

# THE TRANSPORTATION BRIEF®

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

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## SCOPELITIS SEMINAR PANEL DISCUSSES PAST, PRESENT, AND FUTURE OF TRUCKING

The 2018 Scopelitis Transportation Law Seminar's feature panel was moderated by Firm President and Managing Partner Greg Feary, and included Chris Spear, President and CEO of ATA; Cathy Gautreaux, Deputy Administrator of FMCSA; James Gattoni, President and CEO of Landstar; and Robert Fatovic, Executive Vice President and Chief Legal Officer and Corporate Secretary of Ryder System, Inc. The panelists discussed federal transportation developments, independent contractor issues, and emerging technology.

In response to Feary's question, Spear opened by identifying the rules ATA would target to revisit or rescind. "If we feel a regulation is grounded, has good supporting data, and a defined measure of return, we will most likely support it," said Spear. "We're not shy about regulation, we just want good regulation."

Gautreaux then discussed FMCSA's emphasis on industry outreach. "The agency wants to re-instill a spirit of compromise, collaboration, and partnership. Secretary Chao has a tremendous respect for the industry. She gets it," said Gautreaux.

The industry welcomes this approach, as Fatovic explained using the example of Ryder's collaboration with FMCSA to implement new federal regulations.

"Problems arise when you go through any major update to regulatory framework, but it's good to know we have an open dialogue," said Fatovic. "For example, FMCSA has been helpful as we navigate challenges that were hurting customers as a result of the ELD mandate."

The panel then moved to the adverse impact of misleading media coverage regarding independent contractors in trucking. "It's hard to tell the real story of the sector when the vocal minority is getting all the press," said Gattoni. "A silent majority is going about their business, reaping the benefits of small business ownership."

The discussion closed with the panelists' insights on tech distribution in trucking. Fatovic expressed his enthusiasm for the positive ways in which technology is revolutionizing the industry. Spear agreed, with one caveat, the low likelihood of driverless trucks. But he said areas such as safety, lowering fuel burn, lowering emissions, and eliminating congestion could see a positive impact from tech. As the hour came to a close, Feary summarized the discussion. "The takeaway is that the next frontier is technology and it's evolving more quickly than many of us anticipated," said Feary. "We need to encourage innovation while updating the current standards and regulations in a practical and meaningful way."



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# BRIEFLY

## Hazmat Regulation Enforcement

While complying with federal hazmat requirements, motor carriers continue to be cited for alleged violations of state and local hazwaste regulations. This is occurring even though the federal Hazardous Materials Transportation Act (HMTA), and the corresponding federal regulations (HMR), are generally understood to preempt and supersede state environmental protection regulations (including state hazwaste programs that have received RCRA authorization). For example, some states have taken the position they are able to unilaterally classify damaged, defective, or leaking packages containing hazmat as immediately becoming hazwaste subject to local hazwaste regulatory programs. This is arguably in direct contradiction to the HMTA and HMR, which specifically allow a motor carrier to consolidate damaged hazmat for forwarding on to a location for further evaluation and classification. Scopelitis attorneys have recently seen this type of enforcement in a number of states, including California, Indiana, North Carolina, Pennsylvania, Tennessee, and Wisconsin.

**Timothy Wiseman,  
Jeffrey S. Jackson**  
Indianapolis

## FCRA Class Actions Continue

We continue to see an onslaught of class action lawsuits focused on transportation industry employers who use third-party consumer reporting agencies to conduct

background checks. These lawsuits allege violations of the rather strict requirements of the Fair Credit Reporting Act (FCRA) and focus on two primary deficiencies. First, on the front end, the FCRA requires employers to utilize a compliant disclosure and authorization form to be signed by the applicant. These disclosure and authorization forms must be carefully worded in order to meet the FCRA requirements, and the inclusion of extraneous information can invalidate the authorization. Second, on the back end, the FCRA requires employers to send a written adverse action notice to applicants whose applications are denied based on information contained in a background check report.

We urge all transportation employers to carefully review their background check processes to ensure that these two requirements are being met. With statutory penalties of up to one thousand dollars per violation and potential class periods up to five years, FCRA class actions can include thousands of individuals and result in millions of dollars of potential liability exposure.

**David Robinson,  
Peter Morton**  
Indianapolis

## Federal Legislative Update: HOS and Capacity

The ELD deadline has passed, and the industry and regulators are gaining insight into the impact improved compliance may have on tight driver capacity. A variety of approaches have been proposed to mitigate this impact. Two HOS bills

have been introduced in the House. The Honest Operators Undertake Road Safety Act (HOURS Act) makes changes to short-haul HOS rules and creates a uniform federal agriculture exemption. Similarly, the Responsible and Effective Standards for Truckers Act (REST Act) eliminates the 30-minute rest break and allows drivers to stop the 14-hour clock for a rest period of up to three hours. In addition to these HOS-related bills, the Developing Responsible Individuals for a Vibrant Economy Act (DRIVE-Safe Act) creates a pathway for drivers under 21 to engage in interstate commerce. While none of these bills appear likely to pass in this election year, they may inform developments in the years to come.

**Shannon M. Cohen**  
Indianapolis

# MILEPOSTS

## Spotlight on the 2018 Scopelitis Transportation Law Seminar

The topics covered and comments made by transportation industry leaders from the American Trucking Associations, the Federal Motor Carrier Safety Administration and the private sector, including Chris Spear, Cathy Gautreaux, Bob Fatovic, and Jim Gattoni, highlighted on the cover of this issue of *The Transportation Brief*, represent a sampling of the more than 25 subjects presented at the 2018 Scopelitis Transportation Law Seminar. The standing-room-only event was held in Indianapolis earlier this summer and also featured top transportation insurance brokers and financial advisors.

The goal of every Scopelitis seminar

# SCOPELITIS-INTERNATIONAL

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Coming this Autumn, Scopelitis will begin providing brief international transportation law updates on a regular basis. Updates will include alerts, recent news and overviews of various current issues. We hope you will find this information useful. Please contact our International Transportation and Logistics Law Practice group with any questions.

is to provide relevant, valuable, and timely information that its attendees can use to improve their transportation business operations. By covering a full spectrum of areas, including trucking regulations, intercompany transactions, finance and investment, emerging technologies, owner-operator issues, labor and employment, logistics, accident litigation, employment tax issues, warehousing, class action litigation, and cargo claims, the 2018 seminar provided attendees with a state-of-the-industry understanding of the current challenges facing the transportation industry.

This year's seminar offered an additional half day of pre-seminar workshops, where attendees could register for one of three topics: Air & Ocean Transport, Class Action, or Mock Trial. "We are quite fortunate to have a unique law firm where every attorney across all 14 offices in America exclusively focuses on only one industry—transportation!" said Greg Feary, Scopelitis President and Managing Partner, reflecting on the 2018 seminar.

"It takes the combined effort of every Scopelitis attorney to host an event of this size," Feary said. "Regardless of the fact we do not charge for the seminar, our clients expect it to meet the high standards we have set over the many years we have been holding them. We cannot compromise on time, expense and effort. From writing speeches and perfecting presentations to entertaining hundreds of clients, we all have to pull in the same direction to provide a worthwhile experience for our clients."

"We took on an additional challenge at this seminar by borrowing from a TED Talks approach and making our format fast-moving and visually interesting while remaining true to our exacting timing," Feary said. "It is important to keep the seminar content fresh, which requires the Firm to select seminar dates based on significant developments in transportation."

Please visit the Scopelitis website at [www.scopelitis.com](http://www.scopelitis.com) for additional information on the Firm's practice areas and attorneys.

## FOR THE RECORD

Don Vogel, a partner in Scopelitis' Chicago office, was presented with the Lifetime Achievement Award and Distinguished Service Award by the Transportation Lawyers Association at their 2018 Annual Conference.

We are pleased to announce that Karen Butler Reisinger has joined the Firm's Indianapolis office. Ms. Reisinger's practice is primarily devoted to Litigation Project Management in the Class Action Defense and Complex Litigation Practice Group.

## ON THE ROAD

Greg Feary presented "Managing the Risk Environment" as part of a panel discussion at the National Home Delivery Association's 2018 NHDA Forum, August 13-15, in **Denver**.

Chris McNatt presented "The Dynamex Decision and Your Independent Contractor Relationship" at the California Trucking Association's San Bernardino/Riverside Unit Meeting, August 22, in **Ontario, California** and will present at the California Trucking Association's San Diego Unit Meeting, September 19, in **Otay Mesa, California**.

Greg Feary will present "Independent Contractor Status – State of the Union" at the Truckload Carrier Association's Independent Contractor and Open Deck Program, September 6, in **Chicago**.

Jim Hanson will present "The Changing Landscape of Trucking Regulations in California" at the North American Transportation Employee Relations Association's 2018 National Conference, September 16-18, in **Salt Lake City**. Fritz Damm will also attend the Conference and Board of Directors meeting.

Jay Starrett will attend the Arkansas Trucking Seminar, September 18-20, in **Rogers, Arkansas**.

Fritz Damm will attend the State Bar of Michigan's Annual Conference, September 26, in **Grand Rapids, Michigan**. Fritz will be recognized for 50 Years of membership.

Greg Feary will present "Shaking the Risk Tree: Mitigate Your Risk" at the Customized Logistics and Delivery Association's 2018 Final Mile Executive Leadership Summit, September 27-28, in **Chicago**.

Mike Langford and Jay Starrett will attend TIDA's Annual Conference, October 3-5, in **Austin, Texas**.

Fritz Damm will attend the DRI's Annual Meeting, Truck Law Committee Meeting and Presentation, October 18-20, in **San Francisco**.

John Hove will join a panel on Trade, Supply Chain and Financial Issues in the Face of Global Trade Barriers and Protectionism at TAG Alliances' 2018 Fall International Conference, October 23-26, in **Atlanta**.

Greg Feary, Shannon Cohen and Prasad Sharma will attend the American Trucking Associations' 2018 Management Conference & Exhibition, October 27-30, **Austin, Texas**.

Bob Henry will serve as the Moderator of a panel discussing "Insurance in the Transportation Industry: Managing Risk Economically" at the Canadian Transport Lawyers Association's 40<sup>th</sup> Annual Conference, October 27, in **Montreal**. Fritz Damm will also attend.

## DISPATCHES

State and local Ban-the-Box laws continue their steady march across the country. David Robinson cautions that these laws generally **prohibit employers from asking about an applicant's criminal history on an initial application**, and some states place further limitations on the use of criminal history information. Currently, the following states/districts have enacted Ban-the-Box laws applicable to private employers: California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Washington D.C.

Airfreight volumes in the first half of 2018 continued a strong growth pattern started in 2017, possibly benefiting from a sense of urgency by U.S. importers to beat the imposition of tariffs by the Trump Administration. Jake Fisher reports that while the industry is wary of the impact of tariffs (and retaliatory tariffs), **air cargo volumes for the second half of 2018 remain on an upward trend**, driven by strong demand.

Braden Core reports that the U.S. Supreme Court has scheduled oral argument in *New Prime* for October 3, 2018. The case raises the question of **whether owner-operators work under "contracts of employment" that are exempt** under the Federal Arbitration Act. A decision is not expected until early 2019.

According to Greg Feary, **the Dynamex decision has caused a ripple effect** resulting in plaintiffs' attorneys backtracking on previously reached agreements and revising arguments to reinterpret the decision and expand its reach. The recent Superior Court decision in *Johnson v. CVG-IS* illustrates the receptivity of California courts to apply the *Dynamex* holding to wage orders in addition to Wage Order No. 9.

Jack Finklea highlights a recent DOL Guidance On Attendance Policies. Companies with an **attendance policy calling for discipline after a particular number of absences regardless of the reason** (a no-fault attendance policy) are encouraged to consult the new DOL Guidance to prevent such a policy from violating FMLA obligations. The Guidance is one of six DOL opinion letters issued on August 28, including guidance relating to compensable hours worked and overtime exemptions.

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