Spring 2011 ❖ Vol. 18 No. 1

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

The Transportation Brief®

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Recent Broker Liability Case Highlights Risk of Exercising Too Much Control

On March 30, 2011, the Appellate Court of Illinois issued a decision offering insight on pitfalls brokers (and possibly shippers) should avoid. While the ruling disappointingly appears to have disregarded several key legal points, the award of over $23 million in personal injury damages against broker CH Robinson highlights dangerous operational procedures given the unusual fact pattern. The court's ruling is compared and contrasted with a more recent FMCSA decision inside this issue of *The Transportation Brief*.

The CH Robinson case facts are unusual, but cautionary

The suit against CH Robinson involved an owner-operator (Henry) who was under lease to motor carrier Dragonfly, but was permitted to obtain loads directly from property brokers such as CH Robinson. Dragonfly neither received compensation nor charged/retained any amount related to the transportation movements. In fact, CH Robinson arranged a direct deposit of compensation into Henry's bank account. For the move in question, during which Henry's accident caused two deaths and other serious injury, CH Robinson assigned a load of potatoes directly to Henry, sending a load confirmation sheet to Dragonfly that provided special load handling instructions and notably outlined when Henry alone could be fined for non-compliance. Henry was required to call in to CH Robinson in numerous instances to, for example, report delivery progress and temperature of the potatoes. Henry also claimed the pick-up and delivery times required her to exceed DOT hours-of-service requirements.

The court found CH Robinson liable under a principal/agent theory

Finding CH Robinson vicariously liable for Henry's accident, the court's analysis primarily turned on its determination that CH Robinson had the right to control Henry, in large part because CH Robinson's special instructions required Henry to be in constant communication and subjected her to fines. The court also secondarily found Henry's occupation was not unique from CH Robinson's and thus the relative nature of the work supported a conclusion that Henry was acting as CH Robinson's agent. Other factors influencing the decision included CH Robinson's direct dispatch of and payment to Henry and, quite oddly, the fact that the CH Robinson-owned potatoes were viewed by the court as "materials for delivery" supplied by CH Robinson even though Dragonfly owned the trailer and Henry owned the tractor. Despite many unusual facts, the case does illustrate the danger of a broker's extremely close monitoring of the details of the movement and direct involvement with the truck driver. Alarmingly, the case also gives short shrift to the separate and distinct occupations of the various parties within the supply chain (i.e., broker, motor carrier, and independent contractor under lease) and, in what could be seen as an unprecedented ruling of special concern to shippers, considers the cargo's ownership as partially indicative of who has control of the driver.

Gregory M. Feary, Indianapolis *William D. Brejcha, Chicago*

Briefly...

FMCSA Sends Compliance Message to Motor Carriers and Property Brokers

While the CH Robinson case considers a broker's use of a motor carrier's truck driver in the context of a personal injury action, an FMCSA decision of April 15, 2011 addresses a motor carrier's use of other authorized motor carriers in a safety audit setting. The FMCSA's unprecedented ruling, which decides whether a motor carrier can be held responsible for the safety compliance duties of other carriers that actually perform the transportation, will likely be applied in future cases to carriers also holding brokerage authority.

In the FMCSA case, for-hire motor carrier Missouri Basin Well Service, Inc. (MBW) used other motor carriers to deliver excess capacity of oil and related products. These contract carriers operated under their own DOT numbers and operating authority using their own trucks and drivers. MBW's customer contracts typically obligated MBW to ensure the contract carriers operated safely, inclusive of drug and alcohol testing and driver training and orientation. The Field Administrator assessed violations against MBW based ***solely*** on MBW's failure to maintain various compliance records (including driver logs) for the ***contract carriers'*** drivers, contending MBW was required to treat them as its own for purposes of DOT compliance.

According to the FMCSA on appeal, MBW's compliance responsibility for the contract carriers' drivers turned on whether it exercised "significant control" over the drivers—a standard similar to that applied in the CH Robinson case. It ruled, however, that MBW's level of control was not "significant" enough to warrant the Field Administrator's action. Finding the relevant contracts evidenced an independent contractor relationship, despite driver training, drug testing, and screening requirements, the FMCSA noted the drivers were hired and paid by the contract carriers. The FMCSA also observed that MBW's arrangement with the contract carriers was not exclusive and seemingly determined that MBW's pre-approval, training, and drug testing of the drivers was not necessarily an assumption of DOT-mandated safety duties but was rather primarily based on MBW's contractual obligations to its customers.

Yet, it is significant that the FMCSA even inquired into such issues of "control" by closely examining MBW's direct dispatching of the drivers, determining who assumed various safety compliance and training duties, and cautioning that shipping documents must reveal what entity is held out as the motor carrier performing the service. While the FMCSA predictably had a keener understanding of the operational realities of transportation, its coverage of analytical ground similar to that of the CH Robinson court is unprecedented in a safety rating decision, and, like the court, the FMCSA notably did not seem to give weight to the defined roles of the various parties within the brokerage environment. It also did not address legal authority indicating carriers are responsible, from a safety regulatory standpoint, only for drivers of owned or leased vehicles, and thus, while MBW prevailed under the specific facts presented, the case is cause for concern to carriers and brokers alike.

Timothy W. Wiseman, Lynne D. Lidke, Gregory M. Feary, Indianapolis

Data Quality Under CSA's Safety Measurement System Requires Scrutiny

The CSA Safety Measurement System (SMS) ranks carriers' on-road performance and can be misleading and possibly unreliable for use in the carrier selection process. SMS analyzes inspections and crash data and ranks a carrier's "on-road" performance in each BASIC category. Due to the sensitivity of shippers' and brokers' carrier selection procedures, it is important for carriers to closely monitor the data uploaded to their DOT number.

Each state that submits data to the FMCSA is considered the "owner" of the data. Therefore, any challenge to the data must go to the "owner" state. The FMCSA's DataQs Website (https://dataqs.fmcsa.dot.gov/login.asp) handles these data challenges.

Carriers should actively review their SMS data every month as follows:

- Validate any crash or inspection data the DOT has assigned to the carrier's DOT number to ensure it actually belongs to the carrier.
- Identify unusual violations or violations in locations the carrier does not typically operate, which may be indicative of a misassignment.
- Identify roadside violations that are not likely to be spotted via a facial roadside inspection.
- Evaluate patterns in the data. This may indicate a problem with a carrier's policy or other issues that should be corrected.
- Encourage drivers to timely report all stops and inspections and to notify the carrier if anything unusual occurred at the roadside.
- Thoroughly document the reason for a challenge through the DataQ system by, for example, attaching supporting documentation if available. The FMCSA has suggested two challenges to the same data will be the limit, although due process questions remain as to the FMCSA's position.

Annette M. Sandberg, Spokane *Timothy W. Wiseman, Indianapolis*

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Mileposts

Sandberg Joins Scopelitis Just in Time for CSA

CSA is rapidly changing the safety and compliance landscape for motor carriers, brokers and shippers, according to Annette M. Sandberg of the Scopelitis firm's newly established Spokane office.

And the terrain is likely to get tougher in the days ahead, as rulemaking gets underway on CSA and other safety issues and the FMCSA turns to more of an enforcement mindset.

Sandberg would know. She served as Administrator of the FMCSA from 2003 to 2006, leading an agency of 1,100 people with a budget of $465 million, all focused on highway safety. Before that, Sandberg was Deputy Administrator of the National Highway Traffic Safety Administration.

In addition to her affiliation with the Scopelitis firm, Sandberg continues to serve as the CEO of TransSafe Consulting, LLC, which she established following her departure from the FMCSA.

At Scopelitis, Sandberg has joined the firm's safety and compliance team led by Indianapolis partner Tim Wiseman. Wiseman regularly assists clients in defending DOT safety audits and responding to other trucking safety issues, often proactively through on-site "mock" audits. In safety and compliance counsel Wiseman is joined by Andy Light and Jeff Jackson in the Indianapolis office and Bill Brejcha and Bob Henry in Chicago.

According to Wiseman, one of Sandberg's many values to the Scopelitis firm and its clients lies in her understanding of the FMCSA's people and processes – to use her words, "the avenues inside the agency."

Adopted last December, CSA is an FMCSA initiative aimed at improving large truck and bus safety and ultimately reducing crashes, injuries, and fatalities related to commercial motor vehicles. According to Sandberg, the fallout from CSA lies primarily in the Safety Fitness Determination rulemaking, expected later this year, that may ultimately affect the way carriers' overall safety ratings are determined.

The FMCSA's relatively recent focus on a wide range of safety issues – hours of service, detention time, electronic on-board recorders, and sleep apnea, to name a few – is likely to mean significant operational changes for the industry as well. At the same time – and not coincidentally – the FMCSA's enforcement agenda is likely to become more aggressive, according to Sandberg.

Wiseman and Sandberg suggest in their article in this *Transportation Brief* that the quality of a carrier's safety data is the key to navigating the new landscape brought about by CSA. Through careful monitoring of the data uploaded to their DOT number and by challenging incorrect data through DataQs, the FMCSA's new web-based data-challenge system, carriers may just find their way back to familiar terrain.

For the Record

Allison O. Smith has been named a shareholder in the firm. Allison will continue her position as Director of Business Development in the Indianapolis office.

On the Road

Chris McNatt will serve on a panel addressing preemption under the Federal Aviation Administration Authorization Act of 1994 at the Transportation Lawyers Association Executive Committee Meeting and Annual Conference, May 10-15, in **Las Vegas**. Kim Mann, Kathleen Jeffries and Fritz Damm will also attend.

Bob Browning will speak on class action independent contractor litigation at the Messenger Courier Association of America's Annual Meeting and Convention, May 11-14, in **Las Vegas**.

Andy Light, Greg Feary and Jay Robinson will present two sessions, one on Mergers and Acquisitions and the other on Logistics and the Law, at the American Trucking Associations' Information Technology Logistics Council and National Accounting & Finance Council 2011 Annual Conference and Exhibition 2011, June 20-22, in **Phoenix**.

Steve Pletcher will deliver a Legal Update at the National Association of Professional Employer Organizations' Legal and Legislative Conference, May 23-24, in **Arlington, Virginia**.

Kathleen Jeffries, Bob Henry and Fritz Damm will participate in the Conference of Freight Counsel, June 26-27, in **Chicago**.

Fritz Damm will attend the Transportation Lawyers Association's Summer Executive Committee Meeting, July 29-30, in Boulder, **Colorado**.

Greg Feary and Dan Barney will moderate panels, respectively, on Structuring Independent Contractor Relationships and Defending Independent Contractor Challenges at the American Trucking Associations' Forum for Motor Carrier General Counsels, July 24-27, in **La Jolla, California**. Allison Smith, Shannon Cohen and Fritz Damm will also attend.

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Dispatches

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Mike Tauscher reports that truck inspections in Ontario are emphasizing certain criteria that might surprise U.S. motor carriers. **Brake adjustment violations are essentially being viewed as strict liability offenses,** exposing both the company and the driver, individually, to $5,000 fines for a first offense. Conduct and documentation of pre-trip inspections for Ontario-bound tractors and trailers may have to be modified in order to avoid violations or provide the basis for a defense to the charges.

According to Braden Core, the U.S. Supreme Court recently agreed to hear a case that holds implications for carriers facing leasing regulation class actions and class action law generally. In Wal-Mart v. Dukes, **the Court is set to resolve a split of authority regarding whether claims for money damages can be class-action certified under Federal Rule 23(b)(2),** even though that rule only authorizes the plaintiff to obtain non-monetary relief.

Andy Butcher reports that the Wage Theft Prevention Act enacted by former New York Governor David Paterson became effective April 9, 2011. **The Act imposes new record-keeping and notice obligations on New York employers** that will affect, among other things, what information the employer must provide on employee wage statements. Employers face stiff penalties for non-compliance.