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# 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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## *Failure to Pre-Plan Can Undo Arbitration Efficiencies*

Transportation contracts increasingly embrace arbitration as a fast, inexpensive, informal alternative to litigation. The new ATA-NITL Model Truckload Motor Carrier/Shipper Agreement recommends arbitration, as do many owner-operator leases. To avoid disputes over the arbitration itself, however, careful analysis of the following key points is essential before signing an agreement to arbitrate:

- Voluntary or Mandatory: If a party believes arbitration will be in its best interests, the contract should mandate the practice, not just suggest it.
- Binding or Non-binding: If the arbitrator is to decide and not merely recommend resolution of the dispute, the arbitration clause should include the term "binding."
- Venue: Trucking companies' multi-state operations make it important to specify the county and state where the arbitration will take place.
- Class Arbitrations: If the parties do not want arbitrations to cover entire classes of plaintiffs, the arbitration clause would best so state.
- Availability of Arbitration: Carriers should be aware that courts increasingly are refusing to enforce arbitration clauses in owner-operator leases.
- Procedural Rules: The contract should select one of the various federal and state arbitration laws that define the scope of discovery, appeal rights, and arbitrator selection.
- Arbitrator(s): The parties should weigh the cost-effective, yet more likely "winner-take-all" result of using a single arbitrator against the potential compromise result that is more likely with a more expensive three-arbitrator panel.
- Defining Appeal Rights: Normally, a party may appeal an arbitration award only when there has been arbitrator misconduct, but some jurisdictions allow parties to agree upon broader standards of appellate review that should be researched and evaluated before being written into the contract.

*Robert L. Browning,*
*Michael B. Langford,*
*Indianapolis*
*Daniel R. Barney,*
*Washington, D.C.*

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# Briefly...

## *Consider Privacy Laws Before Divulging Subpoenaed Personal Health Information*

HIPAA regulations generally prohibit employers who sponsor health plans from using or disclosing protected health information (PHI). Employers nevertheless receive subpoenas and litigation discovery requests for PHI.

In order to avoid HIPAA liability for wrongful disclosure, employers must (1) obtain the consent of the subject employee, (2) respond only to a court order compelling disclosure, or (3) obtain "satisfactory assurances" regarding the proper use and return of PHI. Satisfactory assurances exist when

- The requesting party provides a court order restricting the use and disclosure of PHI to the litigation and requiring its return or destruction at the end of the litigation; or
- The requesting party has provided written notice to the subject employee so that the employee may raise an objection to the court if necessary.

Employers should carefully consider HIPAA requirements each time they are asked to divulge PHI.

*James H. Hanson,*
*A. Jack Finklea,*
*Indianapolis*

## *Owner-Operators Continue to Sue*

In litigation around the country, owner-operator groups have recently convinced more courts of their right to sue motor carriers for violations of the federal leasing regulations. They have also prevailed in making some lawsuits "class actions" covering hundreds or thousands of contractors and in avoiding referral of claims to contractor-by-contractor arbitrations.

Carriers, meanwhile, have won "substantial compliance" decisions in which courts rule that disclosures need not go in the lease itself if communicated to contractors in other ways.

Still undecided is the crucial question of how much disclosure is enough (for example, whether only a charge-back's total amount or also its administrative-fee component must be disclosed). In contention, too, is whether monetary awards are justified for "technical" violations that end up harming no one.

As always, the best deterrent to expensive lawsuits is to compliance-test leases against the leasing regulations and to match leasing practices closely to lease provisions.

*Daniel R. Barney,*
*Washington, D.C.*

## *Anti-Business Workers' Compensation Changes Pending in Illinois*

The majority in the Illinois Senate is poised to consider dramatic anti-business changes in the Workers' Compensation Act in the Fall Veto Session. Staunchly supported by unions and trial lawyers, these anti-growth initiatives include

- A dramatic increase in the value of wage differential awards;
- A "usual and customary" medical fee schedule that mandates a level of reimbursement unfavorable to businesses;
- Increased permanency rates;
- Creation of a new benefit for light duty workers;
- Inclusion of overtime in the calculation of the average weekly wage; and
- Revised penalty provisions that discourage the defense of most claims.

Jerry Cooper of the Chicago office was instrumental in the defeat of the proposal in the regular legislative session. However, the Veto Session, scheduled to begin on November 8, 2004, will afford the Senate another opportunity to consider the legislation and pass it on to the House and Illinois Governor Blagojevich for approval. The Senate, therefore, will likely prove to be a battleground once again in November.

*Victor P. Shane,*
*Dennis J. Duffy,*
*Chicago*

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# Mileposts

## *Commercial Litigators Provide Services From Trucking-Law Perspective*

As long as contracts drive the trucking business there will be a place at Scopelitis, Garvin, Light & Hanson for seasoned commercial litigators to enforce those contracts on behalf of motor-carrier clients.

As a case in point, the Chicago office recently made room for yet another experienced courtroom attorney – its fifth such hire in the past six months – with the recent arrival of Adam Smedstad from Michael Best & Friedrich, LLP, a large regional firm where Smedstad was a partner in the firm's commercial litigation section.

Smedstad's experience includes litigation involving commercial and business contracts, trade secrets, secured transactions, and products liability. At his former firm he managed a number of complex litigation matters and directed senior associates and local counsel on behalf of his business clients.

Commercial litigators help clients resolve disputes in commercial and business settings through alternative dispute resolution methods and court trials. When a dispute arises in trucking, Scopelitis commercial litigators have the advantage of approaching the controversy from a perspective rich in trucking-industry knowledge. The key premise to the commercial litigation practice is to surround experienced litigators with other attorneys with longtime regulatory, tax, insurance, labor, and other trucking-law experience.

Commercial litigation services at the Scopelitis firm are provided from each of its five offices by a core group of veteran attorneys. In Chicago, Smedstad will collaborate with partner Bill Brejcha, who splits his time between regulatory and litigation practices on behalf of motor carriers, brokers, and freight forwarders. James Attridge in San Francisco and Jim Graves in Kansas City have similar dual-purpose practices.

In Indianapolis, partner Bob Browning devotes his practice to complex commercial litigation with "make-or-break" implications for the motor carrier, and, in Washington, D.C., Dan Barney leads the firm's defense of motor carriers against potentially crippling class action lawsuits by owner-operator groups alleging federal leasing violations. Also in Washington, D.C., Kim Mann rounds out the commercial litigation group's experience with a practice long devoted to transportation issues.

## *For the Record*

Congratulations to **W. Todd Metzger,** who became a Scopelitis firm shareholder on November 1, 2004. Todd's Indianapolis practice focuses on corporate transactions, including mergers and acquisitions.

**Deborah J. Anderson** joined the firm on August 12, 2004, as an associate in the Washington, D.C. office. Debbie's practice focuses in the area of transportation-agreement drafting, federal court litigation, and transportation regulation.

Indianapolis partner **Robert L. Browning** has accepted his nomination by the Indianapolis Bar Foundation as a 2004 Distinguished Fellow. The honor recognizes "a long record of service, an exemplary standing, and a record of exceptional contributions to the Indianapolis legal community."

## *On The Road*

Norm Garvin, Andy Light, Tim Wiseman, Bill Brejcha, Leonard Kofkin, Don Vogel, and Rich Clark will attend the Transportation Lawyers Association 2005 Regional Seminar, January 21, in **Chicago.** Tim will participate in a panel discussion on regulatory changes affecting motor carriers.

Dan Barney will attend the American Trucking Associations' Leadership Meeting, February 8 – 10, in **Washington, D.C.**

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## Dispatches

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Tim Wiseman warns that the new **hours of service regulations will remain in effect** until at least September 30, 2005 as a result of legislation enacted by Congress as part of the current Highway Reauthorization Bill. The legislation does not overturn a federal court's recent ruling as to the new rule's flaws, but does give the FMCSA another year to address the court's concerns.

On April 6, 2004, the Supreme Court of Alaska found that a motor carrier's provision of **workers' compensation coverage to two owner-operators was not, in and of itself, dispositive** that the owner-operators were employees. According to Greg Feary, the case was remanded to the superior court for further analysis of the "relative nature of the work" between the motor carrier and the owner-operators.

Revisions to the federal overtime exemptions went into effect on August 23, 2004. The revisions include an increased salary threshold, an altered test for determining an employee's exempt status, and a modification of an employer's ability to make salary deductions without destroying the exemption. Jim Hanson advises carriers to **re-evaluate overtime pay practices,** giving consideration to the effect the new rules may have on dispatchers, customer service representatives, load planners, supervisors, and managers.