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CURRENT STATUS OF BROKER LIABILITY – PREEMPTION AND LEGISLATIVE ACTION

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BROKER LIABILITY

- A. Broker liability claims generally take two paths
 - a. Broker as motor carrier
 - i. Broker exercised a level of control, or maintained a sufficient right to control to be considered the driver's employer, and therefore the motor carrier or co-carrier
 - b. Negligent vetting
 - i. Knew or should have known the motor carrier was "unsafe"
- B. Definition of a motor carrier – 49 CFR 371.2
- C. Definition of a broker – 49 CFR 371.2(a)
- D. Registration requirement – 49 USC 13901(a)
- E. Written specification of authority acting under – 49 USC 13901(c)
- F. Regulations with regard to brokers are generally administrative and pertain to how brokers should provide their services. Financial responsibility is imposed on motor carriers to ensure that a motor carrier can pay 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 CFR § 387.7(a). For freight brokers, the reason for the lesser required amount of financial responsibility is that brokers may be responsible to shippers, carriers, and passengers "dealing" with brokers. 49 USC § 13904.

FAIR COMPENSATION FOR TRUCK CRASH VICTIMS ACT (PROPOSED)

A. Proposed Changes

- a. “Increase minimum levels of financial responsibility for transporting property, and to index future increases to changes in inflation relating to medical care” (H.R. 6884 – Fair Compensation for Truck Crash Victims Act)
- b. Altering “\$750,000” to “\$5,000,000”
- c. Adding the ability to alter minimum responsibility levels on a 5-year basis in order to adjust for medical care inflation
- d. Changes effective 1 year after Act is enacted

B. History and Findings

- a. Introduced December 22, 2023, to the House of Representatives
- b. Minimum insurance levels are intended to maintain safety
 - i. Motor Carrier Act of 1980, Public Law 96-296
- c. Increasing financial responsibility will lead to proactive safety enhancements of equipment
 - i. House Report No. 96-1069a
- d. \$1,000,000 minimum for a single occurrence was initially recommended in 1979 by The National Transportation Policy Study Commission
 - i. Advised to remain the minimum through the Year 2000
- e. The amount of \$750,000 set in 1980 would be the equivalent of \$5,193,665.62 in 2020
 - i. Inflation rate based on medical costs

C. Arguments

- a. Owner-Operator Independent Drivers Association and others oppose the attempt to increase the minimum insurance citing, in part, a recent study suggesting that current minimum insurance levels adequately cover damages on all but 0.6% of cases.

b. Bill's sponsors states:

- i. "For too long truck crash victims and their families have been burdened by tremendous emotional and financial consequences, facing a mountain of medical debt and shattered lives."
- ii. "The Fair Compensation for Truck Crash Victims Act is about justice, responsibility, and protecting our communities. It is time to ensure that trucking companies have adequate insurance to cover the true cost of their actions and prevent families from being financially destroyed by crashes they had no control over."

- Congressmen Jesus "Chuy" Garcia (IL-04) and Hank Johnson (GA-04): Dec. 22, 2023, Press release

D. Broker v. Motor Carrier Liability Insurance

- a. 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)
- b. 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)
- c. There does not appear to be any significant present effort to raise the required financial responsibility for brokers

FEDERAL PREEMPTION AND THE FAAAA

A. FAAAA Preemption

- a. Federal Aviation Authorization Administration Act (“FAAAA”) – 49 U.S.C. § 14501
- b. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

B. Why?

- a. "Congress enacted the FAAAA's preemption provision in 1994 with the aim of eliminating the patchwork of state regulation of motor carriers that persisted fourteen years after it had first attempted to deregulate the trucking industry."

Nationwide Freight Sys., Inc. v. Illinois Commerce Comm'n, 784 F.3d 367, 373 (7th Cir 2015) (citations omitted).

C. When?

- a. Issue is always: does the claim relate to price, route, or service of a motor carrier?

D. What type of claims are preempted?

- a. Preemption applies to any tort action "where the subject matter of the action is related to the carrier's prices, routes, or services. . ." Although generally not applicable to personal injury claims, The FAAAA nonetheless necessarily preempts claims that are related to ""prices, schedules, origins, destinations or the point-to-point transportation of passengers, cargo, or mail." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am. Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997)
- b. delivery of a pipe bomb (*Rockwell v. UPS*, No. 2:99-CV-57, 1999 U.S. Dist. LEXIS 22036 (D.C. Vt. July 7, 1999))
- c. negligence and conversion arising from lost consumer package (*Vieira v. United Parcel Service, Inc.*, No. C-95-04697 CAL ARB, 1996 U.S. Dist. LEXIS 11223 (N.D. Cal. Aug 5, 1996)
- d. untimely delivery of medication (*Eggleston v. UPS*, 834 S.E.2d 713 (S.C. Ct. App. 2019))

E. What about freight brokers and freight forwarders?

a. Sixth Circuit – Likely preempted

- i. Negligence claims brought against a shipper and broker "fall[] squarely within the preemption of the FAAAA." *Creagan v. Wal-Mart Transp., LLC*, 354 F. Supp. 3d 808, 813 (N.D. Ohio 2018)
- ii. "Safety exception" exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. §14501(c)(2)(A), but excluding accident claims would make preemption pointless. *McCarter v. Ziyar Express, Inc.*, 2023 U.S. Dist. LEXIS 4552, *2 (N.D. Ohio Jan. 10, 2023).

b. Seventh Circuit – Preempted

- i. "Simply put, I remain dubious that Congress, in its mission to unencumber the interstate trucking industry from a patchwork of state tariffs, price controls, and similar economic regulations, also aimed to completely unyoke trucking companies and freight brokers from commonsense standards of care enforced through private tort actions."
Wardngley v. Ecovyst Catalyst Techs., LLC, 639 F. Supp. 3d 803, 810, 2022 U.S. Dist. LEXIS 201265 (N.D. Ind. Nov. 4, 2022).
- ii. Negligent hiring against broker preempted because (1) claim had a direct relationship to broker services under the Act and subjecting such decisions to a common-law negligence standard would have significant economic effects ; and (2) safety exception did not preclude preemption because Congress required motor carriers—not brokers—to bear responsibility for motor vehicle accidents.
- iii. *Ye v. GlobalTranz Enters.*, 74 F.4th 453 (7th Cir. 2023)

c. SCOTUS denied certiorari in *Ye v. GlobalTranz Enters.*, 74 F.4th 453 (7th Cir. 2023) on January 9, 2024.

d. Eleventh Circuit – Preempted

- i. *Aspen Am. Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261, 1267 (11th Cir.2023) ("[T]he [Act] makes plain that [the plaintiff's] negligence claims relate to a broker's services.").

e. Ninth Circuit – NOT Preempted

- i. *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1024 (9th Cir. 2020) (“[A] claim that imposes an obligation on brokers at the point at which they arrange for transportation by motor carrier has a 'connection with' broker services.”)

1. BUT “Safety exception” saves state law tort claims from preemption

- ii. Under § 14501(c)(2)(A), the FAAAA's preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." To meet this exception, a common law negligence claim must be (1) within a state's "safety regulatory authority" and (2) "with respect to motor vehicles.”

f. Fifth Circuit – Likely preempted

- i. “[S]electing a motor carrier to transport a load is the essential service of the broker. Plaintiffs' Second Amended Complaint alleges that J.B. Hunt "had a duty to select a competent motor carrier" and "had an ongoing duty to monitor Euro Express to ensure it was a competent motor carrier" to transport the load involved in the accident leading to this case. And Plaintiffs' negligent brokering claim stems from J.B. Hunt's alleged breach of that duty. Thus, the negligent brokering claim is fundamentally "related to" the broker's service of selecting a competent motor carrier.” *Hamby v. Wilson*, No. 6:23-cv-249-JDK, 2024 U.S. Dist. LEXIS 90897 (E.D. Tx. May 21, 2024).

- ii. Safety Exception does not apply

1. “The Court thus concludes that the safety exception excepts from preemption only state laws or regulations that have a direct relationship to motor vehicle safety. And a negligent hiring or brokering claim is not directly related to motor vehicle safety.” *Hamby*, 2024 U.S. Dist. LEXIS 90897 at *14.

g. Fourth Circuit – Likely preempted

“Of the three Courts of Appeals that have considered this question, all have found these claims to be preempted by the FAAAA. The Court agrees with the reasoning in these Circuit opinions and finds that negligence and negligent hiring claims are preempted under the FAAAA . . .” *Mays v. Uber Freight, LLC*, No. 5:23-CV-00073 , 2024 U.S. Dist. LEXIS 15434, *8 (W.D. NC Jan. 29, 2024).

F. Removal?

- a. Gulley v. Hansen & Adkins Auto Transport, Inc., 2023 WL 4494186
United States District Court for the Middle District of Alabama, Northern Division (July 12, 2023)
 - i. Claim arose from an Alabama truck accident – suit originally filed Butler County, Alabama. Plaintiff did not raise any federal questions on the face of the Complaint.
 - ii. Defendant removed based on federal question jurisdiction and supplemental jurisdiction alleging the Plaintiff’s claims against it were completely preempted by section 14501 (c) (1) of the F4A.
 - iii. Plaintiffs argued that even if the claims were subject to “ordinary” preemption, ordinary preemption does not confer federal question jurisdiction.
 - iv. The Court determined there were doubts as to whether Congress intended to the F4A to completely preempt State law negligent hiring claims against freight brokers, thereby determining that there was no complete preemption and therefore no federal question upon which to base federal question jurisdiction

MOTOR CARRIER SAFETY SELECTION STANDARD ACT OF 2023 (PROPOSED)

A. Proposed Carrier Selection Standard – Senate

* * *

(b) Selection standard.—

(1) IN GENERAL.—For any claim of negligent selection of a motor carrier against a covered entity with respect to the covered entity contracting with a covered motor carrier for the shipment of goods or household goods, the covered entity shall be considered reasonable and prudent in the selection of that covered motor carrier if, not later than the date of shipment and not earlier than 45 days before that date, the covered entity verifies that the covered motor carrier—

(A) is registered under section 13902 of title 49, United States Code, as a motor carrier or a household goods motor carrier;

(B) has at least the minimum insurance coverage required by Federal and State law; and

(C) has been confirmed by the Federal Motor Carrier Safety Administration, including through a public confirmation described in subsection (c)(1), to be in compliance with all required Federal Motor Carrier Safety Administration safety standards to operate as a motor carrier.

(2) SUNSET.—Paragraph (1) shall cease to be effective on the effective date of a regulation promulgated under subsection (d)(1).

(c) Public confirmation.—The public confirmation described in paragraph (1)(C) shall include 1 of the following statements, depending on the status of the motor carrier:

(1) “This motor carrier is confirmed to meet all operating requirements of the Federal Motor Carrier Safety Administration (FMCSA) and is authorized to operate on the nation’s roadways.”.

(2) “This motor carrier is not confirmed to operate on the nation’s roadways and fails to meet 1 or more requirements of the Federal Motor Carrier Safety Administration (FMCSA) to operate as a motor carrier.”.

* * *

B. Proposed Carrier Selection Standard – House (Timed Out)

(1) SELECTION STANDARD.—For any applicable legal requirement with respect to a covered entity contracting with a covered motor carrier for the shipment of goods or

household goods, the covered entity shall be considered reasonable and prudent in the selection of such motor carrier if the covered entity verifies, not later than the date of shipment and not earlier than 45 days before the date of shipment, that the covered motor carrier—

(A) is registered under section 13902 of title 49, United States Code, as a motor carrier or household goods motor carrier;

(B) has at least the minimum insurance coverage required by Federal and State law; and

(C) is not determined unfit to operate safely commercial motor vehicles under section 31144 of title 49, United States Code, or otherwise ordered to discontinue operations by the Federal Motor Carrier Safety Administration (including not renewing a Department of Transportation registration number) or a State, for intrastate commerce.

(2) SUNSET.—The standard established under paragraph (1) shall sunset on the effective date of a regulation issued pursuant to subsection (c).

C. FMCSA Definition – “Satisfactory”

- a. “A safety rating received as a result of a compliance review. A Satisfactory rating is defined as: a motor carrier has in place and functioning adequate safety management controls to meet the safety fitness standard prescribed in the FMCSRs, Section 385.5. Safety management controls are adequate if they are appropriate for the size and type of operation of the particular motor carrier.” 49 CFR 385.3

D. Do Not Forget Indemnity

- a. *Diamond Transportation v. Kroger*, 101 F.4th 458, (6th Cir. May 13, 2024)
- i. Indemnity case – Diamond transported goods for Kroger. Diamond used subcontractors to haul the goods. Diamond sub hit minivan head-on. 3 deaths in minivan. Suit v. Diamond, truck driver, others, and Kroger. Kroger was sued for negligent and reckless selection, hiring, and retaining of Diamond. Kroger settled after Diamond did not timely take up the indemnity and defense demands of Kroger. Kroger went after Diamond per indemnity clause.
 - ii. Main issue was the meaning of a phrase in the indemnity exception - “liability ... caused by the sole negligence or willful misconduct of Kroger.”
 - iii. Court found that Kroger’s liability for the claim against it was not caused by its “sole negligence.” Kroger had to be the only negligent party for the exception to apply. According to the Court, negligent selection, hiring, and retention claims can only prevail with at least two negligent parties – the employer’s negligence in hiring, retention, etc., AND the acts or omissions of an employee.

BROKER AND CARRIER FRAUD AND IDENTITY THEFT (FROM THE FMCSA)

- A. ALERT: Broker and Carrier Fraud and Identity Theft
- B. Fraud and identity theft occurs when entities use another motor carrier’s assigned USDOT number, when not authorized to do so, or when someone acts as a broker and is not registered with FMCSA. Fraud and identity theft are criminal acts.
- C. If you suspect your company has been the victim of fraud or identity theft, FMCSA recommends that you take the following steps:
 - a. Do not click any suspicious links, hover over them to see the real email address or URL of that link. Click ONLY on links you deem trustworthy.
 - b. Visit the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) for more guidance on online deceiving tactics. Learn more about phishing.
 - c. You can report scams and suspicious communications to the U.S. Federal Trade Commission
 - d. You can also contact the FBI's Internet Complaint Center, your local police and/or state attorney general's office for assistance
 - e. Reach out to the FMCSA Contact Center or call (1-800-832-5660) if you are the target of these practices
 - f. You may also report the incident to the U. S. Department of Transportation’s (USDOT) Office of the Inspector General (OIG) Hotline at (800) 424-9071 or online at <https://www.oig.dot.gov/hotline>.
 - g. You are also encouraged to file a complaint with the FMCSA National Consumer Complaint Database (NCCDB) at <https://nccdb.fmcsa.dot.gov>.
 - h. Make sure your company’s phone number(s) displayed in FMCSA’s Safety and Fitness Records System (SAFER) are visible and correct by going to <https://safer.fmcsa.dot.gov> and scrolling down to “FMCSA Searches” and clicking on “Company Snapshot”.
 - i. Contact your insurance company, all load boards and factoring companies to let them know your company’s information is being fraudulently used.
 - j. Make social media and website posts to inform your customers.
 - k. Treat your company information like your banking and credit card information.

- D. **Carriers:** If you picked-up or hauled a fraudulently brokered load, identify who is paying the freight on the load and ask to be put in contact with their brokerage service. In many cases, the real broker of the load is also a victim of fraud or theft and is not involved in the illegal transaction. Holding loads hostage until you get paid is illegal.

- E. **Brokers:** The carrier, who had or has your load, may also be a victim and is not knowingly involved in the theft. By working together, you may be able to get the goods properly delivered.

- F. **Prevention:** You can take steps to attempt to protect yourself from being a victim by:
 - a. Confirming phone numbers of brokers and carriers using SAFER at <https://safer.fmcsa.dot.gov>. If the number you were given by the carrier/broker does not match the number posted, call the number posted in SAFER for the company to discuss the load. It is possible the identity of an employee of the business you are contacting has also been stolen.

 - b. If your SAFER search identifies a carrier or broker without a phone number visible, consider not contracting for the work until you can confirm it is a valid transaction.

 - c. When using a search engine to confirm numbers, emails and websites, keep in mind the top search returns may be fake profiles created by the scammers. Do not trust the information unless you can confirm it on multiple sites.

 - d. Document examination is critical. Even insurance certificates can be fraudulent. If you suspect something is not right, research the numbers and call the companies.

 - e. STOP the transaction if:
 - i. your broker asks you to present yourself as a carrier of a different name, or asks your driver to lie about who they work for;

 - ii. you question the destination of the load and are told it's a "blind load";

 - iii. the broker is quick to agree in paying you more; or

 - iv. the rate far exceeds the current market rate.

 - v. Encourage your customers to maintain driver and vehicle logs. Confirm the name and numbers on the truck that shows up to load are the same as the one with which you contracted. Having your customer record the tractor and trailer plate information will assist in identifying the actual carrier. Request pictures of the truck and trailer and compare and verify information provided on the carrier packets. If you have been involved in a fraudulent load, this will be important information for law enforcement.

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