GENERAL SESSION II: LAW OF THE LAND V. LAW OF THE JUNGLE

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FEDERAL PREEMPTION

CORE CONCEPT: The Interstate Commerce Act provides that “a 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 ..., broker, or freight forwarder with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). This statutory provision was enacted by the Federal Aviation Administration Authorization Act (the “FAAA Act”).

Recently, courts have held that cargo claims against transportation brokers based on common law negligence (for example, negligent selection of the underlying motor carrier, failure to procure appropriate insurance, etc.) were preempted by the FAAA Act. Once the negligence claim is dismissed, the shipper only has breach of contract claim against the broker.

ISSUE: Does 49 U.S.C. § 14501 broadly preempt all state law claims or causes of action against motor carriers, brokers and freight forwarders, except a claim or cause of action based on breach of contract? What are the latest developments in this area?

Ameriswiss v. Midway Line, 2012 U.S. Dist. LEXIS 138880 (D.N.H. 2012). The court ruled that not only were negligence claims against the broker (C.H. Robinson) preempted by the FAAA Act, but that based on the broad definition of “transportation services” at 49 U.S.C. § 13102(23)(B), the claims alleged against the broker were “impliedly” preempted by the Carmack Amendment, notwithstanding its status as a broker.


Chatelaine, Inc. v. Twin Modal, Inc., 737 F.Supp.2d 638 (N.D.Tex. Aug 20, 2010). In this case the Complaint alleged five causes of action: (I) breach of contract; (II) negligence; (III) violation of the Texas Deceptive Trade Practices Act (“TDTPA”); (IV) negligent hiring; and (V) a claim for the actual loss to the shipment under the Carmack Amendment, also seeks to recover its attorney’s fees. The court stated that “The Carmack Amendment preempts state law claims against interstate motor carriers and provides the exclusive cause of action for loss or damages to goods arising from interstate transportation ... Further, the Carmack Amendment preempts all state claims that seek to recover damages to, or for loss of, goods during shipment, and for misdelivery or untimely delivery of goods.”


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WHETHER A CARRIER CAN COLLECT FREIGHT CHARGES FROM A SHIPPER EVEN WHEN THE SHIPPER HAS PAID A BROKER FOR THE SHIPMENT?

CORE CONCEPT: Under the NMFC Uniform Bill of Lading both the consignor and consignee are liable to the carrier for payment of its charges. Where a Shipper has paid a Broker is it still responsible to a Carrier for freight charges for the shipment? The primary objection of shippers to the "double payment" is that it is "unfair".

ISSUE #1: When a consignor or consignee pays a transportation broker, who does not pay the carrier, can the consignor and/or the consignee be held liable for the carrier’s freight charges? The carriers or the collection agent hired by the carrier usual rely upon 2 theories for recovery: (1) The shipper (or consignee) is liable to the carrier under the terms of the bill of lading; and (2) The broker acted as the agent of the shipper (or consignee) and, under the law of agency, the principal (the shipper or consignee) is responsible or liable for any debts that its agent (the broker) failed to pay, such as where the broker fails to pay the carrier.

ISSUE #2: Many shippers and brokers have been harassed by particular collection agencies such as Baxter Bailey & Associates. The collection tactics used by some of these collection agencies often questionable, such as seeking charges that are time-barred, giving off the appearance that they are attorneys, etc. Have you experienced similar experiences?

RELATED CASES:
Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co., 513 F.3d 949 (9th Cir. 2008).
C.A.R. Transportation Brokerage v. Darden Restaurants, 213 F.3d 474 (9th Cir. 2000).
Consolidated Freightways v. Admiral Corporation, 442 F.2d 56 (7th Cir. 1971).
See also: Augello, Transportation, Logistics and the Law, Second Edition, pp. 61-63

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VETTING OF MOTOR CARRIERS: SHIPPER AND BROKER DUTIES?

CORE CONCEPT: Plaintiffs in both cargo and accident cases typically allege that brokers and/or shippers are liable or responsible for their damages as a result of negligent selection of the motor carrier, negligently failing to procure adequate “insurance coverage,” breach of contract and even assert claims for punitive damages. see, e.g., Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004); Jones v. C.H. Robinson Worldwide, Inc., 558 F. Supp. 2d 630 (W.D. Va. 2008); Jones v. D’Souza, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007).

ISSUES: What duty is owed by shippers and/or brokers to vet motor carriers? Do brokers and/or shippers create a greater duty for themselves by taking on additional responsibilities? Are brokers liable when they fail to detect a fraudulent carrier (thief), and how does this potential liability affect their duties? Are brokers liable for failing to transmit instructions from shipper to the carrier?

CONFLICTING VIEWS:

NO DUTY BEYOND LICENSE VERIFICATION: The FMCSA and only the FMCSA is authorized by federal statute to make safety fitness determinations. The federal government is responsible for regulating interstate commerce and credentialing carriers for use. Court in Gibbons v. Ogden, 22 U.S. 1 (1824). States cannot require brokers or shippers to exercise a higher level of scrutiny than what is undertaken by the federal government, and negligence cannot be found for the use of an authorized motor carrier. A shipper ordinarily has the right to assume that the carrier is not conducting business in violation of law, and that the carrier utilizes proper equipment. See Moore v. Roberts, 93 S.W.2d 236 (Tex.Civ.App.1936); L. B. Foster Co. v. Hurnblad (9th Cir. 1969) 418 F.2d 721. Further, CSA’s BASIC scores have significant problems and are meaningless to safety. ATRI study – Driver Fitness and Controlled Substances BASICS are “defective,” “beyond problematic,” and need “major re-evaluation.” Trans. Topics, Oct. 8, 2012.

DUTY TO EVALUATE SAFETY RECORD: Negligence is determined under state law using a reasonableness standard. Under many state laws, one who negligently selects an incompetent independent contractor to do work which involves a risk of physical harm to others unless skillfully and carefully done is subject to liability for physical harm a third person sustains as a proximate result of the negligent selection. L. B. Foster Co. v. Hurnblad (9th Cir. 1969) 418 F.2d 727; Mooney v. Stainless, Inc., 338 F.2d 127 (6th Cir. 1964); W. Prosser, Law of Torts, § 70, at 481 (3d Ed. 1964). Thus, a shipper or broker that ignores publicly available safety information is not acting reasonably, and is disregarding the risk of harm. Further, some cases allow testimony regarding a carrier’s CSA Score and its on-road performance percentiles at the time of an accident. See McLane v. Rich Transport, Inc., 2012 WL 3996832 (E.D.Ark. 2012).

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DOES PLACING A PRO STICKER ON A BILL OF LADING, PACKING SLIP, MANIFEST OR OTHER SHIPPING DOCUMENT BIND THE SHIPPER TO THE TERMS AND CONDITIONS IN THE PRO STICKER?

CORE CONCEPT: A shipment is transported under a shipper-prepared bill of lading or even a non-bill of lading, such as a packing slip, shipping manifest, purchase order or other shipping document. When the carrier picks up the shipment, the driver affixes a pro sticker to the bill of lading or other shipping document. The pro sticker contains language that seems to make the carrier’s tariff applicable. Some examples are as follows:

![Pro Sticker Example 1](image1)

![Pro Sticker Example 2](image2)

![Pro Sticker Example 3](image3)
ISSUE(S): Does putting the pro sticker on the bill of lading or other shipping document create a binding contract under which the shipper is bound to the terms and conditions set forth in the pro sticker? How does placing a pro sticker affect the terms and conditions of pre-existing contract that is in effect between the shipper and carrier? What should a shipper do when the driver puts its pro sticker on the shipping documents?

SAMPLE CASES:

Norpin Manufacturing Co. v. CTS Con-Way, 1999 WL 754038 (D. Mass. 1999). A shipment containing an aircraft engine was moving under an airway bill of lading and Con-Way affixed its pro sticker to the airwaybill. The engine sustained some damages that were not discovered until about a year after delivery. Con-Way asserted that the claim was untimely because it was filed more than 9 months after the shipment had been delivered. Con-Way argued that the 9-month claims filing period was standard in the industry and that it was established by the Uniform Straight Bill of Lading. The court refused to uphold the 9-month claims filing period because there was no reference to the 9-month period or the Uniform Straight Bill of Lading in either the airwaybill or Con-Way's pro sticker.

Emerson Electric v. Estes Express, 451 F.3d 179 (3rd Cir. 2006). The court held that Estes could not limit its liability to a shipment of electrical equipment because its tariff provisions did not offer a choice of rates to the shipper. The court noted that Estes' rules tariff EXLA-105 was identified in Estes' pro sticker, and the court analyzed the case under the terms of tariff EXLA-105. Unfortunately, it's not clear from the decision if the shipper argued about the applicability of the terms of the pro sticker, and it seems the court and perhaps the parties accepted this fact.

AM Controls v. USF Reddaway, 2008 WL 495028 (S.D. Tex. 2008). The bill of lading was prepared by the shipper – Control Techniques (“CT”). The carrier – USF Reddaway – placed its pro sticker on the shipper's bill of lading. The court held that the tariff and the limitation of liability in the tariff were properly incorporated by reference through the pro sticker and were binding on the shipper. In finding that CT consented to a choice of rates, the court held:

In this case, CT surely knew that its bill of lading did not contain a tariff, and that it would therefore negotiate that choice with Reddaway. If it disagreed with the tariff Reddaway selected, it could have refused to sign the bill of lading, requested Reddaway to use another tariff, or chosen another carrier. Instead, it signed the bill of lading. Reddaway therefore effectively obtained CT’s agreement to its tariff, and to the inadvertence clause.

Hillenbrand Industries v. Con-Way, 2002 WL 1462687 (S.D. Ind. 2002). The court refused to uphold a limitation of liability in a tariff referenced on a pro sticker affixed to a shipping order, because the shipper did not have actual notice of the limitation of liability. The court also noted that shipping order itself did not have any "declared value" box and, therefore, the shipper had no means of declaring a value.

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“WE DON’T NEED NO STINKING BADGES” – DO ALL THIRD PARTY LOGISTICS PROVIDERS NEED A “BROKER’S” LICENSE?

CORE CONCEPT: With the advent of MAP-21 there are new requirements for brokers (i.e., $75,000 surety bond) and brokerage operations are more broadly defined. As a result of the increased bond requirements, the Federal Motor Carrier Safety Administration has been revoking broker licenses if the broker fails to obtain the $75,000 bond.

Now, some brokers who have had their license revoked are taking the position that their operations as a Third Party Logistics Provider (“3PL”) are exempt from regulation and that no broker license is needed for its operations. The types of services that are “claimed” to be exempt include transportation services as a freight management consultant, customs house broker, air freight forwarder, intermodal marketing company, NVOCC, local drayage on import shipments, etc.

Some key statutory provisions to consider:

49 U.S.C. 13102(2) – Definition of “broker.” The term “broker” means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or 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 USC 14916 – Unlawful Brokerage Activities (new section enacted under MAP-21). Under this section it is unlawful to provide brokerage services without being licensed as a broker. Violations are punishable by fines of up to $10,000 per violation.

49 USC 14916(b) – Exemptions under MAP-21. The prohibition against unlawful brokerage activities specifically does NOT apply to NVOCCs, ocean freight forwarders, customs brokers, and indirect air carriers (i.e., air freight forwarders).

49 CFR Part 372 – shipments moving within a commercial zone.

Ultimately, whether you are impacted or affected by these new requirements against unlawful brokerage activities depends on the nature of the transportation services your company provides.

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FREQUENTLY CONTESTED ISSUES IN CONTRACT NEGOTIATIONS

CORE CONCEPT #1: In contract negotiations, there are two related issues that run the gamut from being a non-issue to something that is hotly contested. These issues are: the “Choice of Law” and “Forum Selection” provisions. The “Choice of Law” provision determines what laws will control the interpretation of the contract in the event of a dispute between the parties. The “Forum Selection” provisions will determine where a dispute is resolved (i.e., which court).

ISSUE(S): What law should govern the interpretation of the contract in the event of a dispute? Where should lawsuits be filed, if necessary? How are forum selection clauses affected by the venue provisions of the Carmack Amendment, which allow a claimant to file suit against the “delivering carrier” in a federal or state court “in a State through which the defendant carrier operates” or against the carrier responsible for the loss in the judicial district where the “loss or damage is alleged to have occurred”?

CORE CONCEPT #2: When a dispute arises between contracting parties, it is helpful if the contract covers where and who should decide such disputes.

ISSUE(S): Should contracting parties agree to alternative dispute resolution ("ADR") in their contracts (i.e., arbitration, mediation)? If so, should these ADRs be binding or non-binding? Should the parties agree to use ADRs as an exclusive dispute resolution method?

CORE CONCEPT #3: Carriers are normally entitled to take possession of salvage freight when paying loss and damage claims without limitation. In today's world of contract negotiations, shippers often times want to maintain full control of salvage freight (and not relinquish said freight to the carrier) for a variety of reasons. One common reason is product liability concerns when their freight is sold in the salvage market. Another concern is trademark, brand name or product image concerns—shippers simply do not want their goods being seen in the salvage markets.

ISSUE(S): Do shippers have reasons to be concerned about their freight being in the salvage markets? If so, how does this come into play for a carrier trying to minimize their loss by selling salvage freight to offset their claims payments? What options exist during contract negotiations to address these issues?

CORE CONCEPT #4: Shippers and consignees of food and food grade products (such as packaging material for foods) follow appropriate FDA rules, regulations and guidelines. These businesses must follow the FDA criteria regarding the condition of the goods they ship and receive. Carriers are not subject to the same FDA criteria and operate under a completely different set of regulations and laws when it comes to the condition of freight, mitigation and claims for loss and damage. This dichotomy presents issues.

ISSUE(S): How do shippers and carriers rectify this problem prior to transportation? In contracts—shippers will want carriers to follow and be subject to the same criteria they are held to by the FDA. Carriers will not want to agree to that standard. What about after a shipment moves without a contract—what set of rules and regulations will prevail?