

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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Preparation and Participation are Key to an IFTA/IRP Audit

The International Fuel Tax Agreement (IFTA) and the International Registration Plan (IRP) afford motor carriers the benefit of apportioning their fuel tax and vehicle registration fee payments among the states based upon mileage incurred in each jurisdiction. Adding to the convenience of making filings and payments with a single base state, IFTA and IRP also reduce the potential for duplicative fuel and plate administration expense that carriers once faced in interstate operations. Importantly, however, IFTA and IRP recordkeeping requirements are rigorous, and carriers that neither prepare for nor participate meaningfully in an audit may incur substantial liability.

First impressions make a difference

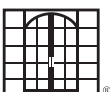
Motor carriers sometimes approach the IFTA/IRP audit process too casually. In early communications, the auditor will often identify what records need to be produced and organized for audit. Expecting the auditor to accept your company's records "as is" if they are not organized in a logical, easy-to-audit format can create a poor – and costly – first impression. Also during this information-gathering stage, it is important to cross-check reports and returns to identify any inconsistencies and correct errors that may be seen by an auditor as "red flags" requiring a closer examination of the records.

Collaboration with the auditor can also have positive results

An auditor's unassisted review of carrier records may leave questions unanswered and result in adverse audit findings. A knowledgeable carrier representative assisting the auditor, however, can anticipate and address those questions early on. For example, participating in the selection of sample vehicles and time periods for review, explaining what might otherwise appear to be "gaps" in mileage or fuel records, and identifying alternative source information when record deficiencies do exist can reduce the carrier's potential exposure. Significantly, if the carrier's records are deemed inadequate, the auditor may impose a 4.0 miles-per-gallon presumption that will substantially increase the IFTA taxes owed, or may recalculate a 100% IRP fee liability to the base state without affording credit for fees previously paid to any other state.

In sum, it is important to approach an audit courteously and cooperatively, yet diligently and cautiously, with an eye toward advocating your company's position. If a costly assessment does result, be mindful that a protest procedure is available, but usually only within 30 days. Thus, an assessment should be put into the hands of a capable tax representative as soon as it occurs.

*Andrew K. Light,
Lynne D. Lidke
Indianapolis*



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Briefly...

Beware of IFTA's Punitive Interest Calculation

Carriers are often unaware that IFTA assessments bear a costly interest rate of 1% per month and also employ an interest calculation with potentially harsh results. Under IFTA, fuel tax overpayments to one state offset tax underpayments to another state, but interest applies separately to any underpayment regardless of overpayments made elsewhere.

Thus, for example, if 2003 taxes are found to have been overpaid to a number of jurisdictions by \$110,000, but underpaid to other jurisdictions by \$100,000, only a \$10,000 tax liability will result. However, because interest is calculated separately on the underpayments, by the end of 2006 the carrier may also owe anywhere from \$27,000 to \$36,000 in interest, depending upon the quarters in which the liability accrued. Also, assessed interest may be waived only by each particular state to which it is owed. These requirements are strictly mandated by the IFTA Articles of Agreement and may be a consideration for a future petition to the IFTA Board of Directors in order to request a change.

*Andrew K. Light,
Indianapolis*

C-TPAT Imposes Minimum Security Criteria for Highway Carriers

Although the Customs-Trade Partnership Against Terrorism (C-TPAT) continues to be a voluntary program run by the Bureau of Customs and Border Protection (CBP), participation by highway carriers requires compliance with increased security measures mandated by CBP. CBP commenced implementation of aspects of the new security requirements in May, taking steps to harden the physical supply chain and requiring C-TPAT carriers to tighten internal controls. The security requirements address the entire supply chain, from the point of origin (the location at which tractors and trailers are stored), through the point of pickup, and on to the point of distribution.

On the horizon for mid-October is implementation of the C-TPAT Business Partner Requirements, under which highway carriers must establish written and verifiable processes to screen their business partners. Business partners include the carrier's agents, sub-haulers, and service providers. Carriers must also have processes for screening customers. CBP's continued commitment to security will require increased vigilance by C-TPAT carriers and a hefty undertaking by those wishing to become C-TPAT certified.

*Christopher C. McNatt,
Los Angeles*

State Anti-Indemnity Laws Emerge to Benefit Carriers

In negotiating shipper agreements, carriers often address one-sided indemnity clauses requiring the carrier to indemnify the shipper for any claims arising out of the agreement even if caused in whole or in part by the shipper's conduct. A more balanced approach is now mandated in a few states, with many other states likely giving it consideration at the urging of state trucking groups and the American Trucking Associations' vigilant effort to turn the spotlight generally on tort reform.

Indiana, Nebraska, Oklahoma, North Carolina, Texas, Virginia and West Virginia have enacted carrier-specific laws voiding any provision of a contract that shifts a shipper's liability (for either negligent or intentional acts) to the motor carrier, thus requiring each party to bear the burden of its own conduct. Importantly, there are limits to these new laws, some of which do not apply to a contract for indemnity under the Uniform Intermodal Interchange and Facilities Access Agreement. Also, which state law applies to your shipper contract may hinge on a choice-of-law clause in the contract coupled with the logical connection between operations under the contract and the state the parties contemplate such operations will be centered in, to, and from.

*Gregory M. Feary,
Indianapolis*

For the Record

Misti Presnell DeVore has joined the firm as an associate in the Indianapolis office. Misti will continue her ten-year career in trial court litigation, concentrating on truck accident defense, insurance coverage, and commercial and business disputes.

Congratulations to **Renea Vealey Hill**, who first joined the Scopelitis firm thirteen years ago as a legal secretary and recently passed the Illinois bar. Renea is now an associate in the Chicago office, focusing in the areas of civil litigation and transportation law.

Kathleen Jeffries has been asked to serve as a Voting Past President of the Transportation Lawyers Association for 2006-2007.

Mileposts

Efficient IRP Program Calls for State-by-State Knowledge

Long before they have occasion to use the audit tips offered on the cover of this issue of *The Transportation Brief*, motor carriers may have a choice as to where their fleet will be base-registered under the International Registration Plan (IRP). Strategizing an IRP program from the outset or even changing IRP base jurisdictions can result in a much more efficient and economical company registration process.

The IRP is an agreement among the states and Canada that allows the proportional registration of fleets of vehicles. A primary purpose of IRP is to allow for a single base jurisdiction to issue IRP plates that allow for both interstate and intrastate movements. The base jurisdiction is then responsible for calculating, collecting, and distributing fees for all IRP jurisdictions in which the fleet is operated according to the mileage traveled in each of those jurisdictions. Initially, most IRP fees were limited to the actual state registration fees, but more states are now collecting other fees and taxes, such as excise and property taxes, through the base jurisdiction.

According to Indianapolis partner Andy Light, who has assisted motor carriers with IRP registrations since the program was federally adopted in 1996, registration is relatively straightforward for motor carriers with a single base of operations. But IRP registration is more complicated and requires planning and assistance for carriers engaged in the following activities:

- ❖ startups,
- ❖ mergers and acquisitions,
- ❖ equipment leasing arrangements,
- ❖ the creation of affiliated fleets and services,
- ❖ use of owner-operators,
- ❖ multiple state or provincial terminal locations, or
- ❖ the transfer of IRP base jurisdictions

Light, who is assisted by paralegal Sue Madden on IRP registrations, advises that a carrier's choice of the best state for its base jurisdiction relies on several factors, including each state's additional fees, (e.g., vehicle title fees, cab card fees, and county wheel tax); administrative benefits; established place-of-business qualification; and registration-related restrictions, such as in-state title requirements. Indiana, for example, is now viewed as a particularly "user-friendly" state, as it allows for electronic filing, self-issuance of temporary IRP registrations, out-of-state titles for non-Indiana-based or leased vehicles, and IRP plates displaying the motor carrier's logo.

On the Road

Steven Pletcher will present "Benefits of Regulatory Certainty for PEOs" at the National Association of Professional Employer Organizations' Annual Conference, September 11-13, in **Boca Raton, Florida**.

Don Vogel will offer "A Motor Carrier Update from the U.S. Perspective" at the Canadian Transport Lawyers Association's Conference, September 14-16, in **Toronto**. Kim Mann and Kathleen Jeffries also will attend.

Dan Barney will provide an update on independent contractor litigation at the Truckload Carriers Association's Independent Contractor Division Annual Meeting, September 21-22, in **Chicago**.

Greg Feary will moderate a panel entitled, "Owner-Operator Insurance Issues - A Motor Carrier's Perspective," and Dan Barney will deliver a "Legal Update - Independent Contractor/Lease Purchase Agreements" at the American Trucking Associations' National Accounting and Finance Council's Fall Meeting, September 24-26, in **Washington, D.C.** Jerry Cooper also will attend.

Jim Hanson, David Robinson, Don Vogel and Sari Pettinger will conduct a human resources workshop for the North American Transportation Management Institute to be held in conjunction with the ATA Safety & Loss Prevention Management Council meeting, September 26, in **Las Vegas**.

Norm Garvin and Todd Metzger will participate in the Indiana Motor Truck Association's Annual Meeting, September 27-29, in **Santa Ana Pueblo, New Mexico**.

Tim Wiseman will lead the Truckload Carrier Association's audio conference, "Are You Prepared for the Worst?" September 28, 12:00 pm - 1:30 pm.

Norm Garvin will address members of Delta Nu Alpha at their annual meeting, October 6, in **Louisville**.

Tom Farrell, Mike Langford, Don Devitt, and Jim Ellman will attend the 14th Annual Trucking Industry Defense Association Industry Seminar, October 12-13, in **Memphis**.

Jim Hanson, Jerry Cooper, and David Robinson will attend the North American Transportation Employee Relations Association's 20th Annual Conference, October 15-17, in **Amelia Island, Florida**.

Steven Pletcher will attend the National Transportation & Logistics Association's Fourth Annual Transportation Roundtable, October 18-20, in **Scottsdale, Arizona**.

Norm Garvin, Andy Light, Greg Feary, Jay Robinson, Dan Barney, and Allison Smith will attend the American Trucking Associations' Management Conference & Exhibition, October 28-31, in **Dallas**.



SCOPELITIS, GARVIN, LIGHT & HANSON

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Dispatches



SCOPELITIS, GARVIN, LIGHT & HANSON

- ◆ **In a recent unprecedented decision, a federal appellate court awarded a truck driver benefits under the Family and Medical Leave Act even though he was not employed by the company for the full year normally required by the FMLA. Jack Finklea reports that the driver previously ran the same route for another trucking company, and even though the two companies did not merge or transfer assets, the court counted the entire period the employee ran his particular route, regardless of which company employed the driver at the time.**
- ◆ **Rich Clark advises household goods movers to note the FMCSA's new 2006 version of the "Your Rights and Responsibilities When You Move" booklet. Readers may download a copy at <http://www.protectyour-move.gov/consumer/awareness/rights/Rights1.htm>**
- ◆ **Legislative proceedings in the U.S. Senate appear in place to delay implementation of the new Unified Carrier Registration System, the effect of which would require for-hire motor carriers to file 2007 Single State Registration System (SSRS) renewals. Less progress in the House, however, makes it uncertain whether SSRS filings will continue for 2007. Andy Light suggests affected carriers continue to monitor the situation.**