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INTRODUCTION

On August 28, 1990, the day after she moved from Myrtle Beach, South Carolina to Northampton, Massachusetts, Jane Rini woke up and began unpacking her household belongings which had been transported to her new home by United Van Lines ("United"). When she opened a box that United's packers had labeled with the title "artwork," she discovered it was empty. Later in the day, she discovered that another box, labeled by the packers as "Orange Box 77" and designated by them as containing artwork, was not in her new home. When all of the boxes were unpacked, Ms. Rini discovered that eleven pieces of valuable art that had been in her family for generations were missing.[1]

United never located Ms. Rini's lost artwork; in fact, it apparently never looked for it. United also denied Ms. Rini any financial

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1. *See* Rini v. United Van Lines, Inc., 903 F. Supp. 224, 226-27 (D. Mass. 1995), *rev'd*, 104 F.3d 502 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997).

compensation whatsoever for losing her valuable belongings.[2] Ms. Rini followed United's procedure for filing a claim, but the company denied it in its entirety.[3] Throughout the claims process, and the ensuing trial, United asserted multiple and conflicting defenses.

First, it suggested that Ms. Rini never provided the company with her artwork before she moved.[4] United then contended that even if it had received the artwork, it had delivered it to Ms. Rini in her Northampton home.[5] Next, United claimed that it was immaterial whether or not it lost the artwork, because Ms. Rini could not prove how much the items were worth since she had no receipts for objects that had been in her family for generations.[6] United reasoned that since Ms. Rini could not prove the worth of the lost items with exactitude, she was not entitled to compensation.[7] Finally, when Ms. Rini submitted photographs of the missing items to professional art appraisers, who placed a value on all of the missing items, United again rejected her claim altogether, stating that it did not accept appraisals based on photographs.[8]

In December of 1992, after almost two and a half years of fighting with United to no avail, Ms. Rini brought suit in the United States District Court for the District of Massachusetts.[9] After a trial in which United "offer[ed] any argument theoretically available, regardless of its basis in fact,"[10] a jury awarded her $50,000 to compensate her for the artwork whose value United said was impossible to assess.[11] The jury also awarded Ms. Rini $100,000 to compensate her for the injuries she suffered as a result of United's negligence and misrepresentations during the two and a half year claims process.[12] Characterizing United's behavior during the

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2. *See id.* at 228.
3. *See id.* at 227-28.
4. *See id.* at 230.
5. *See id.* at 228, 230.
6. *See id.* at 227, 230.
7. *See id.* at 227 (explaining that United's demands for documentation were a deliberate "sham to justify denial of a valid claim").
8. *See id.* at 227, 230.
9. *See id.* at 229. United tried to thwart Ms. Rini's lawsuit before it began by bringing a Declaratory Judgment Action in the United States District Court for the District of South Carolina before she filed suit in Massachusetts. United's suit was dismissed by the district court in South Carolina as an improper use of the Declaratory Judgment Act. *See id.*
10. *Id.* It should be noted that the defenses asserted by United during the claims process were reasserted at trial. See *supra* notes 4-8 and accompanying text for a discussion of these defenses.
11. *See Rini*, 903 F. Supp. at 231.
12. *See id.*

claims process as "a sham designed to wear plaintiff down and force her to abandon a legitimate claim,"[13] the trial judge found for Ms. Rini on her claim under chapter 93A of the General Laws of Massachusetts[14] and tripled her damages.[15] He also awarded attorneys' fees and costs, resulting in a total judgment of $504,309.[16]

Ms. Rini's period of vindication was short. Upon appeal by United, the United States Court of Appeals for the First Circuit determined that all of Ms. Rini's common law and state statutory claims were preempted by a federal statute commonly known as the Carmack Amendment to the Interstate Commerce Act.[17] The court found that Ms. Rini's only remedy against United was compensation for the actual value of her missing items. Thus, Ms. Rini's recovery was limited to the $50,000 the jury determined her artwork was worth, the same amount that she was owed on the day she first filed her administrative claim with United in 1990.[18]

In so deciding, the First Circuit aligned itself with other circuit courts that have considered the matter of Carmack preemption.[19] As a result of the uniform decisions of the circuit courts on this matter, the moving industry in the United States has immunity for any deceptive, careless, or deliberately dishonest acts in which it chooses to engage. No matter how egregious the behavior of a moving company in processing a consumer's claim, the company's

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13. *Id.* at 232.

14. Section 2 of chapter 93A bars parties doing business in Massachusetts from engaging in unfair and deceptive acts. *See* MASS. GEN. LAWS ch. 93A, § 2 (1996). Section 9 of chapter 93A provides remedies for consumers victimized by such acts, including recovering of double or treble damages. *See id.* § 9. Chapter 93A claims are equitable in nature and are resolved by the court, not a jury. *See* W. Oliver Tripp Co. v. American Hoeschst Corp., 616 N.E.2d 118, 125 (Mass. App. Ct. 1993).

15. *See Rini*, 903 F. Supp. at 233.

16. *See id.* at 239.

17. *See* Rini v. United Van Lines, Inc., 104 F.3d 502 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997). In 1926, the Carmack Amendment became codified at 49 U.S.C. § 20(11). At the time of Ms. Rini's claim, it was codified at 49 U.S.C. §§ 10103, 10730 and 11707. In late 1995, Congress passed legislation abolishing the Interstate Commerce Commission as of January 1, 1996. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 804 (1995). Under the new legislation, the Surface Transportation Board has jurisdiction over carriers of household goods. *See* 49 U.S.C. § 702 (Supp. I. 1995). The issues presented in the *Rini* case remain vital because the new legislation preserves the Carmack Amendment in the same form as the prior legislation. *See* 49 U.S.C. § 14706(a), (f) (Supp. I. 1995).

18. Since the trial judge also determined that Ms. Rini was entitled to an award of attorneys' fees, pursuant to provisions of the Carmack Amendment, *see Rini*, 903 F. Supp. at 236, Ms. Rini will also be entitled to that portion of her fees that is attributable to her recovery under the Carmack Amendment.

19. *See* cases cited *infra* note 24.

liability will be limited to the actual value of the lost or missing items.

This Article addresses both the underpinnings and the merits of this outcome. After discussing the general principles of preemption, Part I describes the history, purpose and language of the Carmack Amendment and demonstrates that at the time the amendment was passed, Congress had no intention of preempting claims based on moving industry misconduct such as occurred in Ms. Rini's case. Part II discusses the constitutional principles that govern application of the law of federal preemption and describes how application of preemption in Carmack Amendment cases has diverged from the overall application of preemption principles in other areas of congressional legislation. This section views *Rini* in context with the overall view of preemption law taken by the courts in similar situations. Finally, Part III argues that the courts have improperly granted the moving industry carte blanche to deceive and mistreat consumers without consequence, and suggests congressional action to solve this problem.

I. HISTORY, PURPOSE, AND LANGUAGE OF THE CARMACK AMENDMENT

At the time that Ms. Rini moved from South Carolina to Massachusetts, the Carmack Amendment consisted of the following three provisions:[20]

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or bill of lading for property it receives for trans-

20. When the Carmack Amendment was passed in 1906, it read, in relevant part, as follows:

> That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Interstate Commerce Regulations, ch. 3591, § 7, 34 Stat. 593, 595 (1906) (codified with some differences in language at 49 U.S.C. § 20(11) (1926)) (repealed 1978). Section 20(11) was repealed in 1978 by Pub. L. No. 95-473, § 4(b), 92 Stat. 1466, but the Interstate Commerce Act was reenacted as positive law by the same statute. *See* Interstate Commerce Act and Related Laws, Pub. L. No. 95-473, 92 Stat. 1337 (1978).

> portation . . . . That carrier . . . [is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under the paragraph is for the actual loss or injury to the property . . . .[21]
>
> The Interstate Commerce Commission may require or authorize a carrier . . . providing transportation or service subject to its jurisdiction . . . to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by written agreement, when that value would be reasonable under the circumstances surrounding the transportation.[22]
>
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.[23]

It is evident from the language of the statute, that interstate carriers were required to issue a bill of lading when accepting goods for transportation and that if the goods were lost or damaged in the course of transportation, the initial carrier was responsible for compensating the shipper in the amount of the actual value of the goods, unless the parties had agreed to limit liability. Ms. Rini, in her lawsuit, asserted claims not just for the loss of her goods, but for the emotional injuries she endured as a result of the protracted and futile claims process with United. Thus, the essential question for the *Rini* court, as well as other federal courts of appeal that had considered similar cases,[24] was whether state common law and statutory claims that relate to injuries separate and distinct from the actual loss of goods were preempted by the federal statute outlined above.

A. *Principles of Preemption*

The basic principles of federal preemption are well settled. "Consideration under the Supremacy Clause [of the United States Constitution] starts with the basic assumption that Congress did not intend to displace state law."[25] State law is paramount, unless, and

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21. 49 U.S.C. § 11707(a)(1) (1994).
22. *Id.* § 10730(a).
23. *Id.* § 10103.
24. *See, e.g.*, Cleveland v. Beltman N. Am. Co., 30 F.3d 373 (2d Cir. 1994); Moffit v. Bekins Van Lines Co., 6 F.3d 305 (5th Cir. 1993); Hughes Aircraft Co. v. North Am. Van Lines, Inc., 970 F.2d 609 (9th Cir. 1992); Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir. 1987); W.D. Lawson & Co. v. Penn Cent. Co., 456 F.2d 419 (6th Cir. 1972).
25. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

only to the extent that, Congress unmistakably expresses its intent to usurp it.[26] "[T]he historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."[27]

In the absence of express congressional command, state law is preempted only when Congress evidences an intent to exclude it by legislating so pervasively on a subject that it occupies the field and leaves no room for state regulation or when state law conflicts directly with federal law, making it impossible to comply with both.[28] "[F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect" on the area that Congress sought to regulate.[29]

There is no explicit preemption provision in the Carmack Amendment.[30] Indeed, the only reference to state law contained in the text of the Carmack Amendment is the proviso that "[e]xcept as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."[31] Thus, shippers should be entitled to state common law and statutory remedies for injuries separate and apart from the loss of their goods, unless, despite including this savings clause, Congress "clear[ly] and manifest[ly]" expressed its intent to supersede these claims by either entirely occupying the field of shipper-carrier relations or by creating a direct clash between state and federal law.[32]

B. *Congressional Intent Behind the Carmack Amendment*

When the Carmack Amendment was enacted by Congress in 1906, it was not accompanied by any legislative history.[33] Nonetheless, Congress's intent may be gleaned from an examination of the text and decided United States Supreme Court cases surrounding its enactment. These sources support the conclusion that Congress intended to resolve specific difficulties that had arisen in the arena of interstate transit of goods due to the existence of diverse state

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26. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

27. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

28. *See* English v. General Elec. Co., 496 U.S. 72, 79 (1990).

29. *Id.* at 85.

30. *See supra* notes 21-23 and accompanying text.

31. 49 U.S.C. § 10103 (1994).

32. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

33. *See* 40 CONG. REC. 7075 (1906) (indicating that no committee considered the amendment).

laws. These laws, however, had nothing to do with shipper complaints of carrier misconduct in the claims process or any other aspect of the shipper-carrier relationship.

Pennsylvania R.R. Co. v. Hughes,[34] decided three years before the enactment of the Carmack Amendment, involved a contract between a shipper and a railroad carrier for shipment of a horse. The shipper agreed that in exchange for a reduced rate of shipment, the carrier would be responsible for only a limited monetary loss if the horse was lost or damaged in transit. This agreement was valid under the laws of New York, where it was made. However, the horse was destined for Pennsylvania, a state that did not enforce contractual limitations on liability because of its internal public policy. The shipper sued successfully in Pennsylvania for the full value of his horse, which was injured on the railroad tracks after arriving in Philadelphia.[35]

In the United States Supreme Court, the carrier objected that such state interference in its practices was a violation of the Interstate Commerce Act. The Court disagreed, declaring that while the Act covered many areas of interstate commerce, Congress had not legislated on the precise matter in controversy.[36] Since Congress had not expressed any intention with respect to the validity of contracts between shippers and carriers to limit carrier liability for loss or damage to goods, the Court held that state law remained controlling. Consequently, the shipper in *Hughes* was permitted to recover the full amount of his loss resulting from the injury to his horse pursuant to Pennsylvania law, despite the previously agreed to limitation.[37] The Court invited a congressional response to its opinion in *Hughes* by noting the absence of legislation on the matter.[38]

Three years later, Congress took up the invitation and passed the Carmack Amendment.[39] The amendment provided a federal scheme of carrier liability for goods lost or damaged in interstate transit by placing responsibility for the goods with the initial carrier and by providing that the terms of the bill of lading issued by the initial carrier controlled the transaction.[40]

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34. 191 U.S. 477 (1903).
35. *See id.* at 478-80.
36. *See id.* at 488.
37. *See id.*
38. *See id.* at 491.
39. Interstate Commerce Regulations, ch. 3591, § 7, 34 Stat. 593, 595 (1906) (repealed 1978). See *supra* note 20 for original text of the amendment.
40. *See* Adams Express Co. v. Croninger, 226 U.S. 491, 504 (1913) (defining the "significant and dominating features" of the Carmack Amendment).

This legislation was a direct response to the Supreme Court's decision in *Hughes*, which had continued the uncertainty regarding the validity of contractual limitations on liability depending on where a shipment originated and its final destination. This interpretation of the amendment was confirmed in the first case to examine it in detail, *Adams Express Co. v. Croninger*.[41]

Adams Express Co. involved a bill of lading "in all essentials identical" to the one at issue in *Hughes*.[42] In *Adams Express Co.*, the shipper of a diamond ring lost in transit attempted to recover the full value of the ring, although he had previously contracted to limit the carrier's liability for the ring to fifty dollars in exchange for a lower shipping cost.[43] The shipper relied on Kentucky's common law permitting him to recover the full amount of his loss despite the contractual agreement contained in the bill of lading.[44] The Court determined that the rule of law announced in *Hughes*, that would have permitted the shipper's full recovery, was superseded by passage of the Carmack Amendment.[45]

Congress, it reasoned, had responded to the *Hughes* Court's invitation to legislate with respect to this precise issue. Congress demonstrated its intent to eliminate the confusion resulting from conflicting state laws regarding limited liability contracts by providing that the terms of the initial carrier's bill of lading would control recovery on the shipment. While Congress did not explicitly announce its intent to usurp state law on the issue, the *Adams Express Co.* Court found that it implicitly did so by announcing a uniform policy on the subject.[46] The Court, quoting the Georgia Court of Appeals, noted the difficulties created by the policy perpetuated in the *Hughes* decision:

> Some States allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper

41. 226 U.S. 491 (1913).
42. *Id.* at 501.
43. *See id.* at 492-93.
44. *See id.* at 497-98.
45. *See id.* at 505.
46. *See id.* at 505-06.

> engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another.[47]

The Court held that Congress intended to eliminate this confusion by passing the Carmack Amendment. Immediately following the foregoing passage, the Court stated the following:

> That the legislation supersedes all the regulations and policies of a particular State upon *the same subject* results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of *the subject* is covered so completely that there can be no rational doubt but that Congress intended to take possession of *the subject* and supersede all state regulation with reference to it.[48]

From the standpoint of modern day shippers like Ms. Rini, the essential question is the scope of "the subject" referred to by the *Adams Express Co.* Court. The most reasonable reading of the words, in the context of the decision, is that they refer to the enforceability of a contract between a shipper and a carrier which limits the carrier's liability for loss of goods in exchange for a lower shipping cost. There is no indication that the *Adams Express Co.* Court was referring to any other aspect of the shipper-carrier relationship, particularly not the post-loss claims process.

C. *Application of Preemption Principles to Carmack Cases*

Cases decided by the United States Supreme Court in the years immediately following passage of the Carmack Amendment did little to clarify the scope of "the subject" referred to in the *Adams Express Co.* decision. In 1914, in *Missouri, Kansas & Texas Railway Co. v. Harris*,[49] the Court reviewed a Texas statute that allowed shippers who sue to recover damages under a bill of lading, to collect attorneys' fees from the carrier as well.[50] The *Harris* Court

47. *Id.* at 505 (quoting Southern Pac. Co. v. Crenshaw, 5 Ga. App. 675, 687 (1909)).

48. *Id.* at 505-06 (emphasis added).

49. 234 U.S. 412 (1914).

50. *See id.* at 415. Demonstrating a sign of changed times, the attorneys' fees

rejected the argument that state statutes permitting recovery of attorneys' fees were now preempted by the Carmack Amendment, reasoning that statutes did not "enlarge or limit the responsibility of the carrier for the loss of property entrusted to it in transportation."[51] The *Harris* Court remarked that Congress had not acted on the question of entitlement to attorneys' fees when goods were lost or damaged in interstate commerce, and that unless and until Congress acted, state law on the matter was enforceable.[52] The message of the *Harris* Court, thus appeared to be that the Carmack Amendment preempted only state laws that specifically addressed the issue of the amount of recovery shippers were entitled to for the loss of their goods and the ability of shippers and carriers to limit the carrier's liability for such loss by contract. On the other hand, the *Harris* Court indicated, state laws that allow recovery for losses sustained by shippers in addition to the loss of their goods remained valid exercises of state power.[53]

Nonetheless, a case decided the very next year by the United States Supreme Court muddied this message considerably. *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*[54] involved a South Carolina statute that imposed a fifty dollar penalty on carriers that failed to pay legitimate claims for loss or damage to goods within forty days.[55] The *Varnville* Court determined that this statute, which presumably was intended to compensate shippers for the inconvenience related to the carriers' delay in resolving their claims, *was* preempted by the Carmack Amendment. The Court found the statute to be preempted because the state policy, however well conceived, went further than Congress intended. The *Varnville* Court said the following of the South Carolina statute:

> The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden . . . . But that is immaterial.

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awarded in this case were only ten dollars. Nonetheless, this recovery was over three times the amount of the shipper's actual damages of three dollars. *See id.*

51. *Id.* at 420.

52. *See id.* at 422. Congress later acted on the issue of attorneys' fees under the Carmack Amendment in cases involving shippers of household goods. *See* 49 U.S.C. § 11711(d) (1994). However, because Congress never legislated on the matter of attorneys' fees in cases involving commercial shippers, state laws providing for awards of attorneys' fees are enforceable in those Carmack cases. *See* A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

53. *See Harris*, 234 U.S. at 420.

54. 237 U.S. 597 (1915).

55. *See id.* at 600-01.

> When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.[56]

This language might be interpreted as holding that any state statute enhancing the recovery of shippers beyond the value of their lost or damaged goods was preempted by the Carmack Amendment; however, the *Varnville* Court emphasized the continued vitality of the *Harris* decision.[57] In so doing, the *Varnville* Court indicated that the problem with the South Carolina statute was not that it increased the shipper's recovery for an injury separate from the loss of property, but that it conflicted with the overall scheme of recovery set forth in the Carmack Amendment.

The South Carolina statute involved in *Varnville* was more comprehensive than the Texas statute reviewed in *Harris*. It imposed upon all carriers the burden of identifying which carrier had lost or damaged a shipper's goods within forty days, or to pay the claim itself. If a carrier failed to either identify the responsible carrier or pay the claim within forty days, the carrier was liable to the shipper for the fifty dollar penalty.[58] This procedure conflicts with the one set forth in the Carmack Amendment, which places responsibility for the shipment squarely on the initial carrier.[59]

The Carmack Amendment, and the Supreme Court cases that were decided in the years immediately following its passage, obviously preceded the advent of the consumer protection legislation that spread throughout the United States in the latter part of this century.[60] This legislation heightened consumer expectations that businesses would deal with consumers in a fair and equitable manner, or face consequences through litigation. Not surprisingly, in recent years, the moving industry found itself faced with claims based on both state consumer protection legislation and common law theories of recovery for related acts. However, the moving industry has been successful in asserting the Carmack Amendment as

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56. *Id.* at 604 (citation omitted).

57. *See id.* at 603.

58. *See id.* at 600-01.

59. *See* 49 U.S.C. § 11707 (1994).

60. *See generally* MICHAEL C. GILLERAN, THE LAW OF CHAPTER 93A, THE MASSACHUSETTS CONSUMER AND BUSINESS PROTECTION ACT § 1.1 (1989). Gilleran notes a "sea change" in standards of commercial liability and remarks that every state now has a consumer protection law similar to chapter 93A of the General Laws of Massachusetts. *See id.* at 4.

a shield to such suits.[61]

Prior to *Rini v. United Van Lines, Inc.*,[62] most cases addressing the issue of Carmack preemption involved shippers attempting to recover damages for carrier negligence during the course of transport.[63] Consequently, there was little authority governing the disposition of common law claims based on carrier wrongdoing during the course of processing claims. Trial court decisions in the District of Massachusetts, however, allowed for state law remedies to consumers who suffered injuries separate from the loss or damage to their goods.[64]

The *Rini* decision ended that trend with a definitive statement

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61. *See, e.g.*, Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 381 (2d Cir. 1994); Moffit v. Bekins Van Lines Co., 6 F.3d 305, 307 (5th Cir. 1993); Schultz v. Auld, 848 F. Supp. 1497, 1506 (D. Idaho 1993); Suarez v. United Van Lines, 791 F. Supp. 815, 817 (D. Colo. 1992); Magetson v. United Van Lines, Inc., 785 F. Supp. 917, 922 (D.N.M. 1991); Pierre v. United Parcel Serv., Inc., 774 F. Supp. 1149, 1150-51 (N.D. Ill. 1991).

62. 903 F. Supp. 224, 231 (D. Mass. 1995), *rev'd*, 104 F.3d 502 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997).

63. *See, e.g.*, Hughes Aircraft Co. v. North Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992) (holding that plaintiffs could not assert a state law negligence claim for damaged goods when the driver of a moving van fell asleep on the road); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (9th Cir. 1992) (holding that plaintiff's common law claims for goods destroyed in a fire on a moving van were preempted); *see also* Underwriters at Lloyds of London v. North Am. Van Lines, 890 F.2d 1112, 1120 (10th Cir. 1989) (preempting state law claims for loss or damage to goods); Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261, 1264 (8th Cir. 1984) (preempting state law claims); W.D. Lawson & Co. v. Penn Cent. Co., 456 F.2d 419, 421 (6th Cir. 1972) (preempting state law claims); *cf. Beltman*, 30 F.3d at 380 (finding that federal common law claim for breach of the contractual obligation of fair dealing was preempted based on carrier misconduct during the claims process); *Moffit*, 6 F.3d at 307 (denying common law remedy for late delivery of goods).

64. The district court decision in *Rini* allowed Ms. Rini to recover on her state law claims because "[t]he Carmack Amendment only provides a remedy for damages arising from the loss of goods during transport," and Ms. Rini's state law claims "were based on alleged misconduct by United not undertaken in the course of transporting goods." *Rini*, 903 F. Supp. at 231. In addition, two other trial court decisions in the District agreed with this reasoning. In *Sokhos v. Mayflower Transit, Inc.*, 691 F. Supp. 1578 (D. Mass. 1988), the court allowed the plaintiff to recover on state law causes of action for the mover's late delivery of her belongings and subsequent uncooperativeness during the claims process. *See id.* at 1579-81. Similarly, in *Mesta v. Allied Van Lines International, Inc.*, 695 F. Supp. 63 (D. Mass. 1988), the court, although finding that the plaintiff's claims for negligence during the transport were preempted by the Carmack Amendment, allowed recovery for intransigence during the claims process under chapter 93A of the General Laws of Massachusetts. *See id.* at 64-65. Prior to explicitly considering the issue in *Rini*, the First Circuit implied that it agreed with the distinction made by the *Rini*, *Sokhos*, and *Mesta* courts by allowing a plaintiff's recovery on state law claims of intentional infliction of emotional distress and breach of contract to stand, despite the carrier's contention that such claims were preempted by the Carmack Amendment. *See* Fredette v. Allied Van Lines, Inc., 66 F.3d 369 (1st Cir. 1995).

from the First Circuit on the issue of Carmack preemption. The *Rini* court determined that any claim "based on the loss or damage [to] goods" was preempted.[65] In so deciding, the *Rini* court acknowledged that there was no legislative history available to steer its inquiry regarding the intent of Congress to preempt state law claims.[66] It also recognized that previous Supreme Court cases did not provide clear guidance on the preemptive reach of the Carmack Amendment.[67] Nonetheless, the *Rini* court gleaned congressional intent to preempt state law remedies from its interpretation of the purpose of the statute and the existence of procedural regulations governing the claims process.[68] It also cited the desirability of uniformity within the interstate moving industry as a rationale for its decision.[69]

With the First Circuit decision, consumers now face a virtually insurmountable barrier when they suffer mistreatment at the hand of carriers during the claims process. From a consumer protection standpoint, this is an unfortunate development because the moving industry is now free to deny the legitimate claims of consumers in the hopes that they will ultimately abandon them. The carrier may remain comfortable in the knowledge that if consumers persist in pressing claims, they will only, under the Carmack Amendment, be entitled to recover the amount owed at the start of the claims process.[70] From the standpoint of legal analysis, the *Rini* decision is unfortunate because it conflicts substantially with well settled constitutional principles governing federal preemption of state law remedies.

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65. *Rini*, 104 F.3d at 506. The *Rini* court stated, however, that "liability arising from separate harms—apart from the loss or damage to goods—is not preempted." *Id.* The court stated that such liability might arise from a claim of intentional infliction of emotional distress, but did not specify whether such a claim was preempted if it arose from infliction of distress during the claims process. *See id.* One might expect that plaintiffs in Ms. Rini's position will in the future assert claims of intentional infliction of emotional distress on the theory that these claims remain redressable under state law.

66. *See id.* at 504.

67. *See id.*

68. *See id.* at 505.

69. *See id.* at 507. Regulations governing interstate carriers with regards to the procedural requirements for filing and settling claims are set forth at 49 C.F.R. pt. 1005 (1997).

70. This is not an unrealistic fear. The factual background of *Rini* and other Carmack preemption cases reflect periodic unscrupulousness by the moving industry in resolving consumer claims. *See* cases cited *supra* note 24; *see also* Andrea Adelson, *Boxing Up a Life and Moving Requires Caution and Cash*, N.Y. TIMES, Dec. 23, 1995, at F8 (describing the difficulties and abuse shippers of household goods can encounter when submitting a claim).

II. THE MISAPPLICATION OF CARMACK PREEMPTION

A. *Comparison of Preemption Principles as Applied to Non-Carmack Cases*

As set forth above, the Supreme Court has repeatedly held that state common law and statutory remedies remain available, despite the existence of federal legislation in a related area, unless Congress has made its intent to preempt clear and manifest.[71] By joining other circuits to preclude recovery on Ms. Rini's state law claims, the United States Court of Appeals for the First Circuit assured that disputes between shippers and carriers of household goods will be decided in a manner that does not give proper deference to the constitutional presumption against preemption.

It is unquestionable that a circumscribed preemption of state law can be inferred from the provision of the Carmack Amendment that fixes a carrier's liability for loss or damage of goods to their actual value or the declared value of the shipper.[72] However, the *Rini* court extended this implicit preemption to bar recovery for all injuries that might be incurred during the course of the shipper-carrier relationship, even when those injuries are separate and distinct from the loss of goods. Ms. Rini incurred damages during the course of a claims process that the trial court found to be egregiously unfair and abusive.[73] Despite the Supreme Court's many admonitions that state law is not preempted unless Congress has made its intention to do so absolutely clear,[74] the First Circuit inferred preemption of Ms. Rini's state law remedies for this mistreatment in the absence of any meaningful evidence of congressional intent to preempt.

The text of the Carmack Amendment[75] establishes that the legislation regulates three areas. First, it mandates the initial carrier to compensate the shipper if goods are lost or damaged in transit.[76] Second, it provides that the shipper and carrier can contract to limit

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71. *See supra* Part I.A.

72. *See* 49 U.S.C. § 11707(a)(1) (1994). See *supra* text accompanying notes 21-23 for the entire text of the Carmack Amendment.

73. *See* Rini v. United Van Lines, Inc., 903 F. Supp. 224, 227-30 (D. Mass. 1995), *rev'd*, 104 F.3d 502 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997). For a discussion of the abusive claims process, see *supra* notes 2-8 and accompanying text.

74. See *supra* notes 25-29 and accompanying text for a discussion of the Supreme Court's stance on preemption.

75. *See supra* text accompanying notes 21-23.

76. *See* 49 U.S.C. § 11707 (1994). It should be noted that the language of the Carmack Amendment is no longer codified within § 11707. However, see *supra* note 17 for a discussion of the continued relevance of the Carmack Amendment.

the carrier's liability for lost or damaged goods to a declared value.[77] Third, it prescribes the remedy available for lost or damaged goods when no contractual limitation on liability exists or when the contract has been improperly formed.[78] State law regulation on these points is preempted.[79]

However, it is a great leap to assume that by regulating these three areas Congress intended to sweepingly obliterate claims for separate injuries such as Ms. Rini's. Examination of other field preemption cases teaches that courts should carefully examine the extent of the field occupied and evidence of congressional intention to preempt the particular state law claim at issue before inferring the existence of preemption.[80] State law must have "some direct and substantial effect" on the subject of congressional legislation to support a finding of preemption.[81]

This is true even when Congress has enacted complex and comprehensive legislation regarding subjects requiring substantial regulation and uniformity. For instance, in *Silkwood v. Kerr-McGee Corp.*,[82] the Supreme Court concluded that Congress intended to occupy the field of nuclear safety and oust all state law regulation in that area.[83] However, the Court determined that Congress did not intend to preclude all state law remedies, including punitive damages, for individuals who suffered radiation injuries, even though the award of such damages could conceivably have some impact on nuclear safety decisions.[84] The Court noted that Congress was silent on this issue when enacting and amending the Atomic Energy Act and that it could not assume that Congress intended to preempt state law remedies without comment.[85]

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77. *See id.* § 10730(a). Although the Carmack Amendment is no longer codified within § 10730, see *supra* note 17 for a discussion of the amendment's continued relevance.

78. *See id.* § 11707. Although the Carmack Amendment is no longer codified within § 11707, see *supra* note 17 for a discussion of the amendment's continued relevance.

79. *See* New York, New Haven & Hartford R.R. v. Nothnagle, 346 U.S. 128, 131 (1953) ("With the enactment in 1906 of the Carmack Amendment, Congress [established] a nationally uniform policy governing interstate carriers' liability for *property loss*." (emphasis added)); Adams Express Co. v. Croninger, 226 U.S. 491, 504-05 (1913).

80. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-86 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

81. English v. General Elec. Co., 496 U.S. 72, 85 (1990).

82. 464 U.S. 238 (1984).

83. *See id.* at 250.

84. *See id.* at 251-52.

85. *See id.* at 251. Specifically, the Court stated that congressional silence on the

Most recently, in *Medtronic, Inc. v. Lohr*,[86] the Supreme Court held that a comprehensive federal statute governing the regulation of medical devices did not preempt state law product liability claims. Despite the existence of substantial federal control over marketing and development of medical devices, the Court noted that preemption of such claims would have "the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order 'to provide for the safety and effectiveness of medical devices intended for human use.'"[87]

Cases from the federal courts of appeals also demonstrate that courts should carefully parse federal statutes for evidence of congressional intent to preempt. This should be done in order to avoid applying preemption principles to matters that Congress failed to address. For example, in *Tousley v. North American Van Lines, Inc.*,[88] the United States Court of Appeals for the Fourth Circuit examined the interplay between a state statute governing pre-contract negotiations between a lessor and a motor carrier, and the provisions of the Interstate Commerce Act governing formation of a motor carrier's lease agreement.[89] The South Carolina statute at issue placed a number of requirements on entrepreneurs selling business opportunities, and had the "obvious purpose of . . . alert[ing] South Carolina citizens to the possibility that investments in business ventures may be ill-conceived and to provide some protection from unscrupulous promoters."[90] The Fourth Circuit determined that while the Interstate Commerce Act addressed the issue of contract formation between motor carrier lessors and lessees, it did not address the *pre*-contract behavior governed by the South Carolina statute.[91] Although the Interstate Commerce Commission stated, when adopting the regulations at issue, that it was leaving "'[l]essors and lessees . . . completely free to bargain at arm's length and negotiate the sale or rental of any products, equipment, or services,'" the *Tousley* court did not find that this rose to the level of

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issue "takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by [tortious] conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*

86. 518 U.S. 470 (1996).
87. *Id.* at 487.
88. 752 F.2d 96 (4th Cir. 1985).
89. *See id.* at 103.
90. *Id.* at 100.
91. *See id.* at 101.

the "clear and manifest" expression of congressional intent necessary for a finding of preemption of state law governing contract negotiations.[92] Under those circumstances, the court found that South Carolina retained the right to legislate in this area. The *Tousley* court also noted that the two statutes served the same purpose of assuring fairness in the relationship of carriers and lessors, and therefore complemented each other.[93]

Before deciding *Rini*, the First Circuit applied a similarly careful analysis to a preemption case. In *Schafer v. American Cyanamid Co.*,[94] the court determined that a comprehensive federal statute governing remedies for vaccine-related injuries did not specifically address the question of loss of consortium claims for family members of those injured by vaccines.[95] In that case, the First Circuit would not infer congressional intent to preempt state law claims for such losses, despite the strong federal interest in limiting the liability of vaccine manufacturers so they would continue making this important product.[96] In his concurring opinion, Judge Stahl stated that this conclusion was unavoidable because of the court's "circumscribed scope of . . . authority," but encouraged Congress to act if it did not concur in the result.[97]

When the analysis employed in these cases is applied to the dispute between Ms. Rini and United, it seems evident that the Carmack Amendment should not have preempted Ms. Rini's state law claims. The Carmack Amendment says nothing about injuries inflicted by carriers on shippers that are separate and distinct from the loss of goods, or even about the claims process itself.[98] This should have prevented a finding of preemption in *Rini*, because as the First Circuit itself stated, a congressional act should not be read to preempt state law through silence.[99] Preemption is particularly counter-indicated when, as here, "the state law at issue creates a remedy unavailable under federal law."[100]

There is no legislative history supporting the conclusion that

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92. *Id.* at 102.

93. *See id.*

94. 20 F.3d 1 (1st Cir. 1994).

95. *See id.* at 7.

96. *See id.* at 6-7. In fact, the court stated that "[p]re-emption law . . . cautions us against finding that a congressional act pre-empts a state law through silence." *Id.* at 6.

97. *Id.* at 7 (Stahl, J., concurring).

98. *See supra* text accompanying notes 21-23.

99. *See Schafer*, 20 F.3d at 6.

100. *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)).

Congress intended to preempt state law claims like Ms. Rini's.[101] In fact, the existing history indicates that Congress aimed to resolve entirely different problems through enactment of the Carmack Amendment.[102] Without the availability of state law remedies, Ms. Rini was left with no judicial recourse for the injuries she suffered during the claims process. Under these circumstances, there does not appear to be a "clear and manifest" intent to preempt state law.[103]

B. *Preservation of Uniformity*

The *Rini* court cited the desirability of uniformity for carriers as a factor in its decision that Ms. Rini's state law claims were preempted.[104] However, for the uniformity argument to support a finding of preemption, the court must determine that either it is impossible to comply with both state and federal law or that state law stands as an obstacle to the accomplishment of the full purposes of Congress.[105]

The text of the Carmack Amendment fully reveals the extent of the uniformity Congress sought when it enacted the legislation. Congress intended that shippers whose goods were lost in transit should not have to track down which of several interstate carriers lost them in order to recover for their loss. It also intended to permit carriers to contract to limit liability, despite state law to the contrary. In addition, it intended that, in the absence of a properly formed contractual limit on liability, shippers should be allowed to recover for the actual loss of their goods.[106]

The *Rini* decision has transformed the uniformity created over the regulated areas of the Carmack Amendment into complete immunity for anything that occurs in the course of the shipper-carrier relationship. Certainly, if Congress had intended this result, it would have said so.[107]

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101. *See supra* note 33 and accompanying text.

102. *See supra* Part I.B.

103. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

104. *See* Rini v. United Van Lines, Inc., 104 F.3d 502, 505 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997); *see also* Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 379 (2d Cir. 1994) (noting the importance of the Carmack Amendment in preserving uniformity for interstate carriers).

105. *See* English v. General Elec. Co., 496 U.S. 72, 79 (1990).

106. *See supra* text accompanying notes 21-23.

107. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 487, 491 (1996); *see also English*, 496 U.S. at 83 (remarking that Congress could not have intended to preempt state law intentional infliction of emotional distress claims when the implication would be that an

In *Missouri, Kansas & Texas Railway Co. v. Harris*,[108] the Supreme Court made clear that the uniformity sought by Congress when it enacted the Carmack Amendment was not a barrier to enforcing any and all state laws in some way related to interstate shipment of household goods. In *Harris*, the Court held that states were free to enact general legislation to compensate shippers for damages they incurred as a result of carrier recalcitrance, because this did not interfere with the federal scheme.[109] Similarly, allowing shippers to recover for abusive claims processes would not interfere with the federal scheme governing recovery for the loss of goods. This is particularly true since carriers are uniquely able to avoid the liability that follows from acts involved in cases like *Rini*. Carriers can avoid the unpredictability related to state law claims by resolving shippers' claims fairly and expeditiously. Unfortunately, unsuspecting shippers cannot so easily avoid injuries like the ones suffered by Ms. Rini. In any event, it is reasonable to assume that if Congress intended to grant carrier immunity for misconduct during the claims process in order to assure them of uniformity, it would have expressly stated so.

C. *Effect of Regulations on Preemption Finding*

The *Rini* court cited the existence of regulations governing the claims process as guiding its inference that Congress intended to preempt all state law claims related to the loss or damage of goods.[110] However, the existence of even extensive regulations do not support a conclusion that state law remedies are preempted.[111] Again, intent is the touchstone of the preemption analysis.[112] The presumption against preemption is strengthened when the federal regulations and state law supplement each other to accomplish the same purpose.[113] Here, enforcement of the federal regulations and state law both seek to promote fairness in the claims process, and thus complement, rather than conflict with, each other.

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employer could "retaliate against a nuclear whistle-blower by hiring thugs to assault the employee on the job" without being answerable to state law).

108. 234 U.S. 412 (1914).

109. *See id.* at 421-22; *see also* A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

110. *See* Rini v. United Van Lines, Inc., 104 F.3d 502, 505 (1st Cir.), *cert. denied*, 118 S. Ct. 51 (1997).

111. *See Medtronic*, 518 U.S. at 498-500; *English*, 496 U.S. at 87 (1990).

112. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

113. *See* Tousley v. North Am. Van Lines, Inc., 752 F.2d 96, 102-03 (4th Cir. 1985).

Examination of the Interstate Commerce Commission regulations covering the claims process demonstrates that they do not have a preemptive effect on state law. The regulations include some basic procedural aspects of the claims process. For instance, a claim must be in writing, the carrier must establish individual claims files, and the carrier must pay, decline to pay or make a compromise settlement within a specified amount of time.[114] These regulations are, in all respects, completely compatible with the requirements of Massachusetts law.[115]

Another strong consideration in the preemption analysis is an agency's own approach to the preemptive effect of its regulations.

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.[116]

The claims process regulations, which were passed in 1972, are silent on the issue of preemption. The ICC did not state any intention to preempt state law in its introductory statement to the new regulations.[117] The failure to speak on the subject reflects that the ICC did not intend the regulations to have a preemptive effect.

Moreover, it is not dispositive on the issue of preemption that the ICC had the authority to sanction carriers who violate the regulations. The existence of these powers does not oust all potential state law remedies. State law claims and federal enforcement powers are presumed to exist side by side.[118]

III. CONCLUSION

The view of Carmack preemption taken by the *Rini* court appears inconsistent with the general principles of preemption, as ap-

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114. *See* 49 C.F.R. pt. 1005 (1997).

115. Interestingly, little of the conduct viewed by the *Rini* trial court judge as "egregious" and "unfair" is specifically addressed by the regulations, which belies a construction of the regulations as comprehensive. See *supra* notes 1-16 and accompanying text for a discussion of United's behavior and the trial court's ruling.

116. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 583 (1987) (quoting Hillsbourough County v. Automated Med. Lab., Inc., 471 U.S. 707, 718 (1985)).

117. *See* 37 Fed. Reg. 4257 (1972).

118. *See* Silkwood v. Kerr-McGee Corp., 461 U.S. 238, 254 (1984).

plied by the United States Supreme Court and by the First Circuit itself in other preemption cases. It may be that the *Adams Express Co. v. Croninger*[119] Court's statement in 1913 that "[a]lmost every detail of the subject is covered so completely that there can be no rational doubt that Congress intended to take possession of the subject and supersede all state regulation with reference to it,"[120] was the death knell for all consumers seeking remedies against unscrupulous interstate carriers for the future. Although the *Adams Express Co.* Court surely was not considering the relationship between the Carmack Amendment and consumer protection acts that would be enacted many years later, this statement has created an impossible barrier for those seeking an exception to federal preemption.

Unfortunately, because of this statement by a Court sitting long ago, the moving industry has been able to exempt itself from the requirements of good faith and fair dealing with its customers, by asserting immunity from state law claims based on implicit preemption by the Carmack Amendment. Given the Supreme Court's recent decision not to take certiorari in *Rini*, it is unlikely that this problem will ever be resolved by judicial means.

Now what probably has always been the best means of exacting fairness from the moving industry has become the only means. Since consumers have no access to state law remedies designed to protect them from unscrupulous businesses, Congress should act quickly to insure more stringent regulation of the moving industry's claims process practices and to provide consequences for violations that have bite. Congress has a number of options available in this regard. It could explicitly state that it does not intend to preempt state law remedies and restore the ability of consumers to bring state common law and statutory claims when they have been wronged by interstate carriers in the course of settling a claim. Alternatively, Congress could create an administrative system, providing consumers with a reasonably swift and effective means of resolving their complaints against recalcitrant moving companies. Regardless of the method chosen, the moving industry should not be allowed to continue to ride roughshod over its customers, with no consequence for any longer than the time it takes to pass such legislation.

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119. 226 U.S. 491 (1913).
120. *Id.* at 505-06.