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Recent Agency Action Confirms a Reduction in DOT Jurisdiction Over Small Freight Carriers

The 2005 highway reauthorization bill commonly known as "SAFETEA-LU" has been well publicized as a far-reaching means of controlling government spending for highway projects. Out of the intended consequences, however, has come a significant and seemingly unintended change in the jurisdiction of the Federal Motor Carrier Safety Administration (FMCSA) confirmed by an October 1, 2007 "technical amendment" to the Federal Motor Carrier Safety Regulations. The amendment reinforces the narrowed definition of a "motor carrier" under SAFETEA-LU as one that provides transportation using a *commercial* motor vehicle (a vehicle with a gross vehicle weight or a gross vehicle weight rating of over 10,000 pounds).

SAFETEA-LU diminishes FMCSA authority

The October 1, 2007 technical amendment makes it clear that the FMCSA no longer has the authority to set financial responsibility standards for freight vehicles operated by for-hire motor carriers with a gross vehicle weight or gross vehicle weight rating of under 10,001 pounds unless the vehicles are hauling placardable quantities of hazardous materials. This change, along with the SAFETEA-LU provisions stripping the FMCSA of authority to require for-hire carriers using these small freight vehicles to obtain operating authority, went largely unnoticed even by the FMCSA until just recently.

Overtime exemption issues also a concern

SAFETEA-LU has also erased the overtime exemption applicable to interstate drivers of both for-hire and private carriers operating small freight vehicles. The overtime exemption applies only to drivers whose hours of service the FMCSA has power to regulate. SAFETEA-LU, however, takes away the FMCSA's power to regulate the hours of service of drivers of vehicles under 10,001 pounds. This summer, two years after enactment of SAFETEA-LU, the U.S. Department of Labor issued a directive to its field investigators to ensure this new right of small freight vehicle drivers to receive overtime and to apply the right retroactively to August 2005.

The unintended effects of SAFETEA-LU have caused concerns throughout several industry factions as well as the FMCSA itself, particularly with respect to whether the FMCSA can continue to regulate leasing, freight

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Briefly...

Proposed Regulations May Increase Overall Tax Liability for Carriers with Captive Insurers

The IRS and the U.S. Department of Treasury recently released a notice of proposed regulations that may affect motor carriers that maintain captive insurance companies and file a consolidated tax return.

The proposed regulations change the "separate entity" treatment of a captive insurance company and provide that, when a significant portion (5% or more) of the captive insurer's business arises from insuring the risk of related entities that file a consolidated tax return, the inter-company insurance transaction should be treated as and accounted for on a "single entity basis."

Under the proposed regulations, while a motor carrier owner/insured of the captive would be entitled to an accelerated tax deduction on its tax returns for the premium amount paid to the captive insurer, the captive insurer would not be allowed tax deductions for items such as unearned premiums and reserves. The net effect of the new proposed regulations is that a captive insurance transaction will be treated in a manner comparable to "self-insurance" by a single corporation resulting in the loss of critical deductions.

The Scopelitis law firm will be submitting comments in opposition to the proposed regulations by December 27, 2007.

Gregory M. Feary
Jeffrey S Toole,
Indianapolis

Hours of Service Developments Roll On

The recent decision of the U.S. Court of Appeals for the D.C. Circuit striking down the 11-hour driving rule and the 34-hour re-start provisions within the Hours of Service Regulations has caused much concern in the trucking industry. Fortunately, on October 1, 2007, the court granted a 90-day stay from its prior ruling in order to allow the FMCSA time to reconsider both provisions. As a result, the FMCSA indicates that an interim final rule will be issued before the end of the year, and initial indications are that at least the 11-hour driving rule will be retained.

More recently, the FMCSA withdrew its current rulemaking proposal on supporting documents. According to the FMCSA, the rulemaking was meant to clarify some confusion as to the records required to be maintained by a motor carrier to review against the accuracy of driver logs, but "significantly underestimated the actual burden the industry would confront." It is expected that the agency will initiate new rulemaking on this issue in the next several months.

Timothy W. Wiseman,
Indianapolis

Selling? Stock Sales Offer Advantages

Based on common tax planning, administrative burdens, and transaction costs, motor carrier sellers can often obtain the highest net sale price through a sale of stock rather than assets. Long-term capital gains tax treatment of a stock sale often generates tax expense on proceeds that are lower than ordinary income rates generally associated with an asset sale. Also, many administrative burdens can be avoided through a stock sale, to include, terminating employees, assigning contracts, and obtaining requisite consents to assignment.

Finally, transaction costs often borne by the seller can be significantly reduced on a stock sale by avoiding retitling of significant rolling stock and real estate assets. These and other factors should be considered by every prospective seller early in any negotiation to obtain the most advantageous transaction structure from the seller's perspective.

Jay D. Robinson,
Indianapolis

Cover story, continued

charges, and all other functions it has overseen to this point. These concerns may be leading Congress and/or the FMCSA to revisit jurisdiction over small freight vehicles. Until then, however, for-hire and private carriers with small freight fleets should carefully evaluate SAFETEA-LU's effects on their business and adjust accordingly.

Andrew K. Light
A. Jack Finklea,
Indianapolis

Scopelitis Firm Becomes Scopelitis, Garvin, Light, Hanson & Feary

The full service transportation law firm became Scopelitis, Garvin, Light, Hanson & Feary recently with the addition of Gregory M. Feary's name to the top of the letterhead.

It was the first name change for the firm since 1989, when the names of Andrew K. Light and James H. Hanson were added. The firm originated as Scopelitis & Garvin in 1978 when it was formed by Alki E. Scopelitis and Norman R. Garvin.

Feary, who joined the firm in 1988 and became a partner in 1992, is a nationally recognized advocate for members of the transportation industry. His practice – unique within the legal community – focuses on insurance regulatory matters and risk management initiatives designed to reduce exposure to the firm's transportation clients. Feary is also well-known for his expertise on independent contractor programs and the negotiation and implementation of transportation contracts. He is frequently called upon to speak to industry groups nationwide on these and other transportation-related topics.

From his Indianapolis office, Feary balances the demands of a legal practice serving the nation's top motor carriers with his duties as a managing partner of a multi-city law firm. He has served as a member of the firm's three-member management committee since its inception in 1997, leading the firm through a period of significant growth and change. Notably, since 1997, the Scopelitis firm has broadened its presence through the opening of five new Scopelitis offices in major transportation hubs across the country, with the sixth set to open in Detroit in January 2008.

Other firm initiatives in which Feary plays a key role include active participation in state and federal legislative initiatives affecting transportation; vigorous advocacy on behalf of the transportation industry through collaboration with the American Trucking Associations and other key industry associations; and – above all else – "setting the bar high" on the Scopelitis standard for speedy yet informed and creative responsiveness to the legal and business issues affecting the firm's clients

The name change to Scopelitis, Garvin, Light, Hanson & Feary, P.C., was effective September 14, 2007. Services in California are provided by Scopelitis, Garvin, Light, Hanson & Feary, LLP.

For the Record

We are pleased to announce that **Lynn M. Eriks** and **Andrew J. Butcher** began their practices this Fall as associates in the Indianapolis office.

On the Road

Jim Hanson, David Robinson, Don Vogel and Sari Pettinger will conduct a Human Resources Boot Camp for members of the Illinois Trucking Association, December 6, in **Chicago**.

Kathleen Jeffries will attend the Conference on Freight Counsel, January 6-7, in **Atlanta**.

Jay Robinson will serve on a panel addressing Current Issues and Strategies for Adding Value to Mergers and Acquisition Transactions, and Don Vogel will present a Labor and Employment Law Update at the Transportation Lawyers Association's 2008 Regional Seminar, January 11, in **Chicago**. Andy Light, Bill Brejcha, Rich Clark, Greg Ostendorf and Kathleen Jeffries also will attend.

Chris McNatt will attend the California Trucking Association's Management Leadership Conference, January 19-23, in **San Diego**.

Jim Golden will present the Negotiation Counsel Model at the Chief Litigation Officer Summit, February 10-12, in **Las Vegas**.

Mike Langford will participate in the Trucking Industry Defense Association's 2008 Advanced Seminar, January 30-31, in **Memphis.**

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

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Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

- **Get a fresh start in 2008** - Tim Wiseman suggests that motor carriers periodically update their owner-operator lease agreements and review driver logs and other records to ensure compliance with DOT safety requirements.

- Mike Langford reports that the U.S. Supreme Court has agreed to review a Maine law requiring tobacco retailers to use carriers that agree to ensure the consumer to whom tobacco is shipped is at least 18 years old. At issue is whether **federal preemption** renders the Maine statute invalid, as the First Circuit Court of Appeals held in May of last year.

- Past issues of the ***The Transportation Brief*** **are now online with full-text search capability.** Please visit the Scopelitis, Garvin, Light, Hanson & Feary website at www.scopelitis.com under the RESOURCES tab.

The Transportation Brief® *is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light, Hanson & Feary would be pleased to provide more specific information or individual advice on matters of interest to our readers.*

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