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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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## *Traditional Contract/Common Carrier Distinctions No Longer Define Cargo Claim Liability*

Passage of the ICC Termination Act ("ICCTA"), effective January 1, 1995, was intended to eliminate most of the legal distinctions between contract and common carrier concepts, as the legal definition of the term "motor carrier" now includes both types of carriers. Yet, the Federal Motor Carrier Safety Administration continues to issue both contract and common carrier authorities, which confuses motor carriers and shippers alike. Compounding the inconsistency, ICCTA allows carriers holding common carrier authority to enter into contracts and those holding contract carrier authority to operate under rules and rates "tariffs" that need only be provided to shippers upon request. This paradox has confounded many motor carriers and shippers that traditionally viewed cargo loss and damage claims in terms of contract versus common carrier liability. ICCTA's allowance for the parties to "waive" certain statutory provisions, including those related to cargo claims, also contributes to misunderstandings as to what liability standard applies.

### *Written contracts are key to evaluating liability*

To navigate through the confusion, cargo claims liability standards are best analyzed based upon whether a signed "shipper agreement" exists between the parties. When freight moves without a shipper agreement, all regulated, interstate shipments will automatically invoke Carmack liability. If a shipper agreement exists, Carmack liability will also apply unless it is expressly waived in writing by the parties. Recent court decisions serve as warnings that the parties' intent to waive all or part of Carmack liability should be unambiguous.

### *Use caution in waiving Carmack liability terms*

Motor carriers in particular should take heed when agreeing in a written contract to a cargo claims standard other than Carmack liability, regardless of whether the standard adopted is more favorable to the motor carrier. The result in doing so, probably unintended, is that the motor carrier likely becomes subject to a myriad of state law theories of liability, and an aggressive cargo loss claimant may assert state law claims, such as conversion and fraud, without Carmack's federal preemption of such claims. Accordingly, it is imperative that cargo liability issues be thoroughly reviewed in each and every signed contract scenario.

*Andrew K. Light*
*Gregory M. Feary,*
*Indianapolis*

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# Briefly...

## *Beware of Limitations on Additional Insured Endorsements*

A common misconception of both motor carriers and shippers is that listing a shipper as an additional insured on a carrier's policy entitles the shipper to the same coverage benefits afforded the carrier. For example, because cargo coverage is generally applicable only to liability of a motor carrier transporting property for others, the shipper may be exposed when carrier liability is lacking. Although not uniformly accepted by insurers, the solution may be to name the shipper as a "loss payee, as its interests in the cargo may appear." Bear in mind that the consignee rather than the shipper may have legal title and thus the legal interest in the cargo.

Also, additional insured status on the carrier's auto liability policy under the ISO "designated insured" endorsement duplicates the coverage to which the shipper is already entitled as a permissive user under the policy, which coverage has important limitations. Thus, a manuscripted endorsement may be needed to provide the shipper "additional insured" status that mirrors as much as possible the contractual obligations imposed on the carrier by the indemnity provisions of the "shipper agreement."

*Andrew K. Light*
*Gregory M. Feary,*
*Indianapolis*

## *Indiana Indemnity Statute Assists Carrier*

A recently-introduced bill in Indiana is one of a few legislative initiatives designed to "level the playing field" between motor carriers and shippers. Should it become law in Indiana, House Bill 1230 may well become a template for similar legislation in other states in future years.

Under the bill, when parties enter into a motor carrier transportation contract (the definition of which principally addresses agreements between shippers and motor carriers) any contract provision that creates an obligation for one party to indemnify or otherwise hold the other party harmless for the other party's own negligence, intentional acts, or omissions is deemed void and unenforceable.

Texas and Oklahoma have enacted similar laws, and other states, such as Indiana and South Carolina, are in the midst of a concerted legislative effort to enact such laws in 2005. The Indiana effort is led by the Indiana Motor Truck Association and its executive director, Kenny Cragen. As of the date of this article, House Bill 1230 successfully passed through the Indiana House of Representatives and awaits review by Indiana's Senate.

*Gregory M. Feary,*
*Indianapolis*

## *Logistics Trend Calls for Careful Contract Review*

It has been estimated that the logistics outsourcing market was worth in excess of $65 billion in 2004. Because the logistics trend has changed the way motor carriers do business, contracts with logistics providers require careful consideration.

Before "logistics" became a term of art, motor carriers typically entered into contracts with property brokers, the rights and duties of which were fairly well settled and understood. Today, however, motor carriers often contract with logistics providers that provide value-added warehouse services, surface transportation, and air/ocean forwarding. Thus, it is important for motor carriers and logistics providers to understand the capacity in which the logistics company is contracting so that both parties are aware of the rights and liabilities they are undertaking.

For example, a logistics company may enter into a contract as a warehouseman, a shipper, a shipper's agent, a freight forwarder, a property broker, or third-party payor. Each has different responsibilities and liabilities in relation to the motor carrier that must be adequately addressed in the agreement to avoid misunderstanding in connection with the parties' course of dealing.

*Norman R. Garvin,*
*Indianapolis*

# Mileposts

## *Corporate Contracts Provide Vehicle For Effective Business Relationships*

This issue of *The Transportation Brief* focuses on the Scopelitis firm's practice in contract formation and review. The topics covered here – shipper indemnification provisions, logistics contracts, and others – are typical of the items addressed daily by Scopelitis attorneys who draft, review, and negotiate contracts for their motor carrier clients.

Principles of contract law are at the heart of nearly all business transactions. Consequently, the Scopelitis firm's practice related to contracts law, like that of most full-service law firms, is broadly divided into two groups - the corporate attorneys who participate in contract formation and the trial attorneys who litigate when contract disputes arise.

Todd Metzger's practice is typical of those with a corporate practice in trucking law. A partner in the Indianapolis office, Metzger devotes his practice to business transactions, including mergers and acquisitions; corporate formation and restructuring; contract drafting and review; real estate transactions; and general corporate and business matters.

According to Metzger, a contract means more to a business than its legal-dictionary definition - "an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit." Contracts are the vehicle that help companies build and maintain long-term relationships by defining the context within which the parties conduct business with each other. Plus, a carefully thought-out contract is often the most effective tool for heading off costly disputes or misunderstandings before they occur.

Metzger is joined in the firm's corporate practice by partners Norm Garvin, Andy Light, Greg Feary, and Jay Robinson in Indianapolis; Bill Brejcha and Don Vogel in Chicago; and Dan Barney and Kim Mann in Washington, D.C.

Most of the Scopelitis firm's corporate law group participated in a seminar titled "Restructuring: The New Trucking Corporate Platform," which was held Wednesday, April 13, at the Chicago Marriott Oak Brook. Interested trucking owners and executives may contact Allison Smith in the Indianapolis office for details.

## *For the Record*

**Phillip J. Johnson** joined the firm on February 1, 2005, as of counsel in the Chicago office. Phil continues his 35-year practice focusing on workers' compensation defense on behalf of major insureds and self-insured employers.

## *On the Road*

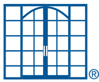
Norm Garvin will attend the National Tank Truck Carriers Annual Conference and Tank Truck Equipment Show, May 9-11, in **Chicago**. Norm will also attend the NTTC's Summer Board Meeting, August 3-5, in **Homestead, Virginia.**

Greg Feary will present "Best Practices in Insurance" at the American Trucking Associations' National Accounting and Finance Council meeting, June 26-28, in **Chicago**. Jay Robinson and Greg Ostendorf will also attend.

Don Vogel will participate in the Transportation Lawyers Association's Summer Retreat and Executive Committee Meeting, July 22-25, in **Denver**.

Greg Feary and Dan Barney will participate in a panel discussion on owner-operator legal issues at the American Trucking Associations' General Counsel Forum, July 25, in **La Jolla, California.** Allison Smith will also attend.

Scopelitis, Garvin, Light & Hanson is pleased to announce the launch of our new website at **www.scopelitis.com**. Please visit us for transportation industry news, firm information, and articles by and about our attorneys.



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# Dispatches

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Rich Clark reports that the FMCSA has confirmed its plans to issue an advance notice of proposed rulemaking as a step toward raising **broker bonds** from $10,000 to $300,000 and possibly as high as $500,000. The agency did not provide a timetable for the rulemaking.

Todd Metzger cautions clients reviewing contracts not to overlook the "boilerplate" (a term originating from the steam locomotive industry and used to describe standard provisions usually found near the end of a contract). **Boilerplate provisions** may unintentionally misstate the intent of the parties or intentionally favor the drafter of the contract. Typical boilerplate language may often relate to assignment of the contract, waiver or amendment of terms, notice, governing law, venue, and attorneys' fees.

Citing growing concern over increased use of the Internet, the FMCSA has requested comments on a petition to impose new **requirements on household goods (HHG) brokers.** According to Rich Clark, the petition seeks regulations requiring HHG brokers to afford consumers information about their rights, to use only licensed HHG carriers, and to provide disclosures on estimates.

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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