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Transportation News

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Customs Reverses Course on Proposed Change to Jones Act Interpretation

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The "Jones Act," enacted in 1920 as section 27 of the Merchant Marine Act, is the principal law governing wholly domestic shipping to and from American "ports" and "coastwise points," commonly known in the maritime industry as "cabotage" or "coastwise trade." The Jones Act supports the important purposes of national defense and the development of domestic and foreign commerce by requiring a U.S.-flagged merchant marine fleet – built, owned and crewed by

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President Obama's Antitrust Stimulus Package

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During the presidential campaign, candidate Barrack Obama promised more vigorous enforcement of the antitrust laws. President Obama and his new administration have fulfilled that pledge. While some question the effectiveness of the financial stimulus packages, the "antitrust stimulus" is clearly being felt, with new pro-enforcement leadership at the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC). Even Congress is joining in by introducing bills to overturn recent United States Supreme Court antitrust decisions favorable to defendants and by urging more aggressive enforcement of the antitrust laws.

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Brokers Beware! Your Carriers Have No Duty to Count the Goods.

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A Tennessee appellate court recently held that a carrier had no duty to count the goods delivered to it by a broker's customer, even when the goods were delivered to the carrier unsealed. As a result of this ruling, brokers must take care to ensure that goods are properly counted, when loaded and unloaded, or risk liability exposure when disputes arise as to delivery quantities.

Background

It is well known to Tennessee practitioners that *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008) made it more difficult to obtain summary judgment. Under *Hannan*, "the moving party must either affirmatively negate an essential element of the nonmoving party's claim or establish an affirmative defense" in order to shift the burden

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In this issue:

Events

Hall

Kennedy

Join Transportation Group Chair David Hall and shareholder Steve Kennedy when they speak at the Mississippi Trucking Association annual meeting June 10–13 in Sandestin, Florida.

Klemm

As Co-Chair of the ABA Energy Litigation Committee, Ken Klemm is organizing a panel discussion during the August 5 – 10 ABA Annual Meeting in San Francisco. He also will be speaking at the 9th Annual Energy Litigation Conference in Houston, Texas on October 12.

Turner

Sara Turner has been invited to the DRI Insurance Roundtable, an invitation-only gathering of senior officers from several insurers throughout the country that will allow those in attendance to hear about the latest developments and issues confronting insurers.

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American citizens – that is sufficient to maintain the flow of waterborne commerce, domestic and international, and able to support the U.S. military in times of war or national emergency.

While the Jones Act's central dictates may appear straightforward on their face, a clear application and interpretation of the statute has remained elusive since enactment. Particularly in recent decades, many questions of key importance to the maritime industry have arisen, including (1) what constitutes a U.S. "port" or "coastwise point;" (2) what is "merchandise" that must be carried between U.S. ports or points on U.S. vessels; and (3) in what instances are vessels "wholly owned by citizens of the United States." In large measure, the governmental entities charged with enforcing and administering the Jones Act must resolve these questions, including the U.S. Maritime Administration (MARAD), U.S. Customs and Border Protection (CBP or Customs) and the U.S. Coast Guard.

One key issue that Baker Donelson maritime attorneys continue to monitor closely is a proposed rule change introduced by CBP that if implemented will significantly affect the rights of non-U.S. vessels to transport construction materials from American ports to offshore oil and gas well sites, principally in the Gulf of Mexico. Although controversy surrounding the proposed rule change led CBP to withdraw it pending further study, it is expected that Customs will reintroduce a proposed rule change in the near future. This article examines the significance of the proposed changes to U.S. Coastwise law, why they were controversial and what may lie ahead for water-borne transportation between U.S. ports and offshore installations.

It has long been established that the Jones Act's dictates apply to many of the structures commonly used in off-shore resource exploration operations, provided those structures are secured to or submerged onto the seabed of the Outer Continental Shelf (OCS). In this circumstance, the structures attached to the OCS, which include mobile drilling rigs, drilling platforms, artificial islands and anchored warehouse vessels, constitute "points in the United States to which the coastwise laws apply," barring foreign-built vessels from conducting any coastwise trade with these structures. But in a seminal 1976 ruling, Customs concluded that, with respect to vessels that provide diving operation support to offshore oil and gas production structures, "the use of a vessel in laying pipe is not a use in the coastwise trade of the United States" because "the pipe is not landed but only *paid out* in the course of the pipelaying operation."

Through other rulings, Customs has also recognized an important distinction between "merchandise," which can only be carried between U.S. coastwise points by a coastwise-qualified vessel, and "vessel equipment," which can be carried between coastwise points by foreign vessels, broadly characterizing "vessel equipment," as examples, to encompass items carried "in furtherance of the primary mission of the vessel," "in furtherance of the operation of the vessel" or "essential to the mission of the vessel." To constitute "equipment," Customs has not required that an article be necessary to the navigation, operation and maintenance of the vessel, or to the comfort and safety of the individuals aboard the vessel. Examples of articles found to constitute "equipment" include "rope, sail,

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Events, *continued*

Carey

Scott Carey, former Chair of the Transportation Group and current Managing Shareholder of the Nashville office, attended the National Private Truck Council Annual Conference and Exhibition in Cincinnati, Ohio on April 18-20. Programs included supply chain collaboration and specific tips for successfully uniting your private fleet with your company's supply chain. Other workshops focused on private fleet management in the new economy, implementing technology solutions and investing in solutions. A theme throughout the conference focused on environmental sustainability and included a discussion by Environmental Protection Agency officials on the SMARTWAY Partners Program and how it is expanding to encourage fleets to become more environmentally friendly. Baker Donelson was a proud sponsor of the conference.

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table linens, bedding, china, table silverware, cutlery, bolts and nuts." Applying the distinction made, several Customs rulings have reasoned that items that are "paid out" and not "unladen" are vessel equipment. In other words, Customs has historically held that the paying out of pipe, cable, flowlines and umbilicals is permissible because these items are "vessel equipment" carried in furtherance of the vessel's mission, such that there is no "landing of merchandise" and therefore, no engagement in coastwise trade.

What CBP's proposed change means for offshore oil and gas operations. On July 17, 2009, CBP published a notice in which it proposed modifying its position on what constitutes "merchandise" and non-merchandise "vessel equipment" for purposes of the Jones Act. In that notice, CBP was critical of many of its own prior rulings, finding that certain key parts of seminal rulings had been ignored in later determinations, or taken out of context. For example, CBP posited that the initial requirement that carriage of pipeline materials must be "incidental to the pipe-laying function" of a vessel had been ignored in later rulings allowing non-U.S. vessel carriage of materials to be installed on previously laid or installed pipelines. Thus, CBP suggested that unless its installation was part of the original pipeline laying or "paying out" process, carriage of underwater equipment for installation on a well or related structure on the OCS by a non-U.S. vessel would be a violation of the Jones Act, potentially carrying a severe penalty, including seizure of the cargo or a fine equivalent to its value or the freight for its carriage, whichever is greater.

CBP also criticized prior rulings that characterized items as "vessel equipment" (not merchandise) even if they were not necessary to the vessel's navigation, operation or maintenance, or to the safety and comfort of the persons aboard the vessel. For example, a 2003 CBP ruling found that that non-coastwise qualified liftboats could transport compressors, generators, pumps and pre-fabricated structural components from a U.S. port to a coastwise point on the OCS without violating the coastwise laws since such equipment was "fundamental to the mission of the vessel" to support oil and gas well drilling, construction and repair. According to the notice, such rulings took concepts in earlier rulings out of context, and violated the intent of the Jones Act. CBP suggested that such equipment, characterized in some rulings as "vessel equipment" that could be carried by non-U.S. vessels, were in fact "merchandise" that must be carried by Jones Act-qualified vessels.

Reaction to CBP's proposed change. The proposed change, if implemented, would invariably have a significant economic impact on the maritime industry, favorable to U.S. vessels and adverse to foreign-built vessels. In light of this significance, numerous interested parties and industry groups responded to CBP's requested comments on its proposed re-interpretation of the Jones Act in relation to offshore oilfield operations.

The Offshore Marine Service Association (OMSA) came out in favor of the proposed changes: Ken Wells, OMSA's president, noted, "With this proposal, CBP is saying that there is a hard line between transportation and installation. Foreign boats may be able to install oilfield equipment, but only U.S. boats can carry it offshore. . . .The problem is that for many years, CBP rulings had allowed foreign vessels to carry cargo to subsea oil and gas locations as long as that vessel also installed it."

Foreign vessel owners, unsurprisingly, opposed CBP's proposal. The International Marine Contractor Association (IMCA) claimed it would shut down offshore projects due to a lack of coastwise qualified vessels and trained personnel to take over work now being performed by foreign-flagged vessels. OMSA responded that American vessels were in fact available, and that the CBP proposal would protect existing U.S. jobs. OMSA urged offshore oil and gas companies to support the CBP proposal, saying that opposing the CBP initiative was tantamount to saying, "We don't want Americans to work in offshore energy at a time when we are arguing that expansion would create jobs."

Withdrawal of ruling and the future. The proposed changes proved controversial, evidenced by the extent of comments received, ultimately leading to their recent withdrawal by Customs, effective October 1, 2009, pending further study. As part of its withdrawal, Customs indicated that it would publish a new notice "in the near future." Because CBP

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is again expected to receive comments on its future proposed revision, persons interested in a proposed change would be wise to carefully review any upcoming proposed change.

Related movements are also underway seeking legislative support for increased "short sea" domestic shipping to reduce highway congestion, cut diesel exhaust and lessen wear and tear on our bridges and highways. Some have advocated for relaxing the Jones Act to support this effort, and vigorous debate continues. In his campaign for President, Barrack Obama expressed strong support for the Jones Act, calling into question the potential viability of an effort to limit the Jones Act's applicability. As to future changes to the Jones Act, whether by a Customs ruling or by legislation, one thing is certain: any changes will meet immediate scrutiny and vigorous debate among the many parties interested in the development of U.S. oil and gas reserves, domestic short sea shipping and a strong U.S. Coastwise fleet. Baker Donelson's marine and energy attorneys are closely monitoring significant Jones Act rulings and changes, and will keep readers informed of future events.

President Obama's Antitrust Stimulus Package, *continued*

The policy changes and increased litigation expected from the administration's antitrust initiatives will broadly impact the nation's transportation industry. Indeed, many companies are already feeling the impact of increased enforcement today. Significant activities relating to transportation and energy include:

- **DOJ Repudiates Bush "Passive" Antitrust Enforcement.** The head of the DOJ Antitrust Division, Christine Varney, condemned the "passive" antitrust enforcement policy of the Bush administration and expressly repudiated the 2008 Antitrust Division policy paper on Section 2 of the Sherman Act which had adopted a lenient approach on monopolization, attempted monopolization and dominant firms. Ms. Varney promised renewed antitrust focus on several specific sectors, including the energy and transportation sectors, and continued aggressive prosecution of criminal conspiracies to fix prices and allocate markets. It is expected that both antitrust agencies will significantly increase scrutiny of conduct by dominant firms.

- **FTC Suing Dominant Firms Under Section 5.** The FTC believes that Section 5 of the FTC Act, which prohibits unfair competition, is broader than the antitrust laws, and its recent complaint against Intel for alleged illegal use of its dominant position is based on this broad interpretation of Section 5. In addition, the FTC just announced a settlement under Section 5 which bars the nation's leading manufacturer of certain lens treatments from engaging in exclusionary conduct.

- **More Non-Merger Investigations.** There have been numerous non-merger investigations by the DOJ and FTC involving agreements among competitors regarding employees, optical disk drives, low prices paid to dairy farmers for milk, a proposed class action settlement between Google and book publishers and authors, and market-default swaps. In the Google matter, the DOJ has raised significant concerns with the court about the proposed settlement.

- **Special Task Force to Combat Collusion on Stimulus Funds.** DOJ has formed a special task force to combat collusion with respect to federal funds. A Citizen Complaint Center has been established to collect reports of potential collusive conduct and fraud in procurement and granting of awards using federal stimulus funds. The DOJ has also published a list of "Red Flags of Collusion" to aid in the identification of potential collusive activities.

- **Aggressive Criminal Enforcement.** Aggressive criminal enforcement of the antitrust laws continues to focus on cartels, agreements among competitors to fix prices, allocation of markets and bid rigging. Enforcement has been particularly active against government contractors alleged to have rigged bids on projects relating to the wars in Iraq and Afghanistan, and against international and domestic cartels. The DOJ has already collected more than $1 billion in criminal fines for the most recent fiscal year, a record amount.

- **Long Jail Time for Individuals.** Incarceration of individuals remains a priority, as DOJ views long prison sentences as a strong deterrent to violations of the antitrust laws. A 48-month prison sentence was recently imposed on a shipping executive for bid rigging on coastal shipping services between the U.S. and Puerto Rico. Individuals have been indicted in connection with the sale of municipal bonds and in connection with kickbacks to Home Depot. The ex-wife

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of a Home Depot employee received a two-year jail sentence for filing false tax returns in connection with this kickback scheme.

• **Small Businesses Targeted.** Even relatively small businesses are being targeted for criminal prosecution. Criminal price fixing charges have been brought against individuals and companies in the packaged ice business. Recently a former executive of an Iowa ready-mix concrete business agreed to plead guilty and serve 19 months in jail for participating in price fixing conspiracies involving sales in Iowa.

• **Foreign Nationals Targeted.** The DOJ recently indicted a Swedish national for his alleged role in fixing surcharges on international air cargo shipments and for allegedly obstructing justice; the defendant is outside of the United States and the DOJ is believed to have filed an INTERPOL red notice, which would subject the defendant to arrest if he crosses an international border and could result in his extradition if, generally speaking, at least one of the crimes alleged in the indictment is a felony in both the United States and the country from which extradition is sought.

• **Business Review Letter on LTL Joint Venture.** The DOJ announced in a Business Review Letter that it would not challenge a proposal by seven less-than-truckload (LTL) freight carriers to bid jointly and engage in other collaborative activity as part of a nationwide LTL joint venture. This conclusion was based on the carriers' representation that there was "insignificant overlap" in their operations, that they faced significant competition in their areas of operations and that the proposal would allow them to offer "seamless" nationwide LTL services and respond to shipping opportunities that originate from multiple regions by sharing the information and internal systems. The LTL carriers sought this review following approval of a pooling agreement by the Surface Transportation Board, which provided antitrust exemption for certain activities, but the parties were concerned that the exemption was not broad enough. While DOJ stated that it would currently not challenge the proposal, it also expressed concern about the possible elimination of significant current or potential competition among members.

• **Private Antitrust Transportation Actions Raising Immunity Issues.** Transportation companies should also be aware of the recent federal court decision *In Re Household Goods Movers Antitrust Litigation*, MDL Docket No. 1865 (D.S.C. Sept. 10, 2009), a class action alleging a conspiracy to unlawfully impose fuel surcharges. The court ruled that defendants' alleged conspiracy on fuel surcharges was not immunized from the antitrust laws by statutory immunity or the filed rate doctrine. The judge relied on deposition testimony from executives in finding that defendants did not conform to the statutory requirements for immunity and that the surcharges returned far more than the actual increased cost of the fuel and could not have been based on industry average carrier costs. The court certified its decision for immediate appeal on the basis that these issues involve controlling questions of law as to which substantial grounds for difference of opinion exist. In an air passenger fuel surcharge class action, the district court dismissed with prejudice plaintiffs' third amended complaint on the grounds that the alleged conspiracy was immunized by federal law, and even if no immunity existed, plaintiffs had failed to adequately plead an illegal price fixing conspiracy. *LaFlamme v. Societe Air France* (E.D.N.Y. April 5, 2010)

• **Trade and Professional Associations Targeted.** Trade associations and professional associations continue as a popular target for the antitrust agencies. The FTC charged a trade association of manufacturers, distributors and dealers of musical instruments with antitrust violations for organizing meetings among competing music retailers to discuss strategies for implementing manufacturer minimum retail prices, restricting retail price competition and securing higher retail prices. The defendants entered into a consent order with the FTC.

The FTC brought price fixing charges against a 600-physician independent practice association for fixing prices charged to health care insurers and unlawful concerted refusal to deal, with the defendants settling the case. Recently, the FTC took action against the executive director of a Boulder Valley, Colorado physician association for attempting to evade a previous

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FTC order against the association.

• **More Merger Challenges.** The agencies are aggressively challenging mergers of all sizes, including consummated mergers and non-reportable mergers. The FTC obtained a preliminary injunction blocking a $1.4 billion acquisition involving companies providing systems and software for estimating the cost of collision repairs and the value of passenger vehicles damaged beyond repair. The FTC successfully challenged a $20 million completed acquisition of outpatient clinics in Roanoke, Virginia, with the acquiring party agreeing to divestiture. Other acquisitions have been abandoned after the FTC or DOJ started investigations.

The FTC is requiring divestiture of certain bulk de-icing road salt operations in connection with a recent proposed acquisition to preserve competition in Maine and Connecticut.

DOJ has required divestiture of certain assets for the production and sale of desalters used in the oil refinery industry in Cameron International's acquisition of Natco Group. The DOJ stressed that this divestiture would also remedy the harm to competition caused by a 2005 Cameron acquisition.

• **Revised Draft Horizontal Merger Guidelines.** The DOJ and FTC have just issued revised Draft Horizontal Merger Guidelines for comment that describe how the agencies will analyze mergers. These revised Guidelines are intended to conform with current agency practice and focus more attention on competitive effects of acquisitions, both proposed and consummated.

• **Petroleum Market Manipulation Rules.** The FTC has issued its Petroleum Market Manipulation Rules effective November 4, 2009, and a Compliance Guide to help businesses and individuals comply with the Rules and the Energy and Independence Act of 2007. These rules prohibit manipulative or deceptive conduct in wholesale petroleum markets, including crude oil, gasoline or petroleum distillates.

• **Workshops on Competition in Agriculture Industry.** The DOJ has been holding public workshops with the Department of Agriculture to explore competition issues affecting the agriculture industry, including buyer power (monopsony power), vertical integration, patent and intellectual property issues and retailer concentration. The DOJ has expressed concerns that small farms are being lost at "astronomical and intolerable rates."

• **Congressional Action.** The Senate and House of Representatives Judiciary Committees have approved bills to make resale price maintenance per se unlawful and overturn the United States Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), which replaced the per se illegality standard with a rule of reason test.

Bills are also pending in both Houses that would return the pleading standard for surviving motions to dismiss in antitrust and other cases to the more lenient standard that existed prior to the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Members of Congress have been active in urging the antitrust agencies to pursue investigations of various industries.

While not specifically related to antitrust, the False Claims Act was recently amended to greatly expand the parties who could be held liable, including third parties who do not deal directly with the government. Many antitrust claims involving sales to the government also include False Claims Act allegations. DOJ has obtained $2.4 billion in settlements and judgments through False Claims Act cases through the end of September.

With this increased antitrust enforcement, this may be a good time for companies to review existing antitrust compliance programs or implement such programs if they are absent. Companies should consider alerting management and sales force employees and any employees or agents with contact with competitors to this increasing antitrust scrutiny. Companies that engage in business abroad should also bear in mind that competition authorities outside the United States are increasing antitrust enforcement and imposing significant fines. Additionally, state attorneys general are expected to be more active as the FTC stresses increased cooperation with the state offices.

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of production to the nonmovant. *Id.* at 5. Applying *Hannan*'s standard in *Mark VII Transportation Co., Inc. v. Responsive Trucking, Inc.*, No. W2009-001430-COA-R3-CV, 2009 WL 2986108 (Tenn. Ct. App. Sept. 18, 2009), the Court of Appeals of Tennessee denied summary judgment to a broker despite its contract with a shipper that invoked the Carmack Amendment standard of liability and expressly required the carrier to indemnify it for any cargo loss or damage. Significantly, as a basis for its holding, the Court concluded that a bill of lading does not establish delivery and, moreover, an incomplete or illegible bill of lading can actually create a material factual dispute as to the time a loss occurred.

Summary

Mark VII, acting as a broker, made arrangements for Responsive Trucking (Responsive) to pick up toy shipments from Milton Bradley/Hasbro (Hasbro) and deliver them to retailers throughout the United States. Over the course of two years, Hasbro made claims for a number of short shipments to the retailers, ultimately requiring Mark VII to reimburse Hasbro in the amount of $129,627.07. Mark VII sued Responsive for breach of contract based upon the Carmack Amendment standard of liability after the trucking company refused a claim for reimbursement pursuant to the parties' Contract Motor Carrier Agreement (the Agreement).

The Agreement between Mark VII and Responsive contained a "Loss or Damages to Cargo" provision that expressly required the carrier to accept the Carmack Amendment standard of liability. Additionally, the Agreement included an "Indemnification" provision that obligated Responsive to "defend, indemnify, and hold MARK VII harmless from and against any and all claims . . . for damage to the Goods of MARK VII's customer while under the care, custody, or control of CARRIER."

Evidence before the court demonstrated that Responsive, while at Hasbro to pick up shipments, would sign bills of lading, load toys and seal shipments without ever having counted the goods to be delivered. Consistently, a guard would check the seal before Responsive left Hasbro and the goods in each situation arrived with the seal intact. For unknown reasons, however, shortages regularly occurred. Incredibly, Responsive denied that any loss occurred under its care, custody or control.

In the lower court, Mark VII sought summary judgment under the Agreement, contending that Responsive was liability under the Carmack Amendment standard of liability as a matter of law. Liability exists under the Carmack Amendment for any damage or loss to property that is transported in the United States under a bill of lading. To establish a prima facie case against a carrier under the Carmack Amendment, a plaintiff must prove (1) delivery of the goods to the carrier in good condition, (2) receipt by the consignees of a lesser quantity of goods at the destination, and (3) damages. The trial court denied summary judgment, finding that bills of lading did not establish the fact of delivery of all items to the shipper and that the shipper had no duty to count a shipment to ensure its quantity matched the bill of lading. Accordingly, the court found that Mark VII had not met its burden of production with respect to the first element, as required by *Hannan*.

On appeal, the parties disputed whether the two provisions in the Agreement were in conflict, whether the Indemnification provision should control as being more specific, and whether the Carmack Amendment was even applicable because Mark VII was technically a "broker" rather than a "shipper." The Court of Appeals found that the two provisions did not conflict and ruled that Mark VII could pursue claims under both provisions. However, it affirmed the trial court's holding that a material dispute of fact existed with respect to the timing of the shortage loss. Rejecting Mark VII's argument that the bills of lading were sufficient evidence of delivery to Responsive, the Court found that the preprinted bills of lading before it were incomplete and illegible, and thus did not clearly establish the quantity of contents received by Responsive at the time of loading. Effectively, Mark VII found itself both unable to prove the origin of a shortage and lacking a legal mechanism to shift the risk of loss to either its customer or shipper.

Conclusion

The transactions in *Mark VII* involved four parties: a broker, a customer, a carrier and a shipper. The shortages at issue could have occurred while the goods were in the custody of three of those four

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parties: the customer (pre-loading shortages), the carrier (shortages during loading, transit or final delivery), and the shipper (shortages after final delivery). Yet, as *Mark VII* demonstrates, the broker, the only party to the transaction that never had custody of the shipments, may be the party that must ultimately bear an expensive shortage loss.

As always, but more so now after *Mark VII*, it is critical to have complete, accurate and legible bills of lading. To avoid the trap posed by *Mark VII*, brokers should consider implementing policies and using contracts that require more complete bills of lading consistent with those of the Federal Motor Carrier Safety Administration (FMCSA), coupled with provisions that shift legal responsibility to the extent bills of lading prove to be incomplete, inaccurate or illegible. Additionally, brokers should evaluate whether their contracts adequately address the duty on the part of carriers to ensure the actual quantity of a load matches the quantity set forth on a bill of lading.

Baker Donelson's Transportation Practice Group is well equipped to provide legal assistance in matters like those presented in the *Mark VII* case. Baker Donelson maintains a motor carrier emergency response team, handles all aspects of transportation litigation and has extensive experience with obtaining operating authority from the FMCSA and several States' regulators. For a complete list of our Transportation attorneys, please visit our website at www.bakerdonelson.com.

Need Help with C-TPAT Certification?

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Customs-Trade Partnership Against Terrorism (C-TPAT) is a government program through Customs and Border Protection (CBP). The program allows shipping companies to reduce the number of CBP inspections, and allows for priority processing at those inspections, for companies that have the required safeguards and protections over their shipments and personnel. Although C-TPAT is a voluntary program, suppliers and customers have steadily come to demand participation, and it has quickly become the standard.

Achieving certification from the Department of Homeland Security (DHS) is not easy. DHS rejects many applicants because the companies do not appear to understand that the program is geared towards addressing past violations, and in turn often misinterpret the program goals. Companies must understand that any safeguard procedure or security incidents in their history will trigger a rejection if the company does not approach DHS with the right tone. DHS wants to see management involvement from the board level down, along with training and teamwork between everyone from the desk clerks to the drivers. Internal compliance procedures are also very important, and will be reviewed by DHS during the validation stage of C-TPAT.

Companies are strongly encouraged to consult legal counsel before applying for certification. While companies can apply for the C-TPAT certification themselves, those who are denied and then appeal the ruling can often take the wrong approach once more, and will be forced by DHS to wait years to reapply. Baker Donelson was recently successful in petitioning DHS to allow a trucking company to re-apply for C-TPAT approval after they were initially denied certification due to inadequate safeguards and security procedures related to trucks transporting goods into the U.S. from Mexico. Our guidance throughout the C-TPAT process, along with a reorganization and improvement of personnel screening, truck and facility security, internal compliance measures, and the client's swift implementation of our recommendations, saved them from a five-year waiting period for C-TPAT reapplication.

For questions on the C-TPAT process, contact Doreen Edelman in our Washington, D.C. office.

BAKER DONELSON
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Profile

Mason W. Wilson

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Mason Wilson is based in Memphis, Tennessee, the city known as "America's distribution center." He has served as national counsel for a $17 billion shipping and logistics company and also represents numerous national and regional motor carriers, shippers, freight forwarders, brokers and railroads in all types of litigation. As a member of both the Transportation and Product Liability groups, Mason has extensive experience in a wide range of litigation, from general transportation and product liability to class action defense, commercial litigation, medical malpractice defense and bankruptcy litigation. He also frequently handles governmental affairs, including the representation of government and civilian clients during investigations and litigation. In December, Mason served as second chair in a trucking accident jury trial that resulted in a defense verdict.

Mason is licensed to practice law in Tennessee and Mississippi. He is a board member of the Traffic Club of Memphis, an organization dedicated to fostering the professionalism of its members by providing a networking system and a forum for the presentation of transportation, distribution and logistics topics. He is a member of the Defense Research Institute's Trucking Law Committee and the Transportation Lawyers Association. He is also heavily involved in the legal community and currently serves as Vice President of the Tennessee Bar Association's Young Lawyers Division. Before he became a lawyer, Mason was a sportswriter and newspaper reporter.

Andrew Walsh, of counsel in the Birmingham office, is the editor of *Transportation News.* If you have questions about the articles contained here or need more information, please contact Andrew at 205.244.3863 or awalsh@bakerdonelson.com. Or visit our website, www.bakerdonelson.com, go to "Practices" and choose "Transportation."

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