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Current Status of Broker Liability – Preemption and Legislative Action



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BROKER LIABILITY



Broker Liability

- Broker liability claims generally take two paths
 - Broker as motor carrier
 - Broker exercised a level of control, or maintained a sufficient right to control to be considered the driver's employer and therefore the motor carrier or co-carrier
 - Negligent vetting
 - Knew or should have known the motor carrier was "unsafe"

Broker Liability

- Definition of a motor carrier – 49 CFR 371.2
- Definition of a broker – 49 CFR 371.2(a)
- Registration Requirement – 49 USC 13901 (a)
- Written specification of authority acting under – 49 USC 13901 (c)

Broker Liability

- Regulations with regard to brokers are generally administrative and pertain to how brokers should provide their services. Financial responsibility is imposed on carriers to ensure that a carrier can pay for claims pertaining to “bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property.” 49 USC § 13906(a)(1); See 49 CFR § 387.7(a). For brokers, the purpose of the lesser amount of financial responsibility is that it is only anticipated that brokers may be responsible to shippers, carriers, and passengers in their “dealing” with brokers. 49 USC § 13904.

“PREEMPTION” OF DIRECT NEGLIGENCE CLAIMS AGAINST MOTOR CARRIERS

Direct Negligence Claims & Double Dipping

Vicarious Liability

Employer/employee

Principal/agent

Direct (but derivative) Negligence

Negligent hiring

Negligent training

Negligent supervision

Negligent retention

Negligent entrustment

Negligent maintenance

Direct Negligence & Double Dipping: Preemption Rule

“Preemption Rule”

If employer/principal admits vicarious liability/course and scope, then direct negligence claims are duplicative

- Would “be a waste of time and inflame the jury”
- “The employer, although guilty of a separate tort, is only liable to the plaintiff for those damages caused by the employee’s negligence”
- The employer’s liability is **indivisible** from the employee’s liability

Affirmative Defense? Better description than “Preemption Rule”?

Exceptions:

Claims for punitive damages, but must be well pleaded

Federal Courts – TN Western, Middle and Eastern Districts

Ogletree v. New Prime, 22-CV-00142-DCLC-SKL, 2023 WL _____ (E.D. Tenn. March 2, 2023)

Jackson v. Trendafilov, No. 19-CV-02886-SHM-CGC, 2022 WL 1721210, at *3 (W.D. Tenn. May 27, 2022);

Madrid v. Annett Holdings, Inc., No. 1:21-CV-1173-STA-JAY, 2022 WL 1005307, at *4 (W.D.

Tenn. Apr. 4, 2022);

Swift v. Old Dominion Freight Lines, Inc., 583 F. Supp. 3d 1125, 1134 (W.D. Tenn. 2022);

Teil v. Rowe, No. 3:21 -CV-00917, 2022 WL 187824, at *2 (M.D. Tenn. Jan. 20, 2022);

Freeman v. Paddack Heavy Transp., Inc., No. 3:20-CV-00505, 2020 WL 7399026, at *3

(M.D. Tenn. Dec. 16, 2020);

Ryans v. Koch Foods, 2015 WL 12942221, at *9.

Federal Courts: Partial Survey

Agree:

Tennessee: *Rector v. Owens*, 2023 WL 9891204 (E.D. Tenn., Oct. 24, 2023)

Texas: *Frazier v. U.S. Xpress, Inc.*, 2020 WL 4353175 (W.D. Tx., Jul. 29, 2020)

Colorado: *Trujillo v. May Trucking*, 2019 WL 5684213 (Co., Nov. 1, 2019)

Florida: *Tereskun-Arce v. KW International, Inc.*, 2019 WL 13245751 (M.D. Fla., Nov. 25, 2019)

New York: *Saleh v. Savage*, 2015 WL 1608839 (W.D. NY, Apr. 10, 2015)

Disagree:

Georgia: *Roberts v. AAA Cooper Transportation, Inc.*, 2021 WL 9031118 (N.D. Ga, Oct. 12, 2021)

Wyoming: *Cahalan v. May Trucking Co.*, 2013 WL 12168764 (Wy. May 13, 2013)

Tennessee (as of April 8, 2024): *Binns v. Trader Joe's*, M2022-01033-SC-R11-CV (Tenn. April 8, 2024)

Tennessee State Court Status

Binns v Trader Joe's East, Inc., M2022-01033-SC-R11-CV

Claim originated in the Circuit Court for Davidson County

Slip and fall accident

Premises liability claims, vicarious liability, AND direct negligence claim for negligent training and supervision

Issues:

Whether the "preemption rule" bars a plaintiff from asserting direct negligence claims against an employer after the employer admits that it will be vicariously liable for the negligent conduct of its employees under the doctrine of respondeat superior

Whether a plaintiff can assert direct negligence claims against a premises owner concurrently with a premises liability theory of recovery

They are inconsistent causes of action that allow a double recovery for a single wrong

A negligent activity claim requires that the claimant's injury result from a condition created on the premises by the activity, whereas a premises defect claim is based on the property itself being unsafe

FAIR COMPENSATION FOR TRUCK CRASH VICTIMS ACT (PROPOSED)



Proposed Changes

“Increase minimum levels of financial responsibility for transporting property, and to index future increases to changes in inflation relating to medical care”

H.R. 6884 – Fair Compensation for Truck Crash Victims Act

- Altering \$750,000 to **\$5,000,000**
- Adding in the ability to alter minimum responsibility levels on a 5-year basis in order to adjust for medical care inflation
- Changes effective 1 year after Act is enacted

History and Findings

- **Introduced December 22, 2023, to the House of Representatives**
- **Minimum insurance levels are intended to maintain safety**
 - Motor Carrier Act of 1980, Public Law 96-296
- **Increasing financial responsibility will lead to proactive safety enhancements of equipment**
 - House Report No. 96-1069
- **\$1,000,000 minimum for a single occurrence was initially recommended in 1979 by The National Transportation Policy Study Commission**
 - Advised to remain the minimum through the Year 2000
- **The amount of \$750,000 set in 1980 would be the equivalent of \$5,193,665.62 in 2020**
 - Inflation rate based on medical costs

Arguments

- **Owner-Operator Independent Drivers Association and others oppose** the attempt to increase the minimum insurance citing, in part, a recent study suggesting that current minimum insurance levels adequately cover damages on all but 0.6% of cases.
- **Bill's sponsors states:**

“For too long truck crash victims and their families have been burdened by tremendous emotional and financial consequences, facing a mountain of medical debt and shattered lives.”

“The Fair Compensation for Truck Crash Victims Act is about justice, responsibility, and protecting our communities. It is time to ensure that trucking companies have adequate insurance to cover the true cost of their actions and prevent families from being financially destroyed by crashes they had no control over.”

-Congressmen Jesus “Chuy” Garcia (IL-04) and Hank Johnson (GA-04): Dec. 22, 2023, Press release

Broker v. Motor Carrier Liability Insurance

- **Motor carriers** are subject to a “[l]iability insurance requirement” that “must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant **for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property . . . or both.** 49 U.S.C. § 13906(a)(1) (2017)
- **Brokers** must secure “[a] surety bond, trust fund, or other financial security” in order to “**pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation.**” 49 U.S.C. § 13906(b)(2)(A) (2017)
- There does not appear to be any significant present effort to raise the required financial responsibility for brokers

FEDERAL PREEMPTION AND THE FAAAA



“F QUAD A”



FAAAA Preemption

Federal Aviation Authorization Administration Act (“FAAAA”) -
49 U.S.C. § 14501

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law **related to a price, route, or service of any motor carrier** (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.



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Why?

"Congress enacted the FAAAA's preemption provision in 1994 with the aim of eliminating the patchwork of state regulation of motor carriers that persisted fourteen years after it had first attempted to deregulate the trucking industry."

Nationwide Freight Sys., Inc. v. Illinois Commerce Comm'n, 784 F.3d 367, 373 (7th Cir 2015) (citations omitted).

When?

Issue is always does the claim relate to price, route, or service of a motor carrier?

What type of claims are preempted?

- Preemption applies to any tort action "where the subject matter of the action is related to the carrier's prices, routes, or services. . ." Although generally not applicable to personal injury claims, The FAAAA nonetheless necessarily preempts claims that are related to "prices, schedules, origins, destinations or the point-to-point transportation of passengers, cargo, or mail." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am. Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997)
- delivery of a pipe bomb (*Rockwell v. UPS*, No. 2:99-CV-57, 1999 U.S. Dist. LEXIS 22036 (D.C. Vt. July 7, 1999))
- negligence and conversion arising from lost consumer package (*Vieira v. United Parcel Service, Inc.*, No. C-95-04697 CAL ARB, 1996 U.S. Dist. LEXIS 11223 (N.D. Cal. Aug 5, 1996))
- untimely delivery of medication (*Eggleston v. UPS*, 834 S.E.2d 713 (S.C. Ct. App. 2019))

What about freight brokers and freight forwarders?

- Sixth Circuit – Likely preempted

-Negligence claims brought against a shipper and broker "fall[] squarely within the preemption of the FAAAA." *Creagan v. Wal-Mart Transp., LLC*, 354 F. Supp. 3d 808, 813 (N.D. Ohio 2018)

- "Safety exception" exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. §14501(c)(2)(A), but excluding accident claims would make preemption pointless. *McCarter v. Ziyar Express, Inc.*, 2023 U.S. Dist. LEXIS 4552, *2 (N.D. Ohio Jan. 10, 2023).

What about freight brokers and freight forwarders?

- Seventh Circuit - Preempted

“Simply put, I remain dubious that Congress, in its mission to unencumber the interstate trucking industry from a patchwork of state tariffs, price controls, and similar economic regulations, also aimed to completely unyoke trucking companies and freight brokers from commonsense standards of care enforced through private tort actions.”

Wardingley v. Ecovyst Catalyst Techs., LLC, 639 F. Supp. 3d 803, 810, 2022 U.S. Dist. LEXIS 201265 (N.D. Ind. Nov. 4, 2022).

Negligent hiring against broker preempted because (1) claim had a direct relationship to broker services under the Act and subjecting such decisions to a common-law negligence standard would have significant economic effects ; and (2) safety exception did not preclude preemption because Congress required motor carriers—not brokers—to bear responsibility for motor vehicle accidents.

Ye v. GlobalTranz Enters., 74 F.4th 453 (7th Cir. 2023)

What about freight brokers and freight forwarders?

SCOTUS denied certiorari in *Ye v. GlobalTranz Enters.*, 74 F.4th 453 (7th Cir. 2023) on January 9, 2024.

What about freight brokers and freight forwarders?

- Eleventh Circuit - Preempted

Aspen Am. Ins. Co. v. Landstar Ranger, Inc., 65 F.4th 1261, 1267 (11th Cir. 2023) ("[T]he [Act] makes plain that [the plaintiff's] negligence claims relate to a broker's services.").

What about freight brokers and freight forwarders?

-- Ninth Circuit – NOT Preempted

Miller v. C.H. Robinson Worldwide, Inc., 976 F.3d 1016, 1024 (9th Cir. 2020) ("[A] claim that imposes an obligation on brokers at the point at which they arrange for transportation by motor carrier has a 'connection with' broker services.")

- BUT “Safety exception” saves state law tort claims from preemption

Under § 14501(c)(2)(A), the FAAAA's preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." To meet this exception, a common law negligence claim must be (1) within a state's "safety regulatory authority" and (2) "with respect to motor vehicles."

What about freight brokers and freight forwarders?

- Fifth Circuit – Likely preempted

“[S]electing a motor carrier to transport a load is the essential service of the broker. Plaintiffs' Second Amended Complaint alleges that J.B. Hunt "had a duty to select a competent motor carrier" and "had an ongoing duty to monitor Euro Express to ensure it was a competent motor carrier" to transport the load involved in the accident leading to this case. And Plaintiffs' negligent brokering claim stems from J.B. Hunt's alleged breach of that duty. Thus, the negligent brokering claim is fundamentally "related to" the broker's service of selecting a competent motor carrier.”

Hamby v. Wilson, No. 6:23-cv-249-JDK, 2024 U.S. Dist. LEXIS 90897 (E.D. Tx. May 21, 2024).

What about freight brokers and freight forwarders?

- **Fifth Circuit – Likely preempted**
- **Safety Exception does not apply**

“The Court thus concludes that the safety exception excepts from preemption only state laws or regulations that have a direct relationship to motor vehicle safety. And a negligent hiring or brokering claim is not directly related to motor vehicle safety.”

Hamby, 2024 U.S. Dist. LEXIS 90897 at *14.

What about freight brokers and freight forwarders?

- Fourth Circuit – Likely preempted

“Of the three Courts of Appeals that have considered this question, all have found these claims to be preempted by the FAAAA. The Court agrees with the reasoning in these Circuit opinions and finds that negligence and negligent hiring claims are preempted under the FAAAA . . .”

Mays v. Uber Freight, LLC, No. 5:23-CV-00073 , 2024 U.S. Dist. LEXIS 15434, *8 (W.D. NC Jan. 29, 2024).

Removal?

Gulley v. Hansen & Adkins Auto Transport, Inc., 2023 WL 4494186
United States District Court for the Middle District of Alabama, Northern Division (July 12, 2023)

- Claim arose from an Alabama truck accident – suit originally filed Butler County, Alabama
 - Plaintiff did not raise any federal questions on the face of the Complaint.
- Defendant removed based on federal question jurisdiction and supplemental jurisdiction alleging the Plaintiff's claims against it were completely preempted by section 14501 (c) (1) of the F4A.
- Plaintiffs argued that even if the claims were subject to “ordinary” preemption, ordinary preemption does not confer federal question jurisdiction.
- The Court determined there were doubts as to whether Congress intended to the F4A to completely preempt State law negligent hiring claims against freight brokers, thereby determining that there was no complete preemption and therefore no federal question upon which to base federal question jurisdiction

MOTOR CARRIER SAFETY SELECTION STANDARD ACT OF 2023 (PROPOSED)



Proposed Carrier Selection Standard - Senate

- (b) Selection standard.—
- (1) IN GENERAL.—For any claim of negligent selection of a motor carrier against a covered entity with respect to the covered entity contracting with a covered motor carrier for the shipment of goods or household goods, **the covered entity shall be considered reasonable and prudent** in the selection of that covered motor carrier if, not later than the date of shipment and not earlier than 45 days before that date, the covered entity **verifies that the covered motor carrier—**

Proposed carrier Selection Standard - Senate

- (A) is **registered** under section 13902 of title 49, United States Code, as a motor carrier or a household goods motor carrier;
- (B) has **at least the minimum insurance coverage required by Federal and State law**; and
- (C) has been confirmed by the Federal Motor Carrier Safety Administration, including through a public confirmation described in subsection (c)(1), to be **in compliance with all required Federal Motor Carrier Safety Administration safety standards to operate as a motor carrier.**
- (2) SUNSET.—Paragraph (1) shall cease to be effective on the effective date of a regulation promulgated under subsection (d)(1).

Proposed Carrier selection Standard - Senate

- (c) Public confirmation.—The public confirmation described in paragraph (1)(C) shall include 1 of the following statements, depending on the status of the motor carrier:
- (1) “This motor carrier is confirmed to meet all operating requirements of the Federal Motor Carrier Safety Administration (FMCSA) and is authorized to operate on the nation’s roadways.”.
- (2) “This motor carrier is not confirmed to operate on the nation’s roadways and fails to meet 1 or more requirements of the Federal Motor Carrier Safety Administration (FMCSA) to operate as a motor carrier.”.

Proposed Carrier Selection Standard - House

- (1) SELECTION STANDARD.—For any applicable legal requirement with respect to a covered entity contracting with a covered motor carrier for the shipment of goods or household goods, the **covered entity shall be considered reasonable and prudent** in the selection of such motor carrier if the covered entity verifies, not later than the date of shipment and not earlier than 45 days before the date of shipment, **that the covered motor carrier—**

Proposed Carrier Selection Standard - House

- (A) is **registered** under section 13902 of title 49, United States Code, as a motor carrier or household goods motor carrier;
- (B) has **at least the minimum insurance coverage required by Federal and State law**; and
- (C) **is not determined unfit to operate safely commercial motor vehicles under section 31144 of title 49, United States Code, or otherwise ordered to discontinue operations by the Federal Motor Carrier Safety Administration (including not renewing a Department of Transportation registration number) or a State, for intrastate commerce.**
- (2) SUNSET.—The standard established under paragraph (1) shall sunset on the effective date of a regulation issued pursuant to subsection (c).

FMCSA Definition – “Satisfactory”

“A safety rating received as a result of a compliance review. A Satisfactory rating is defined as: a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in the FMCSRs, Section 385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier.”

49 CFR 385.3

Do Not Forget Indemnity

- *Diamond Transportation v. Kroger*, 101 F.4th 458, (6th Cir. May 13, 2024)
 - Indemnity case – Diamond transported goods for Kroger. Diamond used subcontractors to haul the goods. Diamond sub hit minivan head-on. 3 deaths in minivan. Suit v. Diamond, truck driver, others, and Kroger. Kroger was sued for negligent and reckless selection, hiring, and retaining of Diamond. Kroger settled after Diamond did not timely take up the indemnity and defense demands of Kroger. Kroger went after Diamond per indemnity clause.
 - Main issue was the meaning of a phrase in the indemnity exception - “liability ... caused by the sole negligence or willful misconduct of Kroger.”
 - Court found that Kroger’s liability for the claim against it was not caused by its “sole negligence.” Kroger had to be the only negligent party for the exception to apply. According to the Court, negligent selection, hiring, and retention claims can only prevail with at least two negligent parties – the employer’s negligence in hiring, retention, etc., AND the acts or omissions of an employee.

Pop-Up Question

- **What is the required financial responsibility for a transportation broker?**
 - a) \$750,000
 - b) \$50,000
 - c) \$75,000
 - d) \$0

THANK YOU! If you have any questions, please contact one of the presenters



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