Recent Trend by Plaintiffs to Expand Broker Liability
RECENT TREND BY PLAINTIFFS TO EXPAND BROKER LIABILITY

INTRODUCTION

Since the adoption of the Moving Ahead for Progress in the 21st Century Act (“MAP-21”), and specifically 49 USC 14916, there has been little in the way of judicial interpretation or application of that provision. Plaintiffs, however, have been increasingly assertive in that regard, and, in the past few years, have started to press, with greater enthusiasm, a broad interpretation and application of the private right of action it creates.

Plaintiffs continue to press conspiracy, aiding and abetting, misrepresentation, unlawful brokering, joint venture or joint enterprise, and now attach them to 49 USC 14916 in an effort to argue that any “unlawful” brokering triggers the private right of action and vicarious liability provisions in all manners of cases, including those with claims for bodily injury. Plaintiffs are also pushing such theories as sub-carrier, co-carrier, de facto carrier, and the like, in the same vein. They are using the statutory provision as a means to attempt to attach joint and several liability, “without regard to amount, in contravention of state law and tort reform,” to all potential defendants under that provision. (49 USC § 14916(c)(2)).

UNLAWFUL BROKERING

On December 5, 2014, the Federal Motor Carrier Safety Administration published its guidance with regard to the then new private right of action provision. Current guidance, updated May 11, 2017, for 49 USC § 14916, reads as follows:

What is the civil penalty for a broker or freight forwarder who engages in interstate operations without the required operating authority (registration)?
A broker or freight forwarder who knowingly engages in interstate brokerage or freight forwarding operations without the required operating authority is liable to the United States for a civil penalty not to exceed $10,000 and can be liable to any injured third-party for all valid claims regardless of the amount. (49 USC 14916(c)). The penalties and liability to injured parties apply jointly and severally to all corporations or partnerships involved in the transportation and individually to all officers, directors, and principals of these business forms (49 USC 14916(d)). Under 49 USC 14901(d)(3), a broker of household goods (HHG) who engages in interstate operations without the required operating authority is liable to the United States for a civil penalty of not less than $25,000 for each violation. Source: 78 FR 54720.

Based upon this guidance, and prior guidance from the FMCSA, as well as the rather open wording of the statute itself, plaintiffs are convinced that they have found an opening through which to expand broker liability, and to tie more defendants (with likely higher insurance limits) to severe or catastrophic bodily injury cases.
In one fairly recent Complaint, plaintiff’s counsel pled, as many now typically do, in a manner to attempt to combine a broker and carrier as one entity, and try to tie both to the Federal Motor Carrier Safety Regulations. In addition, plaintiff’s counsel pled as follows:

1. Carrier and broker share personnel, offices, accounts, and staff.

2. The sharing of personnel, offices, accounts, and staff is in violation of FMCSR 371.7(b), 49 USC § 13901(c), and the Moving Ahead for Progress in the 21st Century Act (MAP-21).

3. As a result of the violations of carrier and broker, and to put the matter at issue, their actions taken as a whole and in consideration of all applicable paragraphs in this Complaint, constitute misrepresentation and unlawful brokering.

4. The corporate entities, as well as the individual officers, directors, and principals of such entities are jointly and severally liable for unlawful brokering pursuant to 49 USC § 14916(b).

5. Officer in his position as officer with carrier, is ultimately responsible for placing carrier of the brokered load, and its driver, on the road, entering Tennessee, and using the public highways.

6. Officer of carrier, by not ensuring there was separation, as required by law, between carriers and brokers actions in this case, breached his duty as a director and officer of carrier and was negligent.

7. Officer of carrier is thus individually and jointly and severally liable pursuant to 49 USC § 14916(d) for any unlawful brokering of carrier and broker.

8. By reason of, and as a direct and proximate result of officer of carrier’s breaches of the above duties, which were a cause of the injuries and eventual deaths of plaintiffs, plaintiffs have suffered economic and non-economic losses for which they are entitled to restitution to the extent allowed by law.

**DEFENSES**

As one can see from these allegations, plaintiffs are not only attempting to pierce the corporate veil, they are attempting to tie the officers, directors, and principals of any corporation or partnership that knowingly participated with a broker that they claim was acting “unlawfully”. Defenses pled in response to similar allegations include failure to state a claim for conspiracy, aiding and abetting, misrepresentation or unlawful brokering, denial of any joint venture or joint enterprise, including the lack of elements that would create such a relationship, and a defense in specific response to the MAP-21 allegations similar to the following:
Plaintiffs have failed to state any claim, or “valid claim”, upon which relief may be granted, including, but not limited to, “misrepresentation”, “aiding and abetting”, “unlawful brokering”, or “conspiracy” under the Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 USC § 14916, or under any statute, any regulation, or common law. Plaintiffs failed to state a “valid claim”, or any private right of action, and have failed to present a “valid claim” under MAP-21 for which relief may be granted. The plaintiffs’ claims against these defendants are pre-empted, in their entirety, by MAP-21, or otherwise by field pre-emption, and must be dismissed. The plaintiffs lack standing to bring such claims as this matter is not “ripe,” and they are not proper parties. This Court lacks jurisdiction over the subject matter. The exclusive jurisdiction of any claim under 49 USC § 14916 is in the United States District Court. The statute of limitations as to these claims has run, and no saving statute is here applicable to save the same. Further, any recovery under the statutory provision alleged, 49 USC § 14916, is limited, and does not apply to the type and kind of damages alleged herein, or to the plaintiffs.

It is denied that these defendants are subject to joint and several or vicarious liability under any applicable legal theory. It is denied that the plaintiffs are entitled to any recovery from these defendants. The plaintiffs have failed to state a claim upon which vicarious or joint and several liability may be applied with regard to these defendants under MAP-21, 49 USC § 14916, any statute, any regulations, or under common law.

49 USC § 14916

Certain key words in the statute are consistently and conveniently overlooked by plaintiffs. Under 49 USC § 14916(c) and (d), these keywords include “valid claims”, and “liability for civil penalties and for claims under this section”. The FMCSA guidance appears to suggest a more expansive interpretation with the addition of “any injured third-party,” as opposed to using the phrase in the statute, “the injured party.”

49 USC § 14916. Unlawful Brokerage Activities, reads as follows:

(a) Prohibited activities. - A person may provide interstate brokerage services as a broker only if that person –

(1) is registered under, and in compliance with, Section 13904 [49 USC § 13904]; and

(2) has satisfied the financial security requirements under Section 13906 [49 USC § 13906].

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(c) Civil penalties in private cause of action. Any 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) is liable (1) to the United States government for a civil penalty in an amount not to exceed $10,000 for each violation; and (2) to the injured party for all valid claims incurred without regard to amount.

(d) Liable parties. The liability for civil penalties and for claims under this section for unauthorized brokering shall apply, jointly and severally (1) to any corporate entity or partnership involved; and (2) to the individual officers, directors, and principals of such entities.

**Personal Jurisdiction**

A Court cannot exercise specific jurisdiction over the defendant unless the plaintiff can show that he/she/it has purposefully established significant contact with the forum State such that he should expect being hailed into court there. A Court cannot exercise general jurisdiction over such a defendant if the contacts with the forum State have been random, sporadic and rare. Tennessee respects the fact that a corporation is a distinct legal entity that exists separately from its officers. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 650 (Tenn. 2009).

**Piercing the Corporate Veil**

The purpose of any motion filed pursuant to Rule 12.02(6) of the Tennessee Rules of Civil procedure “is to test the sufficiency of the complaint.” *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 710 (Tenn. 2003) (citations omitted). Although the Court “must take the factual allegations contained in the complaint as true,” where the plaintiff “can prove no set of facts in support of the claim that would entitle the plaintiff to relief,” dismissal pursuant to Rule 12.02(6) is appropriate. *Id.*

It is well settled in Tennessee law that “[t]here is a presumption that a corporation is a distinct legal entity, wholly separate and apart from its shareholders, officers, directors or affiliated corporations.” *Boles v. Nat'l Dev. Co.*, 175 S.W.3d 226, 244 (Tenn. Ct. App. 2005) (quoting *VP Buildings, Inc.* v. *Polygon Group*, No. M2001-00613-COA-R3-CV, 2002 Tenn. App. LEXIS at * 11 (Tenn. Ct. App. Jan. 8, 2002)). While the law does allow for this corporate separateness to be “disregarded or pierced,” the corporate “identity should be disregarded 'with great caution and not precipitately.'” *Id.* at 245 (emphasis added) (quoting *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991)).

Tennessee Courts have outlined several factors to be considered “in determining whether to pierce the corporate veil.” *Id.* at 245. These factors include:

- whether the corporation was grossly undercapitalized,
- the non-issuance of stock certificates,
- the sole ownership of stock by one individual,
- the use of the corporation as an instrumentality or business conduit for an individual or another corporation,
- the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors,
- the use of the corporation as a subterfuge in illegal
transactions, the formation and use of the corporation to transfer to it the existing liability of another person or entity, and the failure to maintain arm’s length relationships among entities.

Id. (quoting VP Buildings, Inc., 2002 Tenn. App. LEXIS at * 11). In addition, Tennessee courts have also “relied upon the so-called Allen factors stated in Federal Deposit Ins. Corp. v. Allen.” Id. In Allen, the District Court set forth the following list of factors to consider:

(1) whether the entity has been used to work a fraud or injustice in contravention of public policy; (2) whether there was a failure to collect paid in capital; (3) whether the corporation was grossly undercapitalized; (4) the non-issuance of stock certificates; (5) the sole ownership of stock by one individual; (6) the use of the same office or business location; (7) the employment of the same employees or attorneys; (8) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (9) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (10) the use of the corporation as a subterfuge in illegal transactions; (11) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (12) the failure to maintain arm’s length relationships among related entities.


If the plaintiffs fail to specifically allege that piercing of the corporate veil is appropriate and/or to plead any violation of the factors set forth above, a Complaint may fail to state a cause of action against the individual 14916(d)(1) and (2) defendant for personal liability under applicable state law.

49 USC § 14916 Purpose

49 USC. § 14916 is one part of The Moving Ahead for Progress in the 21st Century Act. 112 P.L. 141 § 32919 (2012). It is important to note that what ultimately became codified as § 14916 actually began not as a component of MAP-21, but as a component of the Fighting Fraud in Transportation Act of 2011. 2011 H.R. 2357 § 6 (2011). That bill was introduced in 2011 and was referred to committee. It was ultimately not enacted, but its provisions were incorporated into MAP-21 the following year. 2011 Legis. Bill Hist. US H.B. 2357. This brief history of § 14916 is important. As the name of the 2011 bill reflects, the purpose behind enactment of § 14916 was to prevent fraud in brokerage activities, not to expand liability for personal injury actions.

Elements

Section 14916(d) provides that “liability for civil penalties and for claims under this section for unauthorized brokering shall apply, jointly and severally . . . to any corporate entity or partnership involved . . . and . . . to the individual officers, directors, and principals of such entities.” 49 U.S.C. § 14916(d)(1)-(2) (2017) (emphasis added). Thus, under the plain text of the statute, joint and several liability exists only for civil penalties and claims authorized by § 14916.
Moreover, § 14916(c) makes clear that the imposition of civil penalties and private causes of action under the statute is not automatic. Instead, § 14916(c) states that civil penalties and private causes of action are only permitted against “[a]ny person who knowingly authorizes, consents to, or permits . . . a violation of subsection (a).” 49 U.S.C. § 14916(c) (2017) (emphasis added). § 14916(c) thus imposes at least two prerequisites to the joint and several liability provided in § 14916(d). Specifically, no civil penalty or private cause of action can be asserted (1) without proof of a ‘knowing’ action or (2) without proof of a violation of § 14916(a).

In turn, § 14916(a) requires that “[a] person may provide interstate brokerage services as a broker only if that person . . . is registered under, and in compliance with, [49 U.S.C. § 13904]; and . . . has satisfied the financial security requirements under [49 U.S.C. § 13906].” 49 U.S.C. § 14916(a)(1)-(2) (2017). Putting the entire section together, then, before personal liability can attach under § 14916, there must be a knowing failure to register pursuant to § 13904 or a knowing failure to have appropriate financial security under § 13906. A complaint, to state a claim, should allege either (1) a knowing action on the part of the broker and the 14916 defendant or (2) any violation of § 13904 or § 13906.

The sample allegations suggest that the carrier and broker share “personnel, offices, accounts, and staff . . . in violation of FMSCR 371.7(b); 49 U.S.C. § 13901(c), and the Moving Ahead for Progress in the 21st Century Act.” In regard to the 14916 defendant, the plaintiffs allege that the individual’s alleged failure to ensure “separation . . . between the carrier’s and the broker’s actions in this case renders him negligent. Finally, the allegation suggests that the 14916 defendant is “individually and jointly and severally liable pursuant to 49 U.S.C. § 14916(d) for any unlawful brokering. (Id. at ¶ 260).

Even assuming arguendo that the claim involves violations of FMSCR 371.7(b), 49 U.S.C. § 13901(c), or even negligent actions on the part of the carrier and broker, no individual, joint and/or several liability can attach to the 14916 defendant if these actions do not constitute knowing violations of § 14916(a)(1) and (2). The plaintiffs merely allege that the 14916 defendant is individually liable for unlawful brokering, but the plaintiffs fail to make a single allegation that the broker knowingly failed to comply with either § 13904 or § 13906, or that the 14916 defendant knew of that failure.

Penalties and Valid Claims

Even if a violation of § 14916(a) is proven, § 14916 does not provide a right of recovery for personal injury damages. Under § 14916(c)(2), when a knowing violation of § 14916(a) is established, an “injured party” can assert a private right of action against the broker “for all valid claims incurred without regard to amount.” 49 U.S.C. § 14916(c)(2) (2017).

The plaintiffs contend that they are entitled to recover personal injury damages from the 14916 defendant through operation of MAP-21. A determination of whether that contention is true requires further analysis of the MAP-21 statutory language. Particularly informative in this regard is the financial security requirement spelled out in 49 U.S.C. § 13906. That provision includes financial security requirements for both motor carriers and brokers. Under the statute, brokers must secure “[a] surety bond, trust fund, or other financial security” in order to “pay any claim against a broker arising from its failure to pay freight charges under its contracts,
agreements, or arrangements for transportation.” 49 U.S.C. § 13906(b)(2)(A) (2017). (Emphasis added). In contrast, motor carriers are subject to a “[l]iability insurance requirement” that “must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property . . . or both. 49 U.S.C. § 13906(a)(1) (2017) (emphasis added).

Accordingly, under the financial security requirement applicable to brokers, they are only required to ensure the ability to pay for freight charges – not for death or bodily injury, as with motor carriers. Thus, motor carriers must carry personal injury claim coverage. This is not so for brokers. This understanding of the financial security requirement, incorporated into § 14916, must necessarily inform what “valid claims” can be pursued against a broker, and who can be an “injured party.”

A logical analysis of the plain language of the two connected statutes reveals only one reasonable conclusion as to what “injured party” and “valid claim” mean for a broker: “Injured party” means a party injured by the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation, and “valid claim” means legal claims arising from the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation.

Subject Matter Jurisdiction

Pre-emption


In state court, subject matter jurisdiction may be lacking because MAP-21’s statutory scheme to deter unlawful brokerage activities arguably preempts state law action against brokers. Preemption seems particularly clear for an individual defendant such as a 14916 defendant since even plaintiffs seemingly acknowledge that the only even theoretical avenue for individual liability against a 14916 defendant is the private cause of action provided for in 49 U.S.C. § 14916(c)(2) & (d)(2). When evaluating a claim of preemption, “courts work from the assumption that the historic powers of the states with regard to matters traditionally subject to state regulation are not displaced by a federal statute unless that is the clear and manifest intent of Congress.” Id. at 30 (citations omitted).
In making this determination, “Congressional purpose is the ‘ultimate touchstone.’” *Id.* at 30 (citations omitted). The intent of Congress can be express or implied. *Id.* at 31. “Express preemption occurs when the Congress includes explicit preemptive language in federal statutes” while “[i]mplied preemption occurs when the federal statutes occupy the entire legislative field leaving no room for state regulation.” *Id.* (citations omitted).

Through enactment of MAP-21, Congress has implicitly preempted state law in the area of broker liability. The Act includes a requirement that brokers register with the federal government (49 U.S.C. § 13904) and includes financial security requirements (49 U.S.C. § 13906). Further, the Act provides for civil penalties to be enforced by the federal government (49 U.S.C. § 14916(c)(1)). Civil actions for failure to secure appropriate financial security are to be brought by [e]ither the Secretary or the Attorney General of the United States . . . in an appropriate district court of the United States.” 49 U.S.C. § 13906(b)(7)(A) (2017) (emphasis added). This likewise raises the issue of removal from state to federal court based on federal question jurisdiction.

The comprehensive MAP-21 statutory scheme, in regard to brokers, puts in place a detailed system of registration and financial security requirements that creates a federal system of punishing violations of these requirements. It therefore evidences Congress’ implied preemption of brokerage liability issues. As such, state courts may lack subject matter jurisdiction over the individual liability claims asserted by plaintiffs, and it arguably limits such actions to the appropriate district court.

Under § 13902(c)(7), civil actions may be brought either by the Secretary or Attorney General “in an appropriate district court for the United States to enforce this subsection or a regulation prescribed or order issued under this subsection.” The Court may award appropriate relief, including injunctive relief. Under 13906(b)(7)(A) and (B), an identical provision provides that either the Secretary or the Attorney General of the United States may bring a civil action in an appropriate district court of the United States to enforce the requirements of this subsection or a regulation prescribed or order issued under this subsection. The court may award appropriate relief, including injunctive relief.

49 USC § 14704, Rights and Remedies of Persons Injured by Brokers or Carriers, sets forth private rights of actions by persons injured because a carrier or broker providing transportation or service jurisdiction under Chapter 135 does not obey an order of the Secretary or the Board. That action may be brought to enforce the order, and for injunctive relief for violation under §§ 14102 and 14103. Any complaints under that section are limited to those brought or filed with the Board or the Secretary. Further provisions allow for filing in a district court of the United States under this subsection, but all such claims pertain to enforcement of an order, damages for violation of an order, and liability and damages for exceeding tariff rates.

§14901, General Civil Penalties, sets forth the penalties for reporting and record keeping, transportation of hazardous waste, unauthorized transportation, violations relating to transportation of household goods, and factors to consider when determining the amount of civil penalties. Venue for any claims thereunder is in the judicial district in which the carrier or broker has its principal office, the judicial district in which the carrier or broker was authorized to provide transportation or service under this part when the violation occurred, the judicial district in which the violation occurred, or the judicial district in which the offender is found.
For § 14916 to apply as broadly as plaintiffs propose, the statutory scheme would have to be so pervasive as to preempt state law. This would include state restrictions and limitations on corporate veil piercing, liability of sister corporations, state restrictions on tort damages, tort reform, comparative fault, and, in general, federal and state due process. If a “valid claim” is a claim by any injured third party, to include bodily injury, without monetary limit, any one of the persons or entities to whom § 14916 could apply, could find themselves responsible for a judgment in a matter in which they were not involved, and in which they had no right or ability to participate. If § 14916 is that broad in application, it must be preemptive, and no recovery may be made against, and no suit filed against, any transportation broker that is properly registered, and that had and maintains the appropriate amount of financial security. Otherwise, the statute has to be limited as suggested above, as there can be no and should be no position in-between.

**Parties**

§ 14916 creates a private cause of action against the officers, directors, and principal of an entity engaged in interstate transportation brokerage services—but only for damages arising out of both a claim for unpaid freight charges and the entity’s failure to properly register as a broker. Again, an entity’s officers, directors, and principals are jointly and severally liable for unpaid freight charges that arise while the entity is engaged in unauthorized brokering. § 14916, however, does not expose an entity’s officers, directors, and principals to joint and several liability for damages arising out of the entity’s alleged negligence in a wrongful-death action where, coincidently, the entity also engaged in unauthorized brokering.

For purposes of § 14916, an entity acts as a transportation broker when it or its 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) (emphasis added). That being so, an entity may provide brokering only after meeting two requirements:

1) The entity must be registered as a broker with the U.S. Secretary of Transportation, in compliance with 49 U.S.C. § 13904; and

2) The broker must have filed proof of a minimum $75,000.00 in financial security (e.g., a “surety bond, trust fund or other financial security”) to “pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation[.]” 49 U.S.C. § 13906 (b)(1)(A), (b)(2)(A) (emphasis added).

49 U.S.C. § 14916(a). The second requirement, in short, obligates a broker to ensure that it can financially cover claims for unpaid “freight charges”—no other coverage is required. 49 U.S.C. § 13916 (b)(1)(B). Motor carriers, in contrast, are expressly required to carry liability insurance that can cover “bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles.” 49 U.S.C. § 13906(a)(1). Indeed, the legislature did not contemplate that brokers would be exposed to liability for the same type of damages that a motor carrier might be exposed to. As such, because a broker’s financial-security requirement is expressly limited, the officers, directors, and principals of an entity that engages in unlawful
brokering should only be jointly and severally liable under § 14916 when the entity fails to pay for those losses expressly contemplated by the financial-security requirement—unpaid freight charges—and only for those unpaid charges and civil penalties “without regard to amount.”

Nothing in § 14916 provides for joint and several liability outside of damages that arise directly from unauthorized brokering. To hold otherwise would mean that officers, directors, and principals of an unlawful broker could be jointly and severally liable for any claim brought against the broker merely because the broker did not have insurance to cover freight charges—even if freight charges are entirely unrelated to the claim.

In the example herein, plaintiffs have not brought a claim for unpaid freight charges and are, therefore, not “injured” parties as contemplated by § 14916.

49 C.F.R. § 371.7(b) does not provide that a motor carrier and a broker cannot share resources. In fact, the regulation does not even address unlawful or unauthorized brokering. The regulation, instead, provides that “[a] broker shall not, directly or indirectly, represent its operations to be that of a carrier.”49 C.F.R. § 371.7(b) (emphasis added). Thus, on its face, the statute only restricts a broker from holding itself out as a motor carrier. The act of brokering, as provided in 49 C.F.R. § 371.2(c), is a clearly defined “service”—not a mere state of coexisting:

Brokerage or brokerage service is the *arranging* of transportation or the physical movement of a motor vehicle or of property. It can be *performed* on behalf of a motor carrier, consignor, or consignee. . . . *Non-brokerage service is all other service*.[

49 C.F.R. § 371.2(c), (d) (emphasis added).

**Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier**

One of the primary reasons for MAP-21, with regard to brokers, was to reduce “double brokering.” Double brokering, as opposed to co-brokering, typically results when a load is accepted by some person or entity as a carrier, but that carrier then flips the load or subcontracts the load without the shipper’s or customer’s knowledge and approval. The subcontracted carrier is then not paid for the service it rendered. The statute makes clear that the purpose of the increased financial responsibility is to pay claims arising from the broker’s failure to pay freight charges under contracts and that the purpose of the bonding requirement does not extend to cargo claims or vicarious liability for the negligent acts or omissions of the retained carriers. § 14916 is simply a self-help provision that allows an injured party to sue the intermediary and all officers and directors for all valid claims incurred regardless of amount as a result of unlawful brokerage.

Many states and federal jurisdictions generally agree that logistics brokers are not vicariously liable for the torts of independent contract carriers. As to a de facto carrier claim, many plaintiffs attempt to argue that due to the actions of the broker, the broker was acting as carrier, co-carrier, de facto carrier, or subcarrier for the load and that it is then, therefore, bound by the same safety regulations of the Federal Motor Carrier Safety Administration as is the actual carrier. Further, plaintiffs attempt to tie what are consistently claimed to be non-delegable duties of the carrier to the broker based upon contracts to which the plaintiff is not a party, the carrier listed on the bill of lading, right of control retained by the broker, and the control exercised by
the broker over the carrier. As a practical matter, if the broker appears next to the word “carrier” on a bill of lading, the name of the broker is usually just a placeholder, as, at the time the bills of lading are drafted, a carrier is not yet assigned or has not yet accepted the load.

Regulations define a “broker” as one “who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.” 49 CFR § 371.2(a). The very statutory scheme upon which most plaintiffs rely to blur the lines between broker and carrier, actually distinguishes between each, and does not subject brokers to any safety regulations regarding the carriage of freight. Regulations with regard to brokers are generally administrative and pertain to how brokers should provide their services. Again, as mentioned above, and made clear in the financial regulations, financial responsibility is imposed on carriers to ensure that a carrier can pay for claims pertaining to “bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property.” 49 USC § 13906(a)(1); See 49 CRF § 387.7(a). For brokers, the purpose of the lesser amount of financial responsibility is that it is only anticipated that brokers may be responsible to shippers, carriers, and passengers in their “dealing” with brokers. 49 USC § 13904. The financial responsibility portion of § 13904 states, specifically:

* * *

(e) Regulation to protect motor carriers and shippers. -- Regulations of the Secretary applicable to brokers registered under this section shall provide for the protection of motor carriers and shippers by motor vehicle.

* * *

49 USC § 13904.

Under Section (b)(2)(A) of 13906, it is clear that the anticipated damages to which a broker would or might be exposed are:

Payment of claims. A surety bond, trust fund, or other financial security obtained under Paragraph (1) shall be available to pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation subject to jurisdiction under Chapter 131 [49 USC § 13501, et seq.] . . ..

CONCLUSION

Although inclusion of additional defendants in transportation bodily injury litigation has not created the flood of claims predicted with the enactment of the MAP-21 provisions, there is a slow creep of such claims. In light of same, defenses, including, but not limited to, the foregoing, should be pressed when available in appropriate courts to establish a body of judicial application that will make such claims, including the resulting burden and expense, and the anxiety of those sued as § 14916 defendants, a thing of the past. The sharing of information and collaboration within the industry toward that end is a necessary endeavor for all.