

# 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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## *Bankrupt Trucking Insurers – Issues Raised And Lessons Learned*

Recently, motor carriers and their insurance brokers have become embroiled in failed or failing insurance arrangements due to financially insolvent insurers. The liquidation or rehabilitation of trucking insurers not only creates new legal issues for motor carriers, but also confirms that basic preventive measures in the negotiation of insurance are always a wise undertaking.

### *Claims against the trucking company may not be “stayed” during the bankruptcy*

Due to the manner in which a particular court interprets the insurer’s home state bankruptcy proceedings, a trucking company may face exposure to claims that would otherwise have been covered by its insurer. Trucking companies are also exposed to a patchwork quilt of state guarantee funds that may contribute to the payment of larger claims, but often do not completely cover them. Settlements of these larger claims raise questions about what recourse the motor carrier may have against the failed insurer’s reinsurers or remaining funds. Also, insurers often hold collateral, and the process of obtaining release of the collateral is complicated by government and court intervention in the insurance company’s operations and the trucking company’s inability to find a way of communicating with the insurer’s remaining decisionmakers.

### *Preventive negotiation may eliminate later problems*

There are a few lessons taught by failed insurance arrangements (often a byproduct of hard or hardening insurance markets), including the following rules of thumb:

- ❖ Understand the financial rating of the insurer;
- ❖ Negotiate clear terms for the periodic release of collateral;
- ❖ Confirm that the insurer is licensed in all states where your trucking company operates;
- ❖ Review all transactional documents before purchasing the insurance (review samples if the actual documents are not available);
- ❖ Organize loss data and cooperate with your broker to prepare submissions for new quotes at least 90 days prior to policy expiration dates to avoid last-minute decisions.

Although the above points seem fundamental, all too often motor carriers do not follow these simple rules. When an insurance arrangement fails, failure to follow the fundamentals can and likely will financially burden the motor carrier.

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

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# Briefly...

## *Owner-Operator Litigation Produces Gains & Setbacks*

Carriers defending against owner-operator lawsuits have recently experienced significant gains and setbacks. Hanging in the balance are millions of dollars in potential damages and attorneys' fees for alleged violations of the federal leasing regulations.

Carriers won rulings applying a 2-year, rather than 4-year, statute of limitations; denying a preliminary injunction; and using a "substantial," rather than "literal," compliance test for leasing violations.

However, OOIDA scored victories certifying two more suits as class actions; applying the 4-year statute of limitations; and, for the first time, declaring a lease's arbitration clause "unenforceable" – a result OOIDA is now seeking against three other carriers.

To avoid litigation, it is all-important for carriers to make their leases track the regulations, conform practices to lease provisions, and properly phrase arbitration clauses.

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

## *New Hours of Service Rules Effective January 4, 2004*

After years of heated debate, the Federal Motor Carrier Safety Administration (FMCSA) has finally issued new hours of service regulations replacing

rules that have been in place since 1939. Key provisions of the new rules are as follows:

- ❖ Drivers may drive up to 11 hours (currently 10) after 10 hours (currently 8) off duty
- ❖ Drivers cannot drive after having been on duty for 14 hours (currently 15) without first taking a 10-hour break
- ❖ Drivers are still subject to the limitation of 60/70 hours on-duty in 7/8 consecutive days, but can "restart" this period after any 34-hour off-duty period

Importantly, the FMCSA abandoned its earlier proposal that motor carriers equip trucks with electronic on-board recorders as a replacement for driver logs. Also, the agency indicates it will conduct further rulemaking in an attempt to clarify what types of supporting documents must be retained by carriers for driver log verification.

The existing regulations remain in force until January 4, 2004, at which time the new rules will go into effect.

*Timothy W. Wiseman  
Indianapolis*

## *U.S. Supreme Court Strikes Down Punitive Damages Award*

In an important victory for defendants and their insurers, the Court recently struck down as unconstitutional an award of \$145 million in punitive damages on a \$1 million actual damages judgment.

For the first time, the Court has attempted to define the degree to which punitive damages should relate proportionately to the compensatory damages awarded. The Court ruled that awards should seldom exceed a single-digit ratio (i.e., 9 to 1) between punitive and compensatory damages and that, when the compensatory damages judgment is "substantial," a lesser ratio of 1 to 1 may be the limit of constitutionality.

The Court also emphasized that punitive damages may not be used to punish the defendant for conduct bearing no relation to the specific harm suffered by the plaintiff and that the wealth of a defendant cannot be used to justify an otherwise unconstitutional award.

*Lynne D. Lidke,  
Shannon M. McClellan  
Indianapolis*

Major John Hill from the Indiana State Police Commercial Vehicle Enforcement Division was recently appointed by Transportation Secretary Norman Mineta as the Chief Safety Officer and Assistant Administrator for the Federal Motor Carrier Safety Administration. SGL&H has worked with Major Hill for several years on various safety and legislative issues in Indiana and congratulates him on his new position.



# Mileposts

## *Accident Response Shapes Carriers' Future Defense*

The Firm's accident defense litigators urge motor carriers to develop and regularly review a comprehensive response plan designed to give them every possible advantage in the litigation that is likely to follow a highway accident. Such plans can include step-by-step guidance for drivers on the scene of an accident in tending to injuries, notifying police and the company, collecting witness information, stepping off distances, creating accident drawings or photographing the accident scene, and discussing the accident (or not) with investigating officers.

Effective training in these matters may help the driver "nail down" critical details in the often traumatic aftermath of an accident. Such firsthand details can make a big difference at trial, according to Tom Farrell, an Indianapolis partner whose practice focuses upon truck accident defense. Farrell is joined by partners Mike Langford and Angela Cash and associates Chris Whitten and Eric Habig as accident litigators in the Indianapolis office and by associate Steve Oakley in Chicago. Additionally, plans are underway for the addition of two new litigators in the Chicago office later this summer.

Effectively-designed response plans also provide guidance for managers and the professionals they retain. They delineate responsibilities and relationships among insurers, adjusters, reconstructionists, and legal counsel. Some plans call for the carrier's legal counsel to manage its accident investigation firsthand. Doing so can create attorney-client privilege that may make the investigators' work product undiscoverable by the opposition, according to Langford, who has been retained by some large carriers to oversee their accident-response efforts nationwide.

The Firm is best equipped to provide a comprehensive defense against claims initiated in Indiana and Illinois. Collectively, however, its team of accident litigators provides a broad range of services for motor carriers beyond courtroom litigation, to include:

- ❖ Consultation with local counsel on litigation strategy;
- ❖ Referral of legal counsel in states where accidents occur;
- ❖ Coordination with a wide network of accident reconstructionists; and
- ❖ Development and review of accident response plans.

## *For The Record*

**Tom Farrell**, a partner in the Indianapolis office, has been appointed to represent Indiana and serve as vice-chair of the Commercial Transportation Litigation Committee of the American Bar Association's Torts and Insurance Practice Section.

We welcome the following new attorneys as they begin their association with SGL&H in the Indianapolis office:

**Eric K. Habig**, an associate focusing on truck accident defense. Eric joins us with over three years of litigation experience in the Indianapolis community.

**Ronald J. Morelock**, an associate practicing in corporate and business taxation. Ron will draw upon former roles with the Internal Revenue Service, the Indiana Department of Revenue, and a national tax/financial consulting firm.

**Allison Smith**, our new Director of Business Development. Allison has served the past seven years as an account representative of LexisNexis, a widely used online legal research firm.

**R. Jay Taylor**, the most recent addition to the Indianapolis office. Jay's legal experience includes two judicial clerkships at the Indiana Court of Appeals and three years in defense litigation with an Indianapolis law firm.

We also welcome **Amelia D. Yaros**, who has joined SGL&H as an attorney in the San Francisco office. Amy will serve clients in several areas, including cargo claims litigation and bankruptcy.

## *On The Road*

Greg Feary will serve in a panel titled "Risk Management and Insurance Captives" at the 74th Annual Meeting of the Association for Transportation Law, Logistics & Policy, July 2, in **Newport, Rhode Island**.

Steve Pletcher will speak at the Midwest Association of Professional Employers Organizations' Chapter Meeting, August 21, in **Detroit**.



# The Transportation Brief®

## Dispatches



❖ The federal Transportation Security Administration (TSA) has begun a comprehensive review of air cargo security rules. Motor carriers, air freight forwarders, and logistics company/brokers with concerns about the current security program may email or call **Dan Barney**, who is collecting such concerns to pass along to TSA on a non-company-specific basis.

❖ As part of the Department of Transportation's new security regulations, all motor carriers and shippers that handle hazardous material requiring registration with the DOT must have a written security plan in place by September 25, 2003. **Tim Wiseman** advises that the security plan must include an assessment of possible transportation-related security risks posed by each type of hazardous material handled by the company. The plan must also address such issues as personnel security, unauthorized access to hazardous materials, and en route security. All employees who perform any tasks covered by the DOT hazardous material regulations must receive training on the company's security plan before December 22, 2003.

❖ **James Attridge** reports that the U.S. Supreme Court is considering whether to accept review of two federal cases addressing the extent to which a standard Himalaya clause in an ocean bill of lading protects the inland carrier of an inbound ocean container. If the cases are accepted for review, it will be the first time in almost 40 years that the Court has entertained a cargo claim case.