

The Transportation Brief®



Indianapolis

10 W. Market Street
Suite 1500
Indianapolis, IN 46204
Phone (317) 637-1777
Fax (317) 687-2414

Chicago

30 W. Monroe Street, Suite 600
Chicago, IL 60603
Phone (312) 255-7200
Fax (312) 422-1224

Washington, D.C.

1850 M Street, N.W., Suite 280
Washington, DC 20036-5804
Phone: (202) 783-9222
Fax: (202) 783-9230

Los Angeles

2 N. Lake Avenue, Suite 460
Pasadena, CA 91101
Phone: (626) 795-4700
Fax: (626) 795-4790

Chattanooga

633 Chestnut Street
Chattanooga, TN 37450
Phone: (423) 266-2769
Fax: (615) 247-9950

Detroit

535 Griswold Street, Suite 1818
Detroit, MI 48226
Phone: (313) 237-7400
Fax: (313) 963-7425

Spokane

503 W. Riverside Avenue
Suite 583
Spokane, WA 99201
Phone: (509) 747-1800
Fax: (509) 725-0359

Dallas/Fort Worth

801 Cherry Street, Suite 1075
Fort Worth, TX 76102
Phone: (817) 869-1700
Fax: (817) 878-9472

Please fax or e-mail
address changes to:

The Transportation Brief
fax (317) 687-2414
tbrief@scopelitis.com

The Road Ahead: 2013 – Challenges and Opportunities

The trucking industry faced a difficult legal and regulatory environment in 2012, and 2013 has already seen last year's leading issues continue to develop, even as new challenges have emerged. A few of these are noted below. While these and other issues will test the industry, they offer opportunities to identify and implement the changes necessary to survive and thrive in this evolving legal and regulatory reality.

Safety Regulations

The CSA initiative continued to evolve as the FMCSA made several well-publicized late-year changes in response to complaints that CSA data is not reliable or representative enough to accurately measure safety risks. The reliability and validity of the data remain questionable, and pressure for improvement will persist. In the meantime, carriers must continue to identify and prevent problems that can increase a CSA risk profile.

The more significant revisions to the Hours of Service (HOS) rules announced in late 2011 (the 30-minute rest break requirement and limits on the 34-hour restart) will take effect July 1, 2013, unless a pending court challenge to the rules succeeds (the FMCSA has refused to delay implementation of the rules pending the outcome of the case). Given the significance of the changes and the reduction of net driving time, carriers should not wait to prepare for compliance or to evaluate their capacity to sustain service levels with fewer driver hours. In a related development, the FMCSA is required under MAP-21 to publish a final rule for the adoption and use of electronic logging devices by October 1, 2013.

Labor and Employment

Aggressive federal and state enforcement of wage and hour laws and related efforts to reclassify owner-operators as employees will continue in 2013. So will the threat of costly wage and hour class action lawsuits. While some courts have taken a more restrictive approach to class certification, and while transportation defendants have won important victories (including rulings secured by the Scopelitis firm that California's meal and rest break rules are preempted by federal law), the lure of attorney fees will continue to encourage the filing of class action cases for the foreseeable future. Transportation industry companies must identify and correct the problems that are driving these enforcement activities and lawsuits.

*Jay Taylor,
Indianapolis*

Briefly...

Verdict Trends Require Reassessment

In the last year, juries have awarded surprising personal injury and wrongful death verdicts of \$40 million, \$36.5 million and \$13.2 million against motor carriers. Occasional outlier jury verdicts have always been part of the claims landscape. The recent frequency and dollar amounts of these alarmingly high verdicts may call into question whether these verdicts are mere anomalies or a disturbing trend. Studies indicate that verdict increases are indeed outpacing increases in the value of the U.S. dollar.

This growing trend requires prudent motor carriers to reevaluate whether their insurance policy limits are sufficient. Also, consideration should be given to whether the corporate structure should be re-designed so principal assets are not held by entities that could be held vicariously liable for accidents — the employer of the drivers and the holder of the operating authority. Post-accident efforts for early settlement resolution or high-low settlement caps are increasingly important as well.

*Michael B. Langford,
Indianapolis*

UM Insurance Protocol Demands Careful Attention

Uninsured/Underinsured Motorist (“UM”) coverage is governed by a combination of policy language, state statutory provisions, and case law. Motor carriers often reject UM coverage for their truck drivers, taking the position that workers’ compensation or occupational accident insurance provides sufficient benefits for

drivers who are injured while working. The extent to which UM coverage can be rejected is controlled by complex state-specific laws. In most states, UM coverage can only be rejected or reduced by using specific language and protocol. Even then, some states do not allow a full rejection, but instead require certain minimum levels. Failure to obtain a proper rejection may mean that UM coverage limits will revert to liability coverage limits, including the corresponding liability deductible or self insured retention exposure. This may also adversely affect the motor carrier’s claims experience.

Unpredicted court interpretations of the UM rejection process can add further wrinkles. For instance, the New Mexico Supreme Court recently determined that UM rejections are valid only if insurers provide insureds with premium charges corresponding to each available option for UM coverage so the insured can make a knowing decision to receive or reject coverage. Staying current on UM rejection requirements is crucial for motor carriers in making certain that their insurance goals match their potential claims reality.

*Michael B. Langford,
Indianapolis*

U.S. Supreme Court to Decide Preemption Cases

The United States Supreme Court has agreed to hear two cases exploring the reach of a federal preemption statute known as the Federal Aviation Administration Authorization Act (FAAAA), which prohibits states from enacting a law “related to a price, route, or service of any motor carrier.” In *ATA v. City of Los Angeles* (No. 11-798), the Court will consider

whether the FAAAA contains an unexpressed “market participant” exception that permits a municipal governmental entity to take action that conflicts with Congress’ preemptive intent. In a second case, *Dan’s City Used Cars v. Pelkey* (No. 12-52), the Court will consider whether state statutory, negligence, and consumer-protection claims asserted against a tow-truck carrier are preempted under FAAAA. The Court’s rulings may shape the course of future preemption challenges by industry stakeholders fighting back against overreaching by state governments.

Braden K. Core

For the Record

Gregory M. Feary is leading a team of Scopelitis attorneys in teaching a newly-created Transportation Law course at the Indiana University Robert H. McKinney School of Law in Indianapolis. The class is designed to provide instruction in the fundamental legal issues affecting the nation’s transportation industry. **Andy Light, Jim Hanson, Tim Wiseman, Angela Cash, Craig Helmreich, and Nathaniel Saylor** are also providing instruction to the students.

We are pleased to announce that attorney **Kevin M. Phillips** has joined the firm. Kevin brings with him more than 15 years experience in warehouse legal liability. Kevin will practice from the firm’s Chicago office.

Congratulations to **Braden K. Core** and **Andrew J. Butcher** on being named as Rising Stars in the *Super Lawyers* magazine.



Mileposts

Experienced Litigator Brings Warehouse Liability Capabilities to the Firm's Chicago Office

The addition of Kevin M. Phillips as a partner in the Scopelitis law firm's Chicago office provides a valuable new resource for the firm's transportation clients with diverse operations that include warehousing and logistics.

Phillips' practice focuses on all aspects of warehouse legal liability, including property losses, general liability, regulatory compliance, enforcement of warehousemen liens, and review of storage contracts. He represents warehousemen, shippers, carriers, and freight forwarders in tort, contract, bailment, warranty, and statutory-based actions.

In addition to his litigation practice, Phillips drafts, negotiates, and reviews warehousing and transportation documents, including warehouse receipts, bills of lading, freight contracts, standard contract terms and conditions, security agreements, and tariffs. He also has experience instituting and enforcing warehousemen's liens and the recovery of unpaid storage charges.

Phillips earned his law degree in 1996 at the John Marshall Law School in Chicago, and his undergraduate degree in 1993 at The George Washington University in Washington, D.C.

Phillips is a member of several warehouse associations, including the International Warehouse Logistics Association (IWLA), where he serves as Claims and Litigation Counsel for the Association and its members, the Warehouse Education Research Council (WERC), and The International Association of Refrigerated Warehouses (IARW).

He is a member of the Illinois State Bar, the U.S. District Court for the Northern and Central District of Illinois, and the U.S. Court of Appeals for the Ninth Circuit. He has also practiced pro hac vice in a number of courts throughout the United States.

Phillips joined the Scopelitis firm on January 11, 2013.

On the Road

Jerry Cooper will provide an owner-operator update at the New Hampshire Motor Transport Association Annual Meeting, February 26, in **Key West**.

David Robinson will address driver screening concerns at the Specialized Carriers & Rigging Association's 2013 Specialized Transportation Symposium, February 28, in **Orlando**.

David Robinson will participate in a panel discussion on background screening compliance at the Truckload Carrier Association's 2013 Annual Convention, March 3-6, in **Las Vegas**. Greg Feary will also attend.

Bob Henry will deliver a speech titled "Protecting Independent Contractor Status in a World of Evolving Safety Regulation and Advanced Technology" at the American Moving & Storage Association's 2013 Education Conference & Expo, March 3-6, in **Atlanta**.

Tom Farrell will attend the American Bar Association's Transportation MegaConference XI, March 6-8, in **New Orleans**.

Dan Barney and Chris McNatt will attend the AirCargo 2013 Conference, March 10-11, in **Las Vegas**.

Kevin Phillips will lead a session on warehouse legal matters at the 2013 International Warehouse and Logistics Association's Convention & Expo, March 10-12, in **Orlando**. Craig Helmreich will also attend.

Dan Barney will attend the Truck Renting and Leasing Association's Annual Meeting, March 12-13, in **Naples, Florida**.

Annette Sandberg will provide an update on MAP 21 and the FMCSA regulatory agenda, and will moderate a panel on issues with CSA and brokers at the Transportation Intermediaries Association meeting, April 7-10, in **Tucson**.

Kathleen Jeffries and Mike Tauscher will join a panel discussion at the Transportation & Logistics Council/Transportation Loss Prevention & Security Association Joint Annual Conference, April 22-24, in **San Diego**.

Tim Wiseman and Katie Feary-Gardner will speak on CSA at the NAFA Fleet Management Association's Institute & Expo, April 23-26, in **Atlantic City**.

Kathleen Jeffries will moderate an interactive workshop on litigation practices and Fritz Damm will participate in a panel discussion on the conflicts between the ADA and FMCSA requirements at the Transportation Lawyers Association Annual Conference, April 30-May 4, in **Napa, California**. Don Vogel will also attend.

Jim Golden will present Managing, Organizing and Negotiating for Value in Large Business at the Harvard Business School, April 25 in **Boston**.

The Transportation Brief®

Dispatches

 SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

❖ Jeff Jackson warns that some of the new California Air Resources Board (CARB) regulations that took effect January 1, 2013 allow **fin**es to be levied against carriers, brokers, forwarders, shippers, and receivers regardless of where the companies are headquartered. Companies with loads or shipments traveling in or through California should be familiar with the CARB regulations and the steps that can be taken to minimize exposure.

❖ David Robinson reports that the U.S. Department of Labor published a new Final Rule related to the Family and Medical Leave Act (“FMLA”). The Final Rule addresses, among other things, new FMLA posting and form requirements, a new category of qualifying exigency leave, and an expansion of covered employees’ rights to military caregiver leave. **The new FMLA poster, which covered employers must display in a conspicuous place beginning March 8, 2013**, is available at <http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>. Covered employers are advised to evaluate their FMLA programs to ensure compliance with the new regulations.

❖ Mike Tauscher reports that Michigan’s seasonal frost law weight restrictions go into effect statewide on Monday March 11, 2013. Various Michigan counties have their own frost law restrictions independent of the state limitations. Michigan’s implementation of its frost law weight restrictions reminds us that **similar restrictions will soon be in effect in several states** (including MN, ND, NV, SD and WI) and most Canadian provinces (including AB, BC, ON, QC and SK), continuing through April, May and even June depending on local conditions.



Asleep at the Wheel – Liability Issues Arising from Accidents that Might be Related to Sleep Apnea

In early 2012, the Motor Carrier Safety Advisory Committee (MCSAC) and Medical Review Board (MRB) issued a number of recommendations to the Federal Motor Carrier Safety Administration (FMCSA) regarding the screening and medical certification of drivers who demonstrate a high likelihood that they have obstructive sleep apnea (OSA). Pursuant to the MCSAC and MRB, high risk factors include a BMI of 35 or greater, a self-report of excessive sleepiness while driving, a single-vehicle or sleep-related crash, or a combination of factors such as BMI between 28 and 35, neck size, age, small airway or small or recessed jaw, family history, snoring, and other medical conditions such as hypertension, type 2 diabetes, or hypothyroidism. The FMCSA claims that untreated OSA can lead to a higher incidence of crashes as well as a host of other serious medical conditions. Unfortunately, the agency has not moved forward to implement or reject the MCSAC/MRB recommendations through formal guidance or rulemaking, leaving uncertainty in the industry as to what steps medical examiners or motor carriers must take for drivers who fall within the at-risk group.

Plaintiffs' attorneys have taken note of OSA as another potential basis of motor carrier liability – and, potentially, punitive damages – for negligently hiring or retaining an unfit driver arguing that while the FMCSA has not mandated testing of drivers who might demonstrate a higher risk of the disease, motor carriers must still exercise reasonable care under the circumstances. If a driver who meets the at-risk criteria in the MCSAC/MRB recommendations may have drifted off behind the wheel and caused an accident, motor carriers should expect the driver's medical history to be scrutinized in detail. Coupled with the growing amount of information available through the FMCSA, sleep disorder service providers, and motor carriers who have voluntarily implemented full-scale programs for all drivers to screen, diagnose, provide treatment and monitor treatment compliance, plaintiffs' attorneys and their "trucking experts" have a number of avenues to argue that a motor carrier who stood silent on the OSA issue may not have acted with reasonable care. While a motor carrier may successfully defend such claims based upon the lack of any regulatory duty to screen for OSA, the absence of any pre-accident red flags indicating that the driver was unfit, lack of carrier sophistication and resources and other fact-sensitive defenses, this is a difficult area not easily addressed without direct guidance from the FMCSA.

Carriers considering proactive programs to screen drivers for OSA must ensure compliance with the Americans with Disabilities Act and other applicable laws.

*Angela S. Cash,
Indianapolis*