

The Transportation Brief®



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Undue Reliance On the MCS-90 Can Produce Unanticipated Auto Liability for Motor Carriers

The federally-required MCS-90 endorsement attached to auto liability insurance policies guarantees compensation to third parties injured in motor vehicle accidents for which the motor carrier is found liable. Importantly, however, the MCS-90 also contains a clause obligating the carrier to reimburse its insurer for all payments made if the loss in question would not have been otherwise covered by the insurance policy's terms. Accordingly, careful evaluation of the policy is necessary to avoid unexpected exposure.

Understanding the policy's key components is critical

Each of the three components to the auto liability policy – its declarations page, the coverage form (usually the standard Truckers' or Motor Carrier form), and the set of attached endorsements – plays a role in defining important coverage terms. All three should be consulted to verify who is a named insured, what other parties are afforded coverage as additional insureds, which vehicles are covered for a loss, and when exclusions may come into play. Care must be taken to read the declarations page, coverage form, and endorsements together because one often modifies the other. For example, the covered auto provisions of the declarations page may be changed by an endorsement, and a seemingly clear-cut endorsement may be limited in effect by a coverage form definition.

Avoid reliance on other insurance as well

Although all available sources for coverage should be explored, carriers are wise not to rely on other insurance to cover auto liability losses. Commercial general liability policies, for example, typically do not cover losses arising out of the use of a vehicle, and the non-trucking use or "bobtail" policies purchased by owner-operators usually provide only narrow coverage. Moreover, even when a bobtail policy does afford coverage, the MCS-90 endorsement on the carrier's policy will also apply if the carrier is found liable for the owner-operator's conduct, and the carrier can still be exposed to reimbursing its insurer for damages paid that were not otherwise covered by its policy's terms.

In short, there is no substitute for reading, understanding, and evaluating the full scope of coverage provided by an auto liability policy. Indeed, because risk management plays such an important role in any trucking business, watch for additional articles on insurance coverage in future editions of *The Transportation Brief*.

*Andrew K. Light
Lynne D. Lidke,
Indianapolis*



Briefly...

Buying? Asset Sales Offer Advantages

Under current law, motor carrier purchasers can often obtain more favorable tax accounting advantages from a purchase of the seller's assets rather than stock. Applicable tax laws allow the buyer to write-up the asset value to the purchase price, which often far exceeds the seller's remaining book value for such assets. Advantages gained through depreciation of those higher valued assets often outweigh the higher transaction costs that can arise from re-titling and re-plating various assets. Other strategies can often reduce those costs as well.

Historically, most states have allowed for greater insulation from the seller's liabilities – both known and unknown – through asset sale transactions. These and other factors, including tax disadvantages to the seller, should be weighed by every prospective buyer to obtain the best transaction structure from the buyer's perspective.

*Jay D. Robinson,
Indianapolis*

Evaluating and Negotiating Credit Facilities Require Advance Analysis

When evaluating a credit facility, consideration of all costs and realizable benefits is critical. Interest charges are typically the largest component of the costs; however, there are usually many other costs, e.g. commitment, non-utilization, letter of credit and other fees, to be understood and evaluated.

On the benefit side, important considerations include reasonableness of financial and

restrictive covenants, structure of the borrowing base, permitted liens, and the availability of LIBOR (London Interbank Offer Rate)-based interest rate and/or interest rate hedging mechanisms. Although many terms and conditions are negotiated in the loan documents, most items such as fees, financial and restrictive covenants, permitted liens, and borrowing base structures are best negotiated prior to execution of the loan commitment and included within that commitment.

*Gregory A. Ostendorf,
Indianapolis*

The IRS Is on the Move

Two areas targeted by the IRS for enforcement in 2008 may impact motor carriers. The first involves the IRS's ongoing scrutiny of independent contractors. As part of the "questionable employment tax practice" initiative, the IRS has announced an agreement with state unemployment tax agencies to share training materials and audit information.

Although this initiative does not specifically target motor carriers, the common use of independent contractors in the industry may result in increased examinations at both the federal and state levels. Motor carriers utilizing the services of owner-operators are well served to review their independent contractor procedures in anticipation of a potential state unemployment tax audit or IRS examination.

The second IRS initiative focuses on expense reimbursement plans. Such "accountable plans" include automobile expense allowances and driver per diem programs. If such programs are not in compliance with IRS guidelines, otherwise exempt expense reimbursements can

be reclassified as wages subject to employment tax. Reviewing programs to assure compliance with IRS guidelines is advisable in anticipation of the IRS initiative.

*Steven A. Pletcher,
Indianapolis*

Timely Employment Practices Audits Are an Effective Maintenance Tool

With changes in the employment law arena continuing at a rapid pace, the start of a new year is a great time to evaluate employment practices and programs. Employment practices audits are designed to spot possible problem areas and identify areas for internal improvement. They can be an effective preventive maintenance tool for any organization.

A typical audit provides a comprehensive evaluation of employment practices in a number of areas, including hiring and firing practices, employment contracts, job descriptions, employee handbooks, wage and hour compliance, equal employment requirements, record retention policies, and covenants not to compete.

If it has been some time since you have had the opportunity to examine the broad array of employment practices affecting your company, now may be just the time to do it.

*David D. Robinson,
Indianapolis*

Mileposts

Fritz Damm, Mike Tauscher Join The Scopelitis Firm At Its Newest Office in Detroit

Former Transportation Lawyers Association (TLA) President Frederick R. “Fritz” Damm and Michael J. Tauscher, also a member of the TLA, recently joined Scopelitis, Garvin, Light, Hanson & Feary as the firm opened its newest office – its 7th nationwide – in Detroit.

Damm has been practicing law since 1968. His focus is in labor and employment, commercial litigation, mergers and acquisitions, regulatory and administrative law, freight and cargo claims, and a wide range of other transportation-related matters.

Damm is the fourth Scopelitis partner to have served as president of the TLA, joining Kim Mann of the firm’s Washington, D.C. office, Kathleen Jeffries of its Los Angeles office, and current TLA president Don Vogel of Chicago. He also was previously Chairman of the North American Transportation Employee Relations Association and is a member of the Defense Research Institute’s Trucking Committee, the Canadian TLA, and the Conference of Freight Counsel.

Tauscher was advising his motor carrier clients as a sole practitioner when he joined Damm to establish the Scopelitis firm’s Detroit office. His transportation practice also focuses upon labor and employment and includes workers’ compensation and other insurance defense matters, trucking insurance law, and cargo claims, airfreight, and other multi-modal insurance coverage issues.

Tauscher is admitted to practice in Michigan and Florida and is also a member of the Conference of Freight Counsel. He is a certified arbitrator who serves on the Transportation Panel of the American Arbitration Association and the TLA’s Alternative Dispute Resolution panel.

The Scopelitis firm now serves the trucking, transportation, and logistics industries from offices in Indianapolis, Chicago, Washington, D.C., Los Angeles, Kansas City, Chattanooga, and, as of January 1, 2008, Detroit.

For the Record

We are pleased to announce that **Adam C. Smedstad** has been named a shareholder in the firm. Adam will continue his commercial and business litigation practice in the Chicago office.

On the Road

Greg Feary and Dan Barney will participate in the Truckload Carrier Association’s Annual Convention, March 1-4, in **Paradise Island, Bahamas**. Dan will lead a Trucking in the Round Session on “Truckload Tackles Airfreight: Dodging the Legal Landmines.”

Dan Barney will attend the Truck Renting and Leasing Association’s Annual Meeting, March 2-5, in **Phoenix**.

Dan Barney and Chris McNatt will attend the AirCargo 2008 Annual Convention, March 16-18, in **Orlando**.

Chris McNatt will offer a presentation on transportation law, March 24, at the University of Denver, Sturm College of Law, in **Denver**.

Greg Feary will participate in the American Trucking Associations National Finance and Accounting Council’s annual meeting, March 25-26, in **Phoenix**.

Rich Clark and Bob Henry will attend the American Moving and Storage Association’s Annual Education Conference & Expo, April 1-5, in **Orlando**.

Chris McNatt will attend the National Customs Brokers & Forwarders Association of America’s Annual Conference, April 6-10, in **Orlando**.

Fritz Damm will attend the Defense Research Institute’s Trucking Law Seminar, April 16-18, in **Phoenix**.

Kathleen Jeffries and Fritz Damm will attend the Transportation Loss Prevention & Security Association joint conference with the Transportation & Logistics Council, April 20-23, in **San Diego**.

Chris McNatt will serve on a panel addressing “Transportation Security Planning and Information Sharing: Implementing the 9/11 Commission Act of 2007” at the 2008 Transportation Lawyers Association’s Annual Conference and CTLA Mid-Year Meeting, May 6-10, in **Ft. Lauderdale**. Norm Garvin, Andy Light, Kim Mann, Leonard Kofkin, and Don Vogel also will attend.

Fritz Damm will participate in the Transportation Club of Detroit’s board of directors meeting, May 15, in **Detroit**.

Steve Pletcher will present at the National Association of Professional Employer Organizations’ Legal & Legislative Conference, May 19-20, in **Arlington, Virginia**.



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Dispatches



According to Jim Hanson, a recent NLRB decision holds that employers may lawfully prohibit employees from using the employer's e-mail system for any "non-job-related solicitations," including union-related correspondence. In its decision, the NLRB allowed the employer to enforce its **policy against union-related e-mails** despite the employer's practice of permitting other nonwork-related e-mail.

Jim Hanson also reports that a federal appeals court recently vacated an injunction which precluded UPS from applying a DOT driver hearing qualification to a non-DOT driver (i.e., a driver of package cars of 10,000 pounds or less). In remanding the case back to the lower court, the appeals court overruled the pattern or practice burden-shifting analysis established in a prior decision and instead instructed the lower court to allow UPS to use evidence of its **reliance on a DOT standard to establish its ADA business necessity defense**.

Although Old Man Winter is currently up to his usual tricks throughout the North and Midwest, spring is not far off. Mike Tauscher warns that with spring comes Seasonal Weight Restrictions, or "Frost Laws" in Michigan. **Frost Laws reduce gross vehicle weights by 25% in March, April and May**, making loads that are otherwise legal on many state roads the rest of the year illegal and the subject of substantial fines. Additional information for plotting legal routes can be found at www.micountyroads.org