

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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Broker-Carriers May Encounter Unanticipated Liability

Growth in the property brokerage industry can be attributed to motor carriers entering an industry segment that historically has been ruled by companies devoted to that purpose. Any number of factors drive carriers toward providing supplemental brokerage services, including potential profits, customer demand, and load management. Also, brokers perceive they are insulated from claims arising out of the contracted carrier's negligence. Recently, however, courts have developed new theories for making brokers jointly and severally liable for damages caused by a contracted carrier's acts.

Broker-carriers are potential targets

Property brokers are traditionally held to be mere intermediaries between shippers and carriers and not liable for cargo damage or accident liability caused by carrier negligence. That distinction between carriers and brokers can become blurred when the broker also maintains carrier authority and performs motor carrier operations. Many broker-carriers are tendered loads in their capacity as a carrier and subsequently tender the same loads to a third party in their capacity as a broker. Often, the broker-carrier will remain the named carrier on the bill of lading for the load. These practices may cause a confusion of roles that can result in unanticipated liability.

Restructuring may offer protection

The current litigation and insurance environment has caused many plaintiffs, in the context of both cargo claims and accident litigation, to look for avenues of recovery beyond a contracted carrier's available policy limits. Different theories for recovery from a broker-carrier abound, and increasingly courts are being urged to disregard the view of brokers as traditional intermediaries. In addition, insurance for the broker-carrier's brokerage operation is becoming more difficult to obtain. Accordingly, a review of broker-carrier operations is warranted, and consideration should be given toward splitting brokerage authority and operations into a separate and dedicated brokerage company.

*Jay D. Robinson, Jr.,
Indianapolis*

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Briefly...

U.S. Supreme Court Upholds Validity Of Himalaya Clause For Inland Carrier

On November 9, 2004, the U. S. Supreme Court issued its first major decision governing cargo claims liability in over 40 years. The Court upheld "Himalaya clauses" in ocean bills of lading which extend the limitation of liability enjoyed by the ship owner to "downstream" carriers, particularly railroads and truckers that complete the last leg of the journey on land.

The shipment in question was destined from Australia to Alabama and was damaged in a derailment before reaching its final destination. Describing the case as "a maritime case about a train wreck" the Court ruled that maritime law applied rather than state law or the Carmack amendment because the essential character of the commerce was maritime even though a surface component was involved. It also held that common sense dictates that land carriers are intended beneficiaries of Himalaya clauses. Last but not least, the Court reiterated the principle that shippers are bound by whatever arrangements their intermediaries negotiate with the carrier.

SGL&H filed an *amicus curiae* brief in the case on behalf of the Transportation Loss Prevention and Security Association.

*James Attridge,
San Francisco*

Recent Americans With Disability Act Ruling On Hiring Practices Raises Possible Conflict

A federal court in California recently found that UPS wrongfully applied a blanket rule that screened out deaf applicants for all driving positions. Although DOT safety regulations disqualify deaf applicants, the regulations apply only to commercial motor vehicle drivers and not to UPS's package truck drivers. The court therefore required UPS to individually evaluate whether deaf applicants can drive package trucks safely.

In contrast, in 2003, a federal appellate court in New York held that J.B. Hunt did not unlawfully discriminate against the disabled by employing hiring practices that went beyond DOT regulations. Rather, according to the court, J.B. Hunt properly declined to hire applicants who used medications with potentially-dangerous side effects.

Notably, the DOT regulations, which expressly authorize carriers to impose more stringent requirements to promote safety, applied to all J.B. Hunt drivers. UPS, however, applied the DOT requirements to package truck drivers who were not subject to the DOT limitations at all. The UPS decision thus raises a possible conflict in how and when carriers may apply rules designed to promote safety, and, as a result, carriers should review any blanket restrictions used in hiring.

*James H. Hanson,
A. Jack Finklea,
Indianapolis*

Driver Criminal Charges May Impact Motor Carrier Liability

The outcome of a truck driver's criminal charges arising from an accident may affect subsequent lawsuits involving the same accident. In most jurisdictions, evidence of a felony conviction is admissible in a subsequent civil action. Meanwhile, with respect to citations or misdemeanors, a plea of guilty is usually admissible and a finding of guilt after trial often is not.

Pleas are not technically conclusive of fault, but jurors often give considerable weight to a guilty plea in determining fault in subsequent civil lawsuits. Motor carriers should thus be proactive and confer with their drivers about strategies for defending criminal charges, including whether the carrier should pay for the criminal defense attorney. However, because the interests of the driver and carrier could be in conflict, separate legal counsel for the driver is often advisable.

*Michael B. Langford,
Indianapolis*

Illinois' recent amendment to its rolling stock sales tax exemption has caused considerable confusion. If assistance is needed on this issue, contact Andy Light, Bill Brejcha, or Ron Morelock, as important changes take effect July 1, 2005.



Mileposts

Restructured Motor Carrier Operations May Spark Opportunities on Many Fronts

The potential for reducing liability by separating a motor carrier's broker authority from its other functions as suggested in this *Transportation Brief* is one of many benefits of a carefully structured motor carrier operation.

For motor carriers, restructuring is the process of breaking down the operations into separate legal entities. Each entity holds potential for a different insurance coverage, tax, debt-management, or other opportunity for the owner. The most basic restructured operation may result in (1) a trucking company that holds the motor carrier authorities and conducts over-the-road operations, (2) an equipment-leasing company that owns trucks and trailers, (3) a logistics/brokerage company that performs sales and marketing functions, and (4) a real estate company that holds title to land and buildings.

Restructuring may be an option for carriers of all sizes and may be accomplished more readily than one would expect. It should be viewed, however, as a proactive strategy aimed at long-range goals – not a “quick fix” for current problems, according to Indianapolis partner Andy Light.

Light has been involved in most of the Scopelitis firm's restructuring projects. He is joined by partners Norm Garvin, Greg Feary, Jay Robinson, and Todd Metzger in Indianapolis and Bill Brejcha in Chicago.

The newest member of the Scopelitis restructuring team is Greg Ostendorf, who joined the Indianapolis office in December as of counsel. Ostendorf notes the opportunities for redistributing existing debt and assuming new debt in the course of a restructuring project.

Besides restructuring issues, Ostendorf's practice will focus on business transactions, bankruptcy, and creditors' rights. He spent the past eight years as General Counsel and Secretary of Braun Consulting, Inc., a publicly-held information technology and business consulting company that was recently acquired by Fair Isaac Corporation.

Trucking owners interested in the potential benefits of a restructuring plan should be prepared to collaborate with the company's legal advisers, accountants, insurers, and/or insurance brokers. Successful collaboration among these disciplines requires a common ground of hands-on experience in issues specific to trucking.

For the Record

Norman R. Garvin has been selected to serve on the Indiana Motor Truck Association's Board of Directors and its Executive Board for 2005.

Gerald F. Cooper, Jr. has been appointed General Counsel of the Illinois Trucking Association.

Norman R. Garvin, Andrew K. Light, James H. Hanson, Lynne D. Lidke and **Gregory M. Feary** have been named Super Lawyers® 2004. Super Lawyers are deemed to be in the top 5 percent of attorneys in each state as chosen by their peers and through independent research.

James Attridge has earned a client nomination to The BTI Client Service All-Star Team 2005. This elite list honors a select group of attorneys who deliver exceptional client service to Fortune 1000 clients.

Gregory A. Ostendorf joined the firm on December 1, 2004 as of counsel in the Indianapolis office. Greg's practice focuses in the areas of business transactions and restructurings, bankruptcy, and creditors' rights.

On the Road

Mike Langford will present a case study at the Trucking Industry Defense Association's Mini-Seminar in **Las Vegas**, February 10.

Mike will also present “The Pain and Gain of Scorched Earth Discovery Tactics” at the American Bar Association's Transportation Megaconference VII, March 3-4, in **New Orleans**. **Tom Farrell** will attend as well.

Jim Hanson will speak on “Pre-Employment Screening: Protecting Your Company's Interest” at the Specialized Carriers & Rigging Association's 2005 Specialized Transportation Symposium in **Albuquerque**, on March 4. **Dan Barney** will present “Strategies for Avoiding Costly Lawsuits by Owner-Operators”.

Dan Barney will also attend the AirCargo 2005 Conference in **Coronado, California**, on March 6-7.

Greg Feary and **Dan Barney** will participate in the 2005 Truckload Carriers Association Annual Convention in **Las Vegas**, on March 8, where Dan will lead a trucking-in-the-round panel on owner-operator issues.

Dan will also be at the Truck Rental & Leasing Association's 2005 Annual Meeting in **Tucson**, April 5-7.

Norm Garvin, Don Vogel and **Leonard Kofkin** will attend the Transportation Lawyers Association's 2005 Annual Conference in **Indian Wells, California**, May 10-14.



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Dispatches



Tim Wiseman reports that the FMCSA is once again considering the possibility of mandating the use of **electronic on-board recorders** for interstate trucking companies. In its Advanced Notice of Proposed Rulemaking issued on September 1, 2004, the FMCSA requested comments from the industry on various issues related to the use of the recorders to document compliance with the federal hours of service regulations. Proposed rules on this topic are expected from the FMCSA in early 2005.

A new law requires employers to notify employees of their rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In addition, the Department of Labor is in the process of creating regulations that interpret USERRA. Jim Hanson warns employers to carefully analyze their **new and continuing obligations to employees called to or returning from active military service**.

According to Norm Garvin, the Indiana Department of Revenue has **logo plates** available to qualified applicants. The new logo plates may display a company's logo and/or name and could therefore reduce incidents of plate theft.

Steve Pletcher cautions that states across the country are becoming increasingly aggressive in **reclassifying owner-operator/independent contractors** as employees for state unemployment tax purposes. Although increased activity appears to focus on the courier and home delivery aspects of the industry, motor carriers should also review independent contractor operations for compliance with state unemployment law.