The Evolution of Motor Carrier Liability Under the Carmack Amendment Into the 21st Century

Wesley S. Chused*

"The interstate shipment of goods is a complicated business."[1]

I. INTRODUCTION

When Congress enacted the Motor Carrier Act of 1935[2] it extended federal regulation for the first time over what was then a relatively young but fast—growing trucking industry that had been fraught with disparate and discriminatory pricing and practices, subject only to the law of the streets. The original Interstate Commerce Act of February 1887,[3] enacted to regulate interstate rail transportation, was extensively amended by the Hepburn Act of June 29, 1906, which included what became known as the Carmack Amendment.[4] It became applicable to the motor carrier industry when Congress passed the Motor Carrier Act of 1935. The Carmack Amendment, which codified the common law, prescribed the rights, duties, and liabilities of shippers and carriers with respect to interstate cargo loss and damage claims, and has been revised and recodified without substantive change over the years. The latest iteration of the statute took effect on January 1, 1996 with the enactment of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"),[5] which today, as to motor carriers, is codified at 49 U.S.C. §14706.

The current motor carrier edition of the Carmack Amendment provides, as pertinent:

> (1) Motor carriers and freight forwarders. A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 [49 USCS §§13501 et seq. or §13531] shall issue a receipt or bill of lading for property it receives for transportation under this part [49 USCS §§13101 et seq.]. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III chapter 135 or chapter 105 [49 USCS §§13501 et seq. or §13531 or §§10501 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
> (2) Freight forwarder. A freight forwarder is both the receiving and deliver-

1. REI Transp., Inc. v. C.H. Robinson Worldwide, Inc., 519 F. 3d 693, 695 (7th Cir. 2008).
2. Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543.
3. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).
4. Carmack Amendment to Hepburn Act, Pub. L. No. 59-337, ch. 3591, 34 Stat. 584 (1906).
5. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

ing carrier.[6]

One of the purposes of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.[7] As such, the Carmack Amendment is a strict liability statute, and our courts—in both motor and rail cases—have applied it accordingly. The ICCTA version of the Carmack Amendment also continues to preserve the right of motor carriers to limit their liability for interstate cargo loss or damage.[8] With the evolution of the trucking industry over the last 75 years, shippers and motor carriers have persistently challenged these early cargo liability principles in their respective efforts to establish, avoid, or limit interstate cargo loss and damage liability.

Moreover, in the last 20 years alone there have been significant changes to the parties in the supply chain and the standing of those involved in the interstate transportation of goods by truck. Whereas once upon a time there were only "shippers" and "motor common carriers" litigating Carmack Amendment issues, today the roster of those involved in the supply chain is longer and more complicated with the evolution of property brokers and logistics providers whose services often affect any attempt to identify with any certainty the respective parties' rights, duties, liabilities, and defenses in a motor truck cargo claim. Add to this the proliferation of shipper/carrier/broker contracts, the expansive definition of "transportation"[9] and the elimination of the filed rate doctrine; and the stage is set for a complex mix of facts and relationships that continually test shippers, carriers, brokers, their counsel, and the judicial system as they try to sort things out in a Carmack Amendment dispute. It is hoped this article will help identify issues, principles, and precedents as a guide to resolving (or avoiding) motor carrier cargo disputes under the Carmack Amendment as we head into the 21st Century.

II. Origins of Interstate Motor Carrier Liability; Burdens of Proof and Defense

The Carmack Amendment codified the common law rule making a carrier liable, without proof of negligence, for all damage to the goods it transports, unless it affirmatively shows that the damage was occasioned by an act or omission of the shipper, an act of God, the public enemy, public authority, or the inherent vice or nature of the goods trans-

6. 49 U.S.C. § 14706 (2005).
7. Reider v. Thompson, 339 U.S. 113, 119 (1950).
8. 49 U.S.C. § 14706.
9. 49 U.S.C. § 13102 (2008).

ported.[10] The Carmack Amendment was adopted to achieve uniformity in rules governing interstate shipments, including the rules governing injury or loss to property shipped.[11] Since the motor carrier version of the Carmack Amendment is substantively identical to the rail version (and, in fact, there was only one version until the two modes were split into two different sections of Title 49 with the passage of the ICCTA in 1995), the principles laid down by early rail cases interpreting the statute apply as well to motor carriage.

As noted by Justice Frankfurter, "[t]he common law, in imposing liability [on a carrier], dispensed with proof by a shipper of the carrier's negligence in causing the damage."[12] There is no burden on a shipper to prove negligence on the part of the carrier. The Carmack Amendment is a strict liability statute. When a shipper shows delivery of goods to a carrier in good condition, and non-delivery or delivery to the consignee in damaged condition, there arises a *prima facie* presumption of liability.[13] Liability is not imposed upon carriers based on negligence. Rather liability is imposed upon carriers because, as insurers, they are required to deliver the goods entrusted to them in the same condition as received.[14]

A shipper/plaintiff's burden of proof and a defendant/carrier's burden of defense, *infra,* have been exhaustively litigated and—one would think—settled by now.[15] Since the Carmack Amendment was originally enacted in 1906, numerous court decisions have also established the principle of Carmack Amendment preemption of all state law and common law claims.[16] Nonetheless, creative shippers and plaintiffs continue undeterred in attempting to invent new theories of motor carrier liability for goods lost or damaged in transit, as they seek ever-expanding forms of relief, and challenge the motor carrier industry to fit traditional defenses into the modern cargo loss and damage claim process.

A. Shipper's Burden of Proof

The Carmack Amendment entitles the beneficial owner of goods to

10. *See* Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 421-422 (1926); Adams Express Co. v. Croninger, 226 U.S. 491, 506-509; *In re* Bills of Lading, 52 I.C.C. 671, 679 (1919).

11. *Croninger*, 226 U.S. at 505-506; Rio Grande Motor Way, Inc. v. Resort Graphics, Inc., 740 P. 2d 517, 519 (Colo. 1987).

12. Sec'y of Agric. v. United States, 350 U.S. 162, 173 (1956) (Frankfurter, J., concurring).

13. *See Chesapeake*, 270 U.S. at 416-18.

14. *See id.*

15. *See* Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964); Am. Nat'l Fire Ins. Co. v. Yellow Freight Sys., Inc., 325 F.3d 924, 929 (7th Cir. 2003); D.P. Apparel Corp. v. Roadway Express, Inc., 736 F.2d 1, 2 (1st Cir. 1984); Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468, 470-471 (6th Cir. 1980).

16. *See Adams Express,* 226 U.S. at 505-06.

recover "for the actual loss or injury to the property caused . . . by the receiving carrier, . . . delivering carrier, or . . . [other] carrier over whose line the property is transported."[17] In the Supreme Court's landmark decision in *Elmore & Stahl,* a rail case, the Court held that under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes its *prima facie* case when it shows delivery of the goods to the carrier in good condition, arrival in damaged condition and the amount of its damages.[18] Thereupon, the burden of proof is upon the carrier to show *both* that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability *and* that it was free of negligence.[19] The same principles apply to motor carriers. As the *Plough* Court has noted:

> In fact, the carrier's delivery of damaged goods which were in good condition when it received them created a presumption of negligence, not a mere inference. The burden which shifts to the carrier once a shipper makes out a prima facie case is not the burden of going forward with the evidence. It is the burden of proof which 'shifts to the carrier and remains there.'[20]

That seems simple enough, right? All a shipper-plaintiff need do is come up with evidence of good origin condition, damaged destination condition, and the amount of its damages and it has thereby met its burden of proving a *prima facie* case. It then will have fixed upon the defendant motor carrier the burden of proving (1) that the loss was caused by one of the five exceptions to motor carrier liability *and* (2) that the motor carrier was free of negligence. Well, history has taught that there is more to proving a *prima facie* case than meets the eye.

B. Good Origin Condition

A Carmack Amendment claimant or plaintiff, whether shipper or consignee, theoretically, should not have too much trouble proving the "good" origin condition of its shipment. This can be done easily enough through shipper witnesses involved in the manufacturing, testing, quality control, packaging, and shipping operations at point of origin. But, what if such witnesses are unavailable? And why go to the expense of identifying and contacting such witnesses, preparing affidavits, or preparing them to testify at trial, if the plaintiff has in his file the motor carrier's bill of lading? The terms and conditions of the industry-standard Uniform Straight Bill of Lading, state, *inter alia,* as follows:

---

17. 49 U.S.C. § 14706(a)(1) (2005).

18. *Elmore & Stahl*, 377 U.S. at 138.

19. *Id.*

20. *Plough*, 630 F.2d at 470; *see* Super Serv. Motor Freight Co. v. United States, 350 F.2d 541, 542 (6th Cir. 1965).

> Received, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rule that have been established by the carrier and are available to the shipper, on request; . . . the property described below, *in apparent good order*, except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as shown below.[21]

Over the years, the "in apparent good order" language in the Uniform Straight Bill of Lading has taken on a life of its own and has been relied on extensively by shipper/plaintiffs and their counsel to prove good origin condition. This has resulted in an evidentiary conundrum in which our courts are not in consonance: whether, with respect to goods in packages not open to inspection and visible, the bill of lading alone is sufficient to establish good origin condition. Courts disagree on this. "[T]he acknowledgment in a bill of lading that a shipment is in apparent good order is *prima facie* evidence of delivery in good condition only as to those parts open to inspection and visible."[22] In those cases, plaintiffs relied unsuccessfully on the bill of lading alone to establish good origin condition.

Other jurisdictions considering the issue have lowered the bar as to the quantum of proof a plaintiff must elicit to prove good origin condition. The Third Circuit, which had rendered the *Bluebird* decision, subsequently liberalized the shipper's burden of proving good origin condition in a Carmack Amendment lawsuit and ruled that its prior decision in *Bluebird* was "simply directed at making shippers produce evidence, other than a clean bill of lading, to establish the condition of goods which were not open and visible for the carrier's inspection. Accordingly, we reject the view that *Bluebird* renders all circumstantial evidence irrelevant with the goods not open and visible."[23] The court then noted:

> Although a bill of lading, by itself, is not sufficient to establish the condition of goods that were neither visible nor open to inspection, a shipper may rely on other reliable evidence—direct or circumstantial—which is 'sufficient to

21. UNIFORM STRAIGHT BILL OF LADING, IN COMMODITY CLASSIFICATION STANDARDS BOARD, NATIONAL MOTOR FREIGHT CLASSIFICATION STB NMF 100-AI, at 230 (2009) (emphasis added).

22. D.P. Apparel Corp. v. Roadway Express, Inc., 736 F.2d 1, 4 (1st Cir. 1984); *see* Kaiser Aluminum & Chem. Corp. v. Ill. Cent. Gulf R.R. Co., 615 F.2d 470, 475 n.4 (8th Cir. 1980); Ed Miniat, Inc. v. Baltimore & Ohio R.R. Co., 587 F.2d 1277, 1283 (D.C. Cir. 1978); Bluebird Food Prod. Co. v. Baltimore & Ohio R.R. Co., 474 F.2d 102, 104 (3d Cir. 1973); Cont'l Grain Co. v. Am. Commercial Barge Line Co., 332 F.2d 26, 27-28 (7th Cir. 1964); Hoover Motor Exp. Co. v. United States, 262 F.2d 832, 834 (6th Cir. 1959).

23. Beta Spawn, Inc. v. FFE Transp. Serv., Inc., 250 F.3d 218, 224 (3d Cir. 2001). *See also* Fine Foliage of Fla., Inc. v. Bowman Transp., Inc., 901 F.2d 1034, 1038 (11th Cir. 1990) ("We find no support for [the carrier's] assertion that a judge may not rely on circumstantial evidence to establish the original condition of goods when that evidence is substantial and reliable.").

> establish by a preponderance of all the evidence the condition of the goods upon delivery.' . . . Thus, even assuming that the shipment in the present case was not open and visible, the only difference between . . . [the shipper's] evidentiary burden here, as opposed to in a case where goods are open and visible, is that . . . [the shipper] cannot rely solely on the bill of lading to establish the [original] condition.[24]

Similarly, another court held that where a motor carrier's driver signed the shipper's Order Form document as an acknowledgment that a machine had been "received in apparent good order" and noted no exception on the form—and although the court found that the order form was not a bill of lading and that no bill of lading had even been issued—the court ruled that "it is not inappropriate to view the Order Form in this case as analogous to the bill of lading," and thus found that it was reasonable to determine that the shipment was in good condition when the carrier received it.[25]

Prudence would dictate that regardless of the jurisdiction in which a case is litigated, a Carmack Amendment claimant should obtain all available evidence, documents, and witnesses to establish good origin condition without relying solely on the bill of lading. Conversely, defending motor carriers will seek to exclude or disqualify origin condition evidence. Thus, while the good news for shippers is that although they need to prove only three elements to establish a *prima facie* Carmack Amendment case, the bad news for shippers—and the good news for defending motor carriers—is that the defendant need only prevent a plaintiff from proving one of those three elements in order to defeat the lawsuit.

C. Damage at Destination

The second element in a Carmack plaintiff's burden of proof—proving that the shipment was delivered damaged at destination—though less frequently litigated, nonetheless makes for evidentiary challenges on both sides. The simplest cases are those in which a shipment is signed for as damaged or short at destination or is lost in transit, and the carrier has little basis on which to challenge such evidence from the consignee. However, the plot thickens substantially where a shipment is signed for clear—with no exception noted on the delivery receipt—and as having been delivered "in good order and condition except as otherwise noted," per the standard preprinted language on the delivery receipt. In these so-called "concealed damage" cases, a plaintiff has the task of overcoming the clear delivery receipt with other admissible evidence.

---

24. *Beta Spawn*, 250 F.3d at 225 (quoting Pillsbury Co. v. Ill. C.G. R.R., 687 F.2d 241, 244 (8th Cir. 1982)).

25. Mach Mold Inc. v. Clover Assoc., Inc., 383 F. Supp. 2d 1015, 1030 (N.D. Ill. 2005).

A leading concealed damage case is *Vacco Industries v. Navajo Freight Lines, Inc.*[26] In *Vacco*, the defendant motor carrier, Navajo, was found liable to the shipper, Vacco, for damage to a shipment of machinery Navajo had delivered to the United States Navy in Rhode Island.[27] The shipment had been accepted and signed for by a naval shipping clerk without exception as to the external condition of the packaging materials, but subsequently, two of the units were found to have been badly damaged.[28] Navajo appealed, contending, *inter alia,* that the shipper had failed to prove the second element of its *prima facie* case, namely, delivery in damaged condition.[29] The Court of Appeal of California disagreed and held that the fact that no exception was taken at the time of delivery:

> cannot be deemed, however, to foreclose any showing of in-transit damage, especially since such a receipt went only to the exterior crating, a detailed inspection of the contents of the crates being reserved until later. . . . [I]t was not necessary for the respondent to *rule out* the possibility of damage to the crates after they were removed from the truck, as long as some evidence was presented upon which it could reasonably be concluded that due care was exercised by the consignee in handling the merchandise.[30]

In *U.S. Aviation Underwriters*,[31] a case involving a concealed damage fact pattern similar to that in *Vacco*, the parties again tested whether the plaintiff had adequately established the second element of its *prima facie* case. Plaintiff's insured had shipped a jet engine by truck from Alabama to Virginia via defendant Yellow.[32] Yellow delivered the engine and obtained the consignee's signature on its delivery receipt under the legend "[r]eceived in good condition except as noted," with no damage notation or exception.[33] One day later, following transportation of the engine to another area via forklift, an employee of the consignee noticed the engine was damaged.[34] Although Yellow argued the undisputed evidence demonstrated that the shipment had been delivered in good condition, the court nonetheless ruled that "reliable, substantial circumstantial evidence of condition [at time of delivery] will suffice to prove a *prima facie* case."[35] The court continued "[s]ubstantial and reliable circumstantial evidence, direct evidence or a combination of the two may be employed

26. Vacco Indus. v. Navajo Freight Lines, Inc. 63 Cal. App. 3d 262 (Cal. Ct. App. 1976).
27. *Id.*
28. *Id.* at 268.
29. *Id.* at 269-70.
30. *Id.* at 271.
31. U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc., 296 F. Supp. 2d 1322 (S.D. Ala. 2003).
32. *Id.* at 1326–327.
33. *Id.* at 1327.
34. *Id.* at 1328.
35. *Id.* at 1340.

to prove the second element of the claim."[36] Timing, as they say, is everything. So, too, is it important to examine the evidence as to the existence of damage at the time of delivery, and if there is subsequent handling of the goods, the burden will be on the plaintiff to show with convincing evidence that it was unlikely to have happened after delivery by the carrier.

In *Fuente Cigar,* the court reversed the lower court's finding in favor of the appellee motor carrier, Roadway, who had been sued for damage to a shipment of cigars that was misrouted during transportation from Florida to New Jersey.[37] Following the misrouting of the shipment, Roadway tendered delivery on July 10, 1986, but the consignee refused the shipment, without inspecting it, because the extended transit time would have caused the cigars to dry out.[38] It was not until about six weeks after tender of delivery to the consignee that the shipment was returned to the shipper, Fuente, where the cigars were found to have been dried out and damaged.[39] In reversing the district court, the Eleventh Circuit, citing *Fine Foliage,* held that the second element of a Carmack Amendment plaintiff's burden of proof "can also be satisfied by substantial and reliable circumstantial evidence alone. . . . It takes very little direct evidence to satisfy the second element, while it takes a much greater degree of circumstantial evidence."[40]

The quantum of evidence offered by a plaintiff to prove damaged destination condition also is critical. This was demonstrated in *Design X Manufacturing, Inc.* where the plaintiff, Design X, sued the defendant motor carrier, ABF, for damage to a shipment of custom-made commercial furniture transported from Connecticut to Michigan.[41] Under a "turnkey" agreement between Design X and ABF, the furniture was supposed to have been delivered to the second floor of the consignee's facility.[42] Instead, a large desk was left on the first floor by ABF's delivering agent because it would not fit up the stairway.[43] ABF's delivering agent then obtained the signature of an unidentified person on the delivery receipt, with no exceptions noted.[44] In its motion for summary judgment,

36. *Id.* (citing Fuente Cigar, Ltd. v. Roadway Express, Inc., 961 F.2d 1558, 1561 (11th Cir. 1992).

37. *Fuente Cigar*, 961 F.2d at 1559.

38. *Id.*

39. *Id.*

40. *Id.* at 1561, 1561 n.6.

41. Design X Mfg., Inc. v. ABF Freight Sys., Inc., 584 F. Supp. 2d 464, 465–66 (D. Conn. 2008).

42. *Id.* at 465.

43. *Id.* at 465-66.

44. Plaintiff's Objection to Defendant's Motion for Summary Judgment, *Design X Mfg., Inc.*, 584 F. Supp. 2d 464 (No. 3:06cv01381 (MRK)).

ABF contended Design X had failed to prove delivery in damaged condition, although Design X had offered hearsay accounts attributed to its customer/consignee that the desk was damaged at the time of delivery.[45] Design X also claimed it had photographs showing the delivery damage and e-mails from its customer recounting the alleged damage.[46] Nonetheless, the Court excluded such statements as inadmissible hearsay.[47] After Design X, despite being given additional opportunities in which to submit supplemental affidavits had failed to do so, the Court ruled it had failed to establish its *prima facie* case by failing to prove damaged condition at destination and entered summary judgment for ABF.[48]

To limit their exposure in concealed damaged claims, motor carriers often publish in their tariffs, classifications, or rules circulars a concealed damage rule—an example of which provides as follows:

> When damage to contents of a shipping container is discovered by the consignee which could not have been determined at time of delivery it must be reported by the consignee to the delivering carrier upon discovery and a request for inspection by the carrier's representative made. Notice of loss or damage and request for inspection may be given by telephone or in person, but in either event must be confirmed in writing by mail. If more than fifteen days pass between date of delivery of shipment by carrier and date of report of loss or damage, and request for inspection by consignee, it is incumbent upon the consignee to offer reasonable evidence to the carrier's representative when inspection is made that loss or damage was not incurred by the consignee after delivery of shipment by carrier. While awaiting inspection by carrier, the consignee must hold the shipping container and its contents in the same condition they were in when damage was discovered insofar as it is possible to do so.[49]

It is surprising to see how often motor carrier claim personnel of carriers large and small operate under the mistaken belief that because they have a clear delivery receipt they are home free for any cargo damage claims. Not so fast. It is defense counsel's job to educate his client in the nuances of burdens of proof and the rules of evidence which are especially critical in proving—or not—damaged condition at destination.

D. Damages

On its face, the Carmack Amendment seems simple and straightforward: the liability imposed "is for the actual loss or injury to the property" caused by the motor carrier.[50] An in-depth analysis of the scope

45. *Design X Mfg., Inc.*, 584 F. Supp. 2d at 468.
46. *Id.*
47. *Id.*
48. *Id.* at 468-69.
49. Commodity Classification Standards Board, *supra* note 21, at 729 (Item 300135).
50. 49 U.S.C. § 14706(a)(1) (2005).

and types of damages a motor carrier may be liable for under the Carmack Amendment could easily be the subject of an entire article, if not a book. However, for present purposes, it is appropriate to identify generally the damages a shipper may recover for the loss, damage, or delay to an interstate shipment versus those for which a motor carrier is not liable.

Under the Carmack Amendment carriers generally are liable for the market value of the shipment at the place of destination.[51] The statute incorporates common law principles of damages.[52] However, such recoverable damages are limited to the reasonable foreseeability of the plaintiff's actual injury at the time of entry into the bill of lading contract.[53] "Damage is foreseeable by the carrier if it is the proximate and usual consequence of the carrier's action."[54] "Within the meaning of the Carmack Amendment, 'actual loss or injury to the property' is ordinarily measured by the reduction in market value at destination or by replacement or repair costs occasioned by the harm."[55]

The task of identifying what constitutes market value for lost or damaged goods has always been challenging. In an early rail case, *Illinois Central Railroad Company v. Crail,* the Court established a guideline to help calculate shipper's damages.[56] The case involved the determination of damages recoverable by the dealer and consignee of a carload of coal weighing 88,700 pounds that was delivered 5,500 pounds short.[57] The dealer had not resold any of the coal but added it to his stock for future resale, and the shortage did not interfere with his business.[58] The evidence indicated that before and after the shipment, the dealer purchased coal of like quality in carload lots of 60,000 pounds or more at a price of $5.50 per ton, and that the retail price of coal sold at less-than-carload lots was $13.00 per ton.[59] In the district court, the dealer obtained judgment for the wholesale value of the coal not delivered, but the Court of Appeals reversed, holding that it should have been for the retail value, as the plaintiff contended.[60] The Supreme Court then reversed again, noting that the plaintiff's contention "ignores the basic principle underlying common-law remedies that they shall afford only compensation for the injury suffered."[61] The court then held, "[t]he test of market value is at

51. *See, e.g.*, Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U.S. 97 (1920).
52. Hector Martinez & Co. v. S. Pac. Transp. Co., 606 F.2d 106, 108 (5th Cir. 1979).
53. *Id.* at 109.
54. *Id.*
55. Camar Corp. v. Preston Trucking Co., Inc., 221 F.3d 271, 277 (1st Cir. 2000).
56. Illinois Cent. R. Co. v. Crail, 281 U.S. 57, 65 (1930).
57. *Id.* at 62.
58. *Id.*
59. *Id.*
60. *Id.* at 62-63.
61. *Id.* at 63.

best a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable."[62]

A similar result was reached in *Robert Burton Associates, Inc. v. Preston Trucking Company, Inc.*[63] In *Robert Burton*, the plaintiff shipped eighty-one cases of cigarette papers from its New Jersey warehouse to one of its customers, but the shipment was lost in transit.[64] As a result, Burton sent a replacement shipment to its customer for which it received payment in full.[65] The question was whether the defendant motor carrier, Preston, was liable for the market (retail) value of the goods or the replacement (wholesale) cost of the goods.[66] The evidence showed that the replacement shipment consisted of products that were identical to those in the lost shipment, that Burton's cost to purchase, procure, warehouse, and ship the goods was $17,591; and that Burton had a sufficient quantity of replacement goods on hand both to replace the lost shipment and to fill orders for its other customers.[67] The district court had rejected Preston's argument that replacement cost was the appropriate measure of damages and entered judgment against Preston for $55,928, the invoice value of the original shipment.[68]

On appeal, the Third Circuit vacated the judgment on damages, noting that Burton had not lost any sales as a result of the loss of the original shipment.[69] It ruled that if Preston met its burden of proving that the loss of the first shipment did not cause Burton any loss of sales, then the district court should enter judgment for Burton's wholesale cost, $17,591.[70] "But if Preston cannot establish that Burton did not lose any sales by reason of the loss of the goods, the district court will enter judgment against Preston for $55,928."[71]

Another case illustrating a motor carrier's exposure to damages under Carmack is *Paper Magic Group, Inc. v. J.B. Hunt Transp, Inc.*[72] *Paper Magic* involved a shipment of greeting cards and seasonal paper goods tendered to the defendant motor carrier, Hunt, on October 16, 1998 for transportation from Pennsylvania to Wisconsin.[73] The invoice

62. *Id.* at 64-65.
63. Robert Burton Assoc. v. Preston Trucking Co., 149 F.3d 218 (3d Cir. 1998).
64. *Id.* at 219.
65. *Id.*
66. *Id.* at 219-20.
67. *Id.* at 221.
68. *Id.* at 219-20.
69. *Id.* at 220-21.
70. *Id.* at 221.
71. *Id.*
72. Paper Magic Group v. J.B. Hunt Transp., Inc., 318 F.3d 458 (3d Cir. 2003).
73. *Id.* at 460.

value of the shipment was $130,080.[74] The shipment became lost in Hunt's system, but about four months later Hunt found it and notified Paper Magic (who had been unaware of the delay because its customer had not been scheduled to pay for the goods until March 1999).[75] Under an agreement in place between Paper Magic and Hunt, Hunt's liability for "lost, damaged or destroyed [goods]" was defined as "the price charged by [Paper Magic] to its customers," with reasonable salvage deducted.[76] Hunt sold the goods at salvage for $49,645 and Paper Magic sued for the full amount, $130,080, which was awarded by the district court.[77]

On appeal, the Third Circuit affirmed.[78] It ruled that under the Carmack Amendment, the measure of damages in the event goods are damaged or delayed is "the difference between the market value of goods at the time of delivery, and the time when they should have been delivered."[79] In particular, the Court in *Paper Magic* distinguished "special" and "general damages" and found that Paper Magic was not seeking special damages such as damages for loss of use, lost future profits, or additional labor.[80] The court noted, "[Paper Magic] is seeking actual damages: the loss in value of the shipment due to Hunt's delay. We do not think that the District Court erred in concluding that Hunt can be charged with foreseeing that a four month delay would cause harm to Paper Magic."[81]

A recurring damages theme in Carmack Amendment litigation against motor carriers is the shipper's effort to recover special damages such as lost profits or business opportunities. This is especially common in trade show shipments. Generally, courts stick to the foregoing established legal principles and focus on issues of foreseeability on the part of the defendant motor carrier and the certainty the shipper's claimed damages—or lack thereof. An instructive case on lost profit damages is *Camar Corporation v. Preston Trucking Company, Inc.*[82] Camar was in the business of purchasing U.S. Government surplus equipment and then selling the equipment at huge mark-ups.[83] In the case at hand, Camar was the successful bidder at a price of $215 for 156 pieces of U.S. Navy surplus equipment, which the Navy had originally purchased for

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 465.
79. *Id.* at 461.
80. *Id.* at 461-62.
81. *Id.* at 462.
82. Camar Corp. v. Preston Trucking Inc., 221 F.3d 271 (1st Cir. 2000).
83. *Id.* at 273.

$275,000.[84] Camar hired Preston to transport the equipment by truck from Oakland, California to Camar's Worcester, Massachusetts facility.[85] The shipment disappeared. Initially, Camar submitted a claim to Preston for $137,500, representing one half of what the Navy had originally paid, but after reviewing its records of past sales of similar goods, Camar amended its complaint to seek damages of $353,370; claiming that it could have sold the equipment for that sum.[86] The district court entered summary judgment limiting Preston's liability to the $215 that Camar had actually paid for the goods.[87]

On appeal the First Circuit affirmed, ruling that Camar's evidence of past sales at huge mark-ups was too speculative to form the basis for a damage award greater than the $215 purchase price.[88] The Court noted that no evidence of subsequent customer demand was submitted.[89] Nor did Camar submit evidence tending to prove that it lost any customers or good will as a result of Preston's loss of the equipment.[90] Camar's would have, should have, could have argument was insufficient. It failed to meet its "responsibility to produce sufficient evidence of its lost profits with reasonable certainty."[91]

E. Attorney's Fees

Let there be no ambiguity on this point: the Carmack Amendment contains no provision allowing for the recovery of attorney's fees as an element of damages by a shipper of general freight.[92] Claims for attorney's fees in a Carmack Amendment lawsuit based on state law generally have been held to be preempted, as with other forms of state and common law relief.[93] Any state law claim that imposes liability on carriers, based on the loss or damage of shipped goods, that increases the liability of the carrier is preempted.[94] In other words, plaintiffs are entitled to recover only their actual damages for the damaged freight under the statute; no more, no less—and no attorney's fees.

However, in one case involving individual shipper-plaintiffs who had

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 274.
88. *Id.* at 277.
89. *Id.*
90. *Id.*
91. *Id.* at 279.
92. But, *see* 49 U.S.C. §14708(d) (2005)., which allows shippers of household goods to recover attorney's fees under certain circumstances.
93. *E.g.*, Accura Sys., Inc. v. Watkins Motor Lines, Inc., 98 F.3d 874, 877 (5th Cir. 1996); Polygram Group Distrib., Inc. v. Transus, Inc., 990 F. Supp. 1454, 1460 (N.D. Ga. 1997).
94. Rini v. United Van Lines, Inc., 104 F.3d 503, 506 (1st Cir. 1997).

shipped their car from California to Iowa via the defendant motor carrier, an award of attorney's fees was upheld.[95] The attorney's fee award in *Caspe* obviously was driven by the fact that the plaintiffs were individual consumers and by the defendant's pre-suit conduct which the Court determined to have been "most vexatious" and egregious.[96] *Caspe*, however, does not represent the general rule on the subject. Attorney's fees are not recoverable as an element of a plaintiff's damages under the Carmack Amendment (unless the shipment consisted of household goods, and even then, only under certain conditions).[97]

So what kinds of "damages" may shippers seek, and will motor carriers be liable for under the Carmack Amendment? Generally, courts stick to the program and hold motor carriers liable only for the actual value of the lost or damaged article or the cost of repairing it—damages that were foreseeable to the motor carrier when it received the shipment for transportation—with the objective of restoring the shipper to the position he would have been in. No more, no less. A shipper seeking "special" damages has a substantially greater burden of proof in terms of foreseability.

F. Motor Carrier Defenses

Under the Carmack Amendment, a motor carrier's defenses are the same as those of a rail carrier. "[A] carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of god; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods."[98]

Motor carriers defending Carmack Amendment claims, contrary to the beliefs of some, actually do have defenses, although their two-fold burden of proof is onerous. During the claims stage, motor carriers commonly take the position that that they are not liable because the damage resulted from a defense articulated by the Supreme Court: "there was a flood;" "the truck was stolen;" "this was a shipper's load and count shipment;" "this load was perfectly tarped and we're not liable for any rust on the machine." All of these defenses indeed are available to motor carriers, with one major caveat that claim personnel often overlook: in addition to proving the applicability of one of these defenses, the carrier also must prove it was free of negligence in handling the shipment. This can be especially difficult where a less-than-truckload shipment is transferred to/from several vehicles and terminals in route to final destination.

95. Caspe v. Aaacon Auto Transp., Inc., 658 F.2d 613, 617-18 (8th Cir. 1981).
96. *See Id.* (citing Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 254-59 (1975)).
97. 49 U.S.C. §14708(d).
98. *Elmore & Stahl*, 377 U.S. at 137.

The Act of God is a good example of a misunderstood and misapplied defense. Although most cases dealing with this defense are in the ocean or rail context, the principle and definition is the same for motor carriers. An Act of God has been defined (in a maritime context) as a "loss happening in spite of all human effort and sagacity."[99] Accordingly:

> [t]his defense has been widely defined as any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented; and/or a disturbance . . . of such unanticipated force and severity as would fairly preclude charging . . . [Defendants] with responsibility for damage occasioned by the [Defendants'] failure to guard against it in the protection of property committed to its custody.[100]

In *Southern Pacific Company v. Loden,* the plaintiff sued the railroad for damage to a shipment of perishable produce delayed in transit.[101] The railroad claimed the delay was caused by an Act of God due to unusually heavy rains and flood conditions, which damaged its track and rail facilities.[102] However, the court rejected the defense because of evidence showing it knew of a weeklong rain but offered no evidence of precautions taken to avoid consequences of this rainfall.[103] The defendant railroad thus had failed to prove it was free of negligence in connection with the flood damage.

Compare that to the result in *Ismert-Hincke Milling Company v. Union Pacific Railroad Company.*[104] In *Ismert-Hincke*, the shipper sued the railroad for damage to its goods while the rail cars were held at the railroad's Topeka, Kansas yard during the 1951 flood.[105] Evidence showed that the most devastating previous flood had occurred in 1903, following which there had been much improvement and flood prevention work along the banks of the river.[106] However, in July 1951 after several days of heavy rain, the dike protecting the carrier's yard broke, flooding the rail yard.[107] During this time the railroad exerted all of its efforts towards strengthening the embankment.[108] The court found that it could not have carried on its operations of strengthening its tracks and the dike

99. Skandia Ins. Co. Ltd. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1239 (S.D. Ala. 2001), *aff'd*, 31 Fed. Appx. 201 (11th Cir. 2001).

100. *Id.*

101. S. Pac. Co. v. Loden, 508 P.2d 347 (Ariz. Ct. App. 1973).

102. *Id.* at 349.

103. *Id.* at 352.

104. Ismert-Hincke Milling Co. v. Union Pac. R.R. Co., 238 F.2d 14 (10th Cir. 1956).

105. *Id.* at 15.

106. *Id.* at 16.

107. *Id.* at 17.

108. *Id.*

and at the same time undertake to evacuate the rail cars in its yard.[109] According to the court:

> the Carrier was faced with the decision whether it would try to protect its tracks, strengthen the dike and its approaches, or abandon all such efforts and evacuate. . . . The flood was much more severe and came much sooner than was anticipated by anyone. . . . Under these facts we are not prepared to say . . . that the carrier acted imprudently. . . . We are forced to conclude that the Court was well within the exercise of sound discretion in concluding that the Carrier was not guilty of actionable negligence and that its acts did not contribute to the loss.[110]

The railroad had successfully proved it was free of any negligence.[111] Perhaps because trucks are more mobile than rail cars and ocean vessels, cases involving the Act of God defense in Carmack Amendment motor carrier cases are rare. Nonetheless, the same principles apply.

By far, the most commonly litigated Carmack Amendment motor carrier defense (apart from preemption and limitation of liability, *infra*) is the act or default of the shipper. This can be based on any number of shipper misdeeds, but most commonly this defense involves improper packing, labeling, or loading of the goods. Invariably, the success of this defense will depend on the strength of the defendant's expert testimony as to the loading or packaging defect.[112] Motor carriers also have the benefit of the following language commonly found in uniform straight bills of lading:

> This is to certify that the above named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation.[113]

Shame on the shipper who uses and signs such bills of lading without taking necessary steps to see to the proper packaging requirements for its goods. When a shipper delivers goods to a motor carrier for transportation, it impliedly warrants that they are fit for transportation and properly packed.[114]

Two leading cases in the area of improper loading on the part of the

---

109. *Id.*

110. *Id.*

111. *Id.* at 18.

112. *See, e.g.*, NATIONAL MOTOR FREIGHT CLASSIFICATION, *supra* note 21.

113. UNIFORM BILL OF LADING TERMS AND CONDITIONS, *in* NATIONAL MOTOR FREIGHT CLASSIFICATION, *supra* note 21, at 231.

114. E. Motor Express, Inc. v. A. Maschmeijer, Jr., Inc., 247 F.2d 826, 828 (2nd Cir. 1957); *see also* Close v. Anderson, 442 F. Supp. 14, 17 (W.D. Wash. 1977) ("Adequate packaging is the responsibility of the shipper. The packaging must be sufficient to withstand normal and reasonably foreseeable events.").

shipper are *United States v. Savage Truck Line, Inc.*[115] and *Franklin Stainless Corporation v. Marlo Transport Corporation.*[116] In *Savage*, the shipper had loaded six airplane engines encased in cylindrical containers in the defendant motor carrier's truck.[117] During transportation they came loose, causing the truck to swerve and resulting in an accident and the death of the driver of another vehicle.[118] There were multiple claims and cross-claims, including claims by the shipper, the United States, against the motor carrier, Savage, for contribution and a claim for damage to its freight.[119] In *Savage,* the Fourth Circuit laid down the standard for determining responsibility for improper shipper loading:

> When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.[120]

Since Savage's driver had inspected the load before the trip and knew the engines were not properly secured, it had failed to prove it was free of negligence and the shipper was entitled to recover for the damage to the engines.[121]

In *Franklin Stainless*, coils of stainless steel were loaded by the shipper's employees on the defendant motor carrier's trailer.[122] Its driver told the shipper he had never hauled steel coils before and asked the shipper whether the load was secure.[123] The shipper assured him it was.[124] During transportation, an accident occurred due to the improper loading of the coils.[125] Following Franklin's settlement of the victim's personal injury action, it sued the motor carrier, Marlo, to recover the damages, costs and expenses it paid in that action.[126] Franklin alleged Marlo was negligent in failing to comply with ICC regulations pertaining to the proper loading and securing of the cargo.[127] The Court, however, noted that the jury found the trucker reasonably relied on the shipper's assurance that the coils were properly loaded, that no witness testified the

115. United States v. Savage Truck Line, Inc. 209 F.2d 442 (4th Cir. 1953).
116. Franklin Stainless Corp. v. Marlo Transp. Corp., 748 F.2d 865 (4th Cir. 1984).
117. *Savage Truck Line, Inc.*, 209 F.2d at 443.
118. *Id.* at 443-44.
119. *Id.* at 444.
120. *Id.* at 445.
121. *Id.* at 446.
122. *Franklin Stainless Corp.*, 748 F.2d at 866.
123. *Id.*
124. *Id.*
125. *Id.* at 866-67.
126. *Id.* at 867.
127. *Id.* at 867-68.

defect was open and obvious, and that Marlo's driver could reasonably rely on the shipper's assurances.[128] It therefore concluded Franklin was not entitled to indemnity against Marlo.[129]

An important lesson from *Savage* and *Franklin Stainless* is that they essentially turned on whether the motor carriers met their burden of proving they were not negligent. A carrier's ability to demonstrate that it complied with the Federal Motor Carrier Safety Administration's (FMCSA) load securement regulations is essential for a motor carrier to successfully meet its burden of proving freedom from negligence in cases involving shifting or unsecured cargo or improper loading as the cause of damage.

The importance of proving freedom from negligence in an "act of the shipper" case involving a latent improper loading defect was illustrated more recently in *Castine Energy Construction, Inc. v. T.T. Dunphy, Inc.*[130] In *Castine*, the shipper sued a motor carrier for damage to a shipment of certain specially made steel industrial filters or covers, each weighing 2,000 pounds, shipped from Maine to Virginia.[131] The shipper, Castine, had welded iron crossbars onto the covers to facilitate their loading onto the trailer.[132] Dunphy's driver then used chains attached to the crossbars to secure the load.[133] The covers became loose in transit and spilled onto the highway becoming irreparably damaged.[134] In defending Castine's Carmack Amendment lawsuit, Dunphy relied on the "act of the shipper" defense, and—to meet its burden of proving freedom from negligence—it called upon a retired Maine state trooper to testify as an expert witness with respect to Dunphy's compliance with federal safety and loading regulations.[135] Following a jury verdict for Dunphy, Castine appealed, contending that the trial court erred by allowing the expert to testify as to how the safety regulations should be interpreted.[136]

The Supreme Judicial Court of Maine affirmed.[137] It ruled the trial court did not err in allowing the state trooper's testimony as to what steps would have been required to properly secure the covers before transporting them.[138] While recognizing that the primary duty of safe loading of property is upon the motor carrier, the court noted:

128. *Id.* at 869.
129. *Id.* at 870.
130. Castine Energy Constr., Inc. v. T.T. Dunphy, Inc., 861 A.2d 671, 675, 678 (Me. 2004).
131. *Id.* at 673-74.
132. *Id.* at 674.
133. *Id.*
134. *Id.*
135. *Id.* at 675-77.
136. *Id.* at 673-74.
137. *Id.* at 678.
138. *Id.* at 677.

> When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observations by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.[139]

Whether the shipper's act or omission is improper packaging, improper loading, misdescription on the bill of lading, inherent defect, or vice or any similar defense the success or failure of the motor carrier's case will depend on the evidence as to the defect or omission at issue (usually requiring expert witness testimony), *and* its concurrent ability to prove its freedom from negligence. Motor carrier defense counsel are continually challenged to explain and reeducate their clients on this two-pronged burden of defense. Perhaps that explains why motor carrier decisions addressing the exceptions to carrier liability under the Carmack Amendment are not nearly as common as three other principal defenses: preemption, limitation of liability and failure to file a timely claim or lawsuit.

III. Preemption of State and Common Law Claims

It is common in Carmack Amendment litigation to see complaints filed by shippers, especially shippers of interstate household goods, that include a constellation of state and common law claims such as garden-variety negligence, breach of contract, breach of warranty, fraud, misrepresentation, negligent and intentional infliction of emotional distress, mental anguish, conversion, various business torts, defamation and, of course, the all-time favorite, a claim under state unfair and deceptive trade practices acts (DTPA) seeking punitive damages, plus attorney's fees, tax, and tip. Of course, punitive DTPA claims are alleged because plaintiffs naturally seek as expansive a scope of damages as possible, because they want an attorney's fee award or because they are ignorant of the strict liability characteristics of Carmack Amendment litigation and its defined permissible damages. To neutralize such claims, motor carriers typically remove the lawsuit from state to federal court, and follow removal with either a Rule 12(b) motion to dismiss all non-Carmack claims on grounds of federal preemption, or plead preemption as an affirmative defense in their answer, laying the foundation for a future motion for summary judgment.

An in-depth analysis of Carmack Amendment preemption of state law claims is far beyond the scope of this article. The most comprehensive treatment of this topic can be found in *Slouching Toward a Morass: A*

139. *Id.* at 678 (citing United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4th Cir. 1953)).

Case for Preserving Complete Carmack Preemption.[140] Suffice it to say, the overwhelming weight of authority on Carmack Amendment preemption, from *Adams Express,*[141] to *Hughes v. United Van Lines, Inc.,*[142] to *Underwriters at Lloyds of London v. North American Van Lines, Inc.,*[143] to *Moffit v. Bekins Van Lines Co.,*[144] to *Cleveland v. Beltman North American Co., Inc.,*[145] to *Rini,*[146] to *Gordon v. United Van Lines, Inc.,*[147] and countless federal and state court decisions in between, have conclusively established that in the interests of uniformity in the disposition of claims brought under interstate bills of lading, all state statutory and common law claims arising out of loss or damage to an interstate shipment of goods are preempted by the Carmack Amendment. Moreover, the Supreme Court has held that where federal regulations cover the same subject matter as the relevant state law, those *regulations* preempt state law claims.[148] Thus, motor carriers facing cargo claims based on alleged violation of the Federal Motor Carrier Safety Administration's (FMCSA) claim handling regulations[149] or other FMCSA regulations have additional available preemption firepower.

Of course nothing is ever simple, and to make things interesting the First Circuit in *Rini* cracked the door open by noting in dicta that while the purpose of the Carmack Amendment is to establish uniform federal guidelines to remove the uncertainty surrounding a carrier's liability when damage occurs to an interstate shipment, "liability arising from separate harms—apart from the loss or damage of goods—is not preempted."[150] This was picked up by the Court in *Gordon*, and—as a result—creative plaintiffs have been designing complaints with language contrived to appear to allege claims standing apart from the actual loss or damage to the goods or the carrier's claim handling process.[151] Basically, they seek to circumvent Carmack Amendment preemption by purporting to allege conduct and claims separate and distinct from the transportation, delivery, loss of or damage to the goods, or the claims process itself so as to create a cause of action appearing to be separate from the Car-

140. George W. Wright, *Slouching Toward A Morass: The Case For Preserving Complete Carmack Preemption*, 1 DEPAUL BUS. & COM. L.J. 177, 177-79 (2003).

141. Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

142. Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1412 (7th Cir. 1987).

143. Underwriters at Lloyds of London v. N. Am. Van Lines, 890 F.2d 1112, 1121 (10th Cir. 1989).

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

145. Cleveland v. Beltman N. Am. Co., Inc., 30 F.3d 373, 381 (2d Cir. 1994).

146. Rini v. United Van Lines, Inc., 104 F.3d 502 (1st Cir. 1997).

147. Gordon v. United Van Lines, Inc., 130 F.3d 282, 289-90 (7th Cir. 1997).

148. Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 352-53 (2000).

149. 49 C.F.R. § 370.1-370.11 (2001).

150. *Rini*, 104 F.3d at 506.

151. *Gordon*, 130 F.3d at 289.

mack Amendment claim. However, most courts see through the camouflage and dismiss such claims. "But for" the interstate transportation of the shipment, the shipper would have no claim. Hence, it is preempted.

Preempted claims include claims for intentional infliction of emotional distress: *Rini*,[152] *Smith v. United Parcel Service*,[153] *Gordon*;[154] claims for breach of the implied covenant of good faith and fair dealing: *Cleveland v. Beltman North American Co*;[155] claims for violations of state unfair and deceptive trade practice statutes: *Rini*;[156] consumer fraud claims related to a plaintiff's purchase of additional insurance coverage: *Berryman v. Wheaton Van Lines, Inc.*;[157] and even lost wages and mental anguish resulting from the destruction of the shipper's goods in *Morris v. Covan World Wide Moving Inc.*[158] Generally, if the claim arose from the interstate transportation of the goods, it is preempted.

Directly related to the Carmack Amendment preemption defense is the so-called "savings clause" argument commonly advanced by shippers seeking to avoid preemption of their state law claims. The savings clause, presently codified as to motor carriers at 49 U.S.C. §13103, provides as follows "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law."[159]

However, shipper reliance on the savings clause as a means to circumvent Carmack preemption has been rejected by every court from *Adams Express* on down, based on the reasoning that to construe the saving clause as grounds for allowing plaintiffs to avail themselves of state remedies would emasculate the Carmack Amendment itself.[160] According to the Court in *Adams Express*, a broad reading of the clause "would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to."[161]

Closely related to Carmack Amendment preemption of state and common law claims is the important but less frequently litigated preemption defense under the Federal Aviation Administration Authorization

152. *Rini*, 104 F.3d at 506.

153. Smith v. United Parcel Serv., 296 F.3d 1244, 1249 (11th Cir. 2002).

154. *Gordon*, 130 F.3d at 289.

155. Cleveland v. Beltman N. Am. Co., Inc., 30 F.3d 373, 376 (2d Cir. 1994).

156. Rini, 104 F.3d at 506.

157. Berryman v. Wheaton Van Lines, Inc., No. 06-5679 (PGS), 2007 U.S. Dist. LEXIS 32218, at *7 (D.N.J. May 2, 2007).

158. Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 379 (5th Cir. 1998).

159. 49 U.S.C. § 13103 (1995).

160. *See* Adams Express Co. v. Croninger, 226 U.S. 491, 507-08 (1913).

161. *Id.* at 507.

Act of 1994 ("FAAAA"), codified as to motor carriers in the ICCTA at 49 U.S.C. §14501(c)(1). That statute provides:

> Except as provided . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.[162]

The origins of §14501(c) preemption trace back to Supreme Court decisions involving the preemptive effects of the Airline Deregulation Act of 1978 ("ADA").[163] The Supreme Court has construed the language "relating to," as used in §14501(c), as preempting all state enforcement actions "having a connection with or reference to" a carrier's "rates, routes or services" in more than a tenuous, remote, or peripheral manner.[164] The Supreme Court later defined the phrase "enact or enforce any law" to mean prohibiting the enforcement of state laws, statutes, regulations, or policies beyond the confines of the contractual agreement between the parties which impose obligations external to the conditions to which the parties voluntarily agreed.[165] The preemptive effect of §14501(c)(1) as to motor carriers was modeled on the virtually identical preemption provision of the ADA.[166]

Thus, motor carriers defending the smorgasbord of state law causes of action arising from or related to loss or damage to interstate shipments of goods have available a substantial preemption defense package to exclude the clutter of such claims. Early preemption in a lawsuit eliminates the waste of time in discovery on irrelevant claims and forecloses so-called "red herring" issues such as a driver's alleged gross negligence or the carrier's routine destruction of driver's logs (spoliation argument)—claims and issues that have no place in the strict liability regime of the Carmack Amendment. Since *Adams Express* in 1913, preemption has matured into an extremely valuable motor carrier defense tool that eliminates extraneous claims and damages exclusive of those available under the Carmack Amendment. It does not matter *how* a shipment got lost or damaged; only the fact of the loss or damage is relevant for a *prima facie* Carmack Amendment case, and it makes no difference whether the car-

162. 49 U.S.C. § 14501(c)(1) (2005). This provision also applies to brokers and freight forwarders.

163. *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378-79 (1992) (Discussing the preemptive effects of the ADA).

164. *Id.* at 383-84.

165. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 226 (1995).

166. *See* Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc., 972 F. Supp. 665, 669 (N.D. Ga. 1997).

rier or its driver were negligent or grossly negligent. This is not tort law. Therefore, a shipper has no need to interview the motor carrier's driver or claim personnel as to *how* a loss or damage occurred in order to prove its case. Preemption thus is a most valuable tool for keeping litigants and judges focused on the relevant issues.

IV. Limitation of Motor Carrier Liability

It can be fairly said that the fiercest battleground in Carmack Amendment litigation is under what circumstances and to what extent a motor carrier is entitled to limit its liability for lost or damaged cargo. Although at common law a carrier was liable for the full amount of the shipper's loss, courts early on held that "a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk."[167]

The validity of carrier/shipper agreements that limit a carrier's liability was tested and upheld even before enactment of the Carmack Amendment in *Hart v. Pennsylvania Railroad*:

> The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.[168]

The current incarnation of the Carmack Amendment as to motor carriers preserves the codification of these principles and permits motor carriers to limit their liability for cargo loss or damage:

> (A) Shipper waiver. Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods

167. Adams Express Co. v. Croninger, 226 U.S. 491, 509-10 (1913).
168. Hart v. Pa. R.R. Co., 112 U.S. 331, 340-41 (1884).

> described in section 13102(10)(A)) under which the liability of carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper *if that value would be reasonable under the circumstances surrounding the transportation.*
>
> (B) Carrier notification. If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.[169]

While early case law on motor carrier liability limitation identified as key elements the knowledge of the shipper that its rate was based upon a limited value from the terms of the bill of lading and the carrier's published tariffs, and the carrier's demonstration that the limitation was "a fair, open, just and reasonable agreement;" courts nonetheless have struggled to identify clear and uniform standards by which a limitation would be deemed binding.

In *Anton v. Greyhound Van Lines, Inc.* the defendant carrier sought to limit its liability for damage to an interstate household goods shipment to 60¢ per pound per article based on the bill of lading on which the shipper had not inserted a declared valuation for the shipment.[170] The bill of lading was not signed by either the plaintiff or the defendant carrier, Greyhound.[171] The First Circuit in *Anton*, after reviewing several prior decisions on the subject, concluded that an interstate motor carrier—in order to limit its liability under the Carmack Amendment—must prove that it (1) maintained an approved tariff with the former Interstate Commerce Commission; (2) obtained the shipper's written declaration of his choice of liability; (3) gave the shipper a reasonable opportunity to chose between two or more levels of liability; and (4) issued a receipt or bill of lading prior to moving the shipment.[172] Since the evidence at trial indicated Greyhound had failed to issue a receipt or bill of lading, and since there was no indication that there was any choice of different liability levels offered by Greyhound to the shipper, it was held liable for the full amount of the plaintiff's claim.[173]

The criteria articulated in *Anton* subsequently evolved into the so-called "four point test" a carrier must meet in order to limit its liability

169. 49 U.S.C. § 14706(c)(1) (2005) (emphasis added).

170. Anton v. Greyhound Van Lines, Inc., 591 F.2d 103, 105-06 (1st Cir. 1978), *overruled by* Hollingsworth & Vose Co. v. A-P-A Transportation Corp., 158 F.3d 617 (1st Cir. 1998).

171. *Anton*, 591 F.2d at 106.

172. *Id.* at 107.

173. *Id.* at 108-10.

for interstate cargo loss or damage. The "four point test" has been recognized in many jurisdictions over the years.[174] The battleground in "four point test" jurisdictions typically turns on whether the motor carrier demonstrates that the shipper had a reasonable opportunity to choose between different levels of carrier liability, meaning "that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice."[175]

However, things began to change in 1994 when Congress enacted the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA")[176] which eliminated the tariff filing requirement for released rates orders for non-household goods motor carriers. TIRRA was followed by Congress' passage of the ICCTA in 1995, which replaced the former 49 U.S.C. §10730 (establishing general tariff requirements which had to be met by a motor carrier seeking to establish limited liability rates) with the present 49 U.S.C. §14706(c) component of the Carmack Amendment.

The notion that Congress' recodification of the former §10730(b)(2) into the present §14706(c) evidences its intent to no longer require carriers to offer two or more levels of liability was rejected in *Emerson Electric Supply Co. v. Estes Express Lines, Corp.*[177] According to the *Emerson* court, "a carrier wishing to limit its liability is still required to give the shipper a reasonable opportunity to choose between different levels of liability."[178] The released value doctrine does not require motor carriers to offer a full value rate.[179]In some jurisdictions, the fact that the carrier's bill of lading contains a so-called declared value box will not, standing alone, satisfy the carrier's obligation to give the shipper a choice between different levels of liability if its corresponding tariff rules do not provide the shipper with an option to declare a higher value with the

174. *See, e.g.*, Toledo Ticket Co. v. Roadway Exp., 133 F.3d 439, 442 (6th Cir. 1998); Rohner Gehrig Co., Inc. v. Tri-State Motor Transit, 950 F.2d 1079, 1081 (5th Cir. 1992) (adopting the four point test); Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 611-12 (9th Cir. 1992); Carmana Designs Ltd. v. N. Am. Van Lines Inc., 943 F.2d 316, 319 (3d Cir. 1991); Norton v. Jim Phillips Horse Transp., Inc., 901 F.2d 821, 827 (10th Cir. 1990); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir. 1987); Mech. Tech., Inc. v. Ryder Truck Lines, Inc., 776 F.2d 1085, 1087 (2nd Cir. 1985).

175. Bio-Lab, Inc. v. Pony Express Courier Corp., 911 F.2d 1580, 1582 (11th Cir. 1990).

176. Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673.

177. Emerson Elec. Supply Co. v. Estes Express Lines, Corp., 451 F.3d 179, 187 (3d Cir. 2006). ("At most, the deletion of §10730(b)(2) indicates Congress's intent to deregulate the motor carrier industry and to abolish the ICC. Moreover, the ICCTA's legislative history does not reveal a congressional intent to alter the two or more levels of liability requirement.").

178. *Id.* at 188.

179. Kemper Ins. Co. v. Federal Exp. Corp., 252 F.3d 509 (1st Cir. 2001). (Court upheld an air carrier's tariff that limited shipper's declaration of value to 500 and ruled that the Carmack Amendment would not mandate a different result.).

corresponding level of liability.[180] As noted in *Emerson*, "[t]o satisfy the two or more levels of liability requirement, a carrier must offer two or more shipping rates with corresponding levels of liability for one type of shipment."[181]

Although cases such as *Anton*,[182] *Hughes*,[183] *Toledo Ticket*,[184] *Emerson Electric*,[185] and others set a high burden for motor carriers seeking to limit their liability, over the last several years there has been a distinct trend away from the "four point test" test toward a practical standard more in line with the realities of modern commerce. The erosion of the "four point test" can be traced to *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*,[186] where the First Circuit addressed and revisited its prior decision in *Anton,* in which it originally adopted the test. The Court in *Hollingsworth & Vose* observed that the "fair opportunity" (to choose between a limited and an unlimited liability shipping rate) requirement had "taken on a life of its own" and decided to "candidly . . . disavow the reasoning of *Anton.*"[187] The Court concluded that in order for a carrier's released rate limitation to apply, "[i]t is enough that the tariff made both coverages available, the bill of lading afforded the shipper a reasonable opportunity to choose between them . . . and the shipper was a substantial commercial enterprise capable of understanding the agreements it signed."[188]

The "four point test" was then further eroded. In *EFS National Bank v. Averitt Express, Inc.* the plaintiff bank sued the defendant motor carrier, Averitt, for the loss of an interstate shipment for which the bank had completed one of Averitt's standard bills of lading.[189] The bill of lading contained the standard language that the shipment was received subject to the carrier's rates, classifications and rules that were available to the shipper on request.[190] Averitt's tariff limited its liability to $25.00 per pound in the absence of a value declared on the bill of lading, and EFS failed to declare a value.[191] Averitt moved for summary judgment

180. *Id.* at 189.

181. *Id.* (citing New York, New Haven & Hartford R.R. v. Nothangle, 346 U.S. 128, 134-35 (1953) ("[O]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained.")).

182. Anton v. Greyhound Van Lines, Inc., 591 F.2d 103, 105-06 (1st Cir. 1978).

183. Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1412 (7th Cir. 1987).

184. Toledo Ticket Co. v. Roadway Exp., 133 F.3d 439, 442 (6th Cir. 1998).

185. *Emerson Electric*, 451 F.3d at 187.

186. Hollingsworth & Vose Co. v. A-P-A Transp. Corp., 158 F.3d 617 (1st Cir. 1998).

187. *Id.* at 620.

188. *Id.* at 621.

189. EFS Nat'l Bank v. Averitt Express, Inc., 164 F. Supp. 2d 994, 995-96 (W.D. Tenn. 2001).

190. *Id.* at 996.

191. *Id.*

seeking to enforce the $25.00 per pound limitation, and EFS opposed the motion in reliance on Sixth Circuit precedent in *Toledo Ticket*[192] and *Trepel v. Roadway Express, Inc.*,[193] which strictly followed the "four point test."[194] EFS claimed that under *Toledo Ticket* and *Trepel* Averitt had failed to give it a fair opportunity to choose between two or more levels of liability and had failed to obtain EFS' written agreement as to its choice of liability.[195] However, the Court granted Averitt's motion and decided not to follow *Toledo Ticket* and *Trepel* on the basis that the shipments in those cases had moved under a pre-TIRRA version of the Carmack Amendment which:

> did not contain a provision stating that the carrier had to provide a copy of the rate classification rules only on the request of the shipper. The legislative history of the revised Carmack Amendment reveals that the intent of Congress in amending the statute was to 'return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment.'[196]

The court added, "[g]iven the recent changes in the law, the four factors used by the Sixth Circuit in earlier cases interpreting the pre-1996 Carmack Amendment may no longer be completely relevant."[197]

The *EFS National Bank* Court did not stop there, noting "[i]t is unclear whether the second and third requirements, that the carrier must give the shipper a fair opportunity to choose between two or more levels of liability and that the carrier must obtain the shipper's written agreement as to his choice of liability, should still apply."[198]

The United States District Court for the Western District of New York in *Schweitzer Aircraft Corp. v. Landstar Ranger, Inc.* reached a similar result in a case involving damage to a shipment of a $914,389 helicopter damaged in transit where the motor carrier, Landstar, sought to limit its liability to $3,000 pursuant to its tariff.[199] The shipper, Schweitzer, had prepared the bill of lading, leaving blank the space provided to declare a value.[200] The bill of lading also contained the standard language that the shipment was received for transportation subject to the carrier's tariffs, which were available but never requested by Schweitzer.[201] In granting

192. Toledo Ticket Co. v. Roadway Exp., 133 F.3d 439, 442 (6th Cir. 1998).
193. Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th 1999).
194. *See EPS Nat'l Bank*, 164 F. Supp. 2d at 999.
195. *Id.*
196. *Id.* at 1000.
197. *Id.* at 1001.
198. *Id.*
199. Schweitzer Aircraft Corp. v. Landstar Ranger, Inc., 114 F. Supp. 2d 199, 200-01 (W.D.N.Y. 2000).
200. *Id.* at 201.
201. *Id.*

Landstar's motion for summary judgment, the Court ruled there "was no affirmative obligation on Landstar to produce [its tariff] prior to shipment."[202] Citing *Mechanical Technology,* the Court in *Schweitzer* observed that the shipper, "having had the opportunity on its own form to secure greater protection . . . cannot complain about the consequences of leaving the applicable spaces blank. . . . This is not a case of an unsophisticated shipper. Schweitzer was not shipping lug nuts."[203]

Another instructive case demonstrating movement away from the "four point test" is *Siren, Inc. v. Estes Express Lines*, another post-ICCTA/post-TIRRA decision, where the plaintiff/shipper, Siren, sought to recover for the full value of a shipment of razors lost in transit between Florida and North Carolina.[204] Siren had prepared the bill of lading on which it indicated that the shipment should move under "Class 85."[205] Under Estes' tariff, Class 85 meant, *inter alia,* that its liability would be limited to $11.87 per pound.[206] Estes' evidence also showed that Siren received and knew that it received a discount of approximately 60% off the full freight rates when shipping at "Class 85."[207] Nonetheless, Siren sued Estes for the full value of the shipment ($46,982).[208] The district court directed a verdict in favor of Siren for the full amount, finding that "there was no showing that Plaintiff knew or reasonably should have known that the Class 85 designation carried with it the limitation of liability set forth in Defendant's tariff."[209] The Eleventh Circuit reversed.[210] It focused on what Siren knew about Estes' tariff limitation and ruled "that even if Siren did not know of the terms of the Estes tariff, Estes had a right to rely on the limitation of liability aspect of the term 'Class 85' used by Siren."[211] The court noted that it "does not deem it proper or necessary to protect shippers from themselves."[212] Concluding, the court then held "that the rate of freight is indissolubly bound up with the valuation placed on the goods by the shipper. Thus, assuming Siren did not *actually* know that it was limiting Estes' liability, Siren certainly *should* have known."[213]

202. *Id.* at 202.

203. *Id.* at 203 (quoting Mech. Tech. Inc. v. Ryder Truck Lines, Inc., 776 F.2d 1085, 1087 (2d Cir. 1985)).

204. Siren, Inc. v. Estes Express Lines, 249 F.3d 1268, 1269 (11th Cir. 2001).

205. *Id.* at 1269 n.3.

206. *Id.* at 1269.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1270.

212. *Id.* at 1271.

213. *Id.* at 1273 (alteration in original) (citation omitted).

The trend in Carmack Amendment limitation cases seems to be towards abandoning strict adherence to the "four point test" in favor of a more practical test that recognizes modern commercial realities. Whereas prior to the enactment of TIRRA, the filed rate doctrine effectively imputed to shippers actual notice and knowledge of the terms, conditions, regulations, and limitations contained in the carrier's tariff as a matter of law, it is not true that TIRRA's repeal of the filed rate doctrine relieves shippers of such knowledge. Specifically, with respect to the subject of the limitation of a motor carrier's liability, the TIRRA House Conference Report states:

> The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), which repealed the requirement that tariffs be filed with the ICC for individually determined rates. Prior to the enactment of TIRRA, carriers had the ability to limit liability as a part of the terms contained in the tariff. By signing a bill of lading which incorporated by reference the tariff, the shipper was deemed to have agreed to the tariff and its conditions and terms. However, the carrier was under no obligation to specifically notify the shipper of the conditions or terms of the tariff. It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff—usually through the retaining of a tariff watching service. An unintended and unconsidered consequence of TIRRA was that, when the tariff filing requirement was repealed, carriers lost this particular avenue as a way of limiting liability. *This provision is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment.*[214]

This legislative history confirms that in spite of the demise of the filed rate doctrine, a shipper—especially a sophisticated one—still should be held to constructive knowledge of the contents of a motor carrier's tariff, even when the tariff is not filed with a governmental body. Under the ICCTA, a motor carrier of property (other than a motor carrier providing transportation in non-contiguous domestic trade) "shall provide . . . to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based."[215] Thus, the shipper has the affirmative duty to request the applicable tariff if it is incorporated by reference into the bill of lading under which the cargo moves.[216]

---

214. H.R. Conf. Rep. 104-422, at 223 (1995) (emphasis added).

215. 49 U.S.C. § 14706(c)(1)(B) (2005). Nowadays, this is typically done by posting on the carrier's website. After all, who doesn't have a computer?

216. *See, e.g.*, EFS Nat'l Bank v. Averitt Express, Inc., 164 F. Supp. 2d 994, 1000-01 (W.D. Tenn. 2001); Schweitzer Aircraft Corp. v. Landstar Ranger, Inc., 114 F. Supp. 2d 199, 201

Further supporting motor carrier enforcement of liability limitations based on their classifications, tariffs, rules and circulars—as opposed to blind adherence to the four point test—is the tendency of courts to follow the parties' course of dealings and hold sophisticated shippers to the motor carrier's limitation. An instructive case on this point is *Calvin Klein Ltd. v. Trylon Trucking Corp.*[217] There, the plaintiff sued the defendant trucking company for the full value of a lost shipment of clothing allegedly worth $150,000.[218] On prior shipments, the carrier had sent the shipper an invoice, which contained language limiting the carrier's liability to $50 per shipment.[219] On the shipment in question, the defendant's driver stole the truck and the shipment and the plaintiff sought to recover full value.[220]

In *Calvin Klein*, the Second Circuit ruled that even gross negligence on the part of the defendant motor carrier did not void its limitation of liability and recognized that shippers and carriers may contract to limit the carrier's liability.[221] The amount of the carrier's limitation of liability was deemed to be immaterial because of the parties' course of dealings, and because the shipper had an opportunity to negotiate the amount of coverage by declaring the value of the shipment, which it declined to do.[222] "Commercial entities can easily negotiate the degree of risk each party will bear and which party will bear the cost of insurance."[223] Significantly, the Court found that this allocation of risk and liability applies "regardless of the degree of carrier negligence."[224] The parties' course of dealings as a basis on which to bind the shipper to the carrier's released rate limitation of liability is well-settled.[225]

Most recently, the Eleventh Circuit took a giant step away from the archaic "four point test" and effectively set a new, more modern and

(W.D.N.Y. 2000); Norpin Mfg. Co., Inc. v. CTS Con-way Transp. Serv., 68 F. Supp. 2d 19, 24 (D. Mass. 1999).

217. Calvin Klein Ltd. v. Trylon Trucking Corp., 892 F.2d 191 (2d Cir. 1989).

218. *Id.* at 192.

219. *Id.* at 192-93.

220. *Id.* at 192.

221. *Id.* at 193-94.

222. *Id.* at 196.

223. *Id.*

224. *Id.* at 195.

225. *See* Emerson Elec. Supply Co. v. Estes Express Lines Corp., 324 F. Supp. 2d 713, 729 (W.D. Pa. 2004) (holding that shippers will be held to the terms of a shipping contract where the terms were "negotiated between people of at least equal economic stature and commercial awareness or acuity"); Ins. Co. of North America v. NNR Aircargo Serv. (USA), Inc., 201 F.3d 1111, 1113 (9th Cir. 2000) ("Invoice terms and conditions may supplement shipping agreements if there has been a sufficient course of dealing" between shipper and carrier); First Pa. Bank, N.A. v. E. Airlines, Inc., 731 F.2d 1113, 1122 (3d Cir. 1984) (holding a prominent Philadelphia bank bound by carrier's $500 liability limitation on lost checks worth millions of dollars transported in low-cost air express service).

practical standard for the application of motor carrier cargo liability limitations. In *Werner Enterprises, Inc. v. Westwind Maritime International, Inc.*[226] the Court, relying on the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*,[227] held that where a shipment of goods was brokered to a motor carrier, and neither shipper nor broker complied with the motor carrier's tariff requirements for declaring full value liability, the shipper was bound by the limitation entered into between the broker and the motor carrier, as articulated in the carrier's tariff rules, regardless of the fact that the shipper had no actual knowledge of the motor carrier's limitation and no opportunity to negotiate the limitation. "Kirby's teaching is not limited to maritime law. . . . [T]he benefits of allowing carriers to rely on limitations of liability negotiated by intermediaries are equally as great here as under maritime law."[228] Moreover, the *Werner* Court observed, "we have consistently been reluctant to protect a sophisticated shipper from itself when it drafts a shipping document."[229]

These decisions, together with the often overlooked TIRRA House Conference Report, signal a clear trend that courts today are more inclined to hold commercial shippers to the limitations set forth in motor carrier tariffs, rules, or classifications; especially where the shipper, its intermediary, broker, or agent prepares or accepts a motor carrier bill of lading or ships goods without declaring a value to the motor carrier. Remember, limitations must be "reasonable under the circumstances surrounding the transportation."[230] Probably the best and most effective way for a motor carrier to demonstrate such "reasonableness" is to prepare and offer into evidence a spreadsheet showing the freight charges as actually billed at the released rate limitation for transporting the cargo versus the freight charges that would have been billed if the shipper had declared the higher valuation it seeks in the claim or lawsuit. Usually, the difference is enormous, and the shipper's rationale (for not having declared a value for the shipment) is simple and obvious: why would the shipper declare a high value and pay high freight charges if it already has cargo insurance? Why pay twice to protect against a risk? Why then should motor carriers be charged with a risk they are not asked or paid to undertake? That answer is simple too: they shouldn't.

Another important point to address when considering the enforceability of a motor carrier's limitation of liability is where the shipper

226. Werner Enterprises., Inc. v. Westwind Maritime Int'l, Inc., 554 F.3d 1319, 1323-24 (11th Cir. 2009).

227. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).

228. *Werner Enterprises, Inc.*, 554 F.3d at 1324-25.

229. *Id.* at 1328.

230. 49 U.S.C. §14706(c)(1)(A) (2005).

claims the limitation is void because of the theft of the shipment by a complicit carrier employee or an allegation of conversion or even gross negligence on the carrier's part. The conversion argument is nothing new to Carmack Amendment plaintiffs seeking to avoid the carrier's cargo liability limitation, but the tactic is doomed to failure. "[T]he conversion doctrine is pertinent [as a defense to a limitation of liability defense] only when there has been a true conversion, i.e., where the carrier has appropriated the property for its own use or gain. The carrier may properly limit its liability [even] where the conversion is . . . by its own employees."[231] Courts have noted that "nothing short of intentional destruction or conduct in the nature of theft of the property" will void the limitation on liability.[232] The *Deiro* court has noted "[o]nly an appropriation of property by the carrier for its own use will vitiate limits on liability."[233]

In *Kemper Ins. Cos. v. Fed. Express Corp.* the plaintiff sued the defendant carrier, FedEx, for the loss of seven packages of jewelry the plaintiff's insured had tendered to FedEx for transportation under a shipping agreement.[234] FedEx pled as an affirmative defense that its liability was limited to $100 per package unless a higher value was declared on the air bill.[235] No value was declared for any of the shipments.[236] The plaintiff alleged many claims including claims of willful and wanton misconduct on the part of FedEx's employees based on the fact that it had knowledge "of rampant employee theft [on prior shipments] and lack of meaningful effort to prevent future thefts from occurring," and therefore claimed the "conversion exception" to the released value doctrine should apply so as to render FedEx liable for the full amount of the claim.[237] However, the First Circuit in *Kemper* affirmed the holding of the district court, "that even if the [conversion] exception included a 'level of willful and intentional conduct . . . so egregious as to rise to the level of conversion for a carrier's own use,' Kemper had not alleged sufficient facts to reach such a level."[238]

Similar to the conversion claim is the misplaced maritime doctrine of "material deviation," which is sometimes argued as a device to get around a motor carrier's bill of lading or tariff limitation. Although one

231. Glickfeld v. Howard Van Lines, Inc., 213 F.2d 723, 727 (9th Cir. 1954).

232. Am. Cyanamid Co. v. New Penn Motor Express, Inc., 979 F.2d 310, 315-16 (3d 1992).

233. Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1366 (9th Cir. 1987).

234. Kemper Ins. Co. v. Federal Express Co., 252 F.3d 509 (1st Cir. 2001).

235. *Id.*

236. *Id.* at 510.

237. *Id.* at 512.

238. *Id.* The court in *Kemper* also upheld and enforced the defendant carrier's released rate limitation under both federal common law applying to air, under *First Pa. Bank, N.A. v. Federal Express Corp.*, 731 F.2d 1113, 1115-16 (3d Cir. 1984) and under the Carmack Amendment, as to ground (motor) carriers, under *Hollingsworth & Vose Co. Kemper Ins. Co.*, 158 F.3d at 620.

misguided court incorrectly applied the "material deviation" doctrine to a Carmack Amendment claim,[239] the weight of authority is that the "material deviation" admiralty doctrine "has no application in the context of regulated interstate commerce, which is governed by the overriding federal policy of uniformity."[240] If shippers were allowed to invoke the maritime "material deviation" principle in Carmack Amendment litigation it would emasculate motor carrier limitations because anything and everything—however trivial—gone wrong with a truck shipment would be claimed as the basis for the "deviation." This absurd result clearly was never intended by Congress.

On the topic of motor carrier limitations of liability, litigants and judges need to pause, take a few steps back, and look at the big picture of what the Carmack Amendment was intended to do: make shippers whole without a complex burden of proof; enable carriers to know and reasonably limit their risk under the circumstances at hand; and create uniformity and consistency in the valuation and disposition of interstate cargo claims. Decisions such as *Werner Enterprises*[241] pull everything together in consonance with those objectives, with due consideration of the realities of allocation of risk in commercial shipping. Shippers know (or certainly should know) the nature and value of the goods they ship; that for the cheap freight rates they pay, they get commensurately low, limited motor carrier cargo liability; and that if they want "full value" cargo liability they must expect to pay commensurately higher freight rates. Motor carriers are not insurance companies, which is why shippers buy cargo insurance in the first place. Shippers and their insurance companies cannot have it both ways.

V. Timely and Sufficient Claim – and Suit - Filing

For over 100 years (nearly 75 as to motor carriers), the Carmack Amendment has permitted carriers to limit the time for filing claims to as short as nine months from the date of delivery of a shipment and for filing suit to two years and one day from the date on which a claim is denied.[242] This is not a statute of limitations, but rather a condition precedent to recovery that the shipper must meet. It is a permissive minimum statutory requirement which, unless incorporated into the contract of carriage, does not apply. According to the *Norpin* court, "[i]n essence,

239. NipponKoa Ins. Co., Ltd. v. Watkins Motor Lines, Inc., 431 F. Supp. 2d 411 (S.D.N.Y. 2006).

240. Rocky Ford Moving Vans, Inc. v. United States, 501 F.2d 1369, 1372 (8th Cir. 1974).

241. Werner Enterprises, Inc. v. Westwind Maritime Int'l, Inc., 554 F.3d 1319 (11th Cir. 2009).

242. *See* Norpin Mfg. Co. v. CTS Con-Way Transp. Serv., 68 F. Supp. 2d 19, 23 (D. Mass. 1999).

Congress meant for a carrier to have a certain measure of repose. A carrier may set any time limitation it chooses by 'rule, contract or otherwise,' so long as it does not fall below the statutory requirements."[243] To avail themselves of these limitation periods as a condition precedent to a shipper's recovery, motor carriers have adopted language in the uniform straight bill of lading contract—standard in the industry since bills of lading were first created—specifying that claims must be filed in writing with the motor carrier within nine months from the date of delivery or, in the case of non-delivery, within nine months from the date the shipment should have been delivered; and that lawsuits must be filed within two years and one day from the date on which a shipper's claim is denied.[244]

Disputes over the timeliness of claims and lawsuits usually involve whether the limitations were part of the transportation contract; whether the documents submitted by the shipper constituted a sufficient, timely claim; and whether the carrier's declination of the claim was sufficient to trigger the two year and one day suit-filing limitation period.

A. Whether the Limitation was Part of the Transportation Contract

The claim and suit-filing requirements referenced above became industry-standard following Congress' enactment of the Carmack Amendment. Both rail and, subsequently, motor carriers incorporated the statute's minimum time limits into their standard bills of lading, which have not changed materially as of today. In most cases motor carriers published the limits in their rules tariffs or classifications. Thus, compliance with the bill of lading requirement that claims be filed in writing with the carrier within nine months after delivery of a shipment was deemed "mandatory under federal law."[245] This is because carriers' filed tariffs, in which the claim-filing rules were published, had the force and effect of law.[246] However, after Congress eliminated the tariff filing requirement for motor carriers by enacting TIRRA in 1994 and motor carriers stopped filing tariffs with the former Interstate Commerce Commission, there became a factual question as to whether the time limits actually became part of the transportation contract.

This was an issue in *Norpin,* where the defendant motor carrier, Conway, had applied its pro sticker to an airfreight forwarder's bill of lading when it picked up the shipment.[247] However, neither the pro sticker nor

243. *Id.* at 25.

244. *See* Uniform Bill of Lading Terms and Conditions, *in* National Motor Freight Classification, *supra* note 21, at 231.

245. B.A. Walterman Co. v. Pa. R.R Co., 295 F.2d 627, 628 (6th Cir. 1961).

246. *See id.*

247. Norpin Mfg. Co. Inc., 68 F. Supp. 2d at 19.

the forwarder's bill of lading had any terms or conditions or made any reference to Con-way's bill of lading terms and conditions or the fact that they were published in the National Motor Freight Classification, in which Con-way was a participating carrier.[248] In deciding whether to charge Norpin with constructive knowledge of the nine-month claim-filing rule in the Classification, the Court considered the intention expressed in the TIRRA House Conference Report, but concluded nonetheless that since there was no reference in the shipping documents directing Norpin to the terms and conditions of the Uniform Straight Bill of Lading or Con-way's classification, the nine-month claim-filing limit was deemed inapplicable and not to have been incorporated by reference into the transportation contract.[249] According to the court, "[i]f a carrier fails to provide notice of its nine month period for filing a claim, a claimant ought not be barred from recovery for failing to adhere to the time limitation."[250]

Consequently, any motor carrier seeking to avail itself of the nine month claim-filing and two year and one day suit-filing limits permitted by the Carmack Amendment is wise to publish those limits in its tariff, service guide, rules, etc. (on its website), make them available to the shipping public, use a long form bill of lading where possible, and—where not practical—include a pro-sticker, which—at minimum—informs the shipper that governing rules are available on the carrier's website or are otherwise available on request.

B. Sufficiency of Claim Documents: "Strict" v. "Substantial Compliance" Jurisdictions

In 1972 the late Interstate Commerce Commission promulgated *Ex Parte No. 263: Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*.[251] That decision resulted in the ICC's adoption of its "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage," which remain in effect today and apply to motor carriers as codified at 49 C.F.R. §370.1 *et seq.* As handed down to the present FMCSA and as published in countless individual tariffs, classifications, service guides, and rules circulars,[252] the claim rules provide as follows:

248. *Id.* at 23.

249. *Id.* at 23-25.

250. *Id.* at 25.

251. Rules, Regulations, & Practices of Regulated Carriers with Respect to the Processing of Loss & Damage Claims, Ex Parte No. 263 n1, 340 I.C.C. 515 (1972).

252. *See, e.g.*, Filing of Claims, *in* National Motor Freight Classification, *supra* note 21, at 727.

> (a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier. . . .
> (b) *Minimum filing requirements.* A written or electronic communication . . . from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and:
> (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property,
> (2) Asserting liability for alleged loss, damage, injury, or delay, and
> (3) Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage. . . .
> (c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.[253]

An endless controversy litigated between shippers and motor carriers under these regulations involves the question of whether shippers comply with the minimum claim-filing requirements in a timely manner: whether the "communication" made by the shipper to the carrier within the nine month claim window sufficiently complied with the condition precedent to recovery prescribed by the claim-filing regulations and whether they apply to all claims or only to "voluntarily paid" claims. Our courts have been divided over whether a "strict compliance" or a "substantial compliance" standard should be applied in making this determination.

i) Strict Compliance View

One line of cases holds that a shipper/claimant, in order to comply with the nine month claim-filing requirement, must strictly comply with the claim-filing rules by making a written or electronic communication to the carrier, within nine months of date of delivery, (1) containing facts sufficient to identify the shipment, (2) asserting liability for the alleged loss or damage and (3) making claim for the payment of a specified or determinable amount of money. A leading case articulating the strict application of the claim-filing regulations is *Pathway Bellows, Inc. v. Blanchette,* a rail case.[254] In *Pathway Bellows,* a shipment of metal expansion

253. 49 C.F.R. § 370.3 (2001) (emphasis added).
254. Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900 (2d Cir. 1980).

joints was transported from California to New York, where it arrived on October 22, 1974 in a damaged condition.[255] Pursuant to the shipper's request, the rail agent examined the shipment and prepared an inspection report, which noted the damage.[256] On May 12, 1975, the shipper sent a letter to the railroad stating "we are in the process of filing a claim for freight damage."[257] It was not until July 23, 1975, one day *after* the expiration of the nine-month claim-filing period, that the railroad received a more detailed letter containing a specific dollar amount of alleged damage.[258] The district court had held that Pathway Bellows' May 12, 1975 letter was deficient as a formal claim but ruled nonetheless that the second letter dated July 22, 1975 and received by the railroad on July 23, 1975 was timely because the word "filed" was not defined in the bill of lading and was somewhat ambiguous.[259]

The Second Circuit reversed, ruling that the shipper's July 22, 1975 claim letter was not "filed" when it was mailed because the railroad did not receive it until the next day, *after* the nine month claim period had expired.[260] As for the May 12, 1975 letter, the Court rejected Pathway Bellows' argument that the regulations relied on in the district court do not provide the proper standard for assessing the sufficiency of contested claims.[261] The Court in *Pathway Bellows* declined to follow the holding in *Wisconsin Packing Co. v. Indiana Refrigerator Lines*,[262] which declared that the claim regulations were intended to apply only to "voluntary" disposition of claims by carriers to ensure that the process of claims settlement would be more expeditious and less subject to discriminatory manipulation.[263] *Pathway Bellows* rejected the notion that there were dual standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or contest its liability.[264] The court noted:

> We do not believe that the ICC, in promulgating the claim-filing regulations, intended a radical departure from the claim investigation policy underlying the written claim requirement. . . .
> Neither do we believe that the ICC, by specifying minimum claim-filing requirements, intended to afford carriers an unfair opportunity to escape liability. The minimum filing requirements appear to call for no more

255. *Id.* at 901.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 901-02.
260. *Id.* at 904-05.
261. *Id.* at 903.
262. Wis. Packing Co. v. Ind. Refrigerator Lines, 618 F.2d 441 (7th Cir. 1980).
263. *Pathway Bellows*, 630 F.2d at 903-04.
264. *Id.*

> information than one ordinarily would expect a claim for damages to contain, and compliance with these requirements is neither onerous nor unreasonable. To the extent that carriers may escape liability, such "windfalls" may be properly traced, not to the existence of the regulations, but to shippers' unexcused failure to comply with a reasonable condition contained in bills of lading. . . .
> . . . Although we agree with the *Wisconsin Packing* court that the ICC's principal aim in promulgating these regulations was to encourage parties to settle claims instead of resorting to costly time-consuming litigation . . . we point out that there is a vast difference between prescribing the form a properly constituted claim must take and that of determining the substantive merits of that claim.[265]

Since Pathway Bellows' letter of May 12, 1975 was inadequate in form to constitute a written claim, and since its July 22, 1975 letter was not timely filed when mailed, the Second Circuit reversed, concluding, "[a]lthough it may appear Draconian to require that Pathway Bellows lose a $40,000 recovery because its claim letter was received one day late, Pathway Bellows has identified no special circumstances that would entitle it to be relieved of the admittedly severe consequences of its own procrastination."[266] Numerous jurisdictions have followed the strict compliance standard articulated by *Pathway Bellows*.[267]

The decision in *Bobst Champlain, Inc. v. IML-Freight, Inc.* is instructive as to the sufficiency of a shipper's claim letter.[268] In *Bobst,* following the motor carrier's delivery of a machine in damaged condition, the only written document sent by the shipper to the motor carrier within the nine month claim period stated, "[p]lease be advised that the above referenced machine which arrived in Port Newark on or about December 26, 1977 was found to be damaged. The estimated amount of damage is approximately $100,000.00."[269] The court concluded the letter was defective be-

265. *Id.* at 903-04.

266. *Id.* at 905.

267. *See, e.g.,* Salzstein v. Bekins Van Lines, Inc., 993 F.2d 1187, 1189-90 (5th Cir. 1993) (shipper's claim must strictly comply with Carmack Amendment claim-filing requirements); Nedlloyd Lines, B.V. Corp. v. Harris Transp. Co., 922 F.2d 905, 908 (1st Cir. 1991) ("[B]y denying liability, the shipper could avoid the ICC procedure for responding to an adequate claim and force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-settled claims would permit precisely the type of discrimination among claimants that the regulations were intended to address."); Intech, Inc. v. Consol. Freightways, Inc., 836 F.2d 672 (1st Cir. 1987) (shipper's claim filed in 13th month deemed untimely in spite of motor carrier's continuous assurances that container would be delivered); S & H Hardware & Supply Co. v. Yellow Transp., Inc., 432 F.3d 550 (3d Cir. 2005) (shipper failed to comply with claim-filing requirements on shipments of goods worth $1.6 million even where carrier's investigators found that one or more of the carrier's drivers was complicit in the theft); Gen. Elec. Co. v. Brown Transp. Co., 597 F. Supp. 1258 (D. Va. 1984) (shipper's claim inadequate because it knew the amount of damages but failed to include the information).

268. Bobst Champlain, Inc. v. IML-Freight, Inc., 566 F. Supp. 665 (S.D.N.Y. 1983).

269. *Id.* at 666.

cause it failed to make claim for the payment of a specified or determinable amount of money as required by the claim-filing regulations.[270] Referring to the shipper's claim letter, the court noted, "[c]learly Bobst does not in this letter make claim for 'a specified amount.' What does 'determinable' mean in this context? I conclude that it means an amount determinable, as a matter of mathematics, from a perusal of the documents submitted in support of the notice of claim."[271]

In *Delphax Systems, Inc. v. Mayflower Transit, Inc.* the defendant motor carrier, Mayflower, delivered a shipment on July 5, 1995 in damaged condition, with a damage notation on the bill of lading.[272] The bill of lading included the standard nine-month claim-filing requirement.[273] On August 22, 1995 Delphax sent Mayflower a letter stating the machine was received in damaged condition, that it was preparing a detailed estimate relating to the damage and that, "[t]he current rough estimate is that the damage will be in the $40,000 to $50,000 range."[274] On November 3, 1995 Delphax sent Mayflower a second letter asking for verification from Mayflower's delivery driver detailing the circumstances surrounding the pick-up and his observations of the damage.[275] The Court in *Delphax*, considering the claim-filing requirements at 49 C.F.R. §370.3(b), concluded that Delphax's two letters to Mayflower neither asserted liability on Mayflower's part nor made claim for payment of a specified or determinable amount of money, contrary to the requirements of Mayflower's bill of lading, published tariff, and the claim regulations.[276] The Court further rejected Delphax's estoppel argument, in which it claimed Mayflower should have been estopped from asserting the claim-filing defense, and ruled that correspondence from Mayflower's claim adjuster—who had initially indicated Mayflower would accept Delphax's late claim for review—did not occur until after the claim period had already expired.[277]

Moreover courts have held that actual knowledge of a claim does not meet or substitute for the written notice requirement, even where a shipper sent a letter but failed to specify an amount of damages.[278]

---

270. *Id.* at 668.

271. *Id.* at 669.

272. Delphax Sys., Inc. v. Mayflower Transit, Inc., 54 F. Supp. 2d 60, 61-62 (D. Mass. 1999).

273. *Id.* at 62.

274. *Id.*

275. *Id.*

276. *Id.* at 64.

277. *Id.* at 65.

278. Gen. Elec. Co. v. Brown Transp. Co., 597 F. Supp. 1258, 1260 (D. Va. 1984)

ii) Substantial Compliance View

Another line of cases applies a more liberal "substantial" compliance standard for determining whether a shipper has complied with the claim-filing regulations. The leading substantial compliance case is the Seventh Circuit's decision in *Wisconsin Packing*.[279] In that case, which involved a shipment of frozen meat gone bad, the only document given by the shipper to the defendant motor carrier was a notice stating that the shipment had been refused due to high temperatures in the product.[280] The Court in *Wisconsin Packing,* citing the Supreme Court's decision in *Georgia, Florida and Alabama Railway Co. v. Blish Milling Co.*[281] for the proposition that a bill of lading requiring written claims within a particular period of time "was intended simply 'to secure reasonable notice' and 'to facilitate prompt investigation,'" held that if the written notice sufficiently apprised the carrier of the claim, it was sufficient under the regulations.[282] The *Wisconsin Packing* Court ruled that the plaintiff's claim letter gave the defendant motor carrier "reasonable notice," and relied on the fact that "it [was] also apparent that the carrier not only was aware of the need to investigate, but actually conducted a thorough inquiry."[283] The Court went on to hold that the ICC's claim-filing regulations do "not even apply to a *contested* case such as this. . . . Even if the regulation were to apply, plaintiff could demonstrate its compliance."[284] Thus, *Wisconsin Packing* gave rise to the notion that if a claim is contested, the claim-filing regulations do not apply.

In *Insurance Company of North America v. G.I. Trucking Company*,[285] the Court agreed with the rationale in *Nedlloyd Lines*[286] and *Pathway Bellows*[287] that the regulations apply to contested as well as uncontested claims, but instead focused on the sufficiency of the claimant's written claim letter itself, which stated, "[t]his letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (Estimate)." The Court in *G.I. Trucking* expressly rejected the notion, articulated in *Nedlloyd* and *Pathway Bellows,* that a claim must specify an amount of damages to be considered legally sufficient and ruled instead that written claims are to be liberally construed.[288] The Ninth Circuit,

279. Wis. Packing Co., Inc. v. Ind. Refrigerator Lines, Inc., 618 F.2d 441 (7th Cir. 1980).
280. *Id.* at 443.
281. Ga., Fla., & Ala. Ry. Co. v. Blish Milling Co., 241 U.S. 190, 198 (1916).
282. *Wis. Packing*, 618 F.2d at 444.
283. *Id.*
284. *Id.* at 445 (emphasis added).
285. Ins. Co. of N. Am. v. G.I. Trucking Co., 1 F.3d 903, 904 (9th Cir. 1993).
286. Nedlloyd Lines, B.V. Corp. v. Harris Transp. Co., 922 F.2d 905, 908 (1st Cir. 1991).
287. Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900, 904 (2d Cir. 1980).
288. *G.I. Trucking*, 1 F.3d at 906.

citing its prior decisions in *Culver v. Boat Transit, Inc.*[289] and *Taisho Marine & Fire Insurance Co. v. Vessel Gladiolus*,[290] concluded there was satisfactory written notice of damage and a clearly communicated intent to hold the motor carrier liable.[291] It was influenced by the fact that the record indicated G.I. performed some investigation of the claim.[292] According to the court, "[u]nder *Taisho* and *Culver,* nothing more is required to satisfy the written claim requirement."[293]

In *Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company* the defendant railroad delivered a transformer on January 28, 2000 in damaged condition.[294] On March 1, 2000 the shipper sent the railroad a letter stating that it intended to file a claim for damages, but could not "state a cost for repairs but [would] send a report when available. [The shipper] estimated repairs at $25,000."[295] Siemens subsequently submitted a letter dated April 5, 2000 to the railroad stating it was "estimating a total cost of $700,000.00-$800,000.00 and that is the amount of our claim."[296] The district court granted the railroad's motion for summary judgment on the grounds that Siemens had failed to file a timely claim within nine months of the delivery because a strict interpretation of Siemens' letters did not satisfy the regulations' requirement that they make claim for a specified or determinable amount of damages.[297] On appeal, the Eleventh Circuit reversed.[298] While the *Siemens* Court agreed with the First, Second, Fifth, Sixth, and Ninth Circuits that the claim-filing requirements apply to both contested as well as voluntarily resolved claims, it disagreed with the district court on the sufficiency of Siemens' claim letter to the railroad.[299] The *Siemens* Court distinguished its facts from those in *Salzstein* and *Nedlloyd,* where the claim letters did not include an amount of damages or assert that the carrier was liable.[300]

289. Culver v. Boat Transit, Inc., 782 F. 2d 1467 (9th Cir. 1986).

290. Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus, 762 F.2d 1364 (9th Cir. 1985).

291. *G.I. Trucking*, 1 F.3d at 907.

292. *Id.*

293. *Id.*

294. Siemens Power Transmission & Distrib., Inc. v. Norfolk S. Ry. Co., 420 F.3d 1243, 1246 (11th Cir. 2005).

295. *Id.*

296. *Id.*

297. *Id.* at 1253.

298. *Id.* at 1245.

299. *Id.* at 1250-54.

300. *Id.* at 1252-53 (citing Salztein v. Bekins Van Lines Inc., 993 F.2d 1187, 1189, 1190-91 (5th Cir. 1993); Nedlloyd Lines, B.V. Corp. v. Harris Transp. Co., 922 F.2d 905, 908 (1st Cir. 1991)).

C. Exceptions to Claim-filing Requirements

Even strict compliance jurisdictions have recognized narrow exceptions to the claim-filing requirements. *Pathway Bellows* cracked the door open through which tardy plaintiffs may save their cases by suggesting, in a footnote, that the failure to file a timely claim might be excused if the shipper was unable, despite the exercise of reasonable diligence, to ascertain the extent of its loss within the nine month claim-filing period.[301] Or, where there is affirmative conduct on the part of the carrier that misled the shipper into believing there was no need to file a timely claim, the carrier could be estopped from raising inadequacy of the notice of claim as a defense.[302]

The leading estoppel case is *Perini-North River Associates v. Chesapeake & Ohio Railway Company*.[303] In *Perini*, a rail case, the plaintiff's crane was damaged during transportation and was discovered at the consignee's yard on August 29, 1972.[304] Subsequently, Perini reported the damage to the railroad, who then assigned a damage clerk to examine the crane damage.[305] The clerk filed various inspection reports with the railroad and told Perini it need not file a claim since one had already been filed when the crane was reloaded after the accident.[306] Also, no claim forms were sent to Perini, which was a departure from the railroad's usual claim practice.[307] There was also evidence that Perini's claim had previously been assigned a file number.[308] In any event, Perini did not actually complete and return the claim form until June 27, 1973, slightly more than ten months after the delivery.[309] The railroad then disallowed the claim because it had been filed out of time.[310]

On these facts, the Third Circuit held that the railroad's indication that the filing requirement had been waived, combined with its departure from its normal practice of forwarding claim forms to the shipper, had misled the shipper as to the necessity of filing a formal claim.[311] Thus, the railroad was estopped from raising the shipper's failure to file a timely notice of claim as a defense.[312] Significantly, the Court in *Perini* noted:

> [w]e do not question the accepted rule that actual knowledge on the part of

301. Pathway Bellows, Inc. v. Blanchette, 630 F.2d 900, 905 n.10 (2d Cir. 1980).
302. *See id.*
303. Perini-North River Assoc. v. Chesapeake & Ohio Ry. Co., 562 F.2d 269 (3d Cir. 1977).
304. *Id.* at 270-71.
305. *Id.* at 271.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 274.
312. *Id.*

> the carrier cannot substitute for the written notice required by a bill of lading. The estoppel inquiry is not closed, however, simply by virtue of that principle.
>
> . . . We do not suggest that it is the carrier's duty to remind a consignee of its pending claim.[313]

However, in light of the facts and circumstances of the shipper/carrier relationship and the conduct of the railroad's claim agent, the carrier was estopped from enforcing the claim-filing regulation.[314] Nonetheless, even if a defendant carrier's conduct contributed to a shipper's failure to file a timely claim, the court still must determine a reasonable period for a plaintiff to discover its loss, determine the extent of its damages, and file a timely claim.[315]

Relief from the nine-month claim-filing requirement must be predicated entirely upon principles of estoppel, based on the carrier's affirmative conduct, not on whether a carrier had knowledge of the loss or damage. In *R.T.A. Corp. v. Consolidated Rail Corp.* the Court refused to excuse the shipper's failure to file a timely notice of claim where the shipper had sent a letter to the carrier stating "due to your negligence, a loaded trailer was received with damage to the trailer itself, as well as the cargo inside. Kindly notify your insurance carrier," but never included a claim amount within the nine month claim period.[316] The Court concluded the shipper's letter did not satisfy the minimum claim-filing requirements and rejected the plaintiff's estoppel argument, based on *Perini,* that the remarks of the defendant's employees in disallowing its claim led it to infer that it was unnecessary to file a written claim.[317] The court held "[i]f damages are sought it is for the claimant to say exactly what it seeks, rather for the carrier, against its self-interest, to say what the claimant deserves."[318] A carrier's actual knowledge of damage to a shipment does not excuse compliance with claim-filing regulations.

As a general rule, courts have refused to apply the doctrine of estoppel where the carrier either did not reply at all to an inadequate notice of

313. *Id.* at 273-74.

314. *Id.* at 274.

315. *See* Usinor Steel Corp. v. Norfolk S. Corp., 308 F. Supp. 2d 510, 521-22 (D.N.J. 2004) (holding that a twenty-two month claim-filing delay tended to "stretch notions of equity beyond reason." A plaintiff shipper will nonetheless be denied relief based on a failure to pursue its claim with diligence).

316. R.T.A. Corp. v. Consol. Rail Corp., 594 F. Supp. 205, 207, 210-11 (S.D.N.Y. 1984).

317. *Id.* at 210-11.

318. *Id.* at 210; *see* LTA Group, Inc. v. J.B. Hunt Transp., Inc., 101 F. Supp. 2d 93, 99 (N.D.N.Y. 2000) ("Rather than look to what the carrier knew, or should have known, about the facts surrounding the claim, courts instead hold that 'the notice that [the shipper] provided in writing to [the carrier] is controlling.'" (quoting Consol. Rail Corp. v. Primary Indus. Corp., 868 F. Supp. 566, 572 n.5 (S.D.N.Y. 1994)).

claim or denied liability orally or in writing.[319] A defendant's failure to pay, decline, or make a firm compromise settlement offer of a shipper's claim in accordance with the FMCSA's regulations also does not constitute a basis for estoppel.[320]

The plaintiff's failure to file a timely written claim as a condition precedent to recovery is a common issue in motor carrier Carmack Amendment litigation. The outcome typically boils down to questions of: what did the shipper know about his claim; when did he know it; when and how did he communicate it to the motor carrier; are the claim-filing requirements articulated in the bill of lading itself or in the motor carrier's tariff; and is the claimant a sophisticated shipper? All these are critical to a court's determination of whether the plaintiff in a Carmack Amendment lawsuit timely complied with the condition precedent to recover on its claim under the claim rules or whether the claim is time-barred.

D. Failure to File a Timely Lawsuit

The Uniform Straight Bill of Lading terms and conditions also require shipper seeking to pursue a Carmack Amendment lawsuit against a motor carrier to file suit within two years and one day from the date on which the carrier denied the shipper's claim.[321] Again, this is a minimum time limit, permitted by Carmack to be included in the transportation contract. If it is not in the transportation agreement (bill of lading), then courts likely will apply the four year default provision for civil actions arising under an Act of Congress.[322]

This two year and one day suit limit for motor carriers is the same as for railroad Carmack Amendment claims and, again, courts will apply the same legal analysis for both. The controversy surrounding this contractual deadline usually involves whether and when the motor carrier sufficiently "denied" the shipper's claim so as to trigger the clock on the limitation period. The two year and one day limitation period in motor carrier classifications and tariffs does not conflict with the Carmack Amendment. "Rather, it is expressly contemplated and sanctioned by

319. *See* Nedlloyd Lines, B.V. Corp., 922 F.2d at 909; Gen. Elec. Co. v. Brown Transp. Co., 597 F. Supp. 1258, 1267 (D. Va. 1984); Bobst Champlain, Inc. v. IML-Freight, Inc., 566 F. Supp. 665, 669 (S.D.N.Y. 1983).

320. *See* One Step Up, Ltd. v. J.B. Hunt Transp. Serv. No. 05 Civ. 7197, 2006 U.S. Dist. LEXIS 85439, at *18-*22 (S.D.N.Y. Nov. 22, 2006). *See also* Landess v. N. Am. Van Lines, Inc., 977 F. Supp. 1274, 1281-83 (E.D. Tex. 1977) (motor carrier's sending a settlement check to plaintiff, which was rejected by plaintiff, was not an affirmative act by defendant that led plaintiff to believe that filing a claim was not necessary so as to estop carrier from strictly enforcing the claim filing regulation).

321. 49 U.S.C. § 14706(e)(1) (2005).

322. 28 U.S.C. §1658(a) (2002).

the Carmack Amendment."[323]

When faced with the carrier's defense that the shipper's lawsuit was not timely filed, the dispute usually focuses on whether the carrier's declination letter was sufficiently clear, final, and unequivocal as to constitute a proper disallowance. "[O]nce an effective . . . disallowance has been made, subsequent correspondence between the parties does not halt the running of the limitations period."[324] In *Combustion Engineering,* the defendant carrier's claim declination letter to the shipper stated the shipper's "claim as presented is disallowed."[325] Thereafter, the carrier and the shipper engaged in extensive correspondence, in some of which the railroad advised the shipper that its claim was still active.[326] Although the district court had granted the carrier summary judgment, relying on the original claim declination letter, the Second Circuit reversed because it found the railroad's letter, stating that the claim "*as presented* was disallowed," "plainly failed unequivocally and finally to reject any part of Combustion's claim for its damaged cargo. . . . From the 'as presented' language used, it is evident that the subsequent presentation of adequate documentation would enable Conrail to process the claim in a routine fashion."[327]

Although it is a factual issue as to whether a particular declination letter is sufficiently "clear, final and unequivocal," many cases have held the motor carrier's declination letter to have been sufficient as a matter of law to trigger the two year and one day time limit and bar a shipper's untimely lawsuit.[328] In *Security Insurance Company of Hartford v. Old Dominion Freight Line, Inc.* on the other hand, a declination letter to shipper stating that the motor carrier would transfer the file to the originating carrier for resolution was held to be susceptible of multiple interpretations and insufficient to start the two year and one day time

323. Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697, 703-04 (11th Cir. 1986) ("we are not prepared to strike down all tariff provisions of which a shipper has no actual notice. Such a result would quickly force carriers to enlarge the bills of lading issued to shippers into mammoth documents containing paragraph upon paragraph of unreadable fine print.").

324. Combustion Eng'g Inc. v. Consol. Rail Corp., 741 F.2d 533, 536 (2d Cir. 1984).

325. *Id.* at 534.

326. *Id.* at 535.

327. *Id.* at 537.

328. *See* Great N. Ins. Co. v. McCollister's Moving & Storage, Inc., 190 F. Supp. 2d 91, 94 (D. Mass. 2001) (declination letter stated "Based on [the above] facts we must deny your claim . . . " and a second letter stating the carrier's apology for having scrapped the plaintiff's machine); Burtman Iron Works, Inc. v. Con-Way Transp. Serv., Inc., 97 F. Supp. 2d 122, 126 (D. Mass. 2000) (declination letter stated "[i]n view of clear delivery record and in the absence of documentation showing carrier liability, we have no alternative other than to deny payment of your claim," and a second letter stated, "[t]o date, we have received no rebuttal to our declination and no evidence overcoming our clear delivery record. . . . [W]e have no alternative other than to maintain our declination and deny payment.").

limit clock.[329]

Motor carrier claim personnel, perhaps for customer relations reasons or because they simply dislike giving their customers the bad news, too often seem disposed towards couching their declination letters with "feel good" phraseology such as, "[y]our claim as presented is disallowed;" "[y]our claim in its present form is disallowed;" "[a]t this time we are unable to process your claim for payment;" "[i]f you have any new information, please contact me;" and similar language that can be construed by shippers as leaving the door open for future processing of their claim. Courts are more likely to rule such letters of declination are not "clear, final and unequivocal" and do not start the running of the two year and one day suit limitation period. Motor carriers must face the fact that the declination message must be clearly sent. If you're going to deny the claim, then deny it. There is no middle ground if you, the motor carrier, want the limitation period to commence. Therefore, the best way to send a declination message and start the two year suit period ticking is to close the letter with, "[f]or the above reasons, your claim is denied." Blunt and to the point. This should remove any doubt as to the message being sent.

Carmack Amendment litigation, as it is involved with contracts of adhesion (bills of lading), rules, tariffs, classifications, service guides, and circulars—which are foreign to many shippers, insurance companies, lawyers, and judges—will inherently involve disputes and litigation over the sufficiency of claims, the timeliness of lawsuits, and whether any exceptions apply to excuse the shipper's failure to act. Though the disputes are fact-based, the outcome will depend greatly on the jurisdiction in which the case is litigated and the detail, clarity, and substance of the communication at issue.

VI. "E-COMMERCE" ISSUES

I doubt that either Senator Carmack or Congress had any inkling in 1906 as to how dramatically the world of commerce and communication would change with the advent of computer technology, the Internet, e-mails, and the convenience, speed, detail, and flood of information we take for granted today. These technological advances leave shippers and motor carriers with no excuses for either being unaware of a carrier's limitation of liability, its claim- and suit-filing rules, or for failing to know a carrier's cargo liability options. Virtually every shipper and motor carrier employee today has on his/her desk a computer terminal connected to the Internet. For shippers this means they have no excuse for being

329. Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., No. 02 Civ. 5258, 2003 U.S. Dist. LEXIS 14682, at *29-*30 (S.D.N.Y. Aug. 22, 2003).

unaware of the liability limits and claim rules in a carrier's tariff, service guide, circular, or classification and the options available to declare and pay for higher valuation. Similarly, motor carriers today have no excuse for failing to publish all these rules on their websites, thereby making them readily available to the shipping public.

In one of the first known reported "E-Commerce" decisions (involving air freight liability), *Treiber & Straub, Inc. v. United Parcel Service, Inc.*, the shipper, Treiber, a jewelry store, shipped a package containing a ring via defendant UPS's "Next Day Air" service and purchased $50,000 "in insurance, the maximum permitted" for the shipment.[330] The ring was actually worth more than double the $50,000 limit.[331] After UPS lost the package in transit, Treiber sued UPS to collect the $50,000, since it had purchased that amount of "insurance."[332] UPS denied liability on the basis that a disclaimer in its Terms and Conditions warned that when a customer ships an item of "unusual value," defined as an item worth more than $50,000, there is no liability at all.[333] After the district court granted UPS's motion for summary judgment, Treiber appealed and the Seventh Circuit affirmed.[334]

The Seventh Circuit, applying federal common law as to air carriers, held that UPS had provided adequate notice of its rules on its website that customers were not permitted to ship items of "unusual value."[335] Moreover, in order to book the shipment on UPS' website, the plaintiff:

> had to agree not once but twice [by clicking to agree to particular terms on the website], to abide by the Terms and Conditions set forth in order to ship the package [which was] enough to ensure that Treiber had clear and reasonable notice of the rules. . . .
> UPS [did] not have the burden of proving that Treiber had actual knowledge of the pertinent restrictions.[336]

In a subsequent, factually similar case, *Feldman v. United Parcel Service, Inc.*, also involving the application of federal common law to an air freight shipment as opposed to the Carmack Amendment, the Court ruled that although UPS's tariff did limit its liability, it had not given the plaintiff adequate notice of the provisions of its tariff because when the shipper clicked on the hyperlink in UPS's website to accept the terms of

330. Treiber & Straub, Inc. v. United Parcel Serv., Inc., 474 F.3d 379, 381 (2d Cir. 2007).
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 382.
336. *Id.* at 385. It is interesting that this decision, by the Seventh Circuit, imposes a harsh, strict application of the carrier's tariff rules as published on its website, in contrast to the liberal compliance enforcement of motor carrier claim filing rules and regulations in *Wisconsin Packing Co. v. Ind. Refrigerator Lines*, 618 F.2d 441 (7th Cir. 1980), also authored by the Seventh Circuit.

the UPS tariff, the tariff itself was not hyperlinked.[337] In order to see the actual "Terms of Service," the customer had to go to UPS's website or obtain a copy from UPS, and once he did "he would discover, in the twenty-eight pages of the Tariff, an Item 460, which states that 'any package having an actual value of more than $50,000' may not be shipped.'"[338] Thus, taking into consideration all of the "surrounding circumstances," the court concluded there were enough factual ambiguities as to reasonable notice to deny UPS's motion for summary judgment.[339] Although *Treiber & Straub* and *Feldman* were not Carmack Amendment lawsuits, there is no reason to expect the outcome would be different in a Carmack case involving website-based tariff rules and booking arrangements since Carmack represents a codification of federal common law.

The lesson from these two E-Commerce cases, albeit in a federal common law context nonetheless, is that motor carriers should publish their cargo limitation and loss and damage claim rules on their websites in readily accessible places and in straightforward, plain language if they expect to avail themselves of 21st Century technology to limit their cargo claim exposure. Shippers should research the carriers they use, request and obtain all relevant cargo claim rules and, if in doubt, inquire.

VII. Shipper/Carrier Contracts; Waiver of Carmack Amendment Remedies

Long before Congress' passage of the ICCTA, the former Interstate Commerce Act identified two different types of for-hire motor carriers: "common" and "contract."[340] The Carmack Amendment applied only to common carriers. The ICCTA eliminated the "common" versus "contract" distinction and now defines only the term "motor carrier" as "a person providing motor vehicle transportation for compensation."[341] However, "Congress' creation of one type of motor carrier did not also create only one type of carriage."[342] According to the *M. Fortunoff* court, the difference is:

> common carriage services, that is, those services offered to the general public at fixed rates without negotiated bilateral contracts, continue to be different from contract carriage services, which are those services performed on an ongoing basis for a shipper pursuant to a contract individually negotiated

337. Feldman v. United Parcel Serv., Inc., No. 06 Civ. 2490, 2008 U.S. Dist. LEXIS 30637, at *44-45 (S.D.N.Y. Mar. 24, 2008).

338. *Id.* at *45.

339. *Id.* at *55.

340. *See* M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 130 (2d Cir. 2005).

341. 49 U.S.C. §13102(14) (2008).

342. *M. Fortunoff of Westbury Corp.*, 432 F.3d at 139.

at arm's length.[343]

The ICCTA expressly provides that a motor carrier providing transportation or service subject to the Act may enter into a contract with a shipper (other than for the transportation of household goods) "to provide specified services under specified rates and conditions. If the carrier and shipper, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies."[344] The waiver of Carmack Amendment rights, duties, and liabilities under §14101(b) must be expressed and in writing.[345] As a result of this freedom to contract under the ICCTA, motor carriers and shippers now routinely enter into contracts intended to identify transportation services unique to a particular shipper. For many shippers and carriers this freedom to contract is a very convenient, beneficial business tool that facilitates commerce at various levels.

However, both shippers and motor carriers are cautioned to pay particular attention to whether their §14101(b) contract waives the provisions of the Carmack Amendment. The consequences of waiver can be significant. If a shipper/carrier contract does not expressly waive the provisions of Title 49, including the Carmack Amendment, then the full force and effect of that statute continue to apply: the shipper retains the benefit of Carmack's strict liability features, its limited, relatively easy burden of proof and the motor carrier's two-pronged, often difficult burden of defense; while the motor carrier retains its limitations on liability, claim and suit-filing time limitations, other rules applicable to its services as published in its tariff, classification, circular, or service guide (on its website); and—especially—the preemptive power of the Carmack Amendment over state law claims for relief.

Conversely, if the §14101(b) contract expressly waives the Carmack Amendment, the parties will be left to the terms of the contract and applicable state law for determining their rights, duties, and liabilities in the event of cargo loss or damage. An express waiver of the Carmack Amendment can cut either way depending on the issue, the facts, and the law of the forum state. Shippers could benefit from an express waiver under §14101(b) by then being able to allege various claims against the motor carrier that would otherwise be preempted, including breach of

343. *Id.*

344. 49 U.S.C. §14101(b)(1) (1995).

345. *See* Cent. Transp. Int'l Inc. v. Alcoa, Inc., No. 06-CV-11913-DT, 2006 U.S. Dist. LEXIS 71788, at *10 (E.D. Mich. Sept. 29, 2006); Celadon Trucking Serv., Inc. v. Titan Textile Co., Inc., 130 S.W.3d 301, 303 (Tex. App. 2004); Midamerican Energy Co. v. Start Enter., Inc., 437 F. Supp. 2d 969, 972-73 (S.D. Iowa 2006); Cont'l Ins. Co. v. Saia Motor Freight Line, Inc., 210 Fed. Appx. 381, 382 (5th Cir. 2006).

contract, conversion, misrepresentation, fraud, unfair and deceptive trade practices claims, claims of bad faith, waiver, estoppel, laches, and many other state and common law remedies and defenses commonly seen in traditional breach of contract actions.

This parade of horribles, from the motor carrier's perspective, was recently illustrated in *Great American Insurance Company of New York v. T.A. Operating Corporation*.[346] In *Great American*, the plaintiff subrogating insurance company sued the defendant motor carrier, Prime, and a truck stop for the loss of Great American's insured's (Novartis') $30 million shipment of pharmaceuticals stolen from the truck stop.[347] Novartis had a contract with Prime which limited Prime's liability to $100,000 but it also contained a clause waiving all remedies under the Carmack Amendment pursuant to 49 U.S.C. §14101(b).[348] In a convoluted, poorly reasoned decision, the Court in *Great American*, after noting the §14101(b) waiver and the "released valuation" doctrine under the Carmack Amendment, nonetheless denied Prime's motion for summary judgment and allowed the plaintiff the opportunity to prove a "separate, risk-related promise (special to the particular shipment at issue)" to avoid Prime's limitation under the misplaced, wrongly applied maritime doctrine of "material deviation."[349] While it is difficult to tell from the decision how much (or how little) the *Great American* Court was affected by the §14101(b) waiver, one point is clear from the decision: it was not a good outcome for the defendant motor carrier.

There is no doubt that express waiver of Carmack Amendment rights, remedies, and liabilities can benefit shippers and motor carriers in the right circumstances, but extreme caution must be exercised by both parties before waiving any Carmack remedies or defenses in a §14101(b) contract. Yes, the parties could, through very careful draftsmanship and attention to every detail, craft an agreement that covers everything without the necessity for Carmack Amendment rights, remedies, duties, liabilities, and defenses. But be careful what you wish for. If Carmack is waived, you will be subject to state contract law including all the claims and relief Carmack does not tolerate.

VIII. Conclusion

Although the Carmack Amendment, as it pertains to motor carriers, has not changed substantially in the last 75 years, judicial interpretation and application of Carmack principles are constantly tested and affected

346. Great Am. Ins. Co. v. T.A. Operating Corp., No. 06 Civ. 13230, 2008 U.S. Dist. LEXIS 101758 (S.D.N.Y. Dec. 8, 2008).

347. *Id.* at *3.

348. *Id.* at *6-*7.

349. *Id.* at *12-*14.

by creative litigants and modern technology. Major litigation battles continue to be fought over burdens of proof and defense, recoverable damages, preemption, limitations of liability, time-bar issues, and other tariff-based motor carrier defenses. Shipper responsibility for the acts of their intermediaries, shipper/carrier contracts, §14101(b) waivers, website-based motor carrier rules, and the ease of information access and communications via the Internet will be more frequently litigated as we head into the 21st Century. With all this available technology and information, courts in the future should be more inclined to recognize the sophistication of the parties to the transportation contract.

The days of the filed rate doctrine may be long gone, but the days of information technology and website-based tariffs and rules are here and now. In each case, courts will look to determine what the agreement between the parties was. Was the motor carrier's limitation reasonable under the circumstances? What did the shipper know or what should it have known, etc.? By identifying the critical issues described above and dealing with as many of them as possible before transportation, shippers and motor carriers can minimize risk and subsequent problems. But until we have Star Trek-style transporters that move goods from point A to point B by dissolving and reassembling their molecules—which doesn't appear likely in the near term—trucks will continue to transport and deliver goods. Hence, everyone in the supply chain should be aware of how the Carmack Amendment affects cargo claims and liabilities in the real world of truck transportation today.