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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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Shippers As Additional Insureds Can Create Legal Issues For Carriers

Often, motor carriers are asked to name their shippers as additional insureds on the carriers' comprehensive general liability insurance, auto liability insurance, and/or cargo insurance coverages. Depending on the context of the request, the effect of an additional insured endorsement may require careful evaluation and coordination of obligations between the parties.

The Additional Insured Endorsement Should Match The Shipper's Request

In seeking additional insured status, the shipper is requesting that the insurance coverage of the motor carrier cover the shipper's losses that are either (a) arising out of the motor carrier's operations or (b) resulting from the operations of the motor carrier providing service to the shipper. It is important to understand the difference between (a) and (b) to ensure that the endorsement matches the shipper's request. The law interprets the phrase "arising out of" to be a very broad type of additional insured coverage that includes covering damage or injury due to the shipper's negligence. The "resulting from" language has been interpreted more narrowly to afford coverage only when the shipper may be vicariously liable for the negligent acts of the motor carrier.

The Endorsement Must Also Coordinate With Indemnification Obligations

In the typical indemnification clause within the shipper's contract, the motor carrier assumes the tort liability of the shipper and holds the shipper harmless from claims. Understandably, motor carriers often seek to negotiate a mutual indemnification clause under which each party indemnifies the other against its respective negligent acts. Ironically, however, courts have held that the contract between the shipper and the motor carrier is not an "insured contract" when it includes a mutual indemnification clause. Because many policies automatically insure third parties who enter into "insured contracts" with the named insured, creating a mutual indemnification clause may eliminate additional insured coverage. Consequently, it is important to make sure that the additional insured endorsement procured for a shipper does not depend on the existence of an "insured contract." Otherwise, when negotiating a mutual indemnification clause, the motor carrier may be eliminating the insured's coverage and thereby breaching the additional insured provision of the shipper contract.

Gregory M. Feary
Indianapolis

Briefly...

Criminal Liability For Truck Accidents?

Although safety directors are well aware of the risks of civil liability arising out of truck accidents, a driver's conduct can also lead to criminal liability.

In Southern Indiana, a truck driver involved in a fatal collision with the car he was following was not only joined in the civil suit brought against his employer but also jailed on criminal charges. At trial, the prosecutor argued that the truck driver, who failed to see that the lead car was slowing to make a left-hand turn, acted recklessly by traveling five miles per hour over the speed limit and following the lead car too closely. The truck driver was convicted of reckless homicide. Although the Firm was able to convince the Indiana Court of Appeals to overturn the conviction on appeal due to lack of evidence of excessive speed or following too closely, other convictions have been affirmed for serious violations of the traffic code.

As always, trucking companies must be vigilant with respect to the driving habits of both company drivers and contractors. A criminal conviction arising from a truck accident also provides civil plaintiffs with devastating evidence to place in front of a jury. Be mindful, therefore, of every form of complaint that drivers are violating traffic codes, whether they come from customers, consumers, or law enforcement officials.

Thomas E. Farrell
A. Jack Finklea
Indianapolis

In an appeal successfully argued by Indianapolis partner Jim Hanson, the U.S. Court of Appeals for the 2nd Circuit has ruled that a major motor carrier's prescription-drug screening of truck drivers does not violate the Americans With Disabilities Act and does not subject the carrier to class action claims brought by the EEOC.

Illinois Workers' Compensation Premium Assessment Overturned

In an order issued January 21, 2003, the Illinois Department of Insurance recognized certificates of occupational accident insurance as proper evidence that 27 delivery drivers under lease to a motor carrier opted out of the Illinois Workers' Compensation Act as it relates to extra hazardous work. The order thus prohibited the carrier's insurer from assessing additional workers' compensation premiums associated with the drivers.

The hearing officer reasoned persuasively that, because certificates of insurance from workers' compensation insurers are evidence of coverage obtained elsewhere, then the occupational accident certificates were also appropriate to show that the drivers had opted out of the Act. The hearing officer also noted it was unlikely that drivers would inflate their expenses by choosing both occupational accident and workers' compensation coverage and that those who opt out of the Act should be encouraged to purchase alternate coverage. The decision, while still subject to appeal, helps motor carriers with Illinois owner-operator fleets by substantially diminishing the negative effect of a prior Illinois case and provides guidance for similar disputes in other states.

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

Workers' Compensation Settlements Trigger Medicare Issues

As noted in the last *Transportation Brief*, the Centers for Medicare and Medicaid Services (CMS) is aggressively pursuing collection actions against employers that are designed to stop the payment of unreimbursed Medicare benefits resulting from workers' compensation claims.

In the past, when claimants were eligible for Social Security Disability (SSD), the goal of the employer was to simply settle the claims as quickly as possible. The claims were settled for a reduced value because the claimants applied for SSD and Medicare paid for the continuing treatment of the work-related medical condition. This is estimated to have cost Medicare $43 billion from 1991 through 1998.

Under the new system, employers must reimburse all past Medicare conditional payments through the claim settlement. There are no exceptions to this rule. Employers must also identify any case in which there is a reasonable expectation that there will be future Medicare payments for the work-related condition. If the claimant is presently enrolled in Medicare (or may be within thirty months), an allocation must be made in the settlement agreement between indemnity benefits and medical payments. Also, a reasonable expectation of Medicare payments is deemed to exist in cases involving settlements of $250,000 or more.

Gerald F. Cooper, Jr.
Chicago

SCOPELITIS, GARVIN, LIGHT & HANSON

Mileposts

Insurance Coverage Tightened Through Independent Review And Audit

Trucking owners coping with the hard insurance market through multiple sources and types of coverage should be careful to review and coordinate policies, according to Indianapolis partners Andy Light and Greg Feary. An independent policy review may be the best way to eliminate gaps in coverage that arise through changes in the company's structure, operations, contractual commitments, or insurance carriers.

The review should include each policy's scope of coverage, exclusions, endorsements, and coordination with the company's other insurance coverage. Factors to consider include the potential for gaps in coverage created by restructuring and the carrier's potential exposure for accidents involving its owner-operators and employee drivers. The insurance programs of related companies, such as logistics arms and equipment lessors, should also be examined.

A comprehensive report following the review may include recommendations for the motor carrier to work with its insurance broker and insurers to

- consider alternatives to bobtail coverage;
- review the coverage and deductible amounts on uninsured motorist coverage;
- check commercial general liability coverage for exclusions related to acts by independent contractors; and
- verify that excess and umbrella coverage protects the carrier from liability under its federally-imposed MCS-90 endorsement.

SGL&H attorneys bring years of experience in trucking insurance to a policy review project. Light has focused his practice almost exclusively on trucking law since he joined SGL&H in 1981. His areas of concentration include regulatory compliance, tax issues, restructurings, and coverage analysis.

In addition to policy reviews, which focus upon the language and coverage of policies already in place, SGL&H also provides insurance program audits. The scope and purposes of a program audit are broader than those of a policy review, according to Feary. Feary has conducted many audits for motor carriers, some of which have led to alternative risk programs including single parent and group captive insurance, risk retention groups, and various self-insurance and self-insured retention programs.

For the Record

Carla Hounshel, an associate in the Indianapolis office, was selected by the Indianapolis Bar Association (IBA) as its Young Lawyer of the Year. Carla's award was based on her leadership in a variety of IBA programs that serve the Indianapolis legal community.

Chicago partner **Jerry Cooper** has been selected by the Chicago Law Bulletin to serve on the Leading Lawyers Network Advisory Board as one of the top 750 lawyers in the State of Illinois.

On The Road

Dan Barney will attend the 2003 Air Freight Management Conference & Exposition, March 8-9, in **Phoenix.**

Greg Feary and Dan Barney will lead a workshop on "Lease-Purchase Plans" at the Truckload Carriers Association's 65th Annual Convention, March 9 – 12, in **Orlando.** Norm Garvin also will attend.

James Attridge will speak on "Intermediary Liability for Cargo Losses" at the Transportation Intermediaries Association's 25th Anniversary and Trade Show, March 27, in **Anaheim, California.**

Bob Browning and Rich Clark will speak at the Claims/Loss Prevention and Security Annual Conference sponsored by the American Trucking Associations' Safety & Loss Prevention Management Council, March 31 – April 2, in **Charlotte, North Carolina.** Bob's topic is "Measure of Damages in Cargo Claims," and Rich will cover "Mitigation Techniques in Damaged Shipments."

Bob and Rich also will speak at the American Moving and Storage Association's Annual Convention and Trade Show, April 5 – 8, in **La Quinta, California.**

James Attridge and Rich Clark will speak at the joint annual meeting of the Transportation Consumers Protection Council and the Transportation Loss Prevention and Security Association, April 6 – 8, in **Reno.** Rich's topic is "How to Win in Court." James will participate in a panel on "Law of the Land vs. Law of the Jungle."

Tom Farrell and Mike Langford will attend the American Bar Association's "MegaConference VI," April 17 & 18, in **New Orleans.**

Norm Garvin, Andy Light, and James Attridge will attend the Transportation Lawyers Association's Annual Conference, April 29 – May 3, in **Maui.**

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Dispatches

SCOPELITIS, GARVIN, LIGHT & HANSON

Tim Wiseman reports that the Federal Motor Carrier Safety Administration (FMCSA) recently submitted to the Office of Management and Budget (OMB) its long-awaited plan to reform the commercial truck driver hours of service regulations. The OMB can publish the plan for public comment or send it back to the FMCSA for further revisions. It is anticipated that the OMB will finish its review by Spring.

Transporters of logs, dressed lumber, metal coils, paper rolls, concrete pipe, autos and other heavy equipment should be mindful of the new load securement and tie-down rules that recently went into effect. According to **James Attridge,** the new rules will require motor carriers to change their existing load securement procedures and provide training to their drivers on the new tie-down rules. Carriers have until January 1, 2004 to achieve compliance with the new requirements.

Rich Clark advises household goods carriers to expect the newest version of changes to the Federal Consumer Protection Regulations to appear again in the near future. The new changes could be published for comment as soon as February, after review by the OMB. Depending upon the actual release date, the comment period could run into the Spring, making it questionable whether the new regulations will be implemented before the 2003 moving season hits full stride.