

# The Transportation Brief®



## *The Transportation Brief*

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

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## *Illinois Court Rulings Chill The For-Hire Broker Industry*

Trial court rulings in several Illinois cases threaten to turn the world upside down for transportation brokers. In litigation arising out of a truck accident in St. Louis, the courts ruled that a broker was both a partner and a joint venturer with its contracting motor carrier whose driver caused a catastrophic loss. As a result, the courts found that the broker could be held equally liable with the motor carrier for the deaths of the accident victims.

### *Broker-carrier “partnerships” can create liability.*

The Illinois courts relied upon purported “admissions” by the broker’s witness who referred to its motor carriers and customers as being the broker’s “partners.” The witness further testified that all of these “partners” profited from the transportation movement and that the broker gave directions to the driver for the load’s routing and delivery. Other “admissions” related to the broker’s web page, which referred to the broker’s “partnerships” with its carrier base, its “management of all aspects of the supply chain,” and its role as “the strongest link” in that chain. Notably, the bills of lading also named the broker as the motor carrier.

### *Brokers are advised to use caution in advertising.*

Traditionally, broker liability for motor carrier accidents has been limited to claims for negligent selection in which it is alleged that the broker carelessly tendered the load to an uninsured or unsafe motor carrier. However, the ongoing Illinois litigation creates a very real potential for precedent holding that brokers have much broader liability due to legal findings of partnerships and joint ventures between the broker and its motor carrier. Regardless of the ultimate outcome of the Illinois cases, brokers need to exercise care in drafting their marketing material and associated paperwork to ensure that their separate corporate identity is emphasized and to avoid holding themselves out as an interrelated part of their motor carrier group. The Illinois litigation teaches that aggressive broker marketing might cause substantial liability exposure that no broker will want to accept.

*William D. Brejcha*  
*Chicago*

*Timothy W. Wiseman*  
*Michael B. Langford*  
*Indianapolis*

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# Briefly...

## *New Cargo Security Requirements Planned*

USDOT is considering new cargo security requirements for motor carriers, including

- ❖ Development of a security plan
- ❖ Security training for all hazmat employees
- ❖ Pre-notification to states and localities of certain hazmat shipments
- ❖ Armed escorts
- ❖ Vehicle tracking
- ❖ Remote vehicle shut-offs and other anti-theft devices
- ❖ Safe havens at truck stops for hazmat loads

Carriers drawing up their own security plans may contact the Firm for USDOT's suggested outline for personnel, facility, and enroute security measures.

Meanwhile, the new Transportation Security Administration has expanded the definition of "indirect air carrier" (IAC) to include motor carriers, brokers, and logistics arms that tender freight to airlines or other IACs for transportation by passenger aircraft. This form of air freight forwarding is subject to cargo-security and hazmat regulation, and carriers must institute mandated procedures to limit exposure to terrorist or negligent-shipper incidents.

*Daniel R. Barney  
Washington, D.C.*

*Shannon M. McClellan  
Indianapolis*

## *UAW Seeks to Organize Drivers*

The UAW has recently increased efforts to organize truck drivers serving automobile and component manufacturing plants at which the UAW represents production workers. If carriers have operations involving spotters and shuttle drivers at UAW-represented plants, drivers may be targeted for organizing.

Before any organizing begins, carriers should evaluate their vulnerability to unionization, taking into account wages, benefits, communication efforts, personnel policies, working conditions and general treatment of drivers. Once an organizing drive begins, carriers are also advised to move quickly to defeat the organizing attempts and to educate dispatchers and other supervisors on how to properly respond.

*James H. Hanson  
A. Jack Finklea  
Indianapolis*

## *Workers' Compensation Claim Settlements Must Reimburse Medicare*

Employers across the nation report that the Centers for Medicare and Medicaid Services (CMS), the collection agency for Medicare, is aggressively pursuing employers that may have settled workers' compensation claims without protecting Medicare's interests. CMS is not only pursuing reimbursement for past Medicare payments, but also demanding that its interests be protected in any settlement that includes payment for future medical treatment. Watch for updates on this emerging trend in future editions of *The Transportation Brief*.

*Gerald F. Cooper, Jr.  
Chicago*

## *Owner-Operator-Purchase-Lease-Back Reviewed by Washington Court*

In an important case, the Washington Court of Appeals ruled that a truck driver was acting as an independent contractor when he purchased his tractor from the trucking company and then leased the truck and his driving services back to the company via an owner-operator agreement. The court decided that the truck driver was the "owner" of the truck and therefore not an employee under Washington's Workers' Compensation Act.

Even though the truck driver was not permitted to sell or borrow against the truck during the 48-month lease/purchase term, the court ruled that there was sufficient indicia of ownership because the driver could allow others to operate the truck, was permitted to haul for other carriers, could refuse loads tendered by the lessee carrier, and paid all of his own truck expenses. The court also recognized that there were legitimate purposes for the purchase-leaseback arrangement and concluded that it was not an unlawful attempt to avoid workers' compensation premiums.

*Gregory M. Feary  
Indianapolis*



# Mileposts

## *SGL&H Helps Carriers Protect Leasing Programs*

Scopelitis, Garvin, Light & Hanson continues to stand by motor carriers defending challenges to their leasing programs. Two key challenges have been attempts by the IRS and courts to reclassify owner-operators as employees, along with OOIDA's class-action claims of federal leasing violations. Both have stirred much litigation in recent years, creating a one-two punch that has knocked some of the nation's largest carriers out of business and ensnared others in long and costly court fights.

For many years SGL&H has helped large and small carriers develop leases and owner-operator insurance programs designed both to advance the carrier's business goals and to minimize the risk of lawsuits. Recently, Dan Barney has been one of the Firm's leading advocates in this field on behalf of carriers and the industry at large.

A partner in the Firm's D.C. office since it opened in 1999, Dan has represented a number of major carriers fighting leasing program challenges. Dan also led the Firm-sponsored coalition of industry associations and motor carriers that challenged the preliminary injunction won by OOIDA against Ledar Transport two years ago.

Dan and his colleagues at SGL&H also counsel lawsuit prevention. Dan's recommendations for avoiding OOIDA litigation: 1) Update independent-contractor and vehicle leases regularly, matching language to regulations; 2) include an arbitration clause to keep owner-operator disputes out of court; 3) keep dealings with contractors within the confines of the leases; and 4) contact knowledgeable counsel at the first hint of inquiries by OOIDA or its attorneys.

## *For the Record*

Angela S. Cash became a Firm shareholder on July 1, 2002. An attorney in the Indianapolis office since 1995, Angie will continue her practice in trial court litigation, including insurance defense, appellate practice, and estate and probate matters.

Congratulations to Shannon M. McClellan and Rebecca S. Smith, who began their practices as Indianapolis associates this Fall.

The Firm sponsored a reception for Governor Bill Graves of Kansas, the incoming president and CEO of the American Trucking Associations, at the ATA's Management Conference and Exhibition, October 28, in Orlando.

With regret and best wishes we note the departure of Karla Cooper-Boggs to spend more time with her two young children. We also extends warm wishes to Laurie Baulig in her new venture as a partner at Gurne, Porter & Baulig, PLLC, in Washington, D.C.

## *On the Road*

Bill Brejcha and Steve Oakley will attend the Illinois Transportation Association Annual Convention, Management Conference and Truck Show, December 6 - 7, in Lombard, Illinois.

Andy Light and Tim Wiseman will attend the Transportation Lawyers Association Regional Seminar in Chicago on January 17, 2003.

James Attridge of the San Francisco office will attend the Conference of Freight Counsel's annual meeting February 26, 2003, in Santa Fe.

Dan Barney will attend the Truckload Carriers Association Annual Convention in Orlando on March 9-12, 2002.

### **Pollution Clean -Up Alert**

Please contact Jay Robinson at the Firm if you have incurred out-of-pocket expenses related to pollution clean up on or near your real estate. Restitution for those costs may be available even if incurred many years ago.



# The Transportation Brief

## Dispatches



- ❖ **Steve Pletcher** reminds all employers that sponsor group health plans of the approaching HIPAA privacy regulations compliance date. The regulations, which are effective April 14, 2003 (April 14, 2004 for small group plans), control use and disclosure of individually-identifiable health information and impose significant administrative requirements. All employers sponsoring group health plans should consult with their benefit plan advisors to assure compliance with the new rules.
- ❖ DOT regulations set forth an appeal procedure to resolve disagreements concerning a driver's medical certification. A federal court in Arkansas recently held that a driver was required to exhaust the DOT appeal procedures prior to filing suit against the carrier under the Americans With Disabilities Act (ADA), and the driver's claim was dismissed. **David Robinson** advises carriers to consider whether this under-utilized tool may be appropriate in defense of an ADA lawsuit.
- ❖ Carriers that transport radioactive material for the U.S. Department of Energy (DOE) should be aware that the Price-Anderson Act will no longer provide automatic statutory indemnification for spills or other incidents. **Tim Wiseman** cautions carriers that provide services for the DOE related to radioactive materials or nuclear power plants to negotiate contractual indemnifications to minimize their liability exposure for a nuclear or radioactive release or accident.