

The Transportation Brief



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

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The Transportation Brief is published by Scopelitis, Garvin, Light & Hanson.

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FHWA Cracks Down on Compliance Reviews

As Congress considers measures to improve truck safety, including establishing a new National Motor Carrier Administration, the Federal Highway Administration (FHWA) has stepped up enforcement in the field, principally through the use of compliance reviews.

A compliance review and the resulting assignment of a carrier's safety rating — “satisfactory,” “conditional” or “unsatisfactory” — can significantly impact the carrier's business relationships with customers and insurers. FHWA has also recently proposed rules that would *shut down* carriers with final “unsatisfactory” ratings if the noted violations are not corrected within 60 days.

Initial safety rating can be appealed

After a compliance review, carriers receive a Notice of Proposed Safety Rating. If a carrier believes the proposed rating was assigned in error, or if it has corrected the noted deficiencies, the carrier can petition FHWA for a change in the final safety rating. The best strategy for the appeal will depend on the facts surrounding the compliance review, including the carrier's safety management practices and overall safety record and whether the review was conducted consistent with FHWA procedures.

Carriers can minimize the risk of an unfavorable rating

Carriers should take the following steps before receiving notice of an upcoming compliance review:

- ❖ Compare your company's safety performance, including driver and vehicle out-of-service rates and recordable accident rates, with national averages. Carriers that are safer than average in these areas have a better chance of receiving a “satisfactory” rating.
- ❖ Review dispatch and other driver assignment procedures with an eye toward preventing logbook violations.
- ❖ Because driver complaints can trigger a compliance review, address legitimate driver concerns and document driver performance issues so that a compliance review does not become a weapon of retaliation for a disgruntled employee.

Given FHWA's increased attention to enforcement, even carriers with good safety records may soon face compliance reviews. Focusing on safety practices and making necessary improvements now will enable you to spend more time in the future with your customers — not your lawyers.

Laurie T. Baulig, Washington, D.C.
Timothy W. Wiseman, Indianapolis

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Briefly...

Owner Operators: Between Health Insurance and a Hard Place

Given the driver shortage, many motor carriers have endeavored to secure health insurance coverage for owner operators for purposes of recruiting and retention. Unfortunately, if coverage is not properly structured and carefully administered, unwary motor carriers may face undesirable legal issues. For example, group health insurance appears to be the only affordable type of coverage, but state insurance laws discourage insurers from issuing policies that properly define the owner operator group as independent contractors. As a result, motor carriers sponsoring conventional group health coverage may increase the chance of having their owner operators reclassified as employees. Therefore, carriers should seek advice from an experienced insurance provider or legal professional regarding structure, marketing, and administration of health insurance coverage.

*Gregory M. Feary
Jeffrey S. Toole
Indianapolis*

OSHA Targets Trucking For Increased Enforcement

The Occupational Safety and Health Administration (OSHA) has targeted so-called “high hazard” industries, including all segments of the trucking industry, for increased inspections. Many trucking companies have already received notification from OSHA that their workplace injury and

illness rates are too high and that they are therefore good candidates for inspections.

What will the OSHA inspector likely look for? The top five OSHA violations in the trucking industry consist of failure to comply with the following regulations:

- ❖ Distribution of a written hazardous communication program;
- ❖ Proper operation of powered industrial trucks and training of operators;
- ❖ Proper placement of portable fire extinguishers;
- ❖ Training in hazardous waste site operations and emergency response; and
- ❖ Maintenance of safe walk-working surfaces.

To reduce the risk of workplace injuries and to avoid significant OSHA penalties, carriers should make it a priority to review their compliance with OSHA regulations.

*Laurie T. Baulig
Washington, D.C.*

Federal Court Recognizes New Contractor’s Right To Sue

A federal appeals court recently recognized the right of independent contractor owner operators to sue motor carriers in federal court for violations of the federal leasing rules. Independent contractors may recover damages, injunctive relief, and attorneys’ fees for such violations.

Previously, owner operators were limited to either filing complaints with the Federal Highway Administration or bringing

breach of contract actions against carriers.

If the decision stands, it may encourage independent contractors to bring new class actions in addition to the 25 cases already being litigated against tank-truck, truckload, household goods, and intermodal carriers. Carriers should take preventive steps against potential lawsuits, beginning with a review and update of their driver and equipment leases to ensure they are in compliance with the leasing rules.

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

Do You Have a Highway Accident Response Plan?

Every risk management program should include a highway accident response plan. For serious accidents, motor carriers should consider dispatching an attorney to the scene. The attorney, who should be well versed in highway accident defense, can take the following steps to protect the motor carrier’s interests:

- ❖ Supervise the accident investigation;
- ❖ Retain accident reconstruction engineers, equipment engineers, and other technicians; and
- ❖ Assist the driver in responding to police inquiries.

Personally viewing and preserving as much physical and documentary evidence as possible will further assist the attorney and the experts in best presenting the carrier’s case at trial.

*Michael B. Langford
Indianapolis*



Mileposts

Scopelitis, Garvin Expands to the Nation's Capital

Two former top American Trucking Associations (ATA) executives have joined Scopelitis, Garvin, Light & Hanson to open a Washington, D.C., office of the Firm.

Former ATA senior vice presidents and inside counsel Daniel R. Barney and Laurie T. Baulig have joined the Firm as partners in its Washington, D.C., office. Their addition brings to 26 the number of attorneys in the firm's national transportation practice — 20 in Indianapolis, four in Chicago, and two in the nation's capital.

In addition to being Senior Vice President and General Counsel of the ATA until late last year, Barney was the co-organizer and longtime chief counsel of the highly successful ATA Litigation Center. His practice will include strategic legal and business advice, antitrust and trade regulation, trucking acquisitions and joint ventures, transportation safety regulation, independent contractor issues, and state trucking restrictions and taxes.

Baulig, formerly Senior Vice President for Policy and Regulatory Affairs for ATA, will focus her practice on labor and employment, transportation safety, occupational safety and health, and immigration law, as well as government relations in these areas.

Barney and Baulig have just moved to their new offices located in the heart of the District at 1500 K Street, N.W., Suite 910. They are joined by D.C. Officer Manager Wendi Martinez.

The Washington, D.C., announcement follows by less than 18 months the announcement of the Firm's opening of its Chicago office.

For the Record

Jerry Cooper, a partner in the Firm's Chicago office, has been appointed to the Illinois Self-Insurers Advisory Board by Governor George Ryan. Among the Board's responsibilities is approval of all applications for self-insurance status in Illinois.

Congratulations to **Dennis J. Duffy** on his successful completion of the Illinois Bar Exam. Dennis, a law clerk for the Firm during the past two summers, will now begin his practice as an associate attorney in the Firm's Chicago office.

Best wishes to **Angela Stemle Cash** on her marriage to Michael Cash, in Clarksville, Indiana, on August 28. Angie will continue her litigation practice as an associate in the Indianapolis office.

Firm staff and attorneys raised more than \$1,200 for the Central Indiana Chapter of the Alzheimers Association through their participation in the Association's Memory Walk on September 19 in Indianapolis. Thanks to **Kathy Bjerke** and **Paula Arnold-Carson**, organizers of this worthwhile event.

On the Road

Norm Garvin will attend the 32nd Transportation Law Institute, sponsored by the Association for Transportation Law, Logistics, and Policy; Transportation Lawyers Association; and the University of Denver College of Law, October 28 - November 3, in **San Francisco**.

Norm also will attend the National Transportation Industry Conference, sponsored by Deloitte & Touche, November 16 - 17, in **Atlanta**; and he will speak on "Employees v. Independent Contractors" at the meeting of Indiana Household Movers & Warehousemen, Inc., December 4, in **Indianapolis**.

Greg Feary, Andy Light, Jerry Cooper, Jay Robinson, Dan Barney, and Laurie Baulig will attend the American Trucking Associations' (ATA) Management Conference & Exhibition, October 30 - November 2, in **Orlando**. Jay and Dan will conduct an educational session titled "Mergers, Acquisitions, and Pooling Agreements—Time to Take the Plunge?" Laurie will moderate a seminar on Alternative Dispute Resolution.

Greg Feary and Jerry Cooper will attend the ATA's Human Resources Forum, November 8 - 9, in **Washington, D.C.**

Jim Hanson, Jerry Cooper, and Laurie Baulig will attend the 13th Annual Conference of the North American Trucking Industrial Relations Association, November 8 - 10, in **St. Petersburg Beach, Florida**. Jim will moderate a panel discussion on compliance problems presented by the Family and Medical Leave Act.



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Dispatches



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- ❖ A recent court case provides a reminder that carriers bear a “substantial burden” in limiting their liability for cargo claims. Tariffs, bills of lading, and other shipping documents that contain unambiguous and legible language regarding **released rate limitations of liability** help carriers enforce such limitations. Bob Browning (Indianapolis) cautions carriers and shippers to carefully review shipping documents to determine whether the limitation language used is in their respective best interests.
- ❖ Also on the cargo claim front, at least one court has found that the **statute of limitations** applicable to a Carmack Amendment cargo damage claim is not interrupted or tolled by the parties’ subsequent correspondence regarding the claim. Bill Brejcha (Chicago) offers a reminder that a shipper must file suit within two years and a day after its claim is initially denied or the case will be forever barred.
- ❖ Finally, Bill Brejcha notes that a federal appeals court recently refused to apply the “**last carrier presumption**,” which generally provides that the last carrier to handle goods prior to an intermodal delivery is liable for cargo loss and damage. The court applied common sense and found that it would be “absurd” to hold an inland motor carrier liable for salt water damage that clearly occurred during the ocean portion of an international move.

The Transportation Brief is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light & Hanson would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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