

# The Transportation Brief®



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## *Brokers and Freight Forwarders Rely on Federal Preemption*

The Federal Aviation Administration Authorization Act (“FAAAA”) is often relied upon by motor carriers to preempt plaintiff causes of action (that is, federal law “trumps” the state law cause of action). Brokers and forwarders are sometimes surprised to learn that the FAAAA may also apply to them. While some courts have found the preemption does not apply on the merits of the case in question, several courts have liberally applied the FAAAA to dismiss claims against brokers.

Traditionally, brokers have been liable for cargo loss and damage to the extent caused by the broker’s negligence. In recent years, the trend has been to argue that brokers are liable for highway accidents either because the broker negligently selected the motor carrier transporting the shipment in question, or because the broker was somehow directly liable for the motor carrier’s own negligence. While cases are not unanimous, some courts have held that the FAAAA preempts negligence claims against brokers in the cargo claim context. For negligent selection claims arising from highway accidents, at least one court has left the door open to the argument upon development of the record.

What does this all mean for broker liability? To start, a growing number of courts appear willing to consider federal preemption as a defense for brokers in the context of cargo claims. Brokers now have a line of cases to cite for the proposition that negligence claims against them should be preempted if cargo is lost, damaged, or stolen. While not all courts agree, there is ample authority supporting this position and brokers should make the argument.

Perhaps even more important to brokers is the fact that there is at least an argument that negligent selection claims for personal injury are likewise preempted under the FAAAA; if negligence is preempted in the cargo claim context, it should also be preempted in the personal injury context. It is important to point out that the FAAAA does not typically preempt breach of contract claims. Thus, to the extent claims are based on alleged breach of contract or on an indemnity clause whereby the broker has agreed to indemnify against negligent selection or the acts of the motor carrier, the FAAAA may not likely provide relief.

*Nathaniel G. Saylor,  
Paul D. Root,  
Indianapolis*

# Briefly...

## *Massachusetts Issues Rare Misclassification Decision Favorable to Transportation Industry*

A federal court in Massachusetts recently granted a rare summary judgment order favorable to the transportation industry on an independent contractor's misclassification claim under the Massachusetts Independent Contractor Law, ch. 149, § 148B. In *Debnam v. FedEx Home Delivery* (No. 10-11025), FedEx argued the Independent Contractor Law applied to individuals, not business entities like the partnership and LLC plaintiff operated. The court agreed with FedEx and held that the independent contractor's formation of a business entity employing multiple drivers and operating numerous delivery routes demonstrated that the plaintiff was a "legitimate independent contractor" in a "business-to-business relationship." While not a silver bullet to independent contractor misclassification claims, this favorable decision should benefit other transportation companies doing business with independent-contractor-owned business entities that face similar claims in the future.

*Andrew J. Butcher,*  
Washington, D.C.

## *The Dangers of Texting While Driving*

The dangers of texting while driving are obvious, leading many states to enact legislation banning the practice. Moreover, the liability of the driver distracted by reading a text message has been well established. But, what about the individual on the other end of the message?

As a matter of first impression, a New Jersey appellate court recently held that a sender of a text message may potentially be liable for an accident caused by the receipt of his text message but only if the sender "knew or had special reason to know" the recipient would view the text while driving. Although the evidence did not support a finding against the defendant in this case, the court suggested a sender's personal relationship or prior experience with a recipient may put him or her on notice that the recipient will read the text message while driving. This case may have broader implications for companies, including motor carriers, that text or send other wireless communications to drivers who they have reason to know will read the messages while driving.

*Brandon K. Wiseman,*  
Indianapolis

## *California Court Supports Insurance Chargebacks to Independent Contractors*

The California Court of Appeals recently held that chargebacks to owner-operators for certain insurance costs are allowable even though California law prohibits transacting insurance by unlicensed entities.

In a class action, Rodriguez, an independent contractor providing services for RWA Trucking, claimed RWA unlawfully engaged in and profited from the sale of insurance when it deducted liability and workers' compensation insurance costs and an administrative fee from driver compensation.

Relying on obstacle preemption — federal preemption of a state law that stands as an obstacle to the federal law — the court found that state law cannot require motor carriers to first become licensed to sell insurance before facilitating and profiting from driver purchases of liability insurance because federal leasing regulations permit motor carriers to engage in such activities.

The court nevertheless found that charging back for workers' compensation insurance violated California state law and is not preempted by federal law.

*Gregory M. Feary,*  
Indianapolis

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Call Karen Farrell at (317) 637-1777 with any questions.



# Mileposts

## *Scopelitis Firm Opens Doors to International Commerce*

If the Scopelitis firm's recent webinar on international issues is any indication, logistic providers will continue to expand their services into international markets, while others will open those markets soon – despite the complicated web of legal issues they need to negotiate in order to do so.

Presented as part of the “Scopelitis Internet Conference Series,” the webinar attracted a variety of companies in the transportation and logistics industry, including a number of freight forwarders, customs brokers and NVOCCs (non-vessel operating common carriers).

Among the firm's attorneys who regularly advise clients with respect to international transportation and logistics matters are the three presenters of the webinar – Nathaniel Saylor, Chris McNatt and John Dimitry, of the Firm's Indianapolis, Los Angeles, and Dallas/Fort Worth Offices, respectively.

Saylor regularly advises clients regarding licensing and regulatory compliance, but cautions that clients should also be concerned with protecting their commercial interests. According to him, a surprising number of logistics providers operating in international commerce rely on ‘off-the-shelf’ or otherwise outdated terms and conditions, bills of lading, air waybills, and other transactional documents.

“A proactive review of documentation, including terms and conditions, would benefit any company providing services in international commerce as part of a multi-modal movement,” Saylor said. “The review would ensure that the documentation is accurate, up to date and fully protects the company's interests.”

McNatt's practice in international transportation law focuses upon transportation providers' compliance with U.S. law, international cargo claims, and customs compliance. His clients include air freight forwarders and ocean transportation intermediaries.

Dimitry is also familiar with international transportation issues. He joined the Scopelitis firm nearly two years ago after 13 years in a number of key roles as inside counsel to leading U.S. domestic and global logistics providers. He has negotiated hundreds of contracts with major multinational companies and has developed contracting and compliance policies for companies immersed in international commerce.

In this webinar, the Scopelitis trio presented topics including Federal Maritime Commission regulations, international cargo liability, issues in handling foreign agents and operations, and U.S. import-export compliance.

Past webinar topics have included legal issues in the owner/operator model, trends in transportation litigation, driver “whistleblower” complaints, transportation risk management, and strategies for limiting liability in cargo claims.

## *For the Record*

**Rebecca S. Trenner** has been named a shareholder in the firm. Becky will continue her unemployment tax practice in the Indianapolis office.

Congratulations to **Paul D. Root** who began his practice this fall as an associate in the Indianapolis office.

## *On the Road*

Mike Langford will present “Strategies in Addressing Traumatic Brain Injury Claims” at the Trucking Boot Camp for Claims Professionals, March 10, in **Denver** and April 10, in **Dallas**.

Jay Starrett will present, “Strategies in Addressing Traumatic Brain Injury Claims” at the Trucking Boot Camp for Claims Professionals, March 21, in **Scottsdale, Arizona** and April 8, in **Chicago**.

Kevin Phillips will provide a legal update at the International Warehouse Logistics Association's 2014 Convention and Expo, March 23-25, in **Phoenix**. Nathaniel Saylor and Eric Meyers will also attend.

Nathaniel Saylor will attend AirCargo 2014, March 30-April 1, in **Orlando**.

Nathaniel Saylor will attend the Transportation Intermediaries Association's Great Ideas Conference and Exposition, April 9-12, in **Tucson**.

Don Vogel will speak on motions to transfer for forum non conveniens at the TLA/CTLA Annual Conference, May 29, in **St. Petersburg, Florida**.



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# Dispatches

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Braden Core reports that in October the Federal Reserve published the Beige Book, a periodic report on overall trends in the U.S. economy. The Fed reported that most of the country saw **modest rises in demand for transportation services and that port activity remained robust in the Southeast.** The report also indicated that, while wages for drivers were edging up, trucking firms were having difficulty taking rate increases in most areas of the country. The Fed publishes the Beige Book eight times a year.

*The Transportation Brief<sup>®</sup> is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light, Hanson & Feary would be pleased to provide more specific information or individual advice on matters of interest to our readers.*

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