

The Transportation Brief®

The Transportation Brief

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light & Hanson.

Indianapolis Office:

10 W. Market Street
Suite 1500
Indianapolis, IN 46204
phone (317) 637-1777
fax (317) 687-2414

Chicago Office:

30 W. Monroe Street
Suite 600
Chicago, IL 60603
phone (312) 422-1200
fax (312) 422-1224

Washington, D.C. Office:

1850 M Street, N.W.
Suite 280
Washington, DC 20036-5804
Phone: (202) 783-9222
Fax: (202) 783-9230

San Francisco Office:

601 Montgomery Street
Suite 325
San Francisco, CA 94111
Phone: (415) 986-2479
Fax: (415) 989-1340

Kansas City Office:

Two Pershing Square
2300 Main Street
Suite 900
Kansas City, MO 64108
Phone: (816) 279-9835
Fax: (816) 279-1973

Please fax or e-mail address changes to:

The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com

Steps Taken Following Highway Accidents May Improve Motor Carrier's Outcome

A successful resolution of any accident claim depends on the cooperation and coordinated effort of a team of professionals. That team includes the driver, owner/trucking company, safety personnel, claims managers, adjusters and investigators, and the defense attorney. Whether a claim is resolved before litigation, through mediation, or at trial, each team member contributes a necessary component. The following suggestions may help carriers reach a more satisfactory conclusion when a serious loss has occurred.

- **Do Not Fire Your Driver on the Spot:** Keeping the driver employed helps when it comes time for discovery and trial. If a positive drug or blood alcohol test, license issues, or a mounting record of poor driving makes it necessary to terminate the driver, keep track of his residence and new job location for future contact.
- **Offer the Driver Assistance in Finding Legal Representation:** A guilty plea to a traffic citation can seriously prejudice the civil accident claim. The driver and the trucking company may be unable to refute the plea and civil liability can be automatic without any opportunity to present a defense, so make sure the driver gets legal counsel.
- **Keep Driver Log Books:** Federal regulations require log book retention for a limited period of time; however, when an accident occurs, do not destroy log books. Juries may view the destruction of log books as an effort to hide evidence.
- **Report Losses to Your Insurance Carrier Immediately:** Every insurance policy requires timely reporting of all potential losses. Do not wait until a claim is filed before reporting. Claims that appear to be minor may turn into substantial losses later.
- **Stay Involved and Attend the Trial:** Everyone's cooperation is needed until after the jury verdict. Successful plaintiffs' attorneys obtain jury sympathy by personalizing pain and suffering. Juries need to see the truck driver as a person and that the trucking company is made up of real people too. Having both the driver and a company representative attend the trial and assist defense counsel will increase the chances of a favorable claim resolution.

Donald W. Devitt, Chicago

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Briefly...

Disclosure of Rebates and Allowances

As the transportation industry continues to develop new ways to serve customers' needs, including greater use of brokerage, forwarding and third-party logistics providers, carrier and shipper compliance with federal law on disclosure of off-bill discounts is more important than ever.

The law requires a carrier to disclose the actual rates, charges or allowances for any transportation service at the time the freight bill is presented to the party directly responsible to the carrier for payment. The carrier must also disclose whether, and to whom, any allowance or reduction in charges is made. Even when the actual rate or allowance is dependent upon volume incentives or the performance of other services, the carrier is still required to disclose that a reduction, allowance or other adjustment may apply.

Further, no person may cause a motor carrier to present misleading information about the actual charges or an allowance to any party. A carrier's freight bill can travel through several parties' hands before it reaches the party responsible for payment. Thus, shippers, brokers, forwarders and third-party logistics providers must also be careful to ensure that the freight bill they receive and pass on to their customer discloses any rebate or allowance. Failure to do so places both the carrier and its shipper at risk for claims by the

party ultimately responsible for the freight charge payment.

*Andrew K. Light,
Richard A. Clark,
Indianapolis*

DOT 14-Hour Rule Causes Concern

The most significant changes to the federal hours of service regulations in over 50 years are still scheduled to become effective on January 4, 2004. The regulation causing motor carriers the most concern is the requirement that drivers complete all driving and on-duty activities within a 14 consecutive hour window before being required to take a 10-hour off-duty or sleeper berth break.

Importantly, off-duty time taken by the driver within the 14-hour window, including meal breaks and time spent waiting to load or unload, does not extend the 14-hour window. For example, even if a driver has only driven and been on duty for a combined total of 8 hours within the 14-hour window, he is still mandated under the new regulations to take a 10-hour off-duty break at the conclusion of the 14-hour time period. The only limited exception is for sleeper berth time taken by the driver within the 14-hour window that can be used by the drivers to complete the required 10-hour break, thus extending the 14-hour window.

*Timothy W. Wiseman,
Indianapolis*

Bills of Lading – Is Yours Sufficient?

Often, the bill of lading is the only written contract between the shipper and the motor carrier. It may be issued by the shipper, motor carrier, or a third party such as a broker, freight forwarder, or logistics company and should be carefully reviewed to ensure that it includes all necessary terms.

Federal regulations require only that a bill of lading for a motor common carrier include the consignor and consignee names; the origin and destination points; the number of packages; and a description of freight, weight, volume, and measurement. Unless the carrier has a written contract, other important terms of the shipment may not be enforceable if not included in the bill of lading.

Thus, before accepting a bill of lading, motor carriers should ensure that it includes a clear limitation of liability for cargo loss or damage and a description of who is liable for transportation charges. It also should incorporate by reference, if applicable, the appropriate tariff or National Motor Freight Classification. If hazardous materials are transported, the shipper must certify that the shipment has been properly packaged and labeled. Finally, a space for any special instructions is also recommended.

*Norman R. Garvin,
Richard A. Clark,
Indianapolis*



Mileposts

SGL&H Chicago Fortifies Firm's Accident Defense Team

The recent addition of Don Devitt and Jeffrey Tabares in the Chicago office strengthens the Firm's accident litigation team by adding significant litigation experience and additional resources in matters calling for Illinois representation.

The additional accident litigators complement the core strengths of the Chicago office's workers' comp defense practice led by Jerry Cooper and Victor Shane, as well as its trucking regulatory law practice led by Bill Brejcha.

Devitt's recommendations on accident response are the topic of the lead article in this issue of *The Transportation Brief*.

Devitt, a senior attorney who joins Scopelitis as of counsel, draws upon nearly 20 years of legal experience – the bulk of it as a highway accident litigator – in serving the Firm's trucking clients with Illinois operations. A top national trucking insurer made the recommendation that led to Devitt's joining SGL&H.

Devitt has been in private practice since 1984, with responsibilities including first-chair trial and appellate litigation in multi-million dollar personal injury suits on behalf of trucking companies and trucking insurance carriers.

Tabares is a third-year attorney who has practiced with Devitt the past two years and followed Devitt to SGL&H when the opportunity presented itself.

Indianapolis' accident litigation group includes partners Tom Farrell, Mike Langford, and Angie Cash, as well as associates Chris Whitten and Eric Habig.

***We are pleased to announce the relocation
of the San Francisco office to:***

601 Montgomery Street, Suite 325
San Francisco, CA 94111
phone: (415) 986-2479
fax: (415) 989-1340

For The Record

Congratulations to **Jeffrey S. Toole** and **David D. Robinson**, who became Firm shareholders on November 1, 2003. Jeff's practice areas include employee benefits and insurance law. David's focus is in labor and employment law. They both practice in the Indianapolis office.

SGL&H has been invited to serve on the advisory board for a Purdue University think tank in developing a transportation, distribution and logistics research center in West Lafayette, Indiana. **Greg Feary** will represent the Firm as an official board member. A public/private initiative, the research center will focus on Indiana business development in logistics and other transportation-related industries. The planning for the center is being led by Purdue with assistance from the Central Indiana Corporate Partnership and corporate leaders in Indiana's transportation industry. Greg is a Scopelitis partner in the Indianapolis office and serves as one of the Firm's managing partners.

For her contributions to the Indianapolis legal community, **Allison Owen Smith** has been nominated and accepted as a Distinguished Fellow of the Indianapolis Bar Foundation. Allison is an attorney in the Indianapolis office who serves as the Firm's Director of Business Development.

Lori Schein will join SGL&H as an associate on January 1, 2004. Lori returns to the Indianapolis office, where she served as a law clerk in the summer of 2002.

On The Road

Mike Langford will present "Best Discovery Strategies for the Motor Carrier" and also participate as the defendant's attorney in a mock trial at the Trucking Industry Survival Series Seminar - Dec 9-10 in Springdale, Arkansas.

Norm Garvin and Andy Light will attend the Transportation Lawyers Association Regional Seminar in Chicago on January 16, 2004.



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Dispatches



◆ **“Maggie’s Law”** went into effect in September in New Jersey. The law identifies fatigued driving as reckless behavior. Tim Wiseman advises that any driver who has been awake for 24 consecutive hours is considered to be fatigued. A fatigued driver involved in a fatal accident may face 2nd degree homicide charges (1st degree if the accident occurs within 1000 feet of a school).

◆ Andy Light cautions carriers to beware of **IFTA’s interest provisions**. In an audit, interest is calculated separately at the rate of 1% per month for each jurisdiction to which tax was under reported, but interest is generally not paid if tax was over reported. Thus, although an audit might reallocate tax liability between states and produce offsetting increases and decreases that result in a modest overall assessment of tax, the interest awarded to the states that were originally underpaid can significantly exceed the amount of tax owed.

◆ According to Greg Feary, forming a wholly-owned **captive insurance company** may reduce state corporate income taxes. In addition to providing insurance to related businesses, a captive insurer may also engage in non-insurance business transactions with its related entities. Payments made by the related entities to the captive may be deductible expenses for the payors that are possibly not taxable income at the state level when received by the captive.

◆ Motor carriers maintaining **per diem expense reimbursement programs** should be aware that, for expenses incurred on or after November 1, 2003, the IRS has raised the flat rate from \$40 to \$41 for travel within the continental United States and from \$45 to \$46 for travel outside the continental United States. Steve Pletcher reports that rates under the “high-low” substantiation method have also been raised from \$45 to \$46 for high-cost localities and from \$35 to \$36 for all other localities within the continental United States. The per diem income tax deductible percentage increases from 65% to 70% in 2004.