

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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U.S. Supreme Court Upholds Michigan Trucking Fees

On June 20, 2005, two U.S. Supreme Court decisions ended a long legal battle prosecuted by Scopelitis attorneys on behalf of the trucking industry. The Court upheld a flat \$100 decal fee assessed annually by the State of Michigan on each for-hire truck operated solely in interstate commerce and base plated within the state. The Court also sanctioned a flat \$100 fee imposed on for-hire trucks engaged in Michigan intrastate operations. The Scopelitis firm, which has been co-class counsel in the lawsuit challenging the fees for over ten years, was supported by the U.S. Solicitor General on its claim against the interstate fee. The American Trucking Associations (ATA) intervened in the suit to challenge the intrastate fee.

The Court's Rulings May Be Narrowly Interpreted

In a split decision, the Court ruled that Michigan's \$100 fee imposed on interstate-operated trucks does not violate the \$10 fee cap established by the Single State Registration System (SSRS). According to the majority, the SSRS pre-empts state fees only if they impede a carrier's ability to register under the SSRS and Michigan's law passes the test because it does not hold a carrier's SSRS compliance "hostage" until the \$100 fee is paid. ATA's Commerce Clause challenge to the intrastate fee was rejected on the basis that fees imposed for distinctly local activities are permissible absent proof of a discriminatory impact on interstate carrier operations. Thus, neither ruling stands for the proposition that states are free to ignore the SSRS limitations placed upon carrier registration or to impose flat trucking fees that actually discriminate against interstate commerce.

Carriers May Take Steps To Avoid Michigan's Fees

Given the flexibility the International Registration Plan affords carriers with multi-state operations, many will be able to avoid the \$100 fee on interstate-operated trucks by base plating outside Michigan. In addition, to the extent operationally feasible, carriers should continue dedicating only a limited number of trucks to Michigan intrastate operations or use trip permits when available to reduce the impact of the \$100 intrastate fee. In short, the disappointing U.S. Supreme Court decisions send a message to interstate carriers that, if they are to limit the effect of Michigan's flat truck fees, they must assess and potentially change the way in which they register and conduct their operations.

*Andrew K. Light
James H. Hanson,
Indianapolis*



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Briefly...

Indiana Adopts Tax Amnesty Program

For the first time in history, Indiana is offering a tax amnesty program between September 15 and November 15, 2005. All listed taxes or fees administered by the Indiana Department of Revenue, including IRP and IFTA (Indiana interest only), are included in the amnesty program. Any taxpayer with a liability for a tax period ending on or before July 1, 2004 is eligible.

To participate in the amnesty program, a taxpayer must sign an amnesty agreement and agree to pay all tax liabilities. In return, the Department will waive any related penalties, interest, or collection costs and agree to forego any civil or criminal actions against the taxpayer for the covered tax periods. A taxpayer has an option of paying the tax through an installment plan that must be completed by June 15, 2006. If an eligible taxpayer chooses not to participate in the amnesty program, a double penalty applies unless a pre-existing payment plan or a legitimate "hold" (usually associated with a tax protest) was in place as of May 12, 2005, a timely tax appeal was filed with the Indiana Tax Court, or the taxpayer proves it never received notice of the outstanding liability.

Final regulations addressing the amnesty program have yet to be promulgated by the Department and should be reviewed before entering into an amnesty agreement.

*Andrew K. Light
Ronald D. Morelock,
Indianapolis*

Indiana Courts Update Rulings on Spoliation Claims

"Spoliation," which refers to the negligent or intentional destruction or loss of evidence relevant to a

lawsuit, has been the subject of recent Indiana court rulings. Although the Indiana Supreme Court declined to recognize a claim for "first party" spoliation of evidence, an Indiana appellate court later acknowledged that "third party" claims for spoliation do exist under Indiana law.

The distinction between "first" and "third" party claims means that, if a motor carrier is sued as a result of a truck accident, the injured claimant may not assert an additional claim for spoliation against the motor carrier (the "first party"). However, an insurer of the motor carrier (a "third party" not involved in the original accident) may be subject to a spoliation claim if the insurer loses, damages, or destroys evidence and thereby negatively affects the claimant's action against the motor carrier.

Motor carriers and insurers should therefore contact counsel after a serious accident to discuss whether and what type of evidence to preserve. Consideration should be given to preserving logs, trip sheets, fuel receipts, comchecks, maintenance records, satellite tracking data, on-board computer data, and other relevant trip documents.

*Thomas E. Farrell
Thomas J. Schulte,
Indianapolis*

Air Cargo Security Is New Concern Of Trucking

Air cargo security regulation has become a legal concern for more than just the airlines. Motor carriers, brokers, and logistics companies that pick up freight destined for a passenger aircraft must first obtain either certification from the Transportation Security Administration (TSA) as an indirect air carrier (IAC) or appointment in writing by an IAC as its agent, with assigned security functions. TSA security rules must then be strictly followed. If

the air cargo is hazardous ("dangerous goods"), separate DOT/FAA requirements apply.

Ignoring these legal mandates could bring not only heavy TSA and FAA penalties, but also civil suits for huge money damages in the event of a catastrophic airliner crash. The best preventive measures: TSA registration (if desired), frequent compliance-checking, and carefully-drafted contracts.

*Daniel R. Barney,
Washington, DC*

Preference Claims In Bankruptcy Under Fast-Track Schedules

The U.S. Bankruptcy Code provides that the trustee or a debtor in bankruptcy may claim reimbursement of any payments made by the bankrupt entity in the 90 days preceding the bankruptcy filing. Such claims, known as "preference claims," have multiplied exponentially over the past few years. In mid-2004, over 15,000 adversary proceedings were pending in Delaware and an additional 10,000 were anticipated before the end of the year.

The increase in filings has led Delaware to implement strict case management rules for preference cases. Generally, answer and discovery deadlines cannot be extended, and the case, if not quickly settled, will be ordered to mediation.

There are defenses available, some of which are unique to the transportation industry. In fact, recent amendments to the Bankruptcy Code, effective after October 17, 2005, strengthen these defenses. However, given the fast track now in place in Delaware and likely to be implemented elsewhere, it is more important than ever to address preference claims immediately.

*Craig J. Helmreich
Gregory A. Ostendorf,
Indianapolis*

Mileposts

Appellate Practice Reaches Summit In U.S. Supreme Court Litigation

The Scopelitis firm's recent appearance before the U.S. Supreme Court in its challenge to Michigan's decal fees was a high point in the firm's appellate practice over the past 25 years.

The firm's appellate practice group is led by Indianapolis partner Lynne Lidke, who was at fellow partner Jim Hanson's side on April 26 when Hanson presented his oral argument in the Michigan decal fee case. Lidke helped prepare Hanson for his appearance before the nine Justices and had a hand in each brief filed in the case as it worked its way from a Michigan trial court to the highest court in the land.

The Scopelitis firm considers its appellate practice to be an important adjunct to its litigation services. In some cases, an appeal is necessary to clarify the law or to simply right the wrong when the uncertainties of litigation produce an adverse result. In other cases, it is just as important to vigorously defend an appeal brought by the opposing party in order to protect a favorable judgment obtained at trial.

The firm's appellate work – the strategizing, goal-setting, and weighing of risks and benefits – requires close collaboration among the appellate practitioners and the trial lawyers most familiar with the case. It is not unusual, therefore, for members of the appellate practice team to become involved in significant litigation cases early on and to lead the research and writing efforts at both the trial court and appellate court levels.

Since joining the firm in 1984, Lidke has devoted her practice to complex appellate and trial court litigation in a number of areas affecting motor carriers, including insurance coverage questions, state tax disputes, highway accident defense, business conflicts, and employment law matters. A managing partner since 1998, she is also actively involved in day-to-day firm management.

Lidke's fellow members on the Scopelitis firm's appellate practice team – which has been involved in over 65 appeals in state and federal courts across the country – are Indianapolis associates Jack Finklea and Jay Taylor. Finklea focuses his practice on labor and employment matters, while Taylor devotes much of his efforts to the nationwide defense of owner-operator class action lawsuits. Both Lidke and Taylor previously served as judicial clerks on the Indiana Court of Appeals, which affords them an extra measure of insight on how best to guide a case through the appellate process.

For the Record

We are pleased to announce that Kathleen C. Jeffries has joined the Scopelitis firm at its new office in Los Angeles, California. Kathleen is a well-recognized transportation law litigator and is Immediate Past President of the Transportation Lawyers Association.

Don Vogel has been elected to the post of First Vice President of the Transportation Lawyers Association. He is also the Editor of *The Transportation Lawyer*, a Transportation Lawyers Association publication.

On the Road

Rich Clark will speak at the American Moving and Storage Association's National Safety Conference, September 10-13, in **Herndon, Virginia**.

Kim Mann and Don Vogel will attend the Canadian Transport Lawyers Association Conference, September 15-18, in **St. John's, Newfoundland**.

Norm Garvin, Tim Wiseman, and Todd Metzger will participate in a panel on "Improving Your Odds" in the "game" of independent contractors, broker liability, shipper contracts, cross border operations, employment, refinancing, and DOT/FMCSA issues at the Indiana Motor Truck Association's annual meeting, September 28 - October 2, in **Las Vegas**.

Victor Shane, Rob Rubin, and John Magiera will attend The Longshore Institute's Longshore Seminar, October 4-5, in **New Orleans**.

Tom Farrell, Mike Langford, Angela Cash, Don Devitt, and Jim Ellman will attend the Trucking Industry Defense Association's meeting, October 6-7, in **Las Vegas**.

Dan Barney will attend the Truckload Carriers Association's Independent Contractor Division Annual Meeting, October 6-7, in **Chicago**.

Norm Garvin, Andy Light, Greg Feary, Jay Robinson, and Dan Barney will attend the American Trucking Associations' Management Conference & Exhibition, October 15-19, in **Boston**.

Jim Hanson, Jerry Cooper, and David Robinson will attend the North American Transportation Employee Relations Association's 19th Annual Conference, October 16-19, in **Amelia Island, Florida**.



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Dispatches



Published reports indicate that employer costs associated with the **Family Medical and Leave Act (FMLA)** totaled \$21 billion in 2004. The transportation and telecommunications industries were the hardest hit. Steven Pletcher reminds carriers to review FMLA policies particularly with respect to the interplay with health benefit plans, an area that can cost employers significantly.

Ron Morelock reports that state taxing authorities are increasingly targeting interstate motor carriers with **unsolicited mailings that request disclosure of the carrier's in-state business activities**. Abatement of tax, interest and/or penalties is typically offered if the carrier files tax returns with payment on some open tax years, but carriers should carefully analyze in-state business activities before responding to taxing authorities.

As expected, the Transportation Security Administration (TSA) has reported delays in the **fingerprint-based criminal background checks** required for all CDL holders with Hazmat Endorsements beginning May 31, 2005. One reason is that many states have an insufficient number of sites that can process the fingerprints for the TSA. Because of these expected delays, Tim Wiseman suggests that drivers start the fingerprinting and application process in their home states at least 60 days before their current CDL expires.



Illinois General Assembly Passes New Workers' Compensation Law

Carriers with operations in or employee drivers who drive through the State of Illinois should be aware of the new workers' compensation law signed by Governor Rod Blagojevich on July 20, 2005. The new law makes Illinois a much more expensive state in which to do business.

House Bill 2137 is the product of what is known as the "Agreed Bill" process between management and labor. Under this procedure, no changes can be made to the Workers' Compensation Act unless both groups sign off on those changes. Unfortunately for Illinois employers, the business lobbyists lost much during the negotiation process and received little in exchange.

Benefit Increases

A "snapshot" of numerous benefit increases under House Bill 2137 is as follows: The law will increase the amount of scheduled permanent partial disability awards; death claim benefits; and compensation for amputations, disfigurement, and loss of an eye. In addition, the minimum rates on all injuries are increased, as is the basis for computation of a maximum wage differential. The law also creates a new category of compensation for temporary partial disability. Finally, full temporary total disability benefits will be required during vocational rehabilitation, and maximum penalties for late payments will increase by 400%.

Bureaucratic Changes

House Bill 2137 also affords the Illinois Workers' Compensation Commission broad new powers in a wide array of situations. As written, the law permits the Commission to close down a business for a lapse in workers' compensation insurance coverage, and criminal penalties have been added for failure to secure such coverage. Self-insured employers will have new reporting and auditing requirements, and all employers will become responsible for Rate Adjustment Fund payments. In addition, the Commission will now be responsible for administration of medical fee schedules and utilization review disputes.

Fraud Provisions

The Governor sought legislation that cracked down on fraud. In the end, however, the new law contains fraud provisions that target the employer and make prosecution for claimant fraud most difficult.

Fee Schedules and Utilization Review

The legislation creates Fee Schedules and a Utilization Review for charges submitted by health care providers. Business lobbyists say these provisions will produce savings for employers that will partially offset the benefit increases otherwise contained in the new law.

Questions or requests for a more detailed synopsis of House Bill 2137 should be directed to Chicago partners Jerry Cooper and Victor Shane.