Private Rights of Action to Enforce the Truth-in-Leasing Regulations in Court

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I. INTRODUCTION

Since the enactment of the Interstate Commerce Commission Termination Action of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, owner-operators have sought to enforce alleged violations of the Truth-in-Leasing regulations, title 49, part 376 of the Code of Federal Regulations, in court, asserting private rights of action under 49 U.S.C. § 14704(a)(1) and (2).[1] In *Owner-Operator Independent Drivers Association v. New Prime, Inc.*, the Eighth Circuit ruled that 49 U.S.C. § 14704(a)(1) and (2) create a private right of action for owner-operators to seek injunctive relief and damages.[2] Several district courts have since adopted the reasoning of

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1. *See, e.g.,* Owner Operator Indep. Drivers Ass'n v. New Prime, 192 F.3d 778 (8th Cir. 1999).

2. *Id.* at 784-85.

New Prime, rejecting the carriers' arguments that actions to enforce the Truth-in-Leasing regulations must first be filed with the Federal Motor Carrier Safety Administration ("FMCSA").[3]

This article examines the statutory language on which the federal courts have relied in finding that 49 U.S.C. § 14704 creates a private right of action for owner-operators to seek injunctive relief and damages absent action by the FMCSA in the first instance. Moreover, this article examines the language of 49 U.S.C. § 14705, wherein Congress enacted the statute of limitations for the various private rights of action created by 49 U.S.C. § 14704, and the application of section 14705 to owner-operator suits to enforce the Truth-in-Leasing regulations.

II. Private Rights of Action to Enforce the Truth-in-Leasing Regulations

A. Congressional Intent

Owner-operators have relied upon 49 U.S.C. § 14704(a)(1) and (2) to support their private actions to enforce the Truth-in-Leasing regulations. These provisions provide as follows:

> Rights and remedies of persons injured by carriers or brokers
> (a) In general.—
> (1) Enforcement of order.—A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.
> (2) Damages for violations.—A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.[4]

The plain language of this provision alone does not indicate that Congress intended to create a private right of action, but rather that it intended that the Secretary or the FMCSA have exclusive jurisdiction to review alleged violations of the Truth-in-Leasing regulations. First, sub-

3. *See, e.g.*, Owner-Operator Indep. Drivers Ass'n v. C.R. Eng., Inc., 325 F. Supp. 2d 1252, 1264 (D. Utah 2004); Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc., No. 3:02-CV-1005-J-25HTS, 2003 WL 23941713, at *2 (M.D. Fla. Sept. 30, 2003); Owner-Operator Indep. Drivers Ass'n v. Swift Transp., 288 F. Supp. 2d 1033, 1035 n.3 (D. Ariz. 2003); Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 161 F. Supp. 2d 948, 955 (S.D. Ind. 2001); *but see* Renteria v. K & R Transp., Inc., No. 98 CV 290 MRP, 1999 WL 33268638, at *6 (C.D. Cal. Feb. 23, 1999) ("The Court . . . finds that there is no private cause of action under the ICCTA for damages without first obtaining an agency order.").

4. 49 U.S.C. § 14704(a)(1), (2) (1994).

section (a)(1) by its plain terms is limited to enforcement of an "order" of the Secretary or the FMCSA, which is supported by its title, "Enforcement of Order."[5] Further, subsection (a)(1) provides for a private right of action only when a defendant refuses to "obey an *order* of the Secretary or . . . Board" and further provides that the civil action is only "to enforce that *order*."[6]

The question then becomes whether Congress intended that the leasing regulations should somehow be considered an order. If Congress intended to create a private right to sue for violations of both orders and regulations, it could have done so, as it did in section 14702(a)(2), where it specifically empowered the Secretary (or the FMCSA) to bring a civil action "to enforce this part, or a *regulation or order* of the Secretary."[7] Many cases have recognized that a regulation is not to be considered an order where a statute specifically provides for a private right of action to enforce only an order. For example, in *Mallenbaum v. Adelphia Communications Corp.*, plaintiffs attempted to bring an action under the Federal Communications Act, 47 U.S.C. § 401(b), a provision similar to section 14704(a), for alleged violations of a regulation promulgated by the Federal Communications Commission ("FCC").[8] In relevant part, section 401(b) provides that, "[i]f any person fails or neglects to obey any *order* of the Commission other than for the payment of money, . . . any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order."[9] The Third Circuit affirmed the dismissal of the action for failure to state a claim because a regulation is not an order under section 401(b).[10]

The second sentence of section 14704 (a)(1) clearly creates a private right of action to seek injunctive relief, but again, the language of the statute when read as a whole limits such actions.[11] The entire subsection (a)(1) is titled "Enforcement of Order," and, thus, the second sentence should be construed to simply grant a right to seek injunctive relief

5. *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (quoting Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528-29 (1947)) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.").

6. 49 U.S.C. § 14704(a)(1) (emphasis added).

7. *Id.* § 14704(a)(2) (emphasis added).

8. Mallenbaum v. Adelphia Commc'ns Corp., 74 F.3d 465, 467 (3d Cir. 1996).

9. 47 U.S.C. § 401(b) (2000) (emphasis added).

10. *Mallenbaum*, 74 F.3d at 467; *see also* New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n, 742 F.2d 1, 9 (1st Cir. 1984) (holding that "private parties could not use § 401(b) of the Communications Act to enforce an FCC rule because the word 'order' in that section does not include agency rules . . ."); PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 730 (3d Cir. 1973) (rejecting the contention that "a clearly quasi-legislative exercise of power should be subjected to review under the provisions set up exclusively for review of adjudicatory orders of the FCC.").

11. 49 U.S.C. § 14704(a)(1).

from a court in conjunction with the private party's complaint seeking enforcement of the FMCSA's order when the carrier has violated 49 U.S.C. §§ 14102 to 14103, the provisions empowering the Secretary to regulate the contractual relationships between owner-operators and motor carriers.[12]

By its express wording, 49 U.S.C. § 14704(a)(2) also does not provide for a private right of action. Subsection (a)(2) states that a carrier or broker "is liable for damages" if the carrier or broker violates "this part."[13] Reading subsections (a)(1) and (2) together, the statutory language alone creates a private right of action for damages only after the carrier violates an order issued by the FMCSA.[14] Subsection (a)(1) provides for the right of action in such an instance and subsection (a)(2) allows for the recovery of damages.[15]

In seeking this interpretation, the carriers have sought the same interpretation of section 14704, which governs actions against motor carriers, as that given to 49 U.S.C. § 11704, which uses nearly identical language to set forth actions against rail carriers. In *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, the Eighth Circuit discussed this parallel provision of the ICCTA.[16] In its discussion of section 11704, the court in *DeBruce* did not discuss any private right of action to enforce agency regulations.[17] Instead, it limited its discussion of remedies to the enforcement of agency orders and excess tariff claims:

> In 1995 Congress passed the Interstate Commerce Commission Termination Act under which the STB replaced the Interstate Commerce Commission (ICC) as the regulatory agency for rail transportation. Application can be made to the STB by disappointed shippers for emergency orders similar to injunctions, 49 U.S.C. § 721(b)(4), and for damages, 49 U.S.C. § 11704. . . . *Federal court jurisdiction exists over claims for violations of STB orders* and for charges that are in excess of the applicable rate.[18]

The district court in *DeBruce* had reached the same conclusion. It held, in a part of its opinion not reached or discussed by the Eighth Circuit, that 49 U.S.C. § 11704, the parallel rail provision of the ICCTA, did not authorize private actions to enforce agency regulations.[19]

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12. *See Almendarez-Torres*, 523 U.S. at 234 (quoting Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528-29 (1947)) (" '[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.").

13. 49 U.S.C. § 14704(a)(2).

14. *Id.* § 14704(a)(1), (2).

15. *Id.*

16. DeBruce Grain, Inc., v. Union Pac. R.R. Co., 149 F.3d 787, 788 (8th Cir. 1998).

17. *Id.* at 788.

18. *Id.* (citing 49 U.S.C. §§ 702, 11704) (emphasis added).

19. DeBruce Grain, Inc., v. Union Pac. R.R., 983 F. Supp. 1280, 1284 (W.D. Mo. 1997), *aff'd on other grounds*, 149 F.3d 787 (8th Cir. 1998). The Eighth Circuit's opinion in *DeBruce* did not

In *New Prime*, the Eighth Circuit largely rejected the statutory interpretation discussed above and found that 49 U.S.C. § 14704(a)(1) and (2) create a private right of action for injunctive relief and damages even if the claimant does not first go to the agency for relief.[20] In reaching its conclusions, the court went beyond the statutory language itself and relied heavily upon the statute's legislative history.[21] In so doing, the court noted various "linguistic imperfections and inconsistencies" in section 14704 and acknowledged "to being rather mystified by the inconsistent language used in the [ICCTA's] various enforcement provisions."[22]

While the Eighth Circuit agreed that the first sentence of section 14704(a)(1) does not create a private right of action, the court found that the second sentence, which provides that a party "may bring a civil action for injunctive relief for violations of section 14102[,]"[23] does create such a right.[24] The court found that, by referring to section 14102, Congress must have intended that claimants can pursue injunctive relief to enforce the leasing regulations because section 14102 itself "contains no

affirm the district court's holding on exclusive jurisdiction. It instead held that the Surface Transportation Board had primary jurisdiction to consider the carrier's claims, and affirmed the dismissal of the private claim on that basis alone. Thus, the Eighth Circuit did not need to reach the issue of exclusive jurisdiction in *DeBruce*. But, as noted above, it nevertheless appeared to characterize the parallel ICCTA rail provision as allowing a private right of action to enforce agency orders, not regulations. *DeBruce*, 149 F.3d at 789-90. *See also* Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n, 287 F.3d 568, 574 (6th Cir. 2002) (dismissing case involving alleged failure to obtain certificate of operation required by ICCTA because "none of the ICCTA provisions cited by [plaintiffs] provid[ed] for a private cause of action . . ."); City of Laredo v. Tex. Mexican Ry. Co., 935 F. Supp. 895, 898 (S.D. Tex. 1996) (citing 49 U.S.C. §§ 11704(c)(1), 11705(a), (e), and 11706(d)) (reading the parallel ICCTA rail carrier provisions as allowing a party to file suit in federal court "only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading.").

20. *New Prime*, 192 F.3d at 785.

21. *Id.*

22. *Id.*

23. 49 U.S.C. § 14704(a)(1). 49 U.S.C. § 14102, at least in part, was the basis on which the Interstate Commerce Commission promulgated the Truth-in-Leasing regulations. In relevant part, section 14102 provides as follows:

> (a) General Authority of Secretary. The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to—
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> (1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;
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> (2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;
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> (3) inspect the motor vehicles and obtain liability and cargo insurance on them; and
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> (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

49 U.S.C. § 14102 (1994).

24. *New Prime*, 192 F.3d at 783-85.

mandates or prohibitions."[25] The court also rejected that this provision be limited to injunctive relief to enforce agency orders, relying on legislative history that provides "that private actions brought to enforce the 'leasing . . . rules may also seek injunctive relief.'"[26]

The Eighth Circuit also found that section 14704(a)(2) creates a private action for damages.[27] Again, the court relied heavily upon the statute's legislative history.[28] The court referenced the Conference Report, which states that section 14704(a)(2) "'provides for private enforcement of the provisions of the Motor Carrier Act in court . . . . The ability to seek injunctive relief for motor carrier leasing . . . violations is in addition to and does not in any way preclude the right to bring civil actions for damages for such violations.'"[29] Ultimately, the court concluded that section 14704(a) "authorizes private actions for damages and injunctive relief to remedy at least some violations of the Motor Carrier Act and its implementing regulations."[30]

Notably, the court in *New Prime* refused to pass upon the carriers' argument that "the leasing regulations on which the Owner-Operators rely, 49 C.F.R. §§ 376.12(i) & (k), go beyond the scope of § 14102(a) and therefore may not be enforced by a private action for injunctive relief under § 14704(a)(1)."[31] In response to this argument, the court stated, "[t]here is a simple answer to this contention – it is not part of the jurisdictional issues before us."[32] Thus, whether all of the Truth-in-Leasing regulations fall within the private right of action created by section 14704 remains to be further litigated.

Jurisdiction in federal court to hear claims of alleged violations of the Truth-in-Leasing regulations appears to have taken hold. Since the decision in *New Prime*, several district courts that have reviewed jurisdiction to hear claims of alleged violations of the Truth-in-Leasing regulations have found that section 14704(a) creates a private right of action.[33] *New Prime*, however, is the only circuit court of appeals decision to decide the issue.

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25. *Id.* at 784.

26. *Id.* at 784 & n.3 (quoting H.R. REP. NO. 104-422, at 221 (1995) (Conf. Rep.), *as reprinted in* 1995-2 U.S.C.A.N.N. 850, 906-07).

27. *Id.* at 785.

28. *Id.*

29. *Id.* (quoting H.R. REP. NO. 104-422).

30. *Id.*

31. *Id.* at 784.

32. *Id.*

33. *See, e.g.*, Fitzpatrick v. Morgan S., Inc., 261 F. Supp. 2d 978, 980 (W.D. Tenn. 2003); Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 161 F. Supp. 2d 948, 953-55 (S.D. Ind. 2001).

B. Application of the Truth-in-Leasing Regulations by District Courts

Since the enactment of the ICCTA, numerous class action cases have been filed against motor carriers under section 14704(a), challenging their compliance with the Truth-in-Leasing regulations.[34] The charges raised in many instances seek over-reaching interpretations of the leasing regulations never passed upon by either the Interstate Commerce Commission ("ICC") prior to its demise or by the Department of Transportation ("DOT") or FMCSA since.[35] For instance, owner-operators have challenged the carriers' practice of marking up products and services sold to owner-operators even if the mark-up is fully disclosed and the price charged to the owner-operators is below the market price for such items. Litigating these issues on a case-by-case basis in district courts not only creates a significant risk of inconsistent application of the regulations on motor carriers, but also imposes an undue burden upon the courts in deciding complex issues unique to the trucking industry. Such issues have traditionally been resolved by agencies with specialized knowledge in such matters.

Motor carriers have requested that the courts apply the doctrine of primary jurisdiction to refer the matter to the agency charged with enforcing the regulations.[36] Referral to an administrative body under this doctrine is appropriate when it is "better equipped than courts by specialization [and] by insight gained through experience . . . ."[37] "Uniformity and consistency in the regulation of business entrusted to a particular agency" is one of the key factors when deciding whether an agency is better suited to decide a particular question.[38]

In *New Prime*, the district court had dismissed the owner-operators' claims based upon the doctrine of primary jurisdiction.[39] During the pendency of the appeal of that issue, the owner-operators filed an *ex parte* petition with the Federal Highway Administration ("FHWA"), seeking a review of the carrier's compliance with the leasing regulations.[40] The FHWA denied the owner-operators' petition, stating that the issues presented in the petition were within the competence of the district court

34. *See, e.g.*, Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1109-10 (9th Cir. 2004); *Mayflower Transit*, 161 F. Supp. 2d at 953-55.

35. *See id.*

36. *New Prime*, 192 F.3d at 785; *Mayflower Transit*, 161 F. Supp. 2d at 956.

37. Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

38. *Id.; see also* Hawaiian Tel. Co. v. Pub. Util. Comm'n, 827 F.2d 1264, 1272 (9th Cir. 1987) (applying the doctrine of primary jurisdiction helps "to prevent substantially inconsistent application of FCC rules and serious judicial encroachment on FCC responsibilities."); *In re* Long Distance Telecomms. Litig., 831 F.2d 627, 629-30 (6th Cir. 1987).

39. *New Prime*, 192 F.3d at 780.

40. *Id.* at 780-781.

and had previously been addressed by the agency charged with enforcing the regulations.[41] The FHWA also stated that it "will generally decline to exercise its primary jurisdiction with regard to court referrals involving violations of part 376."[42] In *New Prime*, the Eighth Circuit refused to review the findings of the FHWA, stating that "[w]hen the agency declines to provide guidance or to commence a proceeding that might obviate the need for judicial action, '[t]he court [can] then proceed according to its own light.'"[43]

Despite the FHWA's stated position, the current environment of owner-operator litigation poses vastly different issues than those presented to it in its prior ruling. The FHWA's prior decision was motivated in large part on its determination that the issues presented had previously been decided by the ICC.[44] As mentioned above, the owner-operators are seeking interpretations of the leasing regulations never considered by the agency.[45] The FMCSA should undertake review of allegations that attempt to expand the breadth of the leasing regulations in order to ensure consistency of application.

III. Statute of Limitations for Private Rights of Action to Enforce the Truth-in-Leasing Regulations

In conjunction with the motor carrier enforcement provisions of section 14704, Congress enacted section 14705 to establish statutes of limitation on those rights of action.[46] However, upon close examination, section 14705 appears to contain no statute of limitations for private

41. Petition for Declaratory Order Regarding Application of Federal Motor Carrier Truth-in-Leasing Regulations, 63 Fed. Reg. 31827, 31829 (Dep't of Transp. June 10, 1998).

42. *Id.* at 31828-29.

43. *New Prime*, 192 F.3d at 785-86 (quoting Atchison, Topeka and Santa Fe Ry. v. Aircoach Transp. Ass'n, 253 F.2d 877, 886 (D.C. Cir. 1958)). The court in *New Prime* further found the carrier was not adversely affected by the FHWA's "notice ruling" because it did not constitute an "adjudication." *Id.* at 786.

44. *Id.* at 781.

45. *See, e.g,. Swift Transp.*, 367 F.3d at 1109-10; *Mayflower Transit*, 161 F. Supp. 2d at 953-55.

46. 49 U.S.C. § 14705, limitations on actions by and against carriers, provides in relevant part:

> (a) In general.–A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.
> (b) Overcharges.–A person must begin a civil action to recover overcharges within 18 months after the claim accrues. If the claim is against a carrier providing transportation subject to jurisdiction under chapter 135 and an election to file a complaint with the Board or Secretary, as applicable, is made under section 14704(c)(1), the complaint must be filed within 3 years after the claim accrues.
> (c) Damages.–A person must file a complaint with the Board or Secretary, as applicable, to recover damages under section 14704(b) within 2 years after the claim accrues.

49 U.S.C. § 14705 (2000).

rights of action to enforce the leasing regulations. There is only one limitations period for damages actions under section 14704, and that period is two years.

> Damages.–A person must file a complaint with the [Surface Transportation] Board or Secretary, as applicable, to recover damages *under section 14704(b)* within 2 years after the claim accrues.[47]

Although this subsection appears on its face to provide for a two-year limitations period for plaintiffs' claims, the question is somewhat more complicated. As discussed above, claims for damages for alleged violations of the leasing regulations are authorized, not by section 14704(b), but by section 14704(a)(2).[48] There is thus an ambiguity in the statute. The question becomes whether "claims for damages" under section 14704(a), the *only* section authorizing such damages claims, are governed by the two-year statute, or whether there is no limitation statute governing plaintiffs' claims.

As acknowledged by both the agency enforcing the statute and the original sponsor of the legislation, the statute contains a scrivener's error.[49] The provision authorizing owner-operators claims was originally intended to be codified in subsection (b) of section 14704, not subsection (a), where it was mistakenly placed when the statute was enacted.[50]

A. Statute of Limitations: Congressional Intent

The limitations period in section 14705(c) applies only to recovery of "damages" in cases brought under "section 14704(b)."[51] But, as currently codified, section 14704(b) pertains only to *overcharges,* not damages,[52] and an eighteen-month limitations period for overcharge claims already exists at 49 U.S.C. § 14705(b).[53] Therefore, under a literal reading of the statute, there are two conflicting statutes of limitations for overcharge claims, and no limitation period for damage claims not related to overcharges.[54]

47. 49 U.S.C. § 14705(c) (emphasis added).

48. *Id.* § 14704(a)(2), (b).

49. *See* H.R. Rep. No. 104-311, at 121 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 793, 833.

50. *See id.*; *see also* 49 U.S.C. § 11705(c) (1994) ("A person must file a complaint with the Board to recover damages under *section 11704(b)* of this title within 2 years after the claim accrues." (emphasis added)); *id.* § 15905(c) ("A person must file a complaint with the Board to recover damages under *section 15904(b)*(2) within 2 years after the claim accrues." (emphasis added)).

51. *Id.* § 14705(c).

52. *Id.* § 14704(b).

53. *Id.* § 14705(b).

54. *See id.* §§ 14704(b), 14705(b), (c).

In short, section 14704 contains a drafting error. The language contained in section 14704(a)(2), pertaining to damages actions, was originally intended to be codified at section 14704(b).[55] The legislative history of the Act confirms that the language contained in § 14704(a)(2) should properly have been codified as section 14704(b)(2). The ICCTA Conference Report succinctly describes the purpose of section 14705: "This section *preserves the current relevant statutes of limitation* for bringing court suits by or against carriers *and makes the time limits uniform for all types of traffic.*"[56] Because the then "current" limitations statute for damages actions against rail and water carriers was two years, Congress plainly intended for the same two-year limitations statute to apply in actions against motor carriers.[57]

Under the Act, similar actions for damages against other types of traffic were preserved, and are subject to a two-year statute of limitations.[58] The Conference Report's statement that the Act was intended to make limitations periods "uniform for all types of traffic" compels the conclusion that a two-year statute was meant to apply to damage claims against motor carriers as well.[59]

Moreover, the structure of the Act suggests the same result. Both the rail carrier and pipeline carrier provisions of the Act contain language authorizing damages actions in subsections marked (b) rather than (a).[60] The action for damages against motor carriers is the statutory anomaly in that the action is provided for under subsection (a), at section 14704(a)(2), rather than under subsection (b), as it is with rail and pipeline carriers.[61] In all other material respects, the sister statutes to the motor carrier statute are identical.[62] Significantly, these sister statutes contain two-year limitations periods for actions for damages.[63] The doctrine of *in pari materia* thus also supports the conclusion that actions for damages against motor carriers are subject to a two-year limitations pe-

55. *See* H.R. REP. NO. 104-311, at 121; 49 U.S.C. § 11705(c); 49 U.S.C. § 15905(c).

56. H.R. REP. NO. 104-311, at 121.

57. *See id.*; *see also* 49 U.S.C. § 11705(c) (1994) (codifying a two-year statute of limitations to actions for damages against rail carriers); 49 U.S.C. § 15905(c) (1994) (codifying a two-year statute of limitations to actions for damages against pipe line carriers).

58. *See* 49 U.S.C. §§ 11705(c); 15905(c).

59. H.R. REP. NO. 104-311, at 121.

60. *Compare* 49 U.S.C. § 15904(b)(2) (authorizing *damages* actions) *and* 49 U.S.C. § 11704(b) (authorizing *damages* actions) *with* 49 U.S.C. § 14704(b) (authorizing liability and damages for *overcharges only*.).

61. *Compare* 49 U.S.C. § 15904(b)(2) *and* 49 U.S.C. § 11704(b) *with* 49 U.S.C. § 14704(a)(2).

62. *See* 49 U.S.C. §§ 11704-05, 14704-05, 15904-05.

63. *Id.* §§ 11705(c), 15905(c).

riod.[64] "When a statute is a part of a larger Act . . ., the starting point for ascertaining legislative intent is to look to other sections of the Act *in pari materia* with the statute under review."[65] There can be no other conclusion but that section 14704 contains a drafting error, and that the action for damages belongs in section 14704(b) rather than in section 14704(a)(2). Thus, the two-year limitations statute of section 14705(c) must apply in the present case.

The Act's legislative history tells the same story and confirms that a drafting error occurred. On November 6, 1995, when House Bill 2539 was reported to the House of Representatives from the Committee on Transportation and Infrastructure, the action for non-overcharge damages was found where it was obviously intended to be, in section 14704(b)(2).[66] In fact, as reported to the House on that date, section 14704 did not even contain an (a)(2).[67]

But somewhere between November 6 and November 14, just eight calendar days after the bill was reported to the House, the measure *with* the drafting error was called up for consideration by special rule in the House.[68] The measure was considered and passed.[69] No reference is made in the legislative history of the statute concerning this significant change, which moved the action for damages from subsection (b)(2) to subsection (a)(2), nor was this change made by any amendment.[70] Given the havoc this change plays with the statutory scheme of section 14705 and given that the original bill reported to the House did not have this change, this change can only be ascribed to a drafting or scrivener's error. Thus, the two-year limitations statute of section 14705(c) must apply to actions for damages.[71]

The fact that House Bill 2539 as passed contains a drafting error is confirmed by a review of Senate Bill 1396. When Senate Bill 1396 was

64. *See* United States v. Morison, 844 F.2d 1057, 1064 (4th Cir. 1988) (citing Erlenbaugh v. United States, 409 U.S. 239, 244-47 (1972)).

65. *Id.*

66. ICC Termination Act of 1995, H.R. 2539, 104th Cong. § 14704(b)(2) (1995).

67. *Id.* § 14704.

68. *See* H.R. 2539, *Bill Summary & Status for the 104th Congress*, http://thomas.loc.gov (follow "Search Bills and Resolutions;" then select "Summary and Status Information about Bills and Resolutions;" then select "Bill Number;" then enter "H.R. 2539" into the "Enter Search" field; then select the "104th Congress;" then select "Search;" then select "CRS Summary.").

69. *Id.*

70. *Id.*

71. *See* Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) ("Courts will not foolishly bind themselves to the plain language of a statute where doing so would 'compel an odd result.'") (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989)); Mylan Pharms., Inc. v. Henney, 94 F. Supp. 2d 36, 55 (D.D.C. 2000) ("Courts must follow the plain meaning of the statutory text, except when the text suggests an absurd result or a scrivener's error.") (citations omitted).

introduced in the Senate, the action for damages was found in section 14704(b)(2).[72] In fact, as reported to the Senate, section 14704 did not contain an (a)(2).[73] Later, when the Senate adopted the House version of the Bill in lieu of Senate Bill 1396, no reference was made to the change in placement of the section 14704 damage action.[74]

The district court in *Fitzpatrick v. Morgan Southern, Inc.*, recognized the above problems, stating it "would not invoke a rule recognizing a scrivener's error to modify enacted statutory text absent an extraordinarily convincing justification. In this case, the Court believes such a justification exists."[75] The court recognized that "the legislative history of the ICCTA shows that the structure of [sections] 14704 and 14705 is at odds with the purpose of the statute for several reasons."[76] The court carefully analyzed the legislative history of the scrivener's error, and ruled that the two-year statute of limitations applied because: (1) the legislative history showed that Congress intended to preserve the statute of limitations of the ICCTA's predecessor statute; (2) parallel limitation provisions applying to rail and pipeline carriers is two years; (3) section 14705 was not amended to reflect the change in section 14704; and (4) Congress acted hastily in passing the provisions involved.[77]

B. The Surface Transportation Board's Recognition of the Drafting Error

The agency charged with enforcing the statute, the Surface Transportation Board ("STB"), has already found a reasonable solution to the statute's ambiguity. The STB is an agency charged with enforcing the ICCTA.[78] In *National Association of Freight Transportation Consultants, Inc. – Petition for Declaratory Order*, the STB specifically recognized that the language contained in section 14704(a)(2) of the statute was misplaced.[79] In interpreting the statute, the STB noted an "apparent technical error" in the statute and determined that the right to recover damages

72. Interstate Commerce Commission Sunset Act of 1995, S. 1396, 104th Cong. § 14704(b)(2) (1995).

73. *Id.* § 14704.

74. *See* S. 1396, *Bill Summary & Status for the 104th Congress*, http://thomas.loc.gov (follow "Search Bills and Resolutions;" then select "Summary and Status Information about Bills and Resolutions;" then select "Bill Number;" then enter "S. 1396" into the "Enter Search" field; then select the "104th Congress;" then select "Search;" then select "CRS Summary;" then select "other summaries;" then select "Indefinitely postponed in Senate.").

75. *Fitzpatrick*, 261 F. Supp. 2d at 982.

76. *Id.*

77. *Id.* at 983-85.

78. *See, e.g.*, 49 U.S.C. § 14704 (referring to the STB).

79. Nat'l Ass'n of Freight Transp. Consultants, Inc. – Petition for Declaratory Order, 61 Fed. Reg. 60140, 60141 (Nov. 26, 1996).

under section 14704(a)(2) should have been codified under section 14704(b).

> Section 14704(c)(1) authorizes a person to "bring a civil action under subsection (b) [of section 14704] to enforce liability against a carrier or broker providing transportation [. . .] subject to jurisdiction under chapter 135." As codified, subsection (b) refers only to tariff overcharges, while the provision allowing recovery of damages from carriers is contained in section 14704(a)(2) (as to which the statute does not expressly authorize a civil action). *Both the House and Senate bills (H.R. 2539 and S. 1396) that became the ICC Termination Act of 1995, however, placed the damages provision in subsection (b)(2), as to which the statute does authorize a civil action. Subsection (b)(2), as passed by both Houses, reads as follows: A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.*
> Thus, as enacted by Congress, section 14704(c)(1) authorized civil actions both for damages and for charges exceeding the tariff rate. *Notwithstanding the fact that section 14704(b)(2) was misplaced [having been codified as section 14704(a)(2)]*, in our opinion, section 14704(c)(1) was intended to authorize a person to bring a civil action against a carrier or broker for damages sustained by that person as a result of any act or omission of the carrier in violation of Part B, Subchapter IV, of Title 49.[80]

Thus, according to the STB's interpretation, the cause of action for damages stated in section 14704(a)(2) belongs in section 14704(b), to which the two-year limitations statute of section 14705(c) unquestionably applies.[81] Under *Chevron v. Natural Resources Defense Council, Inc.*, the STB's reasonable interpretation of this statute is entitled to deference.[82] In *Fitzpatrick*, the Western District of Tennessee also noted that the STB's opinion about the two-year statute of limitations "carries significant weight with the Court as the opinion of the agency charged with enforcement and regulatory authority under the ICCTA."[83]

C. The Courts' Reluctance to Cure the Drafting Error

Despite the clear ambiguity in sections 14704 and 14705, courts have been reluctant to correct the defect. As of this writing, two district courts have recognized the statutory absurdity in sections 14704 and 14705 and

80. *Id.* (emphasis added).

81. *See id.*

82. *See generally* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841-44 (1984); *see also* Love v. Tippy, 133 F.3d 1066, 1069 (8th Cir. 1998) ("It is well-settled that 'if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation so long as it is 'a permissible construction of the statute.'") (quoting Stinson v. United States, 508 U.S. 36, 44 (1993)).

83. *Fitzpatrick*, 261 F. Supp. 2d at 986 (citing Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

have found that Congress could only have intended that actions under section 14704(a) were intended to be governed by a two year statute of limitations.[84] Several district courts, however, have found that the ICCTA did not contain a statute of limitations for actions to enforce the Truth-in-Leasing regulations, and have instead applied the catch-all four year statute of limitations contained in 28 U.S.C. § 1658(a).[85] The issue has not yet been addressed by any circuit court of appeals.

A district court's determination of the statute of limitations, either two or four years, has a dramatic impact on the course and ultimate outcome of the litigation. All but one of the cases cited above has been filed as a class action.[86] As such, the statute of limitations governs not only the claims of the named plaintiffs, but the decision will ultimately govern the breadth of a class if certified. The breadth of the class will determine what claims can be included and what damages can be claimed. Thus, the statute of limitations that governs the action may impact the damages recoverable twofold.

D. Legislative Actions to Correct the Drafting Error

The conflicting statutory language of sections 14704 and 14705 and the conflicts among the courts that have addressed the issue call out for legislative action to correct the problem. Indeed, the current administration, with the full support of the DOT, has submitted legislation to do just that.

On May 15, 2003, a bill to correct this scrivener's error was introduced to both houses of Congress. The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 ("SAFETEA"), the Bush Administration's transportation bill, includes sections 7201(f)(1) and (2) that change the ICCTA to make clear that a two-year statute of limitations applies.[87] The bill notes that the change in the ICCTA is a "technical correction."[88] The DOT issued comments about this technical correction, stating that SAFETEA's section 7201

> would move subsection (a)(2) of section 14704 . . . to subsection (b) of that

84. *Fitzpatrick*, 261 F. Supp. 2d at 986; *see also Mayflower Transit*, 161 F. Supp. 2d at 955 ("[W]e agree with the FHWA and with the Eighth Circuit that 49 U.S.C. § 14704(a) appears *on its face* to provide for a private right of action for damages and injunctive relief by parties injured by a carrier." (emphasis added)).

85. 28 U.S.C. § 1658(a) (2000). *See, e.g., C.R. Eng.*, 325 F. Supp. 2d at 1265; Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc., 2005 WL 1269904, at *1 n.5 (N.D. Ill. May 23, 2005); Owner-Operator Indep. Drivers Ass'n v. Bulkmatic Transp., 2004 WL 1151555, at *4 (N.D. Ill. May 3, 2004).

86. *See id.*

87. *See* Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, H.R. 2088, 108th Cong. § 1072; S. 1072, 108th Cong. § 7201 (2003).

88. *Id.* at Subtitle B ("Miscellaneous Technical Corrections to Title 49").

> section . . . [because what is now (a)(2)] appeared as subsection (b)(2) in both the House and Senate bills that became the ICCTA]. . . . There is no indication in the Conference Report of any intent to substantively alter this provision. . . . Furthermore, the change in placement to subsection (a) made certain cross-references invalid.[89]

SAFETEA has been stalled in the legislative process apparently due to controversial funding provisions unrelated to the correction of the scrivener's error. The motor carrier industry should encourage Congress to correct this error so that the original intent of actions under section 14704 is recognized.

IV. Conclusion

The enforcement of the Truth-in-Leasing regulations in the federal courts has and will continue to place a heavy burden on the trucking industry. Motor carriers are faced with court enforcement of regulations that are outdated under current industry practices. Moreover, the regulations themselves are in many respects vague and confusing. Motor carriers have been left to guess as to the meaning of numerous provisions in the regulations and are faced with inconsistent enforcement by federal courts that have been given little, if any, guidance by the enforcing agency. The current position of the FMCSA (previously the FHWA) of refusing to hear Truth-in-Leasing claims only exacerbates the problem. The FMCSA should revisit certain provisions of the Truth-in-Leasing regulations in light of current industry practices and cure ambiguities, or at the very least, exercise its jurisdiction over certain claims in order to provide proper interpretative guidance.

89. The Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2003 Section-by-Section Analysis, p. 148 (2003), http://www.fhwa.dot.gov/reauthorization/safetea_analysis.pdf. A complete copy of the SAFETEA bill and the DOT's comments can be found at http://www.fhwa.dot.gov/reauthorization/safetea.htm.