



## The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

### FLASH NO. 7

#### LIKE AN OLD PENNY, IT KEEPS TURNING UP

Another lawsuit regarding independent contractors and the Leasing Regulations was in the news recently. The lawsuit has been around since 2004 but unfortunately continues to demand time and money due to a simple miscue.

The lawsuit, *Piron, et al. vs. Swift Transportation Co., Inc.*, is an example of what can happen unless you comply with Federal Leasing Regulations. The lawsuit was filed as a class action against Swift, alleging two breach of contract claims for three categories of potential class members:

- (1) Owner-operators who drove under written contracts that paid per mile based on the Household Mover's Guide ("HMG");
- (2) Owner-operators who drove under written contracts that paid on a "per mile" basis; and
- (3) Employee drivers, who drove as at will employees, and were paid "per mile" driven.

Plaintiffs contend that Swift breached the contracts of employees and owner-operators paid on a "per mile" basis for failure to pay based on actual miles driven. The second cause of action, affecting all categories of drivers, is a breach of covenant of good faith and fair dealing for using and not disclosing that HMG miles result in a mileage calculation less than actual odometer miles.

49 C.F.R. 376.12(d) states that the amount to be paid by a motor carrier for

equipment and driver services shall be *clearly stated* on the contract's face. Swift met this requirement for the first category of drivers by indicating that the miles would be based on HMG calculations. However, there seems to be a miscue regarding the second category of owner operators who drove under contract that paid on a "per mile" basis. Based on this miscue, the Plaintiffs presented a class action theory. The Motion for Class Certification was denied at the Trial Court, but the Court of Appeals reversed and remanded the class certification issue back to the Trial Court. Swift appealed to the Arizona Supreme Court, which reversed the Court of Appeals on a procedural jurisdictional basis, remanding the case back to the Trial Court. Plaintiffs filed a renewed Motion for Class Certification. The Trial Court changed its mind and granted the Motion after a six-year odyssey.

If Swift had provided details to all drivers indicating that Swift would use HMG miles, this lawsuit would not exist. The breach of covenant of good faith and fair dealing for using and not disclosing that HMG miles are less than actual odometer miles does not seem to be particularly persuasive. Drivers should notice after a few trips that their odometer miles and settlement checks are not matching. When such a systemic miscue occurs, however, the criteria for certifying a class is easier.

A class certification analysis is beyond the scope of this memo, but a key to

that analysis is whether questions in law or fact exist which are common to the class. This is easily met when considering mileage calculations. Therefore, our year end message is to encourage motor carriers to make a New Years Resolution to review their independent contractor operating agreements to ensure they contain all requirements in 49 C.F.R. 376.12. Remember, actual operational conduct and the provisions of the contract must be in sync. The Federal Leasing Regulations are rather straightforward and if followed in both the contract and conduct, unfortunate situations like the *Piron* case can be avoided.

#### Additional Information

For additional information, please contact any of the following attorneys:

#### Transportation & Logistics Practice Group

**Marc S. Blubaugh** at 614.223.9382 or [mblubaugh@beneschlaw.com](mailto:mblubaugh@beneschlaw.com)

**Richard A. Plewacki** at 216.363.4159 or [rplewacki@beneschlaw.com](mailto:rplewacki@beneschlaw.com)

**Teresa E. Purtiman** at 614.223.9380 or [tpurtiman@beneschlaw.com](mailto:tpurtiman@beneschlaw.com)

**Eric L. Zalud** at 216.363.4178 or [ezalud@beneschlaw.com](mailto:ezalud@beneschlaw.com)

#### Labor & Employment Practice Group

**Maynard Buck** at 216.363.4694 or [mbuck@beneschlaw.com](mailto:mbuck@beneschlaw.com)

**Joseph N. Gross** at 216.363.4163 or [jgross@beneschlaw.com](mailto:jgross@beneschlaw.com)

**Ann E. Knuth** at 216.363.4168 or [aknuth@beneschlaw.com](mailto:aknuth@beneschlaw.com)

**Peter N. Kirsanow** at 216.363.4481 or [pkirsanow@beneschlaw.com](mailto:pkirsanow@beneschlaw.com)