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The Rise and Future of Broker Liability in Trucking Accidents

I. INTRODUCTION

Brokers provide a variety of transportation services to shippers and eliminate the need to manage and contract for their own freight carrying. For motor carriers, brokers provide a centralized clearinghouse, which alleviates the need to solicit individual contracts from each shipper and allows each motor carrier to serve many different shippers. Brokers may also offer logistics services such as designing routes. For the purposes of this paper, a broker offering logistics services will be referred to as a broker/logistics company.[1] Broker/logistics companies bring shippers and carriers together. As independent intermediaries acting for the benefit of both (but as agents or employees of neither), they are vital conduits that have the expertise to facilitate the efficient transportation of goods domestically and internationally. Liability is imposed on broker/logistics companies in two ways; finding that a negligent driver has acted as the company's agent or concluding that the company itself negligently hired an incompetent motor carrier.

II. *SPERL V. C.H. ROBINSON*:[2] A CAUTIONARY TALE OF BROKER LIABILITY UNDER AGENCY THEORY

An Illinois appellate court unanimously affirmed a $23.8 million judgment against C.H. Robinson Worldwide ("CHR") in 2011 based on agency theory.[3] *Sperl* involved a multi-vehicle accident caused by a tractor-trailer that resulted in fatalities and serious injuries. The motor carrier and the tractor-trailer's driver admitted liability. The plaintiffs alleged that the driver was the agent of CHR, which brokered and owned the load.

Brokers are licensed by the Federal Motor Carrier Safety Administration ("FMCSA"), but § 386.12 of the Federal Motor Carrier Safety Regulations ("FMCSRs") makes clear that a broker is not a motor carrier.

[1] Often, brokers are referred to as "3PLs," an abbreviation for third-party logistics providers.
[2] *Sperl v. C.H. Robinson Worldwide, Inc.*, 946 N.E.2d 463 (Ill.App.2011).
[3] On November 1, 2011 the Illinois Supreme Court issued an order officially denying, without comment, CHR's Petition for Leave to Appeal.

This is true only if the broker's actions are limited to arranging the transportation of shipments. Pursuant to § 376.12(c), a motor carrier leasing a commercial vehicle is in exclusive possession and control of "the operation of the equipment for the duration of the lease."

In *Sperl*, CHR denied responsibility for the driver's actions and claimed that its liability was defined by its contract with the motor carrier. The contract explicitly stated that the motor carrier's relationship to CHR was that of an independent contractor and that the motor carrier would provide all drivers. By its terms, the contract should have insulated CHR from any liability for the actions of the driver. The contract established that CHR was merely a liaison between the shipper and motor carrier.

The plaintiffs presented evidence that CHR's role went far beyond that of a mere liaison. They alleged that CHR exercised so much control over the shipment and driver that it became responsible for her actions. CHR both stored and owned the load. Additionally, it imposed upon the driver many exacting requirements including daily check calls, verification of pallet count, fines for lateness, and the requirements to stay in constant communication and maintain the temperature of the load within a two-degree range. Contrary to the contract, CHR directly retained and dispatched the driver. The driver testified that she felt pressured by CHR to violate hours of service regulations. CHR sent the driver a fuel advance and agreed to pay her directly upon delivery of the load. In light of these facts, the jury concluded that the driver was CHR's agent and found CHR vicariously liable for the plaintiffs' injuries.

The appellate court acknowledged that the contract identified the motor carrier as CHR's independent contractor. However, the court looked beyond the contract and considered the actual conduct of the parties. Based on the above facts, it concluded that CHR exercised a degree of control over the driver that created an agency relationship. Interestingly, CHR argued that two cases in which it had been involved, *Jones v. CHR*, 558 F.Supp.2d 630 (W.D. Va. 2008) and *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004), supported finding that that the driver was not CHR's agent. The court said that CHR's extreme degree of control distinguished *Sperl* from the other CHR cases. On November 29, 2018, the Illinois Supreme Court issued a decision on whether the broker could successfully sue the motor carrier for contribution after it paid the entirety of the verdict. The Court held that the broker was entitled to contribution based on the verdict and the fault apportionment laws of Illinois.

It should be noted that *Sperl* is a particularly egregious and uncommon example of a broker/logistics company exerting control over a driver. The Northern District of Illinois recently distinguished from *Sperl* a tractor-trailer collision case where the driver hauled exclusively for the broker/logistics company, drove a trailer owned by the company with its logo on the side, had to call the company each morning to check in, had specific times for pickup and drop-off, and had to call the company to report anticipated delays. *Kolchinsky v. Bentley*, 2019 WL 423372 at *2 (N.D. Ill. Feb. 3, 2019). Additionally, the broker/logistics company could terminate its agreement with the driver at any time and required approval for extra charges by the driver in advance. *Id*. Despite the requirements imposed on the driver, the court reasoned that "[t]he fact that [the broker/logistics company] wanted to know whether [its] loads would be delivered on time and keep[t] track of their location does not suggest direction or

control over how [the driver] carried out the work of hauling trailers and loads from one location to another." *Id*.

III. NEGLIGENT HIRING OF A DRIVER OR MOTOR CARRIER CAN CAUSE BROKER LIABILITY

A. Courts May Consider Motor Carrier Safety Ratings when Determining Whether a Broker Hired a Motor Carrier Negligently

Schramm v. Foster[4] involved a catastrophic motor vehicle accident caused by a tractor-trailer's failure to stop at an intersection. The plaintiffs asserted numerous claims against the driver, the motor carrier, and CHR, the broker/logistics company. After extensive litigation, the negligent hiring claim against CHR was the sole issue remaining before the court.

The plaintiffs presented evidence that the motor carrier hired by CHR lacked a government SafeStat rating. The court considered this evidence and held that the lack of a rating should serve as a "red flag" for brokers to investigate a motor carrier and its drivers more carefully. This evidence spoke directly to whether CHR had the requisite actual or constructive knowledge of the motor carrier's incompetence to support a negligent hiring claim. Curiously, the court quoted the disclaimer on SafeStat's website stating that using "SafeStat for purposes other than identifying and prioritizing carriers … may produce unintended results."

A federal court in Virginia reached the same result as *Schramm*.[5] *Jones* involved a collision between two tractor-trailers. The plaintiffs brought a negligent hiring claim against CHR, the broker/logistics company for the motor carrier at fault in the accident. However, unlike the unrated carrier in *Schramm*, the motor carrier in *Jones* had a "conditional" safety rating. The *Jones* plaintiffs alleged that a non-"satisfactory" rating should have prompted CHR to investigate the carrier and driver's safety records. The *Jones* court, closely paralleling the reasoning in *Schramm*, permitted the motor carrier's safety rating to serve as evidence of CHR's actual or constructive knowledge of the carrier's incompetence.

B. Some Courts Find Motor Carrier Safety Ratings Irrelevant to the Issue of a Broker's Allegedly Negligent Hiring

Some courts have refused to consider evidence of motor carrier safety data and ratings. In *FCCI Ins. Group v. Rodgers Metal Craft, Inc.,*[6] the court refused the defendants' request to take judicial notice of a motor carrier's safety ratings. The court noted that judicial notice is generally reserved for scientific facts, matters of geography, and political history. The court also pointed to Fed. Evid. R. 201, which requires that a judicially-noticed fact be one that is generally known or capable of accurate and ready

[4] 341 F. Supp.2d 536 (D. Md. 2004).
[5] *Jones v. C.H. Robinson Worldwide, Inc*, 558 F.Supp.2d 630 (W.D. Va. 2008).
[6] 2008 WL 2951992 (M.D. Ga. July 28, 2008).

determination. After examining the data, the court determined that it was not the type of evidence contemplated by the rules governing judicial notice.

In *Kemper Ins. Cos. v. J.B. Hunt Logistics, Inc.*, [7] the court refused to permit discovery of motor carrier safety data and ratings. The plaintiffs requested the information that the broker/logistics company kept on carriers having less than "satisfactory" SAFER ratings. The court denied the plaintiffs' motion to compel discovery, reasoning that the request for this information was not reasonably calculated to lead to the discovery of admissible evidence.

Finally, in *Frederick v. Swift Transp. Co.*,[8] the court refused to admit expert opinion testimony regarding the government safety compliance audits used to issue SAFER ratings. The court did not allow the plaintiffs' expert to testify about a safety compliance audit of the motor carrier that resulted in a less than "satisfactory" rating because a subsequent audit yielded a "satisfactory" rating. The court's refusal to admit the expert's testimony was affirmed on appeal. *Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1082–83 (10th Cir. 2010).

IV. NEGLIGENT HIRING CLAIMS MAY BE PREEMPTED

A. The Constitutional Framework of Federal Preemption

Under the federal Constitution, "both the National and State Governments have elements of sovereignty the other is bound to respect, but the Supremacy Clause makes clear that federal laws 'shall be the supreme Law of the Land.'" *Finley v. Dyer*, 2018 WL 5284616 at *2 (N.D. Miss. Oct. 24, 2018) (quoting U.S. Const. art. VI, cl. 2) (other internal citation omitted). Under this regiment, "Congress may preempt state legislation by enacting a statute containing an express preemption provision." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018). When a statute contains an express preemption provision, the court must "identify the domain expressly pre-empted because an express definition of the pre-emptive reach of a statute supports a reasonable inference that Congress did not intend to preempt other matters." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

B. The History of Preemption in Interstate Trucking

"Prior to 1978, the interstate airline industry in the United States was tightly regulated by the federal government." *Finley*, 2018 WL 5284616 at *3. Congress determined that consumers and the economy would benefit from open competition in the industry, especially concerning rates and services, and enacted the Airline Deregulation Act of 1978 (the "ADA") to achieve this result. *Id*. The ADA included an express preemption provision which "prohibit[ed] the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id*. Shortly after enacting the ADA, Congress similarly deregulated the motor carrier industry with the Motor Trucking Act of 1980 ("MTA"). *Id*. Fourteen years later,

[7] (N.D. Ga. 2003), 2003 U.S. Dist. LEXIS 27574.

[8] 591 F.Supp.2d 1156 (D. Kan. 2008).

Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") to prevent states from frustrating the purpose of the MTA with their own laws. *Rowe v. New Hampshire Motor Transp. Ass'n.*, 552 U.S. 364, 372 (2008).

The FAAAA contains language nearly identical to the ADA, and prohibits states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier…, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The FAAAA's "one conspicuous alteration" to the ADA was "the addition of the words 'with respect to the transportation of property.'" *Finlay*, 2018 WL 5284616 at *3 (quoting *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (citations omitted)). Common law tort claims "fall under the scope of the FAAAA." *Krauss v. IRIS USA, Inc.*, 2018 WL 2063839 at *4 (E.D. Pa. May 3, 2018).

The United States Supreme Court determined that, due to the statutes' nearly identical language, the FAAAA's preemption provision must be read broadly like the ADA's. *Rowe*, 552 U.S. at 370. In accordance, the Court quoted its foundational decision regarding the ADA to hold that:

> (1) "State enforcement actions having a connection with, or reference to," carrier "'rates, routes, or services' are pre-empted,"; (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect,"; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; 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 370–71 (quoting with minor alterations *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)) (numeration in original). While broad, the preemption is not unlimited, and "federal law does not preempt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id*. (quoting *Morales*, 504 U.S. at 390).

C. Interpretations of Broker Negligent Hiring Liability Preemption Differ Significantly

In December of 2018, the Northern District of Ohio ruled that negligent hiring claims against a broker were preempted by the FAAAA. *Creagan v. Wal-Mart Transp., LLC*, 2018 WL 6523123 (N.D. Ohio Dec. 12, 2018). The court noted that no circuit court has ruled on the issue of broker negligent hiring liability preemption, and "the district courts who have encountered the issue have diverged on not only conclusion, but also reasoning used to arrive at the conclusion." *Id*. at n.4.

In *Creagan*, the plaintiffs "argue[d] that FAAAA preemption does not apply in personal injury cases," while the defendants "argue[d that] a claim of negligent hiring 'relates to' the 'service' of a broker and must be preempted." *Id*. at *3. The court noted that "[w]hile the FAAAA provides no definition of 'services,' it defines transportation to include 'services related to th[e] movement [of passengers or

property], including arranging for' the transportation of passengers or property." *Id*. (quoting 40 U.S.C. § 13102(23)(B)). "A broker does just that – 'arrange for' the transportation of a shipment by a motor carrier." *Id*. (citing 49 U.S.C. § 13102(2)). Because a broker provides this service "regardless of whether [its] alleged negligence in its choice of motor carrier results in … personal injury, the service remains the same." *Id*. As such, the court concluded that the plaintiffs' argument that all personal injury suits are exempt from FAAAA preemption could not be true. *Id*. Rather, a negligent hiring claim "seeks to enforce a duty of care related to how [the broker] arranged for a motor carrier to transport the shipment (the service)," so it must fall "squarely within the preemption of the FAAAA." *Id*.

The safety regulatory exemption of the FAAAA provides that its preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Finley*, 2018 WL 5284616 at *6 (quoting 49 U.S.C. § 14501(c)(2)(A)). This preserves states' police authority to regulate safety on their highways. *Id*. The court in *Creagan* decided that a negligent hiring claim "seeks to impose a duty on the service of the broker rather than regulate motor vehicles," so it "is not within the safety regulatory authority of the state[,] and the [safety regulatory] exemption does not apply." 2018 WL 6523123 at *4.

District Courts' differing interpretations of FAAAA preemption of negligent hiring claims against brokers mean that it is too soon to predict how a higher court will rule. *Id*. at n.4. Judge Helmick in *Creagan* essentially adopted the reasoning of *Volkova v. C.H. Robinson Co.*, 2018 WL 741441 at *3–4 (N.D. Ill. Feb. 7, 2018), which held that negligent hiring claims in the context of personal injury are preempted because they "relate to" the "service," selecting competent motor carriers, provided by brokers. *Id*. at *7. *Volkova's* reasoning and holding were similarly adopted in *Krauss v. IRIS USA, Inc.*, 2018 WL 2063839 at *5–6 (E.D. Pa. May 3, 2018) (personal injury claims alleging negligent hiring "go to the core of what it means to be a careful broker" and arise from the "core service" of the broker).

Another recent case cited *Volkova* and *Krauss* for the proposition that negligent hiring "relates to" the "service" provided by brokers, but held that a personal injury claim is "saved" by the safety regulatory exemption. *Finley*, 2018 WL 5284616 at *5. The court in *Finley* noted that "[c]ourts are divided on the question of whether negligen[t hiring] claims fall under the definition of 'safety regulatory authority of a State,' so as to come within the ambit of the exemption." *Id*. at *6. However, *Finley* was the first case to "consider[] the salient question … [of] whether common law claims for negligence fall within the preexisting and traditional state police power over safety." *Id*. (internal quotation omitted). The court reasoned that, historically, common law tort claims have been a "'critical component of the States' traditional ability to protect the health and safety of their citizens, … so there can be no serious dispute that common law claims arising from the negligent procurement of a trailer represent a valid exercise of the state's police power to regulate safety … [and] concern motor vehicles so as to fall under the exemption provision." *Id*. (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Blackmun, J., concurring in part and dissenting in part)).

A significant number of courts have, for varied reasons, found that negligent hiring claims against brokers are not preempted by the FAAAA. For example, the court in *Mann v. C.H. Robinson Worldwide, Inc.*, 2017 WL 3191516 at *7 (W.D. Va. July 27, 2017) looked at negligent hiring in the general sense

beyond brokers hiring motor carriers. Based on this view, the court held that negligent hiring has only a "'tenuous, remote, or peripheral' connection to the 'price, route, or service' of a broker," and claims based on it should not be preempted. *Id*. (citing *Rowe*, 552 U.S. at 371 (citation omitted)). A slightly earlier case decided before *Volkova*, *Krauss*, and *Creagan* denied a broker's preemption argument because it could not find any case law to argue against "the near-universal refusal of the courts to find personal injury actions preempted" under the ADA. *Montes de. Oca v. El Paso-Los Angeles Limousine Exp., Inc.*, 2015 WL 1250139 at *1–2 (C.D. Cal. Mar. 17, 2015). *See also Owens v. Anthony*, 2011 WL 6056409 at *3–4 (M.D. Tenn. Dec. 6, 2011) (citing numerous ADA preemption cases and concluding that negligent hiring by brokers relates to highway safety).

Earlier FAAAA preemption cases which cite to ADA preemption authority do not consider the difference in the wordings of the ADA and FAAAA. While the number of cases holding that the FAAAA does not preempt negligent hiring claims against brokers is not insignificant, the most recent cases have generally favored preemption. *See Creagan*, 2018 WL 6523123; *Volkova*, 2018 WL 741441; *Krauss*, 2018 WL 2063839. *But see Hentz v. Kimball Transp., Inc.*, 2018 WL 5961732 at *3 (M.D. Fla. Nov. 14, 2018) ("Congress did not intend to preempt ordinary state law negligence claims … [because t]he target at which it aimed was a State's direct substitution of its own governmental commands for competitive market forces." (internal citations omitted)).

D. Agency Theory May Circumvent Preemption

While *Creagan* and similar recent decisions initially appear a boon for brokers by significantly limiting their exposure to liability, they may pave the way for creative arguments to circumvent preemption using agency theory. The court in *Creagan* explicitly stated that motor carriers remain liable for personal injury and property damage if they fail to comply with financial responsibility requirements. *Id*. at *4. Because it is clear that motor carriers remain liable despite the FAAAA, it is foreseeable that a broker's liability may not be preempted if it "steps into the shoes" of a motor carrier as in *Sperl*. However, even in a case where a broker has assumed the role of a motor carrier through agency, the broker is not subject to motor carriers' financial responsibility requirements.

"Federal regulations require interstate trucking companies to maintain insurance or another form of surety 'conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles.'" *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 870 (10th Cir. 2009) (quoting 49 C.F.R. § 387.301(a)). "The main purpose of the … financial responsibility regulations is to ensure that the public is adequately protected from the risks created by a motor carrier's operations." *Great West Cas. Co. v. Gen. Cas. Co. of Wisconsin*, 734 F.Supp.2d 718, 734 (D. Minn. 2010) (citing *Yeates*, 584 F.3d at 875; *Canal Ins. Co. v. Kwik Kargo, Inc. Trucking*, 2009 WL 1086524 at *2 (D. Minn. Apr. 21, 2009)). While no case law yet exists on the subject, the absence of these important public policy requirements for brokers provides a strong argument that they should not be considered *de facto* motor carriers and subjected to the same liabilities under agency theory.

V. RECENT CASES INVOLVING AGENCY BETWEEN BROKER AND MOTOR CARRIER

- Hoffman v. Crane, 2014, $27 Million, Illinois – 2014 IL App (1st) 122793-U
    - Jury found that Crane was an agent of Ryerson on the basis that they could deny loads to drivers for failure to follow their guidelines and maintained professionalism requirements for its drivers, requiring them to get regular haircuts, for example.

- McHale v. W.D. Trucking, 2015, $8 Million, Illinois – 2015 IL App (1st) 132625
    - Jury found that the broker had a litany of requirements of the drivers, and the broker maintained regular progress calls with the motor carrier to ensure compliance with their requirements

- Le v. TQL, 2018, Oklahoma, - 2018 OK.CIV.APP. 71, 431 P.3d 366 (Okla. 2018)
    - Appellate Court upheld finding of summary judgment in favor of the broker
    - Court found that the level of control exerted by the broker in the Sperl case was not present in this case
    - While the broker had a great number of instructions and requirements for its drivers, the Court held that many of these requirements were simple common sense requirements "that any shipper of refrigerated products would require before entrusting a load to a carrier. . . "

VI. RECENT CASES INVOLVING NEGLIGENT HIRING BY BROKERS

- Espinoza v. J.B. Hunt, 2017, $15.5 Million, Pennsylvania - Philadelphia Court of Common Pleas, June Term, 2015, No. 2656
    - J.B. Hunt's Brokerage Division contracted with one man, one truck motor carrier company operated by Defendant Hatfield. Hatfield, who had been granted operating authority 8 months before the fatal accident, had a history of drunk driving on the job and other reckless driving tickets.
    - The jury held that J.B. Hunt had a duty to perform an investigation into the motor carrier, and that Hatfield had used a J.B. Hunt issued debit card to buy diesel and the booze he was drinking before the accident

- Linhart v. Heyl Logistics, 2012, $5.2 Million, Oregon - 2012 U.S. Dist. LEXIS 11951, 2012 WL 325844
    - Heyl Logistics, the broker, was operating under a contract with Nestle. Heyl hired Washington Transportation as the motor carrier for the load. The driver, Clarey, fell asleep at the wheel of the truck while coming off of a crystal methamphetamine high, striking and killing Linhart, who was checking the brakes of his own truck on the side of the road.
    - The contract between Heyl and Nestle contained a clause requiring Heyl to be solely responsible "to ensure that all carriers hired by Heyl were in compliance with all applicable federal, state, and local laws, rules, and regulations."

- The evidence showed that Heyl performed only a cursory search into the operating authority of Washington Transportation, and specifically failed to notice that their insurance expired six days after the entry of the broker/motor carrier contract.
- During the pendency of Heyl's brokerage relationship with Washington, Washington's insurance expired and its operating authority was ultimately revoked. At trial, Heyl did not have documentation to prove that when it hired Washington, Washington had operating authority and insurance.

VII. TAKEAWAYS FOR AVOIDING BROKER LIABILITY

- The regulations say that a broker is not a motor carrier – don't act like one.
- Don't control dispatch.
- Don't regulate hours of service of the driver, and never require a driver to violate federal regulations.
- For motor carriers with brokerage operations, keep them separate by way of corporate formalities and structure.
- The broker should never own, possess, or control the freight.
- The contract between the broker and motor carrier should not be specific as to the motor carrier's safety rating, driver qualifications, or other safety issues beyond a commitment that the motor carrier will comply with applicable regulations.
- Don't dictate route design unless it has been vetted through a fatigue, or other qualified, expert.
- Don't make representations on your website or in promotional materials regarding the safety of motor carriers or drivers.

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