

THE MODERN-DAY RISKS OF TRANSPORTATION BROKERAGE

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Transportation brokers arrange, or offer to arrange, for compensation the transportation of property by a motor carrier.¹ As stated by the FMCSA, brokers “don’t transport the property, don’t operate motor vehicles or have drivers, and don’t assume responsibility for the cargo being transported.”² Given what they *don’t* do, it would seem that brokers should have little legal risk aside from the occasional breach of contract claim. Unfortunately, however, recent case law indicates that brokers’ exposure—whether it be for claims resulting from motor vehicle accidents or supply-chain fraud—is a very real and expensive concern.

Negligent Selection

Brokers potentially face tort liability for the negligent selection of a motor carrier when accidents occur during the transportation of cargo by carriers they select, whether the same results in cargo damage, personal injury, or both. At common law, a transportation broker’s liability for negligent selection turns on whether it used reasonable care in the selection of a motor carrier by confirming that the carrier (1) had the proper authority or license, (2) maintained the required cargo and liability insurance, and (3) had an appropriate safety rating.³ Brokers must strike a careful balance to negate a negligent selection claim while avoiding a possible claim for vicarious liability resulting from the exercise of too much control over a motor carrier or driver.⁴

In 1994, as part of the Federal Aviation Administration Authorization Act (“FAAAA”), Congress expressly preempted States from enacting or enforcing laws relating to prices, routes, or services provided by, among other entities, brokers:

Except as provided in paragraph (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.**⁵

¹ 49 C.F.R. § 371.2(a).

² Federal Motor Carrier Safety Administration Frequently Asked Questions, *What are the definitions of motor carrier, broker and freight forwarder authorities?*, May 22, 2023, <https://fmcsa.dot.gov/faq/what-are-definitions-motor-carrier-broker-and-freight-forwarder-authorities>.

³ See, e.g., *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004); *CGU Int’l Ins., PLC v. Keystone Lines Corp.*, No. C-02-3751 SC, 2004 WL 1047982 (N.D. Cal. 2004).

⁴ See *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E.2d 463, 470 (Ill. App. 2011) (addressing a claim of vicarious liability against a broker for the actions of a driver).

⁵ 49 U.S.C. §14501 (c)(1) (emphasis added). See also 49 C.F.R. § 371.2(a), (c) and 49 U.S.C. § 13102(23) for support.

Over the last several years, FAAAA preemption has gained traction in cases involving cargo damage/loss claims, with courts in several jurisdictions holding that the foregoing statutory provision preempts a negligence claim against a transportation broker because such a claim affects its services.⁶

Claims for bodily injury, however, may fare better when it comes to establishing a broker's tort liability. While courts appear to uniformly apply FAAAA preemption to suits against brokers for cargo loss as noted above, some have refused to find preemption of common law tort claims against freight brokers in cases involving personal injury.⁷ In 2020, the Ninth Circuit Court of Appeals in *Miller v. C.H. Robinson Worldwide, Inc.*⁸ concluded that tort claims against brokers are not preempted because they fall under the "safety exception" of the FAAAA, which states that the statute's 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....⁹

Noting that the phrase "with respect to" is synonymous with "relating to," the Ninth Circuit interpreted the application of the safety exception as broadly applying to regulations both directly and indirectly having a connection with motor vehicles, including negligence claims against brokers arising out of motor vehicle accidents.¹⁰ However, in a dissenting opinion, Justice Fernandez disagreed, asserting that the relationship between a broker

⁶ See, e.g., *Ameriswiss Tech., LLC v. Midway Line of Illinois, Inc.*, 888 F. Supp. 2d 197, 205-06 (D. N.H. 2012) ("Ameriswiss's negligence claim and all three of MB Insurance's claims are expressly preempted by the ICCTA.") (collecting cases); *Alpine Fresh, Inc. v. Jala Trucking Corp.*, 181 F. Supp. 3d 250, 257 (D. N.J. 2016) ("[T]he Court concludes that the express prohibition against state regulation of 'intrastate services of any ... broker,' and 'related to a price, route or service of any broker,' precludes the claims at issue here against Super Logistics, which Alpine has alleged acted as a broker."); *Marx Cos., LLC v. W. Trans Logistics, Inc.*, No. 14-751 JAP, 2015 WL 260914, at *3 (D.N.J. Jan. 21, 2015) ("Many other courts, under facts similar to the instant case, have found common law claims against a freight broker preempted by Section 14501"); *ASARCO LLC v. England Logistics Inc.*, 71 F.Supp.3d 990, 1006-07 (D. Ariz. 2014) (holding that a negligence claim against a broker would affect its "services" and so was preempted under the FAAAA/ICCTA); *AIG Europe Ltd. v. Gen. Sys., Inc.*, No. RDB-13-0216, 2014 WL 3671566, at *4 (D. Md. July 22, 2014) (mem. op.) (holding that common-law negligence claim asserting that broker "negligently failed to select a different motor carrier" was expressly preempted). See also *Enbridge Energy, LP v. Imperial Freight Inc.*, No. H-14-2615, 2019 WL 1858881, at *2 (S.D. Tex. April 25, 2019).

⁷ See *Mann v. C. H. Robinson Worldwide, Inc.*, No. 7:16-CV-00102, 2017 WL 3191516 (W.D. Va. July 27, 2017); *Montes de Oca v. El Paso-Los Angeles Limousine Exp., Inc.*, No. CV 14-9230 RSWL (MANx), 2015 WL 1250139 (C.D. Cal. Mar. 17, 2015); *Owens v. Anthony*, No. 2-11-0033, 2011 WL 6056409 (M.D. Tenn. Dec. 6, 2011).

⁸ 976 F.3d 1016 (9th Cir. 2020).

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

¹⁰ *Miller*, 976 F.3d at 1026, 1030.

and a motor vehicle was simply too attenuated for the statute's safety exception to apply.¹¹ The United States Supreme Court denied certiorari in *Miller* on June 27, 2022.

More recent decisions in other jurisdictions have expressly rejected the holding in *Miller*, instead holding that the safety exception does not negate broker preemption. In *Lee v. Werner Enterprises, Inc.*,¹² a plaintiff who sustained serious injuries sued not only the motor carrier, but also the broker and the shipper, for negligence. Both the broker and the shipper filed motions to dismiss based on FAAAA preemption. In the order granting both motions, the Ohio district court explained how the plaintiff's negligence claims against the transportation broker and shipper "fall[] squarely within the preemption of the FAAAA."¹³ Addressing the safety exception, the court disagreed with *Miller*, ruling that "[t]he plain meaning of the words ['safety regulatory authority of a State'] does not support the inclusion of private tort claims."¹⁴ The court further noted that "if the safety exception preserved all claims related to motor vehicles ... all preempted claims would then be 'saved' by the exception."¹⁵ In the court's view, "the FAAAA's preemption provision protects precisely parties such as the shipper and broker, who did not have direct involvement in the accident that injured Plaintiffs."¹⁶

The Eleventh Circuit, in *Aspen American Insurance Company v. Landstar Ranger*, likewise construed the statute's safety exception as using specific and intentional language that does not accommodate general state law negligence claims, regardless of whether they implicate safety concerns and fall within the state's safety regulatory authority.¹⁷ Although *Aspen* addressed a negligence claim involving stolen property as opposed to a claim for personal injury, the Eleventh Circuit found the distinction between property damage and personal injury irrelevant to its analysis, stating that

it makes little sense for the safety exception to turn on whether a plaintiff seeks damages for property loss or bodily injury—the common law negligence standard is the same no matter the damages a breach has caused.¹⁸

Most recently, in *Ye v. GlobalTranz Enterprises, Inc.*,¹⁹ the Seventh Circuit agreed with the logic of *Landstar Ranger* and held that personal injury claims asserted against a broker under a theory of negligent hiring were expressly preempted under the FAAAA. In rejecting Ye's assertion that the FAAAA's safety exception applied, the court observed that although the statute broadly preempted state laws related to the prices, routes, and services of motor carriers, there is no mention of either brokers or broker services in Section 14501(c)(2)(A)'s safety exception.²⁰

¹¹ *Id.* at 1031-32 (Fernandez, J., dissenting).

¹² No. 3:22 CV 91, 2022 WL 16695207 (N.D. Ohio Nov. 7, 2022).

¹³ *Id.* at *4 (quoting *Creagan v. Wal-Mart Transp., LLC*, 354 F.Supp.3d, 808, 813 (N.D. Ohio 2018)).

¹⁴ *Id.* at *5.

¹⁵ *Id.* (quoting *Creagan*, 354 F.Supp.3d at 814).

¹⁶ *Id.*

¹⁷ 65 F.4th 1261, 1271-72 (11th Cir. 2023).

¹⁸ *Id.* at 1269.

¹⁹ 74 F.4th 453 (7th Cir. 2023).

²⁰ *Id.* at 460-62.

Other recent decisions, however, follow the *Miller* analysis. For example, in *Ruff v. Reliant Transportation, Inc.*²¹ (a case predating the *Ye* decision), a Nebraska district court addressed removal of a wrongful death claim against a broker as the result of an accident involving the motor carrier with which the broker had arranged a shipment. In holding that the statute's safety exception applied to preclude removal of the claim to federal court on the basis of FAAAA preemption, the court observed that

both [*Aspen American* and *Miller*] accepted at more or less face value the assertion that a negligent hiring claim seeks to regulate broker conduct at the core point of service. But presumably, Reliant did not hire the carrier to kill the [plaintiffs]—it hired the carrier to transport and deliver a shipment. The fatal crash thus [being] a detour well outside the scope of service, Plaintiffs' negligent hiring claim asks not so much whether Reliant erred in selecting a carrier to deliver a shipment, but whether it so erred as to select a carrier that both failed to deliver and killed two bystanders in the process. ... 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.²²

Although the U.S. Supreme Court declined to review the Ninth Circuit's decision in *Miller*, it did so at a time when no circuit court conflict existed. The recent Seventh Circuit decision in *Ye*, however, is directly at odds with *Miller*, creating a conflict among the federal appellate courts regarding interpretation of a federal statute and thus now setting the table for consideration by the high court. The Seventh Circuit denied reconsideration of *Ye* on August 16, 2023, making a petition for writ of certiorari to the Supreme Court due on or before November 14, 2023.²³

Double-Brokering

Exposure also exists for a broker in cases involving double brokering. As stated in *Millam v. Northern Freight, LLC*,

[d]ouble brokering involves the practice of a broker receiving a shipment from a shipper and subsequently tendering the shipment to another broker for movement by a motor carrier. It is frequently done without the shipper's knowledge or the motor carrier's knowledge. No written or even oral contracts exist between the motor carrier ultimately used and the initial broker.²⁴

²¹ No. 8:23CV92, 2023 WL 3645719 (D. Neb. May 25, 2023).

²² *Id.* at *2.

²³ Sup. Ct. R. 13.1, 13.3.

²⁴ No. 20-cv-00797-JPG, 2023 WL 423114, *3 (S.D. Ill. Jan. 26, 2023) (mem. op.) (citing *Jets Prolink Cargo, Inc. v. Brenny Transp., Inc.*, No. Civ. 02-1294 ADMRL, 2003 WL 22047910, *1 n.1 (D. Minn. Aug. 29, 2003)).

In light of the wording of the federal regulations, double brokering is often considered illegal.²⁵ See 49 U.S.C. § 13901(c), requiring a motor carrier or broker registrant to “specify, in writing, the authority under which the person is providing such transportation or service.” A purported motor carrier that double-brokers a shipment tendered to it is violating this statute unless its transportation or service agreement specifies in writing that it is acting as a broker.

The primary double-brokering risk is the non-payment of freight charges, particularly when a shipper pays the freight charges to an intermediary that does not transmit payment to the ultimate motor carrier. As at least one court has stated, “[t]he bedrock rule of carriage cases is that, absent malfeasance, the carrier gets paid.”²⁶ The Fourth, Fifth, Sixth, Ninth and Eleventh Circuits support carrier recourse against shippers (or even their vendors or consignees) for payment,²⁷ explaining that “the 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.”²⁸ In these cases, the shipper is contractually liable to the carrier via the bill of lading. Although some such cases 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, those cases are in the minority.²⁹ As a result, when the shipper pays the broker, the broker pays the carrier it hires, and that carrier double-brokers to another carrier (with which the broker doesn’t have a contract) and absconds with the funds, there is a good chance that the broker ultimately is left holding the bag when the actual delivering carrier comes looking for payment.

Fraudulent brokering appears to have been involved in a recent freight collection case, *P.A.M. Transport, Inc. v. Schell & Kampeter, Inc. d/b/a Diamond Pet Foods*.³⁰ Diamond, the shipper, engaged P.A.M. via an unidentified broker to transport hundreds of shipments from Arkansas to a facility in Mexico, racking up over \$1 million in transportation fees in the process. Although Diamond paid the broker, the broker did not pay P.A.M., and the carrier sued Diamond for payment. Diamond moved to dismiss the suit for failure to state a claim and failure to join the broker as a necessary party, asserting that it already had paid the freight charges to the broker and should not have to pay the charges twice. In denying Diamond’s motion, the court held that double payment “is a fact outside the pleadings which the Court is not permitted to consider at this stage ... [and] is a matter more appropriately addressed at the summary judgment stage after the parties have conducted discovery.” Although Diamond argued that P.A.M.’s failure to join the

²⁵ See James C. Hardman, *Third Party Contract Issues Concerning Motor Carriers, Brokers, and Shippers*, 34 TRANSP. LAW J. 307, 310 (2007).

²⁶ *Exel Transp. Servs., Inc. v. CSX Lines LLC*, 280 F.Supp.2d 617, 619 (S.D. Tex. 2003).

²⁷ See *Hawkspere Shipping Co. v. Intamex, S.A.*, 330 F.3d 225, 237-38 (4th Cir. 2003); *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 489-90 (5th Cir. 1983); *Oak Harbor Freight Lines, Inc. v. Sears, Roebuck & Co.*, 513 F.3d 949, 959-60 (9th Cir. 2008); *Nat’l Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544, 1546-47 (11th Cir. 1997).

²⁸ *Oak Harbor Freight Lines*, 513 F.3d at 959.

²⁹ 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).

³⁰ No. 5:23-cv-5002, 2023 WL 2465788 (W.D. Ark. Mar. 10, 2023).

broker prejudiced its defense, the court noted that Diamond had not met its burden of explaining “why [Diamond could not] simply join the broker to this case by filing a third-party complaint.” Although not stated in the opinion, the likely reason neither party joined the broker was because that entity couldn’t be found and/or did not exist.

Another risk of double brokering involves theft of the cargo, when the party engaged by the broker arranges for transportation by a third party to a different location. The delivering carrier is told by the “broker” that the delivery destination has changed, resulting in the delivery of the cargo to a compromised warehouse or location. Because the original broker has no information regarding the delivering carrier, it has no way to locate the cargo.³¹ Again, the broker may well be left bearing the loss, by virtue of its contract with the shipper.

Collection/Other Lawsuits and Intangible Costs to the Industry

With the proliferation of supply chain fraud, shippers and brokers alike are being hit with collection lawsuits for the payment of transportation charges due to the fraudulent intermediary’s failure to pay carriers. And assuming the shippers and brokers are successful in defending such claims, the carriers remain unpaid for their services. According to Transportation Intermediaries Association President and CEO Anne Reinke, brokerage fraud is costing brokers, carriers, shippers and consumers \$800 million or more.³² Those losses, along with the attendant legal fees and costs, are the obvious damages resulting from the fraud. But there are others, as well, such as the increased costs associated with guarding against fraud (including but not limited to extra staff hours devoted to vetting carriers), loss of business, and reputational harm.

For example, overzealousness in guarding against double-brokering can backfire and expose legitimate brokers to liability for defamation. In *Jets Prolink Cargo, Inc. v. Brenny Transportation, Inc.*,³³ Joyce Brenny contracted for Jets to serve as a carrier for a shipment. Brenny alleged that Jets double brokered the shipment and fraudulently tried to get additional money from her company, Brenny Transportation. Brenny obtained an authorized carrier profile on Jets from an Internet site and, after making a few calls, formed the belief that Jets had engaged in similar practices with other transportation brokerage companies. Brenny then sent a letter, on Brenny Transportation letterhead to “one and all in the trucking industry” warning brokers and carriers to “beware” of Jets. This and subsequent letters indicated that other individuals and companies that Brenny had contacted—but that did not participate in drafting or publishing the letters—joined in her views. Jets sued all of the identified parties, claiming that the letters contained multiple defamatory statements. Fortunately, three of the named parties (not including Brenny)

³¹ Craig Fuller, *It’s time for massive load board players to take responsibility for fraud*, FREIGHT WAVES, May 16, 2023, <https://www.freightwaves.com/news/its-time-for-massive-load-board--players-to-take-responsibility-for-fraud>; Ian Putzger, *US shippers put on high alert over double-brokering fraud*, THE LOAD STAR, May 24, 2023, <https://theloadstar.com/us-shippers-put-on-high-alert-over-double-brokering-fraud>.

³² Colin Campbell, *Brokerage fraud costs could surpass \$800M, TIA president says*, TRANSPORT DIVE, May 18, 2023, <https://transportdive.com/news/brokerage-fraud-costs-could-surpass-800-million-dollars-transportation-intermediaries-association/650595>.

³³ No. 02-1294 ADMRL, 2003 WL 22047910 (D. Minn. Aug. 29, 2003) (mem. op.).

were able to obtain dismissal of Jet's claims, but only after incurring legal fees in the defense of the matter.

Additionally, aggressive collection efforts can result in damage to a broker's reputation and a loss of business. In *Sunteck Transport Co., Inc. v. Baxter Bailey & Associates*,³⁴ Sunteck sued Baxter Bailey, a collection firm, for breach of contract, tortious interference with business relationships and fraudulent misrepresentation. Baxter Bailey had previously sued Sunteck, a transportation logistics and freight management provider, for shipping debts owed to motor carriers by Sunteck's brokers. The parties had entered into a release agreement, wherein the firm had agreed to accept \$10,000 in satisfaction of certain debts allegedly owed by one of its brokers for shipments arranged on behalf of Sunteck customers R.R. Donnelly, PepsiCo and Nestle; the release included a confidentiality agreement. One month after entering into the release, Baxter Bailey contacted several other of Sunteck's customers directly seeking payment for the debts and stating to those customers that Sunteck had resolved claims on behalf of two of the customers involved in the released claim. The firm also allegedly engaged in harassment of both Sunteck and its customers via email, mail and telephone calls, resulting in Sunteck's alleged loss of customers and other damages.³⁵ Although Sunteck obtained summary judgment against Baxter Bailey on liability for breach of the confidentiality clause in the release agreement,³⁶ any damage award that Sunteck ultimately received likely did not fully compensate it for the long-term harm that the company sustained to its business relationships.

Similarly, in *Canning Logistics Services, LLC v. Baxter Bailey & Associates*,³⁷ Canning—which provided freight-hauling services as both a carrier and a broker—discovered that Baxter Bailey was attempting to collect debts allegedly owed by Canning to Cyclone Carriers for freight-hauling jobs. Cyclone had sued Canning for those claimed debts, and the litigation had been stayed pending arbitration. Apparently, however, Canning had assigned the debts to Baxter Bailey, and an employee of the firm sent a series of emails to Canning, copying its customers, accusing Canning of dishonesty and of sending checks without sufficient funds. Additionally, Baxter Bailey sent letters to two of Canning's major customers stating that they were liable for the debt due to Canning's nonpayment. Shortly thereafter, a Canning customer informed Canning that it was suspending payments to Canning pending an investigation into allegations that Canning engaged in double-brokering and failed to pay its carriers. Canning sued Baxter Bailey, alleging tortious interference with business relationships and defamation. The court entered a temporary restraining order and a preliminary injunction restraining Baxter Bailey from attempting to collect any debt allegedly owed by Canning and from contacting current Canning Customers to attempt to collect any debt owed by Canning to Cyclone.³⁸

³⁴ No. 3:13-cv-00271, 2014 WL 12642571 (M.D. Tenn. Sept. 15, 2014).

³⁵ *Id.* at *2.

³⁶ *Id.* at *4.

³⁷ No. 8:17CV116, 2017 WL 2178350 (D. Neb. May 16, 2017) (mem. op.).

³⁸ *Id.* at *4.

Both *Sunteck* and *Canning Logistics* illustrate the aggressive tactics utilized to collect debts—whether owed or not—and the reputational harm that can result therefrom across the supply chain.

Combating Fraud in the Industry

In 2020, the Federal Motor Carrier Safety Administration (“FMCSA”) within the United States Department of Transportation (“USDOT”) issued a “Broker and Carrier Fraud Identity Theft” alert with recommendations of steps to take in the event of suspected fraud and identity theft in the transportation industry.³⁹ More recently, the FMCSA has undertaken steps to combat fraud, such as validating information received via paper applications, verifying that applicants’ principal places of business are physical addresses recognized by the U.S. Postal Service, publishing guidance regarding the definition of a broker and dispatch services, and focusing additional resources on detecting, preventing and stopping unlawful brokerage.⁴⁰ However, and despite the foregoing, the perception is that the FMCSA simply has not done enough to stem the rising tide of fraud in the transportation industry.

In response to the increase in supply chain theft, several lawmakers have written the USDOT’s Office of the Inspector General (“OIG”) to request the creation of a permanent task force to address these issues.⁴¹ In a May 22, 2023 letter, these lawmakers wrote “to share concerns regarding an area of increasing supply chain fraud and theft,” stating that approximately 3,500 such schemes are conducted each year.⁴² Specifically, their letter urged the OIG to consider creating a special unit, in consultation with both the FMCSA and the U.S. Department of Justice (“DOJ”), “to investigate, refer and prosecute cases of transportation fraud in a systematic, concerted manner.”⁴³ On August 22, 2023, the OIG responded to the letter, stating that “[i]nvestigating 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.”⁴⁴

The OIG has successfully assisted in taking down fraudulent brokers in recent years. As a result of an OIG investigation, the government prosecuted Nicholas Lakes and Viacheslav Berkovich in 2009. For over three years, Lakes and Berkovich had repeatedly hacked the FMCSA’s SAFER system to temporarily change contact information for legitimate brokers and trucking companies to addresses and phone numbers of their own choosing, then negotiated with brokers on load boards to transport

³⁹ Federal Motor Carrier Safety Administration, *Broker and Carrier Fraud and Identity Theft*, June 11, 2020, <https://www.fmcsa.dot.gov/mission/help/broker-and-carrier-fraud-and-identity-theft>.

⁴⁰ Clarissa Hawes, *Truckers deal with fallout after fraudsters steal DOT numbers*, Freight Waves, Aug. 3, 2023, <https://www.freightwaves.com/news/truckers-deal-with-fallout-after-fraudsters-steal-dot-numbers>.

⁴¹ Mark Schremmer, *Lawmakers ask DOT to create supply chain theft task force*, Land Line, May 25, 2023, <https://landline.media/lawmakers-ask-dot-to-create-supply-chain-theft-task-force>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Letter from Eric J. Soskin, U.S. Dept. of Transp. Inspector Gen., to The Honorable Mike Braun, U.S. Senate, *et al.* (Aug. 22, 2023) (“Soskin letter”) at 2, available at https://www.oig.dot.gov/sites/default/files/Letter%20to%20Congress%20on%20Investigating%20and%20Prosecuting%20Household%20Goods%20Moving%20and%20Double-Brokering%20Fraud_8.22.2023.pdf.

cargo. Once contracted, Lakes and Berkovich would then arrange for another trucking company to deliver the cargo, posing as the legitimate broker whose identity they had hijacked. The fraudsters would issue their invoice once the cargo was delivered and would pocket the incoming funds (ultimately totaling over \$2.7 million) without paying the motor carrier. Because they contracted for loads at a lesser rate than what they agreed to pay the motor carriers, they more than doubled the shipper's/initial broker's out-of-pocket losses.⁴⁵ As part of their plea agreement, Lakes and Berkovich were each sentenced to prison for several years and ordered to pay over \$2.7 million in restitution.⁴⁶

Prior to Lakes' and Berkovich's conviction, William Francis Hickey III had pled guilty to a three-year scam in which he and his co-conspirators engaged in double-brokering loads, receiving over \$1 million in transportation fees for loads he brokered to legitimate trucking companies; the trucking companies that transported the goods were not paid. The OIG participated in the investigation that led to Hickey's arrest and conviction.⁴⁷

In a similar scheme, the Avetyan family (a father and two sons) were sentenced in 2011 for their fraudulent double-brokering of loads. They had provided false information to the FMCSA to obtain a DOT motor carrier registration number enabling their company, State Transport, to obtain loads from brokers. The Avetyans would then use a different name to broker those loads to other carriers. State Transport got paid for the delivered loads; the delivering carriers did not. Following investigation by the OIG jointly with other agencies, the Avetyans were sentenced and ordered to pay over \$1 million in restitution.⁴⁸

In 2021, the OIG worked with the DOJ to arrest Alexis Castillo Padilla in Italy and extradite him to the United States on charges of fraudulent brokering. Padilla, operating out of Mexico, had stolen the identity of a California-based carrier and agreed to make deliveries under that entity's name. Instead of delivering the loads, he posed as a shipper and re-brokered the same loads to other carriers. Padilla collected payments for completed deliveries, but (surprise) did not pay the actual delivering carriers.⁴⁹

Unfortunately, the OIG's August 22 letter suggests that its partnership with the FMCSA and the DOJ will 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."⁵⁰ The letter also falls short of committing to a

⁴⁵Press Release, U.S. Dept. of Justice, Central Dist. of Cal., *Second Defendant in Internet Scheme that Defrauded Trucking Companies Sentenced to Federal Prison*, Aug. 10, 2009, <https://www.justice.gov/sites/default/criminal-ccips/ccips-press-releases-2009>.

⁴⁶ *Id.*

⁴⁷ Press Release, U.S. Attorney's Office, Dist. of Md., *Maryland Man Pleads Guilty to Federal Wire Fraud Charges in Connection with a Scheme to Defraud Trucking Companies and Brokers of More Than \$1 Million*, Sept. 27, 2019, <https://www.justice.gov/usao-md/pr>; see also Soskin letter at 3.

⁴⁸ U.S. Dept. of Transportation Office of Inspector General, *Father and Sons Sentenced to Jail and Ordered to Pay \$1 million in a Consumer Fraud Scheme*, Mar. 4, 2011, <https://www.oig.dot.gov/library-item/29764>.

⁴⁹ Overdrive Staff, *Busted double broker pleads guilty to stealing carrier's identity, fraud*, OVERDRIVE, Oct. 25, 2022, <https://www.overdriveonline.com/regulations/article/15302134>; see also Soskin letter at 3.

⁵⁰ Soskin letter at 3.

specialized task force that would address such issues. It thus appears that only sizeable broker fraud will warrant scrutiny by the OIG.

In terms of alternative remedies, some observers have suggested that fraudulent brokering activities may be subject to federal civil and criminal prosecution under the Racketeer Influenced and Corrupt Organizations Act (“RICO”).⁵¹ RICO, which provides both criminal and civil remedies, is particularly appealing because its civil remedies include treble damages, injunctions and attorney’s fees.⁵² To establish a criminal or civil RICO violation, a criminal indictment or a civil complaint must allege four essential elements: (1) a pattern of racketeering activity, (2) a culpable person, (3) the infiltration of an enterprise, and (4) an effect on interstate commerce through (a) investment of income derived from the pattern of racketeering activity in the enterprise, (b) the acquisition or maintenance of an interest in the enterprise through the racketeering activity, (c) the conduct of the affairs of the enterprise through a racketeering activity, or (d) conspiracy to commit any of the foregoing acts.⁵³ Of the options listed with respect to element (4) above, the one most likely to apply would be the conduct of the affairs of the enterprise through a racketeering activity.⁵⁴

The primary challenge in asserting a RICO claim is to allege a “racketeering activity” as enumerated in the statute.⁵⁵ Case law indicates that where a claim is not based on a statutorily enumerated “racketeering activity,” but rather on a state-law crime (such as theft), tort or breach of contract, it cannot form the basis of a RICO claim.⁵⁶

Notably, RICO defines “racketeering activity” as including any act that is indictable under 18 U.S.C. § 659, relating to theft involving interstate or foreign shipments.⁵⁷ Upon a closer reading, however, Section 659 is limited to the theft of goods in the possession of a common carrier or in storage, when part of an interstate shipment, or money from a common carrier moving in interstate or foreign commerce (or any passenger thereon).⁵⁸ Thus, while interstate cargo theft may give rise to a RICO claim under this provision, broker fraud that results in only a loss of funds presumably would not.⁵⁹

⁵¹ 18 U.S.C. §§ 1961 to 1968.

⁵² See *id.* at § 1964(a), (c).

⁵³ *Id.* at §§ 1962 to 1964.

⁵⁴ 18 U.S.C. §§ 1962(c).

⁵⁵ See *id.* at § 1961(1).

⁵⁶ *Cargo On Demand v. Polar Air Cargo Worldwide*, No. 22-CV-10243, 2023 WL 4472167, *3 (S.D.N.Y. July 11, 2023) (noting that “ordinary corporate fraud, conducted by or through employees or agents of a single corporation, cannot be dressed up as a RICO claim.”); *Holland v. Cole Nat’l Corp.*, No. 7:04CV00246, 2005 WL 1799540, at *3 (W.D. Va. July 28, 2005) (finding that the defendant’s alleged fraud activities “do not threaten the social well-being such that RICO treatment is warranted”); *Stangel v. A-1 Freeman N. Am., Inc.*, No. 01-CV-2198, 2001 WL 1669387, at *1 (N.D. Tex. Dec. 27, 2001) (mem. op.) (holding that wrongful acts allegedly committed by defendants, including breach of a settlement agreement, did not constitute racketeering activity); *Annulli v. Panikkar*, 200 F.3d 189, 192 (3d Cir. 1999) (holding that theft by deception, breach of contract, and intentional interference with contract were not predicate RICO acts), *abrogated on other grounds by Rotella v. Wood*, 528 U.S. 549 (2000).

⁵⁷ *Id.* at § 1961.

⁵⁸ *Id.*

⁵⁹ See *Annulli*, 200 F.3d at 199.

Mail fraud⁶⁰ and wire fraud⁶¹ also fall within the definition of racketeering activity. For mail or wire fraud to qualify as a RICO claim, a claimant must prove “(1) a scheme or artifice to defraud or obtain money by false pretenses, representations or promises; (2) a use of the mails [or interstate wires] for the purpose of executing the scheme; and (3) a specific intent to defraud either by devising, participating in or abetting the scheme.”⁶² In *Update Traffic Systems, Inc. v. Gould*,⁶³ a transportation broker survived a motion to dismiss his RICO claims against a freight forwarder, based on allegations that the freight forwarder and its principal had created a criminal enterprise using two different entities. The purpose of the alleged enterprise was to engage in a series of fraudulent activities involving the alteration of bills of lading and double brokering of loads with the intent of defrauding both the broker and the United States government with which one of the entities had a contract. There, the court declined to dismiss the broker’s RICO claim, finding that the broker had adequately and sufficiently pled, among the other RICO elements, specific acts of fraud committed via the mailing of letters, posting of checks, and transmission of improper bills of lading, to maintain its claim.⁶⁴ Notably, the court observed that the broker’s allegations of wire fraud “include, but are not limited to interstate telephone calls to plaintiff and other transportation brokers to arrange for the shipment of goods, and false promises of future payments.”⁶⁵

Another significant challenge to asserting a RICO claim where broker fraud is involved is alleging the existence of an enterprise that is separate and distinct from the culpable party itself, to establish Section 1962(c)’s requirement that such party be “employed by or associated with” an enterprise.⁶⁶ The RICO statute defines an “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁶⁷ As clarified by the United States Supreme Court, RICO “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs.”⁶⁸ In the case of a corporation, the enterprise cannot “consist merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant.”⁶⁹

Needless to say, the assertion of a RICO claim, much less the maintenance of such a claim, is a complicated process involving a number of statutory hurdles. As one author has noted, “many courts have utilized Rule 9 of the Federal Rules of Civil Procedure, requiring fraud to be pled with particularity, to bludgeon RICO cases to death

⁶⁰ 18 U.S.C. § 1341.

⁶¹ *Id.* at 1343.

⁶² *Update Traffic Sys., Inc. v. Gould*, 857 F.Supp. 274, 282 (E.D.N.Y. 1994) (quoting *Morrow v. Black*, 742 F.Supp. 1199, 1205 (E.D.N.Y. 1990); see also 18 U.S.C. § 1341.

⁶³ 857 F.Supp. 274 (E.D.N.Y. 1994).

⁶⁴ *Id.* at 281-82.

⁶⁵ *Id.* at 281.

⁶⁶ 18 U.S.C. § 1962(c); see *Cargo On Demand*, 2023 WL 4472167, at *3.

⁶⁷ 18 U.S.C. § 1961(4).

⁶⁸ *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original).

⁶⁹ *Cargo On Demand*, 2023 WL 4472167, at *3 (quoting *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013) (cleaned up)).

at an infantile stage.”⁷⁰ The fact that the OIG and FMCSA do not appear to have prosecuted supply chain fraud under RICO, combined with the absence of reported civil cases in this area, suggest that the chance of a successful conviction or civil recovery does not outweigh the time and expense likely involved in pursuing such action.

Conclusion

There is no dispute that brokers face legal exposure to damages on multiple fronts, primarily in the areas of negligent selection and supply chain fraud. With respect to negligent selection, FAAAAA preemption appears to prevail where cargo claims are involved, but is inconsistently applied across the circuit courts in personal injury cases. With respect to the latter cases, the *Ye* decision is a positive development and hopefully will warrant Supreme Court consideration of the issue. Supply chain fraud and, in particular, double brokering, has become more prevalent in recent years and has added to the due diligence burdens in the marketplace. Moreover, the negative economic impacts appear to have caught the attention of lawmakers and enforcement agencies alike. One can only hope that intervention—whether judicial, legislative, or administrative—will have an impact on these issues. In the interim, brokers must remain vigilant and cautious when hiring carriers.

⁷⁰ Mark E. DuVal, *A Trial Lawyer's Guide: Everything You Always Wanted to Know about RICO Before Your Case Was Dismissed*, 12 WM. MITCHELL LAW REV. 291, 311 (1986) (footnote omitted).