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ERRATA INFORMATION

The Journal staff would like to correct an error included in William Byrne's article “Competing Periods in Determining Laches in Demurrage Disputes” in volume 33:1-2 of the Transportation Law Journal, published Spring 2006. Footnote 6, page 136, in lines 9 and 10, should direct readers to I.C.C.T.A. § 102(b), rather than 49 U.S.C. § 11908(b). Further, readers should see also Norfolk Southern Railway Co. v. Consolidated Freightways Corp., 443 F.3d 1160, 1163 (9th Cir. 2006) for a discussion of the Interstate Transportation Act. The Journal staff regrets this error and appreciates the patience of its authors and readers.
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The Mythology of Logo Liability: An Analysis of Competing Paradigms of Lease Liability for Motor Carriers

R. Clay Porter* and Elenore Cotter Klingler**

I. INTRODUCTION

The late 1970s and early 1980s, it was a time when law students spent their evenings playing Pong, the Soviets were unbeatable at hockey, streaking swept college campuses, and Americans experienced gas lines for the first time since World War II. The best lawyers were defense lawyers, and advertising wasn't allowed. No one handling accident claims thought a life could ever be worth more than $100,000. It was during this time that an obscure doctrine called “logo liability” started becoming a topic of conversation in the inner circles of truck bodily injury claims.

From the start, logo liability was not well understood by plaintiffs, defense lawyers or truck claims specialists, much less by the courts. The lawyers who understood transportation at that time seldom ventured into the messy realm of bodily injury litigation. The defense of truck injury claims was assigned to insurance defense lawyers who had learned their trade on auto injury claims and occasional slip and fall cases. Many had no idea that drivers kept logs, much less that there was a complex body of regulations controlling the industry. State and national plaintiffs’ lawyer

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organizations had not yet discovered trucks. A few well-informed plaintiff and defense lawyers became familiar with a United States Supreme Court case Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.\(^1\) and 49 C.F.R. § 1057.4, an obscure interstate commerce commission regulation. Transamerican, which was not even about logo liability, had this to say about the use of independent contract or truck drivers:

It is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules.\(^2\)

The obscure lease regulation provides for the “exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement . . . .”\(^3\) Without a lot of thought about how or why the Supreme Court had commented about the use of independent contractors in trucking, the “exclusive possession, control, and use” regulation began to take hold in claims involving trucks leased with the driver. Over time, the lawyers on both sides of truck injury cases, as well as the claims handlers, came to accept the notion that the logo or placard on the side of the truck conferred some degree of responsibility on equipment leased with the driver.\(^4\) Most firms refer to this concept of lease liability as “logo liability.”\(^5\) It has also been called “placard liability” and “statutory employment.”\(^6\) To the more sophisticated, it was referred to as “lease liability.”\(^7\)

By the end of the 1980s, the doctrine of logo liability had appeared in

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2. Id. at 234.
4. See, e.g., Rodriguez v. Ager, 705 F.2d 1229, 1236 (10th Cir. 1983) (reviewing case law and recognizing that 49 C.F.R. 1057.4 holds the lessee as well as the driver responsible in truck injury cases).
6. See id., for a discussion of “placard liability.” See Rodriguez, 705 F.2d at 1236, for a discussion of cases that have recognized the ICC placard as the equipment’s authorization to be on the highway. See Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131, 137 (8th Cir. 1974), for a discussion of cases that have extended liability coverage to the owner-operator as a “statutory employee” of the motor carrier.
7. E.g., Strawinski & Goldberg, supra note 5; see also Johnson v. S.O.S. Transp., Inc., 926 F.2d 516, 521 (6th Cir. 1991) (recognizing that lessee carriers can be held vicariously liable “for injuries sustained by third parties resulting from the negligence of the drivers of the leased vehicles.”).
many reported state and federal decisions. Like many of the lawyers involved in these cases, the courts generally accepted the notion that injured members of the public were entitled to extra protection when it came to trucking companies using equipment leased with drivers. Today, there are two primary schools of thought concerning lease liability. First, there exists the "strict agency liability" school of thought embodied by Morris v. JTM Materials, Inc., which found that a motor carrier is liable as a matter of law for the negligence of its leased drivers regardless of whether they were under the control of the motor carrier at the time of the tort. Second, there exists the "scope of employment" school of thought embodied by Parker v. Erixon, which held that the court should look to state employment law to determine whether the driver was acting within the scope of his agency with the motor carrier at the time of the tort. The competing paradigms can lead to dramatically different outcomes for the motor carrier.

The concept of logo liability permeates the truck claims industry. It not only dominates owner-operator liability claims as previously demonstrated, but also dominates the determination and responsibility in the context of temporary leases between motor carriers, referred to as trip leases. Truck insurance claims analysis for these types of claims has become exceedingly complicated and often results in the arbitrary assignment of insurance liability. Unaccounted for are the claims funds paid because of fear of the doctrine, which remains misunderstood. In fact, nearly thirty years after the doctrine of logo liability began to develop, it has become a force of its own, often applied simply because it seems applicable. Behind the mythology of logo liability, there is legal foundation for the responsibility conferred upon trucking companies that utilize equipment leased with drivers. This responsibility is not unlimited. It is the purpose of this article to expose that foundation. Part II will examine the history and development of the logo and lease liability doctrines, Part III will compare the Morris and Parker approaches, and Part IV will conclude that while the law remains unsettled, the Parker approach provides the better analysis for applying liability through a lease.

II. History and Development of Logo and Lease Liability

Long before logo liability was a glimmer in a plaintiff's lawyer's eye, motor carriers and owner operators had perfected the independent contractor arrangement. Leasing equipment and drivers provides advantages

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8. See Rodriguez, 705 F.2d at 1232.
to both the motor carrier and the driver. First, the motor carrier is relieved of the burden of holding, maintaining, and upgrading equipment to meet the needs of its drivers. Second, the motor carrier does not have to keep a large staff of employees on the books. Third, the driver benefits by earning a greater percentage of revenue per mile, having greater control over his schedule, and avoiding the high premiums of trucking insurance.

Liability imposed upon the motor carrier for the driver’s conduct is relatively straightforward when the driver is an employee. While some states impose liability based on the use of the equipment alone under dangerous instrumentality or statutory owner liability, liability is typically imposed through the respondeat superior doctrine. In order to impose liability through respondeat superior, the plaintiff must demonstrate that the employee was on the business of the motor carrier at the time of the subject accident. Generally, if the driver is using his truck on a frolic or detour, the liability for the driver’s conduct will not be imputed to the motor carrier.

When the driver is an independent contractor, however, the question of liability is more complicated. Typically, an employer would not be held liable for the conduct of an independent contractor unless that employer controlled the contractor’s work. In the case of owner-operator drivers, however, some motor carriers used the contractor relationship to avoid liability for accidents while the driver was transporting its freight.

12. For example, Florida law provides that motor vehicles are dangerous instrumentalties and, therefore, special liability is imposed upon the owner for the operation of such an instrumentality. Martin v. Lloyd Motor Co., 199 So.2d 413, 414 (Fla. Dist. Ct. App. 1960) (recognizing that Florida law provides that motor vehicles are dangerous instrumentalties). California, Iowa, Michigan, and New York have statutes concerning the liability of owners for the negligence of permissive users. Cal. Veh. Code § 17150 (2005); Iowa Code § 321.493 (2005); Mich. Comp. Laws § 257.401 (2005); N.Y. Veh. & Traf. § 388 (McKinney 2005).


In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id.

Congress attempted to put a stop to the practice in 1956.\textsuperscript{18}

A. The Leasing Regulations and the Requirement of Responsibility

In considering regulations issued by the Interstate Commerce Commission ("ICC"),\textsuperscript{19} the United States Supreme Court discussed some of the testimony concerning abuses of some companies' use of owner-operators and leased equipment in \textit{American Trucking Ass'ns v. United States}.\textsuperscript{20} In particular, the Court noted that the ICC was concerned that companies were not enforcing the safety requirements for drivers or for equipment, and that the owner-operators themselves were driving beyond their limits to maximize their income.\textsuperscript{21} The Court upheld the Commission's authority to promulgate leasing regulations, stating, "The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system."\textsuperscript{22} In 1956, Congress enacted enabling statutes that permitted the ICC to more closely regulate the lease of equipment. The statute now provides in pertinent part:

The Secretary may require a motor carrier providing transportation . . . that uses motor vehicles not owned by it to transport property under an arrangement with another party to— . . . (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.\textsuperscript{23}

Based upon the enabling statute, the ICC promulgated leasing regulations, which require, among other things, that leases be in writing.\textsuperscript{24} 49 C.F.R. § 1507.4(a)(4) required the lease to "provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of..."
said contract, lease or other arrangement . . . .” One of the purposes of the enabling statute was to require motor carriers to treat leased equipment like owned equipment. The ICC put that into practice by promulgating a strongly worded regulation, which required motor carriers to assume complete responsibility for the equipment.

In order for motor carriers to use leased equipment, they are required to provide the lessor with a placard for the motor carrier. The placard, usually affixed to the door of the tractor, identifies the motor carrier for whom the equipment is being operated. The pre-1986 regulations made it the motor carrier’s responsibility to retrieve the placards when terminating a lease. Because the placard could be evidence of the existence of a lease, it was a relatively easy leap in logic to equate the placard itself with the leasing regulations requiring the “complete assumption of responsibility” for the equipment.

B. The Rise and Fall of “Logo” Liability

From the leasing regulations, courts created the doctrine of logo liability. The purpose of the regulations was to prevent motor carriers from circumventing the responsibility for drivers through the owner-operator relationship. Motor carriers were required to treat leased equipment like owned equipment. The analysis for imposing liability for owned equipment requires an examination as to whether the driver was acting within the course and scope of his employment at the time of the subject accident. Some courts, however, interpreted the ICC regulations as expressing an intent for motor carriers to assume greater liability for leased equipment than it did for owned equipment. The text of 49 C.F.R. § 1057.4, after all, did not mention anything about course and scope of employment. Instead, it simply stated that the lease had to require the “complete assumption of responsibility” for equipment. In some courts, however, the shortcut of using the logo to demonstrate a lease

27. Id.
28. See 49 C.F.R. § 390.21 (2005) (providing the requirements for the contents of the placard). The placard must display the legal name of the operating carrier, the carrier’s DOT number issued by the FMCSA, when the transport is done by another carrier than shown on the placard, the statement “operated by” and the name of the carrier must be displayed., and the placard must be on both sides of the tractor. Id.
29. Id. § 390.21(a)(3).
30. Id. § 1057.4(d)(1).
32. See, e.g., Mellon, 289 F.2d at 478.
33. See 49 C.F.R. § 1057.4.
34. Id. § 1057.4(a)(4).
itself became evidence of a relationship between the driver and motor carrier.

For example, one of the earliest decisions to impute liability on the existence of placards came from the Third Circuit Court of Appeals in *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.* In that case, a truck was owned by Sophie Lines and leased to Turner Transfer, Inc. Turner dispatched the driver to the Sophie Lines terminal with a load and instructed the driver to remove the Turner placards because no return load was available. Without Turner’s knowledge, Sophie arranged for the driver to transport a return load on behalf of another carrier. The accident occurred on the return trip and it was found that the driver had not removed Turner’s placards from the truck.

The Third Circuit Court of Appeals upheld the trial court’s determination that Turner was liable as a matter of law for the accident, in part, because it had failed to retrieve the placards and obtain a receipt as required by the leasing regulations. The court reasoned that because the placards were still on the truck, the lease was still in effect and the motor carrier was liable. The court’s analysis ended with the existence of the placards, but tacitly the court held that a motor carrier would be liable as long as the lease was in effect regardless of whether the driver was acting within the scope of his agency.

The Eighth Circuit Court of Appeals adopted the reasoning of *Mellon* in *Wellman v. Liberty Mutual Insurance Co.* in a decision concerning insurance coverage. In that case, the truck driver leased his truck to Morgan Drive-Away, Inc. but was carrying a load for IMT, Inc. at the time of an accident with the plaintiff. The truck was displaying Morgan placards. The court acknowledged that the display of the placards would impose liability to the plaintiff on the part of Morgan for the driver’s negligence, but denied that the driver was an employee for insur-

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36. *Id.* at 474-75.
37. *Id.* at 475.
38. *Id.* The stipulated facts acknowledged that although Turner did not have knowledge of this trip, it was aware that Sophie had arranged similar trips in the past. *Id.*
39. *Id.* at 476.
40. *Id.*
41. *Id.* at 476-77.
42. See *id.* at 477; see also Carolina Cas. Ins. Co. v. Ins. Co. of N. Am., 595 F.2d 128, 137 (3d Cir. 1979) ("In furtherance of the policy of protecting the public and providing it with an identifiable and financially accountable source of compensation for injuries caused by leased tractor-trailers, federal law in effect creates an irrebuttable presumption of an employment relationship between a driver and the lessee whose placards identify the vehicle.").
43. *Wellman*, 496 F.2d at 136.
44. *Id.* at 132.
45. *Id.* at 134.
ance coverage purposes.\textsuperscript{46} The court stated that the driver "was using the vehicle for Morgan in a general way because of the existence of the vehicle lease and display of permit number."\textsuperscript{47}

The Tenth Circuit Court of Appeals decision, \textit{Rodriguez v. Ager},\textsuperscript{48} demonstrated the potential for absurdity in the doctrine of logo liability. In \textit{Rodriguez}, the truck in question was owned by the driver's brother, David Ager, and had been leased to Sammons Trucking Company on August 3, 1977.\textsuperscript{49} On December 11, 1978, Ager signed the documents sent by Sammons Trucking to terminate his lease.\textsuperscript{50} Ager arranged the transportation of a load of wool from South Dakota to Wyoming, and his brother was driving the truck for that purpose when he was involved in a head-on collision with the Rodriguez family, killing Salvador Rodriguez and three of his children.\textsuperscript{51} Sammons' placards were still on the vehicle at the time of the accident.\textsuperscript{52} The jury found that a lease was in effect between Ager and Sammons but did not attribute any liability to Sammons for Rodriguez's death.\textsuperscript{53} The Tenth Circuit Court of Appeals reversed the verdict because it held that the trial court failed to find as a matter of law that Sammons was liable for Ager's actions.\textsuperscript{54} This is a "worst case scenario" for motor carriers, in which the motor carrier is taking reasonable steps to cancel the lease, but liability or a high exposure accident is charged to it solely because the placards remain attached.\textsuperscript{55}

Not all courts upheld the "strict agency liability" interpretation of logo liability. The Sixth Circuit Court of Appeals, in \textit{Wilcox v. Transamerican Freight Lines, Inc.}, affirmed the trial court's grant of summary judgment, recognizing that the motor carrier, whose leased driver was not within the scope of his agency at the time of an accident, was not vicariously liable under the ICC regulations for the driver's conduct.\textsuperscript{56} In fact, the \textit{Wilcox} court reached the novel conclusion that the use of leased equipment should not impose greater liability than would the use of

\begin{itemize}
\item 46. \textit{Id.} at 136-37.
\item 47. \textit{Id.} at 137.
\item 48. \textit{Rodriguez}, 705 F.2d 1229.
\item 49. \textit{Id.} at 1230.
\item 50. \textit{Id.}
\item 51. \textit{Id.}
\item 52. \textit{Id.}
\item 53. \textit{Id.} at 1230-31.
\item 54. \textit{Id.} at 1237. It is worth noting that the trial court instructed the jury that Sammons could only be held liable on the basis of respondeat superior. \textit{Id.} at 1231.
\item 55. The tragic nature of the accident may have also influenced the court's decision. It stated, "To fail to uphold the ICC Regulations would result in injustice. Trucking equipment such as that here present has a capability for bringing about terrible injuries and damages to life. This is a typical illustration." \textit{Id.} at 1236.
\item 56. \textit{See Wilcox} v. \textit{Transam. Freight Lines, Inc.}, 371 F.2d 403, 404 (6th Cir. 1967).
\end{itemize}
owned equipment. The Seventh Circuit Court of Appeals reached a similar decision the same year in *Gudgel v. Southern Shippers*. In *Gudgel*, the lease between Southern Shippers and the owner of the truck was cancelled prior to the accident and the driver was carrying a load for another entity. The court acknowledged that the ICC regulations would impose liability if the accident took place while the driver was operating by authority of the motor carrier’s ICC certificate and carrying its placards. However, the court held that the jury could not have reasonably found that the driver was on the business of Southern Shippers at the time of the accident.

In spite of the few favorable courts, decisions like *Mellon*, *Wellman*, and *Rodriguez* left motor carriers at the mercy of drivers to return placards when the relationship ended. Under this line of analysis, a driver could be terminated for failing to pick up a load and never return to the terminal to return the motor carrier’s placards. These cases indicate that so long as the placards were in place, the motor carrier would be found liable for the driver’s conduct. It is difficult to find any justification for this in the federal enabling statute.

In 1986, the ICC changed the regulations to clarify its intent. The ICC amended the regulations to delete the requirement that the motor carrier obtain a receipt from the driver when the driver returned the placard. Instead, the terms of the lease were permitted to control the exchange. Also and more significantly, instead of the motor carrier being

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57. *Id.* at 404. The court’s statement regarding the regulations, however, was without analysis. The court simply held, “In our opinion, the I.C.C. Regulations do not impose a liability on a carrier using leased equipment greater than that when operating its own equipment.” *Id.*

58. *Gudgel*, 387 F.2d 723.

59. *Id.* at 726-27.

60. *Id.* at 725-26 (citing, among other cases, *Mellon Nat’l Bank & Trust v. Sophie Lines*, Inc., 289 F.2d 473 (3d Cir. 1961)).

61. *Id.* at 726. The court’s decision is puzzling in that if it had actually followed the *Mellon* holding as cited it would have found that the lease was in effect and the motor carrier was liable, regardless of whether the driver was on the business of the carrier at the time of the accident. The court apparently relied more on state agency law than the *Mellon*-view of the regulations.


63. *See Lease and Interchange of Vehicles (Identification Devices), 3 I.C.C.2d 92, 95 (1986)* [hereinafter *Identification Devices*]. Prior to 1986, the ICC regulations mandated that the authorized carrier remove the placards on the truck and to obtain a receipt specifically identifying any returned equipment in order to terminate the lease. *Graham v. Malone Freight Lines, Inc.*, 948 F. Supp. 1124, 1133 n.14 (D. Mass. 1996) (citing 49 C.F.R. § 1057.4(d) (1985)). However, this requirement was deleted in the 1986 amendments. *See id.* (providing that in the notes to the amendments that “the ICC emphasized that liability should not be assigned on the existence of placards alone.”).

64. *See Identification Devices, 3 I.C.C.2d at 96; see also 49 C.F.R. § 1057.12(e) (1986) (currently codified at 49 C.F.R. § 376.12(e) (2005)). The new regulation provided as follows:

(e) Items specified in lease. The lease shall clearly specify the responsibility of each
responsible for retrieving its placards from the driver, the terms of the lease could control whose responsibility it was. This change protected motor carriers from rogue drivers who refused to return placards and subjected the motor carrier to potential liability. The ICC further commented at the time of the amendment:

As noted by the comments, certain courts have relied on Commission regulations in holding carriers liable for the acts of equipment owners who continue to display the carrier's identification on equipment after termination of the lease contract. We prefer that courts decide suits of this nature by applying the ordinary principles of state tort, contract and agency law. The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of state tort, contract and agency law and create carrier liability where none would otherwise exist. Our regulation should have no bearing on this subject. Application of state law will provide appropriate results.

The change in the regulation, however, failed to correct the misapplication of the regulation by some courts to equate the existence of a placard to the existence of a lease and to impose liability on that basis. Without analysis or acknowledgement of the change in regulation, some courts continue to apply the doctrine of logo liability. Other courts, however, have changed their analysis in light of the change in regulations. For instance, in Graham v. Malone Freight Lines, Malone Freight terminated the lease with the driver approximately one month before an acci-

party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and license, and any unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service.

49 C.F.R. § 376.12(e).
65. See Identification Devices, 3 I.C.C.2d at 96; see also 49 C.F.R. § 1057.12(e).
66. Identification Devices, 3 I.C.C.2d at 93 (emphasis added).

67. See, e.g., Guar. Nat'l Ins. Co. v. Dallas Moser Transporters, Inc., 596 N.E.2d 966, 969 (Ind. Ct. App. 1992) (holding that "[w]here the leased vehicle is involved in an accident during the term of the lease while carrying the ICC number of the common carrier with operating authority, the carrier is liable as a matter of law." (citations omitted)); Detrick v. Midwest Pipe & Steel, 598 N.E.2d 1074, 1080 (Ind. Ct. App. 1992) (recognizing that the carrier is liable as a matter of law when a leased vehicle is involved in an accident while under lease and carrying the ICC number of the carrier); J. Miller Express, Inc. v. Pentz, 667 N.E.2d 1018, 1021 (Ohio Ct. App. 1995) (relying on the ICC regulations in order to hold the motor carrier liable); Reliance Nat'l Ins. Co. v. Royal Indem. Co., No. 99 Civ. 10920 NRB, 2001 WL 984737, at *7 to *8 (S.D.N.Y. Aug. 24, 2001) (mem.) (determining that the motor carrier was vicariously liable for the driver's negligence because the truck was still under lease and bore the motor carrier's logo); Gilstorff v. Top Line Express, Inc., 910 F. Supp. 355, 359 (N.D. Ohio 1995) (relying on the ICC regulations, which make carrier liable for acts of the driver who displays its placards and identification numbers while under lease, in holding the motor carrier vicariously liable), rev'd on other grounds, 106 F.3d 400, 1997 WL 14378 (6th Cir. 1997) (unpublished table disposition).
At the time of the accident, the driver was carrying a load without interstate authority for a broker, not the motor carrier, but was still displaying Malone Freight’s placards. The District Court for the District of Massachusetts analyzed the ICC regulations in place at the time and recognized that the existence of the placards alone did not impose liability on the motor carrier. In the Fifth and Sixth circuits in particular, logo liability has been disavowed. In Jackson v. O'Shields, the driver refused to sign a cancellation receipt indicating the termination of the lease and refused to remove the motor carrier’s placards from his truck. The Fifth Circuit Court of Appeals held that after the 1986 amendment, the motor carrier should no longer be held liable on the basis of placards alone. The court stated, “In the aftermath of the ICC amendments, the continued vitality of decisions in other circuits holding that a lease cannot be effectively terminated until a carrier removes its placard and obtains a receipt is at best questionable.” In Ross v. Wall Street Systems, the motor carrier sent a letter to the truck’s owner terminating the lease, but Wall Street Systems’ placards were still on the truck a month later when the accident occurred. The court held, relying on Graham and Jackson, that the lease had been terminated and the presence of a placard alone did not impose liability on the motor carrier.

The recognition that the regulations were not intended to impose liability based on the logo on the truck has been a positive change.

69. Id. at 1128.
70. Id. at 1133 & n.14; see also Williamson v. Steco Sales, Inc., 530 N.W.2d 412, 419 (Wis. Ct. App. 1995) (determining that because of the 1986 amendments, liability should not be imposed on the motor carrier based solely on the existence of placards); Tartaglione v. Shaw’s Express, Inc., 790 F. Supp. 438, 441-42 (S.D.N.Y. 1992) (granting summary judgment after recognizing that the motor carrier was not liable because the lease was terminated and the placards were not removed due to the fault of the driver); Newman v. M & S Trucking Co., 12 F.3d 1101, 1993 WL 540,600, at *5 (7th Cir. 1993) (unpublished table disposition) (providing that no liability exists in the absence of a lease).
72. Id. at 1087 (citing Atlantic Truck Lines, Inc. v. Kersey, 387 So.2d 411, 416 (Fla. Dist. Ct. App. 1980)).
73. Id. at 1087. The court distinguished, rather than overruled, its prior decisions Simmons v. King, 478 F.2d 857, 867 (5th Cir.1973) and Price v. Westmoreland, 727 F.2d 494, 497 (5th Cir.1984), which recognized that if the truck bears the carrier’s ICC placard, then the driver constitutes a statutory employee and, thus, the carrier will be held vicariously liable for the injuries, and which applied the Simmons reasoning.
75. Id. at 480. The court went even further than Jackson in declaring the death of logo liability. “In the past, some courts followed a doctrine of ‘logo liability,’ under which the presence of a carrier’s government-issued placard created an irrebuttable presumption that the lease continued in effect. However, the underlying ICC regulations have changed, and this rule is no longer in effect.” Id. at 479-80 (citing Jackson v. O'Shields, 101 F.3d 1083 (5th Cir. 1996) and Graham v. Malone Freight Lines, 948 F. Supp. 1124 (D. Mass. 1996)) (internal citations omitted).
Though some courts have not yet overturned decisions made under the pre-1986 amendment analysis, it is probably safe to say that the persuasive authority rests with those courts, which have disavowed the doctrine of logo liability. Nevertheless, the pre-1986 cases continue to be cited to support the assertion of lease liability against motor carriers. Strict agency liability, or the imposition of liability against a motor carrier for the driver’s negligence whenever a lease is in effect, has taken the place of logo liability in the courts.

C. LEASE LIABILITY AS THE NEW LOGO LIABILITY

By providing in the ICC amendments that liability should not be assigned on the existence of placards alone, it can be inferred that the regulations intended for the motor carrier’s vicarious liability to flow through the lease, not through the placard. The majority of courts have interpreted the regulations to impose liability whenever a lease is in effect, with no consideration given to whether the driver was acting within the scope of his agency at the time of an accident.76 Even the Graham court, which had properly interpreted the regulations to disavow logo liability, acknowledged that the majority of courts hold that an irrebuttable presumption of statutory employment existed as a result of a valid lease.77

76. See, e.g., Kreider Truck Serv., Inc. v. Augustine, 394 N.E.2d 1179, 1181 (Ill. 1979) (“The multiple use of these trucks in both interstate and intrastate commerce by both the owner and the lessee made it difficult to determine who had control or possession of a truck at any given time for the purpose of determining liability for injury and damages arising from accidents.”); Price v. Westmoreland, 727 F.2d 494, 496 (5th Cir. 1974) (“In order to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles, Congress in 1956 amended the Interstate Common Carrier Act to require a motor carrier to assume full direction and control of leased vehicles.”); Roberts v. Xtra Lease, Inc., No. 98 CV 7559(ILQ), 2001 WL 984872, at *8 (E.D.N.Y. June 25, 2001) (“Negligence per se is only available where the motor carrier against whom this form of liability is sought has control of the vehicle but fails to comply with specific regulations [concerning lease liability].” (citations omitted)); Lung v. Manning Servs., Inc., 8 F. Supp. 2d 1155, 1157 (E.D. Ark. 1998) (“The federal regulations and ‘logo liability’ case law in this circuit make it clear that if [the driver] was driving under [the motor carrier’s] logo with its consent, [the motor carrier] is liable for [the driver’s] negligence.”); Shackelford v. Roe, No. 83-2136, 1985 U.S. Dist. LEXIS 22300, at *10 to *11 (W.D. Penn. Feb. 26, 1985) (“[I]n an action against a lessee by a person injured by the leased truck, that the lessee was responsible as a matter of law for the driver’s negligence.”). See also Smith v. Johnson, 862 F. Supp. 1287, 1291 (M.D. Pa. 1994) (“The ICC is empowered to promulgate regulations concerning the exclusive control and responsibility of leased vehicles, pursuant to § 11107. It has done so in the form of § 1057.12(c)(1), among others. Common law principles which are inconsistent with the regulations are preempted by the regulations.”); A.C. v. Roadrunner Trucking, Inc., 823 F. Supp. 913, 918 (D. Utah 1993) (“The purpose of the regulatory scheme governing truck leasing was to protect the public from irresponsible leasing arrangements. Prior to amendment of the Interstate Commerce Acts there were widespread violations and evasions of regulatory authority by carriers leasing or borrowing equipment not subject to the Act.”).

77. Graham, 948 F. Supp. at 1132 (citations omitted).
Lease liability, as opposed to logo liability, existed as a doctrine in the courts even before the 1986 amendment. In 1973, the Fifth Circuit Court of Appeals, in Simmons v. King, implied liability on the basis of the existence of a lease itself, not a placard as proxy for a lease.\textsuperscript{78} In Simmons, a truck permanently leased to Ace Freight Lines and trip-leased to Dubose Trucking rear-ended another truck.\textsuperscript{79} The trial court directed the jury to find that either Ace or Dubose was liable in addition to the driver; the jury attributed liability to Ace.\textsuperscript{80} The Fifth Circuit Court of Appeals found that Dubose had complied with the lease regulations and, thus, a lease was in effect at the time of the collision.\textsuperscript{81} It noted that Dubose had accepted “full responsibility” for the truck in its lease and was accordingly liable for the driver’s negligence.\textsuperscript{82} A year later, the Fourth Circuit Court of Appeals, in Proctor v. Colonial Refrigerated Transportation Inc., held flatly that the ICC regulations had eliminated the independent contractor arrangement from the trucking industry.\textsuperscript{83} It stated that “[a]ny language to the contrary in the lease agreement would be violative of the spirit and letter of the federal regulations and therefore unenforceable.”\textsuperscript{84}

The court did not consider whether the regulations imposed liability regardless of whether the driver was on the business of the motor carrier, likely because the driver in that case was under dispatch at the time of the accident.\textsuperscript{85} After the 1986 amendment, in Johnson v. S.O.S. Transport, Inc., the Sixth Circuit Court of Appeals considered whether a driver was a statutory employee under the regulations.\textsuperscript{86} In holding that the driver

\textsuperscript{78} Simmons, 478 F.2d at 867.

\textsuperscript{79} Id. at 859 n.4 & 862-63.

\textsuperscript{80} Id. at 859.

\textsuperscript{81} See id. at 867 (citing Cox v. Bond Transp., Inc., 249 A.2d 579 (N.J. 1969)). The court found irrelevant the fact that Dubose’s representative had not actually signed the lease. Id. at 863 n.14.

\textsuperscript{82} Id. at 867. In this case, unlike some others, the driver was actually acting with this scope of his agency at the time of the accident.

\textsuperscript{83} Proctor v. Colonial Refrigerated Transp., Inc., 494 F.2d 89, 92 (4th Cir. 1974).

\textsuperscript{84} Id. The court’s determination of the “spirit and letter” of the regulations came in part from the discussion in American Trucking Associations v. United States concerning “widespread abuses” in the trucking industry involving leased drivers. As noted earlier, the United States Supreme Court acknowledged that the abuses were speculative. Am. Trucking Ass’ns, 344 U.S. at 305 n.7.

\textsuperscript{85} See Proctor, 494 F.2d at 90-91.

\textsuperscript{86} Johnson, 926 F.2d at 520. The court acknowledged that third parties could make use of the doctrine, but considered whether the regulations were intended to protect only members of “the general public.” In holding that the regulations were not intended to protect only the general public, the court looked to the reasoning of Proctor and dismissed the reasoning of White v. Excalibur, 599 F.2d 50 (5th Cir. 1979). Id. at 522-23 (“In reaching our result in this case, we find the reasoning of the Fourth Circuit in Proctor to be more persuasive. The Fifth Circuit’s opinion in White assumes – incorrectly, we believe – that the driver of a leased vehicle is not an intended beneficiary of the federal regulatory scheme with which the lessee-carrier is required to comply in using nonowned equipment.”).
was a statutory employee, the court accepted, without question, the majority understanding that the leasing regulations render "lessee carriers vicariously liable, notwithstanding traditional principles of agency, for injuries sustained by third parties resulting from the negligence of the drivers of leased vehicles."\footnote{Id. at 521, 524 (citations omitted).}

The reasoning behind the courts' assumptions that the leasing regulations were intended to strictly impose vicarious liability upon motor carriers is best seen in \textit{A.C. v. Roadrunner Trucking, Inc.}\footnote{Roadrunner, 823 F. Supp. 913.} In that case, the driver sexually assaulted the plaintiff in equipment owned by the motor carrier.\footnote{Id. at 916.} The plaintiff sought to extend the rationale of \textit{Rodriguez} and \textit{Mellon} to apply to instances of owned equipment.\footnote{Id. at 917.} Though \textit{Rodriguez} and \textit{Mellon} concerned logo, not lease liability, the court cited them for the purpose of discussing lease liability.\footnote{Id.} In rejecting the plaintiff's attempt to extend the doctrine, the court explained that it may be more difficult to identify the responsible party when the equipment was leased.\footnote{Id. at 919.} The \textit{Roadrunner} court quoted the court in \textit{Rediehs Express, Inc. v. Maple.}\footnote{Id. (quoting Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986)).}

Absent such a policy, when innocent people are hurt or killed, there will be, as here, a round robin of finger pointing by carriers, lessors, owners and drivers, cargo owners, and insurers raising issues of independent contractor, frolic and detour, whose cargo was being carried, what instructions the driver had, agency and the like in their attempt to evade responsibility for the carnage wrecked [sic] upon innocent motorists. The plaintiff encounters much difficulty in fixing responsibility, for only the carrier and his lessor really know their arrangements. A plaintiff should not be required to bear this burden nor should he be required to settle for a financially irresponsible defendant fathered by the carrier. The carrier must, at his peril, exert care in his leasing arrangements and avoid leasing from "gypsies" or fly-by-night, irresponsible truckers. The regulations and cases make the carrier police its lessors as it is policed by the ICC.\footnote{Id. (citing Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986), Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473, 476 (3d Cir. 1961), and Am. Trucking Ass'ns v. United States, 344 U.S. 298, 302 (1953)).}

The court further reasoned that, without the lease, the equipment had no independent ICC authority and was therefore not authorized to be on the road.\footnote{Id.} Only the lease stood between regulated, safe, inspected
equipment and "fly-by-night" truckers. The court stated that the rationale did not apply to owned equipment because it was easy to identify the employer and the doctrine of respondeat superior would protect the public.

In 1992, the leasing regulations were again amended, this time to specifically acknowledge the independent contractor relationship flatly rejected in Proctor. 49 C.F.R. § 376.12(c)(4) was added to the regulations, which provided that

[nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 14102 and attendant administrative requirements.

Thus, independent contractor relationships became explicitly authorized by the regulations. Such a change appears directed to the problem of Roadrunner, namely, that the leasing regulations impose strict vicarious liability no matter the nature of the relationship between the driver and the motor carrier. Recognition of the independent contractor relationship suggests that courts should look more closely to the actual work being performed by the driver at the time of the accident. This interpretation is further supported by the ICC's comments at the time of the 1992 amendment. The ICC stated,

While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship . . . . By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the [factfinders''] and the [carriers''] time and

96. See id. (quoting Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986)).

97. Id. This rationale fails to consider the result when the driver is not acting within the scope of his employment. It is ironic that the motor carrier in this case received summary judgment because the driver was not acting within the scope. Under the court's own reasoning, this would not have been the case had the equipment been leased.

98. Proctor, 494 F.2d at 92.


100. 49 C.F.R. § 376.12(c)(4).

101. See id. "At all relevant times, defendants . . . were employees of Roadrunner and did not act as independent contractors." Roadrunner, 823 F. Supp. at 916. The ICC was also addressing the developing trend of using the statutory employment doctrine in workers' compensation cases to award workers' compensation when none would otherwise have been available.
expense.\textsuperscript{102}

This, combined with the ICC's 1986 comment that the regulations were not intended to impose liability where none existed,\textsuperscript{103} suggests that the "majority" view imposing strict vicarious liability may not have been intended by the regulations.

Though it has been over ten years since the regulations were amended to recognize independent contractor relationships, the "majority" view imposing strict agency liability continues to prevail in most places.\textsuperscript{104} Most courts, in fact, continue to analyze questions of statutory employment under the pre-1992 paradigms of \textit{Mellon} and \textit{Rodriguez}.\textsuperscript{105} A few courts have analyzed the question of lease liability under the post-1992 framework and reached entirely different conclusions.\textsuperscript{106} After re-

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\textsuperscript{102} \textit{Petition to Amend}, 8 I.C.C.2d at 671.
\textsuperscript{103} \textit{Identification Devices}, 3 I.C.C.2d at 93.
\textsuperscript{104} \textit{E.g.}, \textit{Reliance}, 2001 WL 984737, at *8 ("[C]ourts have ruled that '[t]he statute and regulatory pattern clearly eliminates the independent contractor concept from such lease arrangements and ... [a]ny language to the contrary in the lease agreement would be violative of the spirit and letter of the federal regulations and therefore unenforceable.' The majority of authority holds that 49 C.F.R. § 376.12(c) creates a carrier's liability for a leased truck's negligence as a matter of law." (quoting \textit{Proctor v. Colonial Refrigerated Transp.}, Inc., 494 F.2d 89, 92 (4th Cir. 1974) (citations omitted)); \textit{Gilstorff}, 910 F. Supp. at 359 ("Federal law makes a carrier liable for the acts of any driver who displays its ICC placard and identification numbers while a lease is in effect, regardless of whether the driver embarks on an undertaking of his own." (citations omitted)); \textit{Guar. Nat'l Ins. Co.}, 596 N.E.2d at 969 ("[T]he employer of an independent contractor – one who controls the method and details of his own task – is generally not liable for the torts of the contractor. However this independent contractor – master/ servant distinction has been eliminated for lease arrangements under ICC regulations." (citations omitted)).
\textsuperscript{105} \textit{E.g.}, \textit{Conn. Indem. Co. v. Stringfellow}, 956 F. Supp. 553, 556 (M.D. Pa. 1997) (relying on \textit{Mellon} in holding that federal law controls the issue of carrier liability and further holding that the carrier is responsible for the "actions of a driver of a leased tractor without regard to issues concerning course or scope of employment or whether the driver was performing his duties under the contract at the time of the accident.")); \textit{Meyers v. Norton Ramsey Motor Lines, Inc.}, No. 4:96CV324-D-B, 1997 WL 170308, at *3 (N.D. Miss. Apr. 3, 1997) ("When a statutory employee relationship is created under the terms of the ICC regulations, the carrier becomes 'vicariously liable as a matter of law for the negligence of the driver.'" (quoting \textit{Price v. Westmoreland}, 727 F.2d 494, 496 (5th Cir. 1984))); \textit{Baker v. Roberts Express, Inc.}, 800 F. Supp. 1571, 1574 (S.D. Ohio 1992) (finding that the "ICC regulations enacted pursuant to the Interstate Commerce Carrier Act create an irrebuttable presumption of an employment relationship between a driver of a leased vehicle furnished by a contractor-lessee and a carrier-lessee."); \textit{Holliday v. Epperson}, No. 1:02-CV-1030-T, 2003 WL 23407496, at *5 (W.D. Tenn. Aug. 26, 2003) (ruling that the lease agreement made motor carrier the statutory employer of the owner-operator driving the truck).
\textsuperscript{106} \textit{E.g.}, \textit{Parker}, 473 S.E.2d at 426 (determining that the ICC regulations "were not intended to impose upon carriers using leased equipment or the services of independent contractors greater liability than that imposed when a carrier uses its own equipment or employees." Under the principle of respondeat superior, "the employer is held vicariously liable for the negligent actions of his employee 'if the negligent conduct occurred while the employee was acting within the course and scope of his employment.' This same rule should apply to carriers who
viewing the regulations, one court upheld the strict vicarious liability,\(^{107}\) and the other held that the question should be analyzed under state tort and agency law.\(^ {108}\) These competing paradigms are the cutting edge of the law on lease liability.

### III. A Comparative Analysis of the Post-1992 Paradigms

The doctrine of logo liability has generally transitioned to the more analytically precise doctrine of lease liability. The cases that developed logo liability, however, continue to be cited to support the imposition of lease liability on motor carriers. Those cases are typically cited without analysis of their holdings, and are instead used to support the general notion that motor carriers are vicariously liable for the negligence of their leased drivers. Those courts are not so much considering the founding cases of lease liability as they are referring to a conception of it in general. The two primary schools of thought regarding lease liability demonstrate that the mythology of logo liability has consumed its analytical foundation.

### A. The Decisions

In 1996, the North Carolina Court of Appeals held in *Parker v. Erixon* that state agency law, not the leasing regulations, should determine the relationship between a motor carrier and driver.\(^ {109}\) In that case, the driver, Harold Erixon, leased his truck to Chemical Leaman Tank Lines, Inc. and operated under its authority.\(^ {110}\) After delivering a load for Chemical Leaman, Erixon went off duty and took his truck to visit his son.\(^ {111}\) On the way, he was involved in a head-on collision with the plaintiff, James Parker.\(^ {112}\) The trial court denied Chemical Leaman's motion for summary judgment on the basis that there was an “irrebuttable presumption of agency” between Chemical Leaman and Erixon.\(^ {113}\) Chemical Leaman appealed.\(^ {114}\) The state court of appeals noted that there were “two lines” of authority on the driver's relationship with the motor carrier.\(^ {115}\) One line recognizes a rebuttable presumption of agency,\(^ {116}\) which

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\(^{107}\) *Morris*, 78 S.W.3d at 43.

\(^{108}\) *Parker*, 473 S.E.2d at 426.

\(^{109}\) *Id.*

\(^{110}\) *Id.* at 422.

\(^{111}\) *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.* at 423.

\(^{114}\) *Id.*

\(^{115}\) *Id.*

\(^{116}\) *Id.*
is embodied by the Wilcox case. The other line recognizes an irrebuttable presumption, which is embodied by the Rodriguez case. The court noted that, in 1974, the Fourth Circuit in Proctor held that the independent contract relationship was not authorized, but reasoned that the Proctor decision had been undermined by the 1992 amendments authorizing the relationship. Relying largely on the 1992 and 1986 comments from the ICC and a 1993 decision from the Eastern District of Pennsylvania, the court concluded,

The ICC regulations were not intended to impose upon carriers using leased equipment or the services of independent contractors greater liability than that imposed when a carrier uses its own equipment or employees . . . . Under this principle, the employer is held vicariously liable for the negligent actions of his employee 'if the negligent conduct occurred while the employee was acting within the course and scope of his employment.' . . . This same rule should apply to carriers who have lease equipment or arranged for the services of an independent contractor.

In the instant case, the Parker court held that the driver was not within the scope of his agency at the time of the accident and reversed the trial court's denial of Chemical Leaman's motion for summary judgment.

In direct contrast to the Parker decision, in 2002, a Texas state court of appeals held in Morris that motor carriers are liable as a matter of law for the negligence of their leased drivers. In that case, the plaintiff was injured when he was involved in an accident with a leased truck. The truck was owned by Hammer Trucking, Inc. and leased to JTM Materials, Inc. At the time of the accident, the driver, Jerry Largent, was intoxi-

117. See id. (citing Wilcox v. Transam. Freight Lines, Inc., 371 F.2d 403, 404 (6th Cir. 1967)).
118. Id.
119. See id. (citing Rodriguez v. Ager, 705 F.2d 1229, 1235-36 (10th Cir. 1983)).
120. Id. at 424 (citing Proctor v. Colonial Refrigerated Transp., Inc., 494 F.2d 89, 90 (4th Cir. 1974) and Ryder Truck Rental Co., Inc. v. UTF Carriers, Inc., 719 F. Supp. 455, 457-58 (W.D. Va. 1989)).
121. Id. at 424-26. The court cited Penn v. Virginia International Terminals, Inc., 819 F. Supp. 514 (E.D. Va. 1993). That case considered whether a contract driver was eligible for workers' compensation as a statutory employee. Penn, 819 F. Supp. at 515. The court held that the driver was not a statutory employee, rejecting those cases finding that the ICC regulations mandated such a relationship when a lease was in effect. Id. at 523, 526. The court stated,

Those cases find that an employer-employee relationship between lessee-lessee is mandated by the provision of 49 C.F.R. § 1057.12(c)(1), which places exclusive possession, control, use and operation of the leased equipment under the lessor. This Court believes that is a misinterpretation of the regulation, especially with the hindsight provided by the 1992 amendment to 49 C.F.R. § 1057.12(c).

Id. at 523 (footnote omitted).
122. Parker, 473 S.E.2d at 427.
123. Morris, 78 S.W.3d at 35.
124. Id.
125. Id.
cated and off duty.\textsuperscript{126} JTM's motion for summary judgment was granted by the trial court.\textsuperscript{127} The appellate court reviewed the text of the leasing regulations and the cases interpreting them and found that the purpose of the regulations was to "ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment . . . ."\textsuperscript{128} On that basis, the court held that

an interstate motor carrier's liability for equipment and drivers covered by leasing arrangements is not governed by the traditional common-law doctrines of the master-servant relationship and respondeat superior. Instead, an interstate carrier is vicariously liable as a matter of law under the FMCSR for the negligence of its statutory employee drivers.\textsuperscript{129}

The court found that the driver was the statutory employee of JTM and reversed the trial court's grant of summary judgment.\textsuperscript{130} The court outright rejected JTM's argument that it should only be held liable if the driver was acting within the course and scope of his duties at the time of the accident.\textsuperscript{131}

**B. THE PARADIGMS**

The *Morris* and *Parker* cases take different approaches to reach their opposite conclusions. The *Morris* decision relied on prior precedent regarding the obligations of motor carriers and the intent of the ICC regulations.\textsuperscript{132} In particular, the court looked to *Price v. Westmoreland* and *Planet Ins. Co. v. Transport Indemnity Co.* to support its assertion that the "FMCSR preempt state law in tort actions in which a member of the public is injured by the negligence of a motor carrier's employee while operating an interstate carrier vehicle."\textsuperscript{133} *Price* is a Fifth Circuit case from 1984, and its statement that the ICC regulations preempt state tort law came from its holding in *Simmons v. King*, in 1973.\textsuperscript{134} *Planet* is a Ninth Circuit case from 1987, and its holding largely concerns the applicability of an endorsement for insurance coverage purposes.\textsuperscript{135} With the

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 36.
\item \textit{Id.} at 37-38.
\item \textit{Id.} at 39 (citations omitted).
\item \textit{Id.} at 39 (citations omitted).
\item \textit{Id.} at 39 (citing Price v. Westmoreland, 727 F.2d at 496, 494 (5th Cir. 1984), Planet Ins. Co. v. Transport Indemnity Co., 823 F.2d 285, 288 (9th Cir. 1987), and Simmons v. King, 478 F.2d 857, 866 (5th Cir. 1973)).
\item \textit{Id.} at 39 (citing Price v. Westmoreland, 727 F.2d at 496, 494 (5th Cir. 1984), Planet Ins. Co. v. Transport Indemnity Co., 823 F.2d 285, 288 (9th Cir. 1987), and Simmons v. King, 478 F.2d 857, 866 (5th Cir. 1973)).
\item \textit{Id.} at 45. The court did not review either *Parker* or *Penn* in its review of authority. See \textit{id.} at 34-45.
\item \textit{Id.} at 43.
\item \textit{Id.} at 37-43.
\item \textit{Price}, 727 F.2d at 496.
\item \textit{Planet Ins. Co. v. Transport Indemnity Co.}, 823 F.2d 285, 288 (9th Cir. 1987).
\end{enumerate}
exception of one state case, and a Fifth Circuit case that does not discuss the 1992 amendments, every case the Morris court cites in support of the proposition that "an interstate carrier is vicariously liable as a matter of law under the FMCSR for the negligence of its statutory employee drivers" was decided before the 1992 amendments to the regulations. Though the Morris court looks to the regulations to demonstrate that they were put into place to protect the public, it does not discuss the legislative history or comments of the ICC regarding its purpose in implementing the regulations. In contrast, Parker does not look extensively to case law on the question of statutory employment; it confines itself largely to the conflict between Proctor and Penn v. Virginia International Terminals. Instead, Parker finds support for its holding in the ICC's comments on the 1986 and 1992 amendments to the regulations. Both courts, however, are seeking the intent of the ICC, now the FMCSA.

The Morris understanding of the FMCSA's intent comes through case law, which, if one winds through its analytical support, ultimately rests upon two bases, the pre-regulation testimony of the ICC and the text of the regulation itself. The first basis for the Morris line of analysis is the United States Supreme Court's statement in American Trucking Association that the leasing regulations were put into place to avoid widespread abuses of the trucking industry. The language "widespread abuses" has almost taken on a mythology of its own, simply being cited for that fact without discussion of the statement's context. That basis is somewhat undercut by the Supreme Court's acknowledgement that such
abuses were more speculative than documented, a footnote never cited by the *Morris* antecedents.\textsuperscript{146} The second basis, the text of the regulation, is stronger. The text of the regulation appears relatively straightforward. The motor carrier must assume “complete responsibility” for the operation of the truck while the lease is in effect.\textsuperscript{147} There does not appear to be room in the text of the regulation for the argument that responsibility is complete only while the driver is on the business of the motor carrier. A logical reading of the regulation would impose liability the way *Morris* did.\textsuperscript{148} In support of this argument is the fact that, though the ICC amended the regulations in 1986 and again in 1992, it never changed the fundamental requirement of “complete responsibility.”\textsuperscript{149}

The *Parker* understanding of the FMCSA’s intent comes largely from the agency itself.\textsuperscript{150} The 1986 statement that “[t]he Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract and agency law and create carrier liability where none would otherwise exist”\textsuperscript{151} contradicts *Morris*’ assertion, which was based largely on pre-1986 law, that the regulations supersede state law.\textsuperscript{152} The 1992 statement objecting to the practice of holding “the language to be prima facie evidence of an employer-employee relationship”\textsuperscript{153} undercuts the text of the regulation basis for the *Morris* paradigm. The United States Supreme Court has held that an administrative agency’s interpretation of its enabling statutes should be afforded deference.\textsuperscript{154} In the case of the leasing regulations, however, it is not the interpretation of the statute which is in question, but the interpretation of the regulation itself. In such a situation, the agency’s own comments regarding its intent should be given great deference.\textsuperscript{155} In *Bowles v. Seminole Rock & Sand Co.*, the United States Supreme Court held that

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[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if
\end{quote}

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\item \textsuperscript{146} *Am. Trucking Ass’ns*, 344 U.S. at 305 n.7.
\item \textsuperscript{147} 49 C.F.R. § 376.12(c). This is a slightly different phrasing than was found in the prior version of this regulation, but the change is in form only.
\item \textsuperscript{148} See *Morris*, 78 S.W.3d at 42-43.
\item \textsuperscript{149} 49 C.F.R. § 376.12(c); see generally *Identification Devices*, 3 I.C.C.2d 92; *Petition to Amend*, 8 I.C.C.2d 669.
\item \textsuperscript{150} See *Parker*, 473 S.E.2d at 424-27.
\item \textsuperscript{151} *Identification Devices*, 3 I.C.C.2d at 93.
\item \textsuperscript{152} *Parker*, 473 S.E.2d at 424 (agreeing with the court in *Penn.* that “ICC regulations have eliminated the independent contractor concept and therefore traditional common law doctrines of employer-employee and *respondeat superior* do not determine ICC carrier liability.” (citing *Penn v. Va. Int’l Terminals, Inc.*, 819 F. Supp. 514, 521-22 (E.D. Va. 1989)).
\item \textsuperscript{153} *Petition to Amend*, 8 I.C.C.2d at 671.
\item \textsuperscript{155} See, e.g., *Chevron*, 467 U.S. at 844.
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the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.\footnote{156}

In \textit{Bowles}, the Supreme Court upheld the Administrator of the Office of Price Administration’s interpretation of Maximum Price Regulation No. 188 as expressed in bulletins issued by the Administrator to the industry.\footnote{157} In the case of the leasing regulations, the divergent case law has demonstrated that the meaning of the words of the leasing regulations is in doubt.\footnote{158} The 1986 and 1992 comments from ICC speak directly to the interpretation of the agency to its own regulations. Though the language of the regulation remains ambiguous, the ICC’s interpretations do not appear to be clearly erroneous or inconsistent with the regulation.

Neither the \textit{Morris} case nor the \textit{Parker} case has been extensively cited by other courts.\footnote{159} The \textit{Morris} case has been primarily cited within the state of Texas.\footnote{160} The \textit{Parker} case has been cited for its holding on only two occasions, by the Middle District of North Carolina in \textit{Shinn v. Greenness}\footnote{161} and by the Middle District of Georgia in \textit{Clark v. Roberson Management Corp.}\footnote{162}

In \textit{Shinn}, the defendant motor carrier was contesting personal jurisdiction claiming that the defendant driver was not its agent at the time of the accident.\footnote{163} The plaintiff had the burden of establishing a prima facie

\footnotesize{\begin{itemize}
\item 157. \textit{id.} at 417-18.
\item 158. Compare, e.g., \textit{Parker}, 473 S.E.2d at 391 (determining that North Carolina “follows the rebuttable presumption of agency.”), \textit{with Morris}, 78 S.W.3d at 43 (holding that, “if JTM is an interstate carrier, it is vicariously liable as a matter of law for the driver’s negligence in the driving the vehicle).
\item 159. The \textit{Morris} decision has only been examined by one court, the Fifth Circuit Court of Appeals. \textit{Minter v. Great Am. Ins. Co. of N.Y.}, 423 F.3d 460, 461-63 (5th Cir. 2005). Likewise, the \textit{Parker} decision has only been examined by one court, the United States District Court for the Middle District of North Carolina. \textit{Shinn v. Greenness}, 218 F.R.D. 478, 485-86 (M.D.N.C. 2003).
\item 160. In addition to Texas state courts, \textit{Morris} has been cited by the Fifth Circuit Court of Appeals in \textit{Minter v. Great American Insurance Co. of New York}; however, it should be noted that \textit{Morris} was cited in \textit{Minter} because the \textit{Morris} decision gave rise the insurance claim at issue in \textit{Minter}. \textit{Minter}, 423 F.3d at 461-63. \textit{Morris} has also been cited by the California Court of Appeals in Stewart v. Four Seasons Coach Leasing, No. B166695, 2004 WL 2526415, at *3 to *4 (Cal. Ct. App. Nov. 9, 2004) and by the United States District Court for the Western District of Kentucky in Estate of Presley v. CCS of Conway, No. 3:03CV-117-H, 2004 WL 1179448, at *5 to *6 (W.D. Ky. May 18, 2004).
\item 161. \textit{Shinn}, 218 F.R.D. at 485.
\item 163. \textit{Shinn}, 218 F.R.D. at 484.
\end{itemize}
case for agency in order to defeat the defendant's motion.\textsuperscript{164} The court looked to \textit{Parker} and determined that the \textit{Parker} court had interpreted the regulations to create a rebuttable presumption of agency, which could be defeated if the motor carrier showed that the driver was not on the business of the motor carrier at the time of the accident.\textsuperscript{165} The court held that the plaintiff's complaint, which pled that the driver was the agent of the motor carrier, established a prima facie case for agency and denied the defendant's motion to dismiss for lack of personal jurisdiction.\textsuperscript{166} 

In \textit{Clark}, the plaintiff sued the motor carrier for the injury and death of her husband, Robert Clark, who fell from a truck while assisting the driver with repairs.\textsuperscript{167} At the time of the accident, the driver, Joe Roberts, was off duty, and the motor carrier moved for summary judgment.\textsuperscript{168} The trial court considered the plaintiff's argument regarding statutory employment, specifically referencing the decision in \textit{Simmons}, upholding lease liability,\textsuperscript{169} but concluded that the 1992 amendment to the leasing regulations eliminated the doctrine of statutory employment altogether.\textsuperscript{170} The court stated,

It seems evident that the "statutory employee" interpretation of the regulation relied upon by Plaintiff has been rendered a nullity in light of the 1992 amendment and the administrative agency's express and unambiguous intention. . . . Like the court in \textit{Penn}, this Court finds that the "statutory employee" argument is contrary to the express intention of the Surface Transportation Board.\textsuperscript{171}

Like the \textit{Parker} court, the \textit{Clark} court then looked to state agency law to determine whether the driver was acting within the scope of his employment at the time of the accident and granted the defendant's motion for summary judgment.\textsuperscript{172}

Like the courts, commentators have reached divided opinions on the question of logo and lease liability. In a well-researched article detailing the history of the leasing regulations, author Patrick Phillips concluded in 1999 that what he termed the "common law" approach to statutory em-

\begin{itemize}
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.} at 485 (citing \textit{Parker v. Erixon}, 473 S.E.2d 421, 426-27 (N.C. Ct. App. 1996)).
  \item \textsuperscript{166} \textit{Id.} at 486. This holding suggests that a motor carrier may be found to be subject to the personal jurisdiction of a court wherever it has a driver and whenever the plaintiff alleges agency in its complaint.
  \item \textsuperscript{167} \textit{Clark}, No. 5:03CV274-DF, at 1-2.
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Simmons}, 478 F.2d at 867.
  \item \textsuperscript{170} \textit{Clark}, No. 5:03CV274-DF, at 4-6.
  \item \textsuperscript{171} \textit{Id.} at 6-7. The court referenced the \textit{Parker} and \textit{Penn} cases, but did not refer to the \textit{Morris} case in its decision. \textit{See id.} at 1-11.
  \item \textsuperscript{172} \textit{Parker}, 473 S.E.2d at 390-91; \textit{Clark}, No. 5:03CV274-DF, at 7-9, 11.
\end{itemize}
ployment, relying on state agency law rather than the regulations, was more equitable.\textsuperscript{173} Phillips acknowledged that the majority of courts continued to impose strict agency liability on motor carriers in spite of the amendments to the regulations.\textsuperscript{174} A more recent article by Ethan Vessels proposed a statute which would make motor carriers “irrebuttable presumed responsible” for their drivers’ actions under lease.\textsuperscript{175} Vessels argued that the minority position of \textit{Parker} would leave plaintiffs without financial compensation when drivers were not within the scope of their employment and, accordingly, violated the intent of the regulations.\textsuperscript{176} An annually updated treatise on motor carrier liability, on the other hand, argued that leased equipment should be treated like owned equipment for liability purposes.\textsuperscript{177}

Though both \textit{Morris} and \textit{Parker} are state appellate cases with limited precedential weight, the cases embody two distinct lines of analysis regarding the motor carrier’s liability for its leased drivers’ conduct. The \textit{Morris} case is the capstone of prior holdings on the issues of logo and lease liability and endorses that philosophy for future cases notwithstanding the 1992 amendment to the regulations.\textsuperscript{178} The \textit{Parker} case, on the other hand, rejects prior holdings and bases its analysis on the amendments and the regulators’ comments regarding those amendments.\textsuperscript{179} Courts approaching the question of lease liability face uncertainty as to the proper analysis.


\textsuperscript{174} \textit{Id.} The \textit{Morris} case, which was decided in 1992, had not yet been decided when Phillips wrote his article.


\textsuperscript{176} \textit{See id.} at 230-231. Vessels’ analysis relies heavily on \textit{Cincinnati Insurance Co. v. Haack}, a declaratory judgment action in Ohio. \textit{Cincinnati Ins. Co. v. Haack}, 708 N.E.2d 214, 223, 225-226 (Ohio Ct. App. 1997). The \textit{Haack} court, based upon Wycoff Trucking, Inc. v. Marsh Brothers Trucking Service, Inc., 569 N.E.2d 1049 (Ohio 1991), determined that a motor carrier’s insurance company had coverage for an underlying injury because it declared the driver to be the statutory employee of the motor carrier. \textit{Id.} at 224. The court consequently held that the non-trucking exclusion in the motor carrier’s insurance policy was inapplicable. \textit{Id.} at 225-26. This decision not only failed to consider the 1992 amendments to the regulations or the comments of the ICC, but conflated the distinct issues of non-trucking coverage and lease liability. \textit{See generally id.} Because the \textit{Haack} court failed to demonstrate a complete grasp of the law and the issues surrounding lease liability, so too did Vessels’ article. Vessels’ article did not reference the 1992 amendment to the regulations or the ICC’s commentary. \textit{See generally Vessels, supra note 176.}

\textsuperscript{177} \textit{DENNIS, CORRY, PORTER & SMITH, L.L.P., MOTOR CARRIER LIABILITY} ¶ 611 (CCH Inc. ed., 2005). The two authors of this article are contributing editors to the treatise.

\textsuperscript{178} \textit{See Morris}, 78 S.W.3d at 38-39, 42.

\textsuperscript{179} \textit{See Parker}, 473 S.E.2d at 423-25.
C. Resolving the Uncertainty

A court deciding a case involving lease liability today has the opportunity to independently analyze the issues and reach its own conclusion regarding the intent of Congress and the FMCSR. Because so few courts have considered lease liability in light of the 1992 amendments, most of the historically leading cases on the issue are persuasive, rather than controlling, authority. As discussed above, the text of the enabling statute itself says nothing about employment relationships; rather, it provides only that leased equipment be treated "as if the motor vehicles were owned by the motor carrier."\(^{180}\) With a few exceptions, liability is generally not imputed on the owner of equipment for its use.\(^{181}\) The ICC took Congress’ directive and promulgated the leasing regulations, which provide that the lessee of commercial motor vehicles "shall assume complete responsibility for the operation of the equipment for the duration of the lease."\(^{182}\) From those regulations, a few cases were decided which created a mythology of logo liability that later courts have accepted without considering the law beneath the myth.\(^{183}\)

The difference between the *Morris* and *Parker* positions is demonstrated by the following example. Two trucks are traveling the highway side by side, one owned equipment, and one leased equipment. Both drivers are off duty on a personal errand, and the two vehicles jointly cause an accident injuring a fellow motorist. A court using the *Morris* paradigm would hold, as a matter of law, that the motor carrier using leased equipment was vicariously liable for the driver’s negligence.\(^{184}\) The motor carrier using the owned equipment, on the other hand, would not be liable because the driver was not acting within the scope of his


\(^{181}\) *E.g.*, S. Cotton Oil Co. v. Anderson, 80 So. 629, 638 (Fla. 1920) ("It is the province of the courts to determine whether an instrumentality of known qualities is so peculiarly dangerous in its operation as to invoke the principle of law that the owner thereof is liable for injuries to third persons proximately resulting from the negligent operation of such instrumentality by any one using it with the authority of the owner.").

\(^{182}\) 49 C.F.R. § 376.12(c).

\(^{183}\) *See* *Mellon*, 289 F.2d at 476 ("[A]t the time and place of the accident the truck was under the lease which put exclusive possession, use and control during the thirty day period in [the lessee]. . . . [The lessee’s] decals were on the cab together with the [lessee] ICC permit number and no receipt showing termination of the lease had been given by [the lessor to the lessee]. In those circumstances, . . . [t]he truck at the time was under a properly ICC authorized lease to [the lessee] with the latter assuming full responsibility for its operation to the public, the shippers, and the ICC."). *See also* *Rodriguez*, 705 F.2d at 1232 ("Inasmuch as the lease was still in effect the trucking company . . . is responsible until such time as the lease was terminated and after the removal of the insignia of [the lessee] and delivery of the insignia into the hands of [the lessee]. At the time of the collision that produced the deaths [the lessee’s] insignia, the authority to drive the truck on the highways, remained on the truck.").

\(^{184}\) *See* *Morris*, 78 S.W.3d at 34-35 ("[W]e hold that an interstate motor carrier is vicariously liable as a matter of law for the driver's negligence . . . .").
employment at the time of the accident. A court using the *Parker* paradigm, however, would find that neither motor carrier was liable because the drivers were not within the course and scope of their employment.

If a court approaching lease liability today were to begin its analysis with the lease regulations, which provide that motor carriers must be completely responsible for their leased equipment, that court would arrive at the *Morris* position. On the other hand, if the court looked first to the enabling statute, it would then have to consider how the leasing regulations have interpreted Congress' intent. Does Congress' edict that owned and leased equipment be treated the same mean that, for liability purposes, motor carriers are to be liable for their leased driver's negligence when they would not be for their own driver's negligence? Based on the ICC's directives, did the ICC intend that "complete responsibility" be interpreted to create strict agency liability? Essentially, the *Parker* decision looks to the enabling statute and interprets owned and leased equipment to mean that employee and non-employee drivers should be treated alike. Respondent superior will impose liability upon the motor carrier, but only if the driver was within the scope of his employment. If a court approaching lease liability today were to consider the entire package, from enabling statute, to regulation, to directive, to the fundamental equities of the situation, then it would arrive at the *Parker* position.

The body of law on this matter is unresolved. Any court could embrace either the *Morris* or the *Parker* analysis to reach entirely opposite results. To complicate issues, underlying the entire matter is the tacit belief that people injured by trucks should be compensated. Courts are reluctant to leave an injured plaintiff to recover damages only against a driver's limited assets, even when the driver has no connection to a motor carrier at the time of the accident. Barring a decision by the United States Supreme Court, reaching consensus through the courts is likely to be a long process which will result in even more discordance than already exists. Though the *Parker* analysis appears stronger than the *Morris* analysis, courts will continue to reach contradictory opinions.

185. See id. at 39.
186. *Parker*, 473 S.E.2d at 426 ("Under North Carolina law, liability of an owner of a motor vehicle for acts of his employee is governed by the principle of *respondeat superior.*** (citing McNair v. Lend Lease Trucks, Inc., 62 F.3d 651, 654 (4th Cir. 1995)).
187. 49 C.F.R. § 376.12(e).
188. 49 U.S.C. § 14102.
189. See *Parker*, 473 S.E.2d at 423-426.
190. Id. at 423 (citations omitted).
IV. Conclusion

For nearly fifty years, the leasing regulations have required that leased equipment be treated like owned equipment. From those regulations, courts created logo liability, which was eventually overtaken by lease liability. After the 1992 amendment to the regulations, two schools of analysis have developed to apply lease liability to motor carriers in very different ways.\textsuperscript{192} The conflict between the \textit{Morris} and \textit{Parker} paradigms must be resolved. Based upon the text of the enabling statute and the deference which should be granted to the agency's interpretation of its own regulations, it appears that the \textit{Parker} model is the better choice. Until a consensus is reached, however, courts must take it upon themselves to look beyond the mythology of logo liability to the legal foundations of the doctrine and independently decide what the regulations intend.

\begin{footnote}{192} \textit{Parker}, 473 S.E.2d at 423.\end{footnote}
Competition in Air Transport —
The Need for a Shift in Focus

Ruwantissa Abeyratne*

I. Introduction

A preeminent regulatory challenge confronting air transport is the need to update policies, guidelines, and other regulatory instruments to address global changes in the aviation environment. Recent pressures on commercial aviation require that the industry shift its focus to encourage free competition. The industry must either enact measures that enable airlines to fully maximize market potential, or risk falling apart.

Traditionally, competition in commercial aviation was not truly “free.” From the beginning of regulated civil aviation in 1944, marked by the signing of the Chicago convention,¹ competition remained, until recently, rigidly regulated. Competition in commercial aviation was based on predetermined capacities, which limited opportunities for a carrier to enter a market, stunting the growth of the global air transportation sys-

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The air transport industry thus became comfortable and languid, with established legacy carriers dominating a vastly untapped market.\(^2\)

However counterintuitive this system may seem in today’s economy, the air transport system of the past had its advantages when considered in light of the technological limitations of the times. For instance, even then, a consumer in almost any corner of the globe could fly seamlessly to almost any other part of the world through a single transaction. Complex, but reasonably efficient, sets of working relationships between hundreds of individual air carriers facilitated this relatively smooth network. Transaction costs were low; a single call to a travel agent could finalize a transcontinental flight. This was possible because individual airlines themselves ensured the provision of their services, infrastructure and procedures to connect passengers and freight both within their own networks and to those of connecting carriers.

Today, the story is somewhat different. Changing market conditions and a growing demand for air transportation, roughly equal to double the rate of the growth in the general economy, has naturally led the industry towards sophistication and technological improvements. The exponential infusion of capacity to meet growing demand has required costly systems and infrastructure. A primary result is that air transport has become more expensive.

The industry has recently faced other challenges, e.g., terrorism and environmental regulations. The airline industry suffered a tremendous blow in September of 2001. The threat of terror brought such problems as more expensive aviation insurance and the need to cancel flights on an emergency basis.\(^4\) The initial setback suffered due to the events of 11 September 2001, combined with the impact of an economic downturn and an initial precipitous decline in air travel, portended an inevitable gloom for the air transport industry. This became a reality when air traffic suffered an abrupt downfall globally during 2001.\(^5\) Subsequent retaliation by the world community against terrorism further increased passengers’ fear and reluctance to use air transport.\(^6\)

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3. Id.


5. Id. at 12,13.

6. See, e.g., Mariel Garza, Travel Fears Alters Southern Californians’ Travel Plans, Experts Say, Los Angeles Daily News, Nov. 21, 2001. The International Civil Aviation Organization, in its annual report for the year 2001, recorded that following the events of 11 September 2001, total passenger traffic decreased by 3.9 percent over the previous year and international freight tonnes kilometers by 5 percent. 2001 Annual Civil Aviation Report, supra note 4, at 12.
In the years that followed, several events compounded the setbacks initiated by 9/11. The build up to the war in Iraq in 2002, followed by the beginning of the war in 2003, and the outbreak of Severe Acute Respiratory Syndrome (SARS), the failing global economy and the continuing terrorism threat, all had negative effects on the industry. These unfortunate historical landmarks proved to be the industry’s "four horsemen of the Apocalypse," each holding serious ramifications for air carriers. The ill-effects stemming from these events were seen in rising security and insurance costs, massive employee lay-offs, drastic reduction of unprofitable routes, closure of facilities, and cessation of airline operations. Increasing costs of security enforcement and insurance, in combination with falling traffic volume, prompted air carriers to cancel or postpone new aircraft requisition orders. Many carriers, particularly in developing countries, had to revisit their cost structures and downsize their human resource bases. The manufacturing industry experienced a colossal loss in 2002 as aircraft orders were deferred, resulting in significant cutbacks in employment. Airports and air navigation service providers suffered a similar fate, losing income from user charges and non-aeronautical revenues, while at the same time facing enhanced insurance and security costs.

Other consequences of the proliferation of air travel were emerging environmental concerns, including aircraft noise and engine emissions, as well as airport congestion and slot allocation. The explosion in air travel also facilitated the free movement of diseases. Further, the industry's focus on safety began to decline as competition between carriers led some carriers to expand at any cost, ignoring potential adverse consequences. Critical services required for aviation safety, such as efficient ground handling and precise engineering, were outsourced, with no guarantee of

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8. Id.


11. See Morell, supra note 9, at 7.

12. Id. at 7-8; Cochenne, supra note 10.


maintaining previously demanded levels of flight safety.\textsuperscript{16}

Despite the industry's troubles, international airline services have survived because neither a single nation nor the global aviation community has ever deregulated airline safety and security. Governments have continued to bear the responsibility of providing additional capacity, funding safety and security inspectors, and ensuring that carriers operate air services with full insurance coverage, however expensive. In this way, the world economy has not run aground for lack of international air services.

Additionally, all 188 signatories to the 1944 Convention on International Civil Aviation (Chicago Convention) have been able to rely on the ICAO for regulatory solutions that have kept the airline industry from descending into unmanageable crisis. In the recent past, ICAO has passed regulations on safety and security, established and conducted safety and security audits, adopted much needed principles of guidance on facilitation, assisted in preventing the spread of disease by air carriage, and even developed a global aviation insurance program to support in the insurance industry in the case of future emergencies of a similar scale to 11 September 2001.\textsuperscript{17}

Notwithstanding the setbacks of 9/11 and a subsequent slowdown in economic growth, current trends suggest that the world economy will remain moderately stable and healthy in the near future.\textsuperscript{18} The airline industry has generally experienced long-term marginal profitability through cyclical fiscal growth, with profitable periods intermixed by less successful periods.\textsuperscript{19} One of the reasons for this fluctuating pattern is that the industry is driven by multiple variable factors, such as passenger demand, operational and technological changes, and regulatory control.\textsuperscript{20}

Demand for air travel has several determinants. Primarily, the amount of air travel is determined by income levels, demographics and the cost of air travel.\textsuperscript{21} With regard to the cost of air travel, world energy prices are one of the key factors driving both the profitability of the air carrier industry and the costs passed down by the carrier to the consumer.\textsuperscript{22} The continuing upward trend in fuel prices will increase airline fixed costs, meaning that to remain competitive, airlines will increasingly

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\textsuperscript{17} Annual Review of Civil Aviation 2003, ICAO J., Sept. 2004, at 4, 5-6.
\textsuperscript{18} Id. at 4.
\textsuperscript{20} Id.
\textsuperscript{22} Id. at 22.
\end{flushleft}
be defined in trade terms with a firm focus on services.\textsuperscript{23} This will lead to further global alliances and partnerships between carriers, based on ‘core’ groups of airlines providing direction and focus as a key element in industry strategic development. Improved coordination will provide integration and stability to the air transport industry. Moreover, the continuing outsourcing of non-core activities will encourage fledgling carriers to emerge in a liberalized market. Also, larger airlines will seek to maximize franchising opportunities and code sharing agreements with other airlines. They will also seek to create low cost subsidiaries wherever possible, while at the same time looking to consolidate their services with other carriers. In the process, existing distinctions between scheduled and non-scheduled (charter) carriers will be minimized. In terms of service distribution, airlines will invest in e-commerce, concentrating as much as possible on selling their services directly on-line.

The preeminent regulatory challenge confronting the air transport industry is to update policies, guidelines and other regulatory instruments to address recent changes in the aviation environment. Competition, when coupled with the international liberalization of air services, will require a more open regulatory approach.

However, it is not prudent to consider air transport services as a typical economic activity. The overarching objective of the ICAO, as contained in Article 44 of the Convention on International Civil Aviation, is for the ICAO to foster the planning and development of international air transport so as to “meet the needs of the peoples [of the world] for safe, regular, efficient and economical air transport.”\textsuperscript{24} This fundamental declaration not only draws the inference that air transport is a public utility, but also challenges the ICAO, its contracting states, and their carriers to ensure the provision of a safe service that satisfies fixed standards of continuity, regularity, capacity and pricing.\textsuperscript{25}

As air transport is at the same time both a public utility and a free commercial enterprise, there must be a delicate balance between untrammeled competition and overly restrictive regulation. While the first approach may give rise to the predictable free-market inhibitors such as airport, airway and runway congestion, the other may hinder air transport services to such a degree that demand cannot be met.

The challenge to reach such a balance is highlighted in two areas: insufficient airport capacity and revenue management. First, the growth in commercial air services has continued to outstrip the available capacity

\textsuperscript{23} Id.; see \textit{World Trade Report} 2005, supra note 2, at 221.
\textsuperscript{24} Chicago Convention, supra note 1, art. 44.
\textsuperscript{25} Int'l Civil Aviation Org. [ICAO], \textit{Policy and Guidance Material on the Economic Regulation of International Air Transport}, at 1-18, ICAO Doc. 9857 (2nd ed.1999) [hereinafter \textit{ICAO Economic Policy Guidance Material}].
at more and more airports. Although many airports with congestion problems are located in Europe, a growing number of airports in other regions are reaching capacity limits. Moreover, because of the interconnected operations of the international air transport system, capacity constraints at some airports adversely impact other airports. Airport congestion is a challenge to the continued growth of air transport and also impacts further industry liberalization with respect to market access. For instance, some airports may be required to enter into alliances with other airports just to survive.

Governments, airlines and airports have each developed measures to overcome or ameliorate situations of insufficient airport capacity. Many states have expanded existing runways or terminals or built new airports. At least one inter-governmental body and a regional body have taken action to improve air traffic control systems designed to increase the airport capacity. Despite increased security requirements after the events of 11 September 2001, airports and air carriers have been able to enhance airport capacity by improved facilitation at existing facilities. However, environmental, economic, political and physical constraints have, in some instances, prevented physical expansions to increase airport capacity.

In the wake of trends in privatization of airports and air navigation services, such issues as liability, appropriate cost pricing, revenue allocation and investment management are becoming more important.

In order to improve international cooperation and achieve a well-meshed and competitive policy, states must first eliminate anti-competi-

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27. See Hanlon, supra note 21, at 140-41.
28. Id. at 141.
30. As was noted by the WTO:
A number of high growth international ports, such as Hong Kong, China (1998), Osaka (1994), Kuala Lumpur (1998) and Shanghai (2002) have built new airports to deal with the [capacity] problem . . . London’s Heathrow airport is particularly notable for the capacity constraint problem. After decades of struggling to deal with congestion, the authorities have decided to build a new terminal and a short runway.

World Trade Report 2005, supra note 2, at 222.
31. For example, in April 2001, the Federal Aviation Administration (FAA) announced a set of initiatives in its Operational Evolution Plan, which is designed to increase capacity within the United States national air space. See Gov’t Accounting Office, GAO-01-725, Air Traffic Control: Role of FAA’s Modernization Program in Reducing Delays and Congestion 5 (2001).
33. See World Trade Report 2005, supra note 2, at 222.
tive practices. One way of ensuring collective state action in this regard might be for states to enter into agreements toward combating restrictive trade practices, either bilaterally or plurilaterally. This can only be achieved with a robust and effective international legislative structure.

As for liberalization of air transport, there has so far been no indication that any state favours a total opening of its domestic market. Strategic alliances between airlines, whether through mergers or other arrangements, are viewed cautiously by individual airlines and states so as to preclude the total overrunning of local interests.

The question of fundamental importance to international civil aviation is whether the global community should consider the operation of air transport services as a trading activity or as a public utility.

The two integral areas that will carry the sustainability of air carriers and assurance of air services in the years to come will be regulatory control and economic strategy. It seems likely that competition will be increasingly between airline alliances rather than individual carriers. Markets will be unstable, and only the individual airlines that go “back to basics” to offer the consumer a service as “value for money” will survive.

Both states and carriers must share responsibility to ensure continuity of air transport services. The uniqueness of the operation of air transport services lies in the symbiosis between states and carriers. Although air transport may be heavily privatized in some instances, particularly in the developed world, it does not take away the overall regulatory supervisory role of the state and its obligation to support its carriers.

35. See Hanlon, supra note 21, at 48.


39. E.g., Belgium’s Sabena airlines in 1997 was forty-nine per cent foreign owned, Australia’s Qantas airlines was forty-nine per cent foreign owned, and the United State’s Northwest Airlines was twenty-four per cent foreign owned. Global Change, supra note 36, at 77 tbl 3.5.

40. This is particularly true in the area of airline safety. As Hanlon has noted:

In the discussion of airlines as quasi public utilities, the question of safety is often raised. Air transport is a fail-dangerous activity, a fail-extremely dangerous one. It has always been regarded as having unique safety problems because of the nature of its vehicle. There is a widely held view that market forces alone cannot be expected to elicit from all airlines and consistent degree of attention to safety standards. . .[However], [t]he need for technical regulation of safety is one of the few things on which governments have reached unanimous agreement. Under the aegis of the International Civil Aviation Organization, governments have agreed on [various] operational requirements [related to safety].

Hanlon, supra note 21, at 31-32.
From a regulatory perspective, the challenges are to update and promote ICAO policies and guidelines to meet the demands of a changing environment and to seek a balance between promoting economic growth in the industry and strengthening security measures and facilitation. In order to address these challenges, all players involved need to seek a balance between a liberalized economic regulatory framework and proper safety, security, social and labor standards.

II. Competition in Air Transport

Competition is defined by the market conditions that allow buyers and sellers to interact and establish prices and the system by which goods and services are exchanged. Competition in the air transport industry is a complex process, not yet precisely defined by airline economists. In the case of the airline passenger, there is segmentation in travel between the business traveler, who does not usually pay for the travel himself, and leisure travelers, who pay their own way. The leisure market competition is therefore primarily based on the fare, whereas in business travel other considerations, such as facilities on board, play a more considerable role.

From a legal perspective, competition is associated with the rights of the competitor as well as the consumer, whereby the former is precluded from exercising dominance over others by trying to eliminate, restrict or deter competition (an action termed “predation”).

Unfair competition, which occurs when one competitor is being a dishonest or fraudulent rival, usually refers to the misrepresentation of one’s product through deceptive packaging, labeling, pricing of goods and services offered. In a broad sense, unfair competition refers to any activity that unfairly creates an advantage. Competition law de lege fer-

41. See Michael E. Porter, On Competition 21 (1998). Mr. Porter has identified five key market conditions determining competition levels and type within a given industry. These are entry, threat of substitution, bargaining power of buyers, and rivalry amongst current competitors. Id. at 22 fig1.1.

42. See Hanlon, supra note 21, at 28-45 (discussing various economic descriptions of the global airline industry as either giving rise to a natural oligopoly, or, more recently, to a contestable market).


44. Id. at 21.


48. Id.
enda⁴⁹ would dictate that in a state of "perfect competition" there would be a benchmark for evaluating the performance of individual participants in actual markets.⁵⁰ Under conditions of perfect competition, goods and services would be produced as efficiently as possible and consumers would get the maximum amount of the goods and services.⁵¹

Unfortunately, the economic variants in air transport are far too complex to be analyzed on the basis of "perfect competition".⁵² The air transport industry thus looks to a "workable competition" model. Introduced by American economist John M. Clark in 1940,⁵³ the notion of workable competition rests on two premises. First, in most industries the number of business firms is not so great as to preclude an individual firm from having some power to influence market prices and conditions.⁵⁴ Second, participants rarely have complete knowledge of market conditions.⁵⁵

Mr. Clark theorized, however, that departures from perfect competition are often not great enough to warrant government intervention into the market (through antitrust action or direct regulation),⁵⁶ since the results achieved could be approximately comparable to the outcome of the perfect competition.⁵⁷ The main difficulty of the workable competition concept is that no precise criteria have been developed to determine when it actually exists.⁵⁸ This is certainly true of competition in the air transport industry.

The airline industry has always been in the throes of a dichotomy. On the one hand, while it has been international in terms of operations, the industry has been national with regard to matters of ownership and control of airlines and interests relating to market access.⁵⁹ The latter, brought to bear by regulatory inhibition prohibiting airlines from freely accessing markets through remote routes, and prevailing restrictions as to

⁴⁹. "'From law to be passed.' A proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force." Id. at 32.
⁵¹. Id.
⁵². Global Change, supra note 36, at 11-12.
⁵³. See generally J.M. Clark, Toward a Concept of Workable Competition, 30 Am. Econ. Rev. 241 (1940).
⁵⁴. Id. at 243.
⁵⁵. Id. at 244-45.
⁵⁶. Id. at 256.
⁵⁷. Id. at 241-42.
⁵⁸. For a thorough critique of the concept, see George W. Stocking, The Rule of Reason, Workable Competition, and Monopoly, 64 Yale L. J. 1107, 1109 (1955) and Glossary, supra note 50, at 86.
⁵⁹. Doganis, supra note 19, at 19.
who owns and controls an airline that bears the nationality of a state, has been increasingly viewed as overtly restrictive in an expanding air transport market. This has led to a gradual liberalization of market access as well as ownership and control in many parts of the world.

A. CURRENT TRENDS IN COMPETITION

Current competition in global air transport presents unique strategic issues. Global industries, such as multinational air carrier alliances, are characterized by the presence of competitors operating worldwide from home bases in different countries. Host governments may have deeply rooted interests and objectives relating to airline employment and the balance of payments, along with other concerns that may not be strictly economic. Therefore, airlines will be increasingly examining the relationships between individual air carriers and their governments. The home country's industrial policy must be well understood, particularly in terms of the political considerations that may relate to such issues as purchases of aircraft and the exchange of market rights.

As a global industry, commercial entities in air transport develop global competitive strategies, which involve a coordinated world-wide pattern of market positions, facilities and investments. Factors considered include the overlap between competitors, geographic location of carriers, and defensive investments in particular markets and locations that stop competitors from gaining advantages.

Those supporting the retention of regulation argue that the very nature of air transport, being either naturally monopolistic or interdependently oligopolistic, calls for regulation in order that fares remain competitive and are not arbitrarily raised. Another theory in support of regulation is that some form of control should be exercised over "mushroom" airlines that may sprout up to exploit a liberalized market, thus disturbing the existing balance of an integrated network.

The main consideration of efforts by the international aviation community to achieve a deregulated global airline industry is evaluating

60. Id.
61. Id. at 6.
63. Id. at 286.
64. See Global Change, supra note 36, at 13-15.
65. Id. at 16.
66. See Porter, supra note 62, at 276.
67. Id. at 277.
68. Id. at 291-98.
69. Hanlon, supra note 21, at 33.
70. Id. at 35-37.
whether free market principles can be applied globally to air transport.\textsuperscript{71} Specifically, whether the industry is ready to accept the consequences of free market competition in air transport, particularly the loss of national prestige projected by flag carriers.\textsuperscript{72}

Following industry deregulation, companies switch from operative performance to competitive performance.\textsuperscript{73} Indeed, the deregulation of domestic air transport industry of the United States, introduced in 1978, has led to a more efficient airline system.\textsuperscript{74}

Access to facilities is essential toward attaining fluidity of market forces.\textsuperscript{75} In the air transport industry, this specifically addresses the supply of complementary facilities, namely, airport access, computer reservation systems and airport and air regulation services.\textsuperscript{76}

In a policy statement, the International Chamber of Commerce (ICC) expressed the view that the efficiency of air transport would be enhanced by creating more open markets and more flexibility with regard to foreign ownership.\textsuperscript{77} The ICC is in favor of more freedom in the exchange of air services throughout the world and is convinced that it is time to move beyond the existing bilateral system toward a genuine multilateral liberalization of air transport.\textsuperscript{78}

Liberalization and the ensuing competition would impel airlines to pool their resources (such as code sharing and airport slots) in order to maximize assets.\textsuperscript{79} However, alliances do not necessarily mean lack of competition between partners. Airlines within alliances need to gain market access, which in turn requires that both private enterprises and the states in which these enterprises are entrenched be equally competitive.\textsuperscript{80}

Any agreement to liberalize trade is generally a proactive measure and depends on the willingness and ability of the governments to face

\textsuperscript{71} Global Change, supra note 36, at 14, 18-19.
\textsuperscript{72} See id. at 18-19 (outlining the necessary changes that nations must be willing to make).
\textsuperscript{73} Ruwantissa I.R. Abeysinghe, Aviation in Crisis 74 (2004).
\textsuperscript{75} See Global Change, supra note 36, at 68.
\textsuperscript{76} Id. at 68-69.
\textsuperscript{78} Id. at 7.
\textsuperscript{80} Hanlon, supra note 21, at 212-13.
trading issues squarely. Any agreement on trading benefits would be ineffective without competition between both the enterprises and the states. A free trade agreement is merely the catalyst in the process.

B. ANTITRUST REGULATION IN EUROPE, THE UNITED STATES AND THE ICAO

The regulation of competition within the European Community is governed by the EC Treaty. The goals of the Treaty are to promote the free movement of services, goods, persons and capital while effectively obviating barriers to trade within the community. Two provisions in particular, Articles 81 and 82, contain principles which outlaw anti-competitive conduct. While the former essentially contains provisions for agreements, decisions or practices with anti-competitive effects, the latter concerns itself with abuses of a dominant market position. Both these provisions relate generally to all sectors of transport unless explicitly excluded by the Treaty provisions.

Article 81 prohibits agreements that:

81. Abeyratne, supra note 73, at 74.
82. Id.
83. Id.
85. See id.
86. EC Treaty arts. 81-82.
87. Id. art. 82.
a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of those contracts.  

These conditions are imposed on agreements between undertakings, which are defined as independent entities performing some economic or commercial activity.

Article 82 provides that "any abuse by one or more undertakings of a dominant position within the Common Market, or in a substantial part of it, shall be prohibited as incompatible with the Common Market in so far as it may affect trade between member states." Similar to Article 81, this Article prohibits direct or indirect imposition of unfair purchase or selling prices or unfair trading conditions; limitation of production, markets or technical development to the prejudice of consumers; application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In implementing these two provisions, air carriers have to exercise caution not to assume that a related practice would be exempt from the prohibitions contained in Articles 81 and 82 purely in view of a bloc exemption on air transport in the Treaty that may pertain to a particular issue. In the air transport section of the Treaty, it is abundantly clear that block exemptions may apply only if abuse of a dominant position is not evident in a given transaction. Articles 81 and 82 are independent and complementary provisions and any exemption under Article 81 will not necessarily render the provisions of Article 82 nugatory.

"Dominant position" was defined in the 1979 decision of *Hoffman-La Roche v. Commission* as "a position of economic strength enjoyed by

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89. EC Treaty art. 81.
90. Id.
91. Id. art. 82.
92. Id.
93. See Adkins, supra note 88, at 81.
an undertaking which enables the prevention of effective competition in the relevant market by affording the business the power to behave independently of its competitors, its customers and ultimately its consumers.\textsuperscript{95} Such a position may preclude some competition except in monopoly or quasi-monopoly situations.\textsuperscript{96} There is every indication, from existing jurisprudence and EC practice, that an assessment of an abuse of dominant position would not be predicated upon one factor or a single characteristic but would rather be anchored on numerous factors such as market structure, barriers to entry and conduct of the business enterprise concerned.\textsuperscript{97}

In the United States, the term "antitrust laws" encompasses federal and state legislation that regulate competition and outlaw unfair trade practices.\textsuperscript{98} Antitrust laws apply equally to international air services and preclude both conduct and structural changes in business enterprises.\textsuperscript{99} A typical example of conduct falling under antitrust laws in the United States is a merger between competitors that would unduly limit competition.\textsuperscript{100} These laws are also meant to prevent producers or purchasers of goods from exercising a monopoly in imposing prices which significantly deviate from expected free-market norms.\textsuperscript{101}

Antitrust legislation in the United States goes back to 1890 and the enactment of the Sherman Act, which makes it criminally illegal to form any contract, combination or conspiracy in restraint of trade.\textsuperscript{102} This all-encompassing provision prohibits price fixing, anti-discounting agreements, divisions of markets by pooling agreements, and capacity agreements and exchanges of information that can be considered as competitively sensitive.\textsuperscript{103} The Act also prohibits monopolies and conspiracy to monopolize.\textsuperscript{104} In 1914, the United States Congress legislated

\textsuperscript{95} Case 85/76, Hoffman La Roche & Co. AG v. Comm'n of the European Cmty, 1979 E.C.R. 461.

\textsuperscript{96} Id.

\textsuperscript{97} See id.


\textsuperscript{101} See Sherman Act, ch. 647 § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (2000)).


\textsuperscript{103} Id.

\textsuperscript{104} Id. § 2.
the Clayton Act,\textsuperscript{105} primarily as a supplement to the Sherman Act. The Clayton Act outlaws certain types of "exclusive dealing" and "tied sales" and prescribes standards for determining the legality of mergers and acquisitions.\textsuperscript{106}

Both Acts provide for compensation to persons injured in their trade or business up to three times the amount of their loss, plus attorney fees.\textsuperscript{107} Along with the protections offered by these Acts, courts have also permitted consumer class actions as an antitrust activity, leading to significant recovery of damages.\textsuperscript{108}

In its role as the sole international regulatory body in the field of air transport, the International Civil Aviation Organization has issued clear policy and guidance material on the avoidance or reduction of conflicts over the application of competition laws to international air transport.\textsuperscript{109} The ICAO has issued these guidelines to address the conflicts that may arise between states that adopt policies, practices and laws relating to the promotion of competition and restraint of unfair competition within their territories.\textsuperscript{110} The ICAO urges states to ensure that their competition laws, policies and practices, and any application thereof to international air transport, are compatible with their obligations under relevant international agreements.\textsuperscript{111} Within this guideline, there is a strong recommendation for close consultation between all interested parties in order to achieve maximum uniformity in practice across borders.\textsuperscript{112} Accordingly, when a state is adopting laws pertaining to competition, it is expected to give full consideration to views expressed by any other state or states whose interests in international air transport may be affected.\textsuperscript{113} States are urged to have full regard to principles of international comity, moderation and restraint.\textsuperscript{114} The guidelines also provide direction on dispute resolution and problem solving.\textsuperscript{115}

The regulation of air transport services lies within the purview of

\textsuperscript{107} Id. § 15.
\textsuperscript{108} See, e.g., \textit{In re Delta Airlines}, 310 F.3d 953, 953 (6th Cir. 2002) (holding that class action alleging violations of the Sherman act was allowed to proceed); \textit{Fed. R. Civ. P. 23} (governing class action lawsuits in the United States).
\textsuperscript{110} \textit{ICAO Economic Policy Guidance Material}, supra note 25, ¶ A2-1.
\textsuperscript{111} Id. ¶ A2-2.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. ¶ A2-5.
ICAO member states.116 The ICAO retains in its Legal Bureau a register of all bilateral air transport agreements.117 Bilateral air transport agreements usually include a reciprocal agreement between states allowing their carriers to have fair and equal opportunity in operating air services between their territories without unduly affecting the air services operated by each.118 Under a bilateral agreement, capacity offered by carriers must bear close relationship to the needs of the people using air transport.119 These regulatory provisions have so far succeeded in protecting carriers of lesser developed states by securing them fair and equal opportunity to operate air services in routes that are shared by more established carriers of wealthier nations.120

Since the World Trade Association (WTO) cannot sustain air transport services within a bilateral framework,121 it remains to be seen whether the aviation community would move towards placing air traffic rights in a multilateral or plurilateral system.122 Such a General Agree-


117. For ICAO’s searchable Database of Aeronautical Agreements and Arrangements (DAGMAR) see http://www.icao.int/cgi/goto_m_leb.pl?applications/dagmar/main.cfm.

118. These bilateral agreements grew out of the principle of national sovereignty over airspace that forms the basis of the Chicago Convention. See Chicago Convention, supra note 1, arts. 1, 3, 6; Paul S. Dempsey, Flights Of Fancy And Fights Of Fury: Arbitration And Adjudication Of Commercial And Political Disputes In International Aviation 2 Ga. J. Int'l & Comp. L. 231, 231(2003). The first of these bilateral agreements, the Bermuda Agreement, was completed in 1946 between the United Kingdom and the United States and set an example for the many bilateral air agreements to come. See Ramon de Murias, The Economic Regulation of International Air Transport 52-72 (1989) (summarizing the Agreement and its implications); Air Services Agreement with the United Kingdom, Feb. 11, 1946, U.S.-U.K. 60 Stat. 1499 [hereinafter Bermuda 1].

119. De Murias, supra note 118, at 52.

120. This principle of “fair and equal opportunity” is enshrined in the Chicago Convention. Chicago Convention, supra note 1, art. 44; see also Ruwantissa I.R. Abeyratne: The Air Traffic Rights Debate – A Legal Study, 18 AIR & SPACE L. 3, 13 (1993).


122. In general, there has been resistance from the airline industry to the suggestion that the WTO take a more active regulatory role. See, e.g., Frances Williams, WTO seeks to spread its wings over air services, FIN. TIMES, Sept. 29, 2000, at 13 ("But there is little support among members for giving the organization a role in passenger traffic."); see also Int'l Air Transp. Ass'n [IATA], Liberalization Of Air Transport And The GATS, IATA DISCUSSION PAPER, Oct. 1999, at 12, available at www.wto.org/english/tratop_e/serv_e/iaacopy41.pdf (last visited Mar. 17, 2006) [hereinafter IATA] ("IATA Members remain to be convinced that the GATS can add value to
ment on Trade in Services (GATS)\textsuperscript{123} would rejuvenate the WTO's efforts to include air transport services within its purview in order to liberalize market access and impose the Most Favored Nations Treatment Clause (MFN)\textsuperscript{124} of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{125} Under the MFN clause, a GATS member could be required, immediately and unconditionally, to accord to the services and service suppliers of any other member treatment no less favorable than it accords to like services and service suppliers of any other country.\textsuperscript{126} However, this is not practical as the application of the MFN principle to international air transport would adversely affect the ongoing process of liberalization between like minded states.\textsuperscript{127}

In this context, the role played by ICAO (that of the guardian and mentor of international civil aviation) becomes of primary importance. The ICAO believes that it is important to draw to the attention of GATS and its member states certain critical features of international air transport which are relevant to any present or future consideration of how air transport should be treated.\textsuperscript{128} The ICAO steadfastly maintains its posi-

\textsuperscript{123} See GATS, supra note 121.

\textsuperscript{124} See GATT 1947, supra note 121, at art. I. The WTO has described MFN status as denoting a type of equality between trading partners. “Each member treats all the other members equally as ‘most-favoured’ trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same “best” treatment to all the other WTO members so that they all remain ‘most-favoured.’” World Trade Organization, Understanding the WTO 11 (3d ed. 2005), available at www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Mar. 17, 2006).

\textsuperscript{125} See GATS, supra note 121.

\textsuperscript{126} Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

\textsuperscript{127} See IATA, supra note 122, at 12 (“They are also concerned that the unconditional application of the MFN principle would hold back liberalization. Furthermore, bilateral air service agreements continue to offer a practical means of ensuring sector-specific reciprocity.”).

\textsuperscript{128} At its Fifth Worldwide Air Transport Conference, held in March 2003, ICAO Contracting States adopted Recommendation 4.1.4 stating that ICAO’s future economic regulatory role should focus on the development of policy guidance for economic liberalization, which will permit States to choose their own path and pace but also ensure the safety and security of international air transport. See The ICAO Fifth Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization, Mar. 24-29, 2003, Consolidated Conclusions, Model Clauses, Recommendations, and Declarations, ¶ 2.2, ATConf/5 (Mar. 31, 2003) (presented by the ICAO secretariat) [hereinafter 2003 Liberalization Conference Conclusions]. This role should also include facilitation, promotion and provision of assistance to States in harnessing liberalization for their broader benefit. Id. The Conference also recommended that in its relations with WTO-OMC, ICAO should continue to draw attention to the Organization’s policy on trade in services, as currently reflected in Assembly Resolution A35-18, while emphasizing the interrelationship between safety, security and economic regulation and the Organization’s focus on facilitating, promoting and assisting States in the liberalization process. Id. See generally R.I.R.
tion as the guiding force behind air transport services because it feels that bilateralism at the operating level has, over the decades, proved to be a flexible system which has allowed states to pursue their objectives, whether these be regimes of a more open and competitive, or more protective and restrictive nature. The ICAO maintains that any external multilateral framework which seeks general or limited application must recognize, and be compatible with, this existing structure of air transport.

Multilateralism, in the form of a broad-based consensus on principles and guidance to states in the conduct of their air transport activities, has enjoyed renewed interest in the ICAO in recent years. While seeking to progressively develop positions and guidance to assist states in their regulatory and economic activities, the ICAO recognizes the sovereignty of states in pursuing their own national air transport policies and objectives. In this regard, the ICAO’s role is limited to providing consulting services and recommendations, and to avoiding incompatibilities with liberalization. The ICAO has also expressed its resolve to continue to cooperate with GATS in order that ICAO’s views and concerns, along with the particular features of the international air transport sector, are properly considered.

The ICAO first dealt with multilateralism in 1953, when it formally adopted a position on the regulation of air transport services. At its 7th Assembly held in June and July, 1953, the ICAO enacted Assembly Resolution A 7-15, which stated that there was no prospect of achieving a universal multilateral agreement at that time, but acknowledged that the achievement of multilateralism in commercial rights remained an objective of the organization. This Resolution is still in force today.


129. See Abeyratne, supra note 128, at 229-33.

130. Id. at 229.


134. See 2003 Liberalization Conference Conclusions, supra note 128, ¶ 2.2.

At its 26th Session in September/October 1986, the ICAO Assembly adopted Resolution A 26-14, which reaffirmed the ICAO's position as the preeminent multilateral body within the United Nations for dealing with international air transport.\(^{137}\) The Resolution urged contracting states participating in multilateral negotiations on trade in services where international air transport was included, to ensure that their representatives be fully aware of potential conflicts with the existing legal system for the regulation of international air transport.\(^{138}\) The Resolution also requested that the ICAO Council actively promote, to international bodies involved with trade in services, a full understanding of the ICAO's role in international air transport, as well as the existing structure of international agreements regarding air transport.\(^{139}\)

In light of the significant recent developments in the trade in service negotiations, the question arises as to whether this policy is adequate to continue to serve the interests of ICAO, and international air transport in general, over the next few years. The ICAO's philosophy may require reassessment and additional directives from the Assembly. While Assembly Resolution A26-14 gave guidance to states and the Council, and expressed certain concerns, it did not set out an organizational view on the inclusion of international air transport in a multilateral agreement on trade in services.\(^{140}\) A future session of the Assembly may consider developing such a view for transmission to GATS and the GNS as well as to contracting states.

One possible view that the Assembly may consider is that air transport should not be included in services agreements. The adoption of such a position by the ICAO could be based on two concerns expressed in Resolution A26-14.\(^{141}\) First, the Organization was concerned with its role as the United Nations' specialized agency responsible in air transport matters.\(^{142}\) Second, the Organization was concerned for the integrity of the Chicago Convention principles and the widespread system of bilateral air transport agreements that resulted from those principles.\(^{143}\)

Airlines are faced with the imminent prospect of commercial aviation being controlled by a group of air carriers serving global regions and

\(^{136}\) See ICAO, Assembly Resolutions in Force (as of Oct. 8, 2004), ¶ A-13, ICAO Doc. 9848 (noting that A7-15 has since been superseded by A32-17).


\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Id.

\(^{143}\) Id.
operated by a network of commercial and trade agreements. Regional carriers will dominate, forcing out niche- and small national carriers who could not compete with the lower unit costs and joint ventures of a larger carrier. A perceived justification for "open skies" or unlimited liberalization might be seen in bilateral air services agreements between two countries, where fair and equal opportunity to operate air services is a sine qua non for both national carriers concerned.\textsuperscript{144} This may be interpreted to mean fair and equal opportunity to compete, or even fair and equal opportunity to effectively participate in the international air transportation as agreed.\textsuperscript{145}

While the "open skies" policy sounds economically expedient, its implementation would undoubtedly phase out smaller carriers who are now offering competition and a larger spectrum of air transport to the consumer.\textsuperscript{146} Lower fares, different types of services and varied in-flight service profiles are some of the features of the present system.

C. PREFERENTIAL TREATMENT FOR CARRIERS OF DEVELOPING COUNTRIES

To achieve the desirable objective of a higher level of competitiveness in the air transport industry, preferential measures for carriers of developing countries may be required.\textsuperscript{147} The ICAO has suggested the following preferential measures for the consideration of, and possible use by, air carriers of its member states who are at a competitive disadvantage in commercial aviation:

(a) the asymmetric liberalization of market access in a bilateral air transport relationship to give an air carrier of a developing country: more cities to serve; fifth freedom traffic rights\textsuperscript{148} on sectors which are otherwise not normally granted; flexibility to operate unilateral services on a given route for a certain period of time; and the right to serve greater capacity for an agreed period of time;

(b) more flexibility for air carriers of developing countries (than their counterparts in developed countries) in changing capacity between routes in a bilateral agreement situation; code-sharing to markets of interest to them; and changing gauge (aircraft types) without restrictions;

\textsuperscript{144} Hein Wassenbergh, De-Regulation of Competition in International Air Transport, 21 Air & Space L. 80, 80 (1996).
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 83.
\textsuperscript{148} The right to uplift or discharge passengers, mail and cargo in a country other than the grantor state. World Trade Report 2005, supra note 2, at 225 (describing the eight "freedoms" countries may choose to grant in air service agreements).
(c) the allowance of trial periods for carriers of developing countries to operate on liberal air service arrangements for an agreed time;

(d) gradual introduction by developing countries in order to ensure participation by their carriers to more liberal market access agreements for longer periods of time than developed countries’ air carriers;

(e) use of liberalized arrangements at a quick pace by developing countries’ carriers;

(f) waiver of nationality requirement for ownership of carriers of developing countries on a subjective basis;

(g) allowance for carriers of developing countries to use more modern aircraft through the use of liberal leasing agreements;

(h) preferential treatment in regard to slot allocations at airports; and

(i) more liberal forms for carriers of developing countries in arrangements for ground handling at airports, conversion of currency at their foreign offices and employment of foreign personnel with specialized skills.149

Furthermore, two direct corollaries to the proposed measures include the benefits of improved market access and operational flexibility.150 These proposed preferential measures are calculated to give air carriers of developing countries a “head start,” effectively ensuring their continued participation in international air services.151

In addition to addressing the preferential measures proposed by the ICAO (which, if implemented, would be of immense assistance to carriers of developing countries), the international aviation and trading community should consider the larger issue of funding. Long term, low-interest loans could be made available to carriers of developing countries through such institutions as the World Bank and the International Monetary Fund.152 Some consideration could also be given to a balanced distribution of aircraft throughout the world. Developing countries could then have access to aircraft that have been discarded by their more affluent counterparts.153 An equitable system of leasing such aircraft should be considered.

Another useful tool that could be addressed under the umbrella of preferential measures is to exempt aircraft operated by carriers of developing countries from the certain technological standards (to the extent possible) of modern aircraft.154 Aircraft engine emission standards and

149. See ICAO Policy and Guidance Material, supra note 25, ¶ A3-1.
150. Abeyratne, supra note 147, at 41.
152. Abeyratne, supra note 147, at 42.
153. Id.
154. Id.
noise regulations are two examples.\footnote{155}

Preferential measures may also be considered on a collective basis to allow a carrier of one country to use air traffic rights on behalf of a different carrier from another country. This would particularly help developing countries that are unable to launch their own airlines, or are unable to allocate a national carrier on a particular route, due to economic reasons. This principle could also be extended to cover instances where airlines from developing countries would combine their operations by using their air traffic rights collectively. For example, airlines of countries A and B, who have been granted air traffic rights to operate air services from their countries to countries C and D, respectively, would offer joint service to countries C and D in just one flight through their collective traffic rights.

Additionally, developing countries should be released from the obligation to own and control their air carriers or to have their carriers substantially owned and controlled by their nationals. It is only then that countries that cannot fully finance their carriers could maintain, and provide well-rounded competition in, the air transport industry.

\subsection{D. National Ownership and Control and Airline Competition}

The airline industry is unique in terms of trade and competition, giving states the prerogative to impose conditions on ownership and control of airlines.\footnote{156} Ever since the formal regulation of civil aviation, many countries have owned and controlled their national carriers, due partly to national prestige and symbolism, and partly to a traditional requirement in the standard bilateral air services agreement.\footnote{157} This requirement states that a designated carrier should be substantially owned and effectively controlled by nationals of a country which designated that carrier to operate air services under bilateral agreements.\footnote{158} A state may withhold permission for landing rights in its territories if substantial ownership and effective control of an airline is not vested in nationals of that state.\footnote{159} The International Air Services Transit Agreement (IASTA)\footnote{160} is the only international agreement that provides for conditions upon which

\footnotetext[155]{155. \textit{Id.} For a detailed discussion of regulations on aircraft noise and engine emissions, see \textsc{Ruwantissa I.R. Abeyratne}, \textsc{Legal and Regulatory Issues in International Aviation} 271-313 (1996).}


\footnotetext[157]{157. \textit{See} Kirsten Bohmann, \textsc{The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law – Policy; Consideration; Comparison}, 66 J. AIR L. & COM. 689 (2001); \textit{see supra} note 118, and accompanying text.}

\footnotetext[158]{158. \textit{See} ICAO Regulation Manual, \textit{supra} note 109, ¶ 4.4-1.}

\footnotetext[159]{159. \textit{Id.}}

\footnotetext[160]{160. IASTA, \textit{supra} note 156.}
ownership and control of airlines may be restricted. Article 1, Section 5 provides:

Each Contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this agreement.

Starting in the early fifties, states responded to the growth of civil aviation by increasingly availing themselves of the prerogative given by IASTA to withhold or revoke an airline's operational permit to enter into their territories for a commercial purpose. States also restricted foreign investment in their own airlines or "flag carriers" by including a clause with specific conditions on nationality in the bilateral air services agreements they signed with other states in conformity with Article 6 of the Chicago Convention.

Both the United States and member states of the European Union have protected their domestic markets from external operators by preserving their markets for national flag carriers or, at the least, carriers that are owned by the state or state nationals. In the European Union, according to Article 4 of Court Regulation 2407/92, national authorities are vested with this power. States may grant operating licenses based on the criterion that the carrier's principal place of business be located in the licensing state. There are additional requirements under the regulation: The carrier must be involved in air transportation as its main occupation, the holder of the license must be under direct or majority ownership by nationals of the European Union, and the licensee must be effectively controlled by such nationals. One reason, at least from the perspective of the European Union, for retaining ownership and control within its territory is to safeguard the interests of the member states of

161. *Id.* art. 1; see 2003 Liberalization Conference Conclusions, supra note 128, at 2 ("Air carrier ownership and control is a unique and complex issue, arising mainly from the particular way international air transport is regulated.").

162. *Id.* supra note 156, art. 1, § 5.


164. Chicago Convention, supra note 1, art. 6; Alexandrakis, supra note 163, at 75.

165. Bohman, supra note 157, at 692, 693-64.

166. *See* Council Regulation 2407/92, Licensing of Air Carriers, art. 2(g), 1992 O.J. (L 240) 1[hereinafter Licensing of E.U. Air Carriers].

167. *Id.*

168. Effective control essentially means the power and ability to exercise a decisive influence on an air transport undertaking, including but not limited to the use, enjoyment and alienation of movable and immovable property of that undertaking. *See* Licensing of E.U. Air Carriers, supra note 156, art. 2(g).
the European Union and to preclude carriers of non-European Union states from capitalizing on a liberalized European Union market.\textsuperscript{169}

In contrast to Regulation 2407/92 of the European Union, which does not expressly address issues regarding nationality of management, the United States regulations contain requirements pertaining to the nationality of airline management.\textsuperscript{170} Arguably, the European Union regulation addresses the external control of a company by stockholders, and not the management of the air transport enterprise, as envisaged by the United States law.\textsuperscript{171} Be that as it may, both the United States and the European Union have shown, through legislation, that the issue of ownership and control remains a critical issue in the liberalization of, and competition in, air transport.\textsuperscript{172}

Restrictive ownership and control criteria may have been tolerable in the first decades of commercial aviation because demand for capacity was manageable.\textsuperscript{173} However, these requirements gradually evolved into a restrictive force in the provision of air transport services.\textsuperscript{174} Many states were left with unprofitable state-owned airlines that required subsidization.\textsuperscript{175} The circumscribing nature of this inflexible ownership and control requirement has prompted many states to permit privatization of air carriers, with a reduction in percentage of government held shares.\textsuperscript{176} For example, British Airways and Lufthansa have been completely privatized, while Air France, Alitalia, Sabena and Iberia have been partially privatized.\textsuperscript{177} The United States deregulated its domestic carriers in 1978.\textsuperscript{178}

\begin{itemize}
\item[169.] Bohman, supra note 157, at 722.
\item[170.] See id. at 695-97.
\item[171.] See id. at 723.
\item[172.] See, for example, House Resolution 4542, introduced on December 15, 2005 by Rep. Oberstar, and currently in committee (\textit{available at http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.+4542:}) This resolution “direct[s] the Secretary of Transportation to report to Congress concerning proposed changes to long-standing policies that prohibit foreign interests from exercising actual control over the economic, competitive, safety, and security decisions of United States airlines, and for other purposes.” \textit{See also Commission White Paper on European Transport Policy for 2010}, at 92-93, COM (2001) 370 final (Sept. 12, 2001), \textit{available at http://www.eu.int/comm/energy_transport/library/eb_texte_complet_en.pdf} (last visited Mar. 25, 2005) (“To hold their own, alongside the big world players, the major European airlines need to operate world wide...In other words, the objective is to give European airlines ‘Community’ nationality in relations with third countries.”).
\item[173.] See \textit{World Trade Report} 2005, supra note 2, at 222.
\item[174.] See Bohman, supra note 157, at 689.
\item[175.] Id.
\item[176.] See HANLON, supra note 21, at 196; Iain Carson, \textit{The Sky’s the Limit}, \textit{Economist}, Mar. 8, 2001, at 45.
\item[177.] Bohman, supra note 157, at 689 n.1.
\end{itemize}
Although liberalization of air transport is sweeping the globe, the bilateral air services agreement, through antiquated requirements of national ownership, still prevents proactive airlines from merging with each other and entering into other strategic alliances.\footnote{179. This criticism is fairly common. For a particularly well-written and scathing indictment of ownership and citizenship requirements, see Brian F. Havel, \textit{White Paper: A New Approach To Foreign Ownership Of National Airlines} 1-8, www.law.depaul.edu/bhavel (last visited Apr. 2, 2006). \textit{See also}, Bohman, \textit{supra} note 157, at 690; \textit{World Trade Report} 2005, \textit{supra} note 2, at 227 ("Certainly, complete liberalization of foreign ownership regulations has not occurred; on the contrary, such regulations remain a barrier to a more competitive international airline industry."); \textit{Liberalizing Air Carrier Ownership}, \textit{supra} note 131, at 4 ("Liberalization experience, at the national and regional levels, seems to suggest that unless the constraint originating from the bilateral regime is overcome, there will be limited progress in advancing the cause [of creating an operating environment in which air carriers could operate efficiently and economically without compromising safety and security].")} Further, the bilateral requirement of substantial ownership and effective control, based on the fundamental postulate that a majority ownership provision would effectively preclude foreign ownership from taking major control of a national carrier, has not been easy to enforce or put into practice in all situations.\footnote{180. \textit{See}, e.g., Pierre Sparaco, \textit{Air France Now Owns KLM, But Full Union Will Take at Least Three Years}, \textit{Aviation Wk. & Space Tech.}, May 9, 2004, at 1, available at http://www.aviationnow.com/avnnow/news/channel_awst_story.jsp?view=story&id=news/0 (last visited Mar. 25, 2006); Peter Van Fenema, \textit{National Ownership and Control Provisions Remain Major Obstacle to Airline Mergers}, \textit{ICAO J.}, Nov.-Dec. 2002, at 7.} While a blanket provision might simply require majority national ownership and control, airlines have had to contend in many instances with complex requirements regarding the nationality of the members of a board of directors, the powers of a board, and the powers of directors of such boards.\footnote{181. \textit{See} Bohman, \textit{supra} note 157, at 706-07.} Often states have attempted to circumvent these difficulties by establishing a safeguard to ensure a "golden share", which accords the owner government a greater voice in the carrier's decision making process.\footnote{182. G. Nicoletti & R. Gonenç, \textit{Regulation, Market Structure and Performance in Air Passenger Transportation}, 31 (OECD Economics Department Working Paper No. 254, 2000); Robert W. Poole, Jr., \textit{Guidelines for Airport Privatization}, How-To Guide No. 13 (Reason Foundation, Los Angeles, C.A.), Oct. 1994, at 15, available at http://www.reason.org/htg.13.pdf (last visited Mar. 25, 2006).}

There is no documented definition of, or agreed meaning to the term "substantial ownership and effective control."\footnote{183. \textit{ICAO Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization}, Mar. 24-29, 2003, \textit{Working Paper: Airline Views on Liberalizing Ownership and Control}, at 2, ATConf/5-WP26 (Dec. 16, 2002) (presented by the IATA) [hereinafter \textit{Airline Views on Liberalization}].} This is particularly troublesome when an airline is privatized and the government loses its majority share position, resulting in a lack of demonstrable evidence of
national ownership.\textsuperscript{184} The international community has taken to the practice of identifying the ownership of an airline with its voting shares, often equating "substantial ownership" to greater than 50\% of the voting shares.\textsuperscript{185} However, this simplistic approach may no longer be sufficient due to the wave of privatization in the airline industry.\textsuperscript{186} For example, 45\% of voting shares held by a private entity in a national airline may arguably be termed "substantial ownership" even when 55\% of the voting shares are held by nationals of the state.\textsuperscript{187}

The issue of "effective control" is a more complex issue than ownership. Effective control relates to who actually controls the airline in question.\textsuperscript{188} In broad terms, this may mean the individual body who directs airline policy and hires and fires personnel.\textsuperscript{189} For example, the definition of "control" in the United States includes "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."\textsuperscript{190}

There is a distinct variance in the effect between "substantial ownership" and "effective control" regulation. The former may often be established through a presumption of nationality, while the latter may involve such complications as the nationality of members of a supervisory board or the nationality and rights of the directors of a board.\textsuperscript{191} Furthermore, the nationality criterion with respect to ownership may be easily obviated. For example, the European Union introduced a 1997 legislation that admitted a "community air carrier" which could operate air services anywhere within the fifteen member states of the Union and Norway, Iceland and Liechtenstein.\textsuperscript{192} Through this legislation, the European Union effectively replaced the "national carrier" requirement with a "Community air carrier" criteria.\textsuperscript{193}

Other agreements have retained the "effective control" criteria. In November 2000, the United States, New Zealand, Chile and Singapore, under the auspices of the Asia-Pacific Economic Cooperation Group.

\textsuperscript{184} See Nicoletti, supra note 182, at 15.
\textsuperscript{186} See Airline Views on Liberalization, supra note 183, at 3.
\textsuperscript{187} See Bohman, supra note 157, at 723.
\textsuperscript{188} Id.
\textsuperscript{189} See, e.g., id. at 722 (discussing Council Regulation 2407/92 On Licensing of Air Carriers, art. 2(g), 1992 O.J. (L 240) 1).
\textsuperscript{189} 17 C.F.R. § 240.12b-2 (2005).
\textsuperscript{191} See Council Regulation 2408/92 on Access for Community Air Carriers to Intra-Community Air Routes, art. 3, 1992 O.J. (L 240) 8 [hereinafter Council Regulation 2408/92].
\textsuperscript{193} Id.
(APEC), agreed on liberalizing air services between their territories on a multilateral "open skies" basis. The agreement signed by the four state parties did away with the standard term "substantial ownership" but retained the "effective control" requirement.

Airline alliances may offer a way around the market access constraints presented by bilateral air services agreements. However, such alliances are not usually effective against the inhibiting qualities of the traditional ownership and control requirements. This is particularly true in the context of facilitation of cross-border investment, which is essentially regulated by the bilateral air services agreement. In order to find a practical and legitimate way out of this seemingly impossible situation, the ICAO has devised a proactive approach based on making the "principal place of business" and "permanent residence" of the carrier the operative criteria for purposes of devolution of control.

In response to concerns for developing countries, the ICAO, at its 35th Assembly held in September and October of 2004, adopted Resolution A35-18. This legislation recognizes that the strict application of the criterion of substantial ownership and effective control for the authorization of route and other air transport rights could deny many developing states a fair and equal opportunity to operate international air services. The ICAO Assembly was apprehensive that continued insistence on the substantial ownership and effective control criterion could seriously jeopardize the opportunity for airlines of developing states to compete fairly and equally with the airlines of developed states. Resolution A35-18 thus urges states to recognize community of interest within regional and sub-regional economic groupings as a valid basis for designating airlines.

The notion that relaxation of the current ownership and control restrictions may increase competition is commonly accepted in the airline industry. The restrictions came into being in the first place largely as a result of the stringent national interests that prevailed immediately after

195. Council Regulation 2408/92, supra note 192, at art. 3.
197. Liberalizing Air Carrier Ownership, supra note 131, at 5.
199. Id. art. III-3.
200. Id.
201. Id.
World War II and continued until recent globalization and privatization.\textsuperscript{203} The primary question then becomes whether states will continue to retain national interests in their airlines for reasons of national pride, prestige, and other considerations, or relax restrictions so as to allow foreign investment in airlines.\textsuperscript{204} States that retain restrictive practices to promote national interests may impede the emergence of new entrants and competitors in their market. This could lead to monopolistic national carriers with no reason or incentive to lower production costs and pass that savings on to the consumer.\textsuperscript{205} Such a monopoly would be inefficient, producing an increasingly high priced air transport product.\textsuperscript{206}

Withdrawal of current restrictions and liberalizing investment in national airlines may also result in a distinct advantage for the air transport market's ability to attract capital. This infusion of capital into the industry may increase competition in the international market.\textsuperscript{207} Also, a natural corollary to the injection of capital in a domestic market is increased coverage, which could give a competitive edge to a national carrier in the international market.\textsuperscript{208} Of course, it follows that the end result would be enhanced competition among airlines and also between states. This would enable developing States in particular to actively participate in market competition and allow their carriers to effectively compete with dominant carriers.\textsuperscript{209}

Another consideration is that any air traffic rights that a state may obtain for its airline through the process of bilateral air services negotiations (made necessary by Article 6 of the Chicago Convention\textsuperscript{210}) are a national asset.\textsuperscript{211} This raises the question of whether such traffic rights are jeopardized by the removal of ownership and control restrictions.

\textsuperscript{203} Alexandrakis, supra note 163, at 75.

\textsuperscript{204} For an illustration of how efforts by the European Union to liberalize air carriers have forced Member States to reduce their reliance on flag carriers as a means to enhance international prestige, see Paul S. Dempsey, \textit{Competition in the Air: European Union Regulation of Commercial Aviation}, 66 J. AIR L. & COM. 979, 984 (2001).

\textsuperscript{205} See Hanlon, supra note 21, at 33.

\textsuperscript{206} See id.

\textsuperscript{207} See Airlines Views on Liberalization, supra note 183, ¶ 1.2.


\textsuperscript{209} See Abeyratne, supra note 147, at 41.

\textsuperscript{210} See Chicago Convention, supra note 1, art. 6.

In the final analysis, the issue of ownership and control of airlines and its effect on competition has to be viewed in the context of the two operative principles contained in Article 6 of the Chicago Convention and Article 1 Section 5 of IASTA.\textsuperscript{212} As long as airlines are required to obtain permission of states before flying into their territories for commercial purposes, and states continue to exercise the prerogative offered by IASTA by insisting that airlines are substantially owned and effectively controlled by an identified category of person, competition will be stifled. States enforcing such restrictions should ask themselves if this is what they want for their airline industry. And if so, they should ask themselves why.

If the answer to these questions comes from national pride and prestige, protectionism related to air traffic rights or even, as in some instances, a certain reluctance towards implementing change, such a stance is wholly understandable, albeit not economically judicious.\textsuperscript{213} States should realize that retaining the status quo ante does not contribute toward providing needed services to consumers and promoting air transport in their territories.\textsuperscript{214} States must consider the interests of their passengers and consumers.\textsuperscript{215} For instance, would passengers really be concerned if their national airline was not available to carry them overseas, but the same services were available through foreign airlines? Or can the air transport industry be viewed the same way as the hotel and surface transport industry, where the particular name of a hotel or bus line is of secondary importance to the quality of the services provided?

Furthermore, the health of the industry as a whole must be considered in light of the stark reality that, at best, the profitability of the airline industry has been both marginal and cyclical.\textsuperscript{216} The industry has never enjoyed sustained periods of profitability.\textsuperscript{217} Even among the large carriers, short bouts of profitability have inevitably been followed by periods

\textsuperscript{212} IASTA, supra note 156, art. 1.

\textsuperscript{213} For an illustration of the economic benefits that flow from abandoning protectionism, see the summary given in Box 1 in the WTO's World Trade Report 2005, supra note 2, at 225.

\textsuperscript{214} See The Need for Greater Liberalization, supra note 208, at 1.


\textsuperscript{216} Special Report: World Airlines Lining up for Profits, Economist, Nov. 10, 2005, at 65 ("Mention the airline industry in polite company and a few truisms invariably come trundling out: airlines are loss-making, inefficient, prone to extreme cycles and vulnerable to fickle consumers.").

\textsuperscript{217} See Doganis, supra note 19, at ix ("Over the last three decades five to six years of reasonable profits have been followed by four years of declining profits and, in the case of many airlines, of losses.").
of downturn in real income. This fluctuation in fortune is simply a characteristic of air transport and a consequence of rigid regulation, competition and technological change.

Although the flexibility given to states by IASTA regarding ownership and control of airlines may have been tolerable in the first decades of commercial aviation, when demand for capacity was manageable, it has gradually evolved into an inhibitor of air transport services. Many states have been left with unprofitable state-owned airlines that require subsidization. The circumscribing nature of an inflexible ownership and control requirement has prompted many States to permit privatization of air carriers, with a reduction in percentage of government held shares.

E. Extraterritoriality

One of the most significant, and contentious, commercial considerations with regard to transatlantic air transport has been the extraterritorial application of European Union and United States competition law. Extraterritoriality is one way by which the application of a state's domestic trade policy could affect more than one jurisdiction. The United States, the European Community and Germany are all proponents of extraterritoriality. Both the European Union and the United States have policy pertaining to air transport that is carried out by legislation. In these states, competition rules are applied to the commercial conduct of foreign enterprises in foreign markets that is intended to affect the state domestically.

It is not surprising that the laws applicable to trans-national air trans-

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218. For an overview of hardships endured by large carriers in the UNITED STATES, see GEORGE WILLIAMS, THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION 143 (1994).
219. See DOGANIS, supra note 19, at ix.
221. See Carson, supra note 176, at 45.
223. Id. at 197-98.
port from both ends may be questioned by either side as extraterritorial. Such a contention does not necessarily reflect *mala fides* on the party against whom extraterritoriality is alleged. Usually, the question of extraterritorial application of national laws arises in instances where, in the absence of an international framework of competition rules, the extraterritorial application of national competition laws is perceived to be necessary to patch up loopholes emerging from the territorial reach of national jurisdiction.227

In the seminal 1945 case, *United States v. Alcoa*,228 the United States courts established the “effects” doctrine whereby commercial conduct carried out overseas but intended or calculated to affect the United States is subject to United States antitrust laws.229 This doctrine has been followed by the courts in the United States with an unfailing consistency, culminating in the United States Justice Department’s 1995 guidelines on international commercial operations.230 These guidelines give the United States wide extraterritorial jurisdiction with respect to the anti-competitive practices followed by foreign enterprises outside of the United States when those activities adversely affect the United States’ market in a particular commercial activity.231 One of the most compelling features of this legislation is its emphasis on “market access” for American businesses in foreign countries.232 A number of hypothetical examples in the guidelines reflect the Department of Justice’s desire to challenge the conduct of foreign enterprises in foreign countries if they would hinder American enterprises from exporting goods to, or investing in, a foreign country.233

European Union rules on extraterritoriality are not explicit and therefore are not incorporated in the competition provisions of Articles 81 and 82 of the European Community Treaty.234 Although extraterritoriality may be imputed to the provisions through liberal interpretation,

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227. *Id.* at 3-5.
228. United States v. Aluminum Co. of Am. [Alcoa], 148 F.2d 416, 443-44 (2d Cir. 1945).
229. Alford, supra note 226, at 5.
233. See, e.g., *id.* at 18.
the European Court of Justice in the 1988 *Wood Pulp* case235 added further guidance. The court applied the principle of *lex situs* to jurisdiction and held that it is the place where the anti-competitive arrangements take effect that determines the jurisdiction of the Union in matters relating to competition.236

The logical interpretation of Article 85 (requiring that the Commission ensure the application of Articles 81 and 82) is that legislation is necessary to give effect to Articles 81 and 82 in the instance of issues arising from air transport in routes between the European Union and a third country or in routes entirely outside the community.237

However, a case in the German courts softened this requirement. In *Ahmed Saeed*, the German Federal Court of Justice sought the ruling of the European Court of Justice (ECJ) on a matter pertaining to the selling in Germany of air tickets to the public at prices below the approved level by the Federal Minister of Transport, in contravention of local German municipal law.238 The issue was whether Article 82 of the EEC Treaty had overriding jurisdiction over local laws of Union states. The ECJ held that Article 82 is directly applicable in national courts even in the absence of implementing legislation.239

In the modern global economy, some degree of extraterritoriality in the enforcement of national competition rules is inevitable. States are justified in applying competition rules to the conduct of foreign enterprises when conduct abroad adversely affects their economy, particularly if the state in which the conduct takes place does not have competition rules or does not intend to prohibit such conduct. For instance, some transnational business entities engage in restrictive business practices in a type of "twilight zone" where no state can fully exercise jurisdiction over them and yet the harmful effects of their restrictive business practices can be felt in more than one country.240 To say that extraterritoriality has no place in the application of competition rules would mean to give such transnational entities a free pass to engage in anti-competitive conducts with impunity.241

However, the extraterritorial application of competition rules is costly for both the enforcing agency and the foreign defendants. It is

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236. This case established the European equivalent to the United States "effects test," the so-called "place of implementation test." See Elliot, *supra* note 222, at 204.

237. *Id.* at 204-09.


239. *Id.* ¶ 58.


241. *Id.*
often a second-best solution to a problem that essentially boils down to a question of how best to cope with transnational anti-competitive conduct.\textsuperscript{242} An extraterritorial application of competition rules is often not as effective as it would be if applied domestically.\textsuperscript{243} A state attempting to apply its anti-competitive laws extraterritorially to a defendant enterprise located abroad will probably face difficulties in enforcing judgments and in establishing forum and jurisdiction.\textsuperscript{244} Further, disabling legislation in a foreign state may effectively preclude extraterritoriality altogether.\textsuperscript{245}

The \textit{Watchmakers of Switzerland} case of 1955 illustrates the principle that the application of anti-trust laws on foreign enterprises may produce conflicts with the legislation of other states.\textsuperscript{246} In this case, the Court found that a watch repair enterprise, conducted in the United States by two Swiss corporations, could be subjected to United States domestic laws.\textsuperscript{247} The court held that, in order for a foreign corporation to be present within the jurisdiction of a court for purpose of service of process, there must be proof of continuous local activities and a showing that under all circumstances forum is not unfairly inconvenient.\textsuperscript{248} Although the two Swiss entities did not own property in the United States and did not directly carry out their activities in the country, their American business activities were carried out by a domestic American corporation. Due to the control exerted by the Swiss corporations in determining the prices and terms of their American business affiliate, the court held that the Swiss corporations could be subjected to United States anti-trust statutes and tariff laws.\textsuperscript{249}

In the 1984 case \textit{Laker Airways Limited v. SABENA Belgian World Airlines}, the Court held that territoriality-based jurisdiction permitted a state to regulate the conduct or status of individuals or property physically situated within a foreign territory if the effects of that conduct are felt outside that territory.\textsuperscript{250} \textit{Laker} also holds that conduct that is calculated to have a substantial effect on a territory but takes place outside

\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} See, \textit{e.g.}, The Protection of Trading Interests Act, 1980, §§ 2, 5 (Eng.). This so-called blocking statute makes it difficult to depose witnesses, obtain documents, or enforce extraterritorially multiple liability judgments in the United Kingdom. \textit{See id.} It also contains a “clawback” provision allowing parties with outstanding multiple liabilities in foreign jurisdictions (\textit{e.g.}, treble damages in the United States) to sue the successful plaintiff in a British court to recover the punitive element of such awards. \textit{Id.} § 6 (Eng.).
\textsuperscript{247} \textit{Id.} at 42, 47, 48.
\textsuperscript{248} \textit{Id.} at 43, 50.
\textsuperscript{249} \textit{Id.} at 47, 50.
that territory may also be regulated.\textsuperscript{251} The Court further held that a
state has jurisdiction to prescribe law governing the conduct of its nation-
als whether such conduct takes place inside or outside its territory.\textsuperscript{252}
Accordingly, Laker Airways was deemed to be subject to United States
anti-trust legislation because its activities gravely impaired the interests of
the United States.\textsuperscript{253} When considering the question of whether United
Kingdom law should have applied, the Court compared the anti-trust legis-
lation of the United Kingdom to that of the United States and held:

We find no indication in either the statutory scheme or prior judicial
precedent that jurisdiction (by the United States) should not be exer-
cised. Legitimate United States interests in protecting consumers, pro-
viding for vindicating creditors' rights, and regulating economic
consequences of those doing substantial business in our country are all
advanced under the congressionally prescribed scheme. These are more
than sufficient jurisdictional contacts under \textit{United States v. Aluminium
Co. of America} and subsequent case law to support the exercise of pre-
scriptive jurisdiction in this case.\textsuperscript{254}

In the United States, the scope of antitrust legislation and protection
thus extends to those persons who are either directly or indirectly ad-
versedly affected by third-party antitrust violations.\textsuperscript{255} The adverse effect
in question must have been contemplated within the applicable laws.\textsuperscript{256}
For example, in the \textit{Uranium} antitrust litigation of 1979, a business entity
that engaged in a "tying arrangement"\textsuperscript{257} to sell its product was held to
have violated antitrust legislation.\textsuperscript{258}

\section{F. The Low Cost Carrier Phenomenon}

Due to current market conditions, air transportation is growing at a
rate twice that of the general economy, with a correspondingly dramatic
increase in the size of aggregate and individual aviation markets.\textsuperscript{259} There
has been a surge of energetic and robust competition among carriers in

\begin{itemize}
\item \textsuperscript{251} \textit{Id.} at 922.
\item \textsuperscript{252} \textit{Id.}
\item \textsuperscript{253} \textit{Id.} at 923-24.
\item \textsuperscript{254} \textit{Id.} at 945-46.
\item \textsuperscript{255} \textit{See In re Uranium Antitrust Litigation}, 473 F. Supp. 393, 401 (N.D. Ill. 1979).
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{See id.} ("A tying arrangement is the sale of one item (the tying product) only on condition
that the buyer would take the second item (the tied product) from the same source. Such
arrangements are per se unreasonable and violative of antitrust laws if the tie-in involves two
distinct products, and the party has sufficient economic power in the tying market to impose
significant restraints in the tied product market.").
\item \textsuperscript{258} The tie-in resulted in a drop in demand for the product concerned, leading to a drop in
prices and adversely affecting other market competitors. \textit{Id.} at 403.
\item \textsuperscript{259} Michael W. Tretheway, \textit{Distortions of Airline Revenues: Why the Network Airline Busi-
\end{itemize}
the air transport industry in recent years, mostly due to the globalization of the industry and privatization of airlines and airports.\textsuperscript{260} Regionally, market deregulation in Europe and Asia has added to this impetus, encouraging new enterprises to approach the air transport market with vigor and energy.\textsuperscript{261} This has facilitated the emergence of a number of new price-based carriers and the restructuring of existing carriers striving to keep up with the competition.\textsuperscript{262} The end result was the birth of a new breed of air carrier, called the low-cost carrier, offering a simple low-cost service intended for customers with simple itineraries.\textsuperscript{263} The low-cost carrier has grown to such significant size that some now compete with the largest established carriers in the world.\textsuperscript{264} Low-cost carriers have been quick to capture emergent growth opportunities, responding to demand for travel wherever opportunities arise.\textsuperscript{265}

The low-cost carrier is a business model with imposing and permanent visibility in the market place.\textsuperscript{266} The traditional business models of major network airlines have proven fundamentally flawed in the past few years, enabling emerging low cost carriers to establish themselves with robust business profiles.\textsuperscript{267} These low-cost carriers have adopted sustained pricing policies consistent with the recovery of costs and profit making.\textsuperscript{268} The success of the low-cost carrier lies mainly in lower cost structures, more efficient seat management policies and the absence of discrimination on price when compared to the practices of larger legacy carriers.\textsuperscript{269} For instance, drastically reduced airfare has proven to more than compensate for the lack of luxuries of network connectivity and


\textsuperscript{261} Thomas C. Lawton, Cleared for Take Off: Structure and Strategy in the Low Fare Airline Business, 1, 3 (2002). The low cost carrier phenomenon has also spread to the United States and Canada. The major Canadian low cost carriers, CanJet, Jetgo and WestJet have shown an annual growth of 54 percent in the past five years and have been quicker than their US counterparts in infiltrating the trans-border market. LCCs compete with Air Canada in 13 of Air Canada’s 61 U.S. Markets. Steve Lott, Canadian LCCs Poised to Join Battle for Warmer Markets, Aviation Daily, Nov. 17, 2004, at 5.

\textsuperscript{262} Lawton, supra note 261, at 1.

\textsuperscript{263} Abeyratne, supra note 260, at 587.

\textsuperscript{264} Id.

\textsuperscript{265} Id.

\textsuperscript{266} Id.

\textsuperscript{267} Doganis observes that in 1999 a survey carried out on 19,000 leisure passengers had astonishing results where the majority had preferred low cost no-frills carriers to established scheduled airlines such as British Airways and other scheduled European air carriers. See Doganis, supra note 19, at 126 (2001).

\textsuperscript{268} The main difficulty faced by legacy carriers has been their inability to maintain a viable business model that could drive a revenue base to cover a traditional cost base while allowing for an adequate return on invested capital. See Tretheway, supra note 259, at 3.

\textsuperscript{269} Abeyratne, supra note 260, at 587.
other value-added services featured by legacy carriers. This has resulted in a dwindling market share for legacy carriers, a share which could eventually drop to as low as forty per cent, even if producing a higher revenue share.

The threat posed by low-cost carriers to legacy carriers was non-existent until the early 1970s, when charter carriers first started encroaching on the market. This trend coincided with an increasing awareness that, particularly in Europe, controls on market access, monopoly of air services by legacy carriers who were receiving state aid, and restrictions on pricing and frequency of services were overwhelmingly anti-competitive and thus detrimental to the interests of the traveling public. In the United States, the Airline Deregulation Act of 1978 paved the way for liberalization of the domestic air transport market.

The surge of liberalization and the aviation industry’s healthy growth rate of four to six per cent in the late 1970s, which continued for twenty years due to aggregate rises in the gross domestic product, spurred an increased demand for travel. In particular, demand grew from business travelers who had deeper pockets than the average tourist. In response, the major airlines launched a practice called “network management” using sophisticated computer technology and optimized business models. They matched expected demand and offered capacity through advanced quantitative analyses that enabled them to build global networks using the famous “hub and spoke” model. The trend encouraged network carriers to attract traffic to their designated hubs, even going so far as to create the multi-hub systems visible in the United States in the 1980s. However, intense competition between ‘hub and spoke’ carriers created a standoff that forced them to match their competitors’ destination profiles at the expense of productivity. If carriers failed to create competitive destination portfolios, they would be devoured by

270. Id.
271. Tretheway, supra note 259, at 5.
272. Id. at 8.
275. See Global Change, supra note 36, at 25-27.
276. Id. at 42.
277. Tretheway, supra note 259, at 8.
278. Id.; see also, Michael W. Tretheway & Tae H. Oum, AIRLINE ECONOMICS: FOUNDATIONS FOR STRATEGY AND POLICY 64-74 (1992) (giving a detailed statistical description of the hub and spoke system based as it relates to anticipated passenger traffic levels).
280. Id. at 17.
other carriers through computer reservation systems which penalized reductions in connectivity with reductions in bookings, resulting in revenue drops.281

This dilemma led large network carriers to build compensatory competition tools by forming partnerships and global alliances. These arrangements were immensely popular in the mid 1990s and continue to flourish today in certain instances. These alliances would have been absolutely successful had existing regulatory restrictions on ownership and control been liberalized. However, because liberalization this did not occur globally, airline alliances failed to attain the full cost-savings potential.282

The final nail in the coffin of the conventional legacy carrier was driven from late 2000 through 2001 as the demand for air travel rapidly decreased due to the economic downturn and the unfortunate events of 11 September 2001.283 As mentioned, more recently, the war in Iraq and the spread of Severe Acute Respiratory Syndrome contributed to the troubles of the conventionally priced legacy air carriers. These events were a tremendous opportunity for low cost carriers who found a niche market in price sensitive clients.284

One distinct advantage of the low-cost carrier service is its unwavering focus on efficient and punctual carriage by air.285 Further, the fact that low-cost carriers fly to secondary airports is proving attractive to passengers who increasingly prefer to go through airports that offer connections with fewer interactions than congested mega airport complexes.286 Low-cost air carriers also attract to air travel the passenger who would have otherwise used an alternative mode of transportation that was cheaper than the high priced fares of network carriers.287 Large full-service network carriers are further confronted with the reality that low-cost carriers can drastically expand their own empires with their low-cost business models.288 A primary example is Southwest Airlines, which has operated low-cost services for the past 30 years and has now established its own network of low-cost destinations in the United States.

The point-to-point services offered by low-cost carriers such as Ryan Air, Easy Jet, and Southwest, feature operational efficiency and simplicity of service.289 These carriers use simple services and processes which, in

281. Id. at 16.
282. Id.
283. Id.
284. Id.; see supra pp. 2-3 and accompanying notes.
286. Id. at 17.
287. Id.
288. Id.
289. Tretheway, supra note 259, at 4.
turn, result in a simple, lean organization. This approach has been called "sustainable competitive advantage." Usually, airlines following this approach will offer one class of service with open seating and no meals. This strategy has the dual advantage of cutting costs and simplifying cabin services. Additionally, the low-cost carriers standardized their aircraft, such as Southwest’s exclusive use of the 737. This greatly reduces maintenance and crew training costs. Subscribing to one aircraft type also endears the airline to the aircraft’s manufacturer, leading to the potential for special discounts.

From a cost-based perspective, the most strategic measure of the low-cost carrier is its focus on secondary airports in small cities. The airline-airport relationship is an integral part of the “low-cost, legacy carrier” equation. Smaller, uncongested airports are appealing to passengers because they reduce landing and take-off queues and provide much shorter gate times than do congested airports in large cities. Shorter walkways and less confusion at gate and check-in points are critical advantages offered to consumers. Furthermore, smaller secondary airports eliminate the usually difficult transfer connections and delays in the delivery of baggage.

All of these factors enable low-cost carriers to lower their costs per available seat mile compared to their competition. In contrast, network carriers are unable to similarly reduce rates because of the vicious network cycles. Network carriers would have to eliminate their networks in order to attain a sustainable competitive advantage in regards to cost. However, legacy carriers are unable to do so because their existence depends on their route networks.

G. Regulation of Pricing

The most fundamental regulatory postulate applicable to the “low-cost, legacy carrier” phenomenon is enshrined in the Chicago Convention

290. Id.
292. See id. at 45 (discussing Southwest Airlines as the archetypal example).
293. Id.
294. Id.
295. Id.
296. See LAWTON, supra note 261, at 86-87 (discussing the Airline Quality Rating model as applied to Southwest and Ryanair from 1998-2000).
297. Id. at 76.
298. Id. at 77.
299. See generally, LAWTON, supra note 261 (containing a very thorough and far-reaching analysis of the low-cost carrier phenomenon).
300. Franke, supra note 279, at 16.
301. Id.
of 1944, which provides that one of the objectives of the ICAO should be to prevent waste caused by undue competition.\footnote{302}{\textit{\textsuperscript{302}}} To this end, at the ICAO's 5th Worldwide Air Transport Conference, contracting states declared that liberalization of air transport must be accompanied by appropriate safeguard measures to ensure fair competition and effective and sustained participation of all states.\footnote{303}{\textit{\textsuperscript{303}}}

The primary question to be raised is whether low-cost carriers are indulging in unfair competition through pricing. The ICAO Air Transport Conference suggested a model clause that would consider charging fares and rates on routes at levels insufficient to cover the costs of providing the services would constitute unfair competitive practice.\footnote{304}{\textit{\textsuperscript{304}}} If low-cost carriers price their product lower than their cost base, then, under the ICAO's model clause, they would be indulging in a practice inconsistent with fair competition.\footnote{305}{\textit{\textsuperscript{305}}}

The Conference also identified practices involving the addition of excessive capacity or frequency of service as anti-competitive. This would be particularly true if such practices were regular and sustained, rather than sporadic or temporary; had a serious negative economic effect on, or cause significant damage to, another airline; reflected an apparent intent to, or had the probable effect of, crippling, excluding or driving another airline from the market; and, if the behavior indicated an abuse of a dominant position on the route.\footnote{306}{\textit{\textsuperscript{306}}} The Conference recommended consultation between aeronautical authorities of state parties in the case of a conflict under this clause with subsequent resolution under the ICAO's provisions pertaining to dispute resolution.\footnote{307}{\textit{\textsuperscript{307}}}

The Conference also recommended that states carefully consider whether consumer interests in service quality have been addressed by current commercial practices of airlines (and service providers, if applicable), and what elements should be handled by regulatory and/or Voluntary Commitment approaches.\footnote{308}{\textit{\textsuperscript{308}}} Some of the services recognized by the Conference under this heading were: availability of lower fares, including fares on Web sites; reservation, ticketing and refund rules; check-in procedures; handling of compensation for flight delays, cancellation and denied boarding; baggage handling and liability; assistance regarding complaints; and assistance for disabled and special-needs passengers.\footnote{309}{\textit{\textsuperscript{309}}}

\footnote{302}{See Chicago Convention, supra note 1, art. 44(e).}
\footnote{303}{\textit{\textsuperscript{2003 Liberalization Conference Conclusions}}, supra note 128, at 9; see supra note 128.}
\footnote{304}{\textit{\textsuperscript{2003 Liberalization Conference Conclusions}}, supra note 128, at 10.}
\footnote{305}{\textit{\textsuperscript{ld.}}}
\footnote{306}{\textit{\textsuperscript{ld.}}}
\footnote{307}{\textit{\textsuperscript{ld. at 11.}}}
\footnote{308}{\textit{\textsuperscript{ld.}}}
\footnote{309}{\textit{\textsuperscript{ld. at 12-13.}}}

With regard to fares and rates, the ICAO Assembly, at its 32nd Session, adopted Resolution A32-17. This resolution recognized that fares and rates for international air transport must be fair and reasonable and designed to promote the satisfactory development of air services. The Resolution also recognized that states or their governments have a responsibility in the matter of fares and rates and requested the ICAO Council to monitor the establishment of international tariffs along with any associated rules and conditions.

Although Resolution A32-17 is no longer in force, its thrust and spirit is embodied in Resolution A35-18, the Consolidated Statement of Continuing ICAO Policies in the Air Transport Field, adopted at the ICAO’s 35th Session. This Resolution requests the Council to instruct the Secretary General to periodically issue a study on the regional differences in international air transport operating costs, analyzing how differences in operations and input prices affect the impact that changes in costs may have on air transport tariffs.

To this end, the ICAO has published models of bilateral tariff clauses and identified determinative factors and mechanisms for developing tariffs both for passenger and cargo carriage. The ICAO has also identified the following justifications for international tariffs: to ensure that national carriers have a fair opportunity to operate and compete in providing international air services; to respond to the needs of international air transport; and, to promote competition in international air transport.

In Europe, entrenched European Union legislation controls predatory pricing, competition and fair trade. Article 82 of the European Communities Treaty prohibits abuse of dominant position by a carrier as determined through the comparison of a relevant market and the market share enjoyed by the carrier under evaluation. The pricing practices of the carrier must not be lower than average cost. The Competition Act of 1998 of the United Kingdom also links predatory pricing with domi-

311. See id. app.G.
312. See id.
314. See id. at app.G.
316. See ICAO Regulation Manual, supra note 109, ¶ 4.2-1.
317. EC Treaty art. 82.
318. Id. art. 82(a).
nant position and uses a process similar to that of the European Union in assessing price-cost relationships.\textsuperscript{319} Germany has similar legislation in the Gesetz gegen Wettbewerbsbeschränkungen (GWB), an Act Against the Restraint of Competition.\textsuperscript{320} The GWB identifies predatory practices as an abuse of dominant position if the predator is dominant in the market, the conduct of predatory pricing is sustained and continuous, and pricing is below average costs without objective justification.\textsuperscript{321}

As mentioned, the United States competition law has, at its genesis, the Sherman Act of 1890\textsuperscript{322} and the Clayton Act of 1914\textsuperscript{323} (amended in 1950).\textsuperscript{324} These acts have been judicially interpreted as requiring two criteria: pricing below average variable costs and proof of recoupment of losses incurred during an alleged period of predatory pricing.\textsuperscript{325} In the 2001 case of United States v. AMR Corp.,\textsuperscript{326} the court held that an air carrier who matches prices and increases output to compete with low-cost carriers is not guilty of monopolization of the market, even if the carrier in question reverted to its original pricing after all low-cost carriers had left the market.\textsuperscript{327} The court based its decision on the fact that the carrier had not priced its fare at an inappropriately low level.\textsuperscript{328} The carrier in question was found to have met the competition fairly and there was no evidence that the carrier would recoup its losses through competitive pricing.\textsuperscript{329}

Predation in Canada is brought within the purviews of both civil and criminal law. Section 50(1)(c) of the Canadian Competition Act recognizes selling at an unreasonably low price to be an act of predation when it is calculated to eliminate competition or lessen a competitor’s ability to

\begin{thebibliography}{99}
\bibitem{a} See Competition Act, 1998, c. 41, § 18 (Eng.).
\bibitem{b} See 4-35 BUSINESS TRANSACTIONS IN GERMANY § 35.05 (2005) (containing an English translation of the act).
\bibitem{c} See id. at § 35.05[a].
\bibitem{d} See Sherman Act, ch. 647 § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1990)).
\bibitem{g} See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 222, 224 (1993) (holding that in order to prove predatory pricing a plaintiff needs to demonstrate the defendant priced below average variable cost and that the defendant has a “reasonable prospect” or a “dangerous probability” of recouping its losses from its pricing scheme); see David J. Kates, Note: Recouping the Losses of Brooke Group, 73 WASH. U. L.Q. 609, 628-29 (1995).
\bibitem{h} United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001) aff’d 335 F.3d 1109 (10th Cir. 2003).
\bibitem{i} Id. at 1194.
\bibitem{j} See id. at 1207.
\bibitem{k} See id. at 1209.
\end{thebibliography}
compete.\textsuperscript{330}

The Australian Trade Practices Act of 1974,\textsuperscript{331} which is administered through the Australian Competition and Consumer Commission, provides that, when a firm takes control of dominant market power with an intent to lessen or eliminate its competition, the onus is on that party to prove that its actions are not tantamount to predatory practices.\textsuperscript{332} Recapitulation through pricing at competitive levels is seen as a \textit{sine qua non} of predatory pricing.\textsuperscript{333}

The above discussion leaves no room for doubt that there is strong regulatory control of fares and services offered to the consumer in air transport. The responsibility in this regard lies primarily in sovereign states acting through the ICAO (for global consensus) and through their own national legislation and policy.\textsuperscript{334}

\textbf{H. LIABILITY ISSUES}

The most compelling area for consideration, particularly from a legal perspective, is the level of services that should be required by low-cost carriers who do not provide the usual frills of international air transport. In point-to-point service, where support services at an airport are minimal and complaints from the passengers or consignors/consignees are difficult to channel to the carrier, the approach taken by courts to handle is of particular interest.

The United States Supreme Court ruled in the 2004 case \textit{Olympic Airways v. Husain et. al.}\textsuperscript{335} that the plaintiff was allowed recovery for the death of an asthma suffering passenger who was exposed to second hand smoke in flight.\textsuperscript{336} The death was allegedly caused by the refusal of a flight attendant to relocate the passenger away from his assigned seat which was in close proximity to the aircraft's smoking section.\textsuperscript{337} The Warsaw Convention of 1929, applicable to such liability issues, provides that a carrier is liable for damage sustained in the event of death, or any

\begin{itemize}
  \item \textsuperscript{330} Competition Act, R.S.C. 1985, c. C-34, sec. 50(1)(c) (Can.).
  \item \textsuperscript{332} See \textit{id.} §§ 46, 49(1), 49(3).
  \item \textsuperscript{333} See \textit{id.} § 48.
  \item \textsuperscript{334} See, e.g., \textsc{Malcolm N. Shaw, QC}, \textit{International Law} 694-698 (Cambridge University Press 1997) (5th ed. 2003) (explaining that if a state commits an unlawful act towards another state the state committing the wrong owes reparation towards the other state under the law of state responsibility and \textit{not} international law because it does not distinguish between contractual and tortious responsibility).
  \item \textsuperscript{335} \textit{Olympic Airways v. Husain}, 540 U.S. 644 (2004).
  \item \textsuperscript{336} \textit{id.} at 657.
  \item \textsuperscript{337} See \textit{id.} at 648 (explaining that there was not a formal announcement of the cause of death because it was against religious practices to perform an autopsy).
\end{itemize}
other bodily injury suffered by a passenger, if the injury was sustained due to accident that took place on board, or in the course of any of the aircraft’s operations. The *Husain* decision endorses an earlier judicial view that failure on the part of an airline to render medical assistance or care for a passenger in need could constitute an injury under the Convention. The Court clarified a prior ruling stating that an accident which did not bear upon the passenger’s existing condition of health was deemed to be an outside and unexpected occurrence. The *Husain* decision adds another dimension to the word “accident.”

More importantly, *Husain* introduces the possibility that airlines may be burdened with convincing courts that they took every measure possible to look after the interests of their passengers, even if they were not directly responsible for the cause of an accident. Particular care has to be taken regarding passengers who might need special assistance, such as elderly and disabled persons. In a 2002 case, a plaintiff who requested and received wheelchair assistance from check-in to boarding fell on the escalator on her way to boarding, sustaining injury when her wheelchair fell backwards. The primary issue was whether the carrier was liable under Article 17 of the Warsaw Convention for injury sustained during the course of operations of embarking. The Court in that case considered various criteria, such as the plaintiff’s location when the injury occurred, and concluded that, because the accident occurred while the plaintiff was on her way to enter the aircraft, and at a location where she was obliged to be, the situation did indeed fall under the “in the course of operations of embarking” clause. The Court further observed that the airline’s entire “departure routine,” which passengers were obliged to follow, was included in the process of embarking and was not merely a “waiting” activity.

Given the sensitivity of current jurisprudence to a carrier’s liability, carriers should seriously review their exposure to the risk of law suits. As

338. *Id.* at 649.
344. *Id.*
345. *Id.*
346. *Id.*
some courts have gone so far as to find a carrier responsible even for the
conduct of a sexual predator, over whom the airline need not necessarily
have any control, the situation remains delicate.347

III. COMPETITION IN EUROPE

A. EUROPEAN COMMUNITY LEGISLATION ON AIR TRANSPORT

Air transport in the European Community historically has been regu-
lated by two treaties, the ECSC Treaty (which established the European
Coal and Steel Community),348 and the EEC Treaty (which established
the European Economic Community).349 The former, signed in Paris in
1951, addressed issues related to the carriage of coal and steel through
the media of rail, road and inland waterways and as such was not directly
relevant to aviation.350 The latter dealt with issues relating to all modes
of transport in the carriage of persons and goods and is thus of some
relevance to aviation.351

The EEC Treaty, signed in Rome on March 25, 1957, had at its core a
Common Transport Policy (CTP) concept.352 The CTP was calculated to
achieve the fundamental purposes of the European Community.353 One
of the most salient features of the EEC Treaty is that the tasks of the
Community are set out succinctly in Article 2, which provides inter alia
for the adoption of a Common Transport Policy as provided for in Arti-
acle 3(1).354 This provision is linked to Article 84, which in turn provides
that the objectives of the Treaty regarding issues of transportation would
be pursued by state parties within the parameters of the CTP, which is
established by the Council of Europe through secondary legislation.355

The rights and duties of the Council of Europe in establishing the
CTP, particularly in the fields of air and maritime transport, can be attribu-
ted to a 1986 case356 and Article 189 of the EEC Treaty. Article 189

347. See Wallace v. Korean Air, 214 F.3d 293, 299-300 (2d Cir. 2000) (holding that a sexual
assault can be defined as an accident under Article 17 of the Warsaw Convention).
348. Treaty instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S.
140. This treaty expired in 2002, although many of its substantive provisions were included in the
superceding Treaty of Nice. See Treaty of Nice sets stage for union's enlargement, S. CHINA
[hereinafter Treaty of Rome].
350. See Paul S. Dempsey, Competition in the Air: European Union Regulation of Commer-
351. Id. at 992; EC Treaty art. 3(e).
352. See EC Treaty art. 3(e); Dempsey, supra note 350, at 993.
353. See Dempsey, supra note 350, at 993-94.
354. Id. at 994; Council Regulation 1017/68, 1968 O.J. (L 241) 10.
355. See Dempsey, supra note 350, at 994.
art. 189.
enables the Council to adopt common rules attributable to international transport to or from the territory of a member state or passing across the territory of one or more member state, the conditions under which non-resident carriers may operate transport services within a member state, and any other appropriate provisions.357

Article 84(1) of the EEC Treaty applies the provisions of the Section relating to transport to railroad and inland waterway, with a qualifier in Article 84(2) giving discretion to the Council to decide whether, and to what extent and by what procedure, appropriate provisions may be laid down for sea and air transport.358 Although air and maritime transport is explicitly mentioned in Article 84, implicit in the Treaty is the understanding that the transport title will not ipso facto apply to those two modes of transport.359

The applicability of the EEC Treaty to air and maritime transport was examined in some detail in the 1974 case, Commission v. France. The court observed:

Whilst under Article 84(2), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV Part Two of the Treaty relating to the CTP, it remains, on the same basis as other modes of transport, subject to the general rules of the Treaty.360

The court subsequently confirmed this view in a 1977 case.361 Both decisions make it clear that the general rules of the Treaty apply per force to transportation in general, if the Council, acting under Article 84(2) does not decide to the contrary.362 This essentially means that the Commission has a legal, as well as political, duty to ensure that the general provisions of the Treaty are applied to air and maritime transportation.363

The Treaty on European Union (TEU) is a supplemental treaty which embellishes the provisions of the EEC Treaty. In particular, the TEU added that the Council shall, in addition to its duties in Article

357. EC Treaty art. 189.
358. Id. art. 84 (current version at art. 80).
359. See Moritz F. Schapenseel, Perspective, Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market, 22 NW. J. INT’L L. & BUS. 91, 95 (2001) ("Under Article 84(2) of the EEC Treaty the Council decides whether these provisions may be applied to sea and air transportation. This statute raised doubts as to whether shipping and aviation were covered by the EC Treaty at all.").
362. Schapenseel, supra note 359, at 102; see also Ruwantissa Abeyratne, The Decision of the European Court of Justice on Open Skies, How can we Take Liberalization to the Next Level?, 68 J. AIR L. & COM. 485, 503 (2003).
363. See Abeyratne, supra note 362, at 503.
75(1), lay down measures to improve transport policy. The TEU also established the principle that the Council is obligated in all instances to act on proposals from the Commission, consequent to obtaining the opinion of the European Parliament. This procedure is laid out in Article 189c of the EEC Treaty; the TEU merely enforced the need for the Council to act according to the provision. The TEU also requires the European Community to contribute to the establishment and development of trans-European networks, specifically telecommunications and energy infrastructures per Article 129b(1) of the TEU.

In October 1997, the Joint European Council confirmed the creation of a European Common Aviation Area (ECAA) which would encompass the European Community States, member states of the European Economic Area (EEA), and the Associated States of Central Europe. The EEA is based on the Acquis Communautaire in air transport and is founded in a multilateral agreement containing transitional provisions on market access and environmental protection, with a particular emphasis on noise. European Community legislation is extended by the ECAA agreement in areas relating to market access and ancillary issues, competition rules, air traffic management, safety, environmental protection, social aspects, and consumer protection.

The perceived dichotomy between the wide-ranging powers of the European Union in external relations in air transport and the inhibitions cast upon the Union by its enabling legislation, the European Communities Treaty (which does not explicitly grant the Union competence), has led to sustained examination by the adjudicatory process. The European Court of Justice (ECJ) decided in 1971 that the Community has both external competence and internal competence on an intra-Europe basis. This judgment gave implicit external competence to the European Union to take over control of negotiations on behalf of European member states in matters relating to international air transport agreements. Although the Union has not utilized this right extensively, it

365. Id. art. 198(a).
366. Id. art. 75.
367. Id. art 129(b)(1).
368. Abeyratne, supra note 362, at 504.
369. The so-called “third package.” See Scharpenseel, supra note 359, at 95; see infra note 431.
370. Scharpenseel, supra note 359, at 98.
371. Id. at 102.
373. See Civil Aviation Memorandum No. 1 and Civil Aviation Memorandum No. 2, Progress Towards the Development of Community Air Transport Policy, COM(84)72 final (1994).
was used in the 1990s when the European Community adopted internal rules pertaining to CRS on an intra-Europe basis. However, this right (until the recent European Court of Justice Transport cases discussed in Parts B and C infra) did not extend to trade in services per a 1994 ECJ judgment holding that trade in services, including trade relating to air transport services, is beyond the jurisdiction of the European Union.

The Maastricht Treaty of 1992 provided that the European Community may decide to cooperate with third countries to promote projects of mutual interest. It thus became possible to encompass the countries of Central and Eastern Europe within the purview of the European Union, extending some flexibility to the rigid treaty law governing Europe, particularly in relation to trade in services and commercial competition in air transport. The third and final phase, or “third package,” of European Community air transportation liberalization took effect in January 1993, putting in place regulations covering areas such as market access, slot allocation and scheduling.

The tightly-woven Pan-European legislation on competition reflects the desire of the European nations to band together as a collective force rather than compete individually with other nations or among themselves in the field of air transport. However, although a combined Europe is more populated than North America, airlines of the European Union have not maximized the market’s potential, primarily due to the airlines’ high operating costs. Several airlines have been successful, such as British Airways, KLM and Lufthansa (although only in the mid nineties), but most other European carriers, have operated at or below break-even


377. See id.; see also Dempsey, supra note 350, at 1070-72.

378. See Scharpenseel, supra note 359, at 104.

379. There has always been a mixed reaction amongst E.U. countries to the notion of giving the Commission sovereignty to negotiate all international aviation agreements. See, e.g., Daniel Dombey, Long Haul Ahead in Open Skies Struggle, FINANCIAL TIMES, Nov. 5, 2002, at 11 (quoting E.U. Transport Commissioner Loyola de Palacio); AUA Says Court Ruling Will Change Little in Practice, AUSTRIA TODAY, Nov. 7, 2002, at 5 (quoting Austrian Airlines Group spokesman Johann Jurecka).

380. See LAWTON, supra note 261, at 69.
levels.\textsuperscript{381} As a result of the rapidly evolving collectiveness of the European States, particularly in the liberalization of intra-European markets, European Union carriers have now entered more intra-European routes. Several airlines of European States have established subsidiaries in other Union Member States.\textsuperscript{382}

The success of the European Union states in tightening air transport legislation and liberalizing air transport intra-Europe is a classic example of the "cluster" theory, a principle based on the competitive advantage of a cluster of nations which are geographically proximate to each other.\textsuperscript{383} In this case, the air carriers of a cluster of European states, interconnected and linked by commonalities and complementariness, are given the opportunity to form alliances, sourcing their capital, goods and technology to locate their operations wherever within the European Continent it may be cost effective.\textsuperscript{384}

The prevalence of clusters in economies brings to bear new concepts about national, municipal and international economies and opens a whole new dimension of competition centered around liberalization on an intra-continental legal structure.\textsuperscript{385}

Clustering in European air transport in the areas of slot allocation and market access has created new management agendas for European carriers, giving them a tangible stake in key business areas such as taxation, utility cost sharing and wages.\textsuperscript{386} The European Union states, in their macroeconomic vision, have created a driving force in the European air transport industry, not only by maximizing air transport potential within the continent, but also by creating new types of dialogues between air transport enterprises within Europe.

The theory of clustering is based on the economic potential of a group of enterprises. Clusters of European airlines operating within Europe would affect competition by increasing the productivity of constituent partners across the board. The partners' innovation and growth in productivity would increase through the stimulation of new business strategies that expand the dimensions of the cluster.\textsuperscript{387} Clusters also effectively maximize economies of agglomeration by promoting proximity of operation to markets while minimizing costs.\textsuperscript{388}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 62.
\item \textit{Id.} at 21.
\item See generally, Porter, \textit{supra} note 41, at 197-271 (analyzing the manifold forms "clusters" may take and their effects on competition within a market).
\item \textit{Id.} at 199.
\item \textit{Id.}
\item \textit{Id.} at 172.
\item \textit{Id.} at 241.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
Together with the overall thrust of the cluster phenomenon brought about by tight legislation on liberalization, European nations also have the advantage of the immense capacity of their air transport industry to innovate and upgrade. Europe has retained competition advantage within the continent through a highly localized process.

For the European Union nations, the most important market is arguably the North Atlantic air transport market between the United States and Europe. A primary commercial tool which European carriers have used in participating in this market is the air carrier alliance. The North Atlantic market was by far the largest in the world in the mid nineties, with 34 million passengers carried in 1993. The largest country pair in this market is the United States and United Kingdom, which accommodated 43% of all United States-to-Europe traffic in 1997.

Although post-Second World War trends produced by the Bermuda I and Bermuda II models were perceived as inhibiting the hidden potential in air transport between the United States and Europe, the United States’ external aviation policy of liberalization, launched in 1978, paved the way for more competition. The Netherlands, which blazed the trail with the first liberalized bilateral agreement with the United States in 1978, was followed by Belgium and Germany in quick succession.

B. European Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany

In 1998, the European Commission applied to the European Court of Justice to review the actions of seven European Union member states who had concluded bilateral “open skies” agreements with the United

389. Abeyratne, supra note 79, at 431.
393. Id. at 113.
394. Id. at 115.
States in the field of air transport.\textsuperscript{398} The Court held oral proceedings in May 2001 and subsequently considered the conclusions of the Advocate-General.\textsuperscript{399}

The European Commission’s complaint dated back to 1992 when the member states of the European Union jointly agreed to create a single European market in air transport.\textsuperscript{400} Broadly, this meant that air carriers of the European Union member states could carry passengers and freight on an intra-EU basis territorially, using liberalized commercial rights.\textsuperscript{401} This accorded European Community airlines with equal rights at law to operate air services from their home bases.\textsuperscript{402} Furthermore, European Community airlines became \textit{ipso facto} airlines of the European Union, with the same rights and on the same terms as local airlines in a given European Union territory.\textsuperscript{403}

A natural corollary to this agreement was the belief on the part of the Commission that a broad based initiative to remove trade barriers in market access would encourage competition among European Union carriers within the Union, particularly as European carriers would benefit by operating services from their home base and establishing commercial operations anywhere in the European Union on an equal basis to any native carrier.\textsuperscript{404} More importantly, the European Commission held a reasonable expectation that the agreements would apply European Union external policy to countries outside the Union.\textsuperscript{405}

Further, the documents before the Court indicated that, in 1992, the United States had offered various European States the opportunity of concluding a bilateral “open skies” agreement.\textsuperscript{406} Such agreements were


With the exception of the U.K. case, which does not discuss all of the major issues addressed in the other cases, all of the ECJ opinions are nearly identical.

\textsuperscript{399} A Break in the Clouds: The European Court’s “Open-Skies” Ruling Undermines the Protection of Europe’s Flag Carriers, THE ECONOMIST, NOV. 9, 2002, at 14.


\textsuperscript{401} Id. at 240.

\textsuperscript{402} Id.

\textsuperscript{403} Id.

\textsuperscript{404} See Civil Aviation Memorandum No. 1 and Civil Aviation Memorandum No. 2, Progress Towards the Development of Community Air Transport Policy, COM(84)72 final (1994).

\textsuperscript{405} Id.

\textsuperscript{406} See Warden, supra note 400, at 237.
intended to facilitate alliances between American and European carriers. They conformed to a number of criteria set out by the United States government, such as free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of “mutual disapproval” for air routes between the parties to the agreement, and the possibility of sharing codes.407 During 1993 and 1994, the United States intensified its efforts to conclude bilateral air transport agreements under the open skies policy with as many European States as possible.408 In 1994, the United States issued an “International Aviation Policy Statement” advocating a global open aviation system, committing itself to an “open skies” approach.409 The United States “open skies” policy is a liberalized bilateral, and multilateral, structure that enables carriers to continue service to a third country in a single flight (usually called “Fifth Freedom” rights).410 In the context of United States and Europe, an example would be a carrier operating air services from New York to Paris and continuing onwards to London.

In accordance with its position against individual bilateral negotiations in favor of a European Union-based common approach, the Commission requested European Union member states to refrain from entering into any new agreements, specifically with the United States. In a letter sent to member states on November 17, 1994, the Commission highlighted the possible negative effects of such bilateral agreements on the Community and stated that, in its opinion, these types of agreements were likely to affect internal Community legislation.411 The Commission added that only at the Community level could negotiation of bi-lateral agreements be carried out effectively and in a legal manner.412

Although the Commission requested European Union member states to desist from entering into bilateral agreements individually, seven of eight members signed an “open skies” agreement with the United States, the United Kingdom being the only exception.413 For instance, the Kingdom of Belgium reached an agreement with the United States on a new amendment to the 1980 Agreement, subsequently confirmed by an exchange of diplomatic notes on March 1, 1995.414 Several provisions

407. Id.
408. Id.
410. See Warden, supra note 400, at 234.
411. See Dempsey, supra note 350, at 1071.
412. Id. at 1071-72.
413. Id. at 1073-74. Although it agreed to nationality principles in the US/UK bilateral agreement, the UK did not go so far as to conclude an open skies agreement with the US. Id. at 1073 n.634.
were amended or revoked so that the agreement complied with the American "open skies" model agreement.\textsuperscript{415} In addition, Annexes I and II to the 1980 Agreement, containing schedules of routes and opportunities for their use, were amended to bring them into line with that model.\textsuperscript{416} For example, changes were made in relation to routes, operational flexibility, and charter flights.

Under Article 3 of the 1980 Agreement, each contracting party may grant appropriate operating authorizations and necessary technical permissions to airlines designated by the other party, subject to the condition that a substantial part of the ownership and effective control of that airline is vested in the designating party nationals of that party.\textsuperscript{417} According to Article 4 of that agreement, those authorizations and permissions may be revoked, suspended or limited where the above condition is not fulfilled.\textsuperscript{418}

i. \textit{The European Commission's Arguments}

The Commission's major contention against the "open skies" agreements was that they eroded the fundamental premise of the European Union, namely that it is one large liberalized market (similar to the American market in so far as the United States is concerned).\textsuperscript{419} Although the Commission conceded that "open skies" agreements may accord benefits to consumers, it believed that the "open skies" agreements between the United States and European Union member states would provide United States carriers with significant operational benefits in Europe without according reciprocal benefits to European carriers in the United States.\textsuperscript{420}

Specifically, the Commission claimed that although United States carriers could operate air services from any point in the United States to any point in Europe, the European carriers were restricted to operating services to the United States only from their home bases.\textsuperscript{421} Additionally, the Commission argued that nationality restrictions in the "open skies" agreements would hinder intra-European investment and rationali-
zation. It was the Commission’s submission to the European Court that the only reasonable manner in which negotiations with the United States could be carried out was through bloc negotiations in which the leverage of European Union states could be pooled. The Commission noted that the pooling approach was being used by European Union states in other areas of commercial interaction and that air transport should be no exception.

Moreover, the Commission asserted that it was the only party that could effectively negotiate air transport agreements on behalf of all European Union states. The Commission claimed that it had exclusive jurisdiction in air service negotiations based on the doctrine of implied powers, enshrined in Article 80 of the European Communities Treaty. The fundamental principle of the doctrine is that the existence of Community law on a particular issue supersedes the rights of individual states to make their own decisions on that issue. Member states lose their right to assume obligations with non-member countries if and when common rules regarding or affecting those obligations are enacted.

Article 84(1) of the European Communities Treaty (now, after amendment, Article 80 (1) EC) provides that the provisions of Title V, relating to transport, of Part Three of the Treaty are to apply only to transport by rail, road and inland waterway. Paragraph 2 of that article provides: “The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. The procedural provisions of Article 75(1) and (3) shall apply.”

Pursuant to that provision, and with a view to the gradual establishment of the internal market in air transport, the Council adopted three ‘packages’ of measures, in 1987, 1990 and 1992 respectively, designed to ensure freedom in providing services in the air transport sector, and to apply the Community’s competition rules in that sector.

422. _Id._ ¶ 107.
423. _Id._ ¶¶ 77-79.
424. _Id._ ¶ 55 (citing Case 22/70, Comm’n v. Council, 1971 E.C.R. 263 ¶ 17 (holding that a grant of internal competence in given subject matter implies power to make treaties externally concerning that subject)).
427. _Id._
428. _Id._
429. EC Treaty art. 84(1) (as in effect 1998) (now, after amendment, article 80(1) EC), _cited in_ Comm’n v. Belg. ¶ 3.
430. EC Treaty art. 84(1) (as in effect 1998) (now, after amendment, article 80(1) EC) _cited in_ Comm’n v. Belg. ¶ 3 (Article 75(1) and (3) are now Article 71 EC).
The third package, which came into effect in 1992, was essentially geared toward liberalizing and establishing an internal European market of air services by providing uniform standards for intra-European Union market access to European Union carriers. The legislation comprises Regulation Nos. 2407/92, 2408/92 and 2409/92. According to Article 1 of Regulation No 2407/92, that regulation concerns requirements for the granting and maintenance of operating licenses by member states in relation to air carriers established in the Community. In that respect, Article 3(3) provides that no undertaking established in the Community is to be permitted within the territory of the Community to carry by air passengers, mail and/or cargo for remuneration and/or hire unless the undertaking has been granted the appropriate operating license. Under Article 4 (1) and (2), a member state may grant that license only to undertakings which have their principal place of business and registered office, if any, in that member state and, without prejudice to agreements and conventions to which the Community is a contracting party, which are majority owned and effectively controlled by member states and/or their nationals.

As stated in Article 1 (1) of Regulation No 2409/92, that regulation lays down the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community. Article 1 (2) and (3) of that regulation provide:

Without prejudice to paragraph 3, this Regulation shall not apply:

a) to fares and rates charged by air carriers other than Community air carriers; and

b) to fares and rates established by public service obligation, in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.

Only Community air carriers shall be entitled to introduce new products or

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433. Id.


lower fares than the ones existing for identical products.438

In addition to Regulations Nos. 2407/92, 2408/92 and 2409/92, the Community legislature adopted other measures in relation to air transport, in particular Regulations Nos. 2299/89 and 95/93.439

In accordance with Article 1, Regulation No. 2299/89 applies to Computer Reservation Systems (CRS) to the extent that they contain air transport products when offered for use or used in the territory of the Community. This was irrespective of the status or nationality of the system vendor, the source of the information used or the location of the relevant central data processing unit, or the geographical location of the airports between which air carriage takes place.440

However, Article 7 (1) and (2) of the same regulation provides:

The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.

The obligations of parent or participating carriers under Articles 3a, 4 and 8 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that outside the territory of the Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.441

Regulation No. 95/93 also applies to air carriers from non-member countries.442 Article 12 of that regulation provides:

Whenever it appears that a third country, with respect to the allocation of slots at airports:

a) does not grant Community air carriers treatment comparable to that granted by member States to air carriers from that country; or

b) does not grant Community air carriers de facto national treatment; or

c) grants air carriers from other third countries more favorable treatment than Community air carriers, appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the sus-


pension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law.

Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.\textsuperscript{443}

Based on the doctrine of implied powers, the Commission contended that the negotiation of “open skies” agreements by European Union member states with the United States exceed the authority of those states and was contrary to the letter and spirit of the third package of liberalization.\textsuperscript{444} The Commission added that the allocation of traffic rights by nationality effectively prevented competition between European Union airlines and unduly restricted aspirant European Union airlines from establishing bases in other European Union states.\textsuperscript{445}

The Commission took the position that it would be inconsistent with the aims of the liberalization to allow member states to negotiate and finalize bilateral agreements pertaining to air transport services with countries outside the European Union.\textsuperscript{446} The Commission reasoned that a concerted single market approach to bilateral negotiations by the European Union against non-Union countries would ensure the pristine equity of a single European market, effectively precluding unfair competition from non-Union carriers who might not have met the stringent criteria required of airlines before they are granted European Union carrier status.\textsuperscript{447} The Commission argued that non-Union carriers should be granted market access to territories in the European Union only if such carriers satisfied criteria that were acceptable to the Union as a whole, and not on an individual state-by-state basis.\textsuperscript{448}

In support of the principle that bilateral air services agreements with non-Union States should only be negotiated by the European Union and not by individual member states, the Commission further contended that if European Union states were to individually allocate air traffic rights to foreign destinations based on nationality, such an approach would result in discrimination against national flag carriers of separate European Union member states, violating treaty provisions that govern the European Union’s liberalization initiative.\textsuperscript{449} The Commission asserted that any negotiation based on individual nationality would hinder competition


\textsuperscript{445} Id.

\textsuperscript{446} Id.

\textsuperscript{447} Id. ¶ 78.

\textsuperscript{448} Id.

\textsuperscript{449} See Opinion 466/98, 2002 E.C.R. I-09427 ¶ 44.
between European Union airlines, which would react by safeguarding their national interests. This reaction would have far reaching adverse consequences on the progress of the European economy.

ii. The Decision of the European Court

The European Court enunciated similar principles in support of its individual judgments against all eight respondent states, and this discussion refers to the general observations and conclusions of the Court that are applicable to all eight states. However, for purposes of analysis, specific reference will be made to the Court's approach to the Kingdom of Belgium and its decision in that particular case.

a. Abuse of Procedure

The Court noted that European Commission's action was for a declaration that the eight respondent states had failed to fulfill their obligations under Community law by separately forming bilateral agreements with the United States in the field of air transport. The Court found that the Commission had properly applied the Treaty rules by bringing the action in accordance with Article 169 of the Treaty. The Commission had properly utilized the proceedings specifically envisaged by the Treaty for cases where a member state has failed to fulfil one of its obligations under Community law.

The Court did not accept the Belgian Government's argument concerning the Commission's motives in choosing to bring the present action rather than taking action against the Council. The Belgian Government had asserted that the action infringed on its legitimate expectation that the failure to fulfill its obligations would not be pursued. In its role as guardian of the Treaty of Rome, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a member state for a declaration of its failure to fulfill obligations, and on which conduct or omission any such proceedings should be brought. The Court held that this plea must therefore be rejected.

450. Id.
451. Id.
452. See Transport Cases, supra note 398.
454. Id. ¶ 48.
456. Id.
b. Internal Versus External Competency

The Court's primary ruling was that, in relation to air transport, Article 84 (2) of the Treaty merely provides the Community power to take action provided there has been a prior decision by the Council.\textsuperscript{458} Accordingly, although that provision may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport in a given case, the Court was of the view that it could not be regarded as in itself establishing an external Community competence in that field.\textsuperscript{459}

While the Court conceded that it had held that the Community's competence to enter into international commitments may arise not only by express conferment from the Treaty but also by implication from treaty provisions, such implied external competence existed only when the internal competence had already been used to adopt measures for implementing common policies on the occasion of the conclusion and implementation of international agreements.\textsuperscript{460} Thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives.\textsuperscript{461}

In a subsequent opinion, the Court summarized Opinion 1/76 as holding that, where internal competence may be effectively exercised only at the same time as external competence,\textsuperscript{462} the conclusion of international agreements is necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.\textsuperscript{463} However, it was the opinion of the Court that this was not the case here.\textsuperscript{464} There was nothing in the Treaty to prevent the institutions from arranging agreements with the United States, now was there any bar preventing institutions from approaching their external dealings in such a way as to mitigate any discrimination or distortions of competition resulting from the implementation of commitments from member states to the United States under “open skies” agreements.\textsuperscript{465} It has therefore not been established that, by reason of discrimination or distortions of com-

\textsuperscript{458} EC Treaty art. 84(2) (as in effect 1998) (now, after amendment, article 80(2) EC), cited in Comm'n v. Belg. ¶ 65.


\textsuperscript{461} Id.

\textsuperscript{462} Id. ¶ 68.

\textsuperscript{463} Id.

\textsuperscript{464} Id. ¶ 69.

\textsuperscript{465} Id. ¶ 70.
petition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.466

The Court went on to observe that, in 1992, the Council had been able to adopt the third package, which, according to the Commission, achieved the internal market in air transport based on the freedom to provide services. It did not appear necessary at that time to resort to the conclusion by the Community of air transport agreement with the United States of America.467 On the contrary, the documents before the Court showed that the Council, which the Treaty entrusts with the task of deciding appropriate action in the field of air transport and to define the extent of Community intervention, did not consider it necessary to conduct negotiations with the United States at the Community level.468 It was not until June 1996, subsequent to the exercise of the internal competence, that the Council authorized the Commission to negotiate an air transport agreement with the United States. The Council granted the Commission a restricted mandate for that purpose, while taking care to make clear, in its joint declaration with the Commission of 1996, that the system of bilateral agreements with the United States would be maintained until the conclusion of a new agreement binding the Community.469

The Court therefore concluded that the above finding could not be called into question by the fact that the measures adopted by the Council in relation to the internal market in air transport contain a number of provisions concerning nationals of non-member countries.470 In direct contrast to the Commission's argument, the Court found that the relatively limited character of those provisions precluded the inference that the freedom of nationals of member states to provide services in air transport is inextricably linked to the treatment accorded nationals of non-member countries (or, in non-member countries, to nationals of the member states).471

In the opinion of the Court, this case did not constitute a situation in which internal competence could only be exercised at the same time as external competence.472 In the light of the foregoing considerations, it was the considered view of the Court that the Community's claim that exclusive external competence was required to conclude an air transport agreement with that country was not valid.473
c. Clause on Ownership and Control of Airlines

The Court next took into consideration the Commission's assertion that the respondent states had, by individually negotiating and concluding "open skies" agreements with the United States in the field of transport, failed to fulfill their obligations under Articles 5 and 52 of the European Communities Treaty.\textsuperscript{474} The Commission also claimed that the respondent states had, by not rescinding those provisions of the agreements which were incompatible with Article 52 of European Communities Treaty, or secondary law, failed to comply with their obligations under Article 5 of the Treaty and secondary law.\textsuperscript{475} The Commission argued that the states had not accorded to the nationals of other member states the treatment reserved for the states' own nations. In particular, the clause in the case concerning the Kingdom of Belgium did not provide other airlines or undertakings of the relevant member states the same treatment reserved for Belgian nationals.\textsuperscript{476}

The Belgian Government had submitted that the clause on the ownership and control of airlines did not fall within the scope of Article 52 of the Treaty.\textsuperscript{477} It was Belgium's contention that as the clause regulated the exercise of traffic rights to points situated in non-member countries, it did not relate to the freedom of establishment but rather to the right of air carriers to offer services in non-member countries.\textsuperscript{478}

All respondent states were of the view that, whereas Article 61 of the European Communities Treaty precluded Treaty provisions on the freedom to provide services from applying to transport services (being governed by the provisions of the title concerning transport), there was no article in the Treaty precluding provisions on freedom of establishment from applying to transport.\textsuperscript{479}

Article 52 of the Treaty is in particular properly applicable to airline companies established in a member State and supplying air transport services between a member state and a non-member country.\textsuperscript{480} All companies established in a member state (within the meaning of Article 52 of the Treaty) are covered by that provision, even if their business in that state consists of services directed to non-member countries.\textsuperscript{481}

Regarding the question of whether the Kingdom of Belgium had infringed Article 52 of the Treaty, it should be noted that, under the article,
freedom of establishment includes the right to pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms.\textsuperscript{482} Articles 52 and 58 of the Treaty thus guarantee nationals of member states who have exercised their freedom of establishment, and companies or firms assimilated to them, the same treatment in a host member state as that accorded to nationals of that member state. This is both as to access to an occupational activity on first establishment and to the exercise of that activity by the person established in the host member state.\textsuperscript{483}

The Court has previously held that the principle of national treatment requires a member state party to a bilateral international treaty with a non-member country for the purpose of avoiding double taxation to grant to permanent establishments of companies resident in another member state the same advantages provided for by that treaty. Those rights must be granted on the same conditions as those which apply to companies resident in the member state that is party to the treaty.\textsuperscript{484}

In this case, the Court held that the clause on the ownership and control of airlines permits the United States to withdraw, suspend or limit the operating licenses or technical authorizations of an airline designated by a member of the European Union but with substantial ownership and effective control vested in another non-member state or individual.\textsuperscript{485} The Court also held that airlines established in a European Union member state with substantial ownership and effective control vested in another member state or individual ("Community airlines") may be affected by that clause.\textsuperscript{486} By contrast, the United States is, in principle, under an obligation to grant appropriate operating licenses and technical authorizations to airlines with a substantial ownership and effective control vested in European Union states.\textsuperscript{487}

The Court thus concluded that Community airlines may always be excluded from the benefit of an air transport agreement between a European Union member state and the United States, even though that benefit is assured to airlines of that member state.\textsuperscript{488} Consequently, Community airlines suffer discrimination by the prevention of similar treatment to that afforded the host member state and its own

\textsuperscript{482} Id. ¶ 134.
\textsuperscript{483} Id. ¶ 135 (citing Case C-307/97 Saint-Gobain v. Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161).
\textsuperscript{484} Id. ¶ 136; see Saint-Gobain v. Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161 ¶ 59; Case C-55/00 Gottardo v. INPS, 2002 E.C.R. I-413.
\textsuperscript{485} Id. ¶ 137.
\textsuperscript{486} Id. ¶ 138.
\textsuperscript{487} Id. ¶ 139.
\textsuperscript{488} Id. ¶ 140.
nationally. 489

Contrary to the arguments of respondent member states, the Court found that the direct source of the discrimination was not possible conduct by the United States but the clause on the ownership and control of airline, which specifically acknowledges the right of the United States to act in the manner described. 490

iii. Conclusion

While the basic finding of the Court was that, having negotiated an "open skies" agreement with the United States, the European Union states concerned had failed to fulfill certain obligations imposed by the applicable European Communities Treaty, it is important to note, in order to remove any doubt or confusion, that the European Court did not render invalid the bilateral agreements in question. 491 Nor did the Court admonish the European Union states and prohibit them from conducting bilateral negotiations with the United States in the future. 492 In contrast to the Commission's claims, the Court did not have jurisdiction to confer authority on the Commission to conduct air transport negotiations with the United States, a right which only the European Union Council of Ministers could confer. 493 The Court simply held that certain provisions and areas covered in the "open skies" agreements were contrary to European Union law because they encroached internal European Union regulations pertaining to non-European Union nationals. 494 The provisions in question include:

a) those pertaining to the allocation of airport slots; 495
b) those governing pricing, or fares and rates of intra-European air services; 496

c) agreements on computer reservation systems (insofar as they appear as provisions in the "open skies" agreements in question); 497

d) those which reserve the right to grant permission only to those airlines which are substantially owned and effectively controlled by nationals of the European Union member states that were parties to a particular agreement. 498

489. Id.
490. Id. § 141.
491. Abeyratne, supra note 362, at 488-89.
492. Id. at 489.
493. Id.
494. See Warden, supra note 400, at 243.
495. Id.
496. Id. at 244.
497. Id.
498. Id. at 244.
The essential component of the European Court’s decision is not its validity or reasoning, neither of which are in question, but its consequences. The Court ruled that certain areas of air transport are strictly within the overall competency of the European Commission or the Council as the case may be. However, the Court also ruled that the national prerogative of a European Union member state to initiate, negotiate and finalize bilateral air services still remains. Issues of market access and air traffic rights could thus indeed be the subject of individual negotiation of a European Union State provided such did not discriminate against the equal rights enjoyed by other European carriers. In this regard the decision of the Court was not unexpected and retains the status quo ante.

The most interesting aspect to the decisions, particularly from a competition angle, is that the core element of the bilateral air services agreement, market access involving the award of air traffic rights, was untouched except for the Court’s disapproval with European Union members who, in their agreements with the United States, would explicitly preclude another European Union member from operating air services from that member’s territory. For example, Belgium would not be permitted to reach an agreement with the United States in which Belgium agreed that Air France would not be allowed to operate services between Brussels and New York. The prohibition against such agreements is based on the Treaty of Rome, which forms the substance of the European Union’s legislative legitimacy and incorporates the right of equal national treatment for all European Union member states. Under the Treaty, such agreements would be tantamount to discrimination.

The Court further held that where the allocation of airport slots is a consideration in a bilateral agreement, provisions pertaining to slot allocation would be contrary to European Union law and therefore invalid. However, this holding was only academic because none of the eight bilateral agreements in question contained provisions pertaining to slot allocation. The Court also held that provisions prescribing fares and rates for intra-European routes were inconsistent with European Union law. The European Union alone has authority to price air services

499. Id. at 243.
500. Id.
501. Id. at 245.
503. See EC Treaty art. 6.
504. Id.
506. Id. ¶ 105.
507. Id. ¶¶ 96-97.
within the Union. Similarly, when considering European Union laws on Computer Reservation Systems ("CRS"), the Court found that the CRS provisions in the bilateral agreements between the United States and European Union member states were unacceptable.

IV. COMPETITION IN THE UNITED STATES

The United States has, through its courts, applied antitrust laws to commercial activities conducted outside the United States when such activities impinge upon the equilibrium of commercial activities within the United States by having a direct, substantial and reasonably foreseeable effect within the country. The Foreign Trade Antitrust Improvement Act of 1982, which grants the United States courts jurisdiction over certain aspects of foreign conduct, grants the United States Department of Transportation jurisdiction over air routes between the United States and a foreign country. This includes routes that are entirely outside the United States if competition on such routes is reasonably likely to have an adverse effect on the United States. As a result of this legislative possibility, courts in the United States have jurisdiction over antitrust actions brought by private entities in a court in the United States even where such actions may concern foreign entities.

In a laudable and fair attempt at balancing harmoniously the stringent application of United States law to foreign conduct with external cooperation, the United States has enacted the 1994 International Antitrust Enforcement Assistance Act which broadly admits of arrangements with foreign authorities to investigate antitrust violations through the exchange of information and common and reciprocal retrieval of evidence.

Unlike its neighbor Canada, who has a comparably restrictive foreign investment policy, the United States has a liberal "open door policy" on foreign direct investment and is one of the most open economies in this respect. The United States International Investment Policy State-

508. Id.
509. Id ¶ 104.
516. Abeyratne, supra note 362, at 509-10.
ment of 1983 confirmed:

The United States has consistently welcomed foreign direct investment in this country. Such investment provides substantial benefit to the United States. . . We provide foreign investors fair, equitable and non-discriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as are necessary to protect our security and related interests and which are consistent with our international legal obligations.517

The United States has adopted the approach that the absence of regulation encourages investment and is beneficial to the nation’s economy.518 It has therefore generally ensured non-discriminatory treatment for foreign investors.519 A commentator adds:

Foreign nationals and companies are treated as favorably as nationals or companies of the United States with respect to the establishment and operation of enterprises in this country. . . Further, on the basis of the national treatment principal investors from other countries can generally make investments in this country on the same legal terms as American investors.520

However, this “open door” policy and national treatment principal does not provide an accurate picture of the status of foreign investment in the United States.521 In contrast to the policy’s perception, there are numerous laws that effectively preclude it from taking full effect, impeding foreign investment in the country.522 For example, the 1988 Exxon-Florio Amendment523 provided the President with broad powers to review investments of foreign investors on his own initiative for any reason including those which directly or indirectly affect national security.524 The President may also review a foreign investment following the complaint of a third party.525

Foreign investors may, of their own volition, serve notice on the Committee on Foreign Investment in the United States (CFIUS).526 In addition, the CFIUS can also decide to inquire into an investment by it-

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520. Id.
521. See Raby, supra note 517, at 400.
522. Id. at 401-02.
525. See Knee, supra note 524, at 476.
526. Id. at 487.
self. It then advises the President of its decision with regard to an investment and the President ultimately decides whether or not the investment is contrary to national security interests. However, the notion of "national security" is ambiguous in this context, leaving the Executive with great discretion in the implementation of the Act. The Act is used infrequently and each case is evaluated individually.

In addition, many other sectors operate through a fixed maximum level of foreign participation and are thus excluded from foreign investor participation entirely or partially. At the federal level, these restrictions are seen in the fields of communications, transportation, aviation,
energy and national resources, banking, and defense. Federal laws such as antitrust regulations contained in the Clayton Act and the Sherman Act discussed supra, may also have limiting effects on the activities of foreign investors' in the United States.

In 1995, the United States Department of Transportation (DOT) announced a new aviation policy, geared towards providing more access to international air transport and increasing the variety of price and service options available to the consumer. The policy advocated providing carriers with untrammeled rights and opportunities to offer air services based on their own evaluations and positions in the markets. Above all, there was a shift in approach towards liberalization. The policy was crafted to ensure that competition is fair and the playing field level, achieved through the elimination of market distortions such as government subsidies and restrictions placed upon carriers' business practices. The policy's overall objective was to encourage the development of a cost effective and productive air transportation industry well equipped to compete in global aviation and to seek changes to airline foreign investment law so that air transport could be further liberalized.

The United States "open skies" philosophy, which has given rise to numerous agreements with a wide range of countries, allows for an open-

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534. See, e.g., Atomic Energy Act of 1954, 42 U.S.C. §§ 2133, 2134 (2000) (requiring a license for any person in the United States to transfer, manufacture, produce, use or import any facilities that produce or use nuclear materials. Such a license may not be issued to any entity known or believed to be owned, controlled or dominated by an alien, a foreign corporation or a foreign government); see also Agricultural Foreign Investment Disclosure Act, 7 U.S.C. § 3501 (2000) (requiring that individuals who transfer title of agricultural land to a foreign individual submit a report to the Secretary of Agriculture within 90 days of the transaction).


537. See supra Part B and accompanying notes.


539. Id.

540. Id.

541. Id.
route schedule, open traffic rights and open capacity.\textsuperscript{542} The policy's practical application was effected by inviting states to enter into open aviation agreements, either singly or as a group, in order to exchange unrestricted third and fourth freedom traffic.\textsuperscript{543} The first multilateral open skies agreement signed was the 2001 Asia-Pacific Economic Cooperation (APEC) agreement between the United States, Brunei, Chile, New Zealand and Singapore.\textsuperscript{544} This agreement allows carriers of the signatory states to operate unrestricted services to, from and beyond the others' territories, without any restrictions on where the carriers can fly.\textsuperscript{545}

V. COMPETITION OPTIONS

A. TRANSATLANTIC COMMON AVIATION AREAS

As to whether there should be absolute, untrammeled competition within the Americas and between the Americas and Europe is a critical issue for the coming years. One recent suggestion has been to crystallize a "convergence of regulatory principles" between Europe and the United States in competition by establishing a Transatlantic Common Aviation Area (TCAA).\textsuperscript{546} This concept was suggested by the Association of European Airlines (AEA), which put forward a policy statement including detailed and realistic proposals on how to bring about an ideal regulatory convergence between the European region and the United States.\textsuperscript{547} The policy addresses three areas:

a) matters in respect of which harmonization is necessary;

b) those in respect of which convergence could take the form of mutual recognition; and

c) those which could in principle be left at the discretion of each party.\textsuperscript{548}

\textsuperscript{542} The United States has concluded more than seventy bilateral Open Skies agreements with countries from every region of the world and at every level of economic development. For an up-to-date list, see Bureau of Economic and Business Affairs, \textit{Open Skies Partners}, http://www.state.gov/e/eb/rls/othr/2006/22281.htm (last visited Apr. 30, 2006).

\textsuperscript{543} Statement of United States International Air Transportation Policy, 60 Fed. Reg. at 21, 845.


\textsuperscript{545} Id.

\textsuperscript{546} \textit{See EU Transport Commissioner Offers Support to Trans-Atlantic Liberalization}, \textit{World Airline News}, Oct. 29, 1999 (discussing the 1999 policy statement issued by the Association of European Airlines \textit{Towards a Transatlantic Common Aviation Area} [hereinafter TCAA Policy].

\textsuperscript{547} Id.

\textsuperscript{548} Id.
The TCAA concept advocates the freedom of parties to provide services, addresses issues pertaining to airline ownership and the right of establishment, provides recommendations with regard to competition policy, and offers guidelines on the leasing of aircraft.\textsuperscript{549}

Since the TCAA aims at replacing traditional governmental regulatory control of such aspects of competition as market entry and pricing, the issues emerging from competition policy are by far the most complex and difficult to deal with within the TCAA’s parameters.\textsuperscript{550} Although the fundamental postulates of competition in Europe (stipulated by European Union regulations) and the United States are largely similar in purpose, both depending to a certain extent on the application of extraterritoriality in their regulations, there are obvious differences. For instance, there are dissimilar approaches to transatlantic airline alliances.\textsuperscript{551} Also, the United States stringently relies on a principle of “public interest” in its air transportation policy.\textsuperscript{552} while European competition rules are not as explicit in their policies.\textsuperscript{553} The basic essence of a TCAA would therefore establish the principle that matters of route sharing, capacity, pricing and frequency of services should be driven by market forces rather than be determined by governmental intervention.\textsuperscript{554} In this way a certain commonality could be established between the air transport of two regions.\textsuperscript{555}

B. THE WORLD TRADE ORGANIZATION AND GENERAL AGREEMENT ON TRADE IN SERVICES

Along with TCAA, another option is to allow absolute open competition between Europe and North America. Although globalization of competition in trade is a reality, in the case of air transport it may be premature. The current bilateral air services negotiations structure still

\textsuperscript{549} Id.

\textsuperscript{550} Id. To the AEA’s credit, they openly acknowledged that “convergence of competition policy is one of the most important, and difficult aspects of the TCAA.” Id.

\textsuperscript{551} As Mr. Schulte-Strathaus, Secretary General of the AEA succinctly noted:

Certain aspects of international aviation today are absurd. The EU has its Competition Rules and the U.S. its Sherman Act. Both are intended to stimulate market competition, but each arrives at a different conclusion. So the U.S. gave the green light to innovative strategic airline alliances with only minor undertakings for the applicants, whereas the Commission felt obliged to impose inhibiting conditions on the very same alliances between the very same airlines on the very same routes.


\textsuperscript{552} See, e.g., 49 U.S.C. § 40101 (requiring that in carrying out economic regulation of air transport, the Secretary of Transportation shall consider among other things, whether a matter is in the public interest and consistent with public convenience and necessity).

\textsuperscript{553} See Schulte-Strathaus, supra note 551.

\textsuperscript{554} See TCAA Policy, supra note 546.

\textsuperscript{555} Id.
seems to work, and absolute globalization of air transport will depend on the level to which air transport is encompassed in the General Agreement on Trade in Services (GATS), which, as discussed previously,\textsuperscript{556} contains the Most Favored Nations (MFN) treatment clause.

Neither the United States nor the European Union has, in the pursuit of liberalization, advocated the GATS umbrella.\textsuperscript{557} The approach taken by the United States has been to hold on to its policy of "public interest" and of maximizing air transport as a service industry capable of confronting the challenges of the upcoming decades.\textsuperscript{558} The GATS example served only to show a certain similarity of equal opportunity and competition under the MFN clause. This is reflective of the philosophy of an "open skies" regime, where all participating states would enjoy absolutely equal air traffic rights on a reciprocal basis.\textsuperscript{559}

As to the question whether the GATS negotiating scheme should be adopted with regard to international competition policy, the main concern whether, if considered, it should be contemporaneous with the development of a scheme within the World Trade Organization (WTO) for negotiating international antitrust principles. Such negotiations could be made on a total harmonization or partial harmonization basis. This would have the advantage of allowing members to introduce a variety of international competition agreements out of which the most suitable might be selected. Also, if this approach is adopted, it would be important for members to have a firm commitment to promote competition law and policy, both internationally and domestically. Such commitment should be clearly declared. Also, it may be necessary to establish, as in GATS, a time schedule within which negotiations should be carried out. A declaration of fundamental principles of competition would also be necessary. This declaration should contain analogous provisions to most favoured nation treatment, national treatment and transparency. Consideration should also be given to prohibition in principle of cartels, resale price maintenance, boycotts and others. Given the wide variety of princi-

\textsuperscript{556} See supra notes 121-27 and accompanying text.

\textsuperscript{557} See, e.g., IATA, supra note 122, at 5 ("With few exceptions, IATA's member airlines continue to hold to the policy agreed in 1994 that it is premature to view the GATS as a vehicle to liberalise traffic rights.").


Not surprisingly, the U.S. also has a lot to loose. In fact, the MFN principle, while providing an important instrument for ratcheting up the liberalization of international trade, also creates a serious risk of enabling "free-rider" protectionist states to enter large and lucrative markets (such as the US and EU markets) without any obligation to offer the same reciprocity as offered between liberal trading partners.

\textit{Id.} at 20.

\textsuperscript{559} Id.
amples that are followed by members with regard to other areas such as mergers and acquisitions, vertical non-price restraint and predatory pricing, it may be feasible to simply declare general and abstract principles requiring members to promote competition policy in such areas.

The WTO is not the only forum in which a scheme of convergence of competition laws can be accommodated. However, there is compelling reason for such a scheme to be considered under the WTO umbrella due to the volume of membership that WTO carries. Many of the more than 125 states which participated in the Uruguay Round leading to the establishment of the WTO Agreement do not have competition laws and many are not yet ready for such laws. When an international competition code is finally drafted, it is logical to expect a certain degree of universality in its principles. Such uniformity could be accomplished on a wider scale, given the WTO’s membership.

Professor Petersmann has recommended that an international competition code may be accommodated as an agreement of Annex IV of the WTO Agreement, which contains optional agreements. Petersmann examines the idea of a smaller number of nations entering into such an agreement initially, e.g., the United States, Japan and members of the European Community, Canada and Australia. Petersmann believes that, at least in the initial stage, an international competition code among a smaller number of members may work more effectively. Developing states might be granted a grace period to join the agreement. Such an agreement may, according to Petersmann, address “market access” issues effectively.

An international competition code in the WTO Agreement would have the advantage of coordination with other policies embodied in WTO

560. The OECD, for example is, to every purpose, an appropriate forum. See Randolph W. Tritell, Commentary, International Antitrust Convergence: A Positive View, ANTITRUST, Summer 2005, at 26 (“On a multilateral level, the Competition Committee of the OECD has been an important venue for developed country competition agencies to promote convergence.”).


562. Id. at 206-07.

563. Id. at 205.


566. Id. at 171.


568. Id. at 202-09.
agreements, such as the Trade Related Intellectual Property Rights Agreement (TRIPS), the Safeguard Agreement and the Antidumping Agreement. This co-ordination would be accomplished easier than if a competition code was established separately from the WTO. Another advantage is that the dispute settlement process incorporated in Annex II of the WTO Agreement could be utilized for disputes relating to the enforcement of competition laws.

Perhaps the only similarity between the competition rules of the existing bilateral structure relating to the air services agreement and WTO competition rules is the insistence by both systems on the requirement of fair and equal opportunity. The current bilateral structure of the air services negotiations will remain in force as long as states subjectively consider the potential that the air traffic of their carriers would have over others when others are excluded from given market segments. The states are empowered to take this position, not only because of Article 6 of the Chicago Convention but also by virtue of the underlying principle of sovereignty which legally entitles a state to prohibit a carrier from flying into or out of its territory without that state’s permission. As the preceding discussion has revealed, the protectionist attitude that pervades commercial air transport is not limited to struggling carriers of developing nations but applies equally to mega carriers who “protect” what they believe to be a legitimate share of their market. In this backdrop, the term “market access” can only be used with the word “reciprocity.” The status quo in commercial aviation is therefore by no means consistent with the competition principles advocated by the WTO.

If the concept of “market access” of commercial aviation is to be in consonance with WTO competition rules, the first step that the aviation

569. See Petersmann, supra note 564, at 160.

570. Compare Kenneth O. Rattray, Air Carriers of Developing Countries Must Have Safeguards in a Liberalized Environment, ICAO J., Nov.-Dec. 2002, at 13 (“At the very heart of the Chicago Convention is the recognition of the fact that the principles and arrangements for the safe and orderly development of air transport services must be established on the basis of equality.”) with WTO, Understanding the WTO 11 (3rd ed. 2005), available at http://www.wto.org/english/thewto_e/what_is_e/tif_e/understanding_e.pdf (last visited Mar. 17, 2006) (“The WTO is sometimes described as a “free trade” institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.”); see supra note 124 and accompanying text.


572. Id. ¶¶ 68, 69.

573. See Rattray, supra note 570, at 13.

574. See UN Positive Air Transport Agenda, supra note 571, ¶¶ 68, 69.

575. A sentiment that the IATA has repeatedly emphasized. See IATA, supra note 122, at 5.
community should take is to change its overall philosophy and consider all international air traffic as international rather than national property.\textsuperscript{576} This calls for a radical change in international policy regarding air traffic rights. Individual states would have an overall duty to consider their citizens as units of an international community of nations, rather than units of that particular state.\textsuperscript{577} In other words, states should represent citizens as nationals of an international society. The international traffic market would then be viewed as a whole and nations would adapt themselves to an extra national approach in sharing international air traffic. Once such an extra-national philosophy is in place, it would not be difficult to consider extra-territoriality in competition in a manner compatible with WTO competition rules, particularly in the context of the WTO’s emphasis on uniformity.\textsuperscript{578} The principles of transparency, most favored nation treatment and dispute resolution would then all fall into place.\textsuperscript{579}

Although the above proposal may sound logical and workable in theory, in reality, it cannot be denied that states have jealously guarded their historical rights to air traffic over the past fifty five years and would therefore be reluctant to embrace a multilateral approach to open competition. As to whether this trend will continue between the member states of the European Union and the United States after the decision of the European Court is a matter for the future.

VI. CIS States

The Commonwealth of Independent States (CIS) is an emergent body of sovereign states with burgeoning economies and evolving communications systems.\textsuperscript{580} These relatively newly-formed states must develop their telecommunications, information technology and air transport.\textsuperscript{581} Of these, air transport development is arguably the most compelling item. In this regard, the air carriers of CIS states are faced with a problem typical of most carriers of the developing world, \textit{i.e.}, sur-

\textsuperscript{576} See Petersmann, \textit{supra} note 565, at 169.
\textsuperscript{577} Id.
\textsuperscript{578} Id.
\textsuperscript{579} Id.
\textsuperscript{580} At present the CIS includes Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. See About Commonwealth of Independent States, \url{http://www.cisstat.com/eng/cis.htm} (last visited May 2, 2006) [hereinafter About CIS].
vival amidst a firmly entrenched system of alliances among more established international carriers. In order to meet the challenge of global competition, CIS carriers must modernize their fleets, maximize their route structures, develop market access, and forge alliances with established carriers.

At the time when the CIS states were formed, two trends were profoundly affecting the airline industry: country mergers and airline mergers.\textsuperscript{582} Of these, the unification of Europe was the largest single influence on international airlines.\textsuperscript{583}

A. STRATEGIES FOR CIS CARRIERS

Regardless of the political stage of CIS states and the rest of the world, the foremost challenge faced by aviation in CIS states is competition among carriers.\textsuperscript{584} The primary responses to this challenge lie in information technology and competitive strategy.\textsuperscript{585} With the information revolution sweeping the world, business competition in the CIS states, and, in particular, airline competition, should focus on achieving dramatic reductions in the cost of obtaining, processing and transmitting information in order to radically maximize profit bases.

Most CIS carriers have already realized that information technology is more than just computers, but is relating not only to stored databases, but also to management of information through convergent and integrated technologies. With the current high-growth rate of CIS carriers, proper management of information would provide them with a competitive edge and ways to outperform rival competition, the opening out of new businesses within parent companies, and a radical change in industry structure.

The airline product has both a physical and an information dimension. In general, the information dimension represents a systematic spec-


\textsuperscript{583} See Dempsey, \textit{supra} note 351, at 982-85.


\textsuperscript{585} See Porter, \textit{supra} note 41, at 50.
trum of knowledge that the consumer can acquire and fully utilize. Airline passengers have come to expect convenient, convincing and accessible information on the particular products they purchase.

The airline industry’s structure in CIS states is composed of five competitive forces, all of which may impact profitability: the power of the purchaser of the product, the power of the provider (airline) of the product, threats caused by new entrants, threats caused by other modes of transportation, and the rivalry among existing competitors. Information technology can play a role in all of these areas. For instance, information technology has led to automated tickets and airway bills, pop-up computer reservations information on the Internet, and direct communication between airline and passenger. In addition, airlines could develop differentiated travel services for corporate customers through the use of information technology, e.g., to arrange travel and monitor incurred expenses.

Information technology can also enhance an airline’s regional and global scope by facilitating business in international offices in coordination with a local head office. Above all, the use of information technology can give rise to derivative and generic business enterprises such as computer reservation systems and frequent-flyer clubs. Airlines that use information technology prudently could also sell excess capacity to other similar businesses.

The second tool which CIS airlines could use effectively is competitive strategy of ‘being different’. The broad principle of strategic alliances between airlines is a sub-set of competitive strategy. Harvard Business School Professor Michael Porter states that competition strategy is composed of calculated business acts, which deliberately choose a different set of activities to deliver a unique mix of value. Examples of present-day commercial strategies of airlines relating to their in-flight service include such tactics as the installation of a video system in every seat, or offering on-board gambling activities in aircraft. Other examples of airline competitive strategy include Singapore Airlines, which perpetuated the in-flight myth of the “Singapore Girl,” and Emirates which became an aggressive competitor in Asia with its superior quality in-flight service.

586. Id. at 80. For an account of how information on the internet is affecting airline ticketing see generally, Ruwantissa Abeyratne, Electronic Ticketing—Current Legal Issues, 70 J. AIR L. & COM. 141, 141-42 (2005).
587. PORTER, supra note 41, at 86-87.
588. Id. at 45.
Another compelling need in CIS aviation is attracting potential customers. It is imperative that airlines tap dormant markets instead of re-distributing existing traffic.\(^{591}\) One stratagem that airlines could adopt, particularly in regions of Asia which have untapped business and tourism potential, is to create excess demand in areas where tight oligopolies exist and attempt to cater to such demand by supplying capacity.

There are several strategic measures that CIS airlines could adopt for the future. First, they must continue to embrace globalization on the foundation of a unique competitive position. Airlines cannot effectively participate in a global market if they do not gain a competitive advantage over other carriers wherever possible. Airlines should globalize also in areas where they have the most unique advantages, such as computer reservation systems.

Second, airlines of CIS States must establish a consistent approach for penetrating international markets. Airlines must make a comprehensive assessment of market shares that can be tapped in foreign markets with or without the assistance of other carriers who have established presence in those markets. An airline would need to establish a clear home base from which to run its business, preferably located in the country with the most demand for the airline’s business.

Another suggestion for CIS airlines to consider is the fact that alliances need not all be strategic and exclusively calculated to yield profits. Alliances might be formed that merely ensure an airline’s global presence, which can be developed into a viable business prospect when foreign markets demand more capacity.

The basic challenge faced by CIS airlines, particularly those from rapidly developing countries, is to shift from the comparative advantage they may enjoy in certain areas to an overall competitive advantage. To achieve this, airlines must form alliances and build networks on a regional basis to the fullest extent possible, similar in scope and application to such entities as the single European aviation market created in 1997, or the MERCOSUR bloc of Argentina, Bolivia, Brazil, Chile and Paraguay.\(^{592}\) If CIS carriers are considering “open skies” arrangements with

\(^{591}\) The success of the low fare competitors such as Ryanair and Southwest has, in fact, been attributed to their successful tapping of just such underserved markets. See Lawton, supra note 261, at 35.

the United States and States of Europe, they should also pursue "open skies" agreements on an intra-European basis.

Another area in which CIS states should concentrate if their airlines are to succeed is national competitiveness. National competitiveness is the essential catalyst to trade, and a critical element of successful government and industry in every nation.\textsuperscript{593} Yet for all the discussion, debate, and writing on the topic, there is still no persuasive theory to explain national competitiveness.\textsuperscript{594} And there is yet no concrete formula identifying how nations can proactively provide a favorable home base for companies that compete internationally.\textsuperscript{595} However, CIS countries can still consider what sort of home base they can provide. This base is where a company's strategy is set, where core product and process technology are created and maintained, and where the most productive jobs and advanced skills are located.\textsuperscript{596} While the ownership of the company is often concentrated at the home base, the nationality of shareholders is secondary.\textsuperscript{597}

CIS states should review their policies on the ownership and control of the airlines operating in their territories. Past experience of liberalization in ownership and control has demonstrated that it can take place without: (1) conflicting with the obligations of the parties under the Chicago Convention;\textsuperscript{598} (2) without undermining the nature of international air transport;\textsuperscript{599} and, (3) most importantly, whatever the form and pace of liberalization, conditions for air carrier designation and authorization can ensure that safety and security remain paramount, and that clear lines of responsibility and accountability for safety and security are established for the parties involved in liberalized arrangements.\textsuperscript{600}

Moreover, at the Fifth ICAO Worldwide Air Transport Conference,\textsuperscript{601} it was recognised that states may take a wide variety of approaches to liberalizing air carrier provisions, with no single approach being necessarily more appropriate or better than others.\textsuperscript{602} Thus, CIS countries should feel they have wide freedom in choosing their liberalization approach. This could include broadening ownership and control provisions by gradually reducing specified proportions of national ownership, or by making limited and temporary changes regarding certain types of

\textsuperscript{593} Porter, supra note 41, at 155, 158.
\textsuperscript{594} Id. at 158.
\textsuperscript{595} Id.
\textsuperscript{596} Id.
\textsuperscript{597} Id.
\textsuperscript{598} See 2003 Liberalization Conference Conclusions, supra note 128, ¶ 2.1(a).
\textsuperscript{599} Id.
\textsuperscript{600} Id. ¶ 1.2(b).
\textsuperscript{601} See supra discussion in Part D.
\textsuperscript{602} 2003 Liberalization Conference Conclusions, supra note 128, ¶ 2.1(b).
operations (such as non-scheduled or cargo, application within certain geographic regions, or case-by-case consideration).  

The Conference also recommended that states may, at their discretion, take positive approaches, including coordinated action, to facilitate liberalization by accepting designated foreign air carriers that might not meet the traditional criteria of national ownership and control or the criteria of principle place of business and effective regulatory control.  

States that wish to liberalize their conditions for designation could do so in one of three ways: issue individual statements of their policies for accepting designations of foreign air carriers; issue joint statements of common policy; and/or develop a binding legal instrument. However, these measures must be made with an assurance that, whenever possible, any policies developed are in accordance with the principles of non-discrimination and non-exclusive participation.  

CIS countries should also be aware of the economic and social consequences of liberalization. These were also considered by the Conference at some length. The Conference recommended that states should ensure that economic and social impacts, including the concerns of labor, are properly addressed. Moreover, CIS states should be aware of the potential risks associated with foreign investments (such as flight of capital, uncertainty for assurance of service) and take these into account. The Conference also acknowledged that as a result of the diversity of approaches countries may take, there is a need for international regulatory bodies to continue to provide regulatory flexibility, so as to enable all states to follow the approach of their choosing at their own pace while also accommodating the approaches chosen by others.  

Although in regard to safety and security, state sovereignty and regulatory control are more important than ever, eventually, CIS states may have to alter their views of the air transport industry in response to progressive liberalization. Thus, although now they may view the air transport industry as a type of national property to be restricted under rigid sovereign parameters, this view may change to one viewing the industry as being a regular competitive industry simply in need of regulation. The resulting regional CIS networks accompanying this view shift should develop distinctive product varieties for which CIS airlines can become

603. Id.  
604. Id. ¶ 2.1(f).  
605. Id.  
606. Id.  
607. Id. ¶ 2.1(e).  
608. Id.  
609. Id.  
610. Id. ¶¶ 2.1(b), 2.1(c).
known. With time, these airlines can build innovative capacity sufficient to enter more and more markets. It is then that most CIS airlines would gain the competitive advantage they are looking for.

VII. Conclusion

The most undeniable fact when addressing competition in today's world is that low-cost carriers are here to stay. Many of the 50 or so low-cost carriers are already in the pan-European air transport business, such as Ryanair and Easyjet.\textsuperscript{611} There is no doubt that the low-cost carrier has been accepted by the consumer and will continue to flourish. If legacy carriers are to be protected, states, who have overall responsibility for setting policy, should consider eliminating needlessly complex business restrictions such as those applicable to ownership and control of air carriers, and release the network carriers to forge new and innovative alliances. Furthermore, both low-cost and legacy carriers have to work together to achieve a seamless and transparent process toward pricing and general airline practice. All parties concerned, including states, may need to adopt clear rules regarding cost bases of air carriers, particularly regarding available costs, product-specific fixed costs and sunken costs. A key consideration for both types of carriers is the manner in which future alliance models or cooperation arrangements, including mergers, could move towards optimal levels of efficiency. Airports play a critical role in this equation. The first measure that airports can adopt is to align their business models to those of airlines and consider ways and means of revenue sharing. Airports should review their bargaining power and strategic approaches to non-aviation revenue, with particular consideration to the low cost carrier customer.

In the context of both low-cost and legacy carriers, the fact remains that competition in air transport, like any other aspect of human discipline and conduct, is governed by public international law. A fundamental principle of international law that stultifies competition between air carriers is Article 6 of the Chicago Convention. It effectively precludes carriers from operating international air services over and into the territory of a contracting state, unless under that state’s authorization, and in accordance with any attached conditions.\textsuperscript{612} In order to circumvent this bottleneck, airlines have been forming strategic alliances.\textsuperscript{613} The primary objective of strategic alliances is global reach. A 2000 survey indicated that 67 per cent of European and United States carriers had formed alli-

\textsuperscript{611} See Lawton, supra note 261, at 57.
\textsuperscript{612} Alexandrakis, supra note 163, at 75.
\textsuperscript{613} See Kostas Iatrou, The Impact of Airline Alliances on Partner's Traffic, 29 Air & Space L. 207, 210 (2004); Abeyratne, supra note 362, at 506.
ances to bypass restrictive legislation and legal principles in order to gain access to the trans-Atlantic market.\textsuperscript{614} Once permission is obtained by a carrier under Article 6 of the Convention, Article 15 offers equal treatment, under uniform conditions, in accessing airports which a national carrier of a contracting state has been authorized to access.\textsuperscript{615}

However, there are distinct legislative regimes operating in the United States and Europe acting against anti-competitive conduct. American anti-trust laws entail both civil and criminal sanctions. EEC competition law contains civil sanctions against anti-competitive conduct that infringe Community laws.\textsuperscript{616} Competition laws are calculated to achieve agreements that do not eliminate or restrict competition, eliminate the abuse of dominant positions of carriers, and discourage both predatory pricing and the dumping of capacity and monopolistic mergers.\textsuperscript{617}

Broadly, competition in air transport should be viewed from the perspective of the benefits accruing to the people of the world through liberalized aviation. In the years to come, there will be an increase in population, an increase in aging populations with increased disposable income, and increased migration.\textsuperscript{618} All these factors, together with expanding industries and trade, will undoubtedly stimulate the further growth of the air transport industry.

In the air transport field, geographic size of a country becomes a relevant consideration, both in terms of the volume of traffic generated by a particular country and the negotiation leverage it enjoys in bartering air traffic rights and points of departure and landing. European states, being relatively small, must band together in order to optimize their collective potential. Strict European Union legislation is therefore understandable, particularly in such areas as slot allocation, computer reservation systems and fares and rates in air transport services. However, any legislation should continue to promote a competitive advantage and stimulate and upgrade domestic demand in product performance, product safety and environmental impact. In particular, the last element, environmental impact, should be addressed in harmony with global regulations as promulgated through the International Civil Aviation Organi-

\textsuperscript{614} Abeyratne, supra note 362, at 506.
\textsuperscript{615} Chicago Convention, supra note 1, art. 15.
\textsuperscript{616} EC Treaty art. 83.
\textsuperscript{617} Id. arts. 81, 82.
\textsuperscript{618} In 2002, the scheduled air carriers of the world carried over 1.6 billion passengers and 30 million tons of air freight (ICAO records that in the year 2003, airlines of the world carried 1.657 billion passengers and 35 million tons of freight. During that year the world gross domestic product (GDP) grew approximately 3.9 per cent in real terms, almost one percentage higher than in the previous year. Department of Economic and Social Affairs, Population Division, \textit{Population, Environment and Development – The Concise Report}, U.N.Doc. ST/ESA/SER.A/2002, 1.5, 7-8 (2001).
zation. European states should also continue limiting direct co-operation among industry rivals in order to obviate anti-competitive conduct. Competition should be deregulated and state monopolies, which are already discouraged in the Union, should be eschewed. European airlines should also establish early warning systems that can detect changes in the air transport market. For instance, airlines could find and serve passengers and consignors whose needs are indicative of the market, study markets whose regulations foreshadow emerging regulations elsewhere, incorporate outside expertise into their management teams, and continually conduct research on market access.

In the quest for globalization, European airlines should tap selectively into other nations' airlines. However, airline alliances have to be used selectively: a poorly planned alliance could actually end up highlighting the mediocrity of the partnership. In general, the aviation industry should focus on the ripples of prosperity that air transport can generate. The ICAO has estimated that in 1998, the direct contribution of civil aviation, in terms of the consolidated output of air carriers, other commercial operators and their affiliates, was 370 billion US dollars.619 Direct on-site employment at airports and by air navigation services providers generated 1.9 million jobs while aerospace and other manufacturing industries employed another 1.8 million people.620 Overall, the aviation industry directly employed no less than 6 million persons in 1998.621

These direct economic activities have multiplier effects.622 Every $100 US of output produced and every 100 jobs created by air transport trigger additional demand of $325 US and 610 jobs in other industries.623 In 1998, the total economic contribution of air transport, considering both the direct economic activities and the multiplier effects, is estimated at $1360 billion US output produced and 27.7 million jobs world-wide.624

The strategic establishment of domestic airports in undeveloped areas could yield significant prosperity to the populace of those areas and the whole state. For example, a case study conducted recently on Frankfurt Airport quantified a contribution of the airport to Germany's na-

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620. See Economic Contribution, note 619, at 3.
621. Id.
622. Id.
623. Id.
624. Id. at 4. The year 1998 is taken as a benchmark to reflect current trends since the fluctuating fortunes of the air transport industry have not succeeded in radically changing the contribution of aviation over the past 6 years.
tional economy. For every Deutsche Mark earned at the airport and for every airport based job, there were 2.01 DM earned and 1.77 jobs created throughout the national economy, including DM 1.26 earned and 1.29 jobs created in the regional economy.

Economic activity in air transport, particularly in the movement of aircraft between states, must also be viewed in the context of sustainable development, where environmental protection will play a key role. The economic aspects of environmental protection, particularly in the areas of noise charges and emissions trading as a market based option, is a challenge.

It may be time to take a closer look at Article 6 of the Chicago Convention and revisit its meaning and purpose. The Article should project openness by contracting states to freely grant permission to qualified applicant states. If a state can present compelling reasons to allow its carriers market access, states should allow access in order to contribute to the overall objectives of aviation, rather than denying access to protect individual national interests.

625. ICAO, Second Meeting of the North American, Central American, and Caribbean Directors of Civil Aviation, ¶¶ 9, 13, NACC/DCA/2 (Sept. 5, 2005).
626. Id. ¶ 13.
Déjà Vu All Over Again: Transportation Security Regulations — The Emergence of Re-regulation and How to Deal With It

Eric L. Zalud*

I. Introduction

As we all know, the Interstate Commerce Commission ("ICC") was allowed to sunset almost a decade ago. Airlines were deregulated long before that. The ostensibly glorious age of deregulation was upon the transportation industry. Those in the transportation business, and their legal counsel, worked to adjust to the new era. However, then came September 11, 2001. Events of that day spawned the Transportation Security Administration ("TSA"), and a heightened awareness of security regulations was felt, but specifically in the transportation sector.1 Following September 11, 2001, an array of regulations have been gestated, circulated and enacted. Some of the regulations have taken longer to come into effect than others. However, there are now multiple security regulations that have been implemented, and that are impacting the transportation industry on a daily basis. This article collects some of the more recently promulgated transportation statutes, rules, regulations, and ordinances; summarizes the status of the regulations and their implementation; and offers suggestions as to how shippers, carriers and

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intermediaries can cope with legal issues, or prevent practical problems that may emanate from the implementation of these regulations.\footnote{2}

II. TSA Hazmat Driver Registration, Fingerprints and Background Checks

A. Background of Implementation and Practicalities

A regulation that has been percolating since the enactment of the Patriot Act\footnote{3} is the TSA’s plan to fingerprint\footnote{4} and conduct background checks on drivers of hazardous materials ("hazmat").\footnote{5} Although the TSA previously conducted name based security threat assessments on all 2.7 million hazmat drivers,\footnote{6} the current plan is more involved, requiring fingerprints to allow a search of FBI criminal records and an immigration status check.\footnote{7} The TSA’s plan went into effect on January 31, 2005 for drivers seeking to obtain a hazmat license for the first time.\footnote{8} The program’s second phase began on May 31, 2005.\footnote{9} As of that date, all commercial drivers who were renewing or transferring hazmat endorsements to other states were required to submit to a fingerprint background check.\footnote{10} The regulation emanates from the Patriot Act’s concern for the security threat assessments of transportation workers generally, and hazmat endorsement applicants specifically.\footnote{11}

The American Trucking Association ("ATA") had sought to urge the TSA to have all fifty states use the TSA’s contractor for the collection and transmission of fingerprints.\footnote{12} The TSA found that this requirement would place unreasonable restrictions upon the states, and would not significantly reduce costs.\footnote{13} The TSA also opted not to create a federal fin-

\footnote{2} This article was written in the spring of 2005. As such, the regulations discussed herein were recent as of that time, but may not be considered recent at the date of publication.


\footnote{4} 49 C.F.R. § 1572.5(b) (2005).


\footnote{6} Id.

\footnote{7} Id.

\footnote{8} 49 C.F.R. § 1572.13(b).

\footnote{9} Id.

\footnote{10} Id. § 1572.13(c)(2).


\footnote{13} Id.
gerprint collection system because several states indicated to the TSA that they had initiated procurement actions and legislative changes to reprogram computerized licensing systems, obtain legal authority to collect fees and fingerprints, and purchase fingerprint collection equipment. The TSA did not want to penalize these states for their early efforts. The TSA also recognized that driver licensing had always been an inherent "state function," and the TSA wanted the states to have flexibility in this regard.

The TSA chose a process by which the states could conduct their own collection process or use the TSA's agent. Thirty-three states and the District of Columbia elected to use the TSA's agent, Integrated Biometric Technology ("IBT"), while the other seventeen states elected to conduct their own background checks. The average fee for the applicant using IBT is $94.00. The application fees in other non-IBT states varies. IBT is also contemplating asking the TSA if it may open offices in truck stops around the nation.

The fingerprinting program for new hazmat drivers began on January 31, 2005. There were complaints about a lack of fingerprint sites in some of the most populous states. For example, the TSA lists six locations for fingerprinting in California, two in Georgia, and just one in Massachusetts, Michigan, Montana, Nebraska, Nevada, and Oregon. IBT stated that it would add more sites before the May 31, 2005 deadline.

B. The Regulatory Framework

The rule in question is located at title 49, section 1572 of the Code of Federal Regulations. 49 C.F.R. § 1572.13, entitled "State responsibilities for issuance of hazardous materials endorsement," states, in pertinent part, that beginning on January 31, 2005, "in no state may issue or renew a hazardous materials endorsement for a CDL [commercial driver's li-

14. Id.
15. Id.
16. Id.
18. Id.
21. HazMat Background Checks Begin, supra note 19.
license] unless the State receives a Determination of No Security Threat from TSA."

23 The rule stipulates standards for security threat assessments. The TSA is to determine that an individual does not pose a security threat warranting the denial of a hazmat endorsement if:

1. The individual meets the citizenship status requirements;
2. The individual does not have a disqualifying criminal offense;
3. The individual has not been adjudicated as lacking mental capacity or committed to a mental institution; and
4. The TSA conducts the specified analyses and determines that the individual does not pose a security threat.

When conducting the security threat assessment, the TSA is to use one or more of the following:

1. An individual’s fingerprints;
2. An individual’s name;
3. Other identifying information.

If the TSA determines during the course of conducting its security threat assessment that it is necessary to immediately revoke a hazmat endorsement, the TSA will direct the state to revoke the endorsement.

The individual may appeal the revocation following surrender of the endorsement.

49 CFR § 1572.5 is an interim final rule that implements section 1012 of the Patriot Act. The rule establishes security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazmat endorsement for a CDL.

The following crimes constitute “disqualifying criminal offenses” under the rule:

1. Terrorism;
2. Murder;
3. Assault with intent to murder;
4. Espionage;
5. Sedition;
6. Kidnapping or hostage taking;

24. Id. § 1572.5(c)(2).
25. Id. § 1572.5(c)(1).
26. Id. § 1572.5(c)(4).
27. Id. § 1572.5(c)(3).
28. Id. § 1572.5(b)(1)-(3).
29. Id. § 1572.13(a).
30. Id. § 1572.141(b).
32. 49 C.F.R. § 1572.5 ("Scope and standards for hazardous materials endorsement security threat assessment.").
7. Treason;
8. Rape or aggravated sexual abuse;
9. Unlawful possession, use, sale, distribution or manufacturer of an explosive, explosive device, firearm or other weapon;
10. Extortion;
11. Robbery;
12. Arson;
13. Distribution of, intent to distribute, possession or importation of a controlled substance;
14. Dishonesty, fraud, or misrepresentation, including identity fraud;
15. A crime involving a severe transportation security incident;
16. Improper transportation of a hazardous material;
17. Bribery;
18. Smuggling;
19. Immigration violations;
20. Violation of the Racketeer Influenced and Corrupt Organization Act;
21. 18 U.S.C. 1961 et seq. (RICO); and
22. Conspiracy or attempt to commit any of the crimes listed above.\textsuperscript{33}

Any driver currently holding a hazmat endorsement ("HME"), and who has a disqualifying offense, must immediately surrender their HME to the state’s Department of Motor Vehicles.\textsuperscript{34}

Finally, when a criminal history records check discloses an arrest for any disqualifying crime without indicating a disposition, the TSA will notify the individual.\textsuperscript{35} The individual must then provide the TSA with written proof that his or her arrest did not result in a disqualifying criminal offense within thirty days after his receipt of his or her notice from TSA.\textsuperscript{36}

C. LEGAL AND PRACTICAL IMPLICATIONS

The rule’s new regulations and requirements will probably cause several hundred thousand previously licensed hazmat drivers not to register and, thus, be unavailable to transport hazmat. The regulations also force less-than-truckload ("LTL") carriers to have their drivers register since there could be hazmat in a consolidated LTL load. Thus, the rule will also increase supply chain costs. The regulations result in increased pay for hazmat drivers. For hazmat shippers, the rule may mean higher costs and a loss of flexibility in how they ship. These regulations could also impact negligent selection lawsuits, both for third-party intermediaries in terms of the carriers they select, and against carriers in terms of the driv-

\textsuperscript{33} Id. § 1527.103(a)-(b).
\textsuperscript{34} See id. § 1572.11(b).
\textsuperscript{35} Id. § 1572.103(d)(1).
\textsuperscript{36} Id. § 1572.103(d)(2).
ers they select. The screening, however, could reduce instances of driver theft and pilferage, which often spawn freight loss and damage lawsuits.

The rule also allows legal foreign drivers to hold an endorsement if they pass the security screening. One potential problem with the rule is that it appears that Canadian and Mexican truckers will have the same background checks. The Canadian Border Services Agency ("CBSA") coordinates the Fast and Secure Trade ("FAST") program, which is designed, in part, to pre-approve drivers with respect to security considerations. According to CBSA, 90,000 drivers of Canadian nationality cross the United States' border each year. As of September 30, 2004, CBSA had received 47,000 applications for FAST cards and had issued 23,000. As of that same date, 24,000 Canadian drivers were in the "pre-interview" or "interview" stage for the FAST card. Another potential problem is that states can make their regulations more rigid than the federal rule, possibly leading towards a patchwork of regulation.

Carriers are also concerned that the TSA is not sharing enough information with them. For instance, there are no provisions in the rule that require the TSA to notify a carrier if a driver's HME application is declined. "Declined" essentially means that the TSA considers the driver a national security threat. This absence of notice could also be a problem for third party logistic companies ("3PLs") with far flung operations, or in situations in which freight is tendered to other carriers. Carriers and intermediaries may be forced to challenge the credentials of their respective employees or drivers. If not, they will not know whether one of their drivers is qualified under the rule. Because there is not a process in place for carriers to know if a driver is found to be a security risk, carriers could be liable in the event of an incident or an accident involving a "security risk" driver. Consequently, carriers should take steps to

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37. See id. § 1572.9(b)(8) & (d)(6).
40. Id.
41. Id.
43. See 49 C.F.R. § 1572.5(c).
verify that a driver is not a risk independently of the Agency’s background checks, a problematic duplication of effort. Finally, there may be labor and employment issues for carriers when one of their drivers holding a CDL fails to get a hazmat endorsement and the carrier wishes to terminate the driver or limit his or her employment.

Shippers may also be forced to re-evaluate distribution strategies and carrier partners. This could rapidly consolidate the trucking industry, as freight shifts to carriers possessing the resources needed to handle high volume hazmat shipments. Particularly at risk are the shippers and carriers that distribute hazmat items, such as household paint, cleaning products, and cosmetics.

III. C-TPAT EVOLUTION – CONVERTING THE VOLUNTARY INTO THE MANDATORY?

A. INTRODUCTION

The Customs-Trade Partnership Against Terrorism ("C-TPAT") Program was implemented on a voluntary basis to assist shippers in assessing the security of their international supply chains.44 The C-TPAT program was created in 2001,45 and sponsored by the Department of Customs and Border Protection ("CBP").46 The program was designed, at least in part, to identify importers with effective security procedures in place.47 Companies that participated and had their business processes validated by CBP could expect, in turn, that their shipments would move efficiently across borders. 48 Thus, the concept was designed to enhance security, while limiting restrictions on commerce.

On March 25, 2005, the CBP released a set of new security standards to be applied by importers who voluntarily participate in the Program.49 These standards will in all likelihood become mandatory minimum stan-


46. Partnership to Secure the Supply Chain, supra note 44.


48. Id.

dards for shippers participating in the Program. The security criteria thematically state that when an importer out-sources or contracts out elements of its supply chain, such as a foreign facility, conveyance, or domestic warehouse, the importer must work with these business partners to ensure that pertinent security measures are in place and adhered to for any trading party with which it has direct contact or contractual relations.\textsuperscript{50} Importers are required to have written and verifiable processes for the selection of such business partners, including manufacturers, product suppliers, and vendors.\textsuperscript{51} For those business partners eligible for C-TPAT certification, such as carriers, ports, terminal operators, brokers, or consolidators, the importer must have documentation indicating whether such business partners are C-TPAT certified.\textsuperscript{52}

B. SECURITY PROCEDURES

Importers must require current and prospective business partners who are not already C-TPAT certified to demonstrate that they meet C-TPAT security criteria via written or electronic confirmation.\textsuperscript{53} This can be accomplished by contractual mandates, a letter from a corporate officer attesting to compliance, a written statement demonstrating participation in C-TPAT or an equivalent accredited security program of a foreign customs authority, or by providing a completed importer security questionnaire.\textsuperscript{54} These responses subject the business partners to verification and make it easier for importers to identify outsourcing for security purposes if outsourcing occurs at any point in their supply chain.

Importers are also able to ensure that business partners develop security processes and procedures consistent with C-TPAT security criteria, which enhances the integrity of the shipment at points of manufacture, including the periodic review of the business partners' facilities.\textsuperscript{55} Other internal criteria for the selection of trading partners include financial soundness, capability of meeting contractual security requirements, and the ability to identify and correct security deficiencies.\textsuperscript{56}

Additionally, physical access controls must be in place to "prevent unauthorized entry to facilities, maintain control of employees and visitors, and protect company assets," including "positive identification of all

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
employees, visitors, and vendors at all points of entry." 57 Proper vendor identification and photo identification must be presented for all deliveries. 58 There must be procedures in place to "identify, challenge, and address unauthorized [or] unidentified persons." 59

"Processes must be in place to screen prospective employees and to periodically check current employees[,]" including pre-employment verifications, and background checks and investigations "consistent with foreign, federal, state, and local regulations . . . ." 60 In addition, termination procedures should be in place to promptly deny facility access to personnel whose employment has been terminated. 61

Procedural security protecting the supply chain must also be adopted. "Procedures must be in place to ensure that all information used in the clearing of merchandise [or] cargo is legible [and] accurate, and protected against the exchange, loss or introduction of erroneous information[,]" including the safeguarding of computer access and information. 62 "Arriving cargo should be reconciled against information on the cargo manifest." 63 The cargo manifest should accurately describe the cargo, including weights, labels, marks and piece count. 64 "All shortages, overages, and other significant discrepancies or anomalies must be resolved . . . or investigated appropriately." 65

Finally, procedures must be enforced to ensure the physical security for cargo handling areas and storage facilities. There should be perimeter fencing enclosing the areas around cargo handling and storage facilities. 66 Additionally, "interior fencing within a cargo handling structure should be used to segregate domestic, international, high value, and hazardous cargo." 67 The fencing should be regularly inspected. 68 Gates through which vehicles . . . or personnel enter or exit must be manned and . . . monitored [and] [t]he number of gates should be kept to the minimum . . . ." 69 "Adequate lighting must be provided inside and outside the facility including . . . entrances and exits, cargo handling and storage areas, fence lines and parking areas." 70 "Alarm systems and video surveillance

57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
cameras should be utilized to monitor premises and prevent unauthorized access to cargo handling and storage areas.\footnote{71}

C. LEGAL AND PRACTICAL IMPLICATIONS

These enhanced requirements could potentially discourage new companies from participating in the C-TPAT Program and drive some existing participants from the Program. Shipper groups contend that the proposed changes would require each importer to assess risks to its own supply chain, without clear guidelines on how to do so.\footnote{72} There could also be confusion over what measures are considered “voluntary” and what are “mandatory” under the Program.\footnote{73} Also, importers who agree to the new standards could be liable for claims arising from events causing property damage or personal injury.

Thus, in all likelihood, the C-TPAT voluntary parameters for participants in the C-TPAT Program will become mandatory in the near future. While many of the new security regulations place additional burdens upon those in the supply chain, the security enhancements may also prevent freight loss and damage claims.\footnote{74} Once again, however, violations or deviations from the standards set forth in the Program could potentially result in causes of action for the negligent selection, hiring, or retention of employees, and the negligent selection of intermediaries and trading partners.

The CBP may offer certain benefits to those shippers who stay in the Program and adhere to the minimum standards, including fewer inspections for C-TPAT members who import.\footnote{75} CBP analysis has found that C-TPAT members are six times less likely than non-C-TPAT members to have their imports inspected for security.\footnote{76} They are also four times less

\footnote{71. Id.}
\footnote{73. See id. (“Q: 15. The proposed C-TPAT program states that it allows for ‘flexibility and customization of security plans,’ however, the proposed criteria are drafted as ‘mandatory’ requirements. In the event that a requirement is not met due to circumstances outside of the participating C-TPAT importer, what would be the resulting consequences for the importer?”).}
\footnote{74. See id. (“Q: 5. Is CBP moving towards making C-TPAT a regulatory program? A: No. C-TPAT will continue to evolve as a voluntary, incentives based government/private sector partnership. As C-TPAT evolves, the program will continue to work in partnership with the stakeholders of the international supply chain and cooperatively develop improved systems of security and efficiency.”).}
\footnote{75. Id.}
\footnote{76. Id.}
likely to be chosen for customs compliance exams. It is problematic though, for shippers and importers to reach back into the supply chain to set security standards before they even take custody of the goods.

IV. HM-223 AND HAZMAT LOADING AND UNLOADING ISSUES

A. INTRODUCTION

HM-223, the “Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage,” has been in development by the DOT’s Research and Special Projects Administration (“RSPA”) for almost a decade. Delays in the rule’s enforcement have largely been the result of shippers’ protests and a lawsuit pending in the federal appeals court. Ironically, many shippers and carriers want the DOT to regulate the loading and unloading of tank cars and other functions related to hazmat transport. Indeed, the National Transportation Safety Board agrees with the shippers and carriers on this point.

The federal government does have jurisdiction over the movement of hazardous material. However, HM-223 would redefine loading, unloading and storage of hazardous materials in a way that would partially rescind Washington’s role. The rule is designed to identify segments of transportation that are the responsibility of the carrier and to delineate when the carrier takes control of the hazmat load, and when the carrier relinquishes control. The implication of the rule is that the federal government would not be regulating loading and unloading operations of hazmats or would be regulating these processes only partially. In the “Through the Looking Glass” world of regulation, many shippers want the regulations to expand, to include full regulation of the loading and unloading of hazmats.

B. SPECIFIC FUNCTIONS AFFECTED

The rule clarifies the applicability of the hazmat regulation to specific functions and activities, including hazmat loading and unloading op-

77. Id.
78. RSPA has since been split into two agencies, the hazmat agency named the Pipeline and Hazardous Material Safety Administration, which oversees the safety of the more than 800,000 daily shipments of hazardous materials in the country along with the national hazardous material pipeline network of pipelines and the Research and Innovative Technology Administration.
82. Id.
erations, and the storage of hazmats during transportation.\textsuperscript{83}

1. A "pre-transportation function" is defined to be a function performed by any person that is required to assure the safe transportation of a hazardous material in commerce.\textsuperscript{84} For instance, when performed by shipper personnel, loading a packaged or containerized hazmat onto a transport vehicle and filling a bulk packaging with hazmats in the absence of a carrier for the purposes of transporting it, is defined as a pre-transportation function.

2. The rule defines "transportation" as the movement of property and loading, unloading, or storage incidental to the movement.\textsuperscript{85} However, for purposes of Hazardous Materials Regulations ("HMR"), the "transportation and commerce" begins only when a carrier takes physical possession of a hazmat for the purpose of transporting it.\textsuperscript{86} The transportation continues only until the delivery of the package to its consignee or destination, as evidenced by the shipping documentation.\textsuperscript{87}

3. "Transportation functions" under the rule are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading and storage of hazardous materials that is "incidental to" that movement.\textsuperscript{88}

4. "Loading incidental to movement" is defined to mean the loading by carrier personnel, or in presence of carrier personnel, of packaged or containerized hazmats onto a transport vehicle, for purposes of transporting it.\textsuperscript{89} For bulk packaging, "loading incidental to movement" means the filling of the packaging with hazardous material by carrier personnel, or in the presence of carrier personnel, for the purpose of transporting it.\textsuperscript{90} "Loading incidental to movement" is regulated under the HMR with potential coexistent jurisdiction with OSHA.\textsuperscript{91}

5. "Unloading incidental to movement" is defined in the rule to mean the removal of a packaged or containerized hazmat from a transport vehicle, or the emptying of a hazmat from a bulk package after the hazmat has been delivered to a consignee, and prior to the delivering carriers' departure from the consignee's facility or premises.\textsuperscript{92} "Unloading incidental to movement" is subject to regulation under the HMR with

\textsuperscript{83} See 49 CFR § 171.1.
\textsuperscript{84} See id. § 171.1(b).
\textsuperscript{85} Id. § 171.1(c)(1)-(4).
\textsuperscript{86} Id. § 171.1(c).
\textsuperscript{87} Id. § 171.1(c).
\textsuperscript{88} Id. § 171.1(c)(1)-(4).
\textsuperscript{89} Id. § 171.1(c)(2).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. § 171.1(c)(3).
potential coexistent jurisdiction with OSHA.\textsuperscript{93} Note, however, that unloading by a consignee after the delivering carrier has departed from the facility is not unloading incidental to movement and not regulated under the HMR.\textsuperscript{94} Similarly, preloading functions that are not “incidental to movement” are not regulated by the HMR.\textsuperscript{95}

6. “Storage incidental to movement” is defined in the rule to mean storage by any person of a transport vehicle, freight container or package containing a hazmat between the time that a carrier takes physical possession of the hazmat for purpose of transporting it until the package containing the hazmat is physically delivered to the destination indicated on the shipping document.\textsuperscript{96} However, in the case of railroad shipments if, after delivery, the track is under the control of a railroad, the storage on the track is “storage incidental to movement.”\textsuperscript{97}

The rule also amends section 171.1 of the HMR to summarize the regulated and non-regulated functions. As noted, regulated functions are:

1. Activities related to the design, manufacture and qualification of packaging represented as qualified for use in the transportation of hazmats;\textsuperscript{98}
2. Pre-transportation functions;\textsuperscript{99} and
3. Transportation functions defined as movement of a hazardous material and loading, and unloading and storage incidental to movement.\textsuperscript{100}

Non-regulated functions are:

1. Rail and motor vehicle movements of a hazmat solely within a contiguous facility where public access is restricted;\textsuperscript{101}
2. Transportation of a hazmat in a transport vehicle or conveyance operated by a federal, state, or local government employee solely for government purposes;\textsuperscript{102}
3. Transportation of a hazmat by an individual for non-commercial purposes in a private motor vehicle;\textsuperscript{103} and
4. Any matter subject to United States Postal law and regulations.\textsuperscript{104}

The rule specifically notes that “[f]ederal hazmat law does not preempt other [f]ederal statutes nor does it preempt regulations issued by

\textsuperscript{93} Id.
\textsuperscript{94} See id. § 171.1(c)(3).
\textsuperscript{95} See id. § 171.1(b).
\textsuperscript{96} Id. § 171.1(c)(4).
\textsuperscript{97} Id. § 171.1(c)(4)(i)(B).
\textsuperscript{98} Id. § 171.1(a).
\textsuperscript{99} Id. § 171.1(b).
\textsuperscript{100} Id. § 171.1(c).
\textsuperscript{101} Id. § 171.1(d)(4).
\textsuperscript{102} Id. § 171.1(d)(5).
\textsuperscript{103} Id. § 171.1(d)(6).
\textsuperscript{104} Id. § 171.1(d)(7).
other [f]ederal agencies to implement statutorily authorized programs.”

However, the rule further notes that a facility at which pre-transportation or transportation functions are performed must comply with OSHA and state or local regulations applicable to physical structures, such as noise, and air quality control standards, emergency preparedness, fire codes and local zoning requirements. The rule also indicates that the facilities may have to comply with applicable state and local regulations for hazmat handling and storage operations. This appears to be an implicit acknowledgment of authority for state and local governments to enact such regulations as long as they do not conflict with federal regulations.

C. PRACTICAL AND LEGAL IMPLICATIONS

These hazmat regulations relating to loading and unloading essentially codify what has been the law as to delivery and injury or damage around the time of delivery. A carrier has always generally been found not to be responsible for loss, damage or injury to persons or property after it relinquishes control or possession of the cargo. However, carriers who interject themselves into the loading or unloading process can expand their liability. Similarly, shippers who interject themselves into activities that may be determined under the rule to be incidental to transportation may subject themselves to additional hazmat regulatory structures, and potential common law liabilities for loss, injury or damage.

V. MORE FOOD FOR THOUGHT – FDA ISSUES TRANSPORTATION RECORDS RULES

A. REGULATORY SUMMARY

The Food and Drug Administration ("FDA") issued its rules for establishing and maintaining transportation records for food transporters on December 9, 2004. This enactment was the fourth and final rule issued for implementation of the Bio-Terrorism Act of 2002. This rule allows carriers the option of using bills of lading and expense bills cur-

106. Id.
107. Id.
108. See 49 C.F.R. § 171.1(c)(2)-(3).
109. Id. § 171.1(g).
ently used for FMCSA compliance.\textsuperscript{112} This option allows carriers to meet the FDA’s requirements to “establish and maintain records” detailing where food is picked up and where it is delivered with less impact on their day-to-day operations.\textsuperscript{113} At a minimum, the “transportation record” must include:

1. Name of consignor and consignee;\textsuperscript{114}
2. Origin and destination points;\textsuperscript{115}
3. Date of shipment;\textsuperscript{116}
4. Number of packages;\textsuperscript{117}
5. Description of freight;\textsuperscript{118}
6. Route of movement;\textsuperscript{119} and, if applicable,
7. Transfer points through which each shipment is moved.\textsuperscript{120}

The FDA removed earlier requirements that the record keeping be based upon the final intended use of the food product.\textsuperscript{121} This revision was based upon comments from the industry. For instance, a trucker does not necessarily know how a bulk load of a food product will be used when he delivers it to a storage tank.

Anyone who manufactures, processes, packs, transports, distributes, receives, holds or imports food in the United States is subject to the regulation.\textsuperscript{122} However, there are several exclusions:

1. Farms;
2. Restaurants;
3. Those performing covered activities when the food is subject to the exclusive jurisdiction of the United States Department of Agriculture; and
4. Foreign persons, except foreign persons who transport food in the United States.\textsuperscript{123}

In addition, the following persons or facilities are excluded from the record keeping requirements:

1. Fishing vessels not engaged in processing;
2. Retail food establishments that employ ten or fewer full time equivalent employees;

\textsuperscript{112} See Establishment and Maintenance of Records, supra note 110, at 71566; see also 49 C.F.R. § 373.103(a) (2005).
\textsuperscript{113} Establishment and Maintenance of Records, supra note 110, at 71566.
\textsuperscript{114} 49 C.F.R. § 373.103(a)(1).
\textsuperscript{115} Id. § 373.103(a)(3).
\textsuperscript{116} Id. § 373.103(a)(2).
\textsuperscript{117} Id. § 373.103(a)(4).
\textsuperscript{118} Id. § 373.103(a)(6).
\textsuperscript{119} Id. § 373.103(a)(9).
\textsuperscript{120} Id. § 373.103(a)(10).
\textsuperscript{121} See Establishment and Maintenance of Records, supra note 110, at 71565.
\textsuperscript{122} Id. at 71569.
\textsuperscript{123} Id. at 71563.
3. Non-profit food establishments; and
4. Persons who manufacture, process, pack, transport, distribute, receive, hold, or import food contact substances other than the finished container that directly contacts the food.\textsuperscript{124}

Importantly, the regulations in subpart J of the final rule do not require duplication of existing records, if those records contain all of the information required by the subpart.\textsuperscript{125} In addition, “persons can supplement existing records with any new information required by this final rule instead of creating an entirely new record containing both existing and new information.”\textsuperscript{126}

A summary of the required information is as follows:

1. Name, address, telephone number, and, if available, fax number and e-mail address of the immediate previous source and subsequent recipient;
2. Adequate description;
3. Date received or released;
4. For persons who manufacture, process, or pack food, the lot or code number or other identifiers;
5. Quantity and how the food is packaged;
6. Name, address, telephone number, and, if available, fax number, and e-mail address of the transporter who transported the food to and from the reporter.\textsuperscript{127}

Carriers and others in the supply chain can meet the requirements of this rule if they comply with certain other transportation regulations:

1. By compliance with, and establishing and maintaining, specified information that is in the records required of roadway interstate transporters by the DOT’s FMCSA, as contained in 49 CFR § 373.101 and 373.103; or
2. By establishing and maintaining specified information that it is in the records required of rail and water interstate transporters by DOT’s Surface Transportation Board in 49 CFR § 1035.1 and 1035.2; or
3. By establishing and maintaining specified information that is in the records required of international air transporters on airway bills by the Warsaw Convention as Amended at the Hague, 1995 and by Protocol No. 4 of Montreal, 1975 (Warsaw Convention); or
4. By entering into an agreement with a non-transporter immediate previous source, if located in the United States, or immediate subsequent recipient, if located in the United States, to establish, maintain, or establish and maintain the required records.\textsuperscript{128}

A summary of the record retention requirements is as follows:

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 71563-64.
\textsuperscript{128} Id. at 71564.
1. Non-transporters must retain for six months after the dates they receive and released the food all required records for any food for which a significant risk of spoilage, loss of value or loss of palatability occurs within sixty days after the date they receive or release the food;

2. Non-transporters must retain for one year after the dates they received and released the food all required records for any food for which a significant risk of spoilage, loss of value, or loss of palatability occurs only after a minimum of sixty days, but within six months, after the date they receive or release the food;

3. Non-transporters must retain for two years after the dates they receive and release the food all records for any food for which a significant risk of spoilage, loss of value, or loss of palatability does not occur sooner than six months after the date they receive or release the food, including foods preserved by freezing, dehydrating, or being placed in a hermetically sealed container;

4. Non-transporters of food must retain records for one year for any food having a significant risk of spoilage, loss of value, or loss of palatability only after a minimum of sixty days after the date the transporter receives and releases the food;

5. Food transporters must retain records for a maximum of one year for non-perishable food shipment and six months for perishable food shipments;

6. Records can be kept in paper or electronic format;

7. Records must be made available as soon as possible upon governmental request, not to exceed twenty-four hours from the time and receipt of the official request;

8. Failure to establish or maintain records or refusal to permit access to a verification or copying of any records is a prohibited act under section 301 of the Food, Drug and Cosmetic Act;

9. Compliance dates for records establishment and maintenance requirements is December 9, 2005, except that the compliance date for small businesses that employ fewer than five hundred, but more than ten full-time equivalent employees is June 9, 2005, and the compliance date for very small businesses that employ ten or fewer full-time employees is December 11, 2006.129

B. Practical and Legal Implications

The rules will not be a significant additional burden for those in the food transport supply chain since they permit duplicate record keeping functions already required under other transportation statutes and regulations to suffice for compliance with the new FDA rules. Compliance, or lack of compliance, with the rules could impact proof of loss and damage in perishable goods freight loss situations. Similarly, the record keeping requirements could ease proof problems in these cases. The requirements could also result in potential causes of action for the negligent selection of a carrier. The regulation will affect a large percentage of

129. Id.
interstate motor carriers because the Agency is using a very broad definition of food and most carriers haul something that fits the category at some point.

VI. NEW AIR CARGO SECURITY REQUIREMENTS

On November 10, 2004, the TSA proposed new security rules for air cargo. The proposed rules would enhance aviation cargo security by creating a mandatory security program for all cargo aircraft and amending existing security regulations for other aircraft operators and regulated parties. The regulations would

1. Require security threat assessments for individuals with unescorted access to cargo;
2. Codify cargo screening requirements first implemented under SD’s EA’s and part 1550 programs issued in November 2003;
3. Require airports with SIDA’s to extend them to cargo operating areas;
4. Require aircraft operators to prevent unauthorized access to the operation area of the aircraft while loading and unloading cargo;
5. Require aircraft operators under a full or all cargo program to accept cargo only from an entity with a comparable security program or directly from the shipper;
6. Codify and further strengthen the Known Shipper program;
7. Establish a security program specific to aircraft operators and all cargo operations;
8. Enhance security requirements for indirect air carriers.

The intent of the TSA’s proposed security requirements is to infuse them throughout the supply chain to minimize and incrementalize their impact upon the flow of goods instead of concentrating all of the efforts on one measure, such as physical inspection at a single stage. Such a single stage inspection could potentially result in significant disruption of the supply chain.

“TSA currently requires a variety of individuals working in aviation to submit to a criminal history records check. Generally, these individuals work on airport grounds, and have access to secure areas.” However, “[i]n the cargo environment, many other persons have access to cargo before someone who works for the airport and has had such a check han-

131. Id. at 65261.
132. Id. at 65262.
133. Id. at 65263.
134. Id.
135. Id. at 65265.
Consequently, "TSA proposes to require additional persons who have unescorted access to air cargo, but do not have unescorted Security Identification Displayed Area (SIDA) access, to undergo a security check to verify that they do not pose a security threat. TSA recognizes that the number of individuals with access to cargo is large . . . and that the companies [who employ these workers] run the gamut from complex organizations to 'mom and pop's.'" The program will subject these individuals to fingerprint-based criminal history background checks, which will be costly and time consuming. However, "TSA believes that potential security concerns . . . would be best addressed . . . by requiring the individuals to submit to a Security Threat Assessment program . . . ."

Additionally, the new security rules include security measures for persons boarding all cargo aircraft. The TSA is proposing to codify requirements for screening persons other than passengers boarding all cargo aircraft. These include non-flight crew members or passengers, such as those escorting animals being shipped via air cargo. Moreover, the TSA would like to screen cargo. "To guard against unauthorized weapons, explosives, persons and other destructive substances or items in cargo, TSA proposes to codify a requirement for aircraft operators to inspect a portion of air cargo, including that offered by known shippers."

Securing the cargo operating environment is also important. "Measures to prevent unauthorized individuals from gaining access to the cargo operations area are necessary to prevent tampering with the aircraft or the cargo and to remove a potential access point for stowaways." The regulation would expand those airport workers required to have a SIDA and airport approved photo identification.

"TSA is proposing to authorize aircraft operators under full or all-cargo programs to accept cargo only from the shipper, or from an entity with a security program comparable to the aircraft operator's." This requisite would "prohibit aircraft operators from carrying cargo transferred from persons or businesses without the appropriate security measures to guard against the introduction of unauthorized weapons,

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136. Id.
137. Id.
138. Id.
139. Id.
140. See id.
141. Id.
142. Id. at 65266.
143. Id.
144. Id.
145. Id.
explosives [or] persons . . .”\textsuperscript{146}

The TSA also “proposes to codify and strengthen the Known Shipper program in regulation at 49 CFR 1554.239, 1554.215, and 1548.17.”\textsuperscript{147} “[T]he Known Shipper program is a protocol to distinguish shippers about whom security-relevant information is known from those shippers about whom the aircraft operator has inadequate information.”\textsuperscript{148} “This program applies to aircraft operators with full programs, corresponding foreign air carriers, and [Indirect Air Carriers ("IACs")]) that offer cargo to such aircraft operators and foreign air carriers.”\textsuperscript{149}

Further, the rules would enhance existing requirements for IACs.

The IAC, sometimes called a freight forwarder, is a crucial part of the air cargo system, acting as an intermediary between the shipper and the aircraft operator for approximately 80\% of all air cargo shipped on passenger aircraft in the United States. TSA estimates that there are 3,200 entities in the United States operating as IACs ranging from large corporations to sole proprietors working out of their homes. All IACs are required to maintain a security program known as the IACSSP and they are regulated under 49 CFR 1548. [The new rule] proposes to expand the definition of IAC to include businesses engaged in the indirect transport of cargo on larger commercial aircraft, regardless of whether the operation is conducted with a passenger aircraft or an all-cargo aircraft.\textsuperscript{150}

VII. THE D.C. HAZMAT BAN: THE EPICENTER OF A HAZMAT TSUNAMI?

A. BACKGROUND ON THE BAN

Although Boston Congressman Tip O’Neill once prophetically proclaimed that “all politics is local,” local ordinances can have a traumatic, macroeconomic ripple effect. These ripples may be materializing in the guise of the recent Washington, D.C. ban on hazardous materials.

On February 1, 2005, the District of Columbia City Council passed a ninety-day emergency ban on the transportation of explosives, flammable and poisonous gasses or materials via truck or rail, in a 2.2 mile zone near the United States capitol.\textsuperscript{151} Anyone seeking to transport such materials through the zone would have to apply for a permit.\textsuperscript{152} The ordinance was signed into law on February 15, 2005 to take effect following a comment

\begin{itemize}
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} Id. at 65266-67.
  \item \textsuperscript{149} Id. at 65267.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{152} Id. § 4(1).
\end{itemize}
period. CSX Transportation, Inc. filed a petition with the Surface Transportation Board contesting this local ordinance. Several shippers and chemical companies filed petitions in support of CSX, as did the federal government. The very legitimate fear was that a patchwork of local ordinances could render it practically impossible to transport hazmats, particularly since numerous, rather mundane, items are encompassed by the hazmat categorization, such as hairspray, varnish, and other household items. Also, many LTLs transport hazmats in consolidated loads. Such a political patchwork would ramp up costs for both carriers and consumers of transportation services, shippers and consignees.

CXS’s petition was filed on February 7, 2005. On March 14, 2005, the Surface Transportation Board decided that the D.C. Ordinance is preempted by section 10501(b) of the ICC Termination Act of 1995. The Surface Transportation Board thus granted CSX’s Petition for a Declaratory Order. Although the Board did not have the power to invalidate the D.C. Act, the Board’s decision was submitted to the District Court for the District of Columbia at the court’s request.

CSX also filed a federal lawsuit in the United States District Court for the District of Columbia to declare the ban invalid and to block its implementation. The lawsuit was filed on February 16, 2005. In the lawsuit, CSX contends that as a common carrier it is required by federal law to transport the ostensibly banned materials. To comply with the common carrier law and to simultaneously attempt to comply with the Washington D.C. ordinance would not only impose an unreasonable burden on interstate commerce, it would increase risk to other communities by dramatically adding to the miles and the hours these materials spend

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153. See id. § 9.
156. CSX Transp., Inc. – Petition for Declaratory Order, supra note 154, at 1.
157. See id. at 4.
158. Id. at 1.
159. Id. at 11.
160. Id.
162. Id.
164. Id. ¶ 93.
in other communities. Although there is not a large quantity of hazmats transported by rail through Washington, D.C., to the extent that other municipal jurisdictions create a patchwork of local ordinances spanning the nation, problems as to uniformity, and operational headaches will most certainly result.

CSX has also filed a Motion for Summary Judgment in the Lawsuit and, that motion and CSX’s Motion for Preliminary Injunction, are now fully briefed.166

B. LEGAL AND PRACTICAL IMPLICATIONS: AN ASSAULT ON THE PREEMPTION DOCTRINE

The preemption doctrine, as most practitioners know, impacts many of the legal aspects relating to interstate carriage, and helps to provide uniformity of court decisions, and free and fair access to the courts. The D.C. Hazmat Ordinance could represent an assault on this preemption doctrine, as it applies to interstate commerce. The pending lawsuits will be a test case of that doctrine. If the court or Surface Transportation Board do not strike down the ordinance, carriers should be prepared for a proliferation of, and consequent renewed vigilance to, local ordinances regarding hazmats. This vigilance will be complicated by the reality that

165. Id. ¶¶ 58-75.

166. This article was written in February of 2005. In April 2005, the D.C. District Court concluded that, because the federal government had not formulated a comprehensive federal policy addressing the risks of terrorism on the nation’s rail system, states were permitted to act in a limited role to protect public safety and security. Consequently, the D.C. Terrorism Prevention Act was not preempted by the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, or the Interstate Commerce Commission Termination Act. CSX Transp. I, 2005 U.S. Dist. LEXIS 6569, *21-48. Furthermore, the district court found that, because the Terrorism Prevention Act only applied within the boundaries of the District, it did not violate the Home Rule Act. Id. at *72-78. CSX subsequently appealed to the United States Court of Appeals for the District of Columbia Circuit. CSX Transp., Inc. v. Williams (CSX Transp. II), 406 F.3d 667 (D.C. Cir. 2005).

In May 2005, the D.C. Circuit Court of Appeals reversed the district court’s decision and remanded to the district court with direction to enter a preliminary injunction preventing the District from enforcing the ban. Id. at 669. The Court of Appeals found a sufficient likelihood that the Terrorism Prevention Act was preempted by rules that the United States Department of Transportation promulgated under the Federal Railroad Safety Act to grant a preliminary injunction. Id. The court based its decision on three factors: (1) protecting the nation’s capital was a national, not local, safety concern, (2) the Terrorism Prevention Act did not allow carriers to operate with the freedom afforded them under the Department of Transportation’s security rules, and (3) the Terrorism Prevention Act unnecessarily burdened interstate commerce. Id. at 672-73.

In September 2005, the district court ordered the production of additional, sensitive Department of Transportation documents under a protective order to more fully evaluate whether the Terrorism Prevention Act was preempted by Federal Railroad Safety Act. CSX Transp., Inc. v. Williams (CSX Transp. III), 231 F.R.D. 42, 43 (D.D.C. 2005). The court scheduled a status conference for November, 2005. Id.
many LTL carriers often carry mundane hazmats such as hairspray, glue and other household items, which might be banned by this ordinance and other copycat local ordinances.\footnote{167}

A polyglot patchwork of local ordinances could result in re-routings, fines, and increased surcharges for permitting in municipal areas. These costs would be passed along to those in the supply chain and add inefficiencies to the system. Also, violations of local ordinances could be used as springboards to negligence per se assertions in lawsuits for freight loss and damage or bodily injury.

VIII. Summary

As we have seen with the Hours of Service regulations, governmental promulgations that are intended to focus upon safety and security issues, can have a profound effect on supply chain efficiencies, inefficiencies and overall productivity. In certain situations, such as with the Hours of Service régime, safety regulations can actually spawn greater efficiencies, and enhance productivity. Other regulations simply add to the hassles and headaches of daily operations, and increase costs. However, many of these new security regulations, while they do increase costs and headaches – may also have double-edged benefits for shippers, carriers and intermediaries. They may facilitate assistance in burdens of proof in litigation because of enhanced record keeping requirements. They may also limit the quantum of freight loss and damage claims because of their greater scrutiny on security and access to freight. Careful compliance with the regulations can also decrease the likelihood of the amorphous, but steadily increasing “negligent selection/retention” cause of action.

\footnote{167. CSX Transp., Inc. – Petition for Declaratory Order, supra note 154, at 11 (indicating that Pittsburgh is standing by, prepared to enact a similar ordinance).}
Competing Periods in Determining Laches in Demurrage Disputes

William P. Byrne*

A number of cases have established competing timeframes applicable to the limitations period for a demurrage claim arising out of the carriage of goods by water. Such periods have ranged from eighteen months to six years.¹ Demurrage has been defined as “remuneration to the owner of a ship for the detention of his vessel beyond the number of days allowed . . . for loading and unloading . . . .”² Detention of equipment

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¹ Venus Lines Agency, Inc. v. CVG Int'l Am., Inc., 234 F.3d 1225, 1230 (11th Cir. 2000) (assuming a four year limitations period); TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 176 (1st Cir. 2000) (applying a three-year statute of limitations); SL Serv., Inc. v. Int'l Food Packers, Inc., 217 F. Supp. 2d 180, 185-86 (D. P.R. 2002) (applying a three-year statute of limitations); P.R. Marine Mgmt., Inc. v. Molac Imports, Inc., 594 F. Supp. 648, 652 (D. P.R. 1984) (determining that a six-month period of limitation is inappropriate); Asia N. Am. Eastbound Rate Agreement (ANERA), Soc'y of Mar. Arbitrators Award No. 2932 (1993) (Zubrod, Arb.) (applying a six-year statute of limitations period). This article only addresses the limitations periods applicable to a carrier's claim for demurrage on equipment used in water transportation. This article does not address claims against a water carrier for loss or injury to property which is determined by its bill of lading and the law applicable to water transportation. 49 U.S.C. app. §14706(c)(2) (2000); see also 46 U.S.C. app. §§ 190-196 (2000); 46 U.S.C. §§ 1300-1315 (2000). Nor does it address demurrage in rail and motor carrier transportation which is usually governed by 49 U.S.C. § 14705(a) or is addressed by the parties in their contract of carriage under 49 U.S.C § 10709 (rail) or 49 U.S.C § 14101(b)(1) (motor).

used in multimodal\textsuperscript{3} transportation is also subject to demurrage upon the expiration of allowable free time.\textsuperscript{4}

The competing limitations periods described in this article have been supported by several different policy rationales. However, an examination of relevant case law reveals that the most appropriate limitation period is that imposed by the federal statutes which regulate the tariff that gave rise to the demurrage claim, as described later in this article. Alternatively, if no such statute applies, the most appropriate limitation period may be provided by the law governing the contract giving rise to the demurrage claim.

Demurrage for the detention of equipment in the context of transportation by water can arise in either:

(A) the non-contiguous domestic trade; or

(B) the foreign commerce of the United States:

(i) under tariffs filed with the Federal Maritime Commission ("FMC") or

(ii) private charter parties and service contracts.\textsuperscript{5}

Each of these scenarios is described below.

I. NON-CONTIGUOUS DOMESTIC TRADE

In the first category, non-contiguous domestic trade,\textsuperscript{6} finding the ap-

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\textsuperscript{3} Multimodal is used to describe transportation provided by more than one mode of transportation. See Black's Law Dictionary 1041 (8th ed. 2004).
\textsuperscript{4} 4 Saul Sorkin, Goods in Transit § 25.01 (Matthew Bender & Co., Inc, a member of the LexisNexis Group 2005).
\textsuperscript{5} 46 U.S.C. app. § 1702(19).
\textsuperscript{6} Non-contiguous domestic trade was governed by tariffs previously filed with the Interstate Commerce Commission ("ICC"). These tariffs are currently filed with the ICC's successor, the Surface Transportation Board ("STB") pursuant to the Interstate Transportation Act ("ITTA"). Originally promulgated in 1887 as the Act to Regulate Commerce, and formerly known as the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), the ITTA has been revised and renumbered by many subsequent acts, including the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995), which, among other things, amended the Table of Subtitles of Title 49 of the United States Code by striking "Commerce" and inserting in lieu thereof "Transportation," thus, amending the subtitle to Interstate Transportation Act, 49 U.S.C § 11908(b). Section 103 of the ICCTA added chapter 135 to title 49 of the United States Code and established the jurisdiction of the Secretary of Transportation ("Secretary") and the STB over motor carriers and certain water carriers. 49 U.S.C. § 13501 (providing for general jurisdiction over transportation by motor carrier); 49 U.S.C. § 13521 (providing for general jurisdiction over transportation by water carrier). Non-contiguous domestic trade is defined as "transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States." 49 U.S.C. § 13102(17). Title 49 contains a number of limitations periods, including the eighteen month statute of limitations applicable to freight charges for motor and domestic water transportation and a three year statute of limitations applicable to rail carrier transportation. Id. §§ 14705(a), 11705(a). In both rail and motor transportation, a claim "accrues" on delivery or tender of delivery by the carrier. Id. §§ 14705(g), 11705(g).
\end{flushright}
applicable statute of limitations is straightforward. "A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues." Accordingly, where the claim for demurrage arises in non-contiguous domestic trade governed by the Interstate Transportation Act ("ITA"), as codified in title 49, the eighteen month statute of limitations applies. The question of determining the proper limitations period becomes a little more complex when foreign ocean transportation governed by laws codified in title 46 is concerned.

II. FOREIGN OCEAN TRADE

Foreign ocean transportation includes transportation provided under the Shipping Act of 1984 ("the Act") as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), including service contracts authorized by the Act and OSRA and private carriage not regulated by the Federal Maritime Commission and governed generally by charter parties. Both categories are included within the admiralty and maritime jurisdiction of the United States. "In an admiralty case, maritime law and the equitable doctrine of laches govern the time to sue." In applying the doctrine of laches, the court looks to the most analogous statute of limitations "to

7. Id. § 14705(a).
8. See id.
11. 46 U.S.C. app. § 1702(19) defines a service contract as a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.
14. T.A.G., 215 F.3d at 175 (citations omitted); see also Czaplicki v. The Hoehg Silvercloud, 351 U.S. 525, 533 (1956) ("It is well settled . . . that laches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; instead, the rule is that 'the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.'" (quoting The Key City, 81 U.S. 653, 653 (1871)).
establish burdens of proof and presumptions of timeliness and untimeliness.”15 If a party has filed its complaint within the analogous period, the defendant “has the burden of proving unreasonable delay and prejudice.”16 If a plaintiff has filed a complaint after the analogous period has expired, “a presumption of laches is created, and [the p]laintiff has the burden of demonstrating that there was no unreasonable delay in bringing the lawsuit and that [the defendant] was not prejudiced.”17 “The most analogous statute of limitations period may be found in state or federal law. However, courts generally favor applying a federal statute of limitations for policy reasons.”18 When the matter in dispute arises out of foreign ocean transportation, the selection of the most analogous period will be dependent upon the federal statutes, if any, governing the transportation.19

A. FMC Filed Tariffs

In TAG/ICIB Services, Inc. v. Pan America Grain Co., the court was faced with a dispute arising out of ocean transportation between the United States and Puerto Rico.20 The court stated, “we are satisfied that the most analogous statutes are the federal statutes regulating the very tariffs under which the alleged demurrage arose”21 and applied the eighteen month period found in 49 U.S.C. § 14705(a).22

Some have interpreted TAG to mean that the eighteen month limitations period in 49 U.S.C. § 14705(a) should be applied to demurrage disputes arising out of the common carriage of goods by water generally.23 The author respectfully disagrees. TAG should not be read to embrace ocean transportation not included within the definition of the non-contiguous domestic trade. TAG did not involve foreign ocean transportation subject to title 46, but involved transportation in the non-contiguous do-

15. TAG, 215 F.3d at 175.
16. SL Serv., 217 F. Supp. 2d at 184 (citing TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 175 (1st Cir. 2000)).
17. Id.
18. Id. (citing TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 176 (1st Cir. 2000) (“explaining that applying a federal statute of limitations undermines uniformity in admiralty law and enervates the policy against discriminatory rates, especially in a forum with a short limitations period”); and Barrios v. Nelda Faye, Inc., 597 F.2d 881, 884 (5th Cir. 1979)).
19. See id. at 185 (“Since the Shipping Act appears to regulate the tariffs giving rise to the demurrage, we find that the Shipping Act provides the most analogous statute of limitations.”).
20. Id. at 174.
21. Id. at 176.
22. Id. at 178.
23. Paul W. Stewart & Christine H. Scheinberg, Time and Demurrage and the Case for Uniformity, 29 Transp. L.J. 235, 246 (2002) [hereinafter the TAG Article] (“Thus, the TAG case settles for all time the appropriate analogous statute to be used as a benchmark for laches analysis in demurrage claims not brought directly under the ICCTA.”).
mestic trade of the United States subject to title 49.24 As discussed
above, the court could have applied 49 U.S.C. § 14705(a) ex proprio
vigori, but elected not to, stating,

we confine our review to TAG/ICB’s argument based on general maritime
law and the doctrine of laches. In doing so, we do not mean to necessarily
rule out the possibility that a demurrage claim such as this could be pursued
under separate § 1337(a) jurisdiction, in which event the same statutes of limi-
tation found herein to be most analogous for laches purposes might control
directly.25

In the author’s opinion, TAG stands for the proposition that the most
analogous statute of limitations in a claim arising in connection with the
non-contiguous domestic trade of the United States may be found in the
statute Congress legislated to apply to cases of that kind. There is no
reason, however, to extend TAG’s applicability by analogy to foreign
ocean transportation, a subject that Congress has elected to distinguish
and treat independently from domestic water transportation in title 46 of
the United States Code.26

Although the reasoning in TAG does not support an across the board
application of the eighteen month period of limitations to all demurrage
disputes, the TAG decision does support the concept that the most analo-
gous statute is the federal statute under which the demurrage arose. Thus,
in cases arising under the Act as amended by OSRA and involving
tariffs filed with the FMC, the TAG decision actually points towards the
three year limitations period in 46 U.S.C. app. § 1710(g).27 In SL Service,

subject to jurisdiction under chapter 135 involving traffic originating in or destined to
Alaska, Hawaii, or a territory or possession of the United States.”).

25. TAG, 215 F.3d at 175 (emphasis added). For a detailed discussion of trade with Puerto
Rico see 1 Saul Sorkin, Goods in Transit § 1.12, concluding “[c]onsequently, such carriers
engaged in the ‘offshore trade’ between Puerto Rico and the mainland United States are re-
quired to file tariffs with the STB. Jurisdiction over such trade formerly exercised by the [Inter-
state Commerce Commission] and the FMC has been transferred under ICCTA to the STB.” 1
Saul Sorkin, Goods in Transit § 1.12 (Matthew Bender & Co., Inc. a member of the Lexis-
1999)) and TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 174 (1st Cir. 2000)).

26. Section 1701(g) of the Shipping Act of 1984 indicates that one purpose of the Act is “to
establish a nondiscriminatory regulatory process for the common carriage of goods by water in the

27. 46 U.S.C. app. § 1710(g) provides in part:

Reparations - For any complaint filed within 3 years after the cause of action accrued,
the Commission shall, upon petition of the complainant and after notice and hearing,
direct payment of reparations to the complainant for actual injury (which, for purposes
of this subsection, also includes the loss of interest at commercial rates compounded
from the date of injury) caused by a violation of this chapter plus reasonable attorney’s
fees.

Id. § 1701(g).
Inc. v. International Food Packers, Inc., which involved a demurrage dispute involving the transportation of goods from Latin America to Puerto Rico by water, the court discussed TAG, but declined to apply the eighteen month statute in ITA and instead found the three year limitation period in § 1710(g) of the Act to be the most analogous statute. The court stated, “Since the Shipping Act appears to regulate the tariffs giving rise to the demurrage, we find that the Shipping Act provides the most analogous statute of limitations.” Similarly, in Puerto Rico Marine Management, Inc. v. Molac Imports, Inc., the court considered the application of either the three year limitation period in the former ITA or the two year limitation period on administrative actions brought before the FMC in the Act in effect at that time. Since both periods exceeded the actual delay, the court declined to choose between the two; however, the court’s analysis of the issue is directly on point. In Puerto Rico Marine, the court stated, “If Congress deemed two years the adequate period within which to file complaints before the [FMC], we must allow at least as much for the filing of a civil action before a federal court.”

A different result was reached in Venus Lines Agency, Inc. v. CVG International America, Inc. This result is well described in the TAG Article as an “aberration.” Venus involved foreign ocean transportation between Venezuela and the United States. Initially the transportation was performed under a tariff filed with the FMC and was governed by the Act and OSRA. Thereafter, a dispute arose involving whether the parties entered into an oral contract. The opinion indicates that the parties continued to charge and pay the tariff rates and the court concluded that no new agreement or modification to the old agreement was reached. The court then addressed the demurrage claim, held that it was governed

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29. Id. Contra ANERA, Soc’y of Mar. Arbitrators Award No. 2932 (applying the six-year statute of limitations as prescribed by state law because the Shipping Act does not prescribe a statute of limitations for a breach of contract actions).
30. The three year limitation period is now an eighteen month limitation period. 49 U.S.C. § 14705(a).
31. The two year limitation period on administrative actions is now a three year limitation period. 46 U.S.C. app. § 1710(g).
33. Id. at 652.
34. Id. (emphasis added).
35. Venus, 234 F.3d at 1230 (assuming a four year limitations period).
36. Stewart, supra note 23, at 246.
37. Venus, 234 F.3d at 1227.
38. Id. at 1227-28.
39. Id. at 1228.
40. Id. at 1229.
by laches, and assumed that the Florida four year statute of limitations for
claims arising under an oral contract applied. The court did not discuss
either the eighteen month limitation period in the ITA or the three year
limitation period in the Act.

B. CHARTER PARTIES AND SERVICE CONTRACTS

As discussed above, in addition to tariffs, ocean carriers are permitted
to engage in private charter parties not governed by the Act or in
service contracts that are governed by the Act as amended by OSRA. 46
U.S.C. app. § 1707(c) provides:

Service Contracts:
(1) In general – An individual ocean common carrier or an agreement be-
tween or among ocean common carriers may enter into a service contract
with one or more shippers subject to the requirements of this Act. The ex-
clusive remedy for a breach of a contract entered into under this subsection
shall be an action in an appropriate court, unless the parties otherwise
agree.

In cases involving foreign ocean transportation provided under ei-
ther a service contract or a private charter party, it would be a rare excep-
tion if the parties had not “otherwise agreed” to a forum selection and
choice of law clause. In light of the permissive language of 46 U.S.C.
app. § 1707(c)(1), there should be no impediment to the enforcement of a
forum selection and choice of law clause such that the chosen state’s stat-
ute of limitations for breach of contract would be applied. For instance,
in the Asia North America Eastbound Rate Agreement arbitration deci-
sion, decided prior to the enactment of the Interstate Commerce Com-
mission Termination Act (“ICCTA”), an aggrieved party under a service
contract governed by New York law and filed with the FMC was con-
fronted with the respondent’s argument that the three year limitation on
administrative actions filed with the FMC was the applicable limitations
period for claims brought to enforce the service contract. The arbitra-
tor, in reliance upon an affidavit of a former Chief Administrative Law
Judge (“ALJ”) of the FMC, and the affidavit of a former judge of the
United States Court of Appeals for the Third Circuit, held that the three

41. Id. at 1230-31. “The limitations period in Florida’s Statute of Limitations for oral con-
tracts is four years.” Id. at 1230 (citing FLA. STAT. § 95.11(k)).
42. As mentioned, the TAG Article described the Venus case as an aberration. Stewart,
supra note 23, at 246. Unless the parties have expressly adopted state law to govern the limita-
tions period the better view is to look to the federal statute governing the transportation, if any.
43. 46 U.S.C. app. §1707(c) (emphasis added).
44. In practice, most charter parties contain an arbitration and choice of law clause and
most service contracts contain a choice of law and forum selection clause.
45. ANERA, Soc’y of Mar. Arbitrators Award No. 2932.
year period only concerned administrative actions filed with the FMC and did not concern arbitration proceedings brought to enforce the terms of the service contract.\textsuperscript{46} Instead, the arbitrator held that the New York six year statute of limitations was the applicable period to consider in determining the issue of time bar with respect to the enforcement of a service contract.\textsuperscript{47}

A contrary result had been reached in \textit{Sea Land Service v. Trans-Senko Corp.}\textsuperscript{48} In the affidavit of the former ALJ of the FMC, submitted by the petitioner in the \textit{ANERA} case, the \textit{Trans-Senko} case was described by the ALJ as follows:

In my twenty-seven years with the [FMC] . . . the [\textit{Trans-Senko}] case stands in magnificent isolation. I am aware of no other case in which the provisions of either Section 22 of the Shipping Act of 1916 (predecessor statute of the 1984 Act) or subsection 11(g) of the Shipping Act of 1984 have been applied to bar a suit brought to enforce a provision of a contract either by arbitration or by suit in court, either state or federal.\textsuperscript{49}

Similarly, the affidavit of the former judge from the Third Circuit Court of Appeals, also submitted by the petitioner in the \textit{ANERA} case, described the \textit{Trans-Senko} case as standing “in isolation” and further stated, “In my opinion, \textit{ANERA}’s claim is not time-barred and the arbitration should go forward on the merits.”\textsuperscript{50}

\section*{III. Conclusion}

The announced policy considerations behind the applicable statutes supports the holding in \textit{TAG} that the most analogous statute of limitations to a demurrage claim is the statute governing the tariff, if any, under which the claim for demurrage arose. \textit{TAG} should not be interpreted to hold that the only statute to be considered is title 49. Furthermore, in

\textsuperscript{46} \textit{Id.} ("My review of the Act and the FMC regulations leads me to a finding that neither the Act nor regulatory guidelines impose a time bar for a breach of contract claim under an FMC recorded Service Contract. In my view, the FMC regulations which [respondent] is relying upon in its contention of a three year limitation are intended to assist the enforcement by FMC of the Act provisions, and not to shorten the period contracted parties have to bring action in breach of contract disputes, not even mentioned in the Act or FMC regulations. Such finding is consistent with the testimony given by affidavits of Judges John E. Cograve and Arlin M. Adams . . . .")

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Sea Land Serv., Inc. v. Trans-Senko Corp.}, 735 F. Supp. 900, 901(N.D. Ill. 1990).

\textsuperscript{49} \textit{ANERA}, Soc’y of Mar. Arbitrators Award No. 2932 (emphasis added). As discussed above, the court in \textit{Puerto Rico Marine} considered the federal statutory limitations periods, including the one applicable to administrative actions as analogous limitations periods, but did not bar the plaintiff’s suit as it was timely under both limitations periods considered. \textit{P.R. Marine}, 594 F. Supp. at 652.

\textsuperscript{50} \textit{ANERA}, Soc’y of Mar. Arbitrators Award No. 2932.
those cases in which the parties have taken advantage of an allowance in
the statute to enter into private contracts that contain a governing law
clause, the parties' choice should be honored and the analogous state
statute, the statute governing breach of contract actions, should apply.
Third Party Logistics Companies and Legal Liability for Personal Injuries: Where Does the Injured Motorists' Road to Recovery Lead?

Jennifer Mullenbach*

I. INTRODUCTION

Every year, at least seven million large trucks haul commercial goods across the country,¹ while traveling nearly 215,000,884,000,000 miles each year.² These trucks are involved in 436,000 traffic accidents during an average year.³ Of these crashes, just over 4,200 involve fatalities while 85,000 result in personal injury.⁴ At an average cost of $62,000 per crash,⁵ these fatalities and injuries are a significant burden on the transportation industry and the individual victims.

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² Commercial Motor Vehicle Facts, supra note 1.

³ Id.

⁴ Id.

⁵ Id.

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In a typical car crash, the victim has the option of bringing a tort action against the other driver to recover expenses and receive compensation for their injuries. However, drivers may not have the same option if victimized by accidents involving large commercial trucks due to two main factors. First, the rise of third party logistics companies (brokers in the transportation industry) has complicated the division of liability between drivers, the brokers that hire them, and the companies seeking the transportation of goods that brokers serve. Second, the Federal government has implemented agencies and regulations to police commercial motor carriers. These regulations place restrictions on the types of actions that private parties can bring against motor carriers and motor carrier brokers.

There are two main roads to recovery that an injured motorist can take when attempting to hold a third party logistics carrier legally and financially liable for the results of an accident. The first is to sue the third party logistics carrier under the respondeat superior doctrine, based on the assumption that the motor carrier is an employee of the third party logistics carrier. The second is to sue the third party logistics carrier by bringing a private action under section 14704 of the Federal Motor Carrier Safety Administration ("FMCSA"). As this Article will illustrate, both roads to recovery often lead to dead ends for an injured motorist. In the first case, third party logistics carriers and motor carriers are engaged in independent contractor relationships, rather than employer-employee relationships, which exempts the third party logistics carrier from liability. In the second case, section 14704 of the FMCSA often limits the ability of an injured motorist to bring personal injuries claims against third party logistics companies.

This Article first examines the role of third party logistics companies in the motor carrier industry. Section II discusses the concept of respondeat superior as it relates to the liability of third party logistics carriers involved in the interstate transportation of goods. Section III discusses...


9. See 49 U.S.C. § 14704(a)(1) (2000) (limiting private rights of action to persons who have suffered personal injuries and does not include other types of damages, including damage to property).
liability between the parties. Section IV examines the regulations of the FMCSA and limits on private actions for personal injuries by private citizens. Finally, Section V examines Schramm v. Foster,10 a recent Maryland case that addresses both of the above issues.

II. THIRD PARTY LOGISTICS COMPANIES

The deregulation of the trucking industry in the 1980s led to the increase in the number of third party logistics companies, also known as transportation brokers.11 These companies should not be confused with motor carriers—the distinction between motor carriers and transportation brokers is delineated in the regulations of the FMCSA. On the one hand, a motor carrier is defined as a “person providing commercial motor vehicle (as defined by § 31132) transportation for compensation.”12 On the other, a broker is a “person, other than a motor carrier . . . that as a principal or agent sells . . . or arranges for, transportation by motor carrier for compensation.”13 Additionally, “[m]otor carriers . . . are not brokers . . . when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.”14

A third party logistics carrier is a company that specializes in brokering transportation services.15 With over 500 third party logistic companies in the United States, these private companies provide contractual logistics services to a “primary manufacturer, vendor, or user of a product

11. The Motor Carrier Act of 1935, the controlling regulation for the transportation industry until 1980, placed extreme regulations on the industry, specifically tight entry controls on transportation brokers into this industry. With the implementation of the Motor Carrier Act of 1980, the entire transportation industry was virtually deregulated, and there were no longer any restrictive limitations placed on transportation brokers entering the transportation industry. This opened the floodgates to new transportation brokers wanting to become part of this industry. See Jeffrey S. Kinsler, Motor Freight Brokers: A Tale of Federal Regulatory Pandemonium, 14 Nw. J. Int’l L. & Bus. 289, 290-91 (1994) (citations omitted). The increase in transportation brokers has expanded to include the U.S. Department of Defense, which has begun using third party logistics companies to deliver items to military installations in the continental United States and throughout the world where there is no conflict. See Major Sylvester H. Brown, Using Third-Party Logistics Companies, ARMY LOGISTICI AN (Nov. – Dec. 1999), available at http://www.almc.army.mil/alog/issues/NovDec99/MS452.htm (last visited Apr. 21, 2006).
13. Id. § 13102(2).
14. 49 C.F.R. § 371.2(a).
15. For purposes of simplicity, the terms “third party logistics company” and “transportation broker” and “broker” will be used interchangeably throughout this paper. There are distinctions between these terms, for example, the FMCSA specifically defines broker as “a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.” 49 U.S.C. § 371.2(a).
or service.”\textsuperscript{16} Third party logistics carriers have not only increased in number but have achieved significant success. For example, C.H. Robinson Worldwide, one of the largest third-party logistics companies in North America, contracts with over 35,000 carriers worldwide to ship nearly four million products for its 18,000 customers.\textsuperscript{17} For Robinson, this volume of shipments has netted over $137 million in income in 2004, a 20\% growth from the previous year.\textsuperscript{18} Often described as providing a “‘one point of contact’ service to shippers,”\textsuperscript{19} third party logistics carriers can perform a large variety of functions between the manufacturer and the user.\textsuperscript{20} Such outsourcing is cost effective for businesses and allows them to focus on their “core business functions.”\textsuperscript{21}

Oftentimes, the relationship between a business requiring shipping services and a logistics company is solidified through a contract.\textsuperscript{22} The contract commonly specifies such terms as the location of pick-up, the drop-off location, and the level of liability for damages to goods and/or personal injuries.\textsuperscript{23} The company shipping the goods often has no idea which company will actually be transporting the goods and may even believe that the logistics company is the party responsible.\textsuperscript{24} After securing a contract to ship goods, the logistics provider then contracts with a transportation service provider who, in turn, assigns the transportation assignment to a driver. The driver may be an actual employee of the transportation service provider or simply an independent contractor who occasionally performs tasks for the transportation service provider.\textsuperscript{25} While the introduction of a third-party logistics provider decreases business costs by increasing efficiency, such an entity is not without its drawbacks to the transportation industry. One of the primary complications of the introduction of a third party logistics company to the shipping pro-

\begin{itemize}
\item \textsuperscript{16} Brown, \textit{supra} note 11. These providers handle fifty-seven percent of third-party logistics services in the United States. This is up from only thirty-three percent use of third-party logistics providers in the 1950’s. \textit{See} Guo Jianhua, \textit{Third-party Logistics -- Key to Rail Freight Development in China}, 29 \textit{Japan Railway & Transp. Rev.} 32, 33 (2001).
\item \textsuperscript{17} C.H. Robinson Worldwide, Inc., About Us, http://www.chrobinson.com/about_us.asp (last visited Apr. 21, 2006).
\item \textsuperscript{18} C.H. ROBINSON WORLDWIDE, INC., HOOVERS CO. IN-DEPTH RECORDS (2005), available at 2005 WLNR 4046946.
\item \textsuperscript{19} Schramm, 341 F. Supp. 2d at 542.
\item \textsuperscript{20} See Brown, \textit{supra} note 11. These functions include inventory scheduling, distribution management, order fulfillment, supply-chain management, processing of loss and damage claims, motor, rail, ocean, and air transportation, and shipment consolidation. \textit{Id}.
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{23} \textit{See} id.
\item \textsuperscript{24} \textit{See} id.
\item \textsuperscript{25} \textit{See} id.
\end{itemize}
cess is the confusion regarding liability that may arise when an accident occurs while the goods are being transported.

For example, XYZ company desires to move a shipment of shoes from their warehouse in North Carolina to store ABC in Wyoming. XYZ contracts with 123 Shipping Company, a third party logistics provider, to move the goods from North Carolina to Wyoming in a timely manner. 123 Shipping then contracts with Highway Transport Services to move the goods to Wyoming. Highway Transport Services in turn assigns the shipment task to Ted Trucker, a reliable independent contractor. Ted’s trip gets off to a good start, but, unfortunately, he runs a red light in Iowa and hits Sarah Driver’s vehicle. Sarah Driver is injured and her car is totaled. When Sarah and her insurance company bring a lawsuit to recover damages resulting from this accident, from whom of the parties involved can they recover: Ted Trucker, Highway Transport Services, 123 Shipping Company, store ABC, company XYZ, all of the parties, or none of them?

III. LIABILITY BETWEEN THE PLAYERS

In the situation described above, the first road that an injured motorist may take to recover damages is to seek to impose liability at law on at least one of the parties involved. Sarah Driver would likely to cast a wide net and sue all of the parties connected to the motor carrier involved in the accident. However, this would most likely be followed by a “blame game” between the driver, the motor carrier company, the broker, and the shipper. Each party would attempt to remove themselves and their culpability from the suit, hoping to evade responsibility for Sarah’s significant personal injury damages. Before liability can be determined, the interrelated doctrines of respondeat superior, master-servant relationship, and independent contractor status must be resolved in light of the relationships between the parties. Of these questions, the relationship between the transportation broker and the motor carrier is of special concern to transportation attorneys as the recent introduction of third party logistics companies to the transportation industry has complicated the division of liability. The requirements for establishing vicarious liability on the broker are examined below.

A. RESPONDEAT SUPERIOR DOCTRINE

The doctrine of respondeat superior holds that an employer is vicariously liable for both the negligent or and intentional torts committed by an employee when that individual is acting within the scope of employment.\(^{26}\) Respondeat superior is proper when an agency relationship exists

\(^{26}\) Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). This liability even extends to the actions of an employee who disobeys an order relating to the business because it is the...
between an employer and employee. Such a relationship is established by "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."27 An agency relationship may be established by contract or inferred from the circumstances.28 A principal-agent relationship, also referred to as an employer-employee relationship,29 is inferred when an agent is subject to a principal's right of control; when an agent has a duty to act primarily for the benefit of a principal;30 and when an agent holds the power to alter the legal relationship of a principal.31

B. Employee/Servant

In order to hold an employer liable for the negligence of an agent, the agent must not only be acting within the scope of employment, but also be deemed to be servant or employee of the employer.32 A servant is an agent employed by a master "to perform service . . . whose physical conduct in the performance . . . is controlled or is subject to the right to control by the master."33 Ordinarily, a principal will not be liable for the negligence of an agent who is not a servant.34 A principal's liability does not extend to any physical injury caused by the negligent acts of his agent who is not a servant unless the act was authorized by the principal, or the result was one the principal authorized.35 A master-servant relationship exists only when the employer has the right to control the "time, manner,

employer's "duty to select servants who will obey." Philadelphia & Reading R.R. Co. v. Derby, 55 U.S. 468, 472 (1852). However, the employer is not liable for "the unauthorized, the [willful], or the malicious act or trespass" of an employee. Id. at 476. See also Warren A. Seavey, HANDBOOK OF THE LAW OF AGENCY § 83 (1964).


29. Although there are some minor differences between the principal-agent relationship and employer-employee relationship, for purposes of this article, the concepts will be used interchangeably to refer to the employer-employee relationship. See Hynes, supra note 27, for a more complete discussion of these issues.


31. Restatement (Second) of Agency § 12.

32. Am. Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 117 (Ky. 1933) (citations omitted).

33. Restatement (Second) of Agency § 2. "An agent's implied authority is defined by reasonable interpretation of the express instructions given by the [employer] in light of the circumstances faced by the [employee]." Hynes, supra note 27, at 271.

34. See Riplinger, 60 S.W.2d at 116-17 (citations omitted); see also W. Edward Sell, Agency § 18 (1975).

and method of executing the work,” not merely the employer’s request for certain outcomes or results. Additional, to establish vicarious liability, the employer’s control, or right to control, must exist “in respect to the very transaction out of which the injury arose.”

C. INDEPENDENT CONTRACTOR

An independent contractor is one “who contracts with another to do something for him but who is not controlled by the other nor is subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” A prime factor in making the distinction between an employee and an independent contractor is “the authority of the principal to control the detailed physical performance of the contractor.” More specifically, an independent contractor can perform a certain work for another according to his own means, methods, and techniques, free from control by his employer in all details. Typically, an employer is not liable for the wrongdoing of an independent contractor under the respondeat superior doctrine. “Complete control over the result to be accomplished is not enough to make an independent contractor an employee.” For instance, regarding the shipment of goods, the contractual relationship between a broker and a carrier transporting a shipment of cell phones did not qualify as a principal-agent relationship.

D. THE TRANSPORTATION BROKER’S LEGAL LIABILITY IS...

The transportation broker’s relationship with the motor carrier can


37. United States v. Mraz, 255 F.2d 115, 117 (10th Cir. 1958). However, actual control over the employee at the time of the accident is not required. Hynes, supra note 27, at 40.

38. RESTATEMENT (SECOND) OF AGENCY § 2; see also Sell, supra note 34, § 19.

39. Logue v. United States, 412 U.S. 521, 527-28 (1973) (citations omitted); see also Sell, supra note 34, § 95 (providing that where the employer has retained the right of control, the employee is most likely a servant).


41. McKee v. Brimmer, 39 F.3d 94, 96 (5th Cir. 1994) (citing W.J. Runyon & Sons, Inc. v. Davis, 605 So.2d 38, 45 (Miss. 1992), overruled on other grounds by, Richardson v. APAC-Mississippi, Inc., 631 So.2d 143 (Miss. 1994)); see also Mechem, supra note 28, § 40.


44. Id. at 551.
be defined as either an employer-agent relationship or as an independent contractor agreement. The use of the respondeat superior doctrine to extend negligence liability for personal injuries as a result of a motor carrier accident to transportation brokers can only occur when an employer-agent relationship between the transportation broker and the motor carrier exists. Conversely, when the relationship between the transportation carrier and the motor carrier is characterized as an independent contractor agreement, negligence liability under the respondeat superior doctrine no longer applies to the transportation carrier. The level of liability for a transportation broker is remarkably different depending on the classification of its relationships with its drivers.

Courts have defined the broker-motor carrier relationship as one of an independent contractor. In *Tartaglione v. Shaw's Express, Inc.*, the court held that the contractual relationship between the broker and the motor carrier only controlled the result of the work to be performed and not the "physical conduct [of the driver] in the performance of the undertaking." The court reached this conclusion because the broker was interested solely in the delivery of the goods to the proper destination and had no control over the route chosen by the driver or the type of gas used by the motor carrier.

Using the same factors as *Tartaglione*, the court in *King v. Young* held that the transportation broker had also engaged in an independent contractor relationship with the motor carrier. In *King*, the transportation broker was "merely the intermediary in the transaction between the shipper and the transportation medium." Similar to *Tartaglione*, this conclusion was reached based on the fact that the transportation broker did not have control over the route chosen by the motor carrier or the type of gasoline used during the transport. In this case, the independent contractor relationship excused the transportation broker from liability for the motor carrier's negligence.

In *Servicemaster Co. v. FTR Transport, Inc.*, the court also found that

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45. See Servicemaster Co., L.P. v. FTR Transport, Inc., 868 F. Supp. 90, 95 (E.D. Pa. 1994) ("Generally, a broker is independent, serving as a middleman between motor carriers and the shipping public." (citing Reiter v. Cooper, 507 U.S. 258, 261 (1993))). See also *Tartaglione*, 790 F. Supp. at 441 ("The Court finds that, in transporting cargo, [the motor carriers] acted as independent contractors and not as agents of [the transportation broker]."); King v. Young, 107 So. 2d 751, 753-54 (Fla. Dist. Ct. App. 1958) (holding that the relationship between the transportation broker and motor carrier was that of independent contractors).


47. Id. at 440-41.

48. King, 107 So. 2d at 753.

49. Id.

50. Id.

51. Id. at 754.
an independent contractor relationship existed between a broker and a driver.52 The main factor that indicated an independent contractor relationship was the transportation broker’s complete discretion to choose a motor carrier for each individual shipment of freight.53

While in Johnson v. Pacific Intermountain Express Co., the Missouri Supreme Court has extended liability for personal injuries to a motorist to the transportation broker, the case in question did not involve a typical broker-driver relationship. In Johnson, the court concluded that the transportation broker and the motor carrier were involved in a joint venture.54 The relationship was defined as a joint venture because all of the parties “undertook a particular project, for mutual benefit and profit.”55 The court stated that the basis for extending liability to the transportation broker was not under the respondeat superior doctrine but rather under a joint venture doctrine. 56 As such, liability was spread among all of the parties involved in the joint venture.57

The respondeat superior doctrine only extends liability to the personal injuries of a motorist when an employer-employee relationship exists between the transportation carrier and the motor carrier. In the vast majority of cases, this relationship has been characterized as that of an independent contractor, thus exempting transportation carriers from liability under respondeat superior. Therefore, an injured motorist’s road to recovery from a transportation carrier is unlikely to be found by asserting a respondeat superior claim.

IV. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
PRIVATE RIGHT OF ACTION

The next road that an injured motorist may take to recovery against a transportation carrier may be found under the regulations of the Federal Motor Carrier Safety Administration.

Large commercial trucks involved in interstate commerce58 have his-
torically been regulated by the Interstate Commerce Commission ("ICC"). However, in 1995, the ICC was disbanded by the Federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA") and the deregulation of the trucking industry began. The legislature indicated that this deregulation was necessary to eliminate dissimilar state regulation that had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." The Federal Motor Carrier Safety Administration ("FMCSA"), a division of the United States Department of Transportation ("DOT"), is now charged with the duty of monitoring interstate commerce by large trucks and buses. Specifically, the FMCSA has developed an automated data analysis system, SafeStat, to measure the "relative (peer-to-peer) safety fitness of interstate commercial motor carriers and crashes, roadside inspections, on-site compliance review results and enforcement history." Additionally, while the ICC had previously resolved disputes in the motor carrier industry, the ICCTA eliminated, for the most part, the dispute resolution role of the FMCSA. Currently, the FMCSA's dispute resolution duties are limited to such issues as disputes between States or Indian tribes over Non-Radioactive Hazardous Materials ("NHRM") routing.

including international boundaries, wholly within one State as part of a through movement that originates or terminates in another State or country." Who Must Comply with the Federal Safety Regulations, supra note 1.


63. The FMCSA's "primary mission is to reduce crashes, injuries and fatalities involving large trucks and buses." More than 1,000 employees in the fifty states and the District of Columbia work to fulfill the mission of the FMCSA. Federal Motor Carrier Safety Administration, About FMCSA, http://www.fmcsa.dot.gov/about/aboutus.htm (last visited Apr. 23, 2006).


66. See id. ("The bill transfers [dispute resolution] responsibility . . . to the Secretary. . . . The Committee does not believe that DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas.").

67. 49 C.F.R. § 397.75.
As an alternative to FMCSA dispute resolution, the ICCTA specifically indicated "private parties may bring actions in court to enforce the provisions of the Motor Carrier Act." The option of private actions for violations of the FMCSA provisions has been a complicating factor in actions related to personal injury accidents involving motor carriers. Specifically, section 14704(a)(2) provides that "[a] carrier or broker providing transportation or service . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part." Standing alone, this statement would confirm that a private citizen is entitled to bring a private right of action against a motor carrier or broker in an accident causing personal injuries. However, the statute's meaning is less clear when the section is read in conjunction with its preceding paragraph and considered in light of its legislative history. Most courts have agreed that the terms of statute are inconsistent. Section 14704(a)(1) reads "[a] person injured because a carrier or broker providing transportation or service . . . does not obey an order of the Secretary or the Board . . . may bring a civil action to enforce that order under this subsection." Examination of the legislative history has shed light on the appropriate interpretation. Specifically, the legislative history states "DOT should [not] allocate scarce resources to resolving these essentially private disputes," and appears to limit the resolution of disputes in the motor carrier industry to those involving commercial disputes. Most courts have held that while private rights of action may


72. See Schramm, 341 F. Supp. 2d at 547 ("I find the language enigmatic."); Stewart, 241 F. Supp. 2d at 1219 ("The court finds the language . . . ambiguous and inconsistent . . . ").; New Prime, 192 F.3d at 785 ("Despite these linguistic imperfections and inconsistencies . . . ").


74. See New Prime, 192 F.3d at 785. "In construing . . . inconsistently drafted statute[s], it is appropriate to use its legislative history to confirm the most plausible construction of a subsection's plain language." Id. (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)).

75. H.R. REP. No. 104-311, at 87-88 (emphasis added).

76. Id. at 87 ("In addition to overseeing the background commercial rules of the motor carrier industry, the ICC currently resolves disputes that arise in such areas.").
arise under section 14704(a)(2), these actions do not include personal injury claims. Some courts have limited the ability to bring a civil action to enforcement of an order of the Secretary of Transportation or Surface Transportation Board against a motor carrier or transportation broker. Other courts have expanded the civil action to “some violations of the Motor Carrier Act and its implementing regulations.”

To date, only one court has construed this statute as permitting a private right of action for personal injury claims. In Marrier v. New Penn Motor Express, Inc., the plaintiff asserted that a reading of two sections of the Interstate Transportation Act created a private right of action for personal injuries. The plaintiff argued that Section 14704(a)(2) permits private rights of action for “an act or omission of that carrier . . . in violation of this part,” while section 14101(a) mandates that “a motor carrier shall provide safe and adequate service, equipment, and facilities.” The court agreed, recognizing that section §13101 provides that “it is the policy of the United States Government to oversee the modes of transportation and, in overseeing these modes, to promote safe, adequate, economical, and efficient transportation.” The court held that, given that one of the purposes of the legislation was to ensure the safe operation of motor carriers, the plaintiff’s private action to recover personal injuries was permissible.

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77. See Schramm, 341 F. Supp. 2d at 547; Stewart, 241 F. Supp. 2d at 1221; Renteria, 1999 WL 33268638, at *6; but see Marrier, 140 F. Supp. 2d at 329 (holding that a private right of action for personal injury claims is permissible because the act does not expressly prohibit a private right of action for personal injury).


79. See New Prime, 192 F.3d at 785. This court fails to delineate the types of claims that would be appropriate for private causes of action. The Stewart court relies on the analysis of New Prime and limits the private right of action to damages in commercial disputes involving violations of the Motor Carrier Act. Stewart, 241 F. Supp. 2d at 1221. The court in Bulkmaic Transport declined to limit section 14704 claims to “actions for enforcement of agency orders.” 2004 WL 1151555, at *3.

80. Marrier, 140 F. Supp. 2d at 328.

81. Id.

82. Id.; see also 49 U.S.C. § 14704(a)(2).


85. Marrier, 140 F. Supp. 2d at 329.
V. **Schramm v. Foster**

A recent Maryland case, *Schramm v. Foster*, is worthy of its own discussion as it directly addressed the two issues discussed above. First, *Schramm* addressed the relationship between brokers and drivers and the corresponding liability when a personal injury accident occurs. Secondly, *Schramm* examined the appropriateness of a private right of action under the FMCSA for those personal injuries.

### A. Facts

On May 5, 2002, Tyler Schramm, a minor, was driving a pick-up truck that collided with a tractor-trailer being driven by Brian Foster an employee of Groff Brothers Trucking, LLC (“Groff Brothers”). Schramm’s vehicle traveled under the tractor-trailer and stopped on the other side of truck, causing the roof of Schramm’s vehicle to be torn off. This accident occurred after Foster failed to obey a stop sign and turned in front of on-coming traffic. Schramm barely survived the accident; he is in a semi-vegetative state from which he is not expected to recover. In addition to the injuries to his body, Schramm will not be able to perform any basic life functions without assistance.

The tractor-trailer being driven by Foster contained a load of soymilk heading from Jasper Products, LLC (“Jasper”) to the White Rose Food Corporation. C.H. Robinson Worldwide, Inc. (“Robinson”), a third party logistics company, contacted Groff Brothers after Jasper requested transportation arrangements. Groff was already under a contract carrier agreement with Robinson and accepted the transportation request, assigning the job to Foster.

Robinson Worldwide is a third party logistics company that specializes in “brokering the shipment of goods via truck, rail, ocean and air.” Robinson does not transport the actual goods nor does it actually own any transportation vehicles. Like other third party logistics companies,

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87. See *Schramm*, 341 F. Supp. 2d at 543-46.
88. See id. at 547-50.
89. Id. at 541.
90. Id. at 540.
91. Id. at 541.
92. Id.
93. Id.
94. Id.
95. Id. at 540.
96. Id.
97. Id.
98. Id. at 541.
99. Id.
Robinson matches shippers with carriers so that "commercial goods can be moved efficiently from origin to destination." An experienced broker with over 150 branch offices, Robinson brokered nearly 3.2 million shipments in 2003 with more than 20,000 licensed motor carriers. Groff Brothers was one of Robinson’s many carriers that had a master transportation contract with Robinson prior to the shipment of Jasper’s goods and the collision with Tyler Schramm. Relevant provisions of the contract between Robinson and Groff Brothers expressly provided that the "relationship of Carrier to Robinson hereunder is solely that of an independent contractor" and that all drivers shall be employed by Groff Brothers and "are not employees or agents of Robinson or its Customers." Additionally, the contract stated "the Parties agree that Carrier shall be the party solely responsible for operating the equipment necessary to transport commodities under this Contract." Robinson assured its potential customers that, through its many motor carriers, it had the ability to ship cargo at a moment’s notice, and that while Robinson takes responsibility for freight claims, we [Robinson] also step forward when liability issues arise. We insulate the shipper in three important ways: 1. We work only with carriers who carry full insurance coverage. 2. If an accident occurs, the carrier indemnifies both the shipper and [Robinson] from liability. 3. In the rare event that the damage goes beyond the carrier’s insurance limits, [Robinson] maintains a liability insurance policy that pays the rest.

B. NEGLIGENCE/RESPONDEAT SUPERIOR CLAIM

Using the respondeat superior doctrine, Schramm argued that Robinson was vicariously liable for Foster’s negligence because Foster acted as Robinson’s agent when transporting the shipment from Jasper Products. However, given the express provisions of the contract and the conduct of the driver, the court ruled that Groff Brothers and Foster “remained at all times an independent contractor.” The court noted that the contract explicitly stated that the relationship between Robinson and Groff Brothers was that of an independent carrier and that the drivers were not agents of Robinson.

100. Id.
101. Id.
102. Id. at 542.
103. Id. at 544.
104. Id.
105. Id.
106. Id. at 542 (emphasis added).
107. Id. at 543.
108. Id. at 544.
109. Id. at 543-44.
In addition to the contractual language, there was no evidence that Robinson controlled the actions of Groff Brothers or Foster during the shipment, other than to give general guidance such as to obtain instructions before handling the load and to notify Robinson if the goods were in poor condition. More specifically, the court held that Foster's contacting Robinson to receive dispatch information did not constitute control by Robinson, nor did the provision of driving directions and special loading instructions. "Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during its performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties." Instructions on incidental details to the overall goal are not sufficient to hold Robinson liable for Foster's negligent acts when Robinson did not have control over Foster's movements during the course of shipment.

C. FMCSA PRIVATE RIGHT OF ACTION CLAIM

Schramm's second claim for personal injury damages was based on section 14704(a)(2) of the FMCSA, which allows an individual to bring a private action against a transportation carrier or broker for personal injury claims. In analyzing the appropriateness of this claim, the court found that the language of section 14704(a)(2) was "enigmatic" and in direct contrast to the section proceeding it. Section 14704(a)(1) provides that "[a] person injured because a carrier or broker providing transportation or service . . . does not obey an order of the Secretary [of Transportation] or the [Surface Transportation] Board . . . may bring a civil action to enforce that order . . . ." In resolving the incongruence between these two provisions, the court turned to the legislative history of the bill. The court found that the legislative history showed that the bill was intended to apply only to commercial damages, not personal injury cases. Additionally, the legislative history did not contain any discussion about the substantial impact that the establishment of a federal

110. Id. at 544-45.
111. Id. at 544 (citing Tartaglione v. Shaw's Express, Inc., 790 F. Supp. 438, 441 (S.D.N.Y. 1992)).
112. Id. at 545 (citing Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Canada (AFL-CIO), 353 F.2d 593, 596 (4th Cir. 1965)) (emphasis added).
113. Id. at 546.
114. Id. at 547; see also 49 U.S.C. § 14704(a)(2).
115. Schramm, 341 F. Supp. 2d at 547.
117. Schramm, 341 F. Supp. 2d at 547. See also H.R. REP. No. 104-311, at 88 ("This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved-by the parties.") (emphasis added).
private right of action would have on the workload of federal courts. The combination of these two factors, applicability to commercial disputes and failure to address the impact on federal courts, led the Schramm Court to conclude that “it is reasonable to infer that Congress did not intend to create such a right of action [for personal injuries].”

Schramm’s respondeat superior claim and federal claim under section 14704(a)(2) of the FMCSA were dismissed under a motion for summary judgment submitted by Robinson; however, the court allowed Schramm’s case to proceed under a negligent hiring cause of action.

Schramm v. Foster is illustrative of the conflict between the respondeat superior doctrine and FMCSA regulation allowing a private right of action for personal injuries. Many courts throughout the United States have come to the same conclusion as the Schramm Court that transportation brokers are not liable to personal injury victims involved in accidents with motor carriers.

However, the Schramm Court seemed to suggest that while a respondeat superior claim or a section 14704(a)(2) claim may not hold the transportation broker liable for personal injuries, the transportation broker may have played a role in those injuries. “[I]t cannot be ignored that Robinson increased the risk of harm to innocent third parties by its . . . actions.” The court went on to state that Robinson had “actively interjected itself into the relationship between shipper and carrier, and it has chosen to do business in a context heavily tinged with the public interest[,]” which imposes a “duty commensurate with its undertakings.”

While other courts have referred to the Schramm case, no other court has explicitly relied on the findings of the Schramm Court in denying a plaintiff’s respondeat superior claim or a claim for personal injury recovery under section 14704(a)(2) of the FMCSA.

118. Schramm, 341 F. Supp. 2d at 547.
119. Id.
120. Id. at 553. A decision as to the outcome of the negligent hiring claim has not been released to date.
121. See Tartagline, 790 F. Supp. at 441 and King, 107 So. 2d at 753 for an example of courts that have held that a transportation broker is not liable under the respondeat superior doctrine. See also Schramm, 341 F. Supp. 2d at 547, Stewart, 241 F. Supp. 2d at 1221, Renteria, 1999 WL 332668638, at *6 for an example of courts that have held that section 14704(a)(2) does not create a private right of action. But see Marrier, 140 F. Supp. 2d at 329 for an example of a case in which the court has held that a private right of action is permissible under section 14704(a)(2).
122. Schramm, 341 F. Supp. 2d at 552. Robinson’s promotional materials provided that “[i]n the rare event that the damage goes beyond the carrier’s insurance limits, [Robinson] maintains a liability insurance policy that pays the rest.” Id. at 542.
123. Id. at 553. Although the court dismissed the plaintiff’s claims under respondeat superior and 49 U.S.C. 14704(a)(2), the court allowed the plaintiff’s claim for negligent hiring to proceed to trial. See id.
VI. CONCLUSION: THE ROAD TO RECOVERY

Clearly, the increased role of the transportation broker in the motor carrier industry has provided valuable benefits to the entire transportation industry. However, the introduction of another player into the transportation equation does not come without costs. When an injured motorist brings a claim against the transportation broker under either respondeat superior or a private right of action under the FMCSA, that motorist is unlikely to recover any damages from the transportation broker.

Due to the fact that the relationship between the broker and the motor carrier is often deemed to be that of an independent contractor rather than a servant/employee, the transportation broker cannot be held liable for accidents that occur while the goods are in transit. Additionally, the restrictions placed on the private right of action under section 14704 of the FMCSA do not allow injured motorists in the vast majority of states to assert a claim against the transportation brokers.

Criticism of this exemption from liability for transportation brokers has been expressed. The court in Schramm recognized that when the transportation broker actively inserts itself into relationship between the shipper and carrier, the transportation broker may assume some of the liability when these types of actions arise. The court went on to state that "this is a case in which the law may simply have to catch up with an obligation that [the transportation broker] has voluntarily assumed . . . ." The court suggested that industry regulators could address this issue through new regulations supported by public policy. One suggested regulation would require carriers, with loads above a certain weight and/or over certain distances, to carry extra insurance for serious accidents.

Additionally, one critic has noted that deregulation has lead to broker abuse, including "undercapitalized, fly-by-night brokers who are preying on unsuspecting carriers and shippers." Based on those con-


125. See Kinsler, supra note 11, at 289. "If used effectively, brokers can lower the transportation costs of domestic and international shippers and increase the revenue of carriers, which ultimately will stimulate interstate and overseas trade." Id.
126. Schramm, 341 F. Supp. 2d at 553.
127. Id.
128. Id. at 553 n.11.
129. Id.
130. Kinsler, supra note 11, at 291.
cerns, this critic has recommended increased regulations for transportation brokers. These regulations include limiting entry of transportation brokers to those with adequate capital, allocation of personal injury damage among brokers and carriers, and increased regulation similar to that of other intermediaries who handle money on behalf of others like stockbrokers, real estate brokers, and trustees.\textsuperscript{131}

Regardless of which road an injured motorist takes, neither appear to represent an easy street to recovery. Third-party transportation brokers aren’t likely to be held liable if sued under a respondeat superior doctrine or under FMCSA’s private right of action.

\textsuperscript{131} Id. at 292-93. In relation to the allocation of personal injury liability between broker and carrier, the author recommends that a freight broker be required to carry insurance for these damages and that the transportation broker be classified as an independent intermediary which would eliminate the respondeat superior disputes involved in these types of cases. Id. at 322-324.
The Carmack Amendment and the American Rule:
Is Arbitration a Necessary Prerequisite to an
Award of Attorney’s Fees?

Kelly A. Fischer*

I. INTRODUCTION

Under a practice in the United States judicial system commonly re-
ferred to as the “American rule,” attorney’s fees are generally not a re-
coverable cost of litigation.¹ The United States Supreme Court first
articulated this rule in Arcambel v. Wiseman, wherein the Court held that
attorney’s fees were not to be included in damages calculations.² In so
holding, the Court stated,

We do not think that this charge ought to be allowed. The general practice of
the United States is in opposition to it; and even if that practice were not
strictly correct in principle, it is entitled to the respect of the court, till it is
changed, or modified, by statute.³

Courts have strictly adhered to this general prohibition against shift-
ing attorney’s fees to the losing party.⁴ Consequently, the legislature has

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2. Carter Chandler, Loggerhead Turtle v. County Council: The Future of Fee Shifting in
4. Chandler, supra note 2, at 481.

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created some statutory exceptions.\textsuperscript{5} There are currently over two hundred federally created statutory exceptions to the American rule.\textsuperscript{6} One such exception applies to suits between shippers and carriers in the transport of household goods.\textsuperscript{7}

Congress enacted the Carmack Amendment in 1906 as part of the former Interstate Commerce Act.\textsuperscript{8} The Amendment governs transportation between the United States and a foreign country as well as interstate transportation.\textsuperscript{9} "The purpose of the Carmack Amendment was to create a national scheme of carrier liability for goods damaged or lost during interstate shipment and to 'relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.'"\textsuperscript{10} Specifically, the Amendment "imposes a form of strict liability on the carrier."\textsuperscript{11} "The shipper establishes a prima facie case of Carmack liability by showing 'delivery in good condition, arrival in damaged condition, and the amount of damages.'"\textsuperscript{12} The statute assigning liability to carriers for the transport of household goods is codified at 49 U.S.C. § 14706.\textsuperscript{13}

49 U.S.C. § 14708(d) provides in pertinent part that "[i]n any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service . . . concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees . . . ."\textsuperscript{14} While the body of case law addressing 49 U.S.C. § 14708(d) is scarce, courts seem to agree that 49 U.S.C. § 14708(d) grants an exception to the general rule against attorney's fee shifting.\textsuperscript{15} However, subsection (d) does not provide for an absolute award of attorney's fees to the shipper. Rather, it provides that attorney's fees be awarded only under certain specified circumstances.\textsuperscript{16} Courts differ as to when that exception should be applied. Specifically, the courts

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 1464-65 (citing 49 U.S.C. § 13501(1)(C) (2000)).
\item Id. at 1464 (quoting Reider v. Thompson, 339 U.S. 113, 119 (1950).
\item Id. at 1465 (citing 49 U.S.C. § 11706). The provisions of the Carmack Amendment relating to motor carriers are codified at 49 U.S.C. § 14706. Id. at 1464 n.18.
\item Id. at 1465 (quoting Mo. Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964).
\item Id. at 1464 n.18.
\item Id.
\item E.g., Yakubu v. Atlas Van Lines, 351 F. Supp. 2d 482, 491 (W.D. Va. 2004) (holding that, because the parties failed to submit a claim through arbitration, section 14708 was inapplicable and, thus, attorneys’ fees were not awarded).
\item Id.
\end{enumerate}
\end{footnotesize}
have not agreed as to whether a shipper must attempt to arbitrate before he is statutorily entitled to an award of attorney’s fees.\(^{17}\)

_Campbell v. Allied Van Lines, Inc._, decided by the Ninth Circuit Court of Appeals, is the most recent case interpreting the statutory exception provided for in 49 U.S.C. § 14708(d).\(^ {18}\) The Ninth Circuit determined that a shipper need not engage in arbitration in order to be properly awarded attorney’s fees pursuant to statute.\(^ {19}\) The Ninth Circuit’s interpretation of subsection (d) stands in isolation from, and in contradiction to, the interpretation set forth by other courts in previous decisions.\(^ {20}\) Other courts have interpreted subsection (d) to require a shipper to attempt arbitration before permitting the recovery of attorney’s fees.\(^ {21}\)

Whether a court will apply the _Campbell_ interpretation, allowing a fee award in the absence of arbitration, or the alternative interpretation, requiring arbitration prior to a fee award, is of great import to shippers and carriers. This is particularly true in light of the fact that “[t]he Carmack Amendment preempts many state and common law claims against carriers . . . .”\(^ {22}\) While the majority of the decisions on this topic have determined that arbitration is a prerequisite to a proper request for attorney’s fees,\(^ {23}\) the number of opinions on point is, at best, limited. Furthermore, the United States Supreme Court has yet to step into the fray. Consequently, due to the lack of precedent, shippers and carriers alike have a captive audience in the courts. Both parties have ample opportunity to present their own policy arguments and interpretations of legislative history and intent, to sway the opinion of the court, an opportunity well taken advantage of by the parties in _Campbell._

This Article will first set forth and explain the relevant statutory sec-

\(^ {17}\) _Compare Yakubu_, 351 F. Supp. 2d at 491 (holding that at least one party must submit the claim to arbitration to invoke section 14708), _with Campbell v. Allied Van Lines, Inc._, 410 F.3d 618, 623 (9th Cir. 2005) (holding that a shipper need not invoke arbitration in order to be statutorily entitled to an award of attorney’s fees).

\(^ {18}\) _Campbell_, 410 F.3d 618.

\(^ {19}\) _Id._ at 623.

\(^ {20}\) _Compare Campbell_, 410 F.3d at 623 (holding that a shipper need not invoke arbitration in order to be statutorily entitled to an award of attorney’s fees), _with Yakubu_, 351 F. Supp. 2d at 491 (holding that, because the parties failed to submit a claim through arbitration, section 14708 was inapplicable and, thus, attorneys’ fees were not awarded) _and Collins Moving & Storage Corp. of S.C. v. Kirkell_, 867 So.2d 1179, 1183 (Fla. Dist. Ct. App. 2004) (holding that section 14708 “would come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708.”).

\(^ {21}\) _E.g., Yakubu_, 351 F. Supp. 2d at 491; _Collins_, 867 So.2d at 1183.

\(^ {22}\) _Campbell_, 410 F.3d at 620 (citing Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992)). _See infra_ text accompanying notes 18 & 19 for more detailed information concerning the Carmack Amendment.

\(^ {23}\) _E.g., Yakubu_, 351 F. Supp. 2d at 491; _Collins_, 867 So.2d at 1183.
tions. It will then proceed to present the current, albeit limited, case law interpreting those statutes, using the Ninth Circuit’s decision in *Campbell* as a framework. This Article will conclude with an analysis of the Ninth Circuit’s opinion in light of other court decisions, the parties’ arguments, and the author’s reading of the statute.

II. THE CARMACK AMENDMENT

“The Carmack Amendment to the Interstate Commerce Act establishes motor carrier liability for ‘the actual loss or injury to the property’ a carrier transports.”24 The Carmack Amendment was enacted to create a “national scheme of carrier liability for goods damaged or lost during interstate shipment.”25

In deciding *Campbell*, the Ninth Circuit focused nearly exclusively on subsection (d) of section 14708.26 Subsection (d) provides:

(d) Attorney’s fees to shippers. – In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney’s fees if –

(1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
(2) the shipper prevails in such court action; and
(3) (A) a decision resolving the dispute was not rendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or
(B) the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed.27

Additionally, other portions of the statute shed light on the appropriate interpretation of subsection (d). These provisions are relevant both to attorney’s fees and the arguments employed by the parties in *Campbell*.

Subsection (a) of section 14708 provides that “a carrier providing transportation of household goods . . . must agree to offer in accordance with this section to shippers of household goods arbitration as a means of

26. *Id.* at 620-23.
settling disputes between such carriers and shippers of household goods concerning damage or loss to the household goods transported.” Subsection (b) sets forth the arbitration requirements. Subsection (b)(6), cited by the shippers in Campbell, provides:

(6) Requests. – The carrier must not require the shipper to agree to utilize arbitration prior to the time that a dispute arises. If the dispute involves a claim for $5,000 or less and the shipper requests arbitration, such arbitration shall be binding on the parties. If the dispute involves a claim for more than $5,000 and the shipper requests arbitration, such arbitration shall be binding on the parties only if the carrier agrees to arbitration.

Subsection (b)(8), which is referenced under subsection (d)(3)(A), provides:

(8) Deadline for decision. – The arbitrator must, as expeditiously as possible but at least within 60 days of receipt of written notification of the dispute, render a decision based on the information gathered; except that, in any case in which a party to the dispute fails to provide in a timely manner any information concerning such dispute which the person settling the dispute may reasonably require to resolve the dispute, the arbitrator may extend such 60-day period for a reasonable period of time. A decision resolving a dispute may include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, and compensation for damages.

Finally, subsection (e) provides:

(e) Attorney’s fees to carriers. – In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation, or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, such carrier may be awarded reasonable attorney’s fees by the court only if the shipper brought such action in bad faith –

(1) after resolution of such dispute through arbitration under this section; or
(2) after institution of an arbitration proceeding by the shipper to resolve such dispute under this section but before –
(A) the period provided under subsection (b)(8) for resolution of such dispute (including, if applicable, an extension of such period under such subsection) ends; and
(B) a decision resolving such dispute is rendered.
For purposes of statutory interpretation, it is also relevant to examine the predecessor to the current statute. The predecessor to 49 U.S.C. § 14708 was codified at 49 U.S.C. § 11711.\textsuperscript{34} Subsection (a)(1) of section 11711 provided in part that

[o]ne or more motor common carriers providing transportation of household goods subject to the jurisdiction of the Commission under Subchapter II of chapter 105 of this title who want to establish a program to settle disputes between such carriers and shippers of household goods concerning the transportation of household goods may submit an application for establishing such program to the Commission.\textsuperscript{35}

In contrast to the current version of the statute, carriers were not required to offer shippers an arbitration program.\textsuperscript{36} Consequently, subsection (d) of the old version contains language different from the current version of the statute. Subsection (d) of section 11711 provides:

(d) In any court action to resolve a dispute between a shipper of household goods and a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney’s fees if—

(1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
(2) the shipper prevails in such court action; and
(3) (A) no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute; or (B) a decision resolving the dispute was not rendered under a dispute settlement program approved under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or (C) the court proceeding is to enforce a decision rendered under a

\textsuperscript{34} See Campbell, 410 F.3d at 624.


\textsuperscript{36} Compare 49 U.S.C. 14708(a) (2000) ("[A] carrier providing transportation of household goods . . . must agree to offer in accordance with this section to shippers of household goods arbitration as a means of settling disputes between such carriers and shippers of household goods concerning damage or loss to the household goods transported." (emphasis added)), with 49 U.S.C. § 11711(a)(1) (1994) ("[M]otor common carriers providing transportation of household goods . . . who want to establish a program to settle disputes between such carriers and shippers of household goods concerning the transportation of household goods may submit an application for establishing such program to the Commission." (emphasis added)). For purposes of this Article, the “current version” of the statute refers to the 2000 United States Code, the version addressed in the Campbell decision. See Campbell, 410 F.3d at 620. A new version of the statute went into effect on August 10, 2005. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-U), Pub. L. No. 109-59, § 4206, 119 Stat. 1144, 1757 (2005).
dispute settlement program approved under this section and is instituted after the period for performance under such decision has elapsed.\textsuperscript{37}

On a basic level, \textit{Campbell} is a statutory construction case. Thus, while not all of these sections were addressed by the \textit{Campbell} court, these statutes provide essential background knowledge necessary to fully understand the controversy. In fact, the court’s failure to examine the above sections was arguably the primary source for the current disagreement among courts’ interpretation of the Carmack Amendment.

III. \textit{Campbell v. Allied Van Lines, Inc.}

\textit{Campbell v. Allied Van Lines, Inc.} asked the Ninth Circuit Court of Appeals to determine whether attorney’s fees may be properly awarded to a shipper who successfully sues a household goods carrier in the absence of an attempt to arbitrate.\textsuperscript{38}

A. Facts and Procedural Background

The relevant facts, undisputed by both parties, are as follows.\textsuperscript{39} Edward and Susan Campbell ("Shippers"), entered into contracts with Kachina Moving and Storage, Inc., Mayflower Transit, Inc., Gates Moving and Storage, Inc. and Allied Van Lines, Inc. ("Carriers") “to transport their household goods from Arizona to Florida.”\textsuperscript{40} However, Shippers’ goods were damaged in transit.\textsuperscript{41} Consequently, Shippers sued Carriers under the Carmack Amendment\textsuperscript{42} to the Interstate Commerce Act.\textsuperscript{43} The Carmack Amendment “establishes motor carrier liability for ‘the actual loss or injury to the property’ a carrier transports.”\textsuperscript{44}

Shippers first filed their claim in Arizona state court.\textsuperscript{45} However, because the case involved a federal question, Carriers removed the suit to the United States District Court for the District of Arizona.\textsuperscript{46}

Following a trial in the district court, the jury found in favor of Shippers and, accordingly, awarded Shippers over $15,000 in compensatory

\textsuperscript{37} 49 U.S.C. § 11711(d).

\textsuperscript{38} \textit{Campbell}, 410 F.3d at 619.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}


\textsuperscript{43} \textit{Campbell}, 410 F.3d at 619.

\textsuperscript{44} \textit{Id.} at 620 (quoting 49 U.S.C. § 14706(a)(1) and citing Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000)).

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}
damages and $31,000 in emotional distress damages.\textsuperscript{47} Of greater significance to this Article, the district court granted Shippers’ motion requesting attorney’s fees in the amount of $15,400.\textsuperscript{48} Carriers appealed this award of attorney’s fees, asserting that, because Shippers did not engage in arbitration prior to initiating the suit, Shippers were not statutorily entitled to the award.\textsuperscript{49} The parties’ dispute centered “on the meaning of the attorney’s fees provisions in subsection (d) [of 49 U.S.C. § 14708].”\textsuperscript{50} Carriers argued that subsection (d) is inapplicable when a shipper fails to attempt arbitration prior to bringing an action in court.\textsuperscript{51} In contrast, Shippers argued that subsection (d) does not provide for such an arbitration requirement.\textsuperscript{52}

B. Carriers’ Argument

Carriers supported their position by asserting several policy arguments, examining the plain language of the statute and its legislative history, and relying on case law. With respect to policy arguments, Carriers first addressed Shippers’ “generalized criticism . . . of the Carmack Amendment and its impact on consumer claims.”\textsuperscript{53} Shippers argued that requiring a shipper to invoke arbitration would be “to the detriment of consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies.”\textsuperscript{54} In response to this argument, Carriers drew an analogy between the Carmack Amendment and workers compensation statutes, asserting that social compromise is a legislative reality and that if Shippers believe the compromise to be unfair, then “their forum is Congress.”\textsuperscript{55}

Workers compensation statutes afford strict liability for injuries arising out of employment, without having to prove negligence and with elimination of certain employer defenses, such as contributory negligence. The employee is limited, though, to the single remedy as specified

\textsuperscript{47} Id. The trial court did not disclose the basis for its decision to award Shippers emotional distress damages. See id. While Carriers elected not to appeal this damages award, “[n]umerous courts have concluded that the pre-emption of the Carmack Amendment precludes such damages.” Appellant’s Reply Brief at 1 n.2, Campbell, 410 F.3d 618 (No. 04-15969) (citing Hoskins v. Bekins Van Lines, 343 F.3d 769, 777 (5th Cir. 2003), Smith v. United Parcel Serv., 296 F.3d 1244, 1246-49 (11th Cir. 2002), Gordon v. United Van Lines, Inc., 130 F.3d 282, 287 (7th Cir. 1997), and Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 379 (2d Cir. 1994)).

\textsuperscript{48} Campbell, 410 F.3d at 619. $15,400 is representative of approximately one-third of the total award. In addition to the $15,400, Shippers requested costs. Id.

\textsuperscript{49} Id. at 619-20; see supra text accompanying note 19.

\textsuperscript{50} Id. at 620.

\textsuperscript{51} Id. at 619.

\textsuperscript{52} Appellee’s Answering Brief, supra note 30, at 5-6.

\textsuperscript{53} Appellant’s Reply Brief, supra note 47, at 1.

\textsuperscript{54} Appellee’s Answering Brief, supra note 30, at 7.

\textsuperscript{55} Appellant’s Reply Brief, supra note 47, at 1-3.
by statute. "The purpose of the workers compensation statute is to provide a trade-off of no-fault compensation for the costs and risks of conventional tort litigation."\(^{56}\)

The Carmack Amendment also involves social trade-offs. While in part Congress was assisting interstate commerce by pre-empting possibly diverse state laws and imposing a uniform regulation of claims for loss or damage to interstate shipments, the elements of proof for a consumer claim were also made simple and uniform. A shipper claimant need only show three things: "(1) delivery of the goods in good condition, (2) receipt by the consignee of less goods or damaged good[s], and (3) the amount of damages."\(^{57}\)

Carriers next addressed Shippers' argument that, because Carriers did not invoke arbitration or inform Shippers that they would be precluded from receiving a fee award in the absence of arbitration, Carriers' arguments were simply "after-the-fact lawyering[,]" at least implicitly asserting that Carriers did not believe the statute at issue to require arbitration at the time of the conflict.\(^{58}\) To oppose this argument, Carriers highlighted the "practical reality that carriers do not initiate consumer claims, whether by arbitration or litigation; shippers do."\(^{59}\) Furthermore, Carriers argued that the statute "contemplates that it is the shipper who controls whether there is an arbitration of a dispute and the onus to make the request is on the shipper."\(^{60}\) Specifically, Carriers emphasized that a carrier must agree to offer arbitration and must give the shipper notice of the availability of such arbitration as a condition of registration.\(^{61}\) However, the carrier may not require the shipper to engage in arbitration.\(^{62}\) Additionally, Carriers pointed to the fact that "[t]he statute specifies that the carrier provide forms and information to initiate arbitration 'upon request of a shipper.'"\(^{63}\) Accordingly, Carriers concluded, "It is irrelevant whether the Carrier defendants could have asked [Shippers] to make [a request for arbitration.]"\(^{64}\)

Following their policy arguments, Carriers looked to the plain meaning of the statute at issue. According to Carriers, when read together, the plain language of subsections (d)(3)(A) and (b)(8) of section 14708 dic-

\(^{56}\) Id. at 1-2 (quoting Barron v. United States, 473 F. Supp. 1077, 1086 n.7 (D. Haw. 1979), aff'd in part & rev'd in part, 654 F.2d 644 (9th Cir. 1981) and citing Lennon v. Waterfront Transp., 20 F.3d 658, 662 (5th Cir. 1994)).

\(^{57}\) Id. at 2 (quoting Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003)).

\(^{58}\) Appellee's Answering Brief, supra note 30, at 7.

\(^{59}\) Appellant's Reply Brief, supra note 47, at 4.

\(^{60}\) Id.

\(^{61}\) Id. (citing 49 U.S.C. § 14708(a), (b)(2)).

\(^{62}\) Id. (citing 49 U.S.C. § 14708(b)(6)).

\(^{63}\) Id. (quoting 49 U.S.C. § 14708(b)(3)).

\(^{64}\) Id.
tate that a shipper may not recover attorney’s fees unless the shipper “first invoked the statutorily required arbitration program.” Subsection (b)(8) “calls for a decision by an arbitrator within 60 days of written notification of the dispute being given to the arbitrator.” Therefore, Carriers argued that, if the shipper does not request arbitration, the arbitrator necessarily does not receive notice of the dispute and, thus, the requirement of subsection (d)(3)(A) is not satisfied. Consequently, if the shipper does not request arbitration, the statute precludes the shipper from being awarded attorney’s fees. Accordingly, because Shippers did not request arbitration, Carriers argued that the district court improperly awarded Shippers attorney’s fees.

In further support of their plain meaning argument, Carriers asserted that, had Congress intended for a failure to invoke arbitration to satisfy the requirement set forth in subsection (d)(3)(A), Congress “would have worded the statute differently...” Specifically, Carriers argued that “Congress would not... have needed to include all those requirements regarding an arbitration program...” Instead, the statute could have “simply permit[ted] a shipper to always request a fee award where it was the prevailing party in court.” Thus, Carriers asserted that subsection (d) “presume[s] participation in the arbitration program described in the rest of [s]ection 14708.”

In addition to the plain meaning of the statute, Carriers asserted that the statute’s legislative history indicated a congressional intent to preclude shippers from being awarded attorney’s fees in the absence of arbitration. Carriers argued that

Congress sought to influence carriers to have an available arbitration program which a shipper could then elect to use or not. Congress also sought to influence carriers to provide a meaningful program which would render decisions in a timely manner and which decisions would be complied with by carriers. Congress sought to influence shippers to use such arbitration programs in lieu of courts by restricting fee awards... to where the program has been utilized or attempted to be utilized...

Carriers emphasized that fee awards had not been previously availa-
ble.\textsuperscript{76} They further highlighted that Congress intended for shippers to utilize or, at least, attempt to utilize, arbitration programs.\textsuperscript{77} "Since it is the shipper . . . who selects the forum, it is the shipper who is encouraged to arbitrate by such restriction on the availability of a fee award."\textsuperscript{78} Carriers suggested that the requirement set forth in subsection (d)(3)(A) would be satisfied in the event an arbitration decision was not timely rendered or a carrier refused to comply with the decision, permitting an award of attorney's fees to the shipper.\textsuperscript{79}

Furthermore, Carriers referred to specific congressional language stating, "[t]he legislative history also directly addressed influencing shippers against pursuing lawsuits to defeat an adverse or pending . . . arbitration."\textsuperscript{80} To discourage shippers from filing non-meritorious claims in court, the section provides for the award of attorney's fees to the successful carrier claimant where a shipper has brought court action in bad faith either (a) after a decision has been issued under the program; or (b) after a shipper has instituted a proceeding under the program, but before the decision has been rendered within the time frame or extension thereof provided under the program.\textsuperscript{81} Given the congressional intent and the language provided, Carriers impliedly asserted that, because carriers cannot claim attorney's fees until the shipper has initiated an arbitration action, shippers should likewise not be afforded any additional latitude in requesting fees.\textsuperscript{82}

Finally, Carriers relied on federal case law to support their contention that shippers must engage in arbitration before they are entitled to an award of attorney's fees.\textsuperscript{83} Specifically, Carriers relied on \textit{Collins Moving \\& Storage Corp. of South Carolina v. Kirkell}.\textsuperscript{84} \textit{Collins} involved a question analogous to the question presented in \textit{Campbell}.\textsuperscript{85} In \textit{Collins}, the shippers "claimed that certain household goods shipped through [the carrier] were damaged and others were missing."\textsuperscript{86} The shippers brought

\textsuperscript{76} Id. at 8.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} See id.

\textsuperscript{80} Id.


\textsuperscript{82} See id.

\textsuperscript{83} Id. However, it should be noted that the case law relevant to the issue presented in \textit{Campbell} is scarce. Id. Furthermore, the decisions issued on topic were not binding on the Ninth Circuit Court of Appeals. Id. at 9.

\textsuperscript{84} Collins Moving \\& Storage Corp. of S.C. v. Kirkell, 867 So.2d 1179 (Fla. Dist. Ct. App. 2004).

\textsuperscript{85} Id. at 1181 (challenging awarded attorney's fees to shippers in the absence of an arbitration decision under 49 U.S.C. § 14708).

\textsuperscript{86} Id.
a strict liability claim under the Carmack Amendment. Following a jury trial, the jury awarded the shippers damages in the amount of $64,031. The shippers asserted that "because [the carrier] had not disclosed that [the shippers] had a right to seek arbitration," and a decision resolving the dispute had not been rendered through arbitration, the trial court should award attorney's fees pursuant to 49 U.S.C. § 14708." The trial court agreed and awarded the shippers $120,000 in attorney's fees. The carrier appealed this fee award. The Florida District Court of Appeal

87. Id.
88. Id.
89. In overturning the trial court, the Collins court determined that the shippers' assertion that an award of attorney's fee award was proper because they did not receive notice of the carrier's arbitration program lacked merit. Id. at 1183. The court looked to the fact that the shippers timely filed their action and that they properly brought the action under section 14708. Id. The court reasoned that, because section 14706, which addresses arbitration, does not contain a provision for attorney's fees, the shippers had to have known they had an option to arbitrate. Id. The court concluded that the shippers' failure to submit a claim through arbitration, despite their knowledge that such an option was available, rendered section 14708 inapplicable. Id. at 1183-84.

In support of their contention, the shippers cited Ward v. Allied Van Lines, Inc., 231 F.3d 135 (4th Cir. 2000). Id. The Ward court held that, because the carrier was obligated to give the shippers notice of the availability of the arbitration program and because the carrier failed to give the shippers notice, the shippers did not have knowledge of the program. Ward, 231 F.3d at 142 (citing Drucker v. O'Brien's Moving & Storage Inc., 963 F.2d 1171, 1174 (9th Cir. 1992); Rini v. United Van Lines, Inc., 903 F. Supp. 234, 236-37 (D. Mass. 1995)). Because the shippers did not have knowledge of the arbitration option, the arbitration program was not available to them. Id. The Collins court distinguished the shippers' claim in Ward because the Collins shippers "acknowledged the arbitration option, but sought attorney's fees under the federal statute without submitting a claim through the arbitration procedure." Collins, 867 So.2d at 1184.

Despite this alleged difference, a simple reading of the facts of Collins and Ward does not warrant such a distinction. However, the slight difference between the old provision, 49 U.S.C. § 11711, and the new provision, 49 U.S.C. § 14708, may provide some understanding for the confusion. The old provision, 49 U.S.C. § 11711(d) provides that

[i]n any court action to resolve a dispute between a shipper of household goods and a motor common carrier . . . concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if - (1) the shipper submits a claim to the carrier within 120 days after the date the shipments delivered or the date the delivery is scheduled, whichever is later; (2) the shipper prevails in such court action; and (3)(A) no dispute settlement program approved under this section was available for use by the shippers to resolve the dispute . . .

Ward, 231 F.3d at 142 (quoting 49 U.S.C. § 11711(d)). In contrast, the new provision, 49 U.S.C. § 14708(d)(3)(A), requires that "a decision resolving the dispute was not tendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection . . . ." Collins, 867 So.2d at 1183. Under this new provision, carriers are "required to offer neutral arbitration as a means of settling disputes . . . ." Ward, 231 F.3d at 141. Because arbitration programs are mandatory, the Collins court may have determined that the shippers had constructive notice that such a program existed.

90. Collins, 867 So.2d at 1181.
91. Id.
92. Id. at 1180-81.
reversed the trial court’s attorney’s fee award.\textsuperscript{93}

In deciding that the shippers were improperly awarded attorney’s fees, the \textit{Collins} court looked to the title of 49 U.S.C. § 14708, “Dispute settlement program for household goods carriers.”\textsuperscript{94} The court stated, “The provision authorizing an award of attorney’s fees under section 14708 would come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708.”\textsuperscript{95} Following this rationale, the court determined that section 14708 was inapplicable because neither the shippers nor the carrier had initiated arbitration.\textsuperscript{96} The court held that failure to invoke arbitration does not satisfy the requirements of subsection (d)(3)(A).\textsuperscript{97}

For the aforementioned reasons, Carriers in \textit{Campbell} asked the Ninth Circuit Court of Appeals to reverse the district court’s decision to award Shippers attorney’s fees.\textsuperscript{98} Because it was undisputed that Shippers failed to utilize the available arbitration program, the district court was precluded from awarding fees as a matter of law.\textsuperscript{99}

C. Shippers’ Argument

Contrary to Carriers’ argument, Shippers argued that the statute does not require a shipper to invoke the arbitration program in order for a shipper to be awarded attorney’s fees.\textsuperscript{100} Specifically, Shippers asserted that there are three elements, not including participation in arbitration, that must be satisfied before attorney’s fees may be properly awarded. First, the shippers must timely submit a claim pursuant to subsection (d)(1).\textsuperscript{101} Second, the shipper must be the prevailing party in the court action pursuant to subsection (d)(2).\textsuperscript{102} Third, the decision resolving the dispute must not have been rendered through arbitration pursuant to subsection (d)(3)(A).\textsuperscript{103} Shippers arrived at this conclusion by relying on the plain language of the statute.\textsuperscript{104} Consequently, because each of the above-mentioned elements had been satisfied, Shippers argued that the district court properly awarded them attorney’s fees.\textsuperscript{105}

\textsuperscript{93} \textit{Id}. at 1184.
\textsuperscript{94} \textit{Id}. at 1183.
\textsuperscript{95} \textit{Id}.
\textsuperscript{96} \textit{Id}.
\textsuperscript{97} \textit{See id}.
\textsuperscript{98} Appellant’s Reply Brief, \textit{supra} note 47, at 9.
\textsuperscript{99} \textit{Id}.
\textsuperscript{100} \textit{Campbell}, 410 F.3d at 620.
\textsuperscript{101} Appellee’s Answering Brief, \textit{supra} note 30, at 5-6.
\textsuperscript{102} \textit{Id}.
\textsuperscript{103} \textit{Id}.
\textsuperscript{104} \textit{Id}. at 6.
\textsuperscript{105} \textit{Id}.
Shippers further urged the court not to add language to the statute.\textsuperscript{106} Shippers drew the court's attention to the fact that "49 U.S.C. § 14708(d) does not state that if the shippers file a lawsuit instead of electing to use arbitration, then the shippers will not be allowed to recover their attorney's fees notwithstanding the fact that they are the prevailing party in the lawsuit against the carrier."\textsuperscript{107} They argued that,

\begin{quotation}
[i]f Congress had intended to deny shippers their attorney's fees, the law would clearly state this, but the statute does not contain this express language. Instead the plain express language states that if an arbitration decision is not made within the specified time frame, a prevailing shipper shall be awarded its reasonable attorney's fees.\textsuperscript{108}
\end{quotation}

Shippers asserted that, if the court interpreted section 14708 in the way Carriers proposed, it would be to the detriment of "consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies."\textsuperscript{109}

In support of this contention, Shippers requested that the court construe subsection (d)(3)(A) "in light of the overall purpose and structure of the whole statutory scheme," including subsection (b)(6).\textsuperscript{110} "49 U.S.C. § 14708(b)(6) provides that when a dispute arises between the shipper and a carrier in excess of $5,000.00, the arbitration shall be binding on the parties only if, 'the carrier agrees to arbitration.'"\textsuperscript{111} In light of subsection (b)(6), Shippers argued that, in cases where a shipper requests arbitration and the carriers refuse to arbitrate, applying Carriers' interpretation of the statute would deny a shipper attorney's fees at the carriers' discretion because there would be no decision rendered through arbitration.\textsuperscript{112} "Such an interpretation would have the pernicious effect of allowing carriers to reject arbitration in complex cases and still deprive prevailing shippers of attorney's fees."\textsuperscript{113}

Shippers contended that it was not reasonable to subject the shipper to the discretion of the carrier. Instead, Shippers asserted that the plain language and purpose of the statute dictated that, "if [Shippers] had re-

\begin{footnotesize}
\begin{itemize}
\item[106.] Id. at 7.
\item[107.] Id. at 6-7.
\item[108.] Id. at 7.
\item[109.] Id.
\item[110.] Id. (quoting United States v. Derr, 968 F.2d 943, 945 (9th Cir. 1992)).
\item[111.] Id. (quoting 49 U.S.C. § 14708(b)(6)). The 2006 version of 49 U.S.C. § 14708(b)(6) provides that "if the dispute involves a claim for more than $10,000 and the shipper requests arbitration, such arbitration shall be binding on the parties only if the carrier agrees to arbitration." The version referenced by Shippers was in effect until August 9, 2005. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1757 (2005).
\item[112.] Appellee's Answering Brief, supra note 30, at 7-8.
\item[113.] Id. at 7.
\end{itemize}
\end{footnotesize}
quested an arbitration, and if [Carriers] had refused to arbitrate, then there would be no decision rendered through arbitration and [Shippers], as the prevailing party would still be entitled to their attorney’s fees . . . ."114 In support of this assertion, Shippers stated, “The statute does not penalize, by way of denying the award of attorney’s fees to either the shipper or the carrier, for refusing to use arbitration when the amount in controversy is in excess of $5,000.00.”115 Instead, “[t]he arbitration program is to be used at the option of both the shipper and the carrier when the controversy is in excess of $5,000.00.”116 Moreover, Shippers asserted that “[t]he purpose of the statute was to mandate that carriers establish an arbitration procedure as an option for use by the shippers that complies with 49 U.S.C. § 14708(b)(1)-(8)[,]” not to preclude shippers from being awarded attorney’s fees in the absence of arbitration.117 Accordingly, when a shipper timely submits a claim, prevails in the action, and an arbitration decision is not rendered, whatever the reason, the shipper is statutorily entitled to a fee award.118

To combat Carriers’ legislative history argument, Shippers first reminded the court that because the language of the statute was clear and unambiguous, the legislative history need not be examined.119 However, Shippers asserted that, even in light of the statute’s legislative history, the award of attorney’s fees was proper. Specifically, Shippers stated, “[T]he historical discussions only serve to demonstrate that Congress is seeking [to] influence the moving companies. The legislative history does not reflect an attempt to directly influence the conduct of shippers . . . .”120 Shippers argued that Congress has encouraged moving companies to arbitrate by “require[ing] moving companies to make arbitration available, and award[ing] attorney[’s] fees to shippers if the process is not utilized and shippers [prevail] in court.”121

Following this line of reasoning, Shippers further argued that subsection (d), addressing attorney’s fees, and the question of whether the arbitration program is optional or mandatory, are two separate issues.122 All the statutory modifications addressed by the cited House Reports deal only with the question [of] whether the dispute resolution [program] is converted from optional to mandatory. Congress could certainly have

114. Id. at 8.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id. at 11.
121. Id. at 12.
122. Id.
changed subsection (d) to reflect that attorney[s]' fees are not required where no arbitration has been requested by the shipper . . . .\textsuperscript{123}

Had Congress intended to require a shipper to invoke arbitration in order to recover attorney's fees, Congress would have explicitly indicated to that end; however, "Congress did not do so . . . ."\textsuperscript{124} Consequently, Shippers argued that, because Congress intended to influence the moving companies, not shippers, when it enacted 49 U.S.C. § 14708, and because "none of the legislative history cited by [Carriers] directly shows to the contrary[,]" Carriers' argument lacked merit.\textsuperscript{125}

Finally, to counter Carriers' reliance on Collins, Shippers criticized the Collins decision as being "remarkably devoid of analysis."\textsuperscript{126} Shippers discouraged the court from relying on Collins stating that "reliance on perfunctory state court decisions simply does not provide meaningful assistance."\textsuperscript{127} Instead, Shippers urged the Ninth Circuit to "carefully consider whether consumers nationwide should suffer such a significant detriment."\textsuperscript{128} Specifically, Shippers asked the court to be mindful of the fact that Congress intended to influence carriers, not shippers, when it enacted section 14708, arguing that such congressional intent "is a small consolation for shippers who have sacrificed state law claims through pre-emption."\textsuperscript{129}

Shippers further asserted that Carriers' argument was "ethnocentric" because Carriers' position "avoids any responsibility for dispute resolution; they focus on forcing shippers suffering the distress of broken sentimentalities . . . and arduous communications with the moving companies on claims resolutions . . . to make elections in time of crisis."\textsuperscript{130} Shippers classified carriers as "strong, powerful corporations with established lobbying and claims processing administration."\textsuperscript{131} Thus, Shippers concluded, "Of course it makes sense to require these companies to bear the mantle of time and inertia in the claims resolution process."\textsuperscript{132} Ultimately, Shippers implored the court,

\textit{[if moving companies are granted the ability to avoid arbitration in cases over $5,000.00 and defeat shippers' right[s] to attorney['s] fees, then the gargantuan and mean-spirited moving companies will have dealt a tortuous blow to the families of America -- and one not expressed by those families']}

\textsuperscript{123.} \textit{Id.}
\textsuperscript{124.} \textit{Id.}
\textsuperscript{125.} \textit{Id.}
\textsuperscript{126.} \textit{Id. at 13.}
\textsuperscript{127.} \textit{Id.}
\textsuperscript{128.} \textit{Id.}
\textsuperscript{129.} \textit{Id.}
\textsuperscript{130.} \textit{Id.}
\textsuperscript{131.} \textit{Id. at 14.}
\textsuperscript{132.} \textit{Id.}
representative legislators. This Honorable court should not support the enterprise.133

D. THE NINTH CIRCUIT’S DECISION

The Ninth Circuit Court of Appeals agreed with Shippers, determining that “nothing in 49 U.S.C. § 14708(d) limits attorney’s fees to shippers who engage in arbitration.”134 In reaching this conclusion, the court essentially adopted Shippers’ argument. The court engaged in a standard statutory construction exercise, examining the plain meaning of the language contained in the statute at issue.135

“Under the ‘plain meaning’ rule, ‘[w]here the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.’”136 As a preliminary matter, the court looked to the phrase “any court action” in determining that subsection (d) applies to court actions “involving disputes between a shipper of household goods and a carrier . . . .”137 While the court recognized that a plain reading of the phrase “any court action” affords 49 U.S.C. § 14708(d) wide applicability, the court identified two limiting factors.138 Adopting Shippers’ argument, the court determined that subsection (d) “entitles shippers to attorney’s fees if they meet the first two requirements of (d)(1) and (d)(2)[,] . . . timely submitting a claim and prevailing in court . . . .”139

The court next discussed the proper interpretation of section (d)(3), the primary point of contention between the parties. In line with its plain meaning analysis and Shippers’ argument, the court concluded that subsection (d)(3) “merely excludes those claims in which a timely arbitration decision is reached and does not necessitate court enforcement.”140 The court further explained its interpretation, stating that “[i]n other words, (d)(3) prevents shippers from receiving attorney’s fees if the arbitration program ‘works’ as intended by swiftly resolving the dispute. It has no effect on shippers . . . who [do] not engage in arbitration.”141

After evaluating the plain meaning of section 14708, the Campbell court examined the statute as a whole, specifically looking at the inter-

133. Id. (alteration in original).
134. Campbell, 410 F.3d at 620-21.
135. Id.
136. Id. at 620-21 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)).
137. Id. at 621.
138. Id.
139. Id.
140. Id.
141. Id.
play between subsection (d)(3)(A) and (b)(8). The court agreed with Carriers that the attorney's fee provision should be read "in light of the arbitration program"; the agreement, however, ended there.

Carriers argued that, when read together, subsections (d)(3)(A) and (b)(8) indicate that subsection (d)(3) cannot be satisfied unless the shipper requests arbitration. Subsection (b)(8) "calls for a decision by an arbitrator within 60 days of written notification of the dispute being given to the arbitrator." Therefore, Carriers argued that, if a shipper does not request arbitration, an arbitrator never receives notification, and, thus, "refusal to invoke arbitration prevents (b)(8)'s time period from beginning to run . . ." Because failure to invoke arbitration prevents (b)(8)'s time period from beginning to run, failure to invoke arbitration "precludes (d)(3)(A) from ever being satisfied." Following this reasoning, unless the shipper requests arbitration, the shipper is not entitled to an award of attorney's fees. Consequently, according to Carriers, because Shippers did not request arbitration, the district court improperly awarded Shippers attorney's fees.

In dismissing Carriers' argument, the court reasoned that "nothing in the text of (d)(3)(A) conditions eligibility upon the happening of a certain event; rather, a shipper satisfies (d)(3)(A) as long as a specific event does not occur, namely the rendering of an arbitration decision within a certain period of time." The court concluded that, "because there was no arbitration decision in [Shippers'] dispute, (d)(3)(A) poses no barrier to the award of an attorney's fee."

Not only did the court determine that Carriers' statutory construction argument lacked merit, but it further concluded that Shippers' interpretation, as adopted by the court, did not create tension between the attorney's fee provision and the arbitration program. "Our interpretation recognizes that receiving a timely arbitration decision affects a shipper's eligibility for an attorney's fee under (d)(3), and that courts must consult the time period in (b)(8) to establish whether an arbitration decision qualifies as timely."

142. Id.
143. Id.
144. Appellant's Reply Brief, supra note 47, at 6.
145. Id. at 6.
146. Id.; Campbell, 410 F.3d at 621.
147. Campbell, 410 F.3d at 621.
149. Id.
150. Campbell, 410 F.3d at 621 (alteration in original).
151. Id.
152. Id.
153. Id.
The court then turned to the relevant, albeit scarce, case law.\(^{154}\) Specifically, the court addressed *Yakubu v. Atlas Van Lines*\(^{155}\) and *Collins*.\(^{156}\) The courts in *Yakubu* and *Collins* held that a failure to invoke arbitration rendered section 14708 inapplicable, precluding the shippers from receiving an award of attorney’s fees.\(^{157}\) According to the *Campbell* court, the decisions in *Yakubu* and *Collins* rested on the title of section 14708.\(^{158}\) Because the Ninth Circuit believed that relying on section 14708’s title ignored the plain language of the statute, the court declined to adopt the interpretation set forth in those decisions.\(^{159}\)

In arriving at this conclusion, the court relied on the reasoning of the United States Supreme Court.\(^{160}\) In *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*\(^{161}\) the Court held,

> [t]hat the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact . . . [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when it sheds light on some ambiguous word or phrase.\(^{162}\)

While the Ninth Circuit recognized that “[s]ection 14708 may be titled ‘Dispute settlement program for household goods carriers[,]’” it concluded that because “there is nothing ambiguous about the text in question[,]” the section’s title did “not give [the court] free rein to ignore the plain language of subsection (d).”\(^{163}\) The *Campbell* court reiterated its conclusion that the plain meaning supported Shippers’ interpretation.

Section 14708(d) is entitled “Attorney’s Fees to shippers” and expressly applies to “any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service . . . .” It does not state that the subsection applies only to court actions pursued after first invoking arbitration; adding such a limitation may be easy enough, but that is the province of Congress, not this court.\(^{164}\)

The court ended its analysis by addressing Carriers’ argument that an examination of legislative history demonstrated congressional intent to

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154. *Id.*
155. *Yakubu*, 351 F. Supp. 2d at 482.
156. *Collins*, 867 So.2d at 1179.
157. *Yakubu*, 351 F. Supp. 2d at 491; *Collins*, 867 So.2d at 1183.
158. *Campbell*, 410 F.3d at 621.
159. *Id.*
160. *Id.*
163. *Id.*
164. *Id.* at 622 (quoting 49 U.S.C. 14708(d)).
encourage arbitration, lending support to an interpretation mandating arbitration prior to awarding attorney’s fees.\textsuperscript{165} The court again dismissed Carriers’ argument, relying on the plain language of the statute. In so doing, the \textit{Campbell} court noted that “[w]e have long held that there is a strong presumption that the plain language of [a] statute expresses congressional intent, rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.”\textsuperscript{166} The court concluded that “[s]ection 14708 does not present such an exceptional circumstance [because] [g]iven the ease with which Congress expressly listed three eligibility criteria, we see no reason why Congress would bury a fourth implicitly within the statute.”\textsuperscript{167} The court declined to supplement the statute’s “three enumerated conditions for attorney’s fee eligibility by reading in a fourth, unstated prerequisite that shippers first invoke arbitration” because the court did not “perceive [any] inconsistency in the statute as it is written.”\textsuperscript{168}

In further response to Carriers’ legislative intent argument, the court indicated its hesitancy “to depart from the statute’s text in situations . . . in which [the court] can only attempt to glean the specific details of [Congress’] intent by examining the limited legislative history of the act in question.”\textsuperscript{169} Consequently, the court concluded that it was “not prepared to second-guess [Congress'] chosen method for adopting a legislative program that may or may not provide the best means to effectuate some underlying congressional goal.”\textsuperscript{170} As the legislative history did not present “overwhelming evidence to suggest that the statute’s language is at odds with a clearly expressed legislative intent to the contrary,” the Ninth Circuit “[deferred] to the plain meaning of the text actually adopted by Congress.”\textsuperscript{171}

However, the \textit{Campbell} court did not summarily dismiss Carriers’ assertion that Congress intended to encourage arbitration by prohibiting shippers from recovering attorney’s fees in the absence of arbitration.\textsuperscript{172} To rebut this argument, the court looked to subsection (b)(6) of the statute as suggested by Shippers.\textsuperscript{173} Specifically, the court opined that “[p]erhaps . . . a rule that obligated shippers to submit to arbitration in order to recover attorney’s fees would more effectively reduce the number of shipper-carrier lawsuits; then again, perhaps requiring carriers to

\textsuperscript{165} ld.
\textsuperscript{166} Id. (quoting United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002)).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. (citing United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002)).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
agree to binding arbitration of all claims over $5,000 would do so as well.”

The Ninth Circuit concluded its opinion in the same manner it began, examining the plain meaning of the statute, fitting given the language the court relied on to introduce its conclusion. “[T]ime and again” the Supreme Court has instructed that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”

The court reiterated its determination that “Congress unambiguously authorized the awarding of attorney’s fees to shippers of household goods who meet three express conditions.” Therefore, because “none of those conditions require a shipper to first invoke arbitration[,]” the court declined to adopt Carriers’ and other courts’ interpretation of section 14708(d). According to the Ninth Circuit, if a shipper timely files a Carmack Amendment claim and prevails in the ensuing court action, the shipper is statutorily entitled to attorney’s fees, even though an arbitration decision is not rendered regardless of the reason for its absence.

E. THE DISSenting OpinIon

Circuit Judge Diarmuid O’Scannlain dissented from Circuit Judge Robert Beezer’s majority opinion. O’Scannlain began his dissent by stating that “[t]his exercise in statutory interpretation forces us to confront the fact that the most literal interpretation of a phrase is not always the most natural and reasonable one.” In O’Scannlain’s opinion, the majority’s interpretation that section 14708(d) applies even in the absence of arbitration is not the “most ordinary, natural, and reasonable interpretation of the provision’s language.” Specifically, O’Scannlain criticized the majority’s “insistence that [its] reading of [section] 14708(d)(3)(A) is not only preferable but unambiguously correct” because the majority was “adher[ing] to a decontextualized literalism that even the staunchest defenders of textualism eschew.” O’Scannlain illustrated this “unnatural literalism” with the following scenario.

174. Id.
175. Id. at 620-21, 622-23.
177. Id. at 623.
178. Id.
179. Id.
180. Id. at 619, 623.
181. Id. at 623 (O’Scannlain, J., dissenting).
183. Id. (O’Scannlain, J., dissenting) (citations omitted).
Imagine that, one summer’s afternoon, a father turns to his son and says, “If you’d like to, we’ll go to the ballpark this afternoon and hit some balls. And I’ll tell you what — if your old Dad doesn’t hit a baseball over the fences, he promises to buy you some ice cream.”

“Great, Dad,” says the son, “but I don’t want to play baseball this afternoon. Let’s play football in the yard instead.”

The father agrees, and after a few spirited hours of play, the two head back to the house for dinner. As they brush the dirt out of their clothes, the son says, “Well, Dad, you owe me an ice cream. You didn’t hit a single baseball over the fences.”

Applying the majority’s reasoning to above-described scene, the father would undoubtedly owe the son an ice cream because, “the majority would insist [that] the father’s words were unambiguous: ‘If I don’t hit a baseball over the fences, I promise to buy you some ice cream.’” Therefore, O’Scannlain proposed that

the majority would conclude that — to paraphrase its own reasoning — “given the ease with which the father expressly listed one eligibility criterion (his failure to hit a home run),” there was “no reason why he would bury a second (the son’s acceptance of the invitation to play baseball) implicitly within” his proposal.

However, O’Scannlain argued that such a result would be contrary to reason. “[T]hat is not how language works, either in conversation or in statutory interpretation.” While O’Scannlain recognized that it was appropriate for the majority to begin by examining the plain meaning of section 14708 and even conceded that “it is possible to read the words of subsection [(d)(3)](A) as the majority [did],” O’Scannlain stressed that “plain meaning is not meaning divorced from context.” Consequently, O’Scannlain looked to the purpose of the statute.

First, O’Scannlain looked to the fact that “[t]he provision appears in the midst of a statute designed to promote and to facilitate arbitration of claims under the Carmack Amendment.” In light of section 14708’s purpose, O’Scannlain deemed the majority’s interpretation unnatural because its interpretation

184. Id. at 623-24 (O’Scannlain, J., dissenting).
185. Id. at 624 (O’Scannlain, J., dissenting).
186. Id. (O’Scannlain, J., dissenting) (citing Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 622 (9th Cir. 2005)).
187. Id. (O’Scannlain, J., dissenting).
189. Id. at 623 (O’Scannlain, J., dissenting).
190. Id. (O’Scannlain, J., dissenting).
turns [the provision] into a powerful incentive for shippers not to pursue arbitration. A shipper who takes his claim straight to court and wins has his legal costs paid by the carrier, while a shipper who submits the claim for arbitration must pay not only his own legal fees but part of the cost of arbitration as well.\textsuperscript{191}

In contrast to the majority's interpretation, O'Scannlain argued that "the most reasonable interpretation of [section] 14708(d)(3)(A) is that it makes attorney fees available if the shipper takes advantage of the opportunity for arbitration that the carrier is statutorily bound to provide and no decision is rendered within the sixty-day period provided."\textsuperscript{192} In arriving at this conclusion, O'Scannlain referred to the father-son scenario. Despite the father's unambiguous statement that he would buy the son an ice cream if he failed to hit a home run, "[a] reasonable person would understand the father to be promising ice cream only if the son agrees to play baseball and the father hits no home runs."\textsuperscript{193}

O'Scannlain then turned to extrinsic sources to support his interpretation.\textsuperscript{194} Specifically, O'Scannlain compared section 14708(d), the statute at issue in \textit{Campbell}, with the earlier version of the statute.\textsuperscript{195} "The earlier statute allowed, but did not require, carriers to offer arbitration."\textsuperscript{196} In comparing the earlier statute with the statute at issue in \textit{Campbell}, O'Scannlain focused on former section 11711(d)(3)(B) and section 14708(d)(3)(A).\textsuperscript{197} O'Scannlain noted that section 11711(d)(3)(B) "is identical for all relevant purposes to . . . [section] 14708(d)(3)(A) . . . ."\textsuperscript{198} Both provisions grant "attorney fees when a decision resolving the dispute was not rendered [in arbitration] within the period provided."\textsuperscript{199} Thus, O'Scannlain concluded that "[i]t would be extremely odd if the two provisions, whose text is essentially the same, meant two sharply different things . . . for the former [section]
11711(d)(3)(B) cannot reasonably bear the interpretation the majority would place upon . . . [section] 14708(d)(3)(A).”

In support of this conclusion, O'Scannlain reasoned that if the majority's interpretation were applied to former section 11711(d)(3)(B), subsection (d)(3)(A) of the former statute would be rendered “wholly redundant and unnecessary . . . .” Subsection (A) of the earlier statute provided that a shipper may be awarded attorney's fees if “no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute . . . .” Subsection (B) provided that a shipper may be awarded attorney's fees if “a decision resolving the dispute was not rendered under a dispute settlement program approved under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection . . . .”

Accordingly, O'Scannlain argued that, if a dispute settlement program was not available for use by the shipper, then “it would necessarily have been true that a 'decision resolving the dispute was not rendered . . . within the period provided.'” Therefore, subsection (A) provided for instances in which the carrier did not provide an arbitration program or in which the shipper did not attempt arbitration, whereas subsection (B) provided for instances in which the carrier provided an arbitration program and the shipper attempted to arbitrate, but a decision was not rendered within the allotted time. Because the language contained in the current section 14708(d)(3)(A) is nearly identical to the language contained in section 11711(d)(3)(B), interpreting the current section to require a shipper to attempt arbitration before he is entitled to attorney's fees is the more natural and reasonable interpretation of the provision.

In addition to comparing the earlier statute with section 14708, O'Scannlain looked to the statute's title, “Dispute settlement program for household carriers[,]” in determining that “the plain meaning of the language of [section] 14708(d)(3)(A) in its context is that attorney fees are available only when shippers attempt arbitration . . . .” In a footnote, O'Scannlain asserted that the “majority's interpretation turns [section] 14708(d)(3)(A) into a general attorney-fee provision whose scope extends well beyond cases in which a dispute-settlement program is involved.” Therefore, because the title of the provision indicates that its

200. Id. at 625 (O'Scannlain, J., dissenting).
201. Id. (O'Scannlain, J., dissenting).
203. Id. (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711(d)(3)(B)).
204. Id. (O'Scannlain, J., dissenting).
205. See id. (O'Scannlain, J., dissenting).
206. Id. (O'Scannlain, J., dissenting).
207. Id. (O'Scannlain, J., dissenting).
208. Id. at 625 n.2 (O'Scannlain, J., dissenting).
subject involves dispute settlement programs for household carriers, an interpretation expanding the provision’s applicability to instances in which arbitration was not attempted is contrary to the provision’s context.\textsuperscript{209}

Like the majority opinion, O’Scannlain’s dissent focused primarily on the plain meaning of the statute. However, O’Scannlain arrived at a different conclusion than the majority. O’Scannlain read section 14708 as a whole to require Shippers to invoke arbitration in order to be statutorily entitled to a fee award.\textsuperscript{210} In arriving at this conclusion, O’Scannlain considered the context of the entire statute, including the statute’s title.\textsuperscript{211} In addition, O’Scannlain concluded that such an interpretation was “consonant with the statute’s history . . .”\textsuperscript{212} Therefore, O’Scannlain would have reversed the district court’s decision to award Shippers attorney’s fees.\textsuperscript{213}

IV. Analysis

The Ninth Circuit Court of Appeals is one of the first courts to interpret 49 U.S.C. § 14708(d)\textsuperscript{214} Because the body of case law addressing the issue presented to the Ninth Circuit in \textit{Campbell} is limited, the parties to the action, as well as the court, were operating at a disadvantage. On the other hand, the lack of case law afforded the parties an opportunity to engage in more creative lawyering, forcing the parties to present arguments outside of simple reliance on precedent. While both parties took advantage of the opportunity, Shippers were particularly effective in employing emotional language to play on the court’s sensibilities.\textsuperscript{215}

Notwithstanding the compelling and varied arguments on both sides,

\begin{footnotesize}

\textsuperscript{209} \textit{Id.} (O’Scannlain, J., dissenting) ("Part of the relevant context is the title of [section] 14708 . . . The 'title of a statute and the heading of a section are tools available for the resolution of doubt' about the meaning of a statutory provision." (quoting Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998))).

\textsuperscript{210} \textit{Id.} at 625 (O’Scannlain, J., dissenting).

\textsuperscript{211} \textit{Id.} (O’Scannlain, J., dissenting).

\textsuperscript{212} \textit{Id.} (O’Scannlain, J., dissenting).

\textsuperscript{213} \textit{See id.} (O’Scannlain, J., dissenting).

\textsuperscript{214} The Florida District Court of Appeal issued an opinion interpreting subsection (d) in Collins Moving & Storage Corp. of South Carolina v. Kirkell wherein the court determined that subsection (d) is inapplicable in the absence of arbitration. \textit{Collins}, 867 So.2d at 1183. The United States District Court for the Western District of Virginia has also issued an opinion interpreting the statute. Like the \textit{Collins} court, the court in Yakubu v. Atlas Van Lines, held that the shipper was not entitled to a fee award in the absence of arbitration. \textit{Yakubu}, 351 F. Supp. 2d at 491.

\textsuperscript{215} Appellee’s Answering Brief, \textit{supra} note 30, at 7, 14 (stating, “This Court is urged to refrain from adding language to the statute to the detriment of consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies. Let his gryphon go to Congress to seek to further feather its nest!” and further characterizing moving companies as "gargantuan and mean-spirited.").

\end{footnotesize}
the Ninth Circuit limited its opinion to a plain meaning analysis. The court properly began its exercise in statutory construction by examining the plain language of the statute. However, the court’s absolute reliance on the plain language of the statute stops short of a well-reasoned interpretation. In light of the parties’ arguments, including their plain meaning analysis, the dissenting Campbell opinion seems to present the more reasonable and natural interpretation.

A. Plain Meaning in Context

The first step in statutory analysis is to determine “whether the statutory meaning is unambiguous.” Where the language [of a statute] is plain and admits of nor more than one meaning the duty of interpretation does not arise, and rules which are to aid doubtful meanings need no discussion.” Because the Campbell court determined that the plain language of section 14708(d) is unambiguous, the court consistently implemented its plain meaning analysis to combat Carriers’ reasoning, as well as that of other courts. The Ninth Circuit’s reliance on the statute’s plain meaning was not necessarily misplaced. However, the court’s rigid application of the plain meaning rule calls into question the soundness of the interpretation, an issue well recognized in the dissenting opinion. “We begin with a statute’s plain meaning, of course, but plain meaning is not meaning divorced from context.” In fact, the United States Supreme Court has recognized on various occasions that, in conducting a plain meaning analysis, courts should “consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. ‘[T]he meaning of statutory language, plain or not, depends on context.’”

The Ninth Circuit recognized that a statute should be construed in light of the statute as a whole. However, while the court recognized this principle, the court arguably failed to engage in the proper inquiry.

216. Campbell, 410 F.3d at 621-23.
219. Campbell, 410 F.3d at 621 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)).
220. Id. at 621-23.
223. Campbell, 410 F.3d at 621 (citing Children’s Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999)).
The court did not examine the statutory scheme prior to making a determination as to the plain meaning of the statute. Instead, the court first looked to the plain language of the statute in isolation from the other statutory provisions. In so doing, the court concluded, "[S]imply put, nothing in [section] 14708(d) limits attorney's fees to shippers who engage in arbitration." The court's preliminary conclusion is not correct. It is, however, incomplete.

Had the Ninth Circuit examined the statutory setting, as instructed by the United States Supreme Court, prior to so steadfastly adopting an interpretation, the court would have likely arrived at a different conclusion, placing the Ninth Circuit in line with prior decisions issued on the topic. Two failures, in particular, on the part of the court contributed to its imperfect interpretation. First, the court declined to give any weight to the section's title and, second, the court read subsection (d) without regard to subsection (a), which requires carriers to offer arbitration. Upon a reading of the section title and subsection (a), the reasonableness of the Campbell court's interpretation is, at least, called into question, if not altogether contradicted.

I. Section 14708's Title

In determining that a shipper must engage in arbitration in order to invoke the attorney's fee provision of section 14708, the United States District Court of the Western District of Virginia and the Florida District Court of Appeal relied, in part, on the title of section 14708. Section 14708 is entitled, "Dispute settlement program for household goods carriers." Because the section title refers to a dispute settlement program,
the Yakubu court and the Collins court determined that subsection (d) would “come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708.”

The Campbell court acknowledged the Yakubu and Collins decisions, but declined to follow their line of reasoning. Specifically, the Ninth Circuit rejected the alternative interpretation adopted by the Yakubu and Collins courts because the court believed their reliance on the section title was misplaced. The Campbell court reasoned that because the statutory language is unambiguous, the section title need not be considered. In support of this conclusion, the court quoted a United States Supreme Court decision.

That the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact . . . . [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text.

However, the above-quoted language does not support the Ninth Circuit’s decision to wholly disregard the section title. In fact, the Campbell court impliedly recognized that such overt disregard for a title or heading is improper. Immediately after discounting the relevance of section 14708’s general title, the court relied on subsection (d)’s title, “Attorney’s Fees to shippers,” in support of its conclusion that a shipper need not pursue arbitration as a prerequisite to properly requesting a fee award. While it is certainly true that a title or heading cannot be expected to encompass the entire content of a statute or provision, headings and titles can serve to inform the reader of the general matters covered. Furthermore, in assessing the plain meaning of a statute, context should be considered, and part of the relevant context is the statute’s title.

236. See Yakubu, 351 F. Supp. 2d at 491.
237. Collins, 867 So.2d at 1183.
238. Campbell, 410 F.3d at 621.
239. Id.
240. See id. (“Section 14708 may be entitled ‘Dispute settlement program for household goods carriers,’ but that does not give us free rein to ignore the plain language of section (d).”).
241. Id.
243. See id. at 622.
244. 49 U.S.C. § 14708(d).
245. Campbell, 410 F.3d at 622.
247. See Campbell, 410 F.3d at 625 n.2.
2. Subsection (a) of Section 14708

Even assuming the Campbell court properly disregarded the section’s title, reading subsection (d) in conjunction with other provisions of section 14708, particularly subsection (a), suggests that a shipper must engage in arbitration prior to properly requesting attorney’s fees. Despite the fact that Carriers raised subsection (a) as an issue in the briefing and the fact that the Yakubu court relied on subsection (a) in rendering its decision, the Ninth Circuit never addressed the subsection.

In Yakubu, in addition to relying on section 14708’s title, the court looked to subsection (a), albeit briefly, in holding that “[s]ection 14708(d)(1)-(3) applies only when a party has initiated its provisions in connection with dispute resolution . . . .” In so holding, the court recognized that “[a] carrier of household goods is required to offer neutral arbitration as a means of settling disputes . . . .”

Because the Campbell court never even impliedly addressed subsection (a), it is difficult to ascertain whether the court believed subsection (a) to be wholly irrelevant or whether the court chose not to address the subsection because it would have presented an obstacle to its interpretation. However, given the court’s summary dismissal of other arguments, such as the section title, it would not be unreasonable to infer the latter, particularly in light of the analysis presented by the dissent.

Unlike the Campbell majority, the dissenting opinion looked to the context of section 14708 before making a determination as to the proper interpretation of the statute. O’Scannlain presumably looked, at least in part, to subsection (a) in determining that section 14708 is “designed to promote and to facilitate arbitration of claims under the Carmack Amendment.” In this context, O’Scannlain concluded that the majority’s interpretation could not be proper because the majority’s interpretation turned the attorney’s fee provision “into a powerful incentive for shippers not to pursue arbitration.” Consequently, O’Scannlain asserted that the more “ordinary, natural, and reasonable” interpretation would require the shipper to invoke arbitration as a prerequisite to an award of attorney’s fees. While O’Scannlain could have ended his opinion with this plain meaning analysis, as the majority did, O’Scannlain

248. Appellant’s Reply Brief, supra note 47, at 4-5.
249. See generally Campbell, 410 F.3d 618.
251. Id. (quoting Ward v. Allied Van Lines, Inc., 231 F.3d 135, 141 (4th Cir. 2000)).
252. See Campbell, 410 F.3d at 623, 625 (O’Scannlain, J., dissenting).
253. Id. at 623 (O’Scannlain, J., dissenting).
254. Id. (O’Scannlain, J., dissenting) (alteration in original).
255. Id. at 623, 625 (O’Scannlain, J., dissenting).
went on to consider the statute's history.\textsuperscript{256}

B. LEGISLATIVE HISTORY

O'Scannlain noted that an examination of the statute's history "only strengthen[ed] the case against the majority's interpretation."\textsuperscript{257} First, O'Scannlain emphasized that, unlike the current statute, the predecessor statute did not require carriers to offer arbitration.\textsuperscript{258} This distinction played an important role in O'Scannlain's historical analysis.\textsuperscript{259}

Former section 11711(d)(3)(A) provided that a shipper may be awarded reasonable attorney's fees if "no dispute settlement program . . . was available for use by the shipper . . . ."\textsuperscript{260} Former subsection (d)(3)(B), which is nearly identical to the current subsection (d)(3)(A), provided that a shipper may be awarded reasonable attorney's fees if "a decision resolving the dispute was not rendered . . . within the period provided . . . ."\textsuperscript{261} Following the majority's interpretation, subsection (A) and subsection (B) of the former statute provide for the same scenario.\textsuperscript{262} Under subsection (A), an arbitration decision was not rendered.\textsuperscript{263} Likewise, under subsection (B), an arbitration decision was not rendered.\textsuperscript{264} Therefore, adhering to the majority's interpretation would render subsection (A) of the former statute "wholly redundant and unnecessary . . . ."\textsuperscript{265} In order to give meaning to former subsection (A), former subsection (B) must be interpreted to mean something other than no arbitration decision was rendered. O'Scannlain proposed that former subsection (B) should be interpreted to mean that no arbitration decision was rendered even though the parties engaged in arbitration.\textsuperscript{266} Consequently, because former subsection (B) is nearly identical to current subsection (d)(3)(A), the current subsection should be interpreted in a similar manner. Accordingly, O'Scannlain disagreed with the majority because its interpretation was not only decontextualized, but also consonant with the statute's history.\textsuperscript{267}

It is interesting to note that O'Scannlain referenced subsection (a) not only to establish a context for his interpretation, but also to ground

\textsuperscript{256} \textit{Id.} at 624-25 (O'Scannlain, J., dissenting).
\textsuperscript{257} \textit{Id.} at 624 (O'Scannlain, J., dissenting).
\textsuperscript{258} \textit{Id.} (O'Scannlain, J., dissenting) (citing 49 U.S.C. § 11711).
\textsuperscript{259} \textit{See id.} at 625 (O'Scannlain, J., dissenting).
\textsuperscript{260} \textit{Id.} at 624 (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711(d)(3)(A) (1994)).
\textsuperscript{261} \textit{Id.} at 624-25 (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711 (d)(3)(B) (1994)).
\textsuperscript{262} \textit{Id.} at 625 (O'Scannlain, J., dissenting).
\textsuperscript{264} \textit{See id.} § 11711(d)(3)(B).
\textsuperscript{265} \textit{Campbell,} 410 F.3d at 625 (O'Scannlain, J., dissenting).
\textsuperscript{266} \textit{See id.}
\textsuperscript{267} \textit{Id.} (O'Scannlain, J., dissenting).
his interpretation in the statute's history, while the majority did not even incidentally mention subsection (a). Again, this supports the inference that the majority made a conscious decision not to address the fact that carriers are required to offer shippers arbitration under section 14708 because such a requirement is detrimental to the majority's interpretation.

C. Legislative Intent

Related to legislative history, but not explicitly addressed in either the majority or dissenting opinions, is the issue of legislative intent. Specifically, the parties attempted to persuade the court that the legislature had intended to influence the other party to invoke arbitration. In other words, Carriers asserted that the legislature intended to influence shippers, while Shippers asserted that the legislature intended to influence carriers.

O'Scannlain briefly and impliedly addressed the parties' legislative intent arguments in discussing the statutory context. Following the majority's interpretation, "[a] shipper who takes his claim straight to court and wins has his legal costs paid by the carrier, while a shipper who submits the claim for arbitration must pay not only his own legal fees but part of the cost of arbitration as well." Under this interpretation, shippers would have no incentive to invoke arbitration. This lack of incentive is not problematic in light of Shippers' argument that the legislature intended to influence carriers. However, Shippers assertion that the legislature intended to influence carriers to engage in arbitration ignores a very important practical reality; shippers, not carriers, initiate consumer claims.

Furthermore, carriers are already obligated to offer shippers arbitration and to notify shippers of the availability of such arbitration. Moreover, subsection (b)(3) "specifies that the carrier provide forms and information to initiate arbitration 'upon request of a shipper.'" It is doubtful that the legislature would have enacted the statute to influence carriers to enter into arbitration, as Shippers asserted, when carriers are under a pre-existing obligation to do so. In contrast, subsection (b)(3)

268. Id. at 623-24 (O'Scannlain, J., dissenting).
269. See id. at 620-23.
270. See id. at 620-25.
272. Appellee's Answering Brief, supra note 30, at 11-12.
273. Campbell, 410 F.3d at 623.
274. See Appellant's Reply Brief, supra note 47, at 4.
275. Id. at 4-5 (citing 49 U.S.C. § 14708(a), (b)(2)).
276. Id. at 5 (quoting 49 U.S.C. § 14708(b)(3)).
makes clear that it is the responsibility of the shipper to select either arbitration or litigation as the forum. Accordingly, it is more reasonable to believe the legislature intended to influence shippers to engage in arbitration, not carriers.

The majority’s interpretation not only fails to influence shippers to invoke arbitration, but actually creates a disincentive. While the Campbell court did not address the parties’ legislative intent arguments, these arguments seem to favor the interpretation adopted by the Yakubu court, the Collins court, and the Campbell dissent.

V. CONCLUSION

The Ninth Circuit Court of Appeals is one of the first courts to address whether 49 U.S.C. § 14708 requires a shipper to engage in arbitration in order to invoke the attorney’s fee provision found at subsection (d). Consequently, the court did not have the comfort of precedent. While the court in Campbell was not entirely without direction, its opinion reads as a forced, unaided decision.

The court’s inflexible insistence on a literal plain meaning analysis leads to the inference that the court had pre-determined that shippers should not have to engage in arbitration and was thereafter strained to justify that conclusion. While the plain language of a statute is undoubtedly the starting point in statutory interpretation, of equal importance is the notion that “plain meaning is not meaning divorced from context.” As pointed out by the dissent, the majority’s interpretation is the result of a “decontextualized literalism.” The court failed to properly consider section 14708’s title, neglected to address the fact that carriers are obligated to offer shippers arbitration under the statute, and ignored legislative history and intent. At best, the court unintentionally disregarded valuable tools to aid it in its responsibilities of statutory interpretation and, at worst, the court intentionally avoided issues leading to a result contrary to its desire.

Had the court issued a more thorough, well-reasoned opinion, the Campbell holding may not be quite so discomforting. However, the court’s staunch reliance on the plain meaning of subsection (d) and its summary dismissal of other arguments portends an awkward sense that the court simply had no other avenues to defend its position. Whether

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277. Id. at 4.
278. See Campbell, 410 F.3d at 623 (O'Scanllain, J., dissenting).
280. Id. (O'Scanllain, J., dissenting).
281. See id. at 620-23.
this speculation is true, the *Campbell* court’s reasoning does not lead to compelling case law.

Interestingly, Shippers urged the Ninth Circuit not to rely on “perfunctory” decisions issued by other courts and empowered the court to “carefully consider whether consumers nationwide should suffer such a significant detriment.” While Shippers may have legitimately argued that other courts have not rendered meticulous decisions, the Ninth Circuit’s decision in *Campbell* is certainly no less mechanical than those issued in *Yakubu* and *Collins*, and is arguably even more so. Furthermore, while the decisions rendered in *Yakubu* and *Collins* were not binding on the Ninth Circuit, it is at least informative that the legislature has not amended subsection (d) in such a way as to indicate that the those decisions were incorrect.  

The interpretation adopted in *Yakubu*, *Collins*, and by O’Scannlain in the *Campbell* dissent requiring a shipper to invoke arbitration prior to properly receiving an award of attorney’s fees seems to be the more reasonable and natural interpretation. Section 14708’s title expressly indicates that subsection (d)(3)(A) is applicable only in conjunction with a dispute settlement program. The fact that carriers are obligated to offer shippers arbitration and to notify shippers of such arbitration programs lends further support to this assertion. Furthermore, the statute’s legislative history and intent, and the practical reality that shippers initiate consumer claims under the Carmack Amendment, indicates that such an interpretation is proper.

This is particularly true in light of the American rule’s general prohibition against fee shifting. It is somewhat incongruous to permit absolute fee shifting, as the *Campbell* majority has done, in the face of a completely reasonable interpretation that would honor the well established limitation on the award of attorney’s fees. Nonetheless, the Ninth

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283. “Considerations of stare decisis have special force in the area of statutory interpretation, for... unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the courts] have done.” Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989), remanded & rev’d on other grounds, 931 F.2d 887 (unpublished table opinion) (citations omitted). 49 U.S.C. § 14708(d) was amended in 2005 and went into effect on August 10th that same year. SAFETEA-U § 4206. Subsection (d)(3)(C) was added, which provides that a shipper may be awarded reasonable attorney’s fees if “the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed.” 49 U.S.C.A. § 14708(d)(3)(C) (2006).
285. Id. § 14708(a).
Circuit's interpretation has opened the door for shippers to boldly claim attorney's fees in addition to damages in actions against carriers. Future courts addressing the issue will not only have the option to award attorney's fees in the absence of arbitration, but will have the luxury of relying on the Ninth Circuit's holding to justify their decision.
Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?

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I. INTRODUCTION

In March 2004, the Tenth Circuit Court of Appeals decided Kinross v. Utah Railway Co.,¹ escalating the divergence among the circuits over whether a federal court may review an arbitration decision under the Railway Labor Act ("RLA") on due process grounds. This conflict originated from Congress' attempt to regulate disputes between organized labor and management in the airline and railroad industries through the RLA's statutory arbitration scheme.² Specifically, Congress mandated that such disputes be referred to the National Railroad Adjustment Board ("NRAB" or "Board"), an arbitral tribunal created by the RLA.³ While administrative bodies are ordinarily subjected to due process review by federal courts, Congress restricted the scope of judicial review of Board decisions made under the RLA.⁴ The RLA explicitly prohibits reviewing courts from reversing NRAB findings unless for non-compliance

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4. Sagers, supra note 2, at 470.

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with the RLA’s requirements, for a decision made without jurisdiction, or for fraud or corruption.\(^5\)

However, the Fifth Amendment of the United States Constitution provides that all individuals are protected from governmental taking of "life, liberty, or property without due process of law."\(^6\) The rights to representation, a fair hearing, and the opportunity to present evidence are essential elements of justice. Holding close to this principle, several courts have determined that the fundamental right to due process is supplemental to the RLA’s three express grounds for review. Federal courts thus disagree over whether courts may review RLA rulings under the auspices of procedural due process.\(^7\)

This survey will explain the Railway Labor Act’s arbitration process, discuss the Supreme Court cases that have led to the Tenth Circuit’s Kinross decision, and explore the split of authority among the circuits regarding judicial review of due process claims in the RLA context. This analysis will demonstrate that the Tenth Circuit in Kinross was consistent with both the holding of the Supreme Court and congressional intent when it held that due process review is impermissible. Finally, this note will analyze the RLA’s arbitration process and conclude that the system’s procedural safeguards are sufficient to protect individual due process rights, rendering judicial review of independent due process challenges unnecessary.

II. The Railway Labor Act

In the early 1900’s, disruptions caused by the litigation of minor disputes between employers and employees in the transportation industry created federal concerns over the stability of this vital sector of the national economy. There was a clear need for a system by which the two parties could resolve minor disputes outside of the courtroom.\(^8\) In response, Congress enacted the RLA in 1926.\(^9\)

The purpose of the RLA was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to “insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of manag-

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5. 45 U.S.C. § 153 First (p)-(q).
6. U.S. Const. amend. V.
7. Sagers, supra note 2, at 470.
ers and employees to settle peaceably their controversies."^{10}

The RLA provides an arbitration scheme for the resolution of disputes between organized labor and management in the airline and railroad industries.\(^{11}\)

Congress amended the RLA in 1934 to create the National Railroad Adjustment Board, an arbitral tribunal that hears disputes covered by the RLA.\(^{12}\) The Board is comprised of three members: one each from the appropriate Labor Union and Carrier, and one neutral member.\(^{13}\) The Board has jurisdiction to hear "minor" disputes, defined as those disagreements arising out of grievances or interpretation or application of agreements regarding the rates of pay, rules or working conditions.\(^{14}\) The NRAB's decisions are final and binding.\(^{15}\) While federal district court review of NRAB decisions is available, it is severely limited.

The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the [National Railroad] Adjustment Board. Prompt execution of Board orders is a necessity. The range of judicial review in enforcement cases is among the narrowest known to the law and the findings and order of the Board are conclusive.\(^{16}\)

Section 153 First (q) of the RLA sets forth the grounds for reversal of an Adjustment Board decision, providing, in pertinent part:

If any employee or group of employees, or any carrier is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order .... The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdic-

11. Sagers, supra note 2, at 470.
15. 45 U.S.C. § 153 First (c).
tion, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.¹⁷

III. SUPREME COURT ANALYSIS OF THE RLA

A. UNION PACIFIC RAILROAD CO. v. PRICE

In the 1959 Union Pacific Railroad Co. v. Price decision, the United States Supreme Court articulated its understanding of the RLA, carefully describing the Act's legislative history and primary purpose.¹⁸ The case originated when Union Pacific terminated Price, a brakeman, for violating rules of the collective bargaining agreement. When the union took up his cause with railroad management, the dispute was submitted to the NRAB, which determined that Price's termination was valid.¹⁹ Some three years later, Price brought an action against the railroad in district court under the grounds of wrongful dismissal, asserting that he was dismissed without cause and that the railroad had failed to perform a proper investigation prior to his termination.²⁰ The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the railroad.²¹ On certiorari, the Supreme Court reversed.²²

Finding that the NRAB had properly decided against Price on both claims, the Court carefully addressed what it considered to be the primary issue, namely whether Price could pursue a common-law remedy for damages in district court despite the adverse determination of the NRAB.²³ After reviewing the legislative record, the Court found that Congress intended for the findings of the NRAB to be final and binding.²⁴ The Court explained that the plain language of the RLA "imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party."²⁵ In holding that Price's action was precluded, the Court reasoned that

our duty to give effect to the congressional purpose compels us to hold that the instant common-law action is precluded unless the overall scheme established by the Railway Labor Act and the legislative history clearly indicate a congressional intention contrary to that which the plain meaning of the words imports. Our understanding of the statutory scheme and the legislative history, however, reinforces what the statutory language already makes

¹⁸ Price, 360 U.S. at 606.
¹⁹ Id. at 604.
²⁰ Id. at 604-05.
²¹ Price v. Union Pac. R.R., 255 F.2d 663, 668 (9th Cir. 1958).
²² Price, 360 U.S. at 617.
²³ Id. at 607.
²⁴ Id. at 608 (citing 45 U.S.C. § 153 First (m)).
²⁵ Id. at 608.
clear, namely, that Congress barred the employee’s subsequent resort to the common-law remedy after an adverse determination of his grievance by the Adjustment Board. 26

Noting that Price’s relitigation of the NRAB’s determination might have been permissible under a legislative scheme other than the RLA, the Court added that “the disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed.” 27

B. ANDREWS v. LOUISVILLE & NASHVILLE RAILROAD CO.

Later, in the 1972 case Andrews v. Louisville & Nashville Railroad Co., a discharged railroad worker sought review of the dismissal of his state court claim due to the fact that he had not exhausted all avenues for dispute resolution provided for in the RLA. 28 The Court affirmed the dismissal, overturning its prior holding in Moore v. Illinois Central Railroad Co. 29 The Moore decision stood for the principle that a common-law remedy for damages might be pursued by a discharged employee who did not resort to the statutory remedy before the NRAB to challenge the validity of the dismissal. 30 The Andrews Court rejected this principle, ruling that “the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.” 31

The Court’s strong language in Andrews, reaffirming the principle that the dispute resolution process established by the RLA is mandatory and binding, marked the culmination of a series of RLA cases that had slowly chipped away at the Moore rationale. 32 In the 1957 Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. decision, the Court recognized that the RLA’s legislative history demonstrated that “the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field.” 33 Additionally, the Court observed in its 1966 Walker v. Southern Railway Co. opinion that “the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.” 34

26. Id. at 608-09.
27. Id. at 615-16.
30. Id. at 630; see also Price, 360 U.S. at 609 n.8.
32. Id.
C. UNION PACIFIC RAILROAD CO. v. SHEEHAN

The Supreme Court’s 1979 holding in Union Pacific Railroad Co. v. Sheehan ("Sheehan II") is the dispositive opinion regarding the scope of judicial review of NRAB rulings. The Court’s holding was made largely in response to the Tenth Circuit Court of Appeals’ reasoning in the case below. In that opinion, the Tenth Circuit had re-examined the scope of review of NRAB rulings, stating that “implications arising from, and the developments since" the Supreme Court’s Andrews decision necessitated a new approach. The Supreme Court embraced Sheehan II as an opportunity to correct the judicial uncertainty that had evolved since Andrews and to re-affirm the limitations of judicial review imposed by the RLA.

The Sheehan II decision originated from the Union Pacific Railroad’s termination of Kermit Sheehan for violating an unspecified company rule. Sheehan sought review in state court, but during the litigation the Supreme Court, in Andrews, held that a party must exhaust all available measures under the RLA before seeking judicial review. Accordingly, Sheehan dropped his state court case and sought NRAB review. Unfortunately for Sheehan, the NRAB dismissed the appeal due to Sheehan’s failure to file his claim within the prescribed time limits. Sheehan then filed a complaint in the federal district court, seeking an order directing the NRAB to hear his case, or, in the alternative, for reinstatement and a money judgment.

Sheehan argued that the RLA’s time limits should have been tolled during his state-court suit and that the NRAB should be required to hear his case. While the district court admitted that Sheehan’s tolling argument was persuasive, it nonetheless granted Union Pacific’s motion for summary judgment. The court found that Sheehan’s claim did not fall under any of the statutory grounds for review of NRAB decisions and that it could not grant Sheehan relief without violating the RLA. Sheehan appealed to the Tenth Circuit, which reversed and remanded on due process grounds, holding that the Board did not afford Sheehan an opportunity to be heard.

36. Id. at 91.
37. Sheehan I, 576 F.2d at 856.
38. Sheehan II, 439 U.S. at 89.
40. Sheehan II, 439 U.S. at 89.
41. Id. at 91; see also 45 U.S.C. § 153 First (r).
42. Sheehan II, 439 U.S. at 90.
43. Id.
44. Id.
45. Id.; see also 45 U.S.C. § 153 First (p)-(q).
46. Sheehan II, 439 U.S. at 91.
In overturning the court’s holding, the Supreme Court offered two alternatives as to why the Tenth Circuit granted Sheehan relief on due process grounds despite the court’s recognition of the limited scope of judicial review of Board decisions.\textsuperscript{47} The Court first surmised that the Tenth Circuit might have found that the NRAB had failed to consider Sheehan’s “tolling” argument.\textsuperscript{48} As the record demonstrated that the Board had in fact considered this argument, the Court held that the Tenth Circuit was “simply mistaken” if it had relied upon this rationale to grant relief.\textsuperscript{49}

The Court next reasoned that the Tenth Circuit might have granted relief simply because it wanted to overrule the Board’s decision of the “tolling” argument.\textsuperscript{50} If that were indeed the case, the Court found that the Tenth Circuit had exceeded the scope of its jurisdiction to review decisions of the NRAB.\textsuperscript{51} A reviewing court may only set aside an order of the Board under one or more of the three statutory bases provided by the RLA: failure of the Board to comply with the requirements of the RLA, failure of the Board to conform, or confine itself, to matters within the scope of its jurisdiction, or for fraud or corruption by a member of the Board.\textsuperscript{52} Sheehan’s claim against the Board did not fall under any of these options. First, the Board acted within the requirements of the RLA in hearing Sheehan’s minor dispute.\textsuperscript{53} Second, the Board had jurisdiction to hear the “tolling” argument.\textsuperscript{54} Third, Sheehan did not suggest that the NRAB’s refusal was a result of fraud or corruption.\textsuperscript{55}

The Court emphasized that the primary question in federal court claims stemming from NRAB decisions is whether the claim falls within one of the three available statutory grounds for review. The Court added that the RLA unequivocally states that the “findings and order of the adjustment Board shall be conclusive on the parties” and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. And nothing in our opinion in Andrews suggests otherwise.\textsuperscript{56}

The Court’s strong language is further bolstered by the principle of

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 92.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 93.
\textsuperscript{51} Id.
\textsuperscript{52} 45 U.S.C. § 153 First (p)-(q).
\textsuperscript{53} Sheehan \textit{II}, 439 U.S. at 93.
\textsuperscript{54} 45 U.S.C. § 153 First (i).
\textsuperscript{55} Sheehan \textit{II}, 439 U.S. at 93.
\textsuperscript{56} Id.
inclusio unius est exclusio alterius.57 Only by considering the RLA’s list of permissible grounds for review as exclusive may Congress’ intent be realized. If the statute is to mean just what is says, there can be no legal option for review of NRAB decisions beyond the three named grounds.

Moreover, the Court noted that its decision was consistent with the RLA’s legislative history. Congress limited the grounds for review of NRAB rulings precisely so that the Board could settle most minor disputes, sparing union members the expense and delay of a lengthy trial.58 In this manner, Congress “endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes.”59

Although the Court’s opinion has since been deemed ambiguous by at least one court,60 the Tenth Circuit’s decision in Kinross demonstrates that the Supreme Court’s Sheehan II opinion successfully communicated the principle that due process is not grounds for judicial review of an arbitration decision under the RLA.61

IV. THE TENTH CIRCUIT FOLLOWS THE SUPREME COURT’S DIRECTION: NRAB DECISIONS MAY NOT BE REVIEWED UNDER DUE PROCESS

The Tenth Circuit’s 2004 Kinross decision is a strong affirmation of the principles laid down by the Supreme Court in Sheehan II.62 The case originated in early 1998 when William Kinross, a railroad employee for over twenty-one years, bought five or six railroad ties from his Utah Railway Company supervisor, a section foreman, for the stated price of a six-pack of Pepsi.63 In April of that year, a large number of ties were reported missing from the company railyard.64 The company inspected the homes of various employees, leading to the discovery of company ties in Kinross’ yard.65 The company conducted an investigation and held a hearing relating to Kinross’ conduct, determining that he had improperly obtained the ties.66 Utah Railway terminated Kinross after the hearing.67

57. Sagers, supra note 2, at 470. In a “finite list of permissible grounds of review, the doctrine of inclusion unius thus mandates that the list be considered exclusive.” Id.
58. Sheehan II, 439 U.S. at 94.
59. Id.
60. Shafii v. PLC British Airways, 22 F.3d 59, 64 (2d Cir. 1994).
61. Kinross, 362 F.3d at 662.
62. Id. at 658.
63. Id. at 659.
64. Id.
65. Id.
66. Id.
67. Id.
After unsuccessfully appealing his termination to a Utah Railway Executive Vice President, Kinross sought a Special Board of Adjustment ("SBA") review pursuant to section 153 of the RLA.\textsuperscript{68} The SBA determined that just cause supported his termination; section foremen did not have authority to sell company ties to employees, and Kinross had failed to follow company policy for purchasing used railroad ties.\textsuperscript{69} While Utah Railway had submitted to the Board that it suspected that Kinross had been involved in the April theft of a large number of railroad ties, there was no indication that this suggestion factored into the Board's decision.\textsuperscript{70}

Kinross sought review in the United States District Court for the District of Utah, claiming that the Board: (1) failed to confine itself to matters within its jurisdiction, (2) acted in a fraudulent and corrupt manner, and (3) failed to afford him due process.\textsuperscript{71} The district court found in his favor, granting his motion for summary judgment and vacating the Board's award.\textsuperscript{72} The court determined that the Board had inappropriately considered both testimony on the large number of missing ties in April and the company's accusation that Kinross was involved in a scheme to steal a large number of ties.\textsuperscript{73} The court found that the information unfairly influenced the neutral member of the Board, violating Kinross' right to due process.\textsuperscript{74} The district court remanded for a new hearing with new Board members and a stipulated set of facts excluding any info about the April event.\textsuperscript{75}

The company appealed the district court decision on three grounds. First, that the district court exceeded its subject matter jurisdiction because it considered the case under due process grounds.\textsuperscript{76} Second, the company argued that, regardless of the propriety of the due process claim, the court exceeded its jurisdiction in making independent factual findings and evidentiary rulings.\textsuperscript{77} Third, the district court exceeded its jurisdiction by ordering a new hearing and directing the manner in which the SBA was to conduct the hearing.\textsuperscript{78}

\textsuperscript{68} The Special Board of Adjustment was created within the parameters of the Railway Labor Act, 45 U.S.C. § 153 Second (2000). The SBA, like the NRAB, consists of one union representative, one carrier representative, and one neutral arbitrator.

\textsuperscript{69} Kinross, 362 F.3d at 659.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 660.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.
The Tenth Circuit Court of Appeals reversed, holding that the RLA does not provide for judicial review of a Board hearing on due process grounds.\textsuperscript{79} Citing extensively from the Supreme Court's direction in \textit{Sheehan II}, the Tenth Circuit determined that judicial review of due process claims beyond those specifically articulated in the RLA is impermissible.\textsuperscript{80} The court emphasized that the RLA provides only three grounds for judicial review, and noted that the \textit{Sheehan II} Court repeatedly stated that only upon one of these three concerns would a claim be recognized in federal court.\textsuperscript{81}

The Tenth Circuit recognized that a split existed among the circuits over this primary issue.\textsuperscript{82} While the Second, Fifth, Seventh, Eighth, and Ninth Circuits allowed review for due process violation, the Third, Sixth, and Eleventh Circuits held the opposite.\textsuperscript{83} After analyzing the key decisions of both sides, the Tenth Circuit joined the three circuits that held against due process review, consistent with \textit{Sheehan II}'s plain language and the RLA's legislative history.\textsuperscript{84} The \textit{Sheehan II} Court had clearly stated that the motivation behind the enactment of the RLA was that "[C]ongress considered it essential to keep . . . so called 'minor' disputes within the Adjustment Board and out of the courts."\textsuperscript{85} Consistent with this purpose, the Tenth Circuit elected to limit due process review of Board decisions to the three specific claims articulated in the statute.\textsuperscript{86}

Moreover, the court noted that Congress armed the RLA with sufficient procedural protections so as to obviate the need for due process litigation.\textsuperscript{87} First, Congress allowed for review of the Board’s failure to comply with the requirements of the Act, procedural or otherwise, ensuring claimants an opportunity to present evidence and argue their case.\textsuperscript{88} Second, the Act allows for review in the case of the Board surpassing its jurisdiction.\textsuperscript{89} Third, the Act allows for review in the case of corruption or fraud on the Board, ensuring an impartial tribunal.\textsuperscript{90}

In addressing the position held by the other circuits, the Tenth Circuit stated that review on due process grounds requires an "evasive" reading of \textit{Sheehan II} and would "frustrate Congress' intent to keep such

\begin{itemize}
\item \textsuperscript{79} \textit{Id.} at 662.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.} at 661.
\item \textsuperscript{83} \textit{Id.} at 661-62.
\item \textsuperscript{84} \textit{Id.} at 662.
\item \textsuperscript{85} \textit{Id.} (quoting Union Pac. R.R. Co. v. Sheehan (\textit{Sheehan II}), 439 U.S. 89, 94 (1979)).
\item \textsuperscript{86} \textit{Kinross}, 362 F.3d at 662.
\item \textsuperscript{87} \textit{Id.} at 661.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\end{itemize}
disputes out of the courts."\textsuperscript{91} 

V. CIRCUITS HOLDING THAT DUE PROCESS IS NOT GROUNDS FOR JUDICIAL REVIEW

The Tenth Circuit’s reasoning in prohibiting independent due process review is consistent with the conclusion reached by several other circuits regarding this issue. These courts have correctly interpreted \textit{Sheehan II}, the controlling decision issued by the Supreme Court, as affirming the RLA’s limitations for the review of NRAB decisions. Specifically, the Third, Sixth and Eleventh Circuits have all cited to \textit{Sheehan II}'s strong language holding that judicial review of arbitration decisions under the RLA is only proper under the three grounds expressly stated in the Act.\textsuperscript{92}

A. THIRD CIRCUIT

In \textit{United Steelworkers of America Local 1913 v. Union Railroad Co.}, the Third Circuit followed the Supreme Court’s direction in \textit{Sheehan II} by holding that review of NRAB decisions is limited to the three grounds listed in the RLA.\textsuperscript{93} The case arose when the defendant Union Railroad terminated Sam Godich, a railroad employee and member of the plaintiff union, due to insubordination and for the violation of other work rules.\textsuperscript{94} Godich appealed to the NRAB, which affirmed Godich’s termination despite several challenges\textsuperscript{95} and procedural errors.\textsuperscript{96} Godich then sought review in the district court, which remanded the matter to review before a new Board on the grounds that the Board had violated Godich’s contractual right to legal representation.\textsuperscript{97}

In reversing the district court, the Third Circuit interpreted the Supreme Court’s \textit{Sheehan II} decision as limiting the permissible grounds of review for NRAB decisions.\textsuperscript{98} The court found that there is a “very narrow standard of review of board findings” and that “the Court in \textit{Sheehan II}] was quite specific in rejecting nonstatutory grounds for review.”\textsuperscript{99} The court summarized the Act as limiting review of NRAB decisions to

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} \textit{Sheehan II}, 439 U.S. at 93. (“We have time and again emphasized that this statutory language means just what it says.”).
  \item \textsuperscript{93} \textit{United Steelworkers of Am. Local 1913 v. Union R.R. Co.}, 648 F.2d 905, 912 (3d Cir. 1981).
  \item \textsuperscript{94} \textit{Id.}
  \item \textsuperscript{95} Godich first claimed that he was denied counsel, then claimed that his counsel was inadequate. \textit{Id.} at 908.
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{97} Rule 26 of the contract between the Railroad and the Union affords a party the right to counsel. \textit{Id.}
  \item \textsuperscript{98} \textit{Id.} at 910.
  \item \textsuperscript{99} \textit{Id.} at 911-12.
\end{itemize}
situations where the Board "fails to comply with the Act, [issues a] new order outside the Board’s jurisdiction, or [where] a Board member acts fraudulently or corruptly."  

Godich argued that he was deprived of substantive due process and not limited by the narrow standards of the statute because Sheehan II applied only to denials of procedural due process. However, the court noted that "there is no language in Sheehan [II] to justify such a procedural/substantive distinction" and that the only issue was "whether the party’s objections to the Board’s decision fall within any of the three limited categories for review" listed in the RLA. As Godich’s claims did not fall within one of the three categories, the Third Circuit concluded that the district court erred when it set aside the Board’s findings.

B. SIXTH CIRCUIT

In Jones v. Seaboard System Railroad, the Sixth Circuit affirmed the district court’s reliance on Sheehan II in holding that the plaintiff’s allegations of due process violations did not provide a legitimate ground for review.

The case originated when railroad employee, Thomas Jones, was arrested for selling twenty-one pounds of marijuana to an undercover police officer. The railroad employer dismissed Jones subsequent to his arrest for conduct unbecoming an employee. Jones unsuccessfully challenged the Board’s decision directly with his employer. He then unsuccessfully petitioned the NRAB to review his dismissal. Finally, Jones appealed to the district court, asking the court to order the NRAB to reconsider his case. When the district court granted the railroad’s motion for summary judgment, Jones appealed to the Sixth Circuit.

The Sixth Circuit strongly refuted the notion that due process was a permissible basis for review of NRAB decision. The court stated that Sheehan II precluded the judicial review of NRAB decisions on any grounds outside of the RLA’s three specific requirements. It added

100. Id. at 910.
101. Id. at 911.
102. Id. (quoting Union Pac. R.R. Co. v. Sheehan (Sheehan II), 439 U.S. 89, 93 (1979)).
103. Id. at 914.
105. Id. at 641.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id. at 641-42.
111. Id. at 642 (citing Union Pac. R.R. Co. v. Sheehan (Sheehan II), 439 U.S. 89, 94 (1979)).
that “if an appellant cannot satisfy one of these three grounds, review cannot be granted.” Noting that Jones had “wisely abandoned his due process argument,” the court held that his appeal was proper only because he had “assert[ed] other grounds to support judicial review” in the district court. The Sixth Circuit determined that Jones’ demand to the NRAB to reconsider his case was time barred and affirmed the district court’s decision to dismiss his complaint.

C. Eleventh Circuit

In Henry v. Delta Air Lines, the defendant, Delta Airlines, fired Jack Henry for numerous occasions of misconduct. Henry appealed with three arguments, one of which was judicial review of the Board’s decision for denying him due process.

The Eleventh Circuit simply refused to hear Henry’s due process argument. The court’s brief opinion summarily dismissed Henry’s claim by holding that it was “without merit because the Supreme Court has held that judicially created challenges to System Board’s awards must fail.” The Eleventh Circuit added that “Sheehan [II] precludes judicially created due process challenges” to NRAB findings.

VI. Circuits Permitting Judicial Review Under Due Process Grounds

Despite the Supreme Court’s firm direction to the contrary, five Circuits, the Second, Fifth, Seventh, Eighth, and Ninth, have affirmed the review of NRAB decisions under due process. The following section offers an examination of the dispositive decision in each circuit, demonstrating that this conclusion is based on a flawed interpretation of Sheehan II, is not supported by case law, and is contrary to congressional intent as embodied in the RLA.

A. Second Circuit

The Second Circuit’s holding in Shafii v. PLC British Airways is a strong articulation of the arguments supporting judicial review of NRAB decisions for due process. Shafii is particularly instructive because the
Second Circuit discussed many, if not all, of the issues involved in the circuit split.

British Airways fired employee Seyed Shafii from his Reservation Sales Agent job for insubordination. Upon his termination, Shafii filed a grievance against British Air and the parties presented the matter to the NRAB for arbitration, as required by the RLA. Shafii contended that he was denied due process when the arbitrator rejected his request to present one witness and two documents during the hearing. Shafii presented an affidavit establishing that the arbitrator had decided not to admit his witness and documents simply because the arbitrator wanted to catch a flight, leaving no time to consider further evidence. The district court granted British Air’s motion for summary judgment on the grounds that the affidavit constituted inadmissible hearsay. The court did not entertain British Air’s argument that judicial review of the arbitrator’s decision on due process grounds was not allowed under RLA.

On appeal, the Second Circuit Court of Appeals recognized the three aforementioned grounds upon which a court has jurisdiction to review a NRAB decision. The court further noted that courts have historically reviewed NRAB decisions to ensure that a participant’s due process rights were not violated. The court reviewed Sheehan II and cited the numerous cases inside and outside of the Second Circuit that have reviewed NRAB decisions on due process grounds. The court then stated that the Sheehan II Court never directly interpreted the RLA to bar a challenge on due process grounds. The Shafii court determined that the ambiguous Sheehan II Supreme Court opinion was a direct response to the “equally ambiguous” Tenth Circuit Court of Appeals opinion which indicated that judicial review of NRAB decisions was available for “purely legal questions.”

Further, the court found significant Congress’ silence regarding its intention for the RLA to serve as the last stop in the protection of a

121. Id. at 63.
122. 45 U.S.C. § 153 et seq.
123. Shafii, 22 F.3d at 60-61.
124. Id.
125. Id. at 61.
126. The court refused to challenge a previous Judge’s ruling that denial of due process was reviewable. Id.
127. Id. at 63 (citing 45 U.S.C. § 153 First (p)-(q)).
128. Id. (citing Bhd. of Maint. of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Ass’n, 794 F.2d 816, 189 (2d Cir. 1986), Kicking Woman v. Hodel, 878 F.2d 1203 (9th Cir. 1989), and Edelman v. W. Airlines, 892 F.2d 839 (9th Cir. 1989)).
129. Id.
130. Id. at 62-64.
131. Id. at 64.
participant's constitutional due process rights.\textsuperscript{132} As neither the Supreme Court nor Congress had articulated an express intention to bar review of NRAB decisions on due process grounds, the Second Circuit determined that judicial review was a valid means of protecting the constitutional rights of participants.\textsuperscript{133} Having found that due process afforded it jurisdiction to hear the case, the court went on to address Shafii's substantive evidentiary claims, which are irrelevant here.

The Second Circuit's reasoning was based on its interpretation of Sheehan \textit{II} as permitting due process review, its reliance on cases from other circuits, and its understanding of the statute's congressional intent. Each of the court's arguments for due process reviewability will be discussed in turn.

First, the Shafii court found that the Supreme Court in Sheehan \textit{II} supported due process review, an interpretation exactly opposite to that reached by the Tenth Circuit in Kinross. The Second Circuit began its argument by contending that the Sheehan \textit{II} opinion was "somewhat ambiguous," due largely to the "equally ambiguous" nature of the Tenth Circuit opinion upon which it was based.\textsuperscript{134} Believing that the Supreme Court's Sheehan \textit{II} decision was unclear, the Second Circuit proffered a different interpretation to that which most naturally flows from Sheehan \textit{II}'s plain language, as articulated by the Tenth Circuit in Kinross. The Second Circuit noted that "[n]owhere in [Sheehan \textit{II}] does the Court state that it interprets the statute to bar due process challenges."\textsuperscript{135}

The court further argued that the Supreme Court itself considered Sheehan's due process claim on the merits when it held that the Tenth Circuit was "simply mistaken" if it ruled that remand was necessary due to the NRAB's failure to consider the plaintiff's equitable tolling argument.\textsuperscript{136} The Second Circuit held that this language was sufficient to demonstrate that the Supreme Court had itself engaged in a due process review of the plaintiff's case and, having found no violation, disposed of that issue summarily.\textsuperscript{137}

As for Sheehan \textit{II}'s strong language upholding the narrow scope of review for NRAB decisions and reaffirming the limitations stipulated in the RLA, the Shafii court contended that the Supreme Court was merely

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\textsuperscript{132} 45 U.S.C. §153 First (q); see also Elmore v. Chicago & Ill. Midland R.R., 782 F.2d 94, 96 (7th Cir. 1986) ("The National Railroad Adjustment Board, however, while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law.").
\textsuperscript{133} Shafii, 22 F.3d at 64.
\textsuperscript{134} \textit{Id.} at 62.
\textsuperscript{135} \textit{Id.} at 63.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 64.
\end{flushright}
chastising the Tenth Circuit for its review of “purely legal questions,” separate from the issue of due process.\textsuperscript{138} The Second Circuit argued that the examination of NRAB decisions for due process violations is an entirely reasonable practice, much different from the category of “purely legal questions” that the Supreme Court specifically emphasized as impermissible.\textsuperscript{139}

The Second Circuit’s interpretation of Sheehan II must fail for several reasons. First, there is no language in the Sheehan II opinion to support the Second Circuit’s contention that the Supreme Court was engaging in due process review. The Sheehan II excerpt relied upon by the Shafti court, quoted above, does not even use the words “due process.”\textsuperscript{140} Further, nowhere in Sheehan II did the Court provide any standards by which to evaluate whether sufficient process has been afforded.\textsuperscript{141} Nowhere in the opinion did the Court make reference to the Mathews v. Eldridge balancing test, the complex, fact-specific scheme that is predominantly utilized to determine when a litigant has received due process.\textsuperscript{142} Completely absent from the opinion is any discussion of the elements of the Mathews test, such as an analysis of the gravity of the private interests involved, the likelihood of erroneous deprivations of life, liberty, or property, or the social costs of added procedural safeguards.\textsuperscript{143}

Finally, the Second Circuit’s interpretation of Sheehan II is questionable because it relies on a small, ambiguous section of the decision’s text to reach a conclusion that is clearly contrary to the opinion’s prevailing message. The unequivocal nature of the Sheehan II opinion is a strong affirmation by the Supreme Court that review should be no broader than that permitted by statute.\textsuperscript{144} If the Court truly did intend for NRAB decisions to be reviewed under due process, the Court most likely would have said so directly, instead of making a weak and ambiguous implication in the midst of a disposition on the limitation of review.\textsuperscript{145} The more reasonable interpretation of the language that is claimed by the Second Circuit to be due process review is simply that of classic dictum.\textsuperscript{146} The Court merely indicated that even had the Tenth Circuit had the power to review for violations of due process, which it did not, there was no due process violation in Sheehan’s case.\textsuperscript{147}

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Sagers, supra note 2, at 475.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
In addition to its interpretation of Sheehan II, the Shafii court also relied on cases from other circuits to reach its conclusion that due process review of NRAB decisions is appropriate. A brief analysis of each of the cases relied upon by the Second Circuit reveals that the court's cited authority fails to adequately support its position.

The Second Circuit first cited to the Ninth Circuit's 1989 Edelman v. Western Airlines decision to support its contention that the Sheehan II opinion was ambiguous. In Edelman, the Ninth Circuit extensively discussed Sheehan II and then relied on an analogous Ninth Circuit decision, Kicking Woman v. Hodel, to conclude that due process is proper grounds for judicial review. However, while Kicking Woman discussed due process as grounds for review, the decision for which the plaintiff sought review in that case was made by an administrative governmental agency, not a private, bargained-for arbitration board like the NRAB. Both the Edelman and Shafii courts failed to address this important distinction. It was improper for the Shafii court to rely on the Ninth Circuit's Edelman decision without accounting for the glaringly disparate factual situation in Kicking Woman on which Edelman found its authority.

The Shafii court also cited to the Seventh Circuit's Steffens v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees decision to support its contention that Sheehan II did not prohibit due process review. However, the Second Circuit's reliance on Steffens is questionable as the Second Circuit accepted that holding without inquiring into the validity of its authority. If the Second Circuit had investigated Steffens' foundational cases, it should have

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149. Shafii, 22 F.3d at 63.
150. Kicking Woman v. Hodel, 878 F.2d 1203, 1206-07 (9th Cir. 1989) (supporting the principle that due process protection through judicial review of administrative hearings is required unless otherwise explicitly expressed, specifically as related to Native American Land decisions by the Department of the Interior, a government entity, and in turn relies on due process review of social security act claims by the secretary of health, education, and welfare, another government entity). Though judicial review of a governmental agency's administrative decision may be proper, the court does not provide support that an administrative hearing is analogous to an arbitration board hearing. Id.
151. Edelman, 892 F.2d at 846. In addition to relying on Edelman, the Shafii court also cited explicitly to Kicking Woman, stating that the Ninth Circuit's analysis in that case was persuasive. Shafii, 22 F.3d at 64.
152. Kicking Woman, 878 F.2d at 1206-07.
153. Edelman, 892 F.2d 839; Shafii, 22 F.3d 63.
154. Steffens v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express and Station Employees, 797 F.2d 442, 449 (7th Cir. 1989) (concluding that the Court supports due process as a basis for review because Sheehan II does not "explicitly disapprove of due process as a basis for review.").
155. Shafii, 22 F.3d 63.
been aware of the fact that Steffens was not adequately supported by relevant authority.

The Steffens court reached its decision by relying on O’Neill v. Public Law Board No. 550,\textsuperscript{156} Kotakis v. Elgin, Joliet & Eastern Railway Co.,\textsuperscript{157} and Elmore v. Chicago & Illinois Midland Railroad.\textsuperscript{158} Both the O’Neill and Kotakis decisions were rendered prior to the Supreme Court’s 1979 Sheehan II holding, an opinion directly contrary to those earlier decisions. Furthermore, Elmore was a 1986 Seventh Circuit case that relied on O’Neill merely to hold, in dicta, that due process could form the basis for a claim.\textsuperscript{159} However, the court in that case stopped short of deciding the issue because it found that no violation had occurred.\textsuperscript{160} In sum, the Steffens decision was based on two cases that have been superseded by a subsequent Supreme Court decision and a third that failed to reach a holding on the particular issue of due process review. Contrary to the Second Circuit’s understanding, Steffens actually provided little support for its conclusion.

A third element of the Second Circuit’s conclusion in favor of due process review was its understanding of congressional intent behind the RLA. The Second Circuit first found that the NRAB, while private in fact, is public in name and function because it flowed from the RLA, the scheme erected by Congress to resolve certain disputes in the railroad industry.\textsuperscript{161} The court reasoned that the NRAB’s public nature makes its decisions the acts of the government and subject to the constitutional requirements of due process.\textsuperscript{162} The Second Circuit then concluded that prohibiting courts’ ability to review the NRAB’s procedures for due process violations would be contrary to Congress’ intent in enacting the RLA because it would leave a plaintiff’s legitimate constitutional rights unprotected.\textsuperscript{163}

The Second Circuit’s conclusion is objectionable because it is inimical to the RLA’s stated purpose of preserving the efficient operation of national transportation industries through stream-lined dispute resolution mechanisms.\textsuperscript{164} The RLA’s goal of ensuring expeditious dispute resolu-

\textsuperscript{156} O’Neill v. Pub. Law Bd. No. 550, 581 F.2d 692, 694 (7th Cir. 1978) (concluding that review under due process is a viable collateral attack on a NRAB decision).

\textsuperscript{157} Kotakis v. Elgin, Joliet & E. Ry. Co., 520 F.2d 570, 574 (7th Cir. 1975) (citing Union Pac. R.R. Co. v. Price, 360 U.S. 601, 604-05 (1959)).

\textsuperscript{158} Elmore, 782 F.2d at 96.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Shafii, 22 F.3d at 64 (quoting Elmore v. Chicago & Ill. Midland R.R., 782 F.2d 94, 96 (7th Cir. 1986)).

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Prolonged labor struggles in the transportation industry poses a serious threat to na-
tion was made clear in its mandate to "avoid any interruption to commerce or to the operation of any carrier engaged therein [and] to provide for the prompt and orderly settlement of all disputes." In contrast to the NRAB's informal and efficient mechanisms, the federal district courts are slow decisionmakers whose overflowing dockets are ill equipped to handle complicated, burdensome and unsettled constitutional litigation regarding administrative agencies. Far from effectuating congressional intent, concluding that the RLA allows due process appeals frustrates the government's desire to maintain an efficient transportation system and impedes the RLA's true purpose.

The Second Circuit's holding in Shafii to permit the review of NRAB decisions for due process is based on a flawed interpretation of the Supreme Court's Sheehan II decision, relies on unpersuasive authority, and acts directly against Congress' intent in enacting the RLA.

B. FIFTH CIRCUIT

In Atchison, Topeka and Santa Fe Railroad Co. v. United Transportation Union, the plaintiff railroad terminated a union employee for failing two drug tests within ten years. The employee furnished evidence of several prescription drugs that clouded the validity of the most recent test. The railroad's medical review officer failed to investigate the questionable drug test as required by regulation. The employee appealed to the NRAB which reinstated the employee with back pay and benefits. The railroad sought review before the district court.

At trial, the Fifth Circuit noted the RLA's three grounds for review, adding that the Fifth Circuit had recognized an additional fourth basis for review on grounds of due process. The court rejected the railroad's request that the court adopt a fifth basis for review based on public policy. The court granted the union's motion for summary judgment as the railroad's claim did not fit into any of the four established grounds for

165. 45 U.S.C. § 151 (a).
166. Sagers, supra note 2, at 485.
167. Id.
169. Id.
171. Atchison, 175 F.3d at 356-57.
172. Id. at 357.
174. Atchison, 175 F.3d at 357 (citing Bhd. of Locomotive Eng'rs v. St. Louis Sw. Ry. Co., 757 F.2d 656, 660-61 (5th Cir. 1985)).
175. Id.
review.176

While the Fifth Circuit Court of Appeals affirmed the district court’s rejection of review on the basis of public policy, it did not question the district court’s stance on reviewing NRAB decisions on grounds of due process, even though the district court had blindly relied on a 1985 case that held contrary to the Supreme Court’s 1978 Sheehan II holding.177 The case in question, Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co., held that due process provided a fourth ground for judicial review under the RLA.178 However, the Fifth Circuit’s reliance on Brotherhood was misplaced. Brotherhood was itself based upon a pre-Sheehan II 1967 Fifth Circuit decision, Southern Pacific Co. v. Wilson,179 which in turn cited to a 1966 Seventh Circuit decision, Edwards v. St. Louis-San Francisco Railroad Co., that concluded similarly.180 As Brotherhood relied upon cases that were decided prior to the Supreme Court’s directive in Sheehan II, the Fifth Circuit should have re-evaluated Brotherhood’s validity before basing its conclusion on that holding.

C. SEVENTH CIRCUIT

Pokuta v. Trans World Airlines, Inc. involved a dispute regarding the termination of Sandra Pokuta, a thirty-three year employee of Trans World Airlines (“TWA”) and the Lead Agent at TWA’s Chicago O’Hare’s ticket counter.181 TWA terminated her employment following an incident during which she allegedly twisted her co-worker Hernandez’s wrist and pushed Hernandez up against a wall while TWA passengers looked on.182 Pokuta denied this version of the incident and instead alleged that Hernandez pulled Pokuta’s hair and repeatedly pummeled Pokuta in the face.183 Pokuta, however, could produce no witnesses to confirm her side of the story.184

Pokuta appealed to the Board, which decided that termination was a just disciplinary measure for her actions.185 The district court agreed to review the case on due process grounds, but dismissed the case for failure to state a claim.186

176. Id.
177. Id.
178. Locomotive Eng’rs, 757 F.2d at 660-61 (concluding, without discussing Sheehan II, that due process is still a valid basis for judicial review).
179. S. Pac. Co. v. Wilson, 378 F.2d 533, 536-37 (5th Cir. 1967).
182. Id. at 835-36.
183. Id. at 836.
184. Id.
185. Id.
186. Id. at 839.
The Seventh Circuit indicated that Pokuta’s due process claim fell within the “fourth category of objections that supply jurisdiction over the award.” The court affirmed the district court’s dismissal for reasons that are unimportant for this discussion.

The Seventh Circuit supported its conclusion by citing to the 1993 Bates v. Baltimore & Ohio Railroad Co. and the 1987 Morin v. Consolidated Rail Corp. decisions. Morin is based on Steffens, which relies on O’Neill, all cases that were cited by the Second Circuit in its Shaﬁt holding. O’Neill is in turn supported by the 1959 Price decision. The Seventh Circuit thus based its conclusion to allow due process review in Pokuta by relying on a chain of authority that ultimately leads to a 1959 decision that conﬂicts with the Supreme Court’s clear directive in its 1978 Sheehan II holding.

Further, the Price court’s conclusion that due process is proper grounds for judicial review was unreliable even before the Sheehan II decision. Price relied on Ellerd v. Southern Paciﬁc Railroad Co. and Barnett v. Pennsylvania-Reading Seashore Lines, both of which supported judicial review of NRAB decisions under due process grounds. However, both holdings were issued before the 1966 Senate Report and subsequent amendments to the RLA. Directly contrary to the conclusion reached in those cases, the 1966 Report declared that “[t]here is no other provision for judicial review of decisions of the National Railroad Adjustment Board” except for the three grounds expressed in the

187. Id. (citing Morin v. Consol. Rail Corp., 810 F.2d 720, 722 (7th Cir. 1987) (per curiam) (concluding that the Seventh Circuit may review a NRAB decision under due process grounds) (citing O’Neill v. Pub. Law Bd. No. 550, 581 F.2d 692, 694 (7th Cir. 1978) (concluding that review under due process is a viable collateral attack on a NRAB decision) (citing Union Pac. R.R. Co. v. Price, 360 U.S. 601, 617 (1959) (determining that allowing judicial review under due process and other grounds requires the assumption that “Congress planned that the Board should function only to render advisory opinions, and intended the Act’s entire scheme for the settlement of grievances to be regarded ‘as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board’s decision . . . [a contention] inconsistent with the Act’s terms, purposes and legislative history.”) (alteration in original) (citing Elgin Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 720-21 (1945)))).
188. Id. at 841.
192. Ellerd v. S. Pac. R.R. Co., 241 F.2d 541 (7th Cir. 1957) (holding that if the Union, as representative of an employee, denies that employee of due process by representing the employee against his wish, then the Federal District Court has jurisdiction to hear the case).
194. Ellerd, 241 F.2d at 544; Barnett, 245 F.2d at 581.
The Seventh Circuit’s holding in *Pokuta*, finding that due process constitutes a fourth ground of review for NRAB decisions, lacks sufficient support. The court improperly relied on antiquated cases that have been superseded by both the government and the Supreme Court.

D. EIGHTH CIRCUIT

In *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, locomotive engineer Ronald Goff tested positive for marijuana during a post-accident drug test administered after a derailment.198 Dakota, Minnesota & Eastern Railroad (“DM&E”) terminated Goff, who in turn appealed to the Board.199 The Board reinstated Goff but withheld back pay.200 Goff appealed to the district court.201

The district court heard the case under due process grounds.202 The district court found that the Board had violated Goff’s right to due process when DM&E submitted an incomplete transcript of the post suspension hearing.203

The Eighth Circuit agreed with the basis upon which the district court reviewed the Board’s decision, but held that the Board did not violate Goff’s right to due process.204 The Goff court did not address the legitimacy of the district court’s decision to review the arbitrator’s decision on grounds of due process, but like the Fifth and Seventh Circuits, concluded that due process was the fourth basis on which judicial review of a NRAB decision was proper.205

The Eighth Circuit’s decision in *Goff* to allow due process review relies on three cases: *Price*,206 *Shafii*,207 and *Armstrong Lodge No. 762 v. Union Pacific Railroad*.208 The limited authoritative value of both *Price* and *Shafii* has been discussed above. The court’s reliance on *Armstrong* is

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199. Id.
200. Id. at 995.
201. Id.
202. Id. at 997 (citing 45 U.S.C. §153 First (i), (j)) (“Under the RLA provisions governing Board hearings, due process requires that: (1) the Board be presented with a ‘full statement of the facts and all supporting data bearing upon the disputes,’ and (2) the ‘[p]arties may be heard either in person, by counsel, or by other representatives . . . and the . . . Board shall give due notice of all hearings to the employee.’”).
203. The incomplete transcript was not a “full statement of the facts and all supporting data bearing upon the disputes.” Id.
204. Id. at 998.
205. Id. at 992.
207. Shafii, 22 F.3d 59.
208. Armstrong Lodge No. 762 v. Union Pac. R.R., 783 F.2d 131, 135 (8th Cir. 1986) (con-
also fails to adequately support its conclusion. The *Armstrong* court did not conclude whether due process is adequate grounds for NRAB decision review. 209 Rather, it simply addressed whether the plaintiff’s due process rights were actually violated in that particular case. 210 At most, *Armstrong* merely raises an inference that the court deemed due process grounds adequate for review. 211 A tenuous inference such as that raised by *Armstrong* is insufficient to support the Eighth Circuit’s *Goff* holding when considered in light of the Supreme Court’s strong language to the contrary in *Sheehan II*.

E. NINTH CIRCUIT

In *English v. Burlington Northern Railroad Co.*, Burlington Northern Railroad Co. (BNRR) discharged Anthony English because of a fight between English and a fellow BNRR employee. 212 English appealed to the NRAB. 213 English did not testify in front of the Board because of the ongoing criminal investigation into his actions, and the Board affirmed the discharge. 214 English then applied for judicial review in district court under the grounds that the NRAB arbitration process violated his due process rights when BNRR asked him to waive his right against self-incrimination during the preliminary investigatory hearing. 215 The district court granted BNRR’s motion for summary judgment. 216

The Ninth Circuit Court of Appeals reaffirmed the district court’s jurisdiction to review a NRAB decision, stating, “a constitutional challenge is a permissible fourth ground by which a federal court can review an adjustment Board decision.” 217 On the merits of the due process claim, the court found that the Board complied with the RLA due process requirements. 218

\[including the arbitrator violated plaintiff’s right to due process without considering whether due process was an adequate ground for judicial review.\]

209. *Id.*
210. *Id.*
211. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 744.
216. *Id.* at 743.
217. *Id.* at 744 (citing Edelman v. W. Airlines, 892 F.2d 839 (9th Cir. 1989) (joining the Seventh and Fifth Circuits against the Eleventh Circuit in the first impression question of whether due process is a fourth grounds for review of a NRAB decision)).
218. *Id.* (citing 45 U.S.C. §153 First (i), (j), “Under the RLA provisions governing Board hearings, due process requires that: (1) the Board be presented with a ‘full statement of the facts and all supporting data bearing upon the disputes,’ and (2) the ‘parties may be heard either in person, by counsel, or by other representatives . . . and the . . . Board shall give due notice of all hearings to the employee.’”).
The Ninth Circuit relied on its 1989 *Edelman* decision to hold that a due process claim is a permissible fourth ground by which a federal court can review an adjustment board decision. While *Edelman* extensively discussed the *Sheehan II* decision, the court relied primarily on the analogous Ninth Circuit decision, *Kicking Woman*, to conclude that due process is proper grounds for judicial review. As discussed previously in regards to the Second Circuit's reliance on *Kicking Woman* in its *Shafti* opinion, the decision for which the plaintiff sought due process review in *Kicking Woman* was by an administrative governmental agency, not a private, bargained-for arbitration board. Similar to the court in *Shafti*, the Ninth Circuit in *Edelman* failed to recognize this distinction. Considering the importance of this unrecognized factual disparity, the English court's reliance on *Edelman* to affirm due process review is questionable.

**F. Summary**

Circuits that have concluded that due process review is permissible within the context of the RLA have been forced to circumnavigate the Supreme Court's strong language in *Sheehan II* limiting the review of NRAB decisions. These courts have resorted to an illogical and awkward interpretation of *Sheehan II* in order to contrive some measure of justification for their conclusion, failing to acknowledge *Sheehan II*'s prevailing directive to the contrary.

Additionally, unlike the Tenth Circuit's reliance on the Supreme Court's dispositive *Sheehan II* holding, courts that have permitted due process review of NRAB decisions have relied on outdated authority. These circuits have cited to cases that ultimately rely on decisions made prior to *Sheehan II*, imparting limited persuasive power when considered in light of the Supreme Court's later holding. Like a house of cards that collapses when the bottom card is removed, these circuits have constructed an argument that must fail as it has been shown that the chain of authority upon which they rely leads to a foundation comprised of pre-*Sheehan II* holdings.

**VII. The Railway Labor Act's Arbitration Process Inherently Protects Individuals' Due Process Rights**

Along with constitutional issues too broad to be properly addressed in this note, a primary question regarding the RLA's jurisdictional lim-

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220. *English*, 18 F.3d at 743.
221. *Kicking Woman*, 878 F.2d at 1206-07.
222. This note does not address the well established doctrine of Legislative Restriction of Judicial Review, the similarly well established suggestion that bargained-for arbitration is proper in labor cases, or whether benefits or employment is "property," thereby triggering due process.
itation is whether the absence of district court review on due process grounds deprives litigants of their right to procedural due process. The following section will analyze the procedures mandated by the RLA to determine whether the Act’s procedural safeguards are sufficient to protect participants’ due process rights in NRAB arbitration, thus, obviating the need for due process review.

Procedural due process is a flexible concept that demands a varying level of process depending on the specific facts of each case. It has been well established that the standards necessary in RLA hearings are lower than in many other administrative contexts as the private interests involved are less significant than in other administrative proceedings. However, until the 1970’s, courts generally referred to the due process requirement of a “hearing” without further specification of what exactly the requirements of a hearing were. In 1975, Judge Friendly responded to the “due process explosion” of the 1970’s by compiling a list of factors, organized roughly in order of priority, that are generally considered the basic elements of a fair hearing. This list identifies the maximum procedural standards necessary in RLA hearings given the balance between the private interests at issue and the government’s interests in the RLA’s administrative regime. These “core” procedural requirements “serve so many important functions that their provision by an agency should excuse the absence of the more expensive and time-consum ing procedures in other classes of disputes.” An analysis of the procedures imposed by the RLA on its tribunals makes clear that RLA proceedings have sufficient procedural safeguards to satisfy these core requirements.

A. An Unbiased Tribunal

An unbiased tribunal is a necessary element in every case where a hearing is required. This first core procedural standard is satisfied by the RLA’s structural mechanisms. The RLA provides for a thirty-four member NRAB comprised of half carrier representatives and half labor

223. Sagers, supra note 2, at 476.
228. Sagers, supra note 2, at 477.
229. Id. at 478, 479.
230. Id. at 480.
231. Friendly, supra note 227, at 1279.
232. Sagers, supra note 2, at 480.
representatives.\textsuperscript{233} The NRAB is further split into four divisions of varying sizes to preside over disputes depending on the labor classification of an employee.\textsuperscript{234} In the event that the NRAB is deadlocked, the NRAB is to select a neutral person to act as referee to the grievance.\textsuperscript{235} The RLA expressly permits a carrier and employee to submit their grievance to the SBA. The SBA is a creature of contract,\textsuperscript{236} usually consisting of three members, one each from Labor and Carrier, and one neutral party selected by the parties or the National Mediation Board.\textsuperscript{237} As the parties bear the responsibility of selecting a neutral party to hear their claim, the RLA inherently satisfies the unbiased tribunal requirement.\textsuperscript{238}

B. \textbf{Notice of the Proposed Action and the Grounds Asserted for It}

Notice that timely and clearly informs the individual of the proposed action and grounds for it is fundamental to due process.\textsuperscript{239} The RLA expressly provides that tribunals shall give "due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."\textsuperscript{240} While the Act does not further define the meaning of "due notice," the basic "notice pleading" attendant of the appellate nature of both NRAB and SBA proceedings ensures that reasonable notice is provided.\textsuperscript{241}

C. \textbf{Opportunity to Present Reasons why the Proposed Action Should not be Taken}

This fundamental requirement represents the traditional "hearing" element of due process.\textsuperscript{242} The RLA addresses this concern by providing that the parties "may be heard in person."\textsuperscript{243} As Judge Friendly noted, this condition meets or exceeds the demands of due process as, in some circumstances, a "hearing" may even be satisfied through the exchange of

\textsuperscript{234} 45 U.S.C. § 153 First (h). Each division is comprised of an equal number of Carrier representatives and Labor representatives. \textit{Id.}
\textsuperscript{235} \textit{Id.} § 153 First (l). Should the NRAB fail to agree on a neutral member, the Mediation Board shall select the neutral member. \textit{See id.} § 154 et seq.
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} Sagers, \textit{supra} note 2, at 480.
\textsuperscript{239} Friendly, \textit{supra} note 228, at 1280.
\textsuperscript{240} 45 U.S.C. § 153 First (j).
\textsuperscript{241} Sagers, \textit{supra} note 2, at 481.
\textsuperscript{242} Friendly, \textit{supra} note 227, at 1281.
\textsuperscript{243} 45 U.S.C. § 153 First (j).
written materials, much less an oral hearing.244

D. THE RIGHT TO CALL WITNESSES, TO KNOW OPPOSING EVIDENCE, AND A DECISION BASED ONLY ON THE EVIDENCE PRESENTED

While it is questionable whether these closely associated rights are indeed core due process requirements in the RLA context, they have generally been applied to administrative and regulatory actions of all types and, thus, merit discussion.245 The RLA mandates that each Adjustment Board is to base its decisions on a “full statement of the facts and all supporting data” that is provided by each party. To the extent that the parties stipulate to the facts, the rules encourage them to make a “joint statement of the facts.”246 At the very least, each party will be able to ascertain the primary factual differences of their claims. Further, the Board considers only the facts and testimony presented at a hearing.247

E. THE RIGHT TO COUNSEL

Although the right to counsel may not prove as useful in the administrative context as in criminal cases, this right constitutes a well recognized principle.248 While a party may choose to proceed without counsel, the RLA provides that “[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.”249

F. PRESENTATION OF A RECORD OF THE EVIDENCE

Even though the RLA contains no explicit requirement that proceedings be recorded, the satisfaction of this due process requirement may be presumed from the necessities of the appeal process.250 Tribunals are required to provide the district court with a record of their proceedings upon appeal.251 To the extent that each hearing may be subject to judicial review, tribunals must operate under the unwritten rule that a transcript must be produced.

245. Friendly, supra note 227, at 1282.
246. Sagers, supra note 2, at 480.
247. Id. at 483. This requirement is presumed from the fact that, upon appeal, a tribunal must provide the district court with a record of its proceedings. Id.
248. Friendly, supra note 227, at 1287.
250. Friendly, supra note 227, at 1291. Judge Friendly noted that this particular due process concern is less of a requirement than simply a matter of the American addiction to transcripts. Id.
251. Sagers, supra note 2, at 483.
252. Id.
G. Written Findings of Fact

Along with being essential in the case of judicial review, this "justification" requirement is also a powerful preventive of wrong decisions. The RLA meets this requirement by providing that "[t]he awards of the several divisions of the Adjustment Board shall be stated in writing" and that "[a] copy of the awards shall be furnished to the respective parties to the controversy." 254

H. Summary: The RLA Satisfies All Applicable Due Process Requirements

A comparison of the procedures mandated by the RLA to the core procedural requirements of this administrative setting reveals that the Act’s procedural safeguards are sufficient to protect participants’ due process rights in NRAB arbitration. The RLA not only meets every imposed requirement, but also exceeds the minimum standard, providing greater protection than required. The procedural safeguards inherent in the NRAB arbitration process, including the three grounds for review provided by statute, ensure the constitutional rights of all participants. 255 As the Kinross court stated, "Congress provided sufficient process to meet these due process requirements when it set forth the three grounds for judicial review in 45 U.S.C. § 153(q)." 256 There is simply no need for constitutional review of NRAB decisions; indeed, no court has found that a NRAB decision denied a participant due process. 257

VIII. Conclusion

The Tenth Circuit’s Kinross decision was consistent with both Supreme Court precedent and congressional intent. The Supreme Court in Sheehan II forcefully declared that the review of NRAB decisions is limited to those claims permitted by statute. The Court detailed the RLA’s history, explaining its purpose to show how strict adherence to the RLA’s three explicit grounds for review is a fulfillment of congressional intent. By following the Supreme Court’s holding, the Tenth Circuit upheld the quick and efficient resolution of disputes that Congress envisioned when it enacted the RLA.

In contrast, several circuits have found that due process review is appropriate for NRAB decisions. These courts based their opinions on a tortured and illogical interpretation of Sheehan II, finding that it author-

253. Friendly, supra note 227, at 1291.
254. 45 U.S.C. § 153 First (m).
255. Sagers, supra note 2, at 484.
256. Kinross, 362 F.3d at 662 & n.3.
257. Sagers, supra note 2, at 484 & n.112.
ized due process review despite the Supreme Court’s emphasis on the limitations of review in the RLA arena. Additionally, these circuits relied on unpersuasive authority. On the one hand, they relied on decisions which were made before Sheehan II and are superseded by the Court’s contrary holding. On the other hand, they relied on decisions with factual settings that are dissimilar to the RLA’s unique dispute resolution framework.

Finally, an analysis of the RLA’s arbitration process demonstrates that the system’s procedural safeguards are sufficient to protect individual due process rights, rendering judicial review of independent due process challenges unnecessary. The NRAB arbitration process has built in measures to protect individuals from due process violations. Affording review grants an aggrieved party with what amounts to a second chance in court.

The Supreme Court in Sheehan II found that Congress enacted the RLA specifically so that minor disputes between railroad companies and employees could be resolved quickly and efficiently, ensuring the continued vitality of our nation’s transportation system.258 Expending precious time and resources for the litigation of delicate constitutional questions is entirely inconsistent with the RLA’s congressional purpose. Courts which allow review of NRAB decisions on due process grounds circumnavigate Congress’ intent to expedite the resolution of disputes through binding arbitration under the RLA.

258. Sheehan II, 439 U.S. at 94.
Safety Among Dragons: East Asia and Maritime Security

Phil DeCaro*

I. SECURITY MEASURES

Since the events of September 11, 2001, the United States has led the world toward the goal of establishing a more secure transportation industry. The results of this U.S.-led initiative have significantly affected the marine transportation world. The most direct impacts have been felt by companies that rely on international transportation for manufactured parts and/or finished goods. Those companies have seen firsthand the impact of new security protocols implemented by the United States Transportation Safety Administration ("TSA") and the Department of Homeland Security ("DHS"). Most significantly, companies that transport goods by ocean freight have been impacted by new procedures and security initiatives that broadly regulate international trade.

More so than in most other regions of the world, trade in East Asia is greatly dependent on the seas and oceans. With the exception of China, no country in the region has a large enough land mass facilitate transportation by land. The maritime transport industry is thus of particular importance to the economic stability of that region.

This paper inspects the scope of recent American cargo and port se-

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curity measures and their impact within the East Asia region. Specifically, this analysis will address efforts towards compliance by the International Maritime Organization ("IMO") within Asia, and the effectiveness of these new rules in protecting that region, and possibly the world, from future terrorist attacks.

II. HISTORICAL BACKGROUND

Maritime law, as we know it, began with the Egyptians, Phoenicians and Greeks, who traveled extensively on the Mediterranean.1 The earliest known surviving laws were designed simply to settle disputes between seafarers.2 As time passed, these settlements became codified under Roman influence and eventually became customary rules followed by any seafarer in the Mediterranean.3 Early maritime law, thus, developed as a customary law of the sea, not a product of each nation’s territorial sovereignty.4

Eventually the maritime trade world expanded, and so did maritime law. With the growth of the northern European ports came more developed sea codes. The Laws of Wisby,5 the Laws of Hansa Towns,6 and the

2. See id.
3. See id.
4. Id.

‘Wisby is the capital of Gotland and lies on the west coast at about its middle. It was a city of merchants, and during the 12, 13, and 14 centuries, attained great importance, and accumulated vast wealth. The trade of Northern Europe with the East passed through Wisby, which was a free port, and was trans-shipped thence to Russia, and went overland by caravan, and the goods of India, Persia and China came down the great rivers of Russia, and were passed on through this town. Merchants settled here in large numbers; so numerous were the ships that came to this port that a code of maritime laws was framed, known to the legal profession to this day as the Laws of Wisby.’

Id.

The first impulse to mercantile union came from the dangers of traveling in the early Middle Ages. In those days mariners had neither chart or compass to guide their course, and were forced to creep timidly along the shore and to avoid as much as possible the open sea. The merchants had also to dread more positive dangers than those of storm and wreck. The coasts of northern Germany harbored numbers of rovers and pirates, who regarded the peaceful trader as their natural prey. To increase their power of resistance, it was usual for merchants to undertake their voyages in more or less numerous companies. The union thus began on sea, was still further cemented on land. In those days law was personal, and not territorial. The foreign merchant had no share in the law of the land in which he sojourned; he brought with him his own law and
Laws of Oleron were all created during the medieval period and are said to be the principal foundation of maritime law. As the European nations began to expand their pursuits and travels in the world, new sea courts were established in order to administer justice for disputes. By the 1600’s, admiralty courts were established in most colonial states, including the early American colonies.

Modern maritime law is a blend of the ancient doctrines and newer national and international laws. Many traditional principles such as marine insurance, salvage rights and general average are still in place. The older doctrines remain relevant and applicable because the overall problems and risks associated with seafaring have changed little over time.

III. United States Entities and Policies Overview

A. Entities

The DHS was created in response to the terrorist attacks of September 11, 2001 to ensure the nation’s security by managing all facets of national protection. In regards to maritime security, including cargo container security, the two entities primarily responsible, are the Bureau of Customs and Border Protection ("CBP") and the United States Coast Guard.

The Coast Guard is responsible for protecting more than 361 ports and 95,000 miles of coastline. The Coast Guard coordinates its efforts with the DHS and CBP to ensure the security of the security of ports, waterways and maritime borders. Its role with the DHS includes:

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7. See generally Royal Australian Navy, The Gun Plot, The Articles of War and the Laws of Oleron, http://www.gunplot.net/navalhistory/originsofnavy2.html (last visited Mar. 25, 2006) (providing that “[t]he ‘Laws of Oleron’ were the laws which governed the seafaring nations of the West, and were derived from the code formulated in the Republic of Rhodes and received and confirmed by the Romans and neighbouring [sic] states bordering on the Mediterranean . . .”).
9. See id.
10. Id. However, in England, admiralty courts had been functioning since the mid-14th century. Id.
11. Id.
12. Id. There are still the concerns about pirates, the sinking of ships and rights to salvage. The ancient concept of “maintenance and cure” for a seaman is still enforced, among many others. Id.

The Coast Guard also occupies a unique role within the concept of homeland security since it is both a law enforcement agency and part of the military armed services.

Since the Coast Guard is simultaneously, and at all times, both an armed force of the United States (14 U.S.C. 1), and a law enforcement agency (14 U.S.C. 89), its capabilities are extremely relevant, valuable, and needed for Maritime Homeland Security, whether the threat is termed a military or terrorist attack.15

The CBP is the unification of the U.S. Customs, U.S. Immigration, Animal and Plant Health Inspection Service and the entire U.S. Border Patrol into one agency for the dual purpose of protecting the United States borders from terrorists and the smuggling of weapons into the country while also creating a stable and secure system by which commerce, travel and trade can occur.16 The CBP also works with foreign counterparts to improve that country's security and international trade, and by doing so, lessens the need for security inspections on those goods coming into the U.S.17

14. Id.
17. Id.

CBP has implemented joint initiatives with our bordering countries, Canada and Mexico: The Smart Border Declaration and associated 30-Point Action Plan with Canada and The Smart Border Accord with Mexico. The Secure Electronic Network for Travelers' Rapid Inspection (SENTRI) allows pre-screened, low-risk travelers from Mexico to be processed in an expeditious manner through dedicated lanes. Similarly, on our northern border with Canada, we are engaging in NEXUS to identify and facilitate low-risk travelers. Along both borders, CBP has implemented the Free and Secure Trade (FAST) program. The FAST program utilizes transponder technology and pre-arrival shipment information to process participating trucks as they arrive at the border, expediting trade while better securing our borders.

Id.
B. Policies

On November 25, 2002, President Bush signed the Maritime Transportation Security Act ("MTSA"). The MTSA was also created to improve the level of maritime security throughout the world and create the discussion for a universal automatic identification system, a long-range vessel tracking system, overall increase in security for the maritime transportation industry, and the effective sharing of maritime intelligence. It was passed to protect United States ports and waterways and minimize the risks of a terrorist attack. The MTSA requires maritime facilities and vessels that are or may be involved in any type of transportation to implement increased security plans, increase the use of technology for accurate inspection of containerized cargo, enhance overall maritime security, and implement the use of a risk-based system to better target those sections of the maritime transportation industry that are at higher risk. The MTSA also specifically provides that "[c]urrent inspection levels of containerized cargo are insufficient to counter potential security risks. Technology is currently not adequately deployed to allow for the non-intrusive inspection of containerized cargo." The CBP and Coast Guard have partnered together and divided the requirements of the MTSA. The CBP has taken on the role of implementing improvements in cargo container security and inspections. The Coast Guard has assumed taken the role of improving security for American ports and waterways.

The CBP, in order to meet its responsibility of strengthening maritime security, has developed several programs specific to that goal. The Container Security Initiative ("CSI"), and the Customs-Trade Partnership Against Terrorism ("C-TPAT") were both created to address potential security problems or inabilities of the maritime industry. Both programs aim to identify and remove any gaps in security that terrorists might exploit.

Implemented by the CBP in January 2002, the CSI is a response to fear that sea cargo containers bound for the United States could be used to facilitate a terrorist attack by providing direct access to a United States port. Approximately forty percent of the yearly value of all United States exports enters the United States through ports and more than one hundred and thirty million containers pass through United States ports each year. Hence, the CSI was designed to verify that all cargo containers entering the United States were secure.

19. Id.
States imports arrive via sea cargo containers which means that the protection and increase in the security measures of those ports is key to American economic interests. CSI is designed to increase the security of cargo containers and ships bound for the United States before they leave their international ports. Those containers that are deemed high-risk are identified and thoroughly inspected by United States Customs officers stationed at foreign ports. The CSI is highlighted by the following four directives:

2. Pre-screen containers at the earliest possible point.
3. Use technology to quickly pre-screen high-risk containers.
4. Develop secure and “smart” containers.

An additional core element of CSI is that United States custom officials are to be placed at foreign seaports to oversee the security procedures at those ports and to work with the foreign officials posted there. Another core element emphasizes the advanced transmission of cargo manifests to the destination port to ensure accuracy of goods being shipped. More than 48 million cargo containers move annually among the world’s top seaports. Overall, the CSI is currently enforced in forty-one international ports and the government hopes to increase its international presence in the future to make the maritime industry more secure.

The second program initiated by the CBP, C-TPAT, was implemented in November of 2001 with the goal of improving the physical security of shipping containers as they move through international commerce. “Under C-TPAT, Customs officials work in partnership with

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23. Id.
25. Id.
private industry, reviewing supply chain security plans and recommending improvements." In exchange for their participation, C-TPAT member businesses receive the benefit of a reduced likelihood that containers traveling along their international supply chains will be stopped and inspected for weapons of mass destruction ("WMDs") or held up for additional inspections. The goal of the program is to ensure that the flow of goods is both secure and unimpeded through the international supply chain.

IV. THE INTERNATIONAL MARITIME ORGANIZATION

The International Maritime Organization (IMO) is a global cooperative that resulted from an international conference held in Geneva in 1948. The IMO Convention became effective in 1958, and the new organization met for the first time the following year. The IMO is the United Nations' specialized agency responsible for the safety and security of shipping and the prevention of marine pollution by ships. The first task undertaken by the IMO was the adoption of the International Convention for the Safety of Life at Sea ("SOLAS"). After the initial version of SOLAS was completed in 1960, the IMO then turned to other matters such as the facilitation of international maritime traffic, load lines, the carriage of dangerous goods, and revising the system of measuring the tonnage of ships. "With a staff of 300 people, IMO is one of the smallest

30. Id.
31. International Maritime Organization, About IMO, Introduction to [IMO, http://www.imo.org/home.asp (last visited Apr. 18, 2006) [hereinafter Introduction to IMO]. The International Maritime Organization ("IMO") was formerly known as the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO. Id.
32. Id.
33. Id.
35. SOLAS was subsequently amended in 1974 and most recently 2005. SOLAS, supra note 33.
36. Introduction to IMO, supra note 31.
of all United Nations agencies." Nevertheless, it has achieved considerable success in accomplishing its aim of "safer shipping and cleaner oceans." Ship casualty rates have declined and the amount of oil entering the sea from ships has been cut."

One of the newest and most complex challenges facing the IMO is the issue of security. The IMO's responded to the attacks on September 11, 2001 by enacting Assembly resolution A.924(22) in November 2001, which "called for a review of the existing international legal and technical measures to prevent and suppress terrorist acts against ships at sea and in port, and to improve security aboard and ashore." Amendments were added to SOLAS, namely the new chapter "XI-2" on special measures to enhance maritime security and the International Ship and Port Facility Security Code. "The International Ship and Port Facility Security Code ("ISPS Code") is a comprehensive set of measures [designed] to enhance the security of ships and port facilities, developed in response to the perceived threats to ships and port facilities . . . ." The new code "contains detailed security-related requirements for [g]overnments, port authorities and shipping companies in a mandatory section (Part A)," and a series of guidelines regarding the implementation of these requirements in a second, non-mandatory section (Part B). These new provisions became effective as of July 1, 2004. "The biggest change is that the Contracting

36. Id.
37. Id.
38. Id.
40. SOLAS, supra note 33.

[That figures for ships subject to the ISPS Code the information available indicates a high degree of compliance and almost no disturbance of the world trade while, for ports, information suggests that almost 94% of the Contracting Governments to the SOLAS Convention have approved security plans for 97% of the declared port facilities, which in total number in excess of 9,600 worldwide.

Maritime Security, supra note 33.
Governments to the 1974 SOLAS Convention are able to formally exercise...control over ships in accordance with the provisions of chapter XI-2 and of the ISPS Code." The Contracting Governments are also required to address all requirements under the ISPS Code and to ensure that adequate security measures are in place in the ports and waterways within their nation's territorial control.

The new regulatory maritime security regime will be a significant burden for those port facilities and ship operators who had not already responded to the increased threat to maritime security in the current climate. "They will need to catch up, according to the rules and guidelines in the ISPS Code." This will cost both time and money and may cause some shippers to suffer under the increased economic requirement. In contrast, those governments and ship operators who have already implemented enhanced security regimes will be more prepared to assist in the establishment of a more standardized security system, under the ISPS, for maritime shipping. By being prepared to comply, or complying with such regulations, businesses will benefit because the process will be smoother and they have less likelihood of having their cargo being flagged for security inspections.

In addition to the security interests that promulgated these new regulations, they also have the advantage of offering potential commercial benefits to the maritime industry. In the long run, the implementation of the Code should provide a tremendous cost-benefit for the entire maritime industry. "By putting in place an effective and compliant security regime, ports will be able to continue to participate fully in global trade and, of course, the potential economic consequences of a major security breach, which might result in disruption or even port closure, are serious indeed." Overall, the SOLAS XI-2 and ISPS codes have been updated and implemented in order to create a basic standardized system for ensuring security for both ships and ports. This system has also impacted businesses and commercial traffic by the creation of a more organized and systematic process for the processing of cargo.

The IMO's "new requirements form the international framework through which governments, ships and port facilities can co-operate to...

45. Id.
46. Id.
47. Id.
48. See id.
49. Id.
50. Id.
51. Id.
detect and deter acts which threaten security in the maritime transport sector."52 There is still a very large challenge ahead for the IMO and its 164 Member States to continue to effectively address the enormous change occurring in shipping due to the increased security requirements of the United States and other countries around the world.53 A determination must be made by the IMO regarding how risk management of ships and ports is to be accomplished in light of the new rules, and what sort of time line for compliance should be imposed.

V. Security Is Key

Security is the top issue for many countries throughout the world. The maritime industry is no different. Very real threats exist, and the IMO has had security on its radar for some time. The 1985 terrorist hijacking of the Italian cruise ship *Achille Lauro* brought this issue to the forefront of the maritime security world.54 Since the *Achille Lauro* incident, the IMO has developed a series of technical measures in order to protect passengers and crews on board ships.55 Yet, attacks on maritime

52. *Id.*

53. For instance:
The Advances (Added Value Network Concerning European Shipping) Thematic Network is intended to be an arena in which all the relevant actors; shippers, ports, shipping operators, and land transporters meet to achieve a common understanding of how to combine the industrial concept of total logistics quality with the IMO and European desire for improved safety at sea into one, coherent operational platform. The knowledge base generated in the Thematic Network will be used to co-ordinate relevant European and national research.


54. See generally *Wikipedia Encyclopedia Achille Lauro*, http://en.wikipedia.org/wiki/Achille_Lauro (last visited Apr. 18, 2006) (discussing the hijacking of the *Achille Lauro*). On October 7, 1985, six men representing the Palestine Liberation Front (PLF) took control of the liner off Egypt while she was sailing from Alexandria to Port Said within Egypt . . . . Holding the passengers and crew hostage, they directed the vessel to sail to Tartus, Syria, and demanded the release of 50 Palestinians then in Israeli prisons. Refused permission to dock at Tartus, the hijackers shot one wheelchair-bound passenger – an American named Leon Klinghoffer – because he was Jewish and threw his body overboard, leaving him to die. The ship headed back towards Port Said, and after two days of negotiations the hijackers agreed to abandon the liner for safe conduct and were flown towards Tunisia aboard an Egyptian commercial airliner. The plane was intercepted by United States Navy fighters on October 10 and directed to land at Naval Air Station Sigonella, a NATO base in Sicily, where the hijackers were arrested by the Italians after a disagreement between US and Italian authorities. The other passengers on the plane (possibly including the hijackers’ leader Abu Abbas) were allowed to continue on to their destination, despite protests by the United States.

*Id.*


*The IMO* in March 1988, adopted the Convention for the Suppression of Unlawful
infrastructures have continued in other parts of the world such as Yemen and Iraq. The purpose of the ISPS is to reduce the vulnerability that the industry faces and prevent future attacks by reducing the risk of occurrence.\textsuperscript{56} Shoring-up all aspects of border security is a standard concern of every country in the world, especially in the wake of September 11, 2001. At the same time, many countries realize that transport is key to socio-economic development and competitiveness in the international community.

With the distribution of goods through a transportation system, comes the need for a maintained interest in the security of those transportation routes. Regional organizations like the Association of Southeast Asian Nations (\textquotedblleft ASEAN\textquotedblright)\textsuperscript{57} realize this fact and are committed to doing what they can to comply with the IMO's new regulations without sacrificing their own economic growth. ASEAN was organized on August 8, 1967, under an agreement between five Member countries: Indonesia, Malaysia, Philippines, Singapore and Thailand.\textsuperscript{58} Later countries to join were: Brunei Darussalam in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and, most recently, Cambodia in 1999.\textsuperscript{59}

The following sections of this paper distinguish the various countries in Asia and what each is specifically doing in order to protect the international community from breaches in security that could be exploited by terrorists.

\section{ASEAN Countries}

ASEAN has taken steps to respond to the threat of terrorism. The maritime order is mostly maintained within East Asia by the United Na-
tions Convention on the Law of the Sea.\textsuperscript{60} Within the last few years, a number of conventions have specifically addressed the problem of terrorism and its regionally-oriented solutions.\textsuperscript{61} ASEAN is working with its members and other world leaders in coordinating a response to combat terrorism.\textsuperscript{62}

There are many different nation/state perspectives in Asia, but the goal of secure maritime shipping lanes and ports throughout the region is common to all. Through programs like the CSI, ASEAN, under the auspices of the IMO regulations, is the coordinative group that may enable the region to be stable and secure from terrorist activity. ASEAN has seen overall success in at least beginning the discussions and implementing foundational plans to increase security and combat terrorist activity.

A. Thailand

Thailand has begun implementing the SILAS and ISPS per the IMO's requirements. Though there have been some technical and financial setbacks that have held up implementation, Thailand has received assistance from international sources in order to improve its maritime security.\textsuperscript{63} "Thailand also continues to promote strengthening of domestic coordination and international cooperation to suppress piracy and armed

\begin{footnotesize}


The ASEAN Leaders Declaration on Terrorism at the 8th Summit in 2002 built upon the ASEAN Declaration on Joint Action to Counter Terrorism released by ASEAN leaders at the 7th Summit in November 2001. A Special ASEAN Ministerial Meeting on Transnational Crime or AMMTC on Terrorism was held in Kuala Lumpur in May 2002 as a concrete follow-up to address terrorism. The meeting produced a workplan for the \textit{ASEAN Plan of Action to Combat Transnational Crime (Terrorism Component)} \ldots \ldots At the 4th AMMTC Meeting in January 2004, ASEAN further declared its commitment to undertake a comprehensive and coordinated approach in addressing various areas of transnational crimes that have links to terrorism and to accelerate the implementation of the Terrorism Workplan. \textit{Id.} at 63.

\textsuperscript{62} \textit{Id.}

The Foreign Ministers of ASEAN and the US adopted a \textit{Joint Declaration for Cooperation to Combat International Terrorism} in August while ASEAN and China issued a Joint Declaration of ASEAN and China on \textit{Cooperation in the Field of Nontraditional Security Issues} in November 2002. ASEAN and India also adopted a \textit{Joint Declaration for Cooperation to Combat International Terrorism} at the Bali Summit in October 2003. \textit{Id.}

\end{footnotesize}
Overall, while Thailand may have problems, it appears to be on the right track and is within full compliance of its membership responsibilities in the IMO and SOLAS.

B. SINGAPORE

Singapore appears to be a leader in security management, and continues to help lead the international community in promoting counter-terrorism efforts. In January 2003, Singapore and the United States co-hosted a workshop on counter-terrorism and the economic financing necessary to combat terrorism. Singapore also co-hosted another workshop with Australia in June 2003. Singapore continues to promote counter-terrorist approaches to ASEAN and the creation of a network of intelligence communication with meaningful exchanges of information between the members of ASEAN.

Singapore is a member of the IMO and the SOLAS convention. It has stated that it is committed to implementing all approved amendments and will continue to do what it can to prevent terrorists from attacking again.

Singapore was the first port in Asia to meet the CSI requirements. Since March 2003, it hosts the largest transnational port with shipments destined for the United States that has been in compliance with the CSI initiative and is deemed “essential to securing global trade against terrorist exploitation.” It was the first Asian port to reach compliance and is

64. Id.

65. Bomb kills two in southern Thailand, WASH. TIMES, Feb. 2, 2006, http://www.washington times.com/upi/20060202-012359-6753r.htm (last visited Apr. 18, 2006). More than 1,200 people have died in violence in the predominantly Muslim provinces of Yala, Patani and Narathiwat in the past two years. The attacks, which mostly have targeted security officials, are blamed on an Islamic separatist movement.


68. See The Singapore-US Partnership, supra note 66.


70. Id.
illustrative of Singapore's serious and effective approach to counter-terrorism.

Singapore is focused on ensuring safety and security for its shipping and transportation of goods by sea.\textsuperscript{71} Singapore is continually concerned about maritime security as it prospers from its good standing in Asia and relies upon peace in the region to maintain that prosperity. Not only has Singapore met the SOLAS and ISPS regulation requirements, but it also continues its leadership in the security and stability of the region and it asks that the issues continue to be discussed at future ASEAN Regional Forum ("ARF") meetings.\textsuperscript{72}

C. MALAYSIA

Malaysia depends heavily on the safety of seaborne transport as approximately 90% of its trade is by water.\textsuperscript{73} Malaysia's biggest industries and commodities, oil and gas, are found offshore, while the fishing industry accounts for about 2% of the nation's labor force. As a result, maritime security is a high priority for Malaysia.\textsuperscript{74} To monitor the interests of the government in matters that related to sea shipping, the government set up the Maritime Institute of Malaysia ("MIMA"), a policy research institute that serves as a national focal point for research in the maritime sector.\textsuperscript{75}

Malaysia also announced its implementation of the CSI in March 2004.\textsuperscript{76} The CBP has deployed officers "to the port of Klang to work with their Malaysian counterparts to target cargo containers destined for

\textsuperscript{71} See The Singapore-US Partnership, supra note 66; see also Ministry of Foreign Affairs, Foreign Policy, Association of Southeast Asian Nations (ASEAN), Recent Bilateral Highlights, http://www.mfa.gov.sg/internet/foreignpolicy/io_asean.htm (last visited Apr. 19, 2006) [hereinafter Recent Bilateral Highlights].

\textsuperscript{72} See Recent Bilateral Highlights, supra note 71.

The ASEAN Regional Forum (ARF) is an informal multilateral dialogue of 25 members that seeks to address security issues in the Asia-Pacific region. The ARF met for the first time in 1994. The current participants in the ARF are as follows: ASEAN, Australia, Canada, China, European Union, India, Japan, North Korea, South Korea, Mongolia, New Zealand, Pakistan, Papua New Guinea, Russia, East Timor, and the United States.


\textsuperscript{74} Id.

\textsuperscript{75} Id.


the United States.” 77 Officials of the Malaysian government will be responsible for “examining any container identified jointly with CBP officers as a potential terrorist risk.” 78

D. BANGLADESH

Bangladesh has had problems with securing its maritime industry and the waters that it claims as territory. While it has long been ranked among the five greatest problem countries in the Southeast Asian region it has recently begun to work on its record and to protect itself. 79 “[The International Maritime Bureau ("IMB")] reported 68 piracy incidents in 2003 in Bangladesh” and identified its territorial waters as the second most dangerous place after Indonesia in Asia. 80 From 2003 to 2004, incidents of piracy and armed robberies decreased by two-thirds. 81 Bangladesh’s program for reducing criminal acts shows a desire to comply with the SOLAS and ISPS standards.

E. VIETNAM

In the past, Vietnam has had difficulty meeting the requirements set for it by the international community. Such requirements as the IMO’s Global Maritime Distress and Safety System (GMDSS), which was to be implemented by January 1999, were not actually completed in Vietnam until September 2001. 82 As such, it is possible that while Vietnam is attempting to comply with the SOLAS amendments and the ISPS, it may be having a hard time meeting those objectives, and therefore its ports and shipping may offer good targets for terrorists.

VII. NON-ASEAN COUNTRIES

China, Japan, and the Koreas, who are not members of ASEAN and have chosen not to become members, function as individuals or occasionally as an advisory bloc. However, they are all members of the IMO. The

77. Id.
78. Id.
80. Id.
81. See id.
82. JAPAN BANK FOR INT'L COOP. (JPIC), VIETNAM COASTAL COMMUNICATION SYSTEM PROJECT 3 (2003), available at http://www.jbic.go.jp/english/oec/post/2004/pdf/2-33_full.pdf (last visited Apr. 19, 2006). The GMDSS was “based on 1988 revisions of the SOLAS convention (International Convention for the Safety of Life at Sea). Vietnam did not possess the facilities to support GMDSS, and so the country’s measures were inadequate for observing the provisions of the SOLAS convention and complying with the regulations of the SAR convention (International Convention on Maritime Search and Rescue).” Id. at 1.
most likely reason that they have not become a part of ASEAN is because they are the strongest economies in the region and do not yet see the benefit of being bound by such an international agreement. Still, they are constantly involved in ASEAN negotiations and conferences, because decisions by that organization may have a profound impact on their dealings in the world.

A. CHINA

China is a very significant and involved member of the IMO that has committed itself to strictly meet the IMO guidelines.\textsuperscript{83} China helped draft and is a signatory to the new amendments to SOLAS.\textsuperscript{84} As such, China states it is completely committed to combating terrorist organizations within the stipulated framework of the United Nations and will do whatever is deemed necessary to comply with the new regulations.\textsuperscript{85}

China has experienced significant economic growth, especially in the last decade. That means that their shipping ports have had to develop very rapidly. There is concern that terrorists may see these new busy ports, that are still adapting to their new size and increased security needs, as prime targets.\textsuperscript{86} A successful attack would greatly affect the flow of foreign trade from China, and would certainly impact the world economy. In order to prevent such attacks, a new system of security measures must be installed and implemented by the port administrators.\textsuperscript{87}

"There are more than 130 ports open to foreign trade in China with more than 10,000 port facilities. There are around 2,000 national flagged ships serving international routes. Therefore, the security work for the ships and port facilities is very heavy."\textsuperscript{88} In order to coordinate all the various groups involved in port security (government, port administrators,


\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} See id.

\textsuperscript{87} Id.

The Port Law of the People’s Republic of China came into effect on 1 January 2004. Its implementation provides the legal basis for the security management role played by the port administrative agencies. It also makes the port administrative agencies responsible for maintaining port security by law. Security management is an important aspect of port administration. It also gives full power to the port administration agency to manage the port... In accordance with the Amendments to the SOLAS Convention and the ISPS Code, and having taken our ships and ports situation into consideration, the Code for Port Facilities Security and the Code for Ship’s Security and the relevant documents came into force in November 2003 and March 2004 respectively. The requirements for port facility security and ship’s security in the Amendments to the SOLAS Convention have been encoded in these two codes and the relevant documents.

Id. at 1-2.

\textsuperscript{88} Id. at 2.
shipping companies, individual boat owners, etc.), the Chinese government established a coordination workgroup in 2003 to begin the process of securing the foreign trade ports. 89 "[The agency] is responsible for the guidance of the implementation by the port industry, the appraisal of port facility security as well as the approval of security plans." 90 On June 30, 2004, China conducted a security test of its facilities and found them to be in compliance with the SOLAS and ISPS conventions. 91

Now that China has met the amendments to SOLAS and the ISPS, their main task is to maintain their current level for implementation of the rules and to upgrade in the future. "The Chinese government will, taking the implementation of the Amendments to the SOLAS Convention and the ISPS Code as an opportunity, strengthen port facility and ship security management and guarantee the normal operation of both Chinese and foreign flagged ships in Chinese ports." 92 Their hope now is that other countries will comply and meet the same or better levels of security. China jumped on-board the CSI in July 2003. CBP officials are stationed in the ports of Shanghai and Shenzhen to oversee the security of cargo containers heading to United States ports. 93

B. JAPAN

Japan depends on international import shipments to supply a vast portion of its food and energy needs. Because Japan is such an influential country in the world economy, any sort of detrimental impact or stoppage of maritime shipments to Japan could greatly impact the entire world. Therefore, the security of their ports is of key importance to all.

Japan became part of the IMO in 1958 and, behind Panama and Liberia, is the third highest contributor at about five percent of the IMO’s budget. 94 Japan was a contributor and officer to the SOLAS and ISPS conventions and has begun implementing the associated regulations. The Ministry of Construction and Transportation took the initiative in January 2004 and proposed a new law to control the flow of foreign traffic in and out of Japanese ports. 95 The new law, which became effective in July

89. Id.
90. Id.
91. Id.
92. Id.
2004, corresponds to the SOLAS convention. It includes provisions allowing Japanese port authorities to refuse foreign vessels entry to Japanese ports if they are deemed to represent a security threat, and will also allow the port authorities to remove any such vessels already in port.96 Also, the Japanese government joined CSI and implemented its requirements per the American demands as of March 2003.97 Also, the Ministry of Land, Infrastructure and Transport approved various port facility plans to be implemented in compliance with the conventions in April 2004.98

In addition to complying with the SOLAS convention and the new ISPS rules, the Japanese Maritime Self Defense Force ("JMSDF") is responsible for the security of Japanese ports and the surrounding waters in order to ensure that the trading of goods by ship is not hindered in any way. Any stop or hindrance on the shipping of goods could be detrimental to the government and the nation's economy. The JMSDF is, thus, responsible for not only protecting Japan from enemy submarines and surface ships, but also for maintaining the security in vital shipping lanes.99 Of particular concern is the Malacca Strait, since it is the main route for ships bound for East Asia and Japan will continue to ensure that this passage remains a safe navigable waterway.100

VII. PARTICULAR PROBLEM AREAS

Indonesia represents the greatest potential risk in the East Asia region, both as the world's largest archipelago and as home to the largest Islamic population of any country. Though most of Indonesia's Muslims are moderate, there are pockets of extremism, a growing fundamentalist movement, and several organized Islamic-based terrorist groups. There does not appear to be any negative impact on the business world or insurance rates, due to this upsurge in risk assessment, but insurance companies who cover ships that dock at Indonesian ports have begun to require

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96. Id.
specific underwriting approval before docking is permitted.101

The Philippines is a second country of concern. For centuries there has been a "Moro" (Philippine word for Muslim) movement to establish an independent Islamic state on the southern island of Mindanao. In 2004, Philippine authorities uncovered active terrorist cells of the Indone-
sian-based JI in the country and subsequently discovered a money trail leading to al-Qaeda. The American authorities, along with Philippines of-
cials, are working to combat terrorists in the Southeast Asian region.102

Of vital importance to the stability and maintenance of the security of strategic sea lanes is the protection and safety of such waterways as the Straits of Malacca.103 Piracy is one of the most grave problems persisting in East Asia. Since the attacks of September 11, 2001 there has been con-
siderable interest in the acts of pirates and to classify them as ter-
rors.104 "[E]xperts, however, fail to realize that the popular perception that the international community has eliminated sea piracy is far from true. Not only has piracy never been eradicated, but the number of pirate attacks on ships has also tripled in the past decade-putting piracy at its highest level in modern history."105 More than two-thirds of piratical at-
tacks worldwide occur in Asian waters.106 In 2000, the region accounted for 65% of piracy worldwide.107 In 2003, 42% of pirate attacks took place

canal6.html (last visited Apr. 19, 2006).

102. ASS’N OF SE. ASIAN NATIONS, ASEAN REGIONAL FORUM ANNUAL SECURITY OUT-
19, 2006).

103. The Malacca Straits, supra note 101.


105. Id.

106. Id.

107. Id.
in the Strait of Malacca between Malaysia and Indonesia. Piracy is a problem in Asia, not only because of the region’s geographical constraints, but because there is no clear definition demarking piracy for “private ends” as opposed to piracy as a terrorist acts made for political ends.

The IMO Council approved a “high-level conference to consider ways and means of enhancing safety, security and environmental protection in the Straits of Malacca and Singapore.” The event, which took place in Jakarta, Indonesia, in July 2004, featured much discussion about what exactly should be done to combat terrorism. There was a great deal of concern that the Straits of Malacca would be a target for terrorist activity, resulting in a huge worldwide impact on the shipping of goods. In an attempt to at least temporarily deter such an event, Malaysia and Singapore have begun using their navies to escort oil tankers and increase their overall presence and visibility. Japan also has a great interest in the continued operation of the Straits because an estimated eighty percent of the country’s oil coming from the Middle East goes through those waters. Japan has offered its own naval forces to help patrol the area, but so far Malaysia and Indonesia have refused Japan’s offer. The Straits of Malacca is a security issue that needs to be resolved in the near future, perhaps with the involvement of ASEAN and the IMO.

The last problem area in Asia is the constantly-disputed right to ownership of the South China Sea. This area is another vitally important transport channel for ships. “It is the second most used sea lane in the world.” The dispute arises out of the United Nations’ 1982 Law of the Sea Convention, which permits a country to have an Exclusive Economic Zone (“EEZ”) extending 200 nautical miles beyond the nation’s territorial waters. With that dictation, every country whose coast touches those waters makes a claim to at least part of it. China makes the claim that it owns all of the area and has stirred both diplomatic and physical disputes over such statements. There are also constant disputes over who has claim over the series of islands called the Spratly Islands, and with the

108. Luft & Korin, supra note 104.
110. Id.
111. The Malacca Straits, supra note 101.
112. Id.
113. Id.
114. Id.
116. Id.
117. Id.
knowledge of large oil and natural gas reserves contained beneath the waters, there is little doubt that the South China Sea will continue to be an area of concern.

IX. Conclusion

The September 11, 2001 attack against the United States was one of the most influential events in recent times. They caused the IMO to push up the schedule for the resolution of the SOLAS amendments and the ISPS. The United States is one of the leaders for a more secure and safe maritime industry. The SOLAS convention and the ISPS rules are the newest stepping stones in a long history of Maritime law. All 164 IMO member countries are now implementing their own procedures in order to meet and be in compliance with these conventions. The question remains whether these measures will be enough to stop a terrorist attack on a port or protect a container from being infiltrated, but really only time will answer that question. The United States and the IMO have led the way in new regulations concerning the safety of ports and ships. The amendments to the SOLAS convention, the adoption of the ISPS Code, and the implementation of the CSI will all help to protect and standardize the maritime industry. Still, the United States is worried that these measures are simply not enough, and has put forth proposals concerning long-range tracking of ships, and the importance of access to shore leave for seafarers. The IMO’s continued technical cooperation in such activities to enhance maritime security is greatly appreciated and wanted.

There has been some implementation of the CSI at the busiest ports in Asia, but there are still many busy ports that need to implement it to ensure more up to date security measures. Overall, the CSI is a great program that will help to create a more standardized and secure maritime industry. It should be implemented throughout the world, especially in Asia where so much of the region depends upon maritime shipments.

Despite the general optimism over implementation, there remain other regional pockets in which progress has not been as rapid as might be hoped. “The statistics suggest Africa is falling behind other continents in complying with the new regulations, with just over half of the 30 countries in Africa to which the Code applies reporting approved port security measures.”\textsuperscript{118} “Countries in the former Soviet Union and Eastern Europe have also been slow to implement the measures.”\textsuperscript{119} In order to help


\textsuperscript{119} Id.

IMO launched its global technical co-operation programme on maritime security in January 2002
meet this gap in implementation and compliance, in January 2002 the IMO began the Global Program on Maritime and Port Security.\textsuperscript{120} Numerous seminars and workshops at both the regional and national level along with private functions have helped train and enable individuals to begin meeting compliance.\textsuperscript{121} Originally the program was focused on raising awareness of various security threats to the maritime industry, but the focus has shifted to emphasize specific operational measures that need to be taken in order to safeguard the security of everyone on-board a ship (crew and passengers).\textsuperscript{122} To better accomplish this within the Global Program, a sub-program has been developed. A “Train-the-Trainer” program was developed by the IMO to assist governments in strengthening their maritime security implementation by having well trained instructors capable of delivering quality training to others.\textsuperscript{123} The Train-the-Trainer program got underway in the second half of the 2004 and will be targeting instructors from national institutions responsible for maritime security training.\textsuperscript{124}

These are the newest procedures that the international community has to offer in order to help standardize the protection of the entire maritime industry and the secure the world for the future. Still, this writer has concerns about the effects of the overhaul of the United States Customs office and Border Protection when those agencies were combined under the roof of the Department of Homeland Security. United States Customs, for a very long time, was simply the pencil-pushing accountant of the shipping industry. It would only find reason to interfere in commercial matters if there was some sort of tax payment error. Now, the customs service is expected to become guards, with the responsibility of protecting millions of people from the possibility of a terrorist attack, without having the resources of the other interior and exterior security agencies (CIA, NSA, TSA, FBI, etc.). This change in direction is most-likely not something that can easily be accomplished. The United States authorities will have to work extremely hard to ensure the transition is smooth, thorough and effective in order to protect the nation from possible terrorist attacks facilitated through the shipping industry.

\textsuperscript{... The aim of the global programme initially was to raise awareness of maritime security threats and of the possible future regulatory measures that were being developed at that stage. Press Release, International Maritime Organization, IMO’s Global Programme on Maritime and Port Security – the work (June 17, 2004), http://www.imo.org/About/mainframe.asp?topic_id=848&doc_id=3656 (last visited Apr. 19, 2006).

120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
Book Review


Reviewed by Rod D. Margo*

Anyone who has taught a class in aviation law will have experienced the frustration of attempting to assemble teaching materials for a course touching upon elements in such diverse disciplines as public international law, conflicts of law, contracts, torts, criminal law, government regulation, antitrust, and labor law, all the while praying that the students will have at least a basic grounding in aviation technology and the practical aspects of aircraft operation.

Fortunately, instructors and students can now turn to an extremely comprehensive and broadly focused book of cases and materials on the subject. This 976-page volume (680 pages of text and 260 pages of appendices), published in March 2006, reflects the diverse backgrounds and experiences of Professors Jarvis, Crouse, Fox and Walden, authors who boast impressive credentials in the field of aviation law.

The book, written in a contemporary and highly readable style, gathers together an extensive assortment of cases, law journal articles, reading notes, sample problems, and appendices. It begins with an analysis of the history of civil aviation (going back well before the epic flight of the Wright brothers at Kitty Hawk, North Carolina, in December 1903) and then proceeds to describe the birth of international aviation law and provide a discussion of the sources of modern aviation law. The book then

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deals with the legal regime applicable to aircraft, airmen (including pilots, mechanics, and flight attendants), passengers, cargo, and airports.

In the chapter on aircraft, the authors focus on registration and recordation of interests in aircraft, as well as the creation and enforcement of liens, and taxes applicable to aircraft. This chapter contains some excellent materials on aircraft products liability, including discussion of the General Aviation Revitalization Act (GARA) and the liability of the government under the Federal Tort Claims Act.

In the discussion on airmen, the authors deal with the licensing and regulation of pilots and mechanics. This chapter also includes an important discussion on flight attendants, including collective bargaining issues and the application of the Railway Labor Act.

The chapter on passengers contains a succinct survey of the law governing the liability of aircraft operators to passengers in domestic and international law, and admirably summarizes the principles of law applicable under the Warsaw and Montreal Conventions. In this chapter, the reader will find a useful introduction to the topic, though one is left with an inevitable sense of uncertainty about the extent to which established case law on the Warsaw Convention regime of liability (which was adopted in 1929, primarily to protect the nascent airline industry) will influence decisions on the Montreal Convention (which was adopted 70 years later, primarily to protect passengers and their heirs).

The chapter on cargo contains helpful material on the carriage of hazardous materials, as well as carrier liability for loss of or damage to cargo. The chapter also includes useful discussion on the security aspects of cargo carriage.

Finally, the book contains a chapter on the certification, operation and regulation of airports in the United States, including the thorny question of airport security. This chapter also includes a discussion on liability for damage caused on the surface – an area that has attracted considerable attention since September 11, 2001 – and the certification and regulation of air traffic controllers.

The authors have adopted an extremely practical approach to the subject, and have even gone to the trouble of including materials on aspects of ethics and professional responsibility which apply to the practice of aviation law. They raise the interesting question of how a young lawyer can become sufficiently competent in aviation law to comply with the ethical obligations to his or her client. Reading this book would certainly be a help!

Another helpful aspect of the book is its discussion of what a young lawyer should be aware of in searching out a suitable aviation law firm. So eager are the authors to assist the young aviation lawyer that refer-
ence is also included to sources from which one might obtain the names of aviation law practitioners around the world.

The book features an impressive appendix containing all the international treaties that any instructor could possibly need to refer to starting with the Paris Convention of 1919 and going all the way through to the Model Open Skies Agreement adopted by the United States in 2004. It also contains some entertaining references to popular culture, including well known television programs, which adds a somewhat human aspect to the materials.

While it is hard to find anything missing from this comprehensive work, this reviewer would have preferred to have seen more detailed treatment of the structure and workings of ICAO, as well as the process involved in the negotiation of bilateral air service agreements and the background to, and nature of, some of the current areas of disagreement between states in this area.

All told this is an extremely comprehensive and ambitious project which succeeds in providing the student with readily available materials for a vast assortment of topics in a vast and interesting field. This book – and its accompanying teacher’s manual – will surely make the life of any aviation law instructor considerably easier. I highly recommend it.
Articles

Recall the Recall

Kevin M. McDonald*

At some point, the cost of additional safety improvements becomes so great that additional safety measures are not worthwhile.¹

- W. Kip Viscusi, Harvard law professor

INTRODUCTION

The system governing automotive recalls in the United States has run amok. If “secret” recalls were part of the concern expressed in 1966 when Congress created what would later become the National Highway Traffic Safety Administration (NHTSA) to oversee the auto industry, by 2006 the pendulum has swung the other direction to over-recalling. The legal standard requiring automakers and others to conduct a recall in

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cases where a defect presents an unreasonable risk to motor vehicle safety is now essentially meaningless because the agency, backed by the courts, has stripped out the unreasonable element.

As a result, now, automakers routinely have more annual recalls than annual sales. In 2004, for example, automakers conducted nearly 600 recalls covering more than 30 million vehicles, an increase of 57% from 2003.\textsuperscript{2} Compared to the 17 million vehicles sold,\textsuperscript{3} that equates to nearly 1.75 recalled vehicles for every new vehicle sold. Fourteen percent of all vehicles on the road have been recalled at least once to correct a safety-related defect or failure to comply with an applicable safety standard.\textsuperscript{4} Another compelling fact is, not even 25% of those vehicles are brought in by owners for repair.\textsuperscript{5} Thus, over 750,000 vehicles that should have been repaired in 2004 are still on the roads – with an unfixed safety defect.

Lest one think that 2004 was an anomaly, the overall recall trend in the industry is increasing. In 1967, the first full year the government began tracking safety recalls, manufacturers conducted a total of fifty-seven recalls.\textsuperscript{6} By 2000, the number of safety recalls had increased to 663.\textsuperscript{7} The number of potentially affected vehicles has also increased. Leaving out 2004, between 1998 and 2005, recalls averaged more than 18 million vehicles per year, far more than the average new sales during that timeframe.\textsuperscript{8}

The volume of recalls is not improving motor vehicle safety.\textsuperscript{9} In fact, when one considers the risks of crash posed by otherwise unnecessary trips to car dealerships to repair ‘safety defects,’ NHTSA’s recall program is probably exposing motorists to more hazards than it is correcting. The problematic effect of recalls on vehicle safety is highlighted by NHTSA’s consistent refusal to study the issue. Thirty years ago NHTSA’s own Advisory council concluded that: “The question naturally arises – do the

\begin{itemize}
\item 3. Greg Bowens and Lindsay Chappell, Analysts: Sales will be flat – still fat – this year; The crystal ball consensus is a match of ‘04’s 16.8 million, AUTO. NEWS, January 3, 2005, at 3.
\item 5. See Associated Press, Automobile Recalls Reach Record Highs, MIAMI HERALD, Dec. 1, 2004, at 1A.
\item 7. Id.
\item 9. Bae & Benitez-Silva, supra at 4 at 12.
\end{itemize}
safety benefits of the [recall] program justify its cost? Curiously, no one knows. Indeed, the scarcity of hard facts and the abundance of unknown factors make any definitive evaluation of the defect-recall program very difficult."¹⁰ Driven by dogma, NHTSA has nonetheless charged forward each year with its recall program. Driven by fear, reluctant auto companies have continually acquiesced. And so the viscous circle is complete: vehicles must constantly be recalled to fix the most inane ‘safety risks,’ such as a recent General Motors recall, strong-armed by NHTSA, of model year 1996-99 Chevrolet and GMC vans to ‘‘fix’’ the audible seat belt warning signal, which failed by a fraction to chime for the mandated 4-8 seconds when the seat belt wasn’t properly buckled.¹¹

Although the benefits of NHTSA’s recall program remain elusive, its costs are not. NHTSA estimates (rather conservatively) that safety recalls cost automakers about $100 per vehicle per recall.¹² Not including the indirect costs caused by recalls (e.g., brand damage), that would mean that automakers spent around $3 billion in 2004 to fix safety defects. That number does not take into account the numerous other field actions manufacturers undertake to correct ‘non-safety’ defects, such as emissions-related recalls, non-safety or non-emissions service actions, customer satisfaction campaigns, or extended warranties.

If one considers total warranty costs that fund all these actions, automakers spend nearly $12 billion a year in the United States to fix vehicles, which can cut between 1 to 3% off revenues.¹³ Broken down by company, General Motors Corp.’s warranty costs worldwide are about 3.2% of automotive sales as of March 31, 2005; Ford’s are about 2.5%; DaimlerChrysler’s are about 5.2%; and Toyota’s are about 1.2%.¹⁴ Aside

¹³ Ed Garsten, U.S. Auto Warranty Costs Soar, DET. NEWS, Sept. 14, 2004, at 1A. In October 2005, Ford Motor Company disclosed that its quality-related costs during the first nine months of 2005 increased by $500 million compared to the first nine months of 2004. In the third quarter of 2005 alone, the costs increased $200 million compared to the third quarter of 2004. These increases would have been even higher if Ford had not received a $240 million payment from Bridgestone Firestone North American Tire LLC to settle issues dating back to the recall of 20 million defective tires in 2000 and 2001. See Bryce G. Hoffman, Quality Costs at Ford Rise $500M, DET. NEWS, Oct. 23, 2005, at 1A.
¹⁴ See Jeff Plungis & Christine Tierney, Recalls Fall but Toyota Sees Increase, DET. NEWS, Dec. 2, 2005, 1C (noting that the data is from the trade publication, Warranty Week, which “cautions that the figures might not be entirely comparable because of different accounting systems and currencies,” see also http://warrantyweek.com/archive/ww20050524.html).
from automakers, consumers are the main losers here, because automakers must divert resources away from developing better and safer vehicles that can prevent crashes from occurring at all.

In his 1965 bestseller, Unsafe at Any Speed, Ralph Nader wrote: “The regulation of the automobile must go through three stages – the stage of public awareness and demand for action, the stage of legislation, and the stage of continuing administration.”15 Forty years later, the regulation of the automobile has traveled many times through each of these three stages.

My thesis is straightforward: the system governing automotive recalls is stuck in park and must be changed. The current system leads to the paradox of too many vehicle recalls with not enough owner participation. It is a failure on at least five levels.

First, automakers themselves bear part of the blame because they over-recall. Instead of protecting their shareholders’ property interest, employees’ reputations, brand image, and vehicles’ integrity, automakers have acquiesced. Sure, they may have been brow-beaten into submission by trial lawyers, the self-appointed “consumer” lobby (funded by trial lawyers), government officials, and sensation-seeking journalists into appeasing bureaucrats, even when no objective safety defect exists, but it is time automakers defend themselves in a meaningful manner.

Second, NHTSA’s hands-off approach to protecting its jurisdiction as the sole authority for overseeing recalls16 has actually encouraged trial lawyers to ask judges and juries to order recalls themselves, thereby creating the potential for a Balkanized recall system. Unfortunately, some myopic judges have failed to properly or sensibly interpret the statute governing recalls (the National Traffic & Motor Vehicle Safety Vehicle Act (“Safety Act”))17 and are happy to oblige such requests.18 The judiciary should, however, apply the doctrine of preemption to matters involving automotive recalls to ensure that NHTSA continues as the sole authority empowered to investigate defects and oversee automotive recalls.

Third, NHTSA continues to insist on outdated recall letters.19 Any recipient of a formal “RECALL LETTER” will tell you that the letter is

19. See McDonald, supra note 2, at 786 (citing Defect and Noncompliance Notification Rule, 49 C.F.R. § 577.5(a) (2005)). The NHTSA prescribes the language without flexibility. This rule has been in place since 1976.
riddled with incomprehensible legal jargon. Far from just esoteric nit-picking, the content of this letter, together with the flood of recalls, can be causally linked to a low owner response rate.

Fourth, the legislatures have imposed no responsibility on owners to ensure that their vehicles are repaired. As a result, assuming that all affected vehicles pose a safety hazard, not only are those vehicles at risk, but the entire public is put at risk. Legislative changes could include requiring annual registrations of vehicles and denials to those who haven’t tendered their vehicle for repair as well as sharing recall data with insurance companies so increased premiums can be charged to those who don’t have their vehicles repaired. If recalls are to be taken seriously and should be effective, then the burden cannot be placed solely on the manufacturers. Other changes could include criminal or civil penalties to those drivers involved in a crash where the underlying causal factors are attributed to a failure to tender the vehicle for recall repair.

Fifth, large-scale changes to the Safety Act include reducing the burdens of TREAD and tackling the controversial issue of cost-benefit of recalls. NHTSA also needs to prioritize hazard levels and investigate only those defects that legitimately constitute “unreasonable” risks.

MANUFACTURERS: FIGHT FOR YOUR RIGHT!

As a general proposition, manufacturers don’t beat NHTSA when fighting recall orders in court. So it’s understandable that manufacturers don’t fight recall orders. However, as discussed in my book Shifting Out of Park: Shifting from Recalls to Reason,20 the most recent experience in court has been positive (e.g., X-Cars21 and the Chrysler22 noncompliance case). This experience suggests that, given the right circumstances, manufacturers can win. Of course, they have to be willing to sacrifice the product in the effort, because the media will cast the manufacturer as the recalcitrant greedy corporation that is unwilling to cooperate with the government.23

With that in mind, though, it makes no sense to recall otherwise safe vehicles. By continuing to play along, manufacturers are part of the problem. Their recalls form a body of industry custom, such that when a similar issue arises later, enough “precedent” has been set by others in

23. See Jim Mateja, Hold Your Horses on Call for Engine Size Limits, CHI. TRIB. June 12, 2005, at 7 (calling automaker “greedy” for building large engines). See also Editorials, Letters to the Editor, DALLAS MORNING NEWS, July 26, 2006, at 14A.
the industry to make it almost impossible for a manufacturer not to recall for the same or similar issue.

A recent example will prove my point. In October 2005, Toyota conducted a safety recall affecting around 71,000 Scion vehicles (model years 2005 and 2006).²⁴ What was the safety-related defect that posed an unreasonable risk of crash or injury? A defective glass wind deflector used in the “moonroof” that: (1) if impacted by a projectile, such as road debris (2) while driving at highway speeds with (3) the wind deflector in the upward-tilted position (4) could shatter and separate from the frame and (5) perhaps fall upon the vehicle occupants thereby causing (6) driver distraction or injury.²⁵ The fix was to install a plastic film to the inside surface of the wind deflector glass.²⁶

What happened here? Lest one think that Toyota conducted this recall sua sponte, au contraire! Toyota conducted this recall in response to a NHTSA investigation.²⁷ Yes, NHTSA had opened both a preliminary evaluation and a subsequent engineering analysis into the issue. How big of a problem was this? In the closing resume of the engineering analysis file, NHTSA had received a total of seven complaints; Toyota had received one complaint.²⁸ In addition, Toyota reported 37 warranty claims out of a class of 71,400 vehicles, representing a failure rate of around 0.05%.²⁹ There were no reported injuries or crashes to Toyota as a result of this safety-related defect.

Toyota could have argued that, on the basis of Wheels,³⁰ no “defect” existed. Wheels required a “significant number” of performance failures, so long as the vehicle: (1) has been operated under conditions of specified use or (2) sustained the performance failures as a result of either (a) reasonably foreseeable abuse or (b) failure to maintain the vehicle, i.e., “ordinary abuse.”³¹ A “significant number” of performance failures means a number of failures that is “non-de minus [sic].”³² To prove a “significant number” of performance failures, the government need not identify engineering, metallurgical, or manufacturing failures.³³ Rather, the gov-

²⁵ Id.
²⁶ Id.
²⁷ Id. (follow “Document Search” then select #5, “Manufacture Notices”).
²⁹ Id.
³⁰ U.S. v. General Motors Corp. (Wheels), 518 F.2d, 420 (D.C. Cir. 1975).
³¹ Id. at 447.
³² Id. at 438, n. 84.
³³ Id.
ernment can prove a "significant number" of performance failures by relying "exclusively on the performance record of the vehicle or component." 34 A 0.05% performance record is hardly a "significant number."

Even if a "defect" existed, Toyota could have argued that the defect didn't "relate to safety." Recall the test for establishing a nexus to safety: to prove that a defect is "safety-related," the government must show that the defect constitutes an unreasonable risk of accidents or injuries. 35 The "reasonableness" of the risk to safety can be assessed, according to X-Cars, by analyzing the following three factors: "(1) the severity of the harm that the risk to safety threatens; (2) the frequency with which that harm occurs in the threatened population relative to its incidence in the general population; and (3) the economic, social, and safety consequences of reducing the risk to a so-called 'reasonable' level." 36

Let's look at each of those factors. First, the severity of the harm that, as identified by Toyota, is driver distraction or injury: If driver distraction is the standard for conducting a safety recall, we should recall all vehicles containing CD players or that are designed to carry passengers because both have been empirically shown to be highly distracting. If injury is the harm identified, it is worth nothing that the closing resume identified no injuries having occurred. Moreover, perhaps the glass is designed to break or shatter in a manner that would not cause any injury at all. Second, the frequency of the harm occurring is zero, based on the number of injuries. If one measures failures -- and not harm -- then the frequency is 0.05%. Third, the economic, social, and safety consequence of reducing this "risk" to a "reasonable" level presupposes the existence of a risk that is unreasonable. For the reasons discussed in this essay, I would challenge that conclusion. But even if one argues that such a risk is unreasonable here, what's the cost of fixing it? Another trip to the dealership, which consumes fuel and time as well as exposing the driver and any occupant to the usual risk of crash one is exposed to whenever traveling the roads. On balance, I wouldn't say that this "risk to safety" rose to the level requiring a safety recall.

If Toyota's recall isn't the poster child of ridiculous recall, then nothing is (except perhaps the GM recall to fix the audible seat belt buzzer for failing to chime with exact precision). Even if one agrees with NHTSA's argument that the failure rate would increase over time as the population and on-road exposure of the subject vehicles increase, why not allow Toyota to handle the remedy the next time the customer happens to be in

34. Id. at 432.
35. U.S. v. General Motors (X-Cars), 841 F.2d. 400, 409 (D.C. Cir. 1988).
36. Id. at 410.
the dealership? In other words, this problem, to the extent a problem really existed, could have been handled through a standard technical bulletin. Affected cars could have been repaired when they were brought in to the dealership for any reason. The cars are young and can be expected to visit a dealership at the latest during the next maintenance interval. Why should the customer be bothered with an extra trip to the dealership to fix something that could easily be fixed the next time the car is brought in?

Though understandable from a business perspective, by acquiescing, Toyota has made life more difficult in the future for it and the rest of the industry. Why? Because NHTSA now has another piece of precedent to point at when the next sunroof “defect” arises. The standard NHTSA response of “other manufacturers have conducted recalls for similar issues” can be expected now in the case of this type of “defect.” Already by the time the Toyota case emerged, NHTSA could point to a few recent examples when automakers conducted safety recalls for sunroof (or moonroof) ailments. For example, Nissan had recently conducted a safety recall on model year 2004 Nissan Maxima to fix a defectively built glass sunroof.37 And Jaguar had also conducted a safety recall on XJ vehicles to fix an incorrectly assembled reinforcement bar that could shatter the glass in the sunroof.38 But with Toyota’s recall, the bar has been set even lower, and the industry has hammered another nail in the coffin of recalling only “unreasonable” risks.

STOP THE NONSENSE – FOCUS ON THE DRIVER, not the CAR

If automakers are too passive in defending the integrity of their products, they are often too aggressive in touting the latest gizmo as the next life-saving device. Automakers are often their own worst enemy. By overemphasizing vehicle features, automakers can leave the impression that the vehicle can take care of the driver, not vice versa. In some cases, it may be true that the vehicle can “take care” of the driver. For example, safety belts – when used properly – can save lives and reduce injuries. But drivers can avoid crashes from happening in the first place by not drinking alcohol and doing drugs, driving at excessive speeds, or talking on the cell phone while driving. Avoiding those behaviors will provide society with the greatest gains in auto safety. That’s the message automakers - and NHTSA - need to broadcast, not that latest and greatest gadget.

In February 2006, Lawrence Ulrich, a senior writer from Money Magazine, wrote an article entitled “Safety Gizmos That Aren’t Worth the Cost.” He identified a number of “pricey gadgets” that were once “touted as ‘life saving’” but, in fact, “do little or nothing to protect human lives.” These “gadgets” include: (1) adaptive headlamps, touted to pivot in the direction the driver turns the wheel but, for Mr. Ulrich at least, “do little or nothing to improve the nighttime view, even on dark and winding country roads where you’d most expect to see some difference”; (2) lane-departure warning systems, which alert the driver who’s strayed off the road through an audible chime and flashing warning lamp in the instrument cluster but, for Mr. Ulrich at least, “nagged” him when he “wasn’t asking for its help”; and (3) infrared night vision, which can display people or animals that are beyond the range of standard headlamps but, for Mr. Ulrich at least, distracted him from focusing on the road because these objects are displayed on a separate dashboard screen. Ironically, the safety benefit of the latter two gadgets might be offset by the crashes or near crashes caused by the distraction those systems rely on to function, i.e., a warning chime and flasher as well as a separate dashboard monitor.

Mr. Ulrich is not alone. Other well-respected auto experts, such as Jim Hall, Vice President of AutoPacific, a company specializing in research and analysis of the auto industry, have also expressed reservations about these features.

The media, quick to pounce on automakers once a recall is announced, is often surprisingly uncritical when covering these stories. For example, covering the annual conference of the Society of Automotive Engineers in April 2006, the Detroit News ran a cover business story entitled “Smart Cars Could Save Lives,” in which it provided an uncritical account of a host of gizmos touted by companies at the conference, such as a 360-degree “protective bubble . . . that relays everything going on around the car on a 3-D video.” Not a word was devoted, however, to the potential risk of driver distraction posed by this “life-saving” system.

In addition to the distraction problems some of these features cause, a larger problem is perhaps one of perception and credibility. If the auto

40. Id.
41. Id.
42. Id.
43. Id.
industry continues to tout features as life-saving that in fact aren’t, it risks not being believed at some point in the future if it really does discover a life-saving feature. In the meantime, though, by emphasizing vehicle features over personal responsibility, the auto industry creates a situation that is difficult to defend when the driver comes to rely on the gadgets, not his own skill, to drive the vehicle. By declaring these gadgets “safety” features, any problems that arise will have to be remedied through a formal safety recall. After all, they’re performing a safety function, the failure of which could result in a crash. Finally, if everyone in the industry buys into the “safety” function, one could argue that automakers have an affirmative duty to install these features as standard equipment on all vehicles and that failing to do so equates to negligent design.

I’m no psychiatrist, but the behavior of many automakers – shying away from defending their product yet aggressively touting the latest gizmo - is consistent with what I’ve read about passive-aggressive personality disorder. Here’s how one psychiatry textbook describes the clinical features of the disorder:

PAPD patients characteristically procrastinate, resist demands for adequate performance, find excuses for delays, and find fault with those on whom they depend; yet they refuse to extricate themselves from the dependent relationships. They usually lack assertiveness and are not direct about their own needs and wishes. They fail to ask needed questions about what is expected of them and may become anxious when forced to succeed or when their usual defense of turning anger against themselves is removed.46

My message to the marketers here is simple: stop the nonsense.

Let’s Talk about Cost

Recalls are conducted to fix vehicles containing safety-related defects or noncompliance with safety standards. The point of recalls, of course, is to reduce the frequency of crashes or injuries (or both). Considering the significant amount of money and attention devoted to recalls, you might be surprised to learn that NHTSA has never studied the effect of recalls on vehicle safety. This oversight is baffling. After all, NHTSA knows exactly which vehicles subject to a safety recall have been repaired and which vehicles have not been repaired. Furthermore, NHTSA knows the subsequent vehicle crash histories of these vehicles. Yet NHTSA has never provided a quantitative analysis of this link. In laymen’s terms, NHTSA hasn’t measured the “benefits” of recalls. At least the agency is consistent, though, because it also hasn’t effectively analyzed the “cost” of recalls, either. As a result, little is known – officially - about the “cost-benefit” of safety recalls. In my view, the second part of rethinking the

concept of what should trigger a safety recall is thinking about cost-benefit.

I thus aim to frame some cost-benefit questions that should be asked of any regulatory program, including NHTSA’s recall program. I realize, of course, that cost-benefit analysis has its enemies ("how can one ever place a ‘value’ on a human life?"); but I think the following types of questions are worth asking: how much does a proposed recall cost to administer? How much does a proposed recall cost to a company’s reputation? What is the cost to society of a proposed recall, e.g. increased fuel consumption needed to drive to a dealership, increased exposure to crash just by adding the extra trip to a dealership, lost productivity, etc.? What specific benefits, in terms of lives saved or injuries mitigated, can be expected to flow from a proposed recall? Are other remedial actions available short of a formal recall, such as extended warranties or service actions?

The Need for Cost-Benefit in Recalls

As a preliminary matter, a word is needed about the need for cost-benefit analysis in the context of recalls. Why should we even consider the cost of recalling x number of vehicles? After all, trial lawyers have demonized the use of cost-benefit analysis in the context of auto safety, chastising companies that use it.47 For example, in a recent product liability case involving the design of a gas tank used on GM A-cars, plaintiffs’ counsel – upon “discovering” that GM employed a cost-benefit analysis in its design - alleged “despicable” conduct by GM, which the attorneys accused of exhibiting a “conscious disregard for safety” and engaged in a “malicious” act by employing cost-benefit.48

Plaintiffs’ counsel should have known better. After all, California law (the case took place in California) requires juries to apply the same despicable cost-benefit analysis when deciding cases involving alleged design defects.49 Specifically, juries must apply a risk-utility test to allegedly defective automobile fuel tank placement designs, “balanc[ing] and weigh[ing] . . . such competing design consideration as risk, benefit, feasibility, and cost.”50 This “careful assessment of feasibility, practicability, risk, and benefit”51 reflects the actions that any responsible automaker would undertake when exercising sound judgment in design.

In other words, auto safety necessarily entails consideration of cost-

48. Id. at 37.
49. Barker v. Lull Eng’g Co., Inc., 20 Cal.3d 413,430 (Cal.1978).
51. Id. at 562.
benefit trade-offs because, in the words of Supreme Court Justice Stephen Breyer, consumers won’t pay huge premiums for only marginally safer automobiles. 52 In his book Breaking the Vicious Circle: Toward Effective Risk Regulation, Justice Breyer uses the example of consumer spending on auto safety to demonstrate our natural risk-money trade-offs. 53 He asks if it is unreasonable to require a safety feature that costs $10 billion per life saved? 54 Would consumers be willing to pay an extra $48,077 for a car 5% safer than those we now drive?

As law professor W. Kip Viscusi observes, “[t]he fact that we do not all rush out to purchase marginally safer cars that are vastly more expensive reflects the limits we place on safety improvements.” 55 Professor Viscusi has found that “the tradeoffs revealed by consumer purchases of used cars indicate that consumers are willing to pay approximately $3 million for each statistical life saved by the decreased risk of death offered by the purchase of a safer used car.” 56

Both Justice Breyer and Professor Viscusi have hit on something, which is that some product hazard will always exist, regardless whether the consumer or the producer makes the safety decision. That’s because at some point, the cost of adding additional safety features or designed out certain risks is outweighed by the benefit of obtaining the car for a cheaper price.

Taking this thought a step further, Viscusi argues that our desire to limit our expenditures on product safety “could even stem from interest in other health-enhancing expenditures, . . . [such as buying] additional medical care, improved nutrition, or housing in a safer neighborhood.” 57 In fact, we even hurt ourselves by spending inordinate amounts on one safety concern “instead of allocating our funds across different ways of enhancing safety based on the relative efficacy of those expenditures.” 58

Acknowledging the role that cost-benefit tradeoff plays in auto design, we can now turn to auto recalls. In the specific context of auto recalls, I support using cost-benefit analysis for two reasons: (1) case law requires it, and (2) good regulatory analysis demands it.

First, case law precedent requires cost to be considered before judging a defect as one that “relates to safety.” To prove that a defect is

53. Id.
54. Id.
55. Viscusi, supra note 1, at 661.
56. Id. (citing Mark K. Dreyfus & W. Kip Viscusi, Rates of Time Preference and Consumer Valuations of Automobile Safety and Fuel Efficiency, 38 J.L. & Econ. 79, 102 (1995)(finding implicit value of life estimates for automobile owners in the range of $2.6 to $3.7 million)).
57. Id. at 561.
58. Id. at 561-62.
“safety-related,” the government must show that the defect constitutes an "unreasonable risk of accidents or injuries."\textsuperscript{59} The “reasonableness” of the risk to safety should be assessed, according to \textit{X-Cars}, by analyzing the following three factors: (1) how severe the harm and risk to safety are (“severity”);\textsuperscript{60} (2) how often the harm occurs in the threatened population compared to the general population (“frequency”);\textsuperscript{61} and (3) what the economic, social, and safety consequences are of reducing the risk to a so-called “reasonable” level (“cost-benefit”).\textsuperscript{62} As the third factor implies, an analysis of the benefits and costs tied to reducing the identified risk to a “reasonable” level must be conducted before branding a defect “safety-related” and triggering the notification and remedy duty.

Second, evaluating the benefits and costs of a potential recall is, stated simply, part of good regulatory analysis. In its “best practices” guidance circular to the heads of all federal agencies, the Office of Management and Budget (OMB) advised that “good regulatory analysis” consists of three elements: “(1) a statement of the need for the proposed action; (2) an examination of alternative approaches; and (3) an evaluation of the benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis.”\textsuperscript{63}

In sum, as law professor Cass Sunstein has concluded, if a risk is very small – a so-called \textit{de minimis} risk – then that risk shouldn’t be regulated.\textsuperscript{64} By analogy, if a recall remedy can’t be shown to reduce risks by more than a \textit{de minimis} amount, then that recall shouldn’t be conducted, much less mandated.

\textbf{How to Conduct a Cost-Benefit Analysis in Recalls}

Assuming you support my argument that cost-benefit analysis has a role in auto recalls, just how should we conduct such an analysis? The OMB “best practices” document of 2003\textsuperscript{65} is instructive in how to conduct a meaningful cost-benefit analysis.

At a high level, to evaluate correctly the benefits and costs of a proposed recall, the analysis must answer the following questions: how is the proposed recall expected to provide the anticipated benefits and costs, and what are the monetized values of the potential real incremental bene-

\textsuperscript{59} See General Motors, 841 F.2d at 409.
\textsuperscript{60} \textit{Id.} at 410.
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.}
\textsuperscript{64} Cass R. Sunstein, Cost Benefit Default Principles 58 (2002).
\textsuperscript{65} See Office of Mgmt. & Budget, \textit{supra} note 63, at 1.
fits and costs to society. To answer these questions, the analysis must in turn: (1) explain how the recall is “linked” to the expected benefits (e.g., show how the recall of defective parts will reduce safety risks); (2) identify a baseline, i.e., answer the question “what the world will be like if the [recall] is not adopted” and; (3) identify any undesirable side-effects and ancillary befits of the proposed recall; these should be added to the direct benefits and costs as appropriate.

Concerning the second element (identifying a baseline), the baseline should be the “best assessment of the way the world would look absent the proposed action.” An appropriate baseline might require considering the following factors: (1) evolution of the market; (2) changes in external factors affecting expected benefits and costs; (3) changes in regulations promulgated by the agency; and (4) the degree of compliance by regulated entities with other regulations.

**Applying a Cost-Benefit Analysis: Direct Costs**

With these goals in mind, let’s get specific. Recall costs are either direct or indirect. Direct costs are those costs directly attributable to a recall. These costs can be divided into three areas: (1) pre-recall; (2) recall; and (3) post-recall. Pre-recall costs include legal counsel and management costs to cover in-house attorneys and company management who deal with outside counsel, insurance companies, and NHTSA. Management costs include the time of the recall management person (or group) and of those executives at various levels who are involved in deciding how to frame and execute the recall. Other costs incurred during this period include quality assurance investigations and analyses, warranty reviews, and expert opinions. Note that many of these costs (e.g., legal counsel) continue throughout the recall and post-recall periods.

Recall costs are those costs central to the recall. Conceptually, the recall can be thought of in two ways: (1) notification and (2) remedy. The notification costs are the costs of notifying consumers, either directly through letters or also through other means, such as announcements in retail stores. These costs also include notifying NHTSA, any distributors, and also dealers. The remedy costs are the cost of replacement parts

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66. *Id.* at 18.
67. *Id.* at 2-3.
68. *Id.* at 15.
69. *Id.*
70. AM. SOC'y FOR QUALITY, PROD. SAFETY AND LIAB. PREVENTION INTEREST GROUP, THE PRODUCT RECALL PLANNING GUIDE 13 (ASQ Quality Press 2nd ed. 1999).
71. *Id.*
72. *Id.*
73. *Id.*
and labor. Parts costs should include the price of the replacement part, shipment, and storage of the part.\textsuperscript{74} Note that suppliers or contractors may need to work overtime on short notice, which could potentially raise recall costs significantly.\textsuperscript{75} Labor costs include the both the cost of workers to produce the replacement part for the recall as well as the cost of dealership personnel to perform the repair (e.g., inspect and replace, using the replacement part).\textsuperscript{76}

Post-recall costs include the ongoing costs involved in monitoring the effectiveness of the recall. These include monitoring the response rates and providing quarterly reports on response rates to NHTSA. Other costs here include retaining all official documents, including warranty claims, mailing lists, drawings, owner’s manuals, labels, supplier’s documents (purchase orders, invoices, etc.), shipping documents, press releases, and correspondences. NHTSA’s record retention period is five years.\textsuperscript{77}

NHTSA estimates (rather conservatively) that the direct costs of safety average $100 per vehicle per recall.\textsuperscript{78} Not including the indirect costs caused by recalls, that would mean that automakers spent around $3 billion in 2004 to fix safety defects or noncompliant features.

At best, NHTSA’s estimates are crude and way too low. They fail to consider any indirect costs (described immediately below), which often cost more than the direct costs. And they fail to consider the costs placed on consumers.

For example, here’s a way to calculate the costs to consumers of safety recalls. Using 2004 recall data, let’s assume that 30,000,000 vehicles are recalled in a given year. On average, let’s say that consumers live 10 miles from their dealership. Assuming customers make a separate trip to their dealership to have their vehicles repaired, that means that consumers drive 300 million miles solely to repair safety-related defects.

Using the 2004 fatality rate per 100 million vehicle miles traveled (VMT) of 1.44,\textsuperscript{79} just complying with all the recalls can be expected to kill 4.32 people. Considering the number of recalls conducted to fix question-able “safety” defects – think of the Scion moonroof recall or the GM

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at 52.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\end{itemize}
recall to fix the audible safety belt warning chime – it is certainly worth asking whether, in the aggregate, more lives are put at risk by recalls than are saved by recalls.

Taking this analysis further, let’s assume that the recalled class of vehicles, which includes trucks and cars, averages 22 miles per gallon. At that rate, it would take 13,636,364 gallons of fuel just to bring the vehicles to and from the dealership. If gas costs an average of $2.25 per gallon, the cost to consumers for fuel alone is $30,681,818. Other costs include the cumulative effect of depreciation affecting the recalled class of vehicles. Vehicles with more mileage are by and large worth less than vehicles with less mileage.

**Applying a Cost-Benefit Analysis: Indirect Costs**

As we’ve seen, direct costs of a recall are the costs of notifying, inspecting, and remediing the defective vehicles. Direct costs increase with the number of vehicles subject to the recall. Indirect costs of a recall are loss in goodwill or reputation, also known as brand damage.

Nicholas G. Rupp, professor at the Department of Economics at East Carolina University, recently published a paper entitled “The Attributes of a Costly Recall: Evidence from the Automotive Industry.” This paper is the first study that examines which particular aspects of a recall have the most influence on shareholder value.

Using safety recall data from 1973-1998, Professor Rupp attempted to isolate what particular aspects of safety recalls can cause “significant shareholder losses.” In his words, here’s how he did it: “After constructing an equally-weighted automotive market index to control for industry effects and adjusting abnormal returns for the degree of surprise in the Wall Street Journal announcements, the study estimate[d] the effect of recalls on both percentage and real dollar abnormal returns.” In plain English, he compared the stock prices of domestic automakers and American Depository Receipts (ADR) prices for Japanese companies on the day before and the day after a safety recall was announced in the Wall Street Journal.

Professor Ruff found that one of the factors having the most influence on shareholder losses was which defective component needed repair. Recalls affecting airbags, exhaust systems, and steering were

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82. Id. at 2.
83. Id. at 18.
84. European automakers were not studied. Id at 10.
85. Id. at 18.
shown to be "significantly more costly" for automakers, whereas recalls affecting defective heaters, for example, are "significantly less costly." Professor Rupp explains the difference is due to the hazard, i.e. the typical heater defect poses less of a hazard to safety than a defect affecting airbags or exhaust systems.

Another factor found to negatively influence share price was the age of the affected vehicles. Recalls affecting current-year model year and one-year-old model year vehicles have trigger smaller (albeit "marginally" smaller) shareholder losses than models that are two-year-old model year and older vehicles. Professor Rupp points out that older model-year vehicles pose a greater liability threat for automakers "because these defects have had a longer time to cause consumer injuries." That may be true, but it is worth noting that 90% of safety recalls are issued within the first three model years of vehicle introduction, so the overwhelming majority of recalls will fall into the "marginally smaller" shareholder loss category.

Yet another factor found to have a negative effect on shareholder value is whether the recall is the first for the affected vehicles (initial recalls cost more). If so, then share prices can be expected to drop more than if the recall is the second, third, etc. for the model.

A last factor found to have a negative effect on shareholder value is whether the recalls affect companies with high financial stability (companies with the "highest financial stability" – as measured by Moody’s Bond Record for corporate bond ratings (e.g., AAA-, AAA, or AAA+) - suffer the greatest shareholder losses form auto recalls). Stated differently, “companies in excellent financial shape (AAA bond rating) experience a loss of between -0.26 and -0.28 percent after a Wall Street Journal recall announcement, which is similar in magnitude to [an] initial recall.” In terms of real adjusted abnormal dollar returns, companies with the highest bond ratings (AA) experienced a $42.8 million average loss in shareholder value following a Wall Street Journal recall announcement.

Professor Rupp’s study assumes, of course, that the market hasn’t processed auto safety recall information until publication in the Wall

86. Id at 3.
87. Id. at 15.
88. Id.
89. Id.
90. Id. at 15-16.
91. Bae & Benitez-Silva, supra note 4, at 10.
92. Rupp, supra note 82, at 15.
93. Id. at 3.
94. Id. at 15.
95. Id. at 17.
Street Journal. Considering the speed and channels (e.g. Internet) at which information is transmitted, however, this assumption is a little shaky. That being said, his findings are a first of their kind.

An interesting observation of Professor Rupp is that there’s “no evidence” that NHTSA-influenced recalls are more damaging to shareholders than recalls voluntarily undertaken by manufacturers, even those undertaken without any preliminary evaluation. So, perhaps it is worth fighting NHTSA, at least at the administrative stages, i.e. before going to court.

In calculating costs, Professor Rupp found that “the indirect costs of automotive recalls are likely larger than the direct costs.” That sentence bears repeating: the indirect costs of recalls exceed the direct costs. Using the conservative NHTSA estimate would place the indirect costs at more than $3 billion in 2004 alone, not including the costs to consumers. Therefore, the total recall costs in 2004 alone exceeded far more than $6 billion, not including the costs to consumers.

To summarize, the costs of recalls are direct and indirect. Direct costs are those costs directly attributable to a recall. Indirect costs include costs to a manufacturer’s reputation and share price. But the cost segment is only half of the analysis. The other side is benefits. As with cost, the OMB “best practices” document of 2003 is highly instructive in helping to measure benefits.

Benefits of Recalls

“In constructing measures of ‘effectiveness,’” says the OMB, “final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as ... crashes avoided.” Besides “lives saved,” other, more comprehensive, “integrated” measures of effectiveness are the number of “equivalent lives” saved and the number of “quality-adjusted life years” (QALYs).

According to the OMB, a chief advantage of the integrated measures of effectiveness “is that they account for a rule’s impact on morbidity (nonfatal illness, injury, impairment and quality of life) as well as premature death.” Including morbidity effects is needed because (1) “some illnesses (e.g., asthma) cause more instances of pain and suffering than

96. Id. at 3.
97. Id. at 17.
98. Id. at 19.
100. Id. at 12.
101. Id.
102. Id.
they do premature death;"103 (2) "population groups are known to experience elevated rates of morbidity (e.g., the elderly and the poor) and thus have a strong interest in morbidity measures;"104 and (3) "some regulatory alternatives may be more effective at preventing morbidity than premature death (e.g., some advanced airbag designs may diminish the nonfatal injuries caused by airbag inflation without changing the frequency of fatal injury prevented by airbags)."105

Unfortunately, when it comes to auto recalls, very little research has been conducted on the quantitative effect of recalls on motor vehicle safety. In 2005, Yong-Kyun Bae and Hugo Benítez-Silva, both economics professors at the State University of New York (Stony Brook), published a paper entitled "Do Vehicle Recalls Reduce the Number of Accidents? The Case of the U.S. Car Market."106 Using a statistical method that groups individual drivers by types in order to produce synthetic panel data, the authors claim to be able to analyze the effect of recalls on accidental harm, which is measured by the number of crashes.107

Their results purport to show that safety recalls reduce the number of crashes by "around 20%" for the recalled vehicles.108 The drop in reduction differs by make for non-U.S. makes, the reduction is estimated at 21.1%;109 for U.S. makes, the reduction is estimated at 16.5%.110

Furthermore, recalls the authors deemed "hazardous" are purportedly even "more effective" in reducing crashes.111 These recalls can be expected to reduce crashes by 25%.112 Again, the drop in reduction differs by make. For domestic vehicles, the drop is around 19.3%.113 For foreign vehicles, the drop is double that – almost 40%.114 The authors conclude that these numbers "seem to indicate that when foreign manufacturers (or the government) recall foreign cars these recalls are more effective in reducing [crashes], conditional on the same level of hazard of these recalls."115

Finally, the authors claim that recalled vehicles with higher correction response rates have fewer crashes three years after the recall than

103. Id. at 12-13.
104. Id. at 13.
105. Id.
106. Bae & Benítez-Silva, supra note 4.
107. Id. at 3.
108. Id.
109. Id. at 18.
110. Id.
111. Id. at 3.
112. Id. at 19.
113. Id.
114. Id.
115. Id.
vehicles with lower correction response rates.\textsuperscript{116} They find that the higher correction rates of a recall are correlated with lower numbers of crashes of the recalled model in the three years following the recall.\textsuperscript{117} Additionally, they conclude that "recalls reduce accidents, and that correction rates do matter."\textsuperscript{118}

One weakness of the study, also acknowledged by the authors, is that they can't rule out that the drop in crash rates isn't due to changed driver habits.\textsuperscript{119} Perhaps motorists drive differently after having their vehicles repaired to correct a safety defect, and perhaps the change in driving behavior is what could explain the drop in the number of observed crashes. The authors can't say for sure.\textsuperscript{120} What they've observed is a correlation, not necessarily a causal relationship.

Another problem with this study is that, if recalls reduce vehicle crashes by 20\%, we would expect some sort of drop in deaths or injuries. Yet the fatality numbers stay fairly constant - exceeding 42,000 every year.\textsuperscript{121}

\section*{Increase the Recall Response Rates}

Assuming a recall is needed, my second set of suggestions seeks to ensure the highest possible response rate. In 1974 Congress amended the Safety Act, in part to fix the low consumer response rate to recall announcements, which at the time was "only" 72\%.\textsuperscript{122} The amendments required that manufacturers (1) pay for recall repairs and (2) send recall letters by first-class rather than certified mail.\textsuperscript{123} More than thirty years these amendments have raised the response rate a whole 3\%, to around 75\%. It's time to approach the recall response rate differently than it has been approached in the past.

A study entitled "Study to Determine Why Vehicle Owners Respond to or Ignore Recall Notifications" conducted for NHTSA by Market Facts, Inc. in July 1980 identified some of the reasons consumers did not tender their vehicles for repair.\textsuperscript{124} These reasons were (1) they didn't have time; (2) it was too inconvenient; (3) they were too lazy; (4) there

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\textsuperscript{116} Id. at 3. \\
\textsuperscript{117} Id. at 21. \\
\textsuperscript{118} Id. at 22. \\
\textsuperscript{119} Id. at 20. \\
\textsuperscript{120} Id. \\
\textsuperscript{121} See National Center for Statistics and Analysis, supra note 79, at 2. \textsuperscript{122} U.S. Gen. Accounting Office, Report to the Secretary of Transportation, GAO/CED-82-99, Changes to the Motor Vehicle Recall Program Could Reduce Potential Safety Hazards, 14 (Aug. 24, 1982). \textsuperscript{123} Id. \\
\textsuperscript{124} Highway and Traffic Safety Admin., Study to Determine Why Vehicle Owners Respond to or Ignore Recall Notifications, (Market Facts, Inc.) (July 1980).
\end{flushleft}
was no problem; and (5) they didn’t think the recall was important. A more recent study conducted in 2003 by XL Associates and Heiden Associates into CPSC recall response rates came to similar conclusions.

Increasing the response rate will reduce the occurrence of crashes in the recalled vehicles, at least within three years following the recall. With this in mind, this section offers a number of recommendations that, if implemented, would sufficiently motivate consumers and increase response rates.

**Speak (Plain) English**

Have you ever received a formal auto safety recall letter? You’ll know if you have because the envelope probably arrived trimmed in red. That’s supposed to convey a sufficient level of alarm in you so that you’ll open it and read on. The letter is supposed to motivate you to drive to your dealer to get the car fixed. The problem is that much of the letter is inescrutable. And there isn’t much the manufacturer can do to make it understandable, because most of the letter’s substance is mandated by regulation, which means it’s as clear as an IRS tax form. As we’ll soon see, the NHTSA recall letters read at a grade level higher than the instruction for IRS Form 1040.

NHTSA recall regulations require defect recall letters to begin with the following paragraphs:

This notice is sent to you in accordance with the requirements of the National Traffic and Motor Vehicle Safety Act. (Manufacturer’s name or division) has decided that a defect which relates to motor vehicle safety exists in (identified motor vehicles, in the case of notification sent by a motor vehicle manufacturer; identified replacement equipment in the case of notification sent by a replacement equipment manufacturer).

The regulations also require that the letters include the following, in any order:

- A description of the defect, including identifying the system or equipment affected; a description of the possible resulting malfunction; a statement of operating or other conditions that could cause the malfunction; and any precautions the owner should take

125. **Id.**
127. Bae & Benitez-Silva, supra note 4, at 3.
128. Notification Pursuant to a Manufacturer’s Decision, 49 C.F.R. § 577.5 (2005) (required language is slightly different in the case of a noncompliance with a safety standard).
before repair;\textsuperscript{129} 

- An evaluation of the risk to motor vehicle safety, including (1) either a statement that a crash could occur without prior warning or a statement of what warning would occur (with a statement of what will occur if the warning is ignored) or (2) if a crash would not result, a statement of the type of injury that could result;\textsuperscript{130} 

- The measures to be taken to remedy the defect, including (1) a statement that the manufacturer will remedy it without charge, if required, and whether the remedy is by repair, replacement, or refund; (2) the earliest date it will be remedied without charge; and (3) a general description of the repair work involved and an estimate of the time needed to do the repair;\textsuperscript{131} 

- A statement informing the owner of his or her right to reimbursement for certain out-of-pocket expenses incurred prior to announcement of the recall and the parameters for qualifying for reimbursement, including cut-off dates for submission;\textsuperscript{132} 

- A statement informing the owner that he or she can contact NHTSA (address, telephone number, and website must be included) if the owner believes the vehicle wasn’t remedied without charge or the manufacturer couldn’t remedy it within 60 days.\textsuperscript{133}

Twenty-five years ago the U.S. General Accounting Office (GAO), in a report to the Secretary of Transportation, recommended ways to increase the recall response rate by simply improving the recall letter itself.\textsuperscript{134} The GAO found that nearly all the recall letters it reviewed were written at too high a reading level and were difficult to understand.\textsuperscript{135} It recommended lowering the reading level as a way to increase owner response rates.\textsuperscript{136}

At the time the study was conducted (November 1981), 54% of U.S. adults read at or below the 11th grade level.\textsuperscript{137} Today about 50% of U.S. adults read at or below the 8th grade level.\textsuperscript{138} The standard recall letter, whose content is largely prescribed by regulation, is written at a collegiate level, somewhere between a grade level of 12.4 years and 16.4 years (se-

\textsuperscript{129} 49 C.F.R. § 577.5.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} 49 C.F.R.§577.6.
\textsuperscript{133} 49 C.F.R.§ 577.5.
\textsuperscript{134} U.S. GEN. ACCOUNTING OFFICE, supra note 123, at 24.
\textsuperscript{135} Id. at 14.
\textsuperscript{136} Id. at 28.
\textsuperscript{137} Id. at 14.
The recall letters are thus written at a reading level too high for most U.S. adults to understand. The solution to this problem is simple. As the GAO wrote:

If the recall letters are easier to understand, more owners would respond to recalls. Higher response rates in turn would mean less defective vehicles on the road and lower manufacturers’ overall administrative costs, as fewer attempts would have to be made to locate owners who were unresponsive to the initial letter.

Rather than leave it there, however, the GAO hired an expert consultant to advise on exactly how a simplified letter should look. By reorganizing the letter to highlight the result of the defect earlier, at the beginning of the letter, and by underlining and using capital letters as well as, most importantly, rewriting much of the content, a revised letter containing the same information as an actual (and typical) letter was created that reads at a fifth grade level. Strunk & White would be proud, because the proposed letter heeds Rule 16 of their “Approach to Style” in The Elements of Style. That rule states simply: “be clear” and “[c]larity, clarity, clarity.”

The experts argued that letters written in plain English would improve response rates because consumers would be more likely to understand what automakers were telling them. But the suggestions didn’t go anywhere. NHTSA didn’t adopt any of the changes because, according to the GAO report, NHTSA’s Office of Chief Counsel “felt that any changes needed in letter format must be fully substantiated before they could be implemented.” So the letters today remain as inscrutable as they were thirty years ago. And the work of another expert commission was for naught.

That doesn’t mean NHTSA shouldn’t revisit its decision. On the contrary, it should. And it should adopt the revisions suggested by the expert panel. Considering that the average consumer reads at a third-grade level, requiring a letter written at the twelfth-grade level is not only illogical, but also dangerous because defective vehicles will not be repaired.

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140. Id.
141. Id. at 19.
142. Id. at 24.
144. Id.
146. Id.
Hold out the Cash Carrot

Ensuring the highest possible recall response rate presupposes that consumers are sufficiently motivated to tender their vehicles for repair. In this vein, the following recommendations presuppose that our nation’s traffic safety is based not only on automakers correcting safety defects, but also on owners responding to defect letters. In a real sense, correcting safety defects is a two-way street involving manufacturers, their dealers, and vehicle owners. All must be held responsible to ensure their role is upheld in ensuring our roads are kept free of defective vehicles.

NHTSA can – and should – offer incentives to States that require vehicle owners to tender their vehicles for repair in response to a formal safety or noncompliance recall. The current response rate of about 75% hasn’t improved in over forty years. It’s time to think differently.

NHTSA and, more importantly, the motoring public, have a vested interest in obtaining the highest possible recall response rates. Improving response rates will remove otherwise defective vehicles from the roads. Although NHTSA can’t force owners to tender their vehicles for repair, the States – through their historic police powers – can. So all NHTSA (or Congress) needs to do is provide sufficient incentives to the States.

NHTSA’s approach to encouraging seat belt use serves as a model for how it could encourage States to get on board. Despite the wide reach of the federal government in matters affecting automotive safety, belt use remains regulated and enforced at the State and local levels because this matter falls within the historic police powers of the State protected by the U.S. Constitution. Belt enforcement laws are either “primary” or “secondary.” Under a “primary” belt use law, motorists can be stopped and ticketed simply for belt nonuse. Under a “secondary” belt use law, motorists must be stopped for another infraction, such as exceeding the speed limit, to be ticketed for belt nonuse. In 2006, 24 States, Puerto Rico, and the District of Columbia, have primary laws, 25 States had secondary laws, and one State (New Hampshire) has no belt law.

In the event of a vehicle crash, properly used seat belts save lives and

147. Id. at ii-iii.
149. See id. See also U.S. CONST. art. IV.
150. Id.
151. Id.
reduce health care costs by reducing and even preventing injuries.\textsuperscript{153} Available studies provide strong evidence that primary belt laws are more effective than secondary laws in increasing safety belt use and decreasing fatalities, perhaps because primary belt laws penalize the very act of not buckling up, but also because these laws enjoy public acceptance.\textsuperscript{154} Convincing motorists to buckle up is a top priority of NHTSA as it seeks to reduce the 42,000 deaths and 3,000,000 injuries each year attributed to vehicle crashes.\textsuperscript{155} According to NHTSA, more than half (55\%) of those killed in car crashes were \textit{not} wearing their safety belts at the time of the crash.\textsuperscript{156}

Although the federal government can’t mandate primary belt laws, it can effectuate this desired policy of primary belt laws through its powerful purse. In fact, Congress loves the idea of incentives. When it passed the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which President Bush signed into law on August 10, 2005, Congress spent $286,000,000,000 to fund highways, highway safety, and public transportation between 2004 and 2009.\textsuperscript{157} The fiscal year 2007 budget request from President Bush envisions a request for NHTSA of $584,000,000 just for highway traffic safety grants, including almost $498,000,000 worth of incentives for states and territories that enact primary safety belt usage laws.\textsuperscript{158}

Section 2005 of SAFETEA-LU establishes a one-time grant program to increase safety belt use.\textsuperscript{159} The law accomplishes this goal by holding

\begin{footnotesize}
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    \item \textsuperscript{154} \textit{Id.}
    \item \textsuperscript{156} Transportation Secretary Mineta Calls Highway Fatalities National Tragedy, Says All Americans Can Do More To Improve Road Safety, National Highway Traffic Administration (April 20, 2006), available at http://www.nhtsa.dot.gov (select “Research” tab; follow “4/20/06: 2005 Preliminary Motor Vehicle Crash Fatalities and Injuries hyperlink).
    \item \textsuperscript{158} \textit{See Press Release, “New Data Show Rising Safety Belt Use Rates in Most States,”} (Dec 16, 2005), available at http://www.nhtsa.dot.gov (select “In The News” tab; select “2005” from the drop-down menu; follow “New Data Show Rising Safety Belt Use Rates in Most States” hyperlink).
    \item \textsuperscript{159} \textit{See Incentive Grants to Support Increased Safety Belt Use Rates Section 406 Implementing Guidelines,} 71 Fed. Reg. 4196, 4197 (Jan. 25, 2006) (codified at 23 U.S.C. 406) (“the Section 406 Program”). For purposes of the Section 406 Program, a “State” includes the 50
\end{itemize}
\end{footnotesize}
out a carrot to States that either (1) enact and enforce a primary safety belt use law or (2) achieve and maintain a safety belt use rate of 85% or higher in two consecutive years without such a law. 160 State recipients may use the federal funds to pay for a range of traffic safety programs. States satisfy the “enforcement” requirement of (1) by ensuring that citations can be issued solely for violating the belt usage law. 161 Thus, “a primary safety belt use law that has a future effective date or that includes a provision limiting enforcement to only written warnings during a “grace period” after the law goes into effect would not be deemed in effect or “being enforced” until the effective date is reached or the grace period ends.” 162

The carrot amounts to a one-time payment drawing on the $125,000,000 that is based largely (75%) on the ratio of the population each State bears to the total population of all States (as shown by the last census), but also partly (25%) on the ratio which the public road mileage in each State bears to the total public road mileage in all States. 163 Let’s take one state as an example: Minnesota, which does not currently have a primary belt use law. In contemplating whether to pass a primary belt use law, it would stand to receive $15,000,000. 164 Other benefits would accrue, too, such as increasing the usage rate to about 93 percent. 165 “That would result in about 50 fewer people dying and 1,000 fewer serious injuries a year.” 166 “It also would mean an estimated $113.6 million cost savings a year, including medical bills, lost wages, lost tax revenues, legal fees, and more.” 167

This safety belt carrot is working. Within a few months of passage, two states passed their own primary belt usage laws: Mississippi and Alaska. 168 That increased the total number of states with primary usage laws to 24 and covers more than 60% of the U.S. roads. 169 According to


162. Id.


165. Id.

166. Id.

167. Id.


169. Id.
a recent study by researchers at the University of Missouri-Columbia, primary belt usage laws can be empirically shown to increase the belt usage rates.170

AMEND THE NATIONAL DRIVER REGISTER

You might be surprised to find out that, before issuing or renewing a driver’s license, the Department of Motor Vehicles (or their equivalent) runs what amounts to a background check on the applicant.171 Authorized by Congress as part of the National Driver Register Act of 1982172 to “assist State driver licensing officials in electronically exchanging information regarding the motor vehicle driving records of certain individuals,”173 state participation is voluntary, though all 50 States and the District of Columbia currently participate.174

The National Driver Register is a database housed with NHTSA. The database contains the following information: (1) names of those who’ve had their license denied by a participating State for cause; (2) names of those whose license has been revoked, suspended, canceled, or denied; and (3) names of those who have been convicted of serious traffic-related offenses, such as driving while under the influence of, or impaired by, alcohol or drugs.175

If a State wishes to access this information, the Act requires that the State provide that information to NHTSA.176 The Act also requires each State to first notify NHTSA whether it wishes to be bound by the Act and participate at all.177 If so, then in addition to providing that information with NHTSA, the State must also comply with other regulatory requirements issued by NHTSA.178 If NHTSA finds that a State complies, then NHTSA certifies the State as a participating State.179

Once certified, the information is then shared with the DMV when it runs a background check on drivers who seek to obtain or renew a

173. Id.
driver's license. Specifically, state DMVs query the database to determine if an individual's license or privilege has been withdrawn by any other State. The database uses a "pointer-record" to identify which states reported the information noted above, i.e., license withdrawals and convictions for serious traffic offenses.\textsuperscript{180} For this reason, the Register is also known as the Problem Driver Pointer System.\textsuperscript{181}

Considering that the Register is already up and running and, by all accounts, functioning fairly well (after all, every State and the District of Columbia participate), why not include recall information as well? Specifically, Congress, by amending the NDR Act, could expand the individuals covered to include the names of vehicle owners who have failed to have their vehicles repaired to fix an identified safety-related defect or noncompliance. This information could be obtained from the manufacturers, who already provide quarterly response rate information to NHTSA for each recall conducted.\textsuperscript{182} Manufacturers could be required to provide specific VIN information on those vehicles that have not been tendered for repair.

When seeking to renew a driver's license or registering the vehicle, the States would, of course, have to require the driver to prove that the recall was performed. Proof could come in the form of a simple repair order issued by the dealer who performed the repair. Failure to provide such proof should result in the denial of the operator's license.

Privacy advocates and those concerned about how this information is handled can take solace in the existing criminal penalty provision.\textsuperscript{183} The NDR Act currently provides that disclosing the driver information is strictly prohibited, and willfully disclosing it can result in fines under federal law and up to a year of jail, or both.\textsuperscript{184}

The State of California proposed putting the recall notice directly on the DMV registration renewal form that every car owner receives once a year.\textsuperscript{185} California already does this for emissions-related recalls and, according to State Senator Debra Bowen\textsuperscript{186}, it has "worked wonders" in

\textsuperscript{180} 23 C.F.R. § 1327.3 (2006).
\textsuperscript{181} Id.
\textsuperscript{182} 49 C.F.R. § 573.1 (2005).
\textsuperscript{184} Id.
\textsuperscript{186} Senator Debra Bowen, Op-Ed, \textit{A Record Number of Vehicles Are Being Recalled – Is Your Car or Truck Next?}, http://democrats.sen.ca.gov/ (follow "Senators" hyperlink; then follow "Debra Bowen" hyperlink; then follow "Articles" hyperlink) (last visited September 17, 2006).
increasing response rates.\textsuperscript{187} That's why she sponsored Senate Bill 114, which requires the DMV to do the same for all NHTSA recalls.\textsuperscript{188} In a nutshell, for each safety recall automakers would forward a list of affected vehicles to the California DMV.\textsuperscript{189} The DMV would include the recall notification information when it sends out registration renewal notices to the owners of vehicles on those lists, urging motorists to contact their authorized dealers about getting their free repairs.\textsuperscript{190}

Critics contend that including the recall information would contribute to information overload.\textsuperscript{191} But considering that each safety recall implies an unreasonable risk of crash or injury, what can it hurt to add a piece of paper reminding the owner of a recall; in many cases, the owner may not have received the original recall notice at all (e.g., if the owner is a second or third owner, moved locations, etc.). This approach makes sense not only for California, but all States. If it makes sense to conduct a safety recall, then it makes sense to ensure that as many affected vehicles get repaired. This common sense finds empirical support in a study for NHTSA by American Management Systems, Inc. \textit{back in 1979} estimated that recall response rates would rise to 95\% if states would just verify recall compliance during inspections and suspend vehicle registration for noncompliance.\textsuperscript{192}

The approach advocated in this section is not without precedent. For example, in the Australian Capital Territory, certain emissions-related defects affecting diesel engines must be fixed within 14 days of notice.\textsuperscript{193} Failure to get the vehicle repaired can result in suspension and, ultimately, cancellation of the vehicle's registration.\textsuperscript{194} Closer to home, in some areas of the United States, if a vehicle doesn't pass a scheduled emissions test, then the vehicle can't be registered for further use.\textsuperscript{195}

\textsuperscript{187} Id.

\textsuperscript{188} Id. and Senate Bill No. 114 (Ca. 2005), available at http://democrats.sen.ca.gov (follow “Legislation” hyperlink; then enter bill no.).

\textsuperscript{189} Senate Bill No. 114 (Ca. 2005), available at http://democrats.sen.ca.gov (follow “Legislation” hyperlink; then enter bill no.)

\textsuperscript{190} Id.

\textsuperscript{191} See Steve Lawrence, \textit{Recalls from the DMV?}, DET. NEWS, Mar. 16, 2005, available at http://www.detnews.com/2005/autosinsider/050316/autos-119120.htm (quoting an opponent of the bill, State Senator Tom McClintock, Republican from Northridge, as saying the bill would just add to a “sea of information” delivered to motorists); and Senate Bill No. 114 (Ca. 2005), available at http://democrats.sen.ca.gov (follow “Legislation” hyperlink; then enter bill no.).

\textsuperscript{192} U.S. GEN. ACCOUNTING OFFICE REPORT, \textit{supra} note 123, at 15-16.


\textsuperscript{194} Id.

That's because the Clean Air Act provides for an inspection and maintenance program to help improve air quality by identifying high-emitting vehicles in need of repair. This is done by visual inspection, emissions testing, or downloading of fault codes from a vehicle's onboard computer. If a problem is found, then the vehicle must be fixed before it can be registered within an identified high-pollution area. The 1990 Amendments to the Clean Air Act made this test mandatory for several areas across the country, based upon various criteria, such as air quality classification, population, or geographic location. Conceptually, if this approach works for ensuring a cleaner environment, why not use a similar approach to ensure a safer roadway?

**Deal with Dealers**

Many, if not all, automakers require their franchised dealers to always check a vehicle's repair history for an open recall. What this means is that whenever a vehicle comes into the dealership, say, for routine maintenance work or even a simple oil change, dealers will input that vehicle's identification number (VIN) into a computer system supported by the automaker. Based on warranty repair claims submitted by all other dealers, automakers know if a vehicle has been repaired. This data is shared with dealers through the computer system. So the computer will tell the dealer if that vehicle must be repaired. If so, dealers will as a matter of course repair the vehicle.

This process functions fairly well, but it doesn't cover vehicles outside the authorized dealership body. That's because automakers aren't required to, nor do they necessarily, share recall repair history with non-franchised dealers. So a vehicle pulling into a non-franchised dealership will not benefit from the routine open recall check.

Assuming one believes that consumers should be afforded an open recall check regardless of the repair shop they use, then we've just identified a possible problem, because consumers who choose to have their vehicles serviced by an independent repair shop are treated differently than those whose vehicles are serviced by a franchised dealer.

But is this different treatment really a problem? In the case of a safety recall, perhaps the authorized dealership is where consumers...
should be encouraged to go, because those dealers are closer to the automaker that announced the recall. Can we assume that these dealers will have more qualified technicians, especially those trained in servicing the recalled vehicles? If so, then that’s another reason to encourage consumers to get their work done at the authorized dealer. In addition, recall work is conducted at no charge to the consumer, so long as the consumer goes to the authorized dealer. This tie-in is consistent with warranty coverage in that consumers enjoy the protection only if they use authorized dealers. It’s also consistent with NHTSA’s requirement that manufacturers reimburse consumers for out-of-pocket expenses they incurred to have repairs done to correct the problem identified in a recall.

Dealers play an important role in ensuring the defective vehicles are repaired before returning to the roads. To this end, states interested in improving overall response rates should recognize this fact by requiring dealers to certify that all vehicles serviced or owned by them are in compliance with all safety recalls.

**Hold Insurers Accountable**

The Safety Act currently requires that lessors forward recall letters to lessees. NHTSA implemented this statutory mandate by requiring “[a]ny lessor who receives a notification of a determination of a safety-related defect or noncompliance pertaining to any leased motor vehicle [to] send a copy of such notice to the lessee” by first-class mail within ten day’s of the lessor’s receipt of the notification. This requirement applies to both initial and follow-up notifications, but doesn’t apply where the manufacturer has notified a lessor’s lessee directly. Failure to comply with this regulation can subject the lessor to civil penalties of $6,000 per each non-forwarded letter, with a maximum of $16,375,000 for a related series of violations. To remind lessors of this legal obligation, the manufacturers routinely include such language in all recall letters, although neither the Safety Act nor any of NHTSA’s recall regulations require such language. Including such language makes sense, though,
because manufacturers want to obtain the highest possible response rate to their recall letters.

Lessor's have a vested interest in ensuring the highest possible response rate because, in addition to the fines for failing to forward recall information, they can be held vicariously liable for failing to take enough measures to ensure that their insured vehicles are tendered for repair.\textsuperscript{206} Under vicarious liability, a person who is hurt in a crash with a leased or rented vehicle can sue and collect damages from the vehicle’s leasing or rental company, not just from the other driver, for crashes those companies neither caused nor had the ability to prevent.\textsuperscript{207} Vicarious liability laws saddles lessors with liability solely because the lessor owns the vehicle. Lessors can't avoid liability by claiming that they were not in control of the vehicle or they were not negligent in the use or operation of the vehicle.

Sixteen states recognize some form of vicarious liability.\textsuperscript{208} New York has an especially tough vicarious liability statute.\textsuperscript{209} Under that law, which was passed in 1924, the owner of a motor vehicle is vicariously liable for any damages caused by the operator of the vehicle.\textsuperscript{210} The intent of the 1924 law was to make the owners of vehicles liable for crashes in which their chauffeurs were at fault.\textsuperscript{211} Over the years, however, New York expanded the reach to include leasing and rental companies.\textsuperscript{212} For example, when a teenager sunbathing in her driveway was run over by her father, Ford Motor Credit Co. was sued for $900,000, while the insurance company was sued for only $100,000.\textsuperscript{213}

The threat of unlimited exposure forced Ford, General Motors, Chrysler, Porsche, and about 15 other car companies - as well as many banks and credit unions - to stop doing business in New York.\textsuperscript{214} The companies that remained, such as Honda, required consumers to pay a

\textsuperscript{206} John Caher, \textit{Trial Lawyers Urge Quick Action to Sue Lessors of Vehicles}, N.Y.L.J. 1, Col. 4, (2005).

\textsuperscript{207} \textit{Id.} (For additional background of vicarious liability in the context of motor vehicles; \textit{see generally} Thomas B. Hudson & Daniel J. Laudicina, \textit{Recent Developments in Motor Vehicle Leasing and Litigation}, 59 Bus. Law. 1145 (2004); and \textit{see generally} Kenneth J. Roje & Kathleen E. Stendahl, \textit{Vicarious Liability of Motor Vehicle Lessors}, 59 Bus. Law. 1161 (2004)).


\textsuperscript{209} \textit{See} N.Y. Veh. & Traf. Law § 388 (2005) and Harry Stoffer, \textit{supra} note 210, at 4.

\textsuperscript{210} \textit{See} N.Y. Veh. & Traf. Law § 388 (2005).


\textsuperscript{212} \textit{See} N.Y. Veh. & Traf. Law § 388 (2005).


\textsuperscript{214} \textit{See} Caher, \textit{supra} note 208, at 1.
higher acquisition fee.\textsuperscript{215} Between January 1, 2000 and June 30, 2003, the Association of Consumer Vehicle Lessors member companies reported a total of 2,564 vicarious liability suits in New York, totaling more than $6.5 billion dollars.\textsuperscript{216}

Under a federal highway bill signed into law in August 2005, however, vicarious liability lawsuits are greatly curtailed.\textsuperscript{217}

In a similar vain, NHTSA should provide that manufacturers forward recall response information to the insurers of motor vehicles. That way, insurance companies would have a stake in ensuring the highest possible response rate, too. And the companies could also charge higher premiums to those who fail to tender their vehicles for repair. SUNY economics professors Yong-Kyun Bae and Hugo Benítez-Silva argue that insurance companies “should consider taking into account the correction history of particular drivers and cars when pricing their insurance, and maybe even make coverage conditional on fixing major recalls.”\textsuperscript{218} If discounts are given to drivers that have fixed their cars, we are likely to see a decline in accidents and insurance costs, with the resulting welfare improving effects for society, derived from the reduction in the monetary costs and the costs of loss of life due to accidental harm.”\textsuperscript{219} After all, if a recall is important enough to saddle the automakers with the cost and burden ofremedying often millions of vehicles, then other stakeholders should also participate to make sure that each and every safety recall is effectuated to the best of society’s ability. To that end, auto companies should be required to make available the list of vehicles that haven’t yet had recall repair work done.

\textbf{Other Ways to Increase Response Rates}

Two other methods to increase response rates use technology. The first method uses e-mail. NHTSA should allow manufacturers to notify consumers of a safety recall also by e-mail. I say “also” because I’m not advocating replacing the current requirement of first-class mail. Rather, I’m advocating flexibility. If a customer would like to be notified by e-mail, why prevent it? It’s convenient and adds another channel of communication. Manufacturers have an interest in e-mail, too. In contrast to first-class mail, e-mail allows manufacturers to track that the message has been read, not just delivered (Of course, manufacturers can’t track who reads the message).

\textsuperscript{215} Id.
\textsuperscript{217} See Stoffer, supra note 210.
\textsuperscript{218} Bae and Benítez-Silva, supra note 4, at 22.
\textsuperscript{219} Id.
NHTSA currently allows this alternative to owners of child seats.\textsuperscript{220} FMVSS 213, which governs child restraint systems, requires manufacturers to enclose a detachable, post-paid postcard with every new child seat.\textsuperscript{221} The postcard, which comes preprinted with the restraint's model name or number and its date of manufacture (to assist in implementing recalls), must provide a space for consumers to record the owner's name and address.\textsuperscript{222} Recognizing the growth of the Internet as a means to improve the number of people who register their seats, NHTSA amended the registration regulation in 2005 to allow owners to register their seats online and manufacturers to send recall notices via e-mail – in addition to first-class – which NHTSA expects to increase the recall response rate.\textsuperscript{223}

This model could apply in the vehicle context, too. NHTSA should amend its notification requirements to permit vehicle and tire manufacturers to notify affected consumers also by e-mail. When buying a new car, consumers could be asked if they would also like to be informed by e-mail. Dealers could forward this simple information also by e-mail to manufacturers. This would be a good start. Eventually, NHTSA should allow manufacturers and consumers to dispense with the first-class notification requirement. If consumers agree to waive any liability for failure to have their product repaired as part of a safety recall in return for the ability to forego a hard-copy letter, why not permit manufacturers and consumers to communicate in the way they find most appropriate?

The second way to increase response rates through technology uses telematics. “Telematics” is a wireless communications system designed to collect and disseminate information; in the context of vehicles, it refers to electronic systems, vehicle tracking and positioning, on-line vehicle navigation, and information systems and emergency assistance.\textsuperscript{224} Perhaps the most popular example of telematics is General Motors’ OnStar System. With the touch of a button, users can receive navigation assistance, vehicle tracking, and even the location of the nearest Chinese restaurant.\textsuperscript{225} This system can also be used to increase recall response rates. In fact, GM does this already. In September 2005, GM announced that its OnStar service will remind its subscribers of recall repairs 60 days after


\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} See id.

\textsuperscript{224} See What is Telematics? http://searchnetworking.techtarget.com/sDefinition/0,290660,sid7 _gci517744,00.html (Last visited Sept. 25, 2006).

owners fail to tender their vehicles for service. To assist owners, OnStar can also connect drivers to a dealer to schedule repairs. GM added this reminder service in an effort to increase the recall completion rates. Others in the industry should follow GM’s lead here. Telematics offers another channel to get out the recall message.

**Defend the Territory**

Frustration with the NHTSA’s perceived mishandling of the Ford-Firestone matter has fueled the trend of trial lawyers asking state court judges, not agency experts, to order recalls of allegedly defective vehicles. State court judges are “not to decide merely according to the laws or constitution of the state, but according to the Constitution, laws and treaties of the United States – ‘the supreme law of the land.’” Accordingly, judges must apply preemption principles where applicable and give effect to federal law when it applies, disregarding state law when a conflict exists.

Under any of the three preemption doctrines (express, implied, and conflict), state-law-based recalls are preempted by the Safety Act. In a nutshell, preemption is based on the following: (1) the text of the Safety Act, which includes a preemption clause and three saving clauses; (2) the purpose of the Safety Act, namely, promoting vehicle safety through a uniform recall process; and (3) the sound policy reasons involved in avoiding undue confusion caused by potentially fifty different recall processes.

NHTSA provides the superior forum to determine and to oversee an automotive recall. Although courts and juries may be the ideal vehicle for assigning responsibility after a crash, Congress has charged the NHTSA with investigating safety-related defects, ordering recalls, and overseeing a uniform recall implementation and response rate. Unlike NHTSA investigators and engineers, who have been in the driver’s seat effectively overseeing recalls for several decades, the state court system has no experience in administering safety recalls, possessing neither the

227. See id.
232. See id.
234. Id.
resources nor the expertise to ensure either proper technical supervision of vehicle modifications or proper implementation of uniform recall procedures. Were the courts of fifty different states to enter the arena of automotive recalls, manufacturers would be forced to drive off a cliff into legal uncertainty the veering myriad requirements would destroy any semblance of national uniformity. For all these reasons, judges should yield the right-of-way to the NHTSA and put the brakes on lawsuits seeking recalls.

To further this end, NHTSA’s Office of Chief Counsel should rescind its two earlier advisory opinions on preemption of recalls. The agency should also amend its recall regulations to preempt recalls from even arising in state courts. Ample precedent allows NHTSA to safeguard its domain, for it is well-settled law that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.”\textsuperscript{235} The Supreme Court has explained that “[t]he Supremacy Clause of the Constitution provides that ‘the Laws of the United States which shall be made in Pursuance’ of the Constitution ‘shall be the supreme Law of the Land,’”\textsuperscript{236} and “[t]he phrase ‘Laws of the United States’ encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”\textsuperscript{237} Accordingly, “if the agency’s choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”\textsuperscript{238}

Finally, rescission is consistent with Executive Order 13132, which states: “Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law.”\textsuperscript{239} In the case of automotive recalls, the clear evidence is revealed upon examination of the text of the Safety Act, its implementing regulations, and the legislative intent behind the Act, all of which reveal that Congress wanted “to leave no room for supplementary” state recall actions. The Act provides in extraordinary detail the “who, what, when, where, why, and how” of recalls and recall

\textsuperscript{236} Id. at 63, (quoting U.S. CONST. art. VI, cl. 2).
\textsuperscript{237} Id.
\textsuperscript{238} Id. at 64, (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).
management-down to the very envelope. Regarding legislative intent, before Congress passed the Act, neither federal law nor state law provided a structure for issuing recalls. Aware of the absence of means by which to ensure "the speedy and efficient repair of [safety-related] defects," Congress found it "essential" to establish "Federal oversight of defect notification, and correction."240 To fill this absence, Congress created a federal agency that would later become the NHTSA and charged this agency with developing safety standards, requiring manufacturers to notify consumers of safety-related defects, and exercising "Federal oversight" to ensure "uniform" consumer notification.241 Recognizing the uniform power it gave to this agency, Congress urged the NHTSA to exercise its oversight and recall powers with "extreme caution," giving careful consideration to "the risks to traffic safety" and the need "to avoid premature publicity of unevaluated reports as to suspected defects" that could "cause undue public alarm" and could have "a damaging and unwarranted effect on vehicle sales" based on "suspicions [that] may ultimately prove to be without foundation."242

When Congress amended the Safety Act in 1974 to mandate for manufacturers a remedy duty, it specifically did not adopt an amendment allowing for "citizen suits" that would have granted private parties the right to trigger immediate judicial intervention into the regulatory scheme.243 Instead, Congress chose administrative enforcement through the NHTSA, making available to any interested consumer a specified petition process.244 When the NHTSA (or a manufacturer) determines the existence of a safety-related defect or noncompliance, the manufacturer must "remedy the defect or noncompliance without charge when the vehicle...is presented for remedy."245 The combined effect of the amendments to the Safety Act, the detailed implementing regulations, and the legislative intent behind the amendments all "make reasonable the inference that Congress left no room for the States to supplement it."246 Therefore, rescission of the prior advisory opinions is well supported and consistent with Executive Order 13132.247

241. Id. at 2716.
242. Id. at 8, 9, reprinted in 1966 U.S.C.C.A.N. at 2716, 2717.
ALLOW FOR FLEXIBLE SOLUTIONS

EPA allows extended warranties to remedy emissions defects. NHTSA should allow extended warranties to remedy low hazard safety-defects and noncompliances. For example, if my seat belt alarm buzzer doesn’t chime the full eight seconds and NHTSA believe this noncompliance must result in a recall, why not allow me the option to take the car in?

PLUGGING GAPS IN SAFETY ACT FOR USED CARS

Under pre-TREAD law, when a vehicle or parts manufacturer notified a dealer (including a retailer) that a new motor vehicle or new item of replacement equipment either did not comply with a safety standard or contained a safety-related defect, the dealer was not permitted to sell or lease the noncompliant or defective vehicle or equipment. However, prior to passage of the TREAD Act, this sale and lease prohibition did not apply to the sale or lease of used vehicles or used parts. During the Ford-Firestone congressional hearings, media reports indicated that some people were selling defective Firestone ATX or Wilderness AT tires that had been returned to dealers for replacement tires under the ongoing safety recall.

Based on those media reports, Congress amended the Safety Act to expressly prohibit such sales. Section 8 of the TREAD Act added to 49 U.S.C. 30120 a new subsection (j), entitled “Prohibition on [s]ales of [r]eplaced [e]quipment,” effective November 1, 2000. Basically, this subsection bans anyone from selling or leasing either a (new or used) vehicle or part (including a tire) that is the subject of a recall (some state laws already bans such sales). Though not mandated by TREAD,

250. See id. (applying only to sale or lease of new vehicles and new equipment).
253. Id.
254. See National Traffic and Motor Vehicle Safety Act 49 U.S.C § 30,120(j). Under section 30,120(j)(1) and (2), the ban does not apply if the defect or noncompliance is remedied as required under the Vehicle Safety Act or if the recall (or noncompliance) order is set aside in a civil action. See id.
255. For example, on May 15, 2002, Michigan Attorney General Jennifer M. Granholm filed a felony criminal charge against a man accused of reselling dangerously altered used Firestone
NHTSA conducted separate rulemaking implementing Section 8 of TREAD into the Code of Federal Regulations (CFR). The separate rulemaking purportedly offered two benefits: (1) reducing, if not eliminating, questions surrounding the meaning of the prohibitions and (2) providing consistency in the CFR.

The rulemaking resulted in two additions to the CFR, namely, a new Section 573.11 and a new Section 573.12. Section 573.11 merely codifies the previously existing statutory language of 49 U.S.C. § 30120(i), which prohibits dealers from selling or leasing defective or noncompliant new vehicles or new parts. To trigger this prohibition, three elements must be met: (1) manufacturer must have provided a notification of a defect or noncompliance; (2) a dealer must have received notified of the defect or noncompliance; and (3) the dealer possess the vehicle or equipment.

Section 573.12 codifies the TREAD Act’s prohibition on the sale or lease of new and used defective and noncompliant parts. In contrast to Section 573.11, the TREAD prohibition applies to all persons, not just motor vehicle dealers.

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256. See Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-Compliant Tires, 65 Fed. Reg. at 81,409-10. See also Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,693-94 (implementing final rule).


258. Id. at 19,697-98.


260. Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,695. The Vehicle Safety Act also provides for two exceptions that permit dealers to sell or lease defective or noncompliant vehicles or parts: (1) if the vehicle or part is remedied as required by § 30120 before delivery or (2) if enforcement of a recall order is set aside in a civil action. See 49 U.S.C. § 30,120(i)(1). Finally, the Act does not prohibit a dealer from merely offering the vehicle or part for sale or lease. See id. at 30,120(i)(2).

dealers, though the practical effect will be to apply only to dealers.\textsuperscript{262} Although the title of the TREAD amendment reads “Sales of Replaced Equipment” (emphasis added), the actual language of the amendment reaches all parts that have been found to be either defective or noncompliant, regardless of whether the part is “original equipment” or “replacement equipment.”\textsuperscript{263} Accordingly, in writing section 573.12, NHTSA deferred to the language of the statute as opposed to the more limiting title.\textsuperscript{264}

The following table reflects the Vehicle Safety Act’s prohibitions on selling or leasing defective or noncompliant (used or new) vehicles or parts.

**Vehicle Safety Act Sales and Leasing Prohibitions**

<table>
<thead>
<tr>
<th>Noncompliance with any FMVSS</th>
<th>New Parts</th>
<th>Used Parts</th>
<th>New Vehicles</th>
<th>Used Vehicles</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANY PERSON (§§ 30112; 30120(j)) DEALERS* (§ 30120(i))</td>
<td>ANY PERSON* (§ 30112; 30120(j))</td>
<td>ANY PERSON (§ 30112) DEALERS (§ 30120(i))</td>
<td>ANY PERSON (§ 30112)</td>
<td></td>
</tr>
<tr>
<td>ANY PERSON (§ 30120(j)) DEALERS* (§ 30120(i))</td>
<td>ANY PERSON* (§ 30120(j))</td>
<td>DEALERS (§ 30120(i))</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Indicates separate reporting requirement affecting dealers (including retailers) only and covering only tires.

As indicated in the table, key gaps and inconsistencies remain in the Safety Act, despite the TREAD Act amendments. First, the ban on selling defective new vehicles covers only dealers, not manufacturers.\textsuperscript{265} Yet, dealers and manufacturers are prohibited from selling noncompliant new (and used) vehicles (and parts).\textsuperscript{266} The TREAD Act presented the perfect opportunity for Congress to correct this inconsistency by simply extending the prohibition. However, Congress never considered the issue,

\textsuperscript{262} See TREAD Act § 8. See also 67 Fed. Reg. at 19,695 (noting that the “the rule will apply to businesses and individuals that sell new or used automobile parts, including tires”). Consumer group Public Citizen would extend the scope here to include both rental car companies as well as “those who lease” vehicles (which would include finance companies). See id. at 19,697. However, only Congress has the authority to make such a change in the Vehicle Safety Act (a point understood by both NHTSA and Public Citizen). See id.

\textsuperscript{263} See TREAD Act § 8.

\textsuperscript{264} Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,695. The U.S. Supreme Court has long held that the title of a statutory provision cannot trump the plain and unambiguous meaning of the words used in the text of the statute. See Knowlton v. Moore, 178 U.S. 41 (1900).


\textsuperscript{266} See 49 U.S.C. §§ 30,112(a)(1) and 30,120(j).
so the inconsistency remains. Although not explicitly prohibited under federal law from selling defective vehicles (new or used), manufacturers are, of course, obligated (upon finding a defect or noncompliance) to notify customers and remedy defects. Failure to satisfy the “notification and remedy duty” violates not only the Act but also probably many state unfair or deceptive trade practices provisions.

Second, the Safety Act does not even deal with the sale or lease of defective used vehicles. The TREAD Act amended the Safety Act to ban the sale or lease of defective or noncompliant used parts, but stopped short of extending the ban to used vehicles. Consumer group Public Citizen recognized this shortcoming in its comments to NHTSA. However, NHTSA (and Public Citizen) also recognized that such a change must come from Congress, not NHTSA, because NHTSA does not have the authority to change the Safety Act. When Congress passed the Safety Act in 1966, it also considered having the Act reach used vehicles, but in the end Congress was afraid of encroaching on states rights. So NHTSA’s authority, except for the defect, compliance, and making inoperative provisions of the Safety Act, terminates upon the first retail sale of a vehicle. After that, the use of that product becomes a matter of state concern. States may impose their own requirements with regard to use, inspection, registration, and taxation.

The public policy reasons justifying the ban on the sale or lease of new defective or new noncompliant vehicles applies to used defective vehicles. In short, the policy arguments (as set forth in the Safety Act) are to “reduce traffic accidents and deaths and injuries resulting from traffic accidents.” Clearly, this end could be further effectuated by explicitly banning the sale or lease of used defective or noncompliant vehicles, i.e., vehicles subject to a formal safety recall.

Third, as indicated in the table by the asterisks (*), the new reporting obligation is limited in scope to dealers only, and even then, only on tires (not other parts or vehicles themselves). Combining the new reporting obligation with the new sales and lease ban results in the odd situation that the Safety Act prohibits dealers (including retailers) from selling or leasing any (i.e., new or used) defective or noncompliant part or vehicle, yet if they do, they must report the sale or lease to NHTSA if the sale or

268. See 67 Fed. Reg. at 19,697 (NHTSA noting that the suggested amendments would broaden 49 U.S.C. 30120(i) to used motor vehicles and motor vehicle equipment).
269. See id.
lease involved a tire. Even NHTSA saw a certain absurdity in this new situation. As noted above, according to Ken Weinstein, then-NHTSA’s Administrator for Safety Assurance, “[t]he TREAD Act makes it illegal to sell recalled products, and if you do, you have to report it to us... [t]his law was written by a lot of different people at a lot of different times.”

**Summary**

My suggestions can be broken down into three groups: (1) rethinking the concept of what should trigger a recall by (a) returning to a reasonable risk analysis and (b) implementing a cost-benefit analysis; (2) assuming a recall is necessary, ensuring the highest possible recall response rate; and (3) other changes, including preemption and used cars. In sum, here’s what should be done to improve the NHTSA recall program. First, vehicles should only be formally recalled when they contain safety-related defects, which means that the defect must truly present an unreasonable risk of vehicle crash or personal injury. By conducting recalls “only” in situations where a palpable risk exists, we can reduce the number of otherwise unneeded recalls and focus our attention to real problems. Second, by requiring recalls only for real risks, we have more legitimate grounds to enforce penalties for failure to respond to recall notices. As it currently stands, even if the laws were to be tightened for failure to respond, what legitimacy can there be when the underlying “safety defect” is a rare potential of the sunroof chipping or the seat belt buzzer chiming a fraction of a second shorter than it should? To be clear, I’m not proposing that manufacturers should not fix quality problems. They can always offer an extended warranty or even conduct some sort of service action. But I don’t believe that these glitches should be considered “safety-related defects” and thus trigger the statutory requirement to “notify and remedy.”

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274. Miles Moore, *TREAD Act Reality: NHTSA’s Powers Now Greatly Expanded*, TIRE BUS., Apr. 1, 2002, at 9. If quoted correctly, note that Mr. Weinstein overstated the actual reporting requirements of TREAD. He should have replaced “products” in the above quotation with “tires.”
Hours of Service Regulations in the U.S. Railroad Industry: Time for a Change

Patrick Sherry, Gregory Belenky, Simon Folkard*

I. BACKGROUND

A. THE NATURE OF RAILROAD TRANSPORTATION WORK

Fatigue management in the transportation industry is a challenge because the industry operates on twenty-four hours a day, seven days a week (24/7). Operations in the maritime, rail, aviation, and the trucking industry are all 24/7. For the freight industry in particular, nighttime operations are preferred by freight companies and expected by customers because there is less competition for the roads and rails by passenger ve-
hicles. In contrast, operations in the passenger transportation sector are generally more predictably oriented towards the daytime and, in local travel, often involve split shifts.

The issue of fatigue in transportation workers has been on the National Transportation Safety Board’s (NTSB) “most wanted” list of recommended safety improvements since 1990. In 1999, the NTSB recommended that the Federal Railroad Administration (FRA) “establish scientifically based regulations that set limits on hours of service, provide predictable work and rest schedules, and consider circadian rhythms and human sleep and rest requirements.” The FRA, however, has proposed “no statutory changes to the existing hours of service requirements.”

Under current law, a railroad employee must have at least eight consecutive hours of off-duty time following the completion of a work period and during the twenty-four hours before the employee may go on duty. An employee who has been on duty for more than twelve consecutive hours may not return for duty until the employee has had at least ten consecutive hours of off-duty time. It is common practice in the rail industry to transport road crews by cab from a train or terminal to a motel. If the crew is at a remote location, it may take an hour or more for the crew to reach its rest location. Thus, a twelve-hour shift can become thirteen or even fourteen hours if the crew must wait for its relief to arrive before being transported to the terminal. Upon arrival at the terminal the employee must usually spend extra time to drive home. Because crews are called at least two hours before they are to report for duty, a crew member may actually have only five hours or less of uninterrupted time for sleep.

There are powerful incentives in place for both labor and management to maintain the current regulatory framework. Limiting hours of

2. Id.
6. Id.
7. Id.
8. Id.
9. See id.
10. Id.
service would force the railroads to hire additional workers. Consequently, employees would suffer a reduction in their earning power.\textsuperscript{11} Railroad companies would not only need to hire additional workers, but also provide training, benefits, and possible salary guarantees. In addition, railroad employees in the operating crafts have a strong tradition of independence and often resist changing work practices, especially ones they feel that they have adjusted to by reason of experience, seniority, and training. In general, railroad management boards and rail labor have worked cooperatively on several initiatives to address fatigue - a consensus, however, has not been reached to identify an overall approach.\textsuperscript{12}

B. Regulatory Activity

In an effort to protect both the public and the employees of the railroad industry there have been several efforts to legislate employee working times to prevent the occurrence of accidents and injuries that ordinarily arise from human fatigue. Most of the regulations were first enacted in the 1900's and have had little revision since then. In 1907, Congress approved the Railroad Hours of Service Act, establishing the maximum number of hours certain classes of railroad employees may work.\textsuperscript{13} It was substantially revised in 1969, and amended again in 1976 and 1988.\textsuperscript{14} The NTSB has called for a revision of the hours of service based on more up-to-date and current scientific thinking.\textsuperscript{15}

1. Regulatory Activity in the Trucking Industry

The trucking industry in the United States is monitored and regulated by the Federal Motor Carriers Safety Administration (FMCSA).\textsuperscript{16} Since 1995, the FMCSA (formerly a division of the Federal Highway Administration (FHWA)) has been working on revising the Hours of Service (HOS) requirements for the trucking industry.\textsuperscript{17} The NTSB has issued its yearly list of the top ten safety problems for the last ten years. While the Hours of Service regulations for the railroad industry are not currently on the list, the conditions set forth by the regulations have been mentioned repeatedly as a contributing factor in accidents investigated by NTSB.\textsuperscript{18} In fact, NTSB has noted that fatigue is a

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} See id.
\item \textsuperscript{14} NTSB, supra note 4, at 2.
\item \textsuperscript{15} See id. at 19.
\item \textsuperscript{17} See id. (Prior to the FMCSA, the FHWA was responsible for promulgating HOS rules regulating commercial motor vehicle drivers).
\item \textsuperscript{18} NTSB, supra note 4, at 8.
\end{itemize}
significant contributor to the occurrence of transportation related accidents and in 1999 called on the different modes to address these issues directly recommending that "the DOT require the modal administrations to modify the appropriate *Codes of Federal Regulations* to establish scientifically based hours-of-service regulations that set limits on hours of service, provide predictable work and rest schedules, and consider circadian rhythms and human sleep and rest requirements."²⁰

Reform of the HOS regulations has been under consideration by the FMCSA for several years.²¹ In 1995, Congress, concerned about the effect of fatigue as a contributing factor in commercial motor vehicle crashes, directed the FHWA to begin a rulemaking to increase driver alertness and reduce fatigue-related incidents.²² Because the FHWA never issued the required notice of rulemaking, the FMCSA took over the task of revising the existing commercial motor vehicle HOS rules.²³ Specifically, it provided that the FHWA

...shall issue an advance notice of proposed rulemaking dealing with a variety of fatigue-related issues pertaining to commercial motor vehicle safety (including 8 hours of continuous sleep after 10 hours of driving, loading, and unloading operations, automated and tamper-proof recording devices, rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness). . . .²⁴

In April 2003, FMCSA issued the first significant revision to the HOS regulations in over sixty years.²⁵ The new regulations provided an increased opportunity for drivers to obtain necessary rest and restorative sleep, and at the same time reflect operational realities of motor carrier transportation.²⁶ According to Laux, the rules specified a fourteen-consecutive-hour window, after which a property-carrying commercial motor vehicle driver would not be allowed to begin driving, although such a driver is allowed to continue to do other work which must be charged against the overall sixty hours in seven days or seventy hours in eight days on-duty time limit.²⁶ A property-carrying driver is allowed to drive for

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19. Id. at 24.
21. *See id.*
22. Id.
23. Id.
25. Id.
up to eleven hours after having ten hours off duty.27

The new HOS rules were struck down in July 2004 by the appeals court because the FMCSA had failed to consider the effects of the hours-of-service rules on driver health, as required by Congress.28 On August 19, 2005, the FMCSA announced new HOS regulations.29 The revised rules were published despite the ruling by the court of appeals. The new rule contains most of the major provisions of the 2003 hours-of-service regulations with the exception of sleeper berth and short haul regulations.30 The Final Rule, promulgated in April 2003 included the following provisions:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of 395.1(o).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver’s services, for any period after-

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c) (1) Any period of 7 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours.31

The sleeper berth provision for the 2005 rule reads as follows: “CMV drivers using the sleeper berth provision must take at least eight consecutive hours in the sleeper berth, plus two consecutive hours either in the sleeper berth, off duty, or any combination of the two.”32 The new short haul provisions for the 2005 rule were as follows:

27. Id.
32. FMCSA, supra note 29.
Drivers of property-carrying CMVs which do not require a Commercial Driver's License for operation and who operate within a 150 air-mile radius of their normal work reporting location:

- May drive a maximum of 11 hours after coming on duty following 10 or more consecutive hours off duty.
- May not drive after the 14th hour after coming on duty 5 days a week or after the 16th hour after coming on duty 2 days a week.\(^{33}\)

2. Regulatory Activity in the Rail Transportation Industry

Sussman and Coplen conducted an in-depth review of the history of the U.S. Hours of Service Act, which was originally enacted in 1907 and substantially revised in 1969 (and formerly codified at 45 United States Code Sections 61-64b).\(^{34}\) According to Sussman and Coplen, the Act was "intended to promote the safety of employees and travelers upon railroads by limiting the hours of service of certain railroad employees."\(^{35}\) Section 2 of the Act made it "[u]nlawful for a common carrier, its officers, or agents to require or permit 'an employee' to go, or remain on, duty unless certain restrictions on maximum duty hours and minimum periods off duty were met."\(^{36}\) Section 3 states that "no operator, dispatcher, or other employee” engaged in ‘train order service’ could be required, or permitted to go, or remain, on duty in violation of specific limitations.\(^{37}\)

Sussman and Coplen summarized the regulations as follows:

For “train and engine service,” a railroad carrier and its officers and agents may not require or allow an employee to remain or go on duty after 12 continuous hours on duty, or 12 hours in broken service in a 24-hour period starting at beginning of work tour; or at the end of that 24-hour period, if there has not been at least eight consecutive hours of off-duty time even if the employee had fewer than 12 hours on duty. The minimum off-duty periods are eight or 10 consecutive hours, depending on whether 12 continuous hours were worked. There is a 4-hour minimum for interim rest period. . . .\(^{38}\)

Similarly, they wrote “[f]or ‘signal service,’ where employees are engaged in installing, maintaining, or repairing signal systems, limitations and minimum off-duty periods are generally the same as ‘train and engine service,’ but better defined in statute.”\(^{39}\) Due to basic differences in the nature of service, there are unique provisions, the most important of

\(^{33}\) Id.

\(^{34}\) Sussman et al., supra note 1.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.
which are concerned with trouble calls.\textsuperscript{40} With regard to off-duty time, at least thirty minutes and up to sixty minutes of return travel count as time off duty, but this brief period does not break continuity of duty.\textsuperscript{41} Rather, release periods of "more than one hour" are considered to break continuity.\textsuperscript{42}

And finally, "[f]or 'train order service,' where an employee transmits or receives orders pertaining to or affecting train movements (especially dispatchers and operators), work must cease after: nine hours on duty in any twenty-four-hour period where two or more shifts are employed; or 12 hours in one-shift operation."\textsuperscript{43} "There is an exception of four extra hours for an emergency, but no more than three times in a seven-day period."\textsuperscript{44}

In 1992, Congress enacted the Rail Safety Enforcement and Review Act.\textsuperscript{45} This Act added additional language such that,

Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) that requires or permits any employee to go, be, or remain on duty in violation of section 2, section 3, or section 3A of this Act, shall be liable for a penalty...\textsuperscript{46}

Of all transport modes regulated by the U.S. Department of Transportation, railroad hours-of-service standards are the only ones locked into statute rather than being adjustable by administrative regulation.\textsuperscript{47} Comments by spokespersons from the National Transportation Safety Board have indicated that the current rules are not consistent with scientific knowledge concerning human circadian rhythm, nor do they reflect the operating practices employed in various types of freight or commuter rail service.\textsuperscript{48} The basic standard is eight consecutive hours off duty in the preceding twenty-four hours, or ten consecutive hours off duty after working twelve consecutive hours.\textsuperscript{49}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
The current hours-of-service rules are now also embedded in the rail carriers’ crew-calling system and the union pay-scale structure. Crew-calling is the procedure by which operating crewmembers are required to be available for duty and by which they are actually called to report for duty. The NTSB has previously pointed out that rail carriers have become accustomed to the current crew-calling system and see the system as a way of keeping excess crews to a minimum. The operating crew pay scales reflect pay premiums for additional work based on the existing standards of the Hours of Service Act. The NTSB has previously testified that this gives senior employees an incentive to work more hours than they should in order to maximize total pay.

In a recent discussion of the current situation, former Federal Railway Administrator Allan Rutter argued that even if these restrictions are observed, train crews can work an enormous number of hours in a week, month, or year. While commuter train crews may have some predictability in their work schedules, crews of road trains rarely do. The long hours, irregular work and rest cycles, and lack of regular days off combine to have a very deleterious effect on employee alertness.

3. Regulation in Canada

Other countries have also attempted to address these hours of service issues. Most recently, Canada issued and adopted a new approach to the HOS for railroads that both limits time-on-duty and mandates the implementation of Fatigue Management Plans. The European Union has also addressed these issues.

Following a lengthy two-year process the Canadian Railroads and its labor organizations responded to a directive from the Ministry of Transportation that Canadian operating employees in road, yard or passenger service are permitted to work for a maximum of twelve continuous hours

50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
56. Id.
57. Id.
during a single tour of duty. The Work/Rest Rules were developed "pursuant to section 20 (1) of the Railway Safety Act, R.S. 1985, c.32 (4th Supp)." There are a number of relevant provisions in this Act. A few key provisions are listed below:

5.1.1 The maximum continuous on-duty time for operating employees performing one tour of duty is:
   a. 12 hours operating freight trains in road service;
   b. 12 hours operating passenger trains in intercity or commuter service;
   c. 16 hours operating trains in work train service; and
   d. 12 hours for one tour of duty in yard service.

5.1.2 The maximum on-duty time for operating employees working more than one tour of duty is 18 hours in any 24-hour period except as otherwise provided in section 5.1.3.

5.1.3 The maximum on-duty time for operating employees working more than one tour of duty in yard service is 16 hours in any 24-hour period.

5.1.4 When an operating employee works more than one class of service in a 24-hour period, the class of service for which the employee is being called will determine the maximum on-duty time available to that person.

5.1.5 In calculating maximum available hours remaining in the 24-hour period for the purposes of paragraphs 5.1.2. and 5.1.3, 6 hours continuous off-duty time is required to 'reset' the clock to zero.

5.2.1 Operating employees who go off-duty after being on-duty in excess of 10 hours will:
   a. at the home terminal - be subject to at least 8 hours off-duty, exclusive of call time, except for yard service employees returning to their regular shift, who will be subject to at least 6 hours off-duty, exclusive of call time, where applicable; and
   b. at the away-from-home terminal - be subject to at least 6 hours off-duty, exclusive of call time.

5.2.2 When the on-duty time for one trip is less than or equal to 10 hours and the off-duty time between trips is less than 3 hours, the total on-duty time for consecutive trips will be combined for the purpose of calculating mandatory off-duty time. The off-duty time between such trips is not included in the calculation of total on-duty time.

6.1.1 Railways will implement fatigue management plans.

6.1.2 Fatigue management plans shall be designed to reduce fatigue and improve on-duty alertness of operating employees.

6.1.3 Fatigue management plans shall reflect the nature of the operations under consideration, including work trains on a particular territory, taking into account such items as size, complexity, traffic density, traffic patterns, run length and geographical considerations.

6.2.2 Fatigue management plans must consider but not be limited to the following:
   a. employee work scheduling practices;

60. Transport Canada, supra note 58, at § 5.1.
61. Id. at § 3.
b. education and training;

c. on the job alertness strategies;

d. rest environments;

e. work environments;

f. working under unusual operating conditions;

g. unique deadheading circumstances.

6.2.3 Fatigue management plans must address how operating employees, who work more than one tour of duty in any 24-hour period, will be afforded the opportunity to be involved in the decision to accept a subsequent tour of duty, based on their fitness at that time.

6.2.4 A specific fatigue management plan must be in place to address fatigue of operating employees in the following circumstances:

a. where continuous on-duty hours exceed 12 hours;

b. where there are more than 64 hours on-duty in a 7 day period; and

c. emergency situations.62

These rules are a major step forward for the Canadian rail industry. Combined with the required Fatigue Management Plans,63 these rules establish both a prescriptive and a non-prescriptive approach to managing fatigue.64

C. HIGH PROFILE CASES

Ordinarily, societal pressure to address HOS issues emerges following high profile accidents or incidents in the transportation industry. Several such accidents leading to injury and death have occurred in the last few years which have contributed to the general concern that there may need to be some changes in the way that transportation systems – in particular rail and trucking systems - are operated.65 Following a series of railroad car derailments in 2002, the House Subcommittee on Rail held hearings that addressed derailments and explored issues concerning hours of service.66 A number of derailments in 2004 in Texas have also raised concern about fatigue issues.67 These high profile incidents have created concerns that the human operators of the vehicles may have been overly fatigued when they were operating their vehicles.

In a case involving the rear-end collision of three Union Pacific freight trains, the National Transportation Safety Board determined that the probable cause of the accident “was the conductor and engineer of train CNRBW-10 being in a fatigue-induced unresponsive state as their

62. Transport Canada, supra note 58.

63. id. at §§ 6-7.

64. See generally, id.

65. See generally Hearing Before the H. Subcommittee on Railroads, supra note 47.

66. See id.

train passed several wayside signals and approached the rear of train 2CNAAE-10."68 Similarly, the NTSB noted that the probable cause of the collision and derailment of two Union Pacific trains near Des Plaines Illinois was the result of

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\ldots \text{the train MPRSS-21 engineer's falling asleep at the controls of his locomotive and the unexplained inattentiveness and inaction of the conductor in the moments before the collision. Contributing to the engineer's falling asleep was likely his use of prescription medications that may cause drowsiness, as well as his lack of sleep in the 22 hours preceding the accident.}69
\]

The NTSB also investigated an accident near Clarkson, Michigan, and found that the probable cause of the November 15, 2001 Canadian National/Illinois Central Railway incident, was “crewmembers’ fatigue, which was primarily due to the engineer’s untreated and the conductor’s insufficiently treated obstructive sleep apnea.”70

More recently, a major accident occurred in June 2004 in San Antonio, Texas. The collision involved a Union Pacific (UP) freight train and a Burlington Northern Santa Fe (BNSF) freight train.71 According to the NTSB, the UP crew had gone on duty in San Antonio at 2:45 a.m. and had been on duty approximately two hours and eighteen minutes at the time of the collision.72 Prior to the accident, the UP engineer had been off duty for fourteen hours, and the conductor had been off duty for almost twenty-eight hours.73 The impact of the collision caused the derailment of thirty-five freight cars, four locomotives and the release of chlorine from the tank cars.74 The collision caused the death of the UP conductor and two residents of the community near the site of the derailment, while the resulting large chlorine cloud lead the death of two additional residents and treatment of more than forty people at local hospitals.75 Local government officials, urged to action by the public, have called for a major review of the safety operations of the railroad in


72. Id.

73. Id.


75. Id.
their area. The incident has also strengthened the case for reviewing and modifying outdated HOS service regulations.

D. 24/7 Operation

Fatigue of rail employees is always a concern due to the continuous 24/7 nature of railroad operations. While the human organism requires sleep, the railroad industry functions twenty-four hours a day, seven days a week. Rail has become an increasingly visible and integral component of the overall transportation system and has acquired a pivotal significance following September 11 with respect to safety and security measures. Rail transit was particularly essential when air traffic was grounded in the days following the World Trade Center dilemma. The West Coast dockworkers strike in 2002 and the increase in trade with China and South East Asia have generated an even greater demand for safe and reliable freight transportation. Due to the steady growth in trade and economic development throughout the world, inbound containers to the U.S. in 2005 were up by 6.7% after surging over 16% in 2004. Moreover, freight demand has been growing steadily for major U.S. railroads with container traffic 8.3% higher in 2005 than 2004. In addition, train tonnage per movement has increased dramatically over the last five years from an average of 2,870 tons in 1995 to 3,005 tons in 2001. While both the traffic and workload of the nation’s freight railroads have increased, the number of railroad employees has decreased over the last few years – the drop in the number of craft operating employees has been particularly significant. Recent reports suggest that some railroads are experiencing difficulty moving trains as a result of chronic crew shortages. According to the Surface Transportation Board, while container traffic has climbed by 8.3% in recent years, the number of train and engine crewmembers employed by Class I railroads rose to only

77. See id.
82. GAO, supra note 80, at 19-20.
83. Id.
68,799 in September 2005, a 5.19% increase over September 2004. At the same time, the railroad industry's workforce is aging significantly (average age over forty) which may raise specific concerns and needs with regard to workplace related fatigue and injuries. Thus, the increased tonnage, decreased number of train crews, and the unknown factors associated with an ageing workforce may be setting the stage for an increase in the risk of fatigue-related accidents. Of concern to the Federal Railroad Administration is the fact that accidents attributed to human factors, of which fatigue plays an undetermined role, have remained fairly constant at nearly thirty-eight percent in comparison to all other causes of accidents such as those relating to mechanical issues, signals problems, or tracks.

E. Schedules

In order to meet the demand for freight rail traffic, labor organizations and rail carriers in the United States have devised flexible work scheduling systems. Following deregulation of the rail industry with the Staggers Act of 1970, the U.S. rail freight industry has seen unprecedented growth and steady financial returns. Accordingly, both labor and management are reluctant to institute changes that could curtail productivity and threaten continued growth.

Work schedules in this freight industry vary considerably, ranging from yard switching and assigned jobs with regular start times to pool assignments with variable start times. In yard and assigned jobs, employees usually come to work at specific times such as 7:00 a.m. or 3:00 p.m. and work typical eight, ten, or twelve-hour shifts. These jobs generally encompass six or seven workdays a week, and include specific tasks such as delivery or pick up at local merchants.

Another type of work assignment frequently found in the freight industry is referred to as the "pool" crew. Employees bid to be listed on a

board which has a predetermined number of positions or "turns."88 The persons on the board are assigned to a job typically by using a "first-in-first-out" system.89 As each person on the board is called for work, the next person in line advances until the end is reached and the entire sequence is repeated.90 Employees who complete a round trip are placed at the bottom of the board and await the complete cycle of the board before being assigned to a job again.91 Since freight trains typically operate on an as-needed basis to best serve the needs of the customers, there are few scheduled departure and arrival times.92 Thus, call times for employees are unpredictable and provide railroad employees with little certainty regarding when they might realistically depart for work.

The duration of these assignments can range from a few hours to the maximum twelve hours for operating equipment.93 For a variety of reasons, a crew might stop operating its equipment in a remote location rather than a terminal and thus require a relief crew to be transported to that location. Accordingly, in addition to on-duty time there may be significant wait periods before the crew is relieved and transported home or to a hotel. The entire length of the trip can therefore exceed twelve hours and may sometimes be as long as fourteen or even sixteen hours. During periods of high demand, engineers may then need to work between sixteen to even eighteen-hour schedules.94 Thus, an engineer may legally work eleven hours and fifty-nine minutes, be given eight hours off, and then return to work resulting in a twenty hour schedule.95 Alternatively, an engineer could legally work eight hours and rest for eight hours resulting in a sixteen-hour schedule.96

These variable and long work hour schedules benefit both employers and employees alike. The schedules allow rail companies to be more flexible, accommodate their customers, and maximize the use of crew time. These schedules also enhance employee income by providing more paid hours than schedules that are based on a twenty-four hour cycle. However, such schedules create challenges for crews in the form of obtaining needed rest and maintaining a satisfying quality of life. It has been well documented that humans have regular circadian rhythms which regulate the time of sleep onset.97 These rhythms are entrained about the normal

88. Id. at 46.
89. Id. at 119.
90. Id.
91. Id.
92. Id. at 46.
93. Id. at 38.
94. Id.
95. Id. at 8, 38.
96. See id.
97. Sussman et al., supra note 1.
twenty-four hour diurnal cycle. Irregular work schedules might therefore seriously limit the ability of an engineer to achieve adequate sleep and may increase the likelihood that railroad workers will be expected to work at times when their bodies are biologically inclined to be less alert.

The situation in rail passenger service is significantly different. The NTSB report describes an example schedule of an employee working for passenger operations as follows:

The motorman of train 509 reported to work overtime duty at 6:28 a.m. and was scheduled to work a split shift. He had worked from 10:00 p.m. to 6:00 a.m. as a switchman before beginning his overtime shift as a motorman. At the end of the first half of the split shift, the motorman had been on duty for approximately 12 hours. He stated that he took about a 3 1/2 hour nap and returned to work at 2:49 p.m. The CTA has an agreement not to schedule back-to-back shift work, but this assignment was not a scheduled position. Because the assignment was offered as a voluntary overtime position, the motorman of train 509 was able to choose to work the back-to-back shifts.

F. Summary

The rail industry is characterized by unpredictable work schedules, long hours, and continuous operations. The highly flexible scheduling arrangements and focus on customer service has required flexible start times and long hours. For the most part, crews are on duty in the area of about 9.5 hours. However, at peak times employees may be on duty for as many as eighteen hours. Several key high profile accidents have focused attention on fatigue as a contributing factor to the occurrence of accidents. In addition, the success of the freight rail industry has seen increases in both traffic and workload. The NTSB has cited operator fatigue as a top ten safety concern. The HOS regulations were developed in 1907 and have not been substantially revised since that time. Most experts agree that the current HOS regulations are not consistent with recent developments in the science of sleep and fatigue. Taken together these findings suggest a need to review the current HOS regula-

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98. Id.
99. Id.
101. Sherry, supra note 87, at 8.
102. Sussman et al., supra note 1.
103. See Bus. & Co. Resource Ctr., Industry Indicators, 207 Railway Age 1, 1 (2006) (showing U.S. total carloads percentage increased from 2004, thus exemplifying increased workload and traffic).
104. NTSB, supra note 3.
105. NTSB, supra note 4, at 2.
tions in light of current scientific thinking regarding how best to manage the impact of human fatigue on the safety of the rail transportation system.

II. SCIENTIFIC LITERATURE

A. HOURS ON DUTY/LONG HOURS

The issue of how long a person should work, or for how many hours, is one that has been of concern to workers and regulators for many years. As noted above, efforts to restrict the number of consecutive hours that a person could safely work were addressed with the Hours of Service Act of 1907. Research addressing the effect of long periods of time awake on cognitive performance has been conducted to help understand this vexing problem.

A now classic study by Angus, Heslegrave, and Myles found that significant reductions in mood and performance were observed over time for a sample of twelve male university students undergoing sixty hours of sleep deprivation. While this is not a work hours study per se, the study participants were awake for long periods of time and analogously demonstrated the relationship between long hours awake without sleep and the effects of long hours at work on performance. Shortly thereafter, a study by Jones and Stein found that the relative risk of crash involvement for drivers who reported a driving time in excess of eight hours was almost twice that for drivers who had driven fewer hours. Later research by Rosa and Colligan found that performance errors increased after four days on a twelve-hour schedule. More recently, Rosa, Bonnet, and Cole examined the effects of twelve-hour versus eight-hour work schedules on fatigue in the upper body. Results of the study of sixteen participants indicated that fatigue increased with time on shift and that fatigue occurred more quickly on night shifts.

The Driver Fatigue and Alertness Study (DFAS) conducted by the U.S. Department of Transportation showed that several measures of alertness were lower at the end of trips than they were at the start. The

106. Id.
108. See id. at 276 (for discussion of decrease in performance due to extended sleep loss).
112. See Wylie et al., Commercial Motor Vehicle Driver Fatigue and Alertness

DFAS also showed that driver self-reports of fatigue had a strong relationship with elapsed time since trip start.\textsuperscript{113} Even though these self-reports were different from objective measurement outcomes, it was concluded that the reports may indicate that increasing stress levels can be traced to fatigue, and that the self-reporting drivers had diminished motivation and ability to remain alert by the end of their trips.\textsuperscript{114}

O’Neill, Kruegar, Van Hemel, and McGowan studied ten male commercial motor vehicle drivers for one week of driving operations in a simulator, followed by fifty-eight hours of recovery time.\textsuperscript{115} This was followed by another week of driving, fifty-eight hours of recovery time and a final driving day to verify performance after recovery.\textsuperscript{116} The drivers worked fourteen hours on duty (i.e. twelve hours driving plus scheduled breaks) beginning at 7:00 a.m., followed by ten hours off duty.\textsuperscript{117} Among other discoveries, this study revealed a gradual decline in driver response quality, as measured by response probes, with hours of driving.\textsuperscript{118} There were improvements after each break regardless of whether the breaks were for resting, eating, or loading activities.\textsuperscript{119} Throughout the driving week, there was a slight but statistically significant deterioration in subjective sleepiness, reaction time response, and measures of driving performance over each working day.\textsuperscript{120} However, “driver response in crash-likely situations did not show cumulative deterioration.”\textsuperscript{121} The daytime-oriented “schedule of 14 hours on duty/10 hours off duty (12 hours driving) for a 5-day week did not appear to produce significant cumulative fatigue over the 2-week testing period.”\textsuperscript{122} This study shows that long work hours (such as fourteen hours), during daylight hours with appropriate breaks do not necessarily result in significant degradation of performance.

\textsuperscript{113} See id. at 9, 13 (reporting drivers possibly have an increased feeling of fatigue as they work longer hours).

\textsuperscript{114} See id. at 13 (discussing increased stress versus objective performance).

\textsuperscript{115} \textsc{FED. HIGHWAY ADMIN., EFFECTS OF OPERATING PRACTICES ON COMMERCIAL DRIVER ALERTNESS} 2 (Fed. Highway Admin. 1999), \textit{microformed on TD} 2.30/20:99-008 (Microfiche) (reporting decreased tracking performance, cognitive performance and increased fatigue over days of driving).

\textsuperscript{116} See id. (discussing week two, fifty-eight hours for recovery time and day of verification of performance after recovery).

\textsuperscript{117} Id. at 1 (describing the exact driver performance on/off schedule).

\textsuperscript{118} Id. at 3-4 (describing that later in the day drivers experienced decreased physical coordination and vigilance).

\textsuperscript{119} Id. at 3 (describing overall improvement in performance after each break).

\textsuperscript{120} Id. (describing the statistically significant decline in responses and performance over each work day).

\textsuperscript{121} Id. (describing no deterioration in driver response in “crash-likely” situations).

\textsuperscript{122} Id. (describing a schedule that did not result in a significant fatigue effect).
Four studies reported in a recent review of the literature by the Centers for Disease Control (CDC) discussed deterioration in performance when twelve-hour shifts were combined with more than forty hours work per week. Novak and Auvil-Novak reported an unexpected outcome from focus groups with nurses who worked four twelve-hour night shifts per week: nearly all nurses reported an automobile crash or near-miss during the previous twelve months while driving home after working a twelve-hour night shift.123 However, the nurses reported no job performance effects when they maintained consistent sleep and wake times - but changing from night work to day activities was fatiguing and affected performance.124

In a field study, Fischer et al. examined the second, sixth, and tenth hours of twelve-hour shifts in Brazilian petrochemical plant workers and reported a significant decline in subjective alertness at the tenth hour for both day and night shifts.125 Similarly, Mitchell and Williamson reported more vigilance task errors at the end of twelve-hour day and night shifts when compared to the beginning of the shifts in Australian power plant workers, while no effect was reported for an eight-hour schedule.126 On the other hand, significant improvements were observed for simple reaction time and grammatical reasoning tests given at the end of the twelve-hour shift when compared to the beginning.127 Although Duchon et al. reported no differences between eight and twelve-hour shifts on cognitive and psychomotor performance in Canadian mine workers, the heart rate findings suggest that the twelve-hour workers slowed the pace of their work.128 Thus, there appears to be a reduction in performance by the end of a twelve-hour shift suggesting that twelve hours may be approaching an upper limit of acceptable performance in the workplace.129

Looking at the results of several studies, Akerstedt concluded that there is a steady linear decline of approximately 2.4% per hour in cogni-

124. See id.
126. See Rebecca J. Mitchell & Ann M. Williamson, Evaluation of an 8 Hour versus a 12 Hour Shift Roster on Employees at a Power Station, 31 APPLIED ERGONOMICS 83, 89-91 (2000) (implying that there is not an increase in vigilance errors in an eight hour work shift because workers' performance increased at the end of their shifts).
127. Id. at 89.
129. See Mitchell & Williamson, supra note 126, at 83 (arguing that higher error rate at the end of a twelve hour shift correlates to approaching an upper limit of acceptable work performance).
tive performance over time.\textsuperscript{130} While many factors such as time of day, caffeine use, and motivation, affect this rate, the rate can serve as a crude estimate of the effects of sleep deprivation.\textsuperscript{131}

Following this model then, we would estimate that performance declines to about 25\% of baseline at around ten to eleven hours of wakefulness or about 40\% by the end of a sixteen hour day. This would suggest that an upper limit on the number of hours a person should work in a given day would not exceed sixteen hours. More conservatively, we would not expect a person to be engaged in operations requiring considerable cognitive input to last more than ten or eleven hours maximum.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Estimated_Drop_in_Performance_of_Wakefulness}
\caption{Estimated Decline in Performance over Hours of Wakefulness}
\end{figure}

Optimal performance, which of course will vary depending upon the type of task that an individual is engaged in, will require higher levels of cognitive capacity. As can be seen from the above hypothetical graph, performance declines steadily, and after eight hours performance is nearly 20\% off baseline or 80\% effectiveness. Thus, assuming that performance of basic cognitive tasks is expected to be no less than about 80\% of optimal performance then an eight or ten hour day would be desired.

Driving, which requires sustained attention and in which even short lapses of attention of one or two seconds can be fatal, would seem to require shorter durations.\textsuperscript{132} Railroad operations have sufficient redund-

\begin{thebibliography}{13}
\bibitem{130} Torbjorn Akerstedt, \textit{Wide Awake at Odd Hours: Shiftwork, Time Zones, and Burning the Midnight Oil} (Swedish Council for Work Life Research 1996).
\bibitem{131} Sherry, supra note 87, at 77-78.
\bibitem{132} See Christopher A. Monk, \textit{Recovering from Interruptions: Implications for Driver Dis-}
dancies and safeguards such that lapses of one or two seconds may not generally result in catastrophic consequences.133

Some studies have examined the combination of long work hours accumulated over the course of an extended time period, such as a work-week. For example, Lipscomb et al. compared the usual five eight-hour shifts to a combination of twelve-hour shifts and forty or more hours of work a week.134 Their results indicated that study participants in the twelve-hour shifts had a greater chance of neck, shoulder, and back disorders compared to five eight-hour shifts per week.135 In contrast, Mitchell and Williamson reported fewer health complaints during a twelve-hour day/night fast forward rotation when compared with an eight-hour three-shift weekly backward rotation.136

Twelve-hour shifts are popular among some shift workers due to the perceived improvements in lifestyle and leisure time availability. Findings reviewed and summarized in the CDC137 support the benefits of twelve-hour shifts in that there were no significant differences found between (a) eight and twelve hour shifts in nuclear power plant workers;138 (b) four ten-hour shifts versus five eight-hour shifts on cognitive performance tests for air traffic controllers; (c) eight and twelve hour shifts in Swedish power plant workers on simple reaction time and vigilance;139 and (d) no difference in reaction time on workers switching between eight-hour and twelve hours shifts.140 These results suggest that indeed, shifts of twelve hours in length may not present any noticeable perform-

133. See Matthew L. Wald, Faster Amtrack Trains, Fancier Safeguards, N.Y. TIMES, May 21, 2000 sec. Travel Desk at 3 (explaining new safety equipment installed to prevent railroad accidents).
135. Id.
140. Arne Lowden et al., Change from an 8-Hour Shift to a 12-Hour Shift, Attitudes, Sleep, Sleepiness, and Performance, 24 SCANDINAVIAN J. WORK ENV'T HEALTH 69 supp. 3 at 69, 74 (1998).
ance problems.\textsuperscript{141} However, it should be noted that these tend to be regularly scheduled shifts with regular start times, not the variable start times typically found in the railroad industry.\textsuperscript{142}

A recent analysis of the National Longitudinal Survey of Youth examined the shift length, number of hours worked per day and week and the health and safety histories of over 10,793 U.S. workers from 1987 to 2000.\textsuperscript{143} The study employed various multivariate analyses to estimate the relative risk of exposure to long working hours per day, extended hours per week, and overtime on reported work related injury or illness.\textsuperscript{144} Results of the study revealed that individuals working in jobs with overtime had a 61\% higher rate of injury as compared to those without overtime.\textsuperscript{145} In addition, it was found that persons working at least a twelve hour day was associated with a 37\% increased rate of injury and working at least sixty hours per week was associated with a 23\% increased rate of injury or illness.\textsuperscript{146} These findings, based on very large samples, are consistent with the hypothesis of a “dose-effect” such that the greater the amount of time worked, the greater the risk of injury or illness.\textsuperscript{147} While these data are based on self-reported information, they are consistent with other studies finding similar results and raise the issue of the need to address long hours and overtime as potentially hazardous working conditions.\textsuperscript{148} Interestingly, in a recent comparison of backward rotating eight hour shifts with forward rotating ten hour shifts, results showed that the ten-hour nightshift workers self-report indicated more refreshing sleep and fewer performance impairments and driving difficulties than eight-hour nightshift workers.\textsuperscript{149} Moreover, objective measures of sleep and performance on the ten-hour nightshifts were similar or greater than those of the ten-hour dayshifts.\textsuperscript{150} The authors noted that

\textsuperscript{141} Caruso et al., supra note 137, at 17 (describing four studies reporting no differences in work performance).

\textsuperscript{142} See generally id. at 18, 20 tbl.7 (exemplifying results from the studies based on regularly scheduled shifts).


\textsuperscript{144} Id. (explaining the study employed a multivariate analysis).

\textsuperscript{145} Id. at 588, 594 (explaining the higher results of injury to individuals from working overtime versus those not working overtime).

\textsuperscript{146} Id. at 588, 592 (discussing percentages of increased hazard rate).

\textsuperscript{147} Id. at 588 (explaining that a “dose-response” effect occurs with the increased susceptibility to injury with increased number of hours worked).

\textsuperscript{148} See id. at 595 (discussing that the study produced a valid and objective outcome despite self-report limitations).


\textsuperscript{150} Id. at 212, 221.
their data suggests that shorter nightshifts could be more beneficial to shift-workers and employers.\textsuperscript{151}

The findings discussed above reveal a direct relationship between non-sleep hours and performance decreases. Nevertheless, as some studies point out, certain types of twelve-hour shifts may still be beneficial if properly designed. The current maximum duty time recommended by the HOS is therefore not inconsistent with the scientific literature.

\section*{B. Sleep Deprivation}

Following the Angus, Heslegrave, and Myles report, numerous studies began to examine the effects of sleep deprivation on performance.\textsuperscript{152} A review of the literature on sleep deprivation and performance by Pilcher and Hufcutt found that a person's reaction time increases as the number of waking hours increases, while overall cognitive performance decreases.\textsuperscript{153} Summarizing data from nineteen original research studies, meta-analytic results reveal that sleep deprivation is negatively correlated with human performance.\textsuperscript{154} Chronic and partial sleep deprivation or restrictions (less than five hours of sleep per night over a number of days) degraded performance more than either acute short-duration total sleep deprivation (less than or equal to forty-five hours) or long-duration total sleep deprivation (greater than forty-five hours).\textsuperscript{155} The authors noted that partial sleep deprivation had a much stronger overall effect on the dependent measures than either short-duration or long-duration total sleep deprivation.\textsuperscript{156} Specifically, participants in partial sleep-deprivation conditions performed \textit{two standard deviations below the mean of normal non-sleep} deprived study participants compared to approximately one standard deviation for either short or long-duration total sleep deprivation.\textsuperscript{157}

Sleep deprivation results in decrements in many cognitive tasks.\textsuperscript{158} In a study of eighteen right-handed males deprived of sleep for twenty-four hours,\textsuperscript{159} the researchers found no effects on freedom from distractibility, tactile functions, visual function, reading, writing, arithmetic, and

\begin{thebibliography}{99}
  
  \bibitem{151} Id. at 221.
  
  \bibitem{152} R.G. Angus et al., \textit{Effects of Prolonged Sleep Deprivation, With and Without Chronic Physical Exercise, on Mood and Performance}, 22 \textit{Psychophysiology} 276, 276-277 (1985).
  
  
  \bibitem{154} Id. at 320.
  
  \bibitem{155} Id. at 319.
  
  \bibitem{156} Id. at 322.
  
  \bibitem{157} Id. at 324.
  
  
  \bibitem{159} Id. at 129.

\end{thebibliography}
intelectual process functions. However, cognitive functions such as motor, rhythm, receptive and expressive speech, memory, and complex verbal arithmetic functions decreased after sleep deprivation. A review of several studies showed that losses in cognitive performance of nearly 30% occurred after one night and 60% after two nights of sleep loss. There may be some interesting individual differences in ability to handle long work hours and sleep deprivation. A laboratory study of twelve-hour shifts found that older participants performed more poorly than younger participants over the duration of the shifts on tests of cognitive performance. These results may have some implications for the railroad industry where a significant percentage of operating employees are over forty years old. Other research suggests that deficits from sleep loss vary significantly across individuals and may actually be “trait-like” differences - not simply the result of sleep-wake history. Individual differences in vulnerability to sleep disorders such as sleep apnea and insomnia may also influence alertness and fatigue in the workplace. Thus, this may be an area for further study to examine the impact on railroad operations.

A comparison of the effects of sleep loss and ingesting ethanol illustrates the impact that sleep deprivation has on performance. As sleep deprivation and ethanol increased, so did daily sleep latency - both as a linear function of dose, with sleep loss in hours being 2.7 times more potent than ethanol in grams per kilogram. Ethanol and sleep loss, both equipotent in their impairing effect, also slowed reaction time on the psychomotor vigilance test.

In sum, well-documented evidence suggests that sleep loss is significantly related to reductions in cognitive performance. Interestingly, Pilcher and Hufcutt noted that “[a]lthough most of the sleep research community may concur with these results, there are a surprising number

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160. Id. at 133.
161. Id. at 131.
165. Id. at 125.
167. Id. at 983.
168. Id. at 983-84.
of scientists outside the sleep research field who have concluded that sleep deprivation has no profound effect on performance."\textsuperscript{169} It appears that this same situation exists in the railroad industry where most industry players understand that sleep deprivation is a fact of life yet few recognize or admit to the reduction in performance that follows short, long, or even partial sleep deprivation.

C. **Sleep Restriction or Partial Sleep Deprivation**

Pilcher and Huffcutt's review of partial sleep deprivation findings have direct implications for the railroad industry.\textsuperscript{170} Given that railroad work involves variable start times and shift lengths, the working conditions in the railroad industry closely approximate the definition of partial sleep deprivation.\textsuperscript{171} Partial sleep deprivation, in other words, occurs when individuals are required to sleep less than five hours in a twenty-four hour period.\textsuperscript{172} Pilcher and Huffcutt's results suggest that cognitive performance is more affected by partial sleep deprivation incurred over days than either short (less than or equal to forty-five hours) or long (greater than forty-five hours) duration total sleep deprivation.\textsuperscript{173} Given the erratic nature of railroad work schedules, it is therefore likely that railroad sleep schedules are more similar to partial sleep restrictions than to acute total sleep deprivation. Research by Sherry emphasizes this conclusion. In a study of railroad employees, Sherry found that the average amount of sleep for the entire group of thirty-three individuals per twenty-four hour period was 6.32±1.68, ranging from a low of 2.75 average hours of sleep per twenty-four hour period to a high of 10.02 hours of sleep.\textsuperscript{174} Sherry estimated that as many as 45.5\% of the sample population averaged fewer than 5.93 hours of sleep during the assessment period.\textsuperscript{175}

According to the National Sleep Foundation's "2000 Omnibus Sleep in America Poll," shift workers, on average, get less sleep during the week (six hours and thirty minutes) compared to regular day workers (six hours and fifty-four minutes), and almost half of the shift workers average less than 6.5 hours of sleep while far fewer regular day workers aver-

\textsuperscript{169} Pilcher & Huffcutt, supra note 153, at 323.
\textsuperscript{171} Id. at 575.
\textsuperscript{172} Pilcher & Huffcutt, supra note 153, at 319.
\textsuperscript{173} Id. at 319.
\textsuperscript{175} Id.
age this amount of sleep during the workweek. Given the mean, we can assume that a substantial portion of these shift workers obtain fewer than five hours of sleep per night - consistent with the research conducted by Pilcher and Hufcutt.

In a similar vein, the Mitler study of eighty truck drivers carrying revenue-producing loads on four different driving schedules (either nighttime or daytime driving) revealed that the average time spent in bed was just over 5.18 hours. The longest times in bed were for drivers on the day schedules while nighttime drivers spent the least number of hours in bed. Younger drivers with an average age of thirty-six spent more time in bed (including more naps) than older drivers, whose average age was fifty. The drivers in this study averaged 5.18 hours in bed per day over the five-day study (with a range of 3.83 hours for the thirteen-hour night schedule to 5.38 hours for the ten-hour day schedule). Forty-four percent of the drivers took naps to increase their sleep. Thus, work schedules significantly influenced the length of time the drivers slept.

Recent studies indicate that performance errors in air traffic controllers increased by 15%-18% over a five-day midnight workweek schedule. In addition to perceived performance decrements, the research demonstrated performance changes across various shifts. The authors found that sleeping in the “morning (daytime) and in the evening resulted in significantly greater losses of sleep than sleeping during the night, with evening sleeps being 1.5 times shorter than day sleeps (3.5 hours vs. 2.2 hours, respectively, of lost sleep for a single sleep period - group means).” In other words, it appears “controllers in the study got much less sleep during daytime and evening sleeps.” These partial sleep deprivations significantly affected work performance. For example, air traffic controller performance concerning reaction times, logical reasoning, and spatial relations began to deteriorate 5-10% on the second mid-

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177. Pilcher & Hufcutt, supra note 153, at 319.
179. Id.
180. Id. at 4-5.
181. Id.
182. Id. at 5.
184. Id. at 36-39.
185. Id. at viii.
186. Id.
187. Id. at 36.
night shift - by the fourth midnight shift, performance was 10-18% less than the baseline percentage.\textsuperscript{188} For the evening-day-day-midnight (EDDMM) shift, significant performance deterioration did not occur until the midnight shifts, with a 6-12% reduction in reasoning, spatial orientation, and pattern recognition.\textsuperscript{189} For the EEDDM shift, performance impairment of 5-15% was evident beginning during the second day and midnight shifts.\textsuperscript{190} This difference in performance impairments may be due to the length of the workday which interferes with the person's ability to obtain rest in the time available.\textsuperscript{191}

One study found that truck drivers suffering from restricted sleep had an increased reaction time of 650 milliseconds over baseline values.\textsuperscript{192} According to the authors of the study, this longer reaction time translates into an increase of twenty-three meters in breaking distance at a speed of seventy-five miles per hour.\textsuperscript{193}

Several sleep dose response studies present strong evidence on the impact of restricted sleep over time. In the first study, sixteen healthy young adults who had their sleep restricted to an average 4.98 hours per night for seven consecutive nights reported higher levels of subjective sleepiness and had significantly longer reaction times on performance tasks.\textsuperscript{194} A second study showed dose-dependent performance impairment related to sleep loss in participants who slept for three, five, seven, and nine hours respectively.\textsuperscript{195} Performance in the three-hour sleep group typically declined below baseline within two to three days of sleep restriction.\textsuperscript{196} Performance in the five hour sleep group was consistently lower than performance in the seven and nine hour sleep groups.\textsuperscript{197} In contrast, performance in the seven and nine hour sleep groups was often indistinguishable and improved throughout the study.\textsuperscript{198} Virtually no negative effects on performance were seen in the nine hour sleep group.\textsuperscript{199}

\begin{itemize}
  \item\textsuperscript{188} Id. at 38.
  \item\textsuperscript{189} Id. at 36.
  \item\textsuperscript{190} Id. at 86.
  \item\textsuperscript{191} Id. at 78-82.
  \item\textsuperscript{192} P. Philip et al., \textit{Fatigue, Sleep Restriction, and Performance in Automobile Drivers: A Controlled Study in a Natural Environment}, 26 \textit{Sleep: J. of Sleep and Sleep Disorders Res.} 277, 278, 279 (2003).
  \item\textsuperscript{193} Id. at 279.
  \item\textsuperscript{194} D. Dinges et al., \textit{Cumulative Sleepiness, Mood Disturbance and Psychomotor Vigilance Performance Decrement During a Week of Sleep Restriction to 4-5 Hours Per Night}, 20 \textit{Sleep} 267, 267-70 (1997).
  \item\textsuperscript{195} T. Balkin, \textit{et al.}, \textit{Effect of Sleep Schedules on Commercial Motor Vehicle Driver Performance} (2000).
  \item\textsuperscript{196} Id. at 2-84.
  \item\textsuperscript{197} Id.
  \item\textsuperscript{198} Id.
  \item\textsuperscript{199} Id.
\end{itemize}
The second study is interesting from the railroad perspective in that it points to the importance of arranging work schedules so that individuals can obtain at least seven hours of sleep. Even though railroad workers are permitted a minimum of eight undisturbed hours, workers generally spend less than six hours asleep due to commute and preparation times. The study emphasizes that this type of situation does not foster maximum performance levels.200

The study further found that following chronic sleep restriction, the first eight hours in bed (6.5 hours of sleep) are insufficient for restoration of performance on the psychomotor vigilance task (PVT).201 During the four day recovery phase (eight hours in bed each night), five and seven hour sleep groups showed minimal or no recovery, remaining consistently below the nine hour sleep group and below their own baseline levels for the PVT.202 The three hour sleep group showed some recovery for the PVT on the first day and more on subsequent days but also remained well below their own baseline and below the performance of the other groups.203 Subjects’ recovery to baseline or near baseline levels of performance on the PVT often required a second or third night of recovery sleep.204 These data suggest that after sleep debt has occurred (three, five, seven hours time in bed) a single bout of eight hours of night sleep leads to recovery but not full recovery.205 While further sleep is required for full recovery, the number of subsequent sleep periods to reach full recovery is unknown.206 For the three-hour group, the data suggests that even three nights of normal sleep (eight hours spent in bed on each night) is not sufficient to restore performance to baseline levels (depending on the task).207 Balkin concludes that “this suggests that full recovery from severe, extended sleep restriction may require more than three nights of normal-duration sleep.”208

Belenky et al. examined a subset of the Balkin data, specifically looking at the PVT information.209 For participants in the three-hour test group, performance on reaction time measures declined steadily over the seven-day period.210 Performance by participants in the five and seven-

200. Id. at 4-50.
201. Id. at 2-85.
202. Id. at 2-86.
203. Id.
204. Id. at 2-85.
205. Id.
206. Id.
207. Id.
208. Id.
210. Id. at 1.
hour groups initially declined but stabilized subsequently. For participants in the nine-hour group, performance remained at the baseline level. During the recovery period the performance levels did not return to baseline levels after three days of recovery. Reaction times and lapses for the three hour group showed an initial recovery, but only to the levels of the five and seven hour condition, not the baseline.

Interestingly, the data also shows that sleep restriction on the first two nights in the experimental period of only five hours, resulted in performance decrements that were no more than 5% off baseline. In addition, sleep restriction of two consecutive nights with less than fours hours per night in the experimental condition resulted in performance decrements of no more than 13%. Only after the third consecutive night, with less than three hours of sleep, did performance drop 20% below baseline. Thus, these results suggest that persons can endure two consecutive nights with less than six hours of sleep without incurring a performance degradation of more than 5%. However, three consecutive nights of less than six hours of sleep does result in performance degradation of 15% or more.

Collectively, the data suggest that the HOS sleep guidelines might need to ensure that persons in operational settings obtain at least six hours of sleep in a twenty-four hour period and twelve hours in a forty-eight hour period. Put another way, performance is not noticeably affected when individuals obtain less than six hours of sleep over two consecutive twenty-four periods. However, performance decrements are noticed with more than two consecutive twenty-four hour periods with less than six hours of sleep per night.

Van Dongen, Maislin, Mullington, and Dinges studied the effects of chronic sleep restriction by examining the effects of four, six, or eight-hour sleep schedules on forty-eight healthy adults over a fourteen-day period. Results indicate that restriction of sleep of six hours or less per night produced cognitive performance deficits equivalent to two nights of

211. Id.
212. Id.
213. Id.
214. Id.
215. See id. at 6-7.
216. Id.
217. Id.
218. See id. at 1, 9.
219. See id. at 6-7.
220. Id.
221. See id. at 5-6.
222. See id. at 6-7.
223. Van Dongen et al., supra note 164, at 117.
total sleep deprivation.\textsuperscript{224} "Cumulative wakefulness in excess of 15.84 hours predicted performance lapses across all four experimental conditions.\textsuperscript{225} Thus, it appears that even relatively moderate amounts of restricted sleep can seriously impair cognitive function.

Participants were largely unaware of these increasing cognitive deficits.\textsuperscript{226} Mild restriction in the hours of sleep (five hours a night rather than \(7\frac{1}{2}\)) have been shown to result in progressive daytime sleepiness which is evident on the first day following a night of sleep restriction and worsens with successive restrictive nights.\textsuperscript{227} The resulting sleepiness is only recoverable by rest. One night of rest following one week of sleep restriction only partially reverses the problem.\textsuperscript{228} Artificial fragmentation of sleep also rapidly results in an increasing tendency to fall asleep. Sleepiness is also influenced by time of day, increasing significantly in the early hours of the morning.\textsuperscript{229}

Williamson, Feyer, Friswell and Finlay-Brown, looked at the effectiveness of two consecutive sixteen hour work periods separated by six hour breaks.\textsuperscript{230} The study took place in a simulation mode as the hours of work were not legal, but the study involved the professional long distance truck drivers who would have done the trip.\textsuperscript{231} The results prove again that in rested drivers there were no significant fatigue effects after sixteen hours of work, but after only a six-hour continuous rest break, significant fatigue effects occurred around the middle of the second sixteen hour shift.\textsuperscript{232} This indicates that longer hours or work may be possible, provided that the days are balanced by an appropriate period of longer rest.

Partial sleep deprivation characterizes much of railroad operations. The fact that the railroad industry is characterized by rules which permit an employee to be awakened after only six hours of sleep is similar to the definition of partial sleep deprivation that Pilcher and Hufcutt used in their meta-analysis.\textsuperscript{233} Their findings indicated that the negative effects of partial sleep deprivation were about 40% greater than either short or

\textsuperscript{224} Id. at 117.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} See Belenky et al., supra note 209, at 10.
\textsuperscript{229} Id. at 9.
\textsuperscript{231} See id. at 39.
\textsuperscript{232} See id. at 71.
\textsuperscript{233} Pilcher & Hufcutt, supra note 153, at 319.
long duration total sleep deprivation. Consequently, conditions which promote partial sleep deprivation contribute to reduced cognitive performance.

Taken together, these studies provide consistent and strong evidence documenting the negative impact of restricted sleep on performance over time. The railroad industry in particular, with the two-hour call procedure, demands attention to the lower levels of restricted sleep. Specifically, detailing a limit to minimum time needed to recover. These studies suggest that the effects of even partial sleep restriction can lead to noticeable reductions in performance. The Belenky data suggest that performance decrements are noticed with more than two consecutive twenty-four hour periods with less than six hours of sleep per night. Accordingly, it should be apparent that there will be a need to minimize the occurrence of more than two consecutive days of partial sleep reduction situations in the railroad working environment.

D. Recovery Periods

Issues of recovery for shift work have been discussed by various parties. A paper by Totterdell, indicates that there were significant decrements in performance over the course of several night shifts. Furthermore, several measures did not improve on the first rest day after a night shift. Thus, there may be a need for considerable time off before a return to optimal performance is obtained.

Smiley and Heslegrave completed a review of the literature with respect to recovery time needed for CMV drivers. The first study reviewed indicated that a single day off was “insufficient for night workers to recover after an accumulated sleep debt from 5 days of work.” Smiley and Heslegrave concluded that “two nights of recovery sleep is usually sufficient to allow full recovery. This conclusion is still widely regarded as correct. However, the degree to which it may be true for partial sleep loss over extended periods is unknown.”

The O’Neill study includes ten CMV drivers in a simulator with fifty-

234. See id. at 324.
235. Id. at 325.
236. See Belenky et al., supra note 209, at 5-8.
238. Id. at 54.
240. Id. at 15.
241. Smiley & Heslegrave, supra note 239, at 8.
242. Id.
eight hours of recovery time.\textsuperscript{243} The results of this study indicate that drivers returned to baseline on both subjective and performance measures after one night of recovery sleep.\textsuperscript{244}

The Balkin study of CMV drivers determined that at least three recovery days were needed to return to near baseline.\textsuperscript{245} The subjects' recovery to baseline required two or three nights of recovery sleep.\textsuperscript{246} Balkin concluded that:

\textit{... when performance did recover, it was generally not complete after the first 8-h recovery sleep period. Rather, recovery to baseline or near baseline levels of performance often required a second or third night of recovery sleep. This observation clearly indicates that following chronic sleep restriction, eight hours in bed (which resulted in approximately 6.5 hours of sleep) is insufficient for restoration of performance on tasks requiring higher-order cognitive processing.}\textsuperscript{247}

Akerstedt's study determined that most shift workers reported that they needed at least two days with two normal sleep episodes to recover after three consecutive night shifts.\textsuperscript{248} This study also demonstrated that the need for recovery increased by one day when working a succession of seven consecutive shifts.\textsuperscript{249} Evidence from jet lag indicates that it may take up to four days to recover after an acute shift of the sleep wake pattern.\textsuperscript{250} Smiley & Heslegrave noted that there was no difference between the first and seventh shift in terms of sleepiness for 83 construction workers, working an 84 hour week (i.e., seven consecutive 12 hour day shifts between 07:00 to 19:00 followed by a week off).\textsuperscript{251} However they required three to four days of recovery to reach normal sleepiness values.\textsuperscript{252} Thus, a review of several non-driving studies concluded that rest periods between work shifts were sufficient to improve subjective alertness.\textsuperscript{253}

Data on recovery are also available from the Belenky study of the partial sleep restriction of sixty-six normal volunteers who spent three, five, seven, or nine hours in bed (TIB) for seven days followed by three

\begin{thebibliography}{99}
\bibitem{243} \textsc{Fed. Highway Admin., supra} note 115, at 2.
\bibitem{244} \textit{Id.} at 3.
\bibitem{245} \textsc{Balkin et al., supra} note 195, at 2-85.
\bibitem{246} \textit{Id.}
\bibitem{247} \textit{Id.}
\bibitem{248} \textsc{Akerstedt, supra} note 130.
\bibitem{249} \textit{Id.}
\bibitem{250} Smiley & Heslegrave, \textit{supra} note 239, at 7
\bibitem{251} \textsc{A. Smiley et al., Investigation of Commercial Motor Vehicle Driver Cumulative Fatigue Recovery Periods: Literature Review, TP 14206E Transportation Development Centre of Transport Canada} 7, (2003).
\bibitem{252} \textit{Id.}
\bibitem{253} \textit{Id.} at 8.
\end{thebibliography}
days with eight hours TIB (recovery). For persons in either a three hour condition performance on reaction time measures declined steadily over the seven day period. For persons in the five and seven hour conditions, performance initially declined followed by stabilization. In the nine-hour group, performance remained at the baseline levels. During the recovery period the performance levels did not return to baseline levels even after three days of recovery. Reaction times and lapses of the three-hour group showed an initial recovery but only to the levels of the five and seven hour condition, not baseline. Thus, recovery for all participants on a restricted schedule was short of baseline levels.

The Van Dongen study of a group of forty-eight healthy individuals randomly assigned to either four, six, or eight hours in bed per night for a period of fourteen days also provides some information on recovery time. Total sleep deprivation involved three nights without sleep. Results indicated that sleep restriction of six hours or less per night produced cognitive performance deficits equivalent to up to two nights of total sleep deprivation. Interestingly, subjective ratings of sleepiness indicated that participants were "largely unaware" of the resulting declining cognitive performance. In terms of recovery then it will be important to ensure that sufficient time for recovery actually exists.

To date we have only three studies that indicate how much time is actually needed to recover. Most sleep experts argue that at least a forty-eight hour period in which two eight-hour episodes of sleep are obtained is needed. However, the Belenky study suggests that even after three days individuals have not returned to baseline levels. Further study of this phenomenon is clearly warranted. However, at present a definite period of time off of one to three days following partial sleep deprivation is needed to ensure near baseline recovery.

### E. Fatigue Countermeasures Plans

Some efforts have been made in the workplace to address fatigue. Various summaries of Fatigue Countermeasures in the industry have been identified. While these reports are successful at documenting the various types of interventions that have been directed at reducing fatigue in

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254. Belenky et al., supra note 209, at 1.
255. Id.
256. Id.
257. Id.
258. Van Dongen et al., supra note 164, at 117-126.
259. Id. at 117.
260. Id.
261. Id.
262. Belenky et al., supra note 209, at 10.
263. See generally, Sherry, supra note 87, at 30-31.
the workplace, they lack the comprehensiveness that their titles imply. Prescriptive recommendations on when and how many of these measures to apply, and in what circumstances or amounts, is difficult to quantify without knowledge of the specific conditions. Accordingly, many experts in the field are recommending a more holistic approach to fatigue management.264

During the testimony delivered in response to the FMCSA’s Notice of Proposed Rulemaking for revising HOS regulations, a number of witnesses expressed “interest in developing a more holistic approach to the fatigue problem through the use of education and training programs, and screening for sleep apnea and other sleep disorders . . . usually mentioned in the context of fatigue management.”265 The National Sleep Foundation (NSF) pushes for widespread instruction about the necessity of sleep and alertness, as well as the prevention of drowsy driving, for commercial drivers.266 The NSF further promotes a standard of “no-fault” screenings among commercial drivers for sleep disorders.267 The NSF fears that without standardizing and enforcing the number of hours of service per day for commercial drivers, the drivers and the public will continue to be at risk for accidents while traveling on roads.268

In his 1999 testimony before Congress, Michael Mann, the Deputy Associate Administrator of NASA commented that, “[i]t should be evident that no single approach or ‘fix’ can eliminate fatigue as an issue from aviation and other around-the-clock operations.”269 He further noted that any approaches to eliminate such fatigue need to allow for flexibility by the operators.270 However, it does not appear that this advisory circular has been adopted.

In the 1990’s, in order to address fatigue issues, Canadian National combined with Canadian Pacific and VIA Rail to form a task force in conjunction with The Brotherhood of Locomotive Engineers, with Circadian Technologies providing assistance.271 A pilot project resulting from the collaboration was initiated in 1995 in Calgary and Jasper, titled

265. Id.
267. Id.
268. Id.
270. Id.
271. Sherry, supra note 87, at 34.
The CANALERT project set up three time pools or specific blocks of time for locomotive engineers to designate when they would begin their next assignment. Engineers starting their assignments between 5:00 and 15:00 were called Larks, while those starting between 13:00 and 23:00 were called Owls, and those between 21:00 and 07:00 were called Cats. The calling windows were only in effect for assignments beginning at the home terminal, with returns to home governed by the traditional first-in/first-out policy. A protected zone was established for the times when an engineer would be most likely to experience fatigue. Engineers were permitted to take a return train home without rest only if he could be guaranteed to arrive before the beginning of his protected zone; otherwise, the engineer was required to rest for at least three hours at the away from home terminal. Finally, a “special protected zone” was also created to ensure the availability of protection for engineers traveling during a time when fatigue might be a problem. Engineers in the special protected zone were permitted to take a nap if needed.

Engineers in the CANALERT project were also assigned a regular work schedule, with each engineer working one day and off the next. Furthermore, each engineer received two assigned days off in each twenty-eight-day schedule. Assigned days off were built into the regular work schedule, resulting in at least three consecutive days off, and engineers were also allowed to book up to eight hours rest at the away from home terminal. Significant improvements on subjective measures of fatigue and alertness were obtained, with operational measures also indicating improvements.

In the Canadian aviation industry the Tripartite Working Group (TWG) (made up of representatives from Transport Canada, Canadian Air Traffic Control Association and NAV Canada) was formed to address fatigue issues facing Canadian air traffic controllers. As a result of

272. Id.
273. Id.
274. Id.
275. Id.
276. Id at 34-35.
277. Id at 35.
278. Id.
279. Id.
280. Id.
281. Id.
282. Id.
283. Id at 37.
their work the TWG issued a report which made several recommendations regarding how to address fatigue in this very critical safety operation.285 The committee report included the following four recommendations:

- Adopt a holistic approach to fatigue management by all parties to the Tripartite Working Group and Tripartite Steering Committee;286
- Have NAV CANADA introduce a formal Fatigue Management Program;287
- Integrate NAV CANADA’s Fatigue Management Program into the Corporation’s Safety Management System in a manner fatigue-related safety risks are managed practically and efficiently;288 and
- Develop a performance-based measurement system to gauge the effectiveness NAV CANADA’s Fatigue Management Program.289

It is interesting to note that the TWG report included a discussion of the issues of prescriptive vs. non-prescriptive approaches to the management of fatigue.290 Currently, many regulatory bodies utilize a prescriptive approach that identifies certain limits under which operations may occur.291 On the other hand, the non-prescriptive approach recognizes the need for flexibility in operations as a crucial component to maintaining service.292 The committee concluded that a non-prescriptive approach, focusing on the desired outcomes and behaviors, was the most acceptable.293

Transport Canada also completed an extensive review of fatigue counter measures in the transportation industry.294 This document lists a number of suggestions for addressing fatigue including:

- Implement education programs addressing shift work, scheduling work and rest, and proper regimens of health, diet, and rest;295
- Employ fatigue management programs across all transportation industries;296
- Encourage performance-based safety approaches and self-management

285. Id.
286. Id.
287. Id. at ii.
288. Id.
289. Id.
290. Id. at 7.
291. Id.
292. Id.
293. Id.
295. Id. at xiii.
296. Id.
with feedback through measurement technologies;\textsuperscript{297} 
- Limit 12-hour shifts;\textsuperscript{298} 
- Improve the regularity of duty periods on reserve and on-call assignment and reduce the element of unpredictability;\textsuperscript{299} 
- Promote a healthy night’s rest before a trip;\textsuperscript{300} 
- Encourage napping on trips, specifically during night shifts or on cruise portions of long-haul flight operations;\textsuperscript{301} 
- Limit night shifts to two to three consecutive shifts;\textsuperscript{302} 
- Avoid 12-hour night shifts;\textsuperscript{303} 
- Provide at least two full days of rest after extended duty periods, particularly if night work was involved;\textsuperscript{304} 
- Provide at least nine hours of rest between consecutive shifts;\textsuperscript{305} 
- Limit overtime to a minimum;\textsuperscript{306} and 
- Provide adequate areas for strategic napping.\textsuperscript{307}

This list is very similar to that proposed by the Work Rest Task Force addressing the needs for fatigue management in the railroad industry.\textsuperscript{308} The Work Rest Task Force, in an effort to improve fatigue management, identified eight key components of an effective fatigue counter measures program.\textsuperscript{309} A committee comprised of senior railroad executives endorsed the list on February 23, 1998, and railroads are still attempting to integrate the principles into their individual programs.\textsuperscript{310}

An effective Fatigue Countermeasures Program (FCP) should consider, but is not limited to, the following:

- Education and Training
- Employee and Train Scheduling Practices (e.g., line-ups, calling times, work/rest cycles, relief-staffing, employee availability, shift predictability)
- Emergency response requirements (short-term, e.g., derailments, and extended, e.g., natural disasters)
- Alertness strategies (e.g., napping, employee empowerment)
- Evaluation of policies and procedures (e.g., effects on fatigue issues)
- Rest environments (e.g., lodging)
- Work environments

\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} See Sherry, supra note 87, at 33.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
- Implementation strategies and review of FCP effectiveness.$^{311}$

Unfortunately, these recommendations have been implemented with only limited success. In an effort to improve on the consistency of the rules’ implementation and in conjunction with revising the hours of service rules, Transport Canada along with the Canadian Railways and Labor organizations issued Work/Rest Rules developed pursuant to Canada’s Railway Safety Act.$^{312}$ The Canadian Work/Rest Rules include the requirements regarding fatigue management plans:

- Railways must implement such plans,$^{313}$
- Such plans must be designed to decrease fatigue and improve on-duty awareness of operating employees,$^{314}$ and
- Such plans must reflect the nature of the operations under consideration.$^{315}$

The FCPs address employee work scheduling practices, employee education and training, on-job alertness strategies, rest and work environments, how to handle working under unusual operating conditions, and unique deadheading circumstances.$^{316}$ Specific plans should be put in place in special circumstances where the operating practices necessitate exceeding specific guidelines.$^{317}$

The concept of the FCPs addresses the need for a holistic approach to fatigue management.$^{318}$ The complexity of the variables that affect fatigue and alertness are of such magnitude that is difficult to identify specific practices that would be required in all circumstances. The problem in simple terms is “one size does not fit all.” Transport Canada adopted the non-prescriptive approach discussed earlier.$^{319}$

Various groups and reports have attempted to address the need for changes in transit operators’ hours of service. Interestingly the experts, laborers, and managers appear to value both a prescriptive and a non-prescriptive approach. A non-prescriptive approach to the management of fatigue is highly desirable due to the many complex variables that interact to increase or decrease alertness. However, a prescriptive ap-

311. Id.
314. Id. § 6.1.2.
315. Id. § 6.1.3.
316. Id. § 6.2.2.
317. See id. at § 6.2.4.
318. See MEIN, supra note 284, at 4.
319. See id. at 7.
proach is necessary for accountability. Consequently, some form combining both may hold the most promise for the United States rail industry.

III. SOME INITIAL RECOMMENDATIONS

A. FATIGUE COUNTERMEASURES PLANS

Railroad carrier companies should develop Comprehensive Fatigue Counter Measures Plans to address and manage fatigue issues in their operations:

The HOS regulations at present are prescriptive. Most authorities on the topic of regulations are concerned that a prescriptive approach is impractical, overly rigid and likely to create more problems than it solves. Consequently, due to the complex array of variables that influence a person's ability to function at an optimal level it is extremely unrealistic to develop a rule that will cover all the contingencies and still be practical. The rationale for this approach is based on the idea that fatigue is a condition of the workplace that should be managed like any other hazard or risk to working safely. Fatigue should not be considered as a category in and of itself, but rather integrated into the array of risks that are regularly managed by transportation professionals in the workplace.

The idea that fatigue should be managed as part of the workplace environment has been informally discussed by a number of different individuals but not formally described. Various discussions held by the North American Rail Alertness Partnership (NARAP) address the need to develop a comprehensive plan to address fatigue in the workplace as it relates to safety and health of the work Fatigue Management Plans (FMPs) are in use in Canada and several of the U.S. based carriers (e.g. UPRR, BNSF) have been required to file a plan with Transport Canada because some of their operations enter Canada. Given the importance of these issues and the concerns for public safety, it is recommended that the plans be filed with the Federal Railroad Administration. A panel of experts should be developed to review the plans and determine their adequacy. Finally, FMPs should serve as an agreement between labor, management, and the regulatory agencies that will enable the public and other stakeholders to assess the adequacy of those plans. Such FMPs should attempt

320. See Mein, supra note 284, at 7.
321. See id. at 5.
322. See generally id. at 4-7.
323. See generally id.
324. See generally Transport Canada, Work/Rest Rules for Railway Operating Employees, at §§ 3.4, 6.1, 7.1.
to adhere to the recommendations outlined in this report and to general principles of constructing work schedules. Practical factors that have been identified as influencing the effectiveness of a work schedule include the following that were summarized in a report designed to improve the mitigation of fatigue:

1. The number of consecutive hours worked
2. The number of consecutive shifts
3. Start and end times
4. Level of cognitive activity required on task
5. Opportunities for rest, sleep and napping
6. Individual differences

B. **Hours on Duty**

**The maximum number of consecutive hours of on-duty time at work should not exceed twelve hours.** Except in extraordinary circumstances, the maximum number of hours at work (on duty and pre-release) should also be limited to sixteen and include the amount of time preceding release with a minimum of twelve hours undisturbed rest immediately following:

The literature reviewed indicates that performance decrements have been observed in individuals working prolonged hours. Several studies have indicated that performance decrements may occur for persons working twelve-hour shifts. While in some situations it may be possible to work for more than twelve hours, it is not recommended. However, it is understandable that if an individual is in the midst of a shift and cannot be relieved from their place of operations immediately; such individual can end up being inactive but at work and not released for several hours. This situation can extend the workday a number of hours and should be counted when determining amount of time on duty and amount of needed recovery time. Basically, the amount of time that a person is awake should be considered whether the person is operating equipment or awaiting release, as the individual is unable to obtain rest.

C. **Consecutive Shifts Worked**

Individuals should work no more than four consecutive twelve-hour shifts in a 144 hour period, and these consecutive work periods should be followed by at least a two day recovery time. Furthermore, consideration should be given to the practicality and likelihood of actually obtaining sleep, based on considerations of the circadian rhythms of the human body, during the time available:

325. Rosa et al., *supra* note 111, at 155.
Evidence for this recommendation is based on the work of those who have found that performance deteriorated after four consecutive twelve-hour shifts.327 This recommendation is further based on the notion that the freight railroad environment is not necessarily characterized by regular start times or daylight hours of work.328 Working during midnight hours is likely to result in more impaired performance over time than working during daylight hours alone.329 Thus, the findings of reductions in performance after four consecutive twelve hour shifts occurring in the daylight hours should perhaps be considered optimal given the conditions in the freight railroad industry with variable start times.

In addition, the literature indicates that some shifts are more disruptive of circadian rhythms than others. The body has a natural tendency to sleep during the hours between midnight and 5:00 a.m.330 Consecutive midnight shifts have been shown to result in decreased performance.331 Unfortunately, work shifts that start earlier in the morning conceivably result in less sleep because the worker will often not be able to compensate by going to bed earlier in the evening. Thus, if a worker with a 7:00 a.m. start time awakens at 5:00 a.m. (assuming a two-hour call) that worker will likely obtain only seven hours of sleep. The scenario probably changes considerably if work schedules occur during the midnight hours. For example, a person who works nights and gets off at 6:00 a.m. will conceivably get to bed at around 8:00 a.m. and have enough time to obtain a fairly adequate six hours of sleep. Thus, based on these considerations it is likely that a work schedule that has four or more consecutive twelve-hour shifts could result in performance degradations.

The other important consideration for this recommendation is the need to address whether the person will be working or sleeping at a time consistent with their circadian rhythm.332 As was seen in the CANALERT study, the work schedules were arranged in accordance with the likelihood of fatigue or alertness, and a “special protected zone” was created to ensure that safeguards or counter measures were available for engineers traveling during a time when fatigue might be a problem.333 During this “special” zone an engineer was permitted to take naps as needed.334

The overriding principle that should guide decisions in this area is

327. See Rosa et al., supra note 111, at 155; See Rhodes et al., supra note 183, at viii.
328. See Recent Derailments and Railroad Safety, supra note 47, at 11.
329. Rhodes et al., supra note 183, at viii.
330. See generally id.
331. See id.
332. See Rhodes et al., supra note 183, at viii.
333. Sherry, supra note 87, at 35.
334. Id.
the need to address not just the number of hours worked, but the number of hours off between duty periods. Such rest hours will facilitate adequate rest for recovery. In other words, we should take into account the number of hours a person will be able to sleep and the amount of sleep debt they will likely incur. Opportunities to sleep need to increase so that operators get at least eight hours in each twenty-four hour period, and do not incur sleep debts over prolonged periods of time.

It is nearly impossible to come up with a rule that covers all possible scenarios that might occur. It is also true that railroad employees, like other individuals, regularly work safely with less than optimal work/rest cycles. However, to reduce risk, FMPs should be implemented that utilize the following principles to address fatigue problems:

- Individuals require approximately seven to eight hours of sleep in twenty-four hour periods to be at optimum levels of performance
- Individuals obtaining less than six hours of sleep for multiple days demonstrate reduction in performance
- When chances for sleeping an adequate amount decrease, there is greater need for mandatory time off
- When opportunities for sleep during the midnight hours are limited, individuals may need more time to recover from extended work periods

The goal is to eliminate sleep debt. Persons working mostly during nighttime hours should be limited to no more than four work periods of twelve hours on duty, followed by at least twenty-four to forty-eight hours off in order to recover from a sleep debt incurred.

D. Recovery Time

1. On a daily basis, individuals should be afforded the opportunity to obtain eight hours of sleep per twenty-four hour period:

Research suggests that individuals who do not obtain at least five hours of sleep per night in a seven day period show a gradual decline in their cognitive performance by as much as 12% on the average. Individuals obtaining less than three hours of sleep per night are likely to experience an even more severe reduction in performance. Recovery times of three days did not return study participants to baseline levels of performance. Most likely there would be greater deficits if attempts to sleep occurred during times inconsistent with circadian rhythms. Consequently, individuals should obtain as close to eight hours of sleep as possible each day. In order to obtain eight hours of sleep it may be

335. See generally Belenky et al., supra note 209, at 6-8.
336. See id. at 1.
337. Id. at 10.
338. See Rhodes et al., supra note 183, at viii.
339. See Belenky et al., supra note 209, at 1.
necessary to give individuals at least ten hours off between shifts. Furthermore, if the work assignment ends between 3:00 a.m. and 6:00 a.m., twelve hours off may be needed for recovery.

2. A minimum of two days off is recommended to recover from extended work schedules:

Until recently experts have suggested that at least two nights of at least eight hours sleep are needed to recover from sleep deprivation. However, investigations of the dose-response relationship between sleep and performance suggest that even three recovery days may not be sufficient to recover from the severe sleep restriction.\textsuperscript{340} If an individual has worked more than four consecutive twelve-hour shifts with only ten hours off between shifts, the likelihood is great that the person has accumulated a sleep debt.\textsuperscript{341} It is recommended that a person receive at least two days off to recover from their sleep debt. It may be necessary to mandate that the time-off be taken.

3. In order to recover from regular work shifts, there should be at least ten hours off between shifts in order to ensure eight hours of time in bed:

As discussed before, in order to fully recover and to function optimally it is necessary to have seven to eight hours sleep in every twenty-four hour period. Persons can function with less sleep but performance decreases as hours of wakefulness increases. While most evidence suggests that fragmented sleep results in performance decrements,\textsuperscript{342} there is still no conclusion as to whether continuous as opposed to total amounts of sleep are needed to maximize recovery. The current hours of service arrangements permit persons to have a two-hour call - effectively limiting sleep to six hours which, according to most studies, is a partial sleep restriction with subsequent reductions in performance.\textsuperscript{343} Rest periods should be sufficiently long to both provide recovery from long work hours and to prevent the buildup of accumulated sleep debt.

4. Persons who have worked several consecutive midnight shifts will require at least two days off and may need as much as twelve to sixteen hours off between shifts to recover:

Literature suggests that different shift patterns may result in greater performance decrements than others.\textsuperscript{344} In addition, consecutive midnight shifts are also found to have detrimental effects upon perform-

\textsuperscript{340} Balkin et al., supra note 195, at 5-8.; Belenky et al., supra note 209, at 10.
\textsuperscript{341} See generally Rosa & Colligan, supra note 110, at 305.
\textsuperscript{343} See generally Pilcher & Coplens, supra note 170, at 574-75.
\textsuperscript{344} See Rhodes et al., supra note 183, at vii-viii.
The ATC Group concluded that more than two consecutive midnight shifts have a detrimental cumulative impact on performance possibly due to the greater interference with circadian rhythms. The ATC Group indicated that fewer consecutive midnight shifts is better and that in the United Kingdom and New Zealand it is common practice to limit consecutive midnight shifts two or less.

5. At the away-from-home terminal lodging facilities, railroad employees should be permitted shorter recovery times in order to return to their home expeditiously:

In cases where a worker has not worked a full twelve hours and desires to return to the home terminal, there may be conditions in which an extended duty period might be advantageous to allow the person to return to the home terminal for rest and recovery. Efforts are encouraged to determine a combination of hours together with a short rest break to allow this outcome. For example, in some cases it is possible to reach the away-from-home terminal in fewer than eight hours. The operator would still have at least four hours of work time available. Consequently, the operator could work a total of twelve hours and be within acceptable limits. If the person is well-rested upon beginning the first tour, has had a work assignment that is not predominantly in the midnight hours, can take a two hour nap before getting underway, and can reasonably be expected to return to the home terminal in under eight or nine hours, it may be possible to work a total of sixteen hours in a twenty-four hour period. The Canadian Work/Rest Rules attempt to address this by allowing employees to “reset” the clock after a six-hour break. However, this may not be advisable if the reset period occurs during a circadian period when the person is likely to be awake. In such a case it may be advisable to have the person continue working. These situations call for close monitoring - a well-defined FMP would also be desirable.

IV. Conclusion

Railroad carrier companies should develop Comprehensive Fatigue Counter Measures Plans to holistically address and manage fatigue issues in their operations. Furthermore, the maximum number of on-duty hours should remain at twelve hours in a twenty-four hour period. The maximum number of hours at work (on duty and pre-release) should be limited to sixteen, and should include the amount of time preceding release with a minimum of twelve hours undisturbed rest immediately following.

345. See Mein, supra note 284, at 11.
346. Id.
347. Id. at 12.
348. See Transport Canada, Work/Rest Rules for Railway Operating Employees, at § 5.1.4.
It is further recommended that individuals be limited to a maximum number of four consecutive twelve-hour shifts in a 144-hour period. Consideration should be given to the practicality and likelihood of actually obtaining sleep, based on considerations of the circadian rhythms of the human body, during the time available. Individuals should be afforded the opportunity to obtain eight hours of sleep in every twenty-four hour period. A minimum of two days off is recommended to recover from extended work schedules. In order to recover from regular work shifts, there should be at least ten hours off between shifts in order to ensure eight hours of time in bed. Persons who have worked several consecutive midnight shifts will require at least two days off, and may need as many as twelve to sixteen hours off between shifts to recover. At the away-from-home lodging facilities, railroad employees should be permitted shorter recovery times in order to return to their homes.
Predicting the Conditional Viability of Build-Operate-Transfer Contracts for Transportation Facilities without Forecasting Revenues

Craig E. Roco*

I. Introduction

The growing cost of roadway construction and right-of-way acquisition, coupled with the political impracticalities of raising gasoline taxes, have inspired public agencies to implement nontraditional methods of financing transportation infrastructure.¹ At both the state and national level, public agencies are coming to accept public-private partnerships as a remedy to shortfalls in public funding for new projects.² However, establishing an equitable alliance between the public and private sectors for the delivery of infrastructure can be quite a challenge, and history suggests that the identification of truly viable public-private projects remains illusory.³ Perhaps of greater concern than the issue of an equitable partnership are the assumptions under which a privately-led transportation project has been validated, the transparency of the validation process.

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2. Id.
when relying on proprietary forecasting models, and the ethical and legal ramifications of contractual conditions required for project viability (e.g., eminent domain for private gain, subjecting the public to non-compete clauses, etc.).

Differences in public and private motives create significant obstacles to the efficient use of partnerships between these sectors, particularly with regard to the construction of large transportation facilities. The rational expectation for each sector to manage its own risk can in fact lead to actions that are adversarial to a successful partnership. For example, transportation agencies may solicit proposals for privately-led infrastructure projects intending to avoid the expenditure of public funds, a process that inadvertently encourages private firms to: a) minimize costs prior to the award of a contract, and b) maximize the chance of recovering these costs by submitting attractive proposals. Unfortunately for most stakeholders, these firms incur most of their risk through the cost of preparing proposals that might not be selected, so it is not uncommon for concessions to be awarded to construct and operate a transportation facility that never meets expectations. In the event that a private transportation project is unsuccessful and faces foreclosure, the sponsoring agency may either purchase the facility outright or broker its sale in order to preserve the operating functions of the system. Though assets such as track and right-of-way might be easily reclaimed from a failed rail project, roadways (toll roads) are less likely to be abandoned and will inevitably be sold at a significant loss to the original investors.

The potential for the developer – often a group of construction and financial companies – to be the only winner in a failed transportation venture presents a significant weakness to public-private partnerships. After all, these projects may largely be financed with debt instruments such as toll revenue bonds, whereby real project risks are passed along to investors unable to profit from construction of the facility. The sale of these bonds is frequently promoted based on revenue projections prepared with proprietary forecasting models by subcontractors to or members of the development team. Therefore, stakeholders whose primary interest is in the successful operation of a transportation facility (i.e., transportation agencies, bondholders, financial lending institutions, etc.) must often rely on feasibility studies prepared by companies that may benefit more from project implementation than from facility operations.

5. Fed. Highway Admin., Dep’t of Transp., supra note 1, at Ch. III. B. i.
6. Flyvbjerg, Bruzelius, & Rothengatter, supra note 3, at 45.
This paper has been prepared to highlight considerations for the implementation of privately financed transportation projects, and to provide stakeholders in these projects with the ability to assess the long-term viability of facility operations without needing access to proprietary forecasting models. The following sections establish the need for a simple, upfront method of assessing project viability, then develop this method using basic engineering economics concepts, and then demonstrate its application to some relevant projects in Texas.

II. PROJECT PARTICIPANTS VERSUS THE PROJECT

Public agencies have become encouraged by the prospect of concession financing, whereby a private partner is awarded a franchise for transportation infrastructure under a Build-Operate-Transfer (BOT) agreement. The award of a BOT contract usually requires competing consortiums – development teams comprised of construction/financial firms for example – to demonstrate the viability of their respective proposals through, among other things, the submission of cost estimates and revenue forecasts within a voluminous franchise application. The sponsoring public agency often prescribes particular conditions under which these proposals are to be assessed, such as project life, inflation rate, revenue growth rate, or even vehicle operating speeds. In effect, project viability is demonstrated to the agency by outlining an acceptable rate of return based on annual cost and revenue cash flows over the project’s life.

A. DIFFERENTIATING BETWEEN THE DEVELOPER AND THE PROJECT

Consortiums are usually assembled to pursue the award of a specific franchise, with the project development team comprised of construction/financial firms as founding stockholders. As a component of BOT franchise applications, the developer has usually created a new company to finance, build, and operate the project, with initial capitalization represented as founding shares owned by the developer in exchange for project development services such as producing cost estimates, travel forecasts, preliminary geometric designs, environmental studies, etc. In fact, de-

9. Id. at 36.
10. Ho, supra note 4, at 85.
11. Flyvbjerg, Bruzelius, & Rothengatter, supra note 3, at 93.
velopers of risky transportation projects have historically used ownership of the construction firms which serve as prime contractors to these projects as a means of insuring the profitability of these ventures\textsuperscript{13} – a perfectly legitimate arrangement. However, when reviewing proposals, the public sponsor tends to overlook the development team’s vested interest in the award of a franchise to their consortium. In particular, the sponsor often fails to consider that the financial risk of the development team in a BOT contract is limited to their equity investment (founding shares), which coincidently happens to insulate them from most risks associated with cost overruns or revenue shortfalls of the project.\textsuperscript{14} To illustrate, Figure 1 contrasts the cash inflows and cash outflows of the project to those of the developer.

**Figure 1. A Perspective on Project Cash Flows in BOT Projects.**

BOT franchise applications report project viability as a rate of return based on a multi-year forecast of cash inflows and cash outflows (Perspective 1 in Figure 1), which in large part consist of construction costs paid and toll revenues earned by the project.\textsuperscript{15} What is not reported, however, is the rate of return development team members receive based on their own equity investment and earnings from construction and fi-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See infra Part IV.
\item Klein, supra note 12.
\end{enumerate}
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nancing fees (Perspective 2 in Figure 1). The developer can begin earning fees in Perspective 2 early into the implementation phase and with reasonable certainty once the BOT contract is awarded and financing is arranged by the project’s corporation. On the other hand, investors in the project’s corporation in Perspective 1 are faced with large up-front expenses and uncertain toll revenues in later years, with the hope that their return on investment will sufficiently reflect the risk of this predicament. Public-private partnerships in large transportation projects are somewhat unique because the magnitude of fees earned by the development team are quite large relative to the team’s equity investment in the project, and thereby minimize the significance of devaluations in their founding shares in the event that cost estimates and revenue forecasts for the project were wrong.

Advantages of a BOT Contract

To understand the relevance of cash flows to the developer during the implementation of a transportation project, consider a hypothetical transportation project that costs $6.0 billion to build and five years to complete, and earns the development team net profits equal to five percent of project costs.

Figure 2. Rate of Return to the Development Team as a Function of Equity Investment in a Hypothetical Project.

Figure 2 plots the development team’s rate of return as a function of their equity investment (founding shares) in the project’s corporation. As

16. See infra Part IV.
Figure 2 shows, the developers of this hypothetical BOT project can earn high rates of return from fees by minimizing their own equity investment in the project, regardless of the financial performance of the transportation facility throughout its operating life. In other words, developers can earn attractive rates of return even if their founding shares in the project become worthless, though the size of this investment, as examples will show, often represents less than one percent of the total project cost. Thus, developers primarily expose themselves to risk by incurring the up-front expense of preparing franchise applications under the possibility of not being awarded the BOT contract, which may explain why the proposals are often based on unreliable information and overly optimistic financial projections.

B. INVESTMENT PERFORMANCE OF THE CHANNEL TUNNEL

The Federal Highway Administration (FHWA) recently pointed to the Channel Tunnel project between London and Paris as a project that exemplifies the emerging trend in public-private partnerships for transportation facilities in the U.S., and compared the project to plans in Texas for the privately-funded Trans Texas Corridor system.\textsuperscript{17} Unfortunately, while the Channel Tunnel is indeed a high profile example of financing large transportation facilities with private investment, the FHWA failed to note how those investments have performed over the life of the project.\textsuperscript{18} Figure 3 contrasts the original stock price of Eurotunnel – that is, the Channel Tunnel project’s corporation – to the price of shares from January 1998 to December 2005.\textsuperscript{19} The recent price of £0.18 per share is merely five percent of the original offer price of £3.50 per share, indicating that Eurotunnel has been a financial failure despite the project’s status as an engineering marvel.

\textit{Financing Eurotunnel}

The winning Channel Tunnel proposal (Eurotunnel) was prepared by a team of English and French developers, consisting of ten large construction companies and five banks, for the construction and operation of a 50-kilometer rail tunnel under the English Channel.\textsuperscript{20} British Prime Minis-

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\textsuperscript{18} See id.
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ter Margaret Thatcher would only approve of the project under the stipulation that financing would involve no government funds or government guarantees, making this project the largest privately financed transportation project in history. Following award of the concession in 1986, the development team established Eurotunnel as the corporation to operate as concessionaire, staffed with personnel coming from this same team. The consortium of ten construction companies then formed TransManche Link (TML) to serve as the design-build contractor to Eurotunnel.

**Figure 3. Share Price History of the Eurotunnel Corporation.**

TML and the team of five banks contributed £47 million to the project in September 1986 as the founding shareholder equity in Eurotunnel. However, this £47 million represented only 0.96 percent of the original £4.8 billion project cost (construction, financing, and other indirect costs) and, with a private placement of £206 million in October 1986 followed by subsequent public equity placements, the development team was quickly reduced minority shareholders. For such a large, privately financed project, it seems reasonable that sufficient detail would have been given to the construction cost estimate, yet the estimate stated in Eurotunnel's 1987 prospectus was based largely on conceptual designs.

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21. *Id.* at 46-47.
22. *Id.* at 48.
23. *Id.* at 47.
24. *Id.*
25. *Id.* at 48; Ho, *supra* note 4, at 137-38.
prepared by the English and French governments in the early 1970s. Eurotunnel’s co-chairman admitted after financing had been sold that no one had any idea in 1986-1987 what the project would cost, which apparently was true considering that the final project cost was roughly twice the cost presented in the prospectus. As operations began, investors who were confronted with the huge cost overrun then found that the revenue forecasts similarly lacked any accuracy, as the predicted first year revenue exceeded actual revenue by 151 percent.

C. Considerations for Stakeholder Risk Mitigation

Concessions for privately-led transportation facilities, such as the Channel Tunnel project, are often vastly underperforming investments. Flyvbjerg et al. note that some BOT contracts now require approval from the public partner before developers can sell their equity investment in a concession as a means of protecting the long-term operating interests of the project. However, the rates of return shown in Figure 2 were calculated by treating the developers’ equity investment as a sunk cost, or lost investment, indicating that constraints placed on the sale of equity may be immaterial when a development team earns high rates of return from construction and financial services. And while construction fees may buffer developers against risk, other stakeholders need a simple risk mitigation measure – particularly with regard to overly optimistic cost and revenue estimates.

Rationalization of a Simple Assessment Method

Flyvbjerg et al. report that, rather than cost estimates improving over time as a result of experience, underestimation in transportation projects today occurs as regularly and at the same order of magnitude as they have over the last seventy years. This and other findings led the authors to conclude that cost estimates used for decision making in transportation infrastructure development are systematically deceptive. With regard to revenue forecasting, Muller found the consistent and substantial overestimation of toll road revenues troubling and, similar to Flyvbjerg’s work, noted that there has been little improvement in the accuracy of

27. Id.; Ho, supra note 4, at 137.
28. Li & Wearing, supra note 19, at 10.
29. Flyvbjerg, Bruzelius, & Rothengatter, supra note 3, at 97.
31. Id. at 290.
traffic and revenue studies over time. Whether by a lack of diligence or through deception, evidence suggests that these errors will continue to prevail in BOT contracts.

Franchise applications for multi-billion dollar BOT projects usually require millions of dollars in up-front costs, which most stakeholders or potential investors cannot afford. Consequently, stakeholders usually base the investment potential of transportation facilities from cost and revenue estimates produced by the development team or their subcontractors, illustrated in Figure 4a. However, an alternative process can be used that transforms the project’s revenue cash flows from input parameters to a computed result. As Li and Wearing noted about the financial difficulties of Eurotunnel, the primary revenue uncertainties prior to the opening of a transportation facility consist of the initial traffic volume plus the traffic growth rates, whereas revenue uncertainty following the commencement of operations is essentially only a function of traffic growth rates. Also, past research on toll road feasibility studies found that the most successful revenue forecasts relied on growth rates of less than five percent per annum and did not assume periodic toll increases over the project life. In summary, these observations help define the most important parameters in revenue forecasts; namely, first year revenue is of prime importance, and revenue growth rates should be fairly constant and modest. Because first year revenue is the product of traffic volume and toll price, the first year traffic volume (or ridership) shown in Figure 4b can be expressed as first year revenue divided by a unit price (the toll price).

As an example, assume that a large capitalized corporation requires a rate of return of approximately fifteen percent, and that the historic cost of a project under consideration averages $12 million per mile. If the project length is thirty miles, then the fifteen percent return and the capital cost of $360 million can be used as illustrated in Figure 4b to assess project feasibility on the basis of the required first year traffic volume. This method eliminates the time and expense of preparing a ridership study and provides a quick measure of financial viability by comparing the required first year traffic volume to the traffic volume available for diversion to the new facility. Stakeholders may decide to pursue a transportation project further when the required first year traffic volume is no greater than some benchmark percentage of existing traffic — in the past, Bear, Stearns & Company has required that revenue projections for toll

33. Li & Wearing, supra note 19, at 14.
road projects be based on traffic volumes no greater than twenty-five percent of existing traffic. The effect of cost overruns might be examined by adjusting the original cost upward; a cost overrun of fifty percent would essentially inflate the required first year ridership by fifty percent. Of course, this simplistic approach omits operating and maintenance and, therefore, presents an optimistic scenario.

**Figure 4A. Typical Feasibility**

![Diagram](image)

**Project Feasibility**

**Figure 4B. Alternative**

![Diagram](image)

**Project Feasibility**

**Feasibility Analysis Method.**

**Analysis Method.**

**III. Avoiding Revenue Forecasts**

The Internal Rate of Return (IRR) is a widely accepted means of measuring corporate-sector investments, and can be determined by solving for the interest rate at which the present worth of cash inflows equals the present worth of cash outflows. This method of economic evaluation can be expressed as:

\[
\sum_{k=0}^{N} R_k(P/F,i_{IRR},k) = \sum_{k=0}^{N} E_k(P/F,i_{IRR},k)
\]  

(1)

Where  
- \( R_k \) = net revenue in year \( k \),  
- \( E_k \) = net expenditures in year \( k \),  
- \( N \) = project life  
- \( k \) = year in which revenues and expenses are realized,  
- \( i_{IRR} \) = internal rate of return.

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Each summation, or Net Present Value (NPV), of the cash flows in Equation 1 are determined by discounting revenues and expenditures to a beginning point in time \( k = 0 \), or the "present." The special case of discounting by a rate equal to the IRR yields the condition in Equation 1, where the NPV of revenues \( NPV_{IRR(rev)} \) equals the NPV of expenditures \( NPV_{IRR(exp)} \). This relationship can be stated more succinctly as:

\[ NPV_{IRR(rev)} = NPV_{IRR(exp)} \]  

(2)

A. INCORPORATION OF ENGINEERING ECONOMICS

A preliminary and simple assessment of privately financed transportation projects can begin by assuming that the initial capital investment is the only project expense. In doing so, the viability of the project is assessed under the most optimistic of circumstances, and the need to define operating and maintenance costs can be postponed until a more detailed assessment is justified. For example, operating and maintenance costs of passenger rail service are a function of the numbers of cars per train and trains per day required to serve a customer base, which are not easily predicted, though there is no need to establish these costs if the project is found to be infeasible without including them.

The methodology presented herein also redefines the beginning point in time (the present) as the year that revenue service begins, so passenger rail or toll road operations begin at \( k = 0 \) in the subsequent time-value equations. Using this time convention, \( k \) is negative in years that capital expenditures occur prior to the start of operations, a near certainty, leading to the general cash flow schedule depicted in Figure 5.

**Figure 5. Cash Flow Schedule with Time Beginning at Start of Operations.**

![Cash Flow Schedule Diagram](image)

For simplicity, Figure 5 represents a project scenario where all capital costs are incurred by the time operating revenues begin to accrue (i.e., at
\( k=0 \). However, the calculation of \( NPV_{IRR_{(exp)}} \) in Equation 3 accounts for capital expenditures in any time period ranging from \(-n\) through \(N\).

\[
NPV_{IRR_{(exp)}} = \sum_{k=-n}^{N} \frac{E_k(1+i_{int})^k}{(1+i_{IRR})^k}
\]  

(3)

Where

- \( n \) = number of years over which capital expenses are incurred leading to start-up,
- \( N \) = project operating life (beginning at \( k = 0 \)),
- \( E_k \) = net capital expenditures in year \( k \),
- \( i_{inf} \) = inflation rate (decimal),
- \( i_{IRR} \) = interest rate equal to the IRR (decimal).

The need to calculate \( NPV_{IRR_{(exp)}} \) using Equation 3 is usually not necessary since project capital costs are commonly reported in some base year or as the overnight cost (i.e., what the project would cost if it could be built overnight). Therefore, if the capital cost of a project is stated in a base year equal to the year that the facility opens, then \( NPV_{IRR_{(exp)}} \) simply equals this stated cost.

In the case that Equation 3 is used, yearly expenditures are discounted for inflation so that market interest rates can be used to define a reasonable \( i_{IRR} \). For example, investors expect risk-based assets to earn a return from three sources: compensation for the opportunity cost of not investing elsewhere, compensation for the lost purchasing power of dollars due to inflation, and compensation for the risk associated with the investment.\(^{37}\) Since market interest rates on government bonds consist of a risk-free rate and an inflation premium, a reasonable return on risk-based assets can be determined by adding a risk premium to a bond rate of appropriate maturity. An investment’s risk premium can be thought of simply as the difference between historic returns on common stock and government bonds (about 7.5 percent), times a risk factor (\( \beta \)) that adjusts this difference in historic returns for the specific risk condition.

Representing Multi-Year Revenues

Similar to capital expenditures, annual project revenues must also be discounted to the present to determine \( NPV_{IRR_{(rev)}} \), but with a unique time-value relationship that accounts for monetary growth over the operating life of the project. Engineering economics uses a geometric gradient series to relate the time value of cash flows that grow at a constant annual rate, which provides the necessary means of determining \( NPV_{IRR_{(rev)}} \) in the proposed methodology.\(^{38}\) This annual growth in revenue


\(^{38}\) See Sullivan, et al., supra note 36, at 106-07.
(g) will be due to an increase in sales of a unit revenue volume (s) and the inflation of sales prices \((i_{inf})\). Figure 6 diagrams the sequence of cash flows in a geometric gradient series having the following parameters:

\[
A_0 = \text{cash flow at the beginning of period 1 (i.e., at } k = 0),
\]

\[
g = \text{annual growth rate of } A_0, \text{ or } (1 + i_{inf})(1 + s) - 1,
\]

\[
i_{inf} = \text{inflation rate (decimal)},
\]

\[
s = \text{annual sales growth rate (decimal)},
\]

\[
N = \text{project operating life (beginning at } k = 0).
\]

Depending on the BOT contract, transfer of the facility to the public sector in year \(N\) may or may not include an exchange of cash. If this type of transaction will occur, a salvage value can be included in Equation 3 as a negative expense in year \(N\). However, the identification of a reasonable salvage value might be quite difficult, and will diminish in significance to the analysis as the required interest rate and the project operating life becomes larger.

**Figure 6. Graphic Form of a Geometric Gradient Series.**

The sum of end-of-period cash flows in Figure 6 \((k = 1 \text{ through } k = N)\) gives the NPV at the beginning of period 1 \((k = 0)\) when discounted at a specific interest rate and growth rate.\(^{39}\) When applied to the method presented herein, this NPV gives \(NPV_{IRR(\text{rev})}\) when using the IRR as the interest rate, as shown in Equation 4.\(^{40}\)

\[
NPV_{IRR(\text{rev})} = \sum_{k=1}^{N} A_k(1+i_{IRR})^{-k} = \sum_{k=1}^{N} A_1(1+g)^{k-1}(1+i_{IRR})^{-k}
\]

\(^{39}\) Id. at 107.

\(^{40}\) Id.
Equation 4 can be reduced to a more convenient form:\(^{41}\)

\[
NPV_{\text{IRR(rew)}} = \frac{A_1}{1+g} \left( P/A, i_{CR}\%, N \right)
\]  

(5)

Where the convenience rate \((i_{CR})\) is defined in Equation 6 and \((P/A, i_{CR}\%, N)\) is simply the uniform series present worth factor.\(^{42}\)

\[
i_{CR} = \frac{i_{IRR}-g}{1+g}
\]  

(6)

B. Assessing Project Viability

The previous developments can be used to determine either the required first year revenue or the required first year traffic volume. In order to determine the required first year revenue, combining Equations 2 and 5, and solving for the first year cash flow \((A_1)\) gives:

\[
A_1 = \frac{(1+g)NPV_{\text{IRR(rew)}}}{(P/A,i_{CR}\%,N)}
\]  

(7)

Equation 7 provides stakeholders a simple means of assessing privately financed transportation projects, where \(A_1\) represents the required first year revenue that is necessary to provide the IRR at an assumed capital cost, rate of inflation, annual sales growth rate, and project life. The financial viability of a transportation project can be determined by comparing this revenue to cash flows that can be reasonably expected during the first year of a facility’s operation (see Evaluation of Selected Projects – Case 3).

In order to determine the required first year traffic volume, Equation 7 can be further extended by considering that annual revenues from transportation projects such as high-speed rail or toll roads are the product of traffic volume times the fare or toll price. Equation 8 expresses \(A_1\) in terms of these volume-price measures, and assumes that units are consistent – that is, when traffic volume \((V_{T1})\) is expressed in vehicle-miles, the toll price \((P_V)\) must be expressed in $/vehicle-mile; and when traffic volume measures the number of passengers, the fare price must be in $/passenger.

\[
A_1 = V_{T1}P_V
\]  

(8)

Where \(V_{T1}\) = volume of traffic in year 1 (i.e. passengers, vehicle-miles),

\(P_V\) = price per unit volume ($/passenger, $/vehicle-mile, etc.)

Combining Equation 7 with Equation 8 allows for the required first

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41. Id. at 108.
42. Id. at 107.
year traffic volume to be determined for a specific project scenario. Equation 9 solves for $V_{T1}$, giving a mathematical relationship that determines the first-year traffic volume necessary to provide the IRR at an assumed capital cost, rate of inflation, annual sales growth rate, and project life.

$$V_{T1} = \frac{(1+g)NPV_{IRR(exp)}}{(P/A,icr\%,N)}P_V$$  \hspace{1cm} (9)

Similar to the use of Equation 7, the financial viability of a transportation project can be determined using Equation 9 by comparing the required first year traffic volume to the current volume of traffic in the transportation corridor (see Evaluation of Selected Projects – Case 1 and 2). If the required traffic volume is a modest percentage of existing traffic, then the study should progress to a more detailed level of analysis. Otherwise, it may be worthwhile for stakeholders to spend their scarce resources redefining the project scope, or on pursuing other projects altogether. In summary, either Equation 7 or 9 can be used to provide transportation agencies, private investors, and lending institutions a simple assessment method that avoids the need to rely on proprietary forecasting models, and instead bases the assessment of financial viability on current (i.e., proven) transportation data.

IV. EVALUATION OF SELECTED PROJECTS

Travel patterns between cities are fairly predictable due to a limited number of corridor options, whereas urban travel usually presents multiple route options. Therefore, intercity transportation projects may offer the most reliable application of the proposed assessment method given that existing corridor traffic is used to evaluate project viability. Three examples of how this method can be applied to evaluate the financial viability of BOT contracts are described below.


Serious consideration of high-speed rail in Texas began when a German consortium’s 1985 proposal for high-speed rail between Houston and Dallas/Fort Worth was revised and submitted to the 70th Texas Legislature in 1987.\(^{43}\) The legislature acted on the unsolicited proposal by sponsoring a study on the feasibility of operating high-speed rail within the Houston-San Antonio-Dallas/Fort Worth corridors.\(^ {44}\) This study con-


\(^{44}\) Lichliter/Jameson & Associates, Inc., et al., Texas Triangle High Speed Rail Executive Summary 2 (Texas Turnpike Authority 1989).
cluded two years later with a recommendation that high-speed rail was in fact a public need,\textsuperscript{45} prompting the state to create the Texas High Speed Rail Authority (THSRA) through legislation known as the Texas High Speed Rail Act,\textsuperscript{46} wherein the THSRA was authorized to pursue privately-financed high-speed rail projects capable of operating in excess of 150-mph.\textsuperscript{47} The time and expense of these efforts resulted in the state awarding a high-speed rail franchise to Texas TGV Corporation in 1992, which by 1994 had negotiated the termination of its franchise due to a lack of financing.\textsuperscript{48} After almost a full decade of pursuing the development of high-speed rail in Texas, the state concluded its efforts in 1994 with new legislation that abolished the THSRA and repealed the Texas High Speed Rail Act.\textsuperscript{49}

\textit{Project Development}

Proposals for a high-speed rail system in Texas were solicited by the THSRA in August 1990, resulting in the receipt of two franchise applications by the January 1991 deadline, and finalized by a contract with Texas TGV Corporation in January 1992.\textsuperscript{50} Texas TGV, originally known as the Texas High Speed Rail Corporation, was a project corporation created by a development team led by Morrison Knudsen Corporation, a large construction firm based in Boise, Idaho.\textsuperscript{51} Advisors to the THSRA Board of Directors had found that neither franchise application complied with the Request for Proposals (i.e., a complete financing plan, support of ridership estimates, and the avoidance of public funding);\textsuperscript{52} though the Texas TGV proposal was apparently selected when Morrison Knudsen abruptly committed to a project completely financed by the private sector.\textsuperscript{53}

The initial Texas TGV proposal called for the design, construction, and operation of a 180-mph high-speed rail network, illustrated in Figure 7.\textsuperscript{54} The 256-mile Houston-Dallas segment was to be completed and operable by 1998 at an estimated cost of $2.5 billion in fourth quarter 1990 dollars.\textsuperscript{55} The development team showed that Texas TGV would

\begin{thebibliography}{99}
\bibitem{}\textit{Id.} at 16.
\bibitem{}\textit{Id.}
\bibitem{}\textit{Id.} at 63.
\bibitem{}\textit{Id.} at 18, 19, 24.
\bibitem{}\textit{S.G. Warburg Securities, Preliminary Offering Circular: Texas TGV Corporation, $200,000,000 3\% Convertible Equity Notes due 2000 F-8 (Nov. 29, 1993).}
\bibitem{}Burns, supra note 48, at 21 n.69.
\bibitem{}\textit{S.G. Warburg Securities, supra} note 51, at F-8.
\bibitem{}\textit{Id.}, at 30.
\bibitem{}\textit{Texas TGV Corporation, Franchise Application to Construct, Operate, Maintain and Finance a High-Speed Rail Facility Volume III 8-4} (1991).
\end{thebibliography}
Figure 7. Original Texas TGV Proposal for a High-Speed Rail Network.

Texas

Louisiana

Dallas/Fort Worth

Waco

Austin

San Antonio

Houston

Beaumont/Port Arthur

Laredo

earn a return of sixteen percent, based on a twenty-year ridership forecast with average fares of $40-42 per trip and a large revenue annuity in the remaining twenty years.

The development team made two noteworthy modifications to Texas TGV’s original proposal following the award of a franchise: the network shown in Figure 7 was shortened to require the construction of fewer track miles, and the financing plan outlined in Texas TGV’s 1993 public offering was modified to call for the public sector to finance twenty-five percent of the project.

The final form of Texas TGV’s financing plan was presented in their preliminary public offering (November 1993), which made available $200 million in three-percent convertible equity notes. By that time $30 million in founding shares were held by the development team as compensation for initial design and engineering studies, preparation of the Environmental Impact Statement, and general corporate development costs – these shares, representing Phase I of the financing plan, repres-

56. Id., at 9-3.
57. S.G. Warburg Securities, supra note 51, at 32.
59. S.G. Warburg Securities, supra note 51, at 34.
60. Burns, supra note 48, at 32-33; S.G. Warburg Securities, supra note 51, at 1-2.
sented 0.46 percent of the project’s $6.5 billion cost.\textsuperscript{61} Subsequent phases of the financing plan included: Phase II, sale of the $200 million in 3% convertible equity notes; Phase III, an initial public offering of Class A Common Stock expected in 1996; and Phase IV, public market debt issues from public sector transportation programs beginning in 1996.\textsuperscript{62}

Perhaps the most transparent element of Texas TGV’s original franchise application was the adequacy of a 16 percent return considering the risks inherent in this type of project. The long-term interest rate on government bonds in the early 1990s was approximately 7.5 percent.\textsuperscript{63} Therefore, the expected return would have been:

\[
\text{Return} = \text{government bond rate} + \beta(\text{average risk}) = 7.5\% + \beta(7.5\%) = 16\%
\]

So, the risk factor ($\beta$) would have been considered to be:

\[
\beta = \frac{(16\% - 7.5\%)}{7.5\%} = 1.13
\]

A risk factor of 1.13 suggests that the high-speed rail project was being promoted as less risky than security investments in the computer ($\beta = 1.18$) or banking ($\beta = 1.25$) industries.\textsuperscript{64} While it may be hard to believe Texas TGV’s claim that a sixteen percent return was sufficient for a start-up project of this scope and level of risk, the IRR remains an important standard by which corporate projects are to be judged nonetheless. However, the IRR was a relatively straightforward and predictable condition for project viability but was used as a validation measure rather than as a principal component of the analysis. Whatever a suitable threshold rate of return rate might have been, it could have been used as the IRR in Equation 9 to provide a quick assessment of project viability in lieu of a prolonged and questionable ridership forecasting processes.

\textit{Retrospective Assessment of Project Viability}

The data and assumptions from Texas TGV’s proposed Houston-Dallas corridor can be used retrospectively to demonstrate how to use the proposed assessment method. To begin, assume that the THSRA undertook its own feasibility analysis in January 1991, five months prior to the award of a franchise to Texas TGV. Furthermore, assume that, like Texas TGV, THSRA had assumed the following conditions:

Capital cost = $2.5 billion (fourth quarter 1990 dollars),

\textsuperscript{61} S.G. Warburg Securities, supra note 51, at 33-34.
\textsuperscript{62} Id. at 34.

\[ i_{inf} = 4.0\%, \]
\[ s = 2.8\%, \]
\[ i_{IRR} = 16.0\%, \]
\[ N = 40 \text{ years}. \]

Given these assumptions, the annual growth rate of revenues is:

\[ g = (1+i_{inf})(1+s)-1 = (1+0.040)(1+0.028) = 0.06912 \]

And the convenience rate is:

\[ i_{CR} = \frac{i-g}{1+g} = \frac{0.16-0.06912}{1+0.06912} = 0.08500 \]

Also, the uniform series present worth factor is:

\[ (P/A,i_{CR}\% ,N) = \left[ \frac{(1+i_{CR})^N-1}{i_{CR}(1+i_{CR})^N} \right] = \left[ \frac{(1+0.085)^{40}-1}{0.085(1+0.085)^{40}} \right] = 11.314 \]

The THSRA could have determined the feasibility of this scenario by assuming in January 1991 that the Houston-Dallas high-speed rail corridor was already in place and ready to start operations in that year. By establishing January 1991 as \( k = 0 \), and since end-of-year 1990 is the same as beginning-of-year 1991, the present value of the capital cost is \$2.5\ billion. Therefore, the information above gives \( V_{T1} \) in Equation 9 as follows:

\[ V_{T1} = \frac{(1+g)NPV_{IRR(\text{exp})}}{(P/A,i_{CR}\% ,N)P_{V1}} = \frac{(1+0.06912)(2.50\times10^9)}{(11.314)(42.0)} = 5.63\times10^6 \]

At a fare of \$42 per trip, the THSRA could have immediately predicted the ridership required at end-of-year 1991 (\( V_{T1} \)) to be 5.63 million passengers. The solid line in Figure 8 is a plot of required ridership using the proposed methodology, beginning at \( V_{T1} \) and growing at a rate of 2.8 percent annually. The data points in Figure 8 are plots of Texas TGV's 20-year ridership forecast, showing the first year of steady state growth to be 6.10 million riders. The essential parameter in assessing the project subsequent to the calculations above is the first year ridership (\( V_{T1} \)), rather than the annual ridership projections. In this simplified approach, the magnitude of \( V_{T1} \) relative to existing travel statistics should provide an early indication of whether a project might be viable. In the case of Texas TGV, the results in Figure 8 demonstrate how the THSRA could have quickly predicted the magnitude of required ridership far in advance of receiving proposals for a high-speed rail system.

After calculating \( V_{T1} \), the THSRA could have compared the result to the traffic available in corridors from which the high-speed rail line could
generate revenue. For example, historic records from permanent Texas Department of Transportation (TxDOT) counting stations indicate that there were 3.950 million intercity automobile (person) trips between Houston and DFW in 1990, and records from the American Airlines Decision Technologies ten-percent origin-destination sample database indicate that 2.316 million intercity air trips were made between Houston and Dallas-Fort Worth in 1990.65

**Figure 8. Ridership Forecasts for Texas TGV's Houston-Dallas Corridor.**

Therefore, total trips in this corridor equaled approximately 5.906 million passengers and, by comparing this number to the $V_T$ of 5.63 million, the THSRA could have concluded up front that it would take approximately ninety-five percent of existing 1990 automobile plus air traffic, growing at 2.8 percent annually, in order to earn a return of sixteen percent. Of course, this conclusion would have been based on the assumption that Texas TGV's capital cost estimate of $2.5 billion was correct.

**Consideration of Financial Risk**

The proposed assessment method can also be used to evaluate the sensitivity of cost overruns on project viability. For example, even though Texas TGV stated their cost for the Houston-Dallas corridor as $2.5 billion, or $9.77 million per mile, the Transportation Research Board (TRB) released a study on high-speed rail at the same time that estimated the

65. CHARLES RIVER ASSOC. INC., supra note 58, at 2-16, 2-20.
cost of 180-mph technology at $16.44-17.76 million per mile. Figure 9 contrasts the effect of Texas TGV's and TRB's cost estimate using Equation 9 to plot required first year ridership over a range of fares. Based on TRB’s estimate, almost ten million passengers would have been needed in the first year at Texas TGV’s anticipated $42 fare, making a sixteen percent return unthinkable.

![Figure 9. Sensitivity of Required First Year Ridership Volume to Capital Cost and Fare Price for Texas TGV's Houston-Dallas High-Speed Rail Corridor.](image)

Re-examination of High-Speed Rail Policy

The Texas High-Speed Rail Act of 1989 defined high-speed rail as technology capable of operating at speeds in excess of 150 mph, which prevented franchise applicants from performing a thorough economic assessment of all available technologies (i.e., operating speeds). Figure 10 includes plots of $V_{T1}$ versus $P_v$ for lower-speed systems using TRB estimates as the basis for $NPV_{IRR(exp)}$ and holding all other Texas TGV assumptions constant. According to the results in Figure 10, a 110-mph high-speed rail system might have been financially viable if in-route times were acceptable to passengers, and had the Texas High Speed Rail Act allowed more flexibility in the types of technology that could have been considered. If the public sector had funded up to, say, fifty percent of the

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project, then the first year ridership requirements in Figure 10 would have been reduced by fifty percent, and then even 125 or 150-mph technology might have been worthy of further consideration.

Figure 10. Required First Year Ridership Volumes for Texas TGV’s Houston-Dallas Corridor at Specific Operating Speeds.

Case 2: Trans-Texas Corridor’s TTC-35 (2005-present)

The Trans Texas Corridor is a noteworthy plan by TxDOT to construct a new 4000-mile roadway network by awarding concessions to private companies, whereby these companies would raise financial capital through private markets and compensate investors via a return from operating revenues. A comprehensive development agreement was signed in March 2005 for a private consortium to develop TTC-35, the first element of the Trans-Texas Corridor, extending from Oklahoma to Mexico along a route parallel to Interstate 35. The first phase of TTC-35 consists of $7.2 billion in private investment for the construction of a toll road from San Antonio to Dallas in exchange for the right to operate the toll facility over a fifty-year period.

70. Id.
Assessment of Financial Viability

The basic terms of the TTC-35 agreement can be used in the proposed assessment method to determine the conditions for the financial viability of this project; and more importantly, to predict whether public funding might be needed to sustain operations at the facility. To begin, assume that the San Antonio-Dallas toll road has just been completed \((k = 0)\) at a cost of $7.2 billion \(-\) a capital cost of $6.0 billion plus a $1.2 billion concession payment to the state \(-\) and will start earning toll revenue immediately. Then, with long-term U.S. Treasury rates now averaging five percent, and assuming a very moderate risk factor of 1.6 for this type of project, a reasonable rate of return would be:

\[
\text{Return} = \text{government bond rate} + \beta(\text{average risk}) = 5.0\% + 1.6(7.5\%) = 17\%
\]

If inflation remains fairly constant at 2.5 percent per year and vehicle traffic grows at 2.0 percent per year over the 50-year period, a simple assessment of this project can then be made under the following conditions:

\[
\begin{align*}
\text{Capital cost} & = \$7.2 \text{ billion}, \\
i_{inf} & = 2.5\%, \\
s & = 2.0\%, \\
i_{IRR} & = 17.0\%, \\
N & = 50 \text{ years}.
\end{align*}
\]

These assumptions result in the following parameters in Equation 7:

\[
\begin{align*}
g & = 0.0455 \\
i_{CR} & = 0.1191 \\
(P / A, i_{CR}%, N) & = 8.367 \\
A_1 & = \$0.899 \text{ billion}
\end{align*}
\]

For purposes of illustration, the first-year traffic requirement within TTC-35 can be evaluated using a seventy-nine mile San Antonio-Austin segment \((V_T^{1SA-Aus})\) and a 192-mile Austin-Dallas segment \((V_T^{1Aus-Dal})\). While smaller increments of distance could be used (e.g., San Antonio-New Braunfels, New Braunfels-San Marcos, etc.), localized increases in traffic, perhaps due to land development along the toll road, provide a proportionally smaller revenue base for facilities of greater total length. In this particular example, the moderate influence of increased localized revenues on financial viability might be judicious since tolls from these trips will accrue over shorter distances even though project costs will be incurred for the entire 271-mile road. Also, Interstate 35 provides a much more direct and inexpensive route between nearby towns than TTC-35, which is planned to bypass most existing urban areas.

Toll revenues will likely accumulate in a proportion similar to the mix of vehicles on Interstate 35, which should consist of about thirty per-
cent trucks and seventy percent cars. Muller observed that accurate revenue forecasts were made for toll roads that opened between 1986 and 1995 when toll prices less than 8 cents per mile were assumed, equaling about ten to fourteen cents per mile in 2005 dollars. However, an assessment of the project can be made using relatively optimistic toll prices of fifteen cents per mile for cars and forty-eight cents per mile for trucks. The relationship expressed in Equation 8 can be used to convert the required first year revenue of $0.899 billion into required first year traffic volumes on the San Antonio-Austin and Austin-Dallas segments as follows:

\[ A_1 = d_{SA-Aus} V_{TISA-Aus}(\%_t P_t + \%_c P_c) + d_{Aus-Dal} V_{TIAus-Dal}(\%_t P_t + \%_c P_c) \]

Where
- \%_t = percent trucks
- \%_c = percent cars
- \( P_t \) = truck toll price ($)
- \( P_c \) = car toll price ($)
- \( d_{SA-Aus} \) = distance between San Antonio and Austin (miles)
- \( d_{Aus-Dal} \) = distance between Austin and Dallas (miles)

Substituting known values into the parameters above allows \( A_1 \) to be expressed as:

\[ A_1 = (79)[(0.3)(0.48)+(0.7)(0.15)] V_{TISA-Aus} + (192) [(0.3)(0.48)+(0.7)(0.15)] V_{TIAus-Dal} \]

Since \( A_1 = 0.889 \) billion, the equation above becomes:

\[ 19.67 V_{TISA-Aus} + 47.81 V_{TIAus-Dal} = 8.899 \times 10^8 \]

This expression plots as a linear relationship between the required first year San Antonio-Austin traffic and the required first year Austin-Dallas traffic, as shown in Figure 11, where \( V_{TISA-Aus} \) and \( V_{TIAus-Dal} \) are expressed as daily traffic volumes. Based on the simplifying assumptions in this example, the result indicates that if 50,000 daily trips (i.e., the mix of trucks and cars) are made on the toll road between San Antonio and Austin in the first year, then 30,983 daily trips will need to be made on the toll road between Austin and Dallas in the first year for investors to earn a seventeen percent return. While an analysis involving shorter distance increments can be made and presented in tabular form (see Case 3), the plot in Figure 11 demonstrates how the proposed assessment method can provide a means of predicting the viability of intercity toll roads using a limited amount of time, expense, and information.

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71. Muller, supra note 34, at 2.
The TTC-35 project has faced considerable resistance from rural land owners who fear the loss of their property to the acquisition of necessary right-of-way through Central Texas.\textsuperscript{72} Also, many communities that rely on business from Interstate 35 traffic want TTC-35 to follow the existing highway as closely as possible, fearing that the new toll road would otherwise create several ghost towns.\textsuperscript{73} State officials have offered assurance to these small-town communities by suggesting that no more than fifteen percent of Interstate 35 traffic will divert to TTC-35.\textsuperscript{74} So, issues to study regarding the TTC-35 project include:

- The existing volume of intercity traffic on Interstate 35
- Whether sufficient revenue would be generated from approximately fifteen percent of interstate traffic to produce a financially viable project
- How the close proximity of a non-tolled interstate parallel to TTC-35 might lessen revenues from the toll road
- How the location of TTC-35 further from Interstate 35, where right-of-way is less expensive, might discourage motorists destined for towns along the existing interstate from using the toll road.

CASE 3: TEXAS T-BONE HIGH-SPEED RAIL (PROPOSED)

The Texas High Speed Rail and Transportation Corporation


\textsuperscript{74} Id.
(THSRTC) received a Certificate of Incorporation on October 31, 2002, established to promote and assist in linking the major population centers of Texas. With support from the THSRTC, TxDOT submitted a request to the U.S. Department of Transportation the following year to extend the South Central High Speed Rail Corridor, with San Antonio-Dallas/Fort Worth as the main corridor, to include a segment connecting Temple, Bryan/College Station, and Houston. Essentially, this extension matches the THSRTC's proposed alignment for a two-corridor high-speed rail system named the "Texas T-Bone," similar to that shown in Figure 12.

Equation 7 can be used to perform a quick financial assessment of the proposed Texas T-Bone system by comparing the first year cash flow \( A_i \) of a successful private high-speed rail venture (i.e., one that produces an acceptable rate of return) to the first year cash flow from the diversion of an assumed percentage of existing passenger travel to the high-speed rail network.

**Figure 12. Routes and Distances for a Two-Corridor High-Speed Rail System in Texas.**

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75. Office of the Sec'y of State, State of Tex., Filing No. 800139626, Certificate of Incorporation of Texas High Speed Rail and Transportation Corporation (Oct. 31, 2002).


As an example, assume that the Texas T-Bone will operate at a maximum speed of 150 mph, and will be built at a cost $18 million per mile. Furthermore, assume that forty percent of the project will be funded by the public sector, resulting in a cost of $4.882 billion to the private sector for the 452-mile rail system (see Figure 12 for mileage). Assuming the same rates of inflation, revenue growth, and financial return as in Case 2, the parameters needed to evaluate the project over a twenty year life are as follows:

Capital cost = $4.882 billion,

\[ i_{inf} = 2.5\% \]

\[ s = 2.0\% \]

\[ i_{IRR} = 17.0\% \]

\[ N = 20 \text{ years} \]

These assumptions result in the following parameters in Equation 7:

\[ g = 0.0455 \]

\[ i_{CR} = 0.1191 \]

\[ (P / A, i_{CR} \%, N) = 7.513 \]

\[ A_1 = \$0.7272 \text{ billion} \]

The results from Equation 7 indicate that the rail system needs to earn revenue of $727 million in the first year of operation for a seventeen percent return. A rough estimate of the rail system’s capacity to earn $727 million in the first year can be obtained by preparing a spreadsheet containing all origin-destination city pairs like those shown in Table 1. In this example, a route factor is used to adjust a baseline fare of twenty-six cents per mile to reflect a competitive pricing strategy. For example, direct routes between major urban centers might be capable of diverting twenty-five percent more passengers from existing travel modes than will be achieved from travel between smaller cities. Also, instances where high-speed rail travel between urban centers involves an indirect route (e.g., Houston-Austin or Houston-San Antonio) might only be capable of diverting seventy-five to ninety percent of the passengers that will switch travel modes on direct routes. In each of these cases the high-speed rail ridership has been adjusted using the route factor. Table 1 uses projected 2005 auto and air travel volumes as the volume of travelers capable of diverting to high-speed rail; in this table, ridership is based on a traveler diversion scenario of thirty percent.78

Based on the assumptions used in Table 1, diverting thirty percent of available travelers would earn revenue of $738 million in year 1, which happens to be greater than the $727 million in revenue required to earn a seventeen percent return. Figure 13 shows how this approach can be ex-

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78. CHARLES RIVER ASSOC. INC., supra note 58, at 2-16, 2-20.
tended to observe the relationship between diversion rate and project viability by plotting actual-to-required first year revenue (e.g., $738 million / $727 million at a diversion of thirty percent) versus diversion rate. An actual-to-required revenue ratio less than 1.0 in Figure 13 produces a rate of return less than 17 percent. Since the actual-to-required revenue ratio at a diversion rate of thirty percent happens to be 1.02, then approximately thirty percent of travelers in the proposed high-speed rail corridor would in fact be needed to meet the financial objectives in this example.

A primary value of the proposed methodology is to help stakeholders avoid the time and expense of pursuing ideas that stand little chance of financial success. In the example above, basing the long-term viability of privately operated high-speed rail on diversion rates of at least thirty percent may be quite a risk – that is, a risk to investors in the project corporation and to the public sponsor who finances $3.254 billion of the project cost. On the other hand, the development team on the high-speed rail project would likely earn large fees from the construction of an $8.136 billion facility.

**Figure 13. Actual-to-Required First Year Cash Flow Using Various Traveler Diversion Scenarios for the T-Bone High-Speed Concept.**

V. Discussion of Results

Public agencies consider BOT contracts as a means of avoiding the risks and expense of implementing new types of transportation facilities such as high-speed rail or long-distance toll road projects; what is less apparent are the risk mitigation strategies available to their private partners. Consequently, most of the financial risk in these projects, if imple-
mented, is likely to be borne by stakeholders with the least information. This does not preclude, however, the public sector from incurring risks other than financial loss. For example, state officials in Texas foresaw high-speed rail as a long-term solution to congested corridors and the need for additional highway construction, yet the conditions under which proposals from the private sector were sought increased the likelihood that the concept would ultimately fail. If an up-front assessment method had been used to evaluate the prospects for high-speed rail, the state could have identified conditions for viability such as economic train speed technologies, the need for public financial support, and the effect of construction cost overruns on the required volume of first year traffic.

With the expectation that infeasible BOT agreements will continue to be negotiated between the public and private sectors, an up-front assessment of project viability can serve to alert third-party stakeholders (i.e., motorists, land owners, investors) in transportation projects of the need for agencies to concede special contractual provisions to project corporations as risk mitigation measures. For example, Orange County, California, entered into a contract with the California Private Transportation Company, L.P, (CPTC) for the 91 Toll Road, a ten mile toll road that opened in December 1995. This agreement prevented improvements or planning for improvements of the Riverside Freeway, which paralleled the 91 Toll Road, in order to insure that sufficient volumes of traffic would use the CPTC's facility. Although, Orange County purchased the toll road in 2002 so that necessary improvements to the Riverside Freeway could be made without violating the non-compete clause. Other conditions for the financial viability of a transportation facility to the project corporation might involve restrictions on certain vehicle types, such as the requirement that trucks use a toll facility, or grants of land development rights to the private sector along right-of-way acquired for the project – these issues certainly justify a thorough and transparent review process at an early stage of project development.

VI. Conclusions

As far back as the pursuit of our country's first transcontinental railroad, developers of public-private transportation facilities have used ownership of the construction companies contracted to build their projects as a means of protecting themselves against the financial risks inherent in these ventures. Whereas owners of the Union Pacific Railroad franchise

80. Id.
created a construction company (Credit Mobilier of America) that would earn substantial and reliable profits from a project faced with uncertain future cash flows, today's public-private contracts are characterized by well-established construction companies pursuing risky ventures. Unfortunately, modern history has shown that the sophisticated forecasting models used by developers may not provide other stakeholders in BOT projects with sufficient information to make wise investment decisions. With that in mind, this paper has sought to demonstrate that the time, expense, and accuracy of assessing project viability might be improved by opting for a more simple and transparent method. This paper is also intended to show stakeholders how the selection of a suitable rate of return can be integrated into a simple assessment method that allows for BOT proposals to be assessed in a short period of time, using a limited amount of information, and involving little expense. As a result, transportation planners or passive investors can prepare an unbiased assessment of project viability by determining the level of traffic required to sustain a private enterprise rather than await a prediction on the level of traffic expected to support its operation.

82. Klein, supra note 12.
<table>
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Year 1 Total Revenue 738
Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC’s Penal Approach*

Dr. Iliana Christodoulou-Varotsit†

I. INTRODUCTION

One of the first indications of the intention of the European Community (EC) to extend its legislation over the ship-source pollution regime was implied by the European Commission’s proposal to inaugurate a European Pollution Damage Compensation Fund, under the name of COPE.¹ The initiative met serious obstacles to its endorsement by the

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* Based on a lecture delivered at the IMO International Maritime Law Institute (Malta) on February 17, 2006. The views expressed in the article reflect the author’s personal opinions.
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Member States and ultimately did not progress. However, there have been other developments at the EC level creating synergies with the international regime of ship-source pollution. In this context, recent EC developments on ship-source pollution do not fail to raise a number of issues especially with regard to international maritime law. For instance, is EC action that provides for criminal sanctions in the event of ship-source pollution antithetical to international norms? And up to what point does the EC action conform to EC law?

This essay focuses on a number of EC decisions that affect ship-source pollution, such as (1) EC Directive 2005/35/EC of the European Parliament and Council of September 7, 2005 concerning ship-source pollution and the introduction of penalties for infringements; and (2) EU Council Framework Decision 2005/667/JHA of July 12, 2005 on the strengthening of the criminal Framework Decision for the enforcement of the law against ship-source pollution. In light of these efforts, the essay examines and evaluates the EC contribution to the existing regime on ship-source pollution.

II. THE EUROPEAN UNION CONTEXT

It is well known that maritime casualties act as catalysts for the creation of international and regional legislation. For instance, the Titanic
provoked the first International Safety Congress, which led to the first SOLAS Convention, and the Amoco Cadiz resulted in the STCW Convention in 1978. The Oil Pollution, Preparedness, Response and Cooperation Convention (OPRC) (1990) and the U.S. Oil Pollution Act (1990) were adopted in the aftermath of the Exxon Valdez oil spill, and the Torrey Canyon led to the Convention on Intervention on the High Seas and to the Convention on Civil Liability for Oil Pollution in 1969. In more recent years, Erika and Prestige had a major impact on the EC legislature and resulted in the so-called “Erika I,” “Erika II,” and “Erika III” packages.


10. Gold, supra note 7, at 32.


The EC legislator’s sphere of interest and competence in the maritime field revolve mainly around maritime safety and competition. The EC followed a long path in order to come up with today’s common shipping policies in these areas as well as in the field of marine environmental protection. The very first EC maritime-oriented acts, which incidentally prove how long it took for the EC to develop maritime legislation, were the 1978 Council Recommendation of June 26, 1978 on the ratification of Conventions on Safety in Shipping, the 1993 Communication on Safe Seas and the “Erika I” legislative packages of 2001.

From a technical point of view, EC maritime law and policy are structured over the supranational competence area which is known as the first pillar and more precisely on the basis of Articles 80(2) and

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21. See infra note 15.


23. Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C 325) 33, 64 (EC) [hereinafter “EC Treaty”] (This provision refers to the exclusion of maritime (and air transport) from Title V of the EC Treaty on Transport). The Council of Ministers of Transport “may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.” See id. art. 64.
71(1)(c)\textsuperscript{24} of the EC Treaty. The so-called third pillar, which basically consists of intergovernmental nature, has been used only once in the maritime sphere—in the case of the above mentioned Framework Decision 2005/667/JHA.\textsuperscript{25} The dynamic contribution of the European Court of Justice (ECJ) to the elaboration of “common shipping policy” is also to be noted.\textsuperscript{26}

Even though EC competence over maritime issues is growing, the EC is not a member of the International Maritime Organization (IMO).\textsuperscript{27} Rather, the European Commission has an “observer status” in the IMO.\textsuperscript{28} In practice, the European Commission confines itself to coordinating the position of the twenty-five EC Member States, whose maritime interests are far from being convergent.

A. Unilateralism and Regionalism

The development of EC maritime law in the area of maritime safety is often interpreted as an expression of “unilateralism” or “regionalism,” as opposed to the “universal action,” which is traditionally represented by the IMO.\textsuperscript{29} However, the interpretation of the term “unilateralism” is not an easy task. The EC does not consider its actions to be unilateral, because they are shaped on the basis of international requirements and tend to anticipate future international action.\textsuperscript{30} Despite possible controversy about the meaning of “unilateralism,” the EC has not been prevented from developing a substantial legislative policy on maritime safety and marine environmental protection. Some of the EC’s efforts include measures on port state control,\textsuperscript{31} port reception facilities for ship-generated waste and cargo residues,\textsuperscript{32} vessel traffic monitoring and information

\textsuperscript{24} Id. art. 61-62 (this provision refers to EC competence over safety of transport (in general and not specifically over maritime transport)).

\textsuperscript{25} Council Framework Decision 2005/667/JHA, supra note 5.

\textsuperscript{26} See, e.g., Case 167/73, E.C. Comm’n v. Fr., 1974 E.C.R. 359.

\textsuperscript{27} IMO Member States with Year of Joining, http://www.imo.org/home.asp (follow “Quick Links: Member States” hyperlink; then follow “IMO Member States with year of joining” hyperlink) (last visited Sept. 5, 2006) compare with Inter-Governmental Organizations Which Have Concluded Agreements of Cooperation with the IMO, http://www.imo.org/home.asp (follow “Quick Links: Member States” hyperlink; then follow “Inter-Governmental Organizations which have concluded agreements of cooperation with IMO”) (last visited Sept. 5, 2006).


\textsuperscript{29} See e.g. Alan Boyle, EU Unilateralism and the Law of the Sea, 21 Int’l J. of Marine & Coastal L. 1, 15-31 (2006).


system, the accelerated phasing-in of double hull or equivalent design standards for single hull tankers, and the introduction of penalties in case of ship-source pollution.

B. CRIMINAL SANCTIONS

The main issues with regard to criminal sanctions for ship-source pollution concern the potential for disharmony among the shipping industry, and the justification for sacrificing public policy alternatives. It is not the intention of this essay to question the appropriateness of EC maritime law in general, which is nowadays accepted by the twenty-five Member States, and largely accepted by the international shipping community.

III. JUSTIFICATIONS FOR CRIMINAL SANCTIONS IMPOSED BY THE EC


Significantly, these two distinctive acts reflect two different legal bases. This artificial split is due to institutional rather than substantive reasons. The Directive was adopted by a qualified majority and is now binding in respect to its result while leaving Member States free to choose the form and method of implementing the law. The Directive is a creature of the first pillar, based on the EC Treaty, and is therefore subject to political and judicial control by the European Parliament and the ECJ under the same Treaty. This means that the European Parliament, as co-legislator, participates in its adoption, and that the ECJ has full jurisdiction to control the Member States’ implementation of the Directive.

In contrast, the Framework Decision, which was adopted by unanimity, is subject to the third pillar, which is based on the EU Treaty. This

37. Id. at art. 1.
39. See id. at point 4 of the preamble.
40. EC Treaty, as amended by the Treaty of Nice, supra note 23, at art. 249.
41. Id.
42. See EC Treaty, as amended by the Treaty of Nice, supra note 23, at art. 251.
43. See id. at art. 226.
44. EU Treaty, supra note 22, at art. 34.
Treaty, unlike the EC Treaty, is principally of intergovernmental nature and implies limited political and judicial control by the European Parliament and the ECJ. The European Parliament participates in the adoption of Framework Decisions merely in the role of consultant, which implies a lesser degree of participation than in the co-decision procedure. Furthermore, there is no infringement procedure in the frame of the third pillar.

It is also of prime importance to note that the criminal competence of the EC as such is in doubt. Criminal competence is justified by the EC to the extent that it is necessary for the accomplishment of its goals. More precisely, the European Commission believes that criminal penalties are necessary to effectively implement EC laws and policies in EC Member States. Criminal competence has been explored, for example, in Council Framework Decision 2003/80/JHA of January 27, 2003, on the protection of the environment through criminal law. However, criminal competence of the EC is not supported by the majority of Member States.

Significantly, a recent case before the ECJ (mentioned below) states that "[n]ot only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power [has] been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175

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48. See Garcia, supra note 47.


[of the EC Treaty on the environment], were conferred on it.”52 However, even if some Community instruments have included provisions on criminal sanctions, the freedom of the Member States to choose between administrative or criminal law was never called into question.53

Once the institutional basis is clarified, one may pose the question, why would the EC be interested in criminalizing ship-source pollution? In the context of ship-source pollution, the legal framework related to the imposition of sanctions, including criminal sanctions, is left to the discretion of States - according to the MARPOL 73/78 Convention on discharges of polluting substances which is the fundamental text governing marine environmental issues at the international level.54 In the context of the ship-source pollution regime, states are well aware of these criminal sanctions.55 The question is, should Member States be obligated by EC law to take action, and is the requirement merely an addition to the existing international regime, or does it go beyond all existing norms? The


53. See Garcia, supra note 47; See also Directive 2005/35 supra note 4, at art. 8 and Council Regulation 2847/93, art. 31, 1993 O.J. (L 261) 1 (EEC) establishing a control system applicable to the common fisheries policy: “Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have not been respected” Council Regulation 2847/93.


1. (1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefore under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

2. Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefore under the law of that Party. Whenever such a violation occurs, that Party shall either: (a) cause proceedings to be taken in accordance with its law; or (b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

3. Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.

4. The penalties under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur.

same question applies to the accompanying requirements of the Directive and the Framework Decision.

Both the Directive and the Framework Decision imply the weak implementation of the MARPOL 73/78 Convention. The EC, especially via the European Commission, considers that there are discrepancies in the implementation of the MARPOL 73/78 Convention among EC Member States, justifying the need for harmonized and enhanced implementation, including the imposition of criminal penalties.56 The EC also seems to implicitly justify its action on the need to expand the notion of illegal discharge so as to include accidental spills, which, in principle, is tolerated by the MARPOL 73/78 Convention.57

More importantly, the EC texts clearly suggest that there is a need to extend the circle of persons on whom sanctions for ship-source pollution are likely to be imposed.58 The EC texts consequently inaugurate a regime, which will operate in parallel with the civil liability regime that stems from CLC and the Fund Convention.59 It is not an exaggeration to say that for private persons involved in the shipping industry the sword of Damocles hangs over the oceans!

IV. DETAILS OF THE EC'S SHIP-SOURCE POLLUTION ACTIONS

The Directive applies to discharges of polluting substances, and is meant in the same manner as in the MARPOL 73/78 Convention - release of oil and "noxious liquid substances in bulk".60 Discharges fall within the scope of the Directive when they are effected in internal waters, including ports of a Member State, the territorial sea, the straits used for international navigation, the exclusive economic zone, and the high seas.61 "Ship-source discharges of polluting substances" are considered infringements "if committed with intent, recklessly, or by serious negligence."62 As stipulated in Annex I of the Directive, the Directive adopts the exceptions to liability under the MARPOL 73/78 Convention in a selective manner.63 The MARPOL 73/78 Convention provides that a discharge of oil is not illegal if it is necessary "for the purpose of securing the safety of a ship or saving life at sea," if the discharge results from damage to a ship or its equipment (under certain conditions), or if the discharge

57. See id. at art. 2.
61. Id. at art. 3.
62. Id. at art. 4.
63. Id. at annex.
was approved by the flag state “for the purpose of combating specific pollution incidents in order to minimize the damage from pollution.”

However, the exception related to the discharge resulting from the damage to a ship or its equipments, which covers accidental spills, is endorsed by the Directive only if the discharge takes place in the straits used for international navigation, in the exclusive economic zone, and in the high seas with regard to the owner, the master, or the crew, when acting under the master’s responsibility. The Directive does not mention whether such pollution in internal waters, including ports and the territorial sea, falls within this exception. The manner in which the Directive adopts the MARPOL Convention is indicative of its purpose to limit the scope of existing exceptions, and consequently results in more stringent laws.

Within a port of a Member State, if there is suspicion that a ship has been engaged or is engaging in a discharge of polluting substances in all areas described by the Directive, including the high seas, the Member State shall ensure appropriate inspection.

The Directive also refers to coastal Member States. If the suspected discharge of polluting substance takes place in the territorial sea, the straits used for international navigation, the exclusive economic zone or the high seas, and the ship does not call at a port of the Member State concerned, the latter shall coordinate with the next port of call in another Member State in deciding appropriate measures. “Member States shall take the necessary measures to ensure that infringements” as described in the Directive “are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.”

The Framework Decision, which supplements the Directive with detailed rules in criminal matters, was adopted prior to the Directive. While the Directive provides for penalties that “may include criminal or administrative penalties,” the Framework Decision clarifies that all infringements in the Directive shall be regarded as criminal offenses. This can be explained on the basis of institutional considerations.

The Directive aims to demonstrate some flexibility with regard to

64. International Convention, supra note 54, regulation 11.
66. See, e.g., International Convention, supra note 54, reg. 6.
68. See generally id.
69. Id. at art. 7.
70. Id. at art. 8.
71. Id (emphasis added).
73. See Fabienne Kauf-Gazin, Répression de la Pollution Causée par les Navires, REVUE MENSUELLE LEXISNEXIS JURISCLASSEUR EUROPE, Nov. 2005, at 17.
maritime labor. For instance, there is no criminal offense for crew members who cause accidental spills “that occur in the straits used for international navigation”, in the “exclusive economic zones”, “on the high seas”, and “where the conditions set out in the MARPOL 73/78 Convention are satisfied.”

Criminal penalties that Member States might impose as a result of violations of EC law must be “effective, proportionate and dissuasive.” For offenses referred to in the Framework Decision, criminal penalties of a maximum of 1 to 3 years of imprisonment are provided for, accompanied by other penalties or measures such as fines and disqualification from engaging in an activity requiring official authorization.\textsuperscript{76} Intentionally committed offenses justify criminal penalties of 2 to 5 years imprisonment, when they lead to significant damage to water quality and are committed within the frame of a criminal organization or with serious negligence.\textsuperscript{77} For intentionally committed offenses where there is significant damage to water quality and the death or serious injury of persons, criminal penalties of at least 5 to 10 years imprisonment are required.\textsuperscript{78} In minor cases where there is no deterioration of water quality, the Framework Decision provides for various other types of penalties.\textsuperscript{79}

In addition to the above, each Member State must take measures to ensure that legal persons can be held liable for the offenses referred to in the Directive.\textsuperscript{80} Legal persons shall be “punishable by effective, proportionate, and dissuasive penalties.”\textsuperscript{81} The penalties may include criminal or non-criminal fines of at least EUR 150,000 to EUR 300,000 and EUR 750,000 to EUR 1,500,000 in the most serious cases.\textsuperscript{82} Penalties other than fines comprise measures such as the “exclusion from entitlement to public benefits or aid,” and the “temporary or permanent disqualification from engaging in commercial activities.”\textsuperscript{83}

The European arrest warrant may be activated under the conditions prescribed by applicable EC law in order to facilitate and render more efficient the Member States’ enforcement of the Directive and Framework Decision.\textsuperscript{84}

\textsuperscript{74} Council Framework Decision 2005/667/JHA, supra note 5, at art. 2(2).
\textsuperscript{75} Id. at art. 4(1).
\textsuperscript{76} Id. at art. 4(3).
\textsuperscript{77} Id. at art. 4(5), (6).
\textsuperscript{78} Council Framework Decision 2005/667/JHA, supra note 5, at art. 4(4).
\textsuperscript{79} Id. at art. 4(2).
\textsuperscript{81} Id. at art. 8. See also Council Framework Decision 2005/667/JHA, supra note 5, at art. 6(1).
\textsuperscript{82} Id. at art. 6(1)(a).
\textsuperscript{83} Id. at art. 6(1)(b).
\textsuperscript{84} See the Council Framework Decision 2002/584/JHA of June 13, 2002 on the European
V. Assessment of the EC Approach

The EC approach to criminal sanctions for ship-source pollution is likely to cause significant disharmony at two levels. First, the approach may be inconsistent with a number of international requirements. Second, the approach may cause confusion in regards to the legal order of the EC itself.

It may be argued that there is a risk of conflict or friction with international law in relation to the notion of illegal discharge, which seems to be enlarged by the EC instruments under consideration. While the MARPOL 73/78 Convention covers operational discharges, but excepts certain accidental discharges, the EC Directive and Framework Decisions do not accept accidental spills in a number of areas. For instance, the exception contained in Regulation 11(b) of Annex I of the MARPOL 73/78 Convention is reshaped by EC instruments and the latter do not tolerate accidental spills in internal waters, including ports, and territorial waters.\(^85\)

The risk of an international law conflict with regard to the introduction of criminal sanctions is less obvious. Unlike the criminal sanctions introduced by the EC's actions, the international regime for civil liability for oil pollution and the regime on pollution by other hazardous or noxious substances do not provide for criminal penalties. Rather, they merely require compensation for damages by the ship owner via compulsory insurance coverage.\(^86\) As mentioned above, the MARPOL 73/78 Convention leaves the issue of sanctions to the discretion of States which are parties to it.\(^87\) Even if international law is not violated by the criminal


\(^{86}\) Convention on Civil Liability for Oil Pollution Damage (CLC); supra note 3; See also The International Regime for Compensation for Oil Pollution Damage: Explanatory Note prepared by the Secretariat of the International Oil Pollution Compensation Funds, (2006), available at http://www.iopcfund.org/pdf/gene.pdf#search=%22International%20Regime%20for%20civil%20liability%20for%20oil%20pollution%22 (last visited Sept. 6, 2006).

\(^{87}\) See Convention on Civil Liability for Oil Pollution Damage (CLC), supra note 3, at 6; 

sanctions introduced by EC action, the advisability of this action could still be challenged. In particular, existing similar criminal sanctions in a number of States have not prevented oil pollution incidents from taking place.\textsuperscript{88}

As a result, the application of criminal sanctions to persons who cause or contribute to marine pollution, such as ship owners, masters of ships, and owners of cargo may be a deviation from the spirit of the existing regime at the international level. For example, an EU conflict could arise where EC criminal sanctions are sought against persons whom the civil liability regime merely exposes to compensatory sanctions. Moreover, would the EC be able to justify expanding the chain of criminal actors from ship owners to others such as pilots and port owners and operators? In light of the significant differences between State and EC regimes, the answer to this question is still far from certain.

The establishment of jurisdiction by Member States in the event of offenses covered by EC texts may reveal a number of points that must be explored further.\textsuperscript{89} For instance, if several States acquire criminal jurisdiction because they jointly suffer from pollution that occurs in the Mediterranean Sea, courts of EC Treaty Member States will be required to find criminal offenses while courts of non-EC Treaty States may impose mere civil sanctions. Arguably, this difference in adjudication contributes to significant legal uncertainty and may be highly undesirable by the shipping industry.\textsuperscript{90}

The shipping industry may also become confused by institutional dis harmonies at the EC level, which could weaken the moral weight of the EC's efforts. This was recently suggested in an ECJ judgment on September 13, 2005,\textsuperscript{91} which involved an action for annulment against the Framework Decision through criminal law\textsuperscript{92} and which implied by analogy the risk to see the Framework Decision on ship-source pollution being annulled for the same reasons.\textsuperscript{93} The Court declared that the said Decision

\textit{See also} International Maritime Organization Conventions, \textit{available at} http://www.imo.org/home.asp.


90. TsiRIDes, \textit{supra} note 6, at 171-172.


92. \textit{Id.}

must be annulled since the Framework Decision 2003/80/JHA aimed at the protection of the environment while it should have been properly adopted on the basis of the EC Treaty instead of the EU Treaty. This would result in the incorporation of the criminal sanctions into a Directive. Such evolution, which is of internal nature to the EC, is likely to create some confusion among that section of the shipping industry which is already skeptical about the EC instruments under consideration. The EC’s search for the right legal basis for adopting criminal sanctions on ship-source pollution is indicative of the difficulties raised by the question. The pending case, C-440/05, in which the European Commission has instituted an action against the Council of the European Union claiming that the Court should declare the Council Framework Decision 2005/667/JHA unlawful emphasizes the unsettled nature of such criminal sanctions.94

VI. CONCLUSION

Despite the questions raised within this essay, the international civil liability regime is not at risk and MARPOL 73/78 has not been rejected by the EC.95 Rather, the EC’s efforts have selectively shaped MARPOL according to the needs and priorities of Member States. In addition, criminal sanctions for marine pollution are not entirely unknown to the national legislatures.96 However, the spirit of the EC measures demonstrates a tendency by the EC legislator for independent action, which is also corroborated by the new EC proposals under “Erika III.”97

While the contribution of EC maritime law to the enhancement of maritime safety is undeniable, as suggested inter alia by the positive influence of the harmonization process on open registries such as Cyprus and Malta before their accession to the EU and the banning of substandard ships from Community waters, some reservations may be raised with regard to the EC’s penal approach to the question.98

94. Case C-440/05, 2006 O.J. (C 22) 10.
95. See Gauci, supra note 1, at 235-43.
96. For an overview of criminal prosecutions for ship-source pollution in a number of States see Barrett & Grasso, supra note 55.
98. On the harmonization of Cypriot maritime law to EC maritime law: see Iliana Christodoulou-Varotsi, L’Adaptation Du Droit Maritime Hellenique Et Du Droit Maritime Chypriote Au Droit Communautaire, HELLENIC INST. OF INT’L AND FOREIGN L. (1999); see Iliana Christodoulou-Varotsi, L’Évolution du Droit Maritime Chypriote en vue de l’Adhésion à l’Union Européenne, LE DROIT MARITIME FRANÇAIS 378 (April 2004); see Iliana Christodoulou-Varotsi, Introduction to the Adjustment of the Cypriot Maritime Law to the Acquis Communautaire, HELLENIC REV. OF EUR. L. 164, 167 (Dec. 2004); see Iliana Christodoulou-Varotsi, Ensuring Qualitative Shipping in Cyprus: Recent Developments in Cypriot Maritime Law in Light of the “Acquis...
Additional questions may be posed on the advisability of the EC instruments under examination: Have existing provisions been adequately explored before adopting the measures in question? Directive 95/21/EEC on port state control,99 Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues,100 and Directive 2002/59/EC on a Community vessel traffic monitoring and information system101 are only a few examples of the existing measures that can be explored further in order to deal with the problem of polluting discharges. With the issue of criminal sanctions as such, one may also wonder whether the rule of "ultimum refugium" has been respected.102

It is legitimate to consider that the orientation of the EC, which aims to become an integrated entity, is such that it utilizes the maritime sphere as a tool for more integration. In other words, despite the functioning of the international regime governing shipping as shaped by the IMO, which may be assessed under different angles, it seems that the EC considers it necessary to have its own strategy and to expand it in a dynamic manner. This policy is the result of divergent perceptions and interests, expressed by its twenty-five members, including three major maritime powers at the international level: Greece, Cyprus, and Malta.103

In pragmatic terms, the particular interests of each Member State have a determining influence on the consideration of ship-source pollution and, consequently, on public policy choices. It seems that in the particular case presented above, the experience and interests of EC Member States that have "suffered" from major maritime casualties as well as the situation of port and coastal Member States of the EC have prevailed over the interests of Member States which are mainly countries of registration and which have been less exposed to maritime casualties in recent years. This fluctuating parameter, in combination with the apparent determination of the European Commission for more legislation in the maritime field, seems to be the lever of any future action in this area.

Ultimately, as with any debate considering EU integration and con-

102. Tsirides, supra note 6, at 171-172.
ciliation of each Member State’s policies, EU and State legislators are faced with near philosophical considerations. In the words of Descartes, “la diversité de nos opinions ne vient pas de ce que les unes sont plus raisonnables que les autres, mais seulement de ce que nous conduisons nos pensées par diverses voies, et ne considèrons pas les mêmes choses.”

104. René Descartes, Discours De La Methode 122, available at http://abu.cnam.fr/cgi-bin/donner_html?methode3, translated in http://www.literature.org/authors/descartes-rene/reason-discourse/chapter-01.html: “[T]he diversity of our opinions, consequently, does not arise from some being endowed with a larger share of reason than others, but solely from this, that we conduct our thoughts along different ways, and do not fix our attention on the same objects.” A translation can be found at: Literature.org, Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in Sciences, http://www.literature.org/authors/descartes-rene/reason-discourse/chapter-01.html (last visited Sept. 6, 2006).