Third Party Logistics Companies and Legal Liability for Personal Injuries: Where Does the Injured Motorists' Road to Recovery Lead?

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I. INTRODUCTION

Every year, at least seven million large trucks haul commercial goods across the country,[1] while traveling nearly 215,000,884,000,000 miles each year.[2] These trucks are involved in 436,000 traffic accidents during an average year.[3] Of these crashes, just over 4,200 involve fatalities while 85,000 result in personal injury.[4] At an average cost of $62,000 per crash,[5] these fatalities and injuries are a significant burden on the transportation industry and the individual victims.

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1. Federal Motor Carrier Safety Administration, Facts & Research, Data, Analysis, and Statistics, Commercial Motor Vehicle Facts, http://www.fmcsa.dot.gov/facts-research/facts-figures/analysis-statistics/cmvfacts.htm (last visited Apr. 21, 2006) [hereinafter Commercial Motor Vehicle Facts]. A commercial motor vehicle is "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport . . . property when the vehicle: (1) has a gross vehicle weight rating . . . of . . . 10,001 pounds . . . or more . . . ." Federal Motor Carrier Safety Administration, Rules and Regulations, Who Must Comply with the Federal Safety Regulations, http://www.fmcsa.dot.gov/rules-regulations/administration/whomustcomply/index.asp?cmv=1 (last visited Apr. 21, 2006) [hereinafter Who Must Comply with the Federal Safety Regulations].

2. Commercial Motor Vehicle Facts, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

In a typical car crash, the victim has the option of bringing a tort action against the other driver to recover expenses and receive compensation for their injuries.[6] However, drivers may not have the same option if victimized by accidents involving large commercial trucks due to two main factors. First, the rise of third party logistics companies (brokers in the transportation industry) has complicated the division of liability between drivers, the brokers that hire them, and the companies seeking the transportation of goods that brokers serve.[7] Second, the Federal government has implemented agencies and regulations to police commercial motor carriers.[8] These regulations place restrictions on the types of actions that private parties can bring against motor carriers and motor carrier brokers.[9]

There are two main roads to recovery that an injured motorist can take when attempting to hold a third party logistics carrier legally and financially liable for the results of an accident. The first is to sue the third party logistics carrier under the respondeat superior doctrine, based on the assumption that the motor carrier is an employee of the third party logistics carrier. The second is to sue the third party logistics carrier by bringing a private action under section 14704 of the Federal Motor Carrier Safety Administration ("FMCSA"). As this Article will illustrate, both roads to recovery often lead to dead ends for an injured motorist. In the first case, third party logistics carriers and motor carriers are engaged in independent contractor relationships, rather than employer-employee relationships, which exempts the third party logistics carrier from liability. In the second case, section 14704 of the FMCSA often limits the ability of an injured motorist to bring personal injuries claims against third party logistics companies.

This Article first examines the role of third party logistics companies in the motor carrier industry. Section II discusses the concept of respondeat superior as it relates to the liability of third party logistics carriers involved in the interstate transportation of goods. Section III discusses

6. 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1098 (2005).

7. Numerous cases have dealt with this issue. *See* George Weintraub & Sons, Inc. v. E.T.A. Transp., Inc., No. 01 Civ. 6417(JSM), 2003 WL 22023907 (S.D.N.Y. 2003); Owner-Operator Indep. Drivers Ass'n. v. Mayflower Transit, Inc., 161 F. Supp. 2d 948 (S.D. Ind. 2001); Tartaglione v. Shaw's Express, Inc., 790 F. Supp. 438 (S.D.N.Y. 1992).

8. Regulations developed and enforced by the Federal Motor Carrier Safety Administration ("FMCSA") include vehicle registration and licensing, drug and alcohol regulations, and limiting hours of service for drivers. *See* Driver Application Procedures, 49 C.F.R. § 383.71 (2005); Controlled Substances Use, § 49 C.F.R. § 382.213; Hours of Service of Drivers, 70 Fed. Reg. 49978-01 (Aug. 25, 2005).

9. *See* 49 U.S.C. § 14704(a)(1) (2000) (limiting private rights of action to persons who have suffered personal injuries and does not include other types of damages, including damage to property).

liability between the parties. Section IV examines the regulations of the FMCSA and limits on private actions for personal injuries by private citizens. Finally, Section V examines *Schramm v. Foster*,[10] a recent Maryland case that addresses both of the above issues.

II. Third Party Logistics Companies

The deregulation of the trucking industry in the 1980s led to the increase in the number of third party logistics companies, also known as transportation brokers.[11] These companies should not be confused with motor carriers—the distinction between motor carriers and transportation brokers is delineated in the regulations of the FMCSA. On the one hand, a motor carrier is defined as a "person providing commercial motor vehicle (as defined by § 31132) transportation for compensation."[12] On the other, a broker is a "person, other than a motor carrier . . . that as a principal or agent sells . . . or arrang[es] for, transportation by motor carrier for compensation."[13] Additionally, "[m]otor carriers . . . are not brokers . . . when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport."[14]

A third party logistics carrier is a company that specializes in brokering transportation services.[15] With over 500 third party logistic companies in the United States, these private companies provide contractual logistics services to a "primary manufacturer, vendor, or user of a product

10. Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004).

11. The Motor Carrier Act of 1935, the controlling regulation for the transportation industry until 1980, placed extreme regulations on the industry, specifically tight entry controls on transportation brokers into this industry. With the implementation of the Motor Carrier Act of 1980, the entire transportation industry was virtually deregulated, and there were no longer any restrictive limitations placed on transportation brokers entering the transportation industry. This opened the floodgates to new transportation brokers wanting to become part of this industry. *See* Jeffrey S. Kinsler, *Motor Freight Brokers: A Tale of Federal Regulatory Pandemonium*, 14 Nw. J. Int'l L. & Bus. 289, 290-91 (1994) (citations omitted). The increase in transportation brokers has expanded to include the U.S. Department of Defense, which has begun using third party logistics companies to deliver items to military installations in the continental United States and throughout the world where there is no conflict. *See* Major Sylvester H. Brown, *Using Third-Party Logistics Companies*, Army Logistician (Nov. – Dec. 1999), *available at* http://www.almc.army.mil/alog/issues/NovDec99/MS452.htm (last visited Apr. 21, 2006).

12. 49 U.S.C. § 13102(14).

13. *Id.* § 13102(2).

14. 49 C.F.R. § 371.2(a).

15. For purposes of simplicity, the terms "third party logistics company" and "transportation broker" and "broker" will be used interchangeably throughout this paper. There are distinctions between these terms, for example, the FMCSA specifically defines broker as "a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier." 49 U.S.C. § 371.2(a).

or service."[16] Third party logistics carriers have not only increased in number but have achieved significant success. For example, C.H. Robinson Worldwide, one of the largest third-party logistics companies in North America, contracts with over 35,000 carriers worldwide to ship nearly four million products for its 18,000 customers.[17] For Robinson, this volume of shipments has netted over $137 million in income in 2004, a 20% growth from the previous year.[18] Often described as providing a "'one point of contact' service to shippers,"[19] third party logistics carriers can perform a large variety of functions between the manufacturer and the user.[20] Such outsourcing is cost effective for businesses and allows them to focus on their "core business functions."[21]

Oftentimes, the relationship between a business requiring shipping services and a logistics company is solidified through a contract.[22] The contract commonly specifies such terms as the location of pick-up, the drop-off location, and the level of liability for damages to goods and/or personal injuries.[23] The company shipping the goods often has no idea which company will actually be transporting the goods and may even believe that the logistics company is the party responsible.[24] After securing a contract to ship goods, the logistics provider then contracts with a transportation service provider who, in turn, assigns the transportation assignment to a driver. The driver may be an actual employee of the transportation service provider or simply an independent contractor who occasionally performs tasks for the transportation service provider.[25] While the introduction of a third-party logistics provider decreases business costs by increasing efficiency, such an entity is not without its drawbacks to the transportation industry. One of the primary complications of the introduction of a third party logistics company to the shipping pro-

16. Brown, *supra* note 11. These providers handle fifty-seven percent of third-party logistics services in the United States. This is up from only thirty-three percent use of third-party logistics providers in the 1950's. *See* Guo Jianhua, *Third-party Logistics – Key to Rail Freight Development in China*, 29 JAPAN RAILWAY & TRANSP. REV. 32, 33 (2001).

17. C.H. Robinson Worldwide, Inc., About Us, http://www.chrobinson.com/about_us.asp (last visited Apr. 21, 2006).

18. C.H. ROBINSON WORLDWIDE, INC., HOOVERS CO. IN-DEPTH RECORDS (2005), *available at* 2005 WLNR 4046946.

19. *Schramm*, 341 F. Supp. 2d at 542.

20. *See* Brown, *supra* note 11. These functions include inventory scheduling, distribution management, order fulfillment, supply-chain management, processing of loss and damage claims, motor, rail, ocean, and air transportation, and shipment consolidation. *Id.*

21. *Id.*

22. *See* Hewlett-Packard Co. v. Bros. Trucking Enter. Inc., 373 F. Supp. 2d 1349, 1350 (S.D. Fla. 2005).

23. *See id.*

24. *See id.*

25. *See id.*

cess is the confusion regarding liability that may arise when an accident occurs while the goods are being transported.

For example, XYZ company desires to move a shipment of shoes from their warehouse in North Carolina to store ABC in Wyoming. XYZ contracts with 123 Shipping Company, a third party logistics provider, to move the goods from North Carolina to Wyoming in a timely manner. 123 Shipping then contracts with Highway Transport Services to move the goods to Wyoming. Highway Transport Services in turn assigns the shipment task to Ted Trucker, a reliable independent contractor. Ted's trip gets off to a good start, but, unfortunately, he runs a red light in Iowa and hits Sarah Driver's vehicle. Sarah Driver is injured and her car is totaled. When Sarah and her insurance company bring a lawsuit to recover damages resulting from this accident, from whom of the parties involved can they recover: Ted Trucker, Highway Transport Services, 123 Shipping Company, store ABC, company XYZ, all of the parties, or none of them?

III. Liability Between the Players

In the situation described above, the first road that an injured motorist may take to recover damages is to seek to impose liability at law on at least one of the parties involved. Sarah Driver would likely to cast a wide net and sue all of the parties connected to the motor carrier involved in the accident. However, this would most likely be followed by a "blame game" between the driver, the motor carrier company, the broker, and the shipper. Each party would attempts to remove themselves and their culpability from the suit, hoping to evade responsibility for Sarah's significant personal injury damages. Before liability can be determined, the interrelated doctrines of respondeat superior, master-servant relationship, and independent contractor status must be resolved in light of the relationships between the parties. Of these questions, the relationship between the transportation broker and the motor carrier is of special concern to transportation attorneys as the recent introduction of third party logistics companies to the transportation industry has complicated the division of liability. The requirements for establishing vicarious liability on the broker are examined below.

A. Respondeat Superior Doctrine

The doctrine of respondeat superior holds that an employer is vicariously liable for both the negligent or and intentional torts committed by an employee when that individual is acting within the scope of employment.[26] Respondeat superior is proper when an agency relationship exists

26. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). This liability even extends to the actions of an employee who disobeys an order relating to the business because it is the

between an employer and employee. Such a relationship is established by "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[27] An agency relationship may be established by contract or inferred from the circumstances.[28] A principal-agent relationship, also referred to as an employer-employee relationship,[29] is inferred when an agent is subject to a principal's right of control; when an agent has a duty to act primarily for the benefit of a principal;[30] and when an agent holds the power to alter the legal relationship of a principal.[31]

B. EMPLOYEE/SERVANT

In order to hold an employer liable for the negligence of an agent, the agent must not only be acting within the scope of employment, but also be deemed to be servant or employee of the employer.[32] A servant is an agent employed by a master "to perform service . . . whose physical conduct in the performance . . . is controlled or is subject to the right to control by the master."[33] Ordinarily, a principal will not be liable for the negligence of an agent who is not a servant.[34] A principal's liability does not extend to any physical injury caused by the negligent acts of his agent *who is not a servant* unless the act was authorized by the principal, or the result was one the principal authorized.[35] A master-servant relationship exists only when the employer has the right to control the "time, manner,

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employer's "duty to select servants who will obey." Philadelphia & Reading R.R. Co. v. Derby, 55 U.S. 468, 472 (1852). However, the employer is not liable for "the unauthorized, the [willful], or the malicious act or trespass" of an employee. *Id.* at 476. *See also* WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 83 (1964).

27. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). "[T]he 'on behalf of' and 'control' elements are both necessary to prove an agency relationship." J. DENNIS HYNES, AGENCY AND PARTNERSHIP: CASES, MATERIALS, PROBLEMS 7 (4th ed. 1994).

28. Terra Venture, Inc. v. JDN Real Estate-Overland Park, L.P., 340 F. Supp. 2d 1189, 1197-98 (D. Kan. 2004). *See* 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 707-708 (2d ed. 1914).

29. Although there are some minor differences between the principal-agent relationship and employer-employee relationship, for purposes of this article, the concepts will be used interchangeably to refer to the employer-employee relationship. See HYNES, *supra* note 27, for a more complete discussion of these issues.

30. Cromer Fin. Ltd. v. Berger, 245 F. Supp. 2d 552, 562 (S.D.N.Y. 2003); *see also* SEAVEY, *supra* note 26, § 147.

31. Restatement (Second) of Agency § 12.

32. Am. Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 117 (Ky. 1933) (citations omitted).

33. RESTATEMENT (SECOND) OF AGENCY § 2. "An agent's implied authority is defined by reasonable interpretation of the express instructions given by the [employer] in light of the circumstances faced by the [employee]." HYNES, *supra* note 27, at 271.

34. *See Riplinger*, 60 S.W.2d at 116-17 (citations omitted); *see also* W. EDWARD SELL, AGENCY § 18 (1975).

35. Givens v. Mullikin, 75 S.W.3d 383, 394 n.4 (Tenn. 2002) (citing Baldasarre v. Butler, 625 A.2d 458, 465 (1993)); *see also* SEAVEY, *supra* note 26, § 91.

and method of executing the work," not merely the employer's request for certain outcomes or results.[36] Additionally, to establish vicarious liability, the employer's control, or right to control, must exist "in respect to the very transaction out of which the injury arose[.]"[37]

C. Independent Contractor

An independent contractor is one "who contracts with another to do something for him but who is not controlled by the other nor is subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[38] A prime factor in making the distinction between an employee and an independent contractor is "the authority of the principal to control the detailed physical performance of the contractor."[39] More specifically, an independent contractor can perform a certain work for another according to his own means, methods, and techniques, free from control by his employer in all details.[40] Typically, an employer is not liable for the wrongdoing of an independent contractor under the respondeat superior doctrine.[41] "Complete control over the result to be accomplished is not enough to make an independent contractor an employee."[42] For instance, regarding the shipment of goods, the contractual relationship between a broker and a carrier transporting a shipment of cell phones did not qualify as a principal-agent relationship.[43] "A mere contract to ship goods does not establish an agency relationship."[44]

D. The Transportation Broker's Legal Liability Is . . .

The transportation broker's relationship with the motor carrier can

36. Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 609 (D. N.J. 2004) (citing AT&T v. Winback & Conserve Program, Inc. 42 F.3d 1421, 1435 (3d Cir. 1994); *see* Sell, *supra* note 34, § 95.

37. United States v. Mraz, 255 F.2d 115, 117 (10th Cir. 1958). However, actual control over the employee at the time of the accident is not required. Hynes, *supra* note 27, at 40.

38. Restatement (Second) of Agency § 2; *see also* Sell, *supra* note 34, § 19.

39. Logue v. United States, 412 U.S. 521, 527-28 (1973) (citations omitted); *see also* Sell, *supra* note 34, § 95 (providing that where the employer has retained the right of control, the employee is most likely a servant).

40. Hathcock v. Acme Truck Lines, Inc., 262 F.3d 522, 527 & n.16 (5th Cir. 2001) (citing Hoechst Celanese Corp. v. Compton, 899 S.W.2d 215, 220 (Tex. App. 1994).

41. McKee v. Brimmer, 39 F.3d 94, 96 (5th Cir. 1994) (citing W.J. Runyon & Sons, Inc. v. Davis, 605 So.2d 38, 45 (Miss. 1992), *overruled on other grounds by*, Richardson v. APAC-Mississippi, Inc., 631 So.2d 143 (Miss. 1994)); *see also* Mechem, *supra* note 28, § 40.

42. Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Canada (AFL-CIO), 353 F.2d 593, 596 (4th Cir. 1965).

43. *See* Prof'l Commc'n, Inc. v. Contract Freighters, Inc., 171 F. Supp. 2d 546, 550-51 (D. Md. 2001).

44. *Id.* at 551.

be defined as either an employer-agent relationship or as an independent contractor agreement. The use of the respondeat superior doctrine to extend negligence liability for personal injuries as a result of a motor carrier accident to transportation brokers can only occur when an employer-agent relationship between the transportation broker and the motor carrier exists. Conversely, when the relationship between the transportation carrier and the motor carrier is characterized as an independent contractor agreement, negligence liability under the respondeat superior doctrine no longer applies to the transportation carrier. The level of liability for a transportation broker is remarkably different depending on the classification of its relationships with its drivers.

Courts have defined the broker-motor carrier relationship as one of an independent contractor.[45] In *Tartaglione v. Shaw's Express, Inc.*, the court held that the contractual relationship between the broker and the motor carrier only controlled the result of the work to be performed and not the "physical conduct [of the driver] in the performance of the undertaking."[46] The court reached this conclusion because the broker was interested solely in the delivery of the goods to the proper destination and had no control over the route chosen by the driver or the type of gas used by the motor carrier.[47]

Using the same factors as *Tartaglione*, the court in *King v. Young* held that the transportation broker had also engaged in an independent contractor relationship with the motor carrier.[48] In *King*, the transportation broker was "merely the intermediary in the transaction between the shipper and the transportation medium."[49] Similar to *Tartaglione*, this conclusion was reached based on the fact that the transportation broker did not have control over the route chosen by the motor carrier or the type of gasoline used during the transport.[50] In this case, the independent contractor relationship excused the transportation broker from liability for the motor carrier's negligence.[51]

In *Servicemaster Co. v. FTR Transport, Inc.*, the court also found that

45. *See* Servicemaster Co., L.P. v. FTR Transport, Inc., 868 F. Supp. 90, 95 (E.D. Pa. 1994) ("Generally, a broker is independent, serving as a middleman between motor carriers and the shipping public." (citing Reiter v. Cooper, 507 U.S. 258, 261 (1993))). *See also Tartaglione*, 790 F. Supp. at 441 ("The Court finds that, in transporting cargo, [the motor carriers] acted as independent contractors and not as agents of [the transportation broker]."); King v. Young, 107 So. 2d 751, 753-54 (Fla. Dist. Ct. App. 1958) (holding that the relationship between the transportation broker and motor carrier was that of independent contractors).

46. *See Tartaglione*, 790 F. Supp. at 441 (quoting E.B.A. Wholesale v. S.B. Mech. Corp., 127 A.D.2d 737 (N.Y. App. Div. 1987)).

47. *Id.* at 440-41.

48. *King*, 107 So. 2d at 753.

49. *Id.*

50. *Id.*

51. *Id.* at 754.

an independent contractor relationship existed between a broker and a driver.[52] The main factor that indicated an independent contractor relationship was the transportation broker's complete discretion to choose a motor carrier for each individual shipment of freight.[53]

While in *Johnson v. Pacific Intermountain Express* Co., the Missouri Supreme Court has extended liability for personal injuries to a motorist to the transportation broker, the case in question did not involve a typical broker-driver relationship. In *Johnson*, the court concluded that the transportation broker and the motor carrier were involved in a joint venture.[54] The relationship was defined as a joint venture because all of the parties "undertook a particular project, for mutual benefit and profit."[55] The court stated that the basis for extending liability to the transportation broker was not under the respondeat superior doctrine but rather under a joint venture doctrine. [56] As such, liability was spread among all of the parties involved in the joint venture.[57]

The respondeat superior doctrine only extends liability to the personal injuries of a motorist when an employer-employee relationship exists between the transportation carrier and the motor carrier. In the vast majority of cases, this relationship has been characterized as that of an independent contractor, thus exempting transportation carriers from liability under respondeat superior. Therefore, an injured motorist's road to recovery from a transportation carrier is unlikely to be found by asserting a respondeat superior claim.

IV. Federal Motor Carrier Safety Administration Private Right of Action

The next road that an injured motorist may take to recovery against a transportation carrier may be found under the regulations of the Federal Motor Carrier Safety Administration.

Large commercial trucks involved in interstate commerce[58] have his-

52. *See Serviceman*, 868 F. Supp. at 96. ("The fact that [the transportation broker] was to act as the carrier's agent for payment purposes is a recognition of [the transportation broker's] role as a middleman . . . . These facts indicate that [the transportation broker] was a broker, not an agent.").

53. *Id.*

54. Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 241 (Mo. 1983). Vicarious liability for those involved in a joint venture does not arise out of the control over the details of the other party's work. Rather, it arises out of being involved in an enterprise that involves shared purpose control. *See* Hynes, *supra* note 27, at 94.

55. *Johnson*, 662 S.W.2d at 241.

56. *Id.* The court further stated that "[i]t makes no difference whether the venturers are . . . considered to be servants . . . [or] are to be considered as acting together . . . ." *Id.*

57. *Id.* at 241-42.

58. Interstate commerce is defined as "trade, traffic or transportation *across a State line*,

torically been regulated by the Interstate Commerce Commission ("ICC").[59] However, in 1995, the ICC was disbanded by the Federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA")[60] and the deregulation of the trucking industry began.[61] The legislature indicated that this deregulation was necessary to eliminate dissimilar state regulation that had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets."[62] The Federal Motor Carrier Safety Administration ("FMCSA"), a division of the United States Department of Transportation ("DOT"), is now charged with the duty of monitoring interstate commerce by large trucks and buses.[63] Specifically, the FMCSA has developed an automated data analysis system, SafeStat, to measure the "relative (peer-to-peer) safety fitness of interstate commercial motor carriers and crashes, roadside inspections, on-site compliance review results and enforcement history."[64] Additionally, while the ICC had previously resolved disputes in the motor carrier industry,[65] the ICCTA eliminated, for the most part, the dispute resolution role of the FMCSA.[66] Currently, the FMCSA's dispute resolution duties are limited to such issues as disputes between States or Indian tribes over Non-Radioactive Hazardous Materials ("NHRM") routing.[67]

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including international boundaries, wholly within one State as part of a through movement that originates or terminates in another State or country." Who Must Comply with the Federal Safety Regulations, *supra* note 1.

59. *See* Owner-Operator Indep. Drivers Ass'n, Inc. v. Bulkmatic Transp. Co., No. 03 C 7869, 2004 WL 1151555, at *1 (N.D. Ill. May 3, 2004).

60. *See* Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat 803, 804 (1995); *see also* 49 U.S.C. § 13501.

61. *See* Richard P. Schweitzer, *Regulatory Reform Improves Private Trucking Efficiency*, 36 FED. BAR NEWS & J. 91, 91 (1989).

62. H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

63. The FMCSA's "primary mission is to reduce crashes, injuries and fatalities involving large trucks and buses." More than 1,000 employees in the fifty states and the District of Columbia work to fulfill the mission of the FMCSA. Federal Motor Carrier Safety Administration, About FMCSA, http://www.fmcsa.dot.gov/about/aboutus.htm (last visited Apr. 23, 2006).

64. Federal Motor Carrier Safety Administration, Analysis and Information Online, Caution Urged in the Use of SafeStat Data, http://ai.volpe.dot.gov/SafeStat/disclaimer.asp?RedirectedURL=/SafeStat/SafeStatMain.asp (last visited Apr. 23, 2006).

65. *See* H.R. REP. NO. 104-311, at 87-88 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 799 ("The ICC dispute resolution programs include household goods and auto driveway carriers, brokers, owner-operator leasing, *loss and damage claims*, duplicate payments and overcharges, and lumping." (emphasis added)).

66. *See id.* ("The bill transfers [dispute resolution] responsibility . . . to the Secretary. . . . The Committee does not believe that DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas.").

67. 49 C.F.R. § 397.75.

As an alternative to FMCSA dispute resolution, the ICCTA specifically indicated "private parties may bring actions in court to enforce the provisions of the Motor Carrier Act."[68] The option of private actions for violations of the FMCSA provisions has been a complicating factor in actions related to personal injury accidents involving motor carriers. Specifically, section 14704(a)(2) provides that "[a] carrier or broker providing transportation or service . . . 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."[69] Standing alone, this statement would confirm that a private citizen is entitled to bring a private right of action against a motor carrier or broker in an accident causing personal injuries.[70] However, the statute's meaning is less clear when the section is read in conjunction with its preceding paragraph and considered in light of its legislative history.[71] Most courts have agreed that the terms of statute are inconsistent.[72] Section 14704(a)(1) reads "[a] person injured because a carrier or broker providing transportation or service . . . does not obey an order of the Secretary or the Board . . . may bring a civil action to enforce that order under this subsection."[73] Examination of the legislative history has shed light on the appropriate interpretation.[74] Specifically, the legislative history states "DOT should [not] allocate scarce resources to resolving these essentially *private disputes*,"[75] and appears to limit the resolution of disputes in the motor carrier industry to those involving commercial disputes.[76] Most courts have held that while private rights of action may

68. H.R. REP. NO. 104-311, at 88. The private right of action has frequently been used in "truth in leasing" cases brought by the Owner Operator Independent Drivers Association ("OOIDA") against motor carriers for violations of the Motor Carrier Act. Burton J. Mallinger et al., *The Private Right of Action Under 49 U.S.C. § 14704: A New Theory of Recovery for Personal Injury Plaintiffs?*, AM. BAR ASS'N, at 33 (2004).

69. 49 U.S.C. § 14704(a)(2).

70. *See Schramm*, 341 F. Supp. 2d at 547; *Bulkmatic Transp.*, 2004 WL 1151555, at *3; Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc., 192 F.3d 778, 785 (8th Cir. 1999).

71. See *Schramm*, 341 F. Supp. 2d at 547, Renteria v. K & R Transp., Inc., No. 98 CV 290 MRP, 1999 WL 33268638, at *5 (C.D. Cal. 1999), and Stewart v. Mitchell Transp., 241 F. Supp. 2d 1216, 1221 (D. Kan. 2002) for a discussion of cases holding that section 14704(a)(2) does not create a private right of action. *But see* Marrier v. New Penn Motor Express, Inc., 140 F. Supp. 2d 326, 329 (D. Vt. 2001) (holding that a private right of action is permissible under section 14704(a)(2)).

72. *See Schramm*, 341 F. Supp. 2d at 547 ("I find the language enigmatic."); *Stewart*, 241 F. Supp. 2d at 1219 ("The court finds the language . . . ambiguous and inconsistent . . . ."); *New Prime*, 192 F.3d at 785 ("Despite these linguistic imperfections and inconsistencies . . . .").

73. 49 U.S.C. § 14704(a)(1).

74. *See New Prime*, 192 F.3d at 785. "In construing . . . inconsistently drafted statute[s], it is appropriate to use its legislative history to confirm the most plausible construction of a subsection's plain language." Id. (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)).

75. H.R. REP. NO. 104-311, at 87-88 (emphasis added).

76. *Id.* at 87 ("In addition to overseeing the background commercial rules of the motor carrier industry, the ICC currently resolves disputes that arise in such areas.").

arise under section 14704(a)(2), these actions do not include personal injury claims.[77] Some courts have limited the ability to bring a civil action to enforcement of an order of the Secretary of Transportation or Surface Transportation Board against a motor carrier or transportation broker.[78] Other courts have expanded the civil action to "some violations of the Motor Carrier Act and its implementing regulations."[79]

To date, only one court has construed this statute as permitting a private right of action for personal injury claims. In *Marrier v. New Penn Motor Express, Inc.*, [80] the plaintiff asserted that a reading of two sections of the Interstate Transportation Act created a private right of action for personal injuries.[81] The plaintiff argued that Section 14704(a)(2) permits private rights of action for "an act or omission of that carrier . . . in violation of this part,"[82] while section 14101(a) mandates that "a motor carrier shall provide safe and adequate service, equipment, and facilities."[83] The court agreed, recognizing that section §13101 provides that "it is the policy of the United States Government to oversee the modes of transportation and, in overseeing these modes, to promote safe, adequate, economical, and efficient transportation."[84] The court held that, given that one of the purposes of the legislation was to ensure the safe operation of motor carriers, the plaintiff's private action to recover personal injuries was permissible.[85]

77. *See Schramm*, 341 F. Supp. 2d at 547; *Stewart*, 241 F. Supp. 2d at 1221; *Renteria*, 1999 WL 33268638, at *6; *but see Marrier*, 140 F. Supp. 2d at 329 (holding that a private right of action for personal injury claims is permissible because the act does not expressly prohibit a private right of action for personal injury).

78. *See Renteria*, 1999 WL 33268638, at *5; DeBruce Grain, Inc. v. Union Pac. R.R. Co., 983 F. Supp. 1280, 1284 (W.D. Mo. 1997); City of Laredo v. Tex. Mexican Ry. Co., 935 F. Supp. 895, 898 (S.D. Tx. 1996) (providing that "[a]lthough the Surface Transportation Board is probably the appropriate forum for adjudicating Plaintiff's suit, that decision must be made in state court."), *abrogated on other grounds,* Tayssoun Transp., Inc. v. Universal Am-Can, Ltd., No. Civ.A. H-04-1074, 2005 WL 1185811, at *15 (S.D. Tex. April 20, 2005).

79. *See New Prime,* 192 F.3d at 785. This court fails to delineate the types of claims that would be appropriate for private causes of action. The *Stewart* court relies on the analysis of *New Prime* and limits the private right of action to damages in commercial disputes involving violations of the Motor Carrier Act. *Stewart*, 241 F. Supp. 2d at 1221. The court in *Bulkmatic Transport* declined to limit section 14704 claims to "actions for enforcement of agency orders." 2004 WL 1151555, at *3.

80. *Marrier*, 140 F. Supp. 2d at 328.

81. *Id.*

82. *Id.*; *see also* 49 U.S.C. § 14704(a)(2).

83. 49 U.S.C. § 14101(a).

84. *Marrier*, 140 F. Supp. 2d at 329; *see also* 49 U.S.C. § 13101(a)(1)(B).

85. *Marrier*, 140 F. Supp. 2d at 329.

V. *SCHRAMM V. FOSTER*

A recent Maryland case, *Schramm v. Foster,* [86] is worthy of its own discussion as it directly addressed the two issues discussed above. First, *Schramm* addressed the relationship between brokers and drivers and the corresponding liability when a personal injury accident occurs.[87] Secondly, *Schramm* examined the appropriateness of a private right of action under the FMCSA for those personal injuries.[88]

A. FACTS

On May 5, 2002, Tyler Schramm, a minor, was driving a pick-up truck that collided with a tractor-trailer being driven by Brian Foster[89] an employee of Groff Brothers Trucking, LLC ("Groff Brothers").[90] Schramm's vehicle traveled under the tractor-trailer and stopped on the other side of truck, causing the roof of Schramm's vehicle to be torn off.[91] This accident occurred after Foster failed to obey a stop sign and turned in front of on-coming traffic.[92] Schramm barely survived the accident; he is in a semi-vegetative state from which he is not expected to recover.[93] In addition to the injuries to his body, Schramm will not be able to perform any basic life functions without assistance.[94]

The tractor-trailer being driven by Foster contained a load of soymilk heading from Jasper Products, LLC ("Jasper") to the White Rose Food Corporation.[95] C.H. Robinson Worldwide, Inc. ("Robinson"), a third party logistics company, contacted Groff Brothers after Jasper requested transportation arrangements.[96] Groff was already under a contract carrier agreement with Robinson and accepted the transportation request, assigning the job to Foster.[97]

Robinson Worldwide is a third party logistics company that specializes in "brokering the shipment of goods via truck, rail, ocean and air."[98] Robinson does not transport the actual goods nor does it actually own any transportation vehicles.[99] Like other third party logistics companies,

86. *Schramm*, 341 F. Supp. 2d 536.
87. *See Schramm*, 341 F. Supp. 2d at 543-46.
88. *See id.* at 547-50.
89. *Id.* at 541.
90. *Id.* at 540.
91. *Id.* at 541.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 540.
96. *Id.*
97. *Id.*
98. *Id.* at 541.
99. *Id.*

Robinson matches shippers with carriers so that "commercial goods can be moved efficiently from origin to destination."[100] An experienced broker with over 150 branch offices, Robinson brokered nearly 3.2 million shipments in 2003 with more than 20,000 licensed motor carriers.[101] Groff Brothers was one of Robinson's many carriers that had a master transportation contract with Robinson prior to the shipment of Jasper's goods and the collision with Tyler Schramm.[102] Relevant provisions of the contract between Robinson and Groff Brothers expressly provided that the "relationship of Carrier to Robinson hereunder is solely that of an independent contractor"[103] and that all drivers shall be employed by Groff Brothers and "are not employees or agents of Robinson or its Customers."[104] Additionally, the contract stated "the Parties agree that Carrier shall be the party solely responsible for operating the equipment necessary to transport commodities under this Contract."[105] Robinson assured its potential customers that, through its many motor carriers, it had the ability to ship cargo at a moment's notice, and that

> while Robinson takes responsibility for freight claims, we [Robinson] also step forward when liability issues arise. We insulate the shipper in three important ways: 1. We work only with carriers who carry full insurance coverage. . . 2. If an accident occurs, the carrier indemnifies both the shipper and [Robinson] from liability. 3. *In the rare event that the damage goes beyond the carrier's insurance limits, [Robinson] maintains a liability insurance policy that pays the rest.*[106]

B. Negligence/Respondeat Superior Claim

Using the respondeat superior doctrine, Schramm argued that Robinson was vicariously liable for Foster's negligence because Foster acted as Robinson's agent when transporting the shipment from Jasper Products.[107] However, given the express provisions of the contract and the conduct of the driver, the court ruled that Groff Brothers and Foster "remained at all times an independent contractor."[108] The court noted that the contract explicitly stated that the relationship between Robinson and Groff Brothers was that of an independent carrier and that the drivers were not *agents* of Robinson.[109]

100. *Id.*
101. *Id.*
102. *Id.* at 542.
103. *Id.* at 544.
104. *Id.*
105. *Id.*
106. *Id.* at 542 (emphasis added).
107. *Id.* at 543.
108. *Id.* at 544.
109. *Id.* at 543-44.

In addition to the contractual language, there was no evidence that Robinson controlled the actions of Groff Brothers or Foster during the shipment, other than to give general guidance such as to obtain instructions before handling the load and to notify Robinson if the goods were in poor condition.[110] More specifically, the court held that Foster's contacting Robinson to receive dispatch information did not constitute control by Robinson, nor did the provision of driving directions and special loading instructions.[111] "Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during its performance *does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties.*"[112] Instructions on incidental details to the overall goal are not sufficient to hold Robinson liable for Foster's negligent acts when Robinson did not have control over Foster's movements during the course of shipment.[113]

C. FMCSA Private Right of Action Claim

Schramm's second claim for personal injury damages was based on section 14704(a)(2) of the FMCSA, which allows an individual to bring a private action against a transportation carrier or broker for personal injury claims.[114] In analyzing the appropriateness of this claim, the court found that the language of section 14704(a)(2) was "enigmatic" and in direct contrast to the section proceeding it.[115] Section 14704(a)(1) provides that "[a] person injured because a carrier or broker providing transportation or service . . . does not obey an order of the Secretary [of Transportation] or the [Surface Transportation] Board . . . may bring a civil action to enforce that order . . . ."[116] In resolving the incongruence between these two provisions, the court turned to the legislative history of the bill. The court found that the legislative history showed that the bill was intended to apply only to commercial damages, not personal injury cases.[117] Additionally, the legislative history did not contain any discussion about the substantial impact that the establishment of a federal

110. *Id.* at 544-45.

111. *Id.* at 544 (citing Tartaglione v. Shaw's Express, Inc., 790 F. Supp. 438, 441 (S.D.N.Y. 1992)).

112. *Id.* at 545 (citing Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Canada (AFL-CIO), 353 F.2d 593, 596 (4th Cir. 1965)) (emphasis added).

113. *Id.* at 546.

114. *Id.* at 547; *see also* 49 U.S.C. § 14704(a)(2).

115. *Schramm*, 341 F. Supp. 2d at 547.

116. 49 U.S.C. § 14704(a)(1).

117. *Schramm*, 341 F. Supp. 2d at 547. *See also* H.R. Rep. No. 104-311, at 88 ("This change will permit these private, *commercial* disputes to be resolved the way that all other commercial disputes are resolved-by the parties.") (emphasis added)).

private right of action would have on the workload of federal courts.[118] The combination of these two factors, applicability to commercial disputes and failure to address the impact on federal courts, led the *Schramm* Court to conclude that "it is reasonable to infer that Congress did not intend to create such a right of action [for personal injuries]."[119]

Schramm's respondeat superior claim and federal claim under section 14704(a)(2) of the FMCSA were dismissed under a motion for summary judgment submitted by Robinson; however, the court allowed Schramm's case to proceed under a negligent hiring cause of action.[120]

Schramm v. Foster is illustrative of the conflict between the respondeat superior doctrine and FMCSA regulation allowing a private right of action for personal injuries. Many courts throughout the United States have come to the same conclusion as the *Schramm* Court that transportation brokers are not liable to personal injury victims involved in accidents with motor carriers.[121]

However, the *Schramm* Court seemed to suggest that while a respondeat superior claim or a section 14704(a)(2) claim may not hold the transportation broker liable for personal injuries, the transportation broker may have played a role in those injuries. "[I]t cannot be ignored that Robinson increased the risk of harm to innocent third parties by its . . . actions."[122] The court went on to state that Robinson had "actively interjected itself into the relationship between shipper and carrier, and it has chosen to do business in a context heavily tinged with the public interest[,]" which imposes a "duty commensurate with its undertakings."[123]

While other courts have referred to the *Schramm* case, no other court has explicitly relied on the findings of the *Schramm* Court in denying a plaintiff's respondeat superior claim or a claim for personal injury recovery under section 14704(a)(2) of the FMCSA.[124]

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118. *Schramm*, 341 F. Supp. 2d at 547.

119. *Id.*

120. *Id.* at 553. A decision as to the outcome of the negligent hiring claim has not been released to date.

121. See *Tartaglione*, 790 F. Supp. at 441 and *King*, 107 So. 2d at 753 for an example of courts that have held that a transportation broker is not liable under the respondeat superior doctrine. See also *Schramm*, 341 F. Supp. 2d at 547, *Stewart*, 241 F. Supp. 2d at 1221, *Renteria*, 1999 WL 33268638, at *6 for an example of courts that have held that section 14704(a)(2) does not create a private right of action. But see *Marrier*, 140 F. Supp. 2d at 329 for an example of a case in which the court has held that a private right of action is permissible under section 14704(a)(2).

122. *Schramm*, 341 F. Supp. 2d at 552. Robinson's promotional materials provided that "[i]n the rare event that the damage goes beyond the carrier's insurance limits, [Robinson] maintains a liability insurance policy that pays the rest." *Id.* at 542.

123. *Id.* at 553. Although the court dismissed the plaintiff's claims under respondeat superior and 49 U.S.C. 14704(a)(2), the court allowed the plaintiff's claim for negligent hiring to proceed to trial. *See id.*

124. *See* Crosby v. Landstar, No. Civ. 04-1535-SLR, 2005 WL 1459484, at *2 (D. Del. June

VI. Conclusion: The Road to Recovery

Clearly, the increased role of the transportation broker in the motor carrier industry has provided valuable benefits to the entire transportation industry.[125] However, the introduction of another player into the transportation equation does not come without costs. When an injured motorist brings a claim against the transportation broker under either respondeat superior or a private right of action under the FMCSA, that motorist is unlikely to recover any damages from the transportation broker.

Due to the fact that the relationship between the broker and the motor carrier is often deemed to be that of an independent contractor rather than a servant/employee, the transportation broker cannot be held liable for accidents that occur while the goods are in transit. Additionally, the restrictions placed on the private right of action under section 14704 of the FMCSA do not allow injured motorists in the vast majority of states to assert a claim against the transportation brokers.

Criticism of this exemption from liability for transportation brokers has been expressed. The court in *Schramm* recognized that when the transportation broker actively inserts itself into relationship between the shipper and carrier, the transportation broker may assume some of the liability when these types of actions arise.[126] The court went on to state that "this is a case in which the law may simply have to catch up with an obligation that [the transportation broker] has voluntarily assumed . . . ."[127] The court suggested that industry regulators could address this issue through new regulations supported by public policy.[128] One suggested regulation would require carriers, with loads above a certain weight and/or over certain distances, to carry extra insurance for serious accidents.[129]

Additionally, one critic has noted that deregulation has lead to broker abuse, including "undercapitalized, fly-by-night brokers who are preying on unsuspecting carriers and shippers."[130] Based on those con-

21, 2005) (citing Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004) for the proposition that section 14704 does not give state courts jurisdiction over negligence claims); Travelers Indem. Co. of Ill. v. Schneider Specialized Carriers, Inc., No. 04 Civ. 5307(RJH), 2005 WL 351106, at *4 (S.D.N.Y. 2005) (citing Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004) when discussing the categorization of motor carrier on a bill of lading).

125. *See* Kinsler, *supra* note 11, at 289. "If used effectively, brokers can lower the transportation costs of domestic and international shippers and increase the revenue of carriers, which ultimately will stimulate interstate and overseas trade." *Id.*

126. *Schramm*, 341 F. Supp. 2d at 553.

127. *Id.*

128. *Id.* at 553 n.11.

129. *Id.*

130. Kinsler, *supra* note 11, at 291.

cerns, this critic has recommended increased regulations for transportation brokers. These regulations include limiting entry of transportation brokers to those with adequate capital, allocation of personal injury damage among brokers and carriers, and increased regulation similar to that of other intermediaries who handle money on behalf of others like stockbrokers, real estate brokers, and trustees.[131]

Regardless of which road an injured motorist takes, neither appear to represent an easy street to recovery. Third-party transportation brokers aren't likely to be held liable if sued under a respondeat superior doctrine or under FMCSA's private right of action.

131. *Id.* at 292-93. In relation to the allocation of personal injury liability between broker and carrier, the author recommends that a freight broker be required to carrier insurance for these damages and that the transportation broker be classified as an independent intermediary which would eliminate the respondeat superior disputes involved in these types of cases. *Id.* at 322-324.