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Broker Liability

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Continuing Trend of Plaintiffs to Expand Broker Liability

- Statutory Liability: MAP-21 – Moving Ahead for Progress in the 21st Century Act
- Statutory Blending: Double Brokering, De-Facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer
- Clarity & Simplicity Dies on Vine (The Duncan Amendment)
- Recent Cases: Ruan, Puga, Creagan, Saldana, and Brettman

49 USC 14916
“Prohibited Activities”

(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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49 USC 14916
"Civil Penalties in Private Cause of Action"

(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.

49 USC 14916
“Liable Parties”

(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.

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FMCSA Guidance

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.

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14916 -Purpose and Legislative Intent

49 USC. § 14916 is one part of The Moving Ahead for Progress in the 21st Century Act. 112 P.L. 141 § 32919 (2012).

§ 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.

Allegations by Plaintiffs

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.

Allegations by Plaintiffs, cont.

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.

Allegations by Plaintiffs, cont.

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

- Preemption
  - Broad reading required (and creates constitutional concerns)
- Standing
  - Proper Parties
  - Causation
- “Civil Penalties”
- “Valid Claims”
  - Federal Question
  - Statutory Venue
  - Damages – Freight Charges
- Personal Jurisdiction

Preemption

- For § 14916 to apply as broadly as plaintiffs propose, the statutory scheme would be sufficiently pervasive 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 may be 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.

Standing

- Standing: Injury, Causation, and Redressability
- Proper parties
  - Those who can sue for freight charges, and have sued for freight charges.
  - Not personal injury/wrongful death
- Causation
  - Broker’s failure to adhere to financial requirement isn’t but for cause of accident

14916-Civil Penalties and Valid Claims

- 49 U.S.C. § 13906 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)

14916 Civil Penalties and Valid Claims, cont.

- 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).

14916 Civil Penalties and Valid Claims, cont.

- There is only one reasonable conclusion as to what “injured party” and “valid claim” mean for a broker under 14916:
- 1. “Injured party” means a party injured by the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation, and
- 2. “valid claim” means legal claims arising from the broker’s failure to pay freight charges under its contracts, agreements, or arrangements for transportation.

14916 Parties (49 USC 13906)

- Plaintiffs – any injured parties
  - who have “valid claims”
    - for failure to pay freight charges under
      - Contract
      - agreement, or
      - arrangements for transportation

14916 Parties - Defendants

Any person who knowingly authorizes, consents to, or permits, directly or indirectly, alone or in conjunction with any other person, a violation of subsection (a)

Any corporate entity or partnership involved, AND the individual officers, directors, and principals of such entities (jointly and severally liable for valid claims and civil penalties).

Liable to the United States government for civil penalties; and to the injured party for all valid claims without regard to amount.

Personal Jurisdiction

- A Court cannot exercise specific jurisdiction over the 14916(d)(1) or (2) 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).

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer

- 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. 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.

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer

- Many state 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 argue that due to the actions of the referring carrier and broker, the broker and/or referring carrier were acting as carrier, co-carrier, or de facto carrier for the load and that they are then, therefore, bound by the same safety regulations of the Federal Motor Carrier Safety Administration as is the actual carrier.
- 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 may not yet assigned or has not yet accepted the load.

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- The reason for the trend – Motor Carriers may not carry adequate liability insurance for one reason or another. Plaintiff's follow the money.
- For trial purposes, remember its not what the Broker did wrong to cause the accident but did the Broker exercise enough control over the driver, making him an agent of the Broker. (assuming we are talking from a Broker POV)
- Duties of the freight Broker – background checks ; safety stats; following name changes of motor carriers; proof of operating authority; listing of drivers' license info and MVR's; proof of valid insurance with high limits

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Brokers must be aware of exposure they can create. Right of control; uniforms; appearance of the driver; control of schedules; delivery status checks or other regular communication with the motor carrier; measurements such as load temps or routes; reporting accidents; penalties for not doing these things.
- Try to limit exposure – evaluate all potential carriers through background checks and maybe some kind of benchmark. Separation…limit interaction once a carrier selection is made. Make your selection solid and beyond reproach; keep documentation; then switch to the results of the transaction. Don't focus on how the sausage is made. Make certain your Agreements reflect this.

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Broker/Carrier Agreement
- Carrier Dispatch Confirmation
- Bill of Lading

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

- Right to Control – Control Exercised
- Check calls
- Trip instructions
- Fines
- Loading
- BOL
- Contract Language

Double Brokering, De-facto Carrier, Co-Carrier, Sub-Carrier, Statutory Employer, cont.

Carrier Transportation Services Agreement Provision

"The parties recognize that for operating convenience in the fulfillment of its duties and obligations under this contract, Carrier may wish to retain the services of other authorized carriers as subcontractors pursuant to lawful substituted service, interlining or other contractual arrangements. As consideration for 3PL's acceptance of such subcontracting arrangements, Carrier agrees as follows: (1) All subcontracting arrangements will be conducted with subcontractors which meet and maintain all U.S. DOT requirements, (2) Carrier may do so at its expense, in which case Carrier shall continue to be liable for any loss or damage to said shipments and responsible for all other obligations of Carrier under this Agreement to the same extent that Carrier would be liable if it performed the transportation."

Unlawful Brokering
The Duncan Amendment to the FAA Reauthorization Act

AMENDMENT TO H.R. 4

OFFERED BY

MR. DUNCAN OF TENNESSEE Page 267, after line 10, insert the following:

- SEC. ll. NATIONAL HIRING STANDARD OF CARE.

- (a) IN GENERAL.—An entity hiring a federally licensed motor carrier shall be deemed to have made the selection of the motor carrier in a reasonable and prudent manner if before tendering a shipment, but not more than 45 days before the pickup of the shipment by the hired motor carrier, that entity verified that the motor carrier, at the time of such verification—

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(1) is registered with and authorized by the Federal Motor Carrier Safety Administration to operate as a motor carrier or household goods motor carrier, if applicable;

(2) has the minimum insurance coverage required by Federal law; and

(3)(A) before the safety fitness determination regulations are issued, does not have an unsatisfactory safety fitness determination issued by the Federal Motor Carrier Safety Administration in force at the time of such verification; or

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(B) beginning on the date that revised safety fitness determination regulations are implemented, does not have a safety fitness rating issued by the Federal Motor Carrier Safety Administration under such regulations that would place a motor carrier out-of-service.

Unlawful Brokering
The Duncan Amendment to the FAA Reauthorization Act

(b) GUIDELINES.—Not later than 30 days after the implementation of the safety fitness determination referenced in subsection (a)(3), the Secretary shall issue guidelines that specifically outline how a motor carrier's operating authority and registration number could be revoked and subsequently placing them out-of-service.

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UNLAWFUL BROKERING
Pelosi Response to Duncan Amendment

"The Duncan amendment provides immunity to brokers and shippers when someone is killed or injured in a road accident, as long as they check three superficial verifications that do not ultimately ensure the trucks they hire are safe. With outdated and woefully low minimum insurance requirements, and with the majority of motor carriers unrated by the Federal Motor Carrier Safety Administration, this amendment would allow transportation intermediaries to escape liability and leave those injured or killed in truck accidents holding the bag." Nancy Pelosi

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Excerpt of Letter of Plaintiff Groups to House Re: Duncan Amendment

"We also strongly oppose the Duncan amendment, which would result in immunity for broker/shipper companies that negligently hire unsafe trucking companies that cause crashes. Broker/shipper companies are the intermediaries that hire trucking companies that transport goods, so their hiring decisions can have enormous safety implications. They are already incentivized to cut safety corners with normal rules in place, i.e., hiring the cheapest contractor available. The last thing Congress should be doing is passing legislation that would weaken their legal accountability when their negligent hiring leads to deaths or injuries. This is all the more important because under current law, commercial vehicles are grossly underinsured. The insurance minimum requirement is only $750,000, a limit that has not been increased in over 30 years. That means in order for victims with severe injuries to have any meaningful remedy, a negligent broker/shipper must share legal responsibility."

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Recent Decisions

- Moran v. Ruan Logistics, 2018 U.S. Dist. Lexis 159648 (USDC SD Ohio)
- Puga v. RCX, 17-41282, 2019 WL 1648440 (5th Cir. Apr. 17, 2019)
- Creagan v. Wal-Mart Transportation, 354 F.Supp. 3d (USDC ND Ohio 2018)
- Saldana v. Larue Trucking, 2019 WL 154895 (La. App. 2 Cir. Apr. 10, 2019)
- Brettman v. M&G Truck Brokerage, 2019 IL App. (2d) 180236

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Ruan-Motion to Dismiss to Tidy Up Kitchen Sink

- Duplicative, non-existent, and unfounded claims
- Compare elements and dismiss duplicative claims
- No private cause of action under FMCSR (or Ohio State law)
- No predicate allegations for negligent entrustment
- Graves Amendment for rental companies (crim or neg. maint)
- No predicate allegations for negligent hiring
- Agency liability duplicative of respondeat superior theory
- 12 claims—2 DWOP and 7 DWP

Puga-Implied Lease and Second Employer

- The Details
- Original Broker: Sunset
- Original Carrier: RCX (Shares space and all employees with Sunset)
- Equipment Problem and About Tyme
- Carrier Agreement: RCX as broker and About Tyme as Ind. Motor Carrier
- Placard on truck…name in log…defendant in suit…company that paid policy limits (in excess of statutory minimum)

Puga-Implied Lease and Second Employer

- RCX as Second Employer (Summary Judgment Rulings)
  - RCX does not have authority to be broker; bill of lading
  - No proof of lease required (*cf*. CFR; "arrangement")
  - Two employers (*Zamolla*; "exclusive" "complete"; lease; policy)
- Salt in Wound (Jury Instructions)
  - "A person providing motor vehicle transportation for compensation"
  - Did RCX "use motor vehicle(s) it did not own to transport property under an arrangement with [Driver]"

Creagan-FAAAA Preemption for Broker Negligent Hiring BI Claims

- Airline Deregulation Act, and Federal Aviation Authorization Administration Act
  - Broker v. Motor Carrier – one preempted, the other not
  - Interpreted in the same manner per SCOTUS – broadly
  - Negligent hiring seeks to enforce a duty of care related to how a broker arranges for a motor carrier to transport a shipment rather than regulate motor vehicles– therefore it relate to a broker service, and falls within FAAAA preemption
  - Not with the State safety regulatory authority exception
  - Court focused on distinctions between the financial responsibility provisions of 49 USC 13906

Saldana-Look to State Law to Determine if Driver in Course and Scope at Time of Accident

- Saldana argued that Carrier was vicariously liable under the FMCSR for actions of an independent contractor
- Court found Saldana's interpretation of the Regulations was "strained" specifically as to the definition of "employee" under 49 CFR 390.5(2)
  - "Individual" refers to human beings and not to corporations or other legal persons
  - Saldana relied on FMCSA Guidance – Court found that the FMCSR do not address tort liability, and, therefore, that Guidance could not likely be intended to express FMCSA views regarding tort liability
  - Guidance is not entitled to the degree of deference afforded to formal regulations, but is entitled to "respect" to the extent that it has the power to persuade

Brettman- Post Delivery Broker Liability for BI Claims

- Broker brokered load to Carrier. Carrier delivered load. 25 miles from delivery, while empty, Carrier/Driver were involved in an accident resulting in BI
- Plaintiff alleged vicariously liability against Broker claiming Broker exercised sufficient control over to establish employment/agency. Plaintiff argued that Driver became fatigued while with load due to Broker's actions and requirements, and that its responsibility continued after delivery.
- Plaintiff claimed that the trip does not end until the driver reaches "home base"

Brettman- Post Delivery Broker Liability for BI Claims, cont.

- **Plaintiff claimed negligent hiring**
- **Court dismissed plaintiff's claims against Broker**
  - Cases cited by plaintiff regarding the "trip" and "home base" were workers' compensation and insurance cases – the court distinguished and disregarded
  - Broker ceased to exercise any control over Carrier/Driver upon delivery
  - Any agency relationship terminated when Carrier/Driver completed its contractual obligation to deliver the load
  - Parties agreed that **Sperl** controlled whether or not an agency relationship existed- Court distinguished – in Sperl, the driver was "still acting under the broker's direction"
  - Court found it unnecessary to determine whether or not agency was established and found it dispositive that Broker did not exercise control after delivery

Brettman- Post Delivery Broker Liability for BI Claims, cont.

- On the negligent hiring claim plaintiff used an “expert,” but the Court determined, on this issue, the opinions were of insignificant weight
- Court turned to proximate cause finding that it was not a matter for the jury in this case
- The accident has to have occurred by virtue of the servant’s employment. The employer’s liability attaches only where there is demonstrated some connection between the plaintiff’s injuries and the fact of employment
- Carrier/Driver was not operating the vehicle to perform the contracted-for work when the injury occurred. Carrier/Driver was no longer hired or retained by Broker
- “It was the worker, not the work, who went on, posttermination, to injure a third party”
- Postdelivery = Posttermination

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