TRANSPORTATION DEFENSE STRIKES BACK:

FAAAA preemption and the fight against plaintiff's claims against transportation brokers and shippers

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In light of the current environment of heightened verdicts in cases involving serious bodily injury or death arising out of truck accidents, claimants are now asserting claims not only against the truck driver and motor carrier, but also against entities that are "upstream" from the motor carrier, such as the transportation broker and shipper. Claimants allege the broker was negligent in its selection of the motor carrier, and the shipper was negligent in its selection of the broker. Employing some legal creativity, claimants also allege the broker and shipper were the employer of the truck driver, even though everyone involved in the shipment understood the truck driver to be the motor carrier's employee.

There are defenses to these specious claims. The primary defense is a federal statute known as the Federal Aviation Authorization Administration Act ("FAAAA," often pronounced "F–four–A"), codified as 49 U.S.C. § 14501(c)(1). The statute prohibits states from "enact[ing] or enforc[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 . . . or any private motor carrier, broker, or freight forwarder with respect to the transportation of property." The argument is that the plaintiff's state law negligent selection claim and vicarious liability claim against the broker and the shipper are preempted by FAAAA because these tort claims are based on state common law that relates to the service of a motor carrier with respect to the transportation of property.

The majority of courts that have addressed this issue have held that state law tort claims against brokers and shippers relate to the service of a motor carrier with respect to the transportation of property and are therefore within the scope of FAAAA. However, there is an exception to FAAAA preemption that the defense must also overcome. Under the so-called safety exception, Section 14501 exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles[.]" 49 U.S.C. §14501(c)(2)(A).

In the past few years, many courts have held that a plaintiff's state law tort claims against a broker or shipper fall within the safety exception, and therefore preempted by FAAAA. The most notable case to apply the safety exception is the Ninth Circuit's decision in *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1025-26 (9th Cir. 2020). The Ninth Circuit held "the phrase 'with respect to' in the safety exception is synonymous with 'relating to[.]'" Consequently, "the FAAAA's safety exception exempts from preemption safety regulations that 'have a connection with' motor vehicles, whether directly or indirectly." The court reasoned that, while a tort claim does not directly regulate motor vehicles, it does promote safety on the road, and for this reason, it is a safety regulation.

There is good news for the defense, however. Recently, courts have held that tort claims against brokers and shippers fall within the scope of the FAAAA, and the safety exception does not apply. Two such decisions were issued by the Northern District of Ohio, *Lee v. Werner Enterprises,* 2022 WL 16695207 (N.D. Ohio Nov. 7, 2022) and *McCarter v. PAM Transport,* 2023 WL 144844 (N.D. Ohio Jan. 10, 2023). In *Lee*, the court granted motions to dismiss filed by a transportation broker and a shipper. In *McCarter*, the court granted motions to dismiss filed by a transportation broker and other related entities that were "upstream" from the motor carrier.

The *Lee* case arises out of an accident between a truck and a car operated by the plaintiff, who sustained serious injuries in the collision. The plaintiff sued not only

the truck driver and the trucking company but also the transportation broker (Lipsey Logistics) and the shipper (Target) of the load being transported at the time of the accident. Lipsey and Target filed separate motions to dismiss, arguing the claims against them were preempted by the FAAAA.

In its Order granting both motions, the Northern District of Ohio explained how the plaintiff's negligence claims against the broker and shipper "fall[] squarely within the preemption of the FAAAA." Thus, the plaintiff's tort claims against these entities "are included within the scope of the FAAAA preemption provision."

Addressing the safety exception, the Northern District of Ohio addressed the *Miller* Circuit's rationale for applying the safety exception, but explained, "This Court is not convinced." The Northern District of Ohio first explained how "[t]he plain meaning of the words "safety regulatory authority of a State" does not support the inclusion of private tort claims." And "if the safety exception preserved all claims related to motor vehicles," then "all preempted claims would then be 'saved' by the exception." In the Court's view, "the FAAAA's preemption provision protects precisely parties such as the shipper and broker, who did not have direct involvement in the accident that injured Plaintiffs." Finally, the Court rejected the plaintiff's argument that she would be left without a remedy, because the plaintiff was able to seek recourse against the motor carrier and driver, and was doing so in the lawsuit.

The *McCarter* decision, issued by the same judge as in Lee, reiterated these same points with respect to FAAAA preemption of the plaintiff's claims against the transportation broker. The court also dismissed the claims against the other entities "upstream" from the motor carrier, and "upstream" from the transportation broker, explaining that because "the liability of the primarily liable party was extinguished, the liability of the secondarily liable party [is] likewise extinguished." Because the claims against the transportation broker were preempted, the liability of the transportation broker was therefore extinguished, and so the other defendants could not be held liable via a derivative theory of liability.

The *Lee* and *McCarter* decisions represent significant wins for the transportation industry. Moreover, the analysis employed by the Northern District of Ohio in these opinions, on both the scope of the FAAAA and the safety exception, is straightforward and well-reasoned. It should also be noted that the court in these decisions was able to build on a prior Ohio decision on this issue, *Creagan v. Wal-Mart Trans., LLC*, a 2018 case in which the Northern District of Ohio granted summary judgment to a shipper and judgment on the pleadings to a transportation broker. 354 F. Supp. 3d 808 (N.D. Ohio). Because this issue is national in scope, and because these types of claims are being pursued by the plaintiff's bar across the country, these Ohio decisions can provide strong support for FAAAA preemption across the country.

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