Spring, 1999 ❖ Vol. 6 No. 2

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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The Transportation Brief is published by Scopelitis, Garvin, Light & Hanson.

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Current Business Practices Drive Future Acquisition Value

Over the past several years, a good economy, driver shortages, economies of scale, and retirement planning have contributed to a trend toward consolidation of motor carrier operations. Certainly, this trend shows no signs of abating. Whether you are looking to sell now or contemplating a sale of your motor carrier operation in the future, the manner in which you presently conduct your business can have a significant impact upon the net proceeds to be obtained from any sale.

Sellers that prefer stock sales need to plan ahead

Generally speaking, a purchaser prefers an asset sale through which it can avoid concerns over future liability for any of the seller's "skeletons in the closet." The seller, on the other hand, will generally prefer a stock transaction due to tax considerations. Ultimately, a seller's ability to convince a potential purchaser to enter into a stock transaction may be determined on the basis of the following factors:

- The existence of audited financial statements upon which the purchaser can rely as opposed to those prepared in house.
- Adequate levels of insurance coverage maintained by the seller.
- The logistics of transferring assets versus stock, especially in motor carrier operations.
- The seller's ability to deliver opinion letters from qualified professionals.
- The tax impact of the transaction structure upon the net proceeds to the seller.

Investment in operations now can produce profit later

Every purchase and sale transaction will be unique in any number of respects. Typically, however, the seller's ability to convince a purchaser to structure such a transaction as a stock sale will depend, in large part, on any number of the factors listed above. While conducting your operations in a manner consistent with these factors may cost more money in the short haul, the expenditures can often be more than recovered by way of the net proceeds derived from a stock transaction versus an asset sale.

Jay D. Robinson

Briefly...

New OSHA Forklift Training Standards Take Effect

OSHA forklift training standards took effect on March 1, 1999. Among the guideline requirements is refresher training if the operator is:

- Involved in an accident or near miss;
- Observed operating the forklift unsafely;
- Determined during evaluation to need additional training;
- Assigned to operate a different type of forklift; or
- Involved in workplace changes that could affect safe operation of the forklift.

The guidelines also require that an operator's performance be evaluated as part of the initial and refresher training and no less than once every three years. Initial training and evaluation must be completed by December 1, 1999, for all employees hired prior to that date. Employees hired thereafter must receive initial training and evaluation before they are assigned to operate a forklift. A complete copy of the new guidelines may be obtained from the Firm.

Steven A. Pletcher

Spoliation Now Actionable in Indiana

Following a national trend, the Indiana Court of Appeals recently recognized an independent cause of action for spoliation of evidence. Thus, after a highway accident, a motor carrier may be sued not only under a traditional negligence theory but also under a spoliation theory if it discards (or "spoils") evidence potentially relevant to the accident. Examples of potentially relevant evidence are driver's logs, tractor repair records, or on-board computer data.

The spoliation claim may be made even if Department of Transportation regulations allow disposal of the records within certain time frames. Therefore, when involved in vehicular accidents, motor carriers should retain such relevant evidence throughout the duration of the lawsuit or until the appropriate statute of limitations expires if no suit is filed.

Michael B. Langford

What's In a Name?

Because many businesses fail to properly select, protect, and monitor their trade names and trademarks, they unknowingly run the risk of trademark infringement and may lose the right to use their own name. Before selecting a name or trademark, a business should conduct a professional search to ensure the proposed name or mark is not already being used. Next, the business should seek to register its name or mark with the U.S. Patent and Trademark Office and diligently monitor its use. Taking these few simple steps can reduce the possibility that a business will be involved in a costly trademark dispute.

Jeffrey S. Toole

Private Insurers' Actions Under State Law Do Not Violate Federal Rights

The United States Supreme Court has ruled that Pennsylvania workers' compensation claimants do not have a constitutional right to be provided notice and an opportunity to be heard before medical payments are suspended by private insurers acting pursuant to state law. Pennsylvania law permits employers and insurers to withhold payment for treatment of an employee's work-related injuries pending a determination of reasonable and necessary treatment.

Overturning a lower court ruling that due process requires pre-suspension notice to the employee, the Court concluded that the private insurers' actions did not make them "state actors" subject to the Fourteenth Amendment's due process constraints. The Court also found that the Pennsylvania system does not deprive disabled employees of a protected "property" interest within the meaning of federal law.

Gregory M. Feary

Mileposts

Bill Places Premium on DOT Safety & Compliance

The stakes have been raised on the outcome of Department of Transportation (DOT) compliance reviews as a result of the most recent omnibus highway funding legislation, according to Firm partner **Tim Wiseman.**

Wiseman advises motor carriers to take note of the Transportation Act for the 21st Century (TEA-21) and the consequences it will have for carriers that are determined by the DOT to have compliance problems. The law requires the DOT to place stringent restrictions on motor carriers that earn an unsatisfactory safety rating through a DOT audit. A carrier with an unsatisfactory safety rating will be issued an out-of-service order prohibiting it from engaging in any interstate transportation unless the carrier upgrades the safety rating within 60 days.

Even if the out-of-service order is rescinded in short order, the resulting service failures and adverse publicity may represent a "death knell" to the carrier, according to Wiseman.

Wiseman advises motor carriers to ensure their compliance with DOT regulations by periodically conducting mock DOT audits. Although carriers should perform their own internal audits on an ongoing basis, a mock audit by an outside consultant may be more helpful in identifying potential problems.

In the mock audit, Wiseman inspects the company's compliance with DOT regulatory demands as well as compliance with the Occupational Safety and Health Act, the Fair Labor Standards Act, and, for carriers using owner operators, federal leasing laws.

Wiseman brings to the review his prior experience as a safety compliance officer with a large Midwest motor carrier. He has conducted numerous mock audits since joining the Indianapolis office in 1993. Wiseman speaks widely on DOT issues before such organizations as the American Trucking Associations and the Indiana Motor Truck Association. He is also a member of the Transportation Lawyers Association and the National Tank Truck Carriers Association and serves as transportation counsel for the Indiana Petroleum Marketers and Convenience Store Association.

For the Record

Christopher R. Whitten joined the Firm as an associate in the Indianapolis office on February 22, 1999. Chris will continue his litigation practice, concentrating in insurance defense and commercial litigation. He earned his undergraduate degree in 1993 at the University of California, San Diego, and his law degree at Valparaiso University in 1997.

Darlene S. Phillips was elected president of the Indiana Chapter of the Association of Legal Administrators (ALA), effective April 1, 1999. Darlene has served the Firm in a variety of roles since its beginning in 1978, the past 14 years as administrator of the Firm's personnel and facilities.

Karla Cooper-Boggs and her husband **Chris Boggs** announce the birth of their first child, Truman Marquis Boggs, on March 23, 1999. Karla, an associate attorney and assistant editor of *The Transportation Brief*, will return to the Indianapolis office on part-time status following a leave of absence.

With regret and best wishes, we note the departure of associate **Jeff Jackson** from the Indianapolis office. Jeff is pursuing a career in law enforcement with the Federal Bureau of Investigation.

On the Road

Norm Garvin and Tim Wiseman will attend the National Tank Truck Carriers' Annual Tank Truck Equipment Show, May 16 - 18, in **Atlanta.**

Norm Garvin and Bill Brejcha will attend the Association for Transportation Law, Logistics & Policy, June 25 - 30, in **Moran, Wyoming.** Norm will speak on owner operator disputes and how carriers can avoid them.

Greg Feary will attend the American Trucking Associations' Executive Committee meeting June 16-18 in **Arlington, Virginia.**

Andy Light and Steve Pletcher will be at the American Trucking Associations' Accounting and Finance Meeting in **Chicago** on June 27-29.

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Dispatches

SCOPELITIS, GARVIN, LIGHT & HANSON

In light of a recent decision from the U. S. Court of Appeals for the Tenth Circuit, Jim Hanson suggests that employers review their job applications to remove any questions regarding medical histories, workers' compensation claims, and disabilities. The ruling confirms that a job applicant has an **Americans with Disabilities Act** claim against a potential employer if the employer inquires about the applicant's medical history, medical condition, or disabilities prior to a job offer and if the applicant is injured by the employer's actions. This is true even if the applicant is not disabled.

A new Illinois **workers' compensation** decision may affect the way employers communicate with claimants' treating physicians. Despite the intent of Illinois law, which allows for the free-flowing exchange of medical information between employer and claimant, the Illinois Industrial Commission adopted a rule barring *ex-parte* conferences between defense counsel and a treating physician. The dissent suggests that, because the very nature of a workers' compensation claim relates to employers' paying medical benefits that are reasonable and necessary, the new rule will hinder the payment of benefits. Victor Shane advises that the decision will likely be appealed.

Greg Feary reports that the Pennsylvania Supreme Court is scheduled to review an important decision concerning the **owner operator/employee distinction.** A February, 1998, appeals court ruling broadly interpreted federal motor carrier law so as to make it quite difficult for an owner operator to be considered an independent contractor for purposes of workers' compensation law in Pennsylvania. The Pennsylvania Supreme Court, which granted a request of appeal to review the appeals court's decision, is expected to issue its opinion in late Fall of this year.