# AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR

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## Issues in Real Estate and Terminal Leasing: Regulation Under the Shipping Act

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## I. Brief Overview of Applicable Law

A. Shipping Act of 1984

1. The Shipping Act of 1984 ("Shipping Act" or "Act") imposes standards of conduct on marine terminal operators ("MTOs") engaged in "the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to sub-chapter 11 of chapter 135 of title 49, US Code."

2. An MTO may not

   a. "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c) (former Section 10(d)(1)).

   b. "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2) (former Section 10(d)(4)).

   c. "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)).

3. The Federal Maritime Commission ("FMC" or the "Commission") enforces these provisions and also serves as a forum for the resolution of private complaints against MTOs. Resolution of claims under these general standards tends to be very fact bound, but there are certain general principles.

   a. Discrimination.

      i. To establish a claim of unreasonable preference it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-71 (FMC 1997).

ii. "The Commission is not required to tally and compare exactly what benefits were received by the relevant parties," as only unreasonable preferences and prejudices are prohibited. *Seacon Terminals v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993).

iii. A port has no continuing duty to provide tenants with identical lease terms, or to "reevaluate lease terms during the life of the lease to make sure they serve their intended purpose." Where there are valid reasons to treat lessees differently, a port need not "renegotiate leases on demand" to assure that "all interested parties get the same deal." *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349 (ALJ 2014)(case settled on appeal).

b. Refusal to Deal

i. Leasing decisions need not be based on written regulations or on a competitive bidding basis. *Maryland Port Administration v. Premier Automotive Services (In re Premier Automotive Services*), 492 F.3d 274, 284 n.2 (4th Cir. 2007); *Seacon*, 26 S.R.R. at 898.

ii. *Compare e.g., National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-96 (1978) ("[t]he Sherman Act does not require competitive bidding"); *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973) ("[e]ven a direct contract ... without any pretense of putting the job out to bid … would not in itself have constituted a restraint of trade").

B. <u>Antitrust Exemption</u>

1. Scope of the Exemption

a. Agreements filed with the FMC and effective under the Act or exempt from filing under the Act are exempt from the antitrust laws. 46 U.S.C. §§ 40307(a)(1), (2). The Shipping Act also exempts "an[y] activity or agreement within the scope of [the Act], whether permitted under or prohibited by [the Act], undertaken or entered into with a reasonable basis to conclude" that it is subject to an agreement filed or exempt from filing under the Act. Id. § 40307(a)(3); *see A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989) ("[A]ll activity permitted or prohibited by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC, at least until such

immunity is set aside by an agency or court."). The Act allows the filing of agreements only among or between marine terminal operators and ocean common carriers. Agreements with shippers, non-vessel operating common carriers, or other entities do not come within the exemption.

b. A very recent case of first impression confirms that the Shipping Act preempts state law claims as well as federal antirust law claims. *In re Vehicle Carrier Services Antitrust Litigation,* 2017 WL 192704 (3d Cir. 2017). *See* http://www.klgates.com/appeals-court-resoundingly-affirms-scope-and-breadth-of-shipping-act-antitrust-exemption-01-31-2017/

c. Section 6(g) of the Shipping Act allows the FMC, but not private parties, to seek to enjoin an agreement that it finds "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." 46 U.S.C. § 41307(b)(1).

d. "When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits." *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 459 (2009)(Breyer, J., concurring).

2. Port authorities, and their officials and employees acting in official capacities, are protected from antitrust damages actions and from cost and attorney's fee awards even in the absence of the exemption, pursuant to the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

3. Limitations on the exemption

a. Applies only to common carriagein the U.S.- foreign trades and to terminals that serve these trades or mixed foreign and domestic terminals

b. Does not apply to agreements with or among air, rail, motor, or domestic water carriers

c. Does not apply to an agreement among ocean common carriers to establish, operate, or maintain a marine terminal in the U.S.

d. A group of carriers may not negotiate with a non-ocean carrier or any group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to them within the United States unless the negotiations and resulting

agreements do not violate the antitrust laws and are consistent with the purposes of the Shipping Act.

## II. Recent Developments

1. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC No. 08-03 (FMC October 26, 2016, on remand from *Maher Terminals v. FMC*, 816 F.3d 888 (D.C. Cir 2016).

   a. The Commission affirmed an ALJ order finding that the "complex thirty-year maritime leases" at issue resulted from years of negotiation between sophisticated parties on the particular facts and circumstances presented, and that the differences between the leases the port had with Maher and with another tenant (APM/Maersk) were justified as necessary to keep APM's owner Maersk from leaving the port. The Port also acted pursuant to a plan to address shallow channels, high labor costs, inadequate and outdated marine terminal infrastructure and configurations, and low rents due to legacy leases, through a standard set of improvements to all the terminals and restructured terminal leases.

   b. Maher appealed and the D.C. Circuit remanded for further consideration of the matter. The court held that the Commission had not adequately dealt with its prior precedent holding that "status alone is not a sufficient basis by which to distinguish between lessees" and suggesting that responding to a mere threat to leave the port is not sufficient to justify offering more favorable terms. *Maher Terminals v. FMC*, 816 F.2d at 891-92. The appeals court noted that the "Commission could overrule or modify its previous decisions, but it must do so in a forthright manner," and should clarify whether, under its governing law permitting discrimination based on "legitimate transportation factors," the term transportation factor is "simply a synonym for reasonable." *Id.* at 892.

   c. On remand the AAPA, through the Law Review Committee, filed a brief urging "the Commission's confirmation and reaffirmation of a standard that defers to a Port's reasonable business judgments, and that allows for consideration of all factors relevant to the dynamic transportation environment in which modern ports must operate." The brief cited among other cases *New Orleans Stevedoring Company v. Port of New Orleans*, 29 S.R.R. 345, 352 (I.D. 2001), *adopted* 29 S.R.R. 1066, 1071 (FMC 2002), *aff'd mem.*, 80 Fed. App'x 681 (D.C. Cir. 2003), which stated that the "determination of reasonableness, in the context either of an alleged refusal to deal or negotiate or of an alleged preference or disadvantage, is largely dependent on specific facts rather than

broad generalizations," and that relevant factors "include such considerations as maintenance of consistent service and the economic well-being of the port." *See* 80 Fed. App'x at 683-84 (court of appeals affirms that "a preference to lessees who made a "greater commitment to the Port" was easily justifiable as "related to valid transportation concerns."). The brief is available here: http://www.fmc.gov/assets/1/Documents/08-03_AAPA_amicus_brf_fnl.pdf

d. The case settled before the FMC could rule on remand, but in approving the settlement the Commission offered the advisory view, "to reduce potential confusion," that it will "continue to consider all the relevant factors in its unreasonable preference analysis, including" "the situation and circumstances of the respective customers, as competitive or otherwise." In the case of marine terminal leases it will look to "market conditions, available locations and facilities, and the nature and character of potential lessees" [citing *Ceres* and *Seacon*], and "the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being." [citing *Petchem*]. The Commission also confirmed that its analysis "will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions," citing *Seacon* and *Petchem*, and noted the that it "will not assume that competition between ports is a problem in need of a regulatory fix, as among the purposes of the Shipping Act is promoting competitive and efficient ocean transportation and placing a greater reliance on the marketplace." *See* http://www.fmc.gov/assets/1/Documents/08-03_12-02_FNL_ORDR.pdf

e. The settlement also resolved a separate case Maher had filed, and also lost at the ALJ level, alleging discrimination because the Port undertook terminal renovations for its former customer MSC that it did not undertake for Maher, and deferred certain capital expenditure obligations for another tenant, Maersk. The ALJ found Maher's showing insufficient to show that any disadvantages were not justified by legitimate business justifications. The ALJ also held, consistent with the *Twombly/Iqbal* standard applied in the federal courts, that conclusory allegations that differences are not supported by legitimate transportation factors are not enough.

f. Finally, the Third Circuit rejected a separate suit alleging that certain port fees including throughput rent violated the Tonnage Clause of the United States Constitution and related statutes, holding that "landside service providers like Maher are not within

the class of plaintiffs that the Tonnage Clause or its related federal statutes were intended to protect;" only taxes on vessels or on their owner, captain, cargo, or passengers, which are "representatives" of ships, are covered. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 102 (3d Cir. 2015).

B. Joint procurement by carriers / dealings with MTOs and others

1. The Ocean Alliance agreement addresses the parties' relationships with MTOs, chassis pools, and inland facilities. FMC Commissioner Doyle stated when the agreement was approved: "The parties are limited in their ability to use their collective market power to jointly negotiate contracts with marine terminal operators. Importantly, the Ocean Alliance partners must negotiate independently with and enter into separate individual contracts with stevedores, tugs, barges, chassis providers and other third-party service providers. This is the same type of language that exists in the 2M Alliance Agreement."

   a. The agreement language itself states that the parties "shall negotiate independently with and enter into separate individual contracts . . . except where the marine terminal operator is agreeable to a joint contract with the Parties, in which case a joint contract with such marine terminal operator would be authorized."

   b. The parties "are authorized to discuss, exchange information, and/or coordinate negotiations with marine terminal operators relating to operational matters such as port schedules and berthing windows; availability of port facilities, equipment and services; adequacy of throughput; and the procedures of the interchange of operational data in a legally compliant matter."

   c. The parties may also "discuss and jointly contract for, lease, sublease, operate, use, or purchase … to the extent permitted by applicable law and subject to any applicable governmental filing requirements…(a) Inland transportation services (other than by water), provided, however, that the Parties understand that pursuant to 46 U.S.C. 40307(b)(1), this authority does not provide the Parties hereto with immunity from the U.S. antitrust laws with respect to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water relating to transportation within the United States; (b) Environmental services; (c) Bunker and other fuels, provided they are procured outside the United States; and (d) Facilities (inland terminals, equipment depots, warehouses, container yards, container freight stations), and any services provided by such facilities, provided that they are procured outside the United States."

d. There are several tweaks from the 2M agreement; for example 2M adds “inland carriers in the United States” to the list of parties that must be negotiated with independently, and the Ocean agreement does not, but Section 10(c)(4) already requires that such negotiations be consistent with the antitrust laws.

2. Approval of THE Alliance is along the same lines. Announcing that approval of that agreement with the joint procurement limitations, former FMC Chairman Cordero stated: "I am very cognizant of the concerns industry stakeholders had regarding provisions in this agreement, particularly those related to information sharing and joint procurement." Both alliance agreements also prohibit joint negotiations with chassis lessors.

3. Roll-on/Roll-off vessels deployed in services covered by the WWL/EUKOR/ARC/Glovis Cooperative Working Agreement will be permitted to engage in joint negotiation for the procurement of tug services at all U.S. ports beginning January 23, 2017. Former Chairman Cordero described this as “very limited new authority in terms of joint procurement.”

4. A Republican majority on the Commission could result in some liberalization in this area.

C. Port alliance activity

1. Consolidation and the newer mega-ships will help some ports that could see their cargo volumes increase, but others could experience a loss of market share and fewer port calls. Terminals will likely need to be consolidated as well. Cooperative arrangements are cropping up to deal with these developments.

2. Seattle and Tacoma. FMC allowed joint activity of the ports to deal with developments in the industry including larger vessels, alliances, and port consolidation.

3. Miami. FMC allowed the South Florida Container Terminal and the Port of Miami Terminal Operating Company to discuss and establish common rates, rules, and practices as well as to meet to discuss these matters. The Commission’s former Chairman noted that the “two facilities are located in very close proximity to one another and allowing the entities that operate them the ability to communicate on a number of different topics creates an opportunity to achieve efficiencies that potentially can benefit both the Port of Miami and the shipping public more broadly."

4. Virginia and Georgia. Filed an FMC agreement last week to allow them to work together to better handle mega-ships, new alliances, and shared customers. The ports would have authority to jointly acquire operating

systems and equipment; meet to share information on cargo handling, gate operations, turn times, staffing and infrastructure; jointly draft agreements with carriers, shippers and other terminal operators; and sync marketing materials to attract joint services, alliances, and carrier network agreements. The ports would not be able to jointly negotiate, set, and approve terminal rates or charges. Note that the two ports together handled nearly 25% of the total the total East Coast throughput in 2016, a much larger share of a broader market than the port alliances described above.

D. Demurrage and detention

1. For several years, especially in the context of the West Coast labor issues, shippers have been calling for Commission action on detention and demurrage practices that they claim violate the broad Shipping Act prohibition on failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. 41102(c).

   a. Proponents cite several older cases in which the Commission regulated these charges. *See, e.g., Free Time and Demurrage Practices at New York*, 11 FMC 238 (1967) (requiring free time to be extended for a period equal to the time in which a carrier is unable to or refuses to tender cargo for delivery); *Midland Metals Corp. v. MOL*, 15 FMC 193 (1972) (unreasonable practice to charge demurrage unless delay is shipper's fault, construing all circumstances in favor of the shipper).

   b. However, those regulations have not been in place for many decades and were instituted before widespread service contracting. The Shipping Act now provides that "[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court." 46 U.S.C. 40502(f). The Commission will involve itself in contract matters only if a party alleging a Shipping Act violation as to a matter covered by contract "successfully rebuts the presumption that the claim is no more than a simple contract breach claim." *Cargo One v COSCO Containers*, 28 SRR 1635, 1645 (FMC 1998)

   c. Note also that while the Commission has asserted the authority to assess if liquidated damages are set too low, as an indication that the service contract is not a real contract and is simply a "device to evade the carrier's tariff rates," *see Circular Letter No. 1-89*, 54 Fed. Reg. 15256 (1989) (quoting *Service Contracts -- Most Favored Shipper Provisions*, Docket No. 88-07 (FMC 1988), such enforcement is largely a dead letter now that the FMC allows

service contracts with negligible minimum volumes and very little cargo moves under tariffs.

d. The result is a general approach to allow market negotiations to resolve commercial issues, an approach that can be expected to continue under a Republican-majority Commission.

2. A large group of shipper interests filed a wide-ranging petition in December that seeks prospective relief on an uncertain time frame with respect to a variety of complaints about their relationship with carriers. The basic thrust is that the costs of delays beyond either party's control should be placed on carriers and MTOs rather than shippers. Again the precedent cited generally involves tariff regimes rather than contracts.

a. Extensive comments on the petition were filed last week, with carrier and port interests generally opposing on the ground that there is no reason for the Commission to upset contractual arrangements between sophisticated parties. AAPA joined in comments field by the Port of Houston Authority. Ports America and the World Shipping Council filed extensive comments, and UPS and Sen. Cantwell also filed brief comments, all opposing.

b. The port comments object that the petition seeks to deprive terminal operators of compensation, in circumstances over which they generally have no control, for the use of their assets. The costs of factors such as weather, labor issues, government inspections, the bankruptcy of steamship lines, and the burdens of increasingly large vessels would be placed on terminal operators rather than onto the parties to the shipping contract.

c. WSC argues that the Commission lacks the authority to adopt rules that "interpret" 46 U.S.C. 41102(c), or to engage in ratemaking, which the petition essentially seeks because it would set out a "compensatory" rate for detention or demurrage under certain circumstances. The oppositions in general, however, focus on the lack of wisdom of the FMC acting in this area, rather than on its legal authority to act. Commenters note, for example, that bankruptcies of alliance members are a contingency that can be foreseen and that contracts can address, rather than having the Commission impose an after the fact solution.

d. The Commission will consider the comments and does not have to rule of the petition by any given time.

E. Environmental activism issues -- the *Oakland* case

1. Suit was brought in federal court in early December against the City of Oakland by the developer of a new bulk handling terminal on city land next to the port that used to be part of the Army base. The suit alleges that the operator is being prevented for political reasons (not legitimate transportation factors) from developing the terminal to export coal. "The Terminal will not burn coal; rather, coal will be transported to the Terminal by rail and loaded onto ships for export without any burning of coal. Nevertheless, facing pressures from environmental interest groups opposed to the use of coal globally, the Oakland City Council embarked on a campaign to ban the transport and export of coal and petcoke to and through Oakland—and specifically at the Terminal."

2. The complaint claims that the City's activities violate the Shipping Act and the dormant commerce clause, and are preempted by federal laws governing rail and hazardous materials transportation. A motion for dismissal of certain state law claims is being briefed.

F. Recurrent fact patterns:

**1. Exclusive arrangements for provision of services at a terminal (stevedoring,/ tugs,/ cranes).**

*See Petition of South Carolina State Ports Authority for Declaratory Order,* 27 S.R.R. 1137, 1169 (FMC 1997)(restrictions on choice of a stevedore depend on "specific facts regarding local conditions.").

*A.P. St. Philip, Inc*., 13 FMC 166 (1969)(MTO that purported to condition vessel access to its facilities upon exclusive use of a designated tug operator had engaged in an unjust and unreasonable practice);

*California Stevedore & Ballast Co. v. Stockton Port District,* 7 FMC 75, 83-84 [1 SRR 563] (1962)(carriers should have the freedom to pick their own stevedoring companies as this freedom encourages efficient and safe service as well as competitive pricing;

*Perry's Crane Service v. Port of Houston Authority*, 16 SRR 1459, 1473-77 (FMC ALJ 1976) (requirement to use port's crane services created "mini-monopoly" that "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs).

*Compare Petchem, Inc. v. Canaveral Port Auth.*, 28 F.M.C. 281, 307, 23 S.R.R. 975, 995 (F.M.C. 1986), *aff'd*, 853 F.2d 958, 963 (D.C. Cir. 1988) (upholding an exclusive tug franchise as justified by competitive factors, but stating that a port issuing an exclusive

franchise "should consider carefully whether periodic competitive bidding for that franchise would be beneficial") *with Canaveral Port Authority—Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* 29 S.R.R. 1436, 1448-51 (F.M.C. 2003) (finding unreasonable refusal to deal where the port did not consider application for tug franchise; and that asserted justification that the application was submitted too late was not convincing; violation ended when the port sent out a notice inviting applications for an additional franchise) and *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1199, 1223 (A.L.J.) (finding "relevant market is Port Canaveral" and changed circumstances since exclusive franchise had been upheld 15 years earlier), *dismissed on settlement,* 29 S.R.R. 1455 (F.M.C. 2003).

2. **Right of lessee to control premises and access to premises**.

*Marine Repair Services v. Ports America Chesapeake*, FMC No. 11-11 (Initial Decision Jan. 10, 2013), *notice not to review upon withdrawal of exceptions* (FMC March 20, 2013)

Challenge to alleged discrimination and refusal to deal by tenant of Port of Baltimore's Seagirt terminal under long term Public-Private Partnership lease. Lease gave lessee exclusive right under the Lease to perform chassis repair at the Premises; lessee stated it also had the right to decline access to the premises to a competitive maintenance and repair provider to pick up chassis for repair offsite.

FMC judge analyzed the case by identifying a relevant market and assessing effects on competition in that market. Found that competitor was not fully excluded from the market (carriers could take their own chassis offsite) and applied the general antitrust principle that parties generally do not have a duty to assist their competitors. Port was not sued and did not intervene in the dispute.

*R.O. White & Co. v. Port of Miami Terminal Operating Co*., 31 S.R.R. 783 (A.L.J. 2009), adopted as administratively final, 31 S.R.R. 783 (F.M.C. Oct. 6, 2009) (reasonable for terminal operator joint venture members to take actions to enhance their competitive position over non-members; venture not required to provide access on a marginal cost basis to competitor; port sued along with terminal operating company)

*T. Parker Host v Kinder Morgan Liquid Terminals,* FMC No. 16-14 (filed June 2016, settlement approved Aug. 2016). Plaintiff provider of agency services denied access to Kinder Morgan terminals in alleged retaliation for providing competitive services.

**3. Need to meet commitments to lessees.**

*New Orleans Stevedoring Company:* court quotes Commission's Administrative Law Judge that it "cannot seriously be contended" that a motive to maintain long-term relationships with lessees and avoid breach of contract liability "is not related to transportation concerns;" result held fully consistent with the Commission's precedents.

**4. Lease renewals.**

*Seacon Terminals v. Port of Seattle*, FMC No. 90-16, 26 S.R.R. 883 (1992). Plaintiff declined to review lease when renewal period came up during time of business slow down; port went ahead to lease terminal to a carrier subsidiary MTO; plaintiff claimed later it had found a tenant and wanted to lease the terminal, but the port was declined to break off its existing negotiations. Plaintiff claimed a refusal to deal that (a) created a "monopoly" at the port for "independent" terminal operators not affiliated with a carrier and (b) was tainted by a conflict of interest because one of the Commissioners later became affiliated with a law firm that represents the allegedly favored competitor.

*Premier Auto. Servs. v. Flanagan*, 73 Fed. Reg. 34,017, 34,019-20 (F.M.C. June 16, 2008)(lessee did not renew lease and filed for bankruptcy and then filed Shipping Act claim when port tried to recover the premises; dismissal affirmed on 11th Amerndment grounds as port was an arm of the state); *In re Premier Auto. Servs*., 492 F.3d 274, 284 n.2 (4th Cir. 2007)(summarily rejecting Shipping Act claims).

5. **Incentives to keep a major tenant at the port through lease concessions.**

*Compare Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997) with the Commission's rulings in the *Maher* case, FMC No. 08-03.

**6. Discrimination based on factors allegedly extraneous to transportation.**

*"50 Mile Container Rules,"* 24 S.R.R. 411 (1987), *aff'd sub nom. N.Y. Shipping Ass'n, Inc. v. FMC*, 854 F.2d 1338, 1376 (D.C. Cir. 1988)(Discrimination proscribed when based on the requirements of a collective bargaining agreement rather than on an assessment of actual transportation-based realities.)

*Cornell v. FMC*, No. 14-1208 (D.C. Cir. Dec. 2, 2015) cruise passenger sued claiming refusal to deal when Princess wouldn't carry her after she had sued Carnival three times over a $600 dispute over some returned art. Court deferred to the FMC's determination "that the prohibition against an 'unreasonabl[e] refus[al] to deal' under 46 U.S.C. § 41104(10) does not apply to discretionary business decisions." It found "no plausible basis for concluding that Princess's refusal to deal was for reasons other than business considerations related to the costs of past and potential future litigations."

Court however expressed no view on "whether the FMC engaged in reasoned decision-making by giving deference to 'discretionary business decisions' without assessing whether there are 'legitimate transportation-related factors' for the refusal to deal or whether the FMC's position was otherwise an unexplained departure from precedent and past practice," finding that the plaintiff had waived that argument.