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A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

The Transportation Brief®

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Revisiting MAP-21 Requirements for Logistics Companies

MAP-21 has caused much confusion for the transportation industry in recent months. Although property brokers and freight forwarders are not required to file proof of financial security with the FMCSA in the amount of $75,000 (a surety bond or trust fund) until October 1, 2013, the majority of MAP-21's other requirements either took effect on October 1, 2012, or will take effect after the FMCSA adopts regulations. With the financial security deadline approaching, it is important to clarify some of the details surrounding MAP-21.

Motor carriers may incur a $10,000 fine for tendering freight without property broker authority

Among the provisions that have been in effect since October 1, 2012 is the provision clarifying that motor carriers that do not hold property broker authority cannot tender freight to other motor carriers for transportation unless the tendering motor carrier actually transports the freight over some portion of the journey. There is a $10,000 per occurrence fine for violations, and in addition to the motor carrier, the carrier's officers, directors, and "principals" can be held liable for the fine. Likewise, for each agreement to provide transportation service subject to registration, the registrant is required to specify, in writing, the authority under which the service will be provided. Unfortunately, the law does not provide guidance as to how, for instance, an entity that holds both motor carrier and property broker authority should comply when entering into a single agreement covering both services.

New FMCSA regulations will require more information from companies seeking authority

Provisions requiring renewal of existing registrations, retention of qualifying officers with minimum experience levels, updating registrations, and issuance of separate identification numbers for each authority are all awaiting the enactment of new regulations by the FMCSA. The FMCSA will be implementing changes to the registration process in at least two phases (the first under the Unified Registration System rule). Among other things, the changes will require disclosure of significantly more information during the application/renewal process and will result in the FMCSA publishing additional information regarding registrants, including the names and business address of "principals."

One final area of confusion which is discussed elsewhere in this issue is a belief that property broker and motor carrier operations must be housed in separate legal entities.

Gregory M. Feary
Nathaniel G. Saylor,
Indianapolis

Briefly...

FMC Signals Possible OTI Changes

The Federal Maritime Commission (FMC) has recently published proposed new rules for Ocean Transportation Intermediaries (OTIs) signaling a renewed focus on unauthorized OTIs. The proposed rules contemplate severe penalties for servicing unauthorized OTIs, removing definitions for the terms "ocean freight broker" and "brokerage," changing the branch office reporting requirements, and requiring all agency agreements to be written, signed, and made available to the FMC.

Other aspects of the proposed rules require a) the electronic filing and renewal every two years of all licenses and registrations; b) the establishment of increased financial responsibility and bond replenishment obligations; c) the implementation of a priority system for claims against the bonds; and d) the establishment of new standards for "Qualifying Individuals," hearing and appeals procedures, and foreign-based NVOCC requirements. Stay tuned for more in the coming months.

John P. Dimitry, Dallas/Ft. Worth

Combined Broker and Motor Carrier Authority Under MAP-21

A number of commentators have recently reached the conclusion that MAP-21 regulations will, among other things, require motor carriers to segregate their property brokerage authority into a separate legal entity. This interpretation of MAP-21's import is incorrect, and both recent FMCSA publications and the underlying statutes (which are binding on the FMCSA) expressly contemplate one entity holding multiple authorities. Nonetheless, segregating motor carrier operations from brokerage via separate legal entities continues to warrant careful consideration in the developing legal environment providing a host of potential benefits that may not exist within combined operations, including asset protection, litigation reduction/elimination, other MAP-21 compliance efficiencies, shipper protection, and I/C operational efficiencies. Independent of MAP-21 requirements, these considerations should be taken into account when deciding the ultimate structure of transportation and brokerage operations.

Gregory M. Feary
Jay D. Robinson, Jr., Indianapolis

4PL and Warehousing: Contracting Considerations

A recent trend in fourth party logistics companies (4PLs) tendering goods for storage to warehouse operators increases the importance of a proper contract review. A typical 4PL transaction involves a customer (owner of goods), the 4PL (hired to arrange storage of goods and transportation) and the ultimate storing warehouse. The operations of a 4PL are similar to those of a broker that manages the complete logistics process for the customer. When entering into a 4PL agreement, several key terms must be addressed. In terms of payment, the 4PL will want to avoid any liability for payment until after it is paid by the customer. The warehouse, on the other hand, will want to ensure that it has direct rights against both parties for its payment regardless of whether the customer pays the 4PL.

Another key term pertains to liability and insurance. Warehouse companies should conform their conduct to the warehouse standard of care as stated in § 7-204 of the Uniform Commercial Code (UCC), which is "to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances." Those warehouse operators adopting this standard of reasonable care should carry warehouse legal liability insurance. 4PLs must be aware that the warehouses will not normally carry additional property insurance on the goods and should avoid committing to their customers that the underlying warehouses will have such coverage on the goods.

In sum, the 4PL transaction can be difficult to navigate. The warehouse may not have direct rights against the customer, and the 4PL may face the risk of "gaps" between its legal liability to the customer and the contractual liability accepted by the warehouse provider. As a result, warehouses and 4PL providers should review their contracts carefully to ensure that their interests are protected.

Kevin M. Phillips, Chicago

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Mileposts

Firm Opens Milwaukee Office, Broadens Midwest Presence

Transportation attorneys Jay R. Starrett Steven F. Stanaszak, and Pamela M. Schmidt have joined the Scopelitis firm in its newest office – its 9th nationwide – in Milwaukee, Wisconsin.

"A Milwaukee presence further broadens our firm's reach by providing our transportation clients greater access to our firm's knowledge base in transportation law, as well as a knowledge base specific to the Wisconsin and the Midwest region," said Greg Feary, President of the Scopelitis firm and one of its Managing Partners.

Starrett brings considerable litigation experience in numerous areas besides transportation law, including product liability and construction defect defense. His focus, however, has been in defending catastrophic transportation accident claims.

Highlights of Starrett's transportation practice include his role as National Coordinating Counsel for one of the nation's largest motor carriers; his service as panel counsel regionally and for the State of Wisconsin for numerous trucking companies, third-party administrators, and insurance companies; and his long-time, active membership in the Trucking Industry Defense Association, in which he has lectured, co-chaired national conferences, and served on the Board of Directors for the past nine years.

Stanaszak and Schmidt's practices include transportation litigation, as well as labor and employment and civil litigation in a number of other areas. Stanaszak has served as counsel representing management in commercial litigation involving insurance coverage, employment issues, lease disputes, and various other business issues.

Schmidt concentrates her practice in the areas of appellate advocacy and personal injury defense, particularly relating to the transportation and recreation and entertainment industries.

For the Record

We are pleased to announce that attorneys **Jay R. Starrett, Steven F. Stanaszak, Pamela M. Schmidt, and Youngki Sohn** have joined the firm. Starrett, Stanaszak and Schmidt will practice from the firm's recently-opened Milwaukee office, and Sohn from its Los Angeles office.

Congratulations to Fritz Damm, who was recently named Chair of the Defense Research Institute's Trucking Law Committee's newly formed Cargo Specialized Litigation Group.

On the Road

Becky Trenner will present "Top 10 Legal Issues for Carriers in 2013" at the West Virginia Trucking Association's Annual Convention, August 5, in **Myrtle Beach, South Carolina**.

Greg Feary will speak on the topic of MAP 21 at the Texas Motor Transportation Association's Annual Conference, August 8, in **Bastrop, Texas**. John Greene, John Dimitry and Emily Quillen will also attend.

Mike Tauscher will attend the Michigan Trucking Association's Annual Conference, August 8-9, in **Traverse City, Michigan**.

Kevin Phillips will present an update on Warehouse Law at the Southeastern Warehouse Association's Annual Meeting, September 12-14, in **Destin, Florida**.

John Greene will attend Texas Motor Transportation Associations' Executive Committee Retreat, September 28-30 in **Park City, Utah**.

Jeff Toole will speak on the legal considerations associated with Oklahoma's new workers' compensation opt-out provisions on September 20 at the Oklahoma Trucking Association's 81st Annual Convention, September 18-20, in **Catoosa, Oklahoma**. John Greene will also attend.

Don Vogel will present "Social Media and Freedom of Speech in the Employment Setting" at the Canadian Transportation Lawyers Association's Annual Meeting, September 19-22, in **Québec City, Québec.**

Chris McNatt will attend the California Trucking Association's Policy Committee Meetings, September 24-25, in **Ontario, California**.

Kevin Phillips will teach a course titled "International Warehouse Logistics Essentials" at the University of Maryland, October 1-4, in **College Park, Maryland**.

Bob Henry will speak at the 2013 American Moving & Storage Association's National Safety & Operations Conference, October 15-16, in **Las Vegas**.

Greg Feary, Jim Golden and Annette Sandberg will attend the American Trucking Associations' Management Conference & Exhibition, October 19-22, in, **Orlando**.

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Dispatches

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Mike Langford reminds motor carriers that **complying with DOT regulations regarding mobile communication equipment does not relieve the carrier of the obligation to comply with state and local laws** that might be more stringent. Also, compliance with such laws does not necessarily immunize the carrier from a negligence based suit.

Dan Barney notes that the **Transportation Security Administration is increasing its scrutiny of Indirect Air Carrier handling of Sensitive Security Information** and has published a best practices guide which IACs should consult to minimize potential exposure related to handling of such information.

Braden Core reports that the **United States Supreme Court has ruled in two cases exploring the reach of a federal preemption statute known as the Federal Aviation Administration Authorization Act (FAAAA)**. In ATA v. City of Los Angeles, the Court found that the FAAAA preempted requirements imposed by the Port of Los Angeles that trucks accessing the Port carry a placard displaying a number to call with complaints, and that an off-street parking plan be submitted for each truck. In Dan's City Used Cars v. Pelkey (No. 12-52), the Court held that the FAAAA does not preempt state-law claims stemming from the storage and disposal of a towed vehicle. These split holdings will play a prominent role in ongoing litigation in the lower courts over the scope of the FAAAA's preemptive effect.