Autumn 2010 ❖ Vol. 17 No. 3

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

The Transportation Brief®

Indianapolis
10 W. Market Street, Suite 1500
Indianapolis, IN 46204
Phone (317) 637-1777
Fax (317) 687-2414

Chicago
30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200
Fax (312) 422-1224

Washington, D.C.
1850 M Street, N.W., Suite 280
Washington, DC 20036-5804
Phone: (202) 783-9222
Fax: (202) 783-9230

Los Angeles
2 N. Lake Avenue, Suite 460
Pasadena, CA 91101
Phone: (626) 795-4700
Fax: (626) 795-4790

Kansas City
9393 West 110th Street
51 Corporate Woods, Suite 500
Overland Park, KS 66210
Phone: (816) 279-9835
Fax: (816) 676-1427

Chattanooga
633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769
Fax: (615) 247-9950

Detroit
535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400
Fax: (313) 963-7425

Spokane
503 W. Riverside Avenue, Suite 583
Spokane, WA 99201
Phone: (509) 747-1800
Fax: (509) 725-0359

Please fax or e-mail address changes to:
The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com

Protecting the Owner-Operator Model

The owner-operator model continues to be the source of much scrutiny and litigation. State and local governments – desperate to offset huge revenue deficits – are now targeting trucking companies in employment reclassification audits. Class action lawsuits filed by a legion of plaintiff's attorneys whose mission is to find money and benefits for their owner-operator clients are also on the rise. In California, the Los Angeles and Long Beach ports are attempting to ban entry by owner-operators in the name of safety and environmental protection.

Recognizing red flags may help avoid litigation

In light of this increasing threat, motor carriers should remain ever-cognizant of the various triggering events that may result in a legal attack on the owner-operator model, including

- Work injuries sustained by an owner-operator or fleet driver which are not covered by a workers' compensation or occupational accident insurance policy maintained by the owner-operator;
- The improper handling of garnishment or lien notices received on behalf of owner-operators or their drivers;
- Unilateral changes to a carrier's Independent Contractor Agreement, in particular with respect to compensation terms;
- Providing trucks, trailers or other equipment to owner-operators without a properly-structured arrangement;
- Paying all or a portion of the owner-operator's business or operating expenses, including, for example, IRP plate fees, fuel costs or taxes; and
- Violation of the disclosure requirements of the federal leasing regulations in 49 C.F.R. Part 376.

What your company can do to minimize risk

Contractor-based carriers are advised to structure their operations to minimize these trigger points that often lead to litigation or reclassification liability. Carriers are also well advised to regularly audit all aspects of their owner-operator program to ensure that the independent contractor status is maintained and to verify full compliance with the federal leasing regulations.

Gregory M. Feary,
Timothy W. Wiseman,
Indianapolis

Briefly...

Carriers Secure Leasing Regulations Victories

Carriers recently won key Federal Truth-in-Leasing Regulations rulings from two U.S. Courts of Appeals. The appeals court in Atlanta decided a carrier need not disclose its confidential costs, including third-party costs, to an owner-operator when such costs are not necessary to a determination of whether a charge-back was computed correctly. The court also held that federal statutes authorizing injunctive relief, such as the one under which owner-operators bring Leasing Regulations lawsuits, do not carry with them the authority to award other forms of equitable relief, including restitution and disgorgement, which could be much larger than money damages. Meanwhile, the appeals court in Chicago concluded that a carrier does not violate the Leasing Regulations when it passes the cost of public liability insurance through to all of its contractors. Both courts, however, held that the statute of limitations for Leasing Regulations damages lawsuits is four years, not two. Carriers' best hope for avoiding such lawsuits is to keep their leases fully in sync with legal developments and to conform their practices to their leases.

Daniel R. Barney,
Washington, D.C.

Independent Contractor Operating Agreement Tips

The terms of owner-operator contracts are governed by the federal leasing regulations, with a number of critical areas to address. Compensation and chargebacks are two of the most critical, but can be the most difficult to get right. The regulations require compensation be "clearly" stated in a signed document and require the lease to "clearly specify all items" to be charged back, including a recitation of how the amount of each item is to be computed. Carriers have a variety of approaches to compensation, sometimes varying by customer, but complexity is no defense to nondisclosure. Be sure all of your compensation programs are carefully described, and periodically review your contractors' settlement statements to confirm all chargebacks are listed in your agreement. Remember, if a deduction appears on a contractor's statement, it should be authorized in the agreement.

Robert J. Henry,
Chicago

Jeffrey S. Jackson,
Indianapolis

IRS/STATE INDEPENDENT CONTRACTOR RECLASSIFICATION – THE BEAT GOES ON

The mid-term elections have left the business sector cautiously optimistic regarding the direction of regulatory oversight. For motor carriers and others utilizing the services of independent contractors, the hope is that the shift in power might signal a reduction in ongoing independent contractor reclassification attacks, at least at the federal level by the IRS. At minimum, the shift in Congress should benefit efforts to defeat proposed legislation that would effectively gut Section 530 Safe Harbor Relief, which is the tool currently available to defend against independent contractor reclassification. But what about IRS reclassification efforts generally?

Unfortunately, it is likely that reclassification efforts will continue apace. Many of the current IRS reclassification programs were actually initiated during the Bush administration in an effort to increase tax revenue without increasing tax rates. More recently, in October of 2009, the IRS announced the National Research Program, which will target 6,000 companies for examination with respect to payroll tax, independent contractor status, fringe benefits and executive compensation review by randomly selecting 2,000 companies per year over the next three years. While couched as a "research" program, make no mistake, this is an audit initiative. In short, worker classification audits will continue, both at the federal level with the IRS and among state unemployment tax agencies, which then share state unemployment tax reclassification information with the IRS. As such, non-asset based motor carriers should remain vigilant by reviewing independent contractor operations to strengthen their defense of the model *before* a reclassification audit is initiated. Because of the information sharing between state agencies and the IRS, it is vital that all unemployment claims brought by independent contractors be defended as though they will lead to a visit by the IRS—under current information-sharing programs, they just might.

Steven A. Pletcher,
Indianapolis

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

Mileposts

Owner-Operator Audit Program Reviews Key Documents and Front-line Practices

Agreements that meet the rigors of the federal leasing regulations and support independent contractor status—together with operations that mirror their terms—provide the basis for an effective owner-operator program. The Scopelitis firm's Owner-Operator Audit Program is one way for motor carriers to review their programs in a cost-effective way, and to do so under the confidentiality offered by the attorney-client privilege.

The Owner-Operator Audit includes a review of all documents underlying the company's owner-operator programs, a question-and-answer survey of front-line managers' practices, and a report of findings and recommendations resulting from the review. The audit program is led by Greg Feary and Tim Wiseman of the Indianapolis office, with the assistance of Dan Barney and the Scopelitis class-action litigation team.

Over the years, the firm has assisted many large and small carriers in developing leases and owner-operator programs designed to minimize the risk of lawsuits while supporting the business goals of the clients. The firm has successfully defended a large number of class action lawsuits nationwide adding to its insight in this area.

The firm is involved in a number of other activities that allow it to provide owner-operator audits that are sensitive to the most critical trends in the industry, to include

- Compiling surveys on state-specific independent contractor statutory and legal issues;
- Directing a coalition of major motor carriers and industry associations seeking owner-operator reforms in Congress and in state government;
- Assisting in leasing programs at a number of top-100 motor carriers and large couriers battling or threatened with litigation;
- Arguing at all levels of state and federal courts, including the U.S. Supreme Court, on behalf of motor carriers and the transportation industry; and
- Vigilantly monitoring all significant litigation in this area in coordination with a large network of defense attorneys throughout the nation.

The Scopelitis owner-operator practice group is led by Greg Feary and Tim Wiseman in the Indianapolis office with specialized support and strategic litigation-based counsel and drafting by Dan Barney in the D.C. office. Others in the group include Shannon Cohen and Jeff Jackson in the Indianapolis office, Adam Smedstad and Bob Henry in Chicago, and Braden Core in Washington, D.C.

For the Record

Annette M. Sandberg, former Administrator of the Federal Motor Carrier Safety Administration, has joined the firm as of counsel. Annette will practice from the recently-opened Scopelitis, Garvin, Light, Hanson & Feary office in Spokane, Washington.

R. Jay Taylor has been named a shareholder in the firm. Jay will continue his appellate and complex litigation practice in the Indianapolis office.

Christopher J. Eckhart began his practice this fall as an associate in the Indianapolis office. Prior to joining the firm, Chris served as a law clerk to Judge Larry J. McKinney, U.S. District Court for the Southern District of Indiana.

Los Angeles partner Chris McNatt has been asked to serve on the California Trucking Association Board of Directors as a representative of the Los Angeles/ Orange Unit.

On the Road

Jim Golden will speak on the role of negotiation counsel at the Harvard Business School, December 2, in **Boston.**

Kathleen Jeffries, Fritz Damm, and Mike Tauscher will attend the Conference on Freight Counsel, January 8-10, in **Orlando.**

Greg Feary, Shannon Cohen, Kathleen Jeffries and Bob Henry will present at the Transportation Lawyers Association's 2011 Regional Seminar, January 21, in **Chicago.** Norm Garvin, Andy Light, Don Vogel, Nathaniel Saylor, Fritz Damm, and Mike Tauscher will also attend.

Chris McNatt will attend the California Trucking Association's Annual Management Conference 2011, January 22-26, in **Santa Barbara, California.**

SCOPELITIS
GARVIN LIGHT HANSON & FEARY

Lynne D. Lidke, Editor
10 West Market St., Suite 1500
Indianapolis, IN 46204

The Transportation Brief®

Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

- With the advent of CSA 2010 (in December, with driver ratings delayed until 2011), **shippers may be using logistics companies more frequently as insulation from negligent selection liability.** Greg Feary thus cautions that a shift of negligent selection liability to logistics companies could occur industry-wide.

- Steven Pletcher reminds readers that **fully insured group health plans that formerly were not subject to nondiscrimination rules now will be** under the new health care reform laws – as early as January 1, 2011 for some plans.

- Jeff Jackson reports that the **FMCSA now prohibits all Commercial Motor Vehicle drivers from texting while driving.** Keep in mind that 30 states have similar texting bans in place (with 8 states prohibiting all use of handheld cell phones while driving).