

The Transportation Brief®



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3PL Liability on the Rise

Few areas of transportation law are evolving so rapidly as that pertaining to 3PL liability. Long a relative safe-harbor against potential liability, brokers and freight forwarders are increasingly under attack on a number of fronts based on several theories of law whereby a 3PL can potentially be held liable for personal injury and property loss damages arising from a motor carrier's negligence. Because of the publicity surrounding several high-dollar judgments recently obtained against 3PLs, the plaintiff's bar seems increasingly prone to name 3PLs as parties to such cases in its never-ending search for deep or merely additional pockets from which to collect judgments. Therefore, segregating 3PL operations in a stand-alone legal entity can further support a carrier's 3PL diversification.

The single-entity approach to carrier/3PL operations is of decreasing value

A "monolithic" structure in which companies maintain both motor carrier and property broker/freight forwarder authority in a single entity is now of decreasing value and applicability, especially as motor carriers move to a more diversified transportation operation with separate P&L justification for all aspects of their core operations. Historically, loads accepted as a motor carrier could be tendered to third-party carriers when circumstances such as capacity or pricing dictated with little regard to continuing liability arising from acts and omissions of the underlying carrier that actually performed the move. Developing theories of liability such as negligent selection/negligent entrustment and joint venture/agency, however, significantly raise the stakes of combining those service offerings in the traditional "monolithic" structure.

Operational and legal review may be warranted

In addition, insurance carriers have taken note and become more active in monitoring carriers that insist on conducting 3PL operations through the single entity/monolithic structure. In the face of such developments, a review and overhaul of carrier selection practices, procedures and guidelines utilized in 3PL operations can be one means of minimizing risks arising from 3PL activity. In light of these developments, however, and given the ever-increasing distinctions which exist on all levels between motor carrier and 3PL operations, now might also be a good time to consider segregating your distinct motor carrier and 3PL operations into separate entities to further protect each from the potential liabilities of the other.

*Andrew K. Light
Gregory M. Feary
Jay D. Robinson, Jr.,
Indianapolis*

Briefly...

The Estate Tax Rests In Peace (Temporarily)

Failed efforts in Congress to extend the federal estate tax at 2009 levels have resulted in a one-year repeal of the tax. Although there is currently no federal estate tax for individuals dying in 2010, Congress continues to debate this issue, leaving open the possibility that the tax could be imposed retroactively. While the repeal is in effect, the step-up of the cost basis for assets owned at death is limited which may result in significant capital gains taxes. The repeal is only in effect for 2010 and without further legislation, on January 1, 2011, the estate tax reappears at the 2001 levels with an exemption of \$1 million and a whopping 55% estate tax rate.

*Angela S. Cash,
Indianapolis*

Will Your Company Outlive You?

Does your business enterprise have a contingency plan? For example, if the CEO is suddenly incapacitated - temporarily or permanently - can the enterprise survive, and if so will it prosper? While not a pleasant topic, such planning can ensure that the enterprise will be open for business the next day at the most basic level, and planning at advanced levels provides an arrangement for management and/or ownership succession.

A simple power of attorney (POA) may solve some of the issues a company and co-owners may face if an owner is incapacitated. A POA, which is generally governed by state law, can be

tailored to meet a company's needs and personal obligations. A thoughtfully-drafted POA will give the appointed person the power and authority to act on the owner's behalf in the event the owner cannot.

Important contingency planning considerations will include not only the more perfunctory tasks of day-to-day operations (to cover a temporary situation), but also executive-level relationships and responsibilities such as banking and credit, fixed asset management, insurance and risk management, finance, marketing, and officer/director positions (to cover extended or permanent situations). Considerations may also include sharing and/or collaboration with respect to strategic objectives.

Contingency planning can ideally be combined with succession planning, to provide not only for an unexpected or untimely event, but also to set out the manner and means by which various management responsibilities are transitioned and ownership is acquired or distributed.

*Gregory A. Ostendorf,
Indianapolis*

*Donald W. Devitt,
Chicago*

Timing Matters In Distressed Company Acquisitions

Current economic conditions have, among other things, given rise to a near-historic number of "distressed" motor carriers. The number is expected to rise in the first quarter of 2010 when plate renewal fees and insurance

premiums become due. In many cases, a sale of the company represents the only viable exit strategy for its owners and creates opportunity for healthy acquirers from a strategic and pricing standpoint.

Although the purchase and sale of a distressed company is generally no different than a purchase and sale of any other company, an expedited due diligence and closing process is often required to preserve the company's customer and driver relationships (and related goodwill) due to timing considerations. The purchaser will evaluate the company to determine if its traffic lanes, rates, customers, drivers and/or equipment represent an opportunity to profitably expand the purchaser's current operations, while the seller will focus on means of realizing goodwill in the context of existing debt and credit obligations.

If performed correctly, the acquisition of a distressed motor carrier can be structured so as to provide a win-win opportunity for all parties.

*W. Todd Metzger,
Indianapolis*





Mileposts

Motor Carrier Transactions Call for Due Diligence in Industry-Specific Issues

This issue of *The Transportation Brief* features counsel typical of that provided and implemented by the Scopelitis firm's corporate transactions group.

Although many attorneys offer capabilities in drafting, reviewing, and negotiating contracts, Scopelitis lawyers provide these services with the broad, deep experience in transportation-specific issues that is required by motor carriers looking to gain a competitive edge through their transactions. Because Scopelitis is a full service law firm devoted to the transportation industry, our attorneys counsel from targeted background and experiences. That distinction — along with the savings it creates when Scopelitis attorneys need not educate themselves on topics they already know and can spot issues that might not be so readily apparent to general practitioners — is what makes the Scopelitis firm a trusted resource when it comes to critical transactions involving the transportation industry.

The corporate transactions group works closely with all the firm's attorneys, bringing broad experience to the table on transportation transactions. Beyond the breadth of knowledge expected from any transaction counsel, our industry-specific resources include a detailed working knowledge of regulatory, state tax, employment, independent contractor, cargo security, highway safety, insurance (including captive insurance arrangements and government authorized self-insurance programs), contracting (including shipper, broker, vendor and leasing contracts), and cargo loss and damage liability issues. The group's experience also allows us to often quickly peel-away the issues, leading to practical solutions which are the difference between transactions the parties walk away from without results as opposed to those that close successfully.

The firm's corporate practice group includes Norm Garvin, Andy Light, Greg Feary, Jay Robinson, Todd Metzger and Greg Ostendorf in Indianapolis; Bill Brejcha, Don Devitt and Don Vogel in Chicago; and Dan Barney and Kim Mann in Washington, D.C.

Mileposts

We are pleased to announce that **Craig J. Helmreich** has been named a shareholder in the firm. Craig will continue his commercial litigation practice in the Indianapolis office.

Tim Wiseman has been re-elected to the Scopelitis firm's Management Committee and will continue to serve as managing partner with Indianapolis partners Greg Feary and Lynne Lidke.

On the Road

Mike Langford and Fritz Damm will attend the Defense Research Institutes' Trucking Law Seminar, February 2-5, in **Las Vegas**.

Bob Henry will present Effective Compliance with Consumer Disclosure Requirements at the American Moving and Storage Association's Annual Education Conference & Expo, February 21-24, in **Phoenix**.

Greg Feary will speak on Purchasing Insurance – The Impact of CSA 2010 and Dan Barney and Adam Smedstad will participate in a Trucking in the Round session on class actions at the Truckload Carrier Association's Annual Convention, February 28 –March 3, in **Las Vegas**.

Dan Barney and Chris McNatt will attend the AirCargo 2010 Annual Convention, March 14-16, in **Orlando**.

Fritz Damm will participate in the American Trucking Associations Distribution & LTL Carriers annual meeting, February 28-March 3, in **Tampa**.

Jim Golden will speak about the Harvard Business School case study based on his work as negotiation counsel at the Harvard Business School, April 20-24, in **Cambridge, Massachusetts**.

Mike Tauscher will participate in the Law of the Land, Law of the Jungle panel on cargo law at the Transportation Loss Prevention & Security Association joint conference with the Transportation & Logistics Council, April 18-21, in **San Diego**. Kathleen Jeffries also will attend.

Chris McNatt will attend the National Customs Brokers & Forwarders Association of America's Annual Conference, April 11-14, in **San Antonio**.

Don Vogel will present an update on Labor & Employment Law at the 2010 Transportation Lawyers Association's Annual Conference and CTLA Mid-Year Meeting, April 27 – May 1, in **Hilton Head**. Kathleen Jefferies, Kim Mann, and Chris McNatt also will attend.



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GARVIN LIGHT HANSON & FEARY

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Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

The Michigan legislature is considering partial relief for trucking companies subject to a 350% tax increase under Michigan's Michigan Business Tax (MBT) when subcontracting to other carriers. According to Mike Tauscher, House Bill 4481 would reduce the tax burden by **permitting a tax deduction of the subcontracted cost rather than inclusion in the trucking company's gross receipts**; the subcontracting carrier already is taxed on the income received.

Mike Tauscher reports that, effective immediately, **Michigan has amended its overweight statute** in two important respects: the bond required to release the vehicle is now limited to the amount of the anticipated fines and costs rather than double the amount, and portable scales used in roadside inspections must now be tested, sealed and certified as accurate.

Andy Light reports that, due to the fee structure not yet being finalized, a **moratorium on enforcement of the UCR has been issued for the 2010 registration year**, which moratorium remains in effect until further notice. The projection is that the fee structure will be finalized by April 2010 at the earliest. Any interstate motor carrier operating in 2009 is still required to have paid 2009 UCR fees.

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 & Feary would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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