NEEDED, PRIVATE ATTORNEYS GENERAL: EMPOWERING CONSUMERS TO REFORM THE HOUSEHOLD GOODS MOVING INDUSTRY

by
Joseph L. Franco[*]

This Comment discusses how consumers are inadequately protected against the unscrupulous practices of an increasing number of household goods moving companies. It briefly reviews the historical reasons for today's problems, discusses the need to improve upon recent government efforts to increase consumer protection, and proposes a consumer private right of action modeled upon federal RICO and state DTPA statutes.

[*] Student, Lewis & Clark Law School, J.D. expected 2007; B.A., University of Oregon. The author wishes to thank Professor Amy Bushaw for her comments and advice.

I. INTRODUCTION

In May 2004, the Senate found that the federal government lacks the resources to adequately police or deter a growing number of interstate moving companies that willfully violate federal regulations.[1] Exploiting the void in federal enforcement, these moving companies direct their fraudulent and criminal practices at vulnerable consumers.[2] Private consumers are uniquely vulnerable to the fraudulent and criminal practices of household goods movers because a "consumer may utilize a moving company once or twice in the consumer's lifetime and entrust virtually all of the consumer's worldly goods to a mover."[3] Because consumers use moving companies so infrequently, their vulnerability is increased due to a lack of familiarity with the moving industry and its pitfalls. Additionally, consumers often trust moving companies with their most cherished possessions, and dishonest moving companies may exert powerful leverage by withholding those goods until consumers pay an inflated price. It is unsurprising that inadequate federal regulatory enforcement, combined with a uniquely vulnerable consumer group, has led to an increase in fraudulent and criminal activity, as well as an attendant rise in consumer complaints.[4] There are two types of consumer complaints that deserve special attention: moving companies holding goods hostage, and moving companies resolving claims for loss or damage in bad faith.

[1] On May 19, 2004, the Senate passed amended House Bill 3550. *See* Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004) ("The Congress finds the following: (1) There are approximately 1,500,000 interstate household moves every year. While the vast majority of these interstate moves are completed successfully, consumer complaints have been increasing since the Interstate Commerce Commission was abolished in 1996 and oversight of the household goods industry was transferred to the Department of Transportation. (2) While the overwhelming majority of household goods carriers are honest and operate within the law, there appears to be a growing criminal element that is exploiting a perceived void in Federal and State enforcement efforts. The growing criminal element tends to prey upon consumers. (3) The movement of an individual's household goods is unique and differs from the movement of a commercial shipment. A consumer may utilize a moving company once or twice in the consumer's lifetime and entrust virtually all of the consumer's worldly goods to a mover. (4) Federal resources are inadequate to properly police or deter, on a nationwide basis, those movers who willfully violate Federal regulations governing the household goods industry and knowingly prey on consumers who are in a vulnerable position. It is appropriate that a Federal-State partnership be created to enhance enforcement against fraudulent moving companies.").

[2] *Id.*

[3] *Id.*

[4] *Id.*

Holding goods hostage and resolving claims for loss or damage in bad faith are both contrary to federal law and may subject moving companies to fines.[5] Despite the threat of potential fines, an increasing number of moving companies prey upon consumers by engaging in fraudulent and criminal practices. [6] This is so, in part, because federal enforcement of regulations is insufficient to police and deter such illegal activities.[7] Thus, potential fines have a questionable deterrent effect in the absence of adequate enforcement.[8] Because it is important to understand the nature of a bait and switch scheme[9] and the harm that can derive from a bad faith claim settlement, some examples may be helpful.

The plaintiffs in *Roberts v. North American Van Lines, Inc.*[10] alleged that their moving company engaged in classic bait and switch schemes and then held their goods hostage in an attempt to secure an inflated price.[11] The first plaintiff contracted to move her daughter's belongings from California to Florida. She was given a quote of $3,028.50 based upon the estimated weight of the shipment.[12] The goods were later reweighed without notice to the plaintiff. Based on the new weight, the movers raised her charges to $6,172.53 and threatened to place the goods in storage if she did not pay the full amount before delivery.[13] To avoid incurring unloading and storage fees, the plaintiff paid the inflated amount.[14] The second plaintiff, recently widowed, decided to move from California to Massachusetts. She was initially quoted $3,444.16, but on the day of her move, one of the movers told her that she would ultimately pay at least three times the amount originally quoted.[15] Plaintiff told the movers she would not pay more than 110% of the original estimate. When the movers refused this offer, the plaintiff told them that she would hire someone else and then left her home on unrelated business.[16] She returned to find the contents of her home emptied, and the movers later told her that they would release her

[5] 49 C.F.R. § 375.407 (2004) (requiring moving companies to relinquish possession of goods if 110% of the original price quoted is paid by the consumer); 49 C.F.R. §§ 370.1−370.11 (2004) (describing in great detail an interstate motor carrier's responsibilities in claim settlement and requiring prompt and thorough investigation of claims); 49 C.F.R. § 375.901 (2004) (indicating that penalties may be imposed for violations of household goods moving regulations).

[6] H.R. 3550 § 4302 (finding that a "growing criminal element tends to prey upon consumers," and the number of consumer complaints is on the rise).

[7] *Id.* (acknowledging that federal resources are inadequate to police or deter movers who willfully violate federal regulations).

[8] *Id.*

[9] A bait and switch scheme is one whereby a party is quoted a fraudulently low price only to have it significantly increased at a later time. Goods are then "held hostage" until the increased price is paid.

[10] Roberts v. N. Am. Van Lines, Inc., No. C-03-2397 SC (N.D. Cal. Jan. 22, 2004).

[11] *Id.* at 1−2.

[12] *Id.* at 2.

[13] *Id.* at 3.

[14] *Id.* at 3.

[15] *Id.* at 3.

[16] *Id.* at 3.

goods at the point of destination only if she agreed to pay $9,100.00 plus the cost of reweighing, unloading, and storage.[17] Unlike the plaintiffs in *Roberts*, the plaintiff in *Rini v. United Van Lines, Inc.*[18] did not experience a bait and switch scheme. Instead, the facts of her case expose another consumer vulnerability: lack of consumer recourse when moving companies attempt to frustrate legitimate loss or damage claims by dealing with consumers in bad faith.

In *Rini*, the plaintiff's moving company lost some of her valuable artwork.[19] The plaintiff was ill-treated in her attempts to settle her claim with her moving company.[20] During a period of time spanning more than two years, the plaintiff's moving company provided numerous excuses for not paying her claim. Finally, the plaintiff brought suit.[21] The plaintiff prevailed on state law claims for misrepresentation and unfair and deceptive practices. The trial court, in awarding the plaintiff damages for unlawful and deceptive trade practices, referred to the defendant's behavior in the claims process as "a sham designed to wear plaintiff down and force her to abandon a legitimate claim."[22] Unfortunately, the plaintiff's state law judgments were reversed on appeal because they were preempted by a federal law known as the Carmack Amendment.[23] In the end, the moving company was not held accountable for its fraudulent and deceptive practices. In considering the plaintiff's situation, the First Circuit Court of Appeals found that "[i]t may be that Congress' enforcement scheme does not provide a sufficient deterrent to the type of conduct defendants employed in this case."[24]

The above cases, while sensational, are indicative of the larger consumer protection problem referred to by the Senate. But as the plaintiff in *Rini* found, consumers face other stumbling blocks in addition to the enforcement problem identified by the Senate. The plaintiff in *Rini* was awarded substantial damages on her state law claims for misrepresentation and deceptive trade practices. However, the First Circuit Court of Appeals reversed those awards because they were preempted by the Carmack Amendment. The *Rini* plaintiff's experience is not unusual; Carmack preemption all but ensures that consumers will not have recourse to powerful remedies they might otherwise have under state law.

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[17] *Id.* at 3−4.

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

[19] Jeanne Kaiser, *Moving Violations: An Examination of the Broad Preemptive Effect of the Carmack Amendment*, 20 W. NEW ENG. L. REV. 289, 289 (1998).

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

[21] Kaiser, *supra* note 19, at 290.

[22] Kaiser, *supra* note 19, at 290−91.

[23] *Rini*, 104 F.3d at 507.

[24] *Rini*, 104 F.3d at 507 (quoting Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 379 (2d Cir. 1994)); Kaiser, *supra* note 19, at 309 (calling for congressional action and suggesting that Congress might either modify federal law to allow state law claims for bad faith claims handling or create a federal administrative system for the prompt and effective resolution of claims).

The Carmack Amendment to the Interstate Commerce Act[25] has been interpreted by the United States Supreme Court to preempt a broad range of state law claims against interstate moving companies.[26] Congress enacted the Carmack Amendment in 1906 to allow motor carriers to predetermine, under a published tariff and a bill of lading, the extent of their liability for loss or damage of a shipper's property.[27]

In creating a uniform federal standard for liability, Congress created a law that would ultimately help and hurt consumers. The benefits of the Carmack Amendment were recently articulated by one commentator who wrote a comprehensive defense of the statute's preemptive effect.[28] Carmack preemption benefits consumers by providing "lower, more stable transportation rates and uniform, predictable carrier liability standards."[29] Lower, more predictable rates are achieved because moving companies can properly assess their potential risk for damages under a national standard.[30] Consumers also benefit from a predictable carrier liability standard that relieves them from the need to prove tort liability.[31] Without having to prove tort liability, consumers may establish a prima facie case by simply showing that goods have been lost, damaged, or delayed.[32] Because Carmack preemption benefits both the industry and consumers, preemption should be retained to the extent that it can be reconciled with consumer protection. Unfortunately, the Carmack Amendment

[25] 49 U.S.C. § 14706 (2000) (The Carmack Amendment provides in relevant part: "(c) SPECIAL RULES.—(1) MOTOR CARRIERS.—(A) SHIPPER WAIVER.—Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation. . . . (f) LIMITING LIABILITY OF HOUSEHOLD GOODS CARRIERS TO DECLARED VALUE.—A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.").

[26] Adams Express Co. v. Croninger, 226 U.S. 491, 505−06 (1913) (When speaking of the Carmack Amendment's preemption of state law, "[a]lmost 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. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.").

[27] Carmack Amendment, 59th Cong., 34 Stat. 595 (1906).

[28] *See generally* George W. Wright, *Slouching Toward a Morass: The Case for Preserving Complete Carmack Preemption*, 1 DEPAUL BUS. & COM. L.J. 177 (2003) (describing how the Carmack Amendment benefits consumers and industry alike).

[29] *Id.* at 182.

[30] *Id.* at 181.

[31] *Id.*

[32] *Id.* at 182.

is an impediment to consumer protection under current law. It is an impediment, not because state law claims should avoid preemption, but because the federal regulatory scheme currently does not provide federal claims that can take their place.

Some federal courts have used the Carmack Amendment to preempt nearly every state law claim related to a contract of shipment,[33] as opposed to only those state law claims strictly alleging the loss or damage of goods. Some applications of the Carmack Amendment have diminished the consequences for moving companies that engage in bait and switch schemes and that purposely resolve consumer claims for loss or damage of goods in bad faith.[34] Not surprisingly, consumers have attempted to circumvent Carmack preemption over the years by artfully pleading state tort and contract claims, by bringing suit under state consumer protection statutes, and very recently, by suing under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute.

Chen v. Mayflower Transit, Inc. is a noteworthy case because the plaintiff's story was recently featured in an exposé of the moving industry in *People Magazine*.[35] The plaintiff alleged that her moving company engaged in a bait and switch scheme,[36] and she was the first person to bring a private federal RICO claim against a household goods moving company.[37] While the plaintiff's RICO cause of action was ultimately unsuccessful,[38] the plaintiff's instincts were correct that a strong federal cause of action would avoid

[33] U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL ACTIONS ARE NEEDED TO IMPROVE OVERSIGHT OF THE HOUSEHOLD GOODS MOVING INDUSTRY 36 (Mar. 2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=d01318.pdf&directory=/diskb/wais/data/gao (last visited Aug. 16, 2005) ("Emphasizing the goal of uniformity underlying the Carmack Amendment, some courts addressing state law claims asserted by individual consumers have held that the amendment essentially preempts every state law claim related to the contract of shipment.").

[34] Several circuit courts of appeals have interpreted the Carmack Amendment to preempt state law claims for fraud, fraudulent inducement, deceptive practices, and unfair or deceptive claims handling. If they could be brought by consumers, such claims might be an effective way to hold companies accountable for bait and switch schemes and for engaging in bad faith claim negotiations. *See* Rini v. United Van Lines, Inc., 104 F.3d 502, 506−07 (1st Cir. 1997) (holding that state law claims for misrepresentation and unfair and deceptive acts related to bad faith claim settlement are preempted by the Carmack Amendment); United Van Lines, Inc. v. Shooster, 860 F. Supp. 826, 828−29 (S.D. Fla. 1992) (holding that, as a matter of law, the Carmack Amendment preempts claims of fraud in the inducement related to a bait and switch scheme); Smith v. United Parcel Serv., 296 F.3d 1244, 1248 (11th Cir. 2002) (citing *United Van Lines, Inc. v. Shooster* with approval).

[35] Alex Tresniowski, et al., *Taken for a Ride*, PEOPLE MAG., June 21, 2004, at 135−36 (featuring the plaintiff's story, indicating that the Better Business Bureau has seen an increase from 3,736 complaints in 1997 to 9,116 in 2002, and stating that most consumer complaints describe "classic bait-and-switch schemes").

[36] Chen v. Mayflower Transit, Inc., 315 F. Supp. 2d 886, 909 (N.D. Ill. 2004).

[37] Douglas C. Nelson, *Consumer News: Insurance Brokerage Giant Exposed by Consumer Fraud Charges*, 17 LOY. CONSUMER L. REV. 237, 243 (2005).

[38] *Id.*

Carmack preemption and empower consumers to protect themselves against unscrupulous moving companies.

This Comment discusses how consumers are inadequately protected against the unscrupulous and illegal practices of an increasing number of interstate moving companies, and it proposes legislation that will protect both consumers and honest moving companies. Part II argues that the current lack of consumer protection is due to inadequate federal enforcement, federal consumer remedies that do not have sufficient power to deter bad actors, and federal preemption of state law claims. Part III discusses the need for a legislative solution and analyzes the benefits and shortcomings of past and current legislative attempts at such a solution. Part IV advocates the creation of a new federal private right of action for holding household goods hostage and for deceptive claims handling. The action would be similar to private federal RICO and state Deceptive Trade Practices Actions (DTPA) in that it would provide for attorney fees and, most importantly, treble damages. Such a solution would allow wronged consumers adequate recovery. The treble damages provision would provide a strong deterrent effect and a corresponding increase in consumer protection, and the federal nature of the action would not undo the interstate uniformity of liability that the Carmack Amendment was enacted to create.

II. THE FEDERAL REGULATORY SCHEME HAS FAILED TO PROTECT CONSUMERS: EXPLOITATION OF VULNERABLE CONSUMERS IS ON THE RISE DESPITE FEDERAL EFFORTS

A. History of the Federal Enforcement Problem

Though consumer protection has recently worsened,[39] inadequate consumer protection is by no means a new problem. The level of consumer protection achieved by the federal legislative scheme has fluctuated during the last several decades, at times showing significant improvement, but in recent times worsening dramatically. In order to place the federal government's inability to adequately protect consumers in perspective, it is important to take

[39] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004) (stating that there is a growing criminal element preying on consumers and that federal resources are inadequate to police and deter moving companies that willfully violate federal regulations); Tresniowski, et al., *supra* note 35, at 135−36 (indicating that the Better Business Bureau has seen an increase from 3,736 complaints in 1997 to 9,116 in 2002); Fed. Motor Carrier Safety Admin., *Statement of Annette Sandberg, Administrator, Before the Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine* (Apr. 5, 2005), http://www.protectyourmove.gov/documents/testimony/scc-040505.pdf [hereinafter *Sandberg Testimony*] (acknowledging increased consumer complaints about household goods carriers); Fed. Motor Carrier Safety Admin., *About Us*, http://www.protectyourmove.gov/about/mission/mission.htm (last visited Aug. 17, 2005) (stating that consumer complaints against interstate movers have increased over the last several years).

a brief glimpse at the evolution of federal regulation of the interstate household goods moving industry.

Prior to its termination in 1996, the Interstate Commerce Commission (ICC) was the nation's oldest independent regulatory agency.[40] Congress founded the ICC in 1887, originally to prevent railroad monopolies and to prevent the market manipulation and rate abuses that attended them.[41] The ICC's regulatory authority grew as it assumed responsibility over other modes of transportation. With the Motor Carrier Act of 1935, Congress granted the ICC regulatory authority over the burgeoning trucking and bus industries.[42] Congress logically included oversight of the precursor to today's household goods moving industry within oversight of the trucking industry. But by the 1960s, consumers and advocacy groups increasingly complained that the ICC did not adequately regulate the household goods moving industry.

As early as the late 1960s, consumer advocates recognized the unequal position of the private consumer relative to the household goods moving industry.[43] Critics aptly observed that private consumers moving their household goods may need more protection than corporate or governmental shippers.[44] Indeed, the "individual home owner transferring his earthly belongings to a new city is not a businessman shipping his goods to market, and as a result is at a distinct disadvantage *vis-à-vis* the trucker."[45] Because the private consumer is likely to use a household goods moving company only once or twice in a lifetime, the private consumer "lacks the promise of future business as an incentive for good service and honest billing."[46] Therefore, private consumers lack the personal bargaining power that corporate or governmental shippers have. To make matters worse, the private consumer's lack of personal bargaining power is compounded by a lack of legal bargaining power.[47] Consumers lack legal bargaining power because they are unable to meaningfully enforce their rights through the courts or through the agency charged with oversight of the industry.[48]

Private consumers' lack of commercial and legal bargaining power led, as early as the 1960s, to the same chief complaints that are voiced today. First, consumer complaints of artificially low estimates followed by overcharging were rampant. An ICC study in 1960 revealed that, of the 829,038 moves made in 1960, moving companies initially underestimated the price of the move by more than 10% in 107,402 cases and underestimated by 20% or more in 71,753

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[40] S. REP. NO. 104-176, at 2 (1995).

[41] *Id*.

[42] *Id*.

[43] ROBERT C. FELLMETH, ET AL., THE INTERSTATE COMMERCE COMMISSION: THE PUBLIC INTEREST AND THE ICC 223−56 (1970) (detailing, as of the late 1960s, the many inadequacies in protection of private consumers from the practices of the household goods moving industry).

[44] *Id*. at 224−25.

[45] *Id*. at 224.

[46] *Id*. at 224−25.

[47] *Id*. at 225.

[48] *Id*.

cases.[49] Second, mishandling and bad faith handling of consumer claims for loss or damage of goods has been a consistent problem. A 1960 ICC study found that claims for loss or damage of goods occurred in one-fourth of all household goods shipments, and the moving companies did not even acknowledge one-fifth of the overall claims.[50] Consumers found in the 1960s, as they do now, that the regulatory scheme offered little deterrent effect.[51] Though this problem did not improve in the decade following the 1960 study,[52] consumer complaints decreased steadily following the enactment of the Household Goods Transportation Act of 1980.

In enacting the Household Goods Transportation Act of 1980, Congress intended to increase consumer remedies and protection.[53] Reform of the household goods moving industry was critically needed,[54] and Congress made a number of significant changes toward that end. Congress allowed carriers to provide consumers with contractual remedies if the carriers did not pick up or deliver the goods on time.[55] The Act also allowed the ICC to discipline carriers for the acts of their agents.[56] In addition, the Act provided for increased monetary sanctions for violations of consumer protection regulations and expanded the ICC's power to enforce regulations.[57] Lastly, the Act reaffirmed the ICC's power to intervene to protect individual consumers, rather than focusing solely on patterns of complaints.[58] It would appear that, by enacting these changes, Congress largely achieved its goals because consumer complaints steadily dropped from 1980 to 1995.[59]

Unfortunately, the consumer protection gains made since 1980 began to unwind when Congress terminated the ICC in 1996. After the termination of the ICC, enforcement of regulations governing the household goods moving industry weakened substantially. In 2001, the United States General Accounting Office (GAO) found that consumer complaints had increased significantly in the five years since Congress had terminated the ICC. During that time, the United States Department of Transportation (DOT) did little to

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[49] *Id*. at 228.

[50] *Id*. at 244.

[51] *Id*. at 232−33.

[52] *Id*. at 244.

[53] H.R. REP. NO. 96-1372 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4271.

[54] *Id*. at 2 (indicating that consumer complaints occurred in slightly over 2% of all shipments. This level of consumer complaints exceeds the percentage of consumer complaints today. As a result, some might argue that, notwithstanding the increase in consumer complaints, consumers are still better off today than they were in the 1960s. Even if that were true, the fact that the consumer protection was at some point even worse than it is today is no justification for allowing consumer protection to erode.).

[55] *Id*. at 7.

[56] *Id*. at 8

[57] *Id*. at 14−18.

[58] *Id*. at 11 (reaffirming the ICC's authority to issue regulations to protect *individual* shippers).

[59] S. REP. NO. 104-176, at 3 (1995).

respond,[60] and in subsequent years, consumer complaints continued to increase.[61]

By terminating the ICC, Congress dramatically changed the regulation of the household goods moving industry. Most obviously, Congress abolished the ICC and shifted much of its regulatory authority to the DOT.[62] In doing so, Congress provided the DOT with authority to regulate the household goods moving industry. At the same time, a House Committee Report directed the DOT "not to intervene and help resolve individual complaints—as was the practice of the ICC."[63] Therefore, consumers could no longer rely on a neutral government agency to serve as an arbiter when consumers complained about their moving companies. This cut off a major avenue to recourse, forcing wronged consumers to seek redress by dealing directly with the moving companies or by going through the courts. Perhaps in mitigation, Congress also required moving companies to offer neutral arbitration to consumers.[64] Of the changes mentioned, the first two substantially decreased consumer protection, while the effect of arbitration remains uncertain. Although Congress required the DOT to complete a study on the effectiveness of arbitration by 1997, as of 2001, the GAO did not project the study's completion until fiscal year 2005—almost a decade after it was ordered.[65]

The changes made in the wake of the ICC's termination proved to erode consumer protection. The DOT made limited efforts to regulate the industry, and in 1999, the Federal Motor Carrier Safety Administration (FMCSA), a sub-agency within the DOT, assumed responsibility for the industry. While complaints had increased from 1996 to 2001, the DOT had "not taken basic actions that are necessary to oversee the industry and protect consumers."[66] The DOT did not collect and analyze complaint information systematically, took few enforcement actions, and made "little or no effort to reach out to consumer groups."[67] The GAO report continued by stating that the "Department's lack of attention to its responsibility has created a vacuum that has allowed unscrupulous carriers to prey on consumers."[68] Finally, as of 2001, the GAO

[60] U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL ACTIONS TO OVERSEE THE HOUSEHOLD GOODS MOVING INDUSTRY ARE UNLIKELY TO HAVE IMMEDIATE IMPACT 3 (July 12, 2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=d01819t.pdf&directory=/diskb/wais/data/gao (last visited Aug. 17, 2005).

[61] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004) (stating that consumer complaints have been increasing since 1996); Tresniowski, et al., *supra* note 35, at 135−36 (indicating that the Better Business Bureau has seen an increase from 3,736 complaints in 1997 to 9,116 in 2002); *Sandberg Testimony, supra* note 39, at 3 (acknowledging increased consumer complaints about household goods carriers).

[62] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 3.

[63] U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 12.

[64] *Id*. at 11 n.9.

[65] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 5.

[66] *Id.* at 3.

[67] *Id.*

[68] *Id.*

report indicated that, because regulating the household goods moving industry was a relatively low priority for the FMCSA, the entire agency had devoted only 5 of 760 full-time people to the task.[69] With such a small number of staff devoted to household goods moving issues, it is not surprising that the FMCSA could not adequately enforce consumer protection regulations.

Enforcement of regulation has been the problem, not a dearth of regulation. The disproportionately few number of staff allocated to household goods moving issues undermines what might otherwise be a comprehensive and effective regulatory framework. For some time now, the federal regulatory scheme has provided steep fines for statutory violations. The FMCSA may fine a moving company a civil penalty of up to $100,000 for charging a price different than the rate in their tariff.[70] Furthermore, the FMCSA may fine a moving company $500 for each and every violation of any of its statutory duties, and a "separate violation occurs each day the violation continues."[71] Federal law provides extensive rules governing how carriers must handle consumer claims for loss, damage, injury, or delay to property transported.[72] Likewise, for years the federal regulatory scheme has prohibited the practice of holding goods hostage to extort inflated payments from consumers.[73] For example, if a moving company refused to deliver goods at 110% of the agreed price, the FMCSA could fine that company $500 per day until the goods were returned. If the FMCSA enforced the available penalty, a two week violation would cost a moving company $7,000. Unfortunately, such fines are rarely imposed because the DOT and the FMCSA have taken few enforcement actions.[74] Although the GAO found that the FMCSA, and the DOT more generally, failed to adequately protect consumers, fairness requires giving consideration to recent efforts by the FMCSA to improve consumer protection. Some might even argue that consumers do not need a new private right of action because the FMCSA's recent efforts are enough to protect consumers.

B. Recent Improvements by the FMCSA Are Not Sufficient to Protect Consumers

1. Consumer Outreach and Education Efforts

The FMCSA has made efforts to improve consumer protection, but until very recently, those improvements were primarily related to consumer outreach and education. It is not this author's intention to take shots at an already overburdened government agency. The FMCSA just happens to be the agency now in charge of regulating the household goods moving industry. The

[69] *Id.* at 4.

[70] 49 U.S.C. § 14903 (2000).

[71] 49 U.S.C. § 14910 (2000).

[72] 49 C.F.R. §§ 370.1−370.11 (2004).

[73] Roberts v. N. Am. Van Lines, Inc., No. C-03-2397 SC, at 17 (N.D. Cal. Jan. 22, 2004) (stating that a regulation has been in place for years requiring moving companies to release goods to consumers upon payment of 110% of the original estimate).

[74] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 3.

FMCSA's predecessor agencies have drawn critical attention as well.[75] And after all, following the GAO findings discussed above, the FMCSA has taken steps to improve consumer protection.[76] The steps taken by the FMCSA are primarily related to the dissemination of information to better inform consumers. While providing information to consumers is important, it is not enough unless it is accompanied by significant improvements in enforcement.

In the years since the 2001 GAO reports, the FMCSA has made an abundance of consumer protection information available on its website.[77] The website contains links to, among other things, how to file a complaint against a mover, a list of consumers' rights and responsibilities, and a substantial amount of background information about the household goods moving industry and its regulatory history.[78] No doubt such information will benefit the savvy consumer. Of course, because many consumers may not know about the FMCSA or regularly access a computer, the consumer protective impact of the website is inherently limited. Fortunately, FMCSA regulations updated in 2003 strictly require moving companies to deliver consumer protection information to prospective customers.

Although the FMCSA passed regulations in 2003 that would provide some additional protection for consumers, those regulations did not adequately address the need for improved enforcement. With the goal of equipping "consumers with information adequate to make informed decisions about moving their household goods,"[79] the agency improved the level and quality of information movers must provide consumers prior to moving. The FMCSA deserves applause for its efforts in this regard. The revised handbook, *Your Rights and Responsibilities When You Move*,[80] is comprehensive and easy to understand. Consumers who take the time to read the handbook will have a powerful tool for avoiding predatory moving companies. The handbook is posted on the FMCSA web site, and the FMCSA requires moving companies to give it to prospective consumers. In addition to the handbook, moving

[75] FELLMETH, ET AL., *supra* note 43, at 223−56 (discussing the inadequacy of regulatory enforcement by the ICC); U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 3 (discussing the inadequacy of regulatory enforcement by the DOT, particularly before oversight was transferred to the FMCSA).

[76] Many of the improvements coincide with the appointment of Annette Sandberg as Administrator of the FMCSA. *See Sandberg Testimony, supra* note 39, at 1 (indicating that Annette Sandberg was confirmed as Administrator of the FMCSA in May of 2003).

[77] Fed. Motor Carrier Safety Admin., http://www.protectyourmove.gov/ (last visited Aug. 17, 2005).

[78] *Id.*

[79] 68 Fed. Reg. 35064−65 (June 11, 2003) (to be codified at C.F.R. pts. 375, 377).

[80] *See generally* 49 C.F.R. pt. 375, app. A (2004) (The handbook is a well organized, plain language summary of the household goods moving regulations. The regulations themselves are highly comprehensive, well organized, and easy to understand. The many changes made with the 2003 rulemaking are too numerous to discuss in detail here. The regulations cover, among other things, required information prior to contracting, procedures for making estimates, weighing procedures, levels of carrier liability, complaint handling requirements, when carriers must relinquish goods, consumer payment, carrier responsibility for delay, and collection of charges).

companies must also provide a concise and accurate estimate of charges, notice that moving companies must make their tariff available for inspection, a summary of the company's arbitration program, and a summary of complaint handling procedures.[81] Certainly this information would serve consumers by helping them make more informed decisions, and moving companies that already operate honestly and according to the law will no doubt provide consumers with the required information. It does not follow, however, that the growing number of movers who willfully disregard regulations and prey on consumers will provide information that will be harmful to their endeavors. Since the moving companies that prey on consumers will likely withhold consumer protection information, it is questionable whether regulations requiring the distribution of such materials will realize their full potential without meaningful enforcement. While the 2003 regulations were a positive step, they did not provide for improved enforcement.[82] Although the new FMCSA regulations did not provide for improved enforcement of regulations, there is evidence to suggest that the FMCSA has very recently increased its enforcement activity.[83] Other information suggests that, while the number of FMCSA enforcement actions against moving companies has increased in the last year, the fines levied as a result of recent enforcement actions have not.[84] Nevertheless, an inquiry should be made into whether the FMCSA's recent increase in enforcement activity is sufficient to protect consumers on a nationwide basis.

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[81] 49 C.F.R. § 375.213 (2004).

[82] Fed. Motor Carrier Safety Admin., *Summary of Transportation of Household Goods, Consumer Protection Regulations*, *Interim Final Rule*, http://www.protectyourmove.gov/regulation-enforcement/regulations/summary-requirements.htm (last visited Aug. 17, 2005) (summarizing the interim final rule without reference to any improvements or changes in enforcement).

[83] U.S. Dep't of Transp., *Reauthorization of TEA-21 Safety Programs: Statement of the Honorable Kenneth M. Mead, Inspector General, Before the Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine*, at 7 (Apr. 5, 2005), http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/cc2005024.pdf (last visited Aug. 17, 2005) [hereinafter *Mead Testimony*] (stating that, until 2005, the FMCSA had dedicated only one full-time investigator for household goods complaints, and due to congressional concern over fraud, the FMCSA had received an increase in funding in fiscal year 2004 to hire an additional ten investigators. The FMCSA had also cross-trained safety inspectors to support its household goods investigation efforts); *Sandberg Testimony, supra* note 39, at 3−4 (stating that, as of April 5, 2005, the FMCSA had ten full-time investigators devoted to household goods investigations. Since the beginning of the fiscal year, the FMCSA had conducted over 100 investigations, three times as many as in fiscal year 2004.).

[84] This author submitted a Freedom of Information Act (FOIA) request to the FMCSA on October 26, 2004. The request sought information about the agency's enforcement actions over the last four years. This author received a reply dated July 29, 2005. The reply listed FMCSA cases that closed with enforcement action from October 1999 to March 2005. In 2002, the FMCSA closed cases with a total of $263,000 in fines. In 2003, that number dropped to $64,180. In 2004, it was $61,420. Thus far, the report showed that no cases had closed in 2005 with enforcement. *See* Tiffanie C. Coleman, Letter From Federal Motor Carrier Safety Administration (July 29, 2005) (on file with author).

2. Increased Enforcement Activity

The recent increase in the FMCSA's enforcement activity, while a positive step, will not be enough to protect consumers on a nationwide basis. The FMCSA's increased enforcement efforts will not solve the problem on the federal regulatory level for several reasons. The FMCSA's primary method for improving consumer protection is to continue to provide outreach and education, rather than taking enforcement actions against violators.[85] As mentioned above, while outreach and education are important, many consumers will remain unprotected in the absence of aggressive and consistent enforcement. Additionally, when the FMCSA does take enforcement action, its focus is necessarily on patterns of complaints, rather than on specific complaints by individual consumers.[86] Such a focus, while maximizing the impact the FMCSA can make with its limited resources, necessarily does not respond to many consumer complaints.

In 2004, Congress increased the FMCSA's funding so that the agency could hire an additional ten household goods complaint investigators.[87] While in 2001, the FMCSA had devoted five investigators to household goods complaints,[88] immediately before the 2004 increase in funding, the FMCSA had only one full-time investigator devoted to household goods complaints.[89] As of April 2005, the FMCSA had a total of ten full-time investigators devoted to household goods complaints for the entire country and had cross-trained thirty-seven other investigators to provide support.[90] Ten full-time investigators

[85] Fed. Motor Carrier Safety Admin., *Background: The Regulation of Household Goods Movers*, http://www.protectyourmove.gov/about/background/background.htm (last visited Aug. 17, 2005) ("Our overriding goal is to help consumers learn more about household goods transactions so that they can make better informed choices in selecting and negotiating with a moving company. Armed with knowledge about your rights and appropriate business practices on the part of movers, consumers will be less likely to fall victim to unscrupulous moving companies."); Fed. Motor Carrier Safety Admin., http://www.protectyourmove.gov/ (last visited Aug. 17, 2005) ("Our mission is to decrease moving fraud by providing consumers with the knowledge and resources to plan a successful move.").

[86] Fed. Motor Carrier Safety Admin., *Frequently Asked Questions,* http://www.1-888-dot-saft.com/CC_FAQ.asp#howcan (last visited Aug. 14, 2005) (indicating that complaints are entered into the FMCSA complaint database for analytical and statistical purposes and stating that complainant will be contacted *if* the FMCSA decides to take enforcement action); U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 4−5 (stating that the DOT, and consequently the FMCSA, have generally not become involved in settling disputes between individual consumers and carriers. Rather, the FMCSA has focused its enforcement activity on carriers with patterns of noncompliance.).

[87] *Mead Testimony*, *supra* note 83, at 7 (stating that, until 2005, the FMCSA had dedicated only one full-time investigator for household goods complaints and that, due to congressional concern over fraud, the FMCSA had received an increase in funding in fiscal year 2004 to hire an additional ten investigators).

[88] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 4 (The GAO report did not indicate how many investigators or other employees worked on household moving issues on a part-time basis.).

[89] *Mead Testimony*, *supra* note 83, at 7.

[90] *Sandberg Testimony*, *supra* note 39, at 4; *but see Background: The Regulation of Household Goods Movers*, *supra* note 85 (stating that the FMCSA has nine full-time

are simply not enough to handle thousands of complaints—complaints that have been increasing in volume each year.[91] When one considers the rate at which complaints have increased in recent years, it becomes clear that the recent improvements in enforcement are far from sufficient.

As of 2001, the GAO found that the FMCSA received a total of approximately 3,000 to 4,000 complaints about household goods carriers each year.[92] In 2004, the FMCSA received over 16,000 complaints about household goods movers.[93] This nearly exponential increase in complaints occurred during the four years following the GAO study that found the need for significant improvements. This increase happened despite the educational and enforcement efforts of the FMCSA. Considering that FMCSA investigators receive many thousands of complaints each year, it is no surprise that the agency focuses on patterns of complaints rather than on investigating the complaints of each individual consumer. In 2004, despite the volume of complaints, FMCSA household goods complaint investigators conducted only approximately thirty investigations.[94] In fiscal year 2005, FMCSA household goods complaint investigators hope to conduct as many as 300 investigations.[95] Of course, the FMCSA and its leadership should be applauded for their efforts, but that does

investigators and fifty-seven part-time investigators, thus showing fewer full-time investigators and more part-time investigators than the FMCSA Administrator referenced before the Senate. The text also indicates that the FMCSA has entered into a partnership with state attorneys general, local law enforcement agencies, and the American Moving and Storage Association. However, there is no information about when this partnership was formed and what, if any, practical effect it will have on enforcement. The site also indicates that FMCSA household goods investigators have levied more than $1.3 million in fines from the year 2000 to 2005.). The letter in response to this author's FOIA request revealed that less than one-half that amount of fines had been levied. *See* Coleman, *supra* note 84 (showing that a total of $544,100 in fines had been levied under the authority of the FMCSA upon household goods moving companies from 2000 to 2005).

[91] *Mead Testimony, supra* note 83, at 8 (stating that the volume of complaints of fraud and abuse have been steadily increasing).

[92] U.S. GEN. ACCOUNTING OFFICE, *supra* note 33, at 31.

[93] Fed. Motor Carrier Safety Admin., *Partner Descriptions and Contact Information*, http://www.protectyourmove.gov/partnership/partners/partners.htm (last visited Aug. 18, 2005) ("The goal of the Federal Motor Carrier Safety Administration (FMCSA) is to prevent moving fraud by arming consumers with the knowledge and resources to plan a successful move. In 2004, the FMCSA received more than 16,000 complaints about movers."); *but see Mead Testimony*, *supra* note 83, at 7−8 (indicating that FMCSA data reflects that, since 2001, consumers have filed over 10,000 official complaints via its hotline against household goods movers). While at first glance seeming to contradict the statement that the FMCSA had received 16,000 complaints against movers in 2004 alone, the difference in numbers is likely attributable to how the complaints were submitted to the FMCSA. The complaints Inspector General Mead refers to are specifically ones that had been officially submitted via the FMCSA's complaint hotline. Additionally, considering the pressure the FMCSA has been under to improve consumer protection, it is highly unlikely that the agency would overstate or exaggerate the number of consumer complaints they received each year.

[94] *Sandberg Testimony*, *supra* note 39, at 4 (indicating that, as of April 2005, investigators had thus far conducted 100 investigations during fiscal year 2005, three times more than in all of fiscal year 2004).

[95] *Id.*

not change the fact that many consumer complaints are not investigated. Simple mathematics leads to the conclusion that when consumers lodge 16,000 complaints per year—whether the FMCSA conducts thirty investigations or 300—many complaints are not investigated. This is not to demean the FMCSA or its investigatory efforts; the agency is simply focusing its limited resources to achieve maximum results. Making outreach efforts and focusing on patterns of complaints in regions of the greatest concern are the only responsible actions the FMCSA can take, considering its limited resources. That the FMCSA takes a broad, pattern-based enforcement approach is supported by statements in its regulations. In its 2003 rulemaking, the FMCSA reiterated that, "[g]iven the volume and scope of household goods movements each year, FMCSA acknowledges that it cannot intervene in individual cases to assure consumers their desired result."[96] It is also clear from the FMCSA handbook, *Your Rights and Responsibilities When You Move*, that the FMCSA will not help consumers settle their disputes with movers and will not intervene if a consumer's goods are being held hostage.[97]

C. Federal Criminal Enforcement Has Not Solved the Problem

Consumer complaints have increased dramatically despite strong federal criminal enforcement actions taken against household goods moving companies. In the last five years, the DOT Office of the Inspector General has investigated allegations of fraud involving over twenty-five household goods moving companies associated with approximately 8,000 victims.[98] Despite the combination of such criminal investigations with the civil enforcement efforts of the FMCSA, complaints of fraud and abuse in the household goods moving industry have increased.[99] Such an increase in fraudulent activity is not surprising given the limited federal resources the federal government can allocate to the household goods moving industry. Fraud and abuse of consumers has increased, not because federal criminal fines and imprisonment are insufficient to deter, but because federal resources are too limited. While the investigations conducted by the Office of the Inspector General were associated with approximately 8,000 victims, those investigations were focused on just over twenty-five moving companies. While in no way minimizing the importance and impact of these investigations on the targeted companies, and while recognizing the efforts of the Office of the Inspector General, the FMCSA, and other participating federal and state agencies, the increase in consumer complaints of fraud and abuse clearly indicate that the federal government's efforts have not sufficiently deterred dishonest moving companies bent on defrauding consumers.

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[96] 68 Fed. Reg. 35065 (June 11, 2003) (to be codified at C.F.R. pts. 375, 377)

[97] 49 C.F.R. pt. 375, app. A ("If your mover holds your goods 'hostage'—refuses delivery unless you pay an amount you believe the mover is not entitled to charge—the Federal Motor Carrier Safety Administration does not have the resources to seek a court injunction on your behalf.").

[98] *Mead Testimony*, *supra* note 83, at 7.

[99] *Id.* at 8.

The Office of the Inspector General and the FMCSA—particularly since 2003—have made serious and gradually improved efforts to eradicate the problem of interstate movers who willfully violate federal regulations to prey on vulnerable consumers. Despite those efforts, the problem persists and consumer complaints have increased dramatically. Both the FMCSA and Congress agree that the federal government does not, by itself, have the resources to police and deter predatory interstate moving companies. The FMCSA has sought authority to allow state attorneys general to enforce federal household goods consumer protection regulations.[100] Legislation in the 108th Congress,[101] as well as legislation passed just recently,[102] indicates that Congress has also concluded that the federal government must formally partner with others in order to achieve its enforcement objectives. In light of the federal government's inability to adequately protect consumers, an inquiry should be made as to whether consumers themselves have the resources, or should be given the resources, to protect themselves.

D. Consumer Recourse Under Existing Law Is Inadequate

Consumer remedies available under federal law have not deterred those moving companies who willfully prey on consumers. While Congress has correctly noted that the majority of moving companies operate honestly and within the law, the number of movers that prey on consumers by willfully violating federal laws has grown since 1995.[103] Despite this growth, some members of the household goods moving industry most likely believe that consumer remedies at federal law are adequate. Members of the industry may believe that consumer remedies are adequate for a number of reasons. Federal law allows consumers causes of action for overcharging[104] and late delivery.[105] Consumers may also bring a cause of action under the Carmack Amendment for loss or damage of goods.[106] In addition, it appears that consumers may be able to generally bring a cause of action for violations of federal statutes and regulations governing moving companies.[107] With so many remedies available, one might well believe that consumers do not need an additional private right of action like the one proposed in this Comment.[108]

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[100] *Sandberg Testimony*, *supra* note 39, at 4.

[101] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004) ("Federal resources are inadequate to properly police or deter, on a nationwide basis, those movers who willfully violate Federal regulations governing the household goods industry and knowingly prey on consumers who are in a vulnerable position.").

[102] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59 (2005) (H.R. 3, 109th Cong.).

[103] H.R. 3550 § 4302.

[104] 49 U.S.C. § 14705(b) (2000).

[105] Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29 (1936).

[106] 49 U.S.C. § 14706 (2000).

[107] 49 U.S.C. § 14704(a)(2) (2000).

[108] This author is proposing a private right of action specifically for bait and switch schemes where consumer goods are held hostage and for moving company failure to engage

In analyzing whether consumer remedies are currently sufficient, it is important to keep in mind that consumer remedies perform different functions. Consumer remedies may, of course, compensate consumers for wrongs that they have suffered, but they may also deter companies that might otherwise engage in illegal conduct. Of course, this author is concerned that consumers be compensated for harms done. But above and beyond compensation, this author's proposal for a new private right of action with treble damages is aimed at creating a partnership between government and consumers toward improved enforcement and deterrence. With that said, one remedy mentioned above raises a question that deserves special attention: do consumers already have general private rights of action that will sufficiently protect them and deter bad actors?

Understandably, opponents of a new federal private right of action may respond by pointing out that consumers already have a broad private right of action with attorney fees under 49 U.S.C. § 14704(a)(1) and (a)(2).[109] Section 14704(a)(1) allows an individual to enforce an order of the "Secretary or the Board" and provides injunctive relief for violations of 49 U.S.C. § 14102 and § 14103, which concern leased motor vehicles and the loading and unloading of motor vehicles, respectively. Section 14704(a)(2) allows a person to recover "damages sustained . . . as a result of an act or omission of that carrier or broker in violation of this part."[110] Because the damages section is directly below the section that refers to the enforcement of orders and injunctive relief concerning the leasing and loading of motor vehicles, it is easy to believe that the damages provision in section 14704(a)(2) refers to the violations of agency orders listed in section 14704(a)(1).[111] It has also been argued that the words "in violation of this part" in section 14704(a)(2) are not sufficient to create a private right of action for violation of regulations that implement the Motor Carrier Act.[112] In wrestling with such questions, the Eighth Circuit found that the language of the statute was not entirely clear, stating that "we confess to being rather mystified

in the complaint settlement process in accordance with federal regulations. A key component to this private right of action is the availability of treble damages. The availability of treble damages would encourage consumers and their attorneys to pursue and help irradiate these particular fraudulent practices.

[109] 49 U.S.C. § 14704 (2000) (provides in relevant part: "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.").

[110] *Id.*

[111] Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 192 F.3d 778, 784 (8th Cir. 1999) (defendant in that case argued that § 14704(a)(2) referred to damages related to the enforcement of agency orders in § 14704(a)(1)).

[112] *Id.*

by the inconsistent language used in the . . . various enforcement provisions."[113] The Eighth Circuit did not do much to clarify the situation when it held 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."[114]

Though the Eighth Circuit found the wording of the statute to be ambiguous, that court did ultimately decide that it would allow private parties to bring a cause of action under at least some related statutes and their implementing regulations. It is quite possible that many consumers and their attorneys are unaware of the statute's potential reach, which would explain why there are so few reported cases of consumers using the statute to pursue private rights of action against household goods moving companies, particularly during times when fraudulent and predatory practices have increased.[115]

Although it is uncertain that other jurisdictions will interpret section 14704 as allowing consumers a general private right of action, assuming they do, the remedial scheme may still limit the deterrent effect of the statute. A consumer's potential recovery under section 14704 against a moving company that held goods hostage will almost certainly be capped by a mover's limitation of liability under the Carmack Amendment. [116] Supreme Court precedent supports such a limitation.[117] Additionally, claims for delay fall under the umbrella of the Carmack Amendment.[118] Because federal regulations subject a mover holding goods hostage to claims for delay,[119] those claims will be subject to a

[113] *Id.* at 785.

[114] *Id.*

[115] Though 49 U.S.C. § 14704 has been in effect since 1995, this author found only three reported cases where consumers attempted to bring a private right of action against moving companies under that statute. One of the cases did not decide the issue of whether a private right of action exists against a moving company under § 14704. In the other two cases, courts allowed plaintiffs' causes of action against moving companies to survive motions for summary judgment. *See* Hall v. Aloha Int'l Moving Serv., Inc., No. 98-1217 (MJD/JGL), 2002 U.S. Dist. LEXIS 14868, at *41, (D. Minn. Aug. 6, 2002) (discussing briefly whether § 14704 provides consumers a private right of action against moving companies, but not reaching the question); Richter v. N. Am. Van Lines, Inc., 110 F. Supp. 2d 406, 415−16 (D. Md. 2000) (allowing a consumer's § 14704 claim against a moving company to survive summary judgment); Roberts v. N. Am. Van Lines, Inc., No. C-03-2397 SC (N.D. Cal. Jan. 22, 2004) (during a motion for summary judgment, all of plaintiffs' state law claims were dismissed, leaving only plaintiffs' § 14704 claim); Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004) (finding that there is a growing criminal element in the household goods moving industry that preys on vulnerable consumers).

[116] Gellert v. United Airlines, 474 F.2d 77, 80 (10th Cir. 1973) (limiting damages available to the limitation of liability in the Carmack Amendment).

[117] Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28, 28−29 (1936) (holding that, after a jury had awarded plaintiff $1,500 for late delivery that caused an interruption to his business, plaintiff's award needed to be reduced to $50 because the carrier had limited its liability to that sum under the Carmack Amendment).

[118] *Id.* (applying the Carmack Amendment to a claim for delay).

[119] 49 C.F.R. § 375.407 (2004) (indicating that, when a mover does not deliver goods at payment of 110% of the original price, the mover may be subject to claims for delay).

mover's limitation of liability. Thus, it seems that consumers who pursue damages for holding goods hostage under section 14704 may achieve the same result that they have been able to achieve for years using the Carmack Amendment. It seems that section 14704 offers little to deter moving companies that are bent on violating federal law, because the statute will likely be subject to a mover's limitation of liability, and the statute appears so rarely in case law. Still, there is a more obvious reason to support the conclusion that consumer remedies are inadequate.

Not only have current consumer remedies failed to effectively deter predatory moving companies, such companies have also steadily grown in number. Without exception, consumer remedies for overcharging, delay, loss or damage of goods, and general damages have been on the books since the ICC was abolished in 1996.[120] Nevertheless, consumer complaints have risen significantly since then, and the number of movers who willfully violate regulations to prey on consumers has increased.[121] While it is true that this increase may be largely attributable to the diminished regulatory role of the DOT and the FMCSA as compared to their predecessor, the ICC, that does not decrease the need to find a solution that provides consumer protection. The practice of holding goods hostage highlights the need for additional consumer protection.

Using bait and switch tactics, followed by holding goods hostage, is one type of predatory practice that has persisted despite the federal regulatory scheme and existing consumer remedies. Though federal regulations have long provided that an interstate carrier must relinquish a consumer's shipment upon payment of 110% of the original contract price,[122] this longstanding federal regulation has not prevented unscrupulous moving companies from holding goods hostage.[123] In recent legislation, Congress has explicitly recognized that the problem of movers holding goods hostage is one that needs a legislative solution.[124] Since the Senate has concluded that "Federal resources are inadequate to properly police or deter . . . movers who willfully violate Federal regulations,"[125] this author suggests that it is time to give consumers additional power to help fill the enforcement vacuum as private attorneys general.

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[120] 49 U.S.C. § 14705(b) (2000); *Se. Express Co.*, 299 U.S. at 29; 49 U.S.C. § 14706 (2000); 49 U.S.C. § 14704(a)(2) (2000).

[121] H.R. 3550 § 4302 (citing a growing criminal element in the moving industry that preys on consumers and indicating that consumer complaints have increased).

[122] Roberts v. N. Am. Van Lines, Inc., No. C-03-2397 SC (N.D. Cal. Jan. 22, 2004).

[123] *See id.* (recent example of a national moving company holding goods hostage notwithstanding federal regulations to the contrary); *Mead Testimony*, *supra* note 83, at 7 ("Typically, an unscrupulous operator will offer a low-ball estimate and then refuse to deliver or release the household goods unless the consumer pays an exorbitant sum, often several times the original estimate.").

[124] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4315 (2004) (Congress specifically identified the practice of holding goods hostage and proposed steeper civil penalties and a criminal penalty.).

[125] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004).

Moreover, a new cause of action under federal law that expressly allows treble damages under limited circumstances would not be preempted by the Carmack Amendment. Avoiding Carmack preemption is important because, while the Carmack Amendment provides some benefits for consumers, it has also prevented consumers from utilizing state law remedies that might otherwise be effective.

1. Early Interpretations of the Carmack Amendment Set the Stage for Inadequate Consumer Protection

There can be little doubt as to the federal government's authority to regulate interstate transportation. The Commerce Clause found in Article I of the United States Constitution expressly grants the federal government power to "regulate Commerce . . . among the several States."[126] In 1887, Congress exercised that power in enacting the Interstate Commerce Act.[127] In 1906, Congress added the Carmack Amendment to the 1887 Interstate Commerce Act to address, among other things, the liability of an interstate carrier of goods.[128]

Prior to the Carmack Amendment, interstate carriers of goods were subject to an unacceptable diversity of laws concerning their liability under shipping contracts.[129] By enacting the Carmack Amendment, Congress created a uniform system of liability whereby motor carriers could limit their liability in the state of departure and ensure that the limitation would have full effect in the courts of the state where the goods were ultimately delivered.[130] Following the Amendment, motor carriers could limit their liability to less than the actual value of the goods they lost or damaged in interstate transport, so long as the carrier had provided the shipper with a bill of lading and a choice of two or more levels of liability coverage.[131] As discussed in Part I, the Carmack Amendment benefits consumers through, among other things, lower and more stable transportation rates and by establishing prima facie liability for carriers that have lost or damaged goods.[132] The benefits of Carmack uniformity have been somewhat offset because courts have interpreted the language of the Amendment broadly. Such a broad interpretation has preempted state law causes of action that are not exclusively related to the loss or damage of goods. By allowing for the broad preemption of state law claims, courts have enabled the Carmack Amendment to preempt state law causes of action that might otherwise have allowed consumers to adequately protect themselves. Such broad preemption began with a series of early United States Supreme Court decisions.

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[126] U.S. CONST. art. I, § 8, cl. 3; Wright, *supra* note 28, at 178–180 (articulating the constitutional underpinnings and early legislative history of the Carmack Amendment).

[127] Interstate Commerce Act, 49th Cong., 24 Stat. 379 (1887).

[128] Carmack Amendment, 59th Cong., 34 Stat. 595 (1906).

[129] Adams Express Co. v. Croninger, 226. U.S. 491, 505 (1913) (discussing the difficulty for carriers to know the extent of their liability for loss or damage of goods under the diversity of state laws applied to carriers prior to the Carmack Amendment).

[130] *Id.* at 504−06.

[131] *Id*. at 509−10.

[132] Wright, *supra* note 28, at 181−82.

In *Adams Express Co. v. Croninger*, the United States Supreme Court held that, when Congress enacted the Carmack Amendment, Congress intended for the Amendment to completely preempt all state law claims for the damage or loss of shipped goods.[133] Notwithstanding the Carmack Amendment's narrow language,[134] the Supreme Court soon expanded its *Adams Express Co.* holding. In two subsequent decisions, the Court interpreted the Carmack Amendment to preempt state law causes of action not predicated solely upon the loss or injury of property if those claims in any way enlarged a carrier's liability under a bill of lading.[135]

In *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, [136] and in *Southeastern Express Co. v. Pastime Amusement Co.*, [137] the Supreme Court made clear that the federal regulatory scheme and the Carmack Amendment would combine to broadly preempt state law. In *Charleston & Western Carolina Railway Co.*, the Court held that a South Carolina statute penalizing interstate motor carriers for failing to pay a shipper's claims within a timely manner was preempted by the Carmack Amendment. Though the penalty was not directed at the loss or damage of goods, the Court nevertheless found state laws preempted if they enlarged a carrier's responsibility for loss or affected the grounds or measure of a shipper's recovery.[138] In *Southeastern Express Co.*, the plaintiff had arranged for a motion picture film to be transported by a particular date so that it could be shown at an exhibition. The carrier did not deliver the shipment in time for the plaintiff's scheduled exhibition. The plaintiff sued under a negligence theory and received a $1,500 award, far in excess of the $50 limitation of liability that the plaintiff had agreed to in the event of loss or damage to the film.[139] The Court reversed, holding that the plaintiff's damages for delay were capped by the liability limitation in the bill of lading. Regarding the preemptive scope of the Carmack Amendment, the Court held that the "words of the statute 'are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination.'"[140] *Charleston* and *Southeastern* clarified the message of *Adams*

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[133] *Adams Express Co.*, 226. U.S. at 505−06 (describing the statute's preemptive effect and stating that "[a]lmost 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").

[134] 34 Stat. 595 (creating a cause of action covering actual "loss, damage, or injury to . . . property").

[135] Wright, *supra* note 28, at 183−86 (providing a detailed history of the Supreme Court's early Carmack decisions).

[136] Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 603 (1915).

[137] Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29 (1936).

[138] *Charleston & W. Ry. Co*, 237 U.S. at 603 (quoting Miss., Kan. & Tex. Ry. Co. of Tex. v. Harris, 234 U.S. 412, 420−22 (1914)).

[139] *Se. Express Co.*, 299 U.S. at 28−30.

[140] *Id.* at 29 (quoting Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U.S. 190, 196 (1916)).

Express Co.: the Carmack Amendment preempts a broad range of state law claims against moving companies.

Federal courts have taken this message to heart. Using Carmack preemption, federal courts have almost completely barred state contract and tort claims against moving companies if the underlying claims are even tangentially related to the loss, damage, or delay of goods. Almost uniformly, United States circuit courts of appeals have ruled that state law claims against interstate moving companies sounding in contract or tort are preempted.[141] While achieving the important goal of uniformity, the Carmack Amendment also carries a price: decreased consumer protection.

[141] Rini v. United Van Lines, Inc., 104 F.3d 502, 506−07 (1st Cir. 1997) (holding that, although the federal regulatory scheme did not provide a sufficient deterrent to the conduct of the moving company, the Carmack Amendment nevertheless preempted state law claims for negligence, misrepresentation, and the implied covenant of good faith and fair dealing); Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 378 (2d Cir. 1994) ("Congress has created a broad, comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. *This has occupied the field to the exclusion of state law*."); Mallory v. Allied Van Lines, Inc., No. 02-CV-7800, 2003 U.S. Dist. LEXIS 19652, at *7, 12 (E.D. Pa. Oct. 20, 2003) (A Federal District Court within the Third Circuit held that the plaintiff's tort claim for intentional infliction of emotional distress was preempted by the Carmack Amendment. In doing so, the court stated, "Although the Third Circuit has not considered the scope of preemption under the *Carmack Amendment*, other jurisdictions have consistently held that the *Carmack Amendment* preempts state law under almost all circumstances."); Shao v. Link Cargo Ltd., 986 F.2d 700, 706 (4th Cir. 1993) (holding that "the Carmack Amendment was intended by Congress to create a national uniform policy regarding the liability of carriers under a bill of lading for goods lost or damaged in shipment. Allowing a shipper to bring common law breach of contract or negligence claims against a carrier for such loss or damage conflicts with this policy."); Hoskins v. Bekins Van Lines Co., 343 F.3d 769, 777 (5th Cir. 2003) (holding that the Carmack Amendment preempted "1) the tort of outrage, 2) intentional and negligent infliction of emotional distress, 3) breach of contract, 4) breach of implied warranty, 5) breach of express warranty, 6) violation of the Texas Deceptive Trade Practices Act sections 17.46 and 17.50, 7) slander, 8) misrepresentation, 9) fraud, 10) negligence and gross negligence, and 11) violation of the common carrier's statutory duties as a common carrier under state law"); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir. 1987) (holding that "the Carmack Amendment preempts all state and common law remedies inconsistent with the Interstate Commerce Act"); Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261, 1264 (8th Cir. 1984) (holding that "[a]ll actions against a common carrier, whether designated as tort or contract actions, are governed by the federal statute, and 'no recovery can be had in excess of the amount permitted by [the] terms' of the contract"); Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992) (upholding general Carmack preemption of state law); Underwriters at Lloyds of London v. N. Am. Van Lines, 890 F.2d 1112, 1121 (10th Cir. 1989) (overruling previous decisions of the Tenth Circuit and joining the other circuit courts of appeals in recognizing that the Carmack Amendment preempted state law claims for negligent loss or damage of property); Smith v. United Parcel Serv., 296 F.3d 1244, 1249 (11th Cir. 2002) (upholding broad preemption of state law).

2. Preemption of Fraud and Deceptive Practices Claims Erodes Consumer Protection

a. Fraud

In interpreting the Carmack Amendment, federal courts have preempted consumer fraud claims. The Carmack Amendment began rather narrowly as a uniform system of liability for loss, damage, or injury to property.[142] Early Supreme Court decisions expanded the Carmack Amendment to preempt all state law claims related to "any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination."[143] Eventually, the Carmack Amendment preempted any state law claims related to a "carrier's pre-shipment contract negotiations and post-shipment claim handling."[144] As a result, the Carmack Amendment preempts state law claims for delay,[145] bad faith claims handling,[146] refusal to make delivery to an address,[147] and pre-shipment contract negotiations.[148] Unfortunately, such broad preemption has helped to insulate moving companies from state law claims for fraud and deceptive practices.

By preempting state law claims for fraud, some courts have allowed moving companies to participate in bait and switch schemes with little accountability to the consumer. In *United Van Lines, Inc. v. Shooster*,[149] the defendants claimed fraud as an affirmative defense against a moving company that gave them a quote based on an estimate that their shipment weighed 12,000 pounds. Once the moving company had the defendants' belongings, they informed defendants that their shipment weighed almost 25,000 pounds and inflated the price of the move accordingly.[150] Naturally, the defendants believed that they were quoted an artificially low price to induce them into the contract,

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[142] Carmack Amendment, 59th Cong., 34 Stat. 595 (1906).

[143] *Se. Express Co.*, 299 U.S. at 29 (quoting *Ga., Fla. & Ala. Ry. Co.*, 241 U.S. at 196).

[144] Wright, *supra* note 28, at 191, 198–199 (stating that, in addition to the Tenth Circuit Court of Appeals, many other United States circuit courts of appeals recognize broad Carmack preemption over pre-shipment and post-shipment activities related to shipment of household goods. In addition, numerous lower court decisions at the federal and state level have interpreted the Carmack Amendment to preempt state law claims, and in particular, claims for fraud.).

[145] *Se. Express Co.*, 299 U.S. at 29.

[146] *Rini*, 104 F.3d at 506−07.

[147] Smith v. United Parcel Serv., 296 F.3d 1244, 1249 (11th Cir. 2002) (holding that the Carmack Amendment preempted state law claims when UPS would not deliver packages to the plaintiff's home, but instead required plaintiff to obtain the packages at the UPS office. The court broadly held that the "Carmack Amendment embraces 'all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation.'") (quoting *Ga, Fla. & Ala. Ry. Co.*, 241 U.S. at 196).

[148] Wright, *supra* note 28, at 191.

[149] United Van Lines, Inc. v. Shooster, 860 F. Supp. 826 (S.D. Fla. 1992).

[150] *Id*. at 828 (indicating that the moving company had quoted the consumer a price based upon a weight of 12,000 pounds and later charged the consumer based upon a weight of 25,000 pounds. Naturally, the defendant claimed that the moving company had engaged in a bait and switch scheme, claiming that the "plaintiff fraudulently underestimated the weight of the shipment to induce them to enter into the contract").

only to have the movers severely inflate the price at the point of destination. The court held that the defendants' fraud claims were preempted by the Carmack Amendment. In doing so, the court noted that other courts had decided that the Carmack Amendment clearly preempts state law fraud claims.[151] The court dismissed all of the defendants' affirmative defenses, granted the moving company summary judgment for the inflated cost of the move, and left the defendants with only a Carmack Amendment claim for damage of their goods.[152] The court's holding would have been bad enough had it merely prevented the defendants from holding the plaintiff accountable for alleged bait and switch tactics; what made it worse was, by refusing to hear the defendants' fraud claim, the court required the defendants to pay the moving company for the inflated cost of the move.

Preemption of fraud is not unusual. Several circuit courts of appeals have found fraud claims preempted by the Carmack Amendment.[153] Not surprisingly, consumers who have fallen victim to fraudulent or deceptive practices have attempted to use state consumer protection statutes as a remedy. Unfortunately, although they enjoyed some initial success, state consumer protection statutes now share the same fate as state fraud claims.

b. State Consumer Protection Statutes

Although initially promising, state consumer protection statutes will not help consumers hold interstate moving companies accountable. Private rights of action under state consumer protection statutes initially provided injured consumers a remedy against unscrupulous moving companies. In *Sokhos v. Mayflower Transit, Inc.* and *Mesta v. Allied Van Lines International, Inc.*, the Massachusetts Federal District Court held that the Carmack Amendment did not preempt Massachusetts state DTPA laws.[154] Both courts held that the plaintiffs' claims were not based directly on loss or damage of property, but

[151] *Id*. at 829.

[152] *Id*. at 830.

[153] *See* Rini v. United Van Lines, Inc., 104 F.3d 502, 506−07 (1st Cir. 1997) (holding state law claims for misrepresentation and unfair and deceptive acts preempted); Hoskins v. Bekins Van Lines Co., 343 F.3d 769, 777 (5th Cir. 2003) (holding that the Carmack Amendment preempted state law claims for violation of the Texas Deceptive Trade Practices Act and state law fraud claims); Gordon v. United Van Lines, Inc., 130 F.3d 282, 289−90 (7th Cir. 1997) (holding that the Carmack Amendment preempted state law claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, fraud in the claims process, and fraudulent inducement to contract—even though a claim of fraudulent inducement can be made in the absence of any loss, damage, or delay).

[154] Sokhos v. Mayflower Transit, Inc., 691 F. Supp. 1578, 1582 (D. Mass. 1988) (holding that an unfair or deceptive acts and practices claim "is not preempted by the Carmack Amendment as it is not based on loss or damage to plaintiff's belongings but rather is complaining of the process that defendant utilized in handling her claim. This is not inconsistent with the terms of the Carmack Amendment."); Mesta v. Allied Van Lines Int'l, Inc., 695 F. Supp. 63, 65 (D. Mass. 1988) (holding that an unfair or deceptive acts and practices claim "is based not on loss of property, but on the defendant's actions in investigating and responding to the plaintiff's claim. Such activities were not undertaken in the course of transporting goods, and are thus not within the scope of the Carmack Amendment.").

instead were based upon the moving companies' deceptive claim settling practices. Likewise, the Texas Supreme Court, in *Brown v. American Transfer & Storage Co.*, held that the Carmack Amendment did not preempt the Texas Deceptive Trade Practices Act related to pre-contractual fraud or deception.[155]

State DTPA claims did not escape Carmack preemption for long. In *Rini v. United Van Lines, Inc.*,[156] the First Circuit Court of Appeals overruled *Sokhos* and *Mesta*, and in *Moffit v. Bekins Van Lines Co.*,[157] the Fifth Circuit Court of Appeals made clear that the Carmack Amendment did preempt the Texas Deceptive Trade Practices Act, notwithstanding the Texas Supreme Court's holding in *Brown*. In addition, based partly on the reasoning in *Rini*, the Seventh Circuit found the Illinois Consumer Fraud and Deceptive Business Practices Act preempted by the Carmack Amendment.[158] Since the decisions in *Rini* and *Moffit*, federal and state courts in other circuits have followed suit.[159] While closing the door on state consumer protection statutes, both courts noted that they were preserving Carmack uniformity.[160] Because federal courts have incontrovertibly established that Carmack uniformity must be protected from the uncertain and varied liability of state law claims, consumers must look to federal law in order to avoid Carmack preemption.

3. Private RICO Suits Are Not the Answer for Most Consumers

Private rights of action under the federal RICO statute would be unlikely to help most consumers. Although a private federal RICO suit would avoid Carmack preemption,[161] there are factors that make private RICO claims an

[155] Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 938 (Tex. 1980) (holding that the Texas Court of Appeals was correct in stating that the "Carmack Amendment applied only to the liability of a carrier for its breach of contract, and the DTPA was a general statute, which provided remedies for persons victimized by false, misleading and deceptive acts within the police power of the state. Thus, the court concluded the prime object of the Carmack Amendment was to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and that a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations.").

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

[157] Moffit v. Bekins Van Lines Co., 6 F.3d 305, 305−07 (5th Cir. 1993) (holding that the Carmack Amendment preempted Texas Deceptive Trade Practices Act claims).

[158] *Gordon*, 130 F.3d at 289 (holding that the plaintiff's fraudulent inducement claim under the Illinois Consumer Fraud and Deceptive Business Practices Act was preempted by the Carmack Amendment).

[159] C&M Tech., Inc. v. Yellow Freight Sys., Inc., No. CV554356S, 2001 Conn. Super. LEXIS 2552, at *9−17 (Aug. 31, 2001) (citing *Rini* while coming to the conclusion that the Connecticut Unfair Trade Practices Act is preempted by the Carmack Amendment); Nichols v. Mayflower Transit, LLC, 368 F. Supp. 2d 1104, 1107 (D. Nev. 2003) (holding the Nevada Unfair Claims Practices Act preempted by the Carmack Amendment).

[160] *Rini*, 104 F.3d at 507 (emphasizing the importance of preserving Carmack uniformity); *Moffit*, 6 F.3d at 307 (stating that allowing the plaintiff's state law claims would "defeat the purpose of the statute, which was to create uniformity"); *see also Gordon*, 130 F.3d at 286 (discussing the importance of Carmack uniformity).

[161] *In re* Evic Class Action Litig., No. M-21-84 (RMB), 2002 U.S. Dist. LEXIS 14049, at *41 n.31 (S.D.N.Y. July 31, 2002) (holding that the Carmack Amendment does not preempt a civil RICO claim).

unattractive alternative. Consumers suing moving companies would find prosecuting RICO cases costly and difficult. To compound that difficulty, consumers would sometimes need to overcome a growing judicial skepticism of civil RICO claims.

Congress's primary purpose in enacting RICO in 1970 was to "control organized crime's infiltration into legitimate business."[162] A combination of the provisions in 18 U.S.C. § 1962[163] and 18 U.S.C. § 1964[164] allow a private individual to sue an organization for treble damages and attorney fees. As the essential elements of a private RICO action, a plaintiff must prove: "a) a pattern of racketeering activity or the collection of an unlawful debt; b) the existence of an enterprise engaged in or affecting interstate or foreign commerce; c) a nexus between the pattern of racketeering activity and the enterprise; and d) an injury to his business or property by reason of the above."[165] The treble damages provision is designed to encourage private citizens to bring suit and to serve as

[162] ARTHUR F. MATHEWS, ANDREW B. WEISSMAN & JOHN H. STURC, CIVIL RICO LITIGATION § 2.03 (2d ed. 1992).

[163] 18 U.S.C. § 1962 (2000) (providing in relevant part: "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer. (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.").

[164] 18 U.S.C. § 1964(c) (2000) (providing in relevant part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.").

[165] Thomas Fitzpatrick, *Elements of the RICO Statute, in* CIVIL RICO 1984, at 13, 19 (PLI Litig. & Admin. Practice, Course Handbook Series No. 132, 1984).

a disincentive to criminal activity.[166] As such, a private federal RICO claim, in theory, could be a powerful weapon in an aggrieved consumer's arsenal. The power of the civil RICO weapon has been somewhat diminished, however, by judges who have grown hostile to the misapplication of civil RICO to ordinary business disputes.[167]

In recent years, courts have grown hostile to private RICO actions and have therefore heightened their review of such cases.[168] Today's courts tend to "scrutinize civil RICO claims with far more skepticism than they scrutinize criminal RICO charges."[169] Consequently, "civil RICO plaintiffs face formidable barriers."[170] Among those barriers are the complexity of the statute and the aggressive use of summary judgment and other pretrial motions to stop a RICO suit before it really starts.

A corporate defendant can readily turn the complexity of the RICO statute into an advantage[171] because the "multiplicity of elements going into any civil RICO claim, the ambiguities inherent in those elements . . . and the complex and varying interrelationships between those elements, combine to make RICO a difficult statute to understand and use."[172] Defendants have been highly successful in turning RICO's complexity to their advantage using pretrial motions and summary judgment. Between 1987 and 1989, 65% of civil RICO claims were dismissed before trial.[173] By 1995, the number of private RICO actions dismissed before trial had grown to upwards of 80%.[174] This heightened level of scrutiny and consequent reduction in successful RICO claims are part of a judicial backlash against RICO's use against legitimate businesses because it was originally enacted as a "tool in extirpating the baneful influence of organized crime."[175]

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[166] Thomas P. Heed, *Misappropriation of Trade Secrets: The Last Civil RICO Cause of Action That Works*, 30 J. MARSHALL L. REV. 207, 221 (1996) (stating that the "treble damages provision is designed as an economic disincentive to racketeering activity"); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 449 (1991) (referring to DTPA treble damage provisions and stating that the "possibility of a significant damage recovery undoubtedly deters some merchants from engaging in deceptive practices, while affording the damaged consumer an opportunity for compensation").

[167] Sofia Adrogué, *Civil RICO: Is it the Time of Reckoning?*, 42 HOUS. LAW. 34, 35 (2004).

[168] *Id*.

[169] *Id.*

[170] *Id.*

[171] Samuel J. Buffone, *Defending a Civil RICO Case: Motions, Defenses, Strategies and Tactics*, *in* CIVIL RICO 1988, at 469 (PLI Litig. & Admin. Practice, Course Handbook Series No. 147, 1988).

[172] ARTHUR F. MATHEWS, ANDREW B. WEISSMAN & JOHN H. STURC, CIVIL RICO LITIGATION 1−16 (2d ed. 1992).

[173] Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 759 (1990).

[174] Adrogué, *supra* note 167, at 35 n.19.

[175] *Id*. at 35.

In summary, the federal regulatory and remedial scheme does not afford consumers adequate protection. The findings of the GAO and the Senate support this conclusion.[176] A combination of factors have led to the current lack of consumer protection. Perhaps chief among those factors is inadequate enforcement of existing regulations by the federal government. In addition, federal law provides consumers insufficient remedies to protect themselves. The need for consumers to protect themselves at a federal level is even more crucial because state law claims that would otherwise hold interstate motor carriers accountable are preempted by federal law. In recently introducing and passing new consumer protection legislation, Congress has explicitly recognized the need for improved regulatory enforcement to protect consumers.

III. RECENT LEGISLATIVE EFFORTS TO IMPROVE CONSUMER PROTECTION

A. Congressional Recognition of the Need for Enhanced Consumer Protection

For several years, both Houses of Congress have recognized the importance of enhancing consumer protection in the household goods moving industry. In that time, members of the House of Representatives and the Senate introduced several bills in an attempt to bolster consumer protection. Bills of note are: Senate Bill 1316 in the 107th Congress; House Bill 1070, House Bill 2928, House Bill 3550, and Senate Bill 1072 in the 108th Congress; and recently passed House Bill 3 in the 109th Congress. All of these bills recognized, either implicitly or explicitly, that federal resources had failed to protect consumers from predatory moving companies. As introduced, House Bill 1070 and Senate Bill 1072 recognized the inadequacy of the federal scheme in explicit findings of fact.[177] As amended, House Bill 3550 recognized

[176] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 3; Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004).

[177] H.R. 1070, 108th Cong. § 2 (2003) (providing the following congressional findings: "(4) Current Federal regulations allow for a household goods carrier found to be in violation of Federal law to be subject to civil penalties but provide no remedy for consumers who have been harmed by fraudulent or deceptive trade practices of a household goods mover. (5) Various courts have interpreted the 'Carmack' amendment, related to a carrier's liability in loss and damage claims, to preclude States from pursuing any actions against interstate household goods carriers, including the application of consumer protection laws against fraudulent movers. (6) Federal resources are inadequate to properly police or deter, on a nationwide basis, those movers who willfully violate Federal regulations governing the household goods industry and knowingly prey on consumers who are in a vulnerable position. It is appropriate that a Federal-State partnership be created to enhance enforcement tools against fraudulent moving companies."); S. 1072, 108th Cong. § 4302 (2004) ("(4) Federal resources are inadequate to properly police or deter, on a nationwide basis, those movers who willfully violate Federal regulations governing the household goods industry and knowingly prey on consumers who are in a vulnerable position. It is appropriate that a Federal-State partnership be created to enhance enforcement against fraudulent moving companies.").

the inadequacy of the federal enforcement scheme as well.[178] The other bills implicitly recognized the inadequacy of federal enforcement efforts by proposing legislation that would have given either consumers or state attorneys general the power to enforce federal regulations. Senate Bill 1316 proposed to give consumers additional power to protect themselves through expanded federal remedies. The other bills relied upon the creation of a federal-state partnership as opposed to a federal-consumer partnership.

Particular attention should be given to two bills: Senate Bill 1316 and House Bill 3. Senate Bill 1316 should be considered further because it, like this author's proposal, was intended to provide consumers with additional remedies. However, House Bill 3 deserves the greatest attention because it was recently signed into law.[179]

[178] However, this is only because the Senate passed House Bill 3550 after replacing the text of the House version of House Bill 3550 with the text of Senate Bill 1072. *See* 150 CONG. REC. S5838 (daily ed. May 19, 2004) (statement of Sen. Frist) (On May 19, 2004, the Senate struck the text of House Bill 3550 and inserted the text of Senate Bill 1072. Thus, the "Findings; Sense of Congress" section in the Senate version of House Bill 3550 originated in Senate Bill 1072.). Ultimately, the House of Representatives and the Senate did not agree on a final version of House Bill 3550 before the expiration of the 108th Congress. It appears that the primary reason for disagreement was the cost of the Bill. The Senate version of House Bill 3550 proposed $318 billion in spending and was approximately $34 billion more expensive than the House version of the Bill, which was $284 billion. Additionally, President Bush had threatened to veto the transportation Bill at either level of spending. *See* 150 CONG. REC. S7775−76 (daily ed. July 8, 2004) (statement of Sen. Daschle) (discussing the differences in spending between the House and Senate versions of the Bill and indicating that President Bush had threatened to veto even the less expensive House version of the Bill).

[179] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59 (2005) (H.R. 3, 109th Cong.) (House Bill 3 was signed by the President on August 10, 2005). The household goods consumer protection provisions of House Bill 3, although not identical, are very similar to those in the Senate version of House Bill 3550. Although the consumer protection provisions of House Bill 3 did not include congressional findings as House Bill 3550 did, both bills contained provisions creating a federal-state enforcement partnership whereby state officials could enforce federal law related to the household goods moving industry. In addition, both bills contained provisions imposing steeper civil penalties and criminal penalties for holding goods hostage, and both bills contained provisions establishing consumer complaint databases. *See* Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. §§ 4308, 4312, 4315 (2004); *See also* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users §§ 4206, 4210, 4214 (H.R. 3).

B. Senate Bill 1316 and Why It Failed

Senate Bill 1316 had little chance of passing.[180] On August 2, 2001, Senator John Kerry introduced Senate Bill 1316.[181] About a year earlier, Senator Kerry had introduced a previous version of the Bill, referred to as the Moving Company Responsibility Act,[182] in response to the First Circuit's decision in *Rini v. United Van Lines, Inc.*[183] The Bill sought to modify the language of the Carmack Amendment by allowing consumers to bring suits for punitive damages under *state* DTPA statutes against *any* interstate motor carrier that failed to fairly engage in claims processing. In particular, the Bill sought to "waive Federal preemption of State law providing for the awarding of punitive damages against motor carriers for engaging in unfair or deceptive trade practices in the processing of claims relating to loss, damage, injury, or delay in connection with transportation of property in interstate commerce."[184] Basically, the Bill allowed consumers to bring state law causes of action with punitive damages against moving companies that engaged in bad faith claim settlement. While protecting consumers from bad faith claim settlement is a

[180] For a comprehensive argument against the Bill, see Wright, *supra* note 28, at 208−12 (providing sound arguments for not passing Senate Bill 1316 or its predecessor into law. One reason was that the Bill was retroactive so many years that it would allow causes of action to be brought well after federal and most state statutes of limitation would have expired. Additionally, the author found that the history of DTPA statutes did not support their application to the processing of property claims. An even more compelling reason was that application of various state DTPA laws would upset the uniformity provided by the federal scheme.).

[181] S. 1316, 107th Cong. § 1 (2001) ("A BILL To amend title 49, United States Code, to waive Federal preemption of State law providing for the awarding of punitive damages against motor carriers for engaging in unfair or deceptive trade practices in the processing of claims relating to loss, damage, injury, or delay in connection with transportation of property in interstate commerce. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, SECTION 1. STATE COURT AWARDS OF PUNITIVE DAMAGES FOR UNFAIR OR DECEPTIVE PRACTICES OF MOTOR CARRIERS IN CONNECTION WITH CLAIMS FOR LOSS, DAMAGE, INJURY, OR DELAY OF TRANSPORTED PROPERTY, (a) PUNITIVE DAMAGES AUTHORIZED.—Section 14706 of title 49, United States Code, is amended by adding at the end the following: '(h) PUNITIVE DAMAGES FOR UNFAIR OR DECEPTIVE PRACTICES.—Nothing in this section limits the liability of a carrier for punitive damages authorized under applicable State law for any act or omission of the carrier in connection with the investigation, settlement, adjudication, or other aspect of the processing of a claim under this section that constitutes an unfair or deceptive trade practice under such State law.'. (b) RETROACTIVE EFFECTIVE DATE AND APPLICABILITY—Subsection (h) of section 14706 of title 49, United States Code (as added by subsection (a)), shall take effect as of January 1, 1990, and shall apply with respect to receipts and bills of lading referred to in subsection (a)(1) of such section that are issued on or after that date.").

[182] Wright, *supra* note 28, at 178.

[183] Wright, *supra* note 28, at 208 (stating that Senator Kerry introduced the Bill in 2000 as a result of lobbying efforts on the part of the plaintiff in *Rini v. United Van Lines, Inc.*); Rini v. United Van Lines, Inc., 104 F.3d 502, 506 (1st Cir. 1997) (bad faith claims handling case where the plaintiff's award of damages on state deceptive trade practices claims were preempted by the Carmack Amendment).

[184] S. 1316.

commendable end, and one this author advocates, the means by which Senate Bill 1316 proposed to do so were badly flawed.

The Bill as worded contained three fatal flaws. First, although ostensibly aimed at the household goods moving industry, the Bill "indiscriminately authorize[d] punitive damages against all motor carriers, household goods and general freight carriers alike."[185] Thus, Senate Bill 1316 needlessly exposed freight carriers unassociated with the household goods moving industry to the potential for increased litigation. Second, allowing state law actions for unfair or deceptive trade practices would have utterly defeated the Carmack Amendment's original purpose of making interstate carrier liability independent of the various laws of the states.[186] Third, the Bill as written was to be retroactive an astonishing eleven years[187] without any justification in the Bill itself. Given the above limitations, it us unsurprising that Senate Bill 1316 did not pass.

C. Recently Passed House Bill 3

While House Bill 3 is a much needed step in the right direction, it fails to go far enough in protecting consumers. The House of Representatives and Senate passed House Bill 3 on July 29, 2005, and the President signed the Bill on August 10, 2005.[188] The consumer protection provisions relating to the household goods moving industry are found in sections 4201–4216.[189] Though sections 4201–4216 help protect consumers, this Comment focuses on those provisions that seem most likely to decrease the practices of bad faith claims handling and holding goods hostage by: 1) creating a federal-state enforcement partnership with state attorneys general, 2) imposing increased civil penalties and possible criminal penalties for carriers who engage in select practices, and 3) increasing the information collected by the DOT and making it available to the public. This Comment also discusses a section of House Bill 3 that requires the Comptroller General to study the possibility of allowing state attorneys general to apply *state* consumer protection laws to *interstate* household goods carriers.

House Bill 3 could have been far more meaningful had it provided for a federal-consumer enforcement partnership in addition to the federal-state enforcement partnership. A federal-consumer enforcement partnership would have several advantages. Enforcement of federal regulations would not depend on the responsiveness of a particular state's justice system. A wronged consumer could enforce federal law her or himself and, at the same time, deter

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[185] Wright, *supra* note 28, at 178.

[186] Wright, *supra* note 28, at 210−12 (arguing that the Bill destroyed the uniformity standard of the Carmack Amendment).

[187] S. 1316.

[188] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59 (2005) (H.R. 3, 109th Cong.).

[189] *Id.*

future offenders. Under such a system, the wronged consumer would be able to recover the penalty imposed on the moving company, instead of the state.

Allowing state attorneys general to enforce federal household goods moving regulations helps consumers—just not enough. The formal federal-state enforcement partnership created by House Bill 3 provides significant improvements in protection for consumers in states that have the resources to aggressively enforce federal regulations as well as their own state regulations. However, in states with overburdened or non-responsive justice systems, consumers may remain easy prey for predatory moving companies. Section 4206 allows a state to bring a civil action through its state attorney general on behalf of its citizens against an interstate motor carrier.[190] One of the inadequacies of section 4206 is that the enforcement of federal laws and regulations would depend upon state justice systems that in many instances are already overburdened.[191] Though the consumer protection problem is truly a federal issue, consumers will receive different levels of protection depending on the resources and resolve of local agencies on a state-by-state basis. An interstate problem requires an interstate solution.

Another problem with House Bill 3 is that any fines levied are payable to the state instead of to the wronged consumer.[192] As mentioned above, this author desires a solution that protects consumers and compensates victims. Additionally, because House Bill 3 does not create a private remedy for consumers, even those consumers in vigilant states might be forced to wait several years before they could reap the full benefit of any deterrent effect. However, if consumers were given a sufficiently strong private right of action, consumers could immediately begin to protect themselves, and treble damages penalties imposed on moving companies could benefit the individual consumers who had been wronged.

In addition to allowing for state enforcement, House Bill 3 increased penalties in general, and in particular, for holding goods hostage. The fact that House Bill 3 singled out holding goods hostage as a practice worthy of increased penalties[193] strongly supports this author's concern with the practice.

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[190] *Id.*

[191] Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 643−44 (1994) (describing how Oregon resources to combat unlawful and deceptive practices are inadequate, creating greater reliance on individuals to enforce consumer protection measures with private rights of action).

[192] Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users § 4206 (H.R. 3) (providing in relevant part: "Notwithstanding any other provision of this title, a State authority may enforce the consumer protection provisions of this title that apply to individual shippers, as determined by the Secretary, and are related to the delivery and transportation of household goods in interstate commerce. Any fine or penalty imposed on a carrier in a proceeding under this subsection shall be paid, notwithstanding any other provision of law, to and retained by the State.").

[193] Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users § 4210 (H.R. 3) (providing in relevant part: "Whoever is found holding a household goods shipment hostage is liable to the United States for a civil penalty of not less than $10,000 for each violation. . . . Each day a carrier is found to have failed to give up possession of

While the increased penalties may help consumers in the long run, the benefits will be slow to materialize in the absence of consistent and aggressive enforcement. Enforcement would likely be anything but consistent, since it would depend upon state governments with varying resources and commitments. There is little reason to believe that increased penalties will be of much value since federal regulations already provide steep penalties for a variety of offenses,[194] and Congress has found that, despite those penalties, consumer protection has eroded. The problem lies with enforcement. Without strong and consistent enforcement, penalties are paper tigers. As discussed above, under this new federal-state partnership, enforcement may vary considerably from state to state. For consumers living in states with the resources to enforce federal government regulations as well as their own, increased penalties may have a deterrent effect. But for those states with overburdened justice systems, consumers may benefit little from the specter of increased penalties.

House Bill 3 also mandates the DOT to create a consumer complaint database[195] with procedures for providing the public access and for forwarding complaints to state authorities.[196] Such a database will likely help consumers in the long run. Consumers may benefit from greater access to information about carriers, and future sessions of Congress may have the empirical data needed to justify further strengthening of consumer protection regulations. In the short term, however, such a database will likely be of marginal benefit to consumers. Thus, while the consumer protection provisions of House Bill 3 will help consumers, more needs to be done. Accounting for that possibility, Congress has included a provision whereby the Comptroller General will conduct a study of the possibility of allowing state attorneys general to apply *state* consumer protection laws to *interstate* household goods movers.[197]

The last section of House Bill 3's household goods consumer protection provisions requires the Comptroller General to complete a study on the possibility of allowing state attorneys general to enforce state consumer protection laws against interstate household goods carriers.[198] This last section is encouraging because it expresses Congress's realization that the changes

household goods may constitute a separate violation. . . . If the person found holding a shipment hostage is a carrier or broker, the Secretary may suspend for a period of not less than 12 months nor more than 36 months the registration of such carrier or broker under chapter 139. The force and effect of such suspension of a carrier or broker shall extend to and include any carrier or broker having the same ownership or operational control as the suspended carrier or broker. . . . Whoever has been convicted of having failed to give up possession of household goods shall be fined under title 18 or imprisoned for not more than 2 years, or both.").

[194] 49 U.S.C. § 14910 (2000) (providing a penalty of $500 per day for any failure to comply with regulations related to motor carriers, which includes household goods movers).

[195] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users § 4214 (H.R. 3).

[196] *Id*.

[197] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users § 4216 (H.R. 3).

[198] *Id.*

made by House Bill 3 may not go far enough to protect consumers and that stronger measures may be needed. This section is discouraging because allowing states to apply different state consumer protection laws to interstate motor carriers would upset the Carmack Amendment's purpose of creating uniformity of liability for interstate carriers. Imposing state consumer protection laws upon interstate moving companies would not only disrupt uniformity of liability, but it would also allow for disparate levels of consumer protection from state to state. This interstate problem needs a uniform interstate solution. Such a solution may be achieved by forming a uniform federal-consumer enforcement partnership that upholds Carmack uniformity and offers consumers immediate protection.

IV. A NEW FEDERAL PRIVATE RIGHT OF ACTION: EMPOWERING CONSUMERS TO PROTECT THEMSELVES WHILE MAINTAINING CARMACK UNIFORMITY

A. Needed: Private Attorneys General

Based on the recent increase in consumer complaints, and the findings of both the GAO and the Senate, it is clear that the federal government is not adequately enforcing regulations to protect consumers. As mentioned above, House Bill 3 shifts part of the burden of enforcing federal regulations to state officials. Consumers would then be at the mercy of those state officials to enforce federal regulations. When state officials do take action, any penalties levied go to the state rather than to the wronged consumers. Consumers should not be made to depend on the enforcement activities of federal or state authorities. Rather, consumers should be allowed to protect themselves. A private right of action with treble damages and attorney fees would help form a federal-consumer partnership whereby consumers would be allowed to protect themselves, be compensated for harms suffered, and at the same time, provide a serious deterrent to predatory moving companies.

Measured application of the "private attorneys general" concept to the household goods moving industry will protect consumers and honest moving companies. The analogy to private RICO and state DTPA claims is appropriate because the household goods moving industry suffers from the same kind of problems that led to the enactment of RICO and DTPA statutes. Treble damages would compensate injured consumers, encourage an enforcement partnership between consumers and government, and strongly deter the criminal and deceptive behavior of predatory moving companies. By restricting the private right of action to limited federal statutory claims, consumer overuse or abuse associated with RICO and DTPA claims would be avoided. Finally, by allowing defendant moving companies to collect attorney fees for bad faith consumer suits, honest members of the industry would be afforded protection from meritless prosecution.

The household goods moving industry has been invaded by a growing criminal element that preys on consumers.[199] Ineffective governmental enforcement[200] has worsened,[201] and as a result, consumers are inadequately protected.[202] Similar conditions led to the enactment of RICO and DTPA private rights of action. RICO was adopted in response to the growth of organized crime and its infiltration of legitimate businesses.[203] State DTPA statutes were enacted to protect consumers from fraudulent, deceptive, and unfair trade practices.[204] The problems in the household goods moving industry combine elements of criminal predation[205] with the unfair and deceptive practices of bait and switch transactions, holding goods hostage, and bad faith claims settlement. Additionally, both RICO and state DTPA statutes were enacted in response to failed government enforcement due to a lack of resources.[206] Similarly, a lack of resources is responsible for the federal government's inadequate enforcement of regulations to protect consumers from the predatory practices of some household goods movers.[207]

Treble damage provisions similar to those allowed for private RICO actions and state DTPA actions would provide immediate protection for consumers and encourage a partnership between consumers and government that would deter wrongdoers. If allowed a private right of action for holding goods hostage and bad faith claims handling, consumers would be able to protect themselves instead of relying on overburdened and under-funded government agencies. Just as with RICO and DTPA claims, as "private attorneys general," consumers would assist a government with scarce resources

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[199] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004).

[200] U.S. GEN. ACCOUNTING OFFICE, *supra* note 60, at 3 (finding that the DOT and the FMCSA had done little to regulate the industry).

[201] H.R. 3550 § 4302 (discussing recent growth in the criminal element of the household goods moving industry and inadequate enforcement).

[202] *Id.* (discussing how an increasing number of moving companies prey on vulnerable consumers).

[203] ARTHUR F. MATHEWS, ANDREW B. WEISSMAN & JOHN H. STURC, CIVIL RICO LITIGATION § 2.02 (2d ed. 1992) (stating that RICO was enacted in response to organized crime "infiltrating legitimate business and subverting the American economy").

[204] Sovern, *supra* note 166, at 446.

[205] *Mead Testimony*, *supra* note 83, at 3−4 (indicating that the practice of holding goods hostage is essentially the crime of extortion).

[206] Michele R. Moretti, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 NEW ENG. L. REV. 1363, 1398 (1991) (discussing that the concept of "private attorneys general" in civil RICO allowed private citizens to "avail themselves of a legal remedy in cases where the government is unable or unwilling to prosecute"); *see* Sovern, *supra* note 166, at 448 (stating that "[s]tate and local consumer agencies lack sufficient resources to pursue every consumer fraud vigorously, and so, like the FTC, face strong incentives to confine their activities to cases likely to have a broad impact. To plug the holes in consumer fraud enforcement, nearly every state has now extended to injured consumers the power to sue merchants who engage in deceptive practices.").

[207] H.R. 3550 § 4302.

with the eradication of criminal and deceptive practices.[208] Finally, the deterrent effect of treble damage awards, along with increased consumer participation, is consistent with the goals of private RICO and DTPA claims.[209]

By limiting the private right of action to limited federal statutory claims, the consumer overuse or abuse associated with RICO and DTPA would be avoided. Both RICO and DTPA statutes have been criticized by commentators because of their breadth.[210] By creating a federal private right of action that is limited to violations of narrow statutory provisions, unfair or deceptive claims handling and holding goods hostage, consumers would not be able to use the action for broad purposes. The federal private right of action would allow consumers to address two narrow, yet exceedingly important, issues.

B. Preservation of Carmack Uniformity

In upholding Carmack preemption of state law claims, the recurring theme, from the Supreme Court to nearly every circuit, has been the need for uniformity of carrier rates and liability.[211] Uniformity should be preserved because of Congress's original intent, but also because a policy of uniformity makes sense. By following a uniform system of liability, carriers and consumers would have a stable foundation from which to assess their liability and risk. As one commentator put it, "Not only do shippers and carriers benefit from Carmack, the general public also benefits from lower, more stable transportation rates and uniform, predictable carrier liability standards."[212] Therefore, it is important that, whatever means is used to protect consumers

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[208] Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 283 (1992) (Justice Souter stated that, by "including a private right of action in RICO, Congress intended to bring 'the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources [were] deemed inadequate.'"); Sovern, *supra* note 166, at 448.

[209] Heed, *supra* note 166, at 221 ("[T]reble damages provision is designed as an economic disincentive to racketeering activity."); Sovern, *supra* note 166, at 449 (referring to DTPA treble damage provisions and stating that the "possibility of a significant damage recovery undoubtedly deters some merchants from engaging in deceptive practices, while affording the damaged consumer an opportunity for compensation").

[210] Sovern, *supra* note 166, at 467 ("At present, deceptive trade practices statutes are written too broadly, and assume something in their application—judicious exercise of discretion—which is often lacking."); Goldsmith & Linderman, *supra* note 173, at 735 ("Critics claim that civil RICO is too broad because it potentially applies to all commercial transactions.").

[211] Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29 (1936); Rini v. United Van Lines, Inc., 104 F.3d 502, 507 (1st Cir. 1997); Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 379 (2d Cir. 1994); Shao v. Link Cargo Ltd., 986 F.2d 700, 706 (4th Cir. 1993); Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 382 (5th Cir. 1998); Gordon v. United Van Lines, Inc., 130 F.3d 282, 287 (7th Cir. 1997); Hughes Aircraft Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992); Underwriters at Lloyds of London v. N. Am. Van Lines, 890 F.2d 1112, 1116 (10th Cir. 1989); Smith v. United Parcel Serv., 296 F.3d 1244, 1246 (11th Cir. 2002).

[212] Wright, *supra* note 28, at 182, 213 (concluding that, if consumer remedies were ultimately deemed to be inadequate, changing federal law rather than state law would provide for uniform application).

from the wrongful practices of some moving companies, uniformity of liability should be preserved.

A federal private right of action against interstate carriers for bad faith claims handling and holding goods hostage would preserve uniformity of liability. Because the proposed causes of action would be brought under federal law, there would be no disparate treatment of carriers based upon the laws of the state of origin or destination. Additionally, because the damages called for are treble damages as opposed to general punitive damages, juries would not be free to make the outrageous awards often associated with punitive damages. Nor would allowing plaintiffs to recover treble damages for bad faith claims handling or holding goods hostage upset uniformity. The Carmack Amendment was concerned with creating a uniform federal standard for the carrier to know "what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another."[213] Moving companies could predictably count on treble damages if they choose to engage in these two narrow statutory and regulatory violations. Allowing treble damages for violations of limited statutory provisions would not stray from Carmack uniformity any more than the federal government's imposition of fines for violations of the same.

V. CONCLUSION

While the vast majority of interstate moves are completed successfully, and moving companies that prey on consumers form a small percentage of the industry, that percentage is growing,[214] and the effects that their practices have on consumers can be devastating. The federal government lacks the capacity to adequately enforce consumer protection regulations against interstate moving companies that willfully violate federal law.[215] Although Congress recently passed consumer protection legislation which, among other things, forms a federal-state enforcement partnership,[216] more needs to be done to ensure that strict enforcement of federal consumer protection regulations is not dependent on the varying resources or priorities of the several states. The current proposal seeks to allow consumers to protect themselves from a narrow class of predatory and deceptive practices without unduly prejudicing honest companies and while maintaining the uniformity of the current interstate transportation scheme. By equipping individual consumers with the tools to help themselves, those persons who have been harmed by predatory and deceptive practices would be compensated, while at the same time forming an enforcement partnership with government.

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[213] Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913).

[214] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, H.R. 3550, 108th Cong. § 4302 (2004).

[215] *Id.*

[216] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59 (2005) (H.R. 3, 109th Cong.).