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

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InterConnect

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Counsel for the Road Ahead®

Ignorance Is Not Bliss: Brokers Who Sign "Motor Carrier Agreements" Take Significant Risks

Marc S. Blubaugh

Shippers who are used to doing business with motor carriers often present freight brokers with a shipper-*carrier* agreement (often described as a "Motor Carrier Agreement") of one kind or another to serve as the basis of a shipper-*broker* relationship. Freight brokers often sign these agreements without a clear understanding of (or without even reading) the contract or think that simply replacing the word "broker" for "carrier" throughout the contract will protect them. This is a recipe for an incoherent and potentially dangerous shipper-broker relationship. Too often, not until a high-dollar cargo claim or a catastrophic personal injury arises does the broker begin to realize the significance of the piece of paper it has signed. Of course, by then, it is too late.

Brokers who are in transportation for the long term should take a more thoughtful approach to their contracting practices—particularly when transporting high-value freight. For instance:

- **Freight Loss, Damage and Delay.** Motor carriers bear liability for freight loss, damage and delay claims. While that liability can be limited under appropriate circumstances, many shipper-carrier agreements impose upon motor carriers liability for full market value of any loss, damage or delay. In contrast, brokers can legally disclaim all such liability. Brokers who sign Motor Carrier Agreements frequently assume liability for freight claims that they would not otherwise face.
- **Operating Responsibilities.** Shipper-carrier agreements typically require the motor carrier to be responsible for the operation of vehicles and to supervise or control its drivers. A broker who unwittingly signs a shipper-carrier contract containing such an obligation may find itself defending the assertion that it has admitted that it exercises some degree of control over its selected motor carriers or their drivers. Among other things, this fact may be used by an aggressive plaintiff's attorney attempting to establish the broker's vicarious

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Pass this copy of *InterConnect* on to a colleague, or email **MEGAN PAJAKOWSKI** at mpajakowski@beneschlaw.com to add someone to the mailing list.

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

Can a Freight Broker Be Held Responsible As a Principal Contractor for a Truck Driver's Unpaid Workers' Compensation or Related Benefits?

Stephanie S. Penninger

Yes, at least in North Carolina. Earlier this year, the North Carolina Court of Appeals unanimously upheld the state Industrial Commission's finding that a federally licensed, non-asset-based freight broker that had arranged motor carriage transportation for its customer was liable for a truck driver's temporary and total disability compensation and medical expenses arising from a truck accident.

In *Atiapo v. Goree Logistics, Inc.*, 770 S.E.2d 684 (N.C. Ct. App. 2015), Owen Thomas, Inc., a Florida-based transportation broker, arranged to have Goree Logistics, Inc., operating as a motor carrier, transport Sunny Ridge Farms' goods to Wyoming. According to their broker-carrier agreement, Goree was to exercise control over the transportation work it performed, and assume responsibility for the payment of taxes, unemployment and workers compensation.

While the goods were en route to Wyoming, Goree's driver was injured in an accident in Colorado when his brakes failed while descending a hill. Notwithstanding its obligation under the broker-carrier agreement, Goree did not have workers' compensation insurance for its drivers, which proved to be problematic when the Industrial Commission later determined that Goree's driver was actually an employee under North Carolina law. The motor carrier did not secure workers' compensation insurance for its drivers because it believed that North Carolina law did not require such insurance when a company does not regularly employ three or more employees. Notably, had Goree obtained workers' compensation insurance coverage for its employees, the driver's expenses would have been covered under the policy, even though Goree's premiums had not taken into account its independent contractor drivers.

In upholding the Industrial Commission's determination, the North Carolina appellate court found that Owen Thomas was responsible for payment of the truck driver's workers' compensation benefits because it had acted as a "principal contractor" according to N.C. Gen. Stat. § 97-19.1. Under the North Carolina statute, in the event of a work-related accident in performance of a contract, a principal contractor is liable for payment of any unpaid workers' compensation, and related benefits, attributed to the contracting motor carrier's injured employees and subcontractors.

Shocking to the transportation industry was that the *Atiapo* court found that, irrespective of its Federal Motor Carrier Safety Administration broker authority, a typical freight broker, in arranging

Penninger to Vice-Chair ABA TIPS Admiralty and Maritime Law Committee

Stephanie S. Penninger, a senior associate in Benesch's Litigation and Transportation & Logistics Practice Groups and Chair of the firm's Maritime Transportation Group, has been appointed Vice-Chair of the ABA TIPS Admiralty and Maritime Law Committee for 2015–2016. The Admiralty and Maritime Law Committee of TIPS is the premier organized ABA group devoted to the study and practice of admiralty and maritime law. It has been on the front lines of legislative issues impacting the maritime industry and is regularly called upon to evaluate requests for the ABA to submit amicus briefs to the U.S. Supreme Court on cases involving admiralty issues. TIPS is unique within the ABA and the legal community because of its focus on balance and diversity, and bringing together plaintiffs, defense, corporate and in-house counsel to tackle issues confronting the legal profession.

the transportation of its customer's shipment, had exhibited sufficient control over the carrier's driver as if the broker had assumed the responsibility of a shipper's principal contractor, and was, effectively, a carrier itself. The court reasoned that Owen Thomas was able to use its own judgment in selecting a carrier to transport Sunny Ridge's goods and retained a portion of the money it received from Sunny Ridge for the broker fee that was not paid to the carrier it hired as part of the freight charges. Owen Thomas supposedly not only controlled the outcome of the task, i.e., the delivery of goods, but also the method by which the task would be performed, including the frequency by which Goree would report to Owen Thomas and the temperature specifications for the shipment. Owen Thomas also provided Goree with 1099 tax forms for the money Owen Thomas paid to the carrier.

The court also rejected Owen Thomas' argument that federal law preempted the driver's state law claim, and that the exception to the preemption statute only applied to motor carriers, finding that the preemption statute was inapplicable to workers' compensation insurance statutes requiring workers' compensation financial responsibility, and imposing liability on those who fail to procure the requisite workers' compensation insurance.

Brokers were particularly blindsided by the outcome of *Atiapo* in the wake of *Transplace Stuttgart, Inc. v. Carter*, 255 S.W.3d 878 (Ark. App. 2007), a factually analogous case in which the Arkansas Court of Appeals held that a freight broker was not liable for a misclassified truck driver's unpaid workers' compensation as the employer's "prime contractor" or the employee's "statutory employer," under Arkansas' statute Ark Code Ann. § 11-9-402(a). Similar to the North Carolina statute, the Arkansas statute provides that a primary contractor is responsible for workers' compensation to the employees of the subcontractor where the subcontractor (defined as someone who performs work "farmed out" to them by the original contractor) fails to secure workers' compensation. The Arkansas appellate court determined that Transplace, as a transportation broker, arranging the transportation of and not physically transporting its customer's goods, had no obligation to perform transportation services for the shipper and had no obligation to "farm out" any work to the motor carrier. Thus, Transplace was not a primary contractor or the driver's statutory employer.

Moving forward, irrespective of whether the *Atiapo* case is an outlier or a new trend, it is currently the law in North Carolina. To mitigate the risk of a broker being held liable for unpaid workers' compensation as an employer of the motor carrier's independent contractor owner-operators, brokers should not only contractually require, e.g., in their broker-carrier agreements, that the motor carriers they engage obtain workers' compensation insurance and related benefits for their drivers but also require the motor carriers to have their insurance broker or carrier provide certificates verifying the motor carriers' workers' compensation coverage.

Additionally, brokers should be sure that they have in place their own "all states" workers' compensation and employer liability policy covering their own employees. Whether it is due to misinformation about workers' compensation insurance or an erroneous assumption that workers' compensation insurance is not required, many brokers do not have workers' compensation coverage. Even if a broker is only paying insurance premiums for its own employees, and not any of the motor carrier's independent contractor owner-operators, in the event that a driver is subsequently found to have been a misclassified worker, the driver's injuries would still be covered by the broker's workers' compensation policy. While an insurance carrier could subsequently require the payment of additional premiums, following a workers' compensation claim and insurance audit, the "AP Audit Risk" may be well worth the broker's expense in obtaining a workers' compensation policy to limit its exposure for the type of liability imposed in the *Atiapo* case.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or (317) 685-6188.

Get to know **Stephanie V. McGowan**

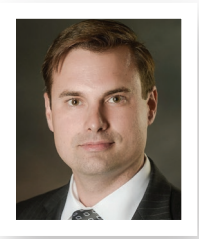
Stephanie V. McGowan

Ms. McGowan is an associate in the firm's Litigation Practice Group. Her practice focuses on representing clients in business and commercial litigation and general litigation in state and federal courts. Ms. McGowan's experience includes litigating a wide range of substantive areas including contractual disputes, employment disputes, insurance defense, product liability, business disputes, collection disputes and appellate practice.

Ms. McGowan's experience in the transportation sector includes representing motor carriers, third-party logistics (3PL) providers, and private corporations, in areas involving NAFTA regulations, state regulatory matters and freight-related disputes.

During law school, Ms. McGowan served as a judicial intern for the Honorable Judge Nannette Baker at the United States District Court for the Eastern District of Missouri. She earned her B.A. in Government and History from Cornell University and her J.D. from Washington University in St. Louis.

Substance Over Form: Seventh Circuit Finds FedEx Ground Drivers to Be Employees—Not Independent Contractors—Under Kansas Wage Payment Law



Christopher J. Lalak

In 2014's closely watched independent contractor case, the Ninth Circuit Court of Appeals invalidated FedEx Ground's independent contractor agreements in *Alexander v. FedEx Ground Package System*, finding the parcel delivery company's drivers to be employees under California law, despite language to the contrary contained in the driver's operating agreements.

Alexander sent a strong message regarding the independent contractor model, to be sure. Still, questions remained regarding the decision's effect beyond the borders of the employee-friendly Ninth Circuit.

Now, however, the Seventh Circuit has eliminated any doubt that may have remained: FedEx Ground's drivers are employees, *despite* labels to the contrary contained in the drivers' operating agreements, even in the heartland of America.

In its July 8th opinion, *Craig v. FedEx Ground Package Systems*, the Seventh Circuit adopted the Kansas Supreme Court's answer to two certified questions concerning the validity of FedEx Ground's independent contractor agreements. Read together, the opinions reach the same conclusion as the Ninth Circuit did in *Alexander;* the language of an independent contractor agreement will ultimately prove to be of little protection to a carrier if the carrier implements the agreement in a way that provides undue control over its drivers.

Although Kansas law concerning independent contractors is governed by a "20 factor" test, and thus differs from California's "right to control" framework, *Craig*'s analysis demonstrates that a common thread of direction and control govern both analyses and yield the same result regarding FedEx Ground.

In its reasoning, the Kansas Supreme Court noted that FedEx Ground's agreements contained a host of declarations that gave the appearance of an independent contractor relationship on the surface, such as an acknowledgement that the "manner and means of reaching … results are within the discretion of the [driver]," and that "no officer or employee of [FedEx Ground] shall have the authority to impose any term or condition contrary to this understanding."

Nevertheless, the Kansas high court found the declarations contained in the agreement to be meaningless, as, upon "a closer look," the court found that FedEx Ground's implementation of the agreements "negates a notion that the drivers have any room for discretion in the manner and means of performing their jobs," citing a host of conduct indicative of a classic employee relationship, including:

- FedEx Ground's strict supervision that certain standards for the handling and delivery of packages were followed
- FedEx Ground's compensation structure, which was set company-wide and not negotiable as to individual drivers
- A requirement that drivers maintain personal appearance standards
- A requirement that drivers comply with strict vehicle appearance, specification and maintenance requirements

Thus, reaching the same conclusion as the court in *Alexander*, the *Craig* court held that "viewing the factors as a whole…FedEx Ground has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing."

While neither the *Craig* decision nor the *Alexander* decision are "good news" for industry, they do provide valuable lessons learned. Simply put, the form of an independent contractor agreement cannot protect a business from a misclassification challenge if, beneath the surface of that agreement, the business owner exercises classic employer-type control over its drivers. This will hold true in Kansas, California and indeed, all other jurisdictions as well.

In light of *Craig*, companies who classify their drivers as independent contractors should review not only the language used in such agreements but also how those agreements are implemented in their operations.

For more information, please contact **CHRISTOPHER J. LALAK** at clalak@beneschlaw.com or (216) 363-4557.

Ignorance Is Not Bliss: Brokers Who Sign "Motor Carrier Agreements" Take Significant Risks

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liability in the event of a personal injury arising from the motor carrier's actions.

- **Equipment.** Motor Carrier Agreements often limit a motor carrier's ability to use equipment other than its own (at least without first notifying the shipper). However, a broker who signs such an agreement once again may open itself up to an argument that it has represented to the shipper (or the public) that a selected motor carrier's equipment is under the broker's own control.
- **Insurance.** Shippers usually contractually require their motor carriers to have certain types of insurance in place. Two such policies are cargo insurance and automobile liability insurance. However, freight brokers cannot make use of such insurance since they neither own vehicles of their own nor actually transport freight. Rather, brokers can purchase *contingent* cargo insurance or *contingent* automobile liability insurance. So, once again, by signing a shipper-carrier agreement containing motor carrier insurance provisions, the broker is assuming obligations that it cannot perform and which may be used against it in a future dispute.
- **Indemnity.** In its Motor Carrier Agreements, the shipper may require a motor carrier to indemnify the shipper in a variety of ways—ranging from indemnity for any liability "arising from" the agreement to indemnity for the shipper's own negligence. A broker who signs such an agreement may be agreeing to indemnify its customer for any and all actions of its selected motor carriers. Furthermore, even though a provision whereby a motor carrier agrees to indemnify a shipper for the shipper's own negligence may now be unenforceable under most states' laws (in light of the adoption of anti-indemnification statutes), those same statutes do not necessarily make such provisions unenforceable against a freight broker. In other words, a freight broker could in fact end up having to indemnify a shipper for the shipper's own negligence notwithstanding any anti-indemnification statute.

Of course, not only do shipper-carrier agreements impose these incongruent obligations on brokers, such agreements lack certain broker-specific provisions. For instance:

- **Bills of Lading/Shipping Documentation.** A good shipper-broker contract will make it clear that any insertion of the broker's name on a bill of lading or other shipping documentation is only for the shipper's convenience and will not change the broker's status as a broker.
- **Insurance.** As mentioned above, freight brokers have very specific insurance-related needs. Furthermore, a good shipper-broker contract will clarify that the broker is making no representations or warranties about coverage or what exclusions or limitations may apply in any policy issued to the motor carriers that it selects.
- **Cargo Claims.** In addition to disclaiming liability for freight claims, a shipper-broker agreement may provide that a broker will help facilitate or assist a shipper in connection with the filing and processing of claims.

In short, a broker who signs a shipper-*carrier* agreement opens itself up to a variety of otherwise avoidable liabilities—ranging from cargo claims to liability for catastrophic personal injuries. Even if a broker might ultimately be able to defend successfully against such liabilities, a broker will nevertheless expend considerable resources (in terms of attorneys' fees, costs and time) in mounting a defense. So, before simply signing a Motor Carrier Agreement (or before simply changing "carrier" to "broker" throughout the agreement), a broker should give careful consideration to these very real implications.

Brokers need to be increasingly vigilant about the terms and conditions contained in the contracts they sign so they do not end up facing enormous (and uninsured) liability that they could have otherwise avoided. Just as good fences make good neighbors, good contracts make good business partners.

For more information, please contact **MARC S. BLUBAUGH** at mblubaugh@beneschlaw.com or (614) 223-9382.

Want more industry-focused Transportation and Logistics-related information?

Check out two new newsletters from Benesch's Transportation & Logistics Practice Group, *Setting the Table,* which focuses on current issues in food transport, storage and security and *Currents: Keeping in Tow with Maritime Legal Updates*. To subscribe to either newsletter, contact **MEGAN PAJAKOWSKI**, Client Services Manager at mpajakowski@beneschlaw.com

Transportation & Logistics Group

For more information about the Transportation & Logistics Group, please contact any of the following:

ERIC L. ZALUD, Chair | (216) 363-4178
ezalud@beneschlaw.com

MARC S. BLUBAUGH, Co-Chair | (614) 223-9382
mblubaugh@beneschlaw.com

MICHAEL J. BARRIE | (302) 442-7068
mbarrie@beneschlaw.com

TAMAR GONTOVNIK | (216) 363-4658
tgontovnik@beneschlaw.com

MATTHEW D. GURBACH | (216) 363-4413
mgurbach@beneschlaw.com

JAMES M. HILL | (216) 363-4444
jhill@beneschlaw.com

J. ALLEN JONES, III | (614) 223-9323
ajones@beneschlaw.com

THOMAS B. KERN | (614) 223-9369
tkern@beneschlaw.com

PETER N. KIRSANOW | (216) 363-4481
pkirsanow@beneschlaw.com

CHRISTOPHER J. LALAK | (216) 363-4557
clalak@beneschlaw.com

STEPHANIE V. McGOWAN | (317) 685-6161
smcgowan@beneschlaw.com

ANDI M. METZEL | (317) 685-6159
ametzel@beneschlaw.com

T. TED MOTHERAL | (614) 223-9384
tmotheral@beneschlaw.com

KELLY E. MULRANE | (614) 223-9318
kmulrane@beneschlaw.com

LIANZHONG PAN | (011-8621) 3222-0388
lpan@beneschlaw.com

MARTHA J. PAYNE | (541) 764-2859
mpayne@beneschlaw.com

STEPHANIE S. PENNINGER | (317) 685-6188
spenninger@beneschlaw.com

RICHARD A. PLEWACKI | (216) 363-4159
rplewacki@beneschlaw.com

PETER K. SHELTON | (216) 363-4169
pshelton@beneschlaw.com

CLARE TAFT (Of Counsel) | (216) 363-4435
ctaft@beneschlaw.com

JOSEPH G. TEGREENE | (216) 363-4643
jtegreene@beneschlaw.com

KATIE TESNER | (614) 223-9359
ktesner@beneschlaw.com

RECENT EVENTS

2015 Truckload Carriers Association Annual Convention

Aaron Mendelsohn, J. Allen Jones and **Richard A. Plewacki** spoke on *Legal Considerations Regarding Data Generated By Electronic Logging Devices.* **Richard A. Plewacki** spoke on *Positioning Yourself to Avoid Worker Misclassification.*
March 8, 2015 | Orlando, FL

IWLA Annual Conference and Expo

Marc S. Blubaugh spoke on *Emerging Trends in Transportation and Logistics: Making Practical Sense of the Year Behind and the Year Ahead.* **Eric L. Zalud** and **Christopher J. Lalak** attended.
March 10, 2015 | Savannah, GA

25th Biennial Tulane Admiralty Law Institute Symposium

Stephanie S. Penninger attended.
March 11–13, 2015 | New Orleans, LA

TIDA 2015 Cargo & Skills Seminar

Eric L. Zalud spoke on freight damage and salvage issues and broker liability issues.
March 18–20, 2015 | Tempe, AZ

Transportation & Logistics Council 2015 Annual Conference

Marc S. Blubaugh spoke on *Freight Claims and Cargo Insurance.* **Stephanie S. Penninger** spoke on *Multimodal Shipments: Liability of Inland Carriers, Himalaya Clauses, Covenants not to Sue, Kirby and its Progeny.* **Eric L. Zalud** spoke on damage mitigation and freight salvage issues. **Martha J. Payne** also attended.
March 23–25, 2015 | Orlando, FL

Transportation Intermediaries Association Capital Ideas Conference and Exhibition

Eric L. Zalud spoke on *Brokers Going on the Offensive to Protect Their Interests.* **Stephanie S. Penninger** and **Martha J. Payne** also attended.
April 15–18, 2015 | Orlando, FL

Transportation Loss Prevention & Security Association, Inc. Annual Trucking Industry Conference

Martha J. Payne spoke on *The Carrier Did Everything Right: Why Can't It Get Paid? Freight Charge Collection.* **Stephanie S. Penninger** spoke on *Food For Thought—Dump & Destroy; Is or May Be Contaminated.*
April 19–21, 2015 | Chicago, IL

TLA Annual Conference and CTLA Midyear Meeting

Stephanie S. Penninger spoke on *Food For Thought: Safety and Security Issues in the Transportation of Goods.* **Eric L. Zalud** spoke on high-dollar freight charge and credit and collection issues. **Marc S. Blubaugh, J. Allen Jones, Martha J. Payne** and **Richard A. Plewacki** also attended.
May 12–16, 2015 | Scottsdale, AZ

TLA Executive Committee

Marc S. Blubaugh presided as President. **Eric L. Zalud** attended as Voting Past-President.
May 13, 2015 | Scottsdale, AZ

National Confectioners' Logistics Council's Annual Conference

Marc S. Blubaugh spoke on *Checking Your Rearview Mirror While Keeping Your Eyes on the Road Ahead.* **Stephanie S. Penninger** spoke on *Food for Thought: Safety and Security Issues in the Transportation of Goods.*
June 15, 2015 | Baltimore, MD

EyeForTransport—13th Annual North American 3PL Summit & Chief Supply Chain Officer Forum

Marc S. Blubaugh spoke on *The State of the E-Commerce Fulfillment Industry.*
June 17, 2015 | Chicago, IL

TCA 32nd Annual Refrigerated Division Meeting

Stephanie S. Penninger and **Richard A. Plewacki** co-presented *Clauses in Transportation Contracts—Don't Get Bitten.*
July 8–10, 2015, Stowe, VT

American Trucking Associations' General Counsel's Forum

Marc S. Blubaugh spoke on *Starting and Growing Your Transportation Brokerage Business.* **Eric Zalud** spoke on *Minimizing Risks of Cargo Liability for Brokers.*
July 20, 2015 | Dana Point, CA

Benesch is pleased to welcome four highly accomplished litigators to our team of more than 50 litigation professionals.

JOSEPH A. CASTRODALE
Vice Chairman, Chair of Litigation Practice Group and Executive Committee member
Chambers USA Leading Lawyer for 8 years
Two-time BTI Client Service All-Star (2011, 2015)

YELENA BOXER, Partner
Benchmark Litigation 2015 Future State Litigation Star
Best Lawyers in America®
Ohio Super Lawyer®

ANDREW G. FIORELLA, Partner
Ohio Super Lawyer®

GREGORY J. PHILLIPS, Partner
Benchmark Litigation 2015 Future Litigation Star
Best Lawyers in America®

Benesch's Litigation Practice Group was recognized in 2015 by *U.S. News/Best Lawyers®* "Best Law Firms" ranking as a first-tier practice in Cleveland, Columbus and Indianapolis. Our newest partners bring decades of experience successfully representing corporate clients in complex business and commercial disputes in federal and state courts throughout the country.

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Featured (left to right) JOSEPH A. CASTRODALE, ANDREW G. FIORELLA, YELENA BOXER, GREGORY J. PHILLIPS

ON THE HORIZON

Admiralty and Maritime Law Committee Meeting at the ABA Annual Meeting, 2015
Stephanie S. Penninger will be attending.
July 31, 2015 | Chicago, IL

Transportation Lawyers Association's Executive Committee Meeting
Marc S. Blubaugh will be attending as Immediate Past-President.
August 1, 2015 | Madison, WI

FTR Transportation Conference
Stephanie S. Penninger will be attending.
September 15–17, 2015 | Indianapolis, IN

Arkansas Trucking Seminar
Eric L. Zalud will be attending
September 16–18, 2015 | Bentonville, AR

Logistics and Transportation Association of North America Annual Conference
Eric L. Zalud will be speaking on purchasing and selling logistics businesses.
September 19, 2015 | Atlanta, GA

Intermodal Association of North America's EXPO
Eric L. Zalud will be speaking on *Current Issues for Freight Intermediaries.* **Martha J. Payne** and **Stephanie S. Penninger** will be attending. **Marc S. Blubaugh** will be attending as Outside General Counsel to the Association.
September 20–22, 2015 | Fort Lauderdale, FL

Annual Conference of the Council of Supply Chain Management Professionals
Marc S. Blubaugh and **Michael D. Stovsky** will be serving on a panel entitled, "If Not Now, When? Mandatory Data Security and Privacy Compliance for Corporate Directors and Managers."
September 28, 2015 | San Diego, CA

Annual Cargo Claims Conference at the International Air Transport Association
Marc S. Blubaugh will be presenting *Flying or Just Falling With Style? The Latest from the U.S. Courts Regarding Cargo Claims Under MP4.*
September 30, 2015 | Montreal, Quebec

Conference on Innovation in Transportation
Eric L. Zalud will be attending.
September 30, 2015 | Toronto, Ontario

Indiana Motor Truck Association, Future Leaders Council Annual Conference
Stephanie S. Penninger will be attending.
October 1–2, 2015 | Bloomington, IN

Canadian Transportation Lawyers Association's Annual Conference
Marc S. Blubaugh, **Martha J. Payne** and **Eric L. Zalud** will be attending.
October 1–3, 2015 | Kelowna, British Columbia

TIPS Admiralty and Maritime Law Committee Fall Meeting
Stephanie S. Penninger will be attending.
October 14–18, 2015 | Scottsdale, AZ

23rd Annual TIDA Industry Seminar
Stephanie S. Penninger and **Eric L. Zalud** will be attending.
October 26–28, 2015 | San Antonio, TX

Transportation Law Institute (Transportation Lawyers Association)
Eric L. Zalud will be speaking on *How to Eliminate Skeletons and Cobwebs and Humanize the Reptiles of the Road: Winning at Trial (and Pretrial) in Trucking Casualty Litigation.* **Marc S. Blubaugh** and **Stephanie S. Penninger** will be attending.
October 30, 2015 | Columbus, OH

2015 IWLA Warehouse Legal Practice Symposium
Marc S. Blubaugh will be presenting on current transportation law topics.
November 12–13, 2015 | Chicago, IL

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