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Why Transportation Brokers Can No Longer Hide Behind Motor Carriers

Historically, parties seeking recovery for loss or damage arising from a trucking accident would pursue claims against the motor carrier, not the broker. However, plaintiffs have become more savvy, and are now making claims against brokers, mainly alleging that the party was a motor carrier, not a broker, and/or the broker negligently hired the motor carrier.

I. The Line Between Brokers and Carriers is Blurry

A "motor carrier" is defined as "a person providing commercial motor vehicle ... transportation for compensation." 49 U.S.C. § 13102(14). A "broker" is "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). "Importantly, a carrier is not a broker for purposes of the Carmack Amendment because it arranges the transportation of shipments that it is authorized to transport and that it has legally bound itself to transport." *Tryg Ins. v. C.H. Robinson Worldwide, Inc*., 2017 WL 5725057, at *6 (D.N.J. Nov. 28, 2017)[1] (citing 49 C.F.R. § 371.2). In other words, if a party accepts responsibility to ensure delivery of goods, regardless of who actually transports them, then that party is acting as a carrier. *Id.* (citing *Nipponkoa Ins*., 2011 WU 671747, at *7 (quoting *CGU Int'l Ins., PLC v. Keystone Lines Corp*., No. 02–3751, 2004 WU 1047982, at * 2 (N.D. Cal. May 5, 2004))). If, however, the party only agrees to locate and hire another party to transport the cargo, then it is acting as a broker." *See Id*.

Courts often describe the line between brokers and carriers to be "blurry." *Nipponkoa Ins. Co. v. C.H. Robinson Worldwide, Inc*., 2011 WL 671747, at *5 (S.D.N.Y. Feb. 18, 2011) (citation omitted). Accordingly, the carrier/broker inquiry is "inherently fact intensive." *Id*. In determining whether a party is a carrier or a broker in relation to a shipment under the Carmack Amendment, courts will look at the services offered by the party – examining whether statements were made indicating that its "actions were not limited to arranging transport, but also exerting some measure of control over ... drivers."

[1] Pending an appeal.

Id. at *4 (citing *Hewlett–Packard Co. v. Brother's Trucking Enters., Inc*., 373 F.Supp.2d 1349, 1352 (S.D.Fla.2005)). Consequently, "[t]he law determines status according to the services offered by an entity, rather than by its corporate character or declared purpose." *Id.* (citing *Delta Research*, 2005 WL 2090890, at *5 (citing *Mass v. Braswell Motor Freight Lines, Inc*., 577 F.2d 665, 667 (10th Cir.1978))). This means that just because an entity is a licensed broker but is not a licensed motor carrier is not dispositive of the entity's character as a broker. *See Id.* (citation omitted). Further, ownership of the vehicles used to transport the goods is not dispositive. *Id.*

In short, courts consider various factors, which include "(1) whether the entity promised to personally perform the transport and therefore legally bound itself to transport; (2) the type of services the entity offers; (3) whether the entity held itself out to the public as the actual transporter of goods; and (4) whether the entity's only role was to secure a third party to ship plaintiff's goods." *Tryg Ins*., 2017 WL 57250578, at *6; *Nipponkoa Ins. Co.*, 2011 WL 671747, at *4 ("The Court looks at whether the party holds itself out to the public generally as the actual transporter of goods ... as well as the services provided under the contract" (citation omitted)).

II. Claims for Damage to Goods

a. Exposure as a Motor Carrier

To establish a prima facie case under the Carmack Amendment, plaintiff must show (1) the goods were delivered to the carrier in good condition, (2) the goods were delivered to the consignee in damaged condition, and (3) damages. *See Nipponkoa Ins. Co., Ltd. v. C.H. Robinson Worldwide, Inc.*, 2011 WL 671747, at *3 (S.D.N.Y. Feb. 18, 2011) (internal citations omitted). Once a prima facie case has been established, under the Carmack Amendment, a carrier is held to be strictly liable unless the carrier can prove "that the damage was caused not by negligence but by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods" and that it was free from negligence in causing or contributing to the loss. *Id*.

Notably, the Carmack Amendment impliedly preempts all state law causes of action against a carrier alleging liability for loss of or damage to goods in interstate commerce. *Alpine Fresh, Inc. v. Jala Trucking Corp*., 181 F. Supp. 3d 250, 255 (D.N.J. 2016) (citing *Phoenix Ins. Co. Ltd. v. Norfolk S. R.R. Corp*., 2014 WL 2008958, at *16–17 (D.N.J. May 16, 2014) (Debevois, J.) (in railway context)); *Mrs. Ressler's Food Prod. v. KZY Logistics, LLC*, 2017 WL 3868703, at *4 (D.N.J. Sept. 5, 2017) (holding that "state law breach of contract and negligence claims against a carrier for loss of or damage to goods are preempted") (quoting *Certain Underwriters at Interest at Lloyds of London v. United Parcel Serv. of Am., Inc.*, 762 F.3d 332, 336 (3d Cir. 2014) (citation omitted))).

b. Exposure as a Broker for Negligent Hiring Claims

i. Preemption

The Federal Aviation Administration Authorization Act ("FAAAA") was enacted in 1994 and modeled from the Airline Deregulation Act of 1978 ("ADA"). *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014). The FAAAA forbids States from enacting or enforcing "a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of any motor carrier . . . or* any motor private carrier, *broker*, or freight forwarder with respect to the *transportation of property."* 49 U.S.C.A. § 14501(c)(1) (emphasis added). The FAAAA was enacted to help "ensure transportation rates, routes, and services that reflect "maximum reliance on competitive market forces" in order to stimulate "efficiency, innovation, and low prices," as well as "variety" and "quality" in interstate trucking. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371, 128 S. Ct. 989, 995, 169 L. Ed. 2d 933 (2008) (internal quotation marks omitted). In other words, this Act was enacted to prevent States from "undermining federal deregulation of interstate trucking" through a "patchwork of regulation." *Reinhardt v. Gemini Motor Transp.*, 869 F. Supp. 2d 1158, 1164 (E.D. Cal. 2012) (citing *American Trucking Ass'ns v. City of Los* Angeles, 660 F.3d 384, 396 (9th Cir.2011)); *See* H.R. CONF. REP. 103-677, 86, 1994 U.S.C.C.A.N. 1715, 1758.

The Supreme Court in *Rowe*, 552 U.S. at 370, 128 S. Ct. at 995, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 375, 112 S. Ct. 2031, 2033, 119 L. Ed. 2d 157 (1992), explained that the Supreme Court had already held:

> (1) that "[s]tate enforcement actions *having a connection with, or reference to*," *carrier " 'rates, routes, or services' are pre-empted,"* 504 U.S., at 384, 112 S.Ct. 2031 (emphasis added); (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect," *id.*, at 386, 112 S.Ct. 2031 (internal quotation marks omitted); (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation, *id.*, at 386–387, 112 S.Ct. 2031 (emphasis deleted); and (4) that pre-emption occurs at least where state laws have a "*significant impact" related to Congress' deregulatory and pre-emption-related objectives, id.*, at 390, 112 S.Ct. 2031.

(emphasis added).

Simply put, the FAAAA preempts state laws that have a connection with, or reference to "rates, routes, or services," or have a "significant impact" related to Congress' objective to deregulate interstate trucking. *Id.*; *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260, 133 S. Ct. 1769, 1778, 185 L. Ed. 2d 909 (2013); *see Reinhardt*, 869 F. Supp. 2d at 1164 ("Preemption resulting from 'reference to' price, route, or service occurs where a State's law acts immediately and exclusively upon price, route or service, or where the existence of a price, route or service is essential to the law's

operation." (citation omitted)). However, the FAAAA does not preempt state laws where their effect on rates, routes, or services is "tenuous, remote, or peripheral." *Id*.

"The preemptive reach of the FAAAA is broad, but not without limits." *Mrs. Ressler's Food Prod. v. KZY Logistics, LLC*, 2017 WL 3868703, at *3 (D.N.J. Sept. 5, 2017) (citing *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1051 (7th Cir. 2016) (citing *Morales*, 504 U.S. at 383–84, 386, 390, and *Rowe*, 552 U.S. at 371)). For example, the FAAAA does not preempt routine breach-of-contract claims based on state law. *Id*. In *Mrs. Ressler's Food Prod*., the Court noted that in *American Airlines, Inc. v. Wolens*, the Supreme Court distinguished breach-of-contract claims from other state-based tort claims, explaining that:

> [A] breach-of-contract claim, by its very nature, does not allege a "violation of state-imposed obligations" and, therefore, does not amount to "a State's enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision." 513 U.S. 219, 228-29 (internal quotation and citation omitted). Rather, "[a] remedy confined to a contract's terms simply holds parties to their agreements...." *Id.* Thus, the ADA does not preempt a breach-of-contract claim because it confines a court "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *See id.* at 233. In *Northwest, Inc. v. Ginsberg*, the Supreme Court advanced its reasoning from *Wolens* when it determined that state-based law "will escape preemption only if the law of the relevant State permits [a party] to contract around those rules in its ... agreement...." *See* 134 S. Ct. 1422, 1433 (2014).

*Id. at *3.*

Generally, courts have held that negligence claims against brokers are preempted by the FAAAA. *Marx Companies, LLC v. W. Trans Logistics, Inc*., 2015 WL 260914, at *4 (D.N.J. Jan. 21, 2015); *Ameriswiss Technology, LLC v. Midway Line of Illinois, Inc*., 888 F.Supp.2d 197 (D.N.H.2012). Contrastingly, however, in *Factory Mut. Ins. Co. v. One Source Logistics, LLC,* where plaintiff asserted a claim against a freight broker for negligently selecting an imposter carrier, determined that "[t]he state law of negligence is a " 'broad law[ ] applying to hundreds of different industries' with no other 'forbidden connection with prices[, routes,] and services'", and therefore held that plaintiff's negligent hiring claim was not preempted by the ICCTA 2017 WL 2608867, at *1 (C.D. Cal. May 5, 2017) (internal quotation and citation omitted).

ii. Obstacles with Negligent Hiring Claims

Currently, there is no uniform standard for vetting carriers by transportation brokers. Some argue that brokers only need to ensure that the carrier is in compliance with the minimum requirements set forth by the Federal Government. In this connection, the Federal Government only requires a carrier to obtain a license, have all relevant forms, and maintain public liability insurance.

Others contend that the requirements set forth by the Federal Government is the minimum, and that brokers must do more to vet carriers. However, how much more has not been established.

III. Claims for Bodily Injury

a. Preemption

Generally, where personal injury claims are based on health and safety, an area traditionally regulated by states, it will not be preempted by the FAAAA. However, preemption is an available defense to personal injury claims where a recipient of a good is harmed.

In *Rockwell v. United Parcel Service, Inc.*, 1999 WL 33100089 (D.Vt. 1999), plaintiff sought to impose liability on UPS for negligently delivering a package that contained a pipe bomb. Plaintiff asserted that UPS was negligent in its intake and delivery protocol by failing to have an inspection process as part of its delivery service. The court ruled that such claims against UPS "go to the heart of the services that UPS provides." The court further noted that "Rockwell's complaint regarding UPS's package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted." Thus, the plaintiff's claims were preempted under the FAAAA. Additionally, because the plaintiff failed to advance any claims that were "cognizable under Vermont tort law," the complaint was dismissed.

Contrastingly, in *Pam Kuehne and Larry Kuehne, v. United Parcel Service, Inc*., (*Indiana 2007)*, the court held that plaintiff's negligence claim, where a package was placed squarely in front of a door where it could easily cause a trip and fall, was not preempted by the FAAAA. In *Kuehne*, the court distinguished pre-delivery versus post-delivery. More specifically, the court noted that it was apparent to them that the pre-delivery processes of UPS certainly related to its services and that the FAAAA should control in those instances. However, once a package is delivered, it could not say that subsequent occurrences stemming from the alleged negligence of an employee amount to a "service" of UPS to the extent that federal preemption would apply.

b. Bodily Injury Claims

There are many ways for bodily injury claims to accrue and be proven against a motor carrier. The motor carrier can be held liable for claims of negligent operation, supervision, retention, and hiring, and a catchall claim of respondeat superior, where the accident occurs while the driver is engaged in employment for the motor carrier. To defend a claim for bodily injury against a motor carrier it is important to have an accurate and thorough investigation of the claim and the accident. In this connection, a video from the cab or exterior of the truck can be the best evidence to show how an accident occurred (in these instances, the parties do not need to rely on an accident scene investigation). The video should be preserved after the accident to avoid spoliation

claims. In some states, where punitive damages are available in motor vehicle accidents and where insurance carriers can be directly liable, verdicts tend to be significantly greater than in other jurisdictions, and video evidence of how the accident occurred can be significant in the defense of these types of cases.