

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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Transportation Insurance – Coping With The Hard Market

The hard transportation insurance market is a challenge for every motor carrier that may last two or three more years according to most predictions. Carriers must implement strategies to cope with the current environment, which is more loss-sensitive. Many carriers are considering self-insurance and most are attempting to reduce premium costs by increasing deductible layers. Other coping strategies include the following:

- ❖ Because occupational accident insurance that includes a contingent workers' compensation coverage feature is no longer readily available, carriers should consider revising contractual requirements in contractor lease agreements and shipper agreements.
- ❖ Shipper contracts often require motor carriers to include the shipper as an "additional insured" with respect to public liability coverage. Some insurers are now reluctant to do so. Communicate with the insurer before assuming the obligation in the shipper contract.
- ❖ Explore alternative risk financing mechanisms, including group captive insurance arrangements and risk retention groups. Carefully examine contractual provisions of such arrangements, including risk-sharing exposure among participants and exit rights.
- ❖ Carriers have become familiar with loss-prevention practices as the industry has focused increasingly on overall safety. Yet, the current hard market requires equal concentration on loss-control practices that include oversight and involvement in claims administration, attorney selection, and litigation management, and examination of and involvement in subrogation opportunities.

Also critical are a proper contractual structure of owner-operator indemnification and an organizational structure carefully designed to limit exposure to the carrier's valued assets.

A motor carrier's insurance broker can be the most valuable component to an effective risk management strategy to cope with the current market. However, carriers can no longer take a passive role in the process of acquiring insurance coverage and containing losses, particularly when many of the losses will have a direct and immediate economic impact.

*Gregory M. Feary
Indianapolis*

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Briefly...

Personal Ownership of Other Businesses Can Be Risky for Pension Fund Contributors

If your company contributes to a multi-employer pension fund, the company owners and shareholders should consider restructuring their personally-owned businesses to avoid personal liability for pension fund withdrawal liability. It has long been the law that withdrawal liability is not limited to the business entity that contributes to the plan and may also be imposed on “trades or businesses...which are under common control.” However, in light of an ongoing case, this controlled group rule may become a significant threat to employers’ personal assets.

Citing the controlled group rule, Central States, Southeast and Southwest Areas Pension Fund recently attempted to hold husband and wife trucking company owners personally liable for \$16 million in withdrawal liability. Central States alleged that the couple’s real estate activities (which involved the leasing of only two apartments in their house’s detached garage) constituted a “trade or business” that was, along with the trucking business, under the common control of the couple.

The district court ruled in favor of Central States, but the U.S. Court of Appeals for the Seventh Circuit reversed and remanded the case to the district court where it is still pending. We will keep readers informed about future developments.

William D. Brejcha
Chicago

U.S. Supreme Court Continues to Narrow Focus of ADA

In keeping with the current legal trend, the U.S. Supreme Court recently issued a decision that further restricts the definition of “disability” under the Americans with Disabilities Act (ADA). To state a claim under the ADA, an individual must show that he or she has a physical or mental impairment that substantially limits a major life activity. The Court ruled that, to be considered disabled in the major life activity of performing manual tasks, the employee’s disability must be severe enough to prevent activities that are central to his or her daily life outside work.

The Court stated that the proper inquiry is “whether the claimant is unable to perform the variety of tasks central to most people’s lives, not whether the claimant is unable to perform the tasks associated with her specific job.” While touted in the media as a major victory for employers, this case does not change an employer’s obligation to provide a reasonable accommodation for employees with physical or mental impairments, provided those individuals are “disabled” within the meaning of the ADA and are qualified to perform the essential functions of the position.

James H. Hanson
A. Jack Finklea
Indianapolis

FMCSA May Use Your Satellite Data Against You

Carriers utilizing electronic tracking or satellite devices on their trucks should be aware that the Federal Motor Carrier Safety

Administration (FMCSA) has recently demanded access to this documentation as part of its safety and compliance review process. The FMCSA can compare this data with driver logs to identify possible false log violations.

In the past, the FMCSA has demanded satellite records only if the carrier did not have more traditional supporting documents, such as fuel receipts or toll tickets. However, in recent months, the FMCSA has apparently abandoned its past policy and has targeted a number of the nation’s largest carriers in an attempt to use satellite data for enforcement purposes.

Carriers that use satellite technology should immediately contact their legal counsel if the FMCSA requests access to this data as part of a compliance review. The carrier may be able to successfully challenge the FMCSA’s right to obtain and review such data.

Timothy W. Wiseman
Indianapolis

Court Issues FMLA Ruling Favorable to Employers

The U.S. Supreme Court recently invalidated Department of Labor regulations that required an employer to provide an additional 12 weeks of leave under the Family and Medical Leave Act (FMLA) if it failed to prospectively designate an employee’s time off as FMLA leave. As reported in the Fall 2001 issue of *The Transportation Brief*, prospective FMLA notice has been a problematic issue for employers, so this decision is a welcome one.

Steven A. Pletcher
Indianapolis



Mileposts

Restructuring Calls For Integrated, Multi-Disciplinary Approach

Scopelitis attorneys currently involved in restructuring projects advise motor carrier clients to consider restructuring with the guidance of a multi-disciplinary team of advisers who have trucking-specific experience and resources.

Indianapolis partners Norm Garvin, Andy Light, Greg Feary and Jay Robinson have embarked on a dozen or so restructuring projects in the past six months with carriers seeking to weather the “perfect storm” of the industry’s prevailing economic pressures through restructuring their operations and assets.

Restructuring acknowledges and addresses the two basic components of the trucking company: (1) the carrier itself, which holds the operating authority and manages its loads, contracts, employees, and drivers; and (2) the company’s tangible assets, which include its equipment and property. Taken separately, these two components have very different insurance and operational requirements for maintenance and asset preservation. A careful review of these components with restructuring as a potential goal calls for collaboration among the company’s legal advisers, accountants, and insurers.

Andy Light suggests that restructuring is an option for carriers of all sizes that may be accomplished more readily than one would expect. Light cautions, however, that restructuring should not be viewed as a “quick fix” to current adverse conditions.

For further information on restructuring, see the Winter 2001 issue of *The Transportation Brief*, which is available at www.scopelitis.com, or ask your Scopelitis contact.

For the Record

Indianapolis partner **Jim Hanson** recently appeared before the U.S. Court of Appeals for the Second Circuit to argue a case in which the Firm successfully defended a trucking company client against an Equal Employment Opportunity Commission (EEOC) complaint. The appeals court will weigh prescription-drug screening of truck driver applicants as a safety measure against Title VII rights under the Americans with Disabilities Act. Hanson was assisted by **David Robinson**, of counsel in the Indianapolis office. The court’s decision had not been announced as of this publication.

Chicago partner **Jerry Cooper** was recently re-appointed by Governor George Ryan to a four-year term on the Illinois Self Insurance Advisory Board. Jerry also serves as the new Chairman of the Illinois State Bar Association Workers’ Compensation Section Council.

Richard A. Clark, former senior counsel of North American Van Lines, has joined the Firm as of counsel in the Indianapolis office. He will practice in the the area of transportation law, including litigation, contracts, and regulatory issues.

On the Road

Norm Garvin and Tim Wiseman will attend the Indiana Motor Truck Association annual conference October 9-11, in **Tucson, Arizona**.

Steve Pletcher will attend the annual meeting of the National Association of Professional Employer Organizations (NAPEO), October 9-12, in **Chicago**.

Jim Hanson will attend the North American Transportation Employee Relations Association in **St. Petersburg Beach, Florida**, October 14-18.

Andy Light, Greg Feary, Jay Robinson, and Dan Barney will attend the American Trucking Associations’ Annual Management Conference in **Orlando**, October 27-30.

Jim Hanson will also attend the Associated Builders and Contractors National Attorneys Conference in **Washington, D.C.**, November 6-8.

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You are invited to subscribe to e-mail updates on legal issues affecting the trucking industry through the “E-mail Sign Up” link on the firm’s website at www.scopelitis.com.

In the form of e-mailed “Trucking Law Alerts,” the updates are designed to keep clients and friends informed of important issues and decisions that arise between issues of *The Transportation Brief*.

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The Transportation Brief®

Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

SGL&H Broadens National Scope

SGL&H recently opened two new offices – one in San Francisco, where James Attridge will continue his transportation practice as of counsel with the Firm, and the other in Kansas City, Missouri, where experienced transportation lawyer Jim Graves has joined the Firm in an of counsel capacity. In addition, attorney Kim D. Mann recently joined the Firm as a partner in its Washington, D.C., office. Mann and Attridge formerly were partners in the international law firm of ShawnCoulson. Graves is former general counsel for Mark VII, Inc.

James Attridge adds shipping law experience to the Firm's defense litigation practice. He has tried numerous cases in transport and admiralty actions, establishing precedent in the areas of maritime jurisdiction and limitations of carrier liability.

Jim Graves has practiced transportation law for more than four decades, and he has served in senior management of three different types of surface transportation carriers — a major regional LTL general commodities carrier, a large national truckload carrier, and a logistics management and intermodal marketer.

Kim Mann has broad experience in transportation law, with a concentration in commercial litigation, employment and labor relations, and administrative and regulatory law. For the past 15 years, he has served as outside regulatory counsel to one of the “big three” LTL motor carriers.

The additions of Attridge, Mann, and Graves will further strengthen the Firm's ability to provide legal and business advice on all facets of the transportation industry. Please see the front page for office contact information.

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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