Autumn 2008 ❖ Vol. 15 No. 3

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

The Transportation Brief®

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Los Angeles/Long Beach Ports Programs Affect Owner-Operator Fleets

Carriers performing drayage services at the Ports of Los Angeles and/or Long Beach should carefully review the ports' "Clean Truck" programs. For carriers utilizing independent contractor owner-operators, the programs may create unanticipated consequences with respect to both leasing regulation compliance and employment classification issues.

The incentive and fee provisions trigger independent contractor concerns

The ports have offered grant and incentive money to entice the use of equipment powered by 2007 engines. Carriers taking advantage of such funding must make sure they are not inadvertently creating employment classification liability by failing to ensure that the owner-operator has the necessary investment in equipment. The ports are also imposing $100 annual "Permitted Truck" fees that, as operating expenses, may be borne by the owner-operator and must be addressed in the chargeback or expense provisions of the Independent Contractor Operating Agreement (ICOA). Likewise, the ports offer certain one-time payments of $10,000 and $10 per-trip incentives (for the first year) for service provided in clean truck, fee-exempt equipment. The carrier's handling of such payments should be accurately disclosed in the compensation provisions of the ICOA.

The programs are still changing and vary by port

Exemptions available from clean truck fees imposed on shippers vary based on the type of equipment used, when the equipment was purchased, what types of funds were used to purchase equipment, and whether previous equipment was scrapped. If the carrier will require an owner-operator to provide fee-exempt equipment, the requirement should likewise be spelled out in the ICOA. In sum, in light of the uncertainty created by the programs (not to mention the current court challenge upon which Chris McNatt reports below), any carrier, but especially those utilizing independent contractor owner-operators, should seek legal counsel before investing in equipment or expanding port operations.

Andrew K. Light
Gregory M. Feary
Timothy W. Wiseman,
Indianapolis

Daniel R. Barney,
Washington D.C.

Briefly...

Port of Los Angeles and Long Beach Update

The ports are continuing to press forward with their Concession Plans that bar pre-1989 drayage trucks, impose certain user fees and mandate compliance with a variety of conditions of operation by carriers seeking to do business in the port complexes. The ATA, aided by a Department of Justice *amicus* brief, is posing a legal challenge to the Concession Plans, but not the environmental aspects or fee structure.

At this stage, the ATA is appealing the denial of its request for a preliminary injunction, and a January 2009 decision by the Ninth Circuit Court of Appeals is anticipated. At issue in the appeal is the lower court's broad interpretation of the "safety exception" to federal preemption of regulations that impact rates, routes and services, along with the court's determination that irrepairable harm would not befall carriers as a result of implementation of the Concession Plans. Because the appeal is on a fast track, new developments arise each week.

Christopher C. McNatt,
Los Angeles

Conventional Auto Liability Insurance May Leave Brokers Exposed

Brokers are increasingly exposed to plaintiffs' claims that they are liable for highway accidents caused by the motor carriers they hire. Plaintiffs may attempt to (a) impose derivative or vicarious liability for the trucker's negligent driving or (b) hold the broker directly liable for its own activity such as the negligent hiring of an unqualified carrier. Unfortunately, conventional trucking auto liability insurance (AL) might not insure such risks.

Typical AL policies cover liability for an "accident" arising out of the "use" of a covered auto, which would seemingly protect brokers. However, some courts define the term "accident" so narrowly as to exclude coverage for negligent hiring, and others have ruled that only the actual operation of a vehicle constitutes a "use." Consequently, the engagement of a motor carrier's services may not be a covered "accident" or "use" under the AL policy. Brokers that rely on an affiliated trucking company's AL policy or that otherwise require additional insured status under the AL policies of third-party motor carriers should thus take heed of such exposure and seek insurance products or carefully-crafted endorsements that more specifically suit their needs.

Gregory M. Feary
Andrew K. Light
Lynne D. Lidke,
Indianapolis

IRS on the Offensive

In 2007 the IRS announced several new initiatives to be pursued in 2008 focusing on worker classification. The result of this stepped-up IRS scrutiny has been an extraordinary increase in the number of IRS independent contractor audits.

The IRS programs include the Questionable Employment Tax Practices initiative. Essentially, the initiative created an enhanced information-sharing program between the IRS and state unemployment tax agencies. In addition, the IRS announced an electronic matching program focusing on companies that issue 1099s with payments to five or more workers of at least $25,000 when the workers have no other reported sources of income. Most motor carriers utilizing the services of five or more owner-operators will fall into this category.

Understanding that motor carriers contracting with owner-operators are potential targets for IRS audit, it is exceedingly important to plan ahead by conducting a self audit of independent contractor operations before the IRS or a state unemployment tax agency comes knocking.

Steven A. Pletcher,
Indianapolis

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Mileposts

Negotiation And Resolution Counsel Share Fundamental Goals

The negotiation and resolution models in which defense counsel aims to achieve a reasonable settlement have proven to be a compassionate and cost-effective approach in handling catastrophic accident claims.

Developed by Jim Golden of the Scopelitis firm's Chattanooga office, The Negotiation Counsel Model™ calls for defense counsel to meet with the claimants' counsel soon after a major accident to

- express genuine concern for deaths and terrible injuries;
- offer no-strings-attached money for immediate needs;
- identify key but often undisclosed interests of the claimants;
- exchange information, and, soon thereafter;
- work with the client and trial counsel to develop and implement a strategy to settle the claim at a mediation scheduled much earlier than normal.

As negotiation counsel, Golden seeks to move quickly to meet claimants' needs and create significant savings in litigation fees and expenses. The same concepts apply, according to Golden, in the role of "Resolution Counsel." As resolution counsel, Golden steps in as a fresh, new party long after the accident and seeks to end protracted litigation with a fair settlement and "put out the fire" in terms of escalating costs for both sides. Thus, negotiation counsel acts proactively with claimant's counsel at the front end of litigation, while resolution counsel intervenes behind the scenes with all counsel at the back end of what appears to be endless and costly ongoing litigation.

Golden's negotiation counsel model was first described in *The Transportation Brief* in its Spring 2007 issue, soon after he joined the firm as of counsel and established the firm's office in Chattanooga, Tennessee. Golden first studied the approach at the Program on Negotiation at Harvard Law School and has adapted it to the unique needs of motor carriers that seek a new approach to resolving catastrophic accident claims.

For the Record

We are pleased to announce that **A. Jack Finklea** has been named a shareholder in the firm. Jack will continue his labor and employment practice in the Indianapolis office.

Congratulations to **Kelli M. Block** and **James M. Magiera** who began their practices this Fall as associates, Kelli in the Indianapolis office and Jim in Chicago.

On the Road

Norm Garvin and Todd Metzger will participate in the Indiana Motor Truck Association's Annual Meeting, November 5-9, in **Puerto Rico**.

David Robinson will attend the Employment Law Institute, November 12-14, in **Chicago**.

Don Vogel, Kathleen Jeffries and Fritz Damm will take part in the Transportation Lawyers Association's Executive Committee meeting and the Transportation Law Institute, November 14-17, in **New Orleans**.

Tom Schulte will attend the Defense Trial Counsel Institute meeting, November 20-21, in **Marshall, Indiana**.

Fritz Damm and Mike Tauscher will join the Ontario Trucking Association Convention 2008, November 20-21, in **Toronto**.

Kathleen Jeffries and Mike Tauscher will attend the Conference on Freight Counsel, January 11-12, in **Savannah, Georgia**.

Jack Finklea will present a Labor and Employment Law Update at the Transportation Lawyers Association's 2009 Regional Seminar, January 23, in **Chicago**. Norm Garvin, Andy Light, Bill Brejcha, Don Vogel, Leonard Kofkin, Greg Ostendorf, Kathleen Jefferies, Bob Henry, Fritz Damm and Mike Tauscher will also attend.

Chris McNatt will attend the California Trucking Association's Annual Management Conference 2009, January 24-28, in **Ojai, California**.

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Lynne D. Lidke, Editor
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Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

Mike Langford reports that California has now joined Connecticut, the District of Columbia, New Jersey, New York, and some local jurisdictions in prohibiting the use of handheld mobile phones while driving. Effective July 1, 2008, **the California Wireless Telephone Automobile Safety Act prohibits the use of cell phones in moving vehicles unless the driver is using a hands-free device.**

Bob Henry reports that the "Duncan Hunter National Defense Authorization Act for Fiscal Year 2009," signed into law on October 14, 2008, includes a requirement that **Defense Department contracts for motor carriage containing "a fuel-related adjustment" provision must also contain a clause mandating pass-through of the adjustment** "to the person who bears the cost of the fuel that the adjustment relates to." As this provision is implemented, Defense Department carriers will need to review their agreements with contractors to ensure compliance.

Employers now have an easier way to correct retirement plan compliance problems. According to Jim Spolyar, the IRS recently modified the Employee Plans Compliance Resolution System, which allows employers to voluntarily correct retirement plan failures. The procedures became optional for employers on September 2, 2008 and will be mandatory after January 1, 2009.

Steve Pletcher cautions employers that, under a new OSHA proposal, **failure to provide appropriate Personal Protective Equipment or training may result in a separate violation for each employee.** If passed, the new instance-by-instance policy could lead to increased penalties for employers.