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The Transportation Brief©

The Transportation Brief

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The "Hardening" Insurance Market — Is a Captive Insurance Subsidiary an Option?

It appears that the predictions of a "hardening" insurance market are true. The cost of insurance will rise and some motor carriers may find it difficult to obtain certain coverages. As a result, some carriers may be considering the formation of captive insurance subsidiaries, or "captives," in an attempt to gain greater control over rising insurance costs.

Captives may benefit motor carriers with certain characteristics

Captives are not for every motor carrier. The typical profile of a company that may benefit from forming a captive is one that operates at least 750 trucks. Also, the motor carrier should have a sizeable independent contractor division, usually no smaller than 75% of the fleet. The motor carrier should have experience in loss-sensitive insurance programs and an effective safety and risk management program. A captive feasibility analysis should be conducted with the assistance of a qualified insurance broker/consultant.

Captives entail many components and cost elements

Typically, a captive is established off-shore where insurance licensing and capital requirements are less burdensome. Nevertheless, license fees and related legal costs must be paid, and capital must be retained within the captive. An off-shore captive manager is typically retained under contract, and domestic insurers issue the actual policies. Excess insurance coverage costs are also a component to be considered. As a recent tax case confirms, a proper arm's length arrangement is necessary to achieve tax savings. Moreover, motor carriers that simply facilitate insurance programs purchased by their independent contractors may be able to participate in a greater portion of the insurance revenue if the motor carrier's captive insures a portion of the loss associated with such programs.

Conventional markets are most often the appropriate place to obtain insurance coverage. Nevertheless, the hardening market could provide some motor carriers an opportunity to diversify and benefit through a captive insurance subsidiary.

Gregory M. Feary, Indianapolis

Briefly...

Illinois Announces Trucking Industry Unemployment Audit

In October, 1999, the Illinois Department of Employment Security initiated a one-year audit program targeting Illinois trucking companies for compliance with the owner-operator employment exemption. Reclassification of an owner-operator from independent contractor to employee status means a motor carrier will be subject to unemployment compensation tax and also could be assessed back taxes, interest, and penalties.

Illinois law exempts owner-operators from employment status if they meet 16 strict requirements, some of which proscribe the use of common lease agreement terms. For example, one of the requirements bars the use of covenants not to compete between owner-operators and carriers, while another prohibits carriers or their related entities from selling or leasing equipment to owner-operators. A careful review of lease agreements is warranted in order to avoid owner-operator reclassification and potential Illinois exposure.

Steven A. Pletcher
Indianapolis
Dennis J. Duffy
Chicago

Avoid COBRA Liability in Mergers and Acquisitions

During merger and acquisition activity, due diligence review of the seller's employee benefit programs is often overlooked. Of particular importance for consideration is the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), a federal law that seeks to ensure a terminated employee's access to continuing health care coverage. Failure of the parties to properly analyze and allocate COBRA responsibility could add significant costs to the transaction, including the possibility of penalties assumed by the buyer for any past COBRA violations of the seller.

Structuring a transaction as an asset purchase to avoid seller liability will not circumvent COBRA liability under recent proposed regulations that treat all sales as stock sales for purposes of COBRA. Therefore, after consultation with benefits counsel, proper allocation of COBRA responsibilities within the structure of the sales transaction is an absolute necessity.

Steven A. Pletcher
Indianapolis
Jeffrey S. Toole
Indianapolis

New Federal Safety Agency Created

On January 1, 2000, a new law transferred all federal truck safety regulation to a new Federal Motor Carrier Safety Administration (FMCSA). The law that created the FMCSA, the Motor Carrier Safety Improvement Act of 1999, also

- More than doubles federal funding of state roadside safety inspections;
- Tightens commercial drivers license regulation for truck drivers whose licenses have been revoked or suspended, who have caused a fatality through negligence or criminal behavior, or who pose an imminent hazard;
- Authorizes sanctions against illegal foreign carriers;
- Requires a safety review of every new carrier within 18 months; and
- Sets up a U.S. Department of Transportation hotline for the reporting of potential safety violations.

Daniel R. Barney
Washington, D.C.

The Firm's website was placed at www.scopelitis.com on February 1, 2000. The site includes Firm background information, practice areas, attorney profiles, and past issues of *The Transportation Brief.*

Mileposts

Baulig to Testify on Ergonomics

Laurie Baulig, a partner in the new Scopelitis office in Washington, D.C., is scheduled to testify at the Occupational Safety and Health Administration's (OSHA) hearings on its proposed ergonomics standard in late February, 2000.

Ergonomics, a term that derives from industrial engineering, is the practice of fitting the job to the worker. OSHA's proposal would require general industry employers to establish a comprehensive 6-point program addressing ergonomics.

Baulig believes the rules, if adopted, would be the most expensive and least effective regulation in OSHA's 29-year history. They could cost the trucking industry as much as $6.5 billion in the first year of implementation, according to a 1996 American Trucking Associations (ATA) study.

Baulig has played a key role in shaping the transportation industry's response to ergonomics. From 1995 to 1998, she was co-chair of the National Coalition on Ergonomics (NCE), an organization of over 300 businesses and trade associations concerned with state and federal efforts to regulate ergonomics in the workplace. A former senior vice president for policy and regulatory affairs for the ATA, Baulig currently serves the ATA as policy adviser on ergonomics.

Baulig is assisting clients in their response to the proposed rules during the "public comment" phase of the rule-making process. The comment phase will be followed by a series of public hearings in Washington, D.C.; Portland, Oregon; and Chicago.

Baulig will testify on behalf of the NCE at the Washington, D.C., hearings. Chicago Scopelitis Partner Jerry Cooper will testify on behalf of the Firm at the Chicago hearings later this spring.

For the Record

Mike Langford, an attorney in the Indianapolis office since 1994, became a shareholder in the Firm on November 1, 1999. Mike will continue his litigation practice in the areas of personal injury, commercial, and contract claims and defense.

Stephen A. Oakley joined the Firm on December 15, 1999, where he will continue his commercial litigation and corporate transaction practice as an associate in the Chicago office.

Greg Feary, a managing partner in the Indianapolis office, was elected Vice Chairman of the American Trucking Associations' Insurance and Risk Management Committee. Greg's term began November 1, 1999.

Carla Stagnolia has accepted an appointment to the Executive Committee of the Indianapolis Bar Association's Young Lawyers Division. Carla's term began January 1, 2000.

On the Road

Dan Barney will attend the American Trucking Associations' Winter Leadership Meeting, February 6-8, in **Fort Lauderdale.**

Norm Garvin, Tim Wiseman, and Mike Langford will present a session on claims handling procedures at the Indiana Motor Truck Association's Safety Council, February 14, in **Indianapolis.**

Bob Browning and Terry Fewell will attend the American Movers Conference, February 24-26, in **Bal Harbour, Florida.**

Steve Pletcher will attend the American Bar Association's (ABA) Labor and Employment Law Section meeting, February 24-26, in **Key West,** primarily to participate in the Senior Editorial staff meeting for a forthcoming ABA book on Alternative Employment.

Norm Garvin, Andy Light, Greg Feary, Dan Barney, and Laurie Baulig will attend the Truckload Carriers Association's Annual Meeting, March 19-22, in **Lake Buena Vista, Florida.** Dan will provide legal perspectives to the meeting's Benchmarking Panel on March 22.

Dan Barney also will speak on "Developments in Transportation Antitrust Issues" at the ABA's Section of Antitrust Law Meeting, April 5, in **Washington, D.C.**

Norm Garvin will speak to Delta Nu Alpha on the North American Free Trade Agreement as it relates to Canadian and Mexican transportation, April 25, in **Louisville.**

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Dispatches

SCOPELITIS, GARVIN, LIGHT & HANSON

The U.S. Supreme Court recently ruled that an employer's good faith efforts to prevent discrimination in its workplace can defeat a claim for punitive damages aimed at punishing the employer for discrimination. However, Carla Stagnolia (Indianapolis) warns that merely adopting an **anti-discrimination policy** is not enough to protect the employer. According to a recent federal court ruling, an employer must adopt an anti-discrimination policy and use good faith efforts to train and educate its employees about the policy in order to avoid punitive damages liability.

Terry Fewell (Indianapolis) advises that carriers using **power take off (PTO) equipment** must file for certification of claims to receive quarterly refunds of Indiana motor fuel taxes for the year 2000. If carriers did not obtain certification prior to October 1, 1999, the certification form must be filed prior to April 1, 2000. Once the certification is obtained, it can be updated as new equipment is acquired or sold.

The national average retail price per gallon for diesel fuel was $1.287 on December 20, 1999, compared with $.968 in 1998. Due to this dramatic increase, Norm Garvin (Indianapolis) notes that some motor carriers may consider implementing **fuel surcharges** as well as allocating fuel charges between themselves and their owner-operators. While it is possible for a carrier to include a fuel surcharge in its tariff, shippers may refuse to pay such charges. Further, if a carrier is providing service to a shipper pursuant to a contract, the carrier should follow the terms of the contract if it amends existing rates to include a fuel surcharge.