

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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Avoid the Owner Operator Dispute

Several class action lawsuits have been filed against motor carriers in the past year, most orchestrated by the Owner Operators Independent Drivers Association (OOIDA). The lawsuits generally seek injunctive relief, monetary damages, and attorney fees. Many of OOIDA's allegations are premised upon violations of federal leasing regulations that mandate both written lease and operational compliance by motor carriers. Ensuring that your owner operator program complies with the leasing regulations, both in writing and in daily practice, will minimize legal disputes and promote good relationships with owner operators.

The importance of reviewing your company's program

When, if ever, has your company scrutinized the structure of its owner operator program? The leasing regulations impose specific requirements for several critical lease compliance areas, violations of which OOIDA exploits. OOIDA's lawsuits frequently include the following allegations:

- ❖ Under-compensation due to ambiguities in compensation terms (e.g., the definition of "dispatched miles").
- ❖ Failure to identify in the lease the responsibility for certain expenses.
- ❖ Incorrect charging of owner operators for insurance coverage and deductibles.
- ❖ Failure to disclose or properly administer equipment purchase programs.
- ❖ Failure to abide by the regulations' escrow rules, including the payment of interest.
- ❖ Failure to properly identify and administer chargebacks to settlements.

Preventive maintenance may achieve additional objectives

A legal review and, if needed, a restructuring of your program can minimize owner operator disputes, as well as maintain the independent contractor status of owner operators for purposes of IRS audits, workers' compensation issues, and undesirable employer-related lawsuits. Like an automobile, your owner operator program, including the written lease, should undergo periodic preventive maintenance.

Andrew K. Light



Briefly...

Supreme Court Rulings Clarify Sexual Harassment Liability

In two recent decisions, the U.S. Supreme Court developed new standards for employer liability for sexual harassment committed by supervisors.

If an employee suffers adverse employment action (i.e., termination, demotion, denial of a promotion, etc.), then the employer is strictly liable. If there is no adverse employment action, the employer can avoid liability if it can prove that it exercised reasonable care to prevent and promptly correct any harassing behavior and that the employee unreasonably failed to take advantage of preventive and corrective opportunities provided by the employer. These same rules have also been applied to other forms of harassment.

Employers should take the following steps to reduce potential liability:

- ❖ Develop a written policy against discrimination and harassment;
- ❖ Distribute the policy to all employees;
- ❖ Conduct a training program; and
- ❖ Properly investigate complaints of harassment and/or discrimination.

*James H. Hanson
David L. Milne*

Don't Get Trapped at the Border

Your company may soon suffer the inconvenience and expense of a load of freight being “trapped” at the border. The U.S. Customs Service recently implemented its TIN MAN program in an effort to ensure compliance with its bond requirements. If your trucks carry freight originating outside the U.S. to (a) destinations within the U.S. or (b) destinations in Mexico or Canada via travel through the U.S., make sure you have the appropriate level of customs bond. If you do not, you could find one or more of your loads held at the border by the Customs Service until the appropriate bond is obtained.

Jeffrey G. Jackson

Reservation of Rights Letters—Whom Do They Protect?

Reservation of rights letters are issued when an insurer is unsure of the coverage obligation owing to its insured. For example, based upon the allegations of a liability claim, it might be difficult to know whether the insured defendant engaged in conduct that is covered by his liability policy. When such issues arise, insurers send reservation of rights letters informing insureds that they will defend the claim but may later deny coverage as the facts of the case develop. The issuance of a reservation protects the interests of the insurer and insured alike. The insurer

is protected because it will be barred from denying coverage at a later date unless it raises a coverage question when it assumes defense of a claim. Conversely, the insured benefits because the reservation must specifically identify the policy language that triggers the coverage question, thus affording the insured clear notice of a potential uninsured exposure that should be reviewed and possibly defended by the insured’s independent counsel.

Michael B. Langford

Criminal Penalties For DOT Violations

In recent months, several trucking company executives were successfully prosecuted and sentenced for abuse of U.S. Department of Transportation (DOT) regulations. The DOT now often pursues criminal indictments against motor carrier executives who, in the past, may have simply written off a DOT fine or penalty as a cost of doing business.

Most criminal proceedings against trucking company personnel involve alleged violations of a federal law prohibiting the issuance of a fraudulent report to a governmental agency. An executive or supervisor who authorizes or knowingly allows a driver to falsify a driver log can be criminally prosecuted along with the driver for conspiracy to commit fraud upon the DOT. This federal law provides for imprisonment of up to 5 years and monetary penalties of \$25,000 for each violation.

Timothy W. Wiseman



Mileposts

Scopelitis, Garvin Opens Chicago Office

With the recent addition of a fourth attorney and a growing new-client base, the Firm's Chicago office is running strong since its opening in August.

Located in the heart of the Loop at 120 South LaSalle Street, the Chicago office offers the Firm a presence in another Midwest transportation hub. The announcement of the opening was made last April at the Firm's 20th anniversary open house in Indianapolis attended by 150 clients and friends.

Serving as the Firm's Chicago partners are Jerry Cooper, Victor Shane, and Bill Brejcha. Cumulatively, the three Chicago partners bring to the Firm 57 years of legal experience. Jerry and Victor's practice lies largely in workers' compensation defense, while Bill's is in transportation law and commercial litigation. David LaPorte brings to four the number of transportation attorneys in the office.

The Firm's Chicago clients or those visiting the Windy City are welcome to stop by the offices on the 17th floor of the American National Bank Building, a recently renovated 23-story classic-style high-rise.

For the Record

Terry Fewell was named of counsel to Scopelitis, Garvin, Light & Hanson on June 1. Terry practices in transportation, corporate and employment law, and general business transactions. Formerly, he was vice-president and general counsel to Allied Van Lines, Inc., and general attorney for North American Van Lines, Inc.

Tim Wiseman and **Jay Robinson** became partners of the Firm November 1. Tim practices in motor carrier transportation, environmental law, and workers' compensation defense law. Before joining the firm in 1993, Tim worked for Liquid Transport Corp., a large Indiana tank-truck motor carrier. Jay's practice focuses primarily on mergers and acquisitions. Jay joined the Firm in 1995 as of counsel.

David LaPorte joined the firm January 1 as an associate in the Chicago office. His practice areas include insurance defense litigation, transportation

regulatory matters, and labor and employment law. Dave's experience includes six years with the U.S. Department of Transportation in safety compliance.

Is your company ready for Year 2000 and the legal issues it raises? Scopelitis, Garvin, Light and Hansen offers a Year 2000 Compliance Packet tailored to meet the needs of trucking companies. For more information, please contact any of the Firm's attorneys.

On the Road

Greg Feary and Jerry Cooper will attend the American Trucking Associations' Executive Committee meeting in **San Francisco** on February 13 and 14.

Norm Garvin will speak to Delta Nu Alpha in **Louisville** on Tuesday, February 23. His topic is owner-operator issues.

The Firm's transportation group will conduct a panel discussion at the Indiana Motor Truck Association's Safety Council meeting in **Indianapolis** on Monday, March 8. The panel is titled, "Got a Legal Question? We've Got the Answer."

Steve Pletcher will speak at the National Association of Professional Employers Organization's "Attorney Day" in **Washington, D.C.**, on Wednesday, March 10. His topic is "Providing Employee Leasing Service in Highly Regulated Markets."

Tom Farrell will attend the ABA Transportation Megaconference in New Orleans on March 11 and 12.

Greg Feary, Andy Light, and Norm Garvin will conduct a roundtable on Owner Operator Independent Driver Association legal issues at the Truckload Carriers Association's Annual Meeting, March 14 - 18, at the Bellagio Resort, **Las Vegas**.

Norm Garvin, Andy Light, and Terry Fewell will attend the Transportation Lawyer Association's Annual Conference in **Victoria, British Columbia**, April 26 - May 2.



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Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

- ◆ Greg Feary reports that a U.S. Court of Appeals, Third Circuit decision represents a most significant opinion affecting the **workers' compensation insurance** industry. The court ruled that private insurers violated the federal due process rights of Pennsylvania workers' compensation claimants even though the insurers were merely acting in accordance with Pennsylvania law in suspending medical benefits. In determining that the insurers were "state actors" subject to suit for violation of federal rights, the court's ruling prompted an appeal to the U.S. Supreme Court, the decision of which is anticipated later this year.
- ◆ Due to a court ruling declaring the refund statute unconstitutional, the Indiana Department of Revenue (IDR) no longer processes claims for **fuel use tax refunds** applicable to the operation of power take-off (PTO) equipment. The IDR still accepts claim filings, however, and Norm Garvin encourages carriers to continue submitting claims to avoid having them barred by the statute of limitations. Future court rulings or legislative changes may prompt the IDR to process PTO refund claims at a later date.
- ◆ Jerry Cooper suggests that **workers' compensation claims handling procedures** be re-evaluated in light of a recent landmark decision. The Illinois Supreme Court ordered an employer to pay penalties and the claimant's attorney fees due to the employer's "unreasonable and vexatious delay" in paying the claimant's medical expenses. Previously, such damages were proper under Illinois law only when there was an unreasonable delay in the payment of compensation for lost wages.

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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