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Disparity out of Uniformity: Rethinking the Continued Vitality of the Carmack Amendment's Pre-emption of State Consumer Protection Laws

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DISPARITY OUT OF UNIFORMITY: RETHINKING THE CONTINUED VITALITY OF THE CARMACK AMENDMENT'S PRE-EMPTION OF STATE CONSUMER PROTECTION LAWS

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I. INTRODUCTION

A provision of federal law, dubbed the Carmack Amendment, operates to severely limit the amount of liability that may be assessed against interstate carriers, such as moving companies, when consumer goods are lost or damaged in interstate shipment. The Carmack Amendment does not distinguish between consumer transactions, and its liability-limiting provisions have been applied to consumers and businesses alike. This limitation acts to the near universal exclusion of claims based upon state law, and has long been a source of frustration for individual consumers who have attempted to assert the protections against interstate carriers, including claims based on consumer-friendly state statutes.

Over the past 100 years, courts have routinely held that the Carmack amendment has pre-empted nearly all state law claims against the liability of interstate carriers, including actions based on state consumer protection law.[1] This pre-emption has been applied regardless of the degree of negligence, bad faith and in some cases outright theft of goods alleged against an interstate moving company.[2] However, the role of the common law in interpreting the Carmack Amendment and assigning it a proper scope has largely been ignored. This outcome creates problems for the individual consumer, and undermine public confidence in the interstate moving industry in

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[1] *See infra* Part III.

[2] *See, e.g.*, Hall v. N. Am. Van Lines, Inc., 476 F.3d 683 (9th Cir. 2007).

general.

The courts have reasoned that the purpose underlying the enactment of the Carmack Amendment is to create "uniformity out of disparity"[3], in order to relieve interstate carriers from the burden of potentially facing differing and uncertain degrees of liability under the laws of the various states in which they operate or traverse. However, rather than strike a balance between the rights of interstate carriers and those of individual consumers, any such advantage that has been gained by the interstate carrier companies has come at the expense of consumers' rights, and ultimately the end result benefits neither. For the consumer, application of the Carmack Amendment creates a confusing morass of disparity despite the uniformity of protections promised by broadly worded state consumer protection laws. For the moving industry, the lack of oversight or remedy to consumers has led to a black eye from desultory reports in the media.[4]

Although one avenue for remedying the disparity suffered by consumers at the hands of the Carmack Amendment is through legislative reform,[5] such reform has been slow to come about.[6] This article proposes looking at another avenue to correct the disparity between consumers and interstate carriers created by the Carmack Amendment – re-evaluating the relationship between the Carmack pre-emption doctrine and the common law. Such a re-evaluation reveals that the application of the Carmack pre-emption doctrine to consumer protection claims by the Courts of Appeals lacks the doctrinal foundation in Supreme Court decisions that is often taken for granted. This article argues that the proper application of Carmack pre-emption in light of the prior common law is to create an exception for state consumer law claims. This interpretation provides consumer relief by exempting state consumer law claims from the scope of the Carmack Amendment, and thus allowing individual consumers to invoke the protections they provide.

Contemporary courts have largely ignored the common law when applying the doctrine of Carmack preemption. As a result, the doctrine of Carmack preemption has been greatly over-extended the past one hundred years into areas like consumer protection where continued recognition no longer serves a pressing need of interstate carriers and frustrates the purpose of consumer protection laws. More

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[3] Moffit v. Bekins Van Lines, 6 F.3d 305, 307 (5th Cir. 1993).

[4] *See, e.g.*, Dan Benson, *Consumers Say Moving Companies are Taking them for a Ride*, Milwaukee Journal Sentinel, May 6, 2002, *available at* http://www.jsonline.com/story/index.aspx?id=41222 (last visited November 4, 2008).

[5] *See* Joseph L. Franco, *Needed, Private Attorneys General: Empowering Consumers to Reform the Household Moving Industry*, 9 LEWIS & CLARK L. REV. 981 (2005), (proposing legislation to create a federal private right of action for aggrieved consumers).

[6] *Id.* at 1010-12.

than a century later, the time has come to re-evaluate the position this law holds in the domain of field preemption.

Much has changed in the years since the Carmack Amendment was enacted. Since that time, developments in other related areas of the law have eliminated the conditions the Carmack Amendment was specifically designed to address.[7] This article will trace the development of the Carmack amendment, and the concerns that it was enacted to address, as well explore the overextension in contemporary consumer protection cases. This article will focus solely on the question of Carmack pre-emption of state statutory consumer protection claims, and does not encompass any issues regarding pre-emption of state common law tort claims.[8]

Part II of this article will outline the Carmack Amendment itself and its liability limiting provisions. Part III of this article will explore the doctrine of field pre-emption generally and its application to the Carmack Amendment specifically. Part IV will highlight the problems created by the Carmack Amendment in the context of consumer protection claims and examine some recent and unsuccessful attempts by plaintiffs to assert state consumer protection law claims against interstate moving companies.[9] Part V will then advance three separate bases which provide avenues available to the courts to correct this overextension and provide proper interpretation of the Carmack pre-emption doctrine. The scope of this article will focus specifically on the issue of Carmack pre-emption as applied to state Unfair or Deceptive Acts and Practices ("UDAP") statutes. In doing so, the article will consider the common law that developed prior to the enactment of the Carmack amendment, the underlying purpose of the Carmack amendment, and whether or not the Carmack amendment continues to serve that purpose in light of advances in other areas of the law. Finally, this article will address more recent congressional action, which evidences intent to pull back from the overextension that Courts have given Carmack pre-emption.

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[7] *See infra* pp. 338-43.

[8] This article address consumer transactions under the Carmack Amendment, although conceivably the same arguments set forth in this article would apply to business transactions, as the pre-1906 common law did not distinguish between these types of transactions.

[9] Although the term interstate carrier has a broader definition by statute, this article will focus primarily on interstate moving companies due to their frequent involvement in Carmack pre-emption and state consumer law cases.

II. THE CARMACK AMENDMENT

A. Historical Background - The Cloud of Uncertainty Facing Interstate Carriers Prior To The Carmack Amendment

The Carmack Amendment[10] was originally enacted in 1906 as an amendment to the Interstate Commerce Commission Act of 1887.[11] Prior to its enactment in 1906, it was the common practice of interstate shipping companies to attempt to limit their liability on an individual basis by a private contractual arrangement with their clients.[12] This practice originated in England, and had been practiced in the United States from the very early days of the Republic.[13] This practice attempted to limit the liability of a carrier for expensive items that might be lost or damaged during the shipment, and served the needs of the carriers, as common carriers often hauled goods of differing degrees of value.

Under the common law, these liability-limiting contracts were themselves subject to limitation by the Courts. Common carriers, for example, generally could not exempt themselves from liability when these limitations were unfair or unreasonable,[14] and under the eyes of pre-Carmack jurisprudence, it was not just and reasonable that carriers could limit their liability for their own negligence, or that of their employees.[15] Further, such agreements were not enforceable unless they were entered into free of deception.[16]

Prior to the enactment of the Carmack Amendment, there was no controlling federal law on the books that spoke to the issue of interstate carriers' potential liability for shipments in interstate commerce.[17] Thus the federal courts looked to and applied state laws to determine the liability of interstate carriers when items were lost or damaged in shipment.[18] As a result, a carriers' attempt to limit its prospective liability was often subject to differing principles of contract interpretation under the laws of any one of a number of jurisdictions through which a shipment might pass.

Just three years prior to the enactment of the Carmack amendment, in 1903, the Supreme Court decided the case of

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[10] 49 U.S.C. § 14706 (2005).
[11] Interstate Commerce Commission Act, 34 Stat. 584 (1906).
[12] N.J. Steam Navigation Co. v. Merch. Bank of Boston, 47 U.S. 344, 367-68 (1848).
[13] *Id.*
[14] N.Y. Cent. R.R. Co. v. Lockwood, 84 U.S. 357 (1873).
[15] *Id.*
[16] Hart v. Pa. R.R. Co., 112 U.S. 331, 340 (1884) (stating that contracts that are entered into free of deceit would be upheld).
[17] Pa. R.R. Co. v. Hughes, 191 U.S. 477, 489 (1903).
[18] *Id.*

Pennsylvania Railroad Co. v. Hughes,[19] which reaffirmed this point. In *Hughes*, the defendant, an interstate carrier, sought to limit its liability on an interstate shipment of a horse from New York to Pennsylvania based upon a private contract.[20] The contract contained a provision purporting to limit the liability of the interstate carrier and was executed in New York, which it was argued, allowed for such a contractual limitation of liability under state law.[21] However, the suit was initiated in Pennsylvania, rather than New York, and the decision of the Pennsylvania Supreme Court being appealed in that case, held that such a limitation on liability violated the public policy of Pennsylvania and could not be enforced.[22] The judgment of the Pennsylvania court was affirmed because there was no controlling federal statute upon which the defendant, or the Court, could rely upon in order to overturn the decision of the Pennsylvania court.[23]

The *Hughes* case is probative of the purpose behind the Carmack Amendment because its language highlights the patchwork of state laws and differing liability schemes that interstate carriers were facing at the time. The Court noted that in the federal courts, interstate carries could generally enforce the contracts that limited their liability on interstate shipments.[24] While the case in some states, such as New York, it is not so in others, such as Pennsylvania.[25] The Supreme Court would, in a later decision, summarize the state of the then-existing law by quoting a Georgia Appellate Court:

> Some states allow carriers to exempt themselves from all or a part of the common-law liability by rule, regulation, or contract; others did not. The Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and

[19] *Id.* at 477 (1903).
[20] *Id.* at 478.
[21] *Id.* at 484-85.
[22] *Id.* at 486.
[23] *Hughes,* 191 U.S. at 488.
[24] *Id.* at 485 (specifically the court pointed to their decision in Hart v. Pennsylvania R.R. Co., 112 U.S. 331 (1884); this decision pre-dates Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).
[25] *Id.* at 485-86.

> trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another.[26]

Ultimately, the *Hughes* court affirmed the decision of the Pennsylvania Supreme Court, but did not do so before practically inviting Congress to make an addition to the existing body of federal law in order to establish a uniform system of liability, and, in the process, made a thinly veiled hint that such a law would pre-empt state law concerning liability:

> While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, *until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject*, although it may to this extent indirectly affect interstate commerce contracts of carriage?[27]

Presumably, this open invitation by the Court to enact what would eventually become the Carmack Amendment, as well as the surrounding historical circumstances, are strong evidence of the underlying Congressional intent behind the Carmack Amendment, perhaps the only positive evidence of Congressional intent available as it was passed "without discussion or debate."[28]. Thus, there is no legislative history, long a favorite arena of both judges and legal scholars on matters relating to legislative intent,[29] to provide any insight into Congress' intentions behind the Carmack Amendment or its scope. Still, a number of courts have reasoned that the Carmack Amendment was enacted to codify the common law regarding a shippers' ability to

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[26] Adams Express v. Croninger, 226 U.S. 491, 505 (1913) (quoting Southern P. Co. v. Crenshaw Bros., 63 S.E. 865 (Ga. Ct. App. 1909)).

[27] *Hughes*, 191 U.S. at 488 (emphasis added).

[28] Rini v. United Van Lines, 104 F.3d 502, 504 (1st Cir. 1997).

[29] *E.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (in which the majority led by Justice Brennan looked almost exclusively at the legislative history of Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, in holding that the Act was not passed for any valid secular purpose).

limit its liability.[30] It was in this historical context, and within three years of the *Hughes* decision, that the Carmack Amendment was enacted in 1906.

B. Rights and Protections Granted to Interstate Carriers Under the Carmack Amendment

The Carmack Amendment provides a scheme defining the liability of interstate carriers under federal law.[31] Most notable are the liability-limiting provisions of the Carmack amendment for interstate carriers.[32] These provisions provide for an absolute maximum limit on the liability of interstate carriers to the replacement value of any goods that are lost or damaged in interstate shipments.[33] Although this purports to set a maximum value on the liability that can be assessed to interstate shippers, the Carmack amendment also provides for a type of liquidated damages mechanism to further insulate the shippers from full liability. The Carmack Amendment allows for the shippers to obtain a waiver from the consumer which caps the liability of an interstate carrier at a fixed price.[34] The Carmack Amendment and the rate schedules it proscribes were enforced by the Interstate Commerce Commission ("ICC") from 1906 until 1995, at which time the ICC was abolished, with most of the functions being assigned now to the Surface Transportation Board.[35] The Surface Transportation Board now determines the fixed rate provided under the Carmack Amendment.[36]

Currently, the rates set by the Surface Transportation Board under this provision are for a recovery of 60¢ per pound of goods.[37] Thus, by way of an example, a consumer who engages an interstate carrier to move across the country with a typical 5,000 pounds of household goods, would be limited to a maximum recovery of $3,000.00

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[30] *See, e.g.*, Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 137-38 (1964); World Wide Moving and Storage Inc., v. Dist. of Columbia, 445 F.3d 422 (D.C. Cir. 2006).

[31] 49 U.S.C. § 14706 (2005). A general definition of an interstate carrier can be found in 49 U.S.C §13102(3) (2008).

[32] 49 U.S.C. § 14706(f).

[33] 49 U.S.C. § 14706(a). Interstate moving companies are freight forwarders as defined in 49 U.S.C. § 13102(8).

[34] 49 U.S.C. § 14706(f)(3).

[35] ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995).

[36] 49 U.S.C § 14706(f)(1).

[37] The Surface Transportation Board set this rate in 2001 in a decision which also allows that interstate carriers charge consumers a higher price for "additional coverage" in order to adequately insure the value of their household goods in 2001. *Released Rates of Motor Common Carriers of Household Goods*, 5 S.T.B. 1147 (2001). As an alternative, the Board also allows for a flat declaration per pound for the value of goods without the additional protection option. That value was previously based on the Bureau of Labor Statistics U.S. City Average Index. On July 26, 2006 the Surface Transportation Board announced that the Bureau of Labor Statistics Consumer Price Index—All Urban Consumers, would be adopted as the index upon which these prices will now be based, *available at* http://www.stb.dot.gov/decisions/readingroom.nsf/unid/ceb20588fa1e0b0a852571b70046df6e/$file/37121.pdf.

under the Carmack Amendment if their possessions were lost, stolen or damaged. This is regardless of the degree of negligence or willful misconduct of the shipper.[38]

III. THE CARMACK AMENDMENT AND PREEMPTION

A. "In determining the scope of Carmack preemption, we look to the intent of Congress and the purpose of the Amendment."[39]

True to form, when the newly enacted Carmack amendment came before the Supreme Court for the first time since the *Hughes* decision on a question of pre-emption, the Supreme Court held that the Carmack amendment pre-empted state law claims which affected the liability of interstate carriers.

B. The Adams Express Case and Field Preemption

Almost without exception, modern cases that pre-empt state consumer protection law claims under the Carmack amendment trace their analysis back to one case[40] – *Adams Express v. Croninger*[41].

The plaintiff in *Adams Express* sought to recover the value of a diamond ring that had been lost during a shipment by an interstate express company.[42] The defendant, sought to limit its liability under its rate schedules and under the newly enacted Carmack Amendment.[43] After the plaintiff had obtained a judgment for the full value of the ring in state court based upon state law, the company sought review before the Supreme Court arguing that the recovery should be limited and reduced to an amount fixed according to the schedules authorized by the Carmack amendment.[44] In deciding *Adams Express*, Justice Horace Lurton, writing for a unanimous Court, noted that the question before the court was whether or not state law, in this case Kentucky law, or federal law governed the recovery amount for the diamond ring.[45]

Before announcing the final decision, the Court in *Adams Express* dutifully noted the prior case law, which would seem to hold that state law claims against interstate express carriers were

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[38] *See, e.g.*, Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936) (Plaintiff's claim of negligence against an interstate carrier for failure to deliver a film on time is preempted by the Carmack Amendment).

[39] *Rini*, 104 F.3d at 504.

[40] *Moffit*, 6 F.3d. at 306; Hall v. N. Am. Van Lines, 476 F.3d 683 (9th Cir. 2007).

[41] *Adams Express*, 226 U.S. at 491.

[42] *Id.* at 492. The case itself however is silent as to just how such a loss occurred, merely that the shipment was never delivered.

[43] *Id.* at 493.

[44] *Id.*

[45] *Id.* at 499-500.

permissible, including the aforementioned *Pennsylvania Railroad v. Hughes*,[46] however the Court then specifically looked at the more recent congressional actions in enacting the Carmack Amendment. This indicated, in the view of the court, an intention to overturn those prior decisions and pre-empt state law claims on the issue.[47]

Ultimately in *Adams Express,* the court held that the Carmack amendment pre-empted the Kentucky state law by invoking the little-used doctrine of field pre-emption.[48] A revealing passage of the *Adams Express* decision shows just why the Court found in favor of field pre-emption:

> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment.[49]

The underlying rationale for finding that the Carmack amendment pre-empted state law was the differing and, in the court's own words, confusing provisions of state law facing interstate carriers at the time.[50] An interstate carrier may face completely different liabilities in a Pennsylvania court, as opposed to a New York court, or in a federal court in either state. Because of this uncertainty, the Carmack amendment was necessary in 1906.

Even so, the language of the *Adams Express* decision indicates that the prior common law was to be adopted into the freshly created doctrine of Carmack pre-emption. Speaking as to the relationship between state and federal laws, the Court mentioned that pre-existing federal law should be applied so as to give the amendment proper interpretation:

> To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under

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[46] *Id.* at 504-06.
[47] *Adams Express,* 226 U.S. at 505-06.
[48] *Id.*
[49] *Id.* at 506.
[50] *Id.*

existing state laws, for the latter view would cause the proviso to destroy the act itself.[51]

The early decisions under the Carmack Amendment would continue to look to the common law for guidance.

C. Justice Lurton and the Advent of the Carmack Pre-emption Doctrine

The *Adams Express* decision was issued on January 6, 1913,[52] but was only the first in a series of three decisions under the Carmack Amendment that were handed down that same day. All three opinions were authored and delivered by Justice Lurton. While, the case of *Chicago, St. Paul, Minneapolis and Omaha Railway Co. v. Latta*,[53] was perfunctorily decided based upon the basis of the *Adams Express* decision and offers little insight into the development of the Carmack Amendment, the third decision of the day in *Chicago Burlington and Quincy Railway Company v. Miller*,[54] does include some insightful language.

In *Chicago Burlington*, the Court applied the *Adams Express* decision and held the Carmack Amendment had "superseded all state regulations on the same subject."[55] The Court specifically confined its remarks on Carmack pre-emption to state "regulations" and was notably silent as to whether or not the common law that had previously been applied by the federal courts had also been superseded.[56] Although *Chicago Burlington* only hints that the common-law was retained after the passage of the Carmack Amendment, subsequent decisions, including the next Carmack Amendment case decided by the court would confirm that indeed it was.

The next Carmack Amendment decision from the Supreme Court was handed down a mere two months after *Adams Express - Kansas City Southern Railway Co. v. Carl*.[57] In this opinion, the Court addressed the question of Carmack pre-emption and the common law that existed prior to 1906. Justice Lurton again wrote for the majority.[58] In this case, the plaintiff claimed that the shipping agreement in question sought to limit a carrier's liability for its own negligence and that such an exemption was actually forbidden by the Carmack

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[51] *Id.* at 508-09.
[52] *Id.* at 491.
[53] 226 U.S. 519 (1913).
[54] 226 U.S. 513 (1913).
[55] *Id.* at 518.
[56] *Id.*
[57] 227 U.S. 639 (1913).
[58] *Id.* There were two dissenting votes to this opinion.

Amendment.[59] The Court recognized that this case was governed by the Carmack Amendment,[60] however, in deciding this question, the Court specifically looked beyond the text of the Amendment to the principles of the common law and applied them to the facts of the case. Specifically the Court, quoting from its earlier decision in *Adams Express*, stated that "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void."[61] Under this common law principle, the Court reasoned that even under the Carmack amendment, exemptions from liability for negligence were forbidden.[62]

Ultimately, the Court held that the agreement and the Carmack Amendment did not exempt the carrier from liability, but did hold that the value of the lost goods could be established by the rates and declaration of value signed by the consumer.[63] For purposes of this article, and any discussion of the relationship between the Carmack Amendment and consumer protection claims, it is worth noting that the Court specifically stated before delivering the opinion, that "There was no evidence tending to show any misrepresentation made by the company, or of any deceit, or fraud, or concealment."[64] The logical inference being that this was a sort of pre-requisite to the issue of Carmack pre-emption and had there been such conduct, the liability-limiting principles of the Carmack amendment would not apply. However, the important principle to glean from the *Carl* case is that the weight and precedence given by the Court to the pre-Carmack common law.

These first Carmack cases, all of which were authored by Justice Lurton, demonstrated a commitment to interpret the Carmack amendment in harmony with prior common law rules. Specifically, in both the *Adams Express* and *Carl* cases, the Court addressed the concern of fairness and deception, and implicit in its reasoning can be found the standard that an attempt to limit a carriers liability under the Carmack amendment would be invalid if it were unfair or entered into via deception.

D. Subsequent Development of the Carmack preemption Doctrine

The over-extension of the doctrine of Carmack preemption

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[59] *Id.* at 649. Although the Court stated that it was forbidden by the Carmack amendment, it is probably more accurate to say it was forbidden by principles of common law, having been retained after the passage of the Carmack amendment.

[60] *Id.* at 648-49.

[61] *Id.*

[62] *Id.* at 650.

[63] *Kansas City Ry. Co.*, 227 U.S. at 655-56.

[64] *Id.* at 642.

began in earnest in 1914 with the High Court's decision in *Boston & Maine Railroad Co v. Hooker.*[65] In this decision, authored by Justice William R. Day, the Court looked to the Carmack Amendment to limit the liability of a railway company for its negligence in losing a passenger's baggage, despite the fact that the railroad had simply posted its rate schedules in the train station and not provided the plaintiff with actual notice of the rates.[66] In doing so, the majority was dismissive of the application of the common law to the Carmack amendment.[67]

This decision brought a scathing dissent from Justice Mahlon Pitney.[68] Justice Pitney cited to *Adams Express* as authority for his argument that the common law continued to apply in conjunction with the Carmack amendment and argued that accordingly the common law surrounding interstate shippers should still govern.[69] He pointed out that there was "nothing in the letter or the policy of the acts that absolved a carrier from its long-recognized duty to treat shippers and passengers fairly."[70] Justice Pitney also forewarned that such consequences would prove to be disastrous for an average consumer.[71]

The *Hooker* Court's dismissive treatment of the common-law was an aberration in early Carmack Amendment decisions. In later years, the Court gradually drifted away from the practice of looking to the pre-Carmack common law and analyzing Carmack pre-emption in light of these common law principles, however, on occasion, after *Hooker*, the Court did reinforce the validity of the pre-Carmack common law.[72]

Following *Hooker,* Justice Pitney was chosen to deliver the next opinion issued by the Court involving the Carmack Amendment. In a decision that seems highly relevant to a contemporary state consumer protection claim, the Court in *Missouri, Kansas and Texas Railway Co. of Texas v. Harris,*[73] upheld an award of attorneys' fees to a plaintiff who had successfully brought a cause of action under the Carmack Amendment, over the arguments of a shipper that such an award be pre-empted by the Amendment. The plaintiff's recovery of his attorneys' fees was made under a separate provision of Texas state law.[74] In so holding, the Court noted that such an award of attorneys'

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[65] 233 U.S. 97 (1914).
[66] *Id.* at 121.
[67] *Id.* at 120-21.
[68] *Id. at* 122-57.
[69] *Id.* at 137-38.
[70] *Boston and Maine Ry. Co.,* 233 U.S. at 155.
[71] *Id.* at 156-57.
[72] *See, e.g.,* Chicago Nw. Ry. Co. v. C.C. Witnack Produce Co., 258 U.S. 369 (1922).
[73] 234 U.S. 412 (1914).
[74] *Id.* at 415.

fees under state law was not inconsistent with the Carmack Amendment and was not pre-empted by the Amendment.[75] Inexplicably, the *Harris* case seems to be almost forgotten in modern jurisprudence. Contemporary consumer protection cases that fall under the Carmack Amendment have not looked to *Harris* for guidance, despite its obvious implication that a state law recovery of attorneys' fees can be had under the Carmack Amendment.[76]

Since 1964, the Supreme Court has not heard any cases arising under the Carmack amendment.[77] Thus it has fallen to the Courts of Appeals to apply the *Adams Express* decision and its progeny to modern consumer protection cases.[78] These courts have found justification for pre-emption of state consumer protection laws under the umbrella of "field preemption."[79] In doing so, the courts have generally considered the broad language of the Carmack Amendment itself as the basis for continuing to find that it pre-empts state consumer protection laws.[80] The courts generally have not revisited or questioned the enduring vitality of the Carmack pre-emption doctrine nor have they been inclined to revisit the issue of the common law, or the insight it provides into the question of preempting state consumer protection laws.

The result has been a gradual judicial drift away from the pre-Carmack common law, and the early decisions regarding Carmack pre-emption. Because this judicial drift has come at the expense of the pre-existing common law, which was retained by the Supreme Court in its early Carmack decisions, the foundation supporting the extension of Carmack preemption to state consumer protection laws is suspect and the issue is ripe for re-consideration.

IV. THE NEED TO REVISIT THE ISSUE OF CARMACK PREEMPTION

The Carmack Amendment is outdated because the problems it sought to correct have been obviated by subsequent developments in the law. However, continued application of the Amendment and its pre-emption doctrine in its current form has left a trail of inequitable results for consumers and leaves the interstate shipping industry largely unregulated. These current problems coupled with the unsupported

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[75] *Id.* at 420-21.

[76] The Tenth Circuit did look to this case in its decision in A.T. Clayton Co. v. Missouri Tex. and Kan. Ry. Co., 901 F.2d 833 (10th Cir. 1990), however even this case has not been widely adopted.

[77] *See Missouri Pac. Ry. Co.*, 377 U.S. at 134.

[78] The Supreme Court has never addressed the question of whether or not state consumer protection actions are preempted by the Carmack Amendment.

[79] Roberts v. N. Am. Van Lines, 394 F. Supp. 2d 1174, 1182-84 (N.D. Cal. 2004).

[80] *Id.*

extension of the Carmack preemption doctrine mandate a re-evaluation of the proper scope of the Carmack Amendment.

A. The Carmack Amendment No Longer Serves the Purposes For Which It Was Enacted

The Carmack Amendment presents the somewhat unique prospect that Congressional intent cannot be discerned in any way from the amendment's legislative history, as the Carmack Amendment has no legislative history.[81] Congressional intent, in this case, is best derived from the environment in which the statute was born.[82]

Modern courts have consistently preempted state consumer protection claims under the Carmack Amendment on the basis that allowing such claims would cause a reversion back to the "morass" of confusion and uncertain liability that existed before the enactment of the Carmack Amendment.[83] However, this assertion is based more on rote repetition of an unquestioned doctrine rather than upon an actual analysis of modern or common law.[84] This conclusion is also erroneous as to the conditions which created the "morass" that existed have long since been displaced by subsequent developments in the law.

The rationale adopted in *Adams Express* for finding in favor of field preemption rested on two key points: 1) that interstate carriers faced potentially differing degrees of liability in federal as opposed to state courts[85] and 2) that interstate carriers were unable to effectively ascertain which state law would apply to the shipment.[86] Although these may have been legitimate concerns a century ago, today both of these concerns have now largely disappeared through entirely separate developments in the law.

B. Advent of the Erie Doctrine

The first concern raised in *Adams Express* was that interstate carriers faced the possibility of facing differing schemes of liability in federal courts as opposed to state courts.[87] At the time that Carmack Amendment was enacted in 1906, the controlling rule for federal courts

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[81] *Rini*, 104 F.3d at 504.

[82] *See* United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter J. dissenting) (stating that "a statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated").

[83] *Moffit*, 6 F.3d at 307.

[84] Not since the *Adams Express* decision, and certainly not since the development of the *Erie* doctrine, has a court really engaged in any sort of meaningful analysis of the uncertainties that interstate carriers might face in a modern world.

[85] *Adams Express*, 226 U.S. at 504-05.

[86] *Id.*

[87] *Id.*

hearing a state law claim was the rule of *Swift v. Tyson*,[88] which held that a federal court sitting in diversity was free to exercise its independent judgment to determine what the law should be.[89] Thus, a defendant in federal court could potentially face different liability than he faced in a state court if a federal judge felt that some different body of law ought to apply.[90] It was under this highly unpredictable rule of law that the Carmack Amendment was enacted and *Adams Exp*ress was decided. Twenty-five years later, in 1938, this concern was effectively resolved by another case that involved an interstate carrier – *Erie R. Co. v. Tompkins*.[91]

In *Erie*, a defendant railroad company faced an uncertain amount of liability for a personal injury that occurred in interstate transit.[92] In *Erie*, we see an echo of the same concerns of uncertainty that pre-dated the Carmack Amendment. The *Erie* court effectively eliminated this uncertainty though by overruling the unpredictable rule of *Swift v. Tyson* and holding that federal courts sitting in diversity were now bound to apply the law of state in which the federal court sat.[93] With the *Erie* decision, interstate carriers were no longer faced with the prospect of differing liabilities in state versus federal court. Federal courts, now applying state law, should assess the same rules of liability that a state court would.

The *Erie* decision effectively eliminated the federal/state confusion question upon which the need for the Carmack Amendment was partially predicated. State law should now be applied equally in both federal and state courts.

However, even after *Erie* specifically addressed one of twin pillars of concern supporting the Carmack Amendment, federal courts still did not question the continuing wisdom of the Carmack pre-emption doctrine.

C. Choice of Law and Forum Selection After Carnival Cruise Lines

Even after *Erie*, an interstate carrier could still face differing liabilities in any given state that obtained jurisdiction over the shipment.[94] This was precisely the situation in *Hughes*, in which a

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[88] 41 U.S. 1 (1842).

[89] Erie v. Tompkins, 304 U.S. 64, 71 (1938).

[90] *Id.*

[91] *Id.*

[92] It is interesting to note that had *Erie* concerned an injury to property, rather than a personal injury, it would have fallen under the scope of the Carmack Amendment and would not have provided us with the monumental *Erie* doctrine that is so familiar throughout the legal community.

[93] *Erie*, 304 U.S. at 71.

[94] This could be especially problematic in cases concerning torts as the prior Conflict of Law rule of *lex loci delicti* required that the law of the state where the injury was suffered controlled

Pennsylvania court refused to apply New York law to a contract which was entered into in New York.[95] Thus, the interstate carriers still lacked a way to adequately ensure some sort of certainty as to what their liabilities would be and still depended on the Carmack amendment to provide that certainty. This concern arguably remained a legitimate one until 1991, when the Supreme Court's decision in *Carnival Cruise Lines v. Shute*[96] was issued.[97]

In *Carnival Cruise Lines*, the Court upheld a forum selection and choice of law claim that had been included as standard boilerplate language in a contract for a cruise on the high seas.[98] In conducting its analysis, the Court noted that forum selection clauses are presumptively valid.[99] The Court went on to specifically enumerate three reasons why the forum selection clause in the cruise contract was valid. All three reasons are also universally applicable to interstate carriers.[100]

First, the court stated:

> "[A] cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora."[101]

The same rationale is directly applicable to interstate carriers, who, by the very nature of their enterprise conduct business and travel through many locales. The court noted that the transitory nature of the cruise line gave it a "special interest" in limiting the fora in which it potentially faced a lawsuit. By extension then, interstate carriers which also traverse many locales in the course of interstate commerce should likewise possess this same special interest.

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liability. Thus, an interstate carrier shipping from California to New York for example could potentially face liability under the laws of any of the states through which it passed en route to its destination. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 379 (1934) (defendant's liability determined by "the law of the place of wrong"); *id.* at § 377, note 1 (the place of wrong for torts involving bodily harm is *"the place where the harmful force takes effect upon the body"* (emphasis in original)).

[95] *Pennsylvania R.R. Co.*, 191 U.S. at 477.

[96] 499 U.S. 585 (1991).

[97] The Supreme Court first applied a presumption of validity to choice of forum clauses in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), but *Carnival Cruise Lines* is particularly important as it relates to this article for both its rationale and the fact that it dealt with consumer transactions rather than business transactions.

[98] *Carnival Cruise Lines*, 499 U.S. at 587.

[99] *Id.* at 589.

[100] *Carnival Cruise Lines* involved a case arising under the admiralty jurisdiction of the federal courts, an exclusively federal domain, as is the domain of interstate commerce; *id.*

[101] *Id.* at 593.

Next, the court stated:

> Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.[102]

This reason is equally applicable to interstate carriers as it is to cruise lines because interstate carriers do similarly face potential litigation in a variety of different forums.

The third reason advanced by the Court was that: "it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[103] This line of reasoning also is equally applicable to interstate carriers. We have seen that prior to 1906, interstate carriers had a real concern about their potential liability. By extending the same forum selection benefit to interstate carriers that was granted to cruise lines, it stands to reason that enjoyment of reduced rates would follow.[104]

Under the reasoning and rationale in *Carnival Cruise Lines*, and by application to the field of interstate shipping,[105] an interstate carrier should now perfectly capable of reviving the ancient practice of forging private contracts with consumers and eliminating any confusion or uncertainty about potential liability in any disputes with the consumer. Carriers would be perfectly capable of establishing, before undertaking any shipments, which state's law may govern the shipment and even the appropriate forum to bring the suit

With the adoption of the *Erie* Doctrine and the *Carnival Cruise Lines* decision, the morass of uncertain liability that swirled around interstate carries prior to the Carmack Amendment has ceased to exist and the rationale for federal preemption of state law has now disappeared. If the Carmack Amendment were simply deleted from the

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[102] *Id.* at 593-94.

[103] *Id.*

[104] *See Franco*, *supra* note 5, at 985.

[105] This would not be the first time that admiralty law would have set the pattern for land based shipping companies to follow. *See* Hart v. Pa. R.R. Co., 112 U.S. 331 (1884) in which the Court looked to the admiralty case of New Jersey Steam Navigation Co. v. Merch. Bank of Boston, 47 U.S. 344 (1848) for validation of the principle that a land based common carrier could contractually limit their liability.

U.S. Code tomorrow, interstate carriers should still have sufficient resources under the law to be able to limit any uncertainty as to the legal liability they might face.

The two twin pillars of concern that supported the Carmack amendment from the beginning are no longer viable, yet no proverbial Samson has yet come forward to directly challenge the vitality of Carmack pre-emption.

D. Frustrations of Individual Consumers Under the Carmack Amendment

The body of consumer protection law is a relatively new development, being essentially nonexistent before the 20th Century.[106] In that time, the most significant consumer protection law is the Wheeler-Lea Amendment to the Federal Trade Commission Act,[107] which outlawed unfair and deceptive acts in interstate commerce in order to grant consumer protection powers to the Federal Trade Commission ("F.T.C.") and upon which a myriad of state consumer protection laws are based. Prior to that time the F.T.C.'s jurisdiction had been limited to the regulation and enforcement of anti-trust matters.[108]

By their very nature, consumer protection laws are designed to protect individual consumers against unfair and deceptive acts and practices by sophisticated businesses.[109] Federal law provides for a blanket prohibition on unfair or deceptive acts or practices against consumers that occur in interstate commerce,[110] and a network of state laws, often termed UDAP laws, patterned after federal consumer protection laws,[111] grant individual causes of action to consumers injured by unfair or deceptive acts or practices.[112]

These state law UDAP claims often provide superior relief than allowed under the Carmack Amendment[113] and consumers have sought to hold interstate carriers liable for damages under such acts. Universally, these cases against interstate carriers have fallen prey to

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[106] At common law, the only action which could remotely be styled a consumer protection matter was common law fraud. Today fraud is often alleged concurrently with consumer protection claims but is largely considered as a distinct action sounding in tort.

[107] Wheeler-Lea Amendment, 15 U.S.C. § 45 (2006).

[108] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L. J. 1 (2003) (In its infancy, the Federal Trade Commission's role was confined to enforcing antitrust matters primarily under the Sherman Antitrust Act.

[109] *See, e.g.*, Lyne v. Arthur Andersen & Co., 772 F. Supp. 1064, 1068-69 (N.D. Ill. 1991).

[110] 15 U.S.C. § 41. This chapter is known as the Federal Trade Commission Act. The Federal Trade Commission does not have jurisdiction of all businesses, there are specific industries, such as banks and interstate carriers which are exempt from FTC enforcement.

[111] *E.g.*, WASH. REV. CODE § 19.86.020 (2008).

[112] *Id.*

[113] *E.g.*, CAL. CIVIL CODE § 1780 (2009).

the Carmack pre-emption doctrine, with the interstate carriers invoking the liability-limiting protections of the Carmack Amendment. To date, consumers have largely been unsuccessful in escaping from the grasps of Carmack preemption, despite raising allegations of manifestly unfair and deceptive acts on the part of intestate carriers.[114]

E. A False Start – Attempting to Narrow the Scope of Carmack Preemption

In another largely forgotten case, *Boston & M.R.R.R. v. Piper*,[115] the Supreme Court held that a carrier's attempts to limit the liability of interstate carriers for negligence in delays of delivery fell outside the scope of the Carmack amendment and were void.[116] Although, *Piper* has not routinely been discussed by the lower courts, for a brief period, a movement arose which allowed consumers' state UDAP claims to survive the Carmack amendment by narrowing the scope of Carmack preemption. This movement began in earnest when the Court of Appeals for the Tenth Circuit held that the Carmack Amendment did not pre-empt state common law rules governing computation of damages for a lost shipment.[117]

In 1988, this argument seemed to gain momentum when it was adopted by the District of Massachusetts in a pair of cases under the Carmack Amendment that permitted consumers to assert state consumer protection claims against interstate carriers.[118] In the first case to come before the court, *Sokhos v. Mayflower Transit,*[119] the plaintiff asserted, among other claims, a claim under Massachusetts' UDAP statute against Mayflower Transit, an interstate moving company.[120] The plaintiff alleged unfair and deceptive acts in the process of making the inventory of the goods that were shipped.[121] The moving company, it was alleged, did not show the inventory list to the plaintiff until after the moving truck had been loaded.[122] The plaintiff claimed that the method of conducting the inventory prevented her from ensuring that the inventory list was accurate, violating

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[114] Clark v. Zimmerman, 394 F. Supp. 1166 (M.D. Pa. 1975).

[115] Boston & M.R.R.R. v. Piper, 246 U.S. 439 (1918).

[116] *Id.* at 445.

[117] Reed v. Aaacon Auto Transport, 637 F.2d 1302 (10th Cir. 1981). Unfortunately this exception to Carmack pre-emption was short lived in the Tenth Circuit. Eight years later the Tenth Circuit overruled the *Reed* decision in Underwriters of Loyd's of London v. N. Am. Van Lines, 890 F.2d 1112 (10th Cir. 1989).

[118] *See* Sokhos v. Mayflower Transit Inc., 691 F. Supp. 1578 (D. Mass.1988); and Mesta v. Allied Van Lines, 695 F. Supp. 63 (D. Mass.1988).

[119] *Id.* at 1578. The question came before the court on a motion for summary judgment by the Defendant.

[120] *Id.* at 1579.

[121] *Id.* at 1581-82.

[122] *Id.* at 1579.

Massachusetts' UDAP law.[123] The court allowed the UDAP claim to go forward on the basis that this practice was unrelated to the loss or damage that occurred while in shipment and was thus outside the scope of Carmack pre-emption.[124]

In the second case, *Mesta v. Allied Van Lines,*[125] an individual consumer hired the Defendant to ship household goods from a port of entry to her home.[126] The Plaintiff, after the goods were lost while in shipment, filed a claim with the defendant shipping company, who failed to respond to the claim for nine months.[127] The District Court, while holding that the Carmack Amendment pre-empted other state law claims, held that the Carmack Amendment did not pre-empt a claim based on the Massachusetts UDAP statute for the Defendant's conduct in failing to respond to the damage claims submitted by the Plaintiff.[128] The basis for this decision was that the Defendant's conduct occurred entirely after the shipment was made and was not undertaken in the course of transporting goods, ergo Carmack pre-emption did not apply.[129]

The doctrine that began to emerge from these cases was that Carmack preemption was limited to losses and damages incurred during the actual shipment of goods, yet related actions, such as negotiating an agreement or loading a moving truck, were still subject to state consumer protection laws.

However, this development, which favored consumers, was short lived. Just seven years later, after the District Court of Massachusetts had again allowed a consumer to assert the state UDAP statute in a claim against an interstate mover,[130] the First Circuit reversed the decision.[131] In an attempt to clarify the state of the law regarding Carmack preemption, the Court held that:

In light of the Court's holding in *Varnville*[132], we find that all state laws that impose liability on carriers *based on the loss or damage of shipped goods* are preempted. A state law "enlarges the responsibility of the carrier for loss or at all affects the ground of recovery, or the measure of recovery," where, in the absence of an injury separate and

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[123] *Id.*

[124] *Sokhos*, 691 F. Supp. at 1582.

[125] *Mesta*, 695 F. Supp. 63.

[126] *Id.* at 63-64.

[127] *Id.*

[128] *Id. at* 65.

[129] *Id.*

[130] *See* Rini v. United Van Lines, 903 F. Supp. 224 (D. Mass. 1995).

[131] Rini v. United Van Lines, 104 F.3d 502 (1st Cir. 1997).

[132] The *Varnville* case referenced in this quotation is *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915), which preempted a South Carolina state law that required interstate carriers to reimburse consumers for lost or damaged goods within 40 days of the loss.

apart from the loss or damage of goods, it increases the liability of the carrier. Preempted state law claims, therefore, include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims.[133]

In making this ruling, the court recognized and overruled the *Sokhos* and *Mesta* cases, effectively putting an end to all state claims, including UDAP claims, against interstate movers.[134]

F. Roberts v. North American Van Lines as a Contemporary Archetype

In 2004, in one of the more recent cases illustrative of the modern state of the Carmack preemption doctrine in the consumer protection field, a group of plaintiffs filed a class action in the Northern District of California against the interstate moving company North American Van Lines.[135] The plaintiffs in that case alleged "widespread and deceptive practices of baiting consumers with reasonable written estimates," and then artificially inflating the cost and withholding delivery of the consumers' possessions unless the higher amount was paid.[136]

The named plaintiffs alleged in their complaint a series of unconscionable acts by the defendant. The first plaintiff alleged that when she hired North American Van Lines to move her daughter's possessions across the county she was quoted an estimated price of $3,028.50 based on an estimate that the goods weighed 3,500 pounds.[137] That charge more than doubled to $6,172.53 just after North American had taken possession of her goods and loaded them on the moving truck.[138] North American then refused to return her household goods until she paid the full amount.[139] When she protested the higher charge, she was threatened with incurring additional costs for storage fees, according to the complaint.[140]

The other class representative alleged that she was also provided an acceptable estimate, but that in the end, the move would cost actually cost triple the estimated price, because the Defendant has

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[133] *Rini*, 104 F.3d at 506.

[134] *Id.* at 506 n. 3. A similar fate befell consumers in the Tenth Circuit which had previously allowed for state law claims for punitive damages against an interstate carrier in *Reed v. Aaco Moving*, but which was later reversed.

[135] Roberts v. N. Am. Van Lines, 394 F. Supp. 2d 1174 (N.D.Cal. 2004).

[136] *Id.* at 1175.

[137] *Id. at* 1176.

[138] *Id.* The actual weight claimed by North American Van Lines was actually 8,180 pounds, a difference of 4.680 pounds from the estimate; a remarkable difference for an experienced moving company.

[139] *Id.*

[140] *Id.*

misestimated the weight of her possessions by more than 50 percent.[141] This plaintiff heard of the increase in price before the moving truck was loaded and she instructed the movers to not load anything as she was going to hire another moving company.[142] In her absence, the North American Van Lines movers loaded up all of her possessions anyways, and moved them across the country from California to Massachusetts.[143] After the plaintiff finally located her possessions, she was told that the actual moving weight was 8,000 pounds.[144] A week later, she was informed that the moving weight increased again, this time to 9,120 pounds and the cost of the move accordingly increased as well.[145] She refused to pay and North American threatened to auction off her belongings and began charging her storage fees.[146] With the extra fees she was charged, her total cost nearly tripled from the already-inflated cost of the move.[147]

The plaintiffs asserted among their causes of action a violation of California's Consumers Legal Remedy Act.[148] California law provides for a significant plaintiff's recovery when the Consumers Legal Remedy Act is violated, including: actual damages, restitution of property and attorney's fees and costs in addition to punitive damages.[149] The defendant, North American Van Lines, sought to dismiss all state law claims on the basis of Carmack pre-emption.[150] In the court's analysis of the Carmack pre-emption issue, the court specifically looked to *Adams Express v. Croniger*[151] and subsequent decisions from the court of appeals as binding precedent which cast a rather wide net of pre-emption on all of the plaintiff's state law claims.[152] The court did not consider, nor was the issue apparently raised, the effect of the common law on these state law claims.

Rather than challenge the enduring validity of *Adams Express* in light of the common law, the Plaintiffs claimed that the operative facts giving rise to the consumer protection claims placed their claims outside of the actual interstate shipment of the goods and was therefore

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[141] *Roberts*, 394 F. Supp. 2d at 1177. In Ms. Saks-Young's case the price was curiously increased even before any items were loaded onto the moving truck.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* Ms. Saks-Young alleged that she had asked to have her belongings re-weighed in her presence and that North American Van Lines did this re-weighing without her.

[146] *Id.*

[147] *Roberts*, 394 F. Supp. 2d at 1177.

[148] *Id.* at 1177.

[149] CAL. CIVIL CODE § 1780. This is California's UDAP law.

[150] *Roberts*, 394 F. Supp. 2d at 1178.

[151] *Id.* at 1179.

[152] *Id.* at 1179-80. The cases that the district court looked at specifically were: Rini v. United Van Lines 104 F.3d 502 (1st Cir. 1997), Morris v. Covan Worldwide Moving, Inc., 144 F.3d 377 (5th Cir. 1998), and Gordon v. United Van Lines, Inc., 130 F.3d 282 (7th Cir. 1997).

removed from Carmack pre-emption.[153] This argument mirrored the reasoning in *Sokohos,*[154] and the court did recognize that the Defendant's "bait and switch" tactics were unrelated to a loss of goods in shipment,[155] but ultimately the claims were pre-empted by the comprehensiveness of the Carmack Amendment's occupying the entire field of interstate carrier liability.[156]

Somewhat ironically, the abuses occurring under the Carmack Amendment are the not the first instance in which interstate carriers have exhibited a pattern of misconduct when afforded special protections by the law. In considering New York's 19th century carrier-friendly approach[157] of generously limiting liability of shipping companies, the Supreme Court noted in 1873:

'The fruits of this rule,' says Judge Davis, 'are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."[158]

Today, after nearly a century of frustration to the consumer caused by the Carmack Amendment, a just sense of public policy again demands that the issue of carrier liability be revisited.

V. THE COMMON LAW AS THE KEY TO A PROPER INTERPRETATION OF THE CARMACK AMENDMENT

A. The Common Law Did Not Permit a Carrier to Limit Its Liability When Its Contracts were Unfair or Were the Result of Deception

The Carmack Amendment was not enacted in a vacuum. At the time of its enactment, there existed a body of common law which dictated when liability could be contractually reduced.[159] Prior to the enactment of the Carmack Amendment, common carriers would attempt to limit their liability through a private contract with their clients. The common law that had developed around this practice is summarily restated by Justice Field as:

The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may . . . prescribe

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[153] *Roberts*, 394 F. Supp. 2d at 1182.
[154] *See Sokhos, supra* note 118 and accompanying text.
[155] *Roberts*, 394 F. Supp. 2d at 1182.
[156] *Id.* at 1182-84.
[157] *See supra* note 105 and accompanying text.
[158] *N.Y. Cent R.R. Co. v. Lockwood*, 84 U.S. 357, 368 (1873).
[159] *Adams Express*, 226 U.S. at 509-10.

regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and he cannot by any mere act of his own avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused. The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct. . .[160]

Further, a common carrier was not entitled to limit its liability when it had engaged in deceptive conduct.[161] Nor would a carrier be allowed to limit its liability if it were "unfair" to do so.[162] The only situations in which carriers were exempt under the common law is when the damage resulted from "acts of God," or "acts of the public enemy."[163] Thus, a fairly-well established body of common law had developed prior to the enactment of the Carmack Amendment.

When Congress enacts statutes on matters which have previously been governed by the common law, "Congress does not write upon a clean slate."[164] As a general rule of law, common law rights which existed prior to the enactment of a statute, or other legislation, remain in effect unless expressly abrogated by the more recent statute.[165] "[S]tatutes which invade the common law ··· are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident, and in order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law."[166] Outside of the *Adams Express* decision, the Courts that have considered

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[160] York Co. v. Cent. R.R., 70 U.S. 107, 112-13 (1865).

[161] *Hart*, 112 U.S. at 340 (stating that contracts that are entered into free of deceit would be upheld).

[162] *See, e.g., Adams Express*, 226 U.S. at 509.

[163] *N.J. Steam Navigation*, 47 U.S. at 381 (1848). The term "Acts of God" is generally understood to mean acts of nature free from human influence. Blacks Law Dict. 33 (8th ed. 2004).

[164] U.S. v. Texas, 507 U.S. 529, 534 (1993).

[165] Silvers v. Sony Pictures Entm't., Inc., 402 F.3d 881, 902 (9th Cir. 2005).

[166] *Texas*, 507 U.S. at 534.

the issue of Carmack pre-emption have neglected to consider the body of common law of shipment contracts which existed at the time; nor have they considered how this body of common law fits into questions of Congressional intent and Carmack preemption.

In the case of the Carmack Amendment, the Court in *Adams Express* recognized that under the common law, a shipping agreement must be fair in order to allow any reduction in liability.[167] This practice had long been established in the course of business as the preferred method for common carriers to establish some sort of certainty as to their potential liabilities should the goods be lost or damaged in shipment.[168] It was this pre-existing common practice among shipping companies that Congress sought to regulate and make uniform with the Carmack Amendment.[169]

In *Adams Express*, after considering the pre-emptive effect of the Carmack Amendment, the Court addressed the argument advanced by the Plaintiff that the Carmack Amendment should not pre-empt state law claims because the Defendant's failure to inquire as to the actual value of the diamond ring was "unfair."[170] The court ultimately rejected this argument, although only upon a question of fact-on the grounds that a failure to inquire as to the value did not render the contract "unfair."[171] Implicit in this reasoning however is the principle that an unfair contract would not be entitled to Carmack preemption.[172]

In deciding this issue, the *Adams Express* Court summarized and actually reinforced the body of common law that had arisen and upon which the Court relied on when considering the issue of limitations on the liability of interstate carriers.[173] The common law at the time of the statute's enactment, as summarized by the Supreme Court in *Adams Express*, required that a limitation of liability by an interstate carrier depended upon a fair and reasonable agreement, free of deceptive practices, to be valid.[174] Specifically, the *Adams Express* Court stated in its summation of the common law that "It is just and reasonable that such a contract [to limit liability], fairly entered into, and where there is no deceit practiced on the shipper, should be upheld."[175]

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[167] *Adams Express*, 226 U.S. at 508.

[168] N.Y., Philadelphia & Norfolk R.R. Co. v. Peninsula Produce Ex. of Md., 240 U.S. 34, 37 (1916).

[169] *Adams Express*, 226 U.S. at 508.

[170] *Id.* at 508-09

[171] *Id.*

[172] *Id.*

[173] *Id.* at 504-06.

[174] *Id.* at 509.

[175] *Adams Express*, 226 U.S. at 511.

B. Permitting State Consumer Protection Claims is Consistent With the Common-Law and Should Not be Pre-empted by the Carmack Amendment

State UDAP laws are consumer protection statutes patterned after the FTC Act which prohibits "unfair or deceptive acts or practices."[176] Although Adams Express was decided well in advance of the enactment of any statutes which employed the specific language of "unfair and deceptive acts," the Court in *Adams Express* recognized that in order to qualify for a limitation on liability the shipping contract must not be unfair and it must not be deceptive.[177] The Carmack Amendment contains no language which speaks to these common law pre-requisites for limitations on liability, and any subsequent abrogation of these requirements cannot be supported by recourse to the statutory text.

In order to properly interpret the Carmack Amendment and its scope of preemption, in harmony of the common law, the Courts cannot ignore this requirement that contacts which are unfair, or which are entered into by deception, cannot shield a shipper from full liability for state law claims. Because claims under state UDAP laws by their very nature concern allegations of unfair or deceptive conduct, the common-law rules would actually require that state consumer protection law claims be allowed.

Thus, the proper interpretation of the Carmack Amendment, as recognized by *Adams Express*, is that Carmack preemption should not be extended in cases involving unfair or deceptive acts by carriers consistent with the pre-existing body of common-law that had developed prior to 1906.

Because of the standard in the common law, which was not addressed in the text of the Carmack Amendment, the proper course of analysis for future Courts which must face questions of Carmack preemption is to first consider whether or not the agreement was fair, and whether or not deceptive acts or practices were used to induce the consumer to agree to the shipping contract. Only if the Court finds that the actions of an interstate carrier are free from unfairness or deception, should the court move on to subsequent Carmack preemption analysis.[178]

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[176] 15 U.S.C. § 45(a)(1) (2006).

[177] *Adams Express*, at 509.

[178] Given the rule that the Carmack Amendment is intended to supplant state regulation of carriers with federal regulations, this would likely need to be a federal standard measuring unfairness, or deception. A number of such guidelines have been promulgated by the Federal Trade Commission. However, this should not serve as a barrier to state law UDAP claims, so long as they allege a violation of a Federal statute or regulation. *See, e.g.*, NEV. REV. STAT. 598.0923(3) which automatically converts a violation of a federal law or regulation into a violation of state

Actions under state UDAP laws, by their claims of unfairness and deception should not be pre-empted by the Carmack Amendment when properly construed because a successful claim under state UDAP laws designates some action on the part of an interstate carrier to be *ipso facto* either unfair or deceptive and therefore these should be exempt under a proper construction of congress' intent in 1906.

VI. CONCLUSION

The time has come to re-evaluate Carmack pre-emption doctrine. Contemporary cases invariably look back to the *Adams Express* decision for continued justification of Carmack's field pre-emption of state law without reconsidering the question of continued field preemption in light of the common law.

The common law required that carriers' agreements must be fair and free from deceit in order to qualify for a limitation on liability. Nothing in the text of Carmack Amendment changes this requirement, and interstate carriers should be held to the same standard today. As consumer protection actions generally outlaw such unfair and deceptive acts, carriers who have violated such UDAP provisions should not be entitled to claim protection under the Carmack Amendment.

As the history surrounding the development of the Carmack Amendment shows, Congress enacted the Carmack Amendment to address a specific concern – the uncertainty of liability faced by interstate carriers as imposed by state laws. However, in contemporary times, these concerns are outdated, as significant developments in the law allow interstate carriers ample opportunity to address these concerns via the prior practice of entering to private agreements with their customers. As the specific concerns underlying the Carmack Amendment are no longer valid, the pre-emption afforded to the Carmack Amendment should be re-evaluated and interpreted in a manner consistent with these concerns.

The continued decisions of the federal courts to unquestioningly apply the doctrine of field preemption to the Carmack Amendment have created an environment which has shifted the burden of uncertainty from interstate carriers to consumers as consumers may not rely on any state consumer protection laws to protect them against interstate moving companies. Asking consumers to bear this burden of uncertainty is inconsistent with the common law, is a departure from comparatively recent trends towards stronger consumer protection laws on both the federal and state level, and is unnecessary after *Erie* and

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UDAP laws. Such an interpretation would be consistent with the elemental holdings of *Adams Express* and other early Carmack jurisprudence.

Carnival Cruise Lines. Because contemporary applications of the Carmack amendment's preemption powers against consumers serve neither the purpose of the amendment or intent of congress, the time has come to re-examine the validity of continued application of the field pre-emption doctrine to the Carmack Amendment.