BROKER PREEMPTION:  
OR WHY YOU NEED A CONTRACT

By

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A shipper contacts a broker to arrange for the transportation of a truckload of high value high-end electronics. The broker arranges for a motor carrier to transport the shipment, but fails to tell the trucker that the shipment has a value of at least $500,000 or that it may require extra security procedures. The truck stops at a roadside truck stop at 11:35 pm and the driver leaves the vehicle unlocked and unattended while he goes into the convenience store to buy a package of cigarettes. The truck is gone when he returns to where he parked it, only to be found by the State Police several hours later, without its cargo.

The shipper subsequently discovers that the motor carrier only has $100,000 in cargo liability insurance and insufficient assets to pay for the remaining $400,000 loss. The shipper decides to sue the broker it hired to arrange the shipment, arguing that the broker bears some responsibility for the loss. The shipper argues that the broker is liable for the loss because it was negligent in selecting the carrier; negligent in failing to tell the carrier the value of the shipment or the need for extra security precautions; negligent because it hired a carrier that was inadequately insured to cover the theft of the cargo; or negligent in representing to the shipper that the carrier was an appropriate carrier for handling the shipment. The shipper may also contemplate actions under the state’s deceptive trade practices act or even for fraud.

Can the shipper recover on these claims? Whether and when brokers can be held liable under state law legal theories remains an unsettled area of the law. However, the trend is increasingly clear that under most scenarios brokers will have only a very limited, if any, state law liability for loss and damage claims related to the services they have arranged, either because the state law claims are pre-empted by federal law or by the broker’s contract under state law. It is thus increasingly important that shippers have written contracts with the brokers that they hire setting forth the explicit duties they expect the broker to perform if they seek to hold the broker responsible for the actions of the carriers that they engaged.

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1. **What is Preemption?**

   At its simplest legal meaning, the concept of pre-emption means that one law trumps and makes inapplicable another law that would otherwise apply. In situations involving the possible application of both federal and state law, the doctrine is found in the United States Constitution. The Supremacy Clause of the U.S. Constitution states that the laws of the United States “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the ….Laws of any State to the Contrary notwithstanding.”  

Federal preemption can be explicit or implicit. Explicit federal preemption is written into the federal law that regulates an industry. Implicit federal preemption is where Congress did not explicitly preempt State law but a court finds that federal regulation is so pervasive that it occupies the subject area and state law cannot be applied.

In the context of cargo loss and damage claims, the Carmack Amendment is an example of a law that preempts all state regulation of carrier liability for loss and damage claims. 49 U.S.C. § 14706(a). There is a long-established body of law that holds that the Carmack Amendment is the exclusive law and remedy governing such claims against carriers.

While there are several court decisions that hold that the Carmack Amendment implicitly pre-empts state law loss and damage claims against brokers, these decisions are minority decisions. Most courts that have examined the issue have held that brokers are not carriers and that since the Carmack Amendment applies only to claims against carriers it does not preempt state law loss and damage claims against brokers.

There is, however, another provision of the Interstate Commerce Commission Termination Act of 1995 (ICCTA) that brokers are increasingly using to preempt the assertion of state law negligence claims. Section 14501(c)(1) of Title 49 provides a general rule that

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a \text{State... 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.... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.}
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The purpose behind preemption, including ICCTA preemption, is to promote a uniform economic regulation of the motor carrier industry. The idea is that States are not allowed to

\[\text{\footnotesize 2 U.S. Constitution, Article. VI, Clause 2.}\]
apply their own state law regulation to re-regulate what is essentially a federally regulated interstate activity. ICCTA removes a States' regulatory power over certain types of carriers. It also removes their regulatory authority over motor carrier property brokers. 49 U.S.C. § 14501(c)(1). 7

The law governing ICCTA preemption of state law claims against brokers is still relatively unsettled even though ICCTA is almost 20 years old. What is currently being litigated in the courts is the interpretation and scope of the ICCTA motor carrier property broker exemption. The Federal Aviation Administration Authorization Act of 1994 and the Airline Deregulation Act of 1978 are the primary sources of the language for the ICCTA preemption provision and cases decided under those statutes have provided some guidance as to how to interpret ICCTA preemption of claims against motor carrier property brokers, given the limited number of appellate cases that have interpreted the statute.

The Supreme Court has held that the pre-emption provisions of the statute are to be broadly construed. 8 How broadly, however, remains an open question and depends on the particular court and whether the court considers a claim to be “related to” a “price, route, and service.”

Some court decisions have held that ICCTA preempts all state claims having more than a tenuous, remote, or peripheral connection with, or effect on, a carrier’s rates, so long as the claims seek to enforce state laws, policies, or regulations external to the mutually brokered agreement between the parties. 9 In other words, unless there is a contract, these courts generally hold that all non-contractual state law claims are precluded by means of the preemption provisions of ICCTA. 10


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Court decisions disfavoring federal broker preemption sometimes rely upon the savings clause in 49 U.S.C. § 13103, which provides that

Except as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law.

These courts have concluded that "the default rule is that a common law claim against a broker (such as a claim for breach of contract or negligence) is not preempted absent specific statutory language to the contrary. Is there specific statutory language which precludes common law suit against a transportation broker? No.".\(^\text{11}\)

This second line of cases has been criticized on the grounds that, while some of them may have examined broker preemption under Carmack, they did not explicitly examine broker preemption under ICCTA and the explicit wording of 49 U.S.C. §14501(c)(1). This is a valid criticism of those decisions for those cases where Section 14501(c)(1) has not been directly discussed, such as the 2002 Chubb decision and the September 2013 Winn-Dixie decision.

However, not all of the recent decisions that reject federal preemption of state common law claims against brokers have ignored Section 14501(c)(1). Instead, these decisions, including a recent August 2013 decision from the same California federal district court that rendered the Chubb decision, have rejected arguments that ICCTA completely preempts all state law claims. In Perry Ellis International, Inc., v. ACT Fulfillment, Inc., et. al., 2013 U.S. Dist. LEXIS 124783 (C.D. Calif. 2013), the court found that

Congress limited § 14501(c)(1)’s language to only state and local regulations "relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker"--not just any state or local law. If Congress wanted to completely preempt state law, it is doubtful that Congress would have used such precise language. Indeed, this limited language belies the complete-preemption notion [defendant] advances.

It thus remains to be seen whether the courts in states as diverse as California and Florida will subsequently reverse their position that state law causes of action against brokers are not generally preempted by federal law.

The Practical Ramifications of Federal Preemption

Without a written contract, a shipper engaging the services of a broker faces the practical problem of not knowing whether the shipper’s subsequent negligence claim against the broker will be preempted by federal law.

Returning to our example of the stolen electronic goods, if the shipper sues in Los Angeles there is a chance that the Court will recognize a common law cause of action for negligence, under the Chubb and Perry Ellis decisions. Sue in Orlando and there is also a good chance that the shipper will be able to assert a cause of action for negligence against the broker under the Winn-Dixie decision.

However, the shipper risks having all of its negligence claims being held preempted if it 
brings suit in New York12, New Hampshire13, Maryland14, Pennsylvania15, Texas16, or any of the 
other jurisdictions that have explicitly found that such claims are preempted. Even then, whether 
preemption applies will depend on whether the claim is related to a price, route, or service of the 
broker.

At least one federal court that has found almost complete preemption of state law claims 
has refused to extend ICCTA preemption to areas which are arguably too tenuously related to a 
Md. 2012), the court refused to find that ICCTA preempted state law unfair competition law 
allegations involving two competing brokers and the breach of an employee’s non-compete 
agreement. Notwithstanding the defending broker’s arguments that the allegations involved its 
services, the court held that preemption of these claims was not what Congress had in mind when 
enacting ICCTA.

However, in the context of loss and damage claims the courts that have examined the 
issue and have found preemption have generally found that claims of negligent hiring and failing 
to procure a carrier with adequate insurance are preempted under ICCTA. Our shipper may thus 
be out of luck.

As a practical matter, does this mean that preemption is depriving the shipper of a remedy 
it would otherwise have – i.e., the right to recover on a loss and damage claim due to the 
negligence of a broker? The answer to this question is probably not, for two reasons.

First, state law may also preempt the claims if the broker has its own terms and 
conditions that applies to the shipment. Second, state law may not recognize a negligence claim 
under the scenario we have discussed.

**Contractual preemption of state negligence claims.**

Court cases holding that ICCTA preempts state law liability against brokers generally 
hold that contractual claims against brokers are not preempted under federal law. This means 
that if the shipper has a contract with the broker the shipper will be allowed to pursue its 
contractual claims against the broker, notwithstanding the federal preemption provisions of 
ICCTA.

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Often lost in the discussion of federal preemption is that state law negligence claims against brokers may be preempted by a similar preemption rule under state law. This rule, known by different names, for example, the *gist of the action* doctrine or the *economic loss* doctrine, basically holds that a common law action for negligence cannot be brought absent the existence of any independent statute or common law duty of care. Otherwise, the sole remedy for the plaintiff is an action for breach of contract.\(^\text{17}\)

To assert a tort cause of action under most state laws, the shipper needs to show the existence of (1) a duty owed by the broker to the shipper; (2) a breach of that duty; and (3) resulting damages proximately caused by the broker’s breach.\(^\text{18}\) However, in the absence of a contract establishing the broker’s standard of care and duties, many courts still find that brokers do not have the duties that shippers seek to impose on them under a negligence theory of liability, even if they say a broker may be liable for common law negligence.

For example, courts have found that while a broker has a duty of reasonable care in selecting a carrier, once a carrier has been selected in the absence of a contract the broker has no independent duty under the law to:

1. Verify that a motor carrier has adequate insurance.
2. Verify that the motor carrier has a specific level of insurance for the shipment.
3. Inform the carrier of the value or content of the load.
4. Inform a carrier of the need for additional security due to the high value of the goods being transported.
5. Obtain insurance for the shipper on a shipment.\(^\text{19}\)

Cases that have addressed these issues have frequently held that the shipper’s remedy, if any, for claims involving negligent hiring; negligent entrustment; the failure to convey security information or needs; and the required level of insurance coverage is a contractual issue, not an independent tort law issue. Any causes of action against the broker must be asserted as a contract claim.

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Thus, as with federal preemption under ICCTA, the rights and remedies of a shipper seeking to recover against a broker under state law for a loss and damage claim attributable to the negligence or failure of the broker to convey information; hire an appropriate carrier; or ensure adequate insurance coverage will often be dependent on the contract between the shipper and the broker. The shipper may find it difficult to proceed against the broker solely on a state common law theory of negligence, either because a contract specifically addresses the issue or because the broker did not have an independent duty under the law to perform that service.

Conclusion

In conclusion, in the absence of a contract setting forth the specific duties of the broker, our shipper may experience multiple difficulties in seeking to hold its broker liable under state law for negligence in brokering the shipper’s stolen shipment. Under federal law, the broker’s state law claims may be pre-empted in many states. Even in states where the court finds that the shipper’s claims are not federally pre-empted, state law may find that these claims are pre-empted under state law by the existence of a contract or that in the absence of a contract the broker does not have the duties the shipper alleges has been breached.

While it is outside the scope of this presentation, the shipper should also presume that there is a good chance that it will have some sort of contractual relation with the broker. It is a simple matter for a broker to print terms and conditions on its credit agreement; its invoices; its communications with the shipper; or posted on its website, conditioning acceptance of the broker’s services on acceptance of the terms and conditions. These terms and conditions will frequently limit the broker’s liability, both as to its responsibility in selecting carriers, insuring the shipment, and in the amount of monetary recovery available from the broker.

Accordingly, shippers who want to recover from their broker for damages that they may incur due to the negligent actions of their brokers are advised to enter into written contracts with the broker, setting forth the exact duties and standard of care that they require of the broker when performing its services.