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A prior article from Benesch Friedlander Coplan & Aronoff LLP's Transportation & Logistics Group

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Now You See Them—Now You Don't: The Magic of Using FAAAA Preemption to Make a Plaintiff's State Law Claims Disappear

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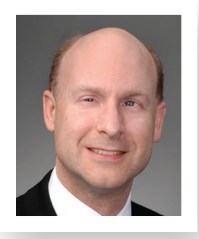

Marc S. Blubaugh

Magic makes the impossible possible. Federal preemption aims at a similarly lofty goal. After all, the power to preempt a plaintiff's state law claims is the power to transform a plaintiff's entire case in a radical and unexpected way. For instance, a plaintiff who finds a fraud claim preempted may no longer have any prospect of recovering punitive damages or attorneys' fees. Likewise, a plaintiff who finds a deceptive trade practices act claim preempted may no longer anticipate an automatic award of treble damages. Similarly, a plaintiff who finds a quasi-contractual claim preempted may recognize that it must live with the written contract at issue. In short, preemption can effectively take the steam out of a plaintiff's case.

On February 20, 2008, the United States Supreme Court unanimously affirmed the broad, preemptive power of the Federal Aviation Administration Authorization Act ("FAAAA") by striking down a Maine statute that imposed certain burdens on motor carriers delivering cigarettes within the state. *Rowe v. New Hampshire Motor Transport Association, et al.*, 128 S.Ct. 989 (2008). While the *Rowe* decision itself did not involve a freight claim, the case nonetheless is a boon for parties defending freight claims, particularly intra-state freight claims where preemption under the Carmack Amendment is not available.

Origins of the FAAAA

By way of background, the U.S. Congress enacted the FAAAA on August 23, 1994. The FAAAA amended the Interstate Commerce Act, effective January 1, 1995. Pub. L. No. 103-305, 108 Stat. 1569, 1607 (1994). Among other things, the FAAAA expressly preempted a wide variety of state and local regulations and state law claims affecting motor carriers. See Section 601 of the FAAAA (originally codified at 49 U.S.C. § 11501(h)). However, on December 29, 1995, the U.S. Congress enacted the Interstate Commerce Commission Termination Act (the "ICCTA"), effective January 1, 1996. Pub. L. No. 104-88, 109 Stat. 803, 804. Section 103 of the ICCTA recodified former 49 U.S.C. § 11501(h) as 49 U.S.C. § 14501(c). In addition, the ICCTA also notably **expanded** federal preemption under the FAAAA to include preemption of claims not only against motor carriers but also against **transportation brokers and freight forwarders**. HR. Rep. No. 311, 104th Cong., 1st Sess. 119-20 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 831-32.

49 U.S.C. § 14501 is entitled "Federal authority over **intrastate** transportation." (emphasis added). 49 U.S.C. § 14501(c)(l) now specifically provides:

> **General rule.**—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States **may not** enact or enforce a law, regulation, or other provision having the force and effect of law **related to** a price, route, or **service** of any **motor carrier** (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) **or any motor private carrier, broker, or freight forwarder with respect to the transportation of property**.

(emphasis added). As a result, the FAAAA preempts state laws that relate to a price, route, or service of motor carriers and intermediaries.

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The ADA is an Analogical Template for The FAAAA

The FAAAA was modeled upon a virtually identical provision in the Airline Deregulation Act of 1978 (the "ADA"), presently codified at 49 U.S.C. § 41713(b)(4)(A). That statute, which is entitled "Preemption of authority over prices, routes, and services," provides:

> **General rule.**—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more states **may not** enact or enforce a law, regulation, or other provision having the force and effect of law **related to** a price, route, or **service** of an **air carrier** or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(emphasis added). Therefore, courts have universally recognized that, in order to understand the preemptive scope of 49 U.S.C. § 14501(c), courts must first look to the ADA.

For instance, the court in *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F.Supp. 665 (N.D.Ga. 1997) expressly found that 49 U.S.C. § 14501(c) preempts state law claims in a manner *identical* to the ADA:

> Considering the analysis motivating the Supreme Court's holdings regarding the preemption provisions of ERISA and the ADA, the Court finds that Congress intended for the preemption provision of the FAAAA-which employs **identical language** to the preemption provision of the ADA-to be **broad** in scope and that the FAAAA's preemption provision precludes any state enforcement action having a connection with or reference to any price, route, or service of any motor carrier, motor private carrier, or air carrier. Further, the language Congress chose in drafting the preemption provisions of the FAAAA shows that Congress intended for the preemption provisions of the FAAAA to be applied **in an identical manner** as the preemption provision of the ADA.

Id. at 668 (emphasis added). The *Deerskin* court also noted that the House Conference Report on the preemption provisions of the FAAAA explains that 49 U.S.C. § 14501(c) "is **identical** to the preemption provision deregulating air carriers… and is intended to function in the **exact same manner** with respect to its preemptive effects." *Id.* at 669 (citing H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 85 (1994), reprinted in U.S.C.C.AN. 1715, 1757) (emphasis added). Likewise, the court noted that the House Conference Report explains that 49 U.S.C. § 14501(c) was intended to operate "**in an identical manner** to the preemption provision passed in 1978 contained in" the ADA *Id.* (internal citations omitted). *See also, Yellow Trans., Inc. v. DM Transp. Mgmt. Servs., Inc.*, 2006 WL 2871745 at *2 (E.D.Pa. 2006) (the Supreme Court's construction of the preemption provision of the ADA provides "an analogical template by which to interpret 14501(c)(l) of the ICCTA"). As described below, the ADA, which provides for broad preemption of all state law claims other than claims for breach of contract, is the appropriate starting place for determining the preemptive scope of 49 U.S.C. § 14501(c)(1).

1. *The ADA Broadly Preempts State Law Claims Other Than Breach Of Contract.*

The ADA broadly preempts state law claims, other than breach of contract, brought *against* air carriers. In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), the United States Supreme Court held that the preemptive language in the ADA must be construed broadly:

> Section 1305(a)(l) expressly preempts the States from enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier…. For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a **broad** one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' Black's Law Dictionary 1158 (5th ed.1979)—**and the words thus express a broad preemptive purpose**.

Id. at 383 (emphasis added). In *Morales*, the National Association of Attorneys' General (the "NAAG") had adopted guidelines that contained detailed standards governing, *inter alia*, the content and format of airline fare advertising. These standards purported to be enforceable through the various states' consumer protection statutes. When threatened with enforcement, various airlines successfully sought to enjoin enforcement and to have the guidelines declared preempted by the ADA. The Supreme Court found that the broad preemptive language of the ADA unequivocally prohibited plaintiffs from enforcing such guidelines because the guidelines "related to" the air carrier's rates or service. *Id.* at Syllabus ¶ 2. *See also, Id.* at 383-386 (noting expansive reach of preemption under ADA).

The Supreme Court elaborated upon *Morales* and its analysis of the ADA's preemptive power a few years later in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In *Wolens*, certain plaintiffs brought a class action against an air carrier for breach of contract and for an alleged violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. As in the case at hand, the plaintiffs essentially alleged that the air carrier was liable for retroactively changing certain terms and conditions of the parties' relationship. As in *Morales*, the air carriers asserted that the state law claims were preempted by the ADA. The Supreme Court agreed and held that:

> The full text of the ADA's preemption clause, and the congressional purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, impel the conclusion that § 1305(a)(l) preempts plaintiffs' Consumer Fraud Act claims. The Illinois Act is prescriptive, controlling the primary conduct of those falling within its governance; the Act, indeed, is paradigmatic of the state consumer protection laws that underpin the NAAG guidelines. Those guidelines highlight the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation. The guidelines illustrate that the Illinois Act does not simply give effect to bargains offered by the airlines and accepted by customers, but serves as a means to guide and police airline marketing practices.

Id. at Syllabus ¶ (b). However, the Supreme Court also found that the ADA did not bar adjudication of routine breach of contract claims. *Id.* at Syllabus ¶ (c). In other words, under *Wolens*, a court is permitted to hold two parties to their contract but is not permitted to enlarge or enhance that bargain based on state laws or policies external to the contract. *Id.* at 223.

2. *The ADA Preempts Non-Contractual Freight Claims In Particular*

Other courts have naturally and consistently followed the Supreme Court's decisions regarding the broad, preemptive power of the ADA in the precise context of claims arising from damaged or lost freight. For instance, in *Trujillo v. Am. Airlines, Inc.*, 938 F.Supp. 392 (N.D.Tex. 1995), *aff'd* 98 F.3d 1338, a shipper had retained an air carrier to transport certain goods. The carrier allegedly made certain misrepresentations to the shipper about the manner in which the shipper could insure the goods. Unfortunately, the carrier lost the goods in transit. The shipper sued the air carrier for a violation of the Texas Deceptive Trade Practices and Consumer Protection Act as well as for negligence and gross negligence. The court held that the shipper's non-contractual claims were preempted by the ADA:

> State causes of action are available to enforce bargains for services into which an airline voluntarily entered but may not be used to impose external requirements upon airlines in the provision of services to the consumer. Plaintiff's breach of contract claim was the means by which he could enforce the agreement for services he made with American. **He may not cast his claims as ones for negligence or deceptive trade practices to extend his recovery beyond the terms of the contract.** To do so would frustrate Congress' intent to deregulate the airline industry.

Id. at 394 (internal citations omitted)

(emphasis added). Likewise, in *Power Standards Lab, Inc. v. Federal Express Corp.*, 127 Cal. App.4th 1039 (2005), a shipper sued a carrier for damaging certain electronic equipment during the course of a purely intrastate move. The shipper included a claim for breach of an implied covenant of good faith and fair dealing and, at trial, successfully obtained a judgment of $78,000.00 in compensatory damages and $600,000.00 in punitive damages. However, the California Court of Appeals reversed the judgment, finding that the ADA, as a matter of law, preempted all state law claims other than breach of the express contract:

> The dispositive question is whether federal law—in the form of a preemption provision in the Airline Deregulation Act of 1978 and a doctrine of federal common law—precludes a state court from awarding any relief greater than was expressly and contractually negotiated between the carrier and the shipper. **We answer this question in the affirmative.**

Id. at 1041 (emphasis added). Similarly, in *Dugan v. Fedex Corp.*, 2002 WL 31305208 (C.D.Cal. 2002), customers of a carrier brought a class action against the carrier for alleged damage to shipped packages. The plaintiffs sued for violation of California unfair business practices statutes, intentional misrepresentation, negligent misrepresentation, and unjust enrichment. The carrier moved for judgment on the pleadings based upon the ADA's preemption of state law claims. The court granted the motion, finding that all of the shipper's claims were preempted by the ADA under *Morales* and its progeny. *Id.* at *3.

State and federal precedent to the same effect is abundant throughout the United States. *See, e.g., Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997) (shipper's claims under Texas Deceptive Trade Practice-Consumer Protection Act against air carrier for loss of packages was preempted by ADA); *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1197 (9th Cir. 1999) ("… [W]e agree with the Fifth Circuit that state law regulating the scope of air carrier liability for loss or damage to cargo is preempted by the ADA"); *Breitling U.S.A. Inc. v. Federal Express Corp.*, 45 F.Supp.2d 179 (D.Conn. 1999) (shipper's claims for negligence, unjust enrichment, and a violation of the Connecticut Unfair Trade Practices Act against trucking company arising from theft of freight from delivery truck were all preempted by the ADA); *Forman v. Federal Express Corp.*, 753 N.Y.S.2d 348 (2003) (holding that the ADA preempts all of shipper's tort and punitive damages claims against carrier for property lost in intrastate transportation); *Ing v. Am. Airlines*, 2007 WL 420249 (N.D.Cal. 2007) (ADA preempts all of shipper's state law claims for violations of California's Business and Professions Code, negligence, trespass, conversion, and intentional infliction of emotional distress related to damaged property transported by air).

In short, the ADA broadly preempts all state law claims other than breach of express contract. As explained above, this ADA precedent constitutes an analogical template that a court must use in applying 49 U.S.C. § 14501(c)(l).

Like the ADA, 49 U.S.C. § 14501(c)(1) Preempts State Law Claims Other Than Breach of Contract

Like the ADA, 49 U.S.C. § 14501(c)(1) preempts state law claims other than breach of contract. For instance, only three months after the *Rowe* decision was issued, the Superior Court for the State of Alaska entered judgment on the pleadings against a shipper who had brought a wide variety of state law claims against a transportation broker.

In *Delta Leasing, LLC v. American Fast Freight, Inc., et al.*, Alaska Superior Court Case No. 3AN-07-10226, a shipper, Delta Leasing, LLC ("Delta") filed an action against American Fast Freight, Inc. (''AFF") and others for injuries allegedly arising out of the intrastate transportation of a modular housing unit (the "Unit") from Anchorage to the North Slope. In particular, Delta alleged that it contracted with AFF to have AFF perform the actual transportation of the Unit. AFF, on the other hand, maintained that it had only been retained to *broker* the transportation of the Unit. In any event, AFF did in fact broker the transportation of the Unit to a motor carrier, Starla McEntire d/b/a 49 State Freight ("49 State Freight"). 49 State Freight utilized Jon Odsather ("Odsather") or a partnership in which he was involved, J & M Leasing ("Defendant J & M"), to transport the Unit. Delta alleged that Odsather or J & M engaged in unsafe and negligent driving that led to an accident and the destruction of the

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Unit. McEntire also apparently had inadequate insurance to cover the loss. Neither AFF, 49 State Freight, Odsather, nor J & M compensated Delta for the loss of the Unit, the various clean-up costs, or the other resulting damages.

In its Complaint against AFF, Delta alleged: (1) breach of contract, (2) promissory estoppel, (3) intentional or negligent misrepresentation, (4) a violation of the Unfair Trade Practices and Consumer Protection Act, and (5) negligence. The claims all related to AFF allegedly misleading Delta about the nature of AFF's business, AFF's alleged negligence in retaining 49 State Freight, AFF's negligence in transporting the goods, AFF's alleged misconduct after the loss in managing the freight claim, and other allegedly untoward activities. Delta sought hundreds of thousands of dollars as a result of its various state law claims—claims which created a colorable basis for recovery of treble damages and attorneys' fees.

AFF moved for judgment on the pleadings, asserting that all of Delta's non-contractual claims were preempted by 49 U.S.C. § 14501(c)(l). Delta vigorously opposed the motion, primarily arguing that a distinction exists between claims arising out of contract negotiations (or post-loss misrepresentations) and claims that "relate to… a service" of a motor carrier or broker. However, the Alaska Superior Court soundly rejected Delta's reasoning:

> The court does not find Delta's distinction between contract negotiation and contract performance to be valid. First, the language of the ICCTA and interpreting case law do not recognize a distinction between claims attacking contract negotiations and claims attacking contract performance and Delta cites no authority for this distinction. … Second, the essential charge of plaintiff's disputed claims is dissatisfaction with AFF's shipping activities as defined by AFF's contractual relationship and its shipping activities…. Third, the distinction is not rational because a claim of misrepresentation during contract negotiations must necessarily show how the misrepresentation differs from actual performance. Therefore, it "relates to" the services provided by AFF under the broad interpretation of the statute. **Finding a distinction would be inimical to the broad and expansive preemptive effect intended by Congress.**

Id. (emphasis added). For similar reasons, the court likewise found no difference between claims relating to contract performance and claims relating to post-performance representations. *Id.* In short, the Alaska Superior Court ratified the broad preemptive effect of the FAAAA upon freight claims:

> Based on the ICCTA's plain meaning and court's [sic] broad interpretation of its preemptive scope, the court finds that Delta's claims relate to dissatisfaction with a shipping service provided by AFF. Therefore, under the preemptive force of the ICCTA, **Delta's claims, other than breach of contract, impermissibly seek [to] extend Delta's recovery beyond the terms of the contract and are preempted**.

Id. (emphasis added). As a result, the only claim that the court permitted to survive preemption was a claim for breach of contract.

The Alaska Superior Court is not alone in its reliance upon FAAAA preemption in the context of a freight claim. For instance, In *Vieira v. United Parcel Service, Inc.*, 1996 WL 478686 (N.D.Cal. 1996), a plaintiff shipper sued a carrier for negligence, conversion, and breach of contract arising out of the carrier's loss in transit of two gold rings. The carrier argued that the plaintiff's claims were all preempted by 49 U.S.C. § 14501(c)(l). After noting that the courts have given the "broadest possible scope" to preemption under 49 U.S.C. § 14501(c), the court concluded that the plaintiff's non-contractual claims necessarily "relate to" the carrier's services and, therefore, were preempted in total. *Id.* at *1. As a result, the court entered judgment in favor of the carrier as a matter of law.

Similarly, in *Yellow Transp., Inc., supra*, a motor carrier sued a transportation broker for alleged misconduct in arranging for the transportation of freight through the carrier. In short, the carrier alleged that the transportation broker misrepresented the volume of work that it was performing for a certain customer. The motor carrier sued under theories of misrepresentation, breach of contract, unjust enrichment, and fraud. The court ultimately dismissed all of the plaintiff's claims except for the breach of contract claim. The court noted:

> It is also clear, based upon applicable case law, that these tort and quasi-contract claims implicate state interests external to the contractual relationship between the parties, thus constituting a state enforcement action 'related to' plaintiff's 'price.'

Id. at *3. As a result, the only claim that was not preempted was the plaintiff's claim for breach of contract.

Rockwell v. United Parcel Service, Inc., 1999 WL 33100089 (D.Vt. 1999) provides yet another example of the preemptive effect of 49 U.S.C. § 14501(c)(1). In *Rockwell*, a plaintiff shipper sued a carrier under various state law tort claims for injuries arising out of a pipe bomb that the motor carrier unwittingly delivered. The carrier defended the action by seeking dismissal of the state law claims due to preemption under 49 U.S.C. § 1450l(c). The court agreed that the shipper's claims were not cognizable under Vermont law:

> In the context of delivering packages, Ms. Rockwell's complaint regarding UPS's package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted. *Trujilo v. American Airlines, Inc.*, 938 F.Supp. 392, 394 (N.D. Tex. 1995) ('It is clear that the act [plaintiff] complains of—preparation of the Waybill . . . and delivery of the package—are services within the meaning of [49 U.S.C.] 41713(b)(l)' and are therefore preempted); aff'd 98 F.3d 1338 (5th Cir. 1995). **Tort claims regarding a carrier's shipment of packages 'would affect [its] provision of air shipment services' and are thus preempted.**

Id. at *2 (emphasis added). Tort claims for freight loss and damage are, by definition, "tort claims regarding a carrier's shipment of packages" and are, therefore, plainly preempted.

Likewise, in *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F.Supp. 665

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(N.D.Ga. 1997), a shipper sued a motor carrier for, among other things, breach of contract, fraud, negligence arising out of allegedly inappropriate freight charges. The carrier defended by asserting federal preemption under 49 U.S.C. § 14501(c)(l). The court fully agreed and dismissed the shipper's state law claims other than breach of contract:

> After considering the reasoning of Supreme Court and Circuit court cases interpreting the identical language of the ADA's preemption provision, the Court finds that **a state law tort action against a carrier**, where the subject matter of the action is related to the carrier's prices, routes, or services, **is a state enforcement action** having a connection with or reference to a price, route or service of any motor carrier, motor private carrier, or air carrier for purposes of the FAAAA. Accordingly, any such state law tort action is preempted by the FAAAA.

Id. at 672 (internal citations omitted). In other words, the court emphasized the well-established principle that tort actions against carriers are preempted when the tort action relates to a service of the carrier.

Finally, in *Dynamic Movers v. Paul Arpin Van Lines, Inc.*, 956 F.Supp. 836 (E.D.Wis. 1997), a plaintiff sued a company that operated as a carrier and as a transportation broker for allegedly violating the Wisconsin Fair Dealership Law (the "WFDL"). The plaintiff carrier alleged that the transportation broker terminated the parties' relationship inappropriately and, in doing so, not only breached the agreement but violated the WFDL and committed tortious interference with certain business relationships. The court concluded that federal law preempted the application of WFDL to logistics services:

> Under federal law, a state may regulate the 'price, route or service' of any motor carrier transporting household goods but not any other motor carrier. 49 U.S.C. § 14501(a), (c). If the WFDL applies to logistics shipments, it would affect the cost and service of shipping. Because the WFDL denies the grantor unfettered discretion in terminating an agent, shipping may cost more, and the state has limited how the grantor provides service in the state. Under 1450l(a), the federal government, not the states, regulates the shipping of logistics. Therefore, the court cannot consider the logistics business as part of a dealership for the WFDL.

Id. at 839. In other words, the court unmistakably held that claims relating to the provision of transportation and logistics constituted claims that "relate to" a service and were, therefore, preempted.

Conclusion

No freight claims practitioner can afford to be ignorant of the broad scope of FAAAA preemption. Fortunately, the Supreme Court's recent decision in *Rowe* is a useful reminder of the breadth of preemption under the FAAAA. As the Supreme Court observed:

> And to interpret the federal law to permit these [restrictions on motor carriers], and similar, state requirements could lead to a patchwork of state service-determining laws, rules, and regulations. That statutory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

Id. Understanding the broad preemptive power of the FAAAA is essential for the proper defense of freight claims against motor carriers, transportation brokers, and freight forwarders, particularly when the transportation in question has an intra-state rather than interstate character, thereby making preemption of state law claims under the Carmack Amendment unavailable. In any event, as all of the foregoing demonstrates, while the effect of FAAAA preemption may appear magical to a plaintiff, such preemption is, in fact, readily accessible and far from mysterious.

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