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TransLaw

VIP Profile: Judith Kaleta, Deputy General Counsel of U.S. Department of Transportation

Alice Koethe

Judith Kaleta, Deputy General Counsel of U.S. Department of Transportation

TransLaw brings you an exclusive interview with Judith ("Judy") Kaleta, who started as DOT's career deputy general counsel on July 29, 2012. A Chicago native, Judy has been with DOT for more than 28 years. She started with the National Highway Safety Administration (NHTSA), in its General Law division. Her federal career has included positions with the Federal Highway Administration as special assistant to the chief counsel when it included motor carrier responsibilities now within the Federal Motor Carriers Safety Administration, chief counsel of the Research and Special Programs Administration (now Research and Information Technology Administration and the Pipeline and Hazardous Materials Safety Administration), senior counsel for Dispute Resolution in the Office of the General Counsel, and acting chief counsel of the Federal Transit Administration. She most recently served as assistant general counsel for General Law.

Judy has been a strong advocate for the department's use of Alternative Dispute Resolution (ADR). As a leader, she has a reputation for approaching her work with enormous enthusiasm, intelligence, and savvy.

Why did you decide to become a lawyer?

I went into the law because I saw it as a service profession. I wanted to make a positive difference with my career, and I saw the law as allowing me to do that.

How did you come to work at DOT?

I was working at the Illinois Attorney General's Office, Consumer Protection Division, immediately after law school. Among other things, I worked on consumer issues related to cars. I started working with folks at NHTSA. I heard about jobs in their Chief Counsel's Office, and I was hired in a General Law position there.

You have worked in several modes and offices within DOT. Was it ever difficult to transition to a new position or role?

Generally, the different components of DOT work together very well, and so the transitions were pretty easy. Having a certain knowledge of people and organizations helped when I went from place to place. Also, having a General Law background helped because I did some of the same kinds of substantive things in a lot of different places. Where you stand on an issue depends upon where you sit. So, I admit that when I've been in OST or the Operating Administrations, I took different positions or looked at an issue more broadly.

What is your favorite thing about your new job?

The people I get to work with. I find that people across DOT are really committed to their organization's mission. They really care about what they do. They take their jobs seriously and they have a lot of expertise.

Do you have any plans for your tenure?

We are at an interesting time in the General Counsel's Office. We have senior people who are retirement eligible and many new employees. For me, it is going to be a question of ensuring we have knowledge transfer, and that we continue to build expertise.

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Chair's Corner

Monica R. Hargrove, Chair

FBA Transportation & Transportation Security Law Section Members:

One of the benefits of serving as chair of the Federal Bar Association's T&TSL Section is the tremendous opportunity to share various professional opportunities with the great leadership group of the FBA. There are quite a range of interesting ways to network, from participating as a judge in the FBA's Annual Thurgood Marshall Moot Court Competition, to brainstorming with the chairs of other FBA sections in planning valuable legal programs, to co-sponsoring programs with various FBA chapters, to participating in leadership training opportunities where one can meet other chapter, division, and section leaders, as well as officers of the FBA, and to be a part of a professional legal association that is committed to maximizing member services.

During April of this year, I had a chance to serve as a judge, for the third year in a row, during the Thurgood Marshall Memorial Moot Court Competition. This year's competition had the largest number of participating teams ever to compete! Although I was only able to judge four teams that competed in the opening rounds, it was a tremendous opportunity to meet some of today's brightest law students. In addition, those who serve as judges get to meet other members of the FBA who serve in various leadership capacities throughout the country. Next year, when you receive the FBA's email soliciting your participation, I encourage members of the T&TSL Section to consider volunteering. Even if the issues don't involve transportation law issues, it is nonetheless an opportunity to contribute your time and talents, and to offer your professional insights to aspiring law students.

Toward the end of April, I also had the privilege of representing the T&TSL Section during the FBA's Midyear Meeting, held in Arlington, Va. Since I live in the Washington, D.C. metropolitan area, I was able to participate in the meeting without incurring expenses to the FBA or the T&TSL Section. The meeting provided a great chance for me to learn how some of the other Sections function, what new programs they are considering, how to co-sponsor programs with other Sections, and to discuss with chapter and division leaders, as well as the circuit vice-presidents, ways that we can work cooperatively to enhance the quality of programs and professional development opportunities to FBA members.

The T&TSL Section offers a variety of excellent programs and networking opportunities each year. We have two exciting programs on the horizon! On May 28, we will feature a brown bag luncheon program with National Transportation Safety Boards General Counsel David Tochen. And on July 16, we will be offering a program exploring a variety of current legal issues associated with the Panama Canal. This summer we will be providing several networking opportunities of special interest to law student interns and young lawyers who will be here in Washington on summer job assignments. So we encourage you to stay tuned for upcoming events and publications of the FBA's T&TSL Section! And, as always, we welcome your ideas and suggestions of activities and topics that would be helpful to you!

Monica R. Hargrove is the chair of the Transportation and Transportation Security Law Section and the general counsel of Airports Council International-North America. You can reach her at mhargrove@aci-na.org. ❖

Letter From the Editor

Lisa A. Harig

I'm pleased to present the Spring 2013 issue of *TransLaw*. We've got a robust collection of articles, case notes, and personal interviews on a variety of transportation-related subjects.

In this issue, we profile Judith Kaleta, DOT's deputy general counsel and supporter of the T&TSL section. John Anderson and Jonathan Patton write about the eroding application of the Carmack Amendment to as it relates to international shipments. Katharine Mapes presents an article on recent cases involving free speech at airports. James Briggs reviews *Gilstrap v. United Air Lines* (concerning air carrier obligations under the ADA and ACAA), and Eric Pilsk reviews the oral arguments at the U.S. Supreme Court in *American Trucking Associations v. City of Los Angeles.* Finally, we have summaries of recent T&TSL section events, including the 2013 Transportation Security Law Forum and the April luncheon with Raymond Atkins, general counsel of the Surface Transportation Board. Thank you to all of our excellent authors and contributors.

Please contract Sherwin Valerio at svalerio@fedbar.org with ideas for future issues of *TransLaw* or to submit an article.❖

Supreme Court Considers the Extent to Which Proprietary Actions by Public Entities are Exempt from Preemption

W. Eric Pilsk

The U.S. Supreme Court is considering an important case addressing the scope of federal preemption when public entities exercise proprietary powers. The case, *American Trucking Associations v. City of Los Angeles*, Case No. 11-798, addresses whether certain provisions of a Concession Agreement the City of Los Angeles adopted for drayage truck operators at the Port of Los Angeles are preempted by 49 U.S.C. § 14501(c)(1), which generally preempts state and local laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property." The case arose from a long-running dispute between the Port of Los Angeles and surrounding communities. The communities objected to a number of aspects of port operations, in particular the presence of heavy trucks driving and idling on local streets. Litigation and political pressure from the communities had largely stymied the port's ability to expand to meet demand for port facilities. To address community concerns, and enable it to realize its expansion goals, Los Angeles adopted a "Clean Truck Program" as part of the Concession Agreement drayage truck operators were required to sign to gain access to the port that included an incentive program to encourage trucking companies to transition their fleets to cleaner, lower-emissions trucks and a number of other conditions.

The issue before the Supreme Court focuses on two of those conditions: that drayage truck companies develop an off-street parking plan to keep trucks from idling on neighborhood streets and that trucks display a particular placard while driving on Port facilities. The Ninth Circuit held that those two conditions did affect rates, routes, or services of trucking companies and did not fall within any of the express exceptions to the statute. But, the Ninth Circuit held that those two conditions were not preempted because the fell in the "market participant doctrine." The market participant doctrine provides that when a public entity acts in a proprietary capacity, as opposed to a regulatory capacity, its proprietary actions are not subject to preemption. For example, a public entity would not be preempted by the Clean Air Act from setting tailpipe emissions standards for cars it chooses to buy for its own use, but it would be preempted from setting tailpipe emissions standards for third parties.

The Supreme Court granted certiorari to consider whether to recognize the market participant doctrine as a general exception to preemption. The case is important to many public entities, but it is of particular importance to entities like airports and ports that rely on their proprietary powers, often exercised through contracts and leases, to manage the use of their property. Those contracts and similar arrangements are not intended as generally-applicable regulations, but are intended to address particular problems with managing and operating a large commercial, if publicly owned, enterprise. The port's Clean Truck Program is a classic example of how a public entity uses its contractual authority to achieve the important proprietary goal of enabling future expansion. In that sense, these actions are no different that the kinds of standards private business impose on their suppliers in order to demonstrate that the company is "green" or does not rely on child labor. There might be a broader public purpose to the action, but the motivation is proprietary.

The case drew wide interest, and a number of entities filed amicus curiae briefs. The United States, as well as a number of trucking and airline industry associations, filed briefs supporting the American Trucking Associations' challenge. Those entities focused their arguments on the idea that the courts should not imply an exception to preemption, particularly when Congress has adopted an express preemption provision. Airports Council International-North America and a number of other entities representing public entities filed amicus curiae briefs in support of the City of Los Angeles and the National Resources Defense Council, which was also a party, focusing on the need for public entities to be able to exercise proprietary powers without fear of preemption because such actions were not the same as generally applicable laws or regulations, and therefore beyond the reach of the Supremacy Clause. NRDC in particular pointed out how private companies have developed extensive "green" programs for the market-driven reasons to enhance their brand and to secure public support, and that public entities should be able to act in the same way when operating a proprietary enterprise like a port or airport.

The case was argued on April 16, 2013 and a decision is expected by the end of June. If you are interested, you can access the merits briefs of the parties and the amicus curiae here: www.americanbar.org/publications/preview_home/11-798.html. A recording of the oral argument is available from the Supreme Court here: www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-798.

Eric Pilsk is a partner in the Washington, D.C. office of Kaplan Kirsch & Rockwell where he focuses on administrative litigation and appeals, primarily on behalf of airports and transit agencies. Pilsk is a 1988 graduate of Vanderbilt Law School. ❖

International Shipments and the Eroding Application of the Carmack Amendment

John E. Anderson, Sr. and Jonathan R. Patton

Introduction

In today's global marketplace, it is not uncommon for products to be shipped across borders to reach consumers in every corner of the world. Inevitably, as products travel great distances via multiple forms of transportation, accidents sometimes occur in which the cargo is damaged or destroyed.

The Carmack Amendment provides a well-established legal regime to deal with such incidents that occur on interstate trucking shipments within the United States. When the accident occurs on the domestic portion of an international route, however, the applicability of the Carmack Amendment is still evolving. The purpose of this article is to examine the application of the Carmack Amendment to international shipments. First, it provides an introduction to the Carmack Amendment. Then, it discusses how the Carmack Amendment applies to international shipments and examines the Supreme Court's recent decision in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp*. Finally, the article profiles three recent cases that all suggest a more limited application of the Carmack Amendment to transnational shipments after *Kawasaki*. This article does not address the applicability of the Carmack Amendment to transportation by a motor carrier in the United States solely between a place in a state and a place in another state.

The Carmack Amendment

The Carmack Amendment was enacted in 1906 to govern bills of lading in the rail transportation industry.[1] It has been altered and codified over the last century.[2] In its current form, it provides a uniform national system of liability and damages for interstate rail and motor carriers designed to provide certainty to both shippers and carriers.[3]

Carmack represents a codification of the common law rule imposing strict liability upon the common carrier-without proof of negligence.[4] Where applicable, Carmack imposes upon 'receiving carriers' and 'delivering carriers' liability for actual loss or injury to property caused during the motor or rail route under the bill of lading, regardless of which carrier caused the damage.[5] One purpose of Carmack is to relieve cargo owners of the burden of searching out a particular negligent carrier among the often numerous carriers handling an interstate shipment of goods.[6]

When does the Carmack Amendment apply to International Shipments?

One evolving issue is the applicability of the Carmack Amendment to portions of international shipments. By its terms, the Carmack Amendment applies to shipments between places in the United States, and between a place in the United States and a place in a foreign country to the extent the transportation is in the United States.[7] Although this seems clear, what is not entirely clear is whether the Carmack Amendment applies to domestic segments of an international shipment that involves multiple different methods of transportation and one contract—often a through bill of lading—that covers all segments of the journey.

The U.S. Supreme Court dealt with this issue in the case of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corporation*. In *Kawasaki*, the plaintiffs were cargo owners who contracted with the defendant to transport their cargo from China to inland destinations in the midwestern United States.[8] The defendant issued four through bills of lading that covered the entire course of the shipment, including the transport segments through the United States.[9]

The through bills of lading included several provisions at issue in the case. First, they included a "Himalaya Clause," which purported to extend the through bills' limitations on liability to subcontracting carriers.[10] Second, they allowed the Defendant to sub-contract on any terms whatsoever.[11] Third, the bills provided that the Carriage of Goods by Sea Act (COGSA) applied to the entire journey, not just the sea portion.[12] And finally, the bills included a forum-selection clause requiring that lawsuits relating to the carriage be brought in Japan.[13]

The goods were shipped to a port in Long Beach, Calif. where the containers were loaded onto a Union Pacific train.[14] The cargo was destroyed when the train carrying the cargo derailed in Tyrone, Okla.[15] The plaintiffs filed suit in California, and they argued that the Carmack Amendment applied to the portion of the cargo's journey in the inland United States and that it therefore trumped the forum-selection clause (and the other clauses) in the through bills of lading.[16] The District Court for the Central District of California disagreed and dismissed the case.[17] On appeal,

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however, the Ninth Circuit agreed with the plaintiffs and held that the Carmack Amendment applied to the inland portion of the journey.[18]

The issue was whether the terms of a through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier and supersede the Carmack Amendment. The Supreme Court held that Carmack does not apply to the domestic segments of a shipment originating overseas under a single through bill of lading.[19]

Justice Kennedy, writing for the majority, reasoned that since Carmack only applies to carriers required by the statute to issue a Carmack-complaint bill of lading, and since only "receiving carriers" are required to issue such a bill of lading, in order for Carmack to apply to a carrier, that carrier must be a "receiving carrier" under the statute.[20] He explained that a receiving carrier for purposes of the Carmack Amendment was only the initial carrier that "received" the property "at the journey's point of origin."[21] He then concluded that since the defendant received the cargo at an overseas location under a through bill of lading that covered transport into an inland location in the United States, the journey did not include a receiving rail carrier that had to issue bills of lading under Carmack, and, consequently, Carmack did not apply.[22]

Thus, the Supreme Court's decision in *Kawasaki* limited Carmack's application in international shipments. However, it left open several issues such as whether Carmack applies to situations where goods are received in the United States for export, and whether it applies in situations involving a freight forwarder or other intermediaries.

These questions and the application of the Carmack Amendment after *Kawasaki* are making their way through the lower courts. Three recent opinions demonstrate that courts seem to be using *Kawasaki* to carve out even more instances where carriers can avoid Carmack liability.

Recent Cases

In *Norfolk Southern Railway v. Sun Chemical Corp.*, the plaintiff, Sun Chemical Corporation (Sun), hired an ocean carrier to transport two containers of ink manufactured by Sun from Kentucky to Brazil.[23] After the ocean carrier hired a freight forwarding company to arrange the shipment, the freight forwarder hired the defendant, Norfolk Southern Railway Company (Norfolk) to carry the ink by rail from Kentucky to Savannah, Georgia, where it would begin its ocean voyage to Brazil.[24] The rail cars carrying the containers derailed and the ink was destroyed.[25] Sun and its insurer sued Norfolk for negligence and breach of contract.[26] Sun moved for summary judgment on several theories, including the theory that Norfolk was strictly liable for the loss under the Carmack Amendment.[27] The trial court granted the motion for summary judgment and held that Norfolk Southern was subject to the Carmack Amendment.[28]

Sun had entered into a contract with the ocean carrier under a "through bill of lading," a bill in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction.[29] The ocean carrier thus took responsibility for the entire transportation of the shipment from the place of receipt to the place of the final destination, and it retained the right to use the services of other carriers and modes of transportation.[30] Sun also authorized the ocean carrier to subcontract on any terms for the handling and carriage of the goods.[31]

Under this authority, the ocean carrier contracted with a freight forwarding company for inland transportation, which in turn hired Norfolk to transport Sun's ink from Kentucky to Savannah.[32] The transportation agreement between the freight forwarding company and Norfolk incorporated Norfolk's rules circular governing such transport, which offered customers a choice between "standard" and "Carmack" liability provisions.[33] The rules circular stated in bold face capitals that unless language expressly selecting "Carmack" was included in the original shipping instructions, any tender of freight for transportation would be accepted under standard liability coverage provided and not under Carmack coverage.[34]

The primary question before the Georgia Court of Appeals was whether Sun could be bound by the agreement of the freight forwarder and Norfolk, reached without notice to Sun, such that Norfolk could not be held strictly liable under the Carmack agreement.[35] The Court held that Norfolk was not subject to Carmack liability for several reasons: first, the bill of lading issued by the ocean carrier was a "maritime contract" to which Carmack liability does not apply; second, Norfolk was not the "receiving carrier" of the ink containers for purposes of Carmack liability; and third, Sun authorized downstream carriers to reach their own terms as to liability, which the freight forwarder did but then declined Norfolk Southern's offer of Carmack liability.[36] The court of appeals, therefore, held that Norfolk was not subject to the Carmack Amendment.

In *Royal & Sun Alliance Insurance, PLC v. Service Transfer, Inc.* the parties disputed whether the domestic leg of an international transportation contract was governed by COGSA or the Carmack Amendment.[37] The defendant was an interstate motor carrier that provided service to ocean carrier American President Lines, Ltd. (APL).[38] In April 2011, Biolife Plasma Services, LLC delivered a shipment of frozen human plasma to the defendant at a warehouse in Kentucky.[39] It was intended that the defendant would transport and deliver the plasma from Kentucky to APL in Norfolk, Virginia for further shipment by sea to Bremerhaven, Germany en route to its ultimate destination in Vienna, Austria.[40] Biolife is part of Baxter and the plasma was to be delivered to a European affiliate of Baxter.[41] While driving between Kentucky and Virginia, the defendant's truck driver fell asleep and drove the truck off the road.[42] The truck burned and the shipment

was lost. Royal and Sun Alliance (Royal) commenced the action as subrogee of Baxter.[43]

The shipment of plasma was subject to a sea waybill between Baxter and APL.[44] The waybill provided for the through intermodal transport of the goods from Kentucky to Vienna, Austria.[45] The waybill included a Clause Paramount and a Himalaya Clause.[46] The clauses, in relevant part, extended APL's liability under COGSA to the period prior to loading goods onto APL's ocean vessel and permitted APL's subcontractors to invoke COGSA liability limitations, respectfully.[47]

When the defendant's truck driver picked up the shipment from Kentucky on April 11, 2011, the defendant driver signed a straight bill of lading dated April 9, 2011.[48] The bill of lading stated that the subject shipment was from MDI in Kentucky to Baxter AG in Vienna, Austria.[49]

In its discussion, the court noted that COGSA governed the terms of bills of lading issued by ocean carriers engaged in foreign trade.[50] Further, COGSA allowed parties the option of extending certain COGSA terms by contract to cover the entire period to which the goods would be under a carrier's responsibility, including a period of inland transport.[51] The Carmack Amendment, by contrast, governed the terms of bills of lading issued by domestic motor carriers providing transportation or service subject to the jurisdiction of the surface transportation board.[52]

The court held that the clear terms of the waybill stated that COGSA governed this action.[53] The ocean freight services agreement between Baxter and APL provided that liability for any freight claims shall be determined pursuant to the terms and conditions of the waybill.[54] The waybill specified that APL was responsible for the performance of the carriage from the place of receipt to the place of delivery of the combined carriage indicated on the waybill, namely the shipment of goods from Erlanger, Kentucky to Vienna, Austria via the ports of Norfolk, Va. and Bremerhaven, Germany.[55] Also, it contained a Clause Paramount that specifically extended COGSA's application to the inland portion of the shipment.[56] The Himalaya Clause extended COGSA's application to STI as APL's subcontractor on the waybill.[57] STI did not issue its own bill of lading and thus it had no privity with Baxter.[58] In fact, no bill of lading was issued by any party to cover solely the domestic segment of the international shipment.[59] Thus, the court reasoned that claims arising during STI's transport of the goods from the waybills place of receipt, Erlanger, Ky. to the port of loading, Norfolk, Va., were covered by COGSA.[60]

The court noted that the Carmack Amendment by its terms did not apply to non-receiving carriers transporting goods as part of a shipment between the United States and a non-adjacent foreign country under a through bill of lading.[61] It therefore concluded that COGSA governed the claims at issue in the action and not the Carmack Amendment.[62]

Finally, *Hartford Fire Insurance Co. v. Expeditors International of Washington, Inc.* involved the loss of solar panels while in transit from the United States to France.[63] Hartford brought the suit as subrogee of Evergreen Solar, Inc. (Evergreen).[64] Expeditors International of Washington (Expeditors) hired Intransit to transport an empty ocean container to Evergreen in Devens, Mass., and, after having the container loaded by Evergreen, to deliver it to a terminal in Elizabeth, N.J.[65] Evergreen loaded the container and sealed it with a seal.[66] On June 29, 2009, Intransit issued a "pick-up/delivery receipt" listing Intransit's "client" as Expeditors and the entity that delivered the container as Evergreen.[67]

On July 2, 2009, Intransit's driver delivered the container with the seal intact.[68] Intransit claimed that Evergreen sealed the container, at no time during Intransit's transport was the container open and visible for inspection, and that Intransit had no knowledge of how the container was loaded and secured.[69]

Expeditors issued a bill of lading on July 6, 2009, listing Evergreen as the shipper and Soleil Energie SAS (Soleil) as the consignee.[70] The bill of lading listed the place of Evergreen's receipt as Devens, the port of loading as New York, New York and the place of delivery as Soleil as Fos-Sur-Mer, France.[71] The bill of lading contained a choice of law provision stating that COGSA applied.[72]

The bill of lading contained three other provisions relevant to the case. First, it contained a limitation of liability provision.[73] Second, the bill of lading also limited liability "where the state of carriage during the loss of or damage to the goods cannot be provided"—in that instance, "it will be presumed that the loss or damage occurred during that portion which is considered sea carriage under this bill."[74] Third, the bill of lading contained a sub-contracting provision, which provided that the carrier could subcontract on any terms, but that Evergreen was to indemnify the carrier against any claims made against it by any of its sub-contractors.[75]

The parties disputed whether COGSA or the Carmack Amendment applied to the action. Intransit argued that COGSA, not the Carmack Amendment, applied to the shipment at issue because Carmack "does not apply to cargo moving under a through bill of lading to or from a non-adjacent country."[76] The court agreed and noted that the bottom line in determining Carmack's applicability is whether the carrier functioned as a receiving rail carrier.[77]

The court noted that the facts regarding Intransit's role were undisputed. Expeditors contracted with Evergreen for the through movement from the U.S. to France.[78] It was undisputed that Expeditors was the freight forwarder for the transport at issue.[79] It was further undisputed that Intransit transported the container to Evergreen in Massachusetts and then delivered the container after it was loaded by Evergreen to the terminal in Elizabeth, N.J.[80] In other words, Expeditor only contracted a small portion of the move to Intransit, and instructed and permitted Intransit to pick up the cargo from the consignee in Massachusetts pursuant to Expeditor's bill of lading and shipping receipt.[81] So Intransit was an intermediate carrier for the freight forwarder.[82]

On those facts, the court decided that Expeditors, not

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Intransit, was the receiving carrier.[83] Because Carmack did not apply to the mere delivery carriers, the Court reasoned that it did not apply to Intransit.[84]

The Court also noted that there were two additional reasons why Carmack did not apply in this instance. First, the plaintiff sued based upon the bill of lading issued by Expeditors and thus was bound by its terms.[85] The bill of lading clearly stated that COGSA applied to Expeditors and its subcontractors. Second, where a bill of lading required a substantial carriage of goods by sea, its purpose was to effectuate maritime commerce, and thus it was a maritime contract.[86] For all of those reasons, the court found that COGSA, not the Carmack Amendment, applied.

These three cases all demonstrate the eroding applicability of the Carmack Amendment to the domestic portions of international shipments. They suggest that after *Kawasaki* courts are more likely to conclude that other bodies of law or contractual arrangements apply to those situations. ❖

Conclusion

International shipments have become more commonplace as products are increasingly transported across the world. The application of the Carmack Amendment to these shipments has become somewhat complicated due to the number of entities involved and the complexity of the agreements between them.

The Supreme Court's decision in *Kawasaki* and several recent cases in its wake indicate a more limited application of Carmack to the domestic segments of international shipments. This trend is significant because it provides motor carriers and railway companies with strategies for attempting to avoid Carmack liability both at the contracting stage and in litigation.

John E. Anderson, Sr. is a member of Dickinson Wright, PLLC in its Nashville, Tenn. office. He specializes in transportation litigation and is the head of the firm's transportation and logistics practice group. Also, he is a member of the board of directors of the Federal Bar Association's Transportation & Transportation Security Law Section, Defense Research Institute, the Transportation Lawyer's Association, and the Federation of Defense & Corporate Counsel.

Jonathan Patton is an associate in Dickinson Wright's Nashville office.

Endnotes

[1]*Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010).
[2]*Id.*
[3]*See* 49 U.S.C. §§ 11706, 14706.
[4]Patricia O. Alvarez & Marc J. Yellin, *Where to Start with a Motor Carrier Cargo Claim*, For the Defense, Feb. 2006, at 29.
[5]*Kawasaki*, 130 S.Ct. at 2441.
[6]Alvarez, *supra* note 4.
[7]*Id.*
[8]*Kawasaki*, 130 S.Ct. at 2439.
[9]*Id.*
[10]*Id.*
[11]*Id.*
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]*Id.* at 2439–40.
[17]*Id.*
[18]*Id.*
[19]*Id.* at 2442.
[20]*Id.* at 244–46.
[21]*Id.* at 2443.
[22]*Id.* at 2444, 2449.
[23]*Norfolk S. Rwy v. Sun Chem. Corp.*, 735 S.E.2d 19, 21 (Ga. Ct. App. 2012).
[24]*Id.*
[25]*Id.*
[26]*Id.*
[27]*Id.*
[28]*Id.*
[29]*Id.*
[30]*Id.*
[31]*Id.* at 22.
[32]*Id.*
[33]*Id.*
[34]*Id.*
[35]*See id.*
[36]*Id.* at 27.
[37]*Royal & Sun Alliance Ins., PLC v. Serv. Transfer, Inc.*, No. 12 Civ. 97 (DLC), 2012 U.S. Dist. Lexis 172307, at *1 (S.D.N.Y. Dec. 4, 2012).
[38]*Id.*
[39]*Id.* at *1–2.
[40]*Id.* at *2.
[41] *Id.*
[42]*Id.*
[43]*Id.*
[44]*Id.*
[45]*Id.* at *3.
[46]*Id.*
[47]*Id.*
[48]*Id.* at *4.
[49]*Id.*
[50]*Id.* at *5.
[51]*Id.*
[52]*Id.* at *6.
[53]*Id.* at *7.
[54]*Id.*
[55]*Id.* at *7–8.
[56]*Id.* at *8.
[57]*Id.*
[58]*Id.*
[59]*Id.*

[60]*Id.*
[61]*Id.* at *8–9.
[62]*Id.* at *15.
[63]*Hartford Fire Ins. Co. v. Expeditors Int'l of Wash.*, No. 10 Civ. 5643 (KBF), 2012 U.S. Dist. LEXIS 96974, at *1 (S.D.N.Y. July 9, 2012).
[64]*Id.*
[65]*Id.* at *2.
[66]*Id.*
[67]*Id.* at *2–4.
[68]*Id.*
[69]*Id.*
[70]*Id.*
[71]*Id.*
[72]*Id.* at *5.
[73]*Id.*
[74]*Id.* at *6.
[75]*Id.*
[76]*Id.* at *11.
[77]*Id.* at *15–16.
[78]*Id.* at *16.
[79]*Id.* at *17.
[80]*Id.*
[81]*Id.*
[82]*Id.*
[83]*Id.*
[84]*Id.*
[85]*Id.*
[86]*Id.* at *18.

PROFILE continued from page 1

So, my priority is to enable the office to continue to do what we're doing right by exploring options for knowledge transfer and providing training.

What has changed the most in your time at DOT?

One major change has been the technology. I came here before the age of email. I came before the age of computers on people's desks. Now, the working environment and the pace are different because people expect a more immediate response.

For lawyers, having legal research tools at your fingertips helps you provide quicker advice or have a better understanding of the issues.

Record retention practices have changed because now we are dealing with electronic filing. We are determining how to embrace technology more, and make it easier to share information.

What advice would you have for attorneys who are new to the world of transportation?

Try to understand the underlying transportation *system*. We serve our clients best by trying to understand what they work on. So, if there are opportunities to do on-site field work, to see how something actually operates, whether it is a pipeline, an airplane, or a tank car, please take them. It is important to get a programmatic perspective in order to understand the challenges the clients are facing. And understand the interrelatedness of the transportation system. It is intermodal and connected.

Also, develop listening skills, and listen to the client. Be a problem-solver. Use ADR skills. We are often called upon to solve problems, and part of doing that effectively is developing a relationship with the client so that you understand what their concerns are. So, the ADR piece is about asking those types of questions. Engage questions, listen to their concerns, engage with them so they know you understand them, brainstorm options, and then start to narrow it down. ADR teaches you to suspend judgment. That has helped me a lot. You need to be able to hear both sides equally in order to help be a problem-solver.

What are your favorite books or movies?

Choosing a favorite is difficult because that may change over time. There are a couple of movies that I'm willing to watch over and over. I own the "Day the Earth Stood Still," original 1951 black and white version. I remember seeing it as a kid. It's a movie that takes place in Washington, D.C. The message of the movie, delivered by a space alien, is that people of the Earth need to live peacefully or be destroyed as a danger to other planets. In some ways, I feel that influenced me to move to D.C. and to work for the government.

Also, "Yankee Doodle Dandy." I like the music and flag-waving patriotism of it. I'm proud to be an American and a federal employee.

As for books, I like fiction and non-fiction. As a leader, I often pick up the book 21 Laws of Leadership by John Maxwell. I pick it up when I'm dealing with a lot of tough issues, as a reminder of the importance of thinking about the leadership in the workplace.

Is there anything else you would like to share with *TransLaw*?

We are fortunate in the department to have skilled and dedicated lawyers who are part of the department's decision-making process, starting with the General Counsel's team. We're open to working with the private sector, and I'd like to continue the relationship with the Transportation and Transportation Security Law Section of the Federal Bar Association. ❖

Place Your Rights on the Conveyer Belt: Free Speech at Airports in the TSA Era

Katharine Mapes

Because airport terminal buildings are considered non-public forums for purposes of the First Amendment, it has been relatively easy for airports to show that restrictions on expressive activity within them pass muster under the First Amendment. However, in the decade since September 11 and the creation of the Transportation Security Administration (TSA), airports have seen a new type of political speech on their premises. The airport's security checkpoint has become a locus of First Amendment activity—and, unlike the traditional test cases on free speech at airport terminal buildings—the message conveyed by protestors is one specifically about the airport itself. As cases involving security protests start to reach the courts, there is a real question to what extent disruption of airport activities will be deemed allowable when First Amendment interests are implicated.

To date, litigation on security protests has involved cases brought by passengers against the TSA itself. Going forward, however, airport operators and local governments should be prepared to deal with protests, leafleting, and other expressive activity adjacent to the TSA checkpoint that will fall within their jurisdiction. This article will discuss the legal standards that will apply and recent case law that may represent developing trends in the area.

The Historical Perspective: Airports as Non-public Forums

Courts have considered at great length the types of restrictions that airports may put on leafleters and protestors inside the airport terminal. At the heart of these cases is the Supreme Court's finding that an airport terminal is not a "public forum" for purposes of the First Amendment. A public forum has as "a principal purpose . . . the free exchange of ideas, " *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985), and has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). But, the Supreme Court found, that is not true of airport terminals: it is only relatively recently that they have become forums for public distribution of literature, canvassing, and similar activities. Nor have airports "been intentionally opened by their operators to such activity," if only because "the frequent and continuing litigation evidencing the operators' objections belies any such claim." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (ISKON).

In deciding *ISKON*, the Supreme Court was influenced by the extent to which expressive activities can impede the business and transportation functions of an airport. It described at length the way passengers must alter their paths to avoid solicitation and proselytization. This impedes the normal flow of traffic in any venue; however, "[t]his is especially so in an airport, where air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation." *ISKON*, 505 U.S. at 684 (internal quotations omitted). As such, delays can be "particularly costly," as "a flight missed by only a few minutes can result in hours worth of subsequent inconvenience." *ISKON*, 505 U.S. at 684.

Thus, airports are considered non-public forums, and as non-public forums, airport operators have relatively wide discretion to regulate expressive activities on their premises. In a non-public forum, the State may make time, place, and manner regulations (as it may in a public forum); it may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Courts have not, however, deemed all restrictions to be reasonable regardless of substance. The Supreme Court has ruled that the Board of Airport Commissioners of Los Angeles could not enact a resolution providing that "the central terminal area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 570-71 (1987). Likewise, a court of appeals struck down a total ban on newsracks inside an airline terminal. *Multimedia Pub. Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993). Ultimately, the court concluded that the airport's newsrack ban made "newspapers hard to come by for many patrons of the Greenville-Spartanburg Airport and impossible for others, thereby placing a heavy burden on the newspaper companies' protected distribution activity." *Id.* at 160.

After 9/11: the Rise of Security-Oriented Protest Activity

The First Amendment cases of the '80s and '90s are marked by a particular commonality: they do not involve speech that is about the airport itself, or about activities that are particular to it. Following September 11, 2001, however, and the subsequent creation of the Transportation Security Administration, airports have seen an uptick in expressive activity directed at airport security measures.

Airports and other interested parties may not be able to assume that the "reasonableness" analysis will be resolved in the same way as to an individual protesting airport security as it is when a religious or political group seeks to distribute information unrelated to the airport. There are the seeds of such a finding in much older case law. The Second Circuit, for instance, has found fee and insurance requirements unreasonable when applied to protestors seeking to

use an abandoned railway bed that was officially closed to the public to "demonstrate the availability of a suitable corridor for a rail line." *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1052 (2d Cir. 1983). The court emphasized that the rail bed was "a particularly appropriate site for the message appellants intended to convey," *id.* at 1055, and that the non-profit group in question sought "access for the purpose of communicating a message of public import which is intimately related to the forum sought." *Id.* at 1057. And in doing so, it noted that it did not "suggest that DOT's fee and insurance requirements would not be valid when reasonably applied." *Id.* The Supreme Court has hinted at such considerations as well. In *Cornelius*, the Supreme Court noted that the reasonableness of a challenged regulation must be assessed "in the light of the purpose of the forum and all the surrounding circumstances." 473 U.S. at 809.

Of course, some regulations will be permissible, and indeed have already been found so. For instance, a TSA regulation prohibits interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties. 49 C.F.R. § 1540.109. In a case interpreting that regulation, the Sixth Circuit upheld it as applied to a passenger who engaged in a loud and profane argument with TSA personnel and was fined $700 for it. In upholding the regulation, the court looked at its preamble, which specified that the rule did "not prevent good-faith questions from individuals seeking to understand the screening of their persons or their property." 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002). The Sixth Circuit added to that gloss the note that "the asking of a good-faith question while using profanities would also not by itself be sufficient for a finding that a screener has been interfered with in the performance of his duties." *Rendon v. TSA*, 424 F.3d 475, 478-79 (6th Cir. 2005). Ultimately, it concluded that the regulation limited "speech only in the narrow context of when that speech can reasonably be found to have interfered with a screener in the performance of the screener's duties." *Id.* at 480.

Perhaps conversely, in January, the Fourth Circuit allowed a claim against the TSA and various agents and officials to proceed on First Amendment grounds past a motion to dismiss. In that case, a passenger Aaron Tobey placed his "sweatpants and t-shirt on the conveyer belt, leaving him in running shorts and socks, revealing the text of the Fourth Amendment written on his chest." *Tobey v. Jones*, 706 F.3d 379, 384 (4th Cir. 2013). Tobey was arrested, questioned, and then released after about an hour. In rejecting the defendants' motion to dismiss, the court found that "it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it." *Id.* at 391.

The court did not depart from *IKSON*'s "reasonableness" standard, but found that it was "*unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest," *id.* at 392, and that "peaceful, silent, nondisruptive protest is protected in a nonpublic forum, like an airport." *Id.* at 393. The court concluded its inquiry by noting that "[w]hile the sensitive nature of airport security weighs heavily on the court, protest against governmental policies goes directly to the heart of the First Amendment." *Id.* It symbolizes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

What the court did not find was that Aaron Tobey had disrupted the smooth flow of traffic at the airport or disrupted other passengers as they rushed to make their flights. Interestingly, both the general presence of airport security and the post-September 11 restrictions that allow only ticketed passengers past the security checkpoint may mitigate against the reasonableness of certain expression, even as they serve as the impetus for it. In *ISKON*, the Supreme Court compared airport terminals to bus terminals and train stations. And in the course of that comparison, it noted that an airport's "security magnet" entirely "lacks a counterpart" in other transportation centers, and that "access to air terminals is . . . not infrequently restricted – just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible." *ISKON*, 505 U.S. at 681-82.

So far, no court has found that disruptive speech need be allowed at an airport regardless of the context in which that speech occurred. And under *ISKON*, a court might never do so. But there is now precedent that suggests the secured—and security-focused—areas of the airport cannot be insulated from expressive activity. In *Tobey v. Jones*, the Fourth Circuit cautioned that "while it is tempting to hold that First Amendment rights should acquiesce to national security in this instance, our forefather Benjamin Franklin warned against such a temptation by opining that those 'who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.'" 706 F.3d at 393. And it thus concluded that it "take[s] heed of his warning and [is] therefore unwilling to relinquish our First Amendment protections-even in an airport." *Id.* Such rhetoric, which places the context of the speech at the forefront, might well be the future of First Amendment jurisprudence in airport terminals. Airports and others seeking to enact policies about expressive activities on their premises should consider how they can balance those concerns with the smooth running of the airport. ❖

Katharine Mapes is an associate at the firm of Spiegel & McDiarmid LLP, where she practices transportation and federal energy law, mostly on behalf of the firm's municipal and governmental clients. Prior to working at Spiegel, Katharine was a law clerk for the Hon. Roslyn O. Silver in the U.S. District Court for the District of Arizona.

Federal Appellate Court Issues Decision on Air Carrier Obligations in Providing Assistance to Passengers with Disabilities

James I. Briggs, Jr.

The U.S. Court of Appeals for the Ninth Circuit in California has issued an important decision involving the obligations of air carriers in providing assistance to passengers with disabilities in moving through airport terminals and the interplay between the Americans with Disabilities Act (ADA) and the Air Carrier Access Act (ACAA) at airport terminals.

In *Gilstrap v. United Air Lines* (No. 11-55271; March 12, 2013) (cdn.ca9.uscourts.gov/datastore/opinions/2013/03/12/11-55271.pdf) the Ninth Circuit upheld the dismissal of a passenger's ADA claim against an air carrier but permitted the passenger's state tort law claim to proceed against an air carrier for alleged violations of the ACAA. In this case, a passenger alleged that United Air Lines treated her hostilely and did not provide her with adequate assistance in moving through the airport terminal, as required by Department of Transportation (DOT) regulation, and that, as a result, she suffered physical and emotional injuries. The passenger sued United and alleged several causes of action under state tort law and a violation of Title III of the ADA.

The court held, first, that the ACAA and its implementing regulations preempt state standards of care with respect to the circumstances under which air carriers must provide assistance to passengers with disabilities in moving through an airport terminal but do not preempt any state remedies that may be available when air carriers violate those standards. Second, the court held that the ACAA and its implementing regulations do not preempt state-law personal-injury claims involving how air-carrier agents interact with passengers with disabilities who request assistance in moving through an airport. Third, the court held that the portion of an airport terminal controlled by an air carrier is not a place of public accommodation under Title III of the ADA. Fourth, the court declined to address the question of whether the ACAA may be enforced through private lawsuits.

As background, the ADA includes three main sections: Title I, which concerns employment discrimination (42 U.S.C. §12111 *et seq.*); Title II, which governs access to public-entity services (§12131 *et seq.*); and Title III, which governs access to privately-operated public accommodations and services, such as restaurants and retail stores (§12181 *et seq.*). Because Title III expressly excludes aircraft from coverage, the Court noted that the Department of Justice (DOJ), which implements the ADA, interprets Title III as not covering any portion of an airport that is under the control of an air carrier and specifies that such areas are covered by the ACAA, not the ADA, and thus under the regulatory jurisdiction of DOT, not the DOJ. (*See* 28 C.F.R. Part 36 App. C).

The DOT implementing regulation for the ACAA (14 C.F.R. Part 382) requires air carriers to provide assistance in transporting a passenger with a disability from the terminal entrance through the airport to the aircraft and from the aircraft through the airport to the terminal entrance, including providing assistance in areas such as ticket counters and baggage claim. (§382.91(a)-(b)). The DOT ACAA regulation provides that air carriers are "deemed to comply" with their ACAA obligations to make airport terminals accessible if the facilities meet requirements applying to places of public accommodation under DOJ regulations implementing Title III of the ADA. (14 C.F.R. §382.51(a)(1)). Concomitantly, privately operated places of public accommodation (such as restaurants, shops, lounges, or conference centers) located within airport terminals, but not under the control of air carriers, are covered by Title III of the ADA.

The court, in evaluating federal preemption under the ACAA, established a two-part framework. The first question is whether the particular area affected by the lawsuit is governed by pervasive federal regulations. If so, then any applicable state standards of care are preempted. However, this scope-of-field preemption extends only to the standard of care. Local law could still govern the other negligence elements (breach, causation, and damages) as well as the choice and availability of remedies.

In this case, the plaintiff's negligence and breach-of-duty claims challenged United's failure to provide her with assistance in traversing the terminal before, between, and after flights. The court held that the ACAA and its implementing regulations establish the standard of care, or duty, that air carriers owe and the assistance air carriers must provide to passengers with disabilities in moving through the airport and so preempt any different or higher standard of care that may exist under state tort law. However, the court held that the ACAA does not preempt any state remedies that may be available when air carriers violate the ACAA standard of care. In such a case, a plaintiff may rely upon state tort law to prove the other elements of the claim—breach, causation, damages, and remedies. In other words, if an air carrier provides a passenger with all the assistance required under the ACAA and its implementing regulations, then the air carrier has met its standard of care and cannot be held liable under state law for failing to do anything further. However, if an air carrier falls short of compliance with the ACAA and its implementing regulations, then whether a passenger may recover for any injuries caused by the air carrier's breach of its standard of care will depend upon the degree to which state tort law recognizes the ACAA standard of care.

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TRANSPORTATION SAFETY AND THE NATIONAL TRANSPORTATION SAFETY BOARD: A LEGAL PERSPECTIVE

Speaker: David Tochen, National Transportation Safety Board General Counsel

Moderator: Monica Hargrove, Transportation and Transportation Security Law Section Chair

- **DATE**
  Tuesday, May 28, 2013
- **TIME**
  Noon – 1:00 p.m.
- **LOCATION**
  U.S. Department of Transportation
  Headquarters
  1200 New Jersey Avenue, SE
  Rooms 8-9-10
  Washington, DC 20590
- **RSVP TO**
  Erin Rodgers
  erodgers@fedbar.org
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FEDERAL BAR ASSOCIATION

Transportation and Transportation Security Law Section • District of Columbia Chapter

And the 2013 Rosenberg Award Goes To … TSA Chief Counsel Francine Kerner!

Congratulations to T&TSL Section member and Transportation Security Administration Chief Counsel Francine J. Kerner, who was recognized by the D.C. Bar for her contributions to the legal profession and her dedication to public service. Kerner will be presented with the 2013 Beatrice Rosenberg Award for Excellence in Government Service at the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting on June 18.

T&TSL Section Happenings—Don't Know Much About the Surface Transportation Board? Come and Meet the General Counsel Raymond Atkins!

Nancy Kessler

On March 19, the section and the Association of Transportation Law Professionals treated interested lawyers to a lunchtime question-and-answer session with Raymond Atkins, the general counsel of the Surface Transportation Board (STB). After learning that STB was ranked Number One for the "Best Place to Work for a Small Government Agency" (rankings produced by the Partnership for Public Service and Deloitte), the consensus of the attendees was that the ranking, in no small part, was due to Atkins's leadership and commitment to staff autonomy at the STB.

The STB is an independent economic regulatory agency, housed within the U.S. Department of Transportation. Under its three board members, the STB resolves railroad rate and service disputes, reviews proposed railroad mergers, rail line purchases, constructions and abandonments. It also oversees Amtrak's on-line performance and has some non-safety jurisdiction over certain pipelines, water carriers and motor carriers. The STB was established after the 1995 statutory termination of the Interstate Commerce Commission.

Atkins explained that the STB's Office of the General Counsel has independent litigation authority to defend STB decisions in appellate court, and the STB attorneys work closely with the U.S. Department of Justice attorneys, who also are named as respondents in challenged cases. About 10 to 20 cases per year are litigated, and STB staff attorneys are empowered to argue the cases themselves. According to Mr. Atkins, staff morale is high due to their independence and responsibility.

Mr. Atkins also discussed the role of the Office of General Counsel in "defensibility assessments" of agency actions that may be subject to judicial challenge. Staff lawyers work with STB Members and the Office of Proceedings to make sure the decisions are defensible. Most of the attorneys rotate through different types of cases or matters, although some specialize in "daunting" fields such as rate cases (which can contain many technical issues) or environmental matters. Mr. Atkins said the office also provides legal advice to STB components, including the Offices of Economics, Environmental Analysis, Managing Director, Proceedings, and Public Assistance, Governmental Affairs and Compliance.

In answering a question about what surprised him about the position of general counsel, he responded that he previously had not been aware of the sheer amount of non-case related work a general counsel does, particularly in the areas of ethics, financial disclosures, and Sunshine Act. His goals for the coming year include helping the STB get through sequestration and the five percent budget cuts. The budget cuts present certain challenges to the STB's ability to institute a new case management system and to launch a website redesign. However, the STB has made strides in efficiency initiatives by use of the "grant stamp" approval in certain routine matters.

Many government lawyers are familiar with transitioning new, Senate-confirmed board members (or other appointees) to the workings of their agencies. They would agree with Atkins's description of the process as entailing "a lot of briefing," making sure "not to overload them," and at the same time, introducing them to the cases most likely to arise.

Atkins resume includes a distinguished career of public and private service. Before he became general counsel in September 2010, he served as chief of staff to Chairman Daniel Elliott and worked as an attorney in the STB's General Counsel's Office. After law school, he clerked for Judge Sloviter on the U.S. Court of Appeals for the Third Circuit and worked in the antitrust and transportation practices at Covington & Burling. Atkins earned a Bachelor of Science degree from Carnegie Mellon University, a law degree from George Mason University, and a Ph.D. in economics from Emory University.

The session was ably moderated by Kathryn Gainey, chair of the section's Surface Transportation Committee. Gainey is of counsel with the law firm Steptoe & Johnson LLP and is a member of the Transportation Group. She previously clerked for Judge Gwin on the Northern District of Ohio and for Judge Briscoe on the U.S.Court of Appeals for the Tenth Circuit.

The section is grateful for the opportunity to hold the brown bag luncheon event at the Washington, D.C. law offices of Steptoe & Johnson LLP and to be associated with the D.C. Chapter of the Association of Transportation Law Professionals. ❖

T&TSL Section Happenings—Federal Bar Association Transportation Security Law Forum: "Transportation Security Legislative Agenda for the 113th Congress"

On Feb. 12, 2013, the Transportation and Transportation Security Law Section held its annual Transportation Security Law Forum at the Transportation Security Administration's headquarters in Arlington, Va. This year's program, entitled the "Transportation Security Legislative Agenda for the 113th Congress," featured a keynote address by TSA Administrator John S. Pistole regarding risk-based security and a panel of congressional staffers from Senate and House Committees discussing the anticipated transportation security legislative agenda. The speaking program was introduced by Francine J. Kerner, TSA's Chief Counsel, with closing remarks provided by Monica Hargrove, general counsel for Airports Council International–North America.

Administrator Pistole outlined TSA's risk-based security strategy and the importance of an intelligence-driven approach to passenger screening. He emphasized that the strategy is intended to focus resources where there is the greatest risk, while encouraging expedited screening to improve the travel experience for the public. During his remarks, Pistole shared some compelling video footage of the powerful and devastating impact of a small amount of liquid explosives. He also highlighted several specific risk-based security initiatives include TSA Pre✓™, which he explained as an innovative and efficient passenger prescreening effort currently up and running in dozens of busy airports.

The legislative panel was moderated by Sarah Dietch, TSA's assistant administrator for Legislative Affairs. The panel of congressional experts consisted of Rich Swayze, a staff member of the Senate Commerce, Science and Transportation Committee; Amanda Parikh, staff director for the Transportation Security Subcommittee of the House Homeland Security Committee; and Justin Wein, associate staff for Homeland Security for Congressman David Price, ranking member of the Homeland Security Subcommittee of the House Appropriations Committee. The discussion focused on critical issues in transportation security, possible legislative proposals and how sequestration might affect the transportation security agenda.

Following the program, participants were invited to tour the Transportation Systems Integration Facility at Ronald Reagan Washington National Airport, where the latest advances in security technology are tested prior to deployment. Those attending this aspect of the forum were given a 90-minute tour of the facilities and the chance to learn about a variety of testing procedures and equipment.

The forum drew approximately 120 participants from government, industry, and private practice. It provided an excellent educational and networking opportunity to attendees. ❖

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In the plaintiff's state law claim for negligent and intentional infliction of emotional distress, the plaintiff alleged that United agents were repeatedly hostile to her requests for assistance. The court found that this state law claim does not implicate preemption because the ACAA regulations say nothing about how air-carrier agents should interact with passengers with disabilities. Therefore, because the ACAA is not implicated, the court concluded plaintiff could proceed with her start law claim of negligent and intentional infliction of emotional distress.

In sum, the court held that the ACAA (1) preempts state standards of care for the assistance air carriers must provide to passengers with disabilities in moving through the airport; (2) does not preempt any state remedies that may be available when air carriers violate those standards; and (3) does not preempt state-law personal-injury claims involving how air-carrier agents interact with passengers with disabilities who request assistance in moving through airport terminals.

James I. Briggs, Jr., is the vice-president of Legal Affairs at Airports Council International-North America and is a member of the editorial board of The Federal Lawyer. *You can reach him at jbriggs@aci-na.org.* ❖