidential gives rise to the need for an ethical barrier within the company's Legal Department. Similar to pre- designating and training a Party Coordinator, your client should pre-designate and train an in-house counsel for NTSB issues and an alternate.

This position is also critical to the success of the process. NTSB-specific in-house counsel will inevitably be working closely with NTSB-specific outside counsel and will be the in-house quarterback for vetting communications, the appropriateness and completeness of document productions, and information responses. Responsibilities include working with outside counsel on witness preparation including both on-scene interviews and subsequent interviews of senior corporate witnesses regarding training, professional development, risk management, safety system management and overall safety culture.

Additional involvement can be expected in connection with vetting draft NTSB Working Group Factual Reports, the preparation of Proposed Findings and Recommendations, and in preparation for meetings with the individual Board Members.

Ensure your Client's Emergency Response Team Understands the NTSB Process

The NTSB Party process is not intuitive. It is, of course, critical that the Party Coordinator and those on his or her team understand the process because they will be immersed in it.

Initially it is particularly important for the investigation side of your client's Emergency Response team to understand how their procedures will need to change upon receiving notice that the NTSB will be investigating. Generally speaking, the team will have to coordinate all planned investigative activity through the Party Coordinator to the NTSB IIC for understanding and approval. The NTSB is now running the investigation and the investigative side of your Emergency Response team is assisting. This includes all testing and evidence preservation, including preservation of first-person accounts through witness interviews and statements.

Questions always arise about the best practices for a Company during two windows of time:

1. from notification that the NTSB will be investigating until their arrival; and
2. from the NTSB's arrival until the company agrees to become a Party to the investigation.

Once a Company is on notice that the NTSB will be investigating, it should take whatever steps are necessary before the NTSB's arrival to preserve perishable evidence including evidence that will no longer exist in its immediate post-accident condition by the time the NTSB arrives. To be clear, this does not include testing that can reasonably await the NTSB's arrival. Although the NTSB IIC and his or her team may be in transit and not be available, the Director or Chief of the involved NTSB Modal Office likely will be available so that your team can explain the response work it is doing and why it cannot wait.

Once the NTSB arrives on scene, and even before the Company has become a Party, the anticipated Party Coordinator should obtain understanding and approval from the NTSB IIC for all actions proposed by the investigation side of your Emergency Response team.

One reason to immediately establish contact with the NTSB, and to stay in close touch during the early hours of an investigation, is to reassure the IIC and his or her team that the Company is educated in the NTSB's investigative process and that your Emergency Response team will not embark upon its own investigation without NTSB notice or participation.

Starting on the right foot is important.

A cautionary comment is in order. The NTSB IIC is pulled in many directions at the outset of an investigation. If there is sampling, testing or other work that absolutely positively must be conducted in the early hours of an investigation to avoid losing the opportunity, make sure that your client's Party Coordinator clearly explains the situation to the NTSB IIC in writing. If the IIC is not responsive or prevents that work from being done, your client may want to respectfully run the question up the chain of command to the Chief or Director. The client's NTSB-dedicated outside counsel can assist with related decision-making and these types of communications.

Despite NTSB involvement, your client will be taking care of your passengers, customers, and employees that may have been affected by the accident. The NTSB will understand this and should be able to assist with that goal.

Ensure your Client's Communications Team Understands NTSB Party Restrictions

Your client's Communications Team

will want to acknowledge the situation on behalf of the company, recognize the fatalities, injuries and property damage, share the company's plans to take care of the families of those involved, and attend to all other customers. Before the Company becomes a Party, they are technically free to do all of this in an unfettered manner. After an agreement to become a Party, the Communications Team is limited conceptually to these two messages about the accident itself:

1. Our hearts and prayers go out to the families of those killed in this tragic accident and, of course, to those who were injured and their families.
2. Our Company is working with the National Transportation Safety Board on the investigation of this matter and for that reason federal regulations prohibit us from making any comment about the investigation.

It is often the best practice to adhere to these communication guidelines even before the company is a Party. The second sentence can just assert that the company "expects to be working with" the NTSB. The Communications Team is, however, able to go into detail about taking care of those displaced and how and when the company expects to resume its operations or restore utility services. This is often a very important part of your client's emergency response process.

The NTSB on-site team is often accompanied by a member of the NTSB press office. It is good practice, though usually not 100 percent necessary, to seek approval of proposed press releases by the NTSB press office staff.

It is absolutely forbidden for any Party to publicly discuss the cause of an accident until the NTSB releases its Accident Report which may not occur until 12 or more months after the incident. Similarly, a Party cannot release any information or documents that have not already been released by the NTSB. The consequence of doing so may be a very public rebuke and removal as a Party to the investigation.

Ensure that Senior Management Understands NTSB Party Restrictions

As noted earlier, the Party Coordinator and his or her team must agree to keep NTSB Investigative Information confidential. Pursuant to the "Party Certification," which the Party Coordinator will be asked to sign on behalf of the company, employees on the investigation team may not share NTSB Investigative Information with their co- workers or management or anyone else outside the investigation.

As noted above, however, there is a "safety-need-to- know" exception to this confidentiality. The classic situation is when a Party needs to know how an accident happened in order to consider whether changes in policies or procedures should be adopted, and the Party cannot reasonably be expected to wait until the NTSB announces its findings and probable cause 12 or more months later. How far up the management chain the safety-need-to-know exception might apply likely depends upon the scope of the calamity (or potential next calamity) and the change being contemplated. If a change to a policy or procedure as a result of the accident is to be made, the NTSB IIC must be advised.

A Party's management (all the way up to the Board of Directors) must understand the Party- related agreement as to confidentiality and its very limited exception.

Outside Litigation Counsel Must Understand NTSB Party Restrictions

The NTSB investigation process is always frustrating to a Company's outside litigation counsel. This frustration is typically compounded because outside counsel has often not been included in the Company's NTSB preparation efforts. For that reason, there is value in briefing them or making them a part of any related training.

The primary early frustration is that so many of the usual steps taken by outside litigation counsel to protect the Company cannot be done. This includes preservation of evidence responsibilities, immediate on-scene interviews of key participants, and wide utilization of outside engineering and accident reconstruction consultants to memorialize the scene with photographs, videos and laser scans. Outside consultants cannot enter the incident scene until it is released by the NTSB.

Another source of frustration is that once litigation begins, NTSB Party restrictions often prevent the Company from fully answering the complaints and almost always prevent the Company from fully responding to discovery demands. Litigants and judges are frequently patient in the early months, but are likely to become impatient as time passes.

It is also worth noting that NTSB Factual Reports, which outside litigation counsel played no role in creating, are routinely admissible in civil litigation. These reports are often hundreds of pages long and, because of the NTSB's reputation, their content is usually very difficult to dispute.

Anticipate the Need to Make a Rapid Decision on NTSB Party Participation

Other than for relatively minor aviation incidents, if a calamity is large enough to warrant the NTSB's attention, it is likely a major event for the Company. Because there will be so much activity in the hours after the event, it is extremely helpful when senior management and the legal department have previously analyzed the advantages and disadvantages of Party Status, possibly considering different scenarios in which they may not want to burden themselves with NTSB Party restrictions.

At least one potential Party in recent years decided not to accept an NTSB Party invitation when they believed that the cause of the incident was so clear, that they did not perceive the benefit of vetting Factual Reports and making a Party Submission of Proposed Findings and Recommendations as outweighing the restrictions on communications and the manner in which their own investigation would unfold. That said, should a company decline an NTSB party-to-the-investigation invitation, its customers or the press may perceive that as declining to assist in determining the cause of the accident and how best to prevent other accidents.

The Factual Phase of NTSB Investigations

On-Scene Inquiries: 5-10 days post-incident

The in-house attorney assigned to the NTSB investigation and the Company's NTSB-dedicated outside counsel need to converge on the accident location, along with the pre-designated Party Coordinator, as quickly as possible. A dedicated conference room needs to be requisitioned, with support staff and technology. If the Emergency Response Plan has not already triggered periodic internal coordination conference calls, that should be done. A separate such call will likely have to be coordinated for those involved with the NTSB investigation.

One of the first orders of business for the legal team will be to issue a broad legal hold, inclusive of electronic records, including email. The scope of the hold, including the list of potential custodians, can be expected to grow as the investigation unfolds. Once the scope stabilizes, the Company should consider retention of an outside vendor to conduct a forensic collection. Having control of relevant documents becomes particularly important if the incident is investigated by entities beyond the NTSB and, of course, for anticipated litigation.

NTSB On-Scene Goals: Preserve Perishable Evidence

The NTSB's goal on-scene is to preserve perishable evidence. Very quickly, though, the NTSB will want to begin interviews of individuals with direct involvement, including those assisting with emergency response efforts. It seems to be universally thought by the NTSB that the longer they wait on these interviews the more likely people's memories will become contaminated by what their co-workers have told them, what they hear on the news, what they think must have happened and possibly discussions with company lawyers.

Once the NTSB team arrives they will want to meet with the Incident Commander, if there is one, and the first responders. They will want to assess physical and biohazards and determine when the scene will be available to begin their investigation. The NTSB will invite the Company, federal regulators, state regulators (if any), any involved contractors and the first responders to an organizational meeting at whatever local hotel or other facility the NTSB has chosen as its headquarters in the area. If the NTSB arrives in the morning, the organizational meeting will be that afternoon or early evening. If they arrive in the afternoon, that meeting will likely be early the next day. No lawyers (for the Company or any injured party) or insurance claims people are allowed at this meeting.

The Organizational Meeting is the NTSB's opportunity to introduce themselves, explain the Party investigation process and the Party confidentiality obligations. They will invite the Company, federal regulators, state regulators (if any), any involved contractors and the first responders and sometimes others to be Parties and will ask each of their representatives to sign the NTSB Party Certification on behalf of their organization.

NTSB Working Groups, addressed in the following section, will then be announced, along with the NTSB Chairpersons for each group. The Parties will be asked to staff and provide resources for each group.

These organizational meetings sometimes stop at organizational efforts, but often they go directly into the substantive aspects of the event. If that happens, the Parties may be asked to provide a summary of what they know so far and recommendations as to how best to proceed.

NTSB Control of Site

The NTSB Investigator-in-Charge ("IIC") will want the Company to arrange for 24-hour security at the accident site. He or she will also expect the Company to arrange for any necessary testing. The IIC will demand copies of all test results, pictures and notes from all Parties.

NTSB investigations make use of "Working Groups" to focus on different aspects of an accident. Each Working Group is comprised of a chairperson from the NTSB, additional NTSB investigators, and a representative from each Party. These Party Representatives must have technical expertise in the Working Group's area and (of course) cannot be lawyers.

A major aviation or rail calamity may involve a dozen or more NTSB Working Groups. These may include operations, structures, power plants, traffic control, cockpit or engine voice recorders, flight data or event recorders, weather, human performance and survival factors. Marine, highway and pipeline incidents involve fewer working groups.

NTSB Working Groups coordinate with the IIC on their own requests to the Parties (and others) for information, documents and witness interviews. A Working Group may be on scene for several days coordinating excavation and testing, and then jump right into conducting interviews of operator staff, contractors or others.

Should an NTSB request for information or documents be met with resistance, federal subpoenas are issued without hesitation by the NTSB Office of the General Counsel. The NTSB's investigative authority is broad, and extends even into health and autopsy records for which any civil litigant would need specific authorizations.

While a company should preselect likely Party Coordinators, it is difficult to pre-select members for participation in NTSB Working Groups. These *Party Representatives* are typically local to an incident and must be brought up to speed rapidly on the NTSB process.

The NTSB Interview Process

Witness interviews in NTSB investigations typically take place in the first few days on scene and then mid-way through the factual investigation at a Party's corporate offices. NTSB interviews often feel unusual. The NTSB strives to make them as informal as possible and to put the witnesses at ease in a homey way. They begin with a casual statement by the Working Group Chairman that the NTSB's mission is to prevent future accidents as opposed to finding fault. The interviews are typically recorded rather than having the testimony taken down by a court reporter. There is no formal swearing in or affirmation to tell the truth. While it is felony to lie to a federal agent or obstruct a federal investigation, witnesses are not routinely cautioned about this by the NTSB. These interviews typically move along much more superficially, and more rapidly,

than in a litigation deposition. Witnesses are often asked, in a single question, to provide a brief statement of their educational background and work history along with an explanation of their actions at the time of the incident and why such actions were being taken. Background topics that might occupy hours in a deposition are covered in just a few minutes, and it is rare that there are any follow-up questions. Topics are also often introduced with little or no foundation. For many witnesses this approach is not a problem, but for others it can be very confusing and lead to misunderstandings by both the witness and the questioner.

This summary of the NTSB's approach to on-scene interviews is not intended to criticize. It is important to understand that the purpose of the interview is for the Working Group to quickly learn as much as it can from a witness on certain very specific aspects of the accident. The NTSB knows that the interviews are typically not comprehensive or thorough. Unlike most depositions, these witnesses can be re-interviewed at a later time, or their employer can be asked for any necessary clarification. It is also rare that there is any logical place to start with the interviews. Witnesses may be unavailable, or an interview sequence that makes sense in the morning may be turned on its head by what is learned throughout the day.

The Working Group Chairman always starts the questioning of each witness. The questioning then moves to the other NTSB Working Group members and then to each of the Party Representatives. And then around the room again, and sometimes again. When a Party's employee is being questioned, that Party's Representative might have an opportunity to resolve confusion through clarifying questions. That being said, most Party Representatives have never been involved in, much less trained for, participation in such an interview process. The process is far from perfect, but it seems to work from the NTSB's point of view.

Many NTSB interviews conclude in less than an hour. Most are less than two hours.

Witness Interview Dos and Don'ts

Everyone interviewed by the NTSB is entitled to a *representative* at the interview. As explained by many IICs early in an interview, that representative could be the witness's friend, union steward, parent, lawyer or just about anyone else. In a matter in which there are potential criminal implications, witnesses are often represented at NTSB interviews (if they are willing to be interviewed at all) by a criminal defense attorney. In most investigations, company witnesses are represented at NTSB interviews by the NTSB-specific outside counsel that the company has retained in connection with the NTSB investigation.

With multiple witnesses interviewed day after day on scene, typically only a day or two after the incident, there is often very little time to conduct traditional preparation, even if two or more company lawyers are involved. Of course, at a minimum it is critical that witnesses are instructed to listen carefully to the questions, to answer only the questions asked, to avoid guessing, and to tell the absolute truth regardless of whether they think the truth might be damaging to the company. They need to be aware that it is a crime to lie to a federal investigator.

While an attorney is free to make litigation-style objections at an NTSB interview, such objections are typically not well received. Should a hopelessly compound yes/no question be posed, a knowledgeable outside NTSB attorney will comment "Oh my goodness that sounds like quite a few questions" rather than "Objection, compound question."

For interviews that are recorded, witnesses are provided transcripts of their interviews and offered the opportunity to submit an errata sheet. While witnesses are typically admonished to only propose changes for transcription errors, the better practice is to propose changes to any answers that upon further reflection are incorrect or misleading. The NTSB needs a solid factual foundation upon which to base its findings and recommendations. Failing to propose a correction to an answer that is wrong or misleading does not serve the investigation or the witness.

Regulatory Agencies as NTSB Parties

Federal regulators (FAA, FMVSS, FMCSA, FRA, FTA, PHMSA & USCG) are almost always Parties to NTSB investigations. They typically send a skilled investigator and are active participants on scene and in interviews. That said, these regulators routinely make their own demands for documents and information. The usual request of an IIC is that the NTSB expects to receive a copy of any document or information that is given to any regulator.

State regulators are sometimes Parties. Whether Parties or not, they make their own demands for documents and information. As noted above, any documents that are given to such state regulators likely need to be shared with the NTSB.

Evidence Gathering and Responding to Requests

The first few days of any investigation are filled with informal requests for documents and information, much of which is ultimately not relevant and may not even be read. In fairness, however, early in the investigation it is not clear what will become relevant which results in intentionally broad requests.

Attorneys are accustomed to responding to requests only if they are in writing and only in a reasonable amount of time. Neither can be expected in the case of NTSB investigations. Requests are often made orally with the expectation that whatever is requested will be provided by the next morning. This makes for many long days and nights, and the need to appropriately staff for this situation.

All documents that are supplied to the NTSB in connection with an investigation should be Bates labeled and logged on a Bates index. That index should include the date the document was requested, who requested it, the date it was provided and to whom. If documents were supplied before this process is up and running, duplicate documents that are Bates labeled should be exchanged for the non-Bates- labeled versions. In order to facilitate this process, the administrative team, and likely the Party Coordinator and attorneys involved, all ought to have software capable of Bates labeling and be trained in its use.

The NTSB will not sign non-disclosure agreements, but they will allow a Party to mark documents "CONFIDENTIAL" and

agree to provide notice should they want to use the document in one of their reports or to respond to a FOIA request. Any confidential document provided to the NTSB should be clearly marked "CONFIDENTIAL" on every page.

All responses to requests should flow through the Party Coordinator, regardless of who on the NTSB team made them. All oral responses to NTSB requests made over the course of a day should be followed up that night with polite confirming e-mails. All documents provided in hard copy, on flash drives or attached to e-mails should also be uploaded the same day to the NTSB's FTP website by a Party's staff member whose job it is to keep the NTSB's FTP site up to date, who knows how to use the site, and who understands the NTSB document naming conventions.

It should be presumed that all communications with the NTSB will someday be made public and be subject to discovery demands in litigation.

Internal Communications

As with external communications, it should similarly be presumed that all non-privileged internal communications will someday be subject to discovery demands in litigation. Everyone on the team must understand that a document or communication does not become protected by attorney-client privilege merely because a lawyer is copied, and that attorney- client privilege can be waived if a document or communication is forwarded for a purpose other than to seek legal advice.

NTSB Arrival

The NTSB typically arrives on scene with great fanfare, encouraging the press to cover their arrival. The spokesperson will be one of the five NTSB Members appointed by the President, typically with the IIC standing at his or her side. The NTSB team on a major launch will likely also include:

- the Member and his or her special assistant;
- the IIC;
- other NTSB investigators, including the Chairpersons of the Working Groups that the IIC expects to form;
- a representative from the NTSB press office;
- a representative from the family assistance office (sometimes); and
- an attorney from the General Counsel's Office (sometimes).

It is routine on the first day of an investigation for the NTSB Chairman to request a call with the transportation operator or pipeline operator's chairman or president. The purpose of the call is to confirm cooperation, answer any questions he or she may have about the NTSB investigation that is about to unfold and to offer a direct line of communication should anything go awry.

NTSB Review of the Scene

The NTSB team typically travels straight from the airport to the scene, where they will seek meetings with the Incident Commander, first responders, and the Company. As previously noted, they will assess physical and biohazards. The NTSB typically cannot begin their on-scene work until the site is released to them by the Incident Commander.

The NTSB typically sets up their command center in a large conference room at a local hotel. Because this will likely be the location for their morning and evening internal briefings, out-of-town members of your team should stay at the same hotel. As previously discussed, the organizational meeting is the NTSB's opportunity to introduce themselves and to explain the Party investigation process and Party confidentiality obligations. Parties will be asked to sign the NTSB Party Certification on behalf of their organization. NTSB Working Groups will then be announced, along with the NTSB Chairpersons for each group. The Parties will be asked to staff and provide resources for each group. Frequently, the plan for the day (or the next day if the Organizational Meeting is late), will be announced and comments and suggestions sought.

Ideally, the IIC will provide the Parties access to the NTSB's accident-specific FTP site, along with instructions for its use including a file naming convention. Often, however, this accident-specific site is not set up for several days or even weeks. In the meantime, Parties often volunteer to provide a file-sharing site for the NTSB's temporary use.

Try to be Helpful, but Avoid Informal Interviews

The NTSB team will begin interacting with Company personnel as soon as they arrive on scene. This presents a tricky problem. While the Company will want to be helpful, there will be a concern that an off-hand remark in these discussions will be taken as fact and later result in misunderstandings. Everyone, from the receptionist on up, must be alerted to this concern. When interacting with NTSB personnel, it is important to be courteous and professional. But if a Company employee is asked substantive questions in a conversation with the IIC or other members of the NTSB team, the employee needs to politely refer the NTSB to the Company's Party Coordinator. This is much easier said than done, but it is important.

Initial Press Briefing

There is typically a press briefing, timed to coincide with the national news cycle, each day that a Member is on scene. This is usually the first three or four days following the incident. Subsequently, the NTSB will release news from its DC headquarters.

While press briefings are usually held in large hotel conference rooms with a blue backdrop prominently featuring the NTSB logo, the NTSB will occasionally hold press briefings at an accident scene. The press briefings are carefully planned to involve the release of only basic factual information, often with graphics and illustrations. It is rare for the NTSB to release more substantive information at this stage of its investigation.

Although snippets of these press briefings are often available on the nightly news, or in full on YouTube within a few days, a representative from the Company's NTSB team needs to attend. If confusion arises and there is a misstatement of fact, it needs to be called to the IIC's attention immediately after the briefing. Should the briefing delve beyond fact into opinion, or even announce a likely cause, everyone on the team needs to know as soon as possible.

Day Two - Multiple Parallel Efforts

The second day of an on-site investigation will see multiple parallel efforts by the NTSB Working Groups get under way. It will likely be the day of maximum stress for the Party Coordinator, legal team and staff. Many things will be happening.

The NTSB will focus on gaining an understanding of whatever there is to understand at the scene. They will want instant access to maps and drawings, as well as all maintenance and test data. They will also want construction crews ready to do whatever work needs to be done.

Simultaneously, the NTSB will start compiling a categorical list of people, possibly with some specific names, ahead of interviews that will begin as early as that afternoon, although more commonly starting the morning of Day Three. The in-house legal team needs to be immediately advised in order to identify the appropriate people (if necessary), confirm availability and a location, and do whatever preparation is appropriate and possible.

Throughout the day, the IIC and Group Chairpersons will make oral requests for documents from the Party Coordinator and the Party Members of the Working Groups. The Party Members should immediately advise the Party Coordinator and the legal or administrative team responsible for assembling the information and documents. The NTSB will expect some of the documents immediately, with the balance before the morning meeting the next day.

Because of national news cycles, the daily NTSB press briefing is often as early as 3:30 PM. This can be disruptive because the IIC needs to meet with the Member and his or her team in order to prepare for the briefing and also needs to be present at the briefing in case a question is posed that the Member cannot answer.

At the end of every day on scene, the NTSB IIC will hold a single meeting for his or her staff and all Party Coordinators and Party Members (typically at 5:00 or 6:00 PM) at which each Working Group will summarize its progress that day and confirm plans for the next day. The large group will brainstorm ideas and try to resolve any problems.

At the conclusion of this meeting, the Party Coordinator should speak privately with the IIC to make sure he or she is pleased with the level of cooperation and ask if there is anything more the Company might do to make the IIC's job and the investigation progress more effectively or efficiently.

After the NTSB progress meeting, the Party Coordinator and the rest of the Company's NTSB team will meet to debrief, confirm outstanding information and document requests, and assist the Party Coordinator and Working Group Members with logistical or other issues.

Day Three - Interviews

By the third day of an on-site investigation, interviews are typically moving forward in earnest. Often, two Working Groups will be conducting interviews simultaneously, requiring representation for two company witnesses simultaneously. A common mistake is a failure to appreciate that the Party may have a Party Representative who is serving as a Working Group Member, and therefore will be participating in all interviews with an opportunity to ask questions. That Party Representative will likely never have done anything like this before. He or she needs an explanation of the process and some examples of how best to clarify the record if things get confusing. Witnesses also need to be informed that questions from any fellow employee serving as a Working Group Member are likely intended to clarify the record.

As witness preparation is considered, if there is a reasonable likelihood that criminal charges may be brought against the witness, he or she should be informed of this possibility and offered the opportunity (typically at the Company's expense, although this is a policy decision) of retaining criminal counsel to advise him or her about the interview and, of course, the overall situation.

If there is no reasonable likelihood of criminal charges, the NTSB-specific outside counsel and his or her inside counsel counterpart still need to make a decision whether there is a reasonable likelihood that the interests of the Company and the witness may at some point diverge. If so, the witness needs to be advised, preferably in front of a witness, that the lawyer or lawyers he or she is meeting with represent the Company and not him or her, that the attorney/client privilege for the preparation discussion belongs to the Company and not the witness, and the Company may, at a later time, choose to waive that privilege. Once these issues are addressed, "appropriate preparation" varies. As earlier noted, it is critical that witnesses be given an overview of the process and are told to listen carefully to the questions, to answer only the questions asked, not to guess, and to tell the absolute truth regardless of whether they think the truth might be damaging to the Company. They need to absolutely understand that it is a crime to lie to a federal investigator.

Preparation beyond this level is a matter of judgement. Some attorneys choose not to go much further. Others choose to prepare by reviewing everything the witness recalls and to possibly review associated Company policies and procedures and related documentation.

Absent extenuating criminal or other circumstances, most Companies, as a matter of policy, ask their employees to be represented by the Company's NTSB- specific attorney at NTSB interviews. That said, one of the first questions to all witnesses is who the witness has chosen as a representative at the interview. The NTSB will often want to interview witnesses from any involved third-party contractors. It is not appropriate for a Party's NTSB counsel to represent these witnesses, but it is often in the Party's best interest for the attorney (or union steward, etc.) serving as a representative to have a reasonable familiarity with the NTSB process. The Company should make efforts to familiarize that person as needed.

End of Day Three

The Company should make sure someone from its NTSB team attends the NTSB press briefing. Then, the Party Coordinator needs to again speak privately with the IIC at the end of Day Three to make sure he or she is pleased with the Company's level of cooperation and ask if there is anything more the Company might do to make the IIC's job and the investigation move more

effectively or efficiently.

There is typically a coordination meeting with the Party's NTSB team, which is very important. By Day Three the team should be compiling a formal timeline in tabular form of who did what when as it relates to the accident, with specific references to supporting documentation.

Days 4, 5 and 6 – Requests for Documents and Information

On scene, requests for documents and information can appear to be never ending, even as interviews continue to be ongoing. Daily NTSB press briefings will generally continue only as long as an NTSB Member is on scene to conduct them. An IIC will occasionally be asked to continue the press briefings after the on-scene Member has departed.

Final Two Days On-Scene

Each individual Working Group's Field Notes are important. The NTSB Working Group Chairman typically cannot depart the investigation until their Field Notes are finalized. Working Group members should start talking to the Working Group Chairman about the Field Notes midway through the efforts on scene and offer to assist in any way they can. During these discussions the importance of the Field Notes should be made clear and the earnest desire to carefully review a near-final draft clearly communicated. The concern that almost always materializes is that one or more of the Working Group Chairman will offer little or no meaningful opportunity to review the Field Notes before announcing that he or she is heading off to the airport and needs the Field Notes approved right away.

If the Company's Working Group Member is not satisfied with the Field Notes, or the Field Notes are not complete in some material way, he or she should not sign off on them. The preferred approach is to negotiate for the opportunity to suggest changes or additions and to delay signing off on the Field Notes until logistics allow, such as when the Working Group Chairman has returned home.

NTSB Preliminary Report

For major investigations, the NTSB aspires to release a *Preliminary Report* approximately 30 days after an incident. These reports are typically innocuous and contain only a confirmation of the press coverage in the first few days after the accident. These reports are intended to be purely factual. The NTSB is inconsistent about providing Parties to investigations a realistic opportunity to factually vet these reports before they become public.

Post-Scene Investigative Work

Parties to NTSB investigations should expect a steady stream of requests for information and documents to continue even after the NTSB team has left the scene.

Evidence is frequently shipped to the NTSB laboratory in DC for testing. In the usual circumstance, the Parties are provided an opportunity to provide input as to testing protocols. If a Party has the appropriate expertise, it is often invited to witness the testing. The NTSB will demand copies of any pictures or notes taken by a Party at the testing. The NTSB laboratory reports are routinely, but not always, shared with the Parties.

If there is litigation pending, the Parties are prohibited by their Party obligations from informing the litigants or the court about the testing, even if the testing will be destructive in nature. The best practice for a Party facing such a dilemma is to obtain a specific instruction from the NTSB Office of the General Counsel prohibiting them from advising the litigants about the destructive testing. Furthermore, the testing should be documented as well as possible, with an eye towards future disclosure in litigation, on order to avoid causing prejudice to the opposing parties in litigation.

NTSB "Safety Culture" Interviews

As previously mentioned, the NTSB is primarily focused not just on what happened, but why. In most investigations this leads to a review of documents and information about the Company's training program, professional career development program, risk management, safety system management, and overall safety culture. This review will be followed by interviews with senior management in these areas. More traditional preparation is appropriate for these interviews.

Draft Working Group Factual Reports

Each Working Group will issue its own Factual Report at the conclusion of the factual phase of the investigation. Parties will have an opportunity to review these documents in draft form. This vetting process is particularly important because the documents typically come into evidence in any related civil litigation. This is in contrast to NTSB "Accident Reports" containing the NTSB's ultimate opinions as to factual findings and probable cause along with recommendations on the prevention of future accidents. NTSB Accident Reports are prohibited by both federal statute and regulation from being admitted into evidence in civil litigation.

Parties are typically provided only 10 calendar days to vet a Factual Report that may be 50 to 100 pages long. It is very important to have the correct people push all else aside in favor of carefully reviewing these reports. A page/line document with proposed changes, and the documentation for the changes, should be created as part of this process. Facts that are plain wrong are the low-hanging fruit. The more important changes, however, may be inappropriate innuendo deriving from a lack of context or the drafter's phrasing. There ought not be any opinions in a Factual Report.

Analytic Phase of NTSB Investigations

Party Submissions

One of the privileges of being a Party is the ability to submit Proposed Findings and Recommendations. The NTSB Members will review this Party Submission in conjunction with their review of the draft Accident Report from the NTSB staff.

Typically, a Party receives 30 days from the finalization of the last Working Group Factual Report to submit its Proposed Findings and Recommendations. The level of detail warranted in these documents is directly related to the open and material issues in the investigation. If the probable cause of the accident is hotly contested, the marshalling of the facts in the Proposed Findings and Recommendations can be extensive. If, on the other hand, a Party largely agrees with the content of the

Group Factual Reports, the probable cause is largely agreed upon (even if not formally discussed), and the overall internal belief is that the company has been fairly represented in the safety culture interviews, the Proposed Findings and Recommendations may be less comprehensive.

It is important that a Party's Proposed Findings and Recommendations discuss any changes in the company's policies and procedures intended to prevent future similar accidents or improve the company's safety culture.

Meetings with NTSB Members

Once a Party is advised of the date of the NTSB meeting at which the incident will be discussed, it should attempt to schedule individual meetings with the NTSB Members in the weeks leading up to the meeting date to discuss its Proposed Findings and Recommendations. This will give the Members an opportunity to ask the Company questions if there are any discrepancies between the NTSB staff's draft Accident Report and the Party's submission. It also provides an opportunity to personalize the Company for the Members. The Party Coordinator, senior safety management, and the president, CEO or chairman ought to attend.

Because of the Sunshine Act, these Member meetings must take place individually with each Member. The meetings are typically limited to one hour, with the Member, his or her special assistant and often one of the senior members of the modal office attending.

Public NTSB Meetings

The NTSB holds public "probable cause" meetings in an auditorium in its building in Washington, D.C. at which its staff presents its proposed findings, probable cause, and recommendations for discussion and vote by the NTSB Members. The meetings are typically two to three hours long and are webcast live.

NTSB Safety Recommendations rarely focus on a single probable cause of an individual accident. Rather, the NTSB frequently uses the opportunity to offer broader recommendations to Companies, manufacturers, industry associations, labor associations, regulators, and other interested parties as to how related future accidents might be avoided.

The auditorium is configured to allow those interested in the investigation to attend and listen, but not to speak or otherwise participate. There is a special area set aside for those who were injured in the incident and their families and for the families of those who were killed. The meetings often receive heavy press coverage.

The NTSB releases an Executive Summary of the findings, probable cause and recommendations the day of the meeting. The final Accident Report is typically released within two weeks.

Petitions to Reconsider

NTSB investigations are never closed. If an interested party (even if not a Party to the investigation) disagrees with a finding, determination of probable cause, or recommendation, it can file a Petition to Reconsider with the NTSB. Such petitions must be based upon new evidence or a material clear error in the Accident Report.

NTSB Recommendations

Entities to whom NTSB recommendations are addressed can expect to receive a letter from the Chairperson of the NTSB requesting a response within 90 days "detailing the actions you have taken or intend to take" to implement the recommendations. This letter, NTSB follow-ups and all responses will be prominently posted on the NTSB web site.

The NTSB Office of Safety Recommendations is tenacious and very proud of its record that 80 percent of NTSB recommendations are "acted upon favorably".

Greatwide Dedicated Transport II, LLC v. United States Department of Labor: Whistleblower Claims in Trucking

David Popowski *

The trucking industry is not immune from whistleblower cases. The facts in *Greatwide Dedicated Transport II, LLC v. United States Department of Labor*[1] are more intriguing than usual in transportation decisions. The primary issues include driver hours of service, protected employee activity, recorded phone calls, impermissible use of company information, and handbook language. The employee driver was ultimately awarded $107,940.07 in backpay and $5,000 in emotional distress damages.

Greatwide Dedicated Transport ("**Greatwide**") has approximately fifty distribution centers and employs 3,500 to 4,000 drivers. Among its shippers are the Nordstrom stores. Theodore Huang was a driver employed at the Upper Marlboro, Maryland distribution center. Huang witnessed certain drivers receive additional driving assignments in violation of 49 C.F.R. § 395.3 – *Maximum driving time for property-carrying vehicles*.[2] Notwithstanding this regulation, dispatchers allowed certain drivers to drive over regulated hours. One day, after a driver informed Huang that he was going to drive illegally, Huang decided that he would expose the unlawful conduct and collect evidence to support his discovery.

In order to capture discussions concerning the alleged safety violations, Huang duct-taped a digital voice recorder to a cubicle's outer wall in the distribution center's "bullpen" area and recorded the dispatcher's daily review and assignment of drivers' routes and hours. The bullpen area, which was in a Nordstrom packaging warehouse, was an open floorplan area with desks and cubicle dividers. Huang alleged that the bullpen was often busy, filled with foot traffic. Only a brief portion of the recorded conversations was relevant to the safety violations, and Huang deleted the remainder. On the same day, Huang also removed paperwork belonging to one of the drivers from the center's lockbox. Management at the Upper Marlboro distribution center required its drivers to deposit relevant documentation, including mileage or assigned store routes, into the lockbox after returning from daily assignments.

Huang stated that he easily slipped his hand through the lockbox's opening, removed the driver's log from the lockbox that demonstrated that the driver surpassed permissible hours, took the paperwork home, made copies, and returned it two hours later. The driver's log supposedly included store numbers referencing the delivery locations, delivery receipts and sheets, and a list of all drivers and runs.

Huang, thereafter, sent identical anonymous letters to several management officers relaying his findings on the safety violations. He later confessed to management that he was the author of the letters and emailed management an edited mp3 file and transcription of the dispatchers' bullpen conversation related to the safety concerns.

Approximately, a month later, Huang drew an assignment to drive a double-trailer to Nordstrom locations in Manhattan, New York and Paramus, New Jersey. Greatwide contended that his performance regarding that assignment was defective, on the grounds that he improperly dropped an unsecure trailer.

Greatwide suspended Huang upon his return from the double-trailer drop. A few days later, he received notice that he was under investigation for an hours-of-service violation. And a week thereafter, he was informed that he was being investigated for a security issue.

Later, Huang met with management to discuss his alleged conduct and the following day, Huang received an official Termination Request which stated without elaboration that he was being terminated based on "[m]ultiple company violations."

Huang filed a whistleblower complaint with the U.S. Department of Labor's ("**DOL**") Occupational Safety and Health Administration. An Administrative Law Judge ruled in Huang's favor, ordering Greatwide to pay both backpay and emotional distress damages; and the DOL's Administrative Review Board affirmed.

The DOL found: (i) Huang engaged in protected activity when he wrote anonymous letters to management, removed and copied documents from the lockbox, and recorded a management conversation to support his allegations; (ii) the temporal proximity between Huang's protected

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activity and termination was sufficient to establish that Huang's protected activity was a contributing factor in his termination; and (iii) Greatwide had not established that it would have terminated Huang absent his protected activity.

On Appeal, the Fourth Circuit Court first set for the legal standard for federal transportation whistleblowers as follows:

> "The Surface Transportation Assistance Act ("STAA") includes an "Employee Protections" provision which prohibits discharging, disciplining, or discriminating against an employee "regarding pay, terms, or privileges of employment, because" "the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding."[3]

In 2007, Congress amended 49 U.S.C. § 31105 'to incorporate the legal burdens of proof set forth in the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(2)(B) ('AIR 21').'[4] Pursuant to the burdens of proof set forth in 49 U.S.C. § 42121(b), complainants must present a prima facie case demonstrating by a preponderance of the evidence that: (i) they engaged in protected activity, (ii) the employer knew of the protected conduct, (iii) their employer took an unfavorable employment action against them, and (iv) the protected activity was a contributing factor to the employer's adverse employment action.[5] Once established, the burden shifts to the employer to demonstrate, 'by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that protected behavior."[6] This standard, as a result, is 'more favorable to the complaining employee.'[7]

The Court agreed that Huang engaged in protected activity when he sent letters reporting safety violations, when he removed and copied documents, and recorded the dispatchers' meeting. Regarding Huang's recording of the dispatchers' bullpen meeting, the Court held that under Maryland's Wiretapping and Electronic Surveillance law, protected oral communication is defined as "any conversation or words spoken to or by any person in private conversation."[8] Huang taped the recording device outside of a cubicle wall in the distribution center's bullpen area, which was an open space in a warehouse floor with only cubicle dividers that Huang and any other employee could access. Although the conversation took place over a couple of hours, Huang testified that he only sent a roughly three-and-a-half-minute portion to management that focused on what Huang claims was relevant discussion of the alleged safety violations and deleted the remainder of the recording.

The Court also stated that Huang engaged in protected activity when he removed and subsequently photocopied an "insider" driver's paperwork from the distribution center's lockbox. However, after removing documents from the lockbox, Huang discovered that the driver's log submitted by one of the drivers demonstrated driving hours beyond the permissible maximum. Huang brought driver's log home, photocopied it, and returned it to the lockbox two hours later. When Huang sent his anonymous letters to management, he attached the photocopied driver's log as relevant evidence to support his discovery.

The Court noted that Greatwide's employee handbook does not classify drivers' logs as confidential information or employee data. In fact, the handbook fails to mention drivers' logs altogether. Regardless of the company's policy, Huang's sole intent in collecting and copying the driver's log was to support his safety violation allegations. Thus, his actions rise to the level of protected activity. The Court then held that Huang's protected activity was a contributing factor in Greatwide's decision to terminate him.

Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation.[9] The Court found that Huang sent the anonymous letters to management on April 2, 2012. He disclosed to management that he was the author of the letters on May 14, 2012. He was suspended on May 18, 2012, the day he completed the double-trailer drop to Manhattan and New Jersey, and was officially terminated on May 31, 2012. These events all occurred in just under two months. The Court stated: "Yet, although integral, 'temporal proximity is not necessarily dispositive,' but rather a piece of 'evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has prove[n] by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'"[10]

The burden then shifted to Greatwide to show, by clear and convincing evidence, that Huang would have been terminated absent his protected activity. The Court noted that Greatwide's Employee Handbook does not provide explicit guidance on why this alleged violation would result in termination:

> Among a non-exhaustive list of thirty examples, the Handbook's "Rules of Conduct" section states that 'willful destruction of Company property' is a serious policy violation which is grounds for "disciplinary actions *ranging from a verbal warning to immediate termination of employment.*" Given the broad range of possible disciplinary grounds, and Greatwide's failure to demonstrate that the destruction of comparable company property typically leads to termination, the company has not met the clear and convincing evidence standard that this specific 'serious policy violation' would have resulted in Huang's termination….
>
> Notably, the Handbook is also silent on rules governing trailer dropping and any related disciplinary conduct. Management testified at the hearing that it assumed there was a policy memorialized in the handbook concerning trailer abandonment, but 'if not, it would be something that would be orally passed out at a safety meeting.' [11]

The Court concluded that Huang prevailed under his whistleblower claim, because he engaged in protected activity which was a contributing factor in his termination, and that Greatwide failed to prove that he would have been terminated absent his protected conduct.

In my view, the moral of the story here to motor carriers is: (i) do not violate the hours of service rules; and (ii) do not overwrite handbooks

Endnotes

1 No. 21 1797 (4th Cir. Jun. 30, 2023).

2 Under this regulation, a "driver may not drive without first taking 10 consecutive hours off duty." 49 C.F.R. § 395.3(a)(1). Nor may a driver "drive after a period of 14 consecutive hours after coming on-duty following 10 consecutive hours off-duty." 49 C.F.R. § 395.3(a)(2). During that 14-hour period, a driver may only "drive a total of 11 hours." 49 C.F.R. § 395.3(a)(3). Further, "driving is not permitted if more than 8 hours of driving time have passed without at least a consecutive 30-minute interruption in driving status.

3 49 U.S.C. § 31105(a)(1)(A)(i).

4 *Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 389 (7th Cir. 2010); see also 49 U.S.C. § 31105(b) (stating that "[a]ll complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)").

5 *See Weatherford U.S., L.P. v. Dep't of Lab., Admin. Bd.*, 68 F.4th 1030 (6th Cir. 2023).

6 *Ibid.* at 1040 (quoting 49 U.S.C. § 31105(b)). See also *Maverick Transp., LLC v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 739 F.3d 1149, 1155 (8th Cir. 2014).

7 Formella, 628 F.3d at 389 (citing Addis v. Dep't of Lab., 575 F.3d 688, 690–91 (7th Cir. 2009)).

8 Md. Code, Cts. & Jud. Proc. § 10-401(13)(i).

9 *Supra*, note 1, quoting *Tice v. Bristol-Meyers Squibb Co.*, 2006 WL 3246825, at *20 (A.L.J. Apr. 26, 2006)).

10 *Ibid.*, citing *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (A.R.B. May 26, 2010) (quoting *Dixon v. U.S. Dep't of Interior*, ARB Nos. 06-147, -160, ALJ No. 2005-SDW-008, slip op. at 13 (A.R.B. Aug. 28, 2008)).

11 *Ibid.*

Arbitration Under the Federal Arbitration Act: Has the SCOTUS Changed the Rules? Answer: Not Yet

Miles L. Kavaller *

Southwest Airlines Co. v. Saxon

Several months ago the question of whether the Supreme Court of the United States had redefined the term "interstate commerce" was raised in the context of its decision in *Southwest Airlines v. Saxon*.[1] It affirmed a Seventh Circuit Court of Appeals ruling finding interstate commerce and thus an exemption from the Federal Arbitration Act ("FAA") for a class of workers engaged in foreign or interstate commerce where "[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the [FAA's] enactment in 1925."[2]

Carmona v. Domino's Pizza LLC – *Round I*

As noted in my earlier article, which was published in the February 2023 issue of *TTL*,[3] the impact of Saxon in the Ninth Circuit was immediate, with that court's decision in *Carmona v. Domino's Pizza, LLC*.[4] It affirmed the district court's finding that the FAA exemption for workers who were engaged in foreign or interstate commerce applied, where the Domino delivery drivers delivered orders from the California supply center to franchisees who were also located within California, and rejecting Domino's claim that the goods were not in the same form in which they had arrived at the supply center. The SCOTUS granted and then vacated certiorari and remanded Carmona for reconsideration in light of the holding in *Saxon*.[5]

Carmona v. Domino's Pizza LLC – *Round II*

The Ninth Circuit has now issued its decision, reconsidered and concluded that its original ruling was correct.[6] It relied chiefly on its ruling in *Rittmann v. Amazon.com, Inc.*[7] a case, according to the Ninth Circuit ruling "whose continued validity Saxon expressly declined to address." Unless *Rittmann* is somehow "clearly irreconcilable" with *Saxon*, said the Ninth Circuit, "we are required to continue to follow it". The Ninth Circuit ruling concluded that "[w]e find no clear conflict between *Rittmann* and *Saxon*."

It is hard to overstate the significance of this ruling. *Rittmann* also dealt with §1 of the FAA and it considered whether delivery drivers who transported goods from Amazon warehouses to in-state consumers were engaged in foreign or interstate commerce. After first examining the business of the company for whom the delivery person works, the analysis turned to what *Saxon* later confirmed is the central inquiry: what the relevant class of workers actually did. "AmFlex workers pick up packages that have been distributed to Amazon warehouses, certainly across state lines, and transport them for the last leg of the shipment to their destination". And the opinion concluded that because the Amazon goods shipped in interstate commerce were not transformed or altered at the warehouses, the entire journey represented one continuous stream of commerce.[8] The *Carmona* ruling, now reconsidered and affirmed after *Saxon*, did not change the Rittman rationale.

Notably, the *Carmona* decision rejected Domino's argument that *Rittmann* does not control based on its assertion that unlike Amazon customers, Domino's franchisees do not order the goods until after they arrive at the warehouse. The analysis, however, is not how the purchasing order is placed, but rather whether the D&S drivers operate in a single, unbroken stream of interstate commerce that renders interstate commerce a central part of their job description. The timing of an order is itself not dispositive of whether goods remain in the stream of interstate commerce. See *Walling v. Jacksonville Paper Co.*[9]

Further, the analysis goes on to observe that a pause in the journey of the goods at the warehouse alone does not remove them from the stream of interstate commerce.[10] Accordingly, because the goods in *Carmona* were inevitably destined from the outset of the interstate journey for Domino's franchisees, their brief pause in that journey at the supply center did not affect the character of the transportation.

Finally, Domino's cited *A.L.A. Schechter Poultry Corp. v. United States*,[11] arguing that the interstate journey ended at the supply center because the goods were repackaged there. No said the Ninth Circuit. In contrast to *Schechter*, which involved chickens slaughtered at the poultry company and only then delivered to local buyers, the relevant ingredients in this case said the opinion are unaltered from the time they

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arrive in the supply center until they are delivered to franchisees.[12]

At least for the time being the scope of interstate commerce remains unchanged. Accordingly, those who arrange for last-mile interstate motor carrier transport must have FMCSA registration as a broker as do the motor carriers who perform the transport. Cargo claims involving this traffic are still subject to the Carmack Amendment. And of course, the workers cannot be compelled to arbitrate under the FAA.

Endnotes

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3 Kavaller, Miles L. "Arbitration Under the Federal Arbitration Act: Has the SCOTUS Changed the Rules?" *The Transportation Lawyer*, February 2023. V.4. No. 4 at 23.
4 21 F.4th 627 (9th Cir. 2021).
5 *Domino's Pizza, LLC v. Carmona*, 143 S.Ct.361 (2022).
6 *Carmona v. Domino's Pizza LLC* (2023), No. 21-55009 (9th Cir. 2023).
7 971 F.3d 904 (9th Cir. 2020).
8 *Ibid.* at 915-17.
9 317 U.S. 564, 570, 63 S. Ct. 332, 87 L. Ed. 460 (1943).
10 *Ibid.* at 568 ("The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey."); *id.* ("[I]f the halt in the movement of goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. see also *Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 241 (1st Cir. 2023) (holding that an employer's "use of its own employees to carry the materials for the last part of each interstate journey does not turn the journey into two unconnected trips").
11 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).
12 *Immediato v. Postmates, Inc.*, 54 F.4th 67, 78 (1st Cir. 2022), upon which Domino's also relies, is similarly inapposite: the products delivered in that case were transformed from their constituent ingredients into meals before the plaintiff drivers delivered them.

The Half-Life of *Andrews*: Shielding Against Nuclear Verdicts in Canadian Law

Pui Hong and Kieran Boyko*

Introduction

Werner Enters. v. Blake[1] epitomizes the phenomenon of nuclear verdicts that have proliferated within the U.S. tort system. The recently affirmed $100+ million award easily surpasses the commonly used $10 million threshold for such verdicts and reifies concerns of defendant liability that developed concurrently. First, Werner's proximate causation was apportioned at 70% despite the plaintiffs' driver having crossed a 42-foot-wide median before colliding with Werner's oncoming truck (the driver for the plaintiffs was 16% liable while the Werner driver was 14% responsible).[2,3,4] Second, this decision rejects application of the admission rule creating further liability exposure for employers, especially where nuclear verdicts are a possibility.[5] But these concerns are secondary to the problem of nuclear verdicts themselves.

While a single such verdict would render these concerns irrational, broad-scale data demonstrates a statistically significant increase in both frequency and amount.[6] For instance, an analysis of 1,376 nuclear verdicts between 2010 and 2019 found that the median award increased by nearly 28% over this 10-year period while inflation rose by only 17%.[7] Notably, the median award in auto accident cases experienced a 63% increase over that period.[8] That same analysis also found across-the-board increases in the annual number of nuclear verdicts, regardless of the overall size of the verdict.[9]

The prevalence of civil juries in nuclear verdicts somewhat reduces data, but available information shows that non-pecuniary damages constitute the majority of nuclear verdict awards.[10] This is especially true in the realm of negligence-based nuclear verdicts that typically lack punitive damage awards.[11] While punitive damages can feature heavily, their contribution is lessened by the U.S. Supreme Court's adoption of due process controls which limit their total amount.[12]

Limiting general damages to a specified amount also impacts the process of reaching a nuclear verdict. This is most clearly illustrated by the inverse relationship between state caps on general damages in general tort and personal injury actions, and the prevalence of nuclear verdicts between states[13,14] For instance, there is no overlap between states that limit general damages and those states with the most nuclear verdicts on a per capita basis.[15]

But how did we get here? Or, more exactly, how did the law of non-pecuniary damages circumvent tort law's rationality and predictability in terms of measuring and predicting damage awards?[16] Unsurprisingly, the causes are multivariate.[17] Yet, using a comparative perspective at this stage highlights the prevalence of nuclear verdicts in the U.S. as a distinct product of legal fission. Much of this divergence is explained by the principles adopted into Canadian law by *Andrews v. Grand & Toy Alberta Ltd.*[18] Consequently, the analysis within this paper limits its scope to the diverging factors entrenched by *Andrews:* (i) the specific theoretical approach to damage assessments and its impact on appellate review, and(ii) caps on general damages.

Andrews and McCliggot

Concerned with the potential of extravagant damage awards becoming a reality in Canada, in 1978 the Supreme Court of Canada released a trilogy of decisions that reformulated and codified the Canadian approach.[19] Yet, the significance of non-pecuniary damages to the phenomenon of nuclear verdicts[20] highlights *Andrews* as the decision of primary importance.

The significance of *Andrews* flows from its establishment of 2 principles as features of Canadian law: a cap on non-pecuniary damages, and the use of a 'functional' approach when assessing such damages. Other principles may also distinguish the Canadian and U.S. approaches, but these other features have been less impactful in limiting non-pecuniary damages in Canada. Rather, the *Andrews* principles are continually featured in decisions that limit or reduce an award of non-pecuniary damages.

McCliggot v. Elliott[21] provides a contemporary use of the *Andrews* principles which enables a more useful comparison to the relatively recent phenomenon of nuclear verdicts. *McCliggot* is an appeal on the issue of non-pecuniary damages.[22] Ms. Elliott, the plaintiff, sustained soft tissue injuries resulting from a motor vehicle accident. Her civil case was tried by a jury[23] that awarded her damages, most of which constituted non-pecuniary damages. This

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is partly due to Ms. Elliott's credibility as a witness, but more a result of Ms. Elliott's emotional pain derived from combined losses which affected her ability to continue in her chosen career, as well as to care for her children.[24]

The Functional Approach in *Andrews and McCliggot*

The functional approach shields against the fallout of nuclear verdicts in two respects: its distinct approach to assessing general damages, and appellate review.

Justice Dickson in *Andrews* introduced three proposals to regulating general losses.[25] The conceptual approach regards the body and its constituents as chattels with an objectively discernable value that is independent of subjective appreciation of that bodypart.[26] The personal approach regards personal injury in terms of the subjective loss of satisfaction and enjoyment experienced by the particular individual.[27] Finally, the functional approach incorporates the individual subjectivity of the personal approach but rejects the focus on loss of satisfaction and enjoyment.[28] Rather, the appropriate level of non-pecuniary compensation is a direct reflection of that required to provide "reasonable solace for [the] misfortune [of the victim]".[29]

But how does providing reasonable solace differ from providing a monetary award determined on the basis of a sympathetic hedonic calculus whereby more pain equals a larger award, as some scholars have described the U.S. approach.[30] The functional approach does not consider the gravity of injuries in a vacuum. Rather, it also considers the capacity of an award to ameliorate the individual suffering of a plaintiff based on their experience of the pain.[31] In this sense, ensuring that general damages provide *reasonable* "solace"[32] necessitates resisting a blanket 1:1 correlation between the presumed level of suffering and the number of general damages awarded.[33] The result is a large degree of variation in general damage awards for the same injury strictly speaking.[34]

In addition to general damages being 'reasonable', the functional approach also established that the purpose of general damages is providing "solace" to the injured party via fair monetary awards.[35] Solace does not entail a sympathy-driven response whereby general damages crudely reference the "pain suffered or expected to be suffered" by a plaintiff.[36] Rather, it entails considering the real-world "arrangements", beyond those directly related to the injury, that can make life more pleasurable for the plaintiff.[37] General damages under this approach are only compensatory because they reference the cost of these material arrangements.[38] Yet, the functional approach also considers the fairness of awards, judged by reference to preceding decisions in a quasi-market approach discussed later in more detail.[39] In deciding that it was difficult to imagine an individual losing more than Andrews and concurrently setting his general damages at $100,000, the rough parameters of a *functional* market for pain and suffering were set.[40] Unsurprisingly, pricing within this market depends on the material arrangements capable of increasing the pleasure in a plaintiff's life given their particular suffering.

The functional approach and related extension of appellate review, clearly demonstrated in *McCliggot*, is critical to safeguarding against nuclear verdicts in Canada. At trial, a jury awarded Ms. Elliott $350,000 which was reduced to $250,000 on appeal.[41] Fairness is evaluated on appeal by looking to various comparator cases. Since the functional approach is concerned with the unique suffering caused by a loss, any useful comparison must share the central feature of Ms. Elliott's loss – her emotional pain.[42] Cases sharing only physical injuries cannot serve as the basis for review under the functional approach.[43] This is why cases suggesting general damages of $100,000 were rejected as a comparison. But it is also why the jury verdict of $350,000 was susceptible to reduction. *Andrews* assures that general damages provide reasonable solace in a fair manner. $350,000 may in fact be reasonable solace, depending on the jury's appreciation of Ms. Elliott's pain and suffering. But the award lacked fairness considering it neared the upper limit for general damages despite Ms. Elliott's subjective suffering being less than plaintiffs who receive the maximum amount. Having identified a single fair comparison at $250,000, the jury's award was reduced accordingly.

Cap on Non-Pecuniary Losses

Justice Dickson in *Andrews* established $100, 000 as an upper limit on awards of non-pecuniary losses with the goal of increasing assessability and predictability. This cap is adjusted for inflation since *Lindal v. Lindal*.[44] Yet, understanding the cap requires again considering the functional approach and general compensation. Non-pecuniary damages under the functional approach are unconcerned with future care because this is the paramount consideration of courts when assessing pecuniary damages.[45] This allowed policy considerations, namely the social and economic burden of extravagant awards, to weigh heavily in the court's decision.[46] Accordingly, it is entirely reasonable that large amounts for general damages should not be awarded.[47] Pecuniary compensation, specifically that related to future care, covers the assistance, equipment or facilities required to care for the direct injury of the plaintiff.[48] General damages, as discussed above, extend to any additional arrangements which can add pleasure to the plaintiff's life despite their subjective suffering. However, any controlling measures must also be compatible with the functional approach since the direct translation of any physical injury into a categorized award perverts the compensatory nature of general damages.[49] Consequently, the upper limit is applied as a layer on top of the functional approach. General damages are first assessed and awarded using the functional approach, but any amount awarded above the upper limit must be reduced accordingly.

Implementing the goals of assessability and predictability were facilitated through the upper limit's derivative effects: the creation of a functional market and exchange rate for pain and suffering, and interjurisdictional uniformity in award amount. These factors similarly diverge from the U.S. approach, influencing a reduction in the number of general damages awarded within the Canadian context. Ultimately, the effect is protective against

nuclear verdicts.

The upper limit, as mentioned prior, provided the framework for a market within the functional approach which created a level of predictability and assessability not seen in the American context.[50] Andrews' experience represented a maximum amount of pain and suffering as it is considered under the functional approach. Virtually all other variations of pain and suffering must fall somewhere below the upper limit. Decisions after *Andrews* contributed to a tariff system which confirmed that the upper limit and related market for pain and suffering are not a strict function of the gravity of an injury.[51] Rather, jurisprudence has adhered to the functional approach. The resulting market provides relatively greater predictability and ensures the primary contributor to nuclear verdicts is bounded. Importantly, a lack of these principles in this context have been consistently identified as contributing to rising damage awards.[52] Without a market embedded in the functional approach, American awards lack a reliable point of reference for both award and review. The result is sympathy-driven awards where the amount roughly corresponds to the presumed level of pain and suffering that the individual will experience.[53]

The continued impact of *Andrews'* focus on regional consistency should not be overlooked in safeguarding against nuclear verdicts. Compensation for non-pecuniary losses that are roughly similar under the functional approach should not vary significantly across Canadian jurisdictions. Operating on the basis of commensurate compensation, the Court denied that mere location of residence entitles a plaintiff to greater or lesser compensation for their suffering. Not so in the U.S. context. States without a cap on non-pecuniary damages regularly host nuclear verdicts, while the nine states with a cap for personal injury claims do not.[54] Available data clearly shows that the ten states with the most per capita nuclear verdicts do not limit non-pecuniary damages outside of medical malpractice cases.[55] This is unsurprising given the overall significance of non-pecuniary damages to nuclear verdicts as discussed above.

Conclusion

Nuclear verdicts host a confluence of factors. But diverging perspectives on non-pecuniary damages help to explain the phenomenon. The functional approach and upper limit established in *Andrews* and upheld in subsequent jurisprudence act as guardrails in the assessment of damages that prevent nuclear verdicts in Canada. Conversely, the U.S. system's reliance on sympathetic calculations whereby the trier of fact translates severe pain or suffering into large non-pecuniary awards has led to greater unpredictability and inconsistency in compensatory assessment. The absence of a specific cap for such verdicts has further facilitated the rise of nuclear verdicts. Nevertheless, while Canada's legal system demonstrates reliable safeguards against nuclear verdicts, maintaining this effectiveness requires continued evaluation. Striking the right balance between compensation for victims and safeguarding against excessive awards necessitates ongoing deliberation and dialogue.

Endnotes

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19 Benedek, Donna. (1998) "Non-Pecuniary Damages: Defined, Assessed and Capped." 32 R.J.T.n.s. 607, pages 607-660. https://heinonline.org/HOL/LandingPage?handle=hein.journals/revjurns32&div=27&id=&page=
20 *Supra.* 6 at 11.
21 *McCliggot v. Elliott*, 2022 BCCA 315.

[22] *Id.* at para. 37
[23] While the jury trials in criminal and civil cases are a constitutional right under the U.S. legal system, civil jury trials are not a constitutional right in Canada. Whether a civil case is eligible to be tried by a jury depends on the type of claim, such eligibility varying from province-to-province. Where a trial by jury is permitted, it is not automatic, in fact, the plaintiff must make application to the court.
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[25] *Supra.* 18 at para. 261.
[26] *Id.*
[27] *Id.*
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[29] *Id.*
[30] Abel, Richard. (2006) "General Damages Are Incoherent, Incalculable, Incommensurable and Inegalitarian (but Otherwise a Great Idea)." DePaul Law Review Volume 55 Issue 2, at 270-271. https://via.library.depaul.edu/law-review/vol55/iss2/3
[31] *Supra.* 21 at para. 44.
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[35] *Supra.* 18 at para. 262.
[36] *Id.*
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[38] *Id.* at para. 263.
[39] *Id.* at paras. 261 and 263.
[40] *Supra.* 21 at para. 46.
[41] *Id.* at para. 5.
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[50] *Supra.* 21 at para. 46.
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Drone Regulation in Canada: Proposed Rules for BVLOS and Medium-Size Drones

Sairam Sanathkumar*

In the climax of Dave Eggers's 2013 dystopian novel, *The Circle*, protagonist Mae Holland, who is employed at the world's most powerful tech company, The Circle (a malevolent combination of all of Big Tech), deploys a phalanx of drones against her ex-boyfriend Mercer to relentlessly record and livestream his movements and interactions. Mercer has been critical of the invasive surveillance and data-gathering practices of The Circle. These drones are equipped with high-resolution cameras and their footage is broadcast in real-time to The Circle's global audience, turning Mercer's life into a public spectacle. Mercer eventually loses his mind and fatally crashes his truck in a bid to flee the drones.

The kind of drones in that climax, known today as beyond visual line-of-sight (**"BVLOS"**) drones, are mostly used in the real world for rather benign and beneficial purposes. Yet, they are not beyond legal regulation chiefly for preventive reasons.

Proposed Amendments

Canada quietly became one of the first countries globally to introduce rules for BVLOS and medium-size drone operations. The proposed amendments to the Canadian Aviation Regulations (**"CARs"**), announced on June 24, lay down new requirements to address the increased risks of:

a. medium drones between 25 and 150 kgs flying within visual line-of-sight (**"VLOS"**) and over people in both controlled and uncontrolled airspace; and

b. drones that weigh between 250 grams and 150 kgs flying beyond line-of-sight in unpopulated and sparsely populated areas, below 400 feet above ground level and in uncontrolled airspace.

Neither operation requires a Special Flight Operation Certificate (**"SFOC"**) anymore. SFOC is a permission – based on a case-by-case assessment – from Transport Canada for specific drone flight operations under special conditions.

Transport Canada groups the new requirements into "3 Ps": the Pilot (pilot training and certification), the Product (aircraft and supporting systems) and the Procedures (operational rules). The three chief objectives of the amendments, according to Transport Canada, are:

i. regulatory predictability, economic growth and innovation that allow the Canadian drone industry to remain competitive in the global drone market while allowing the safe use and testing of drones in lower-risk environments and ensuring a relevant knowledge base for pilots;

ii. safety risk mitigation for other airspace users and people on the ground while permitting the safe use and testing of drones in lower-risk environments; and

iii. introduction of new and updated fees for services related to drone activities. These fees aim to recover a share of the costs of Transport Canada providing services to those who benefit from the activities.

The amendments will have a staggered implementation. Certain provisions will be effective on publication in the *Canada Gazette*, Part II, such as the registrability of drones, submission of declarations and sitting for new pilot exams. Others will be effective April 1, 2025, namely carrying out operations with medium-size and BVLOS drones in lower-risk environments.

The 90-day consultation period ends on September 22, 2023.

Quick History

In January 2019, the federal government, under Part IX (Remotely Piloted Aircraft Systems) of the CARs, published the first set of rules for VLOS drones that weigh up to and including 25 kg. The rules, which came into force on June 1, 2019, formed a baseline for future regulatory projects including the current proposed amendments, addressed safety concerns and created a flexible and predictable environment for small drones flown within the operator's visual range.

The CARs do not make a distinction between recreational and non-recreational use (the former are likely to be "basic" operators and the latter "advanced"). They apply irrespective of whether drones are flown for research, recreation, business or commercial use. Transport Canada reports that nearly 90,000 drones have been registered in Canada to date and this number grows daily.

Subsequently, Transport Canada launched a secure Drone Management Portal for registering, deregistering, transferring ownership and viewing ownership certificates of drones, taking online pilot exams and to apply for and access pilot certificates.

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The Purpose of Regulation

Transport Canada expressly declares that "drones are aircraft – which makes you a pilot." The logic behind clubbing this piece of aerial equipment with large aircraft has been called into question in the past, and appositely so. The regulations, in general, beg the question whether Transport Canada is the appropriate authority to regulate drones' movements in the uncontrolled airspace, i.e., airspace where no air traffic control is provided and is closest to the ground level.

BVLOS drones are not controlled within the operator's direct visual range. Their movements can be monitored with a visual aid like a video feed or be programmed for flight, including to manoeuvre obstacles and return to base. To this end, easing the approval process by eliminating the need for a SFOC (subject to specific thresholds for altitude, weight and venue) is a step in the right direction for both the users and the government.

However, all pilots under the proposed amendments must undergo an updated pilot certification regime and other new operational procedures and requirements. It seems to be regulatory overreach that these requirements also apply to recreational users who fly drones at low altitudes and away from populated areas and away from aerodromes. Why govern such low-risk leisure activity with a bureaucratic hand?

One way to enforce safe recreational use of drones without encumbering the users with paperwork or process is to make remote ID technology mandatory. This would improve the users' awareness of the airspace and enable authorities to identify and monitor recreational drones in real-time. Stringent regulations on geofencing – a geographical boundary-defining function that ensures the equipment does not fly beyond the boundaries – would go a long way in preempting untoward security incidents involving recreational drones. Industry associations have made proposals along these lines in the past and countries around the world are in the process of codifying these into law. Canada would do well to do the same, considering that most drone users in the country are recreational.

Official Languages Up in the Air: the Status of Bilingualism in Canadian Airports

Bennet Misskey*

In two recent decisions by the Federal Court of Canada, the St. John's International Airport Authority (the "SJIAA") and the Edmonton Regional Airport Authority (the **"ERAA"**) were ordered to pay thousands of dollars in damages for violations of their obligations under the *Official Languages Act*.[1]

If upheld on appeal, these decisions could significantly expand the scope of bilingual service requirements expected of a number of local airport and port authorities across the country.

The Background

On June 21, 2019, Michel Thibodeau (**"Mr. Thibodeau"**) brought an application against the SJIAA in the Federal Court of Canada under para. 77(1) of the *OLA* seeking declaratory relief, damages and a letter of apology.

The application was based on six complaints Mr. Thibodeau had filed with the Office of the Commissioner of Official Languages (the **"Commissioner"**) under section 58 of the *OLA*. In these complaints, Mr. Thibodeau criticized the SJIAA for:

- having an exclusively English presence on social medial such as Facebook, YouTube and Instagram;
- having a website with an English-only URL and of which the French version was not of equal quality to the English;
- publishing its press releases in English only;
- making certain documents on its website, including its annual reports and master plan, available in English only;
- posting content on Twitter almost exclusively in English; and
- having certain signs on ATMs in the airport only in English.

When he filed the above complaints, Mr. Thibodeau had not visited the St. John's Airport himself. He ascertained the facts through research on the Internet.[2]

Referring to himself as an "ardent defender of language rights," Mr. Thibodeau is no stranger to claims involving language rights. Between January 2017 and mid-2019, he filed more than 200 complaints with the Commissioner against various federal institutions subject to the *OLA*. Mr. Thibodeau has also appeared as a self-represented litigant before all levels of the courts, including the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada on language issues.[3]

The complaints filed by Mr. Thibodeau against the SJIAA were the subject of two separate reports published by the Commissioner, which determined the complaints to be founded and recommend that the SJIAA ensure, within six months, that all content posted on its website (including annual reports and press releases) and on social media be of equal quality in both official languages.[4]

Based on the Commissioner's findings, Mr. Thibodeau asked the Federal Court to also find that the *OLA* had been breached and to order the SJIAA to issue a letter of apology and pay him damages.

Mr. Thibodeau brought a separate application in the Federal Court of Canada against the ERAA based on similar complaints filed with the Commissioner respecting its website and presence on social media platforms Upon review, the Commissioner found these complaints were also founded.

The St. John's Decision and the Edmonton Decision

On April 21, 2022, Justice Sébastien Grammond issued a judgment in *Thibodeau v St. John's International Airport Authority*, 2022 FC 563 (the **"St. John's Decision"**)[5] allowing Mr. Thibodeau's application and ordering the SJIAA to pay costs in the amount of $11,000.

Adopting an expansive interpretation of language rights obligations, Grammond J. concluded that the SJIAA failed to comply with the *OLA* by communicating in English only on social media and by failing to ensure that its website is fully bilingual. In arriving at this conclusion, Grammond J. held that the SJIAA's official language obligations are not limited to information that is "traveler-relevant" and that its communications with the general public must also be bilingual.[6]

Simultaneously with the St. John's Decision, Grammond J. issued another judgment in favour of Mr. Thibodeau in *Thibodeau v Edmonton Regional Airport Authority*, 2022 FC 565 (the "Edmonton Decision") granting similar relief against the Edmonton Regional Airport Authority for largely the same reasons.

The SJIAA, along with other local airport authorities in Canada, maintain that

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the interpretation of language rights obligations endorsed in these decisions departs from past practice and what they have understood the scope of their obligations under the *OLA* to be.

With validation from the Commissioner and the Federal Court of Canada, Mr. Thibodeau has brought other claims seeking similar relief against not-for profit local airport authorities in Canada for alleged violations of their language obligations under the *OLA*.

The Appeals

The St. John's Decision and the Edmonton Decision are currently under appeal before the Federal Court of Appeal. These appeals involve several intervenors, including the Commissioner and the Canadian Airports Council (the **"CAC"**), which represents over 100 Canadian airports, including the 22 airports in all provinces operated by the 21 Local Airport Authorities subject to the *Airport Transfer (miscellaneous Matters) Act*[7] (the ***"Transfer Act"***). Central to these appeals is the issue of whether local airport authorities are subject to what is known as the "head office rule" under the *OLA* and the scope of the "travelling public" served by airports.

The Head Office Rule

It is common ground that the SJIAA is subject to the "travelling public" regime under section 23 of the *OLA*. That is, the SJIAA acknowledges that it is already required to serve the travelling public in both official languages by virtue of the fact that it meets certain regulatory thresholds (i.e., the total number of passengers per year exceeds one million and its airport is located in a provincial capital).

What is contested is whether, in addition to its obligations under s. 23 of the *OLA*, local airport authorities like the SJIAA are also subject to special "head office" requirements set out in s. 22 of the *OLA*. Under this regime, the SJIAA would be required to ensure that all of its communications to the "general public" be accessible and of equal quality in both official languages, regardless of whether such communications were intended for use by the travelling public.

Section 22 of the *OLA* only requires a federal institution to provide communications and services to the general public in both official languages if one of three conditions are met: i) the facility is the head or central office of a federal institution; ii) it is located in the National Capital Region; or iii) there is significant demand for communications and services in both official languages.

On the last criterion, paragraph 5(1)(a) of the *Official Languages Regulations* clarifies that there is "significant demand" where the office or facility of a federal institution is located in a census metropolitan area that has at least 5,000 persons of the French or English linguistic minority population.

Based on the facts as found by the Federal Court of Canada, the SJIAA is not located in the National Capital Region, nor is it located in a census metropolitan area that has at least 5,000 persons of the French or English linguistic minority population.

As a result, the question of whether the SJIAA has a duty to be fully bilingual in all interactions with the general public hinges on whether Parliament intended to impose the requirements of a head or central office of a federal institution on local airport authorities when it transferred responsibility to them for the operation, management and development of Canadian airports. In interpreting s. 4(1) of the *Transfer Act*, Grammond J found that section 22 should apply to the SJIAA and the ERAA as head offices of a federal institution or facility.

It is noteworthy that when airports were still operated by the federal government, the bilingual services at a particular airport depended on whether there was significant demand for those services. The only office subject to the "head office rule" was Transport Canada's head office in Ottawa. Therefore, the Federal Court of Appeal must address whether, in passing the *Transfer Act*, Parliament intended to impose a higher standard of language rights compliance on privatized airports than on government-operated airports.

Conversely, if it is found that Parliament intended to preserve the official language obligations that applied to government-operated airports before privatization, thereby excluding the "head office" rule under s. 4(1) of the *Transfer Act*, then the SJIAA's official language obligations would extend to serving the travelling public, which it already acknowledges.

Who is a member of the Travelling Public?

In the St. John's Decision, Grammond J. determined that "travelling public" included both those actually using the airport to fly from one place to another by obtaining a travel document and non-travelers, such as those who take a coffee at the airport restaurant. He went on to conclude that: "[u]nless otherwise stated, one must presume that [the local airport authority]'s social media presence is mainly targeted at the people to whom the [local airport authority] provides services, that is, members of the travelling public."

It should be noted that the SJIAA, like several other local airport authorities, has bilingual content on its website intended for use by the travelling public and English only content on its website and social media accounts that appear to be intended for distinct target audiences. For example, should a request for proposals to refurbish the airport's lighting system be treated as intended for use by the "travelling public?"

The outcome of the above issues for the SJIAA, the ERAA, and other similarly situated airport authorities is significant. If it is determined that the head office rule applies, or that all business and communications published by a local airport authority are presumptively intended for the travelling public, then almost all publicly available documents and communications the airport authority produces must be simultaneously bilingual, whether inside or outside the airport, regardless of whether there is significant demand for those communications or whether they are intended for use by those who are actually using the airport's services for travel.

In the meantime, stakeholders can only wait for guidance provided by the Federal Court of Appeal on these issues.

Endnotes

1 R.S.C., 1985, c. 31 [the *OLA*].
2 St. John's Decision at para 15/
3 See, for example: Air Canada (Re) (2004), 2004 CanLII 73244 (ON SC), 71 OR (3d) 784 (SCJ) [Air Canada (Re)]; Thibodeau v Air Canada, 2004 FC 800; Air Canada v Thibodeau, 2007 FCA 115, affirming Thibodeau v Air Canada, 2005 FC 1156 and Thibodeau v Air Canada, 2005 FC 1621; Air Canada v Thibodeau, 2011 FCA 343; Air Canada v Thibodeau, 2012 FCA 14; Thibodeau v Air Canada, 2014 SCC 67, affirming Air Canada v Thibodeau, 2012 FCA 246; Thibodeau v Halifax International Airport Authority, 2018 FC 223; Thibodeau v Air Canada, 2019 FC 1102 and Thibodeau v Canada (Senate), 2019 FC 1474.
4 St. John's Decision at para 16/
5 Affidavit of Zenny Amancio, sworn June 16, 2023 at para 9 [the **"Amancio Affidavit"**].
6 St. John's Decision at para 2.
7 SC 1992, c 5.

In Memoriam

THE HON. DAVID WILLIAM GRUCHY, Q.C.

1932-2016

CTLA was recently advised of the passing of **The Honourable David W. Gruchy**, who passed away peacefully at home on Sunday, May 22, 2016 at the age of 84.

Justice Gruchy was born in Bishop's Falls, Newfoundland to Philip and Evelyn (Baird) Gruchy on March 17, 1932. He was raised in Grand Falls, Newfoundland and attended Bishop's College School in Lennoxville, Québec and King's College School in Windsor, Nova Scotia. In 1951 he attended the University of King's College in Halifax, where he would have the good fortune to meet and fall in love with Helen Elizabeth "Betty" Stayner. They married in 1958.

In 1954 he enrolled at Dalhousie Law School and graduated in 1957. After Articling with R. Lorne MacDougall, Q.C. in Truro he was admitted to the Bar and began his professional career in partnership with Mr. MacDougall as Burchell, MacDougall and Gruchy. From 1958 to 1990 he practiced labour, municipal and administrative law, and civil litigation. He was Solicitor for the Town of Truro from 1975 to 1990. He received his designation as Queen's Counsel in 1974.

Justice Gruchy served as President of the Canadian Transport Lawyers Association (1988-1989) and as Vice-Chair of the Law Foundation of Nova Scotia. He was a founding member of the Truro Industrial Commission, served on the Bar Counsel of the Nova Scotia Barristers Society and was active on various committees of the Canadian Bar Association. He was appointed to the Supreme Court of Nova Scotia, Trial Division, on July 6, 1990, and retired in 2017.

The CTLA extends its deepest sympathies to Justice Gruchy's family and friends.

WILMER "BILL" B. HILL

1928-2010

TLA just received notice that Past President **Wilmer Bailey Hill** (always known as Bill or Billy) passed away on March 21, 2010. Bill was born on May 18, 1928, in Washington, D.C., to Wilmer A. and Matilda Neighbor Hill. He spent his youth in the D.C. area and graduated from Roosevelt High School. Bill earned his Bachelors degree from Dartmouth College where he was a member of Sigma Alpha Epsilon, and he was always proud to wear the Dartmouth green. After graduating with a Masters from Georgetown University School of Law, he spent one and a half years in the U.S. Army Signal Corps in Korea.

In 1967, he married the love of his life, Joan Brunelle, whom he affectionately called "Goodie." They enjoyed living in D.C. and Chevy Chase, Maryland.

Bill was a partner in Ames, Hill & Ames, a transportation law firm co-founded by his father. Following deregulation, Bill dissolved the law firm and practiced on his own for a few years. Bill served as President of the TLA during the fiscal year 1984-1985. In 1986, he became an Administrative Law Judge for the Social Security Administration and was assigned to Portland, Oregon, in the spring. Before retiring in 1996, Bill became a supervising judge for the SSA and traveled throughout the Northwest as part of that position, with Joan joining him as often as she could.

Bill was survived by his loving wife Joan; sons, Stuart and Stephen; grandson, Stuart James; sister Dorothy Hartland from Maryland, and cousin, Doug Waite from Hartford, N.Y.

TLA extends its deepest sympathies to Bill's family and friends.

In Memoriam

CAROL ANN (HINES) HOFFMAN

1947–2023

It is with deep sadness that TLA advises of the passing of **Carol Ann (Hines) Hoffman**, wife of Past President **Ken Hoffman**. Carol Ann passed away peacefully at home in the wee hours of Friday, June 30, 2023, in Kansas City, Missouri.

Carol Ann was born on September 13, 1947, to Bill and Lewene (Leland) Hines in Lockhart, Texas. She is survived by her husband of 39 years Ken Hoffman, their daughter Nicole Johnson Bratton (Jeff), brothers John Hines and Paul Hines (Peggy), sister Deborah Hines Day (Roger), granddaughter Towne Bratton, and many nieces and nephews. Survivors also include countless cousins, high school buddies, former neighbors in Austin, Texas and Parkville, Missouri, and friends from all walks of life in the United States, Canada, and Mexico, many of whom she met through TLA. She made instant connections and genuine friends wherever she went. She tended to be a rebel and to attract other rebels. They know who they are. None will ever forget her.

Carol Ann attended the University of Texas at Austin for a year and then went to work in the Office of the Texas Secretary of State. Ultimately, she spent a decades-long career as an extraordinarily skilled legal secretary, paralegal, and law office manager. She was so smart, perceptive, and resourceful that she could have easily been a highly successful lawyer if she had been so inclined. Instead, as she liked to say, she trained a lot of lawyers!

Carol Ann was a special person who meant so much to so many it is very difficult to describe her in a few words. She was devoted to her husband, family, and friends almost to a fault. She was quietly tough-minded and resilient with an inner strength of will that was sometimes to her detriment because of her selflessness. Despite her gregariousness, she was also a very private person who never outwardly sought credit for the many things she did for others as a wife, mother, grandmother, sister, aunt, mentor, advisor, confidant, and friend. She was a talented chef who could prepare a meal from almost anything except fish. She hated fish. She had an uncanny knack for finding cafés and restaurants and picking the best (but not the most expensive) items on the menu, even in cities and countries where she had never been.

Carol Ann was famously frugal yet unflinchingly generous. "Plan" was one of only a few four-letter words she refused to use. She had definite opinions but was non-judgmental of others. She loved: snow; all of Canada, especially Québec City; parties of two to 200; spicy food, especially Mexican; hole-in-the-wall cafés; visiting old cemeteries; grocery shopping so she could make a new dish she had thought of; reading cookbooks but never following the recipes exactly as written because her changes made them better; and giving her husband, family, and friends grief in some hilarious way. It was almost impossible to have the last word with Carol Ann. It remains to be seen if her passing will change that.

Above all, Carol Ann was loving and loyal, compassionate and kind. She will be forever loved and missed, and her memory will be cherished.

Carol Ann was a registered organ donor. Following her cremation, a small family gathering was held. Impromptu celebrations of her life are likely in the near future. Donations can be made to either or both of the following charitable organizations:

- Feed Northland Kids – https://feednorthlandkids.org
- Hillcrest Platte County – Family Transitional Housing – https://hillcrestplatte.org

TLA will miss you Carol Ann. The Hospitality Suite will never be the same without you.

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- ☐ Freight Claims
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- ☐ Labor and Human Resources

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- ☐ Aviation
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August 2023

CTLA Canadian Transport Lawyers Association

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