

The Transportation Brief®



The Transportation Brief

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

The Transportation Brief is published by Scopelitis, Garvin, Light & Hanson.

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“The Perfect Storm” — Restructuring May Be Your Life Preserver

The current trucking environment has been referred to as “the perfect storm” in many contexts. Multiple events in the last 12 months (possibly aggravated by the September 11 attacks)—including the downward economic trend, rising insurance costs, and the continued driver shortage—are viewed as key elements causing trucking companies to reevaluate corporate structure and organization.

Assets could be at risk

We have seen a dramatic increase in our role as counsel to motor carriers seeking to restructure their companies to separate assets from operating authority. This increase is precipitated by the concern of prudent trucking company owners over already-dwindling assets and the potential for those assets to be catastrophically diminished through claims against the company.

Also, insurance carriers are concerned about affiliated corporations that have not properly adhered to corporate governance, proper structure, and other important formalities associated with the operation of separate corporations under a common umbrella trucking company. Such affiliated corporations may need more insurance than a corporate structure that has maintained both formality and substance related to the separation of various aspects of the affiliated corporations’ independent operations.

Carriers should reevaluate corporate structure now

Corporate restructuring for motor carriers involves many issues that are unique to the trucking industry. Carriers contemplating a restructure must be aware of the regulatory and compliance issues involved, which include sales and fuel tax concerns, IRP and titling issues relating to the transfer of equipment, and DOT safety rating issues associated with the establishment of a new operating entity. Without a careful and proper audit of these issues, trucking companies may find the assets of their corporate affiliates and/or owners “at risk” to the claims of third parties.

*Gregory M. Feary, Andrew K. Light,
Norman R. Garvin, Jay D. Robinson, Jr.
Indianapolis*

Briefly...

Events of September 11th Continue to Affect Trucking

We advise our clients and friends to keep close track of the following important topics in the coming months. Due to the events of September 11, these issues are constantly evolving and may impact your company's operations.

Hazardous materials regulation. The Department of Transportation introduced legislation to increase its authority over hazmat traffic in the U.S. Increased fines for violations and more training for drivers are key provisions of the Hazardous Material Transportation Safety Reauthorization Act of 2001. The already-enacted U.S.A. Patriot Act requires background checks on all hazmat drivers.

Transportation Security Administration (TSA). Created in mid-November by President Bush, this new agency's goal will be to improve the safety of all modes of transportation in the U.S. It is unclear how its existence will impact the trucking industry; at press time, a TSA head had not been appointed.

NAFTA. A law will likely be enacted this month, granting Mexican trucks access to U.S. highways if they obtain DOT operating authority. Before it can issue such authority, the DOT must conduct an investigation and issue a report to Congress ensuring that certain safety measures have been enacted at the U.S.-Mexico border. Heightened security concerns may continue to affect this issue.

*William D. Brejcha, Chicago
Timothy W. Wiseman, Indianapolis*

Carriers May Be Liable for Improper Loading and Load-Shifting

Many carriers incorrectly assume that, if a shipper loads freight, the shipper alone can be held liable for damages caused by the shifting or falling of that freight during transport or delivery. This assumption can prove costly to carriers if persons are injured or killed due to improperly loaded freight.

The Federal Motor Carrier Safety Regulations (FMCSR) state that a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless the person can, by reason of experience, training, or both, determine whether the cargo has been properly loaded and secured. Except when the load is sealed or when inspection is impracticable, the driver must inspect the freight before the trip and again after the first 25 miles of travel to ensure that it is secure. Further inspections are required after driving 150 miles or three hours, whichever comes first, and the driver must also inspect the load when he has a change of duty or takes a break.

Adhering to the FMCSR when loading and monitoring freight may help a carrier avoid liability simply by preventing accidents. In the event of an accident, being able to show that the carrier and driver followed the FMCSR may also reduce the carrier's financial exposure.

*Timothy W. Wiseman
Michael B. Langford
Indianapolis*

Employers Should Know the Law on Employees and Military Duty

In light of current world events, employers should become familiar with the Uniformed Services Employment and Re-Employment Rights Act (USERRA). This federal law, which applies to all employers, outlines the rights of employees who are in the uniformed services and seek military leave. Such employees may take a leave of absence of up to five years for active duty, military training, funeral honors duty, or examination for fitness for duty.

Under USERRA, an employer is not required to pay for an employee's health insurance after the employee is out of work for more than 30 days of military duty; however, an employee may elect to continue coverage for up to 180 days by paying his or her own premium. Also, employees on military leave may retroactively contribute to the employer's 401(k) plan when they return to work.

Many states have enacted laws that provide added protection to service men and women, so it is important to review the applicable state laws as well as USERRA to ensure that your company is in compliance.

*James H. Hanson
David D. Robinson
A. Jack Finklea
Indianapolis*

Visit the Firm's website at www.scopelitis.com for Firm background information, practice areas, attorney profiles, and past issues of *The Transportation Brief*.



Mileposts

Plans Underway for Firm-Produced Program on Captive Insurance

A video-based program on captive insurance for motor carriers is in production by the Firm. It will be available to clients and friends in the spring of 2002.

The program will feature Indianapolis managing partner Greg Feary and associate Jeff Toole. Feary and Toole regularly advise trucking and insurance clients on a wide range of insurance issues.

The program's working title is "Captive Insurance: Creative Approaches to the Hard Market in Trucking Insurance." It will explain to viewers the basics of captive insurance programs, which may be an attractive alternative to certain motor carriers in today's tough insurance market.

A captive insurer is an entity that insures the risks of its parent company or one that covers unique or restricted risks, according to Feary. The formation of a captive, which requires extensive legal and accounting advice, should be undertaken only by motor carriers that fit very specific criteria.

The video program will be available in CD-Rom and VHS formats. Pricing is yet to be determined. For further information or to pre-order the program, call Director of Practice Development Karla Cooper-Boggs at 317-637-1777, or send her an e-mail at kcboggs@scopelitis.com.

For the Record

Indianapolis partner **Jim Hanson** was recently named 2002 Chairperson for the North American Transportation Employee Relations Association (NATERA). NATERA provides a national forum for the exchange of information concerning human resources and labor issues affecting the transportation industry.

Steve Pletcher, a managing partner in the Indianapolis office, was the subject of "Insider Insight" in the October 2001 issue of *PEO Insider*, which is published by the National Association of Professional Employer Organizations. "Insider Insight" is a monthly column that features leading professionals in the PEO industry.

Laurie Baulig, a partner in the D.C. office, has been invited to serve on the Transportation Research Board's Committee on Women's Issues in Transportation. The committee will meet periodically to discuss such issues as safety and security in transportation, access to public transportation, and career development in the transportation industry.

Chicago partner **Bill Brejcha** has been appointed to the Standing Committee on Military Affairs of the Illinois State Bar Association.

On the Road

Greg Feary will speak on "Legal Developments Concerning Independent Contractors" at the Truckload Carriers Association's Independent Contractor Division Meeting, January 18, in **Chicago**.

Laurie Baulig will conduct educational sessions on overtime laws and ergonomics at the Air Conditioning Contractors Association Annual Conference in **Orlando, Florida**, February 27 to March 3, 2002.

Transportation Lawyers' Seminar Set for January 18 in Chicago

The Transportation Lawyers Association (TLA) has announced plans for its Regional Seminar, to be held Friday, January 18, in **Chicago**.

Indianapolis partner **Tim Wiseman** will speak on DOT enforcement issues in a speech titled "Responding to Adverse Safety Ratings." Partners **Norm Garvin** (Indianapolis) and **Bill Brejcha** (Chicago) will attend as well.

The TLA is an independent, international bar association whose members assist providers and users of logistics and transportation services. Indianapolis partner **Andy Light** is a member of the TLA's Executive Committee.

Other seminar topics include safety regulations, hours of service, technology and the trend towards paperless logs, contract litigation, insurance, and drug testing.

Questions may be directed to Program Chairs **Steve Novy** (847-662-7458) or **Don Vogel** (312-836-5101).



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Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

Proceed With Caution!

Practical Strategies for Transportation-Industry Employers

An Employment Law Workshop

Tuesday, February 26, 2002

Wyndham Drake Hotel; Oak Brook, Illinois

A workshop for company owners, general managers, human resources directors, risk managers, in-house counsel, and other employment professionals

Topics include: **Are your salaried employees truly exempt?**
Will today's problem employee become tomorrow's high-dollar plaintiff?
Do you know when to fight unemployment claims and how to win?
Is your handbook a contract of employment?

Cost: \$150/person (\$125 for each additional participant from the same company)

Registration: Register by Friday, February 15, 2002;

First-come, first-serve basis, due to limited space

For more information, including a registration form, please visit our website at www.scopelitis.com or call Karla Cooper-Boggs at 317- 637-1777.



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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