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Interstate Commerce -- A Shipper's Remedy for Discrimination Prohibited by the Motor Carrier Act

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resource development with minimal environmental impacts. Long-range planning is the mandate of NEPA that has been ignored because of the initial high cost to governmental agencies in traditional terms of agency output. In the long run, however, this command of NEPA should provide the impetus for the most effective resource management program possible.

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Interstate Commerce—A Shipper's Remedy for Discrimination Prohibited by the Motor Carrier Act

Section 216(d)[1] of the Motor Carrier Act of 1935[2] (Part II of the Interstate Commerce Act) makes it unlawful for a regulated[3] carrier to subject a shipper "to any unjust discrimination."[4] There have been few cases in which the federal judiciary has been required to interpret the nondiscrimination language contained in section 216(d)[5] and thus it has remained a relatively obscure provision of a major federal regulatory act. However, the recent decision by the United States Court of Appeals for the Fourth Circuit in *Hubbard v. Allied Van Lines, Inc.*[6] may signal the emergence of section 216(d) as an important weapon in the legal arsenal of shippers. In this case of first impression, the Fourth Circuit, relying exclusively on the reasoning of cases interpreting a similar provision[7] of the Federal Aviation Act of

1. 49 U.S.C. § 316(d) (1970).
2. *Id.* §§ 301-327.
3. Some motor carriers, including school busses, taxicabs and farm vehicles, are excluded from the Act's coverage. *Id.* § 303(b).
4. *Id.* § 316(d). This section provides, in pertinent part:
It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .
5. See note 33 *infra* for a discussion of the cases that have interpreted section 216(d)'s prohibition of discriminatory conduct.
6. 540 F.2d 1224 (4th Cir. 1976).
7. 49 U.S.C. § 1374(b) (1970). This section provides:
No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality,

1958,[8] found that an implied damage remedy[9] is available to a shipper for a carrier's breach of its statutory duty of nondiscrimination.[10] Moreover, the court decided that in a proper case punitive damages can be assessed against the breaching carrier.[11]

Plaintiffs in *Hubbard*, a law professor and his wife, had contracted with defendant motor carrier to have their furniture picked up at New Haven, Connecticut and delivered to Columbia, South Carolina by a certain date.[12] Most of the furniture was delivered approximately three weeks after the date specified by the contract while the remainder arrived eleven weeks overdue.[13] Plaintiffs brought suit in federal district court[14] alleging that defendant had violated its section 216(d) duty of nondiscrimination by using its facilities to transport the goods "of other unknown persons instead of plaintiffs' goods . . . ."[15] They further alleged[16] that this was done "in a reckless, wilfull, and wanton manner" and sought $25,000 in actual and punitive damages.[17] De-

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or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

8. *Id.* §§ 1301-1542.

9. The phrase "implied damage remedy" is used in this Note to mean the implication of a private cause of action from a statute not expressly providing one in favor of the plaintiff.

10. 540 F.2d at 1226.

11. *Id.* at 1229. The Fourth Circuit also held that damages for mental distress could be recovered in an action brought under section 216(d) of the Motor Carrier Act. *Id.* at 1230. *See* note 16 *infra.*

12. 540 F.2d at 1225.

13. *Id.* The date named in the contract was July 18, 1973. Eighty percent of the furniture was delivered on August 8, 1973 and the remaining twenty percent on October 10, 1973.

14. Hubbard v. Allied Van Lines, Inc., No. 74-1819 (D.S.C. Jan. 10, 1975) (unreported).

15. 540 F.2d at 1226.

16. Plaintiffs also alleged a right to recover damages for mental distress. They argued that defendant's conduct forced them to delay setting up their new home and thereby caused them to suffer compensable anxiety. *Id.* at 1225. The district court granted defendant's motion to strike all mention of damages for mental distress from the complaint on the grounds that recovery of such damages was precluded by the Carmack Amendment, 49 U.S.C. § 20(11) (1970), *see* note 74 and text accompanying notes 74-77 *infra*, and by the fact that there was no precedent for an award of damages for mental distress for delay in shipping property. Order of the Dist. Ct., No. 74-1819, *reproduced in* Brief for Appellant at 7a; *see* 540 F.2d at 1226. The Fourth Circuit vacated this order, holding that damages for mental distress due to delay in shipment are recoverable and that plaintiffs should have been allowed to take this question to the jury. The controlling inquiry, according to the court, was whether the claim could withstand " 'a careful scrutiny of the evidence supporting [it]' " and not be considered trivial or fictitious. 540 F.2d at 1229 (quoting W. PROSSER, LAW OF TORTS § 12, at 51 (1971)).

17. *Id.* at 1226.

fendant's preanswer motion to strike from the complaint the portion that described its conduct as reckless, wilfull and wanton was granted by the district court[18] on the ground that recovery of punitive damages for injury to property was precluded by the Fourth Circuit's decision in *Chandler v. Aero Mayflower Transit Co.*,[19] a common law case. An agreed stipulation of actual damages was entered as judgment.[20]

On appeal, the Fourth Circuit vacated the order of the district court and remanded the case for further proceedings.[21] In so doing, the court found it necessary to face a threshold issue that the district court had not perceived as an obstacle to recovery: whether plaintiffs had a cause of action against defendant on the basis of section 216(d).[22] Following a line of cases holding that section 404(b) of the Federal Aviation Act[23] implies a private damage remedy in favor of a passenger who is denied his confirmed reservation on an airline flight,[24] the Fourth Circuit concluded that a remedy is similarly implied by section 216(d).[25] On the question of punitive damages, the court again adopted the reasoning of the Federal Aviation Act cases, holding that punitive damages are a possibility in the section 216(d) action and that plaintiffs should have been allowed to take their evidence of malicious conduct to the jury.[26] The court rejected the contention of defendant that the Carmack Amendment,[27] a limitation of liability provision contained in Part I of the Interstate Commerce Act[28] that is applicable to motor carriers but not to air carriers,[29] prevents the recovery of punitive damages.[30] The Fourth Circuit also dismissed

18. Order of the Dist. Ct., *reproduced in* Brief for Appellant at 7a.

19. 374 F.2d 129 (4th Cir. 1967). This case held that a shipper could not recover punitive damages in an action for destruction of the shipper's furniture by the carrier. *Id.* at 137.

20. 540 F.2d at 1226. This stipulation included "out-of-pocket expenses and damages for loss and breakage of property . . . ." *Id.*

21. *Id.* at 1230.

22. *Id.* at 1226.

23. 49 U.S.C. §§ 1301-1542 (1970). Section 404(b) is codified at *id.* § 1374(b).

24. See note 52 and text accompanying notes 52-59 *infra* for a discussion of these cases.

25. 540 F.2d at 1226.

26. *Id.* at 1229.

27. 49 U.S.C. § 20(11) (1970). *See* note 74 and text accompanying notes 74-77 *infra.*

28. 49 U.S.C. §§ 1-300 (1970). Part I of the Interstate Commerce Act deals generally with the regulation of railroads.

29. *Id.* § 319. This section incorporates the Carmack Amendment into Part II (motor carriers) of the Interstate Commerce Act. There is no similar provision with respect to the Federal Aviation Act.

30. 540 F.2d at 1228.

Chandler[31] as inapplicable because it "was an action based on the common law liability of a carrier for damage to goods in transit, not a discrimination case brought under [section 216(d)]."[32]

Since *Hubbard* was a case of first impression, there was no body of case law interpreting the antidiscrimination provision of section 216(d) upon which the court could have based its holding.[33] Therefore, in order to place this decision in the appropriate perspective, it is necessary to examine both the test developed by the courts to determine when it is proper to imply a private cause of action under a federal statute and the cases that have dealt with this question in the context of other provisions of the Motor Carrier Act and section 404(b) of the Federal Aviation Act. In regard to the issue of punitive damages, the section 404(b) cases and the interpretation of the Carmack Amendment constitute the relevant background.

A private damage remedy was first implied from a federal statute in 1916 in *Texas & Pacific Railroad v. Rigsby*,[34] a case in which the United States Supreme Court enunciated a broadly inclusive test for implication. The Court held that a cause of action arose by implication when a member of "the class for whose *especial* benefit the statute was enacted" was damaged as a result of a violation of the statute.[35] Since 1916 this test has been subject to a series of modifications and obfuscations[36] that have successively restricted[37] and broadened[38] the applica-

31. *See* note 19 and accompanying text *supra*.

32. 540 F.2d at 1229.

33. Although the court stated: "We have found no case discussing the issue of whether a private damage remedy will lie for breach of the duty imposed by this section," *id.* at 1226, there is at least one case that has considered this issue. Lyons v. Illinois Greyhound Lines, Inc., 192 F.2d 533 (7th Cir. 1951), held that a black woman who was forced to give up her seat and move to the rear of the bus had an action under section 216(d) for the physical injuries she suffered. *Id.* at 534. This case has not been widely cited and, because of the difference in factual bases, should not be considered as a possible precedent for the holding in *Hubbard*. Another case, Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp., 165 F. Supp. 67 (S.D. Ind. 1958), discussed section 216(d) in regard to discrimination and held that plaintiff had a cause of action against a freight forwarder (who was regulated by section 216(d)) for his refusal to cross picket lines at plaintiff's place of business and deliver goods. It is unclear, however, whether the action was based on section 216(d) or the common law.

34. 241 U.S. 33 (1916).

35. *Id.* at 39.

36. *See generally* Comment, *Private Rights of Action under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1393-97 (1975).

37. *See, e.g.*, Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951), which found that the implication of a private damage remedy was improper when the express provisions of the statute were limited to prospective relief.

38. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), which held that a private damage remedy is implied to carry out the congressional purpose of protecting federal rights.

bility of the implication doctrine. In *Cort v. Ash*,[39] the Supreme Court clarified the state of the doctrine and indicated a move in the direction of the more restrictive view of when a private right of action is implied.[40] The Court held that a stockholder does not have an implied cause of action against the directors of a corporation for violation of a federal statute[41] that prohibits dispersal of corporate funds in connection with a federal election.[42] In reaching this conclusion the Court outlined the relevant pattern of inquiry in deciding the question of implication as: 1) whether the statute was enacted especially to benefit a class of which plaintiff is a member; 2) whether there was an expression of legislative intent that a private damage remedy be implied or denied; 3) whether such a remedy is "consistent with the legislative scheme"; and 4) whether the action involved is one more appropriately left to the states.[43]

Although section 216(d)'s prohibition of unjust discrimination has not been conclusively interpreted, another provision of the same section of the Motor Carrier Act has been examined by the Supreme Court. In *T.I.M.E. Inc. v. United States*,[44] the Court held that the language of section 216(d) making it unlawful for a carrier to charge unjust rates[45] does not imply a cause of action for recovery of overcharges.[46] The Court based its decision on the conclusion that since such an action was expressly provided for in Parts I (railroads)[47] and III (water carriers)[48] of the Interstate Commerce Act, the legislative intent in regard to Part II (motor carriers)[49] was to deny the remedy.[50] In

39. 422 U.S. 66 (1975).

40. *See* Comment, *Implying Private Causes of Action from Federal Statutes: Amtrak and Cort Apply the Brakes*, 17 B.C. INDUS. & COM. L. REV. 53 (1976).

41. 18 U.S.C. § 610 (1970 & Supp. V 1975).

42. 422 U.S. at 69.

43. *Id.* at 78.

44. 359 U.S. 464 (1959).

45. 49 U.S.C. § 316(d) (1970), which remains unchanged since the time the case was decided, provides in pertinent part that:

> All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful.

46. 359 U.S. at 472. *Cf.* Wolf v. Trans World Airlines, Inc., 45 U.S.L.W. 1069 (10th Cir. 1976) (Federal Aviation Act provision barring an air carrier from charging more than the rates and charges specified in the carrier's tarrifs does not create an implied cause of action in passengers who are overcharged).

47. 49 U.S.C. §§ 1-300 (1970).

48. *Id.* §§ 901-923.

49. *Id.* §§ 301-327.

50. 359 U.S. at 470-71. The Court also relied on the failure of Congress to enact

1965, six years after the decision in *T.I.M.E.* was announced, Congress reacted by amending the Motor Carrier Act to provide an action to recover overcharges.[51]

As to the existence of an implied cause of action under section 404(b) of the Federal Aviation Act, the District of Columbia Circuit Court of Appeals held in *Nader v. Allegheny Airlines, Inc.*[52] that "it is well settled that a private damage action is available to remedy violations of this provision."[53] One of the principal cases that underlied the *Nader* court's assumption that the question of implication under section 404(b) had been answered was *Wills v. Trans World Airlines, Inc.*[54] In that case plaintiff made and confirmed a reservation on defendant's flight. However, since defendant had "overbooked"[55] the flight, plaintiff was not allowed to board.[56] The District Court for the Southern District of California, after finding that defendant's actions had reached the level of unjust discrimination prohibited by the statute,[57] concluded that a cause of action was implied in plaintiff's

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amendments to Part II suggested by the Interstate Commerce Commission that would have expressly provided this remedy. *Id.* at 471-72.

51. Congress passed Act of Sept. 6, 1965, Pub. L. No. 83-170, § 6, 79 Stat. 648 (codified at 49 U.S.C. §§ 304(a)(2), (5) (1970)), to provide this remedy.

52. 512 F.2d 527 (D.C. Cir. 1975), *rev'd on other grounds*, 96 S. Ct. 1978 (1976). In this case, plaintiff was not allowed to board defendant's flight even though he held a confirmed reservation. Plaintiff brought suit in federal district court alleging both section 404(b) and common law misrepresentation causes of action. The district court allowed him to recover on the basis of both of these claims. 365 F. Supp. 128, 132 (D.D.C. 1973). On appeal, the District of Columbia Circuit remanded the section 404(b) cause of action for further findings of fact, and ordered that the common law misrepresentation cause be stayed pending a decision by the Civil Aeronautics Board on the question whether defendant's policy of overbooking flights was a deceptive practice. 512 F.2d at 552. The only issue appealed to the Supreme Court was the correctness of the District of Columbia Circuit's order to stay proceedings on the misrepresentation claim, and it was on this issue that the Supreme Court reversed the District of Columbia Circuit. 96 S. Ct. at 1981.

53. 512 F.2d at 537.

54. 200 F. Supp. 360 (S.D. Cal. 1961). *Accord*, Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (9th Cir. 1972); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969).

55. "Overbooking" refers to the standard practice among airlines of selling and confirming more tickets than there are seats on the airplane. This is done in order to maximize the number of passengers on flights while, at the same time, allowing ticket purchasers a great degree of freedom to cancel their reservations without incurring a penalty. *See* the District of Columbia Circuit's discussion of this practice in *Nader*, 512 F.2d at 533-37.

56. 200 F. Supp. at 362. The airline did not allow plaintiff, a tourist class ticket-holder, to board, in order to accommodate a first-class passenger in the tourist section.

57. *Id.* at 365. This does not mean that every instance in which a passenger holding a confirmed reservation is denied a seat is a per se violation of section 404(b). 512 F.2d at 538. Airlines are required by an order of the Civil Aeronautics Board, 14

favor.[58] The basis for the holding in *Wills* was that the Federal Aviation Act only provided measures to insure future complicance with the statute and without implication of a private cause of action the anti-discrimination provision "would be robbed of vitality and the purposes of the Act substantially thwarted."[59]

A more recent case involving section 404(b) is *Polansky v. Trans World Airlines, Inc.*[60] in which the Third Circuit held that passengers who had alleged discrimination in the quality of ground services provided by the defendant airline[61] did not have a remedy implied by section 404(b).[62] In reaching this result the court noted that a remedy had been properly implied under section 404(b) in the overbooking cases[63] but concluded that the factors set out by the Supreme Court in *Cort v. Ash* precluded implication of a remedy in this case.[64] While the Third Circuit premised its holding on the impropriety of implying a remedy in this instance, the true basis for the result appears to be plaintiffs' failure to allege conduct that violated section 404(b).[65] In determining what constituted discrimination under the statute, the *Polansky* court stated that it is "discriminatory denial of *access* to air facilities . . . which is critical."[66] The court concluded that the airline's actions amounted only to breach of a contract of service, which left plaintiffs with an action on the contract under appropriate state law but did not allow them access to the federal courts under section 404(b). If the breach of contract by defendant in *Polansky* were viewed as discrimination condemned by the statute, the Third Circuit speculated that "[t]here would always be another unbreached contract to which the disgruntled air passenger could compare the services per-

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C.F.R. § 250.3 (1976), to "establish and enforce nondiscriminatory priority rules" to determine who should be seated when a flight is overbooked. 512 F.2d at 538. In order to make out a case of unjust discrimination, a passenger must allege "(1) that [he] possessed a designated priority, and (2) that the carrier boarded persons with a lower priority . . . ." *Id.*

58. 200 F. Supp. at 365.

59. *Id.* at 364.

60. 523 F.2d 332 (3d Cir. 1975).

61. *Id.* at 333. Plaintiffs were part of a tour sponsored by defendant airline. They claimed that their "first class" hotel accommodations were inferior to those provided to other members of the tour at tourist rates. *Id.*

62. *Id.* at 338.

63. *Id.* at 335. *See* note 52 and text accompanying notes 52-59 *supra.*

64. 523 F.2d at 335-36. *See* text accompanying note 43 *supra.*

65. The Third Circuit stated that: "[t]he words of the statute and the decided cases suggest that [section 404(b)] does not seek to prevent the harm alleged by these plaintiff-appellants." 523 F.2d at 336.

66. *Id.*

formed for him" and section 404(b) would provide a federal remedy for every violation of a contract of service by an airline.[67]

Apart from section 404(b) of the Federal Aviation Act, there have been few developments in the area of punitive damages in implied rights of action under federal statutes.[68] In *Wills* such damages were assessed against defendant on the theory that since punitive damages are a possibility in common law tort actions, they are also available when a statutory cause of action sounds in tort.[69] The court enunciated the purposes served by punitive damages as being to vindicate the right of plaintiff and to deter similar conduct by "supplement[ing] the criminal and *in futuro* remedial provisions of the Act . . . ."[70] *Nader*, while refusing to allow punitive damages because of a failure of proof of malicious conduct by defendant airline,[71] did not reject the holding in *Wills* that such damages can be properly awarded in an implied action under section 404(b).[72] The *Nader* opinion, however, questioned the extent to which deterrence can be used as a justification for allowing punitive damages without infringing upon the primary jurisdiction of the Civil Aeronautics Board.[73]

A provision of the Motor Carrier Act that could affect the availability of punitive damages in a section 216(d) action is the Carmack Amendment.[74] The essence of this section is that a motor carrier

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67. *Id.*

68. Punitive damages have been awarded in an implied action under section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j (1970). *See, e.g.*, deHaas v. Empire Petroleum Co., 302 F. Supp. 647 (D. Colo. 1969). *But see* Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). *See generally* Note, *Punitive Damages in Implied Actions for Fraud Under the Securities Laws*, 55 CORNELL L. REV. 646 (1970).

69. 200 F. Supp. at 367.

70. *Id.* at 368.

71. In *Wills*, the requisite degree of malicious conduct was established by defendant's intentional violation of its priority rules in favoring a first class ticketholder over plaintiff and by the fact that the overbooking could be characterized as substantial. *Id.* at 367. While it is arguable that the overbooking in *Nader* was also substantial, the court held that if there had been a violation of defendant's priority rules, it was not intentional and therefore could not be construed as malicious. 512 F.2d at 550.

72. 512 F.2d at 550.

73. *Nader* intimates that, if the courts award punitive damages in order to force the airlines to end the practice of overbooking, they have infringed upon the primary jurisdiction of the Civil Aeronautics Board first to consider the propriety of airline policies. *Id.*

74. 49 U.S.C. § 20(11) (1970), made applicable to Part II (motor carriers) of the Interstate Commerce Act by *id.* § 319, provides in pertinent part:

> Any common carrier . . . receiving property for transporation . . . shall be liable . . . for any loss, damage, or injury to such property caused by it . . . and any such common carrier . . . shall be liable . . . for the full actual loss, damage, or injury to such property caused by it . . . notwithstanding any

accepting goods for transport must issue a bill of lading to the shipper that establishes the issuing carrier's responsibility for the goods during the entire time they are in transit. While the Carmack Amendment establishes a limitation on liability when a carrier files a value based tariff with the Interstate Commerce Commission, its main purpose is not to limit the carrier's liability, but rather to provide the shipper with a readily available source of recovery.[75] The amendment could be construed as a roadblock to recovery of punitive damages in that its language states that a carrier "shall be liable . . . for the full actual loss, damage, or injury to such property . . . ."[76] While a technical interpretation of "actual" and "to such property" might possibly lead to the conclusion that punitive damages are precluded by the Carmack Amendment, the courts have refrained from such a literal reading.[77]

The significance of the *Hubbard* decision is its invigoration of the Motor Carrier Act's dormant antidiscrimination provision. The Fourth Circuit added substance to the mere words of the congressional enactment by implying a cause of action for a violation of section 216(d) that carries with it the possibility of a punitive damage award. Without such an implied remedy, a shipper suffering unjust discrimination at the hands of a carrier would be left to bring suit for breach of contract, an action in which actual damages are likely to be small[78] and punitive damages generally unavailable.[79]

An analysis of the reasoning in *Hubbard* begins with an inquiry into the soundness of the court's reliance on section 404(b) precedent. While the language of sections 216(d) and 404(b) is substantially the same, and they are both parts of regulatory acts governing common carriers, the *Hubbard* situation can be distinguished from the section 404(b) overbooking cases on the basis that it involved discrimination against property rather than against people. The Fourth Circuit merely

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limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any . . . receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void . . . .

75. *See* Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 199-203 (1911).

76. 49 U.S.C. § 20(11) (1970).

77. *See* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936); New York, P. & N.R.R. v. Peninsula Exch., 240 U.S. 34 (1916). These cases were cited in the *Hubbard* opinion. 540 F.2d at 1227.

78. In *Wills*, actual damages amounted to only $1.54. 200 F. Supp. at 367.

79. Plaintiffs in *Hubbard* sought punitive damages on the basis of defendant's breach of contract. Brief for Appellant at 28, Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976), but the court's failure to consider this claim in the opinion evidences the amount of credence generally given to such an argument.

states in conclusory terms that this distinction is not valid,[80] but the court could have supported its conclusion by citing the language of other provisions of the Motor Carrier Act. The Act regulates transportation of both freight and people[81] and makes certain provisions expressly applicable to only one of these categories.[82] It is significant that parts of section 216 apply only to "carrier[s] of passengers"[83] or "carrier[s] of property"[84] while section 216(d) contains no such limitation.[85]

Although the section 404(b) overbooking cases provide a valid argument for implication of a remedy in *Hubbard*, the Fourth Circuit could have augmented the persuasiveness of its decision on this issue by also considering the impact of the four factors set out by the Supreme Court in *Cort v. Ash*.[86] Such an analysis would have been highly relevant because the section 404(b) cases upon which the *Hubbard* court placed exclusive reliance either preceded the Supreme Court's tightening of the implication doctrine in *Cort* or ignored that decision altogether.

The requirement, first stated in *Texas & Pacific Railroad* and restated in *Cort*, that plaintiff be "one of the class for whose *especial* benefit the statute was enacted,"[87] presents no real problem for implication of a shipper's action under section 216(d). The Motor Carrier Act represents "a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class . . ." and thus places a shipper in the benefited position.[88]

The second *Cort* factor, the existence of legislative intent either to create or to deny a remedy, is not so readily overcome. While the legislative history, like the Motor Carrier Act itself, is silent on the matter of a private damage remedy in favor of a shipper for a violation of section 216(d)'s nondiscrimination provision, the Supreme Court's holding in *T.I.M.E.* could be advanced to support a conclusion that congressional silence evidenced an intent that there be no implied remedy.[89] Discrimination in service, like charging unjust rates, is pro-

80. 540 F.2d at 1226.
81. 49 U.S.C. § 302(a) (1970).
82. *See* statutes cited notes 83 & 84 *infra*.
83. 49 U.S.C. § 316(a) (1970).
84. *Id.* §§ 316(b), (c).
85. *Id.* § 316(d) is applicable to "any common carrier by motor vehicle."
86. 523 F.2d at 335-36; *see* text accompanying note 43 *supra*.
87. 241 U.S. at 39.
88. Cort v. Ash, 422 U.S. 66, 82 (1975).
89. *See* text accompanying notes 44-50 *supra*.

hibited and a private right of action is expressly provided to redress such a violation in Parts I (railroads)[90] and III (water carriers)[91] of the Interstate Commerce Act. However, the Fourth Circuit could possibly have escaped from the meaning that *T.I.M.E.* drew from congressional silence by finding an expression of legislative intent in the 1965 amendment to Part II of the Interstate Commerce Act (motor carriers) that expressly provides the remedy sought by plaintiff in *T.I.M.E.*[92] While this amendment only provides a remedy for overcharges, it could nevertheless be viewed as expressing an intent that the remedies under Part II be the same as those provided in Parts I and III of the Interstate Commerce Act.[93]

An examination of the third *Cort* factor, whether implication is "consistent with the underlying purposes of the legislative scheme,"[94] supports the result reached in *Hubbard*. The Motor Carrier Act was passed in order to regulate a rapidly growing industry. The aim of regulation was not only to protect carriers from the unbridled competition of other carriers and the railroads from the competition of an unregulated mode of transport, but also to protect shippers from being damaged by the conditions that chaotic competition nurtured.[95] Thus, implication of a remedy in favor of a shipper under section 216(d) furthers a primary purpose of the Act.

Whether *Hubbard* implied a remedy that is "traditionally relegated to state law, in an area basically the concern of the States"[96] and thus violated the final *Cort* requirement is unclear. *Polansky* indicated

90. 49 U.S.C. § 3(1) (1970) prohibits discrimination and *id.* §§ 8 & 9 expressly provide for an action in the federal courts.

91. *Id.* § 905(c) prohibits discrimination and *id.* § 908(c) expressly provides an action in the federal courts.

92. Pub. L. No. 89-170, 79 Stat. 648 (1965) (codified in scattered sections of 49 U.S.C.).

93. *See* Letter from Charles A. Webb to Oren Harris, March 29, 1965, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2939. This letter was written by the chairman of the Interstate Commerce Commission at the request of the House of Representatives Committee on Interstate and Foreign Commerce to justify the amendment of 49 U.S.C. § 304(a). The letter stated:

> The Motor Carrier industry has attained stature and stability as one of the chief agencies of public transportation, handling a substantial volume of the Nation's traffic. It seems appropriate, therefore, that shippers should have the same rights of recovery against motor carriers as they have against rail and water carriers for violations of the act.

Id. at 2940.

94. 422 U.S. at 78.

95. S. Rep. No. 482, 74th Cong., 1st Sess. 1 (1935). The report stated that "[the] present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves." *Id.* at 2.

96. Cort v. Ash, 422 U.S. 66, 78 (1975).

that the overbooking cases complied with this stricture because "federal regulatory control" in the area of boarding priority is total and thus without implication of a federal remedy a bumped passenger would have no action at all.[97] The total control exercised by the Civil Aeronautics Board distinguishes the section 404(b) cases from section 216(d) as there is no similar degree of control exercised by the Interstate Commerce Commission. This difference, however, should not lead to the automatic conclusion that implication is improper under section 216(d). The *Cort* opinion itself cast a significant degree of doubt on the importance of this factor in relation to the first three by recognizing that in some instances state law will be supplemented by implied federal actions in order to avoid frustration of the congressional intent behind the particular statute.[98]

While the *Hubbard* court's finding that a private cause of action is implicit in section 216(d) is highly significant, the court left the ultimate importance of its decision in doubt by choosing not to resolve the question of what constitute the proper elements of this cause of action.[99] It is clear from the text of section 216(d) that unjust discrimination must be alleged, but this conclusion merely leads to a more difficult inquiry into what is meant by unjust discrimination. *Hubbard*'s reference to the discussion in *Nader* of the elements of a section 404(b) cause of action[100] is not directly helpful. *Nader* held that a prima facie case of unjust discrimination is established when an air carrier violates its own priority rules and boards a passenger with a priority lower than that of the person claiming discrimination.[101] Since motor carriers are not required to establish priority rules, a section 216(d) action cannot be alleged in these terms. However, *Polansky* illuminates this problem in relation to section 216(d) by interpreting the *Nader* requirement that priority rules be violated as meaning that denial of access to the carrier's facilities is necessary to make out a case of unjust discrimination.[102] Thus, plaintiffs in *Hubbard* face the prospect that, on remand, the district court will hold that they failed to allege the elements of a section 216(d) cause of action because the conduct that they attribute to defendant amounts to a poor performance

97. 523 F.2d at 338.
98. 422 U.S. at 85.
99. 540 F.2d at 1226 n.1.
100. *Id.*
101. 512 F.2d at 538. *See* note 57 *supra.*
102. 523 F.2d at 336.

of its contractual duties but not a discriminatory denial of access to its transport facilities.

An analysis of the *Hubbard* decision on the issue of punitive damages focuses on the court's conclusion that section 404(b) damages precedent is applicable and controlling. The Fourth Circuit presents a strong case based on statutory interpretation and policy considerations for not precluding punitive damages on the basis of the Carmack Amendment.[103] In contrast, the court's basis for distinguishing its holding in *Chandler* is not so convincing. Although *Chandler* did in fact involve a common law rather than a statutory claim, this distinction should not control the availability of punitive damages in light of the fact that the theoretical justification for such an award in a statutory claim is that punitive damages are available in a common law action.[104] A better reason for distinguishing *Chandler* is that it does not really concern the issue of punitive damages.[105]

The *Hubbard* court's recognition of an implied cause of action with a possibility of punitive damages under section 216(d) was a reasonable exercise of judicial interpretation of a statute. Implication of this remedy promotes the just result that the rights of persons subjected to unjust discrimination in contravention of the public policy expressed in section 216(d) are recognized and safeguarded in the federal courts. The critical weakness of the *Hubbard* decision, however, is its failure to perceive that, although implication of a section 216(d) cause of action is valid, the facts of the case before the court clearly revealed that there was no discrimination. Instead of avoiding the question of the elements of the cause of action, the Fourth Circuit should have held that discriminatory denial of access to the carrier's facilities is necessary to constitute discrimination under section 216(d).

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103. 540 F.2d at 1247-48.

104. *See* text accompanying note 69 *supra.*

105. The facts of the *Chandler* case centered around the existence of a disputed bill of lading. Punitive damages were not mentioned until the next to the last paragraph of the opinion where the court stated in conclusory terms that they were unavailable and cited the Carmack Amendment and four cases. 374 F.2d at 137. None of these cases involved allegations of malicious conduct on the part of carriers and requests for punitive damages, but rather all were concerned with the general rule for computing the shipper's actual damages when a carrier has made faulty performance of his contractual obligations. The cases cited in *Chandler* are Gulf, C. & S.F. Ry. v. Texas Packing Co., 244 U.S. 31 (1917); Stackpole Motor Transport, Inc. v. Malden Spinning & Dyeing Co., 263 F.2d 47 (1st Cir. 1958); Missouri Pac. R.R. v. Rouw Co., 258 F.2d 445 (5th Cir. 1958); Illinois Cen. R.R. v. Zucchero, 221 F.2d 934 (8th Cir. 1955).