

THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

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ILLINOIS SUPREME COURT RULING SPARKS INCREASE IN BIOMETRIC PRIVACY LITIGATION

As the use of biometric identifiers for timekeeping, handheld devices, and security grows, so does state regulation and litigation. Illinois, Washington, and Texas are examples of states that regulate the collection, use, and retention of biometric identifiers such as fingerprints, voiceprint, eye retinas, iris scans, full hand, or facial geometry scans. A recent Illinois Supreme Court ruling and the subsequent flood of litigation regarding compliance with Illinois's Biometric Information Privacy Act (BIPA) highlights the urgent need to review biometric compliance protocol.

BIPA requires companies to develop a written retention and destruction policy related to biometric information and make the policy available to the public. Companies must also make written disclosures and obtain authorization from an individual before collecting biometric data.

BIPA was enacted in 2008, and a renewed interest in BIPA lawsuits followed a 2019 decision from the Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corporation*. The Court held a plaintiff does not need to show actual injury to recover statutory damages under BIPA. Rather, mere procedural violations of the statute, such as the failure to obtain written authorization or to publicly

post a retention policy, were sufficient to support damages. Any procedural violation provides the "aggrieved" individual with a private right of action to recover liquidated damages of \$1,000 for each negligent violation and \$5,000 for each reckless violation of BIPA, along with reasonable attorneys' fees and costs.

Companies can reduce potential exposure by implementing the following:

- Ensure proper retention and destruction policies are in place and publicly available.
- Ensure all biometric information destruction policies comply with the applicable timelines set forth in the statute.
- Ensure all notice and authorization forms are distributed before biometric identifiers are collected or disseminated to third-parties.

Early investment in proper biometric identifier notifications, authorizations, policies, and procedures may save time and money in the long run.

Andrew J. Butcher
Chip Andrewsavage,
Chicago



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BRIEFLY

Federal Courts Split on Applicability of Federal Preemption in Negligent Hiring Claims

In the Autumn 2018 issue of *The Transportation Brief*, the Firm analyzed two federal court decisions that held the Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempted the plaintiffs' negligent selection claims against a broker. Since then, three additional federal district courts have addressed this issue as the law surrounding broker liability continues to develop. In *Creagan v. Wal-Mart Transportation, LLC*, a federal court in the Northern District of Ohio dismissed a negligent hiring claim against a broker based upon FAAAA preemption. However, in *Finley v. Dyer and Nyswaner v. C.H. Robinson, Inc.*, federal courts in Mississippi and Arizona, respectively, held the FAAAA does not preempt such claims. The Firm continues to monitor these and other broker liability and negligent selection cases, and is well-positioned to provide options and cutting-edge legal defenses to those faced with these types of claims.

Thomas E. Schulte
Timothy W. Cochren,
Indianapolis

Transporting Hemp Still Risky Business After 2018 Farm Bill

The 2018 Farm Bill (the Bill) removed hemp and hemp-derived products—provided they contain a THC concentration of 0.3% or less—from the Controlled Substances Act's definition of marijuana, effectively decriminalizing the transportation of those products at the federal level. But, as some carriers and their drivers have learned, states can prohibit transportation of hemp and

related products within their borders.

While the Bill will eventually preempt states from prohibiting the interstate transportation of hemp through their borders, that section of the Bill does not take effect until the U.S. Department of Agriculture (Department) has taken steps to review and approve state regulatory plans and to develop regulations governing hemp production – the Department has not yet taken such actions. In the meantime, some states continue to enforce their state-law bans on hemp products by impounding shipments and arresting drivers, including those operating in interstate commerce.

Despite the hemp-friendly provisions of the Bill, carriers must still exercise caution in accepting shipments of hemp and hemp-derived products for delivery. At the least, they should carefully analyze the laws of the various states through which the products will move to ascertain whether those states continue to treat the products as unlawful.

Brandon K. Wiseman
Indianapolis,
Nathaniel G. Saylor
Salt Lake City

Supreme Court Weighs in on Arbitration with Owner-Operators

Convincing all of the Justices of the U.S. Supreme Court to agree on something is a challenge, but owner-operator Dominic Oliveira was able to do just that in the case *New Prime, Inc. v. Oliveira*, decided on January 15, 2019. (Information and Commentary about the oral argument was published in the Autumn 2018 issue of *The Transportation Brief*.)

At issue was whether Mr. Oliveira—who personally drove a lease-purchase truck—was exempt from the Federal Arbitration Act

(FAA) because he had a “contract of employment.” The answer would determine whether Prime could invoke the FAA to enforce an arbitration agreement Mr. Oliveira had agreed to.

Prime argued Mr. Oliveira did not have a “contract of employment” because he was an independent contractor. The Court disagreed, holding that even *bona fide* independent contractors may have “contracts of employment,” based on the meaning of that phrase when the FAA became law in 1925.

The Court's opinion does not foreclose arbitration with owner-operators. Arbitration agreements may be enforceable under state law even if the FAA does not apply. Now is a good time to review your arbitration agreements to determine the most effective approach going forward.

Braden K. Core,
Indianapolis
Prasad Sharma,
Washington, D.C.

Canada's New Federal Fuel Tax

The Canada Revenue Agency (CRA) now administers a federal fuel tax that is part of the Canadian government's plan to reduce Greenhouse Gas (GHG) emissions in Canada. Those engaged in commercial transportation of goods over the roadways between two or more provinces or between a U.S. location to a Canadian location and operating commercial vehicles with 3 or more axles regardless of weight, or 2 axles with a GVW or CGVW of more than 26,000 pounds (11,797 kg) are required to (1) register as a road carrier with the CRA and (2) pay a fuel charge in specified provinces. The CRA registration deadline for motor carriers operating in Manitoba, New Brunswick, Ontario and Saskatchewan was April 1, 2019 and is July 1, 2019 in

Fuel Tax, continued on back page

SPOTLIGHT

Emerging Tech Practice

The way transportation companies conduct business today is changing quicker than ever, with technology presenting new opportunities and challenges. The Scopelitis Firm actively follows these changes and frequently assists newly-formed, technology-based transportation companies and established companies that seek to adopt new technologies to enhance their existing business model. Our attorneys use their unique understanding of the regulatory structure and familiarity with the transportation industry to help companies incorporate rapidly changing technology into their business practices.

Scopelitis Partner Shannon Cohen helps lead the Firm's Sharing Economy, Autonomous Vehicles, and Emerging Technologies Practice. Cohen monitors forthcoming and active legislation and regulation pertaining to issues affecting motor carriers, and possesses a comprehensive understanding of how regulations interact with and impact the design and use of emerging technology in the transportation industry.

Cohen works closely with Scopelitis President and Managing Partner Greg Feary to manage this quickly growing practice. During a time when regulations are often entrenched in transportation's previous low-tech era, Feary's extensive experience in the transportation space provides insight that results in creative legal and practical solutions to some of the most technical legal problems involving innovation.

"Our primary focus remains being ahead of the curve when it comes to what our clients need to know to keep up with this fast-paced industry," said Feary. "Our Firm's contacts within the transportation industry - and years of experience in creating new and alternative business models to solve problems - help us offer innovative, legally-sound solutions to new technology in a heavily regulated industry."

For questions regarding Scopelitis' Sharing Economy, Autonomous Vehicles, and Emerging Technologies practice, visit our website to connect with Shannon Cohen, Greg Feary, Craig Helmreich, Andy Light, Nathaniel Saylor, or Brandon Wiseman.

FOR THE RECORD

We are pleased to announce that Colleen McCoy has joined the Firm's Dallas/Ft. Worth office. Colleen joins the Personal Injury, Property Damage, and Cargo Claims practice group.

Congratulations to Fritz Damm, in the Firm's Detroit office for being named the Transportation Club of Detroit's Member of the Year.

ON THE ROAD

Kathleen Jeffries will speak on a panel Keep Austin Weird – But Not Your Mediations and Craig Helmreich will present a Mock Cargo Claim Appeal at the Transportation Lawyers Association's 2019 Annual Conference, May 1-4, in **Austin, Texas**. Don Vogel will also attend the Conference and the CTLA Midyear Meeting. Fritz Damm will attend as Past President and Chair of the Membership Committee.

Shannon Cohen will attend the American Trucking Associations' 2019 Mid-Year Management Session, May 5-8, in **Scottsdale, Arizona**.

John Hove will serve as Co-Chair at the organizational meeting of the Transportation and Logistics Specialty Group at TAG Alliances Global Legal Network's 2019 Spring International Conference, May 8-11, in **London, England**. Jake Fisher will also attend.

Jeff Jackson will attend the BiTA Spring Symposium, May 9, in **Atlanta, Georgia**.

Ron Morelock will present State Tax Updates/Fleet Restructuring at the 2019 McLeod Software Transportation Accounting & Finance Conference, May 13-15, **Birmingham, Alabama**.

Steve Pletcher will be speaking at NAPEO's PEO Capitol Summit, May 21-23, in **Washington, D.C.**

Michael Tauscher and Fritz Damm will present on the topic of Cargo Loss and Damage at the Conference of Freight Counsel's Summer Meeting, June 8-10, in **Greenville, South Carolina**. Kathleen Jeffries will also attend.

Greg Feary will present on the topic of Independent Contractors and the *Dynamex* decision at the American Trucking Associations' National Accounting & Finance Council's 2019 Annual Conference, June 10-12, in **Indianapolis**.

Renea Hooper will present Cross-Examination of Plaintiff's Trucking Safety Expert at the Defense Research Institute's Trucking Law Primer Seminar – Big Rig Meets the Court Room, June 26, in **Nashville, Tennessee**. Fritz Damm will also attend.

Kathleen Jeffries will attend the Transportation Lawyers Association's Executive Committee Summer Retreat as Voting Past President, July 12-14, in **Phoenix, Arizona**

Fritz Damm will attend the Defense Research Institute's Trucking Law Committee's Summer Steering Committee and dinner, July 12-13, in **Chicago, Illinois**.

Greg Feary, Shannon Cohen, Braden Core, and Allyson Feary will lead an owner-operator panel and Braden Core will present an update on arbitration at the American Trucking Associations' 2019 Trucking Legal Forum, July 14-17, in **Rancho Bernardo, California**. Allison Smith and Fritz Damm will also attend.

Jeffrey S. Toole, Editor
Allison O. Smith, Editor
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Fuel Tax, continued

Nunavut and Yukon. The fuel charge will be assessed at the pump.

Similar to International Fuel Tax Association (IFTA) procedures, the CRA requires a registered road carrier to file quarterly reports of fuel purchased and used within each listed province. This may result in additional fuel charges or a rebate.

Failure to timely register or pay the fuel charge may result in penalties and interest. The Firm regularly provides U.S.-based motor carriers assistance when contacting the CRA and registering for the fuel charge.

Ronald J. Morelock,
Indianapolis

DISPATCHES

Jeff Jackson reports that the Indiana Department of Revenue (INDOR) has been active in **assessing statutory civil penalties on motor carriers for past overweight/oversize violations** by as much as \$5,000 per violation any time within 3 years of the original citation date. Scopelitis attorneys can assist in negotiating significant reductions in these weighty assessments.

In light of the recent IPS Worldwide (payment processor) bankruptcy, and after the lessons learned in the similar TransVantage bankruptcy, Craig Helmreich advises brokers and carriers to include an **indemnification provision in contracts with their shippers to protect against “claw back” exposure** if a payment processor goes bankrupt.

Jeff Jackson notes that many companies are exploring **dynamic route optimization for pickup and delivery** with some piloting proprietary AI tools that set pickup and delivery sequence and adjust routes in real time based on traffic, road construction, and other factors. While these technological developments may improve overall carrier efficiency, the perceived increase in direction and control require carriers to manage the potentially negative consequence on independent contractor status for owner-operators.

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