

Overweight Trucks

by Paul J. Millenbach 

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Has your company received a ticket for an overweight vehicle lately? If so, Foster Swift can help. Overweight trucks in Michigan are subject to fines calculated according to the amount of weight in excess of a per axle limit, according to a statutory formula. These fines can often result in charges exceeding several thousand dollars. Continued violations could result in impoundments of vehicles.

The Michigan statute that addresses weight restrictions provides that a police officer may stop a vehicle and submit it to a weighing by either portable or stationary scales approved and sealed by the Department of Agriculture as a legal weighing device. The police officer may require that the vehicle be driven to the nearest weighing station to determine the weight. If the vehicle is found to be overweight, a judge or magistrate may order the owner or operator of the vehicle post a bond and the amount of the fines and costs before a hearing can be scheduled.

The statute provides that an owner, operator, or driver of a vehicle shall pay a civil fine in an amount equal to three cents per pound for each pound of excess weight over a thousand pounds, six cents per pound of excess weight when the excess is over two thousand pounds, nine cents per pound for each pound of excess weight when the excess is over three thousand pounds, twelve cents per pound for each pound of excess weight when the excess is over four thousand pounds, fifteen cents per pound for each pound of excess weight when the excess is over five thousand pounds, and twenty cents per pound for each pound of excess weight when the excess is over ten thousand pounds. The excess weight is calculated on a per axle basis.

The court has discretion in imposing a fine if a determination has been made that a vehicle was misloaded. If the court determines that a misload in one or more axles exists by four thousand pounds or less, the court may impose a misload fine of \$200 per axle. However, not more than three individual axles can be used to calculate the fine.

Courts also have discretion when assessing fines on vehicles equipped with lift axles. Under this provision, the axle weight requirements do not apply to a vehicle equipped

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with lift axles during the period in which axles are raised in negotiating an intersection, driveway, or other turn and until the lift axles are fully engaged after the period of time or the distance necessary to negotiate that intersection, driveway or other turn. There are no specific measurements which set forth the distance necessary to negotiate a intersection, driveway or other turn. As such, enforcement is based upon what the

officer determines to be reasonable at the time of the stop.

Attorneys at Foster Swift can assist you in the defense of these citations. If you need such assistance or would like to discuss this matter further, please feel free to contact us.

“Damned If You Do, Damned If You Don’t” - Pitfalls to Watch Out for With Insurance Coverage and Claims That Contractors Will Make Against an Insurance Policy

by Andrew C. Vredenburg 

The United States District Court for the Western District of Michigan recently granted judgment in favor of our client against its insurer for a claim involving defective gravel. (Case No.: 1:07-cv-00112-jtn, U.S. District Court Western District of Michigan, dated April 3, 2009.) The client was under extreme pressure to rebuild the road, which was rendered unpermissible by a county because the asphalt “pimpled” and cracked from a particulate in the gravel sub base, known as ettringite. The ettringite,

under proper soil and clay conditions, expanded and caused the damage to the asphalt.

After learning of the problem, the client put its insurer on notice of the claim. The insurer responded with a reservation of rights letter. The owner, who was preparing to open a new housing subdivision accessible by the road, was anxious to get the road

repaired. After several meetings between the owner and the road contractors involved in constructing the roadway, an engineering firm was hired to determine how the problem developed. As spring was fast approaching, the owner was desperate to have the project open so it could sell the homes it was constructing and the lots it had developed. The owner threatened to sue the client for the damaged road and lost profits from some sales if the road was not repaired during the spring.

The client also began discussions with its insurer about how to pay for the road replacement. The insurer hired its own engineering firm to inspect the project. Its engineering firm advised the insurer that there was a potential for environmental contamination and that in its opinion, the road had to be replaced. The insurer then agreed to pay for at least part of the client’s claim, stating that the policy covered the cost to replace the asphalt only. The client then, with the help of other contractors, replaced the damaged roadways at a cost of approximately of \$230,000.

When the client advised the insurer of the cost, the insurer refused to pay any amount of the money, including the cost for the new asphalt. The insurer claimed that it was

Attorney Highlights:

David Lick and **Dirk Beckwith** recently attended a two-day workshop entitled Implementation of Public Private Partnerships for Transit. The workshop was co-sponsored by the Federal Transit Administration and the National Council for Public-Private Partnerships. A Public-Private Partnership is a contractual agreement between a public agency and a private entity in which the public sector and private entity share their skills and assets in delivering a service or facility (in this case public transportation) for the use of the general public.

not obligated to pay because the client made a voluntary payment (i.e., replaced the defective road) without approval from the insurance carrier.

The insurance policy language the insurer relied upon states:

2. Duties In The Event of Occurrence, Offense, Claim or Suit

- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense, other than for first aid, without our consent.

Although the insurer's engineer stated in writing that there was a potential environmental problem and that replacing the road was necessary, and although the insurer had agreed to pay at least \$100,000 for the costs involved in replacing the damaged asphalt, the insurer refused to make any payment based on the voluntary payment clause in the insurance policy. The insurer argued that because the client performed the repair work without the insurer's written approval, the insurer was no longer obligated to pay on its insurance policy.

The client then filed suit against the carrier. After extensive discovery and a hearing, Judge Janet Neff, U.S. District Court Judge for the Western District of Michigan, entered a judgment in favor of the client for \$100,000, minus the \$25,000 deductible on the policy. The Judge ruled that the insurer was estopped from denying that it owed coverage for at least the cost and expense of replacing the damaged asphalt, which the insurer had previously agreed to pay for under the policy.

The Court stated that although the insurance policy must be enforced according to its plain and unambiguous terms, the doctrine of estoppel prevented the insurer from denying coverage at least in part. The court also

concluded, however, that the insurance carrier set forth valid defenses to coverage on the grounds that the client failed to get the insurer's approval to perform the additional work before it performed the work, and therefore the insurer was not obligated to pay anything more than what it previously agreed to pay.

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Meet David Lick

David M. Lick is a Shareholder in the Lansing Office of Foster, Swift, Collins & Smith, P.C. and is the Chair of the Commercial Litigation Practice Group and the Construction Section.

His practice includes counseling clients in all facets of the construction industry for contracts, construction liens, bond claims and builder's trust fund. He also counsels clients regarding project finance and public-private partnerships to build Michigan's infrastructure for water systems, wastewater systems, material recovery facilities, roads and highways.

Mr. Lick is the member of the American Bar Association Construction Forum, the President-elect of the Ingham County Bar Association, and Chair of the Bench Bar Committee for the Ingham County Bar Association. Mr. Lick is also an approved arbitrator for the American Arbitration Association and a case evaluator for Ingham County Circuit Court. He has been a past member of the Financial Advisory Board to the United States Environmental Protection Agency, and is recognized as one of Michigan's Super Lawyers and in Best Lawyers of America for Construction. Recently, Mr. Lick was honored by the Ingham County Bar Association as the 2008 Recipient of the Distinguished Volunteer Award.

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The lesson from this decision is that contractors should obtain a written statement from their insurer before taking remedial or corrective action. Often, corrective action has to be taken quickly to avoid additional damages. The owner threatened to sue the client for lost profits arising from its inability to sell lots and homes in the subdivision because the road was not approved. If the client was required to wait for the insurance carrier to make a decision before taking corrective action, it would have exposed itself to substantial damages and losses exceeding the costs to replace the road, as well as litigation costs. It is likely that the insurer would not have resolved the claim with the owner or the client quickly enough to avoid additional damages. The client faced the classic problem of being “damned if you do, damned if you don’t.” It chose to take the corrective action promptly to avoid litigation and other possible damages arising from environmental problems and lost sales, but as a result, its insurer denied coverage. It took a court order to force coverage, at least in part, to recover some of the expenses that the client incurred in replacing the roadway.

In summary, before taking quick corrective action to repair defective materials that may be covered by insurance, it is recommended that your insurer be put on notice and that you get the insurer to agree to make payment. Otherwise, you risk losing insurance coverage.

If you have any questions regarding the article, please feel free to contact Andrew Vredenburg at (616.726.2234).¹

¹ The insurance carrier has since appealed the trial court decision.

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