The Preemptive Power of the FAAAA—
A Future in Decline?

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Enacted in 1994, the Federal Aviation Administration Authorization Act pre-empts state trucking regulations under the following language: "[A] State … may not enact or enforce a law … related to a price, route, or service of any motor carrier … with respect to the transportation of property."[1] Borrowed heavily from the Airline Deregulation Act of 1978, the language of the FAAAA similarly reflects the Congressional determination that "maximum reliance on competitive market forces" would result in lower rates and better service.[2] Since its passage, courts have determined that the FAAAA preempts a wide variety of state law claims, including claims for common law fraud, statutory fraud, negligence, gross negligence, unjust enrichment, and the imposition of constructive trusts.[3] However, application of the preemptive effect of the FAAAA is far from uniform across federal jurisdictions.

This article presents some of the latest court decisions that discuss the preemptive effect of the FAAAA, and also sets forth the latest legislative efforts to mold its future: will the FAAAA be strengthened or weakened as a preemptive force against patchwork regulations from state to state?[4]

The FAAAA and Negligent Hiring

Recent court decisions show that FAAAA preemption of state negligent hiring claims is inconsistently applied across federal jurisdictions. Specifically, in a July 2017 decision, *Mann v. C. H. Robinson Worldwide, Inc.*, the Western District Court of Virginia determined that the plaintiffs' negligent hiring claim was not preempted by the FAAAA, providing that a personal injury suit for negligent hiring is not an attempt to regulate the "services"[5] of a freight broker.[6] As such, alleging negligence for selecting an unsafe motor carrier does not have more than a "remote" connection to a broker's "services" and does not have a "significant impact" related to Congress' deregulatory and preemption related objectives. Further, the District Court determined that even if the negligent hiring claim had a sufficient impact upon broker services, it still would not be preempted because it would fall within the general "safety regulatory" exception.[7] The District Court noted that Congress did not intend for the FAAAA to remove all means of judicial recourse for those injured by illegal conduct.[8]

Similarly, in a June 2017 decision, *Muzzarelli v. UPS*, the Central District Court of Illinois held that the plaintiff's personal injury claim was not preempted for several reasons.[9] First, the personal injury claim was "too tenuously related" to be preempted because the case centered upon the placement of a package upon delivery, which would not significantly impact rates, routes, or services.[10] Second, the District Court provided that other courts repeatedly found against preemption in cases where a plaintiff invokes traditional tort law, suing for personal injuries. Third, the District Court stated that the United States Supreme Court does not interpret the ADA to preempt personal injury suits; therefore, the FAAAA should not, likewise, preempt the same. Fourth, the District Court's analysis set forth that the FAAAA fails to provide a federal remedy for personal injury suits and, therefore, it is unlikely that Congress intended to preempt them. Lastly, the District Court held that the FAAAA does not clearly manifest a Congressional intent to preempt state personal injury claims, but rather that the purpose of the FAAAA was solely to address loss or damage to property.

In contrast, the Northern District Court of Illinois recently rejected the analyses of the *Mann* case in a February 2018 decision, involving the same defendant. Specifically, *Volkova v. C.H. Robinson Co.* held that a plaintiff's negligent hiring claims against a freight broker were preempted by the FAAAA.[11] As in the *Mann* case, *Volkova* involved a plaintiff seeking damages for negligent hiring based on the personal injuries suffered due

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to the alleged negligence of a driver hired by the defendant broker. The District Court held that FAAAA preemption applied because the negligent hiring claim "directly implicates how [the broker] performs its central function of hiring motor carriers, which involves the transportation of property."[12] The Court explained that the FAAAA preempted the claim "because enforcement of the claim would have a significant economic impact on the services [the broker] provides."

Further, the *Volkova* Court specifically disagreed with the contention that personal injury related claims could not be preempted.[13] While the District Court sympathized with the plaintiff, it held that it "could not ignore the straightforward preemption analyses as laid out by the Supreme Court."[14] The Court then cited *Rowe v. New Hampshire Motor Transportation Association*,[15] where the Supreme Court found that statutes regulating the delivery of tobacco products were preempted—in spite of the State's argument that the laws were enacted in an effort to protect its citizens' public health. The District Court adopted the Supreme Court's reasoning that "despite the importance of the public health objective, we cannot agree … that the federal law creates an exception on that basis exempting state laws that it would otherwise pre-empt."[16] The *Volkova* Court held that the negligent hiring claims were preempted, and dismissed those claims against the broker defendants.[17]

Recent negligent hiring cases establish an ongoing dispute over the scope of FAAAA preemption, and recent cases involving unjust enrichment appear to be doing the same.

Unjust Enrichment's Uncertain Future

Since the passage of the FAAAA, courts generally have held that claims for unjust enrichment are preempted under the FAAAA without much, if any, analysis of the issue.[18] However, the Sixth Circuit Court of Appeals disagreed in its 2016 decision of *Solo v. UPS Co.*[19] In *Solo,* the plaintiffs filed a putative class action alleging that UPS had overcharged customers for liability coverage against damage to packages above certain declared values. Plaintiffs alleged both breach of contract and unjust enrichment, in the alternative. While the District Court originally dismissed the unjust enrichment claim,[20] the Sixth Circuit held that an unjust enrichment claim could be properly plead in the alternative. Specifically, the Sixth Circuit stated that while it was "not inclined to decide" the issue of FAAAA preemption because the District Court had not fully considered the argument, it provided "guidance" for the issue on remand: that the unjust enrichment claim was not preempted.

In *Solo,* the Sixth Circuit principally relied upon the Supreme Court's analysis of preemption under the Airline Deregulation Act.[21] The Sixth Circuit first explained that the FAAAA did not preempt breach of contract claims because contracts represented a carrier's "own self imposed undertakings" rather than "state-imposed obligations."[22] As such, preemption of contract claims would be inappropriate because "a remedy confined to a contract's terms simply holds parties to their agreements." By contrast, the Sixth Circuit noted that causes of action for the breach of the covenant of good faith and fair dealing *were* preempted, because the duty of good faith depended "on state policy" and "applied to all contracts and could not be disclaimed."[23] In other words, because the duty of good faith expanded contractual obligations—by ensuring that a party "does not violate community standards of decency, fairness, or reasonableness"—claims under that doctrine would be preempted.

Next, the Sixth Circuit determined that a claim for unjust enrichment was more like a contract claim than a claim for contractual bad faith. The Court explained that "unjust enrichment does not synonymously apply to all contracts as a matter of state policy." Instead, unjust enrichment serves to "effectuate the intentions of the parties or to protect their reasonable expectations." The Court noted that unjust enrichment claims look to "the particular parties to a transaction rather than universal, state imposed obligations," such as the duty of good faith. While the Sixth Circuit did not ultimately provide a ruling on whether an unjust enrichment claim is preempted, it clearly set forth that "this scenario may resemble" the breach of contract case.

At least one other federal court recently refused to apply *Solo* (but did not necessarily disagree with the Sixth Circuit's analysis). The District Court of New Jersey recently distinguished *Solo* on the facts in its September 2017 decision, *Mrs. Ressler's Food Prods. v. KZY Logistics, LLC*.[24] *Mrs. Ressler's* involved the loss of a shipment where the contract carrier subcontracted the shipment to another carrier in violation of the broker agreement. The subcontract carrier, ultimately responsible for the loss, filed a third party complaint against the broker, alleging unjust enrichment. In dismissing the unjust enrichment claim, the District Court acknowledged "the Sixth Circuit's sound reasoning" in *Solo,* but "decline[d] to adopt it to the instant case" because the unjust enrichment claim at issue was not plead in the alternative. Rather, it was brought by a third party plaintiff that had no express contract with the third party defendant. The Court determined that because there was no contractual relationship, the unjust enrichment claim at issue could "only be viewed as an enlargement or enhancement … based on state laws or policies."[25] Thus, such claim was preempted.

Based on the Sixth Circuit's reasoning in *Solo,* we may see courts declining to preempt unjust enrichment claims plead in the alternative,

whereas previously, there existed very few situations where an unjust enrichment claim could survive FAAAA preemption.

Amending the FAAAA: One Step Forward or One Step Back?

There are two proposed amendments to Section 14501(c) of the FAAAA pending in Congress—one that would increase the preemptive power of the statute ("Amendment A Positive"), and another that would weaken it ("Amendment B Negative"). While these proposed amendments may not become law in their present form, each further illustrates the uncertainty of how the federal government intends to oversee and regulate the transportation industry.

Amendment A Positive would preempt state laws and regulations prohibiting commercial motor vehicle operators subject to federal regulation[26] "from working to the full extent permitted or at such times as permitted under [federal law]."[27] Amendment A Positive appears to be a direct response to the Ninth Circuit Court of Appeals' 2014 decision in *Dilts v. Penske Logistics*, which held that the FAAAA does not preempt California meal and rest break laws.[28] The *Dilts* Court reasoned that "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide."[29] The Court held that because the meal and rest break laws did not directly "relate to" pricing, routes, or services by trucking companies, the FAAAA could not preempt those laws.

Proposed Amendment A Positive would bypass the traditional "related to" test applied by the courts in determining whether the FAAAA preempts a given state law or regulation. Instead, courts would analyze directly whether a given state law or regulation restricts a commercial vehicle operator from working to the full extent permitted under federal commercial transportation laws and regulations. In broad terms, if a state law or regulation is more restrictive than its federal equivalent, it would be preempted under proposed Amendment A Positive to the FAAAA.

The second proposed amendment, Amendment B Negative, would limit the application of FAAAA preemption in specific geographical areas of the country. Amendment B Negative was introduced[30] by Congressman Jerrold Nadler (D-NY) as a part of the Clean Ports Act of 2017, a measure supported by the International Brotherhood of Teamsters.[31] Specifically, Section 14501(c) contains explicit exceptions limiting FAAAA preemption, including state safety regulations, size and weight restrictions, and insurance requirements.[32] Proposed Amendment B Negative would add an additional express exception—allowing state and/or local government to adopt requirements for motor carriers and commercial motor vehicles providing services at "port facilities" that are "reasonably related to the reduction of environmental pollution, traffic congestion, the improvement of highway safety, or the efficient utilization of port facilities."[33] Port facilities would be broadly defined as "all port facilities for coastwise, intercoastal, inland waterways, and Great Lakes shipping and overseas shipping, including, wharves, piers, sheds, warehouses, terminals, yards, docks, control towers, container equipment, maintenance buildings, container freight stations and port equipment, including harbor craft, cranes, and straddle carriers."[34] Under Proposed Amendment B Negative, state and local governments would be permitted to regulate motor carriers as long as those regulations were "reasonably related" to issues as broad as controlling pollution and traffic congestion—regulations that the United States Supreme Court ruled as preempted under the current language of the FAAAA only a few years ago.

Specifically, Proposed Amendment B Negative directly contradicts the 2013 Supreme Court decision that struck down key parts of the City of Los Angeles' attempt to impose environmental regulations at port facilities in *Am. Trucking Ass'ns v. City of L.A.*[35] In that case, the Port of Los Angeles implemented a "Clean Truck Program" in response to public outcry over expansion of port operations.[36] Under the Program, any trucking company seeking to operate on the premises was required to execute a standard form "concession agreement," which included a variety of requirements. The two requirements at issue in the case compelled companies to (1) affix a placard on each truck with a phone number for reporting environmental or safety concerns, and (2) submit a plan listing off-street parking locations for each truck when not in service.[37] The American Trucking Association filed suit against the Port and City, contending that the FAAAA expressly preempted those requirements. Following a bench trial, the District Court determined that the FAAAA did not preempt any part of the Clean Truck Program, and the Ninth Circuit mainly affirmed. In particular, the Ninth Circuit held that the placard and parking requirements were not preempted because they did not have "the force and effect of law," since the requirements were merely part of the Port's "contract-based participation in a market."[38]

On appeal, the Supreme Court noted that the parties agreed that the placard and parking requirements "relate to a motor carrier's price, route, or service with respect to transporting property." The Supreme Court, therefore, needed only to decide whether the requirements had the force and effect of law. As such, the Court held that while the requirements were

contained in contracts between the Port and trucking companies, the contracts "did not stand alone," as the Port's tariff—deemed equivalent to a municipal ordinance—provided that no truck could access any Port Terminal unless the truck was registered under a concession agreement. Violation of the tariff was punishable by a fine or prison sentence of up to six (6) months. The Supreme Court held that "the contract here functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment." Therefore, the FAAAA preempted the placard and parking provisions of the Port's concession agreement.

Under Proposed Amendment B Negative, state and local governments would have the power to impose precisely the type of regulatory scheme struck down in *Am. Trucking Ass'ns v. City of L.A*, resulting in a dramatic reduction in the preemptive effect of the FAAAA.

In sum, while the proposed amendment to preempt state regulation of working hours of commercial motor vehicle operators would provide some stability and consistency in the trucking industry, the proposed amendment governing port facilities would introduce a broad exception to FAAAA preemption that would undoubtedly create increased uncertainty and exposure to trucking companies throughout the country.

Conclusion

Recent court decisions disagree over whether negligent hiring claims are preempted by the FAAAA and, likewise, whether unjust enrichment claims should be preempted. In response, one proposed amendment to the FAAAA serves to strengthen its preemptive power with regard to the regulation of operators, but another proposed environmental amendment could complicate the trucking industry near port cities and beyond to an unprecedented degree. The FAAAA as a preemptive force against patchwork regulation from state to state appears to be on a weak trajectory, if the course is not righted soon.

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Endnotes

1 49 U.S.C. § 14501(c)(1) (2018); see also § 41713(b)(4)(A) (2018) (similar provision for combined motor-air carriers).

2 *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S. 364, 367 (2008).

3 *See Holmstrom v. UPS,* 2002 U.S. Dist. LEXIS 26617, at *5 (C.D. Cal. Sep. 18, 2002); *Deerskin Trading Post v. UPS of Am.,* 972 F. Supp. 665, 673 (N.D. Ga. 1997).

4 Gordon McAuley provided an excellent analysis of the FAAAA with regard to state regulations in his February and December 2014 Articles in *The Transportation Lawyer. See* Federal Preemption of State Wage and Hour Regulations—The Mighty Sword of FAAAA, Gordon D. McAuley, *The Transportation Lawyer,* February 2014; The Mighty Sword of FAAAA Lost Its Edge, Gordon D. McAuley, *The Transportation Lawyer,* December 2014.

5 The Ninth Circuit defines "service" in the public utility sense and refers to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail.

6 2017 U.S. Dist. LEXIS 117503 (W.D. Va. July 27, 2017); *see also Montes De Oca v. El Paso-Los Angeles Limousine Express, Inc.,* 2015 U.S. Dist. LEXIS 33707, at *4-5 (C.D. Cal. Mar. 17, 2015) (finding that personal injury claims are not preempted).

7 *Owens v. Anthony,* 2011 U.S. Dist. LEXIS 139961 (M.D. Tenn. Dec. 6, 2011) (finding that personal injury negligence claims are not preempted by the FAAAA); *Gill v. JetBlue Airways Corp.,* 836 F. Supp. 2d 33, 42 (D. Mass. 2011) (determining that a state law negligence claim was not preempted by ADA); *Morales v. Redco Transp., Ltd.,* 2015 U.S. Dist. LEXIS 169801 (S.D. Tex. Dec. 21, 2016) (denying broker's motion to dismiss based on the FAAAA).

8 The Fifth and Ninth Circuits have held that personal injury cases did not even reach the threshold of substantive preemption—let alone complete preemption—as they relate to the FAAAA. In *Hodges v. Delta Airlines, Inc.,* 44 F.3d 334 (5th Cir. 1995) (en banc), the Fifth Circuit held that a negligence claim arising from a box falling from an airline's overhead bin was not preempted because it did not relate to a service, but was akin to an ordinary negligence claim. In *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259 (9th Cir. 1998) (en banc), the Ninth Circuit explained that Congress did not intend to preempt passengers' run-of-the-mill personal injury claims.

9 2017 U.S. Dist. LEXIS 99395, at *13-19 (C.D. Ill. June 27, 2017); *see also Kuehne v. United Parcel Service, Inc.,* 868 N.E.2d 870 (Ind. Ct. App. 2007) (finding that the FAAAA did not preempt a homeowner's negligence claim against a package delivery company for injuries suffered when she tripped over a package that a company driver had left on her doorstep).

10 The main distinction is that the plaintiff was not seeking to implement new procedures within the delivery process, but rather alleges only negligent performance of current delivery procedures.

11 *Volkova v. C.H. Robinson Co.,* No. 16 C 1883, 2018 U.S. Dist. LEXIS 19877, at *9 (N.D. Ill. Feb. 7, 2018).

12 *Id.*

13 The District Court also summarily dismissed the argument that a common law claim for negligent hiring constituted a safety regulation of a motor vehicle. *Id.* at *12.

14 *Id.* at *11.

15 552 U.S. 364 (2008).

16 *Volkova,* at *11.

17 The Northern District Court of Illinois came to the same conclusion regarding FAAAA preemption of state negligent hiring claims less than six months earlier in *Ga. Nut Co. v. C.H. Robinson Co.,* No. 17 C 3018, 2017 U.S. Dist. LEXIS 177269, at *11 (N.D. Ill. Oct. 26, 2017).

18 *Mastercraft Interiors, Ltd. v. ABF Freight Sys.,* 284 F. Supp. 2d 284, 288 (D. Md. 2003) (holding that a claim of unjust enrichment seeks to apply "state law standards" that "vary from state to state" and is, thus, preempted); *see also Deerskin Trading Post,* 972 F. Supp. at 673.

19 819 F.3d 788, 798 (6th Cir. 2016).

20 UPS also argued that the FAAAA precluded the unjust enrichment claim; the District Court, dismissing the claim on other grounds, did not consider that argument.

21 Because the FAAAA preemption provision is nearly identical to the older ADA preemption provision, courts often interchange analyses of those provisions. *See Rowe,* 552 U.S. at 370 (noting that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well").

22 *Quoting Am. Airlines v. Wolens,* 513 U.S. 219, 222 (1995).

23 *Quoting Nw., Inc. v. Ginsberg,* 134 S. Ct. 1422, 1433 (2014).

24 No. 2:17-02013, 2017 U.S. Dist. LEXIS 143255 (D.N.J. Sep. 5, 2017).

25 The Court also noted that the actual contract at issue in the case (to which the unjust enrichment claimant was not a party) specifically prohibited such an action.

26 The proposed amendment specifically references employees subject to regulation under 49 USC § 31502, which permits the Secretary of Transportation to prescribe requirements for the qualifications and maximum hours of service of employees of motor carriers and migrant worker motor carriers.

27 H.R. 3353, 115th Cong. (2017).

28 *Dilts v. Penske Logistics, LLC,* 769 F.3d 637, 650 (9th Cir. 2014).

29 *Id.* at 646. *See also* The Mighty Sword of FAAAA Lost Its Edge, Gordon D. McAuley, *The Transportation Lawyer,* December 2014.

30 *See* Press Release, Reps. Nadler, Napolitano, Lowenthal & Barragán Stand with Truckers to Introduce the Clean Ports Act of 2017 and the Port Drivers' Bill of Rights Act (Oct. 26, 2017), https://nadler.house.gov/press-release/reps-nadler-napolitano-lowenthal-barrag%C3%A1n-stand-truckers-introduce-clean-ports-act.

31 The Clean Ports Act of 2017 was introduced concurrently with the Port Driver's Bill of Rights Act of 2017, a bill which would establish a task force to examine truck leasing and operator wages. H.R. 4144, 115th Cong. (2017).

32 49 USC § 14501(c)(2) (2018).

33 H.R. 4147, 115th Cong. (2017).

34 *Id.*

35 *Am. Trucking Ass'ns v. City of L.A.,* 569 U.S. 641, 655 (2013)

36 Neighborhood and environmental groups filed a lawsuit and threatened additional lawsuits, arguing that expansion would increase congestion and air pollution in the surrounding area. *Am. Trucking* at 644.

37 Three other provisions in the agreement, relating to the trucking company's financial capacity, maintenance of trucks, and employment of drivers, were initially disputed, but were no longer at issue in the case by the time it reached the Supreme Court. *Am. Trucking,* 569 U.S. at 649.

38 *Am. Trucking Ass'ns v. City of L.A.,* 660 F.3d 384, 395 (9th Cir. 2011) (reversed by *Am. Trucking Ass'ns v. City of L.A.,* 569 U.S. 641 (2013)).

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