The Carmack Amendment and the American Rule: Is Arbitration a Necessary Prerequisite to an Award of Attorney's Fees?

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I. INTRODUCTION

Under a practice in the United States judicial system commonly referred to as the "American rule," attorney's fees are generally not a recoverable cost of litigation.[1] The United States Supreme Court first articulated this rule in *Arcambel v. Wiseman*, wherein the Court held that attorney's fees were not to be included in damages calculations.[2] In so holding, the Court stated,

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.[3]

Courts have strictly adhered to this general prohibition against shifting attorney's fees to the losing party.[4] Consequently, the legislature has

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1. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994).

2. Carter Chandler, *Loggerhead Turtle v. County Council: The Future of Fee Shifting in Environmental Litigation?*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 477, 481 (2004) (citing Arcambel v. Wiseman, 3 U.S. 306 (1796)).

3. Arcambel v. Wiseman, 3 U.S. 306, 306 (1796).

4. Chandler, *supra* note 2, at 481.

created some statutory exceptions.[5] There are currently over two hundred federally created statutory exceptions to the American rule.[6] One such exception applies to suits between shippers and carriers in the transport of household goods.[7]

Congress enacted the Carmack Amendment in 1906 as part of the former Interstate Commerce Act.[8] The Amendment governs transportation between the United States and a foreign country as well as interstate transportation.[9] "The purpose of the Carmack Amendment was to create a national scheme of carrier liability for goods damaged or lost during interstate shipment and 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.'"[10] Specifically, the Amendment "imposes a form of strict liability on the carrier."[11] "The shipper establishes a prima facie case of Carmack liability by showing 'delivery in good condition, arrival in damaged condition, and the amount of damages.'"[12] The statute assigning liability to carriers for the transport of household goods is codified at 49 U.S.C. § 14706.[13]

49 U.S.C. § 14708(d) provides in pertinent part that "[i]n any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service . . . concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees . . . ."[14] While the body of case law addressing 49 U.S.C. § 14708(d) is scarce, courts seem to agree that 49 U.S.C. § 14708(d) grants an exception to the general rule against attorney's fee shifting.[15] However, subsection (d) does not provide for an absolute award of attorney's fees to the shipper. Rather, it provides that attorney's fees be awarded only under certain specified circumstances.[16] Courts differ as to when that exception should be applied. Specifically, the courts

5. *Id.*

6. Jamie H. Kim, *Better Access to Justice, Better Access to Attorneys' Fees – The Procedural Implications of Sarborough v. Principi*, J. NAT'L ASS'N ADMIN. L. JUDGES 583, 588 (2005).

7. 49 U.S.C. § 14708(d) (2000).

8. Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Good by Sea: The Multimodal Problem*, 79 TUL. L. REV. 1461, 1464 (2005).

9. *Id.* at 1464-65 (citing 49 U.S.C. § 13501(1)(C) (2000)).

10. *Id.* at 1464 (quoting Reider v. Thompson, 339 U.S. 113, 119 (1950).

11. *Id.* at 1465 (citing 49 U.S.C. § 11706). The provisions of the Carmack Amendment relating to motor carriers are codified at 49 U.S.C. § 14706. *Id.* at 1464 n.18.

12. *Id.* at 1465 (quoting Mo. Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

13. *Id.* at 1464 n.18.

14. *Id.*

15. *E.g.*, Yakubu v. Atlas Van Lines, 351 F. Supp. 2d 482, 491 (W.D. Va. 2004) (holding that, because the parties failed to submit a claim through arbitration, section 14708 was inapplicable and, thus, attorneys' fees were not awarded).

16. *Id.*

have not agreed as to whether a shipper must attempt to arbitrate before he is statutorily entitled to an award of attorney's fees.[17]

Campbell v. Allied Van Lines, Inc., decided by the Ninth Circuit Court of Appeals, is the most recent case interpreting the statutory exception provided for in 49 U.S.C. § 14708(d).[18] The Ninth Circuit determined that a shipper need not engage in arbitration in order to be properly awarded attorney's fees pursuant to statute.[19] The Ninth Circuit's interpretation of subsection (d) stands in isolation from, and in contradiction to, the interpretation set forth by other courts in previous decisions.[20] Other courts have interpreted subsection (d) to require a shipper to attempt arbitration before permitting the recovery of attorney's fees.[21]

Whether a court will apply the *Campbell* interpretation, allowing a fee award in the absence of arbitration, or the alternative interpretation, requiring arbitration prior to a fee award, is of great import to shippers and carriers. This is particularly true in light of the fact that "[t]he Carmack Amendment preempts many state and common law claims against carriers . . . ."[22] While the majority of the decisions on this topic have determined that arbitration is a prerequisite to a proper request for attorney's fees,[23] the number of opinions on point is, at best, limited. Furthermore, the United States Supreme Court has yet to step into the fray. Consequently, due to the lack of precedent, shippers and carriers alike have a captive audience in the courts. Both parties have ample opportunity to present their own policy arguments and interpretations of legislative history and intent, to sway the opinion of the court, an opportunity well taken advantage of by the parties in *Campbell.*

This Article will first set forth and explain the relevant statutory sec-

17. *Compare Yakubu*, 351 F. Supp. 2d at 491 (holding that at least one party must submit the claim to arbitration to invoke section 14708), *with* Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 623 (9th Cir. 2005) (holding that a shipper need not invoke arbitration in order to be statutorily entitled to an award of attorney's fees).

18. *Campbell*, 410 F.3d 618.

19. *Id.* at 623.

20. *Compare Campbell*, 410 F.3d at 623 (holding that a shipper need not invoke arbitration in order to be statutorily entitled to an award of attorney's fees), *with Yakubu*, 351 F. Supp. 2d at 491 (holding that, because the parties failed to submit a claim through arbitration, section 14708 was inapplicable and, thus, attorneys' fees were not awarded) *and* Collins Moving & Storage Corp. of S.C. v. Kirkell, 867 So.2d 1179, 1183 (Fla. Dist. Ct. App. 2004) (holding that section 14708 "would come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708.").

21. *E.g.*, *Yakubu*, 351 F. Supp. 2d at 491; *Collins*, 867 So.2d at 1183.

22. *Campbell*, 410 F.3d at 620 (citing Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992)). *See infra* text accompanying notes 18 & 19 for more detailed information concerning the Carmack Amendment.

23. *E.g.*, *Yakubu*, 351 F. Supp. 2d at 491; *Collins*, 867 So.2d at 1183.

tions. It will then proceed to present the current, albeit limited, case law interpreting those statutes, using the Ninth Circuit's decision in *Campbell* as a framework. This Article will conclude with an analysis of the Ninth Circuit's opinion in light of other court decisions, the parties' arguments, and the author's reading of the statute.

II. The Carmack Amendment

"The Carmack Amendment to the Interstate Commerce Act establishes motor carrier liability for 'the actual loss or injury to the property' a carrier transports."[24] The Carmack Amendment was enacted to create a "national scheme of carrier liability for goods damaged or lost during interstate shipment."[25]

In deciding *Campbell*, the Ninth Circuit focused nearly exclusively on subsection (d) of section 14708.[26] Subsection (d) provides:

> (d) Attorney's fees to shippers. – In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if –
>
> (1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
>
> (2) the shipper prevails in such court action; and
>
> (3)
>
> (A) a decision resolving the dispute was not rendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or
>
> (B) the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed.[27]

Additionally, other portions of the statute shed light on the appropriate interpretation of subsection (d). These provisions are relevant both to attorney's fees and the arguments employed by the parties in *Campbell*.

Subsection (a) of section 14708 provides that "a carrier providing transportation of household goods . . . must agree to offer in accordance with this section to shippers of household goods arbitration as a means of

24. *Campbell*, 410 F.3d at 620 (quoting 49 U.S.C. § 14706(a)(1) (2000) and citing Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000)).

25. *Id.* (quoting Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000)).

26. *Id.* at 620-23.

27. 49 U.S.C. § 14708(d) (2000).

settling disputes between such carriers and shippers of household goods concerning damage or loss to the household goods transported."[28] Subsection (b) sets forth the arbitration requirements.[29] Subsection (b)(6), cited by the shippers in *Campbell*,[30] provides:

> (6) Requests. – The carrier must not require the shipper to agree to utilize arbitration prior to the time that a dispute arises. If the dispute involves a claim for $5,000 or less and the shipper requests arbitration, such arbitration shall be binding on the parties. If the dispute involves a claim for more than $5,000 and the shipper requests arbitration, such arbitration shall be binding on the parties only if the carrier agrees to arbitration.[31]

Subsection (b)(8), which is referenced under subsection (d)(3)(A), provides:

> (8) Deadline for decision. – The arbitrator must, as expeditiously as possible but at least within 60 days of receipt of written notification of the dispute, render a decision based on the information gathered; except that, in any case in which a party to the dispute fails to provide in a timely manner any information concerning such dispute which the person settling the dispute may reasonably require to resolve the dispute, the arbitrator may extend such 60-day period for a reasonable period of time. A decision resolving a dispute may include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, and compensation for damages.[32]

Finally, subsection (e) provides:

> (e) Attorney's fees to carriers. – In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation, or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, such carrier may be awarded reasonable attorney's fees by the court only if the shipper brought such action in bad faith –
>
> (1) after resolution of such dispute through arbitration under this section; or
>
> (2) after institution of an arbitration proceeding by the shipper to resolve such dispute under this section but before –
>
> (A) the period provided under subsection (b)(8) for resolution of such dispute (including, if applicable, an extension of such period under such subsection) ends; and
>
> (B) a decision resolving such dispute is rendered.[33]

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28. *Id.* § 14708(a).
29. *Id.* § 14708(b) ("Arbitration Requirements").
30. Appellee's Answering Brief at 7-8, Campbell v. Allied Van Lines, 410 F.3d 618 (9th Cir. 2005) (No. 04-15969).
31. 49 U.S.C. § 14708(b)(6).
32. *Id.* § 14708(b)(8).
33. *Id.* § 14708(e).

For purposes of statutory interpretation, it is also relevant to examine the predecessor to the current statute. The predecessor to 49 U.S.C. § 14708 was codified at 49 U.S.C. § 11711.[34] Subsection (a)(1) of section 11711 provided in part that

> [o]ne or more motor common carriers providing transportation of household goods subject to the jurisdiction of the Commission under Subchapter II of chapter 105 of this title who want to establish a program to settle disputes between such carriers and shippers of household goods concerning the transportation of household goods may submit an application for establishing such program to the Commission.[35]

In contrast to the current version of the statute, carriers were not required to offer shippers an arbitration program.[36] Consequently, subsection (d) of the old version contains language different from the current version of the statute. Subsection (d) of section 11711 provides:

> (d) In any court action to resolve a dispute between a shipper of household goods and a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if—
>
> (1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
>
> (2) the shipper prevails in such court action; and
>
> (3)
>
> (A) no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute; or
>
> (B) a decision resolving the dispute was not rendered under a dispute settlement program approved under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or
>
> (C) the court proceeding is to enforce a decision rendered under a

34. *See Campbell*, 410 F.3d at 624.

35. 49 U.S.C. § 11711(a)(1) (1994) (repealed 1995) (emphasis added).

36. *Compare* 49 U.S.C. 14708(a) (2000) ("[A] carrier providing transportation of household goods . . . *must agree to offer* in accordance with this section to shippers of household goods arbitration as a means of settling disputes between such carriers and shippers of household goods concerning damage or loss to the household goods transported." (emphasis added)), *with* 49 U.S.C. § 11711(a)(1) (1994) ("[M]otor common carriers providing transportation of household goods . . . who *want to establish a program* to settle disputes between such carriers and shippers of household goods concerning the transportation of household goods *may* submit an application for establishing such program to the Commission." (emphasis added)). For purposes of this Article, the "current version" of the statute refers to the 2000 United States Code, the version addressed in the *Campbell* decision. *See Campbell*, 410 F.3d at 620. A new version of the statute went into effect on August 10, 2005. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-U), Pub. L. No. 109-59, § 4206, 119 Stat. 1144, 1757 (2005).

> dispute settlement program approved under this section and is instituted after the period for performance under such decision has elapsed.[37]

On a basic level, *Campbell* is a statutory construction case. Thus, while not all of these sections were addressed by the *Campbell* court, these statutes provide essential background knowledge necessary to fully understand the controversy. In fact, the court's failure to examine the above sections was arguably the primary source for the current disagreement among courts' interpretation of the Carmack Amendment.

III. *CAMPBELL V. ALLIED VAN LINES, INC.*

Campbell v. Allied Van Lines, Inc. asked the Ninth Circuit Court of Appeals to determine whether attorney's fees may be properly awarded to a shipper who successfully sues a household goods carrier in the absence of an attempt to arbitrate.[38]

A. FACTS AND PROCEDURAL BACKGROUND

The relevant facts, undisputed by both parties, are as follows.[39] Edward and Susan Campbell ("Shippers"), entered into contracts with Kachina Moving and Storage, Inc., Mayflower Transit, Inc., Gates Moving and Storage, Inc. and Allied Van Lines, Inc. ("Carriers") "to transport their household goods from Arizona to Florida."[40] However, Shippers' goods were damaged in transit.[41] Consequently, Shippers sued Carriers under the Carmack Amendment[42] to the Interstate Commerce Act.[43] The Carmack Amendment "establishes motor carrier liability for 'the actual loss or injury to the property' a carrier transports."[44]

Shippers first filed their claim in Arizona state court.[45] However, because the case involved a federal question, Carriers removed the suit to the United States District Court for the District of Arizona.[46]

Following a trial in the district court, the jury found in favor of Shippers and, accordingly, awarded Shippers over $15,000 in compensatory

37. 49 U.S.C. § 11711(d).
38. *Campbell*, 410 F.3d at 619.
39. *Id.*
40. *Id.*
41. *Id.*
42. 49 U.S.C. § 14706 (2000).
43. *Campbell*, 410 F.3d at 619.
44. *Id.* at 620 (quoting 49 U.S.C. § 14706(a)(1) and citing Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000)).
45. *Id.*
46. *Id.*

damages and $31,000 in emotional distress damages.[47] Of greater significance to this Article, the district court granted Shippers' motion requesting attorney's fees in the amount of $15,400.[48] Carriers appealed this award of attorney's fees, asserting that, because Shippers did not engage in arbitration prior to initiating the suit, Shippers were not statutorily entitled to the award.[49] The parties' dispute centered "on the meaning of the attorney's fees provisions in subsection (d) [of 49 U.S.C. § 14708]."[50] Carriers argued that subsection (d) is inapplicable when a shipper fails to attempt arbitration prior to bringing an action in court.[51] In contrast, Shippers argued that subsection (d) does not provide for such an arbitration requirement.[52]

B. Carriers' Argument

Carriers supported their position by asserting several policy arguments, examining the plain language of the statute and its legislative history, and relying on case law. With respect to policy arguments, Carriers first addressed Shippers' "generalized criticism . . . of the Carmack Amendment and its impact on consumer claims."[53] Shippers argued that requiring a shipper to invoke arbitration would be "to the detriment of consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies."[54] In response to this argument, Carriers drew an analogy between the Carmack Amendment and workers compensation statutes, asserting that social compromise is a legislative reality and that if Shippers believe the compromise to be unfair, then "their forum is Congress."[55]

Workers compensation statutes afford strict liability for injuries arising out of employment, without having to prove negligence and with elimination of certain employer defenses, such as contributory negligence. The employee is limited, though, to the single remedy as specified

47. *Id.* The trial court did not disclose the basis for its decision to award Shippers emotional distress damages. *See id.* While Carriers elected not to appeal this damages award, "[n]umerous courts have concluded that the pre-emption of the Carmack Amendment precludes such damages." Appellant's Reply Brief at 1 n.2, *Campbell*, 410 F.3d 618 (No. 04-15969) (citing Hoskins v. Bekins Van Lines, 343 F.3d 769, 777 (5th Cir. 2003), Smith v. United Parcel Serv., 296 F.3d 1244, 1246-49 (11th Cir. 2002), Gordon v. United Van Lines, Inc., 130 F.3d 282, 287 (7th Cir. 1997), and Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 379 (2d Cir. 1994)).

48. *Campbell*, 410 F.3d at 619. $15,400 is representative of approximately one-third of the total award. In addition to the $15,400, Shippers requested costs. *Id.*

49. *Id.* at 619-20; *see supra* text accompanying note 19.

50. *Id.* at 620.

51. *Id.* at 619.

52. Appellee's Answering Brief, *supra* note 30, at 5-6.

53. Appellant's Reply Brief, *supra* note 47, at 1.

54. Appellee's Answering Brief, *supra* note 30, at 7.

55. Appellant's Reply Brief, *supra* note 47, at 1-3.

by statute. "The purpose of the workers compensation statute is to provide a trade-off of no-fault compensation for the costs and risks of conventional tort litigation."[56]

The Carmack Amendment also involves social trade-offs. While in part Congress was assisting interstate commerce by pre-empting possibly diverse state laws and imposing a uniform regulation of claims for loss or damage to interstate shipments, the elements of proof for a consumer claim were also made simple and uniform. A shipper claimant need only show three things: "(1) delivery of the goods in good condition, (2) receipt by the consignee of less goods or damaged good[s], and (3) the amount of damages."[57]

Carriers next addressed Shippers' argument that, because Carriers did not invoke arbitration or inform Shippers that they would be precluded from receiving a fee award in the absence of arbitration, Carriers' arguments were simply "after-the-fact lawyering[,]" at least impliedly asserting that Carriers did not believe the statute at issue to require arbitration at the time of the conflict.[58] To oppose this argument, Carriers highlighted the "practical reality that carriers do not initiate consumer claims, whether by arbitration or litigation; shippers do."[59] Furthermore, Carriers argued that the statute "contemplates that it is the shipper who controls whether there is an arbitration of a dispute and the onus to make the request is on the shipper."[60] Specifically, Carriers emphasized that a carrier must agree to offer arbitration and must give the shipper notice of the availability of such arbitration as a condition of registration.[61] However, the carrier may not require the shipper to engage in arbitration.[62] Additionally, Carriers pointed to the fact that "[t]he statute specifies that the carrier provide forms and information to initiate arbitration 'upon request of a shipper.'"[63] Accordingly, Carriers concluded, "It is irrelevant whether the Carrier defendants could have asked [Shippers] to make [a request for arbitration.]"[64]

Following their policy arguments, Carriers looked to the plain meaning of the statute at issue. According to Carriers, when read together, the plain language of subsections (d)(3)(A) and (b)(8) of section 14708 dic-

56. *Id.* at 1-2 (quoting Barron v. United States, 473 F. Supp. 1077, 1086 n.7 (D. Haw. 1979), *aff'd in part & rev'd in part*, 654 F.2d 644 (9th Cir. 1981) and citing Lennon v. Waterfront Transp., 20 F.3d 658, 662 (5th Cir. 1994)).

57. *Id.* at 2 (quoting Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003)).

58. Appellee's Answering Brief, *supra* note 30, at 7.

59. Appellant's Reply Brief, *supra* note 47, at 4.

60. *Id.*

61. *Id.* (citing 49 U.S.C. § 14708(a), (b)(2)).

62. *Id.* (citing 49 U.S.C. § 14708(b)(6)).

63. *Id.* (quoting 49 U.S.C. § 14708(b)(3)).

64. *Id.*

tate that a shipper may not recover attorney's fees unless the shipper "first invoked the statutorily required arbitration program."[65] Subsection (b)(8) "calls for a decision by an arbitrator within 60 days of written notification of the dispute being given to the arbitrator."[66] Therefore, Carriers argued that, if the shipper does not request arbitration, the arbitrator necessarily does not receive notice of the dispute and, thus, the requirement of subsection (d)(3)(A) is not satisfied.[67] Consequently, if the shipper does not request arbitration, the statute precludes the shipper from being awarded attorney's fees.[68] Accordingly, because Shippers did not request arbitration, Carriers argued that the district court improperly awarded Shippers attorney's fees.[69]

In further support of their plain meaning argument, Carriers asserted that, had Congress intended for a failure to invoke arbitration to satisfy the requirement set forth in subsection (d)(3)(A), Congress "would have worded the statute differently . . . ."[70] Specifically, Carriers argued that "Congress would not . . . have needed to include all those requirements regarding an arbitration program . . . ."[71] Instead, the statute could have "simply permit[ted] a shipper to always request a fee award where it was the prevailing party in court."[72] Thus, Carriers asserted that subsection (d) "presume[s] participation in the arbitration program described in the rest of [s]ection 14708."[73]

In addition to the plain meaning of the statute, Carriers asserted that the statute's legislative history indicated a congressional intent to preclude shippers from being awarded attorney's fees in the absence of arbitration.[74] Carriers argued that

> Congress sought to influence carriers to have an available arbitration program which a shipper could then elect to use or not. Congress also sought to influence carriers to provide a meaningful program which would render decisions in a timely manner and which decisions would be complied with by carriers. Congress sought to influence shippers to use such arbitration programs in lieu of courts by restricting fee awards . . . to where the program has been utilized or attempted to be utilized . . . .[75]

Carriers emphasized that fee awards had not been previously availa-

65. *Id.* at 9.
66. *Id.* at 6 (referring to 49 U.S.C. § 14708(b)(8)).
67. *Id.*
68. *Id.* at 6, 9.
69. *Id.*; *Campbell*, 410 F.3d at 619.
70. Appellant's Reply Brief, *supra* note 47, at 6.
71. *Id.* at 7 (referring to 49 U.S.C. § 14708(b)).
72. *Id.*
73. *Campbell*, 410 F.3d at 620.
74. Appellant's Reply Brief, *supra* note 47, at 8.
75. *Id.* at 7-8.

ble.[76] They further highlighted that Congress intended for shippers to utilize or, at least, attempt to utilize, arbitration programs.[77] "Since it is the shipper . . . who selects the forum, it is the shipper who is encouraged to arbitrate by such restriction on the availability of a fee award."[78] Carriers suggested that the requirement set forth in subsection (d)(3)(A) would be satisfied in the event an arbitration decision was not timely rendered or a carrier refused to comply with the decision, permitting an award of attorney's fees to the shipper.[79]

Furthermore, Carriers referred to specific congressional language stating, "[t]he legislative history also directly addressed influencing shippers against pursuing lawsuits to defeat an adverse or pending . . . arbitration."[80] To discourage shippers from filing non-meritorious claims in court, the section provides for the award of attorney's fees to the successful carrier claimant where a shipper has brought court action in bad faith either (a) after a decision has been issued under the program; or (b) after a shipper has instituted a proceeding under the program, but before the decision has been rendered within the time frame or extension thereof provided under the program.[81] Given the congressional intent and the language provided, Carriers impliedly asserted that, because carriers cannot claim attorney's fees until the shipper has initiated an arbitration action, shippers should likewise not be afforded any additional latitude in requesting fees.[82]

Finally, Carriers relied on federal case law to support their contention that shippers must engage in arbitration before they are entitled to an award of attorney's fees.[83] Specifically, Carriers relied on *Collins Moving & Storage Corp. of South Carolina v. Kirkell.*[84] *Collins* involved a question analogous to the question presented in *Campbell.*[85] In *Collins*, the shippers "claimed that certain household goods shipped through [the carrier] were damaged and others were missing."[86] The shippers brought

76. *Id.* at 8.

77. *Id.*

78. *Id.*

79. *See id.*

80. *Id.*

81. *Id.* (quoting H.R. REP. No. 96-1372, at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4271, 4283).

82. *See id.*

83. *Id.* However, it should be noted that the case law relevant to the issue presented in *Campbell* is scarce. *Id.* Furthermore, the decisions issued on topic were not binding on the Ninth Circuit Court of Appeals. *Id.* at 9.

84. Collins Moving & Storage Corp. of S.C. v. Kirkell, 867 So.2d 1179 (Fla. Dist. Ct. App. 2004).

85. *Id.* at 1181 (challenging awarded attorney's fees to shippers in the absence of an arbitration decision under 49 U.S.C. § 14708).

86. *Id.*

a strict liability claim under the Carmack Amendment.[87] Following a jury trial, the jury awarded the shippers damages in the amount of $64,031.[88] The shippers asserted that "because [the carrier] had not disclosed that [the shippers] had a right to seek arbitration,[89] and a decision resolving the dispute had not been rendered through arbitration, the trial court should award attorney's fees pursuant to 49 U.S.C. § 14708."[90] The trial court agreed and awarded the shippers $120,000 in attorney's fees.[91] The carrier appealed this fee award.[92] The Florida District Court of Appeal

87. *Id.*

88. *Id.*

89. In overturning the trial court, the *Collins* court determined that the shippers' assertion that an award of attorney's fee award was proper because they did not receive notice of the carrier's arbitration program lacked merit. *Id.* at 1183. The court looked to the fact that the shippers timely filed their action and that they properly brought the action under section 14708. *Id.* The court reasoned that, because section 14706, which addresses arbitration, does not contain a provision for attorney's fees, the shippers had to have known they had an option to arbitrate. *Id.* The court concluded that the shippers' failure to submit a claim through arbitration, despite their knowledge that such an option was available, rendered section 14708 inapplicable. *Id.* at 1183-84.

In support of their contention, the shippers cited Ward v. Allied Van Lines, Inc., 231 F.3d 135 (4th Cir. 2000). *Id.* The *Ward* court held that, because the carrier was obligated to give the shippers notice of the availability of the arbitration program and because the carrier failed to give the shippers notice, the shippers did not have knowledge of the program. *Ward*, 231 F.3d at 142 (citing Drucker v. O'Brien's Moving & Storage Inc., 963 F.2d 1171, 1174 (9th Cir. 1992); Rini v. United Van Lines, Inc., 903 F. Supp. 234, 236-37 (D. Mass. 1995)). Because the shippers did not have knowledge of the arbitration option, the arbitration program was not available to them. *Id.* The *Collins* court distinguished the shippers' claim in *Ward* because the *Collins* shippers "acknowledged the arbitration option, but sought attorney's fees under the federal statute without submitting a claim through the arbitration procedure." *Collins*, 867 So.2d at 1184.

Despite this alleged difference, a simple reading of the facts of *Collins* and *Ward* does not warrant such a distinction. However, the slight difference between the old provision, 49 U.S.C. § 11711, and the new provision, 49 U.S.C. § 14708, may provide some understanding for the confusion. The old provision, 49 U.S.C. § 11711(d) provides that

> [i]n any court action to resolve a dispute between a shipper of household goods and a motor common carrier . . . concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if – (1) the shipper submits a claim to the carrier within 120 days after the date the shipments delivered or the date the delivery is scheduled, whichever is later; (2) the shipper prevails in such court action; and (3)(A) no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute . . ..

Ward, 231 F.3d at 142 (quoting 49 U.S.C. § 11711(d)). In contrast, the new provision, 49 U.S.C. § 14708(d)(3)(A), requires that "a decision resolving the dispute was not tendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection . . . ." *Collins*, 867 So.2d at 1183. Under this new provision, carriers are "required to offer neutral arbitration as a means of settling disputes . . . ." *Ward*, 231 F.3d at 141. Because arbitration programs are mandatory, the *Collins* court may have determined that the shippers had constructive notice that such a program existed.

90. *Collins*, 867 So.2d at 1181.

91. *Id.*

92. *Id.* at 1180-81.

reversed the trial court's attorney's fee award.[93]

In deciding that the shippers were improperly awarded attorney's fees, the *Collins* court looked to the title of 49 U.S.C. § 14708, "Dispute settlement program for household goods carriers."[94] The court stated, "The provision authorizing an award of attorney's fees under section 14708 would come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708."[95] Following this rationale, the court determined that section 14708 was inapplicable because neither the shippers nor the carrier had initiated arbitration.[96] The court held that failure to invoke arbitration does not satisfy the requirements of subsection (d)(3)(A).[97]

For the aforementioned reasons, Carriers in *Campbell* asked the Ninth Circuit Court of Appeals to reverse the district court's decision to award Shippers attorney's fees.[98] Because it was undisputed that Shippers failed to utilize the available arbitration program, the district court was precluded from awarding fees as a matter of law.[99]

C. Shippers' Argument

Contrary to Carriers' argument, Shippers argued that the statute does not require a shipper to invoke the arbitration program in order for a shipper to be awarded attorney's fees.[100] Specifically, Shippers asserted that there are three elements, not including participation in arbitration, that must be satisfied before attorney's fees may be properly awarded. First, the shippers must timely submit a claim pursuant to subsection (d)(1).[101] Second, the shipper must be the prevailing party in the court action pursuant to subsection (d)(2).[102] Third, the decision resolving the dispute must not have been rendered through arbitration pursuant to subsection (d)(3)(A).[103] Shippers arrived at this conclusion by relying on the plain language of the statute.[104] Consequently, because each of the above-mentioned elements had been satisfied, Shippers argued that the district court properly awarded them attorney's fees.[105]

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93. *Id.* at 1184.
94. *Id.* at 1183.
95. *Id.*
96. *Id.*
97. *See id.*
98. Appellant's Reply Brief, *supra* note 47, at 9.
99. *Id.*
100. *Campbell*, 410 F.3d at 620.
101. Appellee's Answering Brief, *supra* note 30, at 5-6.
102. *Id.*
103. *Id.*
104. *Id.* at 6.
105. *Id.*

Shippers further urged the court not to add language to the statute.[106] Shippers drew the court's attention to the fact that "49 U.S.C. § 14708(d) does not state that if the shippers file a lawsuit instead of electing to use arbitration, then the shippers will not be allowed to recover their attorney's fees notwithstanding the fact that they are the prevailing party in the lawsuit against the carrier."[107] They argued that,

> [i]f Congress had intended to deny shippers their attorney's fees, the law would clearly state this, but the statute does not contain this express language. Instead the plain express language states that if an arbitration decision is not made within the specified time frame, a prevailing shipper shall be awarded its reasonable attorney's fees.[108]

Shippers asserted that, if the court interpreted section 14708 in the way Carriers proposed, it would be to the detriment of "consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies."[109]

In support of this contention, Shippers requested that the court construe subsection (d)(3)(A) "in light of the overall purpose and structure of the whole statutory scheme[,]" including subsection (b)(6).[110] "49 U.S.C. § 14708(b)(6) provides that when a dispute arises between the shipper and a carrier in excess of $5,000.00, the arbitration shall be binding on the parties only if, 'the carrier agrees to arbitration.'"[111] In light of subsection (b)(6), Shippers argued that, in cases where a shipper requests arbitration and the carriers refuse to arbitrate, applying Carriers' interpretation of the statute would deny a shipper attorney's fees at the carriers' discretion because there would be no decision rendered through arbitration.[112] "Such an interpretation would have the pernicious effect of allowing carriers to reject arbitration in complex cases and still deprive prevailing shippers of attorney's fees."[113]

Shippers contended that it was not reasonable to subject the shipper to the discretion of the carrier. Instead, Shippers asserted that the plain language and purpose of the statute dictated that, "if [Shippers] had re-

106. *Id.* at 7.
107. *Id.* at 6-7.
108. *Id.* at 7.
109. *Id.*
110. *Id.* (quoting United States v. Derr, 968 F.2d 943, 945 (9th Cir. 1992)).
111. *Id.* (quoting 49 U.S.C. § 14708(b)(6)). The 2006 version of 49 U.S.C. § 14708(b)(6) provides that "if the dispute involves a claim for more than $10,000 and the shipper requests arbitration, such arbitration shall be binding on the parties only if the carrier agrees to arbitration." The version referenced by Shippers was in effect until August 9, 2005. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1757 (2005).
112. Appellee's Answering Brief, *supra* note 30, at 7-8.
113. *Id.* at 7.

quested an arbitration, and if [Carriers] had refused to arbitrate, then there would be no decision rendered through arbitration and [Shippers], as the prevailing party would still be entitled to their attorney's fees . . . ."[114] In support of this assertion, Shippers stated, "The statute does not penalize, by way of denying the award of attorney's fees to either the shipper or the carrier, for refusing to use arbitration when the amount in controversy is in excess of $5,000.00."[115] Instead, "[t]he arbitration program is to be used at the option of both the shipper and the carrier when the controversy is in excess of $5,000.00."[116] Moreover, Shippers asserted that "[t]he purpose of the statute was to mandate that carriers establish an arbitration procedure as an option for use by the shippers that complies with 49 U.S.C. § 14708(b)(1)-(8)[,]" not to preclude shippers from being awarded attorney's fees in the absence of arbitration.[117] Accordingly, when a shipper timely submits a claim, prevails in the action, and an arbitration decision is not rendered, whatever the reason, the shipper is statutorily entitled to a fee award.[118]

To combat Carriers' legislative history argument, Shippers first reminded the court that because the language of the statute was clear and unambiguous, the legislative history need not be examined.[119] However, Shippers asserted that, even in light of the statute's legislative history, the award of attorney's fees was proper. Specifically, Shippers stated, "[T]he historical discussions only serve to demonstrate that Congress is seeking [to] influence the *moving companies*. The legislative history does not reflect an attempt to directly influence the conduct of shippers . . . ."[120] Shippers argued that Congress has encouraged moving companies to arbitrate by "require[ing] moving companies to make arbitration available, and award[ing] attorney['s] fees to shippers if the process is not utilized and shippers [prevail] in court."[121]

Following this line of reasoning, Shippers further argued that subsection (d), addressing attorney's fees, and the question of whether the arbitration program is optional or mandatory, are two separate issues.[122] All the statutory modifications addressed by the cited House Reports deal only with the question [of] whether the dispute resolution [program] is converted from optional to mandatory. Congress could certainly have

114. *Id.* at 8.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 11.
120. *Id.* (citing H.R. REP. No. 96-1372, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4271, 4283) (alteration in original).
121. *Id.* at 12.
122. *Id.*

changed subsection (d) to reflect that attorney['s] fees are not required where no arbitration has been requested by the shipper . . . .[123]

Had Congress intended to require a shipper to invoke arbitration in order to recover attorney's fees, Congress would have explicitly indicated to that end; however, "Congress did not do so . . . ."[124] Consequently, Shippers asserted that, because Congress intended to influence the moving companies, not shippers, when it enacted 49 U.S.C. § 14708, and because "none of the legislative history cited by [Carriers] directly shows to the contrary[,]" Carriers' argument lacked merit.[125]

Finally, to counter Carriers' reliance on *Collins*, Shippers criticized the *Collins* decision as being "remarkably devoid of analysis."[126] Shippers discouraged the court from relying on *Collins* stating that "reliance on perfunctory state court decisions simply does not provide meaningful assistance."[127] Instead, Shippers urged the Ninth Circuit to "carefully consider whether consumers nationwide should suffer such a significant detriment."[128] Specifically, Shippers asked the court to be mindful of the fact that Congress intended to influence carriers, not shippers, when it enacted section 14708, arguing that such congressional intent "is a small consolation for shippers who have sacrificed state law claims through preemption."[129]

Shippers further asserted that Carriers' argument was "ethnocentric" because Carriers' position "avoids any responsibility for dispute resolution; they focus on forcing shippers suffering the distress of broken sentimentalities . . . and arduous communications with the moving companies on claims resolutions . . . to make elections in time of crisis."[130] Shippers classified carriers as "strong, powerful corporations with established lobbying and claims processing administration."[131] Thus, Shippers concluded, "Of course it makes sense to require these companies to bear the mantle of time and inertia in the claims resolution process."[132] Ultimately, Shippers implored the court,

> [i]f moving companies are granted the ability to avoid arbitration in cases over $5,000.00 *and* defeat shippers' right[s] to attorney['s] fees, then the gargantuan and mean-spirited moving companies will have dealt a tortuous blow to the families of America – and one not expressed by those families'

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 13.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 14.
132. *Id.*

representative legislators. This Honorable court should not support the enterprise.[133]

D. The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals agreed with Shippers, determining that "nothing in 49 U.S.C. § 14708(d) limits attorney's fees to shippers who engage in arbitration." [134] In reaching this conclusion, the court essentially adopted Shippers' argument. The court engaged in a standard statutory construction exercise, examining the plain meaning of the language contained in the statute at issue.[135]

"Under the 'plain meaning' rule, '[w]here the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'"[136] As a preliminary matter, the court looked to the phrase "any court action" in determining that subsection (d) applies to court actions "involving disputes between a shipper of household goods and a carrier . . . ."[137] While the court recognized that a plain reading of the phrase "any court action" affords 49 U.S.C. § 14708(d) wide applicability, the court identified two limiting factors.[138] Adopting Shippers' argument, the court determined that subsection (d) "entitles shippers to attorney's fees if they meet the first two requirements of (d)(1) and (d)(2)[,] . . . timely submitting a claim and prevailing in court . . . ."[139]

The court next discussed the proper interpretation of section (d)(3), the primary point of contention between the parties. In line with its plain meaning analysis and Shippers' argument, the court concluded that subsection (d)(3) "merely excludes those claims in which a timely arbitration decision is reached and does not necessitate court enforcement."[140] The court further explained its interpretation, stating that "[i]n other words, (d)(3) prevents shippers from receiving attorney's fees if the arbitration program 'works' as intended by swiftly resolving the dispute. It has no effect on shippers . . . who [do] not engage in arbitration."[141]

After evaluating the plain meaning of section 14708, the *Campbell* court examined the statute as a whole, specifically looking at the inter-

133. *Id.* (alteration in original).
134. *Campbell*, 410 F.3d at 620-21.
135. *Id.*
136. *Id.* at 620-21 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)).
137. *Id.* at 621.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

play between subsection (d)(3)(A) and (b)(8).[142] The court agreed with Carriers that the attorney's fee provision should be read "in light of the arbitration program[;]" the agreement, however, ended there.[143]

Carriers argued that, when read together, subsections (d)(3)(A) and (b)(8) indicate that subsection (d)(3) cannot be satisfied unless the shipper requests arbitration.[144] Subsection (b)(8) "calls for a decision by an arbitrator within 60 days of written notification of the dispute being given to the arbitrator."[145] Therefore, Carriers argued that, if a shipper does not request arbitration, an arbitrator never receives notification, and, thus, "refusal to invoke arbitration prevents (b)(8)'s time period from beginning to run . . . ."[146] Because failure to invoke arbitration prevents (b)(8)'s time period from beginning to run, failure to invoke arbitration "precludes (d)(3)(A) from ever being satisfied."[147] Following this reasoning, unless the shipper requests arbitration, the shipper is not entitled to an award of attorney's fees.[148] Consequently, according to Carriers, because Shippers did not request arbitration, the district court improperly awarded Shippers attorney's fees.[149]

In dismissing Carriers' argument, the court reasoned that "nothing in the text of (d)(3)(A) conditions eligibility upon the happening of a certain event; rather, a shipper satisfies (d)(3)(A) as long as a specific event does *not* occur, namely the rendering of an arbitration decision within a certain period of time."[150] The court concluded that, "[b]ecause there was no arbitration decision in [Shippers'] dispute, (d)(3)(A) poses no barrier to the award of an attorney's fee."[151]

Not only did the court determine that Carriers' statutory construction argument lacked merit, but it further concluded that Shippers' interpretation, as adopted by the court, did not create tension between the attorney's fee provision and the arbitration program.[152] "Our interpretation recognizes that receiving a timely arbitration decision affects a shipper's eligibility for an attorney's fee under (d)(3), and that courts must consult the time period in (b)(8) to establish whether an arbitration decision qualifies as timely."[153]

142. *Id.*
143. *Id.*
144. Appellant's Reply Brief, *supra* note 47, at 6.
145. *Id.* at 6.
146. *Id.*; *Campbell*, 410 F.3d at 621.
147. *Campbell*, 410 F.3d at 621.
148. Appellant's Reply Brief, *supra* note 47, at 9.
149. *Id.*
150. *Campbell*, 410 F.3d at 621 (alteration in original).
151. *Id.*
152. *Id.*
153. *Id.*

The court then turned to the relevant, albeit scarce, case law.[154] Specifically, the court addressed *Yakubu v. Atlas Van Lines*[155] and *Collins*.[156] The courts in *Yakubu* and *Collins* held that a failure to invoke arbitration rendered section 14708 inapplicable, precluding the shippers from receiving an award of attorney's fees.[157] According to the *Campbell* court, the decisions in *Yakubu* and *Collins* rested on the title of section 14708.[158] Because the Ninth Circuit believed that relying on section 14708's title ignored the plain language of the statute, the court declined to adopt the interpretation set forth in those decisions.[159]

In arriving at this conclusion, the court relied on the reasoning of the United States Supreme Court.[160] In *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*,[161] the Court held,

> [t]hat the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact . . . . [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when it sheds light on some ambiguous word or phrase.[162]

While the Ninth Circuit recognized that "[s]ection 14708 may be titled 'Dispute settlement program for household goods carriers[,]'" it concluded that because "there is nothing ambiguous about the text in question[,]" the section's title did "not give [the court] free rein to ignore the plain language of subsection (d)."[163] The *Campbell* court reiterated its conclusion that the plain meaning supported Shippers' interpretation.

> Section 14708(d) is entitled "Attorney's Fees to shippers" and expressly applies to "any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service . . . ." It does not state that the subsection applies only to court actions pursued after first invoking arbitration; adding such a limitation may be easy enough, but that is the province of Congress, not this court.[164]

The court ended its analysis by addressing Carriers' argument that an examination of legislative history demonstrated congressional intent to

154. *Id.*
155. *Yakubu*, 351 F. Supp. 2d at 482.
156. *Collins*, 867 So.2d at 1179.
157. *Yakubu*, 351 F. Supp. 2d at 491; *Collins*, 867 So.2d at 1183.
158. *Campbell*, 410 F.3d at 621.
159. *Id.*
160. *Id.*
161. Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 519 (1947).
162. *Campbell*, 410 F.3d at 621-22 (citing INS v. St. Cyr, 533 U.S. 289, 308-09 (2001) and quoting Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947)) (alteration in original).
163. *Id.*
164. *Id.* at 622 (quoting 49 U.S.C. 14708(d)).

encourage arbitration, lending support to an interpretation mandating arbitration prior to awarding attorney's fees.[165] The court again dismissed Carriers' argument, relying on the plain language of the statute. In so doing, the *Campbell* court noted that "[w]e have long held that there is a strong presumption that the plain language of [a] statute expresses congressional intent, rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed."[166] The court concluded that "[s]ection 14708 does not present such an exceptional circumstance [because] [g]iven the ease with which Congress expressly listed three eligibility criteria, we see no reason why Congress would bury a fourth implicitly within the statute."[167] The court declined to supplement the statute's "three enumerated conditions for attorney's fee eligibility by reading in a fourth, unstated prerequisite that shippers first invoke arbitration" because the court did not "perceive [any] inconsistency in the statute as it is written."[168]

In further response to Carriers' legislative intent argument, the court indicated its hesitancy "to depart from the statute's text in situations . . . in which [the court] can only attempt to glean the specific details of [Congress'] intent by examining the limited legislative history of the act in question."[169] Consequently, the court concluded that it was "not prepared to second-guess [Congress'] chosen method for adopting a legislative program that may or may not provide the best means to effectuate some underlying congressional goal."[170] As the legislative history did not present "overwhelming evidence to suggest that the statute's language is at odds with a clearly expressed legislative intent to the contrary," the Ninth Circuit "[deferred] to the plain meaning of the text actually adopted by Congress."[171]

However, the *Campbell* court did not summarily dismiss Carriers' assertion that Congress intended to encourage arbitration by prohibiting shippers from recovering attorney's fees in the absence of arbitration.[172] To rebut this argument, the court looked to subsection (b)(6) of the statute as suggested by Shippers.[173] Specifically, the court opined that "[p]erhaps . . . a rule that obligated shippers to submit to arbitration in order to recover attorney's fees would more effectively reduce the number of shipper-carrier lawsuits; then again, perhaps requiring carriers to

165. *Id.*
166. *Id.* (quoting United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002)).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* (citing United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002)).
172. *Id.*
173. *Id.*

agree to binding arbitration of all claims over $5,000 would do so as well."[174]

The Ninth Circuit concluded its opinion in the same manner it began, examining the plain meaning of the statute, fitting given the language the court relied on to introduce its conclusion.[175] "[T]ime and again" the Supreme Court has instructed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[176]

The court reiterated its determination that "Congress unambiguously authorized the awarding of attorney's fees to shippers of household goods who meet three express conditions."[177] Therefore, because "none of those conditions require a shipper to first invoke arbitration[,]" the court declined to adopt Carriers' and other courts' interpretation of section 14708(d).[178] According to the Ninth Circuit, if a shipper timely files a Carmack Amendment claim and prevails in the ensuing court action, the shipper is statutorily entitled to attorney's fees, even though an arbitration decision is not rendered regardless of the reason for its absence.[179]

E. The Dissenting Opinion

Circuit Judge Diarmuid O'Scannlain dissented from Circuit Judge Robert Beezer's majority opinion.[180] O'Scannlain began his dissent by stating that "[t]his exercise in statutory interpretation forces us to confront the fact that the most literal interpretation of a phrase is not always the most natural and reasonable one."[181] In O'Scannlain's opinion, the majority's interpretation that section 14708(d) applies even in the absence of arbitration is not the "most ordinary, natural, and reasonable interpretation of the provision's language."[182] Specifically, O'Scannlain criticized the majority's "insistence that [its] reading of [section] 14708(d)(3)(A) is not only preferable but unambiguously correct" because the majority was "adher[ing] to a decontextualized literalism that even the staunchest defenders of textualism eschew."[183] O'Scannlain illustrated this "unnatural literalism" with the following scenario.

174. *Id.*
175. *Id.* at 620-21, 622-23.
176. *Id.* at 622-23 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).
177. *Id.* at 623.
178. *Id.*
179. *Id.*
180. *Id.* at 619, 623.
181. *Id.* at 623 (O'Scannlain, J., dissenting).
182. *See id.* (O'Scannlain, J., dissenting) (citing Bailey v. United States, 516 U.S. 137, 145 (1995)).
183. *Id.* (O'Scannlain, J., dissenting) (citations omitted).

> Imagine that, one summer's afternoon, a father turns to his son and says, "If you'd like to, we'll go to the ballpark this afternoon and hit some balls. And I'll tell you what – if your old Dad doesn't hit a baseball over the fences, he promises to buy you some ice cream."
>
> "Great, Dad," says the son, "but I don't want to play baseball this afternoon. Let's play football in the yard instead."
>
> The father agrees, and after a few spirited hours of play, the two head back to the house for dinner. As they brush the dirt out of their clothes, the son says, "Well, Dad, you owe me an ice cream. You didn't hit a single baseball over the fences."[184]

Applying the majority's reasoning to above-described scene, the father would undoubtedly owe the son an ice cream because, "the majority would insist [that] the father's words were unambiguous: 'If I don't hit a baseball over the fences, I promise to buy you some ice cream.'"[185] Therefore, O'Scannlain proposed that

> the majority would conclude that – to paraphrase its own reasoning – "given the ease with which the father expressly listed one eligibility criterion (his failure to hit a home run)," there was "no reason why he would bury a second (the son's acceptance of the invitation to play baseball) implicitly within" his proposal.[186]

However, O'Scannlain argued that such a result would be contrary to reason. "[T]hat is not how language works, either in conversation or in statutory interpretation."[187] While O'Scannlain recognized that it was appropriate for the majority to begin by examining the plain meaning of section 14708 and even conceded that "it is possible to read the words of subsection [(d)(3)](A) as the majority [did]," O'Scannlain stressed that "plain meaning is not meaning divorced from context."[188] Consequently, O'Scannlain looked to the purpose of the statute.[189]

First, O'Scannlain looked to the fact that "[t]he provision appears in the midst of a statute designed to promote and to facilitate arbitration of claims under the Carmack Amendment."[190] In light of section 14708's purpose, O'Scannlain deemed the majority's interpretation unnatural because its interpretation

184. *Id.* at 623-24 (O'Scannlain, J., dissenting).
185. *Id.* at 624 (O'Scannlain, J., dissenting).
186. *Id.* (O'Scannlain, J., dissenting) (citing Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 622 (9th Cir. 2005)).
187. *Id.* (O'Scannlain, J., dissenting).
188. *Id.* at 623-24 (O'Scannlain, J., dissenting) (citing Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 499-500 (2002) and Bailey v. United States, 516 U.S. 137, 145 (1995)).
189. *Id.* at 623 (O'Scannlain, J., dissenting).
190. *Id.* (O'Scannlain, J., dissenting).

> turns [the provision] into a powerful incentive for shippers *not* to pursue arbitration. A shipper who takes his claim straight to court and wins has his legal costs paid by the carrier, while a shipper who submits the claim for arbitration must pay not only his own legal fees but part of the cost of arbitration as well.[191]

In contrast to the majority's interpretation, O'Scannlain argued that "the most reasonable interpretation of [section] 14708(d)(3)(A) is that it makes attorney fees available if the shipper takes advantage of the opportunity for arbitration that the carrier is statutorily bound to provide *and* no decision is rendered within the sixty-day period provided."[192] In arriving at this conclusion, O'Scannlain referred to the father-son scenario. Despite the father's unambiguous statement that he would buy the son an ice cream if he failed to hit a home run, "[a] reasonable person would understand the father to be promising ice cream only if the son agrees to play baseball *and* the father hits no home runs."[193]

O'Scannlain then turned to extrinsic sources to support his interpretation.[194] Specifically, O'Scannlain compared section 14708(d), the statute at issue in *Campbell*, with the earlier version of the statute.[195] "The earlier statute allowed, but did not require, carriers to offer arbitration."[196] In comparing the earlier statute with the statute at issue in *Campbell*, O'Scannlain focused on former section 11711(d)(3)(B) and section 14708(d)(3)(A).[197] O'Scannlain noted that section 11711(d)(3)(B) "is *identical* for all relevant purposes to . . . [section] 14708(d)(3)(A) . . . ."[198] Both provisions grant "attorney fees when 'a decision resolving the dispute was not rendered [in arbitration] within the period provided.'"[199] Thus, O'Scannlain concluded that "[i]t would be extremely odd if the two provisions, whose text is essentially the same, meant two sharply different things . . . for the former [section]

191. *Id.* (O'Scannlain, J., dissenting) (citing 49 U.S.C. § 14708(b)(5)) (alteration in original).

192. *Id.* at 624 (O'Scannlain, J., dissenting) (alteration in original).

193. *Id.* (O'Scannlain, J., dissenting) (alteration in original).

194. *Id.* (O'Scannlain, J., dissenting) (citing Int'l Ass'n of Machinists & Aerospace Workers v. B.F. Goodrich Aerospace Aerostructures Group, 387 F.3d 1046, 1051-52 (9th Cir. 2004)).

195. *Id.* at 624-25 (O'Scannlain, J., dissenting). "The current [section] 14708 is the result of Congress's 1995 amendments to the dispute settlement provisions of the Carmack Amendment." *Id.* at 624 (O'Scannlain, J., dissenting).

196. *Id.* (O'Scannlain, J., dissenting) (citing 49 U.S.C. § 11711); *see supra* text accompanying note 31.

197. *Id.* (O'Scannlain, J., dissenting).

198. *Id.* at 625 (O'Scannlain, J., dissenting).

199. *Id.* (O'Scannlain, J., dissenting). O'Scannlain did note one difference between the two provisions. Section 11711(d)(3)(B) provided that a decision was not rendered "under a dispute settlement program approved under this section[,]" while section 14708(d)(3)(A) provides that a decision was not rendered "through arbitration under this section[.]" According to O'Scannlain, this slight difference simply reflected "the fact that arbitration programs need no longer be 'approved' by the Commission." *Id.* at 625 n.1 (O'Scannlain, J., dissenting).

11711(d)(3)(B) cannot reasonably bear the interpretation the majority would place upon . . . [section] 14708(d)(3)(A)."[200]

In support of this conclusion, O'Scannlain reasoned that if the majority's interpretation were applied to former section 11711(d)(3)(B), subsection (d)(3)(A) of the former statute would be rendered "wholly redundant and unnecessary . . . ."[201] Subsection (A) of the earlier statute provided that a shipper may be awarded attorney's fees if "no dispute settlement program approved under this section was available for use by the shipper to resolve the dispute . . . ."[202] Subsection (B) provided that a shipper may be awarded attorney's fees if "a decision resolving the dispute was not rendered under a dispute settlement program approved under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection . . . ."[203]

Accordingly, O'Scannlain argued that, if a dispute settlement program was not available for use by the shipper, then "it would necessarily have been true that a 'decision resolving the dispute was not rendered . . . within the period provided.'"[204] Therefore, subsection (A) provided for instances in which the carrier did not provide an arbitration program or in which the shipper did not attempt arbitration, whereas subsection (B) provided for instances in which the carrier provided an arbitration program and the shipper attempted to arbitrate, but a decision was not rendered within the allotted time.[205] Because the language contained in the current section 14708(d)(3)(A) is nearly identical to the language contained in section 11711(d)(3)(B), interpreting the current section to require a shipper to attempt arbitration before he is entitled to attorney's fees is the more natural and reasonable interpretation of the provision.[206]

In addition to comparing the earlier statute with section 14708, O'Scannlain looked to the statute's title, "Dispute settlement program for household carriers[,]" in determining that "the plain meaning of the language of [section] 14708(d)(3)(A) in its context is that attorney fees are available only when shippers attempt arbitration . . . ."[207] In a footnote, O'Scannlain asserted that the "majority's interpretation turns [section] 14708(d)(3)(A) into a general attorney-fee provision whose scope extends well beyond cases in which a dispute-settlement program is involved."[208] Therefore, because the title of the provision indicates that its

200. *Id.* at 625 (O'Scannlain, J., dissenting).
201. *Id.* (O'Scannlain, J., dissenting).
202. *Id.* (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711(d)(3)(A)).
203. *Id.* (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711(d)(3)(B)).
204. *Id.* (O'Scannlain, J., dissenting).
205. *See id.* (O'Scannlain, J., dissenting).
206. *Id.* (O'Scannlain, J., dissenting).
207. *Id.* (O'Scannlain, J., dissenting).
208. *Id.* at 625 n.2 (O'Scannlain, J., dissenting).

subject involves dispute settlement programs for household carriers, an interpretation expanding the provision's applicability to instances in which arbitration was not attempted is contrary to the provision's context.[209]

Like the majority opinion, O'Scannlain's dissent focused primarily on the plain meaning of the statute. However, O'Scannlain arrived at a different conclusion than the majority. O'Scannlain read section 14708 as a whole to require Shippers to invoke arbitration in order to be statutorily entitled to a fee award.[210] In arriving at this conclusion, O'Scannlain considered the context of the entire statute, including the statute's title.[211] In addition, O'Scannlain concluded that such an interpretation was "consonant with the statute's history . . . ."[212] Therefore, O'Scannlain would have reversed the district court's decision to award Shippers attorney's fees.[213]

IV. ANALYSIS

The Ninth Circuit Court of Appeals is one of the first courts to interpret 49 U.S.C. § 14708(d).[214] Because the body of case law addressing the issue presented to the Ninth Circuit in *Campbell* is limited, the parties to the action, as well as the court, were operating at a disadvantage. On the other hand, the lack of case law afforded the parties an opportunity to engage in more creative lawyering, forcing the parties to present arguments outside of simple reliance on precedent. While both parties took advantage of the opportunity, Shippers were particularly effective in employing emotional language to play on the court's sensibilities.[215]

Notwithstanding the compelling and varied arguments on both sides,

209. *Id.* (O'Scannlain, J., dissenting) ("Part of the relevant context is the title of [section] 14708 . . .. The 'title of a statute and the heading of a section are tools available for the resolution of doubt' about the meaning of a statutory provision." (quoting Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998))).

210. *Id.* at 625 (O'Scannlain, J., dissenting).

211. *Id.* (O'Scannlain, J., dissenting).

212. *Id.* (O'Scannlain, J., dissenting).

213. *See id.* (O'Scannlain, J., dissenting).

214. The Florida District Court of Appeal issued an opinion interpreting subsection (d) in *Collins Moving & Storage Corp. of South Carolina v. Kirkell* wherein the court determined that subsection (d) is inapplicable in the absence of arbitration. *Collins*, 867 So.2d at 1183. The United States District Court for the Western District of Virginia has also issued an opinion interpreting the statute. Like the *Collins* court, the court in *Yakubu v. Atlas Van Lines*, held that the shipper was not entitled to a fee award in the absence of arbitration. *Yakubu*, 351 F. Supp. 2d at 491.

215. Appellee's Answering Brief, *supra* note 30, at 7, 14 (stating, "This Court is urged to refrain from adding language to the statute to the detriment of consumers beleaguered by the insulated insolence of the Carmack-protected [m]oving [c]ompanies. Let his gryphon go to Congress to seek to further feather its nest!" and further characterizing moving companies as "gargantuan and mean-spirited.").

the Ninth Circuit limited its opinion to a plain meaning analysis.[216] The court properly began its exercise in statutory construction by examining the plain language of the statute.[217] However, the court's absolute reliance on the plain language of the statute stops short of a well-reasoned interpretation. In light of the parties' arguments, including their plain meaning analysis, the dissenting *Campbell* opinion seems to present the more reasonable and natural interpretation.

A. Plain Meaning in Context

The first step in statutory analysis is to determine "whether the statutory meaning is unambiguous."[218] "Where the language [of a statute] is plain and admits of nor more than one meaning the duty of interpretation does not arise, and rules which are to aid doubtful meanings need no discussion."[219] Because the *Campbell* court determined that the plain language of section 14708(d) is unambiguous, the court consistently implemented its plain meaning analysis to combat Carriers' reasoning, as well as that of other courts.[220] The Ninth Circuit's reliance on the statute's plain meaning was not necessarily misplaced. However, the court's rigid application of the plain meaning rule calls into question the soundness of the interpretation, an issue well recognized in the dissenting opinion. "We begin with a statute's plain meaning, of course, but plain meaning is not meaning divorced from context."[221] In fact, the United States Supreme Court has recognized on various occasions that, in conducting a plain meaning analysis, courts should "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'"[222]

The Ninth Circuit recognized that a statute should be construed in light of the statute as a whole.[223] However, while the court recognized this principle, the court arguably failed to engage in the proper inquiry.

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216. *Campbell*, 410 F.3d at 621-23.

217. *See* Azarte v. Ashcroft, 394 F.3d 1278, 1285 (9th Cir. 2005) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

218. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

219. *Campbell*, 410 F.3d at 621 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)).

220. *Id.* at 621-23.

221. *Id.* at 624 (citing Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 499-500 (2002) and Bailey v. United States, 516 U.S. 137, 145 (1995)).

222. *E.g.*, Bailey v. United States, 561 U.S. 137, 145 (1995) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994) and citing King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)).

223. *Campbell*, 410 F.3d at 621 (citing Children's Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999)).

The court did not examine the statutory scheme prior to making a determination as to the plain meaning of the statute.[224] Instead, the court first looked to the plain language of the statute in isolation from the other statutory provisions.[225] In so doing, the court concluded, "[S]imply put, nothing in [section] 14708(d) limits attorney's fees to shippers who engage in arbitration."[226] The court's preliminary conclusion is not incorrect.[227] It is, however, incomplete.

Had the Ninth Circuit examined the statutory setting, as instructed by the United States Supreme Court,[228] prior to so steadfastly adopting an interpretation, the court would have likely arrived at a different conclusion, placing the Ninth Circuit in line with prior decisions issued on the topic.[229] Two failures, in particular, on the part of the court contributed to its imperfect interpretation. First, the court declined to give any weight to the section's title[230] and, second, the court read subsection (d) without regard to subsection (a),[231] which requires carriers to offer arbitration.[232] Upon a reading of the section title and subsection (a), the reasonableness of the *Campbell* court's interpretation is, at least, called into question, if not altogether contradicted.[233]

1. Section 14708's Title

In determining that a shipper must engage in arbitration in order to invoke the attorney's fee provision of section 14708, the United States District Court of the Western District of Virginia and the Florida District Court of Appeal relied, in part, on the title of section 14708.[234] Section 14708 is entitled, "Dispute settlement program for household goods carriers."[235] Because the section title refers to a dispute settlement program,

224. *Id.* at 621 (determining that subsection (d)(3) "has no effect on shippers . . . who did not engage in arbitration" prior to examining the statutory scheme).

225. *Id.*

226. *Id.*

227. *Id.* at 623 (O'Scannlain, J., dissenting) ("I do not deny that it is possible to read the words of subsection (A) as the majority does . . . .").

228. *See, e.g.*, *Bailey*, 561 U.S. at 145 (instructing that courts should "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994))).

229. The United States District Court for the Western District of Virginia and the Florida District Court of Appeal have interpreted section 14708(d) to require an attempt at arbitration prior to a proper award of attorney's fees. *Yakubu*, 351 F. Supp. at 491; *Collins*, 867 So.2d at 1183.

230. 49 U.S.C. § 14708(a).

231. *Campbell*, 410 F.3d at 621-22.

232. *See id.* at 622.

233. *See id.* at 624-25 (O'Scannlain, J., dissenting).

234. *Yakubu*, 351 F. Supp. 2d at 490-91; *Collins*, 867 So.2d at 1183.

235. 49 U.S.C. § 14708.

the *Yakubu* court[236] and the *Collins* court determined that subsection (d) would "come into play only in a case in which a party has invoked the alternative dispute resolution provisions of section 14708."[237]

The *Campbell* court acknowledged the *Yakubu* and *Collins* decisions, but declined to follow their line of reasoning.[238] Specifically, the Ninth Circuit rejected the alternative interpretation adopted by the *Yakubu* and *Collins* courts because the court believed their reliance on the section title was misplaced.[239] The *Campbell* court reasoned that because the statutory language is unambiguous, the section title need not be considered.[240] In support of this conclusion, the court quoted a United States Supreme Court decision.[241]

> That the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact . . . . [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text.[242]

However, the above-quoted language does not support the Ninth Circuit's decision to wholly disregard the section title. In fact, the *Campbell* court impliedly recognized that such overt disregard for a title or heading is improper.[243] Immediately after discounting the relevance of section 14708's general title, the court relied on subsection (d)'s title, "Attorney's Fees to shippers,"[244] in support of its conclusion that a shipper need not pursue arbitration as a prerequisite to properly requesting a fee award.[245] While it is certainly true that a title or heading cannot be expected to encompass the entire content of a statute or provision, headings and titles can serve to inform the reader of the general matters covered.[246] Furthermore, in assessing the plain meaning of a statute, context should be considered, and part of the relevant context is the statute's title.[247]

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236. *See Yakubu*, 351 F. Supp. 2d at 491.

237. *Collins*, 867 So.2d at 1183.

238. *Campbell*, 410 F.3d at 621.

239. *Id.*

240. *See id.* ("Section 14708 may be entitled 'Dispute settlement program for household goods carriers,' but that does not give us free rein to ignore the plain language of section (d).").

241. *Id.*

242. *Id.* (quoting Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947).

243. *See id.* at 622.

244. 49 U.S.C. § 14708(d).

245. *Campbell*, 410 F.3d at 622.

246. *Bhd. of R.R. Trainmen*, 331 U.S. at 528.

247. *See Campbell*, 410 F.3d at 625 n.2.

2. Subsection (a) of Section 14708

Even assuming the *Campbell* court properly disregarded the section's title, reading subsection (d) in conjunction with other provisions of section 14708, particularly subsection (a), suggests that a shipper must engage in arbitration prior to properly requesting attorney's fees. Despite the fact that Carriers raised subsection (a) as an issue in the briefing[248] and the fact that the *Yakubu* court relied on subsection (a) in rendering its decision, the Ninth Circuit never addressed the subsection.[249]

In *Yakubu*, in addition to relying on section 14708's title, the court looked to subsection (a), albeit briefly, in holding that "[s]ection 14708(d)(1)-(3) applies only when a party has initiated its provisions in connection with dispute resolution . . . ."[250] In so holding, the court recognized that "[a] carrier of household goods is required to offer neutral arbitration as a means of settling disputes . . . ."[251]

Because the *Campbell* court never even impliedly addressed subsection (a), it is difficult to ascertain whether the court believed subsection (a) to be wholly irrelevant or whether the court chose not to address the subsection because it would have presented an obstacle to its interpretation. However, given the court's summary dismissal of other arguments, such as the section title, it would not be unreasonable to infer the latter, particularly in light of the analysis presented by the dissent.

Unlike the *Campbell* majority, the dissenting opinion looked to the context of section 14708 before making a determination as to the proper interpretation of the statute.[252] O'Scannlain presumably looked, at least in part, to subsection (a) in determining that section 14708 is "designed to promote and to facilitate arbitration of claims under the Carmack Amendment."[253] In this context, O'Scannlain concluded that the majority's interpretation could not be proper because the majority's interpretation turned the attorney's fee provision "into a powerful incentive for shippers *not* to pursue arbitration."[254] Consequently, O'Scannlain asserted that the more "ordinary, natural, and reasonable" interpretation would require the shipper to invoke arbitration as a prerequisite to an award of attorney's fees.[255] While O'Scannlain could have ended his opinion with this plain meaning analysis, as the majority did, O'Scannlain

248. Appellant's Reply Brief, *supra* note 47, at 4-5.
249. *See generally Campbell*, 410 F.3d 618.
250. *Yakubu*, 351 F. Supp. 2d at 491.
251. *Id.* (quoting Ward v. Allied Van Lines, Inc., 231 F.3d 135, 141 (4th Cir. 2000)).
252. *See Campbell*, 410 F.3d at 623, 625 (O'Scannlain, J., dissenting).
253. *Id.* at 623 (O'Scannlain, J., dissenting).
254. *Id.* (O'Scannlain, J., dissenting) (alteration in original).
255. *Id.* at 623, 625 (O'Scannlain, J., dissenting).

went on to consider the statute's history.[256]

B. Legislative History

O'Scannlain noted that an examination of the statute's history "only strengthen[ed] the case against the majority's interpretation."[257] First, O'Scannlain emphasized that, unlike the current statute, the predecessor statute did not require carriers to offer arbitration.[258] This distinction played an important role in O'Scannlain's historical analysis.[259]

Former section 11711(d)(3)(A) provided that a shipper may be awarded reasonable attorney's fees if "no dispute settlement program . . . was available for use by the shipper . . . ."[260] Former subsection (d)(3)(B), which is nearly identical to the current subsection (d)(3)(A), provided that a shipper may be awarded reasonable attorney's fees if "a decision resolving the dispute was not rendered . . . within the period provided . . . ."[261] Following the majority's interpretation, subsection (A) and subsection (B) of the former statute provide for the same scenario.[262] Under subsection (A), an arbitration decision was not rendered.[263] Likewise, under subsection (B), an arbitration decision was not rendered.[264] Therefore, adhering to the majority's interpretation would render subsection (A) of the former statute "wholly redundant and unnecessary . . . ."[265] In order to give meaning to former subsection (A), former subsection (B) must be interpreted to mean something other than no arbitration decision was rendered. O'Scannlain proposed that former subsection (B) should be interpreted to mean that no arbitration decision was rendered even though the parties engaged in arbitration.[266] Consequently, because former subsection (B) is nearly identical to current subsection (d)(3)(A), the current subsection should be interpreted in a similar manner. Accordingly, O'Scannlain disagreed with the majority because its interpretation was not only decontextualized, but also inconsonant with the statute's history.[267]

It is interesting to note that O'Scannlain referenced subsection (a) not only to establish a context for his interpretation, but also to ground

256. *Id.* at 624-25 (O'Scannlain, J., dissenting).
257. *Id.* at 624 (O'Scannlain, J., dissenting).
258. *Id.* (O'Scannlain, J., dissenting) (citing 49 U.S.C. § 11711).
259. *See id.* at 625 (O'Scannlain, J., dissenting).
260. *Id.* at 624 (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711(d)(3)(A) (1994)).
261. *Id.* at 624-25 (O'Scannlain, J., dissenting) (quoting 49 U.S.C. § 11711 (d)(3)(B) (1994)).
262. *Id.* at 625 (O'Scannlain, J., dissenting).
263. *See* 49 U.S.C. § 11711(d)(3)(A).
264. *See id.* § 11711(d)(3)(B).
265. *Campbell*, 410 F.3d at 625 (O'Scannlain, J., dissenting).
266. *See id.*
267. *Id.* (O'Scannlain, J., dissenting).

his interpretation in the statute's history,[268] while the majority did not even incidentally mention subsection (a).[269] Again, this supports the inference that the majority made a conscious decision not to address the fact that carriers are required to offer shippers arbitration under section 14708 because such a requirement is detrimental to the majority's interpretation.

C. Legislative Intent

Related to legislative history, but not explicitly addressed in either the majority or dissenting opinions, is the issue of legislative intent.[270] Specifically, the parties attempted to persuade the court that the legislature had intended to influence the other party to invoke arbitration. In other words, Carriers asserted that the legislature intended to influence shippers,[271] while Shippers asserted that the legislature intended to influence carriers.[272]

O'Scannlain briefly and impliedly addressed the parties' legislative intent arguments in discussing the statutory context. Following the majority's interpretation, "[a] shipper who takes his claim straight to court and wins has his legal costs paid by the carrier, while a shipper who submits the claim for arbitration must pay not only his own legal fees but part of the cost of arbitration as well."[273] Under this interpretation, shippers would have no incentive to invoke arbitration. This lack of incentive is not problematic in light of Shippers' argument that the legislature intended to influence carriers. However, Shippers assertion that the legislature intended to influence carriers to engage in arbitration ignores a very important practical reality; shippers, not carriers, initiate consumer claims.[274]

Furthermore, carriers are already obligated to offer shippers arbitration and to notify shippers of the availability of such arbitration.[275] Moreover, subsection (b)(3) "specifies that the carrier provide forms and information to initiate arbitration 'upon request of a shipper.'"[276] It is doubtful that the legislature would have enacted the statute to influence carriers to enter into arbitration, as Shippers asserted, when carriers are under a pre-existing obligation to do so. In contrast, subsection (b)(3)

268. *Id.* at 623-24 (O'Scannlain, J., dissenting).
269. *See id.* at 620-23.
270. *See id.* at 620-25.
271. Appellant's Reply Brief, *supra* note 47, at 7-8.
272. Appellee's Answering Brief, *supra* note 30, at 11-12.
273. *Campbell*, 410 F.3d at 623.
274. *See* Appellant's Reply Brief, *supra* note 47, at 4.
275. *Id.* at 4-5 (citing 49 U.S.C. § 14708(a), (b)(2)).
276. *Id.* at 5 (quoting 49 U.S.C. § 14708(b)(3)).

makes clear that it is the responsibility of the shipper to select either arbitration or litigation as the forum.[277] Accordingly, it is more reasonable to believe the legislature intended to influence shippers to engage in arbitration, not carriers.

The majority's interpretation not only fails to influence shippers to invoke arbitration, but actually creates a disincentive.[278] While the *Campbell* court did not address the parties' legislative intent arguments, these arguments seem to favor the interpretation adopted by the *Yakubu* court, the *Collins* court, and the *Campbell* dissent.

V. CONCLUSION

The Ninth Circuit Court of Appeals is one of the first courts to address whether 49 U.S.C. § 14708 requires a shipper to engage in arbitration in order to invoke the attorney's fee provision found at subsection (d). Consequently, the court did not have the comfort of precedent. While the court in *Campbell* was not entirely without direction, its opinion reads as a forced, unaided decision.

The court's inflexible insistence on a literal plain meaning analysis leads to the inference that the court had pre-determined that shippers should not have to engage in arbitration and was thereafter strained to justify that conclusion. While the plain language of a statute is undoubtedly the starting point in statutory interpretation, of equal importance is the notion that "plain meaning is not meaning divorced from context."[279] As pointed out by the dissent, the majority's interpretation is the result of a "decontextualized literalism."[280] The court failed to properly consider section 14708's title, neglected to address the fact that carriers are obligated to offer shippers arbitration under the statute, and ignored legislative history and intent.[281] At best, the court unintentionally disregarded valuable tools to aid it in its responsibilities of statutory interpretation and, at worst, the court intentionally avoided issues leading to a result contrary to its desire.

Had the court issued a more thorough, well-reasoned opinion, the *Campbell* holding may not be quite so discomforting. However, the court's staunch reliance on the plain meaning of subsection (d) and its summary dismissal of other arguments portends an awkward sense that the court simply had no other avenues to defend its position. Whether

277. *Id.* at 4.

278. *See Campbell*, 410 F.3d at 623 (O'Scannlain, J., dissenting).

279. *Id.* at 624 (O'Scannlain, J., dissenting) (citing Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 499-500 (2002) and Bailey v. United States, 516 U.S. 137, 145 (1995)).

280. *Id.* (O'Scannlain, J., dissenting).

281. *See id.* at 620-23.

this speculation is true, the *Campbell* court's reasoning does not lead to compelling case law.

Interestingly, Shippers urged the Ninth Circuit not to rely on "perfunctory" decisions issued by other courts and empowered the court to "carefully consider whether consumers nationwide should suffer such a significant detriment."[282] While Shippers may have legitimately argued that other courts have not rendered meticulous decisions, the Ninth Circuit's decision in *Campbell* is certainly no less mechanical than those issued in *Yakubu* and *Collins*, and is arguably even more so. Furthermore, while the decisions rendered in *Yakubu* and *Collins* were not binding on the Ninth Circuit, it is at least informative that the legislature has not amended subsection (d) in such a way as to indicate that the those decisions were incorrect.[283]

The interpretation adopted in *Yakubu*, *Collins*, and by O'Scannlain in the *Campbell* dissent requiring a shipper to invoke arbitration prior to properly receiving an award of attorney's fees seems to be the more reasonable and natural interpretation. Section 14708's title expressly indicates that subsection (d)(3)(A) is applicable only in conjunction with a dispute settlement program.[284] The fact that carriers are obligated to offer shippers arbitration and to notify shippers of such arbitration programs lends further support to this assertion.[285] Furthermore, the statute's legislative history and intent,[286] and the practical reality that shippers initiate consumer claims under the Carmack Amendment,[287] indicates that such an interpretation is proper.

This is particularly true in light of the American rule's general prohibition against fee shifting.[288] It is somewhat incongruous to permit absolute fee shifting, as the *Campbell* majority has done, in the face of a completely reasonable interpretation that would honor the well established limitation on the award of attorney's fees. Nonetheless, the Ninth

282. Appellee's Answering Brief, *supra* note 30, at 13.

283. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for . . . unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the courts] have done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989), *remanded & rev'd on other grounds*, 931 F.2d 887 (unpublished table opinion) (citations omitted). 49 U.S.C. § 14708(d) was amended in 2005 and went into effect on August 10th that same year. SAFETEA-U § 4206. Subsection (d)(3)(C) was added, which provides that a shipper may be awarded reasonable attorney's fees if "the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed." 49 U.S.C.A. § 14708(d)(3)(C) (2006).

284. 49 U.S.C. § 14708.

285. *Id.* § 14708(a).

286. *Compare* 49 U.S.C. § 11711 (1994), *with* 49 U.S.C. § 14708 (2000).

287. Appellant's Reply Brief, *supra* note 47, at 4.

288. *Key Tronic*, 511 U.S. at 814.

Circuit's interpretation has opened the door for shippers to boldly claim attorney's fees in addition to damages in actions against carriers. Future courts addressing the issue will not only have the option to award attorney's fees in the absence of arbitration, but will have the luxury of relying on the Ninth Circuit's holding to justify their decision.