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## NEWSLETTER

January 2008

## TRANSPORTATION LAW UPDATE

### CALIFORNIA UPDATE:

#### RECENT REGULATIONS AND DECISIONS CONCERNING THE TRANSPORTATION INDUSTRY

##### Update on Hours of Service

The Interim Final Rules issued by the FMCSA became effective December 27, 2007. On January 24, 2008, the D.C. Circuit Court denied a motion by Public Citizen to invalidate the Interim Final Rules. Thus, the rules now in effect allow commercial drivers:

1. Up to 11 hours of driving time within a 14-hour, non-extendable window from the start of the workday, following 10 consecutive hours off duty; and
2. To restart their calculations of the weekly on-duty time limits after at least 34 consecutive hours off duty.

Carriers may submit comments on the Interim Final Rules through [www.regulations.gov](http://www.regulations.gov).

##### Update on TRU – ATCM

The California Air Resources Board's Airborne Toxic Control Measure ("ATCM") will be in full effect at the end of 2008. The ATCM applies to all Transport Refrigeration Units ("TRU") on trucks, trailers, shipping containers, and railcars operating in California, whether they are registered in California or elsewhere.

The measure has two components – a reporting component for facilities located in California that have 20 or more loading dock doors serving refrigerated areas, and a performance component that requires all (Cont'd on page 3)

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### THE RIDDLE OF THE BROKERS: *HOW BROKERS' EXPANDING ROLES EXPAND THEIR LIABILITY*

To borrow an old riddle, "When is a truck not a truck? When it turns into a garage."

The same question applies, more seriously, to brokers. Thus, if the question is, "When is a broker not a broker," the answer turns out to be "when it turns into a carrier." The riddle is in figuring out when and how this happens. A second, and equally puzzling question, is when and how a broker's liability may expand beyond what has been traditionally imposed upon it.

If a company acts strictly as a broker, it can be held liable for damaged or lost freight only when it is found to be negligent. In contrast, if a company acts as a motor carrier or a freight forwarder in interstate commerce, its liability

for freight damaged or lost while in its possession is almost automatic under 49 U.S.C. §14706. While this distinction in liability schemes sounds straightforward, the reality of the brokering business and a number of court decisions have created uncertainty, leaving a broker potentially at risk for liability even in the absence of negligence.

Traditionally, brokers arranged for the transportation of freight by acting as conduits between shippers and carriers. Under that scenario, their risk of liability for lost or damaged freight was generally limited to situations of negligent entrustment. Now, they have expanded their roles to provide

value added services, such as assuring delivery schedules, maintaining their own freight insurance, and exerting expanded levels of control over shipments. While such services and advertisements help a broker in competing for customers and in retaining customers, providing such services also enlarges its risk of liability.

The provision of additional services will likely preclude a broker from asserting that its liability is limited to negligent entrustment. In several instances, courts have found that a broker's conduct opened it up to liability as a carrier and/or created duties far beyond the mere selection of a licensed carrier. Thus, if a broker stops acting narrowly as a broker, it may stop being treated like one too. (Cont'd on page 2)

## THE RIDDLE OF THE BROKER, *cont'd*

### When is a Broker Not a Broker?

At least one California court has confirmed what many in the business already know, but may not want to admit – the difference between a carrier and a broker is often blurry. The factual determination of whether a company is a broker, freight forwarder, or motor carrier is not controlled by what the company labels itself, but rather by how it represents itself to the world and its relationships to the shipper and the carrier. Under this analysis, companies that consider themselves brokers may find themselves facing greater than expected risk as a result of their advertising and the additional services they provide.

Often, brokers advertise their services by assuring potential customers that they have a good safety record, that they provide extra or added value, and that they provide on-time delivery. However, the provision of additional customer services, and the advertisement of those services, can create additional liability. Courts may decide that a broker served as a motor carrier when its actions were not strictly limited to arranging for the transport of freight. In one case, a broker assured the shipper regarding its own contingent insurance coverage, presented the shipper's insurance claim after the loss occurred, advised the shipper that the freight would be driven by a team using a GPS tracking system, and advised the shipper that the freight would go directly to the destination. The fact that the broker advertised that it provided control, the very latest systems, and timely transit supported the court's decision that the broker could be held liable as a motor carrier.

Significantly, the fact that a company is licensed as a broker does not prohibit it from also being considered a carrier or freight forwarder for purposes of determining its liability for lost or damaged freight. Obviously, a transportation entity may have authority to operate as both a broker and a carrier. More importantly, a broker that acts as a carrier or freight forwarder and that fails to properly register as a carrier may still be found to be a carrier for purposes of assessing liability for damaged or lost freight.

The statutory definitions of the entities add to the uncertainty. The definition of a broker provided in 49 U.S.C. §13102(2) is "a person ... that ... offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, or arranging for, transportation by a motor carrier for compensation." A motor carrier is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(3). The definition of transportation includes "services related to that movement." 49 USC §13102(2). These services may include arranging for the transportation along with the additional services offered by many brokers.

One crucial difference between a broker and a motor carrier is whether the company legally binds itself to transport. If it does, it will likely be considered a carrier. The question as to whether a broker bound itself to transport is one of fact depending upon the communications, advertisements, relationships, and conduct

surrounding the particular transportation.

Further, the definition of a freight forwarder found in 49 U.S.C. §13102(8) leaves room for interpretation. A company that provides for the transportation of property for compensation, advertises that it coordinates multiple loads, assumes responsibility for the freight from pick up to delivery, and utilizes a carrier subject to the Carmack Amendment may be found to be a freight forwarder, even though it considers itself a broker.

In one case, a court ruled that a company may be considered a freight forwarder even if it does not perform all of the authorized functions, as long as it offers freight forwarding services. Thus, once again, a broker's advertisement may create greater liability than it anticipates.



*"Companies that consider themselves brokers may find themselves facing greater than expected risk as a result of their advertising and the additional services they provide."*

*"The statutory definitions of the entities add to the uncertainty."*

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## Practice Group Update

**Jason Booth** recently resolved two significant stormwater lawsuits brought by a private environmental advocacy group against California trucking companies accused of violating the Clean Water Act. The settlements allowed the companies to pay only a small fraction of the amounts sought, and to implement reasonable improvements to their stormwater management practices.

**Hillary Arrow Booth** is scheduled to participate on a panel of Leading Transportation Attorneys at the April 2008 meeting of the Transportation Loss Prevention & Security Association. She will speak on the drafting and enforcement of provisions to limit liability for lost or damaged freight often contained in bills of lading.

**Hillary Arrow Booth** and Associate **Paul Rasmussen** continue to defend trucking companies in the pending case regarding diesel emissions at the Port of Los Angeles.

**Tim Swickard** continues to represent trucking companies in regulatory and enforcement matters, including compliance with the TRU ATCM and in prosecutions related to Unsatisfactory BIT inspections

## CALIFORNIA UPDATE, *cont'd*

### Update on TRU – ATCM

TRU's operating in California to meet certain performance standards. The specific standards vary by the horsepower range of the engines, and can be met by:

- Using an engine that meets the engine certification standard;
- Equipping engines with the required level of diesel emission control; or
- Using alternative technology.

Interestingly, the California Air Resources Board ("CARB") has declared its intention to aggressively implement and enforce this measure even though it has not been granted a waiver from the US EPA. CARB requested a waiver from preemption of the federal Clean Air Act back in March 2005, and was expecting a decision by the end of 2007. Without the waiver, a challenge to the implementation and enforcement of the measure may be made, based upon the preemption of the federal Clean Air Act.

### CARB APPROVES EMISSIONS PLAN FOR PORTS AND RAIL YARDS

The California Air Resources Board ("CARB") adopted new rules on December 7, 2007 that mandate the replacement or retrofitting of the drayage trucks servicing the Los Angeles and Long Beach Ports. Under these rules, the regulated trucks must comply with the following:

- By December 31, 2009:
  - Equip pre-1994 trucks with 1994 or later engines and retrofit the engines with emission control devices for an 85% reduction in PM emissions;
  - Retrofit 1994 through 2003 engines with devices that achieve an 85% reduction in PM emissions;
  - 2004 or newer engines must meet 2004 model year emissions standards.
- By December 31, 2013:
  - All drayage trucks must meet or exceed 2007 engine standards.

Both the Long Beach and Los Angeles Ports have adopted new container fees in an effort to raise funds for the required conversions and retrofitting. Estimates indicate that the container fees could bring in as much as \$1.6 billion for the truck replacement program. The fees are to be collected by the shipping terminals, and will not apply to containers entering or leaving the Ports by rail. Also, CARB plans to include another \$400 million into the truck replacement program.

For further information on these topics, contact Hillary Arrow Booth at 213- 943-6100

*"CARB has declared its intention to aggressively implement and enforce this measure even though it has not been granted a waiver from the US EPA"*



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## ABOUT OUR FIRM

We are a mid-sized firm providing our clients with first-rate lawyering and professional service at a good value. Most importantly, we see ourselves as being in partnership with our clients. We treat our clients' concerns as our own. Further, it is not by accident, but by design, that many of the Firm's partners are involved in government and politics. Our ability to maneuver our clients' interests through the maze of government requirements, or to obtain government cooperation, is a critical and unique benefit of working with our Firm. We service the litigation, transactional, and regulatory needs of clients in many industries including transportation, manufacturing, energy, recycling, real estate, high-tech, construction, and entertainment. Our success is built upon the professionalism, dedication, and performance of each individual in our Firm. While we plan for future growth, we are determined to retain these qualities and continue to provide energetic and creative representation to our clients.

For more information on our practice areas and attorneys, visit our website at [www.dlflawyers.com](http://www.dlflawyers.com).

## DONGELL LAWRENCE FINNEY -- FIRM NEWS

### *SENIOR SCHWARZENEGGER APPOINTEE TIM SWICKARD JOINS FIRM AS PARTNER*

As Chief Legal Counsel and Director of the Department of Toxic Substances Control during Governor Schwarzenegger's first term, Mr. Swickard brings to the Firm's Clients an unparalleled knowledge and expertise in nearly all aspects of environmental, real estate development, construction, and public agency law matters, whether compliance or litigation related.



Appointed by Governor Schwarzenegger in 2004 as Chief Counsel of the Department of Toxic Substances Control, Mr. Swickard oversaw the Department's Office of Legal Counsel and the Criminal Investigation Branch, as well as the Forensic Investigation, CEQA, and Regulations Units. In addition to providing legal advice, Mr. Swickard initiated the Criminal Hazardous Waste Sting Unit targeting unlicensed transporters of hazardous waste, the Department's Risk-Based Enforcement Initiative re-prioritizing enforcement resources to target violators posing the highest risk to public health and the environment, and the Mercury Lamp and E-Waste Compliance Enforcement Initiative. He also initiated the Department's Nuisance Law Site Cleanup

Regulations and the AB 389 Brownfields remediation Program jointly with the State Water Resources Control Board to facilitate remediation and reuse of smaller low risk Brownfields sites. During his tenure, Mr. Swickard also negotiated the final model Joint Consent Decree language between the State of California and the EPA.

Mr. Swickard's law practice includes the representation of developers, public agencies, transportation companies, and resource conservation landowners in the areas of Federal and State environmental law and litigation, land use entitlement, real estate development, construction, environmental compliance and hazardous waste law, and water law.

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