ON THE RISE

FAAAA Preemption becomes a powerful weapon of defense for brokers and shippers

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THE SCENARIO

The typical scenario is this: A catastrophic truck accident results in a fatality or serious bodily injury to one or more persons. The truck driver who caused the accident was working for a motor carrier who has an insurance policy with a $1,000,000 limit. The plaintiffs' attorneys know that they have a case on their hands with a value well above $1,000,000. In this world of "nuclear verdicts," in some cases the attorney could obtain a verdict from a jury many multiples of $1,000,000.

It is at this point the plaintiffs' attorneys do what plaintiffs' attorneys have done since time immemorial – they look for more "pockets" to contribute to the loss. In this context, claims are asserted against the freight broker who arranged the transportation with the motor carrier. Claims may also be asserted against the shipper who retained the transportation broker for the load.

There are typically two main theories for the claims asserted against the freight broker and shipper. The first is that the broker was negligent in its selection of the motor carrier, i.e. that it failed to use ordinary care when it arranged the transportation of the load with motor carrier under whose authority the transportation was being conducted at the time of the catastrophic accident (and likewise that the shipper was negligent in its selection of the transportation broker).

The second theory is that the freight broker (and shipper) was, in reality, the *employer* of the truck driver who caused the accident and is therefore vicariously liable for the truck driver's negligence. This second theory may seem a bit specious at first blush, but it can be the more insidious claim because, if successful, the freight broker or shipper would be 100% responsible for the plaintiff's damages (or, more accurately, to the same extent as the truck driver's percentage of fault).

It is in defense of these claims that FAAAA preemption can serve as a powerful defense.

FAAAA PREEMPTION

The Motor Carrier Act of 1980 significantly deregulated the trucking industry in the United States. It removed many federal entry controls and allowed for more flexible rate setting, leading to increased competition and a more dynamic market. Yet, after years of continued tariff and price regulation of motor carriers, in 1994, Congress enacted the Federal Aviation Administration Authorization Act (FAAAA) upon finding that state governance of intrastate transportation of property had become "unreasonably burden[some]' to 'free trade, interstate commerce, and American consumers."

Mirroring the language of the Airline Deregulation Act ("ADA") enacted years

earlier, the FAAAA prohibits states from "enact[ing] or enforce[ing] 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). The Act's express preemption clause is designed to prevent a patchwork of state laws from interfering with the free flow of goods in interstate commerce.

The Act also contains a "safety exception" that identifies very specific circumstances in which the Act cannot restrict the "safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. §14501(c)(2)(A).

APPLICATION TO TORT CLAIMS AGAINST FREIGHT BROKERS AND SHIPPERS

When negligent selection and vicarious liability claims are asserted against the freight broker and shipper in a lawsuit arising out of a catastrophic truck accident, the claims asserted are *state law claims*. This is the key to the FAAAA preemption defense. In asserting these claims, the plaintiffs are attempting to enforce state law on these companies relating to the service of a motor carrier. For instance, the freight broker is in the business of arranging transportation with motor carriers. Common law tort claims seek to enforce a duty of care concerning how a company *arranged for* a motor carrier to transport cargo. This is precisely why the FAAAA preempts claims against freight brokers and shippers in lawsuits arising out of catastrophic truck accident.

The defense of FAAAA preemption can usually be asserted in a motion to dismiss or other filing based on the pleadings. It may depend on the specific factual allegations presented in the Complaint, and plaintiffs' attorneys can sometimes be creative in how they plead the facts with respect to the freight broker and shipper that make it difficult to achieve dismissal in an initial motion. Yet even with creative pleading, it is possible to succeed with an early dismissal based on FAAAA preemption.

If the Court is not willing to dismiss the claims upon an initial motion, FAAAA preemption can and should be a primary argument of a motion for summary judgment at the conclusion of the discovery period of the lawsuit.

THE LEGAL LANDSCAPE

There is a growing body of case law in which the FAAAA preempts state law tort claims against freight brokers and shippers. Court decisions addressing this defense, at the trial court and appellate court level, seem to be issued about once a week, and sometimes more frequently. While some of the decisions are favorable to the plaintiff, it appears that the majority of decisions in the past couple of years have been favorable to the defense.

The first federal Circuit Court to address the issue was the Ninth Circuit in *Miller v. C.H. Robinson*, 976 F.3d 1016 (9th Cir. 2020). There, the court determined that the plaintiff's tort claim against the freight broker set out to reshape the level of service a broker must provide in selecting a motor carrier to transport property. Because the claim directly impacted the amount that a broker would charge for services, the claim fell squarely within the scope of the FAAAA. However, the Ninth Circuit also determined that the claim fell within the safety exception.

Three years after *Miller*, in 2023, two more Circuit Courts weighed in on the issue. In *Aspen Am. Ins. Co. v. Landstar Ranger, Inc.*, the Eleventh Circuit determined that tort claims against the freight broker fall within FAAAA preemption because "the broker has but a single job – to select a reputable carrier for the transportation of the shipment. *That's all.*" 65 F.4th 1261 (11th Cir. 2023). And this is precisely the brokerage service that [plaintiff's] negligence claims challenge—[broker's] allegedly inadequate selection of a motor carrier to transport [shipper's] shipment.").

In *Ying Ye v. GlobalTranz Enterprises, Inc.*, the Seventh Circuit affirmed the dismissal of the plaintiff's negligent selection claim against a freight broker because the claim "strikes at the core of [the] broker services by challenging the adequacy of care the company took—or failed to take—in hiring [motor carrier] Global Sunrise to provide shipping services." 74 F.4th 453, 2023 WL 4567097 (7th Cir. Sept. 19, 2023). The *Aspen* and *Ye* Courts also rejected application of the safety exception, explaining that a common law negligence claim enforced against a broker is not a law that is "with respect to motor vehicles."

The *Ye* and *Aspen* decisions represent two strong wins for the defense on this issue, and they currently comprise the majority viewpoint on this issue at the Circuit Court level. In January 2025, the Sixth Circuit heard oral arguments on this issue in *Cox v. Total Quality Logistics*, and so a new Circuit Court decision on FAAAA preemption could be issued any day now.

In addition to these Circuit Court decisions, there is a raft of decisions issued by federal District Courts and by state courts at the trial court and appellate court levels. It is not uncommon for Courts deciding this issue to consider and favor decisions issued by other Courts in the same geographic area or from states within the same Circuit Court region.

PRACTICAL TAKEAWAYS

The following are a few practical steps that freight brokers and shippers can take when facing claims arising out of catastrophic truck accidents.

Assert Preemption Early: The FAAAA preemption can and should be raised at the pleading stage. If not successful at the pleading stage, the defense should be included in a motion for summary judgment.

Educate Courts: When a motion based on FAAAA preemption is presented to a Court, that Court may not have any familiarity with the defense. It is therefore important to educate the Court in the brief concerning the background of the legislation, its purpose, and its express language. Litigators should also be prepared to explain how claims "relate to" rates, routes, and services and are thus preempted.

Leverage Precedent: Because the defense wins keep coming, these decisions can and should be presented to the Court to show the strong precedent that exists for FAAAA preemption and the rejection of the safety exception.

Teamwork: The FAAAA preemption success story to date has been in part to defense attorneys and companies working together to share information, strategies, new decisions, and prior motions. The authors of this article have had many experiences of working with other attorneys and companies within USLAW NETWORK to leverage our knowledge and experiences with this defense to create team wins that we can then build on for the next win.

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