Defending Vicarious Liability Claims Against Brokers in the Wake of *Volkova*

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Numerous federal district courts have followed the *Volkova v. C.H. Robinson Co.*[1] decision from the United States District Court for the Northern District of Illinois and ruled that negligent hiring/selection claims asserted against property brokers are preempted by the Federal Aviation Administration Authorization Act ("FAAAA")[2] because they relate to and would have substantial economic impact on the "core" service provided by brokers – hiring motor carriers to transport shipments.[3] With FAAAA preemption now offering a complete defense to liability for negligent selection claims in many jurisdictions, plaintiffs will inevitably shift their focus to vicarious liability theories of liability against brokers and argue that their case fits the *Sperl v. C.H. Robinson Worldwide, Inc.*[4] fact pattern. As this article examines, there is strong existing case law upon which to combat vicarious liability claims on the merits, and novel arguments to present to courts that FAAAA preemption should also preempt vicarious liability claims.

Attacking Vicarious Liability Claims on the Merits

One unfortunate aspect of the *Volkova* case is that while the court easily concluded that the negligent hiring claims were preempted by FAAAA, it allowed the vicarious liability claims to go to trial. The jury awarded a verdict against the broker in an amount of $18.6 million.[5] It is not clear what particular facts were present in the *Volkova* case that precluded summary judgment on the vicarious liability claims. There is no written opinion, as the court refused to even consider a motion for summary judgment on the vicarious liability issue.[6] In any case, plaintiffs, who obviously do not like *Volkova* for what it does to their negligent hiring claims, readily cite it for the proposition that their vicarious liability claims should proceed to trial.

The outcome in *Volkova* for the vicarious liability claims was surprising given other favorable decisions from Northern District of Illinois. Several decisions have rejected the assertion that instructions and requirements contained in a broker-carrier agreement or rate confirmation constitute "operational control" over the carrier or driver sufficient to impose vicarious liability on a broker. This includes instructions in a rate confirmation regarding pick-up and delivery times/locations, trailer specifications, loading and unloading of cargo, and instructions to the drivers to make check-calls to broker to apprise the broker of the status in the delivery process or in the event of an emergency.[7] The same approach has been followed in other federal district courts.[8] Such activities are in the view of most federal courts, "incidental details required to accomplish the ultimate purpose for which [the broker] [is] hired by its shipper – the delivery of the load to its proper destination in a timely fashion" and do not indicate operational control by the broker over the carrier's operations.[9]

Fortunately, the Seventh Circuit recently weighed in on the issue of vicarious liability in *Kolchinsky v. Western Dairy Transp., LLC,*[10] producing another favorable result that should prove helpful to brokers responding to vicarious liability claims and the inevitable attempt to make every case the new *Sperl* based on the existence of common requirements found in broker-carrier agreements and rate confirmations.

Addressing the "cardinal" issue of control necessary for finding an agency relationship, the Seventh Circuit observed:

> [Plaintiffs'] strongest facts in support of an agency relationship are that WD Logistics [broker] required Bentley [driver] to contact it at various times when carrying its loads, including a daily status call and a call upon delivery, and that WD Logistics could charge Bentley Trucking for damages if a delivery was late or damaged.[11]

In the view of the court, however, "none of these facts show the degree of control that Illinois courts have required when finding that an agency relationship exists."[12] Similarly, the fact that a broker requires delivery of a load at a designated location and time and sets rules for the loading and unloading is insufficient to find an agency relationship as long as the broker does not have the power to "control the manner of delivery."[13]

The court also found it important that broker-carrier agreement provided that the carrier had "full control" over its personnel, its operational costs, and its equipment, and that the broker and carrier adhered to the agreement.[14] While the court noted that it was "somewhat distracting" that the broker, and not the cargo owners, paid the carrier and had the power to fire the carrier, the court ultimately found these facts to be insignificant. The broker did not deduct income taxes or social security contributions like it would for an employee. Rather, the carrier was responsible for all payroll related expenses for drivers.[15] The court also rejected the assertion that the identification

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of the driver as a "pickup agent" on bills of lading created an apparent agency relationship with the broker, noting that it was difficult to imagine how the driver appeared to the personal injury plaintiffs to be the broker's agents since they never saw the bill of lading.[16]

The *Kolchinsky* is also important because it tackles *Sperl* head-on,[17] although district court decision it affirmed did so in a more comprehensive matter.[18] As noted by that court, the broker in *Sperl* imposed a *system* of fines and a tight schedule required the driver to violate hours of service regulations in order to deliver the cargo on time, among other unusual circumstances in play. The broker in *Sperl* also negotiated the freight charges with the driver, booked the shipment with driver, and paid the driver directly. These facts were not present in *Kolchinsky*.[19] Accordingly, the court affirmed entry of summary judgment on the vicarious liability claims against the broker.

FAAAA Preemption of Vicarious Liability Claims

Two federal district courts have ruled that vicarious liability claims are preempted by FAAAA. In *Creagan v. Walmart,* the Northern District of Ohio focused on negligent hiring claims, and concluded that they were preempted by FAAAA because they relate to the core service of hiring a motor carrier. But in a footnote, the *Creagan* court also ruled that the vicarious liability claims against the shipper and broker were preempted by FAAAA, reasoning that the plaintiff did not allege any facts connecting the broker to the driver, other than the broker's selection of the motor carrier that employed driver.[20] In *Gillum v. High Standard, LLC,* the Western District of Texas held that the FAAAA preempted the plaintiff's claims against a broker under theories of negligent hiring and vicarious liability, but the vicarious liability claims were not analyzed in detail.[21] Although these decisions deal with vicarious liability in a limited manner, they nonetheless create an opening for asserting FAAAA preemption for such claims.

Regardless, the rationale for FAAAA preemption of negligent hiring claims applies equally to vicarious liability claims premised on common allegations of control asserted by plaintiffs. Typically, plaintiffs allege that brokers controlled the driver because the broker communicated directly with the driver regarding the load; required that a specific trailer be used; specified the pickup date and time and delivery date and time; required the shipment to be transported at a certain temperature; and required the driver to make check-calls and to report any delays.

Such communications relate to the "services" commonly provided by brokers. A broker cannot select and assign a shipment to a motor carrier without communicating the time, place, and location of pick-up and delivery, and trailer specifications. Moreover, a requirement that a driver make check-calls to report on the status of a shipment, and other similar requirements are commonly found in broker-carrier agreements.[22] While the core service of a broker is selecting a motor carrier, it is not the only service a broker provides.

As discussed above, most federal courts have rejected the assertion that these types of instructions and requirements constitute "operational control" over the carrier or driver sufficient to impose vicarious lability on a broker. But allowing vicarious liability claims against brokers on the ground that such requirements exist is also an attempt to use state tort law to determine and control how common broker services are provided. Therefore, such claims should be preempted by FAAAA because, as stated in *Volkova*, "[e]nforcing state negligence laws that would have a direct and substantial impact on the way in which freight brokers hire and oversee transportation companies would hinder the objective of the FAAAA."[23]

It remains to be seen whether courts will extend FAAAA preemption to vicarious liability claims. Recently, in *Ying Le v. Global Sunrise, Inc.,*[24] the United States District Court for the Northern District of Illinois rejected the argument presented above at the pleading stage. Its grounds for doing so appears to have missed the point, concluding that claims for negligent hiring are preempted by FAAAA because they seek to hold the broker liable for its own actions, while vicarious liability claims are not preempted because they seek to hold the broker liable for liable for the actions of the motor carrier and driver.[25] The court also appears to have read Sperl too broadly with respect to the facts necessary to establish agency between a broker and driver, especially in light of the *Kolchinsky* decision.[26] Whether a claim is for negligent hiring or vicarious liability, the liability of a broker is necessarily based on what the broker did as part of its services, not what the carrier or driver did.

Endnotes

1 *Volkova v. C.H. Robinson Co.,* 2018 U.S. Dist. LEXIS 19877, *8-9 (N.D. Ill. 2018)

2 49 U.S.C. §14501(c).

3 *See, e.g., Creagan v. Wal-Mart Transportation, Inc.,* 354 F. Supp. 3d 808, 813-814 (N.D. Ohio 2018) and *Miller v. C.H. Robinson Worldwide, Inc.,* 2018 U.S. Dist. LEXIS, 194453, *9-11 (D. Nev. 2018), which were appealed to the Sixth and Ninth Circuits, respectively. No decisions have been issued.

4 *Sperl v. C.H. Robinson Worldwide, Inc.,* 408 Ill. App. 3d 1051 (2011).

5 "$18.6 awarded in fatal tractor trailer crash." *Chicago Daily Law Bulletin,* May 21, 2019, Vol. 65, No. 99.

6 Oddly, it appears that the *Volkova* court simply refused to consider a motion for summary judgment on the vicarious liability issue filed by the broker. *Volkova v. C.H. Robinson Co.,* 1:16-CV-01883, Doc. 123, 130.

7 *Boyle v. RJW Transportation, Inc.,* 2008 U.S. Dist. LEXIS 48724, *15 (N.D. Ill. 2008); *Scheinman v. Martin's Bulk Milk Serv., Inc.,* 2013 U.S. Dist. LEXIS 172599, *33-47 (N.D. Ill. Dec. 9, 2013) (collecting cases); *Kolichinsky v. Bentley,* 2019 U.S. Dist. LEXIS 16834, *6-8 (N.D. Ill. 2019).

8 See, e.g., *Dragna v. A&Z Transp., Inc.,* 2015 U.S. Dist. LEXIS 19766, *13-14 (M.D. La. 2015) *aff'd* 638 Fed. Appx. 314 (5th Cir. 2016) (surveying federal case law).

9 *Dragna*, 2015 U.S. DIST LEXIS 19766 at *15-16 (granting summary judgment because "check-in" calls to apprise broker of the driver's status in the delivery process, or in the event of an emergency, does not amount to operational control," even though broker could fine carrier for non-compliance). See also *Martin's Bulk,* 2013 U.S. Dist. LEXIS 172599 at * 31-48 (granting summary judgment in favor of shipper and broker, because "requirement of timely delivery of goods merely specified

particular hauling task, i.e. delivery in a timely fashion–and did not control the manner in which the task was performed.") and *Kolchinsky,* 2019 U.S. Dist. LEXIS 16834,*7 (although broker tracked shipment via GPS monitoring and required daily check calls, the court concluded "the fact that [broker] wanted to know whether their loads would be delivered on time and keep track of their location does not suggest direction or control over how [the motor carrier] carried out the work of hauling trailers and loads from one location to another.").

[10] *Kolchinsky v. Western Dairy Transport, LLC*, 949 F.3d 1010 (7th Cir. 2020).
[11] *Id.* at 1013.
[12] *Id.* at 1013-1014,
[13] *Id.* at 1014.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1015.
[17] *Id.* at 1013.
[18] *Kolchinsky,* 2019 U.S. Dist. LEXIS 16834 at * 8-9.
[19] *Id.*
[20] *Creagan,* 354 F. Supp. 3d at 814, n. 7.
[21] *Gillum v. High Standard, LLC,* 2020 U.S. Dist. LEXIS 14820 * 1 (W.D. TX 2020).
[22] *Dragna*, 2015 U.S. Dist. LEXIS 19766 at *13-14.
[23] *Volkova,* 2018 U.S. Dist. LEXIS 19877 at *10.
[24] *Ying Ye. v. Global Sunrise, Inc.,* 2020 U.S. Dist. LEXIS 37142, *1 (N.D. Ill. 2020).
[25] *Id.* at 12.
[26] *Id.* at 13.