FOSTER PEPPER PLLC

THE INTERMODAL LEAD

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

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The evolution continues: FMC accommodates NVOCC contracting by revising regs governing NSAs and NRAs.

By Steve Block

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Can you believe it's been 20 years since President Clinton signed the Ocean Shipping Reform Act of 1998 (OSRA) into law? You can be a seasoned and tenured transportation professional and not recall the days of mandatory, tariff-based ocean shipping! But as this column proclaimed since before OSRA was on the books (yes, it's been around that long, too), the statute really was just a phase, if a really big one, in an evolutionary process that's been in process for centuries.

The National Industrial Transportation League spearheaded the push through the 1990s to get reform legislation aimed at freeing ocean transportation from the yoke of mandatory common carriage. But the intermediary industry didn't successfully keep its interests in the forefront. Some say the middlemen just didn't think deregulation would ever happen, and there was internal dissent about what positions the trade should take. When OSRA passed, ocean carriers became free to enter into service contracts with shippers which, by and large, were market driven as to the shipper-carrier relationship, cargo volumes, general economic factors, and circumstances particular to shippers' needs and carrier's capacities. Gone were the days of antiquated one-price-fits-all pricing and service options, enforced by a government watchdog, in favor of an environment that accommodated the realities of our evolving industry.

Except, that is, as to intermediaries. Non-vessel operating common carriers (NVOCCs) in particular still struggled under mandatory tariff-based pricing, and for years, government and industry's focus remained on the carrier-shipper transition. Some said the intermediary industry's days were numbered in light of a new system they couldn't compete in.

Only in 2005 did the U.S. Federal Maritime Commission enact regs that freed NVOCCs from tariff requirements under the Shipping Act by allowing them to enter into NVOCC Service Arrangements (NSAs), filed with FMC, the essential terms of which had to be published in their tariffs. NSAs were pretty much the equivalent of service contracts steamship lines have with their shippers, but designed for carriers who don't run boats.

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The evolution continues: FMC accommodates NVOCC contracting by revising regs governing NSAs and NRAs.

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This was a huge step, with NVOCCs moving out of the Stone Age and enjoying market-realistic options in contracting with their customers. But differences between carrier and NVOCC business models left our friends in the middle with severe disadvantages. NVOCCs frequently are more focused on more smaller, discreet shipments than are vessel operators, such that volume intensive contracts don't always provide necessary contracting latitude.

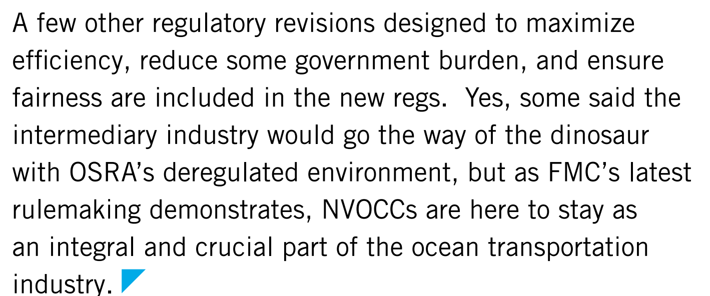
Thus, the evolution continued in 2011, when FMC allowed licensed NVOCCs the option of establishing rates for individualized shipments through Negotiated Rate Arrangements (NRAs). NRAs are agreements between NVOCCs and shippers for a stated number of shipments of specific cargo volumes over a designated time period, i.e., much shorter terms than NSAs. With this, NVOCCs could operate with economic efficiency based on market circumstances within their unique business model.

But circumstances still were far from ideal. While they still may not be perfect, FMC just passed a new set of regs that rightly amount to yet a new phase in the evolution of law and regulation keeping up with industry. With input from various trade associations representing both sides of the NVOCC equation, and after a petition some three years ago from the National Customs Brokers & Forwarders Association of America, FMC modified a number of provisos, conditions and onerous requirements which NVOCCs were subject to under the original NSA and NRA regs.

Now, NSAs and NRAs don't have to be published or filed with FMC. Confidentiality is kind of a big deal in this world, and filing requirements can be a pain. A quid pro quo is that NVOCCs have to allow free public access to their tariffs which have to provide notice that they use NSAs.

Under the new regs, NSA deals are sealed just by both shipper and NVOCC signing them; and NRAs kick into force by a shipper sending its NVOCC a signed agreement, by sending the NVOCC an email accepting the NRA's provisions, or just by booking a load with an NVOCC after an NRA's prominent notice allows the shipper to accept it by doing so.

Recognizing business realities, FMC regs now allow amendment to NRAs midstream, and parties can include economic terms other than rates such as pass-through and accessorial charges. This can be a biggie when ocean carriers kick in General Rate Increases in their contracts with NVOCCs.



A few other regulatory revisions designed to maximize efficiency, reduce some government burden, and ensure fairness are included in the new regs. Yes, some said the intermediary industry would go the way of the dinosaur with OSRA's deregulated environment, but as FMC's latest rulemaking demonstrates, NVOCCs are here to stay as an integral and crucial part of the ocean transportation industry.

Ref: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, available at https://www.fmc.gov/assets/1/Documents/17-10_fnl_rl.pdf

Recent Developments in Motor Carrier Law

By Steve Block

Court can infer elements of a Carmack claim from broadly crafted complaint.

Metalform Services, et. al v. J.J. & Associates, Inc., 2017 WL 6048819 (E.D. Mich. 2017)

ICE Industries contracted with Metalform Services, which transports and assembles/disassembles heavy machinery, to take apart a machine press in Alabama and transport it to Mississippi. Metalform contracted with motor carrier GWS Logistics to haul the press, and GWS, through freight broker TCM Transport, subbed out the load to motor carrier J.J. & Associates. GWS prepared a bill of lading identifying J.J. as the carrier of record and Metalform and GWS as shippers. The cargo was damaged in transport.

ICE made a claim which the opinion doesn't address, but ultimately, Metalform and GWS sued J.J. in the U.S. District Court for the Eastern District of Michigan alleging both Carmack and state and common law theories of liability. As J.J. hauled the load interstate, Carmack clearly preempted the state and common law claims.

J.J. brought a FRCP 12(c) motion for judgment on the pleadings asserting that plaintiffs lack standing, having served only as freight brokers, and not as J.J.'s shipper. The court rejected the argument. While the complaint didn't allege what role the plaintiffs played, it didn't allege they were brokers. As the complaint was written, the court must infer they had standing until discovery proves otherwise.

J.J. also argued that the plaintiffs didn't allege any actual damages. This didn't fly either because, for FRCP 12(c) purposes, "the court must interpret 'actual damages' broadly to encompass 'all damages'"; plaintiffs did allege losses of $250,000 based on delayed delivery; and their names did appear on the bill of lading. This was enough for the court to infer Carmack damages, at least for purposes of a motion to dismiss on the pleadings. Thus, the motion was denied pending discovery to flesh out what really happened here.

… and similarly, unclear complaint and factual circumstances prevent court from dismissing service provider's claims against motor carrier.

Anderson Trucking Service, Inc. v. Eagle Underwriting Group, et al., 2018 WL 564569 (D. Conn. 2018)

A shipper engaged unspecified transportation service provider Ridgeway International USA to arrange transit of a submarine from Massachusetts to Australia. Ridgeway booked surface transit with motor carrier Anderson Trucking Service for carriage of the cargo from Massachusetts to the Port of Baltimore pursuant to a through ocean bill of lading that terminated in Australia. Anderson's trailer caught fire en route, allegedly damaging the trailer to the tune of some $8.3 million. Anderson believed its agreement with Ridgeway didn't include full liability, such that the shipper should have bought its own insurance.

The shipper and its insurer filed claims against Anderson. Anderson brought suit in the U.S. District Court for the District of Connecticut against all involved seeking to establish its limited liability. Ridgeway counterclaimed against Anderson, alleging the loss was entirely Anderson's fault, seeking indemnity from Anderson for any liability Ridgeway might have, and that despite Ridgeway's notice to Anderson to preserve evidence, Anderson destroyed evidence.

Anderson moved to dismiss on the pleadings Ridgeway's claims on the ground of Carmack preemption. The carrier's theories were that Ridgeway was seeking to hold Anderson liable for cargo damage, such that claims for indemnity and spoliation of evidence were preempted. While appearing to recognize the validity of Anderson's theory, the court concluded it couldn't rule on the current record.

Carmack applies only to shippers' claims against motor carriers. Here, it wasn't clear whether Ridgeway was a freight forwarder or NVOCC, which might qualify as a shipper of record, or a "forwarding agent" which probably wouldn't. Anderson's complaint alleged both, and the

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record suggested any number of different hats Ridgeway might be wearing at different phases of the transaction. Carmack specifically doesn't preempt one carrier's claims against another, and the court recognized that "how a company labels itself," i.e., as an intermediary or something else, doesn't control. Thus, the parties will have to undertake discovery to establish the role(s) Ridgeway actually played, so the motion was denied.

Shipper's waiver of Carmack in transportation contract is binding on consignee.

Sanofi-Aventis U.S., LLC, et al. v. Great American Lines, Inc., et al., 2017 WL 6032465 (3rd Cir. 2017)

Pharmaceuticals manufacturer and shipper Sanofi-Aventis had a transportation contract with motor carrier Great American Lines (GAL) that waived Carmack applicability as allowed by 49 USC §14101(b). That statue provides: "If the shipper and carrier, in writing, expressly waive [Carmack], the transportation provided under the contract shall not be subject to the waived rights and remedies …" It doesn't say anything about a consignee having to agree to the waiver for it to be effective.

GAL's truck containing a load of Sanofi-Aventis' drugs was stolen while en route to the shipper's customer McKesson Corporation, which had insured the load with AXA Corporate Solutions Assurance. AXA paid McKesson's insurance claim, and sued GAL alleging Carmack liability. Affirming the U.S. District Court for the District of New Jersey, the Third Circuit Court of Appeals ruled that Sanofi-Aventis's waiver of Carmack was binding on McKesson, even though the consignee wasn't a party to the transportation contract that contained it.

Carmack waivers are statutorily enforceable based on shipper/carrier agreement, and the consignee is bound by it even though Carmack empowers it to bring cargo claims in its own name, and even if wasn't an intended third-party beneficiary, or even aware, of the waiver. The carrier is entitled to rely on terms it agrees to with its customer, i.e., the shipper.

AXA tried to argue that a Truck Manifest was a separate contract between McKesson and GAL pursuant to which it would be entitled to make a Carmack claim, but the document, apart from naming McKesson as a consignee, didn't contain any contract terms.

FAAAA doesn't preempt negligence action against freight forwarder derived from unsafe truck operation.

DNOW, L.P. v. Paladin Freight Solutions, Inc., et al., 2018 WL 398235 (S.D. Tex 2018)

Shipper DNOW engaged freight forwarder Paladin Freight Solutions to forward a load of concrete reinforced barriers to DNOW's customer Tricon, all within Texas. Paladin booked the load with motor carrier L&M, whose driver crashed into Tricon's on-premises fire hydrant causing property damage.

Having indemnified Tricon, DNOW sued Paladin and L&M in Texas state court, alleging various negligence theories based on improper operation of a truck. Paladin removed the action to the U.S. District Court for the Southern District of Texas alleging Federal Aviation Administration Authorization Act (FAAAA) governance and preemption. The court heard cross motions, one from DNOW to remand, and the other from Paladin to dismiss. It denied Paladin's motion and granted DNOW's, kicking the matter back to state court.

Paladin pointed to FAAAA's provisions which bar states from enacting or enforcing law that "have a connection with, or reference to rates, routes or services" offered and provided by motor carriers, freight forwarders and freight brokers. The forwarder urged that DNOW's allegations, if successful, would imply that forwarders must "engage in some sort of additional safety practices in order to avoid liability for drivers' accidents," which would "necessarily affect Paladin's services."

The court agreed with DNOW that its allegations don't include negligent hiring or negligent entrustment, i.e., forwarder activities, but rather general claims about unsafe truck operations. While the former might implicitly impose constraints on Paladin, the latter don't. Moreover,

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U.S. Supreme Court and federal courts of appeal decisions make clear that FAAAA's preemption doesn't apply to health and safety concerns addressed by state law. Most precedents Paladin cited applied to cargo claims, a circumstance distinguishable from property damage and subject to other federal statutes. Because FAAAA doesn't apply and there's no diversity between the parties, this one goes back to state court.

FAAAA preempts decedent's negligent hiring claims against broker.

Volkova v. C.H. Robinson Co., 2018 WL 741441 (N.D. Ill. 2018)

A shipper hired broker C.H. Robinson to arrange interstate transit of cargo (the opinion doesn't give much detail), and Robinson booked the load with motor carrier Antioch Transport. Antioch's truck apparently was making an illegal U-turn when Alexandre Volkov collided with it, tragically killing Mr. Volkov. Volkov's estate sued Antioch and Robinson in the U.S. District Court for the Northern District of Illinois, claiming that the broker negligently hired Antioch without ensuring it would operate safely.

Robinson promptly moved to dismiss based on Federal Aviation Administration Authorization Act (FAAAA) preemption. FAAAA disallows, i.e., preempts, any state law that has "a connection with or reference to carrier rates, routes, or services, whether directly or indirectly" to the extent it concerns a "broker's transportation of property." Robinson's notion was that how it goes about engaging truckers impacts "rates, routes, or services," certainly indirectly, such that state-law based negligence claims are nixed.

The court recognized Seventh Circuit pronouncements against "developing broad rules concerning whether certain types of common-law claims are preempted by the FAAAA," and determined that courts have gone every which way when it comes to broker liability for accidents. It found preemption based on the claimant's allegation that Robinson "failed to adequately and properly perform its primary service" of vetting truckers, concluding that such claim "directly implicates how Robinson performs its central function of hiring motor carriers." True, some courts have carved out a personal injury exclusion for FAAAA preemption, but thos one concluded that those courts don't "faithfully apply the preemption analysis established by the Supreme Court" in its review of the subject. The court also rejected the claimant's contention that state negligent hiring laws were related to motor carrier safety (which wouldn't be subject to FAAAA exemption).

Emails and inferences are enough to substantiate that a broker paid detention charges.

Transport Unlimited, Inc. v. Ardmore Power Logistics, LLC, 2018 Pa. Super. Unpub. LEXIS 573 (Penn. 2018)

Freight brokers Transport Unlimited (TUI) and Ardmore Power Logistics had a co-brokerage agreement by which TUI booked cargo shipped by Ardmore's customers. Representatives of the two brokers informally had discussions and exchanged emails about Ardmore's responsibility to pay detention charges TUI paid truckers. When Ardmore failed to pay some 195 grand in detention, TUI sued Ardmore in Pennsylvania state court. A jury split the baby, awarding TUI about 97 grand, which the trial court bumped to 112 grand.

Ardmore moved for a judgment notwithstanding the verdict ("JNOV," from the Latin judgment non obstante verdicto), essentially asking the trial court to disregard and strike the jury's verdict on the ground it was unsupported by law and/or fact. Its theory was that the parties' emails were imprecise in that they didn't state exactly the circumstances in which detention would be due; and only hearsay evidence suggested TUI ever paid truckers detention in the first place.

The trial court refused to change the verdict, and the Pennsylvania Court of Appeals wouldn't do so either. While Ardmore's arguments make sense from a strictly evidentiary perspective, the boundaries are wider when it comes to what a jury may "infer" from evidence and the circumstances. Truckers didn't testify as to the detention

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they charged, but TUI could, and did, testify to the sums it paid; Ardmore did pay a portion of the detention; and the jury's award of 50% of TUI's claim apparently had a compromise built in.

Damages need not be proven to a mathematical certainty, and "evidence of damages may consist of probabilities and inferences." Here, the courts concluded this standard had been met.

Court can't decide whether arbitration clause applies.

LPF II, LLC v. Cornerstone Systems, Inc., 2018 WL 994708 (D. Kan. 2018)

Applicability of arbitration clauses usually is a pretty straightforward matter, but not when a claimant isn't a party to the contract that contains it. Just ask shipper Cornerstone Systems, which had a contract with two transportation services providers. Those service providers had given Great Western Bank a security interest in their accounts receivable. For unstated reasons, the bank exercised its rights under the security interests, and assigned them to LPF II, LLC as part of an undescribed settlement agreement.

When LPF extended its open palm to Cornerstone asking for 157 grand in transportation service charges, Cornerstone balked, claiming defenses to the claimed ARs. LPF sued Cornerstone in the U.S. District Court for the District of Kansas, and Cornerstone raised those same defenses. It also pointed to an arbitration clause in its contract with the service providers, and asked the court to dismiss either on substantive grounds or in favor of arbitration.

In its opinion, the court goes through five pages to basically say "this is a tricky one." LPF isn't a party to any arbitration agreement with Cornerstone, and usually your adversary has to be for you to force it into alternative dispute resolution. But then LPF's rights and claim were entirely derivative from entities which were parties to arbitration agreements.

While the Federal Arbitration Act implies a presumption of arbitrability, precious little case law addresses what happens in this odd circumstance. Cornerstone made a compelling argument that LPF had "stepped into the shoes" of the parties to the contract, but no authority it cited says that's enough.

The court basically punted, and ordered a "summary trial" on the issue of arbitrability. What evidence might be adduced at such trial isn't clear (it doesn't look like much is disputed), but the court apparently needs to think about this one. Cornerstone's substantive motion was denied without prejudice pending the results of that trial.

Contractual time-to-cure period is an enforceable precondition of breach of contract action.

ONF Systems, LLC v. Cargomatics, Inc., 2018 WL 1087500 (D. NJ 2018)

This one deserves quick mention because it addresses a common contract term many players disregard as meaningless, which often it is, but nonetheless is enforceable. Brokers ONF Systems and Cargomatics entered into a co-brokerage agreement that contained broad applicability clauses and a term requiring any aggrieved party to give a 15-day time to cure, initiated by a "detailed written notice," before pursuing a contract claim against the other.

Apparently, a beef arose between the brokers as to ONF's liability to Cargomatics for per diem, detention and demurrage charges, and ONF hauled off and filed suit in the U.S. District Court for the District of New Jersey seeking a declaratory judgment. The court didn't like it, and granted Cargomatics's motion to dismiss. Not really surprising, given courts' predilection toward clearing their dockets, and assuming the parties don't resolve their dispute, not likely a significant problem.

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Does 49 USC §14704 create a private right of action for cargo damage which Carmack doesn't preempt?

Starr Indemnity & Liability Co. v. YRC, Inc., 2018 WL 905523 (N.D. Ill. 2018)

Procedural irregularities cloud the analysis in this one, and the court doesn't state a conclusion pending the parties filing supplemental pleadings, but the U.S. District Court for the Northern District of Illinois recently considered a shipper's argument that 49 USC §14704 may be the basis for a cargo claim outside of Carmack. 49 USC §14704(a)(2) provides that "[a] carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part."

Subrogated insurer Starr Indemnity & Liability Co. sued motor carrier YRC seeking recovery of some $2 million in insurance proceeds it paid shipper Cessna for alleged damage to a cargo of two aircraft engines incurred in interstate transit. Starr sued YRC alleging Carmack liability, but also liability under §14704 based on alleged violations of FMCSR safety regs, which it believed implicate §14704. Notably, §14704(e) provides for an award of attorneys' fees to successful claimants.

YRC moved to dismiss the §14704 claims based on Carmack preemption. It pointed to the clause "in violation of this part" at the end of §14704(a)(2), and the remaining subparagraphs of §14704 address tariff and rate issues. Legislative history demonstrates that Congress intended this statute only to transfer to the courts jurisdiction the Interstate Commerce Commission once held over these issues, and that's how it's been applied. If it could be interpreted per Starr's understanding, §14704(a)(2) "would render Carmack meaningless."

The court could find no precedent of §14704 being applied based on FMCSR violations, but also none for the notion that one federal statute can preempt another. Because Starr hadn't had a full opportunity to brief the issue, the court deferred ruling.

While adequate opportunity to be heard is important, it should be clear from the existing record that Starr has no cargo claim based on §14704 derived from safety regs.

FAAAA doesn't preempt cargo claim against broker C.H. Robinson asserted as breach of contract …

Georgia Nut Co. v. CH Robinson Co., 2018 U.S. Dist. LEXIS 71806 (N.D. Ill. 2018)

Georgia Nut hired freight broker CH Robinson to arrange transit of its cargo of almonds from Del Rio in California to Georgia Nut's facility in Illinois, and CH Robinson booked the load with motor carrier All Interstate Trucking. Before departure, Georgia Nut placed a tamper-proof band on the trailer door marked with the shipment's bill of lading number, and on arrival saw that the band's bill of lading number didn't match the one at origin. Concluding the band had been tampered with and that the almonds couldn't be certified as fit for human consumption, Georgia Nut claimed a loss of $162,000, and sued both broker and carrier in the U.S. District Court for the Northern District of Illinois.

Georgia Nut pleaded a negligence claim against CH Robinson, claiming the broker failed to properly vet All Interstate. Had it done so, it would have learned All Interstate had driven a total of one registered mile in the preceding year, and therefore was unqualified. CH Robinson moved to dismiss the negligence claim based on Federal Aviation Administration Authorization Act (FAAAA) preemption, which bars state-law tort claims against freight brokers. That motion was granted, and the shipper promptly amended its complaint to allege a breach of contract claim against the broker.

CH Robinson again moved to dismiss, claiming that Georgia Nut's newly-minted theory was just a disguised negligence claim, one that should be preempted just like the earlier theory. This time, the court disagreed and denied the motion. The brokerage contract required CH Robinson to hire a trucker that was "experienced, reputable and reliable." The court concluded that the elements of a contract claim differ from those based on negligence, and if the shipper proved them, it could succeed in its claim.

FAAAA doesn't preempt contract claims against brokers. CH Robinson argued that the contract didn't require it to pay any damages for losses caused by a trucker, but that

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wasn't essential, as its shipper was claiming consequential damages resulting from losses foreseeable at the time the brokerage contract was executed. Nor did the court buy CH Robinson's argument that Georgia Nut's claims were derived from preempted industry custom and courses of dealings beyond the contract's contemplation, as any such considerations weren't mandatory, and the parties could contract around them as part of their bargain.

… but FAAAA does preempt personal injury claims against C.H. Robinson.

Krauss, et al. v. IRIS USA, Inc., et al., 2018 U.S. Dist. LEXIS 74922 (E. Dist. Penn. 2018)

The U.S. District Court for the Eastern District of Pennsylvania applied some novel analyses to reach conclusions that are rather divergent from the mainstream in concluding that Carmack and FAAAA preempt personal injury claims against a freight broker, here again, C.H. Robinson. Great news for the brokerage industry if this case is followed, but query whether it will in light of conflicting decisions.

Shipper IRIS USA, Inc. sold a load of Legos toys to consignee Fightback for Autism (Fightback). IRIS hired broker C.H. Robinson to arrange the transit, and the broker booked transit with motor carrier KV Load. IRIS and KV Load apparently loaded the cargo improperly onto wrong-size pallets, and Fightback employee Krauss was injured while offloading it. He sued IRIS, CH Robinson and KV Load seeking personal injury damages, as well as the costs to fix his forklift.

On KV Load's motion for summary judgment, the court dismissed Krauss's negligence claims against the carrier based on Carmack preemption. Yes, the court ruled that "the Carmack Amendment limits a carrier's liability to the 'actual loss or injury' of the goods in transit …, meaning that the carrier, KV Load, was not liable for common-law claims for Mr. Krauss's personal injuries or for damage to the forklift." You read that right. No explanation about how a personal injury equates to "actual loss or injury of the goods in transit."

On a second round of motions for summary judgment, C.H. Robinson moved to dismiss Krauss's claims based on FAAAA preemption. The court granted that motion as well. Yep, you read that right, too. Despite a plethora of terrifying decisions against brokers in recent years holding just the opposite, this court concluded that Krauss's personal injury claims "related to a service" of the broker, i.e., a connection exists "where it has a forbidden significant effect on rates, routes or services." Krauss's theory against CH Robinson was that it didn't adequately vet KV Load, and carrier vetting, being a significant broker function, couldn't be subject to common law liability.

That makes conceptual sense, but flies in the face of many other decisions that have held brokers liable for carrier-fault accidents. The court did point out that its decision "does not grant freight brokers sweeping immunity from personal injury claims," as "the Court's ruling is narrow," and derived from "the particular circumstances of this case." In other words, something about this factual scenario prompted the court to find preemption with a dash of contrition.

IRIS didn't fare so well, as it couldn't claim either FAAAA or Carmack preemption without being a carrier or broker.

Trucker's insurance coverage extension applies to claim against shipper, but not against broker.

Great West Casualty Co. v. Merchants Metals, LLC, et al., 2018 Mich. App. LEXIS 1681 (Sup. Ct. Mich. 2018)

Here's an interesting case addressing insurance coverage for claims brought under hold-harmless clauses we typically see in broker-carrier contracts. Shipper Merchants Metals engaged broker Access America to arrange transport of its cargo of metal fencing materials between its two facilities in Michigan and Colorado. Access America hired motor carrier Determined Transportation to transport the load, and Determined dispatched its driver Frank Wojcik for the run. While offloading the cargo in Colorado, a roll of fencing material fell on Wojcik, injuring him. The driver sued

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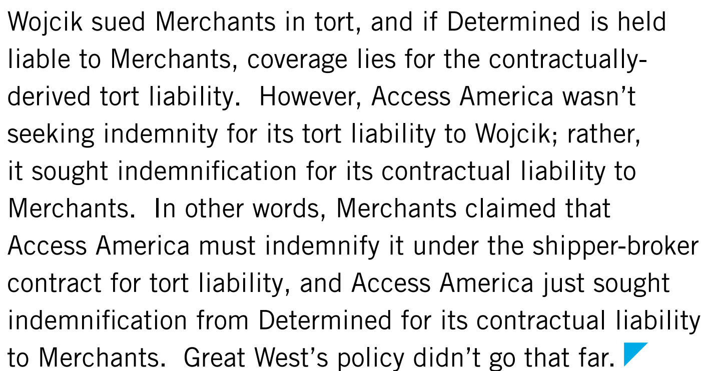
Merchants in Michigan state court, alleging the shipper had improperly loaded the cargo. Merchants brought third-party actions against Access America and Determined, claiming that the shipper-broker contract required Access America to defend and hold Merchants harmless, and that it had third-party beneficiary status under the broker-carrier contract between Access America and Determined. The latter contract contained an indemnification provision that required Determined to hold Access America and Merchants harmless for "negligent or willful acts" of the carrier.

Determined looked to its insurer, Great West, for coverage as to the third-party action. Great West's policy extended coverage to "insured contracts," which included contracts for liability for bodily injury in tort. Great West denied coverage, prompting a coverage dispute that worked its way up to the Michigan Supreme Court. That court concluded that the policy requires Great West to provide coverage for Merchants' claim, but not for Access America's claim.



Wojcik sued Merchants in tort, and if Determined is held liable to Merchants, coverage lies for the contractually-derived tort liability. However, Access America wasn't seeking indemnity for its tort liability to Wojcik; rather, it sought indemnification for its contractual liability to Merchants. In other words, Merchants claimed that Access America must indemnify it under the shipper-broker contract for tort liability, and Access America just sought indemnification from Determined for its contractual liability to Merchants. Great West's policy didn't go that far.

Upcoming Speaking Engagements

Steve Block will present

"The U.S. Limitation of Vessel Owner's Liability Act - Here's how we do it down south . . ."

Annual Conference of the Canadian Transport Lawyers Association, Montreal, Quebec, Canada

October 25-27, 2018.

Steve Block will give a presentation regarding

Legal Developments in Motor Carrier Safety

Washington Trucking Associations Fall Safety Conference, Yakima, Washington

November 1, 2018

Steve Block will moderate a panel entitled

"Web-based transportation intermediaries and other service providers hammer down!"

Annual Conference of the Transportation Lawyers Association, Austin, Texas

May 1-5, 2019.

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