SMU | Dedman School of Law

SMU Law Review

Volume 33 | Issue 4 Article 4

January 1979

American Transfer & (and) Storage Co. v. Brown: Motor Carrier Liability for Misrepresentation Resulting in Property Damage - The Texas Deceptive Trade Practices Act Versus the Carmack Amendment

Wagner Bill Van

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American Transfer & Storage Co. v. Brown: Motor Carrier Liability for Misrepresentations Resulting in Property Damage—The Texas Deceptive Trade Practices Act Versus the Carmack Amendment

Raymond J. Brown sought to move his personal belongings from Irving, Texas, to Fairbanks, Alaska. Brown contacted American Transfer and Storage Company (American) to inquire about American's services.[1] An American agent represented to Brown that American would provide door-to-door service, including careful packing, movement, delivery, and placement in the plaintiff's residence, and would furnish certain types of containers and vaults to assure safe delivery. Brown, relying on these representations, entrusted his goods to American for shipment to Alaska. When the shipment arrived, most of the goods had been either damaged or lost. Brown brought an action under the Texas Deceptive Trade Practices—Consumer Protection Act[2] to recover treble damages for the loss of property and mental anguish suffered. American defended, arguing that the Carmack Amendment[3] to the Interstate Commerce Act[4] preempted the DTPA, and that property damage would not support an award of damages for mental anguish. The jury found that American's representations were deceptive trade practices and thus awarded Brown damages for both property loss and mental anguish. Reasserting all defenses raised at the trial level, American appealed to the court of civil appeals of Dallas. *Held, reversed and remanded*:[5] The DTPA is not preempted by the Carmack Amendment, but a recovery for property damages under the DTPA will not support a claim for mental anguish damages. *American Transfer &*

1. American was not an interstate carrier, but served as an agent for interstate carriers and as a packer of goods for interstate shipment. As neither the court nor the parties stated otherwise, it is assumed that American was subject to all laws, regulations, and rules that apply to common carriers.

2. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-1979), *as amended in* 1979 Tex. Sess. Law Serv., ch. 603, §§ 1-10, at 1327-32 (Vernon) [hereinafter referred to and cited as the DTPA].

3. 49 U.S.C.A. § 11707 (West Supp. 1979). The Carmack Amendment provides uniform legislation concerning carrier liability for loss of, or damage to, goods transported in interstate commerce. Prior to the enactment of Pub. L. No. 95-473, 92 Stat. 1453 (1978), the Carmack Amendment was codified at 49 U.S.C. §§ 20(11), (12).

4. 49 U.S.C.A. §§ 10101-11916 (West Supp. 1979).

5. The appellate court reversed and remanded based on its finding that the trial court improperly excluded from evidence payments made to Brown under an insurance policy obtained by Brown through American.

Storage Co. v. Brown, 584 S.W.2d 284 (Tex. Civ. App.—Dallas 1979, writ granted).

I. FEDERAL PREEMPTION OF THE DTPA BY THE CARMACK AMENDMENT

A. *Federal Preemption and Interstate Commerce*

The supremacy clause of the United States Constitution establishes federal law as the supreme law of the land.[6] Accordingly, when a state law regulates an area in which Congress has prohibited state regulation, the state law must fall.[7] Moreover, even if Congress does not foreclose the states from regulating an area, a state law is preempted to the extent that it conflicts with federal law.[8] Occasionally, a conflict will be found to exist when compliance with federal and state law is physically impossible.[9] More often, however, a conflict is found when state law obstructs the "accomplishment and execution of the full purposes and objectives of Congress."[10] For example, in *Perez v. Campbell*[11] the Arizona Motor Vehicle Safety Responsibility Act was challenged on the ground that it conflicted with the Federal Bankruptcy Act. The Arizona statute provided that discharge in bankruptcy following the rendering of any judgment based on liability for an automobile accident did not relieve the judgment debtor from the requirements or sanctions of the state statute.[12] The declared purpose of the Arizona statute was to protect users of highways from financially irresponsible drivers.[13] In contrast, the declared purpose of the Federal Bankruptcy Act was to give debtors a new opportunity in life

6. U.S. CONST. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States . . . and all treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."

7. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1976); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973).

8. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1976). *See generally* Comment, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

9. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1962).

10. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1976); Perez v. Campbell, 402 U.S. 637, 652 (1971); Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Supreme Court decides each claim of preemption on the basis of the peculiarities and special features of the regulatory scheme in question. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973). The Court will look at such factors as the purposes and objectives of the state and federal statutes, Perez v. Campbell, 402 U.S. at 652, the state interest being asserted, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 445 (1960), local police power concerns, Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 14-15 (1937), the express or implied intent of Congress, Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 280-82 (1977), preemptive language, or lack thereof, within the federal statute, Askew v. American Waterways Operators, Inc., 411 U.S. 325, 329 (1973), and dominant federal interests, Pennsylvania v. Nelson, 350 U.S. 497, 504-05 (1956).

11. 402 U.S. 637 (1971).

12. ARIZ. REV. STAT. ANN. § 28-1163(B) (West 1976).

13. 402 U.S. at 644.

without being hampered by preexisting debt.[14] Expressly overruling the rationale in two of its prior decisions,[15] the Court stated that it would no longer follow a doctrine by which state law would be upheld as long as the purposes of the state and federal statutes differed.[16] Instead, the Court concluded that state legislation is invalid when it frustrates the full effectiveness of federal legislation.[17] Accordingly, the Arizona statute was struck down because it forced bankrupts to pay their debts despite the Bankruptcy Act's provision for discharge of those debts.[18]

Despite the language in *Perez*, the Supreme Court has displayed great deference to state law regulating interests that are historically within the police powers of the states;[19] only when Congress clearly had intended its enactment to control exclusively have state laws regulating such interests fallen.[20] For example, in *Huron Portland Cement Co. v. City of Detroit*[21]

14. *Id.* at 648.

15. Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Reitz v. Mealey, 315 U.S. 33 (1941). As in *Perez*, both *Kesler* and *Reitz* involved conflicts between the Bankruptcy Act and state financial responsibility laws.

16. 402 U.S. at 651-52.

17. *Id.* at 652.

18. *Id.* at 654, 656.

19. *See, e.g.*, New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979) (financial welfare of state's citizens); Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (protection of marine food supply); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (prevention of water pollution); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (prevention of consumer fraud and misrepresentation); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (prevention of air pollution).

In New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979), a recent decision discussing federal preemption, a plurality of the Supreme Court stated that they would not lightly set aside state laws "of general applicability that protect interests 'deeply rooted in local feeling and responsibility.' With respect to such laws, the Court has stated 'that, in the absence of compelling congressional direction, the Court will not infer that Congress had deprived the States of the power to act.' " *Id.* at 1341, 59 L. Ed. 2d at 568 (citations omitted). How much deference will be given to state laws of general applicability cannot be determined from the Court's decision. In a separate concurring opinion, Justice Brennan implied that he was not certain what characteristics a law should have to be classified as a law of general applicability. *Id.* at 1344, 59 L. Ed. 2d at 572. In another concurring opinion, Justices Blackmun and Marshall stated, "The crucial inquiry is whether the exercise of state authority 'frustrate[s] the effective implementation of the [federal statute's] processes,' not whether the State's purpose was to confer a benefit on a class of citizens." *Id.* at 1346, 59 L. Ed. 2d at 574. The dissent, Chief Justice Burger and Justices Stewart and Powell, flatly rejected the test of general applicability as the primary consideration in a preemption analysis. *Id.* at 1350, 59 L. Ed. 2d 579-80. With at least five Justices rejecting the test of general applicability, that test should not predominate in future preemption cases. This is not to say, however, that the Court will depart from its past position of according deference to state laws that are enacted to protect fundamental and deeply rooted state interests. What the concurring and dissenting Justices appear to be stating is that a state law does not necessarily involve a deeply rooted state interest merely because it protects a class of citizens.

20. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (federal statute with objective of securing a uniform system of regulation for oil tanker safety features invalidated state law regulating same subject even though state law aimed at water pollution); Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (state statute aimed at conserving marine food supply invalidated by congressional intent that such conservation regulations be even-handed and nondiscriminatory).

21. 362 U.S. 440 (1960).

the Supreme Court took special note of Congress's concession that air pollution is a matter peculiar to state and local concern.[22] The Court cited legislative history evidencing congressional intent to preserve and protect the rights of states to control air pollution.[23] Accordingly, the Court held that a city ordinance regulating boiler emissions was not preempted by a federal statute approving boilers that produced emissions exceeding the levels permitted by the city ordinance.[24] The Court's preemption analysis centered on the purposes of the federal and state statutes. It observed that the purpose of the local ordinance was to control air pollution levels while the purpose of the federal statute was to insure that seagoing vessels were reasonably safe.[25] The Court concluded that the statutes did not overlap in either scope or purpose, and therefore they were not in conflict.[26]

Another example of federal deference to state regulation is *Florida Lime & Avocado Growers v. Paul*,[27] in which the United States Supreme Court held that a state statute regulating the quality of avocados transported into the state was not preempted by a federal statute that regulated the quality of avocados exported from one state to another.[28] The Court reasoned that the state had a fundamental right to protect its citizens from inedible commodities that are represented as edible.[29] The Court characterized such representations as frauds upon the public,[30] and concluded that the state's interest in proscribing such fraud and misrepresentation could be overcome by a federal statute only when Congress clearly expressed an intent to preempt the field.[31]

Since *Huron* and *Paul*, the Supreme Court has consistently recognized that problems directly affecting the health, welfare, and safety of the local public are deeply rooted local interests.[32] As in *Huron*, subsequent decisions concerning deeply rooted state interests have given special consideration to the purpose and scope of the state regulation when determining if the state law obstructs the accomplishment and execution of the purposes and objectives of the federal statute. The Court's consistency in upholding state statutes that provide for the health, welfare, and safety of the public indicates that the scope of the direct conflict test is narrowed to provide special consideration for such state interests.

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22. *Id.* at 445-46.
23. *Id.*
24. *Id.* at 446.
25. *Id.* at 442, 445.
26. *Id.* at 446.
27. 373 U.S. 132 (1963).
28. *Id.* at 146.
29. *Id.* at 144.
30. *Id.*
31. *Id.* at 144, 152.
32. *See* note 19 *supra* and accompanying text. *See also* Comment, *supra* note 8, at 378. *See generally* Sisk, *State Environmental Protection Versus the Commerce Power*, 13 U. RICH. L. REV. 197 (1979); Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197, 202-03 (1978); Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1769-72 (1974).

B. *Purpose of the Carmack Amendment*

In 1906, Congress enacted the Carmack Amendment[33] to the Interstate Commerce Act. The Amendment provides exclusive legislation[34] on the duty of interstate carriers to issue bills of lading[35] for movement of interstate shipments, on the liability of a carrier for damage to, or loss of, goods being transported under a bill of lading contract, and on the ability of a carrier to limit its liability for damage to, or loss of, an interstate shipment by rule, regulation, or contract.[36] By these provisions, Congress intended

33. Ch. 3591, § 7, 34 Stat. 593 (1906) (current version at 49 U.S.C.A. § 11707 (West Supp. 1979)).

34. When Congress comprehensively regulates an area of commerce pursuant to its power under U.S. CONST. art. I, § 8, the states may no longer regulate that area. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (federal statute with objective of securing an international uniform system of regulation for all tanker safety features invalidates state law regulating same subject); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (pervasive nature of federal regulation of aircraft noise and need for uniformity in regulation of aircraft noise preempts state law regulating same subject); Southern Ry. v. Reid, 222 U.S. 444 (1912) (federal legislation seeking uniformity on subject of interstate carrier's responsibility to accept shipments preempts state law on same subject). In Adams Express Co. v. Groninger, 226 U.S. 491, 505-06 (1912), the Supreme Court stated:

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

35. A bill of lading is a document evidencing the receipt of goods for shipment issued by a person in the business of transporting goods. U.C.C. § 1-201(6); TEX. BUS. & COM. CODE ANN. § 1.201(6) (Tex. UCC) (Vernon 1968).

36. *See* Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1912). In *Adams Express* the plaintiff directed the carrier to transport a package from Ohio to Georgia. The plaintiff failed, however, to declare the value of the package. The defendant's rates were graduated according to the declared value of the package. Because the plaintiff had failed to declare a value, defendant applied its lowest rate applicable to shipments being transported from Ohio to Georgia. The bill of lading issued to the plaintiff provided that the defendant's liability for loss of, or damage to, goods would not exceed $50 unless the shipper declared a greater value at the time of shipment. Plaintiff's goods were lost in transit and plaintiff filed a claim for their full value, which exceeded $50. Defendant, relying on its limitation of liability clause, refused to pay an amount in excess of $50. Plaintiff contended that defendant's limitation of liability clause was void under KY. CONST. § 196, which provides that a common carrier cannot by contract relieve itself of common law liability. The United States Supreme Court rejected plaintiff's claim, holding that the Carmack Amendment provided exclusive legislation on the subject of carrier liability under a bill of lading contract. 226 U.S. at 505-06. Under the Carmack Amendment, a carrier's stipulation limiting recovery to an agreed value when the rate is based on the agreed value is valid. *Id.* at 512. Accordingly, the plaintiff's claim was denied. *Id.*

State regulations with only an incidental effect on the subject matter of the amendment may not be preempted. For example, in Missouri, Kan. & Tex. Ry. v. Harris, 234 U.S. 412 (1914), the plaintiff brought an action against the defendant carrier to recover the value of goods lost by the defendant. The plaintiff was allowed recovery under the Carmack Amendment for the loss and, pursuant to a state statute, was awarded limited attorneys' fees. *Id.* at 415. The Supreme Court held that the state regulation did not directly conflict with the Carmack Amendment. *Id.* at 420-21. The regulation merely authorized an injured party to recover a portion of the costs incurred in recovering for his injuries, as opposed to an authorization to enlarge or limit carrier responsibility for loss of, or damage to, interstate shipments. *Id. But cf.* Strickland Transp. Co. v. American Distrib. Co., 198 F.2d 546, 547 (5th Cir. 1952) (claim for attorneys' fees in suit brought under Carmack Amendment cannot be

to free interstate shipments from diverse state judicial and statutory laws that had made it difficult for both shippers and carriers to know the extent of carrier liability for damage to, or loss of, goods transported in interstate commerce.[37]

Transactions Within the Purview of the Carmack Amendment. The provisions of the Carmack Amendment are limited to a statement of the rights of a legal holder of a receipt or bill of lading issued by an interstate carrier and the responsibilities of a carrier to such a holder. The Supreme Court, however, has expanded the scope of the Amendment beyond its express provisions. For example, in *New York, New Haven & Hartford Railroad v. Nothnagle*[38] the Supreme Court held that a railroad is liable to a passenger for the loss of baggage entrusted to the railroad's employee. Without receiving a receipt, the plaintiff had handed her suitcase to a redcap while waiting to board a train.[39] The Court found that since the redcap was a railroad employee performing functions incident to interstate transportation, the loss of plaintiff's suitcase was reached by the terms of the Interstate Commerce Act.[40] Although neither a bill of lading nor a receipt had been issued to the claimant, the Court concluded that the provisions of the Carmack Amendment, an integral part of the Interstate Commerce Act, governed the railroad's liability for loss of the entrusted goods.[41]

In Texas the Carmack Amendment has been extended to cover agreements collateral to the bill of lading contract. In *Southwestern Motor Transport Co. v. Valley Weathermakers, Inc.*[42] a plaintiff asserted that his claim for freight damages was governed not by the amendment, but by an independent agreement that had been entered into between the plaintiff and the carrier after plaintiff's shipment had been damaged. The court rejected the plaintiff's argument and held that the post-transportation agreement was so intimately connected with the original interstate transaction that it became a part thereof and therefore was controlled by the Carmack Amendment.[43]

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considered for jurisdictional purposes); Southwestern Motor Transp. Co. v. Valley Weathermakers, Inc., 427 S.W.2d 597 (Tex. 1968) (state statute that allowed award of unlimited attorneys' fees in action brought under Carmack Amendment held inoperable in this fact situation).

37. Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1912). *See also* Atlantic Coast R.R. v. Riverside Mills, 219 U.S. 186, 199-203 (1911).

38. 346 U.S. 128 (1953).

39. *Id.* at 129.

40. *Id.* at 130-31. The Court stated that the Carmack Amendment's exception for baggage carried on passenger trains applied only to free baggage checked through on a passenger fare. This exception does not apply to a redcap service, for which the railroad exacts a charge separate from the passenger fare, because the cost of such service is not an element of the determination of passenger rates. *Id.* at 134.

41. *Id.* at 130-32.

42. 427 S.W.2d 597, 605 (Tex. 1968).

43. *Id.* at 604. The controversy between the parties related to the recovery of attorneys' fees. An action for damages under state law would have allowed recovery for attorneys' fees whereas an action under the Interstate Commerce Act would not. *Id.* at 599. *See* Strickland Transp. Co. v. American Distrib. Co., 198 F.2d 546, 547 (5th Cir. 1952).

The Carmack Amendment expressly provides that nothing in the amendment deprives a holder of a receipt or bill of lading of any right of action that existed prior to adoption of the amendment.[44] The United States Supreme Court initially construed this provision to include only rights of action that a holder had under preexisting federal law.[45] In *Southeastern Express Co. v. Pastime Amusement Co.*,[46] however, the Supreme Court expanded the scope of the amendment, holding that it was broad enough to embrace all damages resulting from a carrier's failure to perform its duties with respect to its transportation function.[47] Thus, when the carrier breached its common law duty to timely deliver an interstate shipment, the claimant's measure of damages was controlled by the Carmack Amendment.[48] The principle enunciated in *Pastime Amusement* was subsequently applied to the carrier's common law duties to advise a shipper of impending delay of a shipment,[49]to furnish suitable equipment for transportation,[50] and to transport goods safely.[51]

Damages Under the Carmack Amendment. The general measure of damages under the Carmack Amendment is either the cost of repair for damaged goods or the value of the lost goods.[52] The amendment, however, allows recovery of all damages that result from the carrier's loss of or damage to an interstate shipment.[53] Relying on the amendment's broad language, some courts have extended a carrier's liability beyond actual loss by awarding exemplary damages to a plaintiff whose action is based on a carrier's willful breach of its common law or federal statutory duties.[54] Exemplary damages have been awarded to a plaintiff when a carrier's willful pre-contract misrepresentations and deceit were a proximate cause of the plaintiff's damage.[55] Under federal law, however, an award of exemplary damages may be made against the principal only when the principal either participates in the willful and wanton act or ratifies it.[56]

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44. 49 U.S.C.A. § 11707 (West Supp. 1979).
45. Adams Express Co. v. Croninger, 226 U.S. 491, 507-08 (1912).
46. 299 U.S. 28 (1936).
47. *Id.* at 29.
48. *Id.*
49. Gold Star Meat Co. v. Union Pac. R.R., 438 F.2d 1270 (10th Cir. 1971).
50. Federated Dep't Stores, Inc. v. Brinke, 450 F.2d 1223 (5th Cir. 1971).
51. Mitchell v. Union Pac. R.R., 188 F. Supp. 869 (S.D. Cal. 1960).
52. 49 U.S.C.A. § 11707 (West Supp. 1979); Gulf, Colo. & S.F. Ry. v. Texas Packing Co., 244 U.S. 31, 37 (1917); F.J. McCarty Co. v. Southern Pac. Co., 428 F.2d 690, 692 (9th Cir. 1970); W.A. StackPole Motor Transp., Inc. v. Malden Spinning & Dyeing Co., 263 F.2d 47, 48 (5th Cir. 1958). *See generally* Skulina, *Liability of a Carrier For Loss and Damage to Interstate Shipments*, 17 CLEV.-MAR. L. REV. 251 (1969).
53. 49 U.S.C.A. § 11707 (West Supp. 1979). *See also* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29 (1912).
54. *See* Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224, 1226-28 (4th Cir. 1976); Miller v. AAACON Auto Transp., Inc., 447 F. Supp. 1201, 1205-06 (S.D. Fla. 1978). *But cf.* Chandler v. Aero Mayflower Transit Co., 374 F.2d 129 (4th Cir. 1967) (punitive damages not allowed when carrier and shipper agreed upon limited carrier liability).
55. Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974).
56. Mitchell v. Union Pac. R.R., 188 F. Supp. 869, 874 (S.D. Cal. 1960).

C. *The Texas Deceptive Trade Practices—Consumer Protection Act*

The Texas Deceptive Trade Practices—Consumer Protection Act protects consumers against misleading, false, and deceptive business practices.[57] Three of the provisions of the DTPA are designed specifically to ensure enforcement of the Act. First, any waiver by a consumer of the provisions of the DTPA is unenforceable.[58] Secondly, the DTPA is to be construed liberally to promote its underlying purpose of protecting consumers against unlawful conduct.[59] Thirdly, an adversely affected consumer may recover treble damages, reasonable attorneys' fees, and court costs.[60] The strength of these provisions and the vigor with which they have been enforced reveal a fundamental concern by the Texas Legislature and courts that consumer expectations be protected.[61]

II. AMERICAN TRANSFER & STORAGE CO. V. BROWN

The principle issue in *Brown* was whether the DTPA is preempted by the Carmack Amendment.[62] This determination involved a two-step proc-

57. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-1979). Amendments to the following sections became effective August 27, 1979: §§ 17.43, .45(9), .46, .50, .50A, .56. Sections 17.50B and 17.56A are new additions. 1979 Tex. Sess. Law Serv., ch. 603, §§ 1-10, at 1327-32 (Vernon).

The scope of the DTPA is made broad by the definitions of consumer, goods, and services. Section 17.45(4) defines a consumer as any "individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services." Subsection 1 defines goods as including "tangible chattels or real property purchased or leased for use." Subsection 2 defines services as including all "work, labor or service purchased or leased for use, including services furnished in connection with the sale or repair of goods."

58. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1978-1979).

59. *Id.* § 17.44. The number of cases allowing relief under the DTPA indicates that Texas courts are adhering to the legislative mandate to construe liberally and enforce the DTPA. *See, e.g.*, Spradling v. Williams, 566 S.W.2d 561 (Tex. 1978) (declaring list of deceptive trade practices enumerated in the DTPA is nonexclusive); Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977) (representation that builder would repair all defects in house); Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (representation by corporation to prospective distributor that experience, background, and special abilities were not necessary to become a successful distributor); Burnett v. James, 564 S.W.2d 407 (Tex. Civ. App.—Dallas 1978, writ dism'd) (representation by seller of air conditioning unit that unit would be adequate to serve buyer's needs); MacDonald v. Mobley, 555 S.W.2d 816 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (representation that builder would change carpet in house); Boman v. Woodmansee, 554 S.W.2d 33 (Tex. Civ. App.—Austin 1977, no writ) (company's failure to install swimming pool in good and workmanlike manner was breach of warranty of good workmanship). *But cf.* Singleton v. Pennington, 568 S.W.2d 367 (Tex. Civ. App.—Dallas 1978, writ filed) (because award of treble damages is of penal nature, deceptive acts must be committed knowingly).

60. 1977 Tex. Gen. Laws, Texas Deceptive Trade Practices—Consumer Protection Act, ch. 216, § 5, at 603. One commentator suggested that this provision not only penalized violators of the DTPA, but also served as an incentive for consumers to pursue their claims. Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525, 543 (1977).

61. *See* Comment, *supra* note 60, at 529.

62. The court was also presented with three minor issues. The first issue was whether the trial court improperly excluded from evidence American's limitation of liability clause. Brown claimed that the clause was void because the clause represented a waiver by a consumer of the provisions of the DTPA. The court of civil appeals agreed with the plaintiff, but held that the clause was admissible on other grounds. 584 S.W.2d at 291.

The second issue was whether the lower court erred in excluding evidence that Brown had

ess: first ascertaining the respective scope and purposes of the state and federal statutes, and then deciding the constitutional issue of whether the two statutes are in conflict. The Dallas court of civil appeals held that the Carmack Amendment does not preempt the DTPA as to deceptive trade practices that occur before the parties enter into a bill of lading contract.[63] To arrive at this holding, the court formulated the test of federal supremacy as follows: "Whether under the circumstances of the particular case the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

The court compared the established purposes of the Carmack Amendment and the DTPA. Citing *Adams Express Co. v. Croninger*,[65] the court stated that the purpose of the Carmack Amendment is to establish uniformity both in the requirements of a contract of carriage in interstate commerce and in the carrier's liability for breach of that contract.[66] In contrast, the court observed that the purpose of the DTPA is to protect consumers against false, misleading, and deceptive acts or practices.[67] Thus, the court concluded that the purposes of the acts did not overlap.[68] Furthermore, while the DTPA regulates misrepresentations generally, the court found that the Carmack Amendment is limited to regulating practices that occur after the execution of a bill of lading contract.[69] Accordingly, as American's representations were made prior to execution of the bill of lading, the court held that damages resulting from the representations were not within the purview of the Carmack Amendment.[70]

The court's support for this conclusion rests on the decisions of the United States Supreme Court in *Huron Portland Cement Co. v. City of Detroit*[71] and *Askew v. American Waterways Operator's, Inc.*[72] These cases,

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received approximately $11,000 for damage to goods under an insurance policy he had purchased through American. The court held that exclusion of the evidence was reversible error. *Id.* at 293, 298. Brown contended that the collateral source rule supported the exclusion of the insurance coverage and settlement. The collateral source rule, an exception to the general principle, allows multiple recovery for the same loss. *See* T.L. James & Co. v. Statham, 558 S.W.2d 865, 868 (Tex. 1977). The purpose of the rule is to deny wrongdoers any benefit from insurance coverage independently obtained by the injured party. *See* Graves v. Poe, 118 S.W.2d 969 (Tex. Civ. App.—El Paso 1938, writ dism'd). In *Brown*, however, the court found that the rule was inapplicable because the insurance coverage had not been independently obtained, but was for the benefit of both Brown and American. 584 S.W.2d at 293.

The third issue was whether the special issues were defective. The court found that they were defective, 584 S.W.2d at 295, relying on Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1968).

63. 584 S.W.2d at 288-89. The court indicated that misrepresentations that affect the applicable carrier rate might fall within the purview of federal regulation. This exception would appear to be mandatory because a carrier is bound by federal law to apply the proper rate. 49 U.S.C.A. § 11904 (West Supp. 1979).

64. 584 S.W.2d at 288.

65. 226 U.S. 491 (1912).

66. 584 S.W.2d at 288.

67. *Id.* at 288-89.

68. *Id.*

69. *Id.* at 289.

70. *Id.* at 290.

71. 362 U.S. 440 (1960); *see* notes 21-26 *supra* and accompanying text.

72. 411 U.S. 325 (1973) (state statute imposing strict liability for damages caused by oil

however, are easily distinguished from *Brown* in that *Huron* and *Askew* deal with state regulation of local pollution problems. In the absence of clear congressional intention to preempt the field, the Supreme Court will uphold state law regulating such deeply rooted local interests.[73] Consistent with the reasoning in these cases, the Dallas court of civil appeals could have found that the DTPA protects a deeply rooted state interest by concluding that the DTPA's prohibition against false, misleading, and deceptive acts is an exercise of the state's right to protect its citizens from fraud. Such a conclusion finds precedential support in *Florida Lime & Avocado Growers, Inc. v. Paul*.[74]

Even though the Dallas court of civil appeals failed to identify a deeply rooted state interest, it concluded that the DTPA does not obstruct the accomplishment of the purposes and objectives of the Carmack Amendment because the purposes and scope of the two statutes do not overlap.[75] The Supreme Court, however, has held that the preemption analysis should not focus only on whether the statutes are aimed at similar objectives; rather, the analysis must inquire whether both statutes can be enforced without obstructing "federal superintendence of the field."[76] By enacting the Carmack Amendment, Congress intended to free interstate shipments from diverse state judicial and statutory laws that had made it difficult for both shippers and carriers to know the extent of carrier liability for damage to or loss of goods transported in interstate commerce.[77] Thus, the Supreme Court has recognized that a state regulation that broadens the scope of carrier liability concerning an interstate shipment is an impermissible interference with congressional intent to supervise exclusively this area of carrier liability.[78] The Dallas court of civil appeals measured Brown's damages by the value of his lost and damaged goods, the measure that would have been used had the Carmack Amendment applied.[79] Applying the DTPA, however, the court trebled Brown's actual damages, thereby enlarging the extent of American's liability. Under the court of civil appeals' holding, a carrier operating in several states is again subject to diverse measures of damages, thus destroying the uniformity in carrier liability sought by the Carmack Amendment. The court's holding also creates the opportunity for shippers to shop for a forum that would allow recovery beyond the provisions of the Carmack Amendment, a result that the Texas Supreme Court has expressly recognized as violative of the intent of the amendment.[80]

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spills not preempted by federal statute imposing strict liability for clean-up costs of an oil spill).

73. *See* notes 19-20 *supra* and accompanying text.

74. 373 U.S. 132 (1963); *see* notes 27-31 *supra* and accompanying text.

75. 584 S.W.2d at 289.

76. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

77. Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1912).

78. *See* Missouri, Kan. & Tex. Ry. v. Harris, 234 U.S. 412, 420-21 (1914).

79. 584 S.W.2d at 289. *See also* note 52 *supra* and accompanying text.

80. Southwestern Motor Transp. Co. v. Valley Weathermakers, Inc., 427 S.W.2d 597, 603-04 (Tex. 1968).

The *Brown* court concluded that representations made prior to execution of the bill of lading contract are not within the scope of the Carmack Amendment.[81] Judicial precedent, however, suggests that the bounds of the Carmack Amendment are broader than those suggested by the Dallas court of civil appeals. The United States Supreme Court has held that activities, if incident to the interstate transportation of goods, are within the amendment's scope, even if taking place before the bill of lading is issued.[82] In *Brown* American's representations, although occurring before the bill of lading was signed, were intimately related to the transportation of Brown's goods and therefore should be within the ambit of the amendment. This is not to suggest, however, that American's representations are irrelevant to Brown's claim for damages. The Supreme Court has held that the amendment is broad enough to embrace all damages resulting from a carrier's failure to perform its duties with respect to its transportation function.[83] Exemplary damages have been awarded under the Carmack Amendment when a carrier made willful precontract misrepresentations that were the proximate cause of plaintiff's injury.[84] If Brown could show that American's representations were willful and the proximate cause of his injury, then he should be entitled to an award of exemplary damages.

The court of civil appeals concluded that protection of interstate shippers from carriers' deceptive practices has been left to the police powers of the states. The court, however, failed to consider collateral federal legislation.[85] The Federal Trade Commission Act (FTCA),[86]federal sister of the DTPA,[87] indicates the congressional attitude towards the use of deceptive trade practices by motor carriers subject to the Interstate Commerce Act. The FTCA expressly exempts interstate carriers from its provisions.[88] Although legislative history fails to explain the reason for the exemption, the statute is unequivocal in stating that interstate carriers are not to be governed by the FTCA's provisions proscribing deceptive practices. The

81. 584 S.W.2d at 290.

82. New York, N.H. & H. R.R. v. Nothnagle, 345 U.S. 128 (1953); *see* notes 38-43 *supra* and accompanying text.

83. Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936); *see* notes 44-51 *supra* and accompanying text.

84. Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974).

85. The United States Supreme Court has found it proper to consider collateral federal legislation when determining if state law is preempted by federal law. *See* New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328, 1341-43, 59 L. Ed. 2d 553, 566-67 (1979), in which the plurality relied on the legislative history of the Social Security Act to support its finding that the National Labor Relations Act did not preempt states from granting unemployment benefits to striking workers.

86. 15 U.S.C. §§ 41-45 (1976).

87. Section 17.46(c)(1) of the DTPA provides that courts construing the DTPA are to be guided, to the extent possible, by the Federal Trade Commission Act. TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (1978-1979) (current version at 1979 Tex. Sess. Law Serv., ch. 603, § 3, at 1329 (Vernon)).

88. 15 U.S.C. § 45(a)(2) (1976).

states, when applying their own statutes regulating deceptive practices, should take cognizance of this congressional exemption.

A second issue before the court in *Brown* was whether a consumer whose primary injury is property damage can recover damages for mental anguish under the DTPA. The court of civil appeals held that such damages are not recoverable.[89] Brown had conceded that according to established common law, mental anguish could be compensated only when suffered in connection with physical harm or with intentional invasion of a plaintiff's personal security and peace of mind.[90] He argued, however, that the language of the DTPA created a new cause of action for mental anguish, independent of proof of any other harm.[91] To establish injury under the Act, Brown reasoned, a consumer need only show that he has been adversely affected.[92] Since the Texas Legislature had directed expressly that the terms of the DTPA be construed liberally,[93] Brown contended that a liberal interpretation of "adversely affected" should include mental anguish.[94] The court rejected Brown's contention, noting that the DTPA made no mention of mental anguish[95] and citing with approval *Dennis Weaver Chevrolet, Inc. v. Chadwick*,[96] in which the Beaumont court of civil appeals held that the recovery of mental anguish damages was still dependent on common law rules. Such a decision was wise, the Dallas court stated, because alleged injury due to emotional distress is difficult to rebut, has no monetary measure, and is limited only by the jury's sympathy and the reviewing court's conscience.[97]

The Dallas court of civil appeals rejected the assertion that *Woods v. Littleton*[98] supported the recovery of damages for mental anguish under the DTPA.[99] The court observed that the issue of whether mental anguish is a proper element of actual damages under the DTPA was not before the Texas Supreme Court in *Woods*.[100] Any reference by the *Woods* court to damage for mental anguish under the DTPA, therefore, was dictum and not binding on the lower courts.[101]

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89. 584 S.W.2d at 297.
90. *Id.* at 296.
91. *Id.* at 296-97.
92. 1977 Tex. Gen. Laws, ch. 216, § 5, at 603. In the 1979 amendments, however, the term "adversely affected" is replaced by the term "actual damages." 1979 Tex. Sess. Law Serv., ch. 603, § 4, at 1329 (Vernon). This Note does not speculate on what effect the change of terms will have on future interpretations of the DTPA.
93. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1978-1979); *see* note 59 *supra* and accompanying text.
94. 584 S.W.2d at 296.
95. *Id.* at 297.
96. 575 S.W.2d 619 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).
97. 584 S.W.2d at 297.
98. 554 S.W.2d 662, 672 (Tex. 1977).
99. 584 S.W.2d at 297.
100. *Id.* at 297-98.
101. *Id.* at 298.