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

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Preemption of Meal and Rest Break Claims Catching Steam

While all eyes have understandably been on the California Supreme Court's ruling in *Brinker v. Superior Court*, motor carriers have been demonstrating that, regardless of the "ensure" or "provide" standard addressed in *Brinker*, state meal and rest break laws should be preempted as having an impermissible effect on motor carrier "prices, routes and services" under the Federal Aviation Administration Authorization Act ("FAAAA"). These laws tend to prescribe the length and frequency of breaks an employee must take, and applying them to professional truck drivers thus directly implicates drivers' routes (as not every route between two points offers a safe place to park a commercial vehicle) and reduces the time drivers can spend performing their work (thereby limiting carrier services).

Dilts v. Penske Logistics *is the first case to find FAAAA preemption*

A recent string of cases suggests courts are beginning to understand the practical ramifications meal and rest break laws have on the industry and are consequently finding the laws preempted by the FAAAA. The San Diego federal court ruling in *Dilts*, secured by the Scopelitis firm in defense of the action, was the first victory. In its ruling, the court found California's meal and rest break laws deprive drivers of "the ability to take any route that does not offer adequate locations for stopping," "bind motor carriers to a smaller set of possible routes," and impact service by directly affecting "the frequency and scheduling of transportation." The court also noted that allowing laws like California's to be applied to motor carriers could easily lead to the type of "patchwork" of state laws that the FAAAA seeks to prevent.

Other courts follow the Dilts *court's lead*

Less than five months later, another federal court in Los Angeles, in *Esquivel v. Vistar Corp.*, relied heavily on the *Dilts* analysis and dismissed California meal and rest break claims as preempted under the FAAAA. A state trial court in Tacoma, Washington, in the Scopelitis-defended case of *Mynatt v. Gordon Trucking*, also followed the reasoning in *Dilts* and found the FAAAA preempts Washington's meal and rest break laws. More recently, in *Aguiar v. California Sierra Express*, a federal judge in Sacramento followed *Dilts* and dismissed the plaintiffs' meal and rest break and remaining derivative statutory claims. Importantly, the analysis these courts employed should make it easier for other carriers to obtain the same results, as the rulings were not predicated on facts peculiar to each case.

James H. Hanson, Indianapolis
Adam C. Smedstad, Chicago

Briefly...

Brinker *Decision Clarifies California Meal and Rest Break Rules*

On April 12, the California Supreme Court issued its highly-anticipated decision in *Brinker v. Superior Court*, spelling out what a California employer must do to comply with the state's meal and rest break rules. The court notably rejected the so-called "ensure" meal break standard, holding that while employers must provide employees working more than five hours per day with an uninterrupted 30-minute meal break, and a second meal break when an employee works more than 10 hours, employers need not ensure employees do not work during their breaks. The court also explained that employers must authorize and permit rest breaks of 10-minutes for shifts from three and one-half to six hours, 20 minutes for shifts between six hours up to 10 hours, and 30 minutes for shifts between 10 and 14 hours.

Jay Taylor, Indianapolis

Proliferation of Class Actions in Trucking Industry Demands Vigilant Defense

The last decade has seen an explosion of class actions filed against motor carriers, from leasing regulation challenges to claims of alleged owner-operator misclassification and violations of state wage and hour laws. Many complaints seeking class certification focus on the apparent uniformity of a carrier's driver policies (e.g., those that govern compliance with the Federal Motor Carrier Safety Regulations), even though those policies have no direct bearing on the outcome of the claims the plaintiffs seek to advance on behalf of the class.

The challenge facing carriers is to demonstrate that, despite the superficial uniformity of the policies plaintiffs identify, *actual* experiences and decisions of each driver are what drive the outcome of their claims. For example, while a charge-back leasing regulation claim may be predicated on the existence of a form lease, *whether and why* a driver participated in the program are the issues that will determine whether he is entitled to relief under the law. A vigorous resistance to class certification should point out that, absent proof such issues will be resolved the same way for all drivers, no amount of allegedly uniform policies should justify the certification of these claims.

Adam C. Smedstad, Chicago

No Rest for Unwary Carriers From Leasing Regs Lawsuits

Appeals court decisions in the last several years have given motor carriers useful Federal Truth-in-Leasing Regulations guidance on charge-back markups and fees, compensation specificity, escrow-fund disclosures and fiduciary duties, forced purchases, insurance-cost pass-throughs, and availability of damages, restitution, injunctions, and attorney-fee awards. Still, contractors keep filing class actions seeking millions for alleged leasing-regulations violations and contract-breaches. Major defense hurdles for motor carriers remain, including courts' often reflexive certification of classes, problematic arbitration clauses, and fraud and breach-of-contract claims with long statutes of limitations – frequently translating into protracted litigation and/or expensive out-of-court settlements. Carriers should go on the offensive with a strong compliance program of clearly and comprehensively saying in the lease what you do; doing what you say in your contractor and lease-purchase programs; and then regularly auditing as to both.

Daniel R. Barney
Braden K. Core, Washington, DC

Class and Conditional Certification Denied in Courier Misclassification Case

On March 29, 2011, a federal court in Indianapolis issued a favorable ruling denying conditional and class certification in a courier misclassification case litigated by the Scopelitis firm. In *Krystina Scott v. NOW Courier, Inc.*, the plaintiffs were contractor drivers who claimed they were misclassified as independent contractors instead of employees. The plaintiffs requested conditional certification of a nationwide class of NOW's contractor drivers under the Fair Labor Standards Act and class certification of a state-wide class of NOW's contractor drivers under Indiana state law. The court agreed with NOW's argument that conditional and class certification were both inappropriate because of the individualized inquiries necessary to determine whether any particular contractor driver was an employee instead of an independent contractor. Such a favorable ruling may well prove helpful to other motor carriers, especially couriers, facing similar claims in the future.

Robert L. Browning
Christopher J. Eckhart, Indianapolis

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Mileposts

Brinker *Evokes Two-Pronged Response By Firm's Class Action Defense Team*

The Scopelitis firm's response to the *Brinker* case discussed in this issue of *The Transportation Brief* comes from two distinct but complementary perspectives: operational compliance and readiness for defense litigation. Together, these two perspectives define the firm's class action defense team.

Immediately after the California Supreme Court issued its ruling on California's meal and rest break requirements in *Brinker v. Superior Court*, the firm's employment law compliance group quickly began advising motor carrier clients with a California presence what *Brinker* meant for their operations. At the same time, the firm's class action defense litigators began placing the decision in the context of other recent rulings finding California's meal and rest break rules preempted under the Federal Aviation Administration Authorization Act (FAAAA).

Among those is the *Dilts v. Penske Logistics* case, in which Scopelitis partner Jim Hanson successfully argued that California's meal and rest break laws are preempted by the FAAAA. Two other federal district courts in California and a state trial court in Washington have followed the *Penske* decision.

The Scopelitis firm is no stranger to the intricacies of state and federal wage and hour laws affecting motor carriers. And the firm's class action defense team has handled more than 70 class and collective action cases for its transportation industry clients around the nation in a variety of contexts, including state wage and hour laws, the FLSA, and the federal leasing regulations.

The firm's employment compliance attorneys include partners Jim Hanson, Jack Finklea, and David Robinson in its Indianapolis office; Don Vogel and Sari Pettinger in Chicago; and Chris McNatt in Los Angeles.

The firm's class-action defense litigators include Scopelitis partners Jim Hanson, Bob Browning, Angela Cash, Jack Finklea and Jay Taylor in Indianapolis; Adam Smedstad in Chicago; Chris McNatt in Los Angeles; and Dan Barney in Washington, D.C. Barney will be joined soon by Andy Butcher, a senior associate who has been in transition between the Indianapolis and D.C. offices and plans to move to D.C. later this year.

For the Record

Congratulations to Los Angeles partner Kathleen C. Jeffries for her receipt of the Lifetime Achievement Award from the Transportation Lawyers Association.

On the Road

Don Vogel presented a Labor Law Update, Kathleen Jeffries moderated a panel on Lessons in Legal Ethics, and Annette Sandberg spoke on regulatory issues at the Transportation Lawyers Association Executive Committee Meeting and Annual Conference, May 1-6, in **Naples, Florida.** Chris McNatt, Kim Mann, Fritz Damm, and Leonard Kofkin also attended.

Greg Feary will participate in the American Trucking Associations' Leadership Meeting, May 20-23, in **Tampa.**

Steve Pletcher will deliver a legal update at the National Association of Professional Employer Organizations' Legal and Legislative Conference, May 20-22, in **Arlington, Virginia.**

Greg Feary will conduct a workshop on worker misclassification for the California Trucking Association, June 1, in **Long Beach.**

Greg Feary will present "Employee Misclassification and Other Labor Law Challenges" at the American Trucking Associations' Information Technology Logistics Council and National Accounting & Finance Council Annual Conference and Exhibition 2012, June 11-13, in **Tampa.**

Kathleen Jeffries, Bob Henry, Fritz Damm, and Mike Tauscher will participate in the Conference of Freight Counsel, June 23-25, in **Baltimore.**

Don Vogel, Kathleen Jeffries, and Fritz Damm will attend the Transportation Lawyers Association's Summer Executive Committee Meeting, July 27-28, in **Toronto.**

Greg Feary and Braden Core will serve as panelists on the independent contractor landscape at the American Trucking Associations' Forum for Motor Carrier General Counsels, July 22-25, in **San Francisco.** Allison Smith, Shannon Cohen, and Fritz Damm will also attend.

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Dispatches

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On April 17, 2012, **the National Labor Relations Board was temporarily enjoined from enforcing a regulation that would have required most private sector employers to post a notice of employee labor law rights beginning April 30.** As such, employers will not be compelled by the Board to post such a notice unless and until the appellate process is complete and the injunction is dissolved.

Dan Barney and Nathaniel Saylor note that the pending federal highway funding bills, already approved by a U.S. House committee (H.R. 7) and the full U.S. Senate (S. 1813), contain provisions removing all doubt that **motor carriers, air freight forwarders, and other entities that, in practice, broker motor freight must, with minor exceptions, register with the FMCSA as brokers.** The bills also increase the required broker-bond amount to $100,000 from the current $10,000.

The Scopelitis D.C. office reports that, in a Scopelitis antitrust/regulatory victory strengthening intercity bus carriers' ability to compete with other modes of passenger transportation and with each other, the Surface Transportation Board ruled on May 11 **that, once passenger carriers obtain STB approval to pool their services between two major cities, they are permitted to add service between those and any previously-identified intermediate points without seeking additional approval.**

According to Bill Brejcha, beginning in July, the **State of Illinois will use speed cameras in areas designated as "work zones" on major freeways.** A $375 ticket will be mailed to offenders for the first offense. The second offense will cost $1000 and comes with a 90-day suspension. This is the harshest penalty structure yet for a city or state using photo enforcements.