

The Transportation BriefSM



The Transportation Brief

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

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The Growing Role of e-Commerce

Although ambitious companies entered the Internet world on their own, technologically-advanced shippers will now be forcing all transportation companies to become adept at conducting business via the Web. A good indicator of this trend is the push by third party intermediaries to conduct substantially all business transactions via the Internet. New Web-based business transactions include dispatching, negotiating and entering into the master contract, tracing, claims handling, invoicing and payment.

Web use raises legal questions

Conducting business via the Web gives rise to a host of legal issues including:

- ❖ The validity of electronically-transmitted and executed agreements.
- ❖ The degree of e-Commerce activity that constitutes doing business in a particular state, including tax ramifications.
- ❖ The acceptance by regulatory agencies of electronic data record keeping (e.g. bills of lading) in lieu of paper documents.
- ❖ The proprietary rights and potential antitrust concerns relating to material, such as rate information, transmitted via the Internet.
- ❖ The governing law in international and interstate e-Commerce transactions.

Many of these issues currently have no definitive answers, although some complexities of e-Commerce are being addressed through legislation. For example, of paramount importance to the transportation industry is pending federal legislation defining the means by which to effectuate electronically "signed" documents. As the courts and legislative bodies deal with emerging issues, transportation companies must be aware of and respond correctly to avoid the legal "traps" of e-Commerce.

Developing an e-Commerce protocol is important

Of equal significance is proper company protocol in conducting Internet transactions. Moving too quickly or allowing oneself to be lulled into a sense of informality are potential pitfalls of conducting business via the Web. Reading and impulsively reacting to an "agreement" viewed on the screen omits the important step of carefully reviewing contract terms and potentially exposes the company to unanticipated obligations and/or liabilities. Accordingly, written company policies drafted to address e-Commerce issues should be a prerequisite for any transportation company conducting business via the Internet.

*Andrew K. Light, Gregory M. Feary, Jay D. Robinson, Indianapolis
Daniel R. Barney, Washington, D.C.*

SCOPELITIS, GARVIN, LIGHT & HANSON

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Briefly...

Punitive Damages Added to Indiana's Wrongful Death Act

In a recent case, the Indiana Court of Appeals held that punitive damages are a proper element of damages under Indiana's Wrongful Death Act. Prior to the ruling, punitives were not recoverable in wrongful death actions. Indiana joins 27 other states that allow plaintiffs to recover not only for loss of the decedent's income and love and companionship, but also for punitive damages when the defendant's conduct is particularly egregious.

In motor carrier accident cases causing death, the most likely reasons for a jury award of punitive damages are a truck driver's failure of drug and alcohol testing, driver logs indicating hours violations at the time of the accident, and faulty equipment about which the motor carrier knew or should have known.

*Michael B. Langford
Angela S. Cash
Indianapolis*

Avoid Inadvertent UM/UIM Coverage for Employees

An Ohio court recently awarded uninsured/underinsured motorist (UM/UIM) coverage from an employer's automobile liability insurance policy to an employee even though the employee was driving his personal vehicle and was not in the course and scope of his employment at the time of the accident. This decision may allow a truck driver employee who is within the course and scope of his employment to receive double recovery through workers' compensation and his employer's automobile liability policy.

For motor carriers with high deductibles, payment for either or both coverages comes, at least in part, from the corporate coffers. To avoid unintended UM/UIM coverage for employees, employers should (1) reject UM/UIM coverage, if state law allows, or (2) limit their exposure with exclusions for employees not in the course and scope of employment and not operating a covered auto.

*Norman R. Garvin
Gregory M. Feary
Indianapolis*

Seventh Circuit Issues New Ruling On Interim Withdrawal Liability

The U.S. Court of Appeals for the Seventh Circuit recently created another exception to the "pay now, dispute later" mechanism of the Multiemployer Pension Plan Amendments Act, which requires employers to make interim payments of withdrawal liability while arbitrating any dispute with the pension fund concerning a withdrawal assessment.

The Seventh Circuit had previously ruled that interim withdrawal liability payments were excused only if the assessment was frivolous. Recently, an employer argued that it owed no interim withdrawal liability payments because the pension fund prematurely assessed liability before any withdrawal had occurred. The court held for the employer, finding that employers can avoid interim withdrawal payments if the pleadings at issue identify no factual dispute about when the premature withdrawal liability had been assessed.

*James H. Hanson
Indianapolis
William D. Brejcha
Chicago*

Quarterly Report Targets Labor & Employment Developments

Clients wishing to stay current with multi-state labor and employment developments may want to consider a subscription to Labor and Employment Law Report for Trucking Industry Employers, a quarterly report compiled by Scopelitis attorneys in the Indianapolis, Chicago, and Washington, D.C., offices. Contact Executive Director John Thompson (jthompson@scopelitis.com) for annual subscription fee details.



Mileposts

Professionals Prepare for the “Hard Market”

Professionals involved in trucking and transportation insurance in Illinois and Indiana were urged to take a comprehensive look at workers’ compensation defense strategies at a recent seminar co-sponsored by Scopelitis, Garvin and the Illinois Transportation Association (ITA).

In the day-long seminar titled “Preparing for a Hard Market,” a standing-room-only audience of insurance brokers, risk managers, third-party administrators, and trucking executives analyzed defense strategies targeting the upcoming “hard market” in workers’ compensation. The seminar topics included the following as they relate to Illinois and Indiana law:

- ❖ Owner-Operator Issues
- ❖ Exceptions to Compensability
- ❖ Return-to-Work Issues
- ❖ Settlement Considerations
- ❖ Workers’ Compensation and the ADA, OSHA, and Ergonomics
- ❖ Coverage and Compliance Issues

The seminar was introduced by ITA President Fred Serpe and moderated by Scopelitis Managing Partner Greg Feary.

According to Feary, statistics from the late 80’s and early 90’s related to safety, lost time due to injuries, and insurance costs indicate that the “hardening” market in workers’ compensation insurance is imminent.

Presenters from the Firm’s Chicago office were Jerry Cooper, Bill Brejcha, and Victor Shane. Presenters from the Indianapolis office were Feary, Steve Pletcher, Tim Wiseman, and Carla Stagnolia. The conference was coordinated by Legal Assistant Pat Bugner and Executive Director John Thompson.

Seminar Materials Available

The Firm’s 163-page seminar booklet titled *Preparing for a Hard Market* is available for a cost of \$35. Contact Executive Director John Thompson (jthompson@scopelitis.com) for details.

For the Record

Mike Langford was featured in a televised news piece on a local Indianapolis station as part of a preview of ABC News’ 20/20 story on Dan and Margie Towery, whose daughter was killed by a drunk driver. Mike represented the Towerys in their lawsuit against the estate of the drunk driver and the bar that served the driver prior to the accident.

Laurie Baulig authored a white paper for the Truckload Carriers Association (TCA) titled “Just in Time...To Wait.” An analysis of obstacles to increased productivity faced by the truckload carrier industry, the paper may be found at www.truckload.org.

Dan Barney has been appointed Vice Chair of the Transportation Industry Committee of the American Bar Association Antitrust Law Section.

Todd Metzger and his wife Amy announce the birth of their first child, Drew Austin, born January 3, 2000.

On the Road

Laurie Baulig will attend the American Trucking Associations (ATA) Safety Management Council’s Western Region Meeting, May 2-4, in **Portland, Oregon**. Laurie will speak on OSHA’s enforcement activities and pending ergonomics rulemaking.

Jim Hanson, Dan Barney, and Laurie Baulig will speak at the ATA’s Human Resource Forum, “Human Resources Strategies for Trucking Management,” May 7-9, in **Nashville**. Jim’s presentation is titled “Update on Sexual Harassment”; Dan’s is “Bermuda Triangle: EEOC/Disabilities Act, DOT Safety and OSHA Ergonomics”; and Laurie’s is “OSHA’s New Forklift Training and Proposed Ergonomics Standard.”

Norm Garvin and Andy Light will attend the Transportation Lawyers Association’s Annual Conference, May 9-15, in **Hilton Head, South Carolina**.

Norm Garvin and Tim Wiseman will attend the National Tank Truck Carriers, Inc., Annual Conference and Tank Truck Equipment Show, May 15-17, in **Chicago**.

Tim Wiseman will speak on DOT compliance and enforcement issues at the Indiana Motor Truck Association’s spring safety conference, May 17, in **Indianapolis**.

Laurie Baulig will give a speech on ergonomics at the Self-Insurance Institute of America, Inc.’s Second Annual Group Self-Insured Workers’ Compensation Executive Forum on June 14, in **Nashville**.

Greg Feary and Jeff Toole will speak on the hardening insurance market and captive insurance arrangements at the ATA’s National Accounting and Finance Council, June 22, in **San Francisco**.



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Dispatches



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◆ Laurie Baulig reports that the Occupational Safety and Health Administration (OSHA) began public hearings on its proposed **ergonomics regulation** on March 13, 2000, in Washington, D.C. Baulig testified before OSHA in Washington on March 23, 2000, regarding the detrimental effect the proposed standard would have on the trucking industry. On April 11, 2000, Jerry Cooper from the Firm's Chicago office testified concerning the problems that will likely arise from the interaction of the proposed standard and state workers' compensation systems.

◆ A Wyoming court recently held that a urine collection company owed a duty of care to another company's employee when collecting, handling and processing specimens for the purpose of performing **substance abuse testing** and could therefore be liable for damages suffered by a person due to a breach of that duty. According to Dave Milne, the ruling could open a floodgate of litigation when individuals are terminated for positive drug tests. As a result of this heightened risk, employers may face increased costs for drug testing services in the future.

◆ Steve Pletcher reports that the Department of Labor, Pension & Welfare Benefits Administration has proposed new interim final rules that are currently set to take effect May 1, 2000. The new rules require administrators of **Multiple Employer Welfare Arrangements (MEWAs)** and other entities to file new information reports with the Department of Labor. Harsh non-compliance penalties make this new requirement a priority for our clients and friends that are MEWAs or, importantly, could be deemed to be a MEWA when group health benefits are provided to more than one employer.

The Transportation Brief is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light & Hanson would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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