

The Transportation Brief®



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Switch To Motor Carrier Coverage Form Requires Careful Consideration

The Insurance Services Office announced that effective June 1, 2010, it would continue to support the Motor Carrier Coverage Form ("MCCF"), but not the Truckers Coverage Form ("TCF"). As a result, many insurers have adopted the MCCF as the primary auto liability coverage form for transportation companies. The MCCF has been advertised as more accurately reflecting the current environment within the transportation industry by referencing and giving effect to the owner-operator lease agreement between a motor carrier and its independent contractor drivers.

Under the MCCF, the owner-operator lease agreement influences coverage

Because the lease agreement can impact coverage under the MCCF, motor carriers must be aware that it may lead to unintended coverage consequences or practical problems for the motor carrier and the owner-operator. A key difference between the TCF and the MCCF is that the TCF would generally cover the owner-operator as an "insured," but the MCCF generally will not. This is because, under the MCCF, an owner-operator is not an "insured" when the lease agreement requires the owner-operator to hold the motor carrier harmless (a typical provision in such an agreement). The reason for the exclusion is that the MCCF contemplates the owner-operator has his or her own auto liability policy to cover the contractual indemnity obligation owed to the motor carrier.

Unanticipated problems may result

The problem with the MCCF's assumption is that most owner-operators will not maintain their own auto liability/contractual liability policy, but instead will look to the motor carrier's policy for coverage. Thus, in the context of an auto accident when the cooperation of the owner-operator is most needed, the owner-operator will not receive coverage or a defense under the motor carrier's MCCF policy. This may alienate the owner-operator, disrupt open communication, and reduce cooperation to the point where the owner-operator retains its own legal counsel and becomes adverse in an attempt to impute liability to the motor carrier. Motor carriers should consult their insurance brokers for advice on how best to avoid or minimize this problem.

*Gregory M. Feary
Jeffrey S. Toole,
Indianapolis*



FCRA Prompts Background Check Exposure

Add the Fair Credit Reporting Act (“FCRA”) to the fronts on which motor carriers are being required to defend class action cases. In recent filings, plaintiffs have turned their focus on motor carrier background checks in an effort to expose noncompliance with the technical requirements of the FCRA. These attacks have focused on (1) the lack of a stand-alone, FCRA-compliant disclosure and authorization form, and (2) non-compliance with the FCRA’s notification protocol prior to taking adverse action based on the results of background checks.

Given the industry’s historical reliance on the use of third-party consumer reporting agencies to conduct background checks during the driver qualification process, motor carriers are urged to review their forms and policies to ensure they do not become a target for this new wave of class action litigation.

*David D. Robinson,
Indianapolis*

Logo Liability Still Rules

Motor carriers have long battled the “logo liability” or “statutory employment” doctrine — a judge-made rule holding the motor carrier strictly liable for an owner-operator’s negligent driving even if, at the time of the motor vehicle accident, he or she is not operating on behalf of the carrier or in furtherance of the lease agreement terms. The doctrine is policy-based on the carrier’s assumption of “exclusive possession, control, and use” of the leased equipment as required by the Federal Leasing Regulations. However, a longstanding amendment to the regulations in 1992 disclaims any intent to supersede common-law tort rules that would traditionally impose vicarious liability only for

the acts of others committed within the scope of their employment or agency.

Some recent decisions (namely, from federal courts in Arkansas, Georgia, Kansas, Kentucky, and Virginia) acknowledge the import of the 1992 regulatory amendment and are trending back to the more traditional “scope of employment/agency” analysis in determining motor carrier liability for owner-operator conduct. However, a recent survey by the Scopelitis firm indicates as many as 30 state courts still apply or are likely to follow the logo liability rule, perpetuating the paradigm in those states that an employee driver operating company equipment outside the scope of his employment may not trigger vicarious liability, but an owner-operator acting outside the scope of his independent contractor duties will. The survey confirms motor carrier risk managers and defense counsel have a long road ahead before they can claim victory over logo liability.

*Donald W. Devitt,
Chicago*

*Eric K. Habig,
Indianapolis*

Written Cell Phone Policies Are Warranted

Effective January 3, 2012, the FMCSA will prohibit commercial drivers from using hand-held mobile phones while operating a commercial truck or bus. Violations of the rule can result in fines of \$2,750 to drivers and \$11,000 to motor carriers. Habitually offending drivers of this new rule can be disqualified from operating a CMV. Mobile devices that allow drivers to talk hands-free are permissible under this federal rule.

Motor carriers should make sure their driver manuals now reflect this ban of hand-held phones. Previously acceptable manual

language like “only use your mobile phone if you can do so safely” no longer meets FMCSA standards. Signed acknowledgements by drivers of the change in the mobile phone policy are recommended. In bodily injury accident claims, expect subpoenas of the driver’s cell phone records to become as commonplace as requests for Driver Qualification Files.

*Michael B. Langford,
Indianapolis*

Certificate Of Insurance Changes Spark Cargo Coverage Uncertainty

Revisions to the “Notice of Cancellation” provision in the ACORD 25 Certificate of Insurance (“COI”) removed language requiring prior written notice to certificateholders (e.g., 30 days) of any policy cancellation. In part, insurance regulators recognized that insurers may not be able to satisfy the notice requirement when coverage is suddenly cancelled. The changes to the COI coupled with discontinuance of the requirement that regulated motor carriers file proof of cargo insurance (effective March 21, 2011) has created concerns because certificateholders are no longer able to check the status of a motor carrier’s cargo coverage via the FMCSA’s website. To ease concerns, transportation providers should explore options such as endorsing a policy or modifying the shipper agreement to provide the certificateholder prior cancellation notice. A review of shipper agreements may be necessary to ensure they are consistent with the applicable COIs.

*Gregory M. Feary
Jeffrey S. Toole,
Indianapolis*



Port of Los Angeles Employee Driver Mandate Upended

The Ninth Circuit Court of Appeals recently issued a favorable opinion on the challenge brought by the American Trucking Associations (ATA) against the City and Port of Los Angeles (POLA) on POLA's efforts to force carriers to utilize only employee drivers in performing drayage moves at the port. This decision follows an unfavorable ruling issued by the lower court upholding POLA's Concession Agreement mechanism in its entirety based on a determination that POLA was conducting itself as a market participant in the provision of port services.

On appeal, the Ninth Circuit undertook an analysis of five provisions of the Concession Agreement and examined whether each provision facilitated POLA's interests as manager of the port facilities or whether the provisions sought to affect conduct unrelated to those interests. The Ninth Circuit let stand four of the challenged Concession Agreement provisions addressing financial capability of carriers, off-street parking requirements, maintenance and placarding. Importantly, however, the Ninth Circuit determined that the fifth provision mandating the use of employee drivers was tantamount to regulation. In seeking to set a bright-line test on whether POLA could impose restrictions on carriers transiting port facilities, the court determined that POLA could not implement requirements which "impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port." Thus, it was determined that POLA was overreaching its authority by "unilaterally inserting itself into the contractual relationship between motor carriers and drivers." While finding that POLA could exert some level of control over the manner in which carriers transacted business should they seek to service clients requiring port services, the court determined that POLA could not control the manner in which carriers transacted with third parties in order to perform those services.

POLA swiftly announced that it would seek no further relief from the Ninth Circuit or the U.S. Supreme Court, therefore putting the employee driver mandate to rest. As for the balance of the Concession Agreement provisions, POLA will be allowed to continue to enforce those, subject to potential review by the U.S. Supreme Court. Chris McNatt, a partner in the Scopelitis firm's Los Angeles office, served as a member of the ATA litigation team.

Change Alerts Risk Managers To Initiate Coverage Review

All roads in a motor carrier's operations lead to matters of insurance coverage and risk management. So it should be no surprise that these concerns are at the crossroads of the Scopelitis firm's transportation law practice.

The firm's insurance and risk-management law group is led by Greg Feary and Jeff Toole, co-authors of this issue's cover article on the trucking insurance industry's adoption of the Motor Carrier Coverage Form ("MCCF"). In it they caution risk managers to be aware of the "unintended coverage consequences" for motor carriers and owner-operators of the industry's shift from the Truckers' Coverage Form to the new edition of the MCCF.

In the risk manager's world, change should always sound an alert for coverage review, according to Feary. Examples include

- Changes in industry-wide insurance practice, such as the adoption of the MCCF or revisions to Certificate of Insurance language, also noted in this issue of *The Transportation Brief*;
- Changes in a motor carrier's business operations following an acquisition or restructuring;
- Business decisions leading to pursuit of different markets and service offerings;
- Updates to independent-contractor agreements and vehicle leases; and
- Changes in federal, state and local regulations affecting insurance coverage requirements.

A periodic independent policy review via a knowledgeable transportation insurance broker is the best way to close gaps in coverage that may occur as a result of less obvious changes in the motor carrier's business environment. The review includes each policy's scope of coverage, exclusions, endorsements, and coordination with the company's other insurance coverage.

Joining Feary and Toole in their focus on insurance coverage issues are Andy Light, Lynne Lidke and other Scopelitis attorneys. The group helps motor carriers and their insurance brokers tailor insurance coverages that provide the optimum insurance protection given specific cost and operational requirements. They also assist in minimizing exposure while reducing posted security and collateral requirements; obtaining coverage through insurance products such as high-deductible insurance, retrospective rated insurance, or multi-tiered policies; forming risk retention groups; establishing a captive insurer; or participating in reciprocal insurer or group self-insurance programs.

For the Record

Congratulations to **Kathryne S. Feary-Gardner** and **Brandon K. Wiseman**, who began their practices this fall as associates in the Indianapolis office.

Indianapolis partner **Michael B. Langford** has been elected to the Board of Directors of the Transportation Industry Defense Association.

On the Road

Bob Henry is presenting a legal update at the American Moving & Storage Association's 2011 Safety & Operations Conference, November 9-10, in **Baltimore**.

Bob Henry is also participating in a panel discussion on "Defending Against the Latest Claims From the Plaintiffs' Bar Against Brokers, Carriers, and Manufacturers, and Analyzing Fault Apportionment" at the American Conference Institute's 2nd National Forum on Defending and Managing Trucking Litigation, December 5-6, in **Orlando**.

Mike Langford will attend the Defense Trial Counsel of Indiana's 18th Annual Conference & Meeting, November 17-18, in **French Lick, Indiana**.

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will attend the Conference on Freight Counsel, January 15-16, in **New Orleans**.

Norm Garvin, Bill Brejcha, Nathaniel Saylor, Kathleen Jeffries, Bob Henry, Fritz Damm and Mike Tauscher will attend the Transportation Lawyers Association's 2011 Regional Seminar, January 20, in **Chicago**.

Chris McNatt will attend the California Trucking Association's Annual Management Conference 2011, January 21-25, in **La Quinta, California**.

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Dispatches

 SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

According to Tim Wiseman, **Transportes Olympic became the first Mexican motor carrier to legally operate in the U.S. under the FMCSA's new Mexican Carrier Pilot Program.** On October 22, 2011, the carrier transported a shipment of industrial equipment to Garland, Texas, about 450 miles from the Laredo border. In light of the FMCSA's new pilot program, Mexico has tentatively authorized three U.S. motor carriers to begin making deliveries directly into Mexico.

Don Vogel reports that, in its ongoing effort to legislate without the cooperation of Congress, on August 24, 2011, the National Labor Relations Board issued its final rule requiring all private-sector employers subject to the **National Labor Relations Act to notify employees of their rights under the Act.** The notice must be posted by November 14, 2011, and the failure to do so is an unfair labor practice. A copy of the notice can be downloaded from the Board's website at www.nlr.gov.

Mike Langford reports that, effective September 1, 2011, **Texas' newest tort reform legislation went into effect.** The biggest changes will be that trial courts must tax costs and reasonable attorney fees against a plaintiff whose case is dismissed for having no basis in law or fact and the Texas Supreme Court is to adopt rules to expedite cases where damages are less than \$100,000.