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LITIGATION ISSUES FACING BROKERS

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Common-Law Claims

Negligent Selection:

Did the broker use reasonable care in the selection of a motor carrier by confirming that the carrier:

1. had the proper authority/license;
2. maintained the required cargo and liability insurance; and
3. had an appropriate safety rating?

Schramm v. Foster, 341 F.Supp.2d 536 (D. Md. 2004)

Vicarious Liability:

Did the broker exercise *too much* control over the carrier/driver?

Sperl v. C.H. Robinson Worldwide, Inc., 946 N.E.2d 463, 470 (Ill. App. 2011)



FAAAA Preemption

[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.

49 U.S.C. §14501 (c)(1)

So ... this takes care of common-law claims against brokers, right?



The Safety Exception: The statute states that the preemptive grant shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization....

49 U.S.C. §14501 (c)(2)(A) (emphasis added)

How does this affect brokers?



Cargo/property damage claims:

Negligence claim against a broker affects its “services” and thus is preempted under the FAAAA

- *Aspen American Ins. Co. v. Landstar Ranger*, 65 F.4th 1261, 1271-72 (11th Cir. 2023)
- *Alpine Fresh, Inc. v. Jala Trucking Corp.*, 181 F. Supp. 3d 250, 257 (D. N.J. 2016)
- *ASARCO LLC v. England Logistics Inc.*, 71 F. Supp. 3d 990, 1006-07 (D. Ariz. 2014)
- *AIG Europe Ltd. v. Gen. Sys., Inc.*, CIV.A. RDB-13-0216, 2014 WL 3671566, at *4 (D. Md. July 22, 2014)
- *Ameriswiss Tech., LLC v. Midway Line of Illinois, Inc.*, 888 F. Supp. 2d 197, 205-06 (D. N.H. 2012)



Bodily injury/death claims:

Not preempted:

- *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020) – safety exception broadly applies to regulations both directly and indirectly having a connection with motor vehicles, including claims against brokers arising out of motor vehicle accidents
 - Dissent asserted that the relationship between a broker and a motor vehicle was simply too attenuated for the statute’s safety exception to apply
 - United States Supreme Court denied certiorari on June 27, 2022
- *Ruff v. Reliant Transportation, Inc.*, 2023 WL 3645719, *2 (D. Neb. May 25, 2023) – “It is hard to see how wrongful-death liability significantly impacts the market for interstate motor carriage if liability only arises after the market has failed in a particular instance.”



Preempted, notwithstanding the safety exception:

- *Lee v. Werner Enterprises, Inc.*, 2022 WL 16695207, *4 (N.D. Ohio Nov. 7, 2022) – “The plain meaning of the words [`]safety regulatory authority of a State[`] does not support the inclusion of private tort claims.”
- *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453, 459-62 (7th Cir. 2023) – “It is difficult to conclude that the same Congress that prescribed specific—often itemized—regulations for motor vehicle safety intended something broader than ‘motor vehicle’ in a safety exception that immediately follows an express preemption provision regulating ‘motor carriers.’ So we draw the line where Congress did—at state safety regulations directly related to ‘motor vehicles.’”
 - Reconsideration denied August 16, 2023
 - Petition for certiorari due November 14, 2023



Fraudulent Brokering

Risks:

- Nonpayment of freight charges
- Cargo theft



Fraudulent Broker Examples:

- Lakes and Berkovich – hacked SAFER system to temporarily change contact info for legitimate brokers and trucking companies; agreed to transport at lower rate than offered to delivering carriers who were never paid
- Hickey – received over \$1 million in transportation fees for loads brokered to trucking companies that were never paid
- Avetyan – provided false information to FMCSA to obtain DOT MC registration number and obtain loads from brokers, then brokered to other carriers
- Padilla – stole identity of California-based carrier and agreed to make deliveries, the posed as shipper and re-brokered to other carriers



Nonpayment of Freight Charges:

- In the Fourth, Fifth, Sixth, Ninth and Eleventh Circuits, carriers have recourse against shippers (or even their vendors or consignees) for payment
 - “[T]he shipper, and not the carrier, is in the best position to avoid liability for double payment by dealing with a reputable freight forwarder, by contracting with the carrier to eliminate the shipper’s liability, or by simply paying the carrier directly. *Oak Harbor Freight Lines, Inc. v. Sears, Roebuck & Co.*, 513 F.3d 949, 959 (9th Cir. 2008)
- Other circuits hold that the carrier is not entitled to recover payment from shippers, primarily where the bill of lading is marked “prepaid,” thus setting up an estoppel defense.
 - *See, e.g., Olson Distributing Sys., Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988) and *Farrell Lines, Inc. v. Titan Indust. Corp.*, 306 F.Supp. 1348 (S.D.N.Y.), *aff’d*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970)



Nonpayment of Freight Charges:

Who bears the risk of locating the missing party?

- *P.A.M. Transport, Inc. v. Schell & Kampeter, Inc. d/b/a Diamond Pet Foods*, No. 5:23-cv-5002, 2023 WL 2465788 (W.D. Ark. Mar. 10, 2023)

Cargo Theft:

- Party engaged by broker arranges for transportation by a third party to a different location
- Typical scenario:
 - Delivering carrier is advised by the “broker” that delivery destination has changed, resulting in delivery of cargo to compromised warehouse or location
 - Original broker has no information regarding delivery carrier and no way to locate the cargo



Other Litigation Risks

- Defamation
 - *Jets Prolink Cargo, Inc. v. Brenny Transportation, Inc.*, No. 02-1294 ADMRLE, 2003 WL 22047910 (D. Minn. Aug. 29, 2003) (mem. op.)
- Reputational harm
 - *Sunteck Transport Co., Inc. v. Baxter Bailey & Associates*, No. 3:13-cv-00271, 2014 WL 12642571 (M.D. Tenn. Sept. 15, 2014)
 - *Canning Logistics Services, LLC v. Baxter Bailey & Associates*, No. 8:17CV116, 2017 WL 2178350 (D. Neb. May 16, 2017) (mem. op.)



Combating Fraud

Has the FMCSA done enough?

- Fraud identity theft alerts
- Validation of information on paper applications
- Verifying physical addresses
- Publication of definitions of “broker” and “dispatch service”
- Focusing additional resources on detecting, preventing and stopping unlawful brokerage



Combating Fraud

- May 22, 2023 request to USDOT Office of Inspector General to create permanent task force to address fraud issues
- August 22, 2023 response from the OIG - "Investigating double-brokering amongst freight carriers is [an] area in which we are committed to collaborating with FMCSA, U.S. Attorneys' Offices within DOJ, and other stakeholders, when appropriate."
 - Falls short of commitment to task force
 - Partnership appears to be limited to investigating only the most egregious allegations of ... double-brokering fraud, in addition to [its] primary focus on cases that align with OIG's top investigative priorities."



Private RICO Action?

- Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 to 1968
- Essential elements:
 - (1) a pattern of racketeering activity
 - (2) a culpable person
 - (3) the infiltration of an enterprise
 - (4) an effect on interstate commerce through
 - (a) investment of income derived from the pattern of racketeering activity in the enterprise,
 - (b) acquisition or maintenance of an interest in enterprise through the racketeering activity,
 - (c) conduct of the affairs of the enterprise through a racketeering activity, or
 - (d) conspiracy to commit any of the foregoing acts.



Challenges to RICO

- Racketeering activity
 - Statutorily enumerated crimes – theft of interstate/foreign shipments, theft of money from common carrier moving in interstate/foreign commerce, mail fraud, etc.
 - State-law crimes (such as theft of funds) cannot form the basis of a RICO claim
- Existence of an “enterprise” separate from an individual
 - Individual “employed by or associated with an enterprise”
 - RICO “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)
- *Update Traffic Systems, Inc. v. Gould*, 857 F.Supp. 274, 282 (E.D.N.Y. 1994) – RICO claim for double-brokering of loads survived motion to dismiss



A DEEPER DIVE INTO THE DOUBLE BROKERING PROBLEM

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Statutory Framework

- 49 U.S.C. § 13902 – Registration of Motor Carriers
 - Section 13902 sets out requirements for registration for commercial motor carriers who wish to operate in interstate commerce
 - A motor carrier may not arrange transportation except as described in 49 U.S.C. § 13901(a)(1) unless “the motor carrier has obtained a separate registration as a freight forwarder or broker for transportation under section 13903 or 13904, as applicable.” 49 U.S.C. § 13902(i)(2).
- 49 U.S.C. § 13903 – Registration of Freight Forwarders
- 49 U.S.C. § 13904 – Registration of Brokers
 - Section 13904(d) prohibits a broker from providing transportation as a motor carrier unless the broker has registered separately under this chapter to provide transportation as a motor carrier



Requirements for Registration

- 49 U.S.C. § 13901
 - If the Secretary registers a person under this chapter to provide transportation or service, including as a motor carrier, freight forwarder, or broker, the Secretary shall issue a distinctive registration number to the person for each such authority to provide transportation or service for which the person is registered. See 49 U.S.C. § 13901(b)(1)
 - For each agreement to provide transportation or service for which registration is required under this chapter, the registrant shall specify, in writing, the authority under which the person is providing such transportation or service. See 49 U.S.C. § 13901(c) – Specification of Authority
- 49 U.S.C. § 31134 – Requirement for registration and USDOT number
 - The Secretary shall register an employer or person under subsection (a) only if the Secretary determines that (i) that person is willing and able to comply with the requirements and regulations. See 49 U.S.C. § 31134(b)(1).



Enforcement by Law: **MAP-21**

- MAP-21, signed into law on July 6, 2012, as Public Law No. 112-141, contains several provisions intended to better regulate the transportation industry.
 - Principally, MAP-21 prohibits motor carriers from brokering freight which they possess.
 - MAP-21 separates motor carriage from brokering.
 - MAP-21 makes it unlawful to engage in brokerage activities without authority and without proper financial security.



Civil Penalties for Violating *MAP-21*

- MAP-21 provides for the following remedies:
 - 49 U.S.C. § 14916(a) – Unlawful Brokerage Activities – provides that a person or entity may provide interstate brokerage services as a broker only if registered and licensed as a broker under 49 U.S.C. § 13904.
 - 49 U.S.C. § 14916(c) provides for civil penalties and a private cause of action, without regard to amount, against “[a]ny person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person a violation of subsection (a). . .”.
 - 49 U.S.C. § 14916(d) defines liability as joint and several, and defines liable parties as any corporate entity or partnership involved and the individual officers, directors, and principals of those entities.
 - 49 U.S.C. § 14704(e) provides for the recovery of reasonable attorney’s fees due to the harm suffered because of unlawful brokerage activities.



FMCSA Broker Regulation: *Is MAP-21 Enough?*

- General view from the FMCSA is changes in broker and forwarder requirements are necessary to curtail double brokering.
 - FMCSA proposes changes in broker and forwarder requirements: Notice of Proposed Rulemaking (“NPRM”) for Five (5) Areas:
 - Assets Readily Available
 - Immediate suspension of broker/freight forwarder operating authority
 - Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency
 - Enforcement Authority
 - Entities eligible to provide trust funds for BMC-85 filings would remove the rule allowing loan and finance companies to serve as BMC-85 trustees



Current Regulatory Activity:

What Else is Being Done to Combat Fraud in the Supply Chain?

- Reputable insurance firms have estimated that the plague of double brokering is costing the transportation industry, at a minimum, over \$100M annually.
- Online freight marketplace Truckstop.com said complaints about fraud, including double brokering, jumped 400% in the fourth quarter of 2022 into Q1 2023 from the same period the year before to the highest level since the company began tracking reports in 2004. *Wall Street Journal, Growing Freight Fraud is Peeling Millions from the U.S. Shipping Market, April 26, 2023* .



FMCSA Fraud Reporting System

- There have been about 80,000 complaints logged with the FMCSA national consumer database since 2010. But due to a lack of manpower, the government has only investigated several hundred complaints.
 - Protect your DOT PIN. Check SAFER frequently (bi-weekly at a minimum) to ensure critical information has not changed. Unauthorized changes can signal fraud or stolen identity
- Report double-brokering issues and file complaints directly to the USDOT's Office of the Inspector ("OIG") General Hotline or online.
 - This is an option, but it is reported that while there were roughly 3,500 (if not many more) supply chain schemes conducted last year, the OIG conducted only 13 investigations involving double brokering with two convictions over the last few years.
 - Protecting your company's information starts with you and diligent employees.



USDOT Volpe Center//CVSA Electronic Registration Proposal

- The U.S. DOT Volpe Center is supporting FMCSA in developing and implementing the Level VIII Inspection Program Operational Test, which will apply new technologies to improve the efficiency and effectiveness of roadside enforcement while mitigating the current process's climate impacts and minimizing supply chain disruptions.
- Among Level VIII inspection's potential benefits are a tenfold increase in the total number of vehicle inspection data collected annually, while enabling better decisions about which carriers to prioritize for inspection.
- This type of system could alleviate the problem of bad actors by increasing inspections that would not overly burden reputable motor carriers of any size. This type of "net" could intercept carriers authorizing without requisite authority or paperwork and cut down on the number of fraudsters. However, this is not a viable solution right now because this is a multi-year effort that will continue through at least May 2024