ARE CLAIMS AGAINST BROKERS PREEMPTED BY FEDERAL LAW?

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ARE CLAIMS AGAINST BROKERS PREEMPTED BY FEDERAL LAW?

By David T. Maloof and Kipp C. Leland[1]

A recent trend which merits scrutiny by transportation claims professionals and the legal bar is the purported preemption of certain claims against brokers who arrange interstate motor carriage of goods. Some courts have essentially established a de facto state of immunity for property brokers who fail to exercise due care in the manner in which they transact business, whether it be by hiring unqualified or unsafe carriers, or carriers which do not maintain adequate insurance for the specific cargo to which they are dispatched, or who otherwise violate their common law duties to their customers and the public.

The specific statute at issue is 49 U.S.C. § 14501(c)(1) (2019), which was enacted as a part of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This statute provides that states may not 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." 49 U.S.C. § 14501(c)(1) (2019). This provision was enacted as a part of the deregulation of the trucking industry, so as to prevent states from enacting their own regulatory schemes governing motor carriage as the federal government deregulated the interstate carriage of goods.

While there is nothing within this statute which explicitly preempts common law tort claims arising out of broker negligence, starting in 2006 some courts have seen fit to cite the statute and dismiss negligence causes of action against brokers on the basis of preemption. The most recent examples include: *ASARCO LLC v. Eng. Logistics Inc.,* 71 F. Supp. 3d 990, 1004-06

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(D. Ariz. 2014); *Belnick, Inc. v. TBB Glob. Logistics, Inc.*, 106 F. Supp. 3d 551, 553 (M.D. Pa. 2015); *Alpine Fresh, Inc. v. Jala Trucking Corp.*, No. 15-3663 (KSH) (CLW), 2016 WL 3876656, at *5 (D.N.J. Mar. 31, 2016); *Marx Cos. v. W. Trans Logistics, Inc.*, No. 14-751 (JAP), 2015 WL 260914, at *2-4 (D.N.J. Jan. 21, 2015); and *Zumba Fitness, LLC v. ABF Logistics, Inc.*, No. 2:15-cv-02151, 2016 WL 11478172, at *5 (W.D. Ark. Nov. 2, 2016).

In point of fact, however, in 2013, the U.S. Supreme Court significantly narrowed the scope of preemption under this statute in *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 262 (2013). The import of the *Dan's City* case has been described as follows:

> In the most recent Supreme Court case addressing the issue, *Dan's City Used Cars, Inc. v. Pelkey*, the Court held that although the ICCTA's preemption provision largely tracks that of the ADA, "the [ICCTA] formulation contains one conspicuous alteration—the addition of the words 'with respect to the transportation of property.' That phrase 'massively limits the scope of preemption ordered by the [Federal Aviation Administration Authorization Act of 1994 ("FAAAA")]." 4 —— U.S. ——, 133 S.Ct. 1769, 1778, 185 L.Ed.2d 909 (2013) (quoting City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 449, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002) (Scalia, J., dissenting)). Thus, in order to be preempted, a state law must relate to a carrier's rates, route, or service, as well as *concern a motor carrier's "transportation of property." Dan's City Used Cars*, 133 S.Ct. at 1778–79. Drawing on that additional caveat, the Court held that a plaintiff's claims for negligence and breach of statutory duties related to a towing company's improper disposal of a car were *not* preempted because the claims related to conduct that occurred *after* the car was towed, not to the towing itself. Id. at 1779. The Court's attention was on when the claim arose—when the services were rendered or at some other point in time, i.e., either before the transportation of property or after.

Midwest Trading Grp., Inc. v. GlobalTranz Enters., Inc., 59 F. Supp. 3d 887, 896 (N.D. Ill. 2014). *Dan's City* can be read to set forth five controlling factors for when a court should preempt common law negligence claims under 49 U.S.C. § 14501(c)(1). Those factors are as follows:

1. Conduct that occurs pre-transportation or post-transportation of property is not preempted;[2]

[2] Supreme Court noting that "property stored after delivery is no longer in transit," and that storage occurring after towing job was done "does not involve transportation." *Id.* at 262 (internal quotations omitted).

2. Conduct that is not connected to services of a motor carrier is not preempted;[3]

3. Conduct that does not impose significant governmental control of the trucking industry is not preempted;[4]

4. Conduct that does not require special services which the market does not otherwise provide is not preempted;[5] and

5. A law leaving an injured party without recourse from a negligent entity is not a law that would be intended by a "rational Congress."[6]

None of these factors lend credence to dismissing a common law claim for negligent hiring against a property broker. For that reason, those judges who have carefully reviewed various of the controlling factors outlined in the 2013 *Dan's City* decision have almost uniformly rejected such a preemption argument. *Midwest Trading*, 59 F. Supp. 3d at 897-98 (analyzing *Dan's City* and holding that claim against broker for failure to obtain insurance for shipment is not preempted); *Mann v. C.H. Robinson Worldwide, Inc.*, No. 7:16-cv-00102, 2017 WL 3191516, at *7-8 (W.D. Va. July 27, 2017) (analyzing *Dan's City* and holding that no preemption of negligent hiring claim against broker); *Hentz v. Kimball Trans., Inc.*, No. 6:18-cv-1327, 2018 WL 5961732, at *3-4 (M.D. Fla. Nov. 14, 2018) (citing to *Dan's City* and holding that claim against broker for negligent hiring not preempted, finding that "Congress did not intend to preempt ordinary state law negligence claims" and ruling that "Congress' decision not to provide

[3] Supreme Court noting that the claim at issue has "neither a direct nor an indirect connection to any transportation services a motor carrier offers [to] its customers." *Id.* at 263.

[4] Supreme Court noting that Congress' purpose in enacting 49 U.S.C. § 14501(c)(1) was to preempt "a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." *Id.* (citing *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008)).

[5] Supreme Court noting that: "The state laws in question hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do the state laws invoked by [the plaintiff] 'freez[e] into place services that carriers might prefer to discontinue in the future.'" *Id.* at 263-64 (citing *Rowe*, 552 U.S. at 372).

[6] Supreme Court opining: "[N]ot only would the preemption urged by Dan's City leave vehicle owners without any recourse for damages, it would eliminate the sole legal authorization for a towing company's disposal of stored vehicles that go unclaimed. **No such design can be attributed to a rational Congress**." *Id.* at 265 (emphasis supplied; internal citations omitted).

express remedies for [plaintiff's] claims provides compelling evidence that Congress did not intend to completely preempt this area of law.").

In fact, since *Dan's City* was decided in May 2013, the most commonly cited decisions which continue to preempt claims against brokers were issued without any real analysis of *Dan's City's* five factors. *See Zumba*, 2016 WL 11478172, at *4 (court holding itself bound by a 2009 Eighth Circuit precedent that preceded *Dan's City*); *Ga. Nut Co. v. C.H. Robinson Co.*, No. 17 C 3018, 2017 WL 4864857, at *2-3 (N.D. Ill. Oct. 26, 2017) (fails to analyze *Dan's City* preemption factors but does refuse to preempt post-transit insurance claims); *Volkova v. C.H. Robinson Co.*, No. 16 C 1883, 2018 WL 741441, at *2 (N.D. Ill. Feb. 7, 2018) (fails to analyze *Dan's City* preemption factors); *JRP Int'l, Inc. v. Landa Grp. Inc.*, No. 7:17-CV-263, 2018 WL 4334017, at *2 (S.D. Tex. Mar. 1, 2018) (fails to analyze *Dan's City* preemption factors); *Krauss v. IRIS USA, Inc.*, No. 17-778, 2018 WL 2063839, at *4 (E.D. Pa. May 3, 2018) (fails to analyze *Dan's City* preemption factors).[7]

The effect of a finding of preemption is extremely detrimental to an owner or insurer of damaged cargo, as it may potentially, where the actual motor carrier lacks proper assets or insurance, present for all practical purposes a complete bar to compensation. Indeed, in many of the cases in which a cargo claim has been found to be preempted, the case has been dismissed in its entirety, and thus a finding of federal preemption essentially terminates all claims.

[7] Other cases inexplicably, and seemingly erroneously, fail to reference the Supreme Court's ruling in *Dan's City* at all. *See AIG Europe Ltd. V. General Sys., Inc.*, No. RDB–13–0216, 2014 WL 3671566 (D. Md. July 22, 2014) (court fails to take account of *Dan's City*); *ASARCO,* 71 F. Supp. 3d 990 (court fails to take account of *Dan's City*); *Belnick*, 106 F. Supp. 3d 551 (court fails to take account of *Dan's City*); *Marx,* 2015 WL 260914 (court fails to take account of *Dan's City*).

Even if a Judge Erroneously Believes that Common Law Negligence Claims Against Property Brokers Can Generally Be Preempted, There Are Still Six Remaining Legal Avenues to Require Fair Compensation

Actually, even in the face of a preemption ruling, there are at least six viable avenues under which a property broker can still properly be held liable.

First, consistent with *Dan's City*, most cases denying preemption hold that at least the most common state law claims against brokers for (i) negligent hiring, or for (ii) failure to procure insurance, are not preempted, since these claims either do not impose special transportation industry duties or do not arise during the actual interstate transportation, but rather, precede it. So, if these causes of action are viable under the facts of a case, they are exempt from preemption. *See also Factory Mut. Ins. Co. v. One Source Logistics, LLC*, No. LA CV16–06385, 2017 WL 2608867, at *7 (C.D. Cal. May 5, 2017) (no preemption of claim against broker for negligent selection of carrier who stole goods as this claim merely imposes the standard common law duty of care "applying to hundreds of different industries" and a contrary ruling would "not provide Plaintiff with a remedy"); *Nyswaner v. C.H. Robinson Worldwide Inc.*, No. CV-17-04130, 2019 WL 95896, at *2-3 (D. Ariz. Jan. 3, 2019) (claim against broker for negligent hiring of carrier not preempted as this same duty of care exists outside of the transportation industry); *Midwest Trading*, 59 F. Supp. 3d at 897-98 (claim for failure to procure insurance not preempted because it involved pre-transit conduct).

Second, courts have held that to the extent that a common law claim pertains to public safety, it is not preempted pursuant to 49 U.S.C. § 14501(2)(c)(2)(A). Specifically, it has been held in the context of a broker's negligent selection that:

> Historically, common law liability has formed the bedrock of state regulation, and common law tort claims have been described as a critical component of the States' traditional ability to protect the health and safety of their citizens.

Finley v. Dyer, No. 3:18-CV-78, 2018 WL 5284616 (N.D. Miss. Oct. 24, 2018) (internal citations and quotations omitted). *See also Mann*, 2017 WL 3191516, at *8 (W.D. Va. July 27, 2017) (tort claim not preempted as state safety regulation); *Owens v. Anthony*, No. 2–11–0033, 2011 WL 6056409, at *2-4 (M.D. Tenn. Dec. 6, 2011) (negligent selection not preempted as state safety regulation); *Cruz Miguel Aguina Morales v. Redco Transp. Ltd.*, No. 5:14-cv-129, 2015 WL 9274068, at *1-2 (S.D. Tex. Dec. 21, 2015) (negligent selection claim not preempted as it involved a safety regulation (citing to *Cole v. City of Dallas*, 314 F. 3d 930, 734 (5th Cir. 2002))).

Third, where state law claims are preempted, federal law, as opposed to state law, should be held to govern brokers' obligations. Preemption most certainly does not mean that brokers are entirely free to act negligently and thus exempt from their legal duties. It must instead mean that federal law, as opposed to state law, determines the standard of care. This approach was explicitly recognized in the context of a broker's negligent hiring of a carrier – a district court in the Fifth Circuit found the state law claims were preempted, and refused to dismiss the suit against the broker, finding that the claim would proceed under federal question jurisdiction. *JRP Int'l*, 2018 WL 4334017, at *4.

Fourth, it is settled law that state law contract claims with brokers are not subject to preemption. *See, e.g., Gaines Motor Lines, Inc. v. Klaussner Furniture Indus., Inc.*, 734 F. 3d 296, 307 (4th Cir. 2013); *Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F. Supp. 2d 638, 642 (N.D. Tex. 2010). Even when a shipper does not have a direct contract with a property broker, it has usually been held to be a third-party beneficiary of an intermediary's downstream transportation contract. For example, *see Midwest Trading*, which further found that the owner of the cargo is

the undisclosed principal entitled to enforce an intervening contract with the broker who failed to procure the correct insurance. 59 F. Supp. 3d at 893-94. *See also Midwest Direct Logistics, Inc. v. Twin Cities Tanning Waterloo, LLC*, No. 15-CV-2013-LRR, 2016 WL 4014680, at *7 (N.D. Iowa July 26, 2016) (citing to *Midwest Trading* and holding again that an undisclosed principal can sue under a transportation contract with a broker).

Fifth, to the extent that the broker exercises control over the manner in which the actual trucker handles the goods, it can be sued as a carrier under the Carmack Amendment. *See ASARCO*, 71 F. Supp. 3d at 995-99 (whether alleged broker is also carrier is dependent on its specific actions and control over the driver (citing *Schram v. Foster*, 341 F. Supp. 2d 536, 549 (D. Md. 2004))); *Hewlett-Packard Co. v. Brother's Trucking Enters*., 373 F. Supp. 2d 1349, 1352 (S.D. Fla. 2005) (issue of fact exists as to whether alleged broker executed sufficient control over carrier to be deemed a motor carrier where it promised contingent insurance and handling of insurance claims and other "facts suggest that [alleged broker's] actions were not limited to arranging transport, but also exerting some measure of control over these drivers"); *Nipponkoa Ins. Co. v. C.H. Robinson Worldwide, Inc.*, No. 09 Civ. 2365, 2011 WL 671747, at *5-7 (S.D.N.Y. Feb. 18, 2011) (court holding that alleged broker exerting control over driver can be deemed a carrier); *Just Take Action v. GST (Americas)*, No. 04–3024, 2005 WL 1080597, at *5 (D. Minn. May 6, 2005) (issue of fact exists as to broker or carrier status where alleged broker agreed to retain full liability coverage and directed how and when shipment would take place); and *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98 C 5182, 1999 WL 965686, at *9 (N.D. Ill. Oct. 15, 1999) (alleged broker deemed a carrier where issue of fact exists as to status as broker or carrier where plaintiff gave defendant "discretion to hire whom it chose to ship the goods" and court thus believed plaintiff authorized defendant to exercise control over transportation of the cargo).

Sixth, to the extent that a broker has not registered under and/or is not compliant with the registration requirements under 49 U.S.C. § 13904, or does not have in place the insurance and financial security required by 49 U.S.C. § 13906, the recently enacted "MAP 21" law authorizes a private cause of action in federal court against "[a]ny person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person" a violation of these statutes, for "all valid claims incurred without regard to amount." 49 U.S.C. § 14916(c) (2019). The parties who would be liable, in addition to the broker itself, would be "any corporate entity or partnership involved" and "individual officers, directors and principals of such entities." 49 U.S.C. § 14916(d) (2019). Arguably this could extend to cargo claims. *See, e.g., Sony Biotechnology, Inc. v. Chipman Logistics and Relocation*, No. 17-CV-1292-AJB-WVG, 2017 WL 3605500, at *1 (S.D. Cal. Aug. 22, 2017) (pleading cargo claim under five causes of action including Carmack Amendment and 49 U.S.C. § 14916(c)(2); court dismissing only bailment and negligence causes of action).

Conclusion: Public Policy Demands that, at the Least, Federal Common Law Claims Be Preserved

Courts need to start faithfully applying the five controlling factors set forth in *Dan's City*, and denying preemption of claims against property brokers for negligent retention of carriers.

Should it be the case that certain courts continue the older trend of dismissing state tort claims against brokers pursuant to preemption under 49 U.S.C. § 14501(c)(1), justice would in the future best be served if federal courts hold brokers to task for breaches of their duty of care under a uniform federal common law standard. Merely dismissing tort claims against brokers founded upon state law, thus granting them de facto immunity, and not allowing tort claims against brokers founded upon federal common law to proceed, potentially exempts brokers from any and all accountability for their acts and omissions. The consequences of such a decision would be to

allow brokers to avoid legal accountability for anything short of a breach of a specific contractual provision, and encourage them to openly disregard their common law duties of due care to cargo owners and the public, so long as they do not violate a specific federal statute or regulation. Indeed, the very concept that federal law preempts state law in this field but provides no remedy of its own is on its face irrational. *Dan's City*, 569 U.S. at 265 (commenting that "[n]o such design can be attributed to a rational Congress.")

Accordingly, it is respectfully submitted that some judges have read 49 U.S.C. § 14501(c)(1) beyond its reasonable scope, where it is being construed to decree that transportation brokers are exempt from tort liability under the common law of the state within which they do business. Even in that circumstance, brokers (who are indeed licensed by the Federal Motor Carrier Safety Administration) should be held subject to the corresponding strictures of the federal common law, and claims against brokers should be accepted in federal court to be decided under a uniform federal common law negligence standard. This is precisely how the courts enforce common law duties in the context of marine claims and claims against motor carriers outside of the Carmack Amendment.

The other option – the status quo – where certain courts dismiss state law claims against brokers, regardless of whether the negligent action occurred during transportation, regardless of the degree of negligence, and where potential federal tort claims against brokers are therefore not allowed to be pursued – amounts to justice denied. As a matter of public policy, if a broker is granted sovereign-type immunity, then a broker has little incentive and no legal obligation to exercise proper due diligence, or to give due regard to protecting the rights of cargo owners, and damage to property will increase. The absurdity of this trend is self-evident.

Brokers should not be permitted to be above the law.