

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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Shipper Bankruptcies Call For Precautionary Steps By Carriers

The recent downturn in the economy has sparked an increase in the number of shippers filing for bankruptcy protection. As a result, carriers' operations are adversely affected, cash flow is impaired, and "preference" claim liability has increased. There are many complex legal issues related to protecting a carrier's interests when shippers file for bankruptcy, but there are also practical and prudent steps that carriers can take to reduce bankruptcy-related costs.

Take preventive steps both before and after bankruptcy filings

Carriers should consider the following preventive measures:

- ❖ Monitor accounts receivable closely, make collection calls, inquire about the shipper's financial status, and take appropriate action to terminate services if necessary.
- ❖ Obtain third-party guarantees and secure collateral if the shipper's financial status is questionable.
- ❖ Assess your company's lien rights to the cargo by contract or tariff or under applicable law.
- ❖ After the bankruptcy is filed, do not take any action against the shipper or its property, including collection efforts, until permission is received from the bankruptcy court.
- ❖ Be timely and thorough when filing proofs of claim with the bankruptcy court.

Beware of "preference" claims

Your company will likely be sued for recovery of any payment made by the shipper during the ninety days prior to the bankruptcy filing. To defend against such "preference" claims, carriers should compile payment records to determine whether the payments were made in the ordinary course of business. Carriers should also assess the facts underlying the shipments to determine what other defenses are available. For example, interline shipments frequently are not subject to "preference" claims. In short, carriers must be pro-active to protect against shipper bankruptcy. Avoid the trap of ignoring bankruptcy issues as they arise, whether in the form of a slow-pay account, a notice of bankruptcy filing, or the assertion of a "preference" claim.

Robert L. Browning, Jay D. Robinson
Indianapolis

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Briefly...

DOT Targets 2002 For Cross-Border Traffic

U.S. Department of Transportation (DOT) officials now say that January 1, 2002, likely will be the "Implementation Date" for opening the U.S. to cross-border traffic from Mexico. The DOT released proposed regulations on May 3, 2001, that would regulate the cross-border traffic. The proposed regulations address the registration and safety requirements that must be met by a Mexican carrier before it is allowed entry into the U.S.

Comments to the proposed regulations, a summary of which is available from the Firm, are due July 2, 2001. The Firm is gathering information daily and can assist clients in becoming compliant with regard to all aspects of cross-border traffic.

***Timothy W. Wiseman
Indianapolis***

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Punitive Damages in Wrongful Death Cases: Indiana Update

In recent days, the Indiana Supreme Court issued several decisions clarifying what damages are recoverable under Indiana's wrongful death statutes. On punitive damages, Indiana's highest court overturned a lower court ruling reported in the Spring, 2000 issue of *The Transportation Brief* and confirmed a long line of case law barring the recovery of punitive damages under the general wrongful death statute.

Likewise, the Court held that punitive damages are not recoverable under the child wrongful death statute or in conjunction with a parent's common law claim for loss of the deceased child's services from the date of injury until the child's death. As Indiana's third wrongful death statute covering single adults with no dependents also expressly prohibits punitive damages, motor carriers can now rest assured that punitive damages are not authorized in any Indiana wrongful death action.

***Angela S. Cash
Indianapolis***

FMCSA Parking Brake Rules Trump OSHA Wheel Chock Regs

On March 30, 2001, the Federal Motor Carrier Safety Administration (FMCSA) determined that its parking brake regulations pre-empt wheel-chocking regulations enforced by the Occupational Safety and Health Administration (OSHA).

OSHA has cited carriers based on a concern that the trailer could "walk away" from the dock during the loading and unloading process, thus jeopardizing the safety of forklift operators. However, FMCSA found in its ruling that its parking brake regulations, as well as advances in air and spring brake technology, provide adequate safeguards for trucking employees.

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



Mileposts

Carriers Cautioned to Balance Driver Safety, ADA Concerns

In response to concerns about highway safety, many trucking companies have adopted driver qualification standards that exceed the minimum requirements of the Federal Motor Carrier Safety Regulations (FMCSR). If the standards concern an applicant's physical condition, they might be challenged under the Americans With Disabilities Act (ADA), according to Indianapolis partner Jim Hanson.

Consider the following scenario: A truck driver discloses during the hiring process that he or she is taking medication for a heart condition. Although the condition itself is not automatically disqualifying under the FMCSR, the drug used to treat the condition has potentially dangerous side effects such as dizziness, drowsiness, or even loss of consciousness. Upon the recommendation of its physician, the carrier rejects the applicant due to safety concerns. Is the employer liable under the ADA?

Hanson recently successfully defended a client against an ADA claim under a similar scenario, but cautions that each case requires a careful analysis of many legal issues in light of the facts involved.

Because the ADA only protects "qualified individuals with a disability," one important issue is whether the rejected applicant is in fact qualified to operate a commercial motor vehicle safely. Also, is the applicant actually "disabled" under the ADA? That can be a complex legal question, and the answer may depend upon where the claim is filed, because not all courts use the same analysis. Such uncertainty in the law, combined with the Equal Employment Opportunity Commission's recent keen interest in challenging safety qualification standards, means carriers should carefully review their hiring practices to minimize the risk of an ADA lawsuit.

Hanson, along with Laurie Baulig and Sylvia James in Washington, D.C., and Jack Finklea in Indianapolis, regularly counsels clients on compliance with the ADA and all other employment laws.

On The Road

Laurie Baulig will speak on "Legal Challenges Presented by a Diverse Workforce," June 6, at Randall Publishing's 12th Annual Trucking Symposium, in Tuscaloosa, Alabama.

Jerry Cooper will attend the Illinois State Bar Association's Annual Meeting, June 21 - 23, in Lake Geneva, Wisconsin.

Bill Brejcha will attend the Annual Meeting of the Association for Transportation Law, Logistics and Policy, June 23 - 27, in San Diego.

Dan Barney will participate as Vice Chair of the Antitrust Section's Transportation Industry Committee at the American Bar Association's 2001 Annual Meeting, August 4 - 8, in Chicago.

For The Record

Robert C. Rubin and **Maria E. Portela** joined the Firm on February 19 as "of counsel" in the Chicago office. Rob and Maria previously served as supervising attorneys with Casualty Insurance Company/Fremont General and will devote their practices to workers' compensation defense.

Karla Cooper-Boggs has been appointed to the new position of Attorney Director of Practice Development, in which she will draw upon her experience as a practicing attorney to advance the careers of the Firm's attorneys. Karla and her husband Chris Boggs were also recently featured in an Indianapolis telecast upon their return from China, where they adopted their new baby girl Georgia.

Shannon M. McClellan and **Rebecca S. Smith** recently began their summer clerkships in the Indianapolis office, and **Joshua Owen** began his summer clerkship in the Chicago office.

Jim Hanson spoke on "Protecting Against Wrongful Termination" at the National Business Institute, May 17, in Indianapolis, and **Laurie Baulig** was a guest speaker at the Spring Meeting of the Pennsylvania Motor Truck Association's Philadelphia Chapter on April 5. Laurie's topic was "Ergonomics: What Happened? What Happens Next?"



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Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

The Eleventh Circuit Court of Appeals recently overturned a lower court's order questioning a per diem program that paid over-the-road drivers at a rate of 6% of load revenue to reimburse for food, lodging, and incidental expenses. According to Steve Pletcher, the cases neither approve nor disapprove of "percentage of load" per diem programs in general, but do confirm that carriers must demonstrate a reasonable, good-faith belief that their reimbursement plans do not exceed expenses actually incurred by drivers and/or the federal per diem rate for the locality of travel in which the expenses arose.

In light of the trend to obtain health insurance for drivers through industry associations, Greg Feary and Jeff Toole report that the Florida Department of Insurance recently ordered the National Association of Professional Truckers to stop issuing policies in Florida. Association plans are often exempt from state regulation because they are generally self-funded and established under ERISA. Although there may be benefits to avoiding state regulation, a plan may struggle to pay claims if it is not subject to state financial requirements. Also, an association plan may face allegations of being engaged in the unauthorized sale of insurance. The Firm's insurance attorneys can assist clients in carefully evaluating new insurance programs.

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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