THE TRANSPORTATION BRIEF®

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

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AB5 AND ABC: THE STORY CONTINUES

Two recent decisions have clarified how courts might interpret and analyze California Assembly Bill 5 (AB5). In *CTA v. Becerra, the Southern District of California* granted a temporary restraining order on December 31, 2019 enjoining the state from enforcing AB5 as applied to motor carriers. A hearing for a preliminary injunction was held on January 13; and on January 16, the preliminary injunction was granted with important references to U.S. Congressional intent to allow for owner-operator/independent contractors in trucking.

Concurrently, in *California v. Cal Cartage Transportation Express, LLC*, a California Superior Court held that the B prong of the ABC test used in AB5 and in Dynamex is preempted by the Federal Aviation Administration Authorization Act (FAAAA). The court recognized that the FAAAA was specifically adopted – at least in part – to limit state rules that act to limit owner-operator entry into the industry. The order granting the preliminary injunction in *Becerra* concurs and even defers to the well-reasoned B2B analysis in Judge Highberger's decision in the *Cal Cartage* case.

Importantly, the *Becerra* court denied the City of L.A.'s motion to intervene in the federal case, potentially limiting AB5 proponents' ability to make overlapping arguments in the two cases. It now appears likely that the issue will make its way to the United States Supreme Court via appeals of the final *Becerra* decision through the Ninth Circuit. The next steps in that journey occurred on January 29th when the State of California and Teamsters filed their notices of interlocutory appeal to the Ninth Circuit. Of course, it is likely to take months or even years to reach the Supreme Court for consideration, at which time the Supreme Court could decide not to hear the case (as it did recently in a case considering similar issues under the *Airline Deregulation Act – Brindle v. Rhode Island Dep't of Labor and Training*).

On the other coast, New Jersey continues to move forward with its efforts to create a more California-like environment. While New Jersey Senate Bill 4204 failed upon the legislature's adjournment this week, it was immediately reintroduced as Senate Bill 863 and is poised to continue its high-profile consideration by the Senate. We continue to monitor this legislation and other legislation introduced by states attempting to model the changes made to the treatment of independent contractors by AB5.

Gregory M. Feary
Shannon M. Cohen,
Indianapolis

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FLSA Conditional Certification Denied In Driver Case

Minimum wage compliance under the Fair Labor Standards Act is determined on a weekly basis: if the total weekly wages divided by the total hours worked exceed $7.25 per hour, the FLSA is satisfied. Further, the FLSA allows a plaintiff to bring a collective action on behalf of similarly situated employees. Before an FLSA case can proceed as a collective action, the court must conditionally certify the case. Courts generally grant conditional certification because the standard is quite lenient. In *Shell v. Pie Kingz, LLC*, the court denied the plaintiff's motion for conditional certification. Because the plaintiff's and other drivers' wages and expenses varied every week, minimum wage liability could not be determined on a collective basis and instead required a week-by-week, driver-by-driver analysis, precluding collective treatment. *Shell* represents a rare win for the defendant at the conditional certification stage and should help transportation companies defend against proposed FLSA collective actions by drivers whose compensation, hours worked, and business expenses vary from week to week.

Christopher J. Eckhart
James A. Eckhart,
Indianapolis

Choice of Law Questions Continue in California

Transportation companies outside of California face difficult questions about whether California law applies to their California operations. The Ninth Circuit recently held that California's minimum wage and overtime laws applied to non-California resident baseball players employed by non-California teams playing in an intra-state California league (*Senne v. Kansas City Royals Baseball Corp.*). The court applied California law because the players worked "entire days or weeks" in California, and California's choice of law rules favored application of California law. It is unclear whether California courts will extend the *Senne* court's reasoning to (1) interstate drivers who only occasionally deliver loads to and from California and (2) other California claims, such as expense reimbursement, wage statement, and misclassification claims.

Christopher J. Eckhart
Alaina C. Hawley,
Indianapolis

Hemp Transportation Remains Risky Business

The 2018 Farm Bill removed "hemp" and hemp derived products containing a THC concentration of 0.3% or less from the definition of marijuana under the federal Controlled Substances Act. States remain free to treat such products as illicit controlled substances, but cannot prohibit interstate transportation of hemp that is produced in accordance with a plan established or approved by the US Department of Agriculture (USDA). Unfortunately, determining whether hemp qualifies for this safe harbor is no easy feat.

The USDA has established a website identifying states seeking USDA approval or intending to adopt the USDA plan. For any state not listed by USDA, the assumption must be that hemp produced in any such state would not qualify for the federal safe harbor for interstate transportation. Finally, the USDA regulations do not specifically address what documentation a carrier should have in its possession to prove to law enforcement the hemp cargo qualifies for the safe harbor. As such, transportation companies will need to continue to exercise caution with respect to accepting shipments of hemp and hemp derived products.

Nathaniel G. Saylor
Salt Lake City,
Brandon W. Wiseman
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PHMSA Fails to Act on "Harmonization" Rulemaking

Transportation providers are closely watching the Pipeline and Hazardous Materials Safety Administration's (PHMSA) "harmonization" rulemaking, which aims to bring U.S. rules regarding the transportation of hazardous materials into compliance with international standards. Among other things, the rulemaking would require manufacturers and "subsequent distributors" of lithium batteries to generate and make available a Lithium Battery Test Summary (LBTS) that includes certain information and confirms a lithium battery is safe to ship. The LBTS is already a part of the International Civil Aviation Organization's (ICAO) standards for air transportation. In late 2018, PHMSA proposed that the LBTS would go into effect for domestic shipping on January 1, 2020. That date has come and gone without the agency issuing a final rule. Scopelitis is monitoring the rulemaking and will update clients of new developments.

Braden Core
Lizzie Bolka,
Indianapolis

SPOTLIGHT

Spotlight on
Class Action Defense

Over the last 15 years, the transportation industry has been subject to an onslaught of wage-and-hour class actions. In the cover article for this issue of *The Transportation Brief*, Partners Greg Feary and Shannon Cohen discuss recent developments in case law and legislative efforts on the worker classification front. Legislative efforts like New Jersey's efforts to adopt the ABC test for misclassification claims and California's AB 5 ensure wage-and-hour class actions will continue to threaten transportation companies for the foreseeable future.

Led by Partners Jim Hanson, Adam Smedstad, Andy Butcher, and Chris Eckhart, the Scopelitis Class Action Defense Team has defended misclassification cases in every segment of the transportation industry, as well as claims brought by company drivers. Scopelitis litigators have defended hundreds of class and collective action cases across the United States, including cases in California, New Jersey, New York, Massachusetts, Illinois, and Washington.

The Scopelitis Team understands the intricacies of the industry and the best approach to defending clients. Regardless of the nature of the claims, the Firm vigorously defends clients leading to successful resolution of the claims. Recent examples include:

- Obtaining a meal and rest break preemption determination from the Pipeline and Hazardous Materials Safety Administration
- Submitting an amicus brief in support of the FMCSA's decision preempting California's meal and rest break rules

As one of the few legal teams in the country to have successfully tried multiple class actions to verdict, Scopelitis is at the forefront when it comes to making and defending the law. To learn more, visit Scopelitis.com.

FOR THE RECORD

We are pleased to announce that Timothy M. Fisher has joined the Firm's Los Angeles Office. Tim joins the Class Action Defense and Complex Litigation practice group.

ON THE ROAD

Kevin Phillips presented "Intro to Warehouse Law Course" and "Case Studies in Warehouse Law" and Tyler Biddle presented "Risk Management – Transportation Exposures" at the World Food Logistics Organization's WFLO Institute West, January 12, in **Tempe, Arizona**.

Andy Light, Tim Wiseman, Shannon Cohen, Don Vogel, Becky Trenner, Bill Brejcha, Fritz Damm, Kathleen Jeffries, Tim Cochren and J.D. Robinson will attend the TLA Regional Seminar and Bootcamp, January 23-24, in **Chicago**.

Greg Feary will present "CA AB5 Issues" at the National Tank Truck Carriers' Winter Membership and Board Meeting, February 8, in **Naples, Florida**.

Ryan Wright will attend the National Association of Trailer Manufacturers' Convention & Trade Show, February 11-13, in **Las Vegas, Nevada**.

Greg Feary will present "Broker/3PL/Carrier Agreements – Beware What You Sign" at the Customized Logistics and Delivery Association's Final Mile Forum, February 19-21, in **Miami, Florida**.

John Greene will attend the Texas Transportation Association Board of Directors, Executive Committee, and TruckPAC meeting, February 27-28, in **Austin, Texas**.

Greg Feary will present "The Erosion of Entrepreneurship" at the Truckload Carriers Association's Annual Convention, March 1-3, in **Kissimmee, Florida**.

Jim Hanson will present "Predictive Scheduling – The Next Big Challenge for the Trucking Industry" at the North American Transportation Employee Relations Association's (NATERA) Conference, March 1-3, in **Orlando, Florida**.

Jim Golden will present "Golden Rule Case Study" for the Motivation and Incentive MBA classes at Harvard Business School, April 23.

Kathleen Jeffries will serve on a panel discussing legal issues on "Law of the Land, Law of the Jungle" at the Transportation & Logistics Council's Annual Conference, April 26-29, in **Orlando, Florida**.

Renea Hooper will present "To Admit or Not to Admit: Admissions of Negligence" at the Defense Research Institute's Trucking Law Seminar, April 29-May 1, **Austin, Texas**.

Kathleen Jeffries will attend and participate in the Executive Committee Meeting at the Transportation Lawyers Association's Annual Conference, April 29-May 2, in **Amelia Island, Florida**. Fritz Damm will also attend the Executive Committee Meeting as Recruiting and Membership Chair and Past President.

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DISPATCHES

For employers in California, a recent California Court of Appeal decision highlights the *importance of having employee wage statements reviewed for compliance* with California's numerous requirements under Labor Code § 226, reports Tim Fisher. In *v. Countrywide Payroll & HR Solutions, Inc.*, the court held that the employee failed to meet one of these requirements—that wage statements include "the name ... of the legal entity that is the employer"—where the wage statements identified the company by an acronym for a DBA registered out of state. As in *Noori*, wage statement claims are often brought as class actions in California, with the potential for significant civil penalties resulting from what could be characterized as mere technical violations of Labor Code § 226.

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